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# CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa

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# CEDAW, COMPLIANCE, AND CUSTOM: HUMAN RIGHTS ENFORCEMENT IN SUB-SAHARAN AFRICA

*Angela M. Banks\**

## INTRODUCTION

Human rights scholars and advocates have been at the forefront of recognizing the role of norms and values in achieving compliance with human rights treaty obligations. This is particularly true of scholars and activists interested in gender equality. It is frequently noted that compliance with treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women<sup>1</sup> ("CEDAW") or the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>2</sup> ("African Protocol") is challenging because of "entrenched traditional attitudes regarding women."<sup>3</sup> The treaty body responsible for overseeing compliance with CEDAW, the Committee on the Elimination of Discrimination against Women ("CEDAW Committee" or "Committee"),<sup>4</sup> recognizes this challenge and regularly implores states to modify or eliminate discriminatory social and cultural patterns of conduct. To achieve this goal state parties are encouraged to utilize strategic framing for CEDAW norms. The Committee is increasingly recognizing the role of a state's discursive opportunity structure in the framing process by recommending that state parties collaborate with influential domestic actors.<sup>5</sup> Yet the Committee fo-

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1. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [hereinafter CEDAW].

2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Sept. 13, 2000, OAU Doc. CAB/LEG/66.6 (2003), *available at* [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html) [hereinafter African Protocol].

3. Valerie A. Dormady, *Status of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1998*, 33 INT'L L. 637, 639 (1999).

4. See CEDAW, *supra* note 1, art. 17.

5. See, e.g., 30th and 31st Sessions of the Committee on the Elimination of Discrim-

cuses on circumscribed collaboration—collaboration limited to women’s and human rights organizations. The Committee’s jurisprudence<sup>6</sup> does not include recommendations to collaborate with local elites responsible for administering customary legal systems. This is a significant omission because many issues related to social and cultural patterns are within the jurisdiction of customary law in sub-Saharan African states.

This Article examines treaty body compliance discourse through an examination of the CEDAW Committee’s jurisprudence related to sub-Saharan Africa. Domestic enforcement is recognized as one of the most effective means of enforcing international legal obligations.<sup>7</sup> Absent domestic enforcement, international legal obligations have to be enforced through international legal institutions and states utilizing various combinations of coercion, pressure, and acculturation. In the context of human rights the relevant international legal institutions typically only have advisory powers and are unable to “make” states take particular action. They utilize discursive strategies that can prompt or bolster the coercive or persuasive strategies undertaken by states and non-state actors. Both of these methods of enforcing human rights obligations are resource intensive and consequently are used to address a relatively small number of human rights violations throughout the world. When states have the capacity and the political will to enforce human rights obligations domestically, the likelihood that violations will be adjudicated and corrected increases significantly.<sup>8</sup>

Recognizing the value of domestic enforcement, treaty bodies like the CEDAW Committee encourage states to undertake reforms that will facilitate and strengthen domestic enforcement

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ination Against Women, Jan. 12-30, 2004 and July 6-23, 2004, *Report of the Committee on the Elimination of Discrimination Against Women*, pt. 1, ¶¶ 63, 80, 176, 194, 270, U.N. Doc. A/59/38 (2004) [hereinafter 30-31st Sessions of CEDAW].

6. See Thomas Buergethal, *The U.N. Human Rights Committee*, 5 MAX PLANCK Y.B. UNITED NATIONS L. 341, 351 (2001) (describing the concluding observations of the Human Rights Committee as a “type of Committee ‘jurisprudence’”).

7. See, e.g., Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 497 (2005) (“much of international law is obeyed primarily because domestic institutions create mechanisms for ensuring that a state abides by its international legal commitments whether or not particular governmental actors wish it to do so.”); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656-57 (1997).

8. See Hathaway, *supra* note 7, at 499.

mechanisms.<sup>9</sup> Successful domestic enforcement entails an adoption and adaptation process. States must adopt international legal rules by incorporating them into their domestic legal system.<sup>10</sup> Additionally the international legal obligations and norms must be translated into local terms through the use of strategic frames that advantageously situate the obligations and norms within the state's discursive opportunity structure.<sup>11</sup> Treaty bodies, such as the CEDAW Committee, make recommendations to state parties to assist with the adoption and adaptation process.<sup>12</sup> Based on the CEDAW Committee's sub-Saharan Africa jurisprudence between 1994 and 2006, this treaty body's compliance discourse can be divided into three categories of recommendations—structural, legal, and programmatic. Conceptualizing compliance in this way illuminates the ways in which the existing human rights treaty regime directs states to behave. The overwhelming majority of the recommendations are programmatic and so are those that focus on adaptation.<sup>13</sup> The adaptation-oriented recommendations focus on awareness and knowledge. States are encouraged to undertake awareness-raising campaigns to publicize CEDAW rights or institute professional training programs to familiarize legal professionals with the state's CEDAW obligations.<sup>14</sup> The adaptation process, however, requires significantly more than the introduction of information. This process requires connecting CEDAW obligations and norms to the local context, which includes the local meaning-making institutions, and understanding the power dynamics of these institutions and actors. In other words, the adaptation process is tied to the state's political opportunity structure and

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9. See *id.* at 500.

10. Koh refers to this aspect of the process as legal internalization. See Koh, *supra* note 7, at 2656-57.

11. Koh would refer to this aspect of the process as social internalization. See *id.* However, I remain agnostic as to whether the norms must be internalized or merely recognized as socially valuable. The successful acculturation of the target audience may be sufficient for bringing about the required reforms. See *infra* note 72; see generally Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical and Normative Challenges*, 54 DUKE L.J. 983 (2005) [hereinafter Goodman & Jinks, *International Law*].

12. See generally General Recommendations Adopted by The Committee on the Elimination of Discrimination Against Women, <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html> (last visited Nov. 30, 2008).

13. See *infra* notes 143-58 and accompanying text.

14. See *infra* note 177 and accompanying text.

more specifically to its discursive opportunity structure.<sup>15</sup>

Local elites play a critical role in successfully navigating this process. They serve as influential allies in the deployment of the frames created for the adaptation process, but they are also an indispensable resource for the translating components of the adaptation process. The CEDAW Committee is increasingly recognizing that collaboration with local entities is valuable. This development systematically began in 2004, and since that time the Committee has generally recommended that states collaborate with civil society organizations such as women's organizations and human rights organizations.<sup>16</sup> Yet recommendations to collaborate with the local elites responsible for administering the customary legal systems are missing from the jurisprudence. As most individuals within these states frequently encounter the customary legal system and rarely interact with the statutory system, this circumscribed approach to collaboration significantly limits the impact of international law.

Drawing on the constructivist literature and the sociological framing literature, Part I of this article introduces adoption and adaptation as key features for domestically enforcing treaty obligations. Part I also introduces the CEDAW Committee compliance discourse framework. Through the issue of married women's property rights in Rwanda and Uganda, Part II demonstrates the challenges of implementing the adoption and adaptation process with a circumscribed collaboration approach. Drawing on the constructivist and sociological insights regarding the adoption and adaptation process Part III critiques the CEDAW Committee's compliance discourse's circumscribed approach to collaboration. The Committee's emphasis on awareness-oriented programmatic reforms without an appreciation for customary legal officials as an important resource in the adaptation process minimizes the effectiveness of domestic enforcement mechanisms.

### I. *FACILITATING DOMESTIC ENFORCEMENT*

Current scholarship on human rights presents a daunting picture of state compliance with human rights agreements. Scholars using a variety of theoretical and methodological ap-

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15. See *infra* notes 66, 70 and accompanying text.

16. See generally 30-31st Sessions of CEDAW, *supra* note 5.

proaches conclude that it is not uncommon for states to formally commit to human rights agreements, but fail to change their practices to conform to the treaty requirements.<sup>17</sup> This body of research offers a variety of theories regarding what motivates states to comply with their human rights obligations, and offers normative prescriptions for reforming human rights treaty regimes to obtain better compliance.<sup>18</sup> This literature provides insights on state behavior generally, for example states can be socialized or states respond to credible threats, but to date the compliance literature has taken a narrow view of compliance by focusing on the legal rights outlined in a treaty.<sup>19</sup> Human rights treaties, however, articulate a broad range of goals that include promoting and realizing specific rights, in addition to protecting these rights.<sup>20</sup> The provisions of a given treaty seek to advance each of these goals. Steiner, Alston, and Goodman refer to five types of duties that are created in human rights treaties: respect the rights of others; create structural machinery that is essential to the realization of rights; protect rights and prevent violations; provide goods and services to satisfy rights; and promote rights.<sup>21</sup> The protection of rights is the paradigmatic type of provision in a human rights treaty, and thus the emphasis of much of the compliance literature. For example, CEDAW requires state parties to grant women “in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capac-

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17. See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) [hereinafter Goodman & Jinks, *Influence States*]; Goodman & Jinks, *International Law*, *supra* note 11; Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

18. See, e.g., Goodman & Jinks, *Influence States*, *supra* note 17, at 638-56, 700-02; Goodman & Jinks, *International Law*, *supra* note 11, at 984-89; Hafner-Burton & Tsutsui, *supra* note 17, at 1379-83, 1395-1401; Hathaway, *supra* note 17, at 1942-62, 2002-20.

19. See, e.g., Goodman & Jinks, *Influence States*, *supra* note 17, at 687-99; Hafner-Burton & Tsutsui, *supra* note 17, at 1374; Hathaway, *supra* note 17, at 1937-42.

20. See, e.g., CEDAW, *supra* note 1; African Protocol, *supra* note 2.

21. See HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 187-89 (3d ed. 2008). These duties can be categorized as structural, programmatic, or legal. Respecting rights, protecting rights, and promoting rights are all legal obligations. Creating structural machinery, preventing violations, and providing goods and services to satisfy rights are each structural obligations and the last two in this list would also qualify as programmatic obligations. See *infra* notes 133-145 and accompanying text.

ity.”<sup>22</sup> The African Protocol states that “[e]very woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.”<sup>23</sup> Yet other provisions of these treaties do not articulate clear legal rules that states must implement and adhere to, rather they express a commitment to a principle or goal that can be realized in a variety of ways. For example, CEDAW requires state parties to:

[M]odify 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  
 . . . .<sup>24</sup>

Similarly, the African Protocol states that “[w]omen shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.”<sup>25</sup> Compliance with these kinds of provisions cannot be measured solely by examining the legal rules operating within a state. Consequently the treaty monitoring bodies adopt a broader conceptualization of compliance, one that recognizes state efforts aimed at changing the social meanings attached to particular practices and groups.

This Article focuses on an under-analyzed resource regarding human rights treaty compliance—treaty body reports. The statements and evaluations of human rights treaty bodies play an important role in articulating international standards for compliance. Within the international human rights regime multiple actors ranging from the United Nations (“U.N.”) to regional organizations to individual states can and do play a role in holding states accountable for their legal obligations. The U.N. is, however, one of the most prominent international organizations responsible for enforcing human rights obligations.<sup>26</sup> The U.N.

22. CEDAW, *supra* note 1, art. 15(2).

23. African Protocol, *supra* note 2, art. 3.

24. CEDAW, *supra* note 1, art. 5(a).

25. African Protocol, *supra* note 2, art. 17(1).

26. Enforcement as used in this Article refers to “all measures intended and proper to induce respect for human rights.” Rudolf Bernhardt, *General Report*, in *INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS* 145 (Rudolf Bernhardt & John Anthony Jolowicz eds., 1985). It can refer to the adoption of resolutions, recommendations, or other “hortatory activities of the UN.” STEINER, ALSTON & GOODMAN, *supra* note 21, at 736.

system is divided into the charter-based organizations and the treaty-based organizations. The charter-based organizations are those that are provided for in the U.N. Charter, such as the General Assembly, the Economic and Social Council, and the Commission on Human Rights. The treaty-based organizations are the committees created by a specific human rights treaty to monitor compliance with that specific treaty. There are seven treaty-based organizations in the U.N. system. Each of the following treaties have a corresponding committee: the International Covenant on Civil and Political Rights ("ICCPR"), International Covenant on Economic, Social and Cultural Rights ("ICESCR"), International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), International Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Convention on the Rights of the Child ("CRC"), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("CMW").<sup>27</sup>

These committees have three main functions: reviewing and commenting upon state party reports, issuing general recommendations on specific treaty provisions, and receiving and considering individual communications.<sup>28</sup> This last function is usu-

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27. See Office of the United Nations (U.N.) High Comm'r for Human Rights, Human Rights Bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Nov. 30, 2008). On December 13, 2006, the U.N. General Assembly adopted the eighth human rights treaty, the Convention on the Rights of Persons with Disabilities. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006), available at <http://www2.ohchr.org/english/law/pdf/disabilities-convention.pdf>. The Convention was open for ratification on March 30, 2007, and will enter into force once twenty states have ratified it. See *id.* arts. 42, 45(1). As of February 28, 2008, 137 states have signed the treaty and seventeen states have ratified it. See Office of the U.N. High Comm'r of Human Rights, Disability, <http://www2.ohchr.org/english/issues/disability/index.htm> (last visited Nov. 30, 2008).

28. Regional organizations responsible for enforcing legal obligations under regional human rights agreements utilize a similar process. For example, the African Charter on Human and Peoples' Rights established the African Commission on Human Rights ("Commission") as the body responsible for monitoring compliance. See African Charter on Human and Peoples' Rights art. 30, June 27, 1981, 21 I.L.M. 58, [hereinafter African Charter], available at <http://www.africa-Union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf>.

Pursuant to Article 62 of the African Charter, state parties are required to submit a report every two years "on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter."



ally undertaken pursuant to an optional protocol that grants the committee jurisdiction to receive and consider communications from individuals “claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party.”<sup>29</sup> The committee members are nominated by state parties and elected at a meeting of the state parties.<sup>30</sup> The members are “experts of high moral standing and competence in the field covered by the Convention.”<sup>31</sup> Historically lawyers dominated the CEDAW Committee, but in recent years lawyers have not exceeded one-half of the Committee.<sup>32</sup>

The review and comment on state party reports is the primary activity of all of these treaty bodies. A primary purpose of state parties submitting these reports is establishing a constructive dialogue between the state and the committee.<sup>33</sup> More specifically the production of state reports enables state parties to undertake a comprehensive review of their legislation, administrative rules, procedures and practices for conformity with the

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*See id.* art. 62. The Commission is also tasked with articulating principles and rules to assist in implementing the African Charter. *See id.* art. 45(1)(b). While the African Commission on Human Rights does not have jurisdiction to review individual complaints, it can receive communications from state parties regarding another state party's alleged violation of the African Charter. *See id.* art. 47. The culmination of such a communication is a report from the Commission to the states concerned that is also communicated to the Assembly of Heads of State and Government. *See id.* art. 52.

29. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women art. 2, Oct. 15, 1999, 2131 U.N.T.S. 83; *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 17, 22, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; Optional Protocol to the International Covenant on Civil and Political Rights pmbl., Dec. 16, 1966, 999 U.N.T.S. 302; International Convention on the Elimination of All Forms of Racial Discrimination art. 14(6)(a), Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Convention against Racial Discrimination].

30. *See, e.g.*, CEDAW, *supra* note 1, art. 17(1).

31. *Id.*; *see also* Convention Against Torture, *supra* note 29, art. 17; International Covenant on Civil and Political Rights art. 28, Dec. 16, 1966, 999 U.N.T.S. 171; Convention against Racial Discrimination, *supra* note 29, art. 8.

32. *See* Office of the U.N. High Comm'r for Human Rights, Committee on the Elimination of Discrimination Against Women: Membership, <http://www2.ohchr.org/english/bodies/cedaw/membership.htm> (last visited Nov. 30, 2008) (members' resumes reveal ten lawyers out of twenty-two members for the 2008 Committee and eleven lawyers out of twenty-two members for the 2009 Committee). The professional composition of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) Committee is likely to have implications for the types of recommendations the Committee makes to states. *See infra* notes 133-145 and accompanying text.

33. STEINER, ALSTON & GOODMAN, *supra* note 21, at 851.

treaty; ensures that states monitor the situation on the ground regularly to determine whether the rights provided for in the treaty are being adhered to; allows states to demonstrate that policy-making has been undertaken; encourages states to consult with various stakeholders within the state in formulating, implementing, and reviewing relevant policies; provides a basis for states and the treaty bodies to evaluate a state's progress in realizing the treaty obligations; enables states to better understand the challenges they face in realizing the rights provided for in the treaty; and enables the treaty bodies and the states to develop an understanding of the common problems faced by states and to exchange information on best practices.<sup>34</sup> CEDAW requires state parties to "report on the legislative, judicial, administrative, or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect."<sup>35</sup> The reports may "indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Convention."<sup>36</sup> The treaty bodies play a central role in interpreting and enforcing the U.N. human rights treaties. The manner in which these bodies operationalize compliance has significant implications for the way in which states understand what is expected of them. As the central body responsible for monitoring states and responding to individual communications, states reasonably rely upon the treaty bodies' advice through the recommendations offered.<sup>37</sup>

Despite significant disagreement as to why states adhere to

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34. U.N. Comm. on Econ., Soc. and Cultural Rights, *Report on the Third Session*, 87-89, U.N. Doc. E/1989/22 (Feb. 17, 1989).

35. CEDAW, *supra* note 1, art. 18(1). The African Protocol similarly requires state parties to report on the "legislative and other measures undertaken for the full realization of the rights" recognized within the African Protocol. African Protocol, *supra* note 2, art. 26. This treaty requires that the reporting of this information be included in the state party's periodic report required under the African Charter. *See id.* These reports are to be submitted every two years. *See* African Charter, *supra* note 28, art. 62.

36. CEDAW, *supra* note 1, art. 18(2).

37. Yet this reliance may at times be misplaced because of the manner in which these committees typically make decisions—by consensus. Consensus decision making, while allowing the committee to speak uniformly and clearly, requires compromise and "the blunting of positions." STEINER, ALSTON & GOODMAN, *supra* note 21, at 847. In the end, this can lead to recommendations that are not particularly bold and may not convey the sentiments of other entities active in treaty enforcement, such as individual states, intergovernmental organizations, and non-governmental organizations. Yet these bodies are the entities with the mandate to enforce the treaty, so it is not unreasonable for states to rely on their recommendations.

their international legal obligations, there is widespread agreement that domestic enforcement is one of the most effective means of enforcing treaty obligations.<sup>38</sup> Treaties operate as binding law within ratifying states in one of two ways: the treaty is automatically incorporated into domestic law upon ratification or through implementing legislation giving legal effect to the treaty obligations.<sup>39</sup> Domestic law and domestic legal institutions provide a means of enforcing international legal obligations.<sup>40</sup> Yet many states that ratify human rights treaties do not enact all of the necessary implementing legislation.<sup>41</sup> Additionally, numerous states' legal institutions are not capable of enforcing the treaty obligations. Bolstering legal structures has been the focus of rule of law programs operated by inter-governmental organizations and various states. Typically these programs seek to train judges, lawyers, and law enforcement officers, build courts and prisons, and implement legal reforms that promote consistency and transparency.<sup>42</sup>

The technical emphasis of rule of law programs has recently been questioned by scholars who contend that effective legal systems depend not only on the right institutions, laws, and personnel, but also on culture, or the acceptance of the treaty norms as legitimate.<sup>43</sup> In emphasizing the role of culture in effective law enforcement these scholars recognize that adaptation is an important component of creating and strengthening domestic enforcement mechanisms. Yet implementing the reforms necessary for effective domestic enforcement does require the struc-

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38. See, e.g., Hathaway, *supra* note 7, at 497 (2005) (noting that "much of international law is obeyed primarily because domestic institutions create mechanisms for ensuring that a state abides by its international legal commitments whether or not particular governmental actors wish it to do so.").

39. See Alan Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219, 221 (1985).

40. See *supra* note 38 and accompanying text.

41. See, e.g., Adrien Katherine Wing & Tyler Murray Smith, *The New African Union And Women's Rights*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 33, 38 (2003) (noting that many African countries have ratified treaties that protect women but few have enacted the necessary implementing legislation).

42. U.S. Agency for Int'l Dev./Office of Democracy and Governance, Wash. D.C., *Achievements in Building and Maintaining the Rule of Law*, OCCASIONAL PAPERS SERIES 90, 98, 141 (Nov. 2002), available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacr220.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr220.pdf) [hereinafter *Rule of Law Achievements*].

43. See JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 68-77 (2006); see also Lan Cao, Book Review, 101 AM. J. INT'L L. 901, 903 (2008) (reviewing Stromseth's book).

tural reforms that are part of traditional rule of law initiatives.<sup>44</sup> These initiatives seek to implement a legal system in which law rather than discretionary power dominates and all individuals are equal before the law.<sup>45</sup> Common approaches include rewriting constitutions, laws, and regulations; significantly reforming state institutions; retraining judges, lawyers, and bureaucrats; and restructuring court systems, police forces, and prisons.<sup>46</sup> The existence of these technical aspects of the rule of law is a prerequisite for enforcing domestic law and international human rights obligations.<sup>47</sup> This increases the likelihood that the state will have the structural capacity to identify, prosecute, and punish those running afoul of the state's international legal obligations.

The CEDAW Committee recognizes the value of domestic enforcement for increasing state compliance with CEDAW.<sup>48</sup> Achieving domestic enforcement requires that state parties have the legal and structural capacity to create and enforce legal rights and obligations. An impressive body of literature exists identifying the benefits of the structural or technical features of rule of law reform.<sup>49</sup> This Article focuses instead on the need to

44. See STROMSETH ET AL., *supra* note 43, at 80-84.

45. See Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3, 4 (Thomas Carothers ed., 2006) (arguing that "[t]he rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone."); see also FRANK BEALEY, THE BLACKWELL DICTIONARY OF POLITICAL SCIENCE: A USER'S GUIDE TO ITS TERMS 290 (1999) (explaining A.V. Dicey's conception of the rule of law "as embodying the predominance of law over discretionary authority; equality before the law . . .").

46. See Carothers, *supra* note 45, at 4; see also *Rule of Law Achievements*, *supra* note 42, at 90, 98, 141.

47. Regardless of the manner in which international law operates as binding law within a ratifying state, through automatic incorporation or implementing legislation, the international treaty obligations become part of the state's domestic law. See Bruder, *supra* note 39, at 221. As such the enforcement of these obligations, like domestically created law, depends upon the existence of functioning legal institutions. See also, e.g., *Rule of Law Achievements*, *supra* note 42, at 139-40 (noting United States Agency for International Development ("USAID") support for reestablishing the law school at the University of Rwanda and strengthening the capacity of Rwanda's Ministry of Justice); see also *id.* at 147-48 (detailing USAID support for re-codifying Ugandan law and strengthening the quality of legal training at the Makerere University Faculty of Law). Additionally, support from officials, particularly high-level executive officials, and public acceptance of the legitimacy of the norms underlying the substantive and procedural legal reforms, increases the likelihood that the state will have the political will to empower the legal institutions to undertake the necessary enforcement tasks. See *id.* at 25.

48. See, e.g., 30-31st Sessions of CEDAW, *supra* note 5, pt. 1, ¶¶ 102, 154, 170.

49. See generally Carothers, *supra* note 45; Rachel Kleinfeld, *Competing Definitions of*

change the social meanings attached to traditions and practices that conflict with CEDAW obligations. This is an approach to legal reform that emphasizes the need for norms to be accepted as legitimate within the society.<sup>50</sup> Absent such acceptance “courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper.”<sup>51</sup>

Strategic framing is an approach utilized by advocates and social movement organizations to change social meanings within a society.<sup>52</sup> The CEDAW Committee overwhelmingly recommends that state parties undertake this strategy to comply with particular types of CEDAW obligations.<sup>53</sup> Committee recommendations over the last seven years have shifted from presenting structural reform and adaptation efforts as mutually exclusive to recognizing the importance of collaboration with meaning-making institutions within the state parties. There is a growing appreciation of the role that the discursive opportunity structure plays in the adaptation process.<sup>54</sup> However, the collaboration encouraged is limited. The Committee increasingly encourages states to collaborate with women’s and human rights organizations,<sup>55</sup> but collaboration with officials within the customary legal system is not advanced.

When human rights scholars and activists talk about the normative or cultural changes that must take place within a society before human rights laws can be effectively enforced, they are typically referring to the reframing of a social issue.<sup>56</sup> There

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*the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 31 (Thomas Carothers ed., 2006).

50. The legitimacy of the norms can be based on acceptance of the norms or the recognition that the norms are valued by key members of the international community. The adaptation process as conceptualized in this Article can accommodate persuasion and acculturation as mechanisms of state socialization. See *infra* note 72 and accompanying text.

51. STROMSETH ET AL., *supra* note 43, at 76; see also Abby Morrow Richardson, *Women’s Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform*, 11 HUM. RTS. BRIEF 19, 19 (2004) (noting that statutory reform without changes in customary law has “no practical effect on the great majority of the population.”).

52. See David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 468 (1986).

53. See, e.g., 30-31st Sessions of CEDAW, *supra* note 5, pt. 1, ¶¶ 71, 80, 116, 162.

54. See MYRA MARX FERREE ET AL., *SHAPING ABORTION DISCOURSE: DEMOCRACY AND THE PUBLIC SPHERE IN GERMANY AND THE UNITED STATES* 62 (2002). For further discussion, see *infra* notes 66-78 and accompanying text.

55. See, e.g., 30-31st Sessions of CEDAW, *supra* note 5, pt. 1, ¶ 80.

56. The term frame was first introduced by Erving Goffman to refer to “schemata

is an understanding that new legal rules and national policies will not be enacted, adopted, or enforced until the social meanings attached to the targeted practices or people are changed. For example, opponents of female genital cutting ("FGC") have been successful in changing the social meaning of that practice in a rural community in Egypt.<sup>57</sup> Opponents of the practice undertook an education campaign targeting women, religious leaders, and unmarried men, which constructed FGC as a literacy, family planning, and health care issue rather than one necessary to protect the chastity of young women.<sup>58</sup> In Rwanda, gender equity advocates were able to alter the social meaning attached to women's political participation. These advocates successfully framed women's political participation as a necessary component of unity and reconciliation in post-genocide Rwanda.<sup>59</sup> Many of the programmatic reforms recommended by the CEDAW Committee similarly focus on the state reframing issues related to gender equality.<sup>60</sup> Framing is one way that individuals and organizations align their conception of a social issue with the interpretive framework of other members of the society in order to gain adherents and constituents.<sup>61</sup> Successful frame

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of interpretation" that allow an individual "to locate, perceive, identify, and label a seemingly infinite number of concrete occurrences . . . ." ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 21 (1974). It is used within the sociological literature on social movements to refer to:

an interpretive schemata that simplifies and condenses the 'world out there' by selectively punctuating and encoding objects, situations, events, experiences, and sequences of actions within one's present or past environment . . . . Collective action frames not only perform this focusing and punctuating role; they also function simultaneously as modes of attribution and articulation.

David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 133, 137 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

57. See Lan Cao, *Culture Change*, 47 VA. J. INT'L L. 357, 405 (2007). Cao states that "if a cultural norm such as female genital mutilation carries a certain socially constructed meaning that is traditionally deemed desirable, the underlying meaning must be changed before the cultural norm can be successfully altered." *Id.*

58. See *id.*

59. See Angela M. Banks, *Challenging Political Boundaries in Post-Conflict States*, 29 U. PA. J. INT'L L. 105, 157 (2007).

60. See *infra* notes 146-157 and accompanying text.

61. "*Adherents* are those individuals and organizations that believe in the goals of the movement" while *constituents* provide resources for the movement. John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212, 1221 (1977).

alignment requires that the frame resonate with the broader culture and existing values to enable the frame to appear natural and familiar.<sup>62</sup> Individuals and organizations draw on a variety of cultural norms and values in constructing their frames to achieve resonance.<sup>63</sup>

Pursuing a framing strategy without connecting it to the relevant features of a state's discursive opportunity structure impedes the development of effective domestic enforcement. Yet this is the approach that many sub-Saharan African states have undertaken.<sup>64</sup> Deploying an awareness campaign or providing CEDAW training for legal officials is easy to document and easier to implement than reforms that require collaboration with key components of meaning-making institutions. This is particularly challenging when some aspects of the framing strategy seek to challenge aspects of the same meaning-making institutions. Yet without this type of strategy, the programmatic reforms do not challenge the status quo. Consequently few if any changes are made within the state that bring the state's actions closer to conforming to the substantive requirements of the treaty. The quest for securing married women's access to and ownership of marital property in Uganda and Rwanda demonstrates the challenges states face in implementing reforms that actualize CEDAW obligations without engaging all of the legal institutions that serve as meaning-making institutions within the state.<sup>65</sup>

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62. The acceptance of a new frame is related to its placement within the discursive opportunity structure. See FERREE ET AL., *supra* note 54, at 70 ("[i]n all public arenas . . . social problems that can be related to deep mythic themes or broad cultural preoccupations have a higher probability of competing successfully." (quoting Stephen Hilgartner and Charles L. Bosk, *The Rise and Fall of Social Problems: A Public Arenas Model*, 94 AM. J. SOC. 53, 71 (1988))); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 619-22, 624 (2000); Rita K. Noonan, *Women Against the State: Political Opportunities and Collective Action Frames in Chile's Transition to Democracy*, 10 SOC. FORUM 81, 94 (1995); see also Banks, *supra* note 59, at 157 (additional discussion of the role of framing by gender equity advocates in post-conflict states).

63. But see Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 AM. J. SOC. 304, 305 (2003) (noting that resonant frames are less radical than nonresonant frames and may be utilized by activists to achieve more satisfactory long-term results).

64. See *infra* Part II.B.

65. See *infra* Part II.

### A. Adaptation

Adaptation is the process by which international legal obligations and norms are translated into local terms through the use of strategic frames. The strategic frames utilized situate the international obligations and norms within the local discursive opportunity structure.<sup>66</sup> The discursive opportunity structure is the “framework of ideas and meaning-making institutions” within the state.<sup>67</sup> This is the context within which framing contests occur. It is filled with hills, valleys, barriers, and traps that offer advantages and disadvantages in uneven ways to the participants in the framing contest.<sup>68</sup>

Within the sociological literature on framing, scholars have empirically demonstrated, and theoretically accounted for, a relationship between the political opportunity structure and frame resonance.<sup>69</sup> Through analyzing a society’s political opportunity structure, scholars have accounted for the emergence and sustainability of particular frames within public discourse.<sup>70</sup> A key

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66. The discursive opportunity structure is a sub-structure within a state’s broader political opportunity structure, which is discussed below. See *infra* note 70.

67. FERREE ET AL., *supra* note 54, at 62.

68. *Id.*; see Banks, *supra* note 59, at 153-60 (applying this concept to framing contests during post-conflict constitution making).

69. See FERREE ET AL., *supra* note 54, at 61-63; see generally RETHINKING COMPARATIVE CULTURAL SOCIOLOGY: REPERTOIRES OF EVALUATION IN FRANCE AND THE UNITED STATES (Michèle Lamont & Laurent Thévenot eds., 2000).

70. The political opportunity structure refers to the “institutional and cultural access points” that enable individuals to bring their claims to the political forums of a state. FERREE ET AL., *supra* note 54, at 62. It has been used to explain when collective action occurs. See *id.*; SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 76-77 (1998). Increases in political access, influential allies, divided elites, and declining state repression are the components of the political opportunity structure initially identified by Sidney Tarrow. See *id.* A sub-structure within the political opportunity structure is the discursive opportunity structure, which refers to the “framework of ideas and meaning-making institutions” within the state that “channel and organize discourse.” FERREE ET AL., *supra* note 54, at 62. The discursive opportunity structure has three main categories: political, socio-cultural, and mass media. See *id.* at 63-64.

The political components include the government and the role of the state and political parties within the society. The socio-cultural components include the worldviews, values, norms, ways of thinking, practices, and resources within a society and the rules that support these elements. The socio-cultural components “provide a pool of potential legitimating devices for particular ways of framing an issue and justifying one’s position on it.” Finally, the mass media includes journalistic outlets like newspapers, television, and radio.

Banks, *supra* note 59, at 154-55 (quoting FERREE ET AL., *supra* note 54, at 70).



feature of the political opportunity structure for an analysis of the CEDAW recommendations is the role of influential allies.

In seeking to promote the adaptation process as related to CEDAW norms, the state has to identify or create frames that will adequately translate these norms for the local context.<sup>71</sup> This is a challenging process, as individuals advancing such frames have to package the international legal obligations and underlying norms in familiar terms that simultaneously confront existing understandings of power relationships.<sup>72</sup> A key norm underlying CEDAW is gender equality. Advancing frames to promote CEDAW will unsettle certain entrenched ideas and practices.<sup>73</sup> Developing allies among customary legal officials can be useful in the adaptation process because it is the application of customary legal rules that is often the most significant barrier to altering practices that do not comply with CEDAW.<sup>74</sup>

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71. See SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 135 (2006).

72. See *id.* at 222. This Article discusses adaptation strategies that focus more on internalization than acculturation. The adaptation process could focus on acculturation rather than focusing on making substantive connections between the local discursive opportunity structure and international legal obligations and norms. More specifically, the process could frame the international legal obligations and norms as important to and valued by members of the international community who are part of the target state's reference group. See *infra* notes 103-124 and accompanying text for a discussion of acculturation and state behavior. An acculturation-focused adaptation process would focus on identifying an appropriate reference group and ways to communicate the value of CEDAW obligations and norms to that reference group. This can be a delicate undertaking as referencing the activities or values of Western states can be counterproductive at times. For example, during Uganda's Parliamentary debates regarding land reform, few references to international law or international norms were made regarding women's land rights. Yet of the few references made, one expressed the idea that co-ownership is a foreign concept that will destabilize the family structure. See Gerald Businge, *Did Women Activists Tactfully Sneak Co-Ownership into the New Land Bill?*, NEW VISION (Uganda), July 1, 2003.

73. This is an example of the types of hills, valleys, barriers, and traps that exist in framing contests. In responding to justifications for familiar practices, advocates will find themselves countering alternative familiar frames.

74. Certain activists reject this approach, finding local elites to be their biggest opponents. See Aili Mari Tripp, *Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda*, 7 AFR. STUD. Q. 1, 9 (2004), available at <http://www.africa.ufl.edu/asq/v7/v7i4a1.pdf> (arguing against the reform of customary law); Ann Whitehead & Dzodzi Tsikata, *Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary*, 3 J. AGRARIAN CHANGE 67, 94 (2003). Regardless of how human rights ideas like those within CEDAW are repackaged, they are "a radical challenge to patriarchy." MERRY, *supra* note 71, at 221. Such a challenge will be resisted by those within a community who benefit from the privileges of patriarchy. Yet assuming that all customary legal officials reject CEDAW norms and

My conception of adaptation draws upon the work of anthropologist Sally Engle Merry. Merry has demonstrated that in order for human rights ideas to be effective they must be appropriated and translated into the vernacular.<sup>75</sup> Merry's research is instructive for analyzing the CEDAW Committee's recommendations because it demonstrates the value of collaboration with meaning-making institutions in the adaptation process. Merry contends that while institutions must respond to individuals' rights claims as being important, reasonable, and significant, key components of the community's discursive opportunity structure influence whether or not such claims will be seen as important, reasonable, and significant.<sup>76</sup> Drawing on the sociological framing literature, Merry notes that the translation of human rights ideas requires that the ideas "be framed in images, symbols, narratives, and religious or secular language that resonate with the local community."<sup>77</sup> Local ideas and meaning-making institutions influence the ability of particular frames to resonate successfully.<sup>78</sup>

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failing to seek common ground impedes shifting the social value and role of women within society.

75. See MERRY, *supra* note 71, at 1.

The concept of vernacularization was developed to explain the nineteenth-century process by which national languages in Europe separated, moving away from the medieval transnational use of Latin and creating a new and more differentiated sense of nationhood in Europe. Human rights language is similarly being extracted from the universal and adapted to national and local communities.

*Id.* at 219 (citations omitted). The vernacularization process entails appropriation and translation. *Id.* at 135. Appropriation is the process by which the "programs, interventions, and ideas developed by activists in one setting" are replicated in another setting. *Id.* This is often a transnational process and "requires knowledge of approaches in other countries, and, in many cases, the ability to attract funding and political support." *Id.* "Translation is the process of adjusting the rhetoric and structure of [the appropriated] programs or interventions to local circumstances." *Id.* There are three dimensions to the translation process: framing human rights ideas and institutions in ways that resonate locally, tailoring human rights ideas and institutions to local structural conditions, and defining or redefining the target population. See *id.* at 220 (noting that the local structural conditions include the economic, political, and kinship systems).

76. See *id.* at 215.

77. *Id.* at 220.

78. See *id.* at 222 (noting the success of a frame "depends on features of social class, gender, race, and ethnicity that make up the social hierarchies of modern states."). For example, in Hong Kong the idea that batterers should not hit their spouses was presented as an aspect of Confucian ideas about marriage. Linking the desired behavior to Confucianism was successful because Confucianism was a key com-

State actors seeking to adapt international legal obligations and norms to the local context must make decisions about who will participate in creating the strategy, how the participants will participate, and how decisions will be made. Similarly these state actors have to decide what the content of the frame will be, what aspects of the discursive opportunity structure it will reference, and how the frame will be deployed. State collaboration with local elites, respected individuals within the local legal, political, economic, religious, and social communities, is often necessary to facilitate adaptation.

Adaptation requires states and their inhabitants to accept the legitimacy of international legal obligations and norms.<sup>79</sup> I remain agnostic as to whether a state or its inhabitants must internalize these obligations and norms or merely be acculturated to them.<sup>80</sup> Despite disagreement regarding the mechanism by which norms influence state behavior, constructivist scholars emphasize the role of norms in influencing state behavior.<sup>81</sup> As Martha Finnemore has noted “[t]he international system can change what states *want* . . . not by constraining states with a given set of preferences from acting, but by changing their pref-

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ponent of the society's discursive opportunity structure, specifically the socio-cultural components. *Id.* at 220. See *supra* notes 67-70 and accompanying text for discussion of the discursive opportunity structure.

79. As conceptualized in this Article, the state is not a monolithic entity with a single identity. Rather states “represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics.” Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 518 (1997). While the CEDAW Committee addresses a state party in the traditional international law unitary actor sense, I contend that the recommendations are directed to and picked up by certain domestic actors within the state who must work to persuade or acculturate other domestic actors in addition to government officials. For example, when the gender ministry within a specific state party sponsors an awareness-raising campaign on women’s literacy, officials within the executive branch may be targets of the campaign as much as teachers in rural communities.

80. Compare Koh, *supra* note 7, at 2656-57 (discussing internalization), with Goodman & Jinks, *Influence States*, *supra* note 17, at 638-56 (discussing acculturation).

81. See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 4-5 (1998) [hereinafter KECK & SIKKINK, *ACTIVISTS*]; Kathryn Sikkink, *Restructuring World Politics: The Limits and Asymmetries of Soft Power*, in *RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS* 301, 303 (Sanjeev Khagram et al. eds., 2002) (persuasion) [hereinafter Sikkink, *Restructuring*]; Goodman & Jinks, *Influence States*, *supra* note 17, at 638-56 (acculturation); Koh, *supra* note 7, at 2646 (internalization through persuasion).

erences.”<sup>82</sup>

Harold Koh, through his transnational legal process theory, emphasizes the role of internalization.<sup>83</sup> Koh contends that states engage in a three-step process culminating with the internalization of international legal norms, which facilitates compliance.<sup>84</sup> Interaction, interpretation, and internalization are the three steps of the process.<sup>85</sup> Transnational actors instigate interaction with other states that can lead to the negotiation of an international treaty.<sup>86</sup> The treaty text adopted denotes a common understanding of the articulated norms, an understanding reached through the various interactions during the drafting sessions.<sup>87</sup> Additional meetings allow for additional interactions and interpretations, which “help to reconstitute the interests and even the identities of the participants in the process.”<sup>88</sup>

Koh identifies three types of internalization: legal, political, and social.<sup>89</sup> Legal internalization occurs when a norm is incorporated into a state’s domestic legal system, “through executive action, judicial interpretation, legislative action, or some combination” thereof.<sup>90</sup> When political elites accept the relevant norms and adopt them as a matter of government policy, political internalization has taken place.<sup>91</sup> Social internalization exists when a norm has “so much public legitimacy that there is widespread general obedience . . . .”<sup>92</sup> Social internalization like adaptation focuses on the public legitimacy of the international legal obligations and norms. It is this type of reform that the CEDAW Committee seeks to facilitate through its awareness-oriented programmatic recommendations.<sup>93</sup>

The transnational advocacy network theory similarly empha-

82. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 5-6 (1996).

83. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84 (1996).

84. See *id.*

85. See Koh, *supra* note 7, at 2646; see also Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 929 (2005).

86. See Koh, *supra* note 7, at 2646; see also Neumayer, *supra* note 85, at 929.

87. See Koh, *supra* note 7, at 2646; see also Neumayer, *supra* note 85, at 929.

88. Koh, *supra* note 7, at 2646.

89. See *id.* at 2656-57.

90. *Id.* at 2657.

91. *Id.* at 2656-57.

92. *Id.* at 2656.

93. See *supra* note 5 and accompanying text.

sizes adaptation as a technique for obtaining compliance with human rights treaties.<sup>94</sup> Transnational advocacy networks are made up of activists, who are distinguishable from other international actors "by the centrality of principled ideas or values in motivating" the formation of their networks.<sup>95</sup> These networks seek to change state behavior by framing "issues to make them comprehensible to target audiences, to attract attention and encourage action, and to 'fit' with favorable institutional venues."<sup>96</sup> These actors "bring new ideas, norms, and discourses into policy debates, and serve as sources of information and testimony."<sup>97</sup> Transnational advocacy networks use a variety of mechanisms to achieve these ends, which include persuasion and pressure.<sup>98</sup> The bulk of the work that these networks do can be characterized as persuasion, but Keck and Sikkink contend that these processes often involve "bringing pressure, arm-twisting, encouraging sanctions, and shaming."<sup>99</sup> Through the mechanisms of persuasion and pressure the networks are able to exert influence at five different levels: issue creation and agenda setting; the discursive positions of states and international organizations; institutional procedures; policy changes in "target actors"; and state behavior.<sup>100</sup> The tactics utilized to be effective at these various levels include information, accountability, leverage, and symbolic politics.<sup>101</sup> Symbolic politics seek to make sense of a situa-

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94. See KECK & SIKKINK, *ACTIVISTS*, *supra* note 81, at 3 (noting that transnational advocacy networks "contribute to changing perceptions that both state and societal actors may have of their identities, interests, and preferences, to transforming their discursive positions, and ultimately to changing procedures, policies, and behavior.").

95. *Id.* at 1. Major actors in such networks often include international and domestic nongovernmental research and advocacy organizations, local social movements, foundations, churches, trade unions, consumer organizations, intellectuals, and members of the executive or legislative branches of government. See *id.* at 9.

96. *Id.* at 2-3.

97. *Id.* at 3. Keck and Sikkink use the term norms to "describe collective expectations for the proper behavior of actors with a given identity. In some situations norms operate like rules that define the identity of an actor, thus having 'constitutive effects' that specify what actions will cause relevant others to recognize a particular identity." *Id.* (quoting Peter J. Katzenstein, *Introduction*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 5 (Peter J. Katzenstein ed., 1966)).

98. Across all strategies utilized "the stress is on changing discourses and practices" as "these discourses and norms shape the way people think and make sense of their world." Sikkink, *Restructuring*, *supra* note 81, at 306.

99. KECK & SIKKINK, *ACTIVISTS*, *supra* note 81, at 16.

100. *Id.* at 25. Target actors can include states, international organizations, or private actors. *Id.*

101. *Id.* at 16. Information politics is about "quickly and credibly generat[ing]

tion for a distant audience and strategic framing is an integral aspect of symbolic politics.<sup>102</sup> Keck and Sikkink's identification of symbolic politics as a mechanism for influencing state behavior demonstrates the potential of adaptation and strategic framing to change the social meanings attached to particular practices.

Goodman and Jinks similarly acknowledge the role of norms, yet based on sociological institutionalism they claim that states do not need to internalize the relevant norms. Rather states just need to be acculturated.<sup>103</sup> Sociological institutionalism is the study of organizations and the effect of environment on organizational structure. Empirical studies have found that states display a high level of similarity in their organizational structure—*isomorphism*.<sup>104</sup> In the case of human rights, *isomorphism* is seen in the widespread ratification of important human rights treaties and the adoption of domestic legal provisions that reinforce the treaty obligations.<sup>105</sup> For example, CEDAW has been ratified in 185 countries<sup>106</sup> and many of the state parties have constitutional provisions providing equal protection on the basis of gender.<sup>107</sup>

Sociological institutionalist scholars argue that the observed similarities indicate that states are “constructions of a common wider culture, rather than . . . self-directed actors responding

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politically usable information and mov[ing] it to where it will have the most impact.” *Id.* Holding political actors to their commitments is the focus of accountability politics and leverage politics uses powerful actors to assist less powerful members of the network. *Id.*

102. *See id.* at 16-17.

103. *See* Goodman & Jinks, *Influence States*, *supra* note 17, at 638-56. Sally Engle Merry's research on a campaign for women's property inheritance rights in Hong Kong found that individuals at the grass roots of a human rights movement do not have to adopt a human rights consciousness. Despite a lack of deep or long-lasting commitment to human rights approaches by local grassroots individuals, such a commitment by middle-level women's groups and activists and transnational elites enabled human rights approaches to be utilized effectively. *See* MERRY, *supra* note 71, at 192-217.

104. *See* Goodman & Jinks, *Influence States*, *supra* note 17, at 647.

105. *See id.* at 648.

106. *See* U.N. Comm. on the Elimination of Discrimination Against Women, Statement to Commemorate the Twenty-fifth Anniversary of the Adoption of the Convention on the Elimination of All Forms of Discrimination against Women (Oct. 13, 2004), available at <http://www.un.org/womenwatch/daw/cedaw/cedaw25anniversary/statement/CEDAW%20statement%20E.pdf>.

107. *See* U.N. Div. for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination Against Women: State Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Nov. 30, 2008).

rationally to internal and external contingencies.”<sup>108</sup> The common wider culture is a global society culture that is comprised of numerous models. The models provide the “cognitive and ontological models of reality that specify the nature, purposes, technology, sovereignty, control, and resources of nation-states and other actors.”<sup>109</sup> They outline the proper functioning of states, societies, and individuals.<sup>110</sup>

Global cultural models are “constructed and propagated through global cultural and associational processes.”<sup>111</sup> One of the processes that has recently been highlighted in the legal scholarship is that of acculturation.<sup>112</sup> Acculturation refers to the process by which actors adopt the “beliefs and behavioral patterns of the surrounding culture.”<sup>113</sup> Changes in behavior are induced through social and cognitive pressure to assimilate.<sup>114</sup> Acculturation takes places through a number of microprocesses, which include orthodoxy, mimicry, identification, and status maximization and it “induces behavioral changes not only by changing the target actor’s incentive structure or mind but also by changing the actor’s social environment.”<sup>115</sup>

States change their behavior in response to peer pressure. Unlike persuasion, acculturation does not require states to accept the validity of the global cultural model beliefs, practices, or norms. States need only perceive that an important reference group, in this case certain components of the international community, holds the belief, accepts the norm, or takes part in the practice.<sup>116</sup> States therefore focus more on their relationship

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108. John W. Meyer et al., *World Society and the Nation-State*, 103 *AM. J. SOC.* 144, 152 (1997).

109. *Id.* at 149.

110. *See id.* These models “define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life—business, politics, education, medicine, science, even the family and religion.” *Id.* at 145. The models are based on scientific, professional, and/or legal analysis that is highly rationalized and universalistic. *See id.* at 149.

111. *Id.* at 144-45. For a detailed discussion of sociological institutionalism and its applicability to states and international law, see generally *id.*; Goodman & Jinks, *International Law*, *supra* note 11.

112. *See, e.g.*, Goodman & Jinks, *Influence States*, *supra* note 17, at 638-56.

113. *Id.* at 626.

114. *See id.*

115. *Id.* at 638. *See id.* for a detailed discussion of each of these mechanisms of acculturation.

116. *See id.* at 642-43.

with the reference group than on the content of the relevant rule or norm.<sup>117</sup> This often gives rise to significant decoupling between the structural features of the state and the state's policies on the one hand and the state's behavior on the other.<sup>118</sup>

Decoupling in sociological institutionalism is predicted.<sup>119</sup> Acculturation requires states to implement external cultural models and it is difficult for states to import the models as a fully functioning system that displaces their existing system.<sup>120</sup> Furthermore global culture is comprised of numerous models that are, at times, inconsistent or contradictory.<sup>121</sup> Consequently, states are able to adapt their structures and policies to satisfy particular global cultural models and simultaneously maintain conflicting practices that are supported by other models. Decoupling does not, however, have to remain a permanent condition. Goodman and Jinks contend that the structural transformations undertaken by the state shift the state's political opportunity structure in ways that empower new actors and increase the likelihood of a tighter connection between the state's actions and its commitments.<sup>122</sup> Additionally, states learn over time what constitutes compliance such that shallow reforms will cease to bring about the desired social and cognitive benefits.<sup>123</sup> The civilizing force of hypocrisy is also identified as a tool for rectify-

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117. Acculturation occurs not as a result of the content of the relevant rule or norm but rather as a function of social structure—the relations between individual actors and some reference group. Acculturation depends less on the properties of the rule than on the properties of the relationship of the actor to the community.

*Id.* at 643.

118. See Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1759-60 (2003) (discussing significant decoupling between the constituent features of the state and the functional requirements and/or local values) [hereinafter Goodman & Jinks, *Institutional Theory*]; Meyer et al., *supra* note 108, at 152. To get the social benefits that acculturation provides, states generally only need to make the structural changes because the benefits accrue without changes in actual practices.

119. See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 41, 57-58 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Goodman & Jinks, *Institutional Theory*, *supra* note 118, at 1760-61; Meyer et al., *supra* note 108, at 154-56.

120. See Meyer et al., *supra* note 108, at 154.

121. Institutional environments are pluralistic, and at time inconsistent, which causes "organizations in search of external support and stability [to] incorporate all sorts of incompatible structural elements." Meyer & Rowan, *supra* note 119, at 56.

122. See Goodman & Jinks, *International Law*, *supra* note 11, at 995.

123. See *id.* at 996.



ing decoupling.<sup>124</sup>

While Koh, Keck, and Sikkink focus on the need for persuasion, Goodman and Jinks argue that states can be socialized to comply with their international legal obligations without internalizing the relevant global cultural model, in the case of CEDAW, gender equality.<sup>125</sup> These scholars disagree about the need for states, state actors, and citizens to accept the validity or legitimacy of the relevant norms. Yet they agree that states comply with their international legal obligations when they accept the legitimacy of the international obligations and norms, either through internalization or acculturation.<sup>126</sup>

### B. *Compliance Discourse*

Within the last ten years gender equality has become an issue of considerable importance internationally and CEDAW has become a benchmark for assessing a state's commitment to this issue.<sup>127</sup> Within the last ten years states within sub-Saharan Africa have undertaken important legal reforms in the area of gender equality.<sup>128</sup> Yet a notion persists that gender discrimination abounds in this region of the world. Sub-Saharan African countries are often considered to be among the states with the worst compliance records in the area of gender and human rights.<sup>129</sup> Through an examination of the CEDAW Committee's jurisprudence pertaining to sub-Saharan Africa it is possible to analyze one treaty body's compliance discourse to determine how states are directed to comply with their treaty obligations.<sup>130</sup>

124. See *id.* at 995.

125. See *id.* at 991-92; *supra* notes 84, 96 and accompanying text.

126. See Goodman & Jinks, *International Law*, *supra* note 11, at 991-92.

127. See generally U.N. Office of the Special Advisor on Gender Issues and Advancement of Women, *Supporting Gender Mainstreaming: The Work of the Office of the Special Adviser on Gender Issues and Advancement of Women* (Mar. 2001), available at <http://www.un.org/womenwatch/osagi/pdf/report.pdf>. The United Nations Development Fund for Women ("UNIFEM") describes CEDAW as the "women's bill of rights," and the "cornerstone of all UNIFEM programmes." U.N. Dev. Fund for Women, Key Documents, [http://www.unifem.org/about/key\\_documents.php](http://www.unifem.org/about/key_documents.php) (last visited Nov. 30, 2008).

128. See generally *The Road to Gender Equality in Africa: An Overview* (Afr. Union Comm'n, Addis Ababa, Eth.), July 6, 2004, available at [http://www.africa-union.org/AU%20summit%202004/gender/THE%20ROAD%20TO%20GENDER\\_2.pdf](http://www.africa-union.org/AU%20summit%202004/gender/THE%20ROAD%20TO%20GENDER_2.pdf).

129. See, e.g., Human Rights Watch, Women's Rights in Middle East and North Africa, <http://humanrightswatch.net/women/overview-mena.html> (last visited Nov. 30, 2008) (noting that sub-Saharan Africa ranked lowest in terms of women's participation in economic, professional, and political life).

130. Treaty bodies are not the only entities within the international community

Based on the CEDAW Committee's jurisprudence related to sub-Saharan Africa between 1994 and 2007, the Committee's compliance discourse falls into three categories: structural, programmatic, and legal.<sup>131</sup> It is my contention that the CEDAW

that monitor treaty compliance. States, inter-governmental organizations, and non-governmental organizations, domestic and international, are also involved in this activity and states are cognizant of the opinions and judgments of these entities as well. See *supra* note 37 and accompanying text.

131. The CEDAW Committee's concluding comments were systematically content analyzed using Atlas.ti, a data analysis program. I analyzed the recommendations made by the CEDAW Committee in each of the concluding comment reports for the sub-Saharan African reports submitted between 1994 and 2007. First I developed broad codes for the types of recommendations made and specific subcodes were identified inductively. After coding an initial set of CEDAW Committee review reports, I developed a coding scheme that was applied to the entire set of CEDAW reviews.

Within sub-Saharan Africa forty-six states have ratified CEDAW. The two states that have not ratified CEDAW are Somalia and Sudan. See U.S. Dept. of State, Countries and Other Areas, <http://www.state.gov/p/af/ci/> (last visited Nov. 30, 2008) (listing forty-eight states in sub-Saharan Africa); U.N. Division for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination Against Women: State Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Nov. 30, 2008) (listing forty-six of the sub-Saharan states as parties to CEDAW).

Since 1990, the CEDAW Committee has considered thirty-four country reports. See U.N. Division for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination Against Women: Country Reports, <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (last visited Nov. 30, 2008).

Of these thirty-four reports, thirty-three reports are accessible online. The missing report is from Rwanda which was reviewed in 1993. See *id.* The analysis in this Article is based on these thirty-three reports: 30-31st Sessions of CEDAW, *supra* note 5, pt. 2, ¶¶ 124-71 [hereinafter Angola Comments]; 32nd and 33rd Sessions of the Committee on the Elimination of Discrimination Against Women, Jan. 10-28, 2005 and July 5-22, 2005, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/60/38 (2005) [hereinafter 32-33rd Sessions of CEDAW] pt. 2, ¶¶ 127-70 [hereinafter Benin Comments]; *id.* pt. 2, ¶¶ 315-58 [hereinafter Burkina Faso Comments]; 24th and 25th Sessions of the Committee on the Elimination of Discrimination Against Women, Jan. 15-Feb. 2, 2001 and July 2-20, 2001, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/56/38 (2001) pt. 1, ¶¶ 32-67 [hereinafter Burundi Comments]; 22nd and 23rd Sessions of the Committee on the Elimination of Discrimination Against Women, Jan. 17-Feb. 4, 2000 and June 12-30, 2000, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/55/38 (2000) pt. 2, ¶¶ 30-66 [hereinafter Cameroon Comments]; 34th, 35th, and 36th Sessions of the Committee on the Elimination of Discrimination Against Women, Jan. 16-Feb. 3, 2006, May 15-June 2, 2006, and Aug. 7-25, 2006, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/61/38 (2006) [hereinafter 34-36th Sessions of CEDAW] pt. 3, ¶¶ 16-57 [hereinafter Cape Verde Comments]; 28th and 29th Sessions of the Committee on the Elimination of Discrimination Against Women, Jan. 13-31, 2004 and June 30-July 18, 2004, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/58/38 (2004) [hereinafter 28-29th Sessions of CEDAW] pt. 1, ¶¶ 142-89 [hereinafter Congo Comments]; 34-36th Sessions of CEDAW, *supra*, pt. 3, ¶¶ 326-70 [hereinafter D.R.C. Comments]; 30-31st Sessions of CEDAW, *supra* note 5, pt. 2, ¶¶ 172-218 [hereinafter Equatorial Guinea Comments]; 34-36th Sessions of CEDAW,

Committee overwhelmingly promotes programmatic reforms. The Committee similarly emphasizes programmatic reforms to address the adaptation aspects of domestic enforcement. In 2004, the Committee began to recognize the role that components of the discursive opportunity structure play in facilitating adaptation. That year the Committee recommended that state parties collaborate with meaning-making entities, such as civil society organizations like women's organizations, in preparing awareness-raising campaigns to address CEDAW non-compliant practices.<sup>132</sup> Despite increasing recommendations to collaborate

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*supra*, pt. 1, ¶¶ 61-99 [hereinafter Eritrea Comments]; 30-31st Sessions of CEDAW, *supra* note 5, pt. 1, ¶¶ 226-73 [hereinafter Ethiopia Comments]; 32-33rd Sessions of CEDAW, *supra*, pt. 1, ¶¶ 210-55 [hereinafter Gabon Comments]; 32-33rd Sessions of CEDAW, *supra*, pt. 2, ¶¶ 171-220 [hereinafter Gambia Comments]; 34-36th Sessions of CEDAW, *supra*, pt. 3, ¶¶ 212-56 [hereinafter Ghana Comments]; 34-36th Sessions of CEDAW, *supra*, pt. 2, ¶¶ 97-144 [hereinafter Guinea Comments]; 28-29th Sessions of CEDAW, *supra*, pt. 1, ¶¶ 190-230 [hereinafter Kenya Comments]; 13th Session of the Committee on the Elimination of Discrimination Against Women, Jan. 17-Feb. 4, 1994, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/49/38 (1994) [hereinafter 13th Session of CEDAW] ¶¶ 186-244 [hereinafter Madagascar Comments]; 34-36th Sessions of CEDAW, *supra*, pt. 2, ¶¶ 193-236 [hereinafter Malawi Comments]; 34-36th Sessions of CEDAW, *supra*, pt. 1, ¶¶ 177-217 [hereinafter Mali Comments]; 37th, 38th, and 39th Sessions of the Committee on the Elimination of Discrimination Against Women, Jan. 15-Feb. 2, 2007, May 14-June 1, 2007, and July 23-Aug. 10, 2007, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/62/38 (2007) [hereinafter 37-39th Sessions of CEDAW] pt. 2, ¶¶ 16-65 [hereinafter Mauritania Comments]; 34-36th Sessions of CEDAW, *supra*, pt. 3, ¶¶ 257-94 [hereinafter Mauritius Comments]; 37-39th Sessions of CEDAW, *supra*, pt. 2, ¶¶ 156-206 [hereinafter Mozambique Comments]; 16th and 17th Sessions of the Committee on the Elimination of Discrimination Against Women, Jan. 13-31, 1997 and July 7-25, 1997, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/52/38/Rev.1 (1997) pt. 2, ¶¶ 69-131 [hereinafter Namibia Comments]; 37-39th Sessions of CEDAW, *supra*, pt. 2, ¶¶ 207-49 [hereinafter Niger Comments]; 30-31st Sessions of CEDAW, *supra* note 5, pt. 1, ¶¶ 274-316 [hereinafter Nigeria Comments]; 13th Session of CEDAW, *supra*, ¶¶ 666-728 [hereinafter Senegal Comments]; 37-39th Sessions of CEDAW, *supra*, pt. 2, ¶¶ 348-94 [hereinafter Sierra Leone Comments]; 18th and 19th Sessions of the Committee on the Elimination of Discrimination Against Women, Jan. 19-Feb. 6, 1998 and June 22-July 10, 1998, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/53/38/Rev.1 (1998) [hereinafter 18-19th Sessions of CEDAW] pt. 2, ¶¶ 100-37 [hereinafter South Africa Comments]; *id.* ¶¶ 206-42 [hereinafter Tanzania Comments]; 34-36th Sessions of CEDAW, *supra*, pt. 1, ¶¶ 140-76 [hereinafter Togo Comments]; 26th, 27th, and Exceptional Sessions of the Committee on the Elimination of Discrimination Against Women, Jan. 14-Feb. 1, 2002, June 3-21, 2002, and Aug. 5-23, 2002, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/57/38/Rev.1 (2002) pt. 3, ¶¶ 113-62 [hereinafter Uganda Comments]; *id.* pt. 2, ¶¶ 211-61 [hereinafter Zambia Comments]; 18-19th Sessions of CEDAW, *supra*, pt. 1, ¶¶ 120-66 [hereinafter Zimbabwe Comments].

132. See *supra* note 55 and accompanying text.

with community leaders, the Committee has yet to identify officials within the customary legal system as potential collaboration partners. Rather these individuals are identified as potential targets for the awareness-raising campaign.

The CEDAW Committee's compliance discourse tracks the three categories of obligations and commitments within CEDAW itself: structural, programmatic, and legal.<sup>133</sup> CEDAW is often referred to as the "women's bill of rights" since its primary goal is the elimination of gender-based discrimination by creating equal rights for men and women.<sup>134</sup> Many of the CEDAW provisions addressing the specific areas in which gender discrimination is to be eliminated require state parties to "take all appropriate measures" to bring about the specified outcome.<sup>135</sup> For a smaller set of issues, CEDAW actually requires state parties to adopt new laws.<sup>136</sup> This requirement attaches to the elimination of trafficking of women and child marriage.<sup>137</sup> The CEDAW Committee's report on its consideration of the state party reports articulates which, if any, outcomes the state has successfully achieved and provides recommendations for those that have yet to be achieved. The recommendations offer strategies that will assist the state in achieving the outcomes that demonstrate compliance with the substantive obligations of CEDAW.

Structural reforms refer to political and legal structural changes that are made within a state.<sup>138</sup> Political and legal structural changes will often be in the form of changes to state institu-

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133. See STEINER, ALSTON, & GOODMAN, *supra* note 21, at 185-87 (noting a different, but related, typology for obligations within human rights treaties).

134. U.N. Dev. Fund for Women, Key Documents, [http://www.unifem.org/about/key\\_documents.php](http://www.unifem.org/about/key_documents.php) (last visited Nov. 30, 2008) (describing CEDAW). CEDAW defines discrimination against women as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CEDAW, *supra* note 1, art. 1.

135. CEDAW, *supra* note 1, arts. 7, 10-16. Such outcomes include eliminating gender discrimination in political and public life, education, employment, health care, other areas of economic and social life, and marriage and family relations; and eliminating discrimination against women in rural areas. *See id.*

136. *Id.* arts. 2(f), 3, 6, 16(2).

137. *Id.* arts. 6, 16(2).

138. This includes reforms that focus on procedural changes such as creating "an accessible complaints procedure." Uganda Comments, *supra* note 131, ¶ 132. Struc-

tions such as administrative agencies, government ministries, or the judiciary.<sup>139</sup> For example, in many sub-Saharan African states there is a cabinet-level ministry that focuses on gender issues.<sup>140</sup> A common structural reform recommended by the CEDAW Committee is to increase the “human and financial resources” of such ministries.<sup>141</sup> Programmatic reforms are changes involving policy or program development. The development of policies or programs may lay out substantive goals or a procedural plan for developing substantive goals. For example, Uganda adopted a National Action Plan on Women and a National Gender Policy that “provide[s] guidelines for the development of strategies and interventions for the empowerment of women.”<sup>142</sup> Common CEDAW Committee programmatic recommendations include inviting states to “increase [their] efforts to design and implement comprehensive education and awareness-raising programmes targeting women and men at all levels of society,” “implement measures to . . . retain girls in school,” or “undertake appropriate measures to improve women’s access to health care and health-related services and information.”<sup>143</sup> Finally, legal reforms are changes to a state’s governing law—constitutional, legislative, or administrative. For example, amendments to Uganda’s constitution provide for the recognition of equality before the law and equal protection while legislative reforms guarantee inheritance rights for women.<sup>144</sup> Examples of the CEDAW Committee’s legal recommendations include requesting states to revise their constitution or statutes to include “a definition of discrimination in line with Article 1 of the Convention, encompassing both direct and indirect discrimination,” or to “adopt appropriate legislation for the implementation of

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tural reforms also include calls for increased investment in the structural features of the state. *See, e.g., infra* note 141 and accompanying text.

139. These recommendations often mirror the strategies and goals of technical rule of law programs. *See supra* notes 42-47 and accompanying text.

140. Of the state parties examined, over half, 54.8%, of the states have ministerial departments dedicated to gender issues and in 45.1% of the states the gender ministry is a cabinet level ministry. Approximately one-third, 32.2%, of the states have adopted a gender policy, and 16.1% of the states have adopted constitutional provisions implementing CEDAW obligations.

141. *See, e.g.,* Ghana Comments, *supra* note 131, ¶ 229.

142. Uganda Comments, *supra* note 131, ¶ 127.

143. *See, e.g.,* Ghana Comments, *supra* note 131, ¶¶ 233, 239, 243.

144. UGANDA CONST. arts. 21, 33; Land Act § 39(1)(c)(i) (1998) (Uganda).

each of the provisions of the Convention.”<sup>145</sup> Enforcement of these and other legal reforms depends upon structural reforms. For example, enforcing legal rights requires accessible dispute resolution forums, like courts or tribunals and joint ownership land titling reforms depend upon the existence of accessible land registration offices.

The CEDAW Committee’s compliance discourse does not emphasize law and law enforcement as the primary basis for bringing about gender equality. Rather there is a clear understanding that this goal requires legal as well as non-legal solutions.<sup>146</sup> A particularly prevalent non-legal solution deals with what I refer to as adaptation. The Committee’s recommendations are replete with comments regarding the need to change public perceptions regarding gender norms, to change traditional cultural practices that are harmful to women, and to recognize that culture is dynamic.<sup>147</sup> This approach coincides with specific CEDAW provisions. For example, Article 5(a) requires state parties 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 . . . .<sup>148</sup>

The compliance discourse is replete with programmatic re-

145. Ghana Comments, *supra* note 131, ¶ 225. See, e.g., Congo Comments, *supra* note 131, ¶¶ 175, 181; D.R.C. Comments, *supra* note 131, ¶¶ 347, 357; Equatorial Guinea Comments, *supra* note 131, ¶ 192; Eritrea Comments, *supra* note 131, ¶ 67; Gabon Comments, *supra* note 131, ¶ 232; Malawi Comments, *supra* note 131, ¶ 204.

146. The vast majority of the recommendations implore states to undertake comprehensive measures.

147. See, e.g., Angola Comments, *supra* note 131, ¶ 147; Benin Comments, *supra* note 131, ¶ 148; Burkina Faso Comments, *supra* note 131, ¶ 342; Cameroon Comments, *supra* note 131, ¶ 54; Cape Verde Comments, *supra* note 131, ¶ 33; D.R.C. Comments, *supra* note 131, ¶ 353; Equatorial Guinea Comments, *supra* note 131, ¶ 196; Eritrea Comments, *supra* note 131, ¶ 75; Ethiopia Comments, *supra* note 131, ¶ 252; Gabon Comments, *supra* note 131, ¶ 240; Gambia Comments, *supra* note 131, ¶ 194; Ghana Comments, *supra* note 131, ¶ 233; Kenya Comments, *supra* note 131, ¶ 210; Malawi Comments, *supra* note 131, ¶ 212; Mali Comments, *supra* note 131, ¶ 194; Mauritania Comments, *supra* note 131, ¶ 37; Mauritius Comments, *supra* note 131, ¶ 272; Mozambique Comments, *supra* note 131, ¶ 176; Sierra Leone Comments, *supra* note 131, ¶ 368; Tanzania Comments, *supra* note 131, ¶ 230; Togo Comments, *supra* note 131, ¶ 154; Uganda Comments, *supra* note 131, ¶ 134.

148. CEDAW, *supra* note 1, art. 5(a).

forms to address this type of CEDAW obligation. Programmatic reforms were the most prevalent within the Committee's compliance discourse and structural reforms were the least frequent. The vast majority of the programmatic recommendations implored states to take "appropriate measures," or introduce, adopt, implement, or put in place comprehensive measures to actualize a CEDAW obligation.<sup>149</sup> The topics covered include literacy, violence against women, poverty, and health care.<sup>150</sup> Common examples include recommendations for the state to "make the promotion of gender equality an explicit component of all its national development strategies, policies and programmes";<sup>151</sup> "place high priority on putting comprehensive measures in place to address all forms of violence against women and girls, recognizing that such violence constitutes a violation of the human rights of women under the Convention and further elaborated in the Committee's general recommendation 19 on violence against women";<sup>152</sup> and "to design and implement poverty alleviation programmes so that women and girls do not have to resort to prostitution for their livelihoods."<sup>153</sup> Most of the programmatic recommendations were like those noted above—very general in scope. The second most common type of programmatic recommendation addressed awareness.<sup>154</sup> These recommendations implored states to distribute information about CEDAW obligations and norms. For example, the Committee requested that the state parties widely disseminate the Committee's concluding comments to the public, government officials, and local non-governmental organizations ("NGOs").<sup>155</sup>

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149. See, e.g., Angola Comments, *supra* note 131, ¶¶ 153, 157; Congo Comments, *supra* note 131, ¶¶ 171, 179; Eritrea Comments, *supra* note 131, ¶¶ 75, 83; Gabon Comments, *supra* note 131, ¶¶ 236, 240; Gambia Comments, *supra* note 131, ¶¶ 190, 192, 194.

150. See, e.g., Equatorial Guinea Comments, *supra* note 131, ¶¶ 190, 194, 200, 204, 206; Ghana Comments, *supra* note 131, ¶¶ 235, 243, 245; Mali Comments, *supra* note 131, ¶¶ 196, 210, 212; Mozambique Comments, *supra* note 131, ¶¶ 180, 192, 198.

151. Angola Comments, *supra* note 131, ¶ 149.

152. *Id.* ¶ 153.

153. Cameroon Comments, *supra* note 131, ¶ 52.

154. Of the 838 programmatic recommendations, 20.5% addressed awareness.

155. The request was made in all CEDAW Committee reports issued after 1994. See, e.g., Angola Comments, *supra* note 131, ¶ 171; Benin Comments, *supra* note 131, ¶ 169; Burkina Faso Comments, *supra* note 131, ¶ 357; Burundi Comments, *supra* note 131, ¶ 67; Cameroon Comments, *supra* note 131, ¶ 66; Cape Verde Comments, *supra* note 131, ¶ 56; Congo Comments, *supra* note 131, ¶ 189; D.R.C. Comments, *supra* note 131, ¶ 369; Equatorial Guinea Comments, *supra* note 131, ¶ 46; Eritrea Comments, *supra* note

Additionally, the Committee advised state parties to distribute information to the public on topics of interest to the CEDAW Committee like malnutrition, HIV/AIDS, early marriage, domestic violence, education, and the importance of women's involvement in leadership positions at all levels of decision-making.<sup>156</sup> Awareness recommendations were also prevalent among the Committee's comments regarding adaptation.<sup>157</sup>

*Table 1.1: Programmatic Recommendations*<sup>158</sup>

TYPE OF PROGRAMMATIC RECOMMENDATION	Frequency (n=838)	PERCENTAGE
General	472	56.3
Awareness	172	20.5
Education	86	10.3
Culture	70	8.4
Implementation	38	4.5

Legal recommendations were the second most frequent type made within the Committee's compliance discourse. Within this category of recommendation, the Committee most frequently implored states to enact specific legislation or ratify a particular treaty. For example, the Committee encouraged Cape Verde, Eritrea, and Sierra Leone to ratify the CEDAW Optional

131, ¶ 98; Ethiopia Comments, *supra* note 131, ¶ 273; Gabon Comments, *supra* note 131, ¶ 255; Gambia Comments, *supra* note 131, ¶ 219; Ghana Comments, *supra* note 131, ¶ 255; Guinea Comments, *supra* note 131, ¶ 144; Kenya Comments, *supra* note 131, ¶ 230; Malawi Comments, *supra* note 131, ¶ 235; Mali Comments, *supra* note 131, ¶ 216; Mauritania Comments, *supra* note 131, ¶ 64; Mauritius Comments, *supra* note 131, ¶ 293; Mozambique Comments, *supra* note 131, ¶ 205; Namibia Comments, *supra* note 131, ¶ 131; Niger Comments, *supra* note 131, ¶ 248; Nigeria Comments, *supra* note 131, ¶ 316; Sierra Leone Comments, *supra* note 131, ¶ 393; South Africa Comments, *supra* note 131, ¶ 137; Tanzania Comments, *supra* note 131, ¶ 242; Togo Comments, *supra* note 131, ¶ 175; Uganda Comments, *supra* note 131, ¶ 162; Zambia Comments, *supra* note 131, ¶ 261; Zimbabwe Comments, *supra* note 131, ¶ 166.

156. See, e.g., Gambia Comments, *supra* note 131, ¶ 206 (malnutrition, malaria, HIV/AIDS); *id.* ¶ 210 (early marriage); Guinea Comments, *supra* note 131, ¶ 133 (leadership); Kenya Comments, *supra* note 131, ¶ 216 (leadership); Malawi Comments, *supra* note 131, ¶ 218 (leadership); Mali Comments, *supra* note 131, ¶ 202 (leadership); Mauritania Comments, *supra* note 131, ¶ 45 (domestic violence); Mauritius Comments, *supra* note 131, ¶ 278 (leadership); Namibia Comments, *supra* note 131, ¶ 121 (domestic violence); Niger Comments, *supra* note 131, ¶ 230 (domestic violence); Nigeria Comments, *supra* note 131, ¶ 304 (education).

157. See *infra* notes 179-80 and accompanying text.

158. See *supra* note 131 and accompanying text.



Protocol;<sup>159</sup> Benin to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;<sup>160</sup> and Eritrea to ratify the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.<sup>161</sup> Other examples of the Committee's legal recommendations to enact specific legislation include the Committee urging Congo, South Africa, and Tanzania to incorporate the definition of discrimination from article one of CEDAW within domestic law,<sup>162</sup> and recommending that Nigeria and Togo adopt legislation on domestic violence, including marital rape.<sup>163</sup> The second most frequent legal recommendation was for state parties to revise existing laws to bring them into compliance with CEDAW. Examples include requests for state parties to amend discriminatory nationality laws, civil and penal codes, and marriage laws; remove inconsistencies between civil law and customary law; and revise the state's constitution to include a definition of discrimination.<sup>164</sup> The Committee was also concerned that state parties work to implement and enforce existing law and the Convention more broadly,<sup>165</sup> that women have access to legal institutions to make claims,<sup>166</sup> and that state parties

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159. See Cape Verde Comments, *supra* note 131, ¶ 52; Eritrea Comments, *supra* note 131, ¶ 93; Sierra Leone Comments, *supra* note 131, ¶ 389.

160. See Benin Comments, *supra* note 131, ¶ 168.

161. See Eritrea Comments, *supra* note 131, ¶ 97.

162. See Congo Comments, *supra* note 131, ¶ 159; South Africa Comments, *supra* note 131, ¶ 116; Tanzania Comments, *supra* note 131, ¶ 227.

163. See Nigeria Comments, *supra* note 131, ¶ 298; Togo Comments, *supra* note 131, ¶ 158.

164. See, e.g., Congo Comments, *supra* note 131, ¶¶ 175, 181 (amend marriage laws and laws prohibiting advertisement of contraceptives); D.R.C. Comments, *supra* note 131, ¶¶ 347, 357 (revise existing discriminatory laws); Equatorial Guinea Comments, *supra* note 131, ¶ 192 (remove inconsistencies between civil law and customary law); Eritrea Comments, *supra* note 131, ¶ 67 (reform Civil and Penal Codes); Gabon Comments, *supra* note 131, ¶ 232 (revise Civil and Penal Codes); Malawi Comments, *supra* note 131, ¶ 204 (revise Constitution to include definition of discrimination).

165. See, e.g., Burkina Faso Comments, *supra* note 131, ¶ 348; Ethiopia Comments, *supra* note 131, ¶ 242; Gambia Comments, *supra* note 131, ¶ 198; Ghana Comments, *supra* note 131, ¶ 241; Guinea Comments, *supra* note 131, ¶ 135; Malawi Comments, *supra* note 131, ¶ 206; Mauritius Comments, *supra* note 131, ¶ 266; Nigeria Comments, *supra* note 131, ¶ 296; Sierra Leone Comments, *supra* note 131, ¶ 372; Togo Comments, *supra* note 131, ¶ 158.

166. See, e.g., Benin Comments, *supra* note 131, ¶ 150; Equatorial Guinea Comments, *supra* note 131, ¶ 200; Gabon Comments, *supra* note 131, ¶ 230; Gambia Comments, *supra* note 131, ¶ 194; Mali Comments, *supra* note 131, ¶ 192; Mauritania Comments, *supra* note 131, ¶ 45; Mozambique Comments, *supra* note 131, ¶ 180; Niger

work to increase citizens' knowledge and awareness of their legal rights pursuant to CEDAW and existing domestic law.<sup>167</sup>

*Table 1.2: Legal Recommendations*<sup>168</sup>

TYPE OF LEGAL RECOMMENDATION	Frequency (n=410)	PERCENTAGE
Enact	117	28.5
Review	86	21.0
General	79	19.3
Implement	74	18.0
Access	27	6.6
Awareness	22	5.4
Timeline	6	1.5

Fewer than twenty percent of the recommendations made by the Committee dealt with structural reform. The vast majority of the structural recommendations focused on political or legal structural reforms and the need for state collaboration with domestic stakeholders, domestic civil society organizations, and IGOs.<sup>169</sup> A significant number of these recommendations call on state parties to increase the number of women in decision-making positions and in elected and appointed political bodies.<sup>170</sup> Other recommendations included urging state parties to include a gender perspective in the state's sectoral policies,<sup>171</sup> creating a family court,<sup>172</sup> granting state courts sole jurisdiction

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Comments, *supra* note 131, ¶ 220; Sierra Leone Comments, *supra* note 131, ¶ 372; Uganda Comments, *supra* note 131, ¶ 132.

167. See, e.g., Angola Comments, *supra* note 131, ¶ 141; Burundi Comments, *supra* note 131, ¶ 56; D.R.C. Comments, *supra* note 131, ¶ 337; Equatorial Guinea Comments, *supra* note 131, ¶ 200; Gabon Comments, *supra* note 131, ¶ 232; Mauritania Comments, *supra* note 131, ¶ 31; Mozambique Comments, *supra* note 131, ¶ 178; Namibia Comments, *supra* note 131, ¶ 117; Niger Comments, *supra* note 131, ¶ 240; Nigeria Comments, *supra* note 131, ¶ 296.

168. See *supra* note 131 and accompanying text.

169. 51.1% of the recommendations were for structural collaboration and structural training.

170. See, e.g., Gabon Comments, *supra* note 131, ¶ 244; Gambia Comments, *supra* note 131, ¶ 200; Guinea Comments, *supra* note 131, ¶ 133; Kenya Comments, *supra* note 131, ¶ 216; Malawi Comments, *supra* note 131, ¶ 218; Mali Comments, *supra* note 131, ¶ 202; Mauritania Comments, *supra* note 131, ¶ 35; Mauritius Comments, *supra* note 131, ¶ 278; Mozambique Comments, *supra* note 131, ¶ 184; Niger Comments, *supra* note 131, ¶ 234.

171. See, e.g., Gabon Comments, *supra* note 131, ¶ 228.

172. See, e.g., Mauritius Comments, *supra* note 131, ¶ 288.

for sexual violence cases,<sup>173</sup> and increasing the number of women in the judiciary.<sup>174</sup> The Committee's recommendations acknowledge the value of domestic allies in the context of political and legal structural reforms,<sup>175</sup> yet this insight is not extended to collaboration with customary legal officials for the adaptation process.

*Table 1.3: Structural Recommendations*<sup>176</sup>

TYPE OF STRUCTURAL RECOMMENDATION	Frequency (n=268)	PERCENTAGE
General	84	31.3
Collaboration	75	28.0
Training	62	23.1
Enforcement	32	11.9
Resources	15	5.6

Recommendations addressing adaptation appeared in all three categories. Within the programmatic aspects of the compliance discourse, adaptation was addressed through recommendations for public awareness campaigns, curricular reform, and education campaigns. The relevant structural reforms urged states to provide professional training regarding CEDAW obligations. The professionals targeted were generally judges, lawyers, law enforcement officers, and occasionally "tribal chiefs."<sup>177</sup>

173. See, e.g., Namibia Comments, *supra* note 131, ¶ 120.

174. See, e.g., South Africa Comments, *supra* note 131, ¶ 130.

175. See, e.g., Benin Comments, *supra* note 131, ¶ 156 (civil society to address literacy); Burkina Faso Comments, *supra* note 131, ¶ 348 (international organizations and donors to address development); Burundi Comments, *supra* note 131, ¶ 58 (international assistance to address education); D.R.C. Comments, *supra* note 131, ¶ 359 (civil society and international organizations to address literacy).

176. See *supra* note 131 and accompanying text.

177. Angola Comments, *supra* note 131, ¶ 141; Benin Comments, *supra* note 131, ¶ 146; Cape Verde Comments, *supra* note 131, ¶ 35; D.R.C. Comments, *supra* note 131, ¶ 337; Eritrea Comments, *supra* note 131, ¶¶ 69, 77; Ethiopia Comments, *supra* note 131, ¶ 256; Equatorial Guinea Comments, *supra* note 131, ¶ 200; Gabon Comments, *supra* note 131, ¶ 240; Gambia Comments, *supra* note 131, ¶ 192; Ghana Comments, *supra* note 131, ¶ 233; Guinea Comments, *supra* note 131, ¶ 121; Kenya Comments, *supra* note 131, ¶ 208; Malawi Comments, *supra* note 131, ¶ 212; Mali Comments, *supra* note 131, ¶ 186; Mauritania Comments, *supra* note 131, ¶ 27; Mauritius Comments, *supra* note 131, ¶ 278; Mozambique Comments, *supra* note 131, ¶ 178; Niger Comments, *supra* note 131, ¶ 220; Tanzania Comments, *supra* note 131, ¶ 230; Togo Comments, *supra* note 131, ¶ 154; Uganda Comments, *supra* note 131, ¶ 136; Zambia Comments, *supra* note 131, ¶ 239.

Amongst the legal recommendations, adaptation was addressed through statements that state parties should work to change the legal culture's perception of gender-related claims.<sup>178</sup>

The most frequent adaptation recommendations were within the programmatic category calling for increased awareness. This aspect of the Committee's compliance discourse focused on using awareness-raising activities to challenge and change discriminatory social and cultural patterns and to create an environment to sustain such changes.<sup>179</sup> The Committee encouraged states to undertake awareness-oriented reforms in collaboration with civil society organizations, yet there was no mention of the need to collaborate with officials within the customary legal systems.<sup>180</sup> For the many individuals throughout sub-Saharan Africa who live in rural areas, the customary legal system is the legal system that they are most likely to utilize. The costs associated with bringing claims based on statutory law and the distance parties have to travel to pursue their claims inhibit many rural-based women from utilizing this legal system.<sup>181</sup> Consequently, the customary legal system becomes the primary resource for resolving claims and promoting rights.<sup>182</sup> The indi-

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178. Angola Comments, *supra* note 131, ¶ 141; Eritrea Comments, *supra* note 131, ¶ 69; Gambia Comments, *supra* note 131, ¶ 192; Malawi Comments, *supra* note 131, ¶ 212; Mali Comments, *supra* note 131, ¶ 186; Mauritania Comments, *supra* note 131, ¶ 27; Mauritius Comments, *supra* note 131, ¶ 278; Niger Comments, *supra* note 131, ¶ 220; Nigeria Comments, *supra* note 131, ¶ 292; Togo Comments, *supra* note 131, ¶ 154.

179. Angola Comments, *supra* note 131, ¶ 147; Benin Comments, *supra* note 131, ¶ 148; Burkina Faso Comments, *supra* note 131, ¶ 342; Cameroon Comments, *supra* note 131, ¶ 25; Cape Verde Comments, *supra* note 131, ¶ 33; D.R.C. Comments, *supra* note 131, ¶ 353; Eritrea Comments, *supra* note 131, ¶ 75; Ethiopia Comments, *supra* note 131, ¶ 252; Equatorial Guinea Comments, *supra* note 131, ¶ 196; Gabon Comments, *supra* note 131, ¶ 240; Gambia Comments, *supra* note 131, ¶ 192; Ghana Comments, *supra* note 131, ¶ 233; Kenya Comments, *supra* note 131, ¶ 210; Malawi Comments, *supra* note 131, ¶ 212; Mali Comments, *supra* note 131, ¶ 186; Mauritania Comments, *supra* note 131, ¶ 27; Mauritius Comments, *supra* note 131, ¶ 278; Mozambique Comments, *supra* note 131, ¶ 178; Sierra Leone Comments, *supra* note 131, ¶ 370; Tanzania Comments, *supra* note 131, ¶ 230; Togo Comments, *supra* note 131, ¶ 154; Uganda Comments, *supra* note 131, ¶ 131.

180. See, e.g., D.R.C. Comments, *supra* note 131, ¶ 353; Equatorial Guinea Comments, *supra* note 131, ¶ 196; Gambia Comments, *supra* note 131, ¶ 192; Ghana Comments, *supra* note 131, ¶ 233; Malawi Comments, *supra* note 131, ¶ 212; Mali Comments, *supra* note 131, ¶ 18; Mauritania Comments, *supra* note 131, ¶ 27; Togo Comments, *supra* note 131, ¶ 154.

181. See Laurel L. Rose, *Women's Land Access in Post-Conflict Rwanda: Bridging the Gap Between Customary Land Law and Pending Land Legislation*, 13 TEX. J. WOMEN & L. 197, 226 (2004).

182. *Id.* at 204, 220.

viduals responsible for administering this system represent a significant social institution within the community's discursive opportunity structure. These individuals, through their legal decisions, establish boundaries that define normatively acceptable customs and practices. As such, any framing regarding CEDAW norms and obligations will have to address the complementary and competing frames rooted in customary law. State collaboration with these individuals enables the state to identify areas of convergence and work within those spaces to create and deploy locally relevant frames regarding CEDAW. While finding areas of convergence will be challenging at times it can facilitate the desired outcome as demonstrated by efforts to eliminate FGC in Egypt.<sup>183</sup>

CEDAW recognizes the necessity of a polycentric system of human rights protection.<sup>184</sup> The treaty obligations address structural, legal, and programmatic issues and the Committee sees domestic enforcement as an important goal.<sup>185</sup> To achieve that goal the CEDAW Committee's adaptation recommendations overwhelmingly address increasing awareness. The link between increasing awareness through strategic framing and the role of collaboration with meaning-making institutions in the success of that project is only partially evidenced in the Committee's compliance discourse. The Committee recommends that the state parties collaborate with civil society organizations, but collaboration with other key actors within the state's discursive opportunity structure is not highlighted. A particularly noticeable omission is collaboration with officials within the customary legal system. The cases discussed below, addressing women's property rights in Uganda and Rwanda, highlight the role of customary legal officials in shaping ideas regarding valid customs and practices within communities.

## II. *MARITAL PROPERTY IN RWANDA AND UGANDA*

Land is the key resource in rural economies in sub-Saharan Africa.<sup>186</sup> States throughout this continent, with assistance from

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183. See *supra* notes 57-58 and accompanying text.

184. Cf. MARK DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 209 (2007) (noting the necessary complexity of effective political institutions in the enforcement of international law).

185. See *supra* notes 21, 139-45 and accompanying text.

186. Tripp, *supra* note 74, at 6.

numerous international organizations, inter-governmental and non-governmental, have explored the most effective systems for regulating access to and ownership of land.<sup>187</sup> Within the last ten years Uganda, Rwanda, and other sub-Saharan African states have revised their land tenure systems, and women's access to and ownership of land have become prominent issues.<sup>188</sup> The key issues tied to women's access to and ownership of land have been inheritance and default ownership rules for marital property.

Women's relationship with land historically has been governed by customary rules and practices. There is significant debate as to whether these rules and practices marginalize, protect, or empower women.<sup>189</sup> Those who see customary rules and

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187. *Id.* at 2; Gita Gopal, Gender-Related Legal Reform and Access to Economic Resources in Eastern Africa, at vii (World Bank Discussion Paper No. 405, 1999).

188. Uganda, Tanzania, Zanzibar, Mozambique, Zambia, Eritrea, Namibia, and South Africa enacted new land laws in the 1990s and Rwanda, Malawi, Lesotho, Zimbabwe, and Swaziland adopted new land policies during this time period. *See* Tripp, *supra* note 74, at 2. Women's access to land was an issue addressed during the land reform debates in Zimbabwe, Malawi, Tanzania, Eritrea, Kenya, and Zambia. *Id.* at 3-4.

189. *See, e.g., id.* at 2, 10 (noting that women's organizations in Tanzania "could not see any mechanism through which customary law would change, and saw instead the changes in statutory laws as a basis for advocacy and reform."); Ann Whitehead & Dzodzi Tsikata, *Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary*, 3 J. AGRARIAN CHANGE 67, 94 (2003) ("The most prevalent view is that customary systems enshrine male domination.").

As noted by Celestin Nyamu, there is an impression that:

women's rights do not exist in custom or local practice, and the solution therefore lies in substituting custom and local practice with alternatives offered by national legislation or the international human rights regime.

Celestin I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 51 HARV. INT'L L.J. 381, 393 (2000).

Gita Gopal, however, notes the dangers of focusing exclusively on the statutory legal system:

Legal reform based on the above assumptions, however, has been largely unsuccessful. The formal legal framework governing personal laws, which was intended to replace or complement the traditional systems in many eastern African countries, has not adequately safeguarded women's interests. On the contrary, this paper argues that women have been adversely impacted by insensitive, untimely, and piecemeal legal reform, reform that has led to the imposition of alien norms that reflect a vision not shared by society as a whole. New laws that have been implemented through centralized legal institutions have further exacerbated the exclusion of women. The net result is that most women continue to be governed by customary or religious laws and practices which are stagnant, outdated, and constraining.

Gopal, *supra* note 187, at vii. *See* Rose, *supra* note 181, at 203, for a discussion of the ways in which Rwandan women utilize customary law to enforce their land rights.

practices as marginalizing adopt a rights-based approach to securing women's access to land. As such, they seek constitutional and legislative reforms guaranteeing women's access to and ownership of land. It is their contention that legal rights are the only way to ensure that women's access to land is consistent and reliable.<sup>190</sup>

The issue of married women's property rights is a matter addressed within two international human rights treaties: CEDAW and the African Protocol. Of the forty-eight states within sub-Saharan Africa forty-six are state parties to CEDAW,<sup>191</sup> which entered into force on September 3, 1981.<sup>192</sup> The African Protocol opened for ratification in July 2003 and entered into force on November 25, 2005.<sup>193</sup> As of November 2007, twenty-two sub-Saharan African states have ratified the African Protocol and another twenty-one states have signed it but not ratified it.<sup>194</sup>

In the area of married women's property rights the two treaties protect different rights. CEDAW ensures that husbands and wives have the same ownership, use, and disposition rights with regard to property, while the African Protocol protects married women's legal ability to own land and establishes specific base-lines for property distribution when a marriage dissolves. CEDAW states that:

State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a

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190. See Tripp, *supra* note 74, at 3.

191. Sudan and Somalia are the two sub-Saharan African countries that have not ratified CEDAW. See U.N. Div. for the Advancement of Women, Dep't of Econ. & Soc. Affairs, States Parties to the Convention on the Elimination of All Forms of Discrimination Against Women, States Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Nov. 30, 2008).

192. See U.N. Div. for the Advancement of Women, Dep't of Econ. & Soc. Affairs, Convention on the Elimination of All Forms of Discrimination against Women, Short History of CEDAW Convention, <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Nov. 30, 2008).

193. Fareda Banda, *Blazing a Trail: The African Protocol on Women's Rights Comes Into Force*, 50 J. AFR. L. 72 (2006).

194. The African Women's Development and Communication Network ("FEMNET"), African Union Marks Second Anniversary of African Protocol on the Rights of Women, Nov. 26, 2007, available at <http://www.femnet.or.ke/calendar.asp>. Somalia has signed, but not ratified, the African Protocol although it has not signed or ratified CEDAW. The five sub-Saharan African states that have neither signed nor ratified the African Protocol as of November 2007 are Botswana, the Central African Republic, Eritrea, Sao Tome & Principe, and the Sudan. *Id.*

basis of equality of men and women: . . . [t]he same rights for both spouses with respect to the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.<sup>195</sup>

State parties to the African Protocol are required to, “enact appropriate national legislative measures to guarantee that . . . during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.”<sup>196</sup> This provision does not speak to the ownership of marital property as between husbands and wives, it merely ensures that state parties do not have coverture rules.<sup>197</sup> CEDAW addresses this issue of married women’s legal capacity by requiring state parties to accord to women,

in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.<sup>198</sup>

In addressing the position of women whose marriage has been dissolved in the form of divorce, separation, or annulment,<sup>199</sup> the African Protocol requires state parties to:

enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that . . . in case of separation, divorce or annulment of marriage, women

195. *Id.* art. 16(1)(h) (emphasis added).

196. African Protocol, *supra* note 2, art. 6(10).

197. Coverture rules under American and British law eliminated the separate legal existence of married women. Husbands and wives were treated as one legal entity such that married women could not own or control the disposition of property. As William Blackstone noted,

[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called . . . a *feme-covert* . . . ; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.

1 WILLIAM BLACKSTONE, COMMENTARIES 442.

198. CEDAW, *supra* note 1, art. 15(2).

199. It is not clear if this provision only applies to married couples who have a legal separation or all married couples who are no longer living together as a married couple.



and men shall have the right to *an equitable sharing* of the joint property deriving from the marriage.<sup>200</sup>

In addition to addressing married women's property rights, the African Protocol addresses inheritance. The African Protocol states that:

(1) A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. (2) Women and men shall have the right to inherit, in equitable shares, their parents' properties.<sup>201</sup>

While the CEDAW Committee does not review a state's compliance with other treaties, it is clear that this is an issue that has become a matter of international concern. The default rules regarding the ownership of marital property are critical for providing married women with security.<sup>202</sup> Land is the resource from which the majority of individuals living in Uganda and Rwanda depend upon for their livelihood. Women's lack of ownership rights in this property leaves them vulnerable to the whims of their husbands and male relatives, which can be devastating when marriages disintegrate.<sup>203</sup>

### A. Seeking Co-Ownership in Uganda

Land reform became a significant issue during Uganda's constitutional review process in the early to mid-1990s.<sup>204</sup> The constitutional conference was unable to reach a satisfactory resolution of the various issues involved in land reform so the matter was postponed.<sup>205</sup> The 1995 Constitution required Parliament

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200. African Protocol, *supra* note 2, art. 7 (emphasis added). The wording of this provision was changed from the 2001 draft, which gave men and women the same right to marital property. Banda, *supra* note 193, at 77.

201. African Protocol, *supra* note 2, art. 21.

202. Marital property refers to real property that forms the basis for a family's subsistence in rural areas.

203. See, e.g., Uganda Land Alliance, *Biting the Feeding Hand: Voices of Women on Land* (2006), available at <http://www.cwlr.net/publications/others/resources/women-and-land-uganda.pdf/download>.

204. This process culminated with the adoption of a new constitution in 1995.

205. There are four land tenure systems in Uganda: freehold, leasehold, *mailo*, and customary tenure. Freehold tenure is ownership of land that is registered and the registered owner has full ownership rights. Under leasehold tenure an individual leases

to enact a law “regulating the relationship between the lawful or bona fide occupants” of *mailo*, freehold or leasehold land, and “providing for the acquisition of registrable interest in the land by the occupant.”<sup>206</sup> As the country embarked upon the process of enacting national legislation to reform the land tenure system, women’s organizations found an opportunity to have issues related to land and gender addressed.

Women’s organizations in Uganda utilized a rights-based approach for addressing women’s access to and ownership of land. The dominant land tenure system in Uganda is customary tenure, which is governed by customary law. These organizations adopted a strategy that sought to obtain formal legal rights within the state’s statutory legal system that would prevail over contrary customary rules and practices. The decision to pursue statutory rather than customary reform was based on the belief that customary law is used to justify practices and rules that subordinate women.<sup>207</sup> There was significant concern that seek-

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the land for a specified period of time pursuant to specific conditions. *Mailo* land tenure “involves holding registered land in perpetuity.” Tripp, *supra* note 74, at 5. Finally, customary tenure is a system governed by customary law and the leaders of a particular clan or ethnic group administer it. *Id.*

In 1975, the Land Reform Decree eliminated two long utilized forms of land tenure, *mailo* lands and freeholds. The *mailo* land tenure system was introduced by the British in 1900 in the Uganda Agreement. *Mailo* lands were quasi-freehold in that there were limitations as to whom *mailo* owners could sell their land, the law specified the relationship between the *mailo* owners and the tenants on their land, and the 1967 constitution, “vested ownership of, and control over, all minerals and water on *mailo* lands in the state.” Winnie Bikaako & John Ssenkumba, *Gender, Land and Rights: Contemporary Contestations in Law, Policy and Practice in Uganda*, in *WOMEN AND LAND IN AFRICA: CULTURE, RELIGION, AND REALIZING WOMEN’S RIGHTS* 232, 236 (L. Muthoni Wanyeki ed., 2003). *Mailo* owners obtained the most desirable land while the less fertile land became Crown land.

The *mailo* and freehold land tenure systems were formally replaced with leaseholds. Yet in practice these systems continued to exist with a few modifications. Tenants no longer paid the *busuulu* (ground rent) or *envuijo* (commodity rent). *Id.* at 239. The 1995 constitution meant to determine the relationship between the *mailo* land holders and the tenants or bona fide occupants of that land. This issue was not resolved when the constitution was adopted, rather the constitution required the adoption of a new land law within two years after the first Parliament elected under the 1995 constitution. UGANDA CONST. art. 237(9) (1995).

206. UGANDA CONST. art. 237(9) (1995).

207. Tripp, *supra* note 74, at 1, 2; Jacqueline Asimwe, *Women and the Struggle for Land in Uganda*, in *THE WOMEN’S MOVEMENT IN UGANDA: HISTORY, CHALLENGES, AND PROSPECTS* 119, 124 (Aili Mari Tripp & Joy C. Kwesiga eds., 2002) (“Since customary law is not codified, men are able to manipulate it to suit their desires and have used it to justify the distinctions and/or discrimination between men and women.”). In response

ing reform within the customary legal system would not produce consistent and reliable rights for women.<sup>208</sup> As land has become more scarce and commercialized,

local leaders have felt mounting pressures to protect the clan system, and in so doing have placed even greater constraints on women's access to land. However, the clan system they are seeking to preserve is no longer one that affords women the supports it is once said to have guaranteed.<sup>209</sup>

Customary law dates back to pre-colonialism.<sup>210</sup> It was the legal system used within specific ethnic communities and the legal rules are administered by authority figures within the ethnic group, such as chiefs. Despite the ancient roots of customary law, these legal systems, like statutory systems, are dynamic and change over time to address shifts in social circumstances. Customary legal systems vary by ethnic group, but the land tenure system discussed below is representative of those operating within Uganda.

Customary land tenure provides for both individual and communal ownership.<sup>211</sup> Inheritance is the most common method by which land is passed from one individual to another and patrilineal succession is the norm.<sup>212</sup> There are, however,

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to a 2003 World Bank report advocating the localization of land administration, Angélique Haugerud noted that:

rhetoric about empowering local institutions to administer "customary" land law risks romanticizing or essentializing "community" and "customary" law, assuming the internal politics and hierarchies in communities to be benign, and overlooking potentially inflammatory identity politics and the sometimes deeply conservative or even reactionary tendencies local communities may contain.

Tripp, *supra* note 74, at 16.

208. *Id.* Another scholar working in the area of women's rights in Uganda has noted that:

The women's movement is articulating a vision of land tenure and gender relations that challenge the fantasy that customary arrangements can adequately protect the welfare of women in the way that they are once said to have done. This is no longer the reality for many women, who are trying to find more secure and less arbitrary means of building their lives.

Tripp, *supra* note 74, at 15.

209. *Id.* at 2; *see infra* note 279 and accompanying text, for a discussion of similar concerns in Rwanda.

210. Tripp, *supra* note 74, at 5.

211. *Id.* Ownership within customary land tenure systems does not require titling or registration.

212. Patrilineal descent is "characterized by male control of decision-making about

exceptional circumstances under which daughters can inherit from their fathers. These circumstances exist when there is no suitable male heir or when the father dies intestate.<sup>213</sup> When women are the beneficiaries of a land inheritance the portion they receive is typically significantly less than the portion their brothers or other male relatives receive.<sup>214</sup> Women are also able to inherit land as a trustee for a male relative.<sup>215</sup> Typically mothers will inherit land on behalf of their minor sons. Once the sons reach the age of majority they obtain sole ownership.<sup>216</sup>

Another means by which women gain access to land is through family gifts and marriage. Customary law does not prohibit families from giving land to female family members. However, women who obtain these gifts are not permitted to alienate the property.<sup>217</sup> The right of disposition stays with the male head of the family or kinship group.<sup>218</sup> Married women are granted usufructuary rights to the land owned by their husbands.<sup>219</sup> Upon marriage, a husband would assign a particular segment of land to his wife for her to cultivate for the family's needs.<sup>220</sup> In some instances women are also allowed to exchange or sell any surplus goods cultivated.<sup>221</sup> Both of these avenues of access to land limit women to usufructuary rights.<sup>222</sup> Pre-colonialism women had rather secure user rights to land. As family heads, which were predominately male, obtained greater

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who will inherit and administer the estate, and preference for male over female heirs." Asiimwe, *supra* note 207, at 123.

213. Jacqueline Asiimwe, *Making Women's Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses*, 4 YALE HUM. RTS. & DEV. L.J. 171, 175-76 (2001).

214. *Id.*

215. *Id.*

216. Asiimwe, *supra* note 207, at 123-24 (citing JENNIFER OKUMU WENGI, *WEEDING THE MILLET FIELD: WOMEN'S LAW AND GRASSROOTS JUSTICE IN UGANDA* (1997)).

217. Asiimwe, *supra* note 207, at 123-24.

218. Bikaako & Ssenkumba, *supra* note 205, at 239. Yet historically in at least one region of Uganda property rights were organized around "relatively autonomous, female-headed households." Lynn Khadiagala, *Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda*, 46 J. AFR. L. 1 (2002). Customary legal officials "upheld women's right to control property to the exclusion of husbands and co-wives. Men who sought to sell a wife's land or transfer parcels among co-wives received sharp rebukes from the courts." *Id.*

219. Bikaako & Ssenkumba, *supra* note 205, at 242.

220. *Id.*

221. *Id.*

222. Women's land rights were limited to use, they did not hold rights that enabled them to control the disposition of land. *Id.* at 240.

autonomy in making decisions regarding access, use, and control of land, women's land rights became less secure. The increased autonomy limited the need for family heads to consult with the larger family or community regarding the disposition of land. Land scarcity similarly reduced women's land security within the customary land tenure system. As less land was available to distribute, women's secondary user rights were often ignored in order to ensure that men's primary ownership rights were satisfied.

Statutory law in Uganda does not prohibit women from owning land, but its permissiveness often conflicts with the applicable customary law. Uganda, like many sub-Saharan African countries, has a dual legal system comprising of customary and statutory law. The regulation of land ownership and inheritance is one area that is regulated by both legal systems. Pursuant to the 1998 Land Act, statutory law takes precedence over conflicting customary law regarding women's rights, yet statutory law is not utilized to a great degree in rural communities.<sup>223</sup> The social and cultural dominance of the customary property system has significantly limited women's land access and ownership rights.<sup>224</sup> The desire for statutory law to explicitly grant inheritance rights to women and girls and co-ownership rights to married women was the primary goal of women's organizations in Uganda.<sup>225</sup>

In 1999 and 2000 it was reported that women in Uganda provided over seventy percent of the labor in agricultural production and over eighty percent of the labor in food crop production and processing.<sup>226</sup> Yet the majority of Ugandan women did not own land and ninety-three percent of women had only usufruct or usage rights to land.<sup>227</sup> The 1998 Land Act was the

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223. Land Act, No. 16, § 27 (1998) (Uganda), available at <http://faolex.fao.org/docs/pdf/uga19682.pdf>.

224. Asiimwe, *supra* note 207, at 122 (noting that the Ministry of Gender, Labour and Social Development has reported that "social and cultural realities" effectively deny them this right). A significant barrier to female land ownership has been the socioeconomic position of women generally. Illiteracy rates for women are higher than those for men, 55.1% compared to 36.5%. This is tied to limited educational opportunities that women have experienced in Uganda. Primary school enrollment is fifty-five percent boys and forty-five percent women, but that figure drops significantly at the university level. There women make up thirty-five percent of the student body. *Id.*

225. *Id.*

226. *Id.* at 119.

227. *Id.*; Tripp, *supra* note 74, at 6.

target for reform. Women's organizations lobbied for women's land rights in general, but a key reform proposal was a provision that would allow married men and women to co-own family or marital property.<sup>228</sup> The co-ownership clause, as it became known, was discussed, debated, and approved by Parliament. Yet when the final act was passed the co-ownership clause was missing.<sup>229</sup> Procedural reasons were offered by the Government as to why the clause was omitted from the Land Act, yet many within the women's organizations felt betrayed by what was seen as an invalid presidential line item veto.<sup>230</sup> Years later, President Museveni admitted that "[w]hen I learnt that the Bill was empowering the newly-married women to share the properties of the husbands, I smelt a disaster and advised for slow and careful analysis of the property sharing issue."<sup>231</sup> President Museveni stated that it was better to have this matter addressed in the then-pending (and still pending) Domestic Relations Bill.<sup>232</sup> Activists supporting the co-ownership clause saw the President's move as an unconstitutional interference with the legislative process. If the clause was to be moved it should have been done by Parliament.<sup>233</sup>

Uganda's women's organizations utilized a multifaceted approach for obtaining legal reform. These organizations partnered with land reform organizations, such as the Uganda Land Alliance; networked with women in Parliament, development agencies, gender-related NGOs, non-gender-related NGOs, the civil service, the media, and academia; raised the co-owner-

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228. Asiimwe, *supra* note 207, at 121; Tripp, *supra* note 74, at 6.

229. Asiimwe, *supra* note 207, at 121; Tripp, *supra* note 74, at 7.

230. See, e.g., Asiimwe, *supra* note 207, at 121.

231. *Share Parent's Property, Museveni Tells Women*, NEW VISION (May 10, 2000). Aili Mari Tripp notes, "[i]t was believed that the president's decision to shift the clause to the DRB [Domestic Relations Bill] was intended to save face so that the government would not appear anti-woman. But the effect would be to remove the issue from the agenda altogether." Tripp, *supra* note 74, at 7.

232. Tripp, *supra* note 74, at 7. The DRB was controversial in the late 1990s and it has yet to become law. The leader of the Uganda Land Alliance, Jacqueline Asiimwe in explaining why the DRB was, and remains to be, controversial noted that:

The DRB is already riddled with controversy over marital rape, regulation of polygamy, declaring the payment of bride price as no longer necessary in contracting a customary marriage, even the age of marriage . . . and so we saw it as dangerous to add another clause that in essence would lock debate on the whole bill.

*Id.*

233. *Id.*

ship issue in public forums organized by other interest groups, lawyers, development agencies, political groups, and themselves; produced and circulated materials for members of Parliament and other key actors;<sup>234</sup> and lobbied members of Parliament and the sessional committee responsible for the Land Bill.<sup>235</sup>

While the co-ownership clause failed to make the final act, other provisions aimed at providing and protecting women's land rights were included. For example, the Land Act requires prior written consent by both spouses for all transactions involving family holdings.<sup>236</sup> Secondly, the 1988 Land Act voids any decision regarding customary land that denies "women or children or persons with disability access to ownership, occupation or use of any land or imposes conditions which violate" the Constitution.<sup>237</sup> Finally, provisions were included in the 1998 Land Act requiring the various land management bodies to have female representatives.<sup>238</sup> In 2003 the Land Act was amended and

234. Uganda Association of Women Lawyers ("FIDA-Uganda") produced "Land Briefs," which provided summaries of the members of Parliament's views on the proposed Land Bill and the Uganda Women's Network ("UWONET") produced a publication expressing its position regarding the Land Bill. Asiimwe, *supra* note 207, at 125.

235. *Id.* This strategy of obtaining influential allies and mobilizing was successful for gender equity advocates in Rwanda during the constitution-making process. During the constitution-making process gender equity advocates obtained influential allies domestically in the form of government officials and a member of the constitutional commission and internationally from UNIFEM and states such as the United Kingdom and the United States. They also embarked on a mobilizing campaign in which they sought to gain the support of women and men throughout the country for their proposed constitutional reforms. Another key aspect of their strategy was framing their proposals as being consistent with the goals and interests of Rwanda's political elite. The gender equity advocates in Rwanda were able to frame the need for gender equality-based constitutional reforms as a necessary prerequisite for unity and reconciliation, which was the frame utilized by the executive officials in the constitution-making process. Banks, *supra* note 59, at 153-60.

236. Land Act, No. 16, § 40(1)(c)(i) (1998) (Uganda), available at <http://faolex.fao.org/docs/pdf/uga19682.pdf>. Family holdings are defined as "land on which a person ordinarily resides with his or her spouse, and from which they derive their sustenance." *Id.*

237. *Id.* § 28. In full this Article states,

Any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally shall be in accordance with the custom, traditions and practices of the community, concerned; except that a decision which denies women or children or persons with disability access to ownership, occupation or use of any land or imposes conditions which violate articles 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land shall be null and void.

*Id.*

238. One of the five members of the Uganda Land Commission must be a woman,

women's organizations used this opportunity to seek inclusion of a co-ownership clause again.<sup>239</sup> These efforts were similarly unsuccessful despite extensive lobbying efforts.<sup>240</sup>

Advocates for co-ownership in Uganda developed alliances with other aspects of Ugandan civil society. Unlike in Rwanda, the government did not actively support reform for co-ownership. Despite success within Parliament, the President shared the concerns raised by local elites who opposed co-ownership. The frame created and deployed by the co-ownership advocates focused on equality and fairness, but within Parliament the most frequent frame utilized to support co-ownership was protection.<sup>241</sup> Advocates emphasized women's equal contribution to the household, the need for women to be treated equally, and the need for fairness.<sup>242</sup> Opponents advanced a family preservation frame that presented co-ownership as destabilizing because it would challenge traditional gender roles within the family. The co-ownership supporters within Parliament similarly called upon traditional gender roles, but they emphasized the duty to protect vulnerable portions of the population. The overwhelming emphasis on patriarchal norms by non-advocates suggests that the equality frame did not resonate within Parliament despite its prevalence within the public discourse.<sup>243</sup> Advocates were unsuccessful in both the adoption and adaptation process, although the state bears responsibility for the lack of adop-

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one-third of the District Land Boards and Communal Land Associations must be women, and one of the four members of each of the local Land Committees must be a woman. *Id.* §§ 48(4), 58(3), 17(4)(b), 66(2).

239. Tripp, *supra* note 74, at 5.

240. *Id.*

241. These figures are based on an analysis of Uganda Parliamentary debates between July 16, 2002 and June 18, 2003 and newspaper articles available through Al-Africa.com between July 16, 1997 and July 26, 2003. The Parliamentary debates are from the time period in which Parliament was amending the 1998 Land Act and the newspaper articles are from the years when the 1998 Land Act was initially considered in Parliament and the subsequent amendments.

242. Tripp, *supra* note 74, at 10.

243. The equality frame was the most frequently used frame in the newspaper articles. As noted by Merry, human rights norms often challenge existing distributions of power. CEDAW challenges patriarchy and utilizing an equality frame was a strategy for presenting women as valuable human beings entitled to particular rights. The discursive benefits of advancing that frame may have outweighed the strategic benefits of developing a frame that incorporated patriarchal norms and addressed concerns regarding family instability.



tion.<sup>244</sup> The Uganda case demonstrates the difficulty of successful adaptation absent broad collaboration; and despite government support and a successful adoption process, the Rwanda case illustrates the challenge of adaptation without sufficient collaboration or participation by local elites.

### B. *Obtaining Co-Ownership in Rwanda*

Rwanda, like Uganda, has a plural legal system and land is a topic that is governed by both customary law and statutory law.<sup>245</sup> As a result of the civil war and genocide that took place in

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244. Specifically since the Land Bill that passed Parliament included the co-ownership clause.

245. The statutory law stems from the legal system implemented by Belgium during its colonial rule of Rwanda. See Rose, *supra* note 181, at 203; see also Jennie E. Burnet & the Rwanda Initiative for Sustainable Dev., *Culture, Practice and Law: Women's Access to Land in Rwanda*, in WOMEN AND LAND IN AFRICA: CULTURE, RELIGION AND REALIZING WOMEN'S RIGHTS 176, 180-82 (L. Muthoni Wanyeki ed., 2003) [hereinafter Burnet & RISD]. The statutory regulation of land that was implemented created land titles, however these titles were generally only available to foreigners. Titled property was only available to the *civilisé*, and few Africans could prove that they met the standard. *Id.* at 181. *Civilisé* was legally defined as "any non-European who lived in a Western-style house, wore Western clothes, [and] ate Western food with Western utensils." *Id.* at 180 n.5. Pre-colonial Rwanda had two land tenure systems: *ubukonde* operating in the north and northwest and *igikingi* governing in the central, eastern, and southern portions of the state. *Id.* at 179. Within the *ubukonde* system individuals gained access to land by being the first to clear the land and "valorize" it. Rights to such land were held by a lineage and significant management decisions were made by the lineage chief. The lineages maintained economic and political power over their land and used a system of clientship to grant use rights. *Id.* at 180. Clients had to make payments, generally a portion of their harvest or manual labor, to their patrons. Within the *igikingi* system land was distributed by the *mwami*, the political and spiritual leader of the central Rwandan kingdom, or his chiefs. *Id.* at 180, 180 n.4. The land that was distributed consisted of large tracts of land for grazing cattle. This type of land was an important resource for the pastoralist populations in the central and southern portions of the country. *Id.* at 180. The *mwami* distributed land to war heroes and other highly valued individuals within the society. *Id.* Holders of land within the *igikingi* system could lose their land if they lost the favor of the chief or if they lost their cattle due to disease, mismanagement, or raiding. Those who obtained land within the *igikingi* system were expected to make regular gifts to the *mwami* or the chief. As in the *ubukonde* system, a common gift was providing labor to work at the home of the chief or *mwami*. Other types of gifts included cattle, honey, and milk. *Id.* Those with *igikingi* land had the power to partition it and give plots to other individuals to cultivate. These individuals became clients who would provide seasonal gifts and labor to the *igikingi* landholder. *Id.* Political and economic power shifted during colonialism and the land tenure systems changed as well. In the 1960s during the transition from colonial rule to independence, these traditional land tenure systems were abolished. *Igikingi* land was placed in the hands of communal authorities and individual ownership rights were given to those holding *ubukonde* land. *Id.* at 182.

Rwanda in the early 1990s the state's customary legal system was "rendered barely functional, if not obsolete."<sup>246</sup> Consequently, during Rwanda's reconstruction customary legal practices were recreated as individuals making and adjudicating claims found the customary legal system unable to effectively address the existing disputes. For example, after the war refugees began returning to Rwanda. The returning refugees included both old and new caseload refugees. Old caseload refugees refer to Rwandans that left the country more than ten years before the early 1990s war and genocide. These individuals typically left Rwanda between 1959 and 1962. New caseload refugees were the individuals who left Rwanda in the early 1990s.<sup>247</sup> New rules had to be devised to determine who would get to settle on what land, what type of settlement permit would be issued to returnees, and what, if any, costs would be charged for land administration.<sup>248</sup>

Within the customary land tenure systems as they currently operate, men—fathers, husbands, or male children—guarantee women's access to and ownership of land. Land is generally inherited patrilineally and land held by the lineage is divided to provide each male descendant a plot of land to build a house and fields to cultivate.<sup>249</sup> Married women obtain automatic access to their husband's fields for cultivation purposes.<sup>250</sup> Women do not have a right to inherit ownership rights from their fathers or their husbands and they have limited rights regarding the management and disposition of property to which they have access.<sup>251</sup> When a husband dies women are entitled to retain usufructuary rights to the husband's land and to remain in the matrimonial home.<sup>252</sup> Women hold the land and the home in trust for the male heirs who will inherit based on patrilineal inheritance.<sup>253</sup> If a woman does not have children, her access to the marital land and home depends upon the goodwill of her in-

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246. Rose, *supra* note 181, at 204.

247. *Id.* at 206.

248. *Id.* at 206.

249. Burnet & RISD, *supra* note 245, at 187.

250. *Id.*

251. Fathers could bestow gifts of land upon their daughters or they could inherit if they had no brothers. *Id.* at 210; Rose, *supra* note 181, at 209.

252. Burnet & RISD, *supra* note 245, at 187.

253. *Id.*; Rose, *supra* note 181, at 209.

laws.<sup>254</sup> A woman's land rights under Rwanda's pre-genocide customary system, as under Uganda's customary rules, were contingent upon her status as a wife, mother, daughter, or sister.

The majority of the population in Rwanda lives in rural areas and most individuals obtain land through inheritance, land grant, loan, or sale.<sup>255</sup> While the sale of customary land is prohibited, it has become increasingly common as land fragmentation has become more severe.<sup>256</sup> In the new resettlement villages created after the war and genocide, local authorities were responsible for allocating land plots. Established villages were faced with determining how to allocate land amongst returning refugees. Local authorities were responsible for organizing land-sharing arrangements to address this issue.<sup>257</sup> When individuals have land disputes they are to exhaust local remedies before seeking redress in the formal court system.<sup>258</sup> The first level of review is with the extended family, then the cell, and finally the sector.<sup>259</sup> These forums for review do not utilize courts, but rather traditional *gacaca*.<sup>260</sup> The majority of disputes are addressed at this level, but access to financial resources, education level, and social connections affect whether or not women pursue their claims within the court system applying statutory law.<sup>261</sup>

In 1996, the Ministry of Gender, Family and Social Affairs introduced a draft bill on inheritance and marital property re-

254. Burnet & RISD, *supra* note 245, at 187; Rose, *supra* note 181, at 209-10.

255. Ninety-one percent of the Rwandan population depends upon agricultural for their livelihood. Burnet & RISD, *supra* note 245, at 176.

256. Rose, *supra* note 181, at 208. Land fragmentation refers to the diminishing size of land plots available for inheritance. It is occurring because "males were increasingly inheriting land as a right," which led to "the incessant subdivisions of land to satisfy the claims of sons. With each passing generation, a family's landholding was increasingly fragmented." *Id.* By 1986, smallholder families had an average farm size of 1.2 hectare. The average family size in Rwanda included four sons, meaning that each son could expect to inherit 0.3 hectare. A household of four persons is reported to need from one to two hectare to satisfy basic subsistence needs. *Id.* Between 1960 and 2001 the average size of a family farm plot decreased from two hectare to 0.5 hectare. *Id.*

257. Rose, *supra* note 181, at 205.

258. Under the post 2003 structure, the relevant courts would be the District courts, Provincial Courts, and the Cassation Court. *Id.*

259. *Id.*

260. In 2001, the Rwandan government implemented the *Gacaca* Law for genocide, which created new *gacaca* courts to adjudicate claims related to genocide. These modern forms of *gacaca* exist simultaneously with the traditional *gacaca* courts that address matters like land disputes. *Id.*

261. *Id.* at 226.

gimes. This bill became law in 1999 and it creates three marital property regimes and grants women inheritance rights to their birth family property and marital property (“Matrimonial Regimes, Liberties, and Succession Law”).<sup>262</sup> The law only addresses usufructuary rights because all land in Rwanda belongs to the state. The default regime is “community of property” and it is “a contract by which the spouses opt for a marriage settlement based on joint ownership of all their property—moveable as well as immoveable—and their present and future charges.”<sup>263</sup> The two other options are “limited community of acquests”<sup>264</sup> and “separation of property.”<sup>265</sup> The regime of limited community of acquests “is a contract by which spouses agree to pool their respective properties owned on the day of marriage celebration, to constitute the basis of the acquests as well as the property acquired during marriage by a common or separate activity, donation, legacy, or succession.”<sup>266</sup> The separate property regime “is a contract by which spouses agree to contribute to the expenses of the household in proportion to their respective abilities while retaining the right of enjoyment, administration and free disposal of their personal property.”<sup>267</sup>

The Matrimonial Regimes, Liberties, and Succession Law similarly governs the inheritance of marital property. For couples married within the community property regime, the in-

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262. Law No. 22/99 of 12/11/1999 to supplement Book One of the civil code and to institute Part Five regarding matrimonial regimes, liberalities and successions, Official Gazette of the Republic of Rwanda, art. 4 (community property), arts. 66, 70, 71 (inheritance) (Nov. 15, 1999) (Uganda), *available at* <http://www.grandslacs.net/doc/2740.pdf> [hereinafter Matrimonial Regimes, Liberties, and Succession Law].

263. *Id.* arts. 2, 3.

264. Acquests refers to property, “acquired by purchase, gift, or any means other than inheritance.” BLACK’S LAW DICTIONARY 24 (8th ed. 2004).

265. Matrimonial Regimes, Liberties, and Succession Law, *supra* note 262, arts. 2, 7.

266. *Id.* art. 7. The law notes that:

[a]t the marriage celebration, the spouses who opted for [this regime] shall establish and submit to the officer of civil status a signed inventory of assets and liabilities defined by each spouse to constitute the community. Any property that is not inventoried as common property shall, be presume to be personal property.

*Id.* art. 8.

Both the community property regime and the limited community of acquests regime are dissolved by divorce, legal separation, or voluntary modification of the martial regime. *Id.* art. 24.

267. *Id.* art. 11.

testate succession rules are as follows: "the surviving spouse shall ensure the administration of the entire patrimony while assuming the duties of raising the children and assistance to the needy parents of the *de cuius* [deceased]."<sup>268</sup> For couples utilizing the separation of property regime the heirs pursuant to intestate succession are in the following order: the children, the parents, the full siblings, the half-siblings, and the uncles and aunts of the deceased.<sup>269</sup> Couples using the limited community of acquets regime adhere to the community property intestate rules for the jointly owned property and the separation of property rules for the separate property.<sup>270</sup> Children, both male and female, can inherit from their parents. The law grants all legitimate children, as defined within civil law, the right to "inherit in equal parts without any discrimination between male and female children."<sup>271</sup>

In Rwanda the default rules regarding women's access to and ownership of land changed as a result of direct government intervention prompted by children's and women's rights groups and the Ministry of Gender, Family and Social Affairs.<sup>272</sup> Yet context was also important. Post-genocide Rwanda had a population that was majority female, and there were a significant number of female-headed households in need of land.<sup>273</sup> Additionally, through the death of many Rwandan men and the significant numbers in exile, there were fewer men to challenge women's specific claims to land.<sup>274</sup> Despite the provision of legal rights providing for women's access to and ownership of land,

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268. *Id.* art. 70.

269. *Id.* art. 66.

270. *Id.* art. 71.

271. *Id.* art. 50. The law also makes provisions for minor children:

The family council shall determine the part of the patrimony to be earmarked for the raising of minors and the part to be shared between all the children of the *de cuius* [deceased]. When all children have reached the age of majority, they shall equally share in the rest of the patrimony initially earmarked for raising the minors.

*Id.* art. 51.

272. This ministry was quite active in post-genocide Rwanda in advocating legal reforms to further gender equality. See Banks, *supra* note 59, at 148-53 (discussing the role of the Ministry in collaboration with civil society actors in the constitution-making process).

273. Burnet & RISD, *supra* note 245, at 185.

274. Rose, *supra* note 181, at 229 (stating that some leaders found for women because there were no known men left in the family).

both within the customary legal system and the statutory legal system, women have faced challenges in settling land disputes.<sup>275</sup> The challenges arise when male family members challenge women's land claims. Women's success when bringing land disputes tends to occur when they were supporting minor children, had resided on the land in question continuously, or had cared for the original owner or provided him with resources.<sup>276</sup> Yet if women were seeking land that was desired by adult male relatives—even sons—women's land claims were generally considered to be weak.<sup>277</sup> Despite the existence of legal protections through customary rules and statutory rights, the belief that women's land rights are secondary to those of men has hampered women. Research on current conceptions of women's land rights in Rwanda has found that men and women alike generally believe that land belongs to the family head and family property should be used in the best interests of the family. While women were recognized as possible family heads, common beliefs of men were that women were not as capable as men in managing land.<sup>278</sup> With regard to use or ownership rights, men and women stated that male and female children should be treated equally in the distribution of family land, but they worried that dividing land equally would exacerbate land scarcity and small family holding issues.<sup>279</sup> Many men expressed concern that there simply is not enough land to distribute. Dividing the small family holdings even further would not enable any family to sustain itself. Thus, these men concluded that female children should not inherit family land.<sup>280</sup> The assumption is that women can gain access to land through their husbands. Many male respondents expressed concern that women could inherit land from two sources, their parents and their husbands, while men could only inherit from their parents. A significant number of female respondents agreed with regard to married women, but believed unmarried women and women separated from their

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275. The legal situation in the mid-1990s also created opportunities for women to address their land disputes. The uncertainty of the rules and the gaps between the customary and statutory legal systems enabled some women to utilize their wealth, education, and social connections to their advantage. *Id.* at 225.

276. *Id.* at 227.

277. *Id.*

278. Burnet & RISD, *supra* note 245, at 189, 196.

279. *Id.* at 196.

280. *Id.*

husbands should have access to their parent's property.<sup>281</sup>

Despite the enactment of statutory law realizing the CEDAW obligation that men and women have the same rights to marital property, the implementation of the law has faced cultural and customary obstacles. The norms and motivations underlying the statutory reforms are not supported by a significant number of rural Rwandans.<sup>282</sup> In light of the concerns noted above, rural women believe that the law is only helpful to urban women who work and wealthy families that have large landholdings.<sup>283</sup> The 1999 law faces resistance "because of its collision with prevailing customs in terms of conceptions of marriage and inheritance."<sup>284</sup>

Public awareness campaigns have been very effective in letting women know that the inheritance laws have changed. The use of radio broadcasts, newspaper articles, and word-of-mouth increased knowledge of the Matrimonial Regimes, Liberties, and Succession Law and many women have tried to use it to resolve specific land disputes.<sup>285</sup> Yet these campaigns have not addressed the foundational norms that make it acceptable to privilege male children's property rights over female children's rights in the face of land scarcity. The idea that women's land rights are secondary to men's persists, and, absent collaboration with local elites within the customary legal system, the conflicts between the statutory and customary norms will persist.

### III. *SHIFTING SOCIAL MEANING THROUGH COLLABORATION*

The CEDAW Committee's approach to adaptation is to present CEDAW norms and obligations to the general public through awareness-raising campaigns and educational measures. These measures are promoted as a means of creating an enabling environment to challenge cultural traditions, transform cultural patterns of conduct, and change discriminatory stereotypes. The emphasis is on knowledge and understanding.<sup>286</sup> Yet

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281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 197.

285. See Rose, *supra* note 181, at 246 n.125; see also Burnet & RISD, *supra* note 245, at 195.

286. See *supra* notes 146-57 and accompanying text.

the emergence of a new frame within public discourse as a credible alternative requires more than the introduction of the new frame. It requires corresponding shifts in the states' political opportunity structure, particularly the discursive opportunity structure.<sup>287</sup> Two particularly useful shifts relate to political access for CEDAW advocates and supporters and state collaboration with influential allies. As discussed in Part I.B., influential allies, specifically locally-based allies, serve as an additional resource, providing location-specific knowledge regarding the discursive opportunity structure, access to relevant institutions and individuals, material resources, and, perhaps most importantly in this context, legitimacy.<sup>288</sup> Keck and Sikkink's work identifies specific components of the discursive opportunity structure that are key factors in determining whether or not new ways of conceptualizing ideas and practices will become viable alternatives within public discourse.<sup>289</sup>

The narrow range of locally-based allies has been detrimental to shifting public discourse and attitudes about women's property rights.<sup>290</sup> The introduction of new ideas regarding women's relationship with property alone has not been sufficient for changing "social and cultural patterns of conduct."<sup>291</sup> While this is a long-term process, it is one that also requires structural reform. This Article has focused on the role of the discursive opportunity structure, political access, and influential allies.<sup>292</sup>

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287. See FERREE ET AL., *supra* note 54, at 62.

288. See *supra* Part I.B.

289. KECK & SIKKINK, *ACTIVISTS*, *supra* note 81, at 192-93 (identifying symbolic, information, accountability, and leverage politics as key strategies for bringing about discursive changes in the positions of states and international organizations).

290. Advocates and scholars writing about women's movements throughout sub-Saharan Africa are divided on the question of whether advocates should seek to reform customary land tenure systems or statutory laws. In Uganda the decision was made to focus on statutory laws and seek to obtain legal rights guaranteeing women's access to and ownership of land within the state's statutory legal regime. The justification for this strategy is based on a concern that community leaders responsible for administering disputes within the customary land tenure system were hostile to reforms increasing women's access to land and ownership opportunities. Yet in ignoring this influential segment of the state's elites in developing and deploying its framing strategy, the advocates have been unable to shift the public discourse regarding default co-ownership or the social meaning of married women's property rights. See *supra* notes 74, 207 and accompanying text.

291. CEDAW, *supra* note 1, art. 5(a)

292. The relevance of political and legal structural reform has been adequately addressed within the rule of law literature. See, e.g., Carothers, *supra* note 46.



These types of reforms can be effective in facilitating either internalization or conformity, the end product of persuasion and acculturation. It creates a context in which gender equality is presented as a fundamental norm either within the state's culture or to members of the reference group. Collaboration with local elites can assist in identifying the supportive aspects of the state's discursive opportunity structure and developing a frame that builds upon those ideas. In the example discussed in Part I regarding the use of education to eradicate FGC, the project combined education, influential allies, and government support.<sup>293</sup> The campaign not only targeted individual members of society, it worked to obtain the support of religious leaders who were key figures within the community. Additionally, these programs received the support of the government. The social meaning attached to FGC was able to shift because FGC was framed as a literacy, family planning, and health care issue and that frame was able to gain traction and resonance because of support from significant components of the state's political opportunity structure.<sup>294</sup>

Increasing political access for CEDAW supporters provides new avenues for these actors to impact the political process and provide additional support for CEDAW-consistent legal reforms. The access that CEDAW supporters gain, however, should facilitate internal inclusion rather than eradicating external exclusion.<sup>295</sup> The internal inclusion of CEDAW supporters within political institutions increases the legitimacy and prominence of the CEDAW norms, which can facilitate internalization and conformity. Yet without additional shifts in the state's discursive opportunity structure, political access will be insufficient as demonstrated by the Rwanda case study.<sup>296</sup> The CEDAW Committee's compliance discourse pays insufficient attention to the variety of

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293. See *supra* Part I.

294. See Cao, *supra* note 57, at 405.

295. External exclusion refers to "the ways in which individuals are prevented from participating in decision-making forums." Banks, *supra* note 59, at 112 (citing IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 55 (2000)). Internal exclusion exists when "people lack effective opportunity to influence the thinking of others even when they have access to the fora and procedures of decision-making." IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 55 (2000).

296. This is the point made by Stromseth, Wippman, and Brooks and others about the need for rule of law reform to address adaptation. See *supra* notes 44-45 and accompanying text.

relevant legal institutions within the discursive opportunity structure, particularly the role of influential allies within customary legal systems.<sup>297</sup> Collaboration is overwhelmingly recognized as relevant for institutional reform in the area of obtaining technical and financial assistance, preparing the periodic report, following-up implementation for CEDAW, formulating and implementing policies and programs, and enacting monitoring mechanisms.<sup>298</sup> The Committee is increasingly recognizing the value of collaborating with meaning-making institutions and actors in its recommendations. State parties are encouraged to collaborate with civil society organizations, such as women's organizations and human rights organizations, in the adaptation process. There is, however, no specific recommendation that state parties collaborate with those responsible for administering the customary legal system.<sup>299</sup>

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297. Collaborating with influential actors within the society connects the state's interest in gender equality with relevant reference groups. Partnering with such groups is important whether the goal is internalization or conformity. Working with society members who are influential in setting and regulating norms and values legitimizes the CEDAW norms. Such legitimization supports the internalization of these norms. Additionally, acculturation works through "peer pressure," which requires that there be a group whose acceptance individuals or states are interested in obtaining. If the reference group supports the CEDAW norms then those individuals interested in identifying with the reference group will conform to these norms. The social rewards and punishments provided by these reference groups will facilitate conformity. Partnering with reference groups is relevant for shifting the political opportunity structure in ways that support CEDAW advocates and for deploying social rewards and punishments. Yet it will be difficult for the CEDAW Committee to make specific recommendations in this area without specific knowledge regarding the structural and cultural aspects of the state. Giving general recommendations encouraging state parties to identify these groups and then partner with them is similar to the general collaboration recommendations currently being made. To facilitate the Committee being able to credibly make such recommendations the Committee should utilize the services of country experts.

298. See, e.g., Benin Comments, *supra* note 131, ¶ 162; Nigeria Comments, *supra* note 131, ¶ 294; Sierra Leone Comments, *supra* note 131, ¶ 368; Tanzania Comments, *supra* note 131, ¶ 238.

299. Occasionally there are general suggestions to collaborate with community leaders, but customary legal officials are not specified. See, e.g., Angola Comments, *supra* note 131, ¶ 147 ("Introduce measures to modify or eliminate cultural practices and stereotypes that discriminate against women—work with civil society organizations, women's groups and community leaders as well as teachers and the media to undertake such efforts."); Gambia Comments, *supra* note 131, ¶ 196 (recognizing the importance of involving civil society and religious leaders for eliminating female genital mutilation ("FGM")); Mali Comments, *supra* note 131, ¶ 194 ("undertake such efforts in collaboration with civil society organizations, women's non-governmental organizations ("NGOs") and community leaders, with a view to changing discriminatory social and cultural patterns of conduct about the roles and responsibilities of women and men in

Shifting the public discourse around women's property rights in Rwanda and Uganda followed different paths and ended with different legal reforms. In Rwanda advocates supporting increased property rights for women partnered with the government, which provided political access.<sup>300</sup> This partnership also generated substantive input regarding the content of the reforms and potential legitimacy for the resulting reforms. There was, however, little to no reported collaboration with customary legal officials. The advocates for women's land rights developed a national network of women's organizations that lobbied government officials. The situation in Rwanda after the genocide was one in which the socio-cultural dimensions of the state's discursive political opportunity structure had changed.<sup>301</sup> Social norms regarding women's land tenure shifted to address the reality of a predominantly female population.<sup>302</sup> Few men were present to challenge women's specific land claims and the government supported the formalization of gender equality norms.<sup>303</sup> The State provided resources for the drafting and enactment of legislation that enables women to inherit land from their fathers and husbands and creates default co-ownership for married couples.<sup>304</sup> Collaboration with customary legal officials may have been easier than anticipated in light of these socio-cultural shifts.

In contrast, advocates for women's property rights in Uganda never succeeded in obtaining the overwhelming support of executive government officials.<sup>305</sup> The relevant cabinet-level ministries challenged the advocates to prove that the issue of property rights for women was an issue deserving government attention.<sup>306</sup> This challenge prompted civil society organizations

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the family and in society."); Togo Comments, *supra* note 131, ¶ 154. When such individuals have been mentioned in this context the Committee has recommended that they be the target of the awareness-raising efforts. See Ghana Comments, *supra* note 131, ¶ 233; Sierra Leone Comments, *supra* note 131, ¶ 370.

300. See Banks, *supra* note 59, at 148-53.

301. See *supra* note 70 for an explanation of the discursive opportunity structure.

302. See Rose, *supra* note 181, at 199-202.

303. *Id.* at 214-17.

304. *Id.*

305. These advocates were successful in obtaining the support of members of Parliament as the final vote passing the bill with the co-ownership clause demonstrates. Uganda Hansard, June 18, 2003, Bills, Third Reading, The Land (Amendment) Bill (Uganda).

306. See generally Asiimwe, *supra* note 207.

to commission a study on women's attitudes regarding land rights.<sup>307</sup> The socio-cultural aspects of the discursive opportunity structure within Uganda overwhelmingly supported norms reinforcing traditional gender roles. Co-ownership was seen as a threat to the basic fabric of society.

In addition to lobbying to obtain the support of government officials, the advocates in Uganda organized and obtained the support of various domestic organizations including the Uganda Land Alliance, the leading domestic NGO working on land reform.<sup>308</sup> The Ugandan advocates for co-ownership had a broad base of domestic support for a frame that presented women's access to land as a basic right. What they lacked was strong support from executive government officials and officials within the various customary legal systems. In contrast, in Rwanda advocates had strong government support, but a narrow base of domestic support. In both countries there are numerous examples of violations of the CEDAW obligation of providing spouses with the same rights regarding the ownership, acquisition, enjoyment, and disposition of marital property.<sup>309</sup>

The frame that was introduced within the public discourse failed to resonate with the critical constituents. In Rwanda that constituency was the broader public and customary legal system officials. Despite the 1999 laws providing for female inheritance and default co-ownership for marital property,<sup>310</sup> many women's property claims are challenged based on traditional notions of property ownership. The advocates were successful in obtaining legal reform, but they have yet to achieve widespread social reform regarding the equality of men's and women's land rights.<sup>311</sup> When male relatives seek to contest the ownership or

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307. *Id.*

308. *Id.*

309. CEDAW, *supra* note 1, art. 16(1)(f).

310. Matrimonial Regimes, Liberties, and Succession Law, *supra* note 262, arts. 2, 50.

311. Another challenge faced in Rwanda is the significant number of women in long-term relationships that are not registered marriages. The Matrimonial Regimes, Liberties, and Succession Law of 2000 only extends default co-ownership to married couples whose marriages are registered with local officials.

Consequently, many of the property disputes that emerge are between individuals who do not have registered marriages and are therefore unable to benefit from the default regime created by the 2000 law. It is not, however, uncommon for states to extend community property rights to individuals whose marriage is recognized by the state.

use of family land they often ignore the statutory and customary legal rules and principles that challenge their legal position.<sup>312</sup> Despite statutory law granting women particular rights, women's land rights are often believed to be secondary to men's land rights.<sup>313</sup>

The awareness campaigns in Rwanda have increased knowledge about statutory law governing land rights, but it has not been immediately effective in overcoming the patriarchal norm privileging men's property rights over women's. This tension is not rooted in customary law, which traditionally granted women access to land, yet land scarcity has challenged these traditional rules.<sup>314</sup> As has been noted by numerous scholars, customary law, like statutory law, is fluid and responds to political, social, and economic events occurring within the society.<sup>315</sup> The inclusion of officials responsible for administering customary legal systems in the adaptation process regarding women's land rights would assist in the development of effective domestic enforcement mechanisms. The desire not to engage customary legal officials in the quest for increased land rights for women pretends that these individuals and their views do not impact the implementation and enforcement of statutory law. The resources needed to pursue a land dispute under statutory law are beyond the reach of many individuals.<sup>316</sup> Consequently, dispute settlement options pursuant to customary law are often utilized, which makes the customary legal officials key participants in protecting women's land rights. Excluding them from the adaptation process divorces the CEDAW obligations and norms from a critical component of a state's discursive opportunity structure. Such a disconnect weakens the procedural and substantive aspects of strategic framing that are central to the adaptation process.

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312. See Rose, *supra* note 181, at 228 ("In a number of cases, blood relatives or in-laws went against the spirit of customary law such that the blood relatives of unmarried women denied them land, and the in-laws of legally married women denied them land after the death of their husbands.").

313. *Id.* at 227.

314. See *supra* notes 245-61 and accompanying text for a discussion of customary land tenure in Rwanda.

315. See, e.g., Rose, *supra* note 181, at 218; Lynn S. Khadiagala, *Justice and Power in the Adjudication of Women's Property Rights in Uganda*, 49 AFR. TODAY 101, 114 (2002).

316. Financial resources are necessary to pay for transportation to the administrative offices or courts where the claim will be heard and to obtain the legal services and documentation that is necessary to substantiate a legal claim. Rose, *supra* note 181, at 226.

The strategic framing in Uganda by advocates for co-ownership focused on equality. Women's access to land was presented as a basic human right.<sup>317</sup> This frame was deployed through the media, meetings with executive officials and parliamentarians, interactions with domestic NGOs, and meetings with members of the public. The discourse within Parliament utilized a different frame, one that focused on the need to protect vulnerable aspects of the society. Co-ownership was presented as necessary to provide access to property for women who are abandoned by their husbands. The Parliamentary debates are replete with images of decent honorable women left destitute by unsavory men.<sup>318</sup> Parliamentarians opposed to co-ownership never questioned the equality of women or the appropriateness of women's access to land.<sup>319</sup> Rather opposition was framed as detrimental to families, providing an unfair advantage to women, or in conflict with custom and tradition.

President Museveni shared the concerns raised by opponents to the co-ownership clause, and he deleted the co-ownership provision when he signed the bill.<sup>320</sup> When revisions to the Land Act were considered by Parliament during the 2002/2003 session,<sup>321</sup> the draft bill did not include provisions for default co-ownership. Despite advocates' lobbying efforts in 2002 and 2003 and parliamentary support for such provisions in 1998, co-ownership was never included in the amended Land Act.<sup>322</sup> The opposition concerns about a shift in the distribution of power within families were successful.<sup>323</sup> As in Rwanda, the domestic network supporting default co-ownership rules was not broad

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317. See Asiimwe, *supra* note 207, at 178-79.

318. See, e.g., Uganda Hansard, Apr. 9, 2003, Statement of Prof. Victoria Mwaka, Woman Representative, Luwero (Uganda); Uganda Hansard, Apr. 9, 2003, Statement of Ms. Betty Amangi, Woman Representative, Apac (Uganda).

319. *Id.*

320. See Tripp, *supra* note 74, at 7-8.

321. *Id.*

322. The amended Land Act addressed some of the concerns justifying a default co-ownership regime by granting spouses the "right to have access to and live on family land" and the right to withhold consent for any transaction regarding the land that would affect the spouses' rights. Parliamentary Debates, June 17, 2003 (Consideration and adoption of the report of the select committee on the Land (Amendment) Bill, 2002) (statement of the Chairman of the Select Committee on the Land (Amendment) Bill, 2002 Mr. Fred Ruhindi), available at [http://www.parliament.go.ug/hansard/hans\\_view\\_date.jsp?dateYYYY=2003&dateMM=06&dateDD=17](http://www.parliament.go.ug/hansard/hans_view_date.jsp?dateYYYY=2003&dateMM=06&dateDD=17) (last visited Nov. 30, 2008).

323. See Tripp, *supra* note 74, at 7-8.

enough. The framing strategy utilized by the advocates for women's property rights did not target or sufficiently include local elites, particularly those responsible for administering customary law.

In response to Uganda's third periodic report submitted in 2000, the CEDAW Committee had specific recommendations regarding women's property rights. The Committee began by expressing concern "that customs and traditional practices, prevalent in rural areas, prevent women from inheriting or acquiring ownership of land and other property."<sup>324</sup> The Committee urged Uganda to "eliminate all forms of discrimination with respect to the ownership, co-sharing and inheritance of land" and to introduce measures that would address the "negative customs and traditional practices, especially in rural areas, which affect full enjoyment of the right to own property by women."<sup>325</sup> The Committee also expressed concern with "the continued existence of legislation, customary laws and practices on inheritance, land ownership, [and] widow inheritance . . . that discriminate against women and conflict with the Constitution and the Convention."<sup>326</sup> To address this concern the Committee urged Uganda to "amend these laws and prohibit such practices" and to "work with the relevant ministries and non-governmental organizations, including lawyers' associations and women's groups, to create an enabling environment for legal reform and effective law enforcement."<sup>327</sup>

The Committee's recommendations to Uganda follow the general trend of its compliance discourse, emphasizing programmatic reforms. In addressing the issue of women's access to land, the Committee focused on legal rights and programmatic reforms that would assist in creating and protecting such rights.<sup>328</sup> The Committee recognized the need for ad-

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324. Uganda Comments, *supra* note 131, ¶ 151.

325. *Id.* ¶ 152.

326. *Id.* ¶ 153.

327. *Id.* ¶ 154.

328. The programmatic recommendations are those that urge Uganda to "eliminate all forms of discrimination with respect to the ownership, co-sharing and inheritance of land"; introduce measures to address "negative customs and traditional practices, especially in rural areas, which affect full enjoyment of the right to own property by women"; and to "work with the relevant ministries and non-governmental organizations, including lawyers' associations and women's groups, to create an enabling environment for legal reform and effective law enforcement." *Id.* ¶¶ 152, 154.

aptation when it recommended that Uganda introduce measures to address “negative customs and traditional practices” and that the state “create an enabling environment for legal reform and effective law enforcement.”<sup>329</sup> The compliance discourse within CEDAW’s jurisprudence highlights the role of cultural customs and practices in inhibiting women from having equal rights to access and own land. Yet, the Committee provides no structural recommendations, unlike the Committee’s recommendations to other states regarding the adaptation process. The Committee did not urge, recommend, or call on Uganda to use educational measures or awareness-raising programs to address the above-noted adaptation concerns. Rather Uganda is left to its own devices to determine what measures will address “negative customs and traditional practices.”<sup>330</sup>

Were the Committee to recognize the variety of legal institutions that can be useful in the adaptation process as meaning-making institutions, it would be able to acknowledge the need for state parties to collaborate with customary legal officials. The Committee’s collaboration recommendations tend to focus on presumed supporters, women’s organizations and human rights organizations. The failure to mention customary legal officials may be connected to the decisions made by certain gender equality advocates throughout sub-Saharan Africa that customary law is the problem to be solved and statutory legal reform is the answer.<sup>331</sup> The Committee’s statements regarding customary law similarly frame it as a problem, yet the recommendations never target it for reform.<sup>332</sup> The strategy offered is one in which statutory law is enacted or revised to invalidate problematic customary law.<sup>333</sup> As the Rwanda case study demonstrates, in states operating with plural legal systems this approach is not ef-

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329. *Id.*

330. *Id.* ¶ 152.

331. See *supra* notes 189-90 and accompanying text.

332. See, e.g., Angola Comments, *supra* note 131, ¶ 191 (“The Committee is concerned about the existence of the dual legal system of civil law and customary law, which results in continuing discrimination against women, particularly in the field of marriage and family relations.”); Zimbabwe Comments, *supra* note 131, ¶ 139 (“The Committee notes with great concern that, although the national laws guaranteed the equal status of women, the continued existence of and adherence to customary laws perpetuated discrimination against women, particularly in the context of the family.”).

333. See, e.g., Angola Comments, *supra* note 131, ¶ 192; Nigeria Comments, *supra* note 131, ¶ 296.



fective.<sup>334</sup> Including customary legal officials within the adaptation process would assist in developing frames that draw upon supportive elements within the customary legal system. Developing parallels between the customary legal system and the CEDAW obligations and norms can be useful in creating domestic enforcement mechanisms that will effectively enforce CEDAW.

### CONCLUSION

The CEDAW Committee and other treaty bodies recognize the importance of domestic enforcement. A key aspect of facilitating domestic enforcement is the adoption and adaptation process. A review of the compliance discourse within the CEDAW Committee's jurisprudence reveals that the Committee seeks to encourage and support an adoption and adaptation process. Yet the Committee's adaptation recommendations provide limited guidance due to the emphasis on knowledge, awareness, and circumscribed collaboration. The constructivist and sociological framing literatures empirically demonstrate and theoretically explain the role of local elites in the adaptation process. The application of these insights to the CEDAW Committee's compliance discourse suggests that collaboration is critical for the adaptation process.

Within the compliance discourse, treaty bodies like the CEDAW Committee make three types of recommendations: structural, legal, and programmatic. To facilitate CEDAW compliance, the Committee seeks to support the development of domestic enforcement mechanisms. A key feature for effective domestic enforcement is creating an enabling environment for law reform and enforcement. Recognizing the role of norms and socialization in this process of adaptation, the Committee recom-

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334. Rwanda has not submitted a report since the legal reforms extended inheritance rights to girls and women and created a default community property regime for married couples. Yet the CEDAW norms regarding women's property rights have not achieved prescriptive status. Women's property rights are often understood to be secondary to men's property rights. As long as a man is not challenging a women's access to specific land, the women's rights will be affirmed. Yet if a male family member challenges a woman's claim, her rights will rarely be affirmed. This situation in Rwanda exemplifies why the CEDAW Committee conceptualizes compliance as consisting not only of state behavior conforming to the substantive provisions of the treaty, but also of creating and strengthening domestic enforcement mechanisms, which requires the adaptation of CEDAW's norms.

mends that state parties implement educational measures and awareness-raising programs to increase knowledge about CEDAW obligations and norms.<sup>335</sup> To support this aspect of domestic enforcement, the Committee overwhelmingly makes programmatic recommendations. These recommendations generally encourage states to “take appropriate measures” and to adopt or implement programs or policies that support particular CEDAW obligations. The CEDAW Committee’s embrace of norms and the need for adaptation is circumscribed by the Committee’s narrow conception of acceptable collaboration partners. By focusing on like-minded organizations and individuals, the Committee does not encourage state parties to engage with other components of the discursive opportunity structure that can provide alternative strategies for adaptation. Customary legal officials are key social actors in most communities throughout sub-Saharan Africa. Excluding these individuals from the adaptation process causes state parties to miss a key opportunity for successfully framing CEDAW obligations and norms in a way that will facilitate domestic enforcement.

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335. The role of norms in this process has been empirically demonstrated and theoretically explained by legal scholars, political scientists, sociologists, and anthropologists. See, e.g., Koh, *supra* note 7; KECK & SIKKINK, *ACTIVISTS*, *supra* note 81; Goodman & Jinks, *Influence States*, *supra* note 17; FERREE ET AL., *supra* note 54; MERRY, *supra* note 71.