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Gender, Minorities and Indigenous Peoples

By Fareda Banda and Christine Chinkin



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Minority Rights Group International

Minority Rights Group International (MRG) is a non-governmental organization (NGO) working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. Our activities are focused on international advocacy, training, publishing and outreach. We are guided by the needs expressed by our worldwide partner network of organizations which represent minority and indigenous peoples.

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Preface

While it is generally acknowledged that women suffer discrimination, women who are also members of minority or indigenous communities are particularly marginalized. As with male members of minority and indigenous communities, they lack access to political power and face discrimination in their access to services and rights. However, as women they face these problems and more.

The aim of this report, *Gender, Minorities and Indigenous Peoples*, is twofold: to encourage those working on minority and indigenous peoples' rights to consider the issues from a gender perspective, and to encourage those working on gender equality and women's rights to include minorities and indigenous peoples within their remit.

This is no easy task. Both gender equality and human rights are under-resourced fields; further, despite some good intentions, neither gender equality nor minority and indigenous rights are fully mainstreamed within international law or human rights. However, there is a slow but growing awareness that minority and indigenous peoples' rights cannot be realized without a gender focus, that is, without women's and men's, boys' and girls' issues being considered an essential part of the picture. In short, to quote the United Nations Secretary-General, to 'every human rights violation there is a gender element'.¹

However, many continue to believe that raising gender equality issues is divisive. Female activists from minority or indigenous communities have to be extremely strong to raise issues that confront them. They often face sexism, racism and violence from the majority community, and frequently sexism and violence from within their own community (to say nothing of issues around ageism, class, disability, sexuality, etc.).

Feminist organizations were criticized in the past for failing to recognize or include minority and indigenous women's interests and concerns. While there are many gender-based organizations that work with minority or indigenous peoples, and a far smaller number of minority and indigenous-run organizations, some groups working to promote gender equality and women's rights arguably still have a long way to go before they become fully inclusive in their approach.

Minority Rights Group International (MRG) does not claim to have all the answers. As a body working to promote minority and indigenous peoples' rights, and to promote peaceful cooperation between communities, we seek to mainstream gender equality issues throughout our work. We are already reaping the benefits of this approach, with a far greater understanding of the issues that we seek to address. We recognize that, in the process of producing this report, we have learnt a great deal and will be using this knowledge to continue to improve the mainstreaming of gender equality issues throughout our work.

Gender, Minorities and Indigenous Peoples is written by Fareda Banda and Christine Chinkin, who are both international human rights lawyers and gender specialists. The report has an international law and advocacy focus. It considers the nature of the discrimination faced by minorities and indigenous peoples from a gender perspective, the international legal standards relating to minority and indigenous peoples and women, and the degree to which international treaty bodies – with a particular focus on the Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of Racial Discrimination – mainstream the intersecting issues of gender and minority and indigenous rights in their monitoring of states' compliance with international human rights standards.

Using case studies and examples from around the world, the authors show how gender intersects with other forms of discrimination and consider the consequences of failing to recognize this and to take action. In addition, several key issues for minority and indigenous peoples are stressed in this report, including the vexed issue of culture – which can be both a positive and negative force for women's human rights – group membership, citizenship, participation, land rights and family law. The report concludes with a set of recommendations to further the integration of gender equality and minority and indigenous peoples' rights.

Mark Lattimer

Director

August 2004

Introduction

This report examines gender, minorities and indigenous peoples within an international law framework. Although it refers to the treatment of minority men and women, the report focuses on minority and indigenous women. This reflects the reality that, although both minority and indigenous men and women experience discrimination, it is women who most suffer multiple discriminations. It also marks the gap in the literature and practice; many of the existing reports about minorities and indigenous peoples do not mention gender and, while it is not explicitly stated, the majority of such reports are about men and use men as the normative framework. The same is true of international governmental and non-governmental organizations (NGOs), except for those directed explicitly at women. The report does not revisit the many complex questions about the rights of minorities and indigenous peoples that have been widely discussed by academics and other specialists,² United Nations (UN) bodies and NGOs. Instead it focuses on the ways in which women who are members of minority or indigenous groups are discriminated against on two or more grounds: they are targeted because they are women and because of their identification with the group. Discrimination comes from outside the group, from those who see such women primarily in terms of their ethnicity, nationality, religion or

race, and from within the group, from men who view women as inferior and subordinate.

The report describes how the prohibition of discrimination in international human rights law has placed people within a single category, identified through such characteristics as race, sex, religion or ethnicity, and has failed until recently to take account of the reality that people have multiple, interlocking identities that shape their lives. A Roma or Aborigine woman is primarily neither Roma or Aborigine, nor female. She is clearly both. The report looks at how human rights instruments have started, albeit slowly, to recognize the ways that different discriminations intersect and overlap, and how human rights institutions have responded. It does not offer detailed studies of particular groups or draw comparisons between groups that would require a fuller sociological and empirical survey. Instead, thematic examples drawn from diverse minorities and indigenous peoples are used to demonstrate the impact of double or multiple forms of discrimination on the lives of some minority and indigenous women, and the inadequacy of a response that fails to address this. The examples are illustrative of the realities minority and indigenous women regularly face and do not purport to provide a comprehensive picture of these women's lives.

Basic concepts

This section unpacks the concepts of discrimination, gender and sex. It also discusses gender mainstreaming and intersectionality.

Grounds of discrimination

Discrimination is a complex concept, as are the identified categories of protected groups. The UN Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965, Article 1 defines discrimination as:

‘... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’³

Members of minority groups and indigenous peoples suffer discrimination, or differential treatment, on the basis of a range of factors including their race, nationality, religion, age, disability and ethnicity. Women are discriminated against because of their sex, their gender and often their status, such as being married, widowed or mothers. The discrimination that women may experience shifts throughout their life-cycle from pre-birth to old age and death.

Sex and gender

Sex and gender must be distinguished. The notion of gender captures the ascribed, social nature of distinctions between women and men – the cultural baggage or signifiers associated with biological sex. ‘Gender’ therefore draws attention to aspects of social relations that are not premised on differences based on sex, but are rooted in peoples’ cultures and societal attitudes which are socially constructed and can accordingly change over time. It emphasizes the connection between understandings of masculinity and femininity. ‘Sex’ is typically used to refer to biological differences between women and men. However the distinction is not so clear-cut. Discrimination against pregnant women appears to be sex-based while excluding mothers from corporate or political positions of power appears to be gender-based through the socially designated role of child-caring that is used to exclude

women from the public world of paid employment and political participation. However, discrimination against pregnant women may not be because of the biological fact of child-bearing but because of social customs that deem it inappropriate for them to appear in public.

Discrimination can be imposed with good motives but nevertheless lock women into unquestioned social roles. For example, in the case of the *President of the Republic of South Africa v. Hugo*,⁴ Nelson Mandela had passed a Presidential Act that provided remission of prison sentences for all mothers with children under the age of 12. This Act was challenged by a man with a child of the qualifying age on the grounds that it discriminated against him. The Constitutional Court upheld the Presidential Act and asserted that, in determining whether discrimination is unlawful, three factors must be taken into account:

- The nature of the disadvantaged group.
- The nature of the power balance under which the discrimination is effected.
- The nature of the interests affected by the discrimination.

The discriminatory treatment against men was because of their gender, that society ascribed to women primary child-caring responsibility. The special treatment accorded to women was apparently favourable. The position with respect to the nature of the interests affected by the discrimination is complex. Judge Goldstone noted at paragraph 38:

‘For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in

employment. The generalization upon which the President relied is therefore a fact which is one of the root causes of women's inequality in our society. That parenting may have emotional and personal rewards for women should not blind us to the tremendous burden it imposes at the same time. It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.'

(notes excluded)

However the Court's assumption that women are the primary care-givers, while reflecting social reality, fails to redress societal gender roles and reinforces gendered stereotypes. Often it is members of minority groups – men and women – who lack the skills and resources to compete in the labour market. During *apartheid* in South Africa, all black people suffered discrimination, although they were not a numerical minority. They were discriminated against as a social, political and economic minority. For black South African women the assumption of child-care compounded their disadvantaged position in the ways described. Sometimes black women experienced discrimination on the basis of their race, sex and class. For example, the economic poverty of a black woman forced her to leave her children in someone else's care, usually a female relative, to look for work in the city. As a black woman, often the only work would be in domestic service, looking after the children of white people. In addition to race, gender and economic disadvantage, the black woman, unlike her white female counterpart, suffered a violation of her right to family life. The white woman could live in a family unit, the black woman, often accommodated in single-person accommodation, could not. Yet the Presidential Act made no reference to race or to the intersection of race and gender. Any imprisoned white woman (who benefited from the power balance with respect to both black men and women) with a child under 12 would benefit from its terms. In contrast, both black men and white men were equally denied the remission of sentence. However, the effect on black men and white men would be different. The history of *apartheid*, which underpinned an unfair social structure with a racist justice system, meant that at independence, and indeed to this day, South African prisons were disproportionately peopled by black men. Black men were the group most negatively affected by the *Hugo* judgment.

Minorities and indigenous peoples

Minorities cannot be collapsed into one group or category.⁵ The many ways in which minority groups come into existence within any political unit makes assump-

tions about the commonality of the conditions facing these groups unwise. The attitude of the majority towards minorities and indigenous peoples may be influenced by history as well as by contemporary conditions and context. Nor can assumptions be made about gender relations within minority, indigenous or majority populations, or between these populations, as they also vary and are shaped by historical and social factors. For example, Kurds (in northern Iraq, Syria and Turkey), the Roma (in Europe) and the San (in southern Africa) are among the dispersed minorities or indigenous peoples who experience discrimination differently in different states.

Patterns of minority formation cannot be comprehensively listed here,⁶ especially as minority status is subject to change through continuing demographic and political shifts. New minorities may be formed or previous majorities become minorities: what was a minority may, through a higher birth rate and migration of the former majority, become the new majority. A numerical majority in one state may be a numerical minority in another, creating potential for destabilization through intervention by the 'kin' state. Minorities can be created through migration flows, whereby minority groups are formed in the state to which they have migrated, and through settler policies, including persecution, killings and forced transfer that render the original inhabitants a minority in their own territory. Minorities can also be formed through the drawing of colonial boundaries, the creation of federations and in the upheavals that accompany the break-up of former states. In some places there have been attempts to remove minorities and indigenous peoples forcibly through ethnic cleansing, and in others minorities have been stranded in a legally vulnerable position, for example Russians in various parts of the former Soviet Union.

Kymlicka has differentiated between minorities that have historical roots with the land and a 'national identity' and those 'new' minorities that are formed through migration. Migration may be chosen or involuntary, as in the slave trade or in the forced movement of peoples by colonial powers for the latter's economic advantage. Unlike many other minorities, ethnic Chinese and Indian minorities in, for example, South-East Asia and parts of Africa, are economically powerful and dominant within the financial and trade sectors. Nevertheless, if the minority becomes the focus of discontent, minority women may be targeted for sexual violence, as for example ethnic Chinese women in Indonesia were during the riots that accompanied economic collapse in May 1998.⁷

A person may feel forced to migrate to seek employment or to escape persecution or conflict. Minorities in one country may flee persecution and become refugees in other countries. This has been the fate of the Karen, Karenni and Shan minorities who have fled Burma

because of human rights violations, including the systematic rape of women and young girls, to seek refuge in Thailand.⁸ In Thailand most receive well below the minimum wage and work in highly exploitative conditions. Minority women who suffered particular harms in Burma become subject to further gendered adverse treatment in Thailand. A Karen women's organization reports:

Sexual violence is common in the border area. Women may have experienced sexual violence from the army while still in Burma, and are vulnerable to attack by guards, and by other refugees in the camp itself.⁹

Internal displacement, for example of indigenous peoples through resource development or conflict, can shift the location of minorities and indigenous peoples within countries. A consequence of globalization is an unprecedented movement of peoples responding to the demand for cheap labour, including to export process zones. While conditions are poor for all workers within these zones, indigenous women in Guatemala have spoken of the racist attitudes and discriminatory practices of employers.¹⁰ The vulnerability of migrants also enhances the scope for

human trafficking and people smuggling, which has been responded to by restrictive immigration laws and asylum policies, especially within the industrialized countries.

Members of minority and indigenous groups are often especially vulnerable to social and economic inequality. Further, often what they want is not just to be free from discrimination but to be able to continue their way of life and retain their distinctiveness. Guarantees of minority rights are controversial for governments who fear fuelling secessionist claims or taking on positive obligations, for example providing minority schools, language and cultural centres, and media outlets. Allocation of housing, education or social benefits can also be perceived (or be deliberately presented by a hostile media) as 'privileging' minorities or indigenous peoples (when these could instead be presented as their rights) and thus become a source of divisiveness and resentment among majority populations.

The human rights movement has not fully resolved these different tensions. All minorities and indigenous peoples are entitled to all human rights as individuals. Governments should ensure that this is understood to avoid resentment.

International human rights law

This section focuses on the international legal regime. It examines international instruments pertaining to race and sex discrimination and those relating explicitly to the rights of minorities and indigenous peoples.

Racial discrimination

The Universal Declaration of Human Rights (UDHR), Article 2¹¹ asserts the right to equality and prohibits discrimination on the basis of identified categories: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The International Covenant on Civil and Political Rights (ICCPR), 1966,¹² Articles 2 and 26 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966,¹³ Article 2 also prohibit discrimination on the grounds of identified categories. So too do regional treaties such as the European Convention on Human Rights (ECHR),¹⁴ Article 14, the American Convention on Human Rights (ACHR),¹⁵ Article 1 and the African Charter on Human and Peoples' Rights (ACHPR),¹⁶ Article 2.

These general instruments have been supplemented by specialized instruments prohibiting especially prevalent forms of discrimination. The first was ICERD, which prohibits discrimination on the basis of race, colour, descent, or national or ethnic origin, regardless of whether such discrimination is directed at a member of a minority or majority within the state in question.

Rights of minorities and indigenous peoples

The original philosophy of the UN human rights bodies with respect to members of minorities was that they would be best protected as individuals guaranteed the right to be free from discrimination on any of the identified grounds. Accordingly, the Universal Declaration had no Article referring to minority groups as such. The exception was prevention and punishment of the intentional destruction of a national, ethnic, racial or religious group in the Genocide Convention.¹⁷

The only provision in the ICCPR referring explicitly to minorities, Article 27, states:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities

shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

Article 27 is phrased in terms of individual rather than collective rights by confirming the rights of persons belonging to minorities to enjoy their culture, language and religion in community with other members of the group. Neither Article 27 nor any other provision of the ICCPR addresses the tension that arises when a member of a minority group is in conflict with other members of the community about a cultural or community issue, although the Human Rights Committee (HRC), which oversees implementation of the ICCPR, has addressed this issue, for example in the *Lovelace* case (see pp. 25–6).¹⁸ Nor does Article 27 explicitly tackle the difficulty of the human rights framework, which concentrates on rights of individuals as against the state but does not address the group (collective) nature of the rights of minorities.

Similar language is used with respect to children belonging to minority groups in the Convention on the Rights of the Child,¹⁹ Article 30. It provides for the rights of children who are members of minorities or persons of indigenous origin 'in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language'. France has entered a declaration to this provision noting that there can be no 'accommodation' for the cultures of minorities living in France that conflict with French law. Under law minority children enjoy identical legal rights to those enjoyed by majority children.

These treaties adopt an approach that ignores minority issues in their assumption that members of minorities and indigenous peoples are adequately protected by prohibitions of discrimination. However, since the early 1990s there has been renewed attention to minority issues in the international sphere. The UN General Assembly Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities (UNDM)²⁰ requires states to protect the existence of the minorities identified in the title and to encourage conditions for the promotion of minority identity. Like the ICCPR, Article 27, provisions are phrased in terms of individual rights so that persons belonging to minorities have the right, among other things, to enjoy their own culture, use their

own language and practise their own religion. Other provisions promote effective participation by minorities in state decision-making and state cooperation on minority questions. The UNDM is not a legally binding treaty.

At the regional level the European Convention on Human Rights, Article 14, includes 'on the basis of association with a national minority' as a prohibited ground of discrimination, but has no provision on the rights of minorities. The Council of Europe Framework Convention for the Protection of National Minorities (FCNM),²¹ Article 1, makes the protection of national minorities and the rights of members of national minorities an integral part of human rights, and sets out a number of specific principles ensuring the rights of persons belonging to minorities. The FCNM contains no definition of minorities. It is the first legally binding, multilateral instrument devoted solely to minority rights. The Committee of Ministers may invite non-member states of the Council of Europe to become parties.

The diverse nature of minorities has given rise to additional international legal instruments applicable to particular minorities. These include the Convention Relating to the Status of Refugees, and its 1967 Protocol²² and the Convention on the Human Rights of Migrant Workers and their Families.²³

The International Labour Organization (ILO) Convention, No. 169, Concerning Indigenous and Tribal Peoples in Independent Countries, 1989, gives states the responsibility for developing, with the participation of indigenous peoples, 'coordinated and systematic action' to protect their rights. Specific provisions relate to economic and social rights, participation, property and citizenship. Attention is given to the social, cultural, religious and spiritual values and practices of indigenous peoples. Attempts to reach agreement on a further legally binding instrument on the rights of indigenous peoples have been unsuccessful since the Sub-Commission on Human Rights adopted the Draft Declaration on the Rights of Indigenous Peoples in 1994.²⁴ Of course not all indigenous groups are minorities within the state in which they live.

The different international legal regimes that are relevant to minority and indigenous rights, are generally expressed in gender-neutral language, which assumes that they are equally applicable to, and provide the same protections for, both women and men. Women thus become invisible within the group without any attention being paid to their particular situations. For example, ICERD, Article 5 (d) (vi), asserts the right to enjoyment by everyone 'without distinction as to race, colour, or national or ethnic origin' of the right to inherit. This discounts the fact that women are often legally disbarred from inheritance. Indeed, in many legal systems, family or personal

laws are based on either the religion or the customs of the group from which the person comes. Some of these laws discriminate against women so that the customary laws in many patrilineal societies preclude (majority and minority) women from inheriting. But the impact on minority women may be greater where their options and avenues for redress and assistance are more limited. Because the provision makes no reference to sex or gender, provided all men have equal inheritance rights, it is of no assistance to women who are denied such rights.

Sex and gender discrimination

The approach to discrimination on the basis of racial or ethnic identity that takes no account of gender issues has been mirrored in a parallel development with respect to sex discrimination, which discounts discrimination based upon other identities. Under the UN Convention on the Elimination of All Forms of Discrimination against Women (ICEDAW)²⁵ states parties condemn discrimination against women and undertake to eliminate it by all appropriate means. The definition of discrimination in ICEDAW largely repeats that in ICERD, thus promoting coherence between the Conventions.²⁶ Although the Preamble to ICEDAW emphasizes the need for the eradication of all forms of racial discrimination for the full enjoyment of the rights of men and women, the text does not differentiate between women in different situations, with the exception of rural women. Accordingly, there is no separate reference to the discrimination incurred by minority or indigenous women distinct from that faced by all women.

Sex, gender and minorities

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, goes further, although it is not yet in force. Without referring explicitly to minority or indigenous women, Article 24 headed 'women in distress', requires states parties to 'ensure the protection of poor women and women heads of families including women from marginalized population groups'. The Protocol embraces rights that protect all African women but are of particular relevance to those minority or indigenous women who experience discrimination in the allocation of land and resources, and are subject to sexual and reproductive rights violations from both private individuals and the state.

The Preamble and body of the Protocol stipulate that culture is not to be used to justify discrimination against women, affirming that all women, including minority or indigenous women, are to be allowed to enjoy their rights without hindrance. Moreover, it explicitly pro-

hibits gendered cultural practices of both majority and minority groups that are harmful to women and girls, such as female genital mutilation (FGM) and child marriage. In making culture subject to principles of equality, dignity, justice and democracy, and in providing that women are to be consulted about the content of cultural values, the Protocol goes some way to meeting the criticism that minority or indigenous groups often demand respect for culture at the expense of the rights of individual members, specifically women and children. Culture is often invoked by heads of communities or families to stifle internal debate and without consideration for the rights of women and children in the group who may wish to live free from sex discrimination and also to participate in the construction of community cultural values and norms.

Instruments that deal explicitly with the rights of minorities and indigenous peoples do not generally differentiate between women and men. The UNDM does not mention minority women or prohibition of sex-based discrimination. Nor does the FCNM, although Article 22 states that the Convention shall be not be construed as limiting any of the human rights that have been accepted by treaty by a contracting party, for example those accorded by ICEDAW. ILO Convention No. 169, Article 3 (1), does however state that its provisions 'shall be applied without discrimination to male and female members of these peoples'. The Draft Declaration on the Rights of Indigenous Peoples states that '[p]articular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons'.

Institutional separation: treaty monitoring committees

The maintenance of racial and sex discrimination as two mutually exclusive categories, without drawing linkages between them, has been reinforced by institutional separation. Monitoring Committees, comprising independent experts, have been established under both ICERD (the Committee on the Elimination of Race Discrimination: CERD) and ICEDAW (the Committee on the Elimination of Discrimination against Women: CEDAW). Each Committee has fleshed out the provisions of its Convention through commenting on the reports submitted by states parties on their efforts to implement the Convention, and through General Comments or Recommendations on specific provisions of its Convention. The expertise developed by each Committee for a long time remained focused on the particular harm: race and sex discrimination respectively. The Human Rights Committee (established under the ICCPR) and the Committee on Economic, Social and Cultural Rights

(CESCR) also tended to interpret their treaties without factoring in considerations of gender. Since there is no UN treaty on minority rights there is no specialist committee dedicated to monitoring observance of such rights, although they come within the work of CERD and the Human Rights Committee with respect to ICCPR, Article 27. In 1994 the Commission on Human Rights (CHR) established a UN Working Group on Minorities (UNWGM) to promote the UN Declaration on Minorities, to examine proposed solutions to minorities' problems and to make recommendations. Although the suggestion has been mooted of establishing a monitoring body under ICCPR, Article 27, this has not been done.²⁷

Mainstreaming

Since the 1990s, some legal inroads have been made to this approach of parallel regimes for combating racially and gender-based discriminations. Just as prohibition of racial discrimination is inadequate to ensure the enjoyment by minority or indigenous members of their rights, the prohibition of sex or gender discrimination is inadequate to ensure women's human rights. Guarantees of equality are insufficient where women suffer human rights violations different from those suffered by men and precisely because they are women, in particular, gendered violence and abuses relating to their reproductive capacity such as forced pregnancy, and coercive contraceptive and abortion policies.

The Vienna World Conference on Human Rights, 1993, asserted the human rights of women to be 'an inalienable, integral and indivisible part of universal human rights'.²⁸ It also affirmed the rights of persons belonging to minorities and indigenous peoples to exercise fully and effectively all human rights and fundamental freedoms, but made no specific reference to women in these contexts. Recognizing 'women's rights as human rights' exposed the inadequacy of relying upon the prohibition of discrimination without identification of the obstacles preventing women's enjoyment of their rights. To achieve this objective, the Programme of Action, paragraph 37, asserts that '[t]he equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity'. This so-called policy of gender mainstreaming is:

*'... a strategy for making women's concerns as well as men's concerns and experiences an integral dimension in the design, implementation, monitoring, and evaluation of policies and programmes in all political, economic and social spheres so that women and men benefit equally and inequality is not perpetuated.'*²⁹

Paragraph 37 requires women's human rights to be 'regularly and systematically addressed throughout relevant United Nations bodies and mechanisms'. In paragraph 42, the treaty monitoring bodies, were asked to 'include the status of women and the human rights of women in their deliberations and findings, making use of gender-specific data'.

In 2000 the Human Rights Committee formulated a General Comment on Equality of Rights between Men and Women.³⁰ In its discussion of ICCPR, Article 27, the Committee required states to report on any legislative or administrative actions with respect to minorities that might infringe women's equality. States should also report on how they are discharging their responsibilities in relation to cultural or religious practices within minority or indigenous communities that affect the rights of women. Integration had thus replaced parallel development. Also in 2000, CERD adopted a Recommendation on Gender Related Dimensions of Racial Discrimination.³¹

The policy of integration of gender throughout UN human rights activities was continued at the Fourth World Conference on Women, Beijing, 1995,³² with a further refinement. It was recognized that women are not all the same, but live in diverse situations and experience discrimination differently, so that only paying attention to sex and gender is inadequate. Other factors such as 'race, language, ethnicity, culture, religion, disability or socio-economic class or because they are indigenous people, migrants, including women migrant workers, displaced women or refugees' impact upon women's lives, including their enjoyment of human rights.³³ The girl child was also made a critical area of concern for the first time. The need to take account of the diverse identities of women was spelled out in three areas of critical concern: violence against women, women's human rights and armed conflict. It was reiterated by the General Assembly in the Beijing + 5 process in 2000.³⁴ The Declaration of Indigenous Women, adopted at the Fourth World Conference on Women, recognized in

paragraph 5 that indigenous women suffer as 'indigenous peoples, as citizens of colonized and neo-colonial countries, as women, and as members of the poorer classes of society'. The Declaration was signed by 118 indigenous groups from 27 states.

The World Conference Against Racism also recognized 'that victims [of racial discrimination] can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex ...'.³⁵ This Conference asserted the need to integrate a gender perspective into policies against racial discrimination and related intolerance, which operate in a differentiated way for women and girls and can contribute to deteriorating living conditions, poverty, violence, multiple forms of discrimination, and denial of their human rights. The Programme of Action has separate provisions on the multiple obstacles to achieving their rights faced by indigenous, migrant and refugee women.

In 2003 the African Union adopted the Maputo Declaration on Gender Mainstreaming and the Effective Participation of Women in the African Union.³⁶ The Declaration aims for greater representation of women within the Union and sets a target of 50 per cent women in the regional Parliament. Although examining the need for gender mainstreaming, the Declaration does not mention the specific concerns of minority or indigenous women, thus contributing to the construction of a universal or homogeneous African womanhood.

Alongside gender mainstreaming, in 1999 the Commission on Human Rights adopted Resolution 1999/48 recommending that the treaty bodies and all human rights mechanisms (Special Representatives, Special Rapporteurs, working groups) give particular attention to the rights of minorities, that is, to mainstream minority rights. However, this has not yet happened in practice.

It is not clear whether CEDAW questions states on minorities and indigenous peoples consistently, as the Concluding Observations do not always cover all the points on which the state was questioned.

The intersection of race and sex discrimination

The concept of intersectionality

The international human rights regime has begun to move from parallel but mutually exclusive guarantees of non-discrimination on the grounds of race and gender to mainstreaming gender and minorities into all human rights provisions and mechanisms, to recognizing the incidence of multiple discriminations. A woman is discriminated against because she is a woman and because she is a member of an ethnic, religious or linguistic minority, or a member of an indigenous group. These multiple discriminations do not operate independently but intersect and reinforce each other with cumulative adverse consequences for the enjoyment of human rights. What is now called intersectional discrimination ‘seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination’.³⁷ It exposes how discriminatory systems such as racism, patriarchy and economic disadvantage create ‘layers of inequality that structure the relative positions of women and men, races and other groups’.

‘Intersectionality has been explained through the metaphor of a traffic intersection. “[R]ace, gender, class and other forms of discrimination or subordination are the roads that structure the social, economic or political terrain. It is through these thoroughfares that the dynamics of disempowerment travel.”³⁸ These roads are seen as separate and unconnected but in fact they meet, cross over and overlap, forming complex intersections. Women who are marginalized by their sex, race, ethnicity, or other factors are located at these intersections. The intersections are dangerous places for women who must negotiate the constant “traffic” through them “to avoid injury and to obtain resources for the normal activities of life.”³⁹

Intersectional discrimination is illustrated by the following example: minority men earn less than majority men (racial discrimination);⁴⁰ women earn less than men (sex discrimination); minority women earn less than either majority women or minority men (race and sex discrimination). For example, in its Concluding Comments on Switzerland’s report, CERD noted:

‘Although men of foreign nationality earned 20 per cent less than Swiss, the standardized minimum wage

of foreign women was 15 per cent less than that of Swiss women. There are therefore appreciable differences between the pay of Swiss and foreigners; foreign women constitute the least well-paid group of persons engaged in a gainful activity and are manifestly doubly disadvantaged.’⁴¹

But this is about more than pay distribution. The multiple forms of discrimination intersect to determine what forms of work are engaged in, by whom and under what conditions. Minorities and indigenous peoples are typically pushed into low-paying work and jobs rejected by the majority, especially in the case of migrant labour. The gender division of labour, whereby some forms of work are deemed more suited to women than to men, places minority men into construction work, transport services or mines and minority women into domestic service,⁴² sweat shops and the sex industry. For women and men the jobs are often unregulated, poorly paid and expose especially women to violence and being trafficked.

The effects of ignoring intersectional discrimination: illustrative examples

Failure to identify the racial elements of gender discrimination or the gendered elements of race discrimination can serve to reinforce both patriarchy and racism. Understanding how different discriminations intersect protects against subsuming the gender dimension within that of race, for example, or vice versa. If this is not recognized minority or indigenous women are rendered invisible in official strategies to combat gender equality and minority or indigenous women are rendered invisible in official policies to tackle racial/ethnic discrimination. In both cases women are rendered vulnerable to further discrimination.

In order not to lose sight of either race- or sex-based discrimination, CERD’s General Recommendation on the Gender Related Dimensions of Racial Discrimination provides a methodology for analysis of the intersectionality of race- and sex-based discriminations. This requires ‘[a] comprehensive gender analysis ... of the effects of gender, the effects of race and the effects of gender and race combined’. CERD now routinely requires states to report on the impact of racial discrimination on women

and to provide gender disaggregated statistics. For example, although Albania provided CERD with detailed information about its Office of National Minorities, CERD commented unfavourably on Albania's failure to provide adequate information about the gender-related dimensions of racial discrimination and requested information on this question in Albania's next periodic report.⁴³

Looking at the effects of gender and race combined requires identifying when minority or indigenous women suffer discrimination in different circumstances, of a different kind, or to a different degree to minority or indigenous men, and when minority or indigenous women suffer sex discrimination in different circumstances, of a different kind, or to a different degree than majority women. For example, trafficking of women is typically presented as an issue of gender. Sex discrimination in the country of origin, especially in access to and delivery of economic and social rights, makes women and girls vulnerable to being trafficked. So too does domestic violence where economic dependence deters women from leaving an abusive relationship. Women's avenues for legal migration are limited by poor educational and employment opportunities. These factors make women susceptible to the false promises of opportunities made by traffickers. But what is often overlooked is how trafficking is also based upon racial subordination, both in terms of targeting of certain groups as the source of trafficked persons and of their treatment within their country of origin and destination. For example, in Estonia, Russian citizens comprise a minority group constituting 6.3 per cent of the population:

*'Trafficking in women is a very serious problem for Estonia. High rates of unemployment especially in the region of Ida-Viru (the region bordering with Russia where most of the Russian-speaking population resides), low levels of income etc. force women to search for jobs abroad, which makes them vulnerable ...'*⁴⁴

Trafficked women may fear to seek assistance from the authorities in the country of destination, especially where there is institutional racial prejudice and abuse. They are discriminated against as women, as foreigners and as prostitutes.⁴⁵ Women who do contact authorities may find that giving evidence against the traffickers is a condition for assistance. This puts the trafficked woman in a difficult position, fearing for her life should she inform on the trafficker, and risking being returned to her homeland where she may be ostracized or rejected by her community once people become aware that she was engaged in sex work.⁴⁶ The conditions that led to her being vulnerable to trafficking in the first place, namely discrimination, high

unemployment and a lack of opportunities for women, especially minority and indigenous women, will often still be in place.

Identification of racial discrimination can obscure sex-based discrimination. The most extreme form of race or ethnic-based discrimination is genocide. In Rwanda Tutsi women were targeted for genocide, but also for sexual abuse and rape. In the words of the International Criminal Tribunal for Rwanda:

*'This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.'*⁴⁷

The focus is on ethnicity but Tutsi women were targeted differently to Tutsi men because they were Tutsi and because they were women. Tutsi men were killed while Tutsi women were subject to sexual violence – as part of the genocide – and then killed. Indigenous Twa women were also victims of the killings. This pattern is not unique to Rwanda. Elsewhere sexual violence against minority women has been an integral part of ethnic cleansing. Whether or not the objective of the violence is ethnic cleansing or genocide, women are regularly targeted in armed conflict or domestic riots because of their ethnicity, and the chosen form of violence, rape and sexual violence, occurs because they are women. This also reinforces the humiliation of the men from that community who have been unable to protect the women, and reinforces the gendered role that men should protect 'their' women. For example ethnic minority women in Sri Lanka (especially Tamils) were targeted by the police and security forces in the conflict areas.⁴⁸

In the violence against the Muslim minority in Gujarat, India, vicious sexual and other attacks were directed at women. A Peoples' Tribunal found that:

*'Rape was used as an instrument for the subjugation and humiliation of a community ... in most instances of sexual violence, the women victims were stripped and paraded naked, then gang-raped, and thereafter quartered and burnt beyond recognition ... A women's fact-finding report sums up the usual procedure: "rape, gang rape, mass rape, stripping, insertion of objects into their body, molestation ... a majority of rape victims were burnt alive".'*⁴⁹

The police failed to protect victims, directed them into the paths of armed mobs seeking their deaths and opened fire on minority men trying to defend the women from

the violence.⁵⁰ Another report explained that women in a minority community suffer such violence in two ways: as members of the collective and as women – the biological and cultural reproducers of that community.⁵¹ Such violence is not committed only by men of the majority group but also by women.

Race/gender intersections: a methodological approach

CERD suggested a four-fold inquiry for understanding the intersection of race and gender discriminations.⁵² First, the form or nature of the violation should be identified. Second, the inquiry should consider the circumstances or context of the violation to determine the practical or legal situations in which gender-based race discrimination or racially based gender discrimination occurs. Third, the consequences of violation must be examined. Finally, there is a need to ask how the availability and accessibility of remedies and complaints mechanisms are affected by issues of race and gender.

Barriers to access to justice

There are many ways in which the availability and accessibility of institutional mechanisms for redress are affected by the intersections of gender and other bases of disadvantage. It is especially important to understand these because failure by the state to exercise due diligence in investigating allegations of ill treatment, in prosecuting those accused of wrongdoing or in providing appropriate remedies means that the state in question is in violation of its international responsibilities. For example, Kurdish women face numerous obstacles in pursuing cases of torture and rape (often after arrest and detention) through the Turkish courts. In *Aydın v. Turkey*⁵³ a graphic picture is presented of what faces minority women seeking justice for the wrongs committed to them. The European Court of Human Rights (ECHR) found Turkey to be in violation of the European Convention, Articles 3 and 13, with respect to the rape and torture of a Kurdish girl. In addition to the acts of torture by state agencies, the Court found violations in the failure of the public prosecutor to carry out a complete inquiry, including by not questioning key persons and not seeking corroborating evidence.

Kurdish women who pursued their remedies into the European Court were accused of exploiting the system for even seeking remedies. A Human Rights Delegation cited Turkish officials as saying:

'Kurds are exploiting the remedies of the ECHR, and they and their lawyers are motivated merely by money. Why do these women complain so long after the

*alleged crimes? Women are raped and sexually assaulted all over the world, but here they accuse the state.'*⁵⁴

Minority or indigenous women may be unable to seek remedies because of such factors as illiteracy, inability to speak the majority language, poverty and distrust of public officials. Exclusion from participation within public bodies can exacerbate the sense of isolation and helplessness. In the words of an indigenous Guatemalan woman:

*'One of the most important and invisible issues is the participation of indigenous women ... Women are second-rate citizens ... For indigenous women, access to justice is doubly difficult. Women are faced with double discrimination and are totally unprotected, while no recourse is offered to them through the system of justice.'*⁵⁵

Fear of further abuse may deter minority or indigenous women from accessing the formal justice system. The former Special Rapporteur on Violence against Women, Radhika Coomaraswamy reported that 'racist attitudes and the perceived discrimination against black people by the criminal justice system frequently prevent black women [in Brazil] from seeking assistance'. Indian women in Brazil also found that the criminal justice system did not treat violence against them seriously.⁵⁶

The Special Rapporteur has noted how issues of race, ethnicity, class and disability often intersect and exacerbate the state's institutional failure to respond to rape and sexual violence:

'In the United States of America, "rape was a common method of torture slavers used to subdue recalcitrant black women" and it is held that the impunity with which white men raped black women in the slave era has contributed to the "systematic devaluation of black womanhood". This devaluation and discrimination manifests itself in the criminal justice system through the lack of proportional prosecution and sentencing of sexual violence committed against black women. Such disparities exist as a result of institutional racism that gives rise to and feeds off stereotypical images of black women as sexually available and undeserving of protection by the law. Similar experiences are reported by minority women, women living in poverty and women of low social class throughout the world who have been labelled "unworthy" of state or community protection.' (footnotes omitted)⁵⁷

It may not only be the relations between minority or indigenous women and the government that make access to justice unavailable and inaccessible. Minority or

indigenous women's social status within their own community may restrict their access to public spaces and thus make it impossible for them to seek official support. Minority or indigenous women may of course also fail to tell their communities about rape or sexual abuse because of feelings of shame.

An illustrative example: the Rwandan genocide

Focus solely on race or solely on gender offers an impoverished account of the person's lived experiences whereas CERD's methodology facilitates a full picture of the abuse and thus forms the basis for a comprehensive response. The incidence of sexual abuse of Tutsi women (that is, the form of the violation) in the Rwandan genocide (the context) was not made visible until some considerable time after the end of the killings. Thus the first consequence was silence about how women had experienced the genocide, and their needs, such as those relating to bearing the children of the genocidaires and contracting the HIV virus, went unattended. In the aftermath of genocide access to immediately needed remedies such as healthcare and counselling were unavailable. Genocide survivors face the dual challenges of looking after the children born from the rapes and coping with HIV and AIDS with inadequate access to drugs and other resources. Other actions such as legal proceedings have been delayed and contentious. Only very few survivors will appear before the International Criminal Tribunal for Rwanda. Domestic criminal proceedings have been restricted by the collapse of the Rwandan judicial system and the huge number of accused persons. Community-based proceedings, called Gacaca trials, which were introduced in 2002, are an attempt to end impunity and facilitate reconciliation. However, time is rapidly running out for many of the survivors who have developed AIDS and may not live long enough to see justice prevail.⁵⁸

An illustrative example: forced sterilization of minority women

How the discrimination is perceived is likely to dictate the form of response. Some forced sterilization programmes may be seen primarily as targeting minority or indigenous peoples (necessitating action against such discrimination) or as gender discrimination and violence against women (requiring focus on women's reproductive rights and sexual health). They are often both, and holistic responses would address the intersection of government policies directed towards controlling the reproduction of particular groups and targeting of the most vulnerable within the group, the women.

The *Mestanza* case, which was brought after Mrs Mestanza died as a result of untreated complications arising from forced sterilization,⁵⁹ involved the challenge before the American Commission on Human Rights to the 'massive, compulsory and systematic [Peruvian] government policy that emphasized sterilization as a method for quickly modifying the reproductive behaviour of the population, especially of poor, indigenous and rural women'. The Commission found the case admissible as a violation of the American Convention on Violence against Women,⁶⁰ Article 7, and the non-discrimination provisions of the American Convention on Human Rights. In settlement the government agreed to modify discriminatory legislation and policies that did not recognize women as autonomous decision-makers. This was welcomed by women's groups as 'a landmark settlement that has broad implications for the reproductive freedoms of Peruvian women'.⁶¹ The government also agreed to conduct training courses for health personnel in reproductive rights, violence against women, domestic violence, human rights and gender equity, to pay compensation and take action against the medical personnel involved. The Commission did not specify what basis for discrimination it relied on. Nor did it refer to the Convention on Violence against Women, Article 9, which requires states parties to take 'special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons'.

The sterilization programme was directed at indigenous people (Mrs Mestanza was a low-income, indigenous woman). Reproduction policy may be presented as a rational family policy but is a deliberate attempt at controlling the minority or indigenous group, and the women of these groups. Mrs Mestanza and her husband had been harassed by healthcare officials who told them they were breaking the law by having more than five children, which is harassment directed at their social status and indigeneity. Yet the settlement apparently contained no mention of policies with respect to indigenous peoples. These are needed to ensure that the social and economic subordination of indigenous peoples does not block indigenous women from benefiting from changed policies with respect to women's reproductive rights.

Analysing the claim through the CERD four-fold approach highlights the intersection of gender and indigeneity. The form of the violation was forced sterilization of women; the context was government control of indigenous and poor populations; the consequences were in this case death, but more generally denial of women's reproductive rights and ill-health, and harassment of minority women and men and interference with their

private and reproductive lives; and access to justice was prevented by a provincial judge who found no grounds for an investigation.

*'Where systems of race, gender and class domination converge ... intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles.'*⁶²

Failure to interrogate intersectional discrimination creates a danger of losing the importance of both gender- and minority-based discrimination and rendering women vulnerable to further discrimination.

Forcible sterilization of minority or indigenous women, carried out by hostile and contemptuous health officials and authorities, who deny them basic services, is not infrequent. There are many reports of the violations of the reproductive (and other) rights of Roma people. The Research Council of Norway has found that Roma women have been sterilized in disproportionate numbers compared to other Norwegian women.⁶³ Shocking examples of violations of Roma women's rights in Slovakia were recounted in a 2003 report,⁶⁴ based on interviews with 230 women. Of these, 140 women reported that they had been forcibly sterilized without adequate information to make informed choices about the procedures, and that they had been segregated in healthcare provision and in maternity units, given inferior services and treatment, and verbally abused by health service providers. Thirty women were forcibly sterilized during the communist era, and 110 subsequently, when the practice was supposedly ended.

By failing to prevent these violations and to provide Roma women with adequate access to legal remedies, the Slovak state failed to exercise due diligence to ensure non-discrimination and human rights protections, for example the right to be free from degrading and inhuman treatment, the right to health, the right to life, and men and women's right to private and family life. The women's experiences show how their gender and ethnicity combined to dehumanize them. The report tells how Slovaks often spoke to and about Roma women as if they were 'vermin', intent on spreading disease. Even during childbirth, they were discriminated against, often being left alone to give birth without medical intervention or assistance. Some reported being given caesarean sections without consultation or adequate explanations. Using the language of rights, a Slovak doctor explained the reasons for the segregation:

*'White women do not want to be with primitive, uneducated Roma women. We have to respect the rights of non-Roma women too.'*⁶⁵

CERD has adopted a General Comment on the human rights of the Roma that emphasizes states' obligation to ensure Roma equal access to healthcare and social security services.⁶⁶ States must also 'involve Roma associations and communities and their representatives, mainly women, in designing and implementing health programmes and projects concerning Roma groups'.

Two further forms of intersectional discrimination: caste and sexuality

Caste is another identity which impacts in particular ways upon women. A case of intersecting gender and caste discrimination is that of of Bhanwari Devi.⁶⁷ A Dalit woman village development worker in India, Devi was raped by five higher-caste men. Initially the police refused to record her complaint but, after public protest, an inquiry was held and the matter came to trial. The lower court held that the delay in filing the complaint and in obtaining medical evidence showed that she was lying. Despite the Constitutional prohibition of discrimination on the grounds of religion, race, caste, sex and place of birth, the court considered it unlikely that a higher-caste man would rape a Dalit woman.

The social construction of Dalits (formerly known as 'untouchables') as inferior means that all Dalits, male and female, experience discrimination. Given the long, complex and tangled medical and legal requirements around reporting rape, women are already reluctant to report violence against them. The handling of this particular case has the potential for further discouraging Dalit women from reporting sexual violence. Indeed, it may encourage further violations, as perpetrators realize that little, if anything, will be done to challenge them. Dalit women will be even more marginalized – vulnerable to abuse because of their gender and deemed less deserving of protection by virtue of their caste.

In an intervention to the UN Working Group on Minorities, the Nepalese Forum for Women, Law and Development (FWLD) recounted examples of discrimination experienced by Dalit women, which included higher rates of unemployment as compared to non-Dalit women; lower literacy rates and a lower life expectancy; and rape, including by upper-caste men.⁶⁸

Although commonly associated with South Asia, the problem of caste (or descent-based discrimination) is more widespread.⁶⁹ CERD's General Recommendation on descent-based discrimination recognizes it as a form of racial discrimination,⁷⁰ recognizes especially the multiple discriminations against women members of decent-based communities and provides that states should 'take resolute

measures to secure rights of marriage for members of descent-based communities who wish to marry outside the community’.

Another basis for discrimination that intersects with minority or indigenous status and gender is sexuality. Although sexual minority men and women experience rejection and harassment by family and community within many societies, those also belonging to minority or indigenous populations may experience further isolation and marginalization. Indeed, there is often great silence about their social status within their communities. Some associations have been formed to provide mutual support and solidarity for sexual minorities against this rejection and to break the silence. For example, the Al-Fatiha Foundation was founded in 1998 as an association for gay Muslims in North America with an Internet listserv that includes 250 people in 20 countries. Such websites also become the focus for a ‘torrent of hate and judgment’. The founder, Faisal Alam, experienced the isolation of sexual minorities within his own community when he was asked to leave a Muslim youth group because he was gay.⁷¹ Similarly the Jewish Gay and Lesbian Group in England provides an ‘atmosphere of friendship and support for Jewish gays, lesbians, bisexuals and their partners’.⁷² A report by Human Rights Watch and the International Gay and Lesbian Human Rights Commission on Southern Africa showed that the use of violence against sexual minorities affects women disproportionately and there is no reason to suppose that this would be different within minorities.⁷³ Cultural pressures on women are greater, not least because of the demand that women marry and provide their families with bridewealth or *lobolo*.

The sense of alienation and exposure faced by sexual minorities is heightened by a realization in some countries that they will not even receive the support of human rights groups. For example, the Egyptian Organization for Human Rights refused to intervene in the trial of 52 men for immoral behaviour and contempt of religion after police raided a Nile boat and accused them of participating in a ‘gay sex party’. The Organization refused to become involved for two reasons: that it had no mandate to engage with issues of homosexual rights and that doing so would undermine its work. The reasoning of the Director of the Organization puts the dilemma clearly. He was quoted as saying:

‘What could we do? Nothing. If we were to uphold this issue, this would have been the end of what remains of the concept of human rights in Egypt ... We let them [gays] down, but I don’t have a mandate from the people, and I don’t want the West to set the pace for the human rights movement in Egypt.’⁷⁴

Institutional silence on intersectional discrimination

Although the need to examine multiple and intersectional discrimination is now recognized in some international instruments, analysis may still focus solely on one basis for discrimination. The UN Working Group on Minorities has decided to pay ‘particular attention’ to ensuring the human rights of minority women and to providing a forum for them to present their experiences, but its reports do not do this consistently.⁷⁵

The reports of the UN Human Rights Commission’s Special Rapporteur on the human rights of indigenous people, Rodolfo Stavenhagen, present indigenous women’s rights as simply an ‘add-on’ to men’s. The first report outlined the major problems facing indigenous communities and, although he identified ‘across the board discrimination and marginalization, particularly involving women and children’ as one such persistent problem, his discussion of land rights, homelands, education and culture made little further reference to women.⁷⁶ Subsequent reports provide much historical and contextual information about indigenous peoples visited on missions by the Rapporteur. Throughout there are occasional references to women but no consistent gender analysis. Issues are largely presented in terms that do not recognize gender, and even when women are mentioned there is little focus on them as women. For example he criticizes the absence of a maternity clinic in one of the population centres of the Atacameño people in Chile and the high infant mortality rate. The consequences of there being no local accessible maternity care for Atacameño women are discussed in terms of the effect on the group rather than the added burden for women. He explains that registration of babies in the city, where women must go to give birth, ‘gives the impression that the indigenous Atacameño population is decreasing in size, as well as creating serious problems for families’.⁷⁷

The Special Rapporteur’s report on Mexico⁷⁸ makes more references to women. A paragraph specifically on women notes the violations of sexual and reproductive rights experienced by indigenous women and the disproportionate level of different forms of violence suffered by women in Chiapas. The report does not explain the form, context or consequences of this violence, and the detailed discussion of violence elsewhere in the report (including militarized violence)⁷⁹ makes no reference to gender-based violence against women. The vulnerability of indigenous women and children, and the higher rate of illiteracy among indigenous women as compared to indigenous men, are both noted, but without exploring in either case how gender and indigenous status intersect in creating this situation. One of the report’s conclusions is that

indigenous women and children (particularly girls) are the main victims of discrimination against indigenous peoples in the allocation of wealth and public goods and services. The double discrimination against women is not commented on and women are seen primarily as victims of the discrimination against indigenous peoples.

In contrast, the Special Rapporteur recognizes the three levels of discrimination experienced by indigenous women in Guatemala: as women, as indigenous and as poor people.⁸⁰ He reports that indigenous women experience the lowest levels of economic and social well-being. Contextual analysis of the multiple and intersecting discriminations is required throughout to guide policy-makers in ensuring that '[p]articular attention [is] paid to the rights and special needs of indigenous women, elderly, youth, children and differently-abled persons'.⁸¹

The Organization for Security and Cooperation in Europe (OSCE) High Commissioner for National Minorities has identified certain recurrent issues and themes that are of special importance for minority groups. He has established working parties of internationally recognized experts to make recommendations for policy-making in three areas: effective participation for minorities, linguistic and education rights.⁸² Three sets of detailed and thoughtful recommendations for governments have been produced but none engages in gender analysis or considers the needs and experiences of minority or indigenous women. The assumption is that focusing on these issues for the benefit of the minority community will reduce discrimination against women. Yet experience shows this is not the case. 'No political system has conferred on women both the right to and the benefit of full and equal participation.'⁸³ Considering political participation for minorities without taking account of the

under-representation of women will simply serve to further sex discrimination.

Similarly, the role of education and educational curricula in challenging gender stereotypes, combating prejudice and in providing training for women in male-dominated fields is also well recognized, but is omitted from the recommendations on minority education. Educational materials that celebrate the history and culture of the minority group without attention to the position of women within that history will simply reinforce stereotypes and these women's invisibility. When recommendations from a regional intergovernmental organization omit consideration of minority or indigenous women it is not surprising that many national jurisdictions fail to take account, in their policy-making, of the multiple and intersecting discriminations faced by women.

A notable exception to such failure to consider specifically the position of minority or indigenous women is Liechtenstein's report to CERD which identifies linguistic, socio-economic and cultural factors as the basis for the weaker position of foreign women in relation to the rest of the population. The government explained the effects of this disadvantage:

*'In non-German speaking families in which the men work and the women take care of the children and the household, the women's language skills are usually at a lower level than those of the men. The women are less integrated into society, and it is more difficult for them to inform themselves about their rights and obligations. Accordingly, they are less able to defend themselves against violations of their human rights – including racist acts – and to exercise these rights.'*⁸⁴

Minority and indigenous women and culture

Culture makes the subordination of minority and indigenous women more complex. Central as it is to the construction of gender, culture is particularly important to both majority and minority women throughout the world because women 'bear the burden of being those who reproduce the boundaries of ethnic/national groups ... who transmit the culture ... and who are privileged signifiers of national differences'.⁸⁵ Culture is a multi-faceted concept that encompasses dress, food, music, social practices and norms, and often personal laws.

Customary law can sometimes disadvantage women, for example by allowing 'widow inheritance' (when the brother of the late husband marries the widow, sometimes without her full consent) and for failing to check exploitative bridewealth practices. Given that culture is used to justify continued discrimination against women in some personal or customary laws, it is instructive to consider the constitutional provisions of two African countries that deal differently with the 'culture issue'.

Like the ICCPR, the Constitution of Uganda recognizes that people have a right to cultural expression but also that they have a right to live free from discrimination based on, among other grounds, their sex, race, religion or tribe. The Ugandan Constitution, 22 September 1995, Article 2 (2) provides:

'If any other law or custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.'

The constitutional provision on women's rights, Article 33 (6), makes clear that:

'Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.'

The Ugandan Constitution confronts the issue of potential conflicts between the right to culture and the right to be free from sex discrimination, in accordance with ICEDAW, Articles 2 (f) and 5, which provide that the state should modify or abolish customs and practices that discriminate against women or that reinforce gender stereotypes.

In contrast, the Constitution of Zimbabwe recognizes customary law as being on a par with other national laws. Its non-discrimination clause includes gender, but ring-fences customary law from the non-discrimination provision, so that issues of marriage and devolution of property on death remain governed by customary law.

International instruments and culture

UN specialized agencies such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) seek to preserve culture. This is put into human rights terms in ICCPR, Article 27, which specifies the right of individual members of minorities to enjoy their own culture. Article 27 does not define culture, nor address the collectivity's right to preserve its culture, nor the appropriate response where culture clashes with human rights norms, particularly those pertaining to non-discrimination on the ground of sex. Although the focus is often on women, men may also be unfairly burdened with stereotypical roles, for example, as providers and protectors.

International legal instruments have been slow to assert that cultural justifications are unacceptable for violations of women's (including minority women's) rights. The UNDM, Article 8 (2), does not explicitly refer to women's human rights but does state that: 'The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.'

In 1993, in the context of violence against women, the Vienna Programme of Action, paragraph 38, stressed only 'the importance of ... the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism'. The Conference did not specify that the human rights of women should prevail.

The 1995 Beijing Platform for Action was clearer. Among the strategic actions it recommended should be taken by governments was to: 'Condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.'

In its General Comment 28, paragraph 5, the Human Rights Committee notes that '[i]nequality in the enjoy-

ment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes'. The Committee continues:

'States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights.'

Most recently and forcefully, as discussed here, the African Protocol on the Rights of Women, Article 5, explicitly prohibits cultural practices that deny women their human rights.

Group culture and the rights of individuals

Unpacking the meaning of culture to minorities and indigenous peoples and its relationship to gender shows how the very understanding of these terms raises issues for women. Minority and indigenous women live under two levels of subordination, that of the elites of their own community and that of the dominant group. Majority women, too, experience the impact of cultural practices that are damaging to women.

The importance of culture to minority and indigenous identity can sometimes conflict with the rights and choices of individuals within that group. For women, the problem is exacerbated where they are viewed as the cornerstone of group identity and thus as repositories and transmitters of culture and tradition. This might have been thought to elevate women's status within the group but too often is used to lock them into oppressive and patriarchal interpretations of that culture. Discrimination against women from within the minority is typically justified through assertions of the preservation of culture and autonomy, even when expressed through acts of violence.

Some cultural restrictions concern 'private life', for example those concerning family relations such as so-called honour killings, other forms of violence against women or forced marriages.⁸⁶ The 'private' nature of violations within the family renders much of the discrimination experienced by all women in this private sphere invisible. Minority women are located within a second private sphere, the minority community, that may be screened from government intervention through claims of cultural autonomy. Thus those within the community are shielded by two levels of so-called 'private' action from public scrutiny, condemnation or state engagement with the problems most likely to affect minority or indigenous women and girls, who are subject to internally generated personal and family laws and norms. Minority or indigenous women may also suffer where their culture makes it

impossible for them to respond in what the dominant group perceives as the appropriate way.

Other cultural practices (such as dress) are more visible, which may reinforce stereotyping and arouse prejudice outside the group. The Special Rapporteur on the human rights of indigenous people has explained how, for Guatemalan indigenous women, wearing traditional dress is closely bound up with spiritual practices and is an important element of social and ethnic identity. Women wearing their traditional dress in public places, however, experience *de facto* discrimination and attitudes of rejection from the white population and, despite Constitutional guarantees, traditional dress has been banned in factories in export processing zones.⁸⁷ In Bolivia the derogatory term *Birlocha* is used to describe indigenous women who have changed from wearing traditional dress (*la pollera*) to Western dress. The result is that the women are still discriminated against because of their attempts at assimilation.

Tussles between minority leaders and government authorities over the position of women within the minority or indigenous community are often played out over women's dress codes. In the West, issues of male dress codes typically involve claims of exemption from the dress requirements of the dominant community (for example Sikhs seeking to wear turbans in the police force, or Jews the *yarmulke* in the armed forces) in order for men to access social and economic advantage without having to disclaim their own identity.

In contrast, the issue with women's dress codes in the West is generally whether they can be required by their culture or religion to wear them, or prohibited by the government from doing so. At stake are minority women's access to public places, hence education and work, and in a general sense their right to full citizenship within society. Also at stake are contestations over women's individual autonomy, collective regulation and control of minority or indigenous groups through 'their' women, and claims by the government that it is saving or protecting women from their own community.

Throughout Europe there are different responses to practices among minority communities that may be at variance with, or violate, the norms of the dominant group. A current European example is the decision by the French government to outlaw the wearing of overt religious symbols in public places, including schools. The then French Premier justified the new law by saying:

*'Because such religious symbols acquire political significance, and the Islamic veil in particular harms our concept of the emancipation of women, we cannot accept them in the classroom. It is evidently not a matter of stigmatization, but of having clear republican rules.'*⁸⁸

Although welcomed by some groups as affirming France's commitment to a secular society, others have criticized the ban as targeting Muslim women wearing the veil. An added twist in the post-11 September 2001 environment is the claim that banning minority women's distinctive clothing, such as the veil, protects them against majority hostility towards Muslims. This places minority men who demand that women wear distinctive clothing in the position of exposing those women to the fear of harm from the majority, of being replaced as 'protector' by the government, or themselves committing violence against women for the latter's failure to adhere to the dress requirements. It could also be argued that the assertion of 'protection' by the state reinforces stereotypes of Muslim women as oppressed and lacking in agency, and pejorative stereotypes of Muslim men as overbearing and oppressive. Finally, it constructs all 'Muslims' as belonging to one homogeneous category and not as people who may, like the majority group, have different ideas about dress and the way they wish to manifest their religion.

In the midst of this controversy are Muslim women who are denied agency and control over their own lives. The veil is seen by women who choose to wear it, not as a symbol of oppression, but rather as a tool of freedom and emancipation. However, they are accused of pandering to the dominant group if they assert their wish not to wear it and of false consciousness with respect to their freedom if they assert their wish to do so.

Still another aspect of the veiling controversy is that if girls are removed from state to private schools where they can wear the veil, they leave an environment where they can experience diversity of culture, ethnicity and religion. This also reinforces a 'Muslim' identity that an individual may not want, either at all or in its entirety, thereby narrowing her options, space and ability to enjoy her multiple identities.

Another controversial issue for many governments in Europe and minority communities is female genital mutilation (FGM). FGM is also practised by majorities in a number of states. In France, the practice is prohibited, regardless of the customs of the group, and there have been criminal prosecutions when it has been carried out on minority girls.⁸⁹ The Special Rapporteur on Violence against Women has commented on the use of France's recourse to criminal law, observing that since law is ineffective in decreasing FGM, governments must also engage in education and community outreach efforts. Outreach efforts must be aimed at addressing the deeply ingrained cultural attitudes that foster the practice in the face of the potential criminal penalties.⁹⁰

In contrast, although FGM has been criminalized since in England and Wales,⁹¹ there have been no prosecutions in England and Wales. This has been in part because

the British approach has been to leave minority (immigrant) cultures alone, partly out of a respect for diversity and multiculturalism, but also out of a concern that intervention would fuel racial tensions. However, there have been changes. When announcing a new law on FGM in 2004, the Home Secretary said:

*'... no cultural, medical or other reason can ever justify a practice that causes so much pain and suffering. Regardless of cultural background, it is completely unacceptable and should be illegal wherever it takes place.'*⁹²

A European approach appears to be developing which is intolerant of practices such as FGM and which has little sympathy for calls for cultural sensitivity or respect for minority communities whose practices are out of step with the majority.⁹³ For example, Norwegian policy acknowledges cultural diversity but is premised upon mutual respect and the acceptance of human rights and fundamental freedoms as constituting the foundation of Norwegian society. Immigrants are told that:

*'As long as your lifestyle is not illegal and does not violate other people's rights and liberties, you have the right to live as you please. The price of freedom is that you must respect the fact that other people have values that differ from yours and a lifestyle different from the one you would have chosen.'*⁹⁴

The Norwegian government's approach is in reality prescriptive, and demands that minorities respect human rights norms, which form the basis of Norwegian society. The Norwegian government has announced that in future it will demand that new immigrants sign written declarations that they will not participate in forced marriages or FGM.⁹⁵ Intolerance towards certain minority practices is further illustrated by the European Parliament Resolution on FGM,⁹⁶ which although recognizing in paragraphs 4 and 11 the need to work with communities to eradicate the practice, explicitly notes in paragraph Y that:

'... the protection of cultures and traditions has its limits, consisting in respect for fundamental rights and the prohibition of customs which resemble torture.'

The position of women within the minority or indigenous community may go unremarked. Where the minority suffers extreme economic and social disadvantage and deprivations it may be seen as trivializing to focus on those that occur solely or disproportionately to women. From within the group it may be seen as divisive or disloyal for women to demand their rights. Minority

women may be subjected to pressure to 'preserve minority customs' that may be discriminatory. This may be the case where minorities perceive that their customs and cultures have in the past been denigrated. In such situations, women are dissuaded from seeking their rights under the state system of law, which may give women greater rights, or indeed from invoking international human rights norms that prohibit discrimination on the grounds of sex. An example is that of a Kenyan woman who reported her husband for domestic violence and was labelled a traitor to Masai culture.⁹⁷ The demands for internal loyalty are especially strong where the group is seeking some form of self-determination or autonomy from the majority group, or where its very existence is under threat. Demands for women's rights may then appear to undermine the group's cohesion, or future survival.

Discrimination suffered by all members of a minority or indigenous community can impact especially severely on women in that minority or indigenous women may positively reject taking steps to encourage state intervention, fearing that it that may lead to excessively harsh treatment against men within the group. For example, Australian Aborigine women reportedly suffer higher rates of domestic violence than other Australian women. This violence against women cannot be seen in isolation from the racist and violent history of white settlement, the marginalization and dislocation of all Aborigines, the destruction of Aborigine systems of community control, and the unacceptably high rate of Aborigine male deaths in police custody.⁹⁸ It is not surprising that most Aborigine women fail to report this violence to the authorities 'because of fear, emotional bonds to their partner, commitment to marriage, concern for their children's future and loyalty to their beleaguered communities'.⁹⁹ Accordingly 'the only way to get through to these men is through their own culture'.¹⁰⁰ While violence against Aborigine women has emerged as a national crisis within Australia, there are concerns that the government is using this to distract attention from other aspects of its policies towards Australia's indigenous peoples, including the structural violence suffered by Aborigine men.

Culture as an evolving concept

Although there is resistance to change, often the cultural identity that minorities and indigenous peoples seek to protect has been mediated by external factors, including changing socio-economic structures and the influence of the majority group.¹⁰¹ An example is the San of southern Africa who have seen changes in gender relations from a system which is said to have been based on egalitarianism to a more gender-fractured system. This reconstitution of

gender relations has been identified as a response to changes in work patterns from a time when women were valued as key contributors to family subsistence, towards one where women 'stay at home' and men are the paid breadwinners. The politics of money and resource management that follow this new pattern are not difficult to predict. For example, among the San living in Schmidt-drift in the Northern Cape, women:

*'named the high female unemployment rate as their foremost gender problem ... Unlike at the other field sites [in Namibia and Botswana], the gendered division between the male "haves" and female "have-nots" was described by many women as a major problem.'*¹⁰²

The result has been the socialization of boys and girls into roles of head of the family and dependent female. The situation is exacerbated by well-meaning missionaries who teach San women 'female' skills of knitting and sewing in an attempt to make them into 'better wives'. Additionally, the San are subject to poverty, landlessness, denigration and dispossession. Although violence is present in all societies, the reasons for the violence against indigenous groups such as the San differed so that:

*'Violence against San women committed by people of other ethnic background seemed to be linked to beliefs that the San were inferior and San women the weakest members of their communities, and hence the most easily abused.'*¹⁰³

Like the Twa of the African Great Lakes region (who also suffer from lack of access to education, employment and law), San women were subject to sexual stereotyping as promiscuous, and were sometimes to be found in transient relationships with men from the majority groups who were sometimes abusive towards them, because of the negative perceptions.¹⁰⁴

The example of the San women illustrates how minority or indigenous women face gender-based violence from diverse sources, including both state officials and non-state actors. San women, like Tutsi women, are subjected to violence from other ethnic groups because of their supposed cultural inferiority. Minority or indigenous women may also be subject to violence from within their own community for reasons based on cultural practices. Within patriarchal and traditional societies (as in many other societies) rape and sexual violence are often considered as dishonour. The state may target minority or indigenous women for sexual violence as a deliberate means of destroying the kinship bonds of their group, knowing that these women's own culture might lead to still further violence and ostracism from within their own community.

For example, Kurdish women have committed suicide, been killed by members of their own family or sent away from their community once details of the sexual violence committed against them have become known.¹⁰⁵ Whoever the perpetrator of sexual violence against women may be, women survivors may be unable to seek assistance from within their own community because of the shame and stigma.

Culture can be overridden where other social and political imperatives so demand. Given that a reason for the rejection of homosexuality on the African continent is that it is considered by many to be 'un-African', it is interesting that the first country in the world to make constitutional provision against discrimination on the basis of sexual orientation is South Africa. The rationale is that a country and a people that have been collectively denigrated by *apartheid* cannot condone ongoing discrimination against any group. Substantial gains have been achieved in the courts. These include recognition that same-sex partners are entitled to receive the same pension, medical aid and survivor benefits as a partner in a heterosexual relationship, and that people in same-sex relationships should have parental rights.¹⁰⁶ However, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, appears to focus redress mechanisms on three grounds: of race, gender and disability discrimination. Of course changing the law does not necessarily mean changed social attitudes, so that people with an orientation towards same-sex relationships still experience prejudice.

Culture as a positive force for change

Not all culture is an instrument of patriarchy or oppression. Radhika Coomaraswamy, the first UN Special Rapporteur on Violence against Women has pointed out that there are positive traditions and practices that pro-

mote and enhance women's status and dignity. Becker cites a programme among the Khomani of Northern Cape which involves the collection of oral histories recounting stories of positive female role models who were successful hunter-gatherers in years past,¹⁰⁷ to be used in educational material for San children. Indeed, the San are alive to the need to confront changing gender relations. A 1998 meeting of southern African San and NGOs involved in San issues passed a resolution which noted:

*'Our communities must address the present inequality between men and women in society. Inequality does not honour our traditions and culture. Strategies to rectify gender inequality must be developed by each community.'*¹⁰⁸

Cultures (like gender relations) are not static but are subject to change, although reliance on a sense of continuity and the need to preserve cultural traditions makes challenging problematic or out-of-date cultural practices difficult. However, it can be done, as shown by the example of the San and the assertion of gay rights in South Africa. What is needed is to unpack culture, determine who is claiming it and on whose behalf, and to ensure the participation of minority and indigenous women, free from the restraints of men from either their own or the majority community. This is provided for in the African Protocol on Women's Rights, Article 17, which stipulates the participation of women in the determination of cultural practices. Cultural practices should not be accepted or rejected in a wholesale manner but rather individual practices should be assessed for their impact on human rights. Thus 'those customs and traditions which involve violence against women must be challenged and eliminated as violating the basic tenets of international human rights law'.¹⁰⁹

Membership, citizenship and family issues

This section focuses on a few topics out of the many that could highlight issues facing minority and indigenous women. Sex-based discrimination of minority women by the majority is likely to occur in precisely those areas that cause tension between the dominant group and the minority. While all examples depend upon their own particular circumstances, many patterns are repeated. Recurrent contexts are citizenship, land issues and family law. As has been seen in many of the examples already discussed, gender-based violence against women, including domestic violence, violence and restrictions justified by cultural practices, and economic structural violence frequently accompany all such examples.

Citizenship

Community and the state play a vital role in constructing the citizenship of all people, but particularly women. An important aspect of citizenship is political participation, an area where women are badly represented in both national and minority or indigenous politics. CEDAW has identified tradition, custom and gendered roles as possible barriers to women's effective participation in political life.¹¹⁰ The representation of minority or indigenous men in national politics is also often low. Some states are moving towards offering some form of political autonomy to minority or indigenous groups. However, even where this has occurred, minority women may be under-represented. For example, CEDAW noted that the publicly elected Saami Parliament in Norway, the Sametinget, established in 1989, has a skewed gender composition, with fewer women than men being elected. The Sameting has made no special arrangements to ensure the representation of both sexes. CEDAW was concerned that the percentage of women in the Sameting is decreasing, while the position and importance of the Sameting in society is increasing. However, the Sameting has been progressive in taking steps to enable parents of small children to participate in Saami political life, by allowing representatives to bring their own childcarer to the sessions at the public expense.¹¹¹

Women's position *vis-à-vis* the dominant group is typically mediated by the leaders of their own group, who frequently comprise men purporting to speak on women's behalf. Their right to do so may not be questioned by the government. An example is that when the Canadian government funded indigenous groups to participate in

negotiations about indigenous self-government, the Native Women's Association of Canada received no such direct funding and was not invited to attend the discussions. The Association argued unsuccessfully before the Canadian courts that only its members (not indigenous men) could represent them.¹¹²

The case highlights that indigenous and minority women are not passive. They do take the initiative and form their own groups that are instrumental in advocating for and providing support to them. This also shows the importance of the participation of minority or indigenous women in decisions impacting upon their lives and that such participation can assist in the internal evolution of cultures, communities and religions in positive ways. For example, the Guatemalan Office for the Defence of Indigenous Women was commended by the United Nations General Assembly as a positive step towards the protection of indigenous women. To be effective such bodies must be adequately resourced and be legally independent.

To assist minority and indigenous women, states should give effect to the CEDAW, General Recommendation 25 on temporary special measures,¹¹³ which specifies in paragraph 12 that states may need to take such measures to eliminate multiple discrimination (including that based on race, ethnic or religious identity, disability, age, class and caste), and its compounded negative effects. Paragraph 28 notes that the measures should be based on women's actual life situations, including those of women suffering from multiple discrimination. State positive action could include providing funding for minority and indigenous women's groups and quotas in national bodies, including, but not limited to, Parliament.

However, there can be no assumption that the participation of women will automatically lead to a more gender-sensitive culture emerging. Some, particularly older women, may have a stake in the continuation of cultural norms, not least because of the status privileges accorded to older members of the community. It may therefore also be important to encourage the participation of younger members of the community (males and females), who may be at the sharp end of discriminatory cultural practices but have no voice in community affairs. Ranger argued this point about the exclusion, during the colonial period in Africa, of young men who did not have access to land or cattle, from the (re)construction of cultural norms.¹¹⁴

Restrictive nationality laws may deny women the ability to become citizens¹¹⁵ or to bestow citizenship on their children. CEDAW noted the difficulties of the Russian-speaking minority in Estonia, notably the spouses of former members of the armed forces, in acquiring Estonian citizenship.¹¹⁶ The Special Rapporteur on Violence against Women referred to the predicament of Rohingya women in northern Arakan State, Burma, who are denied citizenship by Burma, cannot cross state borders legally as they lack documentation, and become vulnerable to being trafficked.¹¹⁷

Another denial of the active citizenship of minority or indigenous women is when they become subject to violence and detention because of their relationships with known or suspected male political activists. Minority women may be targeted for their own political activities (for example campaigns for land rights and against resettlement) and also for allegedly supporting political activists by providing food or shelter, irrespective of their own political stance. For example Kurdish women have been arrested and tortured for allegedly sheltering or assisting members of the PKK.¹¹⁸ Women suffer violence because they are members of the minority and for performing typical women's duties – caring for male family members or others. The hostility can extend to those who defend minority or indigenous women's rights. There are many examples. A Kekchi activist in Guatemala was shot and killed, apparently because of her work to promote women's health and to challenge violence against women.¹¹⁹ Lawyers in Turkey were indicted for 'propaganda against the state' for giving factual representations of the systematic sexual abuse of Kurdish women while in police custody.¹²⁰ Human rights and women's aid groups in Indonesia were reportedly warned against investigating and giving assistance to the ethnic Chinese women victims of sexual violence during the rioting in May 1998.¹²¹ Subsequently the government sought to provide redress and assistance through various initiatives to the Chinese women victims. Members of K'inal Antzetik, a Chiapas-based women's advisory group, have reportedly received death threats allegedly because of their actions defending women's human rights in Mexico.¹²²

Citizenship is not only about political participation and access to civil rights but includes enjoyment of economic and social rights such as access to health, education, employment and cultural centres. The examples of forced sterilization of minority or indigenous women are an extreme form of a gendered denial of the right to health. There are numerous situations where minority or indigenous women suffer discrimination in access to employment with the corresponding incidence of poverty and vulnerability to violence and being trafficked, as dis-

cussed above. Minority or indigenous women typically earn less than both other women and minority or indigenous men: the MRG report on Twa women found that Twa women in Uganda earn 50 per cent less a day than non-Twa women.¹²³ This experience is not limited to the South. A report on nurses in Britain revealed that black nurses were twice as likely as their white colleagues to be underpaid.¹²⁴ In another UK case, *Dr F. Banda v. The School of Oriental and African Studies*, the respondent institution was held to have unlawfully discriminated against the applicant by paying her less than a white male comparator. The applicant was awarded the back pay that she was owed plus interest, and damages for injury to her feelings. The applicant told the Tribunal:

*I found the School's apparent preference for admitting sex but not race discrimination abhorrent. As a black woman, I consider that both race and sex discrimination are unacceptable, and cannot see that one is somehow preferable to, or less shameful than the other. I do not have the option of waking up in the morning and deciding to be either black or a woman. I am both simultaneously, and therefore experience multiple and intersecting discrimination.'*¹²⁵

CERD, in its concluding comments to a number of countries, has noted the economic disadvantage suffered by minority women (for example, Cape Verde and Finland-Roma women) and indigenous women (for example, New Zealand-Maori women). Norway's report is explicit in this regard:

Immigrants from Western Europe, North America and Oceania have about the same rate of unemployment as Norwegian non-immigrants. Immigrants from South and Central America, Asia and Eastern Europe have unemployment rates that are three to four times higher than that of Norwegian non-immigrants. Immigrants from Africa have the highest unemployment rate (13.4 per cent in February 2001).

Participation in the workforce is higher among male than among female immigrants. Women with an immigrant background have a higher unemployment rate than ethnic Norwegian women. In 2000, the employee rate for male immigrants was 54.7 per cent and the rate for female immigrants was 47.1 per cent. The employee rates for Norwegians were 63.3 per cent for men and 58.9 per cent for women. The explanation behind the relatively high employee rates among immigrants lies in the fact that around 40 per cent of immigrants are from the Nordic and other Western countries. Immigrants with a non-

Western background have employee rates of around 50 per cent for men and 40 per cent for women.’¹²⁶

Norway explained that:

‘Gender differences in work participation between immigrants and differences between ethnic Norwegian women and immigrant women owe much to cultural factors. Discrimination, prejudice and scepticism with regard to immigrants as a group are also a major reason for the slow integration into working life.’¹²⁷

CERD has noted that some states are resistant to recognizing this economic disparity as racial discrimination (and even more so as the intersection of race and gender discrimination) but see it as economic and social hardship such as is experienced by other sections of the population.¹²⁸ Failure to recognize the structural nature of race and gender discriminations impedes the development of policies for redress.

Membership of minority or indigenous groups

The potential effects on women of an approach based on autonomy for a minority or indigenous group is illustrated by the case of *Lovelace*, in Canada. Sandra Lovelace was born and registered as a member of the Maliseet Indian group or band. After her marriage to a non-member of the band terminated she sought to return to the Tobique reservation where she had previously lived. Under Canadian law, her marriage outside the band entailed loss of her membership rights and privileges. A man who married a non-member of the band would not have suffered the same consequences. Thus the individual rights of a woman community member were set against the will of the collectivity, which sought to preserve the band’s separate status and culture, including determination of membership. The Human Rights Committee, to which Lovelace petitioned, held that:

‘persons who are brought up on a reserve, who have kept their ties with the community and wish to maintain those ties must normally be considered as belonging to that minority’.

It considered that excluding her from the reservation breached ICCPR, Article 27, guaranteeing the individual rights of persons belonging to minorities. The Committee did not discuss sex-based discrimination, although Lovelace had also claimed violations of ICCPR, Articles 2 (1) and 26.

There were various responses to this case, including from within the Maliseet band. Some commentators rejected the notion of sex discrimination, while others saw it as central:

‘It might, therefore, have been more accurate for the Human Rights Committee to have decided that Lovelace was denied the right to enjoy her culture and to use her language in community with other members of her band, in a discriminatory fashion or because she was a woman. In other words, there was a violation of Article 2(1) in relation to the right embodied in Article 27.’¹²⁹

Another view emphasizes guarding against the erosion of minority or indigenous culture and its replacement by ‘alien’, majority values and thus accepting the resulting injustice to minority or indigenous women. In this instance, the minority culture was supported by the dominant group that saw the identity of married women as resting upon that of their husbands. In adopting the Indian Act, the Canadian government argued that it had followed the definition of ‘Indian’ used by the Maliseet group and that this definition traced Indian status through the father’s line, making the Maliseet patrilineal. Maliseet women, however, contest this patrilineal account of how their group functions. One woman notes:

‘The blood comes from the mother, not the father, which is exactly the opposite of what the Indian Act imposed on us.’¹³⁰

Another researcher has noted that there was greater gender parity prior to contact with the majority group:

‘Dispersal of decision-making among both men and women in traditional Maliseet society is certainly confirmed by any knowledge of our culture and history. It shows up in our language, which has no gender. It shows up in our terms of kinship which, for the most part, are precisely the same for maternal relatives as for paternal relatives, indicating a means of reckoning lineage and relationships that is neither patriarchal nor matriarchal, but bilateral. According to our recently deceased elder, Dr Peter Paul, our people showed a strong tendency toward matrilocality insofar as a husband often took up residence in or near the family of the wife.’¹³¹

Lovelace recounts how she challenged the Maliseet chiefs for stripping her of her Indian status noting that, as she had been born an Indian, she would remain one for life. The response of the chiefs is telling. They invoked the

provisions of the Indian Act to justify her exclusion once she had married outside the group, thus cloaking themselves with the legitimacy bestowed by Canadian law. Meanwhile, the Canadian government had invoked Indian 'culture' in making the law, thus showing how culture can be appropriated and manipulated to fit the shape of the dominant group and the views of the powerful, in this case male members of society.

Another justification is the economic rationale that allowing women to remain within the band despite marrying outside it would dispel and dilute its resources. Still others questioned why Indian culture is not accorded equal legitimacy with the dominant (white) cultural perspective of the Canadian state.

The *Lovelace* case has resulted in the repeal of many of the discriminatory provisions of the Indian Act. Considering the Canadian report in 2002, CERD suggested a review of the Indian Act to bring it into conformity with the ICERD, Article 5, on 'the right to marry, to choose one's spouse, the right to own property and the right to inherit with a specific impact on Aboriginal women and children'.¹³² In 2002 CEDAW discussed the (proposed) First Nations Governance Act that introduced measures to enhance the human rights of First Nations women, including participation in community governance; the right to vote on governance codes, whether living on or off reserve; appeal in election matters; access to information; involvement in law-making; and impartial redress for administrative decision-making.¹³³

Lovelace highlights the vexed question of minority and indigenous women's right to retain membership of their community. The European Framework Convention (without any reference to gender) explicitly allows individuals belonging to minorities to choose whether or not they should be treated as such.

Family law and citizenship

It is in within the context of family laws that tensions between the constructions of minority culture and majority norms are most sharply thrown into relief. Indeed, some states have made reservations to ICEDAW precisely to allow the application of minority personal law. For example, Singapore's reservation to Article 16 notes that the Administration of Muslim Law Act might conflict with ICEDAW in that it allows Muslim men, but not women, to marry up to four spouses. Singapore asserts that its reservation is needed to maintain the delicate balance within a multicultural society.

A now famous case involves an Indian Muslim woman, Shah Bano, whose husband left her after 40 years of marriage.¹³⁴ Although he initially gave her maintenance, he stopped paying. She sued him under the Indian Code

of Criminal Procedure. In the Indian Supreme Court the husband argued that his marriage was subject to Muslim personal law, which only required him to pay maintenance during the *iddat* period lasting three months. The Supreme Court rejected this claim, noting that there was no conflict between the statute providing for the support of a wife in case of destitution and the Muslim law. If a wife found herself destitute after the *iddat* period then she was perfectly entitled to ask for maintenance.

The case created interesting alliances and revealed much about the uses and misuses of culture and religion. Shah Bano was supported by women's groups, but also by Hindu fundamentalists, who wished to exploit the situation to show Islam and Muslim men as 'backward and unjust'. They also pushed for the enactment of one law, no doubt the law of the majority, Hindu law. Shah Bano was vilified by sections of the Muslim community for refusing to be bound by the tenets of Islam and, by extension, for being 'un-Islamic'. In the event, the Indian government bowed to pressure from the Islamists and declared that personal laws superseded any provision of the criminal code. Coomaraswamy noted that:

*'The triple oppression of Shah Bano is clearly demonstrated: She suffers as a woman, she suffers as a Muslim, and in this particular context, she suffers as a Muslim woman who wants to assert a different voice in her community.'*¹³⁵

Shah Bano wished to be treated as a woman and receive support through the state system; but was forced by her own community to be treated as a Muslim woman subject to minority personal law. In contrast, Lovelace wished to be treated as a member of her band but was denied that status. Both cases show that when minorities or indigenous peoples perceive themselves to be under stress or attack, then family laws acquire an enhanced importance. The family becomes the only space where members of minority or indigenous groups enjoy unfettered autonomy and decision-making, but this sometimes leads to the imposition of 'cultural' perspectives by the more powerful members of the group.

The *Shah Bano* case was replayed in *Danial Latifi and Another v. Union of India*.¹³⁶ Again the Indian Supreme Court upheld the right of a Muslim woman to financial support after divorce. The Court refused to uphold the different treatment of Muslim women with respect to maintenance on the basis that one group of women within a country could not be deprived of rights which were enjoyed by other groups of women also resident in the country. This shows that gender is not simply a matter of different socially constructed roles of men and women within a country, but rather that there may be differences

between women within the same country or even group. In particular, how should differences between majority and minority women be managed? In this case the guarantee of non-discrimination on the basis of sex was held to cover all women. Muslim women were thus held to be entitled to enjoy the same guarantees of non-discrimination as Hindu women. Intersectional analysis teaches us that it is not just a question of discrimination against women but also which women are being discriminated against, in what circumstances and in what context. Indeed, to try to circumvent these issues the government of India has long mooted the idea of introducing a unitary family code that would cover all groups.

Land issues

Conflicts over land rights and access to land are the source of many violations of the rights of minorities and indigenous peoples. Generalization about the particular position of minority and indigenous women and land is especially problematic as it requires context-specific analysis of the applicable, often complex, legal and social regimes. The law of the majority may deny indigenous people access to and ownership of land to which they may have a special linkage. Indigenous women may also have a distinct and sacred relationship with land, or particular locations, that may not be understood by the majority and which may cause further tensions with majority claims for land use and development programmes.

Access to, and use and management of land are central to women's economic independence, social status and political influence, not only with respect to their own status but also relative to the status of the men within their community. However, women are discriminated against in many ways with respect to access to and use of land. Legal issues of land title, inheritance and common land are technical and may involve regulation under (sometimes discriminatory) state and customary laws. Cultural norms (for example, with respect to public access and participation) may also impinge upon women's enjoyment of land. Women may be restricted in their control of land, even where they formally own it, as for example restrictions among the Jaffna Tamils on the sale of land

by married women.¹³⁷ Recourse may be had to diverse formal and informal institutions for settlement of disputes about land, including criminal courts in the form of proceedings for dispossession or illegal seizure. Women's legal entitlement to land cannot be dissociated from cultural assumptions about the status of women, including that of widows. Cultural assumptions also influence development programmes. For example, the Remote Area Dwellers scheme implemented by the Botswana government to create settlements for the San people in the Ghanzi district is gendered in its approach to resource distribution, giving free cattle to men but not to women.¹³⁸

Serious tension and conflicts can erupt between those responsible for law enforcement (the courts, the public prosecutors and the police) and the leaders of minorities and indigenous peoples, who have traditionally played a role in regulating access to land and settling land disputes. Women organize, join in protest and dissent, and are subject to arrest, imprisonment and violence in the same way as men. They also suffer gendered harms.

In Sarawak, Indonesia, where indigenous communities are being destroyed by logging, men who protest are often jailed. The consequence is that 'It is the women who bear the heavy responsibility of supporting their families while their husbands face arrest and imprisonment.'¹³⁹ Women may be targeted because of the men's protest or refusal to surrender land. Amnesty International has documented the case of a Dalit woman who was beaten up and raped, supposedly because her husband refused to give up land that others wanted.¹⁴⁰

Where indigenous peoples have lost their lands and have reduced economic means of survival the consequences can be harsh for women and girls. Young indigenous girls may be drawn into the tourist (sex) industry. In Taiwan:

*'At least 20 per cent, and in some areas up to 40 per cent, of the women working in prostitution in Taipei are aborigines [i.e. indigenous]. Considering that these groups compose only less than 2 per cent of the total population of Taiwan this is an extraordinarily high ratio.'*¹⁴¹

Conclusion

The report has highlighted many of the areas in which further work needs to be done. The major tensions are around cultural exceptions to women's rights. When deciding their responses to claims of culture, decision- and policy-makers should consider the four questions posed by Rao:

*'First, what is the status of the speaker? Second, in whose name is the argument from culture advanced? Third, what is the degree of participation in culture formation of the social groups primarily affected by the cultural practices in question? Fourth, what is culture anyway?'*¹⁴²

The report has highlighted the fact that, although international law instruments prohibit a range of discriminations, without the lessons of intersectionality there is only an incomplete picture of the discriminations faced by minority and indigenous women. The report focuses on two forms of intersectional discrimination – racial and other forms of discrimination experienced by minorities and indigenous peoples, and gender-based discrimination – but the insights and approaches are more broadly applicable to situations of multiple intersectionality. What is also clear is that international standards are insufficient but must be used in conjunction with a range of social, economic and political measures in a holistic approach to redress the position of minority and indigenous women, and to reinforce their agency and empowerment. Participation, and the setting of priorities and agendas, must take place through local actions and groups.

The position of minority and indigenous women in any one place is specific and contextual. The position of women within one minority or indigenous group is not necessarily replicated across all. The examples given in the report are illustrative. They are not, however, isolated incidents affecting a few marginalized groups; these, and similar incidents are repeated throughout the world. The aim should be to build upon the human rights instru-

ments and to require that all UN and regional human rights bodies should specifically and systematically address the issues of minorities and indigenous peoples, and gender.

At the national level, initiatives should be taken to increase the participation of minorities in education, to enhance access to health and other public services, and to law and legal institutions to remedy violations of rights. Obstacles preventing minority women's participation should be identified and addressed. Recognition should be given to the fact that, although minority and indigenous men experience discrimination and public forms of violence, all women suffer disproportionately from gendered harms and minority and indigenous women may suffer such harm at the hands of members of the majority and from within the minority or indigenous group. States should identify and remove the obstacles that prevent victims of violence seeking assistance from government authorities, and to ensure the provision of and access to refuges, shelters and social and health services. Such refuges must be made secure against members of both the majority and minority. States should encourage recruitment of minority and indigenous women into law enforcement bodies, social service bodies and other administrative bodies with which there is contact. To engender confidence in national institutions, states should aim at a better representation of minorities and indigenous peoples, including women.

States, intergovernmental organizations and NGOs should develop clear, long-term strategies when working on gender equality and minority and indigenous rights with the full and effective participation of minorities and indigenous groups, including men and women, at all stages including design, implementation and monitoring. Finally, mechanisms for the dissemination of success stories should be sought, for example the collection of oral histories by the San using positive examples of cooperative gender relations rooted in San history and culture to reinforce norms of non-discrimination.

Recommendations

1. States should ratify and fully implement all international standards, especially the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination, and accept the jurisdiction of the respective Committees to receive individual complaints. States maintaining reservations to these treaties should consider their removal. States should ratify and implement applicable regional standards. In particular, African states should ratify and implement in national law the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, and implement sub-regional initiatives such as the SADC Gender and Development Declaration, 1997.
2. CERD and CEDAW should ensure analysis of intersectional discrimination takes place in all their work in order to ensure that their work reflects the realities of minority and indigenous women and men, girls and boys. CEDAW should adopt a General Comment on minority and indigenous women, ensuring input into the draft from minority, indigenous and women's NGOs and possibly working together with CERD. CERD should make full use of its General Recommendation 25 on gender-related dimensions of racial discrimination and develop a more consistent and thorough approach when examining state reports that results in clear analysis of the realities faced by minority and indigenous women and gives clear, practical recommendations to states. Special Rapporteurs, Special Representatives and working groups should examine, where appropriate within their mandates, the situations of minority and indigenous women and intersectional discrimination affecting them. The Office of the High Commissioner for Human Rights (OHCHR) should consider appointing a gender specialist within the Indigenous Issues and Minorities Unit to focus on intersectional discrimination and to work with colleagues focusing on gender both in the OHCHR and in the Division for the Advancement of Women, to encourage the integration of the intersectional discrimination experienced by minorities and indigenous peoples into the UN's gender-based work.
3. States, intergovernmental organizations and NGOs should direct the strategic actions recommended in the Beijing Platform for Action and Beijing + 5 Outcome Document at minority and indigenous women. This should include making minority and indigenous women visible through research, within statistics and accounts;¹⁴³ ensuring political participation;¹⁴⁴ addressing violence against women;¹⁴⁵ protecting the knowledge, innovations and practices of indigenous women;¹⁴⁶ developing with their participation education programmes that respect their history, culture and language; ensuring access to all levels of formal and non-formal education.¹⁴⁷
4. Those involved in conflict resolution strategies should ensure the participation of minority and indigenous women in all processes for the management and settlement of conflict and post-conflict reconstruction. Security Council Resolution 1325 and Women, Peace and Security should be applied with reference to minority and indigenous women. Peace-keeping operations and national security forces working to secure peace in regions affected by wars and/or rebellions should pay specific attention to the need to protect minority and indigenous groups, including the specific needs of women and children. Staff, police and military personnel should receive training on the specific needs and vulnerability of marginalized minority and indigenous groups, including women, in particular with regard to the use of sexual violence as a tool of war.
5. States, intergovernmental organizations and NGOs should take measures to identify and integrate the intersectional dimension in all national programmes, policies, legislation and initiatives. When devising national programmes, at all stages of design, implementation and monitoring, the full and effective participation of minorities and indigenous peoples, including men and women, should be ensured. Obstacles preventing minority and indigenous women's participation should be identified and addressed.
6. Governments, minority and indigenous rights organizations and women's rights organizations should implement programmes to address the exclusion and discrimination experienced by minority and indigenous women, to increase their access to education and health services, employment and income generation opportunities. These programmes could include training

minority and indigenous women in leadership skills, negotiation skills and civic representation, ensuring that the priorities and agendas are determined by the women. Development agencies should work with minority and indigenous women and minority and indigenous NGOs to ensure that their interventions address the specific issues faced by minority and indigenous women, including by collecting and disseminating disaggregated statistics to inform policy direction.

7. Governments should recognize that although minority and indigenous men experience discrimination and violence, all women suffer disproportionately from gendered harms and minority and indigenous women may suffer such harm from within the minority and from the majority. States should work together with minority and indigenous communities, minority and indigenous NGOs and women's organizations to eradicate violence and discrimination against minority and indigenous women, whether perpetrated by minority or other communities, including ensuring victims of violence have access to protection and justice. Governments should be sensitive to the fact that marginalized commu-

nities may perceive legitimate concern over violence against women as an attack on the community as whole and ensure that it is not used as a tool in wider disputes.

8. Governmental bodies, international and national institutions and NGOs working on women's rights and issues should integrate minorities and indigenous peoples into their work and those working on minority and indigenous rights and issues of racial discrimination should integrate a gender perspective into their work. Organizations should consider developing joint programmes in order to ensure that issues of intersectional discrimination are visible and tackled in their work.
9. Donors should provide resources for detailed research on specific minority and indigenous women; for capacity building support to minority, indigenous and women's organizations to help them implement effective advocacy and development programmes for minority and indigenous women, and support initiatives to collect and disseminate disaggregated statistics on access of minority women to legal remedies, economic opportunities, education and health.

International instruments

UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992)

Article 1

States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

International Covenant on Civil and Political Rights (1966)

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

Article 1

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

Convention on the Elimination of All Forms of Discrimination Against Women (1979)

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

[...]

- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Article 5

States Parties shall take all appropriate measures:

- (a) 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 or on stereotyped roles for men and women.

Article 16

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations [...].

ILO 169 Indigenous and Tribal Peoples Convention (1989)

Article 3

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

Article 7

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development...

Article 14

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994)

Article 3

Every woman has the right to be free from violence in both the public and private spheres.

Article 6

The right of every woman to be free from violence includes, among others:

The right of women to be free from all forms of discrimination; and

The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.

Article 9

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.

African Charter on Human and Peoples' Rights (1981)

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

Article 22

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Article 11

States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations which affect the population, particularly women.

States Parties shall, in accordance with the obligations incumbent upon them under the international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.

Article 18

2 e) States Parties shall take all appropriate measures to protect and enable the development of women's indigenous knowledge systems.

Article 19

Women shall have the right to fully enjoy their right to sustain-

able development. In this connection, the States Parties shall take all appropriate measures to:
[...]

- b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- c) promote women's access to and control over productive resources such as land and guarantee their right to property;
- d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women.

Article 24

The States Parties undertake to:

- a) ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs.

Notes

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- 2 Thornberry, P., *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991.
- 3 ICERD, 660 UNTS (UN Treaty Series) 195.
- 4 1997 (4) SA 1; notes excluded from quote below.
- 5 There is no universally accepted definition of 'minorities', and the word is interpreted differently in different societies. In general, MRG uses a broad definition: a group of people, usually a numerical minority (although sometimes a numerical majority) who are different from the dominant group(s) in ethnic origin, language, religion, culture and status, and who suffer prejudice, discrimination or exclusion. The term 'indigenous' has come to be applied to politically marginalized, territorially based ethnic groups who are culturally distinct from the majority population(s) of the states in which they find themselves, and who recognize themselves as indigenous. Some indigenous peoples reject the term 'minority', concerned that it may imply a lack of entitlement to the self-determination to which they aspire. MRG follows the principle of self-identification whereby a particular group may choose to identify itself as it wishes, including being a minority and/or indigenous people.
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- 9 Karen Women's Organization, available at http://www.caprbc.ca/linkedmaterials/burma/ngo_kwo.html
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- 11 UDHR, GA Res. 217A (III), 1948.
- 12 ICCPR, 999 UNTS 171.
- 13 ICESCR, 993 UNTS 3.
- 14 European Convention for the Protection of Fundamental Rights and Freedoms, 1950, as amended Protocol No. 11, ETS No. 5 and 13 Protocols.
- 15 American Convention on Human Rights, 1969, 1144 UNTS 123.
- 16 African Charter on Human Rights and Peoples' Rights (Banjul Charter), 1981, OAU Doc. CAB/LEG/67/3 rev. 5.
- 17 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 UNTS 277.
- 18 *Lovelace v. Canada*, Communication No. 24/197 (1986), UN Doc. CCPR/C/OP/1 at 83.
- 19 Convention on the Rights of the Child, GA Res. 44/25, 1989.
- 20 UNDM, GA Res. 47/135, 1993.
- 21 FCNM, 1995, ETS 157.
- 22 Convention Relating to the Status of Refugees, 1951, 189 UNTS 150; 1967, 606 UNTS 267.
- 23 Convention on the Human Rights of Migrants and their Families, GA Res. 45/158, 1990.
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- 25 ICEDAW, 1979, 1249 UNTS 13.
- 26 It is also used in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 1 (f), available at <http://www.africa-union.org>
- 27 Report of the Working Group on Minorities on its eighth session, E/CN.4/Sub.2/2002/19, 2002, para. 66.
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- 29 Chinkin, C., *Gender Mainstreaming in Legal and Constitutional Affairs*, London, Commonwealth Secretariat, 2001, p. 12.
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- 31 CERD, General Recommendation 25 on Gender Related Dimensions of Racial Discrimination, 2000, UN Doc. CERD/C/56/MISC21/Rev.3.
- 32 Fourth UN World Conference on Women, Beijing Declaration and Platform for Action, 1995, UN Doc. A/CONF.177/20, para. 221.
- 33 *Ibid.*, para. 226.
- 34 Gender Equality, Development and Peace for the 21st Century, GA Res. S-23/3, 2000 (Outcome Document, Beijing +5), paras 5, 27.
- 35 Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/Conf. 189/12, 2001, Declaration, para. 2.
- 36 Available at <http://www.africa-union.org>.
- 37 UN Division for the Advancement of Women, Office of the High Commissioner for Human Rights and United Nations Development Fund for Women, *Report of the Expert Group Meeting, Gender and Racial Discrimination*, Croatia, 2000.
- 38 The metaphor was developed by Kimberly Crenshaw and used at the Expert Group meeting above. Crenshaw, K., 'Mapping the margins: intersectionality, identity politics and violence against women of color', 43 *Stanford Law Review*, 1991, p. 1241.
- 39 *Ibid.*
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- 42 For example, the Saudi government was asked to provide information on the situation of domestic women workers within its jurisdiction. Saudi Arabia: Concluding Observations of CERD: 2003, CERD/C/62/CO/8, para. 17.
- 43 Albania: Fourth Periodic Reports of States Parties: 2003, CERD/C/397/Add. 1.
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- 54 KHRP Trial Observation Report, *Turkey's Shame: Sexual Violence without Redress – The Plight of Kurdish Women*, London, Kurdish Human Rights Project (KHRP), December 2003, p. 27.
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- 56 Report of the Special Rapporteur on Violence against Women, E/CN.4/1997/47, Add.2, paras 27–9.
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- 76 Report of the Special Rapporteur on the Situation of Indigenous People, UN Doc. E/CN.4/2002/97, Introduction.
- 77 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to Chile, UN Doc. E/CN.4/2004/80/Add. 3, paras 16, 47.
- 78 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to Mexico, UN Doc. E/CN.4/2004/80/Add.2, paras 46, 48, 49, 61.
- 79 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to the Philippines, UN Doc. E/CN.4/2003/90/Add.3, para. 50, refers to the incidence of rape, sexual harassment, forcing girls to serve as 'comfort women' in military camps, and compulsory prostitution in the Cordillera region and comments that this causes 'fear, coercion, intimidation, and humiliation of indigenous communities'.
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- 87 Report of the Special Rapporteur ... Mission to Guatemala, *op. cit.*, paras 17, 30, 60.
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This report will be essential reading for anyone interested in issues of gender and the human rights of minorities and indigenous peoples.