

WOMEN'S INHERITANCE AND CONDITIONALITY IN THE FIGHT AGAINST AIDS

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Where poor enforcement of women's inheritance rights and high HIV infection rates combine, they form a vicious cycle—where more women are left economically vulnerable, more women are forced into infection risk by the sex trade and “widow inheritance” practices. Women's inheritance rights are critical in the world's efforts to curb the spread of AIDS, but without a method of enforcement that creates strong incentives for governments to implement them, these rights run the risk of continuing to be neglected. This article asserts that placing conditions on aid money could help make women's inheritance rights a reality.

The article focuses on the impact of domestic family structures on the national and international stage. The intersection of poorly enforced women's inheritance rights and HIV infection rates pulls inheritance, which touches on a culture's deeply-rooted ideas of family and morality, into conflict with a population's fight for survival against a deadly epidemic. This article argues that international economic institutions such as the IMF and World Bank can offer the case-by-case analysis and support necessary to navigate such a difficult conflict of priorities. First, the article outlines the importance, both on a domestic and international level, of women's inheritance rights, showing that the rights are not adequately protected under domestic jurisdiction. Second, the article demonstrates that the international community has a right and duty to enforce women's inheritance rights. Finally, the article proposes that international economic institutions take a leadership role in enforcing the rights, primarily through conditions on aid lending.

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INTRODUCTION

A woman has lost her husband to AIDS. She has children. She owns little or nothing in her own name. But for now, she has a home—shelter for her children and herself, one constant in the upheaval of her husband's death.

If she lives in Uganda, she will likely be “inherited”—forced to have sex with her late husband's male relatives—until she becomes little more than a concubine to one. Regardless of where she lives, she will likely lose her home to her husband's relatives, often within days of her husband's death and while her shock, confusion, and grief are still fresh, and often under cruel accusations that she infected her husband with HIV. Regardless of where she lives, homelessness will almost certainly leave the sex trade as her most viable option. And regardless of where she lives, when she loses her home, her risk of spreading HIV, or of becoming infected in the first place, will exponentially increase.

Recently, international organizations and multilateral human rights organizations have paid increasing attention to women's inheritance rights, particularly those of women in areas of Africa most affected by the spread of HIV/AIDS.¹ In the resulting discussion,² human

¹ See MEAZA ASHENAFI & ZENEBEWORKE TADESSE, WOMEN, HIV/AIDS, PROPERTY AND INHERITANCE RIGHTS: THE CASE OF ETHIOPIA 8 (2005), available at http://www.aidslex.org/site_documents/WG-0123E.pdf. “In the context of the rapid growth of

rights experts have agreed that governments' failure to protect women's ability to inherit from fathers or husbands aggravates the spread of HIV/AIDS within those countries.³ In March 2009, the UN Special Envoy for HIV/AIDS in Africa announced that "[l]ack of equal rights for women to inheritance and property excludes women from accessing resources that would help reduce their vulnerability to HIV and improve their ability to cope with the consequences of the epidemic."⁴ The Global Coalition on Women and AIDS asserts that countries have failed to protect women's inheritance rights, exposing women to additional risk of HIV infection.⁵ These organizations agree that the right to inherit should be protected, and that HIV infection rates would drop if the right was enforced. However, their discussion remains open-ended. While it is

the HIV/AIDS epidemic, women's lack of property and inheritance rights has exacerbated women's poverty and has substantially increased their vulnerability." *Id.*

Until these factors [the suppression of women's inheritance rights] are dislodged or altered, efforts to contain and reverse the epidemic are unlikely to achieve sustained success. In the recent past, women's lack of access to and control of strategic resources has been recognized as one of the major contributory factors to the spread of HIV; it is only recently that attention has been given to the potential role of women's property and inheritance rights in preventing HIV/AIDS and mitigating its impact.

Id. at 11.

² Contributors to this discussion range from the UN General Assembly to organizations specifically dedicated to the protection of women's inheritance rights. As the discussion has been extensive, however, I will only be able to provide a sampling of it here. In its Political Declaration on HIV/AIDS, the UN General Assembly resolved, *inter alia*, to enable women to better prevent HIV infection risks, particularly through protecting their rights to make their own sexual decisions and through removing the economic dependence that can expose them to increased HIV infection risk. G.A. Res. 60/262, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/262 (June 15, 2006); *see also* UNFPA, HIV/AIDS AND GENDER: FACT SHEET OVERVIEW 58, *available at* <http://www.unfpa.org/hiv/docs/rp/factsheets.pdf>. As the report notes, in many parts of the world, women are not able to inherit property from their husbands or fathers, but instead property passes to male relatives only. This pattern threatens the livelihood of women after the death of a male family member. *Id.*

³ For an overview of the relationship between women's property rights and HIV/AIDS vulnerability, *see* UNAIDS, UNFPA & UNIFEM, WOMEN AND AIDS: CONFRONTING THE CRISIS 51–55 (2004). For a broader discussion of how these organizations argue women can be better protected against HIV infection, *see generally id.*

⁴ *Greater Action Needed to Protect Women's Inheritance and Property Rights in the Face of HIV*, UNAIDS (Mar. 13, 2009), http://www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/archive/2009/20090313_Propertyright.asp.

⁵ "Women need a secure roof over their heads if they are to provide for their families, stay safe from HIV infection, and care for relatives when they become sick. Too often, if a husband dies, the widow loses access to that security. Most governments have ratified international conventions which protect women's property rights. Now they need to enforce them." ASHENAFI & ZENEBEWORKE, *supra* note 1, at 11.

clear that *someone* should enforce these rights, the question that remains is: who?

This article proposes an answer to that question: International Economic Institutions, through conditionality on aid money. This discussion focuses on the primary International Economic Institutions (IEIs) that provide both hard and soft (market-based and concessional) lending to member countries.⁶ I include the International Monetary Fund (IMF), the World Bank Group,⁷ and other multilateral development banks (MDBs) in this category. Examples arise primarily from the IMF, although the same reasoning applies almost identically to all of the major multilateral development banks.⁸ Although the World Bank and other MDBs engage in policy lending, the IMF's focus on policy lending best demonstrates conditionality's potential application to inheritance rights enforcement.⁹

This article analyzes conditionality as a tool for the enforcement of women's property rights, particularly those of inheritance (from male blood relatives and, most importantly, from husbands), and the related

⁶ For full discussions on the structure and operations of the IEIs, see John W. Head, *For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. KAN. L. REV. 241 (2004) [hereinafter Head, *For Richer or For Poorer*]; John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 42 U. KAN. L. REV. 605 (1994); and Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 Va. J. Int'l L. 553 (1994).

⁷ The "World Bank Group" consists of the World Bank, which is the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA), and the rest of the group, the International Center for the Settlement of Investment, the International Finance Corporation, and the Multilateral Investment Guarantee Agency. For purposes of this discussion, only the hard and soft lending arms of the World Bank (the IBRD and IDA, respectively), are relevant.

⁸ Head, *For Richer or For Poorer*, *supra* note 6, at 249. Multilateral development banks share several key characteristics. The membership of each is made up of states, and all of these organizations use weighted voting systems in which member states' voting power is roughly proportional to their capital subscriptions. As sovereign states are the members of these organizations, multilateral development banks all derive their authority from multilateral treaties in which the member states outline their responsibilities. *Id.*

⁹ The various MDBs all impose conditions on their lending and have room in their charters to allow for imposing conditions in softer loan contexts, but the IMF has by far the most comprehensive membership of countries, and it has the longest history of policy lending, which is directly at issue in my discussion. *See id.* at 247. The primary MDBs are the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the Inter-American Development Bank (IADB), the African Development Bank (AfDB), and the Asian Development Bank (AsDB) and the European Bank for Reconstruction and Development (EBRD). The IBRD and the IDA are closely related, and they are more commonly referred to collectively as the World Bank. *Id.* at 247–48.

right to a share of property acquired during marriage.¹⁰ Part I outlines the current status of women's inheritance in sub-Saharan Africa, arguing that the right of inheritance is inadequately protected by governments acting alone and arguing that treaty law gives the international community the right to require, or help with, enforcement of women's inheritance rights. Part II proposes that the imposition of conditionality by international economic institutions, though not without its drawbacks, is an effective and politically feasible method of protecting women's inheritance rights.

This article does not attempt to diagnose where specific countries fail to protect women's inheritance rights. Such analysis needs to be conducted by domestic and local officials, experts, and advisors¹¹ who can evaluate a country's inheritance structures on a case-by-case basis.¹² Consequently, this article will highlight general trends, using specific countries and their inheritance practices only as examples.

Protecting women's inheritance rights is a concrete, politically acceptable step the global community can take towards curbing the spread of the AIDS epidemic in Africa. Nonexistent or unenforced women's inheritance rights leave widows and orphans vulnerable to economic and sexual exploitation and, therefore, vulnerable to HIV exposure. Where AIDS has widowed a woman, this exploitation also will endanger any future sexual partner she has and, through him, his own family. The global community can hardly afford to miss a chance to allow this aggravating factor to go unaddressed. This article proposes that the careful use of multilateral aid conditionality for the enforcement of women's inheritance rights presents a practical method for addressing it.

¹⁰ For ease of reference, I will refer to both the right to inherit marital property and the right to a share of property acquired during marriage as the "right of inheritance." Both rights deal with the right of both marriage partners to share in the profits of the marriage, viewing these profits from a partnership model of marriage. The right to a share of property acquired during marriage applies both to marriages in which both spouses work and to marriages in which one spouse contributes to the marriage partnership as a homemaker or in a child-rearing capacity.

¹¹ As discussed further in notes 87–91 and accompanying text, this argument assumes that respected human rights organizations should work closely with the IEs to identify both where the right needs protecting and how the right can best be implemented. To implement sustainable enforcement mechanisms and avoid needless cultural, social, and economic disruption, the institutions with the leverage and resources to create change (the IEs) must work closely with international relations or local cultural experts.

¹² Of course, this approach depends on the assumption that IEs should intervene to enforce inheritance rights only where the rights are inadequately protected by domestic practice.

I. INHERITANCE RIGHTS SHOULD BE, BUT ARE NOT, PROTECTED

This Part will posit three main points on the status of women's inheritance rights. First, the right is not adequately protected under the present model of almost exclusive domestic jurisdiction. Second, the right of inheritance has dramatic effects, both on a country's economy and on a country's ability to combat the spread of AIDS. And third, the right's transnational effects and protection under international law merit intervention by the global community where governments fail to enforce it.

This article will not attempt to draw a picture of what the right to inherit should look like. The cultural and legal reality of women's inheritance rights differs vastly from country to country, and the distinct situations present in each country would make a blanket prescription improper. For convenience, therefore, I will discuss women's inheritance rights as a broad, variable right which could encompass women's rights to (1) inherit in intestacy,¹³ (2) receive bequests under wills,¹⁴ and (3) receive some portion of marital property¹⁵ at a spouse's death or at divorce.¹⁶

¹³ A system of intestate succession would provide for the "natural objects" of a decedent's bounty—often presumed to be an individual's surviving spouse and descendants. Such a system provides for minimal disruption of a family's lifestyle following a death, in that it should usually provide for the surviving spouse to retain possession of a home (if the family owns one) and of any personal property which belonged to the decedent, while still providing for as much economic protection as the decedent was able to leave for a surviving spouse and children.

¹⁴ The right to inherit, when properly enforced, does not necessarily usurp freedom of testation, or the ability to freely dispose of property at death, in a country. When the right is enforced, a man can do whatever he wishes with his property, and in fact, can do so with much greater ease than he could before. In countries which explicitly prohibit inheritance by women, a husband or father who wishes to protect his widow or daughters by leaving his property to them cannot do so. Absent a right to inherit, the intended beneficiaries would not be allowed, let alone entitled, to receive the inheritance the husband or father intended for them.

¹⁵ The right to inherit technically modifies the concept of what actually is an individual's property to give if it instituted an elective share for a surviving spouse. If wives are given the right to inherit property at their husband's death, the law effectively recognizes their partial ownership rights to the husband's property. This approach assumes that marriage is a partnership, in which both partners contribute equally, though often differently, to the household. The partnership view of marriage, though not explicitly mentioned in the human rights conventions which provide for the right to inheritance, seems to fit better than the alternative (that either homemakers or women in general do not contribute to the household in a way which would justify their assumed ownership of a share of property earned during marriage) into the principles set by those conventions. If a partnership view of marriage is not accepted, however, granting women a blanket right to a share of marital property is likely improper and a widescale violation of men's individual property rights, as it takes a portion of a spouse's property from the individual who either earned the money used to purchase it or from the individual who holds legal title to it.

The right to inherit, as it has been discussed by human rights organizations in recent years, generally includes a woman's right to inherit from relatives and spouses in both intestate succession and by will.¹⁷ In sub-Saharan Africa, however, women's rights in intestacy have much more potency. In lesser-developed countries (LDCs), particularly those in sub-Saharan Africa, few individuals write wills.¹⁸ With many men dying without a will, then, intestacy governs most succession. The right could also include the related right of a wife's ownership of a share of property earned during a marriage, which is enforceable by either spouse both during a marriage, at the death of a spouse or at divorce. While there are many ways to subdivide and group these aspects of women's property rights, the rights are vitally interrelated,¹⁹ and the conventions which protect women against discrimination support each of these aspects.²⁰

Even if the partnership view was invalid, however, the grant of a spousal share might be proper given the gravity of the effects of the disenfranchisement of HIV/AIDS widows, because although it would deprive men of some freedom of testation, it would still provide some protection for widows and orphans against property-grabbing and wife inheritance practices.

¹⁶ For a description of a traditional form of marital forced shares, see Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994). The right to ownership of a share of marital property deals both with women's rights in the event of divorce and their rights in the event of disinheritance by will. Although less directly linked to inheritance, this right is vital to the protection of women against purposeful disenfranchisement (either by a husband's relatives or by a husband directly). While a right to intestate succession would allow women to inherit from male relatives and husbands in the absence of a will, the right to ownership of a share of property would protect women from being disinherited by a husband's bequest to another beneficiary. Especially in countries which traditionally prevent women from inheriting, the introduction of an intestate system by which widows inherit property on equal terms as do widowers would encourage some to write wills positively bequeathing property to male heirs.

¹⁷ See, e.g., Rachel C. Loftspring, Comment, *Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda*, 29 U. PA. J. INT'L L. 243 (2007).

¹⁸ *Id.* at 263. Loftspring notes that low literacy rates, lack of exposure to legal systems and concepts in rural areas, and superstitions that executing a will invites untimely death are the greatest obstacles to the widespread use of wills in Sub-Saharan Africa, particularly in Uganda.

¹⁹ See *id.* The failure to protect even one of these aspects would leave women's economic rights unprotected. Women who either cannot inherit or cannot earn property rights during marriage are entirely economically dependent on men—the only difference is whether they are dependent on relatives or husbands.

²⁰ Even the name of the Convention on the Elimination of All Forms of Discrimination Against Women advocates a comprehensive protection of women's economic rights. The same discrimination latent in a law which prevents a daughter from inheriting from her father, for example, remains in a law which allows a husband, but not a wife, possession of property earned during a marriage. Any law which allows a husband more rights to property earned during marriage than his wife, or which effectively disenfranchises women by forcing them to rely on the protection and generosity of fathers, husbands, and either sons or more distant relatives on the death of either, blatantly discriminates against a woman's right to earn and hold property.

A. DOMESTIC LAW HAS STRUGGLED TO IMPLEMENT WOMEN'S INHERITANCE RIGHTS

Women's inheritance rights are not adequately protected either by law or by implementation of those laws that, in theory, ensure the right. First, in some countries the right is not actually protected by domestic law. While almost all African countries have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Protocol, which protect women's inheritance rights,²¹ few have enacted domestic legal reform implementing women's inheritance rights.²²

In 2004, the International Committee on the Rights of Women (ICRW) declared that "[t]here is a general need to develop and implement laws that protect the land and property rights of women, and to review and repeal all discriminatory laws that currently exist, whether statutory, de jure, or customary."²³ Several sub-Saharan governments have enacted statutes granting women property rights. Many of these statutes, however, have stopped short of providing any meaningful protection for widows against the strong cultural presumption of male inheritance.²⁴

Second, even where domestic law provides for the protection of the right, the legal prescription can differ sharply from the reality of a country's inheritance practices. Domestic laws protecting women's inheritance rights have met with limited success, often because official domestic law differs sharply from the customary law that many rural areas follow.²⁵ Most countries in sub-Saharan Africa have dual legal

Similarly, any law which grants husbands exclusive ownership of property earned during a marriage marginalizes the role of women's contributions as homemakers, child-rearers, and often as primary breadwinners in their marriages.

²¹ See Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 *FORDHAM INT'L L.J.* 781, 818 (2009). CEDAW protects women's rights to equal ownership, use, and disposition of property, but as Banks notes, CEDAW remains general rather than discussing inheritance rights specifically. The African Protocol, however, addresses women's property issues more directly, protecting women's rights to own land, to receive property in marriage dissolution proceedings, and to inherit property. *Id.* at 820.

²² See *Fact Sheet: HIV/AIDS and Women's Property Rights in Africa*, HUMAN RIGHTS WATCH, www.hrw.org/campaigns/women/property/aidsfactsheet.htm (last visited May 16, 2011).

²³ INT'L CTR. FOR RESEARCH ON WOMEN, *TO HAVE AND TO HOLD: WOMEN'S PROPERTY AND INHERITANCE RIGHTS IN THE CONTEXT OF HIV/AIDS IN SUB-SAHARAN AFRICA* 4 (2004).

²⁴ See generally Abby Morrow Richardson, *Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform*, HUM. RTS. BRIEF, Winter 2004, at 19.

²⁵ See *id.* Richardson analyzes recent legal reforms in Botswana, Zambia, and Ghana. Although Richardson concludes that the Ghanaian system has met with more success than those of

systems: statutory law and customary law.²⁶ Most protections for women's inheritance rights stem from the statutory legal system, but in the poorest areas of sub-Saharan Africa, statutory law is virtually illusory. A woman seeking to enforce her inheritance rights in statutory courts must often travel long distances and incur prohibitively high legal costs to even bring a suit.²⁷ Where statutory law is this difficult to enforce, it is only natural that "customary law . . . persists despite [statutes protecting women's inheritance rights]."²⁸

Where statutes protecting women's inheritance rights are difficult to enforce, customary practice can make those protections meaningless.²⁹ One such practice is "wife inheritance," in which a widow is "inherited" by a male relative of her late husband. Traditionally, wife inheritance was an unconsummated social safety net in which a family cared for the widows and orphans left by a man's death.³⁰ Recently,

Botswana or Zambia, she notes that all of these systems have been only partly successful, mainly because the reforms have been statutory rather than integrating customary law. *Id.* at 22.

²⁶ Elin Henrysson & Sandra F. Joireman, *On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya*, 43 LAW & SOC'Y REV. 39, 40-41 (2009). Colonization left sub-Saharan Africa with a dual legal system: the statutory legal systems of the Western colonial nations was superimposed over the customary legal systems that had prevailed before it. Henrysson and Joireman provide a useful description of customary law: Customary law is a body of rules in many parts of Africa governing personal status, communal resources, and local organization. It has been used by various ethnic groups for their internal organization and administration. Customary law is recognized by the courts and exists as a second body of law (in addition to statutory law) governing citizens in countries of sub-Saharan Africa. It has the greatest control over people in rural areas, but it also affects urban dwellers through the regulation of marriage and inheritance. *Id.*

²⁷ Banks, *supra* note 21, at 815. Banks notes that most residents of sub-Saharan Africa prefer the customary legal system, likely because while customary law is locally enforced and relatively cost-effective, bringing a claim under the statutory legal system would involve a great deal of travel and expense, which many widows simply cannot afford. *Id.*

²⁸ Richardson, *supra* note 24, at 22. Richardson notes that customary inheritance systems, despite the existence of statutory laws contradicting them, continue to be the only law that is broadly enforced in rural sub-Saharan Africa. *Id.*

²⁹ Henrysson & Joireman, *supra* note 26, at 40. Where statutory law provides protections that customary law does not, many governments have had difficulty implementing those statutory protections in light of customary law's pervasive influence in rural areas. Especially in rural areas where customary law is the only practical dispute resolution mechanism for most individuals, governments' efforts to implement sound policies on a statutory level have the potential to go virtually unnoticed. *Id.*

³⁰ Richardson, *supra* note 24, at 19.

In most ethnic groups, such as the Ewe in Ghana, customary systems traditionally included a social safety net providing for widows and orphans at the death of the male head of household. While women were not able to directly inherit land or property, the men that did inherit were required to care for the wife or wives of the decedent and all of his dependents as the decedent would have. The heir thus not only inherited the property, but he also 'inherited' the responsibility to provide for all who depended on

however, wife inheritance has become a brutal distortion of its traditional protection structure.³¹ In most of sub-Saharan Africa, wife inheritance arrangements often require a widow to have sexual intercourse with at least her inheritor.³² Often, before a widow is inherited, however, she must have sex with several of her late husband's relatives before she is ultimately inherited.³³

Another prevalent practice is "property grabbing," in which a decedent's relatives lay claim to the decedent's property outside of any organized inheritance structure, often forcing widows from their homes within days of a husband's death.³⁴ While property grabbing is not

the property for their livelihood. This is no longer the common practice today, however. Increasing poverty, widespread war, and the advent of the HIV/AIDS epidemic in the past two decades have eliminated these traditional welfare mechanisms. Whereas widows were once allowed to stay on the land they shared with their deceased husband until their own death or remarriage, they are now often forcefully removed from their homes.

Id.

³¹ See Stephen Buckley, *Wife Inheritance Spurs AIDS Rise in Kenya*, WASH. POST (Nov. 8, 1997), http://www.washingtonpost.com/wp-srv/inatl/longterm/africanlives/kenya/kenya_aids.htm. Traditionally, an inheritor was prohibited from having sexual relations with an inherited widow. Instead, the widow inheritance relationship was merely a formalization of a male relative taking responsibility for the well-being of his late relative's widow and children. However, the taboo against sexual relations with inherited widows gradually was replaced by an expectation of sex in an inheritance relationship. Unfortunately, as Buckley notes, the sexualization of the widow inheritance system occurred substantially when HIV infection rates in central and East Africa first began to climb. As more and more AIDS widows were inherited, this sexualization exposed inheritors, and their own wives, to the disease, which helped HIV infection rates to skyrocket. *Id.*

³² In Uganda, for example, it is nearly impossible for women to inherit property from male relatives. Loftspring, *supra* note 17, at 250. In theory, women are prohibited from inheriting because their husbands' male relatives are charged with the duty of caring for them. However, the theoretical duty to protect is not always honored, and instead, "[t]his situation makes women completely dependent on men—be it their husbands, fathers, brothers, sons, or other male relatives of the husband's clan—and places them in a precarious situation." *Id.* at 251. Wife inheritance, a widow's primary option after the death of a spouse, "is often abused so that the widow is first forced to have intercourse with multiple men from her husband's clan." *Id.* at 254. In the face of the HIV/AIDS crisis, this practice leaves women vulnerable to infection. Even so, "[w]omen succumb to widow inheritance primarily as a result of economic vulnerability and the fact that they are often without property or any viable means of supporting their children." *Id.* Loftspring goes on to assert that women's inheritance rights, while important in themselves, are part of the larger problem of widespread gender inequality throughout the world. *Id.* at 244. Discussing Ethiopia, Ashenafi raises similar issues, reinforcing Loftspring's assertions. See ASHENAFI, *supra* note 1.

³³ Loftspring, *supra* note 17, at 254.

³⁴ Richardson, *supra* note 24, at 19. Richardson notes that "in countries such as Zambia, the phenomenon of 'property-grabbing' has recently developed. Property-grabbing is a practice followed by many ethnic groups in the continent, where as soon as the male head of household dies, his relatives come to the home and take everything of value away—from pots and pans to furniture and cars. This often occurs while the woman is performing a traditional mourning

explicitly sanctioned by customary law, both of these practices have become more common since the HIV epidemic began.³⁵ Both practices undermine facially nondiscriminatory domestic law.³⁶ Between these two practices, the current default is that women do not inherit from their husbands or male relatives.

B.WOMEN'S INHERITANCE RIGHTS ARE VITAL IN THE FIGHT AGAINST AIDS

Practices such as wife inheritance and property-grabbing only exacerbate the spread of HIV and AIDS. Since many inheritors are married to other women, wife inheritance is especially dangerous when a woman has lost her husband to AIDS. If the woman has been infected with HIV, she risks transmitting the virus to her inheritor. In turn, her inheritor will likely infect his own wife—or wives, in polygamous marriages. If the inheritor then dies, the cycle will only repeat itself when the women are forced to be inherited again.³⁷

Similarly, property-grabbing forces AIDS widows to choose between allowing their children to starve or infecting others with the disease.³⁸ When relatives take all the family's valuables, they leave widows and children impoverished, even more so than the loss of a father or husband already left them. Destitute, these widows are left homeless with almost no options other than the sex trade.³⁹ As Human Rights Watch notes, AIDS widows are more likely than other widows to

ritual, and therefore is not able to defend herself or her property. The woman is often left destitute as a result." *Id.* For full descriptions of the trends of "property grabbing" and wife inheritance specifically as they relate to Ugandan law, see Loftsring, *supra* note 17, at 256–58

³⁵ Richardson, *supra* note 24, at 19.

³⁶ *Id.* As noted in Richardson's Human Rights Brief, "[u]ltimately, the inability of the laws to impact cultural practice has drastically limited their effectiveness." *Id.* at 20; *see also* Loftsring, *supra* note 17. Loftsring notes that while Uganda's Constitution theoretically protects women's rights, cultural practices and social resistance to implementing those rights leaves the constitutional protection almost completely unimplemented. *Id.* at 260–61.

³⁷ For a poignant example, see Buckley, *supra* note 31. Buckley relays the story of Mildred Bwire Auma, who chose to be inherited by her brother-in-law, despite knowing that she was infected with AIDS. Auma described her choice as extremely difficult, pitting her survival and her three children's survival against risking infection of her inheritor and his wives. If Auma had the right to inherit property from her first husband, her inheritor and his wives (and their inheritors once her second husband died of AIDS) may not have been infected. *Id.*

³⁸ *See id.*

³⁹ *See* Valerie Bennett, Ginger Faulk, Anna Kovina & Tatjana Eres, *Report: Inheritance Rights in Uganda: The Plight of Widows and Children*, 7 GEO. J. GENDER & L. 451, 493–94. "Unequal inheritance rights in the country exacerbate the spread of HIV/AIDS . . . poverty resulting from a lack of property rights forces many women, both widows and daughters, into prostitution where they will likely become vulnerable to, and a vehicle for, HIV/AIDS." *Id.*

fall victim to property-grabbing.⁴⁰ Where an increasing number of AIDS widows are left vulnerable for exploitation, the disease's spread only worsens.⁴¹ As human rights organizations have noted, "[t]he abuses of human rights that women deal with on a daily basis can become nearly insurmountable obstacles when HIV/AIDS is involved."⁴²

Just as women's disenfranchisement exacerbates the spread of AIDS, the AIDS crisis has also damaged what inheritance rights women once had in sub-Saharan Africa. In a 2004 joint report, UNAIDS, UNFPA, and UNIFEM found that "[o]ne of the most serious economic effects of HIV for women has been the loss of property."⁴³ Human Rights Watch declared the status of women's inheritance rights in sub-Saharan Africa "catastrophic," leaving women "homeless or living in slums, begging for food and water, unable to afford health care or school fees for their children, and at grave risk for sexual abuse or exploitation."⁴⁴

Given the right to inherit, women would enjoy increased economic stability in the face of the HIV/AIDS crisis. If a woman and her spouse own property, the woman could rely on the marital share and intestacy rules to ensure that she would not be rendered homeless if her spouse dies. Without the threat of homelessness on a husband's death, a widow could remain in her home without having to remarry its new owner. This would reduce the odds that a widow would transmit HIV to a new partner.

If women were presumed to inherit from their husbands, that presumption would mitigate the disruptive effects of a family death in these countries.⁴⁵ Especially in countries with a high concentration of HIV/AIDS, where death rates are skyrocketing, such a reversal would be

⁴⁰ HUMAN RIGHTS WATCH, *supra* note 22. "Widows are often evicted from their homes as in-laws rob them of their possessions and invade their homes and lands. These unlawful appropriations happen even more readily when the husband died of AIDS." *Id.*

⁴¹ The New York Times quoted Dr. David Kihumuro Apuuli, director-general of the Uganda AIDS Commission, as describing the crippling effects of new infection rates on attempts to care for the millions of patients who need treatment: "You cannot mop the floor when the tap is still running on it." Donald G. McNeil, Jr., *At the Front Lines, AIDS War is Falling Apart*, N.Y. TIMES (May 9, 2010), <http://www.nytimes.com/2010/05/10/world/africa/10aids.html>.

⁴² UNAIDS, UNFPA & UNIFEM, *supra* note 3, at 53.

⁴³ *Id.* The Joint United Nations Programme on HIV/AIDS, the United Nations Population Fund, and the United Nations Development Fund for Women, respectively. Each of these organizations is a specialized UN agency charged with diagnosing and addressing global problems relating to their focus issue.

⁴⁴ *Id.*

⁴⁵ This, of course, assumes that a culture implementing the right accepts the proposition that "[t]he natural objects of a decedent's bounty are traditionally thought to be his spouse and children." Brashier, *supra* note 16, at 84.

a dramatic step towards stopping the disease's vicious cycle of economic vulnerability and increased risk of exposure.⁴⁶

C.THE INTERNATIONAL COMMUNITY CAN AND SHOULD ASSIST WITH ENFORCEMENT

Despite the seemingly domestic status of women's inheritance rights, the international community has a right—and duty—to protect these rights. International human rights treaties protect women's inheritance rights, and, therefore, each party to those treaties has a right to enforce them.

Where denial of women's inheritance rights is willful, those treaties oblige party countries to affirmatively defend the rights. When countries fail to do so, the international community has a duty to intervene. Additionally, where women are systematically denied the right to inherit property, they are, for all practical purposes, either forced to submit to widow inheritance or abandoned to the sex trade. Such a legal system is little better, in practice, than codified slavery and trafficking.⁴⁷ The international community is obligated to redress serious human rights violations.

Most countries, however, do not affirmatively prohibit women's inheritance rights. Instead, many espouse the ideals of women's inheritance rights but either cannot afford to implement the rights or cannot find a way to overcome cultural resistance to women's inheritance.⁴⁸ Even in the most pragmatic sense, then, and divorced from any moral pronouncements, women's inheritance rights are vitally important to the international community. The AIDS crisis takes a

⁴⁶ HUMAN RIGHTS WATCH. *supra* note 22. The report notes that as AIDS leaves more and more women as widows at a young age, cultural stigmas against AIDS widows, combined with a dearth of women's property rights, forces many AIDS widows and orphans into prostitution. This pattern exposes these women to dramatically increased HIV infection risks and increases the likelihood that those women already infected by their late husband will transmit the disease to many of their subsequent partners. *Id.*

⁴⁷ What else can we call a system in which certain individuals are *prohibited* from owning property but slavery? And what is a system in which a government leaves women with no option for survival except to submit to the sex trade or to coerced, nonconsensual sex?

⁴⁸ Even where countries attempt to enforce women's inheritance rights, reform laws often go unenforced merely due to the financial strain of enforcement. *See* INT'L CTR. FOR RESEARCH ON WOMEN, *supra* note 23, at 3. "Even where laws are favorable to women's concerns, inadequate interpretation and enforcement effectively renders them obsolete. Community-based women's advocates have documented ways in which women's interests in property disputes are subordinated by discriminatory institutional norms and practices inherent in the statutory legal system. Correcting this situation requires working with those who deliberate legal matters and enhancing the accessibility and effectiveness of the judicial system itself." *Id.*

staggering toll on the countries most affected by it, both culturally and economically. Protecting women's right to inherit is integral to curbing the disenfranchisement of women that plagues the developing world. The International Center on Research for Women describes why women's inheritance rights are important even in an economic sense: "In the ideal, this environment would provide guarantees of property for women in the form of a secure home in which to live, a reliable site for economic activity (on the land or in the home), and collateral for gaining access to credit."⁴⁹

As with any question of intervention in domestic practice, however, the international community must have a legal justification that overcomes the strong presumption that countries have exclusive power over their domestic concerns.⁵⁰ Inheritance, like most individual property rights, is generally governed by domestic law. As a result, international courts are unlikely to take jurisdiction over inheritance matters unless they involve some question of international law or the treaty obligations of a country.⁵¹ Even then, international courts generally only accept cases brought by countries.⁵² Few situations would motivate a country to bring suit against its own inheritance practices, let alone to bring suit on behalf of those who are denied inheritance in another country.

Countries seeking to enforce a right in another country's jurisdiction infringe on the subject country's sovereignty unless treaty or customary international law require the subject country to protect the right.⁵³ In a development context, sovereignty "implies a group right of

⁴⁹ Information Brief, Int'l Ctr. for Research on Women, To Have and To Hold 3 (June 2004).

⁵⁰ For an overview of the principle of nonintervention as it relates to IELs, see John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L.J. 331, 356-61 (2000).

⁵¹ The International Court of Justice's compulsory jurisdiction, perhaps the broadest jurisdiction granted to an international court, is limited to "(a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation." Statute of the International Court of Justice art. 36(2), June 26, 1945, 59 Stat. 1031.

⁵² The International Court of Justice, for example, only hears cases brought by states against states. *Id.* at art. 34(1). According to the ICJ Statute, only states can be parties in cases brought before the ICJ. *Id.*

⁵³ Indeed, a country can hardly complain if another country attempts to pressure it to comply with the treaty obligations it owes to the pressuring country. If a country party to any of these conventions sought to enforce the convention against another party, it would be acting effectively to enforce its own rights under the convention. In the context of human rights conventions, a violating country would be hard-pressed to argue that enforcement of treaty obligations it voluntarily undertook would violate its sovereignty.

the people to 'own' the process of development"—to decide matters of domestic jurisdiction independently.⁵⁴

The international community has a duty to enforce women's inheritance rights. Generally, a right is international if it is either customary international law, which binds all states, or if a country undertakes to protect the right by ratifying treaties that include promises to do so. At this point, women's inheritance rights likely do not rise to the level of customary international law.⁵⁵ However, most countries have a treaty obligation to protect the right. Several widely ratified conventions protect the economic and property rights of women, particularly the rights of women to ownership of property acquired during marriage.⁵⁶

⁵⁴ Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL'Y 331, 402 (2006).

⁵⁵ In order to rise to the level of customary international law, a practice (in this case, the protection or implementation of a right to inheritance) must be both a widespread and consistent practice of states and followed by them out of a sense of legal obligation. Typically, a rule of customary international law does not need to have absolute consensus in order to be a rule of international law. In the case of women's inheritance rights, however, the "widespread" trend, at least in LDCs seems to be one of either ignoring the right or subordinating the theoretical right to social custom and traditional legal systems for inheritance. The very same failure of states to implement women's inheritance rights—either de jure or de facto—which makes the right of inheritance worth defending, more or less defeats the "widespread and consistent practice" element of CIL. Simply put, too many countries fail to protect the right of inheritance for the right to be clear-cut customary international law. While the right is likely not currently protected by a rule of customary international law, this does not mean that a customary international law rule requiring the protection of women's inheritance rights is not currently developing. The rights of women with regard to equality in marriage and in economic rights are codified in widely accepted treaties, as discussed below, which can serve as a good indicator of customary international law when reinforced by a consistent actual practice of states. *Opinio juris*, the elusive and often forgotten element of customary international law, can sometimes be proven by the existence of a widely ratified convention on point with the proposed rule.

⁵⁶ See Manisuli Ssenyonjo, *Women's Rights to Equality and Non-discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court*, 21 INT'L J.L. POL'Y & FAM. 341, 342 (2007). Article 3 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 2 and 3 of the African Charter on Human and Peoples' Rights (ACHPR) all prohibit discrimination on the basis of gender. *Id.* For additional information, see generally International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), at 49, U.N. Doc. A/6316 (1966); Declaration on the Establishment of a New International Economic Order, G.A. Res. S-3201 (S-VI), at 3, U.N. Doc. A/9559 (1974); The Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., U.N. Doc. A/Res/3281 (1975); and The Declaration on the Right to Development, G.A. Res. 41/128, at 21, U.N. Doc. A/41/925 (1986). However, most of those conventions are either regional or largely viewed to be aspirational and not self-executing. If these conventions are not self-executing, then countries party to them are still obligated to comply with them, and especially obligated to not frustrate the basic object and purpose of the conventions before they implement the conventions into their domestic law. If they are not obligated, however, this leaves

II. PROPOSAL: CONDITIONING AID ON ENFORCEMENT OF WOMEN'S INHERITANCE RIGHTS

If the global community wishes to protect the right to inherit, it must carefully choose its implementation method to minimize sovereignty concerns and to encourage efficient, effective implementation. This Part first outlines the obstacles encountered in prior attempts to implement women's inheritance rights.

A. ESTABLISHING CRITERIA FOR IMPLEMENTATION METHODS

Obstacles to inheritance rights enforcement have generally fallen into three categories: lack of domestic laws protecting the right, failure of governmental will to enforce protective laws, and lack of the resources necessary to implement the right. In countries where domestic laws do not protect the right to inherit, governments need incentives to pass protective laws which conform to the international standard set by human rights conventions. Similarly, where proper domestic laws exist but are not enforced due to government inattention, governments need incentives to prioritize the right. Governments also need financial support and technical advice to ensure that inheritance laws are not undercut by lack of adequate enforcement resources, traditional male-preferential practices, and cultural resistance to the implementing law.

In response, the ICRW outlines what conditions countries need to create in order to implement women's property and inheritance rights: "[s]uch rights generally are secure when legal regimes are committed to enforcing property and inheritance laws, and when the general public is conversant with provisions of such laws."⁵⁷ To protect the right to inherit, the global community must first convince governments to protect the right by implementing statutory law. Even though the right to inheritance may have international effects which merit international intervention,

enforcement up to implementation Committees, which cannot always enforce their decisions. This leaves the need for implementing legislation, which likely can only be enacted by somehow incentivizing governments to implement the conventions. If a country's laws do not reflect its non-self-executing international treaty commitments within a reasonable period after ratification, then it can be safely assumed that either the country's government does not intend to implement those commitments into domestic law, or that the government lacks some kind of resource necessary to make the legislation enforceable. Disparity between obligations undertaken by governments and implementation, however, draws into contrast the fact that any method for enforcing the right to inheritance would need to be able to address either a lack of government initiative toward protecting the right or a lack of government resources to implement it.

⁵⁷ INT'L CTR. FOR RESEARCH ON WOMEN, *supra* note 23, at 3.

legal change must occur at a domestic level for inheritance rights to become a functional reality.⁵⁸

Laws by themselves, however, will not be enough to protect women's inheritance rights.⁵⁹ To successfully implement women's inheritance rights, then, the legal regimes must commit to enforcing them. This commitment, however, will only be genuine where a country retains a sense of ownership of the policy itself. Even where a country takes ideological ownership of women's inheritance rights, however, governments will need financial resources to dedicate to informing the public about their rights. Many will find the large and sustained financial burden of public education programs impossible. Consequently, a method must provide financial support that can fund public education measures.

Whichever method the international community uses to enforce the right, however, any such method must also be sustainable over a period of years.⁶⁰ A culture's presumption of where property should go at death is closely tied to the culture's collective moral and traditional structure.⁶¹ In essence, inheritance laws show who society believes a person should provide for at death. Any action changing such a structure, which goes so close to the heart of a society's values, can face a great

⁵⁸ See J. Oloka-Onyango, *Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?* 6 BUFF. HUM. RTS. L. REV. 39, 64–65 (2000) [hereinafter Oloka-Onyango, *Human Rights and Sustainable Development*]. Oloka-Onyango argues that human rights must be implemented at the national and local levels to be effective and sustainable. International-level action to protect human rights must, therefore, revolve around creating domestic-level protections with the investment and support of local governments. J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa* 26 CAL. W. INT'L L.J. 1, 60–61 (1995) [hereinafter Oloka-Onyango, *Beyond the Rhetoric*] (footnote omitted).

⁵⁹ UNAIDS, UNFPA & UNIFEM, *supra* note 3, at 51–55. “Laws are not enough to change these conditions. India, for example, has a law dating back to 1956 that allows women to inherit property from their fathers. Despite the law, women rarely inherit and are often unaware of their rights.” *Id.* at 54.

⁶⁰ “As a new area of policy and program integration, it can be expected that efforts to link property rights and HIV/AIDS will need some time to evolve before they achieve desired results.” Information Brief, Int’l Ctr. for Research on Women, *To Have and To Hold* 4 (June 2004). “New initiatives addressing legislative reform must recognize the typically slow pace of the reform process and be prepared to sustain the necessary focus and resource levels over a period of several years. Coalitions and networks have helped organizations share the burden of such work and sustain the necessary momentum over time.” *Id.* at 5.

⁶¹ Inheritance laws create a default system for distribution of a person's property at death. Lawmakers' decisions as to who should ordinarily receive property at death is a codification of which relatives—spouse, children, parents, other relatives—those lawmakers, and theoretically the society they represent, are believed to be the “natural objects of a decedent's bounty.” Brashier, *supra* note 16, at 84.

deal of opposition from a country's population. Indeed, attempts to implement women's inheritance rights in sub-Saharan Africa have faced a great deal of that opposition.⁶² Consequently, any future legislation codifying and enforcing women's right to inherit will almost certainly face difficult challenges from cultural practice and customary law. In this climate, the international community needs to choose an enforcement method that is both equipped to overcome cultural prejudices and sustainable enough to outlast those prejudices.

Conditionality on both bilateral and multilateral aid lending⁶³ addresses these implementation concerns. Of course, conditionality is not without potential drawbacks and valid points for concern.⁶⁴ However, conditionality on aid lending can create incentives for governments to protect human rights within their own borders. At the same time, conditionality can help ensure that aid money reaches its intended beneficiaries.

One of the most important functions of IEs, such as the International Monetary Fund and the World Bank, is to provide large loans to lesser-developed countries at below-market interest rates.⁶⁵ Because the interest rate on these loans is concessional, however, the IEs can set conditions on these loans—often in the form of economic policies which will help to ensure that the borrowing country can meet its loan obligations.⁶⁶ Most countries in sub-Saharan Africa heavily use this soft lending.⁶⁷

⁶² For full discussion of this opposition, see *supra* notes 25–36 and accompanying text.

⁶³ Bilateral aid lending is a loan arranged directly between one lending country and the borrowing country. By contrast, multilateral aid is a loan arranged through a collective body, most often an IEI.

⁶⁴ See *infra* Part III.D for a discussion of some of these potential drawbacks.

⁶⁵ For an example and description of this concessional lending, see INT'L MONETARY FUND, FACTSHEET: IMF LENDING (2011), available at <http://www.imf.org/external/np/exr/facts/pdf/howlend.pdf>. Although concessional lending has been an important IEI function for years, in recent years this function has met with dramatic demand increases. The IMF, for example, projects that countries' needs for concessional lending will continue to increase as domestic economies struggle to overcome the recent financial crisis. For a discussion of this demand and the IMF response to it, see INT'L MONETARY FUND, FACTSHEET: FINANCING THE FUND'S CONCESSIONAL LENDING TO LOW-INCOME COUNTRIES (2011), available at <http://www.imf.org/external/np/exr/facts/pdf/concesslending.pdf>.

⁶⁶ See Robert Hockett, *Legally Defending "Mission Creep": How the Bretton Woods Charters Anticipate and Justify IMF Attention to "Structural" Variables in its Oversight of the Global Financial System*, INT'L LEGAL PERSP., Fall 2002, at 34, 37. The IMF attaches conditions to its loans to member countries. Article V, Section 3(a) of the IMF Charter allows the Fund to adopt policies for the proper use of IMF resources that would enable the borrower country to repay its obligations to the IMF. Often, these conditions take the form of a set of economic policies the IMF encourages member countries to adopt for itself, but as Hockett goes on to describe, these

This Part argues that IEIs should use their influence under conditionality to help enforce and implement women's inheritance rights. First, the IEIs have the authority to set women's inheritance rights as a condition on aid lending because such enforcement is proper from both legal and policy standpoints. Second, the legal obligations creating the right to inherit avoid or minimize the major criticisms and concerns discouraging IEIs' interference in human rights. Third, condition-based enforcement could be feasibly implemented, both because IEIs have the political leverage to affect legal change and because they offer the financial and technical assistance that would be vital to any real implementation of the right. Although conditionality has weaknesses that should be carefully monitored, it is also an effective, established, and legally justifiable course of action in the face of a humanitarian crisis that requires swift multilateral action, not empty talk or lengthy court battles.

B. IEI CHARTERS GRANT LEGAL AUTHORITY TO ENFORCE INHERITANCE RIGHTS

Enforcement of women's inheritance rights, given the rights' broad economic effects, is legally proper under the IEIs' current charter mandates. Using conditionality to enforce women's inheritance rights is also proper from a policy standpoint because the rights' widespread treaty protection minimizes sovereignty concerns.

1. IEI CHARTERS ALLOW ENFORCEMENT OF WOMEN'S INHERITANCE RIGHTS

The IEIs draw their policy-setting authority by a limited grant of agency in their charters.⁶⁸ The right to inherit, however, fits squarely within the IEIs' economic mandates. Even though inheritance is traditionally domestic in nature, the right has sufficient effect on economic development to be colorably within the bounds of the IMF Charter as it currently stands.⁶⁹ The economic effects of the right to

conditions can often spread to the areas of human rights, government structure, and other policy areas generally thought to be more social than economic in nature. *Id.*

⁶⁷ See *IMF Lending at a Glance*, INT'L MONETARY FUND, <http://www.imf.org/external/np/exr/map/lending/index.htm> (last visited May 24, 2011).

⁶⁸ Hockett, *supra* note 66, at 37.

⁶⁹ See Ciorciari, *supra* note 50, at 347–48. Ciorciari argues that human rights violations have significant enough economic effect to qualify as 'economic considerations,' therefore allowing the IMF to address them with conditionality under Article III, Section 4(v) of the IMF Charter. As Ciorciari notes, human rights violations affect a nation's economic growth, the financial success of its development programs, and its resultant ability to service its debt. Economic studies demonstrate that human rights and the rule of law encourage sustainable economic

inheritance would be dramatic: the right would have broad effects on living conditions for women in LDCs, which in turn would have broad effects on the success of overarching development projects, and would help to slow the spread of HIV/AIDS in Africa.⁷⁰

2. POLICY CONSIDERATIONS SUPPORT IEI INVOLVEMENT IN WOMEN'S INHERITANCE RIGHTS

IEI enforcement of women's inheritance rights is also proper as a matter of policy. Although concerns of cultural hegemony and sovereignty infringement often accompany proposed IEI human rights initiatives, the widespread treaty protection of the right to inherit dramatically minimizes these concerns.⁷¹ Conditionality itself mitigates sovereignty concerns because the IEIs help to involve borrowing countries in the condition-setting process.⁷²

The scope of policy-making authority IEI charters grant is debated.⁷³ Some scholars have argued that the IEIs should be allowed to enforce human rights, even when they are not explicitly economic in nature.⁷⁴ Experts on both sides of the debate question whether the IEIs should—or have the right to—get involved in the enforcement of human

growth, and this finding is only confirmed by lenders' demonstrated reluctance to lend to countries known for human rights violations. *Id.*

⁷⁰ The UN General Assembly asserts: "To address HIV/AIDS is to invest in sustainable development." Declaration of Commitment on HIV/AIDS, G.A. Res. S-26/2, ¶ 68, U.N. Doc. A/RES/S-26/2 (June 27, 2001). Within this same resolution, the General Assembly also resolves to protect children orphaned by HIV/AIDS from, *inter alia*, loss of inheritance. *Id.* ¶ 65; *see also* Loftspring, *supra* note 17, at 266. Loftspring argues that granting women rights to inherit would help combat the spread of HIV/AIDS by making women more economically independent. Loftspring also argues that women's inheritance rights would encourage economic development, giving husbands and fathers incentives to write a will, and giving women incentives to invest their own labor in their husbands' property, and decreasing women's incentives to have a large family. *Id.* at 271.

⁷¹ *See* Oloka-Onyango, *Beyond the Rhetoric*, *supra* note 58, at 11.

⁷² *See* Daniel D. Bradlow, *Globalization and Sovereignty: Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?*, 50 U. KAN. L. REV. 695,728 (2002) ("[T]here is great wisdom in having specialized international organizations that can help countries deal with their myriad developmental challenges and can help the international community deal with the complex problems that it faces in achieving sustainable development for all people.").

⁷³ For a summary of the debate of whether IEIs should be involved in enforcement of human rights, *see* Head, *For Richer or For Poorer*, *supra* note 6, at 291–92.

⁷⁴ For support of general IEI human rights involvement, *see*, e.g., Ciorciari, *supra* note 50, at 332–35.

rights.⁷⁵ In these debates, the strongest argument in favor of IEI involvement is that IEIs possess both leverage and the ability to provide financial and technical resources.⁷⁶ The strongest arguments against IEI involvement cite human rights as largely domestic matters and, therefore, subject to the deference given to sovereign decisions.⁷⁷

Conditionality on multilateral aid creates strong incentives for governments partly because a collection of countries have chosen multilateral aid conditions.⁷⁸

Conditionality on multilateral aid also mitigates sovereignty concerns by leaving governments free to accept conditions and ultimately decide how the conditions should be implemented. IEIs do not make treaties with countries, but merely impose a set of conditions that a country is free to accept (thereby receiving loan disbursements) or reject.⁷⁹ While some have argued that this creates a mandatory policy set

⁷⁵ For a commentary opposing IEI human rights involvement, see Halim Moris, *The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?*, 4 ILSA J. Int'l & Comp. L. 173, 183–84 (1997).

⁷⁶ Scholars have argued that the IEIs should increase their involvement in the enforcement of human rights, and this logic includes the right of inheritance. See Head, *For Richer or For Poorer*, *supra* note 6, at 291. Professor Head, for example, argues that IEIs should increase their involvement in human rights first because human rights need some organization to help protect them, and second because they have the resources and the leverage to implement human rights effectively. *Id.*

⁷⁷ See Bradlow, *supra* note 72, at 728 (“[I]t is important that international organizations define the limits on their ability to intervene in the affairs of their member states in a way that is respectful of the sovereignty of these states.”).

⁷⁸ Conditionality on bilateral aid functions much the same as conditionality on multilateral aid. However, bilateral aid lacks the “triggering function” of multilateral aid, making it less effective than multilateral aid in creating incentives for countries to change their domestic inheritance law. Bilateral aid, if significant enough, provides the same financial support as multilateral aid, but as it originates from limited sources—typically large Western countries—it is more likely to be granted to countries which either share the donor country’s major policy ideals or which the donor country wishes to influence. Bilateral aid is not often as strong an incentive as multilateral aid conditionality, as a recipient country would not likely change its domestic policies, or go to the trouble and expense of implementing favored policies, for anything less than vitally needed aid grants. In addition, bilateral aid conditionality raises serious concerns of cultural hegemony, which are at least mitigated in the case of multilateral aid. Most bilateral aid donors likely to be able to wield strong influence in recipient countries would almost certainly be wealthy Western countries with sophisticated economies. Conditions imposed by such countries, however well-intentioned the conditions might be, continually run the risk of forcing Western ideals on developing countries; in the case of strictly bilateral aid, the goodwill and wisdom of the donor country is the only protection against cultural hegemony.

⁷⁹ Head, *For Richer or For Poorer*, *supra* note 6, at 280. “[S]tates are under no legal obligation to accept the conditions of an [IEI] loan, for the simple reason that states are under no legal obligation to seek an [IEI] loan in the first place—or, indeed, to become a member of an [IEI] . . . it also remains true that if a government is dead-set against adopting the economic and financial policies (or other requirements) that an [IEI] proposes to include in a loan agreement,

for a country seeking financing,⁸⁰ conditionality only limits the options a country can choose regarding IEI involvement. A country can walk away from the IEI conditions, accept the IEI conditions and take a loan, or it can seek loans elsewhere. Further mitigating this, each member country has a voice in the decision-making process of the IEIs.⁸¹ The voluntary nature of the conditions incorporates the receiving country's consent into the acceptance of the loan, saving the trouble of establishing consent through less direct means.

The democratic structure of IEIs, though not perfectly balanced, provides at least some safeguard against the imposition of rich countries' ideals on poorer countries.⁸² While some critics have argued, and validly, that the IEIs suffer from a "democracy deficit," in which G-7 countries wield a dangerously high level of influence,⁸³ IEIs' multilateral structure, even with this deficit, at least mitigates the risks of hegemonic policy-setting that strictly bilateral aid raises.⁸⁴ Further, recent efforts to increase the voting power of non-G-7 countries, including LDCs, have had some

that government can decide to do without the project. There is no legal obligation on the government to surrender or diminish its sovereignty." *Id.*

⁸⁰ See Banks, *supra* note 21, at 802–03. Banks notes that states make changes based on the pressure from the international community. Where a state has accepted a human rights norm solely based on peer pressure from the international community, however, the state's official protection of a human right can flounder without cultural and social support for the right domestically. *Id.*

⁸¹ While each member country has a voice, the weighted voting system by which decisions are made in IEIs does undercut the significance of this voice. Even so, the extensive work and negotiation that an IEI, particularly the IMF, engages in with a potential borrowing country to ensure that development loans or projects are well-implemented and feasible for the borrowing country ensures that a borrowing country is not blindly accepting conditions in which it has had no say. If a borrowing country does not have sufficient leverage in negotiations to find terms favorable to it, then its remaining option to walk away from negotiations mitigates the sovereignty concerns latent in conditionality. IEIs are not obligated to make sure that borrowing countries can afford to walk away from the bargaining table, just as they are not obligated to make concessional loans to developing countries whose policies make it unlikely that the country will be able to repay the loan or even apply the loan disbursements in such a way as will benefit the country's population.

⁸² As an example of the decision-making structure employed at IEIs, see INT'L MONETARY FUND, FACTSHEET: HOW THE IMF MAKES DECISIONS (2011), available at <http://www.imf.org/external/np/exr/facts/pdf/govern.pdf>.

⁸³ See Head, *For Richer or For Poorer*, *supra* note 6, at 267–68. As Professor Head notes, G-7 countries control about forty-three percent of the votes in the World Bank and about forty-one percent of the votes in the AsDB, and as a result, "a handful of mainly Western countries can effectively impose economic and financial policies on most of the world's other countries." *Id.*; see also Bradlow, *supra* note 72, at 725. MDBs are heavily influenced by G-7 countries, and Bradlow argues that this influence is often used to enforce the political agendas of G-7 countries.

⁸⁴ Although it may be little comfort to opponents of the IEIs, having policies set by several rich countries is at least slightly preferable to having one superpower dictating them. Where many countries work in tandem to set policies, as in the IEIs, there is at least the potential that the resulting conditions will be mitigated by political process.

success.⁸⁵ If this trend continues, the “democracy deficit” of the IEIs will be reduced.

Even if IEIs are so influential that their chosen conditions are mandatory, enforcement of inheritance rights raises few sovereignty concerns because most countries, including most countries which borrow from IEIs,⁸⁶ have ratified the conventions which protect the right to inherit.⁸⁷ These borrowing countries have already exercised their sovereignty—in favor of protecting inheritance rights. A borrowing member country, coerced or not, can hardly complain when IEIs require them to comply with human rights obligations they undertook independently. Consequently, IEIs can require enforcement of the right with less danger of usurping the will of a country that needs money more than it needs sovereignty.

The strong influence IEIs wield over borrowing countries requires that they carefully consider the propriety of their actions. However, where IEIs can take legitimate action to remedy serious structural problems, they should not refrain from that action merely because it will be effective.

C. IEIS COULD HELP TO CREATE MEANINGFUL ENFORCEMENT OF THE RIGHT

Once the legal propriety of IEI involvement is established, the question remains: even if the international community uses conditionality for the enforcement of human rights, will conditionality be effective in making those human rights a reality?

⁸⁵ See IMF Staff, *Reform of IMF Quotas and Voice: Responding to Changes in the Global Economy*, INT'L MONETARY FUND ISSUES BRIEF, Apr. 2008, at 1, available at <http://www.imf.org/external/np/exr/ib/2008/pdf/040108.pdf>.

⁸⁶ For information on any member country's borrowing status with the IMF, see *Country Information*, INT'L MONETARY FUND, <http://www.imf.org/external/country/index.htm> (last visited May 24, 2011).

⁸⁷ For full discussion of the treaty provisions protecting women's inheritance rights, see *supra* note 56. For a list of those countries which have signed and ratified the ICCPR see *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited May 24, 2011). For a list of countries which have signed and ratified the ICESCR, see *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited May 24, 2011). For a list of countries which have ratified CEDAW, see *Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited May 24, 2011).

1. CONDITIONALITY WOULD CREATE LEGAL CHANGE

Conditionality could be almost perfectly effective in terms of legal change within borrowing countries. Conditionality, for practical purposes, merely provides a mechanism for the changing of government incentives, leveraging what a government wants (development assistance) against what a government wants less (change of certain economically-linked domestic policies). As Professor Head notes, “[u]nlike the global and regional regimes established to focus exclusively on human rights protection or on environmental protection, these global economic institutions have the kind of influence that seems to matter most in today’s world: economic influence.”⁸⁸ Most countries are unlikely to view inheritance policies as important enough to prevent them from taking out IEI loans. Indeed, most of the inheritance rights’ issues present in LDCs are a result of governments’ prioritizing of other development issues and of governments’ unwillingness or inability to expend the resources necessary to implement the nondiscrimination laws they ratified in multilateral conventions.⁸⁹ If countries do not strongly object to the implementation of nondiscriminatory inheritance policies, then they likely will agree to conditions requiring it. If countries’ governments agree to enact a legal change, there should be few cases in which the legal change does not occur.

Conditionality’s effectiveness would necessarily be limited to countries whose governments borrow from the IEIs.⁹⁰ By their nature, IMF loans, and most IEI soft lending, go to less developed countries.⁹¹ Even if women’s inheritance rights were perfectly implemented in borrowing countries through conditionality, conditionality would not

⁸⁸ See Head, *For Richer or For Poorer*, *supra* note 6, at 291–92.

⁸⁹ For discussion of such prioritization, see generally Ashenafi, *supra* note 1.

⁹⁰ As IEIs only set conditions as a part of financing agreements with member countries, IEIs naturally could not impose conditions on a country which was not seeking financing from them. For an interesting visualization of which countries currently borrow from the IMF, see *IMF Lending at a Glance*, *supra* note 67.

⁹¹ *Id.* It is worth noting, however, that although most concessional lending goes to LDCs, most countries have at some point used IEI financing in order to solve balance of payments problems. See David D. Driscoll, *The IMF and the World Bank: How Do They Differ?*, INTERNATIONAL MONETARY FUND (last updated Aug. 1996), <http://www.imf.org/external/pubs/ft/exrp/differ/differ.htm>. “Membership in the IMF gives to each country that experiences a shortage of foreign exchange—preventing it from fulfilling these obligations—temporary access to the IMF’s pool of currencies to resolve this difficulty, usually referred to as a balance of payments problem. These problems are no respecter of economic size or level of per capita GNP, with the result that over the years almost all members of the IMF, from the smallest developing country to the largest industrial country, have at one time or other had recourse to the IMF and received from it financial assistance to tide them over difficult periods.” *Id.*

affect non-borrowing countries, regardless of their inheritance situations.⁹² This disconnect between which countries set IEI policies and which countries are subjected to conditionality has provoked criticism of the IEIs, and enforcement of women's inheritance rights would be no exception to this disconnect.⁹³ Symmetry of obligation comes into question when we consider enforcing human rights standards through conditionality. The method is definitively limited to the protection of rights within countries that need aid from IEIs.

2. CONDITIONALITY WOULD BE EFFECTIVE AT THE IMPLEMENTATION LEVEL

IEI assistance could help borrowing countries conquer the logistic and financial obstacles that thwart attempts to enforce women's inheritance rights. Laws that officially protect a right may be undermined by prohibitive implementation cost, cultural resistance to the laws, or failure to monitor the right as it is being implemented. While all of these apply to inheritance rights, cultural resistance is likely to be the most difficult for any attempt to enforce them.⁹⁴

⁹² This gap lends further credence to the assertion that conditionality cannot create proper women's inheritance rights in all situations. In countries which do not borrow from the IEIs, the work of NGOs and other human rights organizations would be all the more critical. Even though conditionality cannot affect non-borrowing countries, many sub-Saharan countries borrow from the IMF. See *IMF Lending at a Glance*, *supra* note 67. Consequently, conditionality's reach extends to most, if not all, of the areas most affected by the African AIDS crisis.

⁹³ See Head, *For Richer or For Poorer*, *supra* note 6, at 293. Professor Head notes that the countries that control IEI policies, particularly in setting conditions for borrowing countries, do not borrow. Consequently, these policy-setting countries are not forced by the need for capital to comply with the conditions they set on borrowing, and scholars have criticized this disconnect as hypocritical. *Id.* It is worth noting, however valid this concern may be, that the asymmetry at issue applies most directly to economic, not human rights, issues. In the article cited above, Professor Head draws examples such as the U.S. savings-and-loan crisis and American and Japanese budget deficits to illustrate the hypocrisy which this disconnect can create. *Id.* at 294. While non-borrowing countries are not by any means free from potential human rights violations, their policies with regard to women's property and inheritance rights are much more likely to be in compliance with the inheritance and property-related policies they set through conditionality than with economic oversight policies.

⁹⁴ Inheritance, and its implications about who a decedent would wish to protect after death, is deeply ingrained in most cultural consciences, partly for its implications of familial structures and partly for its capacity to determine a great deal of the distribution of wealth. Indeed, some of inheritance laws that have actually gone into effect have been undercut by cultural concerns. For an example of how customary law has blocked implementation of statutory reform in Ethiopia, see also ASHENAFI & TADESSE, *supra* note 1, at 17. Ashenafi and Tadesse note that, despite several decades of land ownership, marriage, and inheritance reform laws, customary land ownership systems have remained substantially unchanged.

As noted earlier,⁹⁵ even if a country has pristine human rights laws in effect, such laws could go unenforced merely due to the financial strain that enforcement would pose for the government.⁹⁶ Enforcement requires courts to clarify rights and make case-by-case declarations of rights, but it also requires police manpower (and police manpower that is well-compensated enough to make officers difficult to bribe, at that) for on-the-ground protection of rights and public education to teach individuals what rights they have.⁹⁷

The IEIs cannot in good conscience require the undertaking of such measures without providing, on their own or through cooperative financing, the resources necessary for governments to implement them. The IEIs, however, are in a unique position relative to political entities, NGOs, and other international actors: while many organizations place pressure or demands on a recipient government, IEIs actually provide funding. This effectively weakens the recipient country's argument that "we can't afford it." The recipient country, by definition as a borrower, cannot in theory afford any of its intended development projects without IEI and other financial assistance. While borrowing countries could argue that other priorities should take precedence over women's inheritance rights enforcement, IEI involvement makes the financial burdens of implementation easier for governments to bear.

IEIs can also help borrowing countries address logistical and technical barriers to implementation of human rights. The IMF has long-established technical assistance programs that can help member countries implement women's inheritance rights in a sustainable way, using their expertise and experience to help countries work through cultural resistance to a change, improving the quality of life within the country.⁹⁸

⁹⁵ See *supra* notes 29–33 and accompanying text.

⁹⁶ INT'L CTR. FOR RESEARCH ON WOMEN, *supra* note 23, at 28–30.

⁹⁷ For further discussion on the need for education to accompany legislative implementation of inheritance rights, see *id.* at 4. "Sound laws and gender-sensitive judicial systems must go hand in hand with a high level of public awareness of women's property and inheritance rights and of how national law or international human rights frameworks can protect and promote those rights. Women themselves often lack adequate knowledge about courts and other legal mechanisms available to defend their rights, as well as the means to employ such mechanisms when needed. Women who have HIV/AIDS or live in an affected household would be particularly well-served to have access to this knowledge and information." *Id.* (footnote omitted).

⁹⁸ For an overview of the IMF's technical assistance programs and its monitoring activities, see INT'L MONETARY FUND, FACTSHEET: TECHNICAL ASSISTANCE (2011), available at <http://www.imf.org/external/np/exr/facts/pdf/tech.pdf>; see also INT'L MONETARY FUND, FACTSHEET: IMF SUPPORT FOR LOW-INCOME COUNTRIES (2011), available at <http://www.imf.org/external/np/exr/facts/pdf/poor.pdf>.

Other IELs have similar programs, all of which can help governments implement policies with the benefit of experienced counsel.⁹⁹

3. GALVANIZATION OF EFFORTS IS AN IEL STRENGTH

Despite this, perhaps the strongest potential benefit of IEL involvement in women's inheritance rights is the institutions' potential to facilitate cooperation. By no means should imposition of conditions be the only tool the global community uses to help promote women's property rights and prevent women's disenfranchisement. Instead, the IELs' ability to galvanize government, humanitarian, and other NGO initiatives and to create a cooperative plan for implementing the right is perhaps the most effective implementation tool they have.

In particular, IEL protection of women's inheritance rights should not come at the cost of welfare programs for women and children already left vulnerable by disinheritance. Humanitarian aid organizations that help widows and orphans who have been deprived of property, most particularly their homes following the death of a male relative, would benefit from the financial influx and the governmental cooperation that conditionality would encourage.¹⁰⁰ Such organizations are vital and perhaps the most immediately helpful means for protecting women who have been deprived of the right to inherit. These organizations are more familiar with local culture than IELs, and could therefore help IELs tailor their implementation approaches appropriately.¹⁰¹ Providing support for victims can save thousands of lives and help to keep many from being exposed to HIV/AIDS.¹⁰² Consequently, such organizations can and

⁹⁹ Almost all IELs have technical assistance functions. As an example, for an overview of the World Bank's Technical Assistance function, see *Projects & Operations: Non-Lending Activities*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120720~menuPK:235710~pagePK:41367~piPK:51533~theSitePK:40941,00.html#techassist> (last visited May 24, 2011). For a summary of the Asian Development Bank's Technical Assistance Program, see *Technical Assistance Reports*, ASIAN DEV. BANK, <http://www.adb.org/Projects/reports.asp?key=reps&val=TAR> (last visited May 24, 2011).

¹⁰⁰ These organizations provide housing, food, and economic training and counseling to widows. For a discussion of this suggested method as it applies to Uganda, see Loftspring, *supra* note 17, at 273.

¹⁰¹ See Oloka-Onyango, *Beyond the Rhetoric*, *supra* note 58, at 39. Oloka-Onyango notes that NGOs such as Oxfam seldom lobby for legal change, but rather conduct humanitarian programs on a practical level. Partnership between IELs and organizations with an awareness of the humanitarian needs in a particular area could help IELs ensure that their policies do not have unintended consequences in practical application.

¹⁰² Most widows and children who have lost their homes and other property as a result of male-only inheritance laws, I am confident, would best be served by such organizations, not by a legal change which would affect only those whose loved ones passed away after the change was implemented. Consequently, such organizations are perhaps the most immediately needed

should be used to help ameliorate the immediate consequences of the failure to protect the right, freeing IELs to address the legal and enforcement structures that cause them.¹⁰³

Specialized human rights courts could help IELs overcome cultural resistance to women's inheritance rights. Courts' power to interpret laws—including customary laws—can legitimize women's inheritance rights by reconciling them with local customs. As scholars point out, widow inheritance has not traditionally included a sexual component.¹⁰⁴ Courts can help to either delegitimize the sexualization of the practice or to discourage the practice altogether as inconsistent with tradition. Human rights courts could also protect widows on an individual level. In court, the widow accused of infecting her late husband with AIDS can argue her case rather than being automatically forced into widow inheritance or merely being thrown out by her husband's family. Funding from IELs could enable human rights courts to weather the historically prohibitive cost of individual human rights litigation.¹⁰⁵

Even where courts have declared certain laws or actions to be violations of human rights, these declarations have been difficult to enforce.¹⁰⁶ Without strong government incentives to enforce judgments,

response to the failure of women's inheritance rights, especially in areas with high HIV/AIDS infection rates. As noble and vital as these organizations are, however, their goal is to help victims, not to effect legal change. Failure to gain legal change, however, will not stem the cause of the disenfranchisement of women, but only ameliorate the conditions of those women once disenfranchised. If the international community wishes to stop the disenfranchisement at its source, then it must find a way to get laws changed and to get those new laws enforced. Thus, I propose that these support organizations should partner with organizations working towards legal change.

¹⁰³ See Oloka-Onyango, *Beyond the Rhetoric*, *supra* note 58, at 69 ("Work at the level of basic needs must itself be done with an eye to human rights issues. In the end, development activities must be entry points for enhancing human rights; specifically, human rights work must incorporate development action.").

¹⁰⁴ See *supra* notes 30–33 and accompanying text.

¹⁰⁵ Following the Damian Thomas case, Jamaica withdrew from the Optional Protocol that made the ICCPR justiciable, arguably due to the volume of cases which the treaty would engender. *Damian Thomas v. Jamaica*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/65/D/800/1998 (May 26, 1999). See Natalia Schiffrin, *Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, 92 AM. J. INT'L L. 563 (1998). This is an example of the justiciability issues about which the U.S. has been hesitant. If this example is any indication of countries' reactions to the potential for large-scale litigation of human rights, then getting countries to truly commit to the use of human rights courts will be difficult.

¹⁰⁶ As an example, in the breakthrough Grootboom case, South Africa's highest court gave human rights activists a significant victory when it held that the government owed its citizens, and particularly Irene Grootboom, the plaintiff, protection of the right to adequate housing. Despite this holding, the court's verdict remained virtually unenforced, as Grootboom died eight years

the same result would likely occur with decisions declaring women's inheritance rights.¹⁰⁷ Widows would have a legal declaration that they are lawful heirs of their fathers or husbands, but practices such as property-grabbing and wife inheritance would likely keep the declaration from having real force and effect. Law, without active governmental support, cannot be made into actionable reality.

4. GARNERING INTERNAL SUPPORT FOR IEI INHERITANCE RIGHTS ENFORCEMENT

For conditionality to improve women's inheritance rights, IEIs must be both able and willing to become involved with enforcement. If IEIs are willing to act, then their financial resources, technical assistance programs, and leverage with governments will enable them to effectively galvanize implementation efforts. Getting the IEIs to act, however, will likely require strong leadership by countries that wield a great deal of influence within their structures—most notably, the United States.¹⁰⁸

later without ever receiving the housing awarded to her by the judgment. *See* Pearlie Joubert, *Grootboom Dies Penniless and Homeless*, MAIL & GUARDIAN ONLINE (Aug. 8, 2008, 10:45 AM), <http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>.

¹⁰⁷ Even worse, courts which are not backed by sufficient enforcement measures can alter their legal declarations to cater to traditional inheritance practices. This exact trend, in fact, was demonstrated by the Zimbabwean Supreme Court's decision in *Venia Magaya v. Nakayi Shonhiwa Magaya*. Oloka-Onyango, *Human Rights and Sustainable Development*, *supra* note 58, at 64–65. After noting that Zimbabwean law—in theory—protected the right to women's inheritance, the *Magaya* judge stated that “it must be recognised that customary law has long directed the way African people conducted their lives and the majority of Africans in Zimbabwe still live in rural areas and still conduct their lives in terms of customary law. In the circumstances, it will not readily be abandoned, especially by those such as senior males who stand to lose their positions of privilege. . . . In view of the above, I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution initiated by the courts.” *Id.* at 65. Oloka-Onyango notes that the *Magaya* decision “is important to the issue of the realization of the human rights of women in Africa for several reasons. First, it brings out the resilience of patriarchal forms of control and discrimination, and other considerable obstacles that stand in the way of the struggle to achieve gender parity and greater respect for women's human rights on the African continent. Many times, the reasons given for the retention of discriminatory practices relates to the ostensible need to retain social harmony and cohesion.” *Id.* at 64–65.

¹⁰⁸ If an amendment to the IMF Charter is needed to authorize human rights conditionality, then the amendment would need to garner an 85% majority of IMF voting power for approval. Articles of Agreement of the International Monetary Fund, art. XXVIII(a), July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (entered into force Dec. 27, 1945). Given the United States' voting power of over 16 percent, the United States has an effective veto power in the IMF, and it would need to at least concede to, if not spearhead, efforts in favor of the amendment. Consequently, I will discuss the ramifications of the use of conditionality as an implementation method from the perspective of the United States, though most of the method's benefits would apply to other countries, particularly those with significant IMF voting power, who wish to encourage human rights where possible. The United States, however, could very well find the increased use of IMF

This leadership is feasible because IEIs' involvement in implementation mitigates most of the factors that have traditionally led the United States, and other countries, to hesitate to join human rights treaties or enforcement.¹⁰⁹ In particular, conditionality as a method provides two benefits that others do not: diffusion of political pressure and avoidance of the justiciability issues from which the United States has shied during recent decades.¹¹⁰

IEI conditionality minimizes the justiciability concerns which slow human rights efforts. Justiciability issues would not present themselves in the IEI conditionality context, if only because conditionality does not include a court in its enforcement mechanism.¹¹¹ Historically, the United States in particular has hesitated to enter into multilateral human rights treaties, partly because ratifying those treaties would incur obligations that would make human rights, which are unwieldy and difficult to litigate at best, domestically justiciable.¹¹² Given this hesitation,¹¹³ the United States may show similar reticence to the creation and maintenance of individual human rights courts within

conditionality a vital tool in helping to implement human rights. The United States has similar strength in the other IEIs, though not so much in any other as to amount to an effective veto power.

¹⁰⁹ See *supra* note 105 and accompanying text.

¹¹⁰ See *supra* note 105 and accompanying text.

¹¹¹ Indeed, this lack of a court contributes to criticisms that the IMF remains unaccountable to other international organizations or to the intended beneficiaries of IMF loans. If the IMF does not provide a forum for complaint by citizens of a recipient country, then its compliance evaluations may be missing vital pieces of the complete picture in the country. While the need for accountability of the IMF is valid, however, it stretches beyond the scope of my analysis here. For full discussion of why the IMF needs better accountability structures, see generally Head, *For Richer or For Poorer*, *supra* note 6, at 299.

¹¹² For purposes of this article, I will leave the question of the wisdom and propriety of this hesitation open. It is enough for my analysis to note the existence of this hesitation, and to note that the use of conditionality to encourage human rights' protection would allow the United States to encourage enforcement of human rights, which it has on numerous occasions shown willingness to do, without raising the specter of domestic justiciability. A Charter amendment requiring symmetry of obligation, which some IEI critics have proposed, would defeat, or at least challenge, the attractiveness of this benefit for the U.S. Any amendment providing for symmetry of obligation would necessarily leave the question of human rights in the U.S. open for international debate and question. Consequently, I believe that this amendment is much less politically feasible given the U.S.'s hesitancy with regard to justiciability of human rights.

¹¹³ The United States has not, for example, ratified CEDAW. Amnesty International claims that "[h]esitancy to ratify this important document stems from unfounded fears associated with the implementation of CEDAW in the U.S." AMNESTY INT'L, A FACT SHEET ON CEDAW: TREATY FOR THE RIGHTS OF WOMEN 1, available at http://www.amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf. Among those fears listed is that "[CEDAW's] implementation in the U.S. would result in unwise laws and 'frivolous' lawsuits." *Id.* For full discussion of Amnesty's position on this topic and other "myths" about CEDAW, see *id.* at 1–2.

another country. Conditionality offers the United States and like-minded countries an enforcement method that does not open the floodgates of human rights litigation.

In addition, the United States and other G-7 countries would likely find multilateralism's diffusion of political pressure useful. If a G-7 country unilaterally applied pressure to adopt measures protecting women's inheritance rights, then it could be accused of infringing on countries' sovereignty. If the IMF, however, as a multilateral institution, applied the same pressure, then the pressure gains the persuasive force of consensus and the softening benefit of financial relief.

IEIs have already displayed some willingness to get involved with issues close to women's inheritance rights, especially in the HIV/AIDS context.¹¹⁴ The IMF has already identified vulnerability of women and children as a risk factor that it seeks to address in countries dealing with high HIV/AIDS infection rates.¹¹⁵ In addition, it has argued that social structures that ultimately affect the economic conditions within a borrowing country are proper matters for IMF concern.¹¹⁶ Inheritance rights, though perhaps not at the forefront of the IMF's current policies, are just such a social right as the IMF has already demonstrated willingness to enforce.¹¹⁷ Other IEIs have shown more reluctance to address human rights concerns.¹¹⁸

D. IEIS MUST ADDRESS MAJOR CRITICISMS WHILE ENFORCING INHERITANCE RIGHTS

If IEIs get involved with implementation of women's inheritance rights, they will need to proceed carefully. Where the AIDS epidemic has hit hardest, the population has an overwhelming number of urgent needs, none of which can be neglected.

¹¹⁴ As one example, the International Development Agency, a branch of the World Bank, recognized women's inheritance rights as a factor contributing to gender inequality, and particularly as a risk factor for women's health. See INT'L DEV. AGENCY, GENDER: WORKING TOWARDS GREATER EQUALITY 2, available at <http://siteresources.worldbank.org/IDA/Resources/IDA-Gender-Impact.pdf>.

¹¹⁵ See *The IMF's Role in the Fight Against HIV/AIDS*, INT'L MONETARY FUND (Aug. 2008), <http://www.imf.org/external/np/exr/facts/hiv aids.htm>.

¹¹⁶ See *Social Dimensions of the IMF's Policy Dialogue*, INT'L MONETARY FUND (Mar. 2001), <http://www.imf.org/external/np/exr/facts/social.htm>.

¹¹⁷ For a description of the IMF's position on social policy action and examples of its past social policy-setting, see *id.*

¹¹⁸ For examples of this reluctance, see Ciorciari, *supra* note 50, at 351–56.

1. PROTECTING THIS RIGHT SHOULD NOT COMPROMISE HUMANITARIAN EFFORTS

IEIs must avoid several pitfalls to ensure that they do not do more damage than good. First, they should take care not to injure other human rights in the attempt to protect women's inheritance rights. Second, they must consult with the proper human rights organizations and international bodies to ensure proper implementation of the right. Finally, they must limit their involvement in enforcement of the right in countries that have not committed to protect the right.

Perhaps the most important criticism to address is the assertion that imposing human rights conditions on recipient governments will deny vital aid money to those most in need of protection—the general population of the recipient countries.¹¹⁹ Imposing conditions on IMF financing necessarily entails the possibility that money will be withheld if conditions are not met. Critics argue that withholding aid money would truly hurt the populace of a country, not the government which has failed to comply with conditions.¹²⁰ Furthermore, they argue that withholding aid money would only further exacerbate crumbling conditions in recipient countries, even starving innocent individuals by so vigorously “protecting their rights.”¹²¹ While this criticism is compelling, it provides an incentive to very, very carefully weigh the feasibility of implementation of human rights measures and the effect that denial of aid would have on the general population of a country defaulting on IMF conditions, rather than a reason to avoid using IMF conditionality for the encouragement of human rights.

To avoid compromising delicate conditions within recipient countries or causing a domino effect of withdrawal of support from a country, IEIs need to carefully examine which policy goals are most immediate and vital before any given right is imposed as a condition to development aid, and before development financing is diverted from other projects to the enforcement of human rights. Obviously, if a country's people do not have water to drink, addressing their immediate survival needs would supersede addressing their rights to vote (again, if a

¹¹⁹ For a full discussion of this criticism, see Moris, *supra* note 75, at 186–88.

¹²⁰ *See id.*

¹²¹ Moris, for example, argues that “due to the dependency [IEI loan recipient] countries have on the World Bank loans, withholding of those loans (for human rights reasons) will likely cause economic stagnation in those countries. That, in turn, will cause an increase in human rights abuses since there is a positive correlation between poverty and human rights abuses.” Moris, *supra* note 75, at 188.

choice between the two is necessary). However, issues such as whether inheritance rights take precedence over the building of a road get blurrier to the outside eye. For this reason, a highly respected, highly specialized body would be best situated to evaluate what priorities can and should be assigned to any given loan. Additionally, open discussion with specialized NGOs would help to minimize chances of improper implementation measures.¹²²

Another criticism arising from this same aspect of IEI financing is that the IMF's status as a preferred lender¹²³ potentially makes it a much more dramatic loss to a country to have an IEI declare it in default.¹²⁴ Scholars have argued that the IEIs' status as preferred lenders makes their loans "triggers" for any other debt financing which a country might wish to use.¹²⁵ Both private lenders and individual lending countries often evaluate a country's credit-worthiness on whether it is making timely IEI loan payments.¹²⁶ As a result, countries seeking to borrow money from any institution must usually take loans from IEIs before they can obtain other financing.¹²⁷ If IEI financing is mandatory for a would-be-borrowing country, this makes whatever conditions the IEIs impose mandatory as well. This pattern gives the IEIs policy-making power which they must take care not to abuse.

This criticism seems weaker for human rights conditions than for more financial conditions. Private lenders are much less likely to balk at a defaulting country's poor inheritance structures than over a failure to make timely payments on IEI loans or to implement financial reform.¹²⁸

¹²² See Oloka-Onyango, *Beyond the Rhetoric*, *supra* note 58, at 67. "Human rights groups should join with groups working in development to track real incomes and measure the effectiveness of World Bank/IMF social 'safety nets' and poverty-adjustment schemes. This would form part of the process of monitoring the impact of SAPs on economic and social rights." *Id.*

¹²³ "Indeed, the IMF, along with the World Bank, has long been considered by some to be a 'preferred creditor': countries usually honor their financial commitments to these institutions more promptly and fully than to other creditors." John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter*, 33 VA. J. INT'L L. 591, 593-94 (1993).

¹²⁴ See Morris, *supra* note 75, at 188. For a full summary of the triggering function, see Head, *supra* note 123, at 594 n.5.

¹²⁵ See Head, *supra* note 123, at 594 n.5.

¹²⁶ Many creditors condition the disbursement of funds under a loan agreement with a lesser developed country on approval of an arrangement by the IMF, or on the continued effectiveness of such an arrangement. *Id.*

¹²⁷ See *id.*

¹²⁸ Although disclosure of the reason for declaring a country to be in default on an IMF loan addresses the issues of risking private-sector withdrawal from a country, it admittedly raises serious issues as to the propriety of imposing human rights-related conditions on a country. If IMF conditions can be easily separated as non-economic, or at least indirectly economic, then

Consequently, private lenders who have cooperated with the IMF would not necessarily call the country's existing loans or refuse to make new loans solely on inheritance grounds.

2. CHARTER AMENDMENTS WOULD CLARIFY IEI AUTHORITY TO INTERVENE

Scholars have raised valid concerns about the IEIs' "mission creep"—their slowly increasing involvement with domestic policies, human rights, and governance issues.¹²⁹ To address these concerns fully, IEIs may need to amend their charters to explicitly allow enforcement of human rights.¹³⁰

But who should decide what form of the right to inherit should go into IEI conditionality and what laws should that body apply to a recipient country? While IEIs are well-positioned to enforce inheritance rights, they are primarily staffed with economic and technical experts rather than human rights experts.¹³¹ Scholars have raised the concern that this could lead to inefficient or even harmful human rights decision-making if the IEIs do not collaborate with organizations that have more specialized expertise.¹³² If the IEIs undertake to implement the right to inheritance without extensive consultation with NGOs and targeted inheritance-rights organizations, they run the risk of implementing the right improperly, both wasting their efforts and the borrowing government's loan resources.¹³³ If critics are correct that IEI conditions are essentially mandatory for LDCs, then the right should be interpreted

critics may argue that those conditions are not sufficiently related to a country's development or ability to repay a loan for the IMF to impose them.

¹²⁹ For a definition of "mission creep" and a discussion of this criticism's merits, see Head, *For Richer or For Poorer*, *supra* note 6, at 265, 269.

¹³⁰ The use of conditionality could require two amendments to the IMF Charter. Even though women's inheritance rights have broad economic effect, an amendment to allow for the protection of certain human rights would even further legitimize IEI involvement. Additionally, critics have suggested that IEIs need better symmetry of obligation, or enforcement of human rights standards beyond borrowing countries to IEI member countries in general, before IEIs can get involved in enforcement of any human right. For the best articulation of the need for symmetry of obligation, and a suggestion of an amendment which could create it, see *id.* at 314.

¹³¹ For a discussion of proposed staffing and organizational changes which may be required if IEIs became actively involved in general human rights enforcement, see *id.* at 295–96.

¹³² See Bradlow, *supra* note 72, at 726. Bradlow asserts that concerns that IEIs' strong influence in borrowing countries may lead to poor human rights implementation decisions would be mitigated if IEIs consulted with organizations specializing in human rights and deferred to the expert organizations' suggestions on human rights and humanitarian issues. *Id.*

¹³³ Which, we must remember, the government is still obliged to pay back.

by some authoritative body so that IEIs can implement it without sovereignty concerns.¹³⁴

An amendment might not be necessary for IEIs to enforce women's inheritance rights, however. The IEIs have already received permission, through ratification of their charters, to set certain economic policies that should encourage economic growth in borrowing countries.¹³⁵ The right of inheritance may be sufficiently economic to give IEIs legal basis for enforcing the right. However, IEI charter amendments would eliminate any question of the IEI's authority to intervene.

CONCLUSION

Some of the IEIs' major criticisms raise serious caveats for the use of conditionality in inheritance rights' enforcement. Women's inheritance rights are difficult to implement, but the use of conditionality would at least give governments incentives to prioritize those rights. Similarly, the IEIs can provide the financial support countries need to raise awareness of women's inheritance rights and to make structural adjustments where needed. When addressing each of these criticisms, it is worth noting that the IMF's conditions are not a Procrustean bed; countries' good faith efforts to comply with conditionality are not punished by withholding of disbursements nor is a country expected to create dynamic social and economic change overnight.¹³⁶ The IEIs, though perhaps not perfectly democratic or specialists in human rights or a particular right, are uniquely positioned by their financial resources and their established global presence to influence governments. Moreover, their mechanisms for gathering expert technical advice safeguard the direction in which they wield that influence. If the IEIs use their leverage

¹³⁴ In my opinion, the best body to decide the proper interpretations of human rights law to be enforced by the IEIs would be ICJ and regional human rights courts such as the European Court of Human Rights. If these bodies' decisions were applied, the law which would factor into IEI decision-making would be (1) customary international law, which is binding on all states, (2) treaty law which has been so widely accepted as to make it pseudo-customary international law, and (3) treaty obligations specifically undertaken by the recipient government in any given IEI project.

¹³⁵ Article V of the IMF Charter, for example, grants the IMF the authority to set conditions and policies which will better enable a borrowing member country to repay its loans. *See* Articles of Agreement of the International Monetary Fund, art. V, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (entered into force Dec. 27, 1945).

¹³⁶ Critics have argued, to the contrary, that the IMF uses a "cookie cutter" approach to development. To the extent that this criticism is valid, the IMF certainly would need to develop the evaluative protocols and infrastructure necessary to adequate case-by-case analysis before any kind of human rights conditions could be imposed.

to enforce a human right to which most countries have consented already, this method is both legally proper and practically feasible.

IEIs should enforce inheritance rights for many reasons. One of the most compelling reasons is that the rights should be, and really only can be, enforced on an international level. Another is that IEIs enjoy a unique degree of leverage to encourage legal change protecting inheritance rights and to facilitate implementation. I make this proposal knowing that, to some extent, I am preaching to the choir. The IEIs have already demonstrated willingness to prioritize women's property rights, and some have even made some efforts to begin implementing standards for women's inheritance policies. While the institutions have demonstrated their own willingness to help foster this vital right, they have encountered criticism (close to the "mission creep" criticism and the criticism that these institutions lack human rights expertise) that has made their participation politically difficult, and which has kept their participation from being incorporated into their bylaws and charters. This proposal, then, is intended to demonstrate the overarching appropriateness of the IEIs' involvement with the enforcement of women's inheritance rights.

Despite the causes for caution raised by criticisms of the IEIs, the use of conditionality on multilateral aid remains an effective, legally appropriate, and feasible method for enforcing women's inheritance rights. The fight against AIDS needs support from proper inheritance structures. However, implementing those structures will require funding, and IEIs can minimize the financial burdens of protecting the right. Most countries in sub-Saharan Africa can only afford to concentrate on keeping their populations alive;¹³⁷ with IEI assistance, those countries can begin to address one of the factors that exposes those populations to danger in the first place.

No, IEIs are not without serious potential pitfalls which should inform every step of implementation work. No, IEIs should not be given a broad-brush license to define and enforce human rights without accountability. But these limitations are not grounds to prevent them from intervening in the largest health crisis in recorded history. Instead, they should be allowed to act as they were designed—as financial

¹³⁷ Demonstrating the shortage of funding to fight AIDS in Africa, the New York Times noted: "[i]n February, Michel Sidibé, the executive director of UNAIDS, estimated that \$27 billion would be needed this year to fight the disease. Nothing close to that amount is on tap." Donald G. McNeil, Jr., *As the Need Grows, the Money for AIDS Runs Far Short*, N.Y. TIMES (May 9, 2010), <http://www.nytimes.com/2010/05/10/world/africa/10aidsmoney.html>.

institutions aiding struggling governments to translate the legislation they pass from mere theory into enforceable, effective social change; informed by the conditions on the ground and national-level feedback; and curtailed by the checks and balances of a democratic structure.

Women's inheritance rights, if protected, would have dramatic effects, both by curbing a sector of unnecessary HIV/AIDS vulnerability and through the economic development which would follow the grant of property rights to women. Presented with an established and feasible option that would both respect countries' sovereignty and stand a viable chance of actually making the right a reality, the international community can scarcely afford to pass up such an option.