

Michigan Journal of Gender & Law

Volume 2 | Issue 1

1994

The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women

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Recommended Citation

Susan J. Toepfer & Bryan S. Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L. 83 (1994).

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THE WORLDWIDE MARKET FOR SEX: A
REVIEW OF INTERNATIONAL AND REGIONAL
LEGAL PROHIBITIONS REGARDING
TRAFFICKING IN WOMEN

*Susan Jeanne Toepfer**
*Bryan Stuart Wells** ****

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OVERVIEW

This essay considers whether international treaty law is a useful weapon in the battle against the global sex trade. The introduction to this essay surveys the extent of global sex trafficking. Part I of this essay discusses the international legal conventions that address the issue of trafficking in women. Part II of this essay assesses the effectiveness of these inter-

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*** We want to thank our editors, Amy Pokras, Rachael Meny, Kirsten Solberg, Stacey Mufson, Joan Sitomer, and Maura Scott, for their extensive work on this essay.

national instruments and considers why they have failed to end the world sex trade. In Part III, this essay describes the European and Inter-American human rights systems, focusing upon substantive law in the regional systems that might be relevant to the issue of prostitution. It then briefly examines the procedures through which this substantive law could be enforced.

This essay agrees with scholars who conclude that the substantive terms of the international¹ gender-based treaties prohibit trafficking in women.² This essay also maintains that the enforcement procedures in the existing gender-based international treaties are inadequate.³ Under these treaties, trafficking violates international law. An individual trafficked woman, however, can neither bring a claim under the treaties against her pimp or her purchaser, nor require a signatory nation to bring a legal claim on her behalf. Further, despite these treaties, trafficking in women continues on a massive scale.⁴ Consequently, the inadequate enforcement mechanisms of the treaties undercut their substantive prohibitions.

Despite the problems, this essay concludes that feminist lawyers should work to promote enforcement of the principle that trafficking in women is sex discrimination and a violation of human rights. These principles and prohibitions should be enforced under both the regional human rights treaties and the global legal conventions.

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1. "International" refers here to those treaty instruments that are open for signature by any member of the United Nations. By contrast, regional treaty instruments, such as the European Convention on Human Rights, are generally open for signature only to countries listed in the regional charter. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 5 Europ. T.S. 21 (entered into force Sept. 3, 1953) reprinted in COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 102 (1981) [hereinafter European Convention].
 2. *See, e.g.*, Sherry Teachnor, *The U.N. Convention on the Elimination of All Forms of Discrimination Against Women: An Effective Tool to Combat Discrimination in the 20th Century*, 9 WHITTIER L. REV. 419 (1987). *See also* Andrew C. Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1 (1989); Noreen Burrows, *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*, 32 NETHERLANDS L.J. 419 (1985).
 3. *See* Laura Reanda, *Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action*, 13 HUM. RTS. Q. 202, 228 (1991).
 4. Margot Hornblower, *The Skin Trade*, TIME, June 21, 1993, at 45-46.

INTRODUCTION

The Extent of the Problem

Many of the girls have broken teeth. They say they fell downstairs. But there are so many of them that either this business has the worst-maintained stairs in the world, or these girls are being punched.⁵

Don't ask me for love, Sir.

*You're saying that you are paying for this
and for the sake of your money I put up with your boozing
your mouth which smells of frothing alcohol.
Besides, you are not offering a lot of money. I need to buy clothes,
make-up*

*No, the money is not for some lover
it is for my old mother who lives in the country
for my brothers, who need something to wear
who need to go to school and have to eat
One does not live on air and even if one did
it would cost more for the poor.⁶*

For five nights, Almira Ajanovic says, she was raped by Serb soldiers inside the temporary bordello they had set up in her home village of Liplje, three men every night.

"They took a knife and cut my dress open," the 18-year-old woman said, recalling how it began. The men, paramilitary troops with long beards in the style of Chetniks . . . had stripped to the buff, and two pinned her to the bed as the third raped her. Then they switched places, each watching the others perform.

It continued for five nights, with different men each time, until the sixth, when they heightened the humiliation by raping Almira in front of her father. "That Chetnik said that he was going to marry me. My father kept silent," she recalled.⁷

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5. Hornblower, *supra* note 4, at 45, 47 (quoting Francine Meert, head of Le Nid, a Brussels aid group).
 6. Moncho Huaga, *untitled*, (unpublished poem by a prostitute from Paraguay) (on file with the authors).
 7. Roy Gutman, *Victims Recount Nights of Terror at Makeshift Bordello*, *NEWSDAY*, Aug. 23, 1992, at 37. The primary "customers" of these bordellos are Serbian soldiers. Gutman, *supra* at 37.

*A 15-year old Akha hill tribe girl forced into prostitution at the age of 12, told Reuters a man came to her northern Thai village and promised her a job in a Bangkok restaurant. The man then took her to a brothel. "I saw ladies dressed up nicely and going out to work, and I cried and asked the ladies what they were doing," she said. "I realized I had been set up for prostitution."*⁸

These quotations provide insight into the lives of trafficked women. The quotes also show that men force women into prostitution in many places and under many different circumstances. We live in a world in which men buy and sell women's bodies for sex. On any given day, international pimps market women and girls as slaves to Asian, European, and American businessmen who fly hourly into South Korea or Thailand for "sex vacations" organized by their local travel agencies.⁹ Most recently, prostitution has become a new strategy of war, carried out by Serbs in the "rape brothels" of the former Yugoslavia.¹⁰

"Exploitation of prostitution includes casual, brothel, military, pornographic prostitution, and sex tourism, mail order bride markets, and trafficking in women."¹¹ The international traffic in women includes any "situation[] where women or girls cannot change the immediate conditions of their existence; where, regardless of how they got into those conditions, they cannot get out; and where they are subject to sexual violence and exploitation."¹²

8. Patricia Callahan, *Little Progress in Ending Thai Child Prostitution*, Reuters, Sept. 14, 1994, available in LEXIS, Nexis Library, Reuters File.
9. *History and Statement of Purpose of the Coalition 1991-92*, (The Coalition Against Trafficking in Women, State College, PA) [hereinafter *History and Statement of Purpose*]. See also Barbara Crossette, *As Thai Sex Trade Increases, So Do Abuses*, N.Y. TIMES, Oct. 6, 1986, at A10; *Asian Governments Pander to American Tourists*, NEWSDAY, June 7, 1985, at 14-16.
10. In these "brothels" the bodies of Bosnian women are being used as both payment and bounty for Serbian soldiers. See, e.g., Catharine A. MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, Ms., July/Aug. 1993, at 24 [hereinafter MacKinnon, *Turning Rape into Pornography*]; Catharine A. MacKinnon to Represent Croatian, *Muslim Wartime Rape Survivors*, OFF OUR BACKS, Feb. 1993, at 3, 21; Ivica Kostovic & Natalie Nenadic, Address at the University of Michigan Law School (Mar. 4, 1993).
11. Gayle Kirshenbaum, *A Potential Landmark for Female Human Rights*, Ms., Sept./Oct. 1991, at 13.
12. *History and Statement of Purpose*, supra note 9, at 3. As the above definition suggests, this essay deals only with prostitution instigated by force, violence, or coercion. Some scholars argue, however, that there is little difference between

Many trafficked women are enslaved through violence, including rape, gang rape, torture, forced sales, and kidnapping.¹³ Women are sold and resold in every part of the world.¹⁴ In India, for example, pimps purchase lower-caste Hindu women, often girls under the age of sixteen,¹⁵ to fill their brothels. When families refuse to sell these women, pimps often kidnap the women and take them to different provinces, where they are given new names and identities.¹⁶ In the brothels, pimps condition women to accept prostitution through physical brutality and psychological torture. "Those who rebel against their exploiters are starved, whipped, burnt with cigarette or beedi butts, forced to drink intoxicating drinks, drugs or herbal concoctions, cut on the face, branded or locked up."¹⁷

Other countries have similar problems. In China, changing economic times have resulted in trafficking in women.¹⁸ For example, in the village of Haotou in the southern Guangdong Province, Chinese peasants "figured out an easy way to join the market economy."¹⁹ The peasants kidnapped young women and girls from other areas, transported them back to Haotou, and forced them into prostitution.

coerced and so-called "voluntary" prostitution. Few women voluntarily choose prostitution as their employment. Instead, women who are not kidnapped, bought, or sold into prostitution are often forced to become prostitutes because they have no other economic alternatives. See, e.g., RUTH ROSEN, *THE LOST SISTERHOOD* 147 (1983).

13. See, e.g., Julia L. Ernst, *The Politics of Gender & Prostitution in India, Kenya and Thailand* (Dec. 12, 1992) (unpublished manuscript, on file with the authors).
14. Hornblower, *supra* note 4, at 45.
15. In many Asian countries, pimps prefer young girls, especially virgins, because customers fear that older women carry HIV. Because of the fear of AIDS, girls are often prostituted once and then, if they are lucky, discarded—penniless, often addicted to drugs, and too humiliated to return to their families. See, e.g., Birgit Schmidt am Bursch, *Sex Touring, International Match-Making & International Trafficking of Women under International Law*, Panel Presentation at the *Michigan Journal of Gender & Law Symposium, Prostitution: From Academia to Activism* (Oct. 31, 1992) (videotape on file with the *Michigan Journal of Gender & Law*).
16. See M. RITA ROZARIO, *TRAFFICKING IN WOMEN AND CHILDREN IN INDIA (SEXUAL EXPLOITATION AND SALE)* 48 (1988); BISWANATH JOARDAR, *PROSTITUTION IN HISTORICAL AND MODERN PERSPECTIVES* (1984).
17. ROZARIO, *supra* note 16, at 78 (1988).
18. Communist party leaders dream of transforming China into another Singapore, a successful market economy. Their plan is to jettison the economic aspects of communism and replace them with the East Asian tradition of "market-Leninism," or free-market authoritarianism. Nicholas D. Kristof, *China Sees 'Market-Leninism' as Way to Future*, N.Y. TIMES, Sept. 6, 1993, at A1, A5.
19. Kristof, *supra* note 18, at A5.

"Many of the peasants turned their homes into brothels employing more than 100 sex slaves."²⁰ In China, more than 240,000 people engaging in prostitution were arrested last year;²¹ many times more sales of women's bodies went unreported.²²

In Thailand and the Philippines, the massive industries marketing sexual services have a much longer history of open sex trafficking. One United Nations Economic and Social Council (UNESCO) study calculated that "two million Thai women work as prostitutes and that 800,000 are adolescents and children."²³ In the Philippines, prostitution, especially of children, is also rampant.²⁴

Prostitution occurs in the Middle East, but is carefully concealed. At a recent conference on sex trafficking in Brussels, delegates reported that impoverished parents in Bangladesh and India often sell their sons and daughters to brokers from the United Arab Emirates and Oman.²⁵ These brokers transport the children to the Arab Middle East to work in brothels or to be filmed for pornographic videos.²⁶ Similarly, in Israel, the number of brothels in Tel Aviv has grown from 30 to 150 in five years.²⁷ Recent Russian immigrants are the most popular sexual commodities in Israel; advertisements for "entertainment services" boast of "hot new Russians."²⁸

Recently, the prostitution of women and children has become a strategy of war in the former Yugoslavia. "Rape brothels," most often constructed by Serbian forces,²⁹ are tools of genocide: "The world has never seen sex used this consciously, this cynically, this elaborately, this openly, this systematically, with this degree of technological and psychological sophistication, as a means of destroying a whole people."³⁰ The Serbs have built approximately twenty concentration

20. Kristof, *supra* note 18, at A5.

21. Hornblower, *supra* note 4, at 50.

22. Hornblower, *supra* note 4, at 45, 50.

23. Marlise Simons, *The Sex Market: Scourge on the World's Children*, N.Y. TIMES, Apr. 9, 1993, at A3.

24. Michael S. Serrill, *Defiling the Children*, TIME, June 21, 1993, at 53.

25. Simons, *supra* note 23, at 143.

26. Hornblower, *supra* note 4, at 50.

27. Hornblower, *supra* note 4, at 46.

28. Hornblower, *supra* note 4, at 54.

29. See, e.g., Gutman, *supra*, note 7, at 5; Roy Gutman, *New Serb Horror Story: Rapes by the Thousands*, NEWSDAY, Aug. 9, 1992, at 4.

30. MacKinnon, *Turning Rape into Pornography*, *supra* note 10, at 24, 27.

camps exclusively for women.³¹ In these camps, Croatian and Muslim women and girls are raped, tortured, sometimes impregnated, and often killed.³²

Trafficking in women and young children is also pervasive in the United States,³³ despite laws against prostitution.³⁴ Pimps prey on young runaways.³⁵ Each year, approximately 600,000 to 1,000,000 children run away from home; it is estimated that a large percentage of them become prostitutes.³⁶ Adult women are lured into sexual slavery when they respond to advertisements for work in "talent agencies," or when they are offered starring roles in "entertainment shows."³⁷ For example, the Los Angeles Police Department and the Federal Bureau of Investigation have documented over 300 cases per year of women forced into prostitution when they responded to "talent agency" advertisements for entertainment jobs in foreign countries.³⁸ Law enforcement officials ignore prostitution because they are bribed by pimps; city councils also allow prostitution fronts to operate.³⁹ "[Pimps'] profits are so fabulous

This is ethnic rape as an official policy of war: not only a policy of the pleasure of male power unleashed; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side; not only a policy of men posturing to gain advantage and ground over other men. It is rape under orders: not out of control, under control. . . . [This is] rape as a policy of ethnic uniformity and ethnic conquest, annexation and expansion, acquisition by one nation of others, colonization of women's bodies as colonization of the culture they symbolize and embody as well as of the territory they occupy. Croatian and Muslim women are raped to make a Serbian state by making Serbian babies.

Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993*, at 89-90 (Stephen Shute & Susan Hurley eds., 1993) [hereinafter MacKinnon, *Crimes of War*].

31. See generally MacKinnon, *Turning Rape into Pornography*, *supra* note 10.
32. See, e.g., Roy Gutman, *Victims Recount Nights of Terror at Makeshift Bordello*, *NEWSDAY*, Aug. 23, 1992, at 27.
33. See, e.g., KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979).
34. Most states criminalize both prostitution and solicitation. See Raymond I. Parnas, *Legislative Reform of Prostitutions Laws: Keeping Commercial Sex out of Sight and out of Mind*, 21 *SANTA CLARA L. REV.* 669, 675-76 (1981).
35. BARRY, *supra* note 33, at 112.
36. Lan Cao, Note, *Illegal Traffic in Women: A Civil RICO Proposal*, 96 *YALE L.J.* 1297, 1304 n.35 (citing R. TONG, *WOMEN, SEX, AND THE LAW* 60 (1984)).
37. Suzanne M. Shaughnessy, *Fighting Sexual Exploitation of Women*, *NEW WORLD OUTLOOK*, Nov. 1983, at 26.
38. Shaughnessy, *supra* note 37, at 26.
39. Cao, *supra* note 36, at 1304-05 (quoting *American Guild of Variety Artists: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Govt.*

that they are able to place such great temptation in front of law enforcement officers that the first thing you know human frailties prevail and your whole enforcement mechanism breaks down."⁴⁰

International gender-based⁴¹ treaty law purports to outlaw trafficking in women.⁴² Many nations have signed international legal instruments recognizing that trafficking in women is a violation of human rights.⁴³ One such instrument commands each "state party"⁴⁴ to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."⁴⁵ Another international convention forbids "prostitution and the accompanying evil of the traffic in persons" on the grounds that trafficking in women and children is "incompatible with the dignity and worth of the human person."⁴⁶ Another treaty mandates that "[n]o one shall be held in

Operations, 87th Cong., 2d Sess. 384 [hereinafter *AGVA Hearings*] (statement of Sen. Mundt)). See also *United States v. Tunnell*, 667 F.2d 1182, 1184-85 (5th Cir. 1982) (operators of prostitution business bribed constable and justice of the peace).

40. Cao, *supra* note 36, at 1304-05 (quoting *AGVA Hearings* (statement of Sen. Mundt)).
41. "Gender-based" refers to international treaties that concern the status of women. See generally, Natalie Kaufman Hevener, *International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women*, 1 HARV. WOMEN'S L.J. 131 (1978) [hereinafter Kaufman Hevener, *Status of Women*]. Natalie Kaufman Hevener first used this term in the course of developing three analytic categories: "protective," "corrective," and "non-discriminatory." Kaufman Hevener, *Status of Women*, *supra* at 133. Kaufman Hevener uses these categories to describe international legal instruments related to the treatment of women. Kaufman Hevener, *Status of Women*, *supra* at 133-34.
42. As of 1986, Kaufman Hevener had identified twenty-two international documents concerning the status of women. See Natalie Kaufman Hevener, *An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective*, 8 HUM. RTS. Q. 70, 87-88 (1986) [hereinafter Kaufman Hevener, *Gender Based Treaty Law*]. Many of these documents expressly prohibit trafficking in women. Kaufman Hevener, *Gender Based Treaty Law*, *supra* at 74, 87-88.
43. Byrnes, *supra* note 2.
44. The nations that sign an international treaty are called "states parties." See M.N. SHAW, *INTERNATIONAL LAW* 566 (3d ed. 1991). States parties consent to be bound by the terms of the treaties that they sign. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 408 (2d ed. 1987).
45. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14, 17 (entered into force Sept. 3, 1981) [hereinafter CEDAW].
46. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, preamble, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 272 (entered into force July 25, 1951) [hereinafter 1949 Convention].

slavery or servitude.”⁴⁷

The existence of these conventions suggests that the international community recognizes that prostitution is pervasive and harmful. In a January 1983 report to UNESCO, a specially appointed “rapporteur” concluded that prostitution is both common and a form of slavery from which “[i]t is very difficult to escape.”⁴⁸ Furthermore, in 1992, the United Nations Committee which oversees the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recognized that violence against women, as manifested in the global sex trade, is a form of sex discrimination.⁴⁹ Also, the popular media in the United States and Europe frequently document the extent of world trafficking in women and children.⁵⁰

Despite the recognition that prostitution is widespread, international treaty law which addresses global trafficking in women lacks legal force. Like much of international law, legal instruments that ban trafficking in women are difficult to enforce,⁵¹ because they are qualified by reservations that eliminate the binding effects of these treaties.⁵² Further, these treaties are left to be implemented by obscure

47. European Convention, *supra* note 1, art. 4, at 102–03.

48. *Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others*, U.N. ESCOR, 1st Sess., Agenda Item 12, at 10–11, U.N. Doc. E/1983/7 (1983). Slavery, of course, is explicitly prohibited by the United Nations Charter. See Sandra Colliver, *United Nations Machineries on Women's Rights: How Might They Better Help Women Whose Rights are Being Violated?*, in *NEW DIRECTIONS IN HUMAN RIGHTS* 25 (Ellen L. Lutz et al. eds., 1989); Margaret E. Galey, *International Enforcement of Women's Rights*, 6 *HUM. RTS. Q.* 463 (1984) [hereinafter Galey, *International Enforcement*].

49. *General Recommendation No. 19: Violence Against Women*, U.N. Committee on the Elimination of Discrimination Against Women, 11th Sess., Agenda Item 7, at 1, 4, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992) (discussing the global sex trade and other forms of discrimination against women).

50. Some of the popular media's coverage of this problem may be attributed to the efforts of the Coalition Against Trafficking in Women. For example, major American newspapers, such as the *New York Times*, *Washington Post*, and *Los Angeles Times*, covered a recent conference in Brussels, sponsored in part by the Coalition. Other articles concerning this issue have appeared in *Time*, *Newsweek*, and *U.S. News & World Report*, among other publications, in the last two years. For a bibliography of scholarly works concerning international law and the right to nondiscrimination on the basis of sex, see generally Rebecca J. Cook, *Bibliography: The International Right to Nondiscrimination on the Basis of Sex*, 14 *YALE J. INT'L L.* 161 (1989) [hereinafter Cook, *Bibliography*].

51. See generally Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 *MICH. J. INT'L L.* 517, 543–75 (1992).

52. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of*

committees in the United Nations' bureaucracy, which do little more than collect and read reports concerning trafficking.⁵³ Thus, for many nations, the signing and ratification of these documents which facially prohibit prostitution are often a sham. Signatories attempt to gain the moral highground by loudly proclaiming that they have signed a document condemning the buying and selling of women's bodies, when in reality prostitution continues unchecked in their own countries.⁵⁴

As a result of these problems, many feminists have abandoned these treaties. These feminists recognize that "because women are often treated as 'second class' citizens in many countries of the world, governmental efforts to promote their rights have [a low] priority, or may be virtually nonexistent."⁵⁵

Yet, despite substantial enforcement problems, these treaties are important legal tools for feminists because they declare that trafficking in women is a violation of international law. The existence of such declarations, even if the treaties are not enforced, represents a victory for the international feminist movements which first imagined that international law might be a mechanism for gender equality.⁵⁶

Ultimately, feminist lawyers should attempt to enforce the international legal prohibitions against trafficking in women despite the existing enforcement problems.⁵⁷ Feminist lawyers and others should

Discrimination Against Women, 30 VA. J. INT'L L. 643 (1990) [hereinafter Cook, *Reservations to CEDAW*].

53. Galey, *International Enforcement*, *supra* note 48, at 464-75; Malvina H. Guggenheim, *The Implementation of Human Rights by the UN Commission on the Status of Women: A Brief Comment*, 12 TEX. INT'L L.J. 239 (1977).

54. MacKinnon, *Crimes of War*, *supra* note 30, at 97.

55. Galey, *International Enforcement*, *supra* note 48, at 463-64.

56. For a brief history of the passage of some of these documents, see Guggenheim, *supra* note 53.

57. Deciding what it means to outlaw trafficking in women depends on how the terms of international treaties directed toward prostitution are statutorily construed. When a treaty provision reads "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women," CEDAW, *supra* note 45; 1245 U.N.T.S. at 17, does it mean that pimps should be jailed, prostitutes should be jailed, consumers should be jailed, or all three should be jailed? Alternatively, does this provision require national governments to establish social welfare or job training programs so that prostitutes do not have to work as prostitutes? The general language of this provision fails to specify what a signatory nation should do to suppress trafficking. Further, the provision's commands to "suppress all forms of traffic in women and exploitation of prostitution" could be interpreted in utterly different ways by every state signatory.

The ambiguous nature of this provision indicates that interpreting the plain

also examine the possibility of enforcing trafficking prohibitions in regional human rights courts under relevant regional human rights conventions.

I. INTERNATIONAL TREATY LAW PROHIBITIONS ON TRAFFICKING IN WOMEN

The status and treatment of women has been the subject of at least twenty-two different international legal instruments since 1945.⁵⁸ Most commentators agree that these instruments place the issue of women's sexual exploitation in a human rights context.⁵⁹ Arguably, the gender-based treaties also establish an "international right to nondiscrimination on the basis of sex."⁶⁰

Two of these conventions, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (The 1949 Convention),⁶¹ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁶² deal explicitly with prostitution.⁶³ In reviewing the history of these Conventions and considering the legal meaning of the provisions which prohibit trafficking, we believe the history and preparatory work, or

language of international gender-based treaty law is not sufficient to determine its substantive meaning. We suggest, *infra* part I, that courts and scholars look to the history and preparatory work of the treaties in order to construe these provisions. Under our interpretation, such sources support a claim that trafficking in women violates international law because trafficking is both sex discrimination and a violation of equality principles contained in the gender-based international treaties and in the United Nations Charter. Thus, the anti-trafficking provisions in the gender-based international treaties should be enforced in light of principles of sex equality.

58. See HENKIN ET AL., *supra* note 44, 991-93; Margaret K. Bruce, *Work of the United Nations Relating to the Status of Women*, 4 HUM. RTS. J. 365-412 (1971); Kaufman Hevener, *Gender Based Treaty Law*, *supra* note 42, at 75-88.
59. Myres S. McDougal et al., *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AMERICAN J. INT'L L. 497 (1975).
60. Cook, *Bibliography*, *supra* note 50, at 161. See also Margaret E. Galey, *Promoting Nondiscrimination Against Women: The U.N. Commission on the Status of Women*, 23 INT'L STUD. Q. 273 (1979) [hereinafter Galey, *Promoting Nondiscrimination*].
61. 1949 Convention, *supra* note 46, 96 U.N.T.S. at 272.
62. CEDAW, *supra* note 45, 1249 U.N.T.S. at 14.
63. See Kathleen Barry, *The Prostitution of Sexuality: A Violation of Human Rights*, Keynote Address at the *Michigan Journal of Gender & Law Symposium, Prostitution: From Academia to Activism* (Oct. 31, 1992) (videotape on file with the *Michigan Journal of Gender & Law*).

“legislative history,” of these Conventions suggest the framers of the treaties, to some extent, intended to promote sex equality.⁶⁴

A. *The Early History*

The history of United Nations action to eliminate trafficking in women began on June 26, 1945 when the United Nations Charter was signed by the delegates to the United Nations Conference on International Organization.⁶⁵ The United Nations Charter “was the first international treaty to spell out the principle of equality in specific terms.”⁶⁶ Among other things, the United Nations Charter pledges member states to promote and encourage “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁶⁷ The preamble to the Charter reaffirms “faith . . . in the dignity and worth of the human person, in the equal rights of men and women”⁶⁸

In 1946, the Commission on the Status of Women,⁶⁹ established by the United Nations Economic and Social Council, held its first session.⁷⁰ After extensive debate, Commission members agreed on a central motivating principle for their future work:

64. This essay assumes that trafficking in women is sex discrimination. For a demonstration of this principle, see BARRY, *supra* note 33. For arguments in support of an equality principle, see CATHARINE A. MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* (1989).

65. U.N. CHARTER art. 3.

66. Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, 3 HUM. RTS. Q., Spring 1981, at 11, 12 [hereinafter Reanda, *Women's Rights*].

67. U.N. CHARTER art. 55.

68. U.N. CHARTER preamble, ¶ 2.

69. There is some conflict about whether the Commission on the Status of Women started out as a sub-commission of the Commission on Human Rights. An official United Nations source says that the Commission on the Status of Women was established on June 21, 1946, the same day that the Commission on Human Rights was elevated from “nuclear” form to full commission status. See *United Nations Action in the Field of Human Rights*, U.N. Doc. ST/HR/2/Rev. 3 (1988). But see Reanda, *Women's Rights*, *supra* note 66, at 23; John P. Humphrey, *The Memoirs of John P. Humphrey, The First Director of the United Nations Division of Human Rights*, 5 HUM. RTS. Q. 387, 392 (1983) (stating that the Commission on the Status of Women started as a sub-commission of the Commission on Human Rights). For the sake of consistency and because the Commission on the Status of Women has had full commission status since June of 1946 whatever its origins, we will refer to it as a full commission throughout this article.

70. Reanda, *Women's Rights*, *supra* note 66, at 11, 18.

Freedom and equality are essential to human development and woman is as much a human being as man and, therefore, entitled to share them with him;

...

In order to achieve this goal, the purpose of the Sub-Commission is to raise the status of women to equality with men in all fields of human enterprise.⁷¹

In accord with this statement of purpose, the Commission identified the following long-term goals: (1) political equality, based on equal participation in government; (2) civil equality, including equality in marriage and equal rights to guardianship of children, nationality, and property; (3) social and economic equality, including the prevention of discrimination against women in social and economic status and the abolition of prostitution and trafficking in women; and (4) equal educational opportunity.⁷² The Economic and Social Council⁷³ subsequently endorsed these goals and proposed a legislative program to achieve them.⁷⁴ The Council specifically planned to study the status of women in national legislation and, based on its findings, draft and submit legal instruments to the General Assembly for enactment.⁷⁵ In the following years, the Commission and Council prepared a number of legal instruments to address these goals.⁷⁶ The Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others⁷⁷ (the 1949 Convention) was one of the first treaties drafted. The General Assembly considered the Convention in 1949 and opened

71. *Report of the Sub-Commission on the Status of Women to the Commission on Human Rights*, U.N. ESCOR, 2d Sess., Annex 4 at 237-38, U.N. Doc. E/HR/18/Rev. 1 (1946).

72. Reanda, *Women's Rights*, *supra* note 66, at 18. See also Colliver, *supra* note 48.

73. The Economic and Social Council oversees the work of the Human Rights Commission, including the Commission on the Status of Women.

74. Reanda, *Women's Rights*, *supra* note 66, at 18.

75. Reanda, *Women's Rights*, *supra* note 66, at 19.

76. Between 1952 and 1962 the Commission sponsored the Convention on the Political Rights of Women; the Convention on the Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages; and the Convention on the Nationality of Married Women. See Galey, *Promoting Nondiscrimination*, *supra* note 60, at 276-78.

77. 1949 Convention, *supra* note 46, 96 U.N.T.S. at 272.

the document for signature shortly thereafter.⁷⁸

B. *The 1949 Convention*

Commentators generally agree that the 1949 Convention commits signatories to three levels of obligations.⁷⁹ The first level of obligation binds states to a general anti-trafficking principle. On the second level, states agree to specific enforcement measures. On the third level, states agree to use social welfare tools, in areas not addressed by criminal law enforcement, to “rehabilitate” and otherwise support survivors of prostitution.⁸⁰

In its first few articles, the 1949 Convention obliges signatories to work toward the “abolition” of sex trafficking.⁸¹ However, this “abolition” language does not require the prohibition of prostitution. The framers of the Convention viewed trafficked women as victims of pimps and consumers.⁸² Thus, under the 1949 Convention, prostitution itself is legal, and states parties agree that prostituted women will not be punished or subjected to any special supervision or registration.⁸³ Article 6 mandates that “[e]ach Party . . . take all the necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons who engage in . . . prostitution are subject either to special registration or to the possession of a special document. . . .”⁸⁴ Instead of banning prostitution, the 1949 Convention prohibits the accompanying pimping, procurement, brothel management, and under most interpretations, consumption of prostitution. In relevant part the Convention provides:

Article 1: The Parties to the present convention agree to punish any person who, to gratify the passions of another:

1. Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
2. Exploits the prostitution of another person, even with the consent of that person.

78. 1949 Convention, *supra* note 46, 96 U.N.T.S. at 272.

79. Schmidt am Bursch, *supra* note 15.

80. Schmidt am Bursch, *supra* note 15.

81. Schmidt am Bursch, *supra* note 15.

82. 1949 Convention, *supra* note 46, art. 1, 96 U.N.T.S. at 274. See Reanda, *Women's Rights*, *supra* note 66, at 20.

83. 1949 Convention, *supra* note 46, art. 6, 96 U.N.T.S. at 276.

84. 1949 Convention, *supra* note 46, art. 6, 96 U.N.T.S. at 276.

Article 2: The Parties . . . further agree to punish any person who:

1. Keeps or manages, or knowingly finances or takes part in the financing of a brothel;
2. Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.⁸⁵

The 1949 Convention establishes the second level of states' obligations in Articles 8 through 15.⁸⁶ States agree to participate in cooperative administrative and enforcement activities with other signatories. The measures specified in these articles include extradition of traffickers, joint investigation, exchange of information regarding trafficking, and recognition and enforcement of foreign convictions of traffickers.⁸⁷

In Article 16, the 1949 Convention creates a third level of obligations which requires states to undertake general social measures, other than those taken under the criminal law, to end sex trafficking. Under this article, states must take action "for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution" under their "public and private educational, health, social, economic and other related services."⁸⁸

The Commission on the Status of Women intended the 1949 Convention to be a comprehensive document.⁸⁹ In particular, the 1949 Convention consolidated several earlier treaties addressing white slave traffic, including the International Agreement for the Suppression of the White Slave Traffic,⁹⁰ the International Convention for the Suppression of the Traffic in Women and Children,⁹¹ and the International Convention for the Suppression of the Traffic in Women of Full Age.⁹² These early treaties obligated national authorities to cooperate in ending

85. 1949 Convention, *supra* note 46, arts. 1-2, 96 U.N.T.S. at 274.

86. 1949 Convention, *supra* note 46, arts. 8-15, 96 U.N.T.S. at 276-80.

87. 1949 Convention, *supra* note 46, arts. 8-15, 96 U.N.T.S. at 276-80.

88. 1949 Convention, *supra* note 46, art. 16, 96 U.N.T.S. at 280.

89. Reanda, *Women's Rights*, *supra* note 66, at 20.

90. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 92 U.N.T.S. 19 (entered into force June 21, 1951 as amended by the Protocol of May 4, 1949).

91. International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 53 U.N.T.S. 39. See Kaufman Hevener, *Gender Based Treaty Law*, *supra* note 42, at 87-88.

92. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 53 U.N.T.S. 49; 1949 Convention, *supra* note 46, preamble, 96 U.N.T.S. at 272.

trafficking in white women only.⁹³ Specifically, nations pledged to exchange information and monitor ports and railway stations so that traffickers in white women under the age of twenty (and women over twenty when they had been abducted for immoral purposes by fraud, violence, threats, abuse of authority, or other means of constraint) could be punished.⁹⁴

The Commission used race-neutral terminology in the 1949 Convention, thereby rejecting the discriminatory language found in the earlier "white slave traffic" treaties.⁹⁵ The Commission also included sex-neutral language, in part to extend the scope of the earlier treaties to include traffic in young boys.⁹⁶ The Convention framers also recognized the link between the illegal international trafficking in women and the legal market for women's bodies, centered around houses of prostitution.⁹⁷

The 1949 Convention's substantive terms are explicit and clear in comparison to the terms of some subsequent gender-based treaties.⁹⁸ Instead of general admonitions, the 1949 Convention specifies, in Articles 1 through 4, that procurers, brothel keepers and managers, consumers who "exploit" the prostitution of others, and those who

93. Schmidt am Bursch, *supra* note 15. See also NATALIE KAUFMAN HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN (1983); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, WORKING GROUP ON SLAVERY; SUPPRESSION OF THE TRAFFIC IN PERSONS AND OF THE EXPLOITATION OF THE PROSTITUTION OF OTHERS: NOTE BY THE SECRETARY-GENERAL, U.N. Doc. E/CN.4/Sub.2/AC.2/5 (1976) [hereinafter SUPPRESSION OF THE TRAFFIC IN PERSONS].

94. KAUFMAN HEVENER, *supra* note 93, at 78-102.

95. 1949 Convention, *supra* note 46.

96. 1949 Convention, *supra* note 46, art. 1, 96 U.N.T.S. at 274. For some discussion of sex-neutral language in gender-based treaty law, see Kaufman Hevener, *Gender Based Treaty Law*, *supra* note 42, at 85-86.

97. Thus, the U.N. implicitly recognized that the legalized prostitution industry was connected to illegal trafficking activity. See SUPPRESSION OF THE TRAFFIC IN PERSONS, *supra* note 93. Because the Convention arguably legalizes prostitution, the framers must have believed that sex for money "by choice" was an acceptable state of affairs.

98. Compare Articles 1 and 2 of the 1949 Convention, *supra* note 46, arts. 1-2, 96 U.N.T.S. at 274, which read, in part: "The Parties to the present convention agree to punish any person . . . who . . . [p]rocures, entices or leads away, for purposes of prostitution, another person . . ." with the trafficking prohibition in Article 6 of CEDAW: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of others." CEDAW, *supra* note 45, art. 6, 1249 U.N.T.S. at 17.

knowingly rent buildings to pimps should be punished.⁹⁹ In addition, the Convention divides punishable offenses into two categories, preparatory acts¹⁰⁰ and intentional participation.¹⁰¹ These categories dictate when prohibited activities are actionable and preclude certain affirmative defenses.¹⁰² The Convention resolves potential ambiguities, such as the meanings of "punish"¹⁰³ and "consent,"¹⁰⁴ by referring to domestic law.¹⁰⁵

The treaty's language, while generally clear, contains some unresolved ambiguities.¹⁰⁶ The terms "prostitution" and "exploits" in Article 1 are not defined in the treaty. The treaty also does not explain how pimps, procurers, and consumers of prostitution are to be "punished."

The 1949 Convention was the first of several gender-based treaty

99. 1949 Convention, *supra* note 46, arts. 1–4, 96 U.N.T.S. at 274.

100. 1949 Convention, *supra* note 46, art. 3, 96 U.N.T.S. at 274.

101. 1949 Convention, *supra* note 46, art. 4, 96 U.N.T.S. at 274.

102. For a more complete description of the meaning of the 1949 Convention, see KAUFMAN HEVENER, *supra* note 93, at 78–79.

103. 1949 Convention, *supra* note 46, arts. 1–2, 96 U.N.T.S. at 274.

104. 1949 Convention, *supra* note 46, art. 1, 96 U.N.T.S. at 274.

105. 1949 Convention, *supra* note 46, arts. 3–4, 96 U.N.T.S. at 274.

106. Courts must interpret ambiguous treaty language in order to determine whether a state's implementation methods comply with the treaty. The Vienna Convention on the Law of Treaties (Vienna Convention) governs the interpretation of international treaties. HENKIN ET AL., *supra* note 44, at 387. See also James F. Hogg, *The International Court: Rules of Treaty Interpretation*, 43 MINN. L. REV. 369 (1959) (describing interpretative methods used in construction of international instruments). Under the Vienna Convention's rules for the interpretation of treaties, treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty's] object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 8 I.L.M. 678, 691–92 [hereinafter Vienna Convention]. The International Court of Justice construes this clause to mean that the plain language of an international agreement controls, whenever possible, in disputes over the meaning of treaty terms. HENKIN ET AL., *supra* note 44, at 448.

Pursuant to the Vienna Convention, "the preparatory work of [a] treaty and the circumstances of its conclusion" are supplementary means of interpretation. See Vienna Convention, *supra*, art. 31, 8 I.L.M. at 691–92. These supplementary means should be utilized only after a treaty is interpreted with its ordinary meaning. Vienna Convention, *supra*, art. 31, 8 I.L.M. at 691–92. For this reason, courts and commentators have often neglected to consider the history behind the 1949 Convention. Barry, *supra* note 63. Thus, records documenting the intentions of its framers are not readily available.

instruments.¹⁰⁷ Despite the faults of this treaty, it is helpful to study its framers' motivations in order to understand the meaning of modern and more ambiguous treaties.

C. CEDAW

The next convention to specifically prohibit trafficking in women "replace[d] protective [language] with non-discriminatory language."¹⁰⁸ The Commission prepared this new treaty, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), during the United Nations Decade for Women in 1979.¹⁰⁹ CEDAW addresses a broad range of issues related to the sexual exploitation of women, including nationality rights (Article 9), discrimination in education (Article 10), discrimination in employment (Article 11), and discrimination in marriage (Article 16).¹¹⁰ CEDAW resulted

107. The United Nations adopted several Conventions related to the status of women shortly after the 1949 Convention came into force. These instruments included the Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 193 U.N.T.S. 135; the Convention on the Nationality of Married Women, Feb. 20, 1957, 309 U.N.T.S. 65; the Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93; and the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 231. For a description of Conventions drafted by the Commission between 1949 and 1976, see Kaufman Hevener, *Status of Women*, *supra* note 41.

In 1946, the Commission on the Status of Women redrafted two prior conventions that were intended to protect working women. The two conventions were the Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds, July 22, 1946, 81 U.N.T.S. 147, and the Convention Concerning Night Work of Women Employed in Industry, June 21, 1935, 40 U.N.T.S. 63, originally drafted by the General Conference of the International Labour Organization. The Commission revised and modified these documents beginning in 1948. See Kaufman Hevener, *Gender Based Treaty Law*, *supra* note 42. In stark contrast to the equality goals set forth by the Commission on the Status of Women during its first session, these new treaties suggested that working women were similar to children, inferior to men in the workplace, and in need of state protection. See KAUFMAN HEVENER, *supra* note 93, at 6-9. The two treaties called for the total exclusion of women from mining and night work because, according to one commentator's analysis of the Commission's view, women are "essentially familial and . . . incapable of functioning with full responsibility outside the home." KAUFMANN HEVENER, *supra* note 93, at 7, 57-62, 67-77 (containing full text of these two Conventions).

108. Kaufman Hevener, *Gender Based Treaty Law*, *supra* note 42, at 73.

109. CEDAW, *supra* note 45, 1249 U.N.T.S. 14.

110. CEDAW, *supra* note 45, arts. 9-11, 16, 1249 U.N.T.S. at 17-19, 20.

from the work of international women's rights groups¹¹¹ which persuaded the General Assembly to open the treaty for signature and convinced twenty-two states to ratify the document in 1980 and 1981.¹¹² In September 1981, the twentieth state party ratified CEDAW,¹¹³ making it enforceable faster than any previous human rights convention.¹¹⁴

Article 6 of CEDAW is the trafficking provision. This provision mandates that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."¹¹⁵

Article 6 leaves much to be desired as a legally binding and enforceable provision because its language is vague and undefined. First, under Article 6 it is unclear what "measures" qualify as "appropriate." Does "appropriate" legislation include job training for prostituted women, or their arrest and imprisonment? Second, in order to "suppress" trafficking in women, must a state impose a ban with fines or other criminal penalties or is a state simply required to officially condemn prostitution? Given the vagueness of Article 6, it is unclear whether states must characterize prostitution as an institution built upon coercion and slavery, or whether they can characterize prostitution as a legitimate economic choice.

The preamble of the treaty provides some answers to such questions. The preamble establishes that CEDAW's framers considered trafficking in women to be sex discrimination because "[t]he thirty articles of The [sic] Convention set out, in legal form, internationally accepted principles and measures to achieve equal rights for women everywhere in the world."¹¹⁶ In particular, the preamble recognizes that, despite earlier gender-based treaties, "extensive discrimination against

111. Many groups participated in the drafting of the Convention and many more advocated its opening for signature on March 1, 1980. The Caribbean Women's Association (CARIWA), the Inter-American Bar Association, and the Caribbean Association for Feminist Research and Action (CAFRA) are examples of groups that actively participated in the treaty making process. See *WOMEN'S MOVEMENTS OF THE WORLD* (Sally Shreir ed., 1988) (a comprehensive list, including addresses, of feminist organizations, many of whom worked on CEDAW).

112. See Byrnes, *supra* note 2, at 3 (statistics on ratification).

113. Cook, *Reservations to CEDAW*, *supra* note 52, at 643.

114. Cook, *Reservations to CEDAW*, *supra* note 52, at 643.

115. CEDAW, *supra* note 45, art. 6, 1249 U.N.T.S. at 17.

116. Billie Heller, *International Convention on Women's Rights: Bringing about Ratification in the United States*, 9 WHITTIER L. REV. 431 (1987).

women continues to exist.”¹¹⁷ The Convention proclaims that “all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.”¹¹⁸

CEDAW builds on the tradition established when the Commission on the Status of Women articulated its equality goals. CEDAW’s framers intended it to be an extension and a consolidation of earlier treaties.¹¹⁹ However, the framers also recognized that earlier conventions failed to end sex discrimination in the signatory nations.¹²⁰ Therefore, CEDAW’s purpose was to prohibit activities that the framers viewed as sex discrimination.¹²¹ Given this history, the prohibition in Article 6 against trafficking in women is, by implication, makes trafficking in women a violation of women’s equality rights.

This point is significant because it provides us with answers to some questions about the meaning of Article 6. Under an equality analysis, measures which protect women’s equality rights qualify as “appropriate measures including legislation” under the treaty. Because trafficking is a crime which violates women’s equality rights, legislation designed to “suppress” trafficking must end, and not simply reshape, sex trafficking. Also, any measures which punish the victims of trafficking through imprisonment, fines, and other means, are inappropriate remedies under the Convention.

D. The Convention Against Sexual Exploitation

The most recent effort to create international law prohibiting trafficking has been directed by Dr. Kathleen Barry.¹²² With Dorchen Leidholdt,¹²³ Barry founded the Coalition Against Trafficking in Women, an international feminist human rights organization. The Coalition is a non-governmental organization in Category II consultative status with the United Nations Economic and Social Council.¹²⁴ Therefore, the Coali-

117. CEDAW, *supra* note 45, preamble, 1249 U.N.T.S. at 15.

118. CEDAW, *supra* note 45, preamble, 1249 U.N.T.S. at 14.

119. See U.N. ESCOR, 28th Sess., Supp. No. 5, at 56–61, U.N. Doc. E/CN.6/642 (1980).

120. CEDAW, *supra* note 45, preamble, 1249 U.N.T.S. at 14.

121. Teachnor, *supra* note 2, at 42.

122. Professor of Sociology, Pennsylvania State University, State College, PA.

123. Criminal defense attorney on staff at the New York City Legal Aid Society and Adjunct Professor at the City University of New York School of Law.

124. See *History and Statement of Purpose*, *supra* note 9, at 4.

tion can submit reports and testimony to the Commission on the Status of Women. The Commission on the Status of Women then submits reports to the Economic and Social Council which, in turn, submits reports to the General Assembly.¹²⁵

The Coalition is currently drafting a Convention Against Sexual Exploitation (CASE) with the involvement of women and activist feminist organizations all over the world.¹²⁶ Like CEDAW, CASE will be a universal document, meaning that it targets many forms of discrimination. Proponents say that CASE goes beyond CEDAW because it recognizes that all forms of discrimination against women are connected to women's sexual subordination.¹²⁷ Additionally, CASE, as a human rights document, recognizes that prostitution is also a human rights violation.¹²⁸

If implemented, CASE could be the most important treaty concerning trafficking because its language expressly states that trafficking in women is sex discrimination.¹²⁹ The Convention would therefore establish the principle, introduced implicitly in earlier documents, that trafficking in women violates international law because it violates a trafficked woman's right to sex equality. This express statement would eliminate problems inherent in interpreting vague treaty language.¹³⁰

E. International Treaty Interpretation

Until CASE is enacted, activists attempting to prevent trafficking in

125. See generally Galey, *Promoting Nondiscrimination*, *supra* note 60 (discussing protocol).

126. Barry, *supra* note 63.

127. Dorchen Leidholdt, International Solutions, Panel Presentation at the *Michigan Journal of Gender & Law Symposium, Prostitution: From Academia to Activism* (Oct. 31, 1992) (videotape on file with the *Michigan Journal of Gender & Law*).

128. *Elements of a New U.N. Convention Against Sexual Exploitation* (The Coalition Against Trafficking in Women, State College, PA), 1992.

129. The Coalition Against Trafficking in Women completed a draft of CASE early in 1994. The Convention appears to not have been formally considered by either the General Assembly or the Commission on the Status of Women. Several important questions appear to be unresolved. For instance: what enforcement mechanisms the Convention will have; how the Coalition will submit the Convention to the General Assembly; whether the Convention will go through the Commission on the Status of Women, which could alter or refuse to submit it to the General Assembly; or whether it can submit the Convention directly to the General Assembly. Without a state party sponsor, this last possibility seems unlikely.

130. For a discussion of treaty interpretation, see *supra* note 106.

women through international treaty law must address the fact that obtaining enforcement of the gender-based treaties requires utilizing language which is often vague and ambiguous. When a treaty's terms are ambiguous, treaty interpretation requires reliance on the general methods of interpretation prescribed in the Vienna Convention.¹³¹

Courts and commentators sometimes neglect to examine the history of a convention.¹³² However, some evidence suggests that the drafters of the conventions prohibiting trafficking believed in a woman's right to be free from discrimination based on sex.¹³³ Nations which signed the trafficking conventions similarly understood that the members of the Commission on the Status of Women were influenced by a sex equality principle.¹³⁴ Given this evidence, it is important to recognize that the motivating principles of the framers, as well as the general history of gender-based treaty law, provide clues which should be recognized when determining the substantive meaning of any ambiguous terms in the gender-based treaties. Although the plain language and subject matters of the treaties must also be given their due, in the future activists should work to ensure that the history of anti-trafficking treaty law and the goals of its' framers inform the courts, and others, who must construe this law.

II. THE ENFORCEABILITY OF INTERNATIONAL TRAFFICKING PROHIBITIONS

The international conventions calling for the prevention of trafficking in women purport to be legally binding.¹³⁵ The United Nations Charter further mandates that the U.N. shall promote and enforce human rights for all people without distinction as to sex.¹³⁶ However,

131. See *supra* note 106 for a discussion of interpretation methods.

132. See Barry, *supra* note 63 (discussing the 1949 Convention); HENKIN ET AL., *supra* note 44, at 442-51 (discussing arguments for and against framers intent as a tool of interpretation).

133. See *supra* notes 59-64 and accompanying text.

134. Under the Vienna Convention, treaty signatories look to documents issued by the drafters of an instrument to determine its meaning. Therefore, it is the intent of the drafters and not the views of the states parties developed during ratification debates, that is significant. See HENKIN ET. AL., *supra* note 44, at 446-47.

135. The Vienna Convention mandates in Article 26 that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra* note 106, art. 26, 8 I.L.M. at 690.

136. U.N. CHARTER art. 1, ¶ 3.

"[d]espite the contribution of the U.N. Commission on the Status of Women in defining an international norm prohibiting discrimination against women, the international enforcement of women's rights has been especially dismal. . . ."137 This section identifies the principal reasons why efforts to enforce the anti-trafficking principle in the 1949 Convention and CEDAW have been unsuccessful.¹³⁸ Although these international conventions contain important substantive elements, this section concludes that the treaties cannot be successfully enforced.

One reason trafficking in women still exists is because national governments lack the will to stop it. One scholar argues:

Efforts to enforce women's rights have been doubly disadvantaged. . . . The primary enforcement mechanism, national governments, often lack the political will or resources to promote compliance with the standards that they have obligated themselves to support. Furthermore, because women are often treated as "second class" citizens in many countries of the world, governmental efforts to promote their rights have an even lower priority, or may be virtually nonexistent. Those nations that do possess the necessary political will and resources, and go on to initiate concerted efforts to protect human rights, often direct their efforts at target minority groups. Because women have not been viewed as a discrete and insular "minority" in most societies, they normally have not come within the targeted groups requiring special governmental assistance to promote their rights.¹³⁹

Many of the governments that signed the 1949 Convention and CEDAW often ignore trafficking in their countries.¹⁴⁰ These governments are unwilling to devote resources to anti-trafficking enforcement and to consider allegations of sexual slavery brought to their attention by the Commission on the Status of Women, the Committee on the Elimination of Discrimination Against Women, and other human rights

137. Galey, *International Enforcement*, *supra* note 48, at 463.

138. Because CASE was in draft form when this essay was written, we do not attempt to predict whether CASE may have greater enforcement possibilities. Whatever enforcement mechanisms the drafters of that Convention choose, they will confront many of the obstacles described in this section.

139. Galey, *International Enforcement*, *supra* note 48, at 463-64.

140. For a survey of national governments' information and statistics on trafficking in women, see BARRY, *supra* note 33, at 283-98. See also Ernst, *supra* note 13.

and women's groups. Some governments even blatantly ignore their obligations under the Conventions. For example, Japan signed and ratified the 1949 Convention. Despite this, Japan still fails to address the organized pimping networks in Tokyo and Osaka, the daily flights which transport Korean, European, and American businessmen to the brothels and sex shows of Kyoto, and the geisha houses which still exist even though they were formally banned by the Diet in 1957.¹⁴¹

Another impediment to the abolition of trafficking is that many industrialized countries have refused to sign the 1949 Convention or CEDAW because they are legally binding.¹⁴² In fact, only sixty states parties have signed and ratified the 1949 Convention¹⁴³ and, as of November 1994, only 136 countries had ratified or acceded to CEDAW.¹⁴⁴ The United States has not yet ratified either the 1949 Convention or CEDAW.¹⁴⁵

In addition, despite their substantive potential, the treaties are unenforceable because their enforcement structures are, at best, inadequate. Most significantly, individuals have no remedies under the

141. *Asian Governments Pander to Sex Tourists*, *supra* note 9, at 14–16. See also *History and Statement of Purpose*, *supra* note 9; J. Mark Ramseyer, *Indentured Prostitution in Imperial Japan: Credible Commitments in the Commercial Sex Industry*, 7 J.L. ECON. & ORG. 89 (1991) (tracing historic organization of prostitution in Japan).

142. Schmidt am Bursch, *supra* note 15.

143. Schmidt am Bursch, *supra* note 15. These states parties include the Philippines, Argentina, Morocco, Brazil, Mexico, Syria, Egypt, and Japan. Schmidt am Bursch, *supra* note 15. Neither Great Britain, Germany, nor Thailand are parties to the Convention. Schmidt am Bursch, *supra* note 15.

144. Lynne Marek, *Scoring Congress on Family Issues*, CHI. TRIB., Nov. 6, 1994, Womanews Section, at 12. China, Cuba, Germany, Guyana, Haiti, Mexico, Poland, Sweden, and the USSR are among the nations that have ratified this agreement. CEDAW, *supra* note 45, 1249 U.N.T.S. at 14.

145. President Jimmy Carter signed CEDAW on behalf of the United States on July 17, 1980, and presented the treaty to the Senate on November 12, 1980, to obtain its advice and consent. *Convention on the Elimination of All Forms of Discrimination Against Women: Message from the President of the United States Transmitting the Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the United Nations General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980*, S. Exec. R., 96th Cong., 2d Sess. (1980). However, the Senate held no hearings on the Convention until early in 1974. THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS* 53–82 (1986); Schmidt am Bursch, *supra* note 15. See also Marek, *supra* note 144. After brief consideration, the Senate blocked passage of a bill which would have granted United States ratification to the Convention. Because of the Senate's failure to act, CEDAW has no legal effect in the United States. Marek, *supra* note 144.

terms of these international instruments. Therefore, the 1949 Convention and CEDAW permit only a signatory to bring a complaint against another signatory before the International Court of Justice (ICJ).¹⁴⁶ The treaties do nothing for an individual trafficked woman unless that woman convinces a signatory to bring a case on her behalf. Since bringing a legal action against another nation in an international legal forum costs a great deal of political capital,¹⁴⁷ it is unlikely that a woman could convince a signatory to pursue her case.¹⁴⁸

The Conventions' complicated implementation provisions create a second problem within their enforcement structures. For example, CEDAW's enforcement provisions¹⁴⁹ were intended to correct deficiencies in earlier human rights conventions.¹⁵⁰ These CEDAW provisions, however, establish committees which are ill-equipped to enforce the Convention.¹⁵¹ For example, Article 17(1) of the Conven-

146. For example, a country like Japan can be held accountable for its failure to uphold its treaty commitments only if another state party is willing to challenge Japan in court by requesting a hearing before the ICJ. 1949 Convention, *supra* note 46, art. 22, 96 U.N.T.S. at 284.

147. The political costs involved in bringing a legal action against another nation include the possibility that the nation might retaliate, legally or economically, against the nation bringing the complaint. Even if a nation does not fear negative retaliation, it may ignore human rights violations of other nations in efforts to gain or maintain positive foreign relations. Moreover, a nation is unlikely to report another state's violations when it is also violating its own human rights obligations.

148. No nation has ever brought such an action to enforce Article 6 of CEDAW. Schmidt am Bursch, *supra* note 15.

149. Many commentators argue that CEDAW contains the most comprehensive enforcement provisions of any of the gender-based treaty instruments. See, e.g., Guggenheim, *supra* note 53, at 242. A few other commentators disagree. See, e.g., Schmidt am Bursch, *supra* note 15. Some commentators argue that the 1949 Convention has more effective enforcement procedures due to its narrowly tailored prohibition on trafficking; because a state party's treaty obligations are clear, a state party cannot avoid being cited for a violation by relying on ambiguity in vague language. Schmidt am Bursch, *supra* note 15.

We believe that it is easier for a state to avoid a narrow enforcement provision, like that in the 1949 Convention, because the state can modify its conduct to avoid the specific conduct prohibited. For example, the 1949 Convention's provisions may require a state to promulgate laws criminalizing prostitution, but they also fail to impose an affirmative duty on the state to offer women meaningful economic alternatives. In contrast, the broader provisions of CEDAW, and perhaps CASE, if ratified, more explicitly address the connections between male sexual dominance, poverty, race, education, health, and prostitution. This makes it more difficult for a state to avoid its obligations.

150. Guggenheim, *supra* note 53, at 241.

151. In Article 17, CEDAW calls for the election of 23 experts to the Committee on the

tion calls for the creation of the Committee on the Discrimination Against Women to consider "the progress made in the implementation of the present Convention" ¹⁵²

Articles 20 and 21 limit this Committee's powers to considering reports submitted by states parties regarding the extent of trafficking problems in their countries and to making recommendations based on reports and information received from states parties.¹⁵³ The reports from states parties should specify the legislative, judicial, administrative, or other measures the state party has undertaken to end all forms of discrimination against women since the last reporting period.¹⁵⁴ Once the Committee on the Elimination of Discrimination Against Women receives a report, however, it is unclear to whom the Committee should make recommendations.¹⁵⁵

The preparatory work of CEDAW shows that many nations, including most of the Eastern European countries and India, wanted to limit the Committee's powers because they feared that a strong committee would undermine the authority of the Commission on the Status of Women.¹⁵⁶ On the other hand, a few countries and feminist

Elimination of Discrimination Against Women once 35 states accede or ratify the Convention. Consequently, after 38 states ratified CEDAW within six months of its entry into force, the treaty signatories elected members to the Committee on April 16, 1982. UNITED NATIONS: CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, MEETING OF THE STATES PARTIES; ELECTIONS OF THE TWENTY-THREE MEMBERS OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN: NOTE BY THE SECRETARY-GENERAL, U.N. Doc. CEDAW/SP/3 (Apr. 16, 1982). Article 17(3) specifies the election procedure. First, the Secretary-General invites states parties to submit nominations. Then, the Secretary-General prepares a list, including biographical data, that is circulated to states parties. At meetings of states parties, members are elected for four-year terms. But, in accord with Articles 17(4), (5), and (6), these terms are staggered. CEDAW, *supra* note 45, art. 17(4)-(6), 1249 U.N.T.S. at 21. For interesting biographical information on the women elected to the 1982 and 1984 Committees see Galey, *International Enforcement*, *supra* note 48, at 475-81.

152. CEDAW, *supra* note 45, art. 17(1), 1249 U.N.T.S. at 21.

153. CEDAW, *supra* note 45, arts. 20-21, 1249 U.N.T.S. at 22.

154. Galey, *International Enforcement*, *supra* note 48, at 482.

155. Galey, *International Enforcement*, *supra* note 48, at 482.

156. This has probably happened even though the Secretary-General or the General Assembly, depending on who receives the recommendation of the Committee on the Elimination of Discrimination Against Women, is supposed to update the Commission on the Status of Women. The bifurcation of the people and resources that are devoted to promoting women's rights effectively diminished the power of both the Committee on the Elimination of Discrimination Against Women and the Commission on the Status of Women. An independent committee was created

groups wanted the Committee empowered to deliver reports directly to states parties.¹⁵⁷ However, the General Assembly refused to grant the Committee such power. Instead, the Committee must request that the Secretary-General ask a state party for more information or remind a state party that it is "tardy" in reporting. Thus, the Committee has no power to ask states parties for reports directly.¹⁵⁸

When a state party submits a report, the Committee is presented with a report summary by a state party representative.¹⁵⁹ Members of the Committee can ask questions to clarify the report or to gain more information.¹⁶⁰ The Committee, which meets annually, usually devotes one day to consider a state party's report.¹⁶¹ There have been only two circumstances in the Committee's fourteen-year existence, involving the Philippines and El Salvador, where the Committee has directly criticized the content of a state party's report.¹⁶²

In addition to listening to reports of states parties, the Committee prepares an annual report of its own.¹⁶³ Many commentators believe that this is CEDAW's most significant power.¹⁶⁴ The Committee's report includes sections on the status of ratification of the Convention, the Committee's agenda, and the Committee's consideration of the

under CEDAW and placed under the Economic and Social Council because the Commission on the Status of Women was overloaded with work. The only form of communication formally permitted between these two Committees is a reporting communication which must go through at least two other bodies first—namely, the Economic and Social Council and the Secretary-General. Therefore, the people who are fighting to end sexual exploitation have been institutionally divided. See generally Galey, *International Enforcement*, *supra* note 48.

157. Having such power would have been particularly important to the Committee because the Committee then could have given its opinion about the legal effect of a state party's reservation to the Convention. If an interpretive dispute were ever brought before the ICJ under Article 29, it is unclear what deference the Committee's opinions would be given. CEDAW, *supra* note 45, art. 29, 1249 U.N.T.S. at 23.
158. Historically the reporting rate has been very low. In 1984 and 1985, four out of nine western nations that had ratified the Convention did not submit reports when they were due. For further statistics on reporting rates, see *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 39th Sess., Supp. No. 45, Annexes 1 & 2, at 51–54, U.N. Doc. A/39/45 (1984).
159. Galey, *International Enforcement*, *supra* note 48, at 484.
160. Galey, *International Enforcement*, *supra* note 48, at 484.
161. Galey, *International Enforcement*, *supra* note 48, at 484–85.
162. Byrnes, *supra* note 2, at 20.
163. Galey, *International Enforcement*, *supra* note 48, at 487–88.
164. Byrnes, *supra* note 2, at 6.

states parties' reports.¹⁶⁵ The report also assesses the timeliness of states parties' submissions.¹⁶⁶ This report is important because it is published and transmitted to the Economic and Social Council (ECOSOC) and the U.N. General Assembly.¹⁶⁷ Therefore, a state's failure to prevent the sexual exploitation and enslavement of women in prostitution is documented and subjected to international scrutiny to the extent that the world is interested. Such documentation may exert some pressure on nations to implement the substantive provisions of the Convention.¹⁶⁸

There have been many problems with CEDAW's enforcement procedures. First, according to a recent assessment issued by the U.N. Secretary-General, the Committee "faces constraints unmatched by the other committees monitoring global human rights instruments."¹⁶⁹ The Secretary-General's report, for example, "speaks of 'striking disparities' in the working conditions" of the Committee, compared to other human rights treaty committees. The report also indicates that a special problem facing the Committee is "the amount of time available for the consideration of country reports."¹⁷⁰ Unlike similar monitoring committees, the Committee must hold its annual meetings within one two-week period. By contrast, the U.N. Human Rights Committee meets for three three-week sessions each year.¹⁷¹ Second, reports occasionally are not submitted to ECOSOC in time for that body to read them and submit them to the General Assembly for action.¹⁷² The Committee on the Discrimination Against Women may not impose sanctions on states parties that do not submit reports or that strategically submit them too late for recommendations to be made to ECOSOC.¹⁷³ Third, CEDAW has no timetable for state action to end trafficking and no independent evidence gathering mechanism. Instead, the Committee must rely on the state party for information and compliance. Thus, CEDAW's enforcement capabilities do not match the inspiring language of its

165. Galey, *International Enforcement*, *supra* note 48, at 486.

166. Galey, *International Enforcement*, *supra* note 48, at 486.

167. Galey, *International Enforcement*, *supra* note 48, at 488.

168. Galey, *International Enforcement*, *supra* note 48, at 488.

169. Jaya Dayal, *Women-Human Rights: Constraints Choke Monitoring Body*, Int'l Press Serv., Oct. 18, 1994, available in LEXIS, Nexis Library, Wire File.

170. Dayal, *supra* note 169.

171. Dayal, *supra* note 169.

172. *UN Action in the Field of Human Rights*, U.N. Doc. ST/HR/2/Rev. 2 (1983).

173. *UN Action in the Field of Human Rights*, U.N. Doc. ST/HR/2/Rev. 2 (1983).

substantive terms.¹⁷⁴

Further, the ratification successes achieved by international feminist organizations and others have been undermined by the substantive reservations¹⁷⁵ that over thirty states parties have made to CEDAW.¹⁷⁶ CEDAW is riddled with reservations: over eighty substantive reservations have been made to the instrument's first twelve articles.¹⁷⁷ An additional twenty-five reservations have been made to Article 29, which discusses dispute settlement.¹⁷⁸ These reservations significantly diminish CEDAW's legal force and effect.¹⁷⁹

All of these problems make the international treaties concerning trafficking in women practically unenforceable despite their substantive potential. In theory, the international treaties move toward establishing a principle that trafficking in women is sex discrimination. In practice, however, such treaties provide the individual trafficked woman with only minimal opportunity for relief.

III. PROHIBITIONS ON TRAFFICKING UNDER REGIONAL HUMAN RIGHTS TREATIES

In addition to United Nations conventions prohibiting trafficking, there are regional charters and human rights documents which prohibit trafficking in women expressly or implicitly. Presently, three regional human rights conventions exist: the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), the American Convention on Human Rights (American Convention), and the African Charter on Human and Peoples' Rights

174. Gale, *International Enforcement*, *supra* note 48, 464-66. For a comprehensive bibliography of works about CEDAW, including many of the works cited above, see Cook, *Bibliography*, *supra* note 50; Rebecca J. Cook, *Women's International Human Rights: A Bibliography*, 24 N.Y.U. J. INT'L L. & POL. 645 (1992).

175. Reservations are qualifications that states parties make to any international agreement that they sign. States making reservations can avoid treaty obligations or withdraw from the treaty entirely under certain specified circumstances. Cook, *Reservations to CEDAW*, *supra* note 52, at 644, 650.

176. *Report of the Commission on the Elimination of Discrimination Against Women*, U.N. GAOR, 39th Sess., Supp. No. 45, U.N. Doc. A/45/38 (Feb. 8, 1990).

177. UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF 31 DECEMBER 1993, U.N. Doc. ST/LEG/SER.E/12 (1994).

178. Cook, *Reservations to CEDAW*, *supra* note 52, at 709.

179. Cook, *Reservations to CEDAW*, *supra* note 52, at 648. For a more in depth analysis of the problems of reservations in CEDAW, see generally Cook, *Reservations to CEDAW*, *supra* note 52.

(African Charter).¹⁸⁰ This section explores the substantive regional human rights principles which may prohibit trafficking in women. It also examines the procedures in the regional systems which may allow effective enforcement of the substantive principles.

These regional human rights guarantees may more effectively protect trafficked women than the global human rights documents for two main reasons. First, creating substantive law on a regional level may minimize conflicting human rights principles. For example, one commentator argues that the establishment and enforcement of women's rights as human rights are hindered or precluded by equality principles that conflict with other human rights principles, such as the freedom to practice one's own religion.¹⁸¹ However, states within the same region are more likely than others to share common cultural and political values and develop regional human rights obligations which are consistent with these values. Thomas Buergenthal argues that "political and cultural homogeneity are basic prerequisites for an effective human rights system, and these are more likely to be found on the regional plane."¹⁸² This increased consistency between human rights obligations and other values may increase states' commitments to the terms of a regional convention.

The European Convention and the American Convention also establish more advanced enforcement mechanisms than universal human rights documents.¹⁸³ These enforcement structures may result from greater commitment by states parties to regional human rights obligations and less fear of a supranational policing force. These enforcement structures may also be attributed to shared judicial systems and policing traditions. Buergenthal argues that "[o]ther preconditions for such a system include reasonably well-developed legal systems as well as shared

180. European Convention, *supra* note 1, at 101-35; American Convention on Human Rights, Nov. 22, 1969, 1970 OAS T.S. No. 36, 9 I.L.M. 673 (entered into force July 18, 1978) [hereinafter American Convention, cited to 9 I.L.M. 673]; African Charter on Human and Peoples' Rights, Jan. 19, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter].

181. THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 53-82 (1986). See also *A Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3rd Sess., at 74 (1948).

182. Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U. L. REV. 155, 156 (1980). Buergenthal is a judge on the Inter-American Court.

183. Buergenthal, *supra* note 182, at 155.

juridical traditions and institutions."¹⁸⁴

In contrast to the European and Inter-American systems, the African Charter establishes one enforcement structure which is primarily concerned with activities such as collecting information and organizing educational programs. The African Commission on Human and Peoples' Rights considers complaints from states concerning violations of the Charter, however, it can only make non-binding recommendations to governments.¹⁸⁵ The African system is at an earlier stage of development and currently lacks effective supranational enforcement mechanisms. Because of the African Charter's embryonic state, this essay will not discuss its potential for enforcing trafficking prohibitions. We focus, then, on the potential and the limitations of the European and the Inter-American systems as alternative mechanisms for enforcing international treaty prohibitions on trafficking in women.

A. The European Human Rights System

Many commentators consider the European Convention to be the most effective international instrument for the protection of individual rights.¹⁸⁶ It may have the greatest potential for protecting trafficked women. The European Convention is enforced through three institutions: the European Commission on Human Rights, the European Court of Human Rights, and the Committee of Ministers of the European Council.¹⁸⁷ These organizations receive complaints, investigate alleged human rights violations, work to secure friendly settlements, and create binding decisions as to whether a state party has violated the human rights provisions of the treaty.

The most important enforcement feature of the European system is its creation of an individual's right to bring petitions seeking relief from a state's human rights violations. Pursuant to Article 25:

The Commission may receive petitions . . . from any person, non-governmental organisation or group of individuals claim-

184. Buergenthal, *supra* note 182, at 156.

185. African Charter, *supra* note 180, arts. 52-53, 21 I.L.M. at 66.

186. See, e.g., WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 204 (1983); J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 17 (1993); Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133 (1993).

187. European Convention, *supra* note 1, arts. 19, 21, at 106-07.

ing to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention
¹⁸⁸

Therefore, individuals can hold states accountable for breaches of international treaty obligations under the European Convention.

Under Article 25, individual petitions must be submitted by a victim of the alleged violation.¹⁸⁹ Thus, a complaining individual must be affected by the violation. Individuals cannot complain about "a law *in abstracto* simply because they feel that it contravenes the Convention."¹⁹⁰ However, the European Court of Human Rights has held that Article 25 does not require actual harm to the victim, as long as the applicant risks being directly affected by the alleged violation of the Convention.¹⁹¹

As stated in Part II, access to enforcement is absent in the United Nations human rights structures.¹⁹² In contrast to the European Court, a complaint alleging that a state has harmed an individual must be filed by another state on the individual's behalf in order to bring a case before the ICJ.¹⁹³ This requirement effectively eliminates any remedy for individuals harmed by their own state's human rights violations. In addition, this lack of individual access places individual rights at the mercy of political machinery. Governments may be reluctant to respond to human rights violations by other states for a variety of political reasons, such as gaining or maintaining favorable foreign relations. Moreover, states are unlikely to report another state's violations when they are also violating their own human rights obligations.

The European system appears to have a relatively liberal right of petition. However, several procedural requirements of the European Convention limit an individual's access to enforcement. First, the right of an individual to petition for relief is conditional on the state's acceptance of that right. Therefore, the European Commission may

188. European Convention, *supra* note 1, art. 25, at 107-08.

189. European Convention, *supra* note 1, art. 25, at 107-08.

190. *Klass v. Germany*, 28 Eur. Ct. H.R. (ser. A) at 18 (1978). *See also* X, *Cabales and Balkandali v. United Kingdom*, App. Nos. 9214/80, 9473/81, 9474/81, 5 Eur. H.R. Rep. 132, 137 (1983)(Commission report).

191. *Johnston v. Ireland*, 9 Eur. Ct. H.R. (ser. A) at 216 (1986).

192. Statute of the International Court of Justice, June 26, 1945, art. 34, 59 Stat. 1055, 1059 ("Only states may be parties in cases before the Court.").

193. Statute of the International Court of Justice, June 26, 1945, art. 34, 59 Stat. 1055, 1059.

receive a petition from an individual or group only if the state alleged in the petition to have violated the Convention explicitly recognizes the Commission's competence to receive such complaints.¹⁹⁴ Although many European states were slow to recognize the competence of the Commission,¹⁹⁵ today all twenty-three states that are parties to the Convention accept the Commission's jurisdiction to receive individual complaints.¹⁹⁶ Therefore, an individual complaint is effective against every member state.

Another obstacle to individual petitions may exist because the Commission must determine the admissibility of an individual complaint under Articles 26¹⁹⁷ and 27.¹⁹⁸ Article 26 enables the Commission to consider individual petitions only "after all domestic remedies have been exhausted. . . ."¹⁹⁹ However, Article 26 has been applied with the explicit understanding that the domestic "remedies must be

194. European Convention, *supra* note 1, art. 25, at 107-08.

195. Article 25(2), however, states that "[s]uch declarations may be made for a specific period." Thus, acceptance of the Court's jurisdiction is not necessarily permanent. European Convention, *supra* note 1, art. 25(2), at 108.

196. Gates Garrity-Rokous & Raymond H. Brescia, *Procedural Justice and International Human Rights: Toward a Procedural Jurisprudence for Human Rights Tribunals*, 18 YALE J. INT'L L. 559, 572 (1993).

197. Article 26 states:

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

European Convention, *supra* note 1, art. 26, at 108.

198. Article 27 states:

1. The Commission shall not deal with any petition submitted under Article 25 which:

(a) is anonymous, or

(b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

2. The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded [sic], or an abuse of the right of petition.

3. The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

European Convention, *supra* note 1, art. 27, at 108.

199. European Convention, *supra* note 1, art. 26, at 108.

sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness" to allow a respondent state to defeat an individual's claim on the basis of non-exhaustion.²⁰⁰

Article 27(2) directs the Commission to declare inadmissible any petition which seems "incompatible" with the Convention's provisions.²⁰¹ This article has been interpreted to prevent the Commission from hearing complaints outside its competence. For example, a number of complaints have been rejected on the grounds that they were directed against private individuals rather than states parties.²⁰² This limitation may be particularly applied to dismiss complaints of women victimized by pimps. However, Article 1 of the European Convention also states that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."²⁰³ Article 1 has been interpreted to reach state inaction where legislation is necessary to protect the rights established by the Convention. "[I]f a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged."²⁰⁴ Thus, using Article 1 as the jurisdictional basis, a petition by a trafficked woman may be framed as a complaint against a state party under Article 27.

The procedural limitations of Articles 26 and 27 may seem reasonable. However, one author has asserted that despite early declarations by the Commission that its admissibility standards would be applied less vigorously than those of national courts, in reality the Commission relies heavily on procedural obstacles to control its

200. *Johnston v. Ireland*, 9 Eur. Ct. H.R. (ser. A) at 216 (1986).

201. European Convention, *supra* note 1, art. 27(2), at 108.

202. App. No. 9348/81 v. United Kingdom, 5 Eur. H.R. Rep. 504, 504 (1983):

The Commission also finds that the applicant's complaint, concerning the killing of her husband by terrorists, raises the question of State responsibility for the protection of the right to life in accordance with Art. 2 of the Convention. It follows that this complaint cannot be declared inadmissible, under Art. 27(2), as being incompatible with the Convention . . . on the ground that it is directed against acts of private persons.

203. European Convention, *supra* note 1, art. 1, at 102.

204. *Young, James and Webster v. United Kingdom*, App. Nos. 7601/76 and 7806/77, 44 Eur. Ct. H.R. (ser. A) at 20 (1981).

docket.²⁰⁵ Another author has stated that ninety percent of all petitions submitted are ruled inadmissible by the Commission.²⁰⁶ Thus, these limitations may act as substantial obstacles and reduce the chance that a trafficked woman will have her claims considered by the Commission.

A final procedural limitation may prevent an individual petitioner from obtaining relief against a state. The Commission receives petitions but does not make the final determination on any case.²⁰⁷ Rather, it investigates petitions and attempts to facilitate a settlement between the parties. If no settlement is reached, the Commission reports its findings of fact and its non-binding opinion on the case.²⁰⁸ Under Article 44, the Commission or a state party may then refer a case to the European Court of Human Rights for a binding determination.²⁰⁹ In theory, this places an individual at the mercy of the Commission's discretion, or her government's discretion, to refer cases. In practice, however, the Commission generally refers an individual's case to the Court as long as the defendant state has accepted the Court's jurisdiction.²¹⁰ Since all twenty-three states parties to the Convention have accepted the Court's jurisdiction to resolve disputes, an individual should be able to obtain a binding decision of the Court.²¹¹

Moreover, if the case is not referred to the Court, an individual

205. Garrity-Rokous and Brescia state:

In 1991, for example, the Commission opened 5,550 provisional files. Following an initial response to each petitioner, the Secretariat formerly registered 1,648 applications. The Commission subsequently deemed 1,261 of the petitions inadmissible following a full review, and declared 180 more inadmissible upon communication with the respondent state. The Commission ultimately declared only 217 petitions admissible, and later rejected one of these petitions on admissibility grounds during its review of the merits.

Garrity-Rokous & Brescia, *supra* note 196, at 586.

206. Nanette Dumas, *Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals*, 13 HASTINGS INT'L & COMP. L. REV. 585 (1990).

207. European Convention, *supra* note 1, art. 31, at 109.

208. European Convention, *supra* note 1, arts. 28-31, at 108-09.

209. Article 47 grants the Court jurisdiction over a case, only "after the Commission has acknowledged the failure of efforts for a friendly settlement . . ." European Convention, *supra* note 1, art. 47, at 112. Further, Article 48 gives the Court jurisdiction only over High Contracting Parties which have accepted compulsory jurisdiction under Article 46 or which consent to jurisdiction in a particular case. European Convention, *supra* note 1, art. 48, at 112.

210. Garrity-Rokous & Brescia, *supra* note 196, at 572.

211. Garrity-Rokous & Brescia, *supra* note 196, at 572.

can still obtain a binding decision, because any case which is not referred to the Court is automatically decided by a two-thirds vote of the Committee of Ministers.²¹² A decision by the Committee of Ministers is as binding as a judgment of the Court.²¹³ The only disadvantage of a ministerial decision, instead of a Court decision, is that the ministers are state representatives,²¹⁴ and as such their decision-making process may be affected by politics. Regardless of whether a case is heard by the Committee of Ministers or the European Court, an individual petitioner is likely to receive a binding decision if her complaint overcomes the initial procedural obstacles.

Although the procedural obstacles in the European system seem relatively minor, the system has limited potential as a means of enforcing trafficking prohibitions. The institutions of the European human rights system can enforce only the European Convention and no other human rights conventions.²¹⁵ The European Court, for example, cannot enforce human rights obligations which are contained in CEDAW. Before a prostitute can bring a successful action, this Convention must first recognize the right of women to protect themselves from trafficking.²¹⁶

The most useful articles for establishing protection from trafficking are Article 3, stating "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment;"²¹⁷ Article 4, stating:

212. European Convention, *supra* note 1, art. 32, at 109. This alternative route to obtaining a binding decision was created because governments refused to create a European court whose jurisdiction was compulsory. G.L. WEIL, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 140-41 (1963).

213. Whichever body makes the final determination regarding a breach, the decision is binding on the parties to the dispute. Under Article 53, the contracting parties "undertake to abide by the decision of the Court in any case to which they are parties," and under Article 32, the contracting parties "undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs." European Convention, *supra* note 1, arts. 32, 53, at 109, 112.

214. The Committee of Ministers consists of the Minister of Foreign Affairs from each member state. Statute of the Council of Europe, May 5, 1949, arts. 13-14, 8 Europ. T.S. 2, 6.

215. European Convention, *supra* note 1, arts. 31(1), 32(1), 45, 50, at 109, 111-12.

216. Articles 24 and 25 allow the Commission to receive petitions which allege a violation of the provisions of the European Convention. If a petition does not meet this requirement, it will be dismissed. European Convention, *supra* note 1, arts. 24, 25, at 107-08.

217. European Convention, *supra* note 1, art. 3, at 102.

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour;²¹⁸

and Article 14, stating:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.²¹⁹

Although the plain language of these provisions does not address trafficking in women, these principles can and should be interpreted to protect victims of prostitution. To date, little European system case law has specifically addressed prostitution, but a few cases suggest that the Convention prohibits trafficking in women generally. In *Cyprus v. Turkey*,²²⁰ the European Commission concluded that the raping of Greek women by Turkish soldiers during the Turkish occupation constituted inhumane treatment under Article 3.²²¹ The reports of the Greek government, which were included in the Commission's report on the case, equated these mass rapes to "enforced prostitution."²²² The Commission did not explicitly adopt this statement in its findings of fact, although it did conclude that Turkey's failure to prevent such acts on the part of its military was a violation of Article 3 of the Convention.²²³ The Court recognized that mass rape, a form of forced sexual trafficking, is "inhumane and degrading." This case provides a basis from which to argue that pimping, like forced prostitution by the Turkish soldiers, is degrading treatment under Article 3, which a state is obligated to prevent.

Another case established that discrimination against a group may be "degrading treatment" within the meaning of Article 3. In *East African Asians v. United Kingdom*,²²⁴ the United Kingdom refused a

218. European Convention, *supra* note 1, art. 4, at 102.

219. European Convention, *supra* note 1, art. 14, at 105.

220. App. Nos. 6780/74, 6950/75, 4 Eur. H.R. Rep. 482 (1982) (Commission report).

221. *Id.*

222. *Cyprus v. Turkey*, 4 Eur. H.R. Rep. at 493, 536-37.

223. *Cyprus v. Turkey*, 4 Eur. H.R. Rep. at 493, 536-37.

224. *East African Asians v. United Kingdom*, App. Nos. 4403/70-4419/70, 4422/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70, 4526/70-4530/70, 3 Eur.

group of East African Asians, who were citizens of the United Kingdom and colonies, admission to Britain. The Commission defined "degrading treatment" as an action which lowers a person in rank, position, reputation or character, where it reaches a certain level of severity.²²⁵ The Commission found that the United Kingdom's immigration controls discriminated against East African Asians on the basis of their race and concluded that this discrimination amounted to degrading treatment under Article 3 of the Convention.²²⁶

East African Asians arguably requires a finding that a state's failure to prohibit and prevent trafficking is discriminatory to women as a group, and severe enough to constitute degrading treatment. Several arguments can be made to support the assertion that a state discriminates when it fails to protect trafficked women. First, discrimination is the lack of equality, prostitution creates sex inequality, and a state's inaction allows unequal treatment or discrimination. Second, if a state does have laws either prohibiting trafficking of women from across borders or of prostitution by domestic women alone, the failure to protect the other class of prostituted women may be discrimination on the basis of national origin. Lastly, if a country criminalizes prostitution, yet does not enforce these laws, there may be discrimination in the enforcement of its laws.

In *East African Asians*, the Commission stated that "a special importance should be attached to discrimination based on race . . . and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question."²²⁷ However, sex discrimination is arguably an equally significant form of discrimination which raises similar questions as racial dis-

H.R. Rep. 76 (1981) (Commission report).

225. *East African Asians v. United Kingdom*, 3 Eur. H.R. Rep. at 77-79, 86.

226. A second important conclusion in this case is that the refusal of a right not found in the Convention may, in certain circumstances, violate another right covered by the Convention. As this case explains, an individual's right to enter his or her own country is not a right protected by the Convention. However, refusal of this right on the basis of race is discriminatory and constitutes degrading treatment under Article 3. Thus, while Article 14 only ensures nondiscriminatory treatment with regard to the enjoyment of the rights and freedoms set out in the Convention, discrimination as degrading treatment has a more inclusive meaning. *East African Asians v. United Kingdom*, 3 Eur. H.R. Rep. at 79. See also European Convention, *supra* note 1, arts. 3, 14, at 102, 105.

227. *East African Asians v. United Kingdom*, 3 Eur. H.R. Rep. at 86.

crimination.

Although no case law discusses Article 4 in relation to prostitution, pimping and selling women also seem to be covered by the Convention's prohibition on slavery and forced or compulsory labor. The success of an argument under Article 4 will probably depend upon the degree to which the prostitution appears forced. The Court or Commission, for example, would look at the violence and threats used against a prostitute.

Article 14 of the European Convention can also be interpreted to prohibit trafficking in women because it prohibits discrimination against women.²²⁸ The connection between prostitution and discrimination has been clarified by feminists such as Catharine MacKinnon²²⁹ and Kathleen Barry.²³⁰ According to these scholars, pimping or purchasing women is a form of discrimination on the basis of sex.²³¹ However, Article 14 only prohibits a state from applying the individual rights protected by the Convention in a discriminatory manner.²³² Thus, like the precepts in the European Convention, it prohibits only acts of member states, not of individuals. Under Article 14, a state's failure to enact or enforce prohibitions on prostitution is arguably sex discrimination with respect to one of the rights protected by the European Convention. A state's failure to protect prostituted women is arguably a discriminatory application of the prohibition on forced labor in Article 4. A similar argument can be made with respect to Article 3. Accordingly, Article 14, standing alone, does not prohibit trafficking of women, but used in connection with another provision in the European Convention, it prohibits discrimination on the basis of sex.

The legal success of the preceding arguments is uncertain. First, as one commentator has asserted, the Commission and the Court have abided by an "extremely narrow interpretation" of the Convention.²³³ Second, these enforcement bodies are unlikely to prohibit an activity

228. European Convention, *supra* note 1, art. 14, at 105.

229. Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993).

230. Barry, *supra* note 63.

231. MacKinnon, *supra* note 229; Barry, *supra* note 63.

232. European Convention, *supra* note 1, art. 14, at 105.

233. Dumas, *supra* note 206, at 604 (stating that this narrow interpretation has quieted nations' fears of encroachment on their sovereignty and has thus led to greater acceptance of the compulsory jurisdiction of the Court).

which is tolerated, in some form, in every European state.²³⁴ As the Italian government submitted in a case before the European Court of Justice, "since prostitution is a widespread phenomenon tolerated in all the Member States, it is very difficult to regard the individual, and possibly [the] discreet and reserved, exercise of that activity as a serious threat to public policy."²³⁵ If the enforcement structures reflect European views, they may not regard prostitution as a violation of individual rights, but rather as an individual liberty. Until such views change, there is only a limited possibility of protecting prostituted women in Europe.

Despite the current limitations on the ability to enforce trafficking prohibitions in the European human rights system, the system is in an early stage of development and is open to change in many ways. First, since its creation, eight protocols have been added to the Convention and a ninth protocol is currently in the acceptance process. This Ninth Protocol will allow an individual applicant to refer a case to the Court.²³⁶

Second, the Court and Commission have consistently viewed the Convention as adaptable to changing human rights norms within Europe.²³⁷ As one commentator suggests:

Far from being bound by the intention of the drafters, the tribunals interpret the Convention as a modern document that responds to and progressively incorporates changing European social and legal developments. Toward this end, they search for the existence of rights-enhancing practices and policies among the Contracting states that affect human

234. Holly Fechner, Focus on Amsterdam & London: Critique of the Liberal Feminist Philosophy on Prostitution, Panel Presentation, at the *Michigan Journal of Gender & Law* Symposium, *Prostitution: From Academia to Activism* (Oct. 30, 1992) (videotape on file with the *Michigan Journal of Gender & Law*).

235. *Adoui v. Belgian State and City of Liege*; *Cornuaille v. Belgian State*, 1982 E.C.R. 1665, 1694 (1982).

236. See Council of Europe, *The Individual's Right to Seize the Court*, 12 HUMAN RIGHTS L.J. 51 (1991) (text and explanatory report of Protocol No. 9 to the European Convention of Nov. 6, 1990). See also Torkel Opsahl, *Pros and Cons of the Existing Mechanisms for Human Rights Protection in Europe*, 1 ALL-EUR. HUM. RTS. Y.B. 221, 224 (1991).

237. Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 134 (1993). See also *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 15 (1978); *Austria v. Italy*, 1960 Y.B. Eur. Conv. on H.R. 169-69 (Eur. Ct. of H.R.).

rights. When these practices achieve a certain measure of uniformity, a 'European consensus' so to speak, the Court and Commission raise the standard of rights-protection to which all states must adhere.²³⁸

This scholar argues that the European tribunals look to developments in international law to "confirm the existence of a movement toward a common regional perspective . . ." ²³⁹ Furthermore, he states that the international human rights documents most widely adopted by European states should be given the most force, including CEDAW.²⁴⁰ If CEDAW was recognized within the European human rights system, its substantive terms effectively might be enforced within the existing European procedural framework.

The strength of the existing procedural enforcement mechanisms, combined with the possibility for change within the European human rights system, is reason to watch the developing European jurisprudence and to focus enforcement efforts in Europe. Particular goals should include: 1) an interpretation of current convention provisions to prohibit trafficking; 2) future protocols to eliminate both procedural and substantive obstacles to individual petitions; and 3) a future protocol which explicitly prohibits the trafficking of women. These goals can be achieved by the efforts of the European and international feminist community.

B. The Inter-American Human Rights System

The Inter-American human rights system holds many of the same promises as the European system for protecting trafficked women. In fact, certain features of the Inter-American human rights system make it the best forum in which to work toward eliminating trafficking in women. In 1960, the Inter-American human rights system was created

238. Helfer, *supra* note 237, at 134.

239. Helfer, *supra* note 237, at 134 n.6. Additionally, this interplay between regional and global human rights instruments indicates that the creation of international human rights principles is a fluid process. Human rights norms and international customary law develop as additional instruments in regional or global contexts and spell out the same protections. While the state practice element of a customary international law may only be provided when compliance with such obligations becomes consistent, committing to such principles in human rights treaties can be a large factor in showing *opinio juris* among in the international community. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 79-83 (3rd ed. 1991).

240. Helfer, *supra* note 237, at 162.

by the Organization of American States, when it adopted the Inter-American Commission on Human Rights.²⁴¹ The Commission was established to promote respect for the rights set forth in the American Declaration of Rights and Duties of Man which was entered into in 1948.²⁴² After the American Convention became effective in 1978,²⁴³ the Commission also took charge of enforcing this document with respect to those states which ratified the Convention.²⁴⁴ While the American Declaration of Rights and Duties of Man remains a guiding instrument, the widespread acceptance of the American Convention has made it the primary human rights obligation among the American states.²⁴⁵

The American Convention, while modeled on the European Convention,²⁴⁶ contains differences which might benefit a trafficked woman seeking to enforce her rights under it. For example, the procedures for bringing a complaint in this system favor an individual's complaint over a state's complaint. First, as in the European system, the Commission can receive individual complaints alleging violations of human rights obligations by a state.²⁴⁷ In contrast to the European system, by ratifying the Convention, a state obligates itself to accept the power of the Commission to receive complaints from individuals.²⁴⁸ In the Inter-American system, as in the European Court, the Commission's right to receive inter-state complaints is conditioned upon the acceptance of this

241. ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, at 5 (1994) [hereinafter OAS COMMISSION].

242. OAS COMMISSION, *supra* note 241.

243. The Convention was approved by the Inter-American Specialized Conference on Human Rights on November 22, 1969, and entered into force July 18, 1978, when Granada deposited the eleventh instrument of ratification. OAS COMMISSION, *supra* note 241, at 6.

244. The Statute of the Commission has been amended several times in order to make the Commission increase the scope of its enforcement power. In 1979, the General Assembly of the OAS approved the amendments which grant the Commission enforcement authority over the American Convention. OAS COMMISSION, *supra* note 241, at 6.

245. Currently, the following nations are parties to the Convention: Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, Uruguay, and Venezuela. OAS COMMISSION, *supra* note 241, at 6 n.1.

246. Buergethal, *supra* note 182, at 156.

247. This is true under either the Declaration of the Rights and Duties of Man or the American Convention on Human Rights.

248. American Convention, *supra* note 180, art. 44, 9 I.L.M. at 687.

procedure by the state alleged to be in violation in the Inter-American system.²⁴⁹ This provision reflects the drafters' fear of one government interfering in the internal affairs of another government.²⁵⁰

Other procedural requirements of the Inter-American system are similar to those in the European system. For example, individual petitions cannot be anonymous; the complaint must be filed within a certain time period; domestic remedies must be exhausted; the complaint cannot be written in offensive language; and the subject of the petition cannot be pending in another international settlement procedure.²⁵¹ These requirements differ from their European counterparts because they apply to both individual and state petitions. Individual petitions therefore face the same barriers to admissibility as state petitions.

After a petition is deemed admissible by the Commission, the procedure for hearing complaints and receiving a binding decision is similar to the European system's process. The Commission enforces the Convention in cooperation with the Inter-American Court of Human Rights.²⁵² Initially, the Commission receives and considers all complaints for which it may investigate, hold hearings, and attempt to facilitate a settlement.²⁵³ If settlement is not reached, the Commission prepares a report stating the facts and its conclusion.²⁵⁴

At this point, the complaint may be referred by a state or by the Commission to the Inter-American Court on Human Rights for a binding decision.²⁵⁵ Individual petitioners are thus dependent on a state or the Commission to facilitate obtaining a Court judgment.²⁵⁶ The Commission recognizes, however, the importance in helping individuals achieve justice in the Court:

Considering that individuals do not have standing to take their case to the Court and that a Government that has won a proceeding in the Commission would have no incentive to do so, in these circumstances the Commission alone is in a

249. American Convention, *supra* note 180, art. 45, 9 I.L.M. at 687.

250. Buergenthal, *supra* note 182, at 160.

251. American Convention, *supra* note 180, art. 46, 9 I.L.M. at 687.

252. American Convention, *supra* note 180, arts. 61-65, 9 I.L.M. at 691-92.

253. American Convention, *supra* note 180, art. 48, 9 I.L.M. at 688-89.

254. American Convention, *supra* note 180, art. 50, 9 I.L.M. at 689.

255. American Convention, *supra* note 180, art. 51, 9 I.L.M. at 689.

256. American Convention, *supra* note 180, art. 61, 9 I.L.M. at 691.

position, by referring the case to the Court, to ensure the effective functioning of the protective system established by the Convention.²⁵⁷

Also, under Article 62, a petition cannot be brought before the Court unless a state party accepts the jurisdiction of the Court.²⁵⁸ The fact that very few cases have been brought to the Court since its creation is more a reflection on the states parties' resistance to accepting the Court's jurisdiction than on the referral requirement.²⁵⁹

A decision may still be reached regardless of whether a case is or can be referred. By a vote of an absolute majority, the Commission may issue its opinion and conclusions concerning the question submitted.²⁶⁰ However, unlike a final decision by the European Committee of Ministers, this decision lacks the enforceability of a court decision.²⁶¹ Instead, the Commission may make recommendations, and if the situation is not remedied within a specified period, the Commission may decide by a majority vote to publish its report.²⁶² The effect of such negative publicity may be substantial, and combined with the resulting moral pressure from other states, may provide incentives for a state to correct its human rights record.²⁶³

Ultimately, the Inter-American system holds more promise for protecting prostituted women than the European system, because the American Convention explicitly prohibits "traffic in women."²⁶⁴ Article

257. Compulsory Membership of Journalists' Association, 8 Eur. H.R. Rep. 165, 170 (1986) (Advisory Opinion of the Inter-American Court of Human Rights).

258. American Convention, *supra* note 180, art. 62, 9 I.L.M. at 691-92.

259. According to the 1992-1993 Annual Report of the Inter-American Commission on Human Rights only 14 of the OAS states had accepted mandatory jurisdiction of the Court: Argentina, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Peru, Surinam, Trinidad and Tobago, Uruguay, and Venezuela. OAS COMMISSION, *supra* note 241, at 6 n.1.

260. American Convention, *supra* note 180, art. 50, 9 I.L.M. at 689.

261. American Convention, *supra* note 180, art. 51, 9 I.L.M. at 689.

262. American Convention, *supra* note 180, art. 51, 9 I.L.M. at 689.

263. The Commission represents *all* members of the OAS. American Convention, *supra* note 180, art. 35, 9 I.L.M. at 685; *see also* Buergenthal, *supra* note 182, at 158.

264. Article 47 of the American Convention states that "[t]he Commission *shall* consider inadmissible any petition . . . if . . . b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by *this Convention*." American Convention, *supra* note 180, art. 47, 9 I.L.M. at 688 (emphasis added). Article 62(3) states that "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention . . ." American Convention, *supra* note 180, art. 62(3), 9 I.L.M. at 692.

6(1) states: "No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women."²⁶⁵ Further, under Articles 1 and 2 of the American Convention, the states have an affirmative duty to "ensure to all persons . . . the free and full exercise of those rights and freedoms" recognized in the American Convention.²⁶⁶ Although the Inter-American Commission and Court are confined to enforcing the provisions of the American Convention,²⁶⁷ this limitation is not an obstacle to protecting prostituted women as it is in the European system.

A problem of personal freedom could arise if the American Convention is utilized to protect prostituted women. Enforcing the trafficking prohibition in the American Convention will strengthen and legitimize the entire American Convention. Enforcement of the Convention, however, also legitimizes Article 4, which provides a right to life from the moment of conception.²⁶⁸ Therefore, utilizing the American Convention to promote one right of women, such as freedom from prostitution, may offend another right of women, such as reproductive freedom.

The Inter-American system may ultimately be a better forum in which to protect prostituted women than the European system for several reasons. First, the Convention contains an unambiguous prohibition of trafficking in women. Second, certain procedural features make the enforcement structures of the Inter-American system more accessible to individual petitioners. However, any decision to pursue enforcement of one provision of the American Convention should depend on one's view of the Convention's other provisions and an analysis of the overall balance between protections gained and rights lost.

265. American Convention, *supra* note 180, art. 6(1), 9 I.L.M. at 677. Advisory jurisdiction of the European Court, which was established by Protocol No. 2 to the European Convention, is very limited. It allows only the Committee of Ministers to request such opinions, and the opinions cannot address questions of rights in the Convention or rights which the European Court or other convention institutions may be asked to adjudicate in a contentious proceeding. European Convention, *supra* note 1, Protocol No. 2, art. 1(1)-(2), at 121.

266. Buergethal, *supra* note 182, at 163.

267. American Convention, *supra* note 180, art. 64, 9 I.L.M. at 692.

268. Article 4(1) provides: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." American Convention, *supra* note 180, art 4(1), 9 I.L.M. at 676.

CONCLUSION

Despite many years of important work by feminists and human rights organizations to develop and enforce international trafficking prohibitions, trafficking in women remains a pervasive worldwide problem. Legal prohibitions on trafficking in women exist in international treaties such as the CEDAW and the 1949 Convention. For the women such as Almira Ajanovic, the Muslim woman prostituted in a Serbian brothel, and the fifteen-year-old Thai tribe girl bought and sold by traffickers, the international treaties continue to prove worthless in stopping the trafficking of women.

This essay has addressed some of the reasons why the international treaties have failed trafficked women. Specific provisions of international treaty law outlaw trafficking in women, but these provisions often contain unresolved substantive issues and enforcement problems. Other enforcement issues such as signatory nations' refusals to commit to treaty enforcement, reservations to the treaties, and problems with the treaties' committee structures also plague these laws. Therefore, such enforcement issues undermine the substantive goals of the treaties and render them practically unenforceable.

Regional treaties also contain provisions that might protect trafficked women. The European Convention and the American Convention provide better opportunities for enforcing their provisions than do U.N. Conventions. Individuals may, in some cases, assert claims under the regional conventions in the regional human rights courts. Further, most human rights organizations and feminist groups, at least in the United States, overlook the regional treaties in their struggles against international pimps. Therefore, feminist lawyers, trafficked women, and others should increase their use of these regional treaties as a weapon in their battles against the traffickers.

Critical attention should be focused on the deficiencies of the international and regional treaties which purport to outlaw trafficking. Feminist attorneys should utilize and attempt to enforce the regional treaties as well as correct and enforce the international conventions. If both methods are employed, the treaties may accomplish what their framers imagined, ending a world where men can buy and sell women in a global market for sex. ❀