

# Dangerous unions : mapping human smuggling and human trafficking in international marriage through Japan's legal response

著者	MacLean Douglas
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**DANGEROUS UNIONS: *Mapping Human Smuggling and Human Trafficking in International Marriage Through Japan's Legal Response***

Douglas MacLean, J.D.\*

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**Abstract**

This working paper explores human smuggling and human trafficking through international marriage. It focuses on Japan's criminal justice response, while examining the major stakeholders involved in this activity. The paper focuses on the time period from 2008-2013.

International marriages, particularly commercially brokered arrangements, have rapidly increased throughout East and Southeast Asia, with more women from less developed countries moving to richer destinations. The increasing prevalence of brokered marriages, and the overall numbers of marriage migrants, provides cover for criminal organizations to smuggle labor migrants on false marriages, and to send some migrants into what are clearly human trafficking situations.

**Keywords:** human trafficking, human smuggling, criminal justice, migration, Japan

**JEL classification:** F15, O14, O30

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\*Executive Director, Justice Without Borders, [dsm53@georgetown.edu](mailto:dsm53@georgetown.edu)

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**INSTITUTE OF DEVELOPING ECONOMIES (IDE), JETRO**  
**3-2-2, WAKABA, MIHAMA-KU, CHIBA-SHI**  
**CHIBA 261-8545, JAPAN**

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**WORKING PAPER**

**DANGEROUS UNIONS**

*Mapping Human Smuggling and Human Trafficking in International Marriage Through  
Japan's Legal Response*

Douglas MacLean, J.D.

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## INTRODUCTION

*AUTHOR'S NOTE: This paper is a working draft and is still a work in progress. There may be some irregularities in formatting and additional citations to still be added. Feedback is welcome.*

This working paper systematically explores the problem and legal response to human smuggling and human trafficking through one migration route: international marriage. It places particular emphasis on the work of Japan's legal system and its officers to combat these crimes, while also examining the major stakeholders who profit from this activity, including brokers, criminal organizations, employers and other supporting actors, as well as the people who are moved along this route illegally. The paper focuses on the time period roughly from 2008-2013.

International marriages, particularly commercially brokered arrangements, have been rapidly increasing throughout East and Southeast Asia,<sup>1</sup> with more and more women from comparatively less developed countries heading towards richer destinations. The increasing prevalence of brokered marriages, as well as the overall numbers of marriage migrants generally, provides cover for criminal organizations to smuggle labor migrants on fake marriages, and to send migrants into what are clearly human trafficking situations.

Despite generating tens of thousands of US dollars per person in underground profits, there has been little examination of how spouse visas are exploited for illicit migration. Where the demand for this activity originates, the supply chains of smuggling and trafficking, or how criminal organizations game a country's immigration and related legal mechanisms to avoid detection.

Using Japan as a case study, this report divides its examination into four sections:

- 1) **The background of marriage migration in the country**, which establishes the background within which criminal activity occurs,
- 2) **Human smuggling through marriage migration**, i.e. how spouse visas are fraudulently obtained to facilitate illicit labor migration,
- 3) **Human trafficking through marriage migration**, although related smuggling, this is a legally distinct criminal act. This section highlights the prevalence of human trafficking victims identified on spouse visas
- 4) **A step-by-step examination of the spouse visa application**—The application process is the first and best line of defense against criminal activity. This section examines key points in the process, the vulnerabilities to criminal exploitation, and the key steps that can be taken to improve detection.

### Research background

This report is based on nearly one year of on the ground research in Japan, from 2012-2013. The country was chosen for several reasons: it has numerically the largest number of recorded marriage migrants in

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<sup>1</sup> These terms follow the definitions for East Asia and Southeastern Asia as defined by the UN in "Standard country or area codes for statistical use." This report uses the term "Southeast Asia" in place of "Southeastern Asia". (ST/ESA/STAT/SER.M/49/Rev.3).

East and Southeast Asia; as the second largest economy and the third largest by population in the region, the country wields significant influence, and its experiences with this challenge provide important points of consideration for experts in neighboring countries; despite its size and well developed research infrastructure, there is a dearth of information about the situation of human smuggling and human trafficking domestically, with legal analyses of these problems particularly lacking. This report thus seeks to add substantial new research to the field. Finally, the author's experience with the country enabled a deeper investigation than would be possible in most other nearby countries.

### **Research rationale and methodology**

This report was designed with relevant government actors as the primary audience, although the contents will also be of use to non-governmental advocates and scholarly researchers. The focus was particularly on law enforcement officials within the Ministry of Justice, with somewhat less focus on the National Police Agency. The reasons for this were two-fold: first, the Ministry houses the Immigration Bureau and the Prosecutor's Office, both of which are key actors in preventing and uncovering human smuggling and human trafficking. The lack of existing research on their activities and viewpoints, even in Japanese, prevents other stakeholders from understanding current government efforts and limitations, as well as how these actors perceive these problems.<sup>2</sup> Additionally, these agencies are very influential in advocating for new laws and policies designed to prevent transnational organized crime, making analyses and recommendations that take their experiences and perspective into account more productive than recommendations that are made in a vacuum.

The research itself consisted of significant primary source examinations, including not only Japanese laws, but also policy documents and reports released by the Immigration Bureau, the Ministry of Justice, the Cabinet Office, the National Police Agency, and the Ministry of Health Labor and Welfare, as well as other related governmental agencies.

In-person interviews were conducted with current practitioners, including senior prosecutors and immigration bureau staff, and included both staff based within the Ministry of Justice itself, as well as regional offices in Tokyo and Osaka. Additionally, one interview with consular staff in the Japanese embassy in Thailand was conducted in order to obtain a perspective on marriage migration from the beginning of the process. Interviews with police representatives in the Tokyo Metropolitan Police office were also conducted. These interviews focused on understanding how these stakeholders perceived human smuggling and human trafficking, and how their agencies responded to these problems, and what they thought was needed to improve the legal system's response to these issues. Note that these individuals were speaking from their own experience

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<sup>2</sup> Note that the Ministry of Justice, and indeed the National Police Agency bear some responsibility for this state of affairs, as only a small amount of investigation, arrest, and prosecution statistics are released. That said, it is incumbent upon the Japanese scholarly community to proactively research these issues and to engage with relevant government and NGO stakeholders.



and not voicing any official position of their agency or the government generally. As such, their names have been withheld in order to enable them to speak freely.

Finally, beyond government actors, reports and in-person interviews with relevant non-governmental agencies, international organizations, such as the International Organization for Migration and scholars focused on marriage migration and human trafficking were conducted.

Based on the materials collected, the research focuses on describing what is known about human smuggling and human trafficking through marriage migration, and how these government agencies used the law and their own internal processes to combat the problem. Assessments of and recommendations to strengthen these activities were based on relevant international law, namely the UN Convention on Transnational Organized Crime, and its optional protocols on human smuggling and human trafficking, respectively.

### **Research Limitations**

As in other countries, available data or even reliable estimates on the scope of human smuggling and human trafficking are unavailable. Additionally, research into government activities is hampered by the relative dearth of publicly available information. Court cases, prosecution, and arrest statistics are not always publicly available, hampering an accurate mapping of how the laws are actually used. Additionally, many ministerial and agency level policies are also not public; the most critical gap is the lack of published guidelines on how police, prosecutors, and immigration officials determine whether an individual is a victim of human trafficking. Records on negative determinations in particular are not available. Further research into police activity is also needed. However, unlike the Prosecutor's Office or the Immigration Bureau, police forces are organized by prefecture; while police is set nationally, actual implementation, as well as more local policies means that there are 47 different examples to examine.

Finally, an extremely thin body of existing research means that this report focused on establishing a baseline of what is known about these particular criminal activities and how the government is responding to them. Additional research is badly needed to fill in the gaps identified and to deepen the research and recommendations presented in this report.

That said, this report provides a significant base for understanding two key problems in migration, and the research and recommendations provided can serve to fuel further research, as well as provide a roadmap for carrying out similar research in other receiving countries. This report begins with an introduction to marriage migration generally, and the impact it has had in Japan.

## **1. AN OVERVIEW OF MARRIAGE MIGRATION AND THE CURRENT SITUATION IN JAPAN**

### **Introduction**

This section provides a brief background on the growing trend of marriage migration in the region, setting the stage for the criminal activities of human smuggling and human trafficking that take place in this migration stream. On a general level, the scope of marriage migration examined in this report, why international

marriage has been on the rise, the prevalence of marriage, and the use of marriage as a route for illicit migration are examined. Focusing specifically on Japan, marriage migration statistics, as well as Japanese policy on marriage migration follow. The section ends by briefly introducing why the marriage migration route is a target for international criminal activity. Where appropriate, comparisons with the neighboring destinations of South Korea and Taiwan, which share many of the same experiences in marriage migration in Japan, are introduced.

Historically, East and Southeast Asia has been a source for international marriage migrants, and even then, the amount of migration was comparatively small. However, over the last generation, demographic pressures, combined with the increased movement of people brought on by globalization, have turned Japan, Taiwan, and South Korea into destinations for marriage migrants. Mainland China is also rapidly becoming a destination, thanks in part to the effects of its One Child Policy leaving a growing deficit of women of marriageable age. Source countries in the region include those in the Greater Mekong Sub-Region, Mainland China, and to a lesser extent, South Korea, and in addition to the destinations listed above, also serve North America and Western European demand for international brides.

Driving this migration are demographic changes in destination countries that leave local men with a shortage of women of marriageable age, while the unequal economic growth brought about by globalization has pushed (mostly) women in source countries to pursue marriage abroad for both economic reasons, and for their own future family's well-being. While those men with the wherewithal to live or work abroad may seek a bride directly in her home country, many more men must rely on either formal or informal marriage brokers to find a wife. This demand, along with increasingly cheaper travel and communications costs, have enabled commercial marriage brokers to developed supply chains that can connect their male clientele with women abroad willing to migrate for a marriage.

### **1.1 Scope of marriage migration examined in this report**

“Marriage migration” generally refers to migrating either for the purpose of marriage, or to unite with one's family.<sup>3</sup> From a legal perspective, the marriage migration route is defined by the spouse visa that most countries grant foreign spouses. The legal definition thus includes both “genuine” marriages, as well as ones created simply to facilitate a foreign national's entry into the country on a facially valid visa.

That said, this report focuses on criminal exploitation of the marriage migration route. This includes marriages of convenience designed to smuggle labor migrants into the country, and the use of either smuggling or seemingly legitimate marriages to place an individual into a situation of human trafficking.

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<sup>3</sup> Marriage migration generally implies migration for the purpose of marriage and/or reuniting an already married couple. Note in the former however marriage may be only one of several reasons in deciding to migrate. *See generally* Nicola Piper, *Wife or Worker? Worker or Wife? Marriage and Cross-Border Migration in Contemporary Japan*, 9 Int'l. J. Popul. Geogr. 457 (2003).

## 1.2 Why international marriage is a growing migration route

While much of the literature on marriage migration in the region has focused on the rise of formal and informal marriage brokers, the effects of globalization have led to increasing movement across borders generally. Multinational corporations opening offices and factories in other countries, labor migration, study abroad, and even lower costs for international travel, along with cheaper communications over the internet have enabled individuals to meet through various channels.

Arranged	Non-arranged
Commercial marriage broker	Met abroad (e.g. in destination country)
Personal connections in the host country	Met in home country
Relative with spouse from the destination country	

Arranged marriages are equally varied, and can be formal, informal, or unpaid. They can begin via a broker operating a matchmaking service, via a marriage migrant who helps match women in her home community with men in her host community on an informal but paid basis, via an introduction through a friend or contact in the destination country, or even via a relative who is already married and living in the host country.<sup>4</sup>

Individuals seek a foreign spouse for various reasons. The rapid urbanization of Japan and other destination countries, along with cultural changes that find women choosing to pursue careers first and marriage later, have led to many women seeking a career in the cities, leaving a local gender imbalance in many rural areas.<sup>5</sup> However, in recent years, marriage migration has been on the increase in the cities; a culture that labels men in lower socio-economic strata unattractive marriage partners has driven a demand for foreign brides even in urban areas.<sup>6</sup>

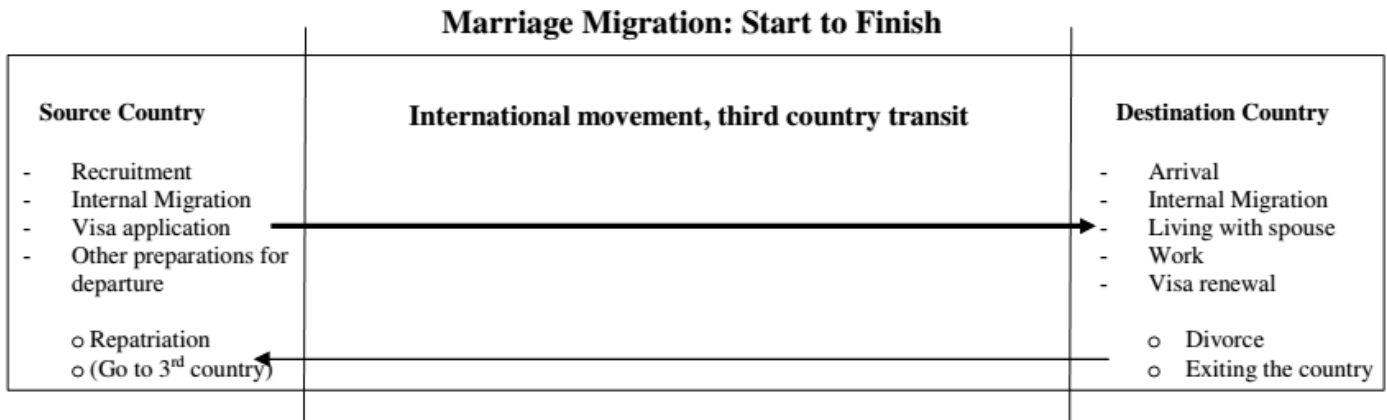
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<sup>4</sup> In fact, some evidence exists in Japan and Taiwan that as the community of a particular migrant population grows, the amount of informal brokering between those in the destination country and their home community increases. Interviews with Dr. Melody Chia-Wen Lu, Research Fellow, Asia Research Institute, National University of Singapore, interviews by phone from the UN Interagency Project on Human Trafficking, Bangkok, Thai. (Jun.-Jul., 2010). (Describing brokering by Vietnamese brides in Taiwan) Interview with Professor Yuriko Saito, Meijigakuin University, Tokyo (May 13, 2013). (Describing brokering by Thai brides in Japan).

<sup>5</sup> Saihan Juna, *International Marriage in the Age of International Migration* at 93-94, 国際移動時代の国際結婚, (Keiso Shobo pub.) (2011).

<sup>6</sup> Eunhee Sawa and Yumiko Utsumi, *What makes Korean women marry Japanese men and migrate to Japan? An analysis of push factors based on the results of interviews with Korean women living in Yamagata Prefecture* at 15-16, 韓国人女性はなぜ日本に結婚移住するのか—山形県における聞き取り調査の結果に見るプッシュ要因—, Yamagata Exchange Student Education and Research Vol. 2 (山形大学留学生教育と研究 2 号) 2010. (Finding that increasing numbers of Korean wives coming to cities rather than rural areas as before); Saihan Juna, *supra* note 9, at 95. (Japanese men in the cities working in “difficult, disgusting, or dangerous” jobs, as well as those still living with parents are unattractive partners for Japanese women).

For those migrating, the reasons to seek a brokered marriage can include the promise of a better life for themselves and their future children, the opportunity to work and send money home, restarting their life after a divorce, or simply the attraction of a life abroad.<sup>7</sup>



### 1.3 Demand for illicit migration

Illicit migration occurs most often when the demand for labor in one or more sectors cannot be met by either domestic labor or legal migration. Such sectors generally involve low-skilled, low-wage work, particularly in what Japanese label the “3K” jobs, translated as “difficult, dangerous, and dirty.” While many countries limit the amount of unskilled labor allowed legally into the country, Japan’s migration system is particularly strict; the country has no unskilled labor visa, and the government has publicly stated it is not interested in creating such a visa.<sup>8</sup> Despite this, demand for these workers remains, and an estimated 70% of foreign residents in Japan are in fact engaged in low-skilled labor.<sup>9</sup> Still, the existing pool of legal labor is insufficient, leading to irregular migrant labor filling the gap.

### 1.4 The attraction of the marriage migration route

Those who smuggle and those who hire illicit migrant labor most likely choose their method of importing workers based on what holds the highest reward. Unlike forged documents, a fraudulent spouse visa is facially valid, and the private nature of a marriage makes uncovering fraud quite difficult.<sup>10</sup> As will be seen in section 2, those most often apprehended are the marriage migrant and the fake spouse; the risk of an

<sup>7</sup> See Nicola Piper, *supra* note 7 at 457, 462.

<sup>8</sup> C.f. Yasushi Iguchi, WHAT ROLE DO LOW-SKILLED MIGRANTS PLAY IN THE JAPANESE LABOR MARKETS?, 56 *American Behavioral Scientist* 1029, 1055 (2012). (“The acceptance of low-skilled labor is not permitted, according to the long-standing principle of the government of Japan.”)

<sup>9</sup> *Id.* at 1055. (“70% of the foreigners actually employed are low-, semi-, or unskilled workers.”) Where these workers are legal residents, they would likely be on foreign trainee visas, or on long-term visas available to foreign national children and grandchildren of Japanese nationals, as most of these have relaxed or no work restrictions.

<sup>10</sup> See section 2.3.4 Challenges in uncovering marriage smuggling.

employer or someone within the smuggling or trafficking operation facing charges are quite low. By the same token, the visa offers the benefits of no restrictions on work, is a facially valid form of residence, can be renewed indefinitely, and even lead to permanent residency.

Additionally, the demand for female labor is particularly high; demand for workers in Japan's restaurant and entertainment sectors, particularly in establishments that provide more adult services, is prevalent and is not open to those on labor visas. Those on spouse visas however can, and the story of an international marriage provides cover for smuggling or trafficking in the needed labor.

Smugglers can thus offer employers and migrants a low-risk pipeline, while human traffickers and their customers can hide the "spouse" in plain sight, and continue to exploit her undetected. The increase in legitimate marriage migration to Japan and its neighbors, particularly through marriage brokers, makes hiding illicit migration even easier. Visa applications for spouses who have only recently met does not raise suspicion.

### **1.5 Statistics on marriage migration in Japan**

From 2000-2011, about 1 in 20 marriages in Japan have involved a foreign spouse.<sup>11</sup> Out of a total of 441,376 couples, over 345,000, or more than 75%, were female.<sup>12</sup> Those from Mainland China (135,645), the Philippines (92,656), South Korea<sup>13</sup> (61,949), and Thailand (18,091) comprise the lion's share of foreign female spouses.<sup>14</sup>

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<sup>11</sup> Statistics drawn from Ministry of Health Welfare and Labor, "Survey of Population Trends", 人口動態調査. (compiled from 2000-2011 reports).

<sup>12</sup> *Id.*

<sup>13</sup> The statistic includes North Korea as well. *See id.* However, the very closed nature of North Korea means that marriage migrants from that country approach zero. Note that "China" includes Taiwan and Hong Kong.

<sup>14</sup> Survey of Population Trends, *supra* note 15.

**Figure 1: International marriage registration statistics 2000-2011<sup>15</sup>**

Year	Total Marriages	Foreign Spouse	% Int'l Marriage	Foreign bride total	Chinese	Filipino	Korean	Thai
2000	798,138	36,263	4.54	28,326	9,884	7,519	6,214	2,137
2001	799,999	39,727	4.97	31,972	13,936	7,160	6,188	1,840
2002	757,331	35,879	4.74	27,957	10,750	7,630	5,353	1,536
2003	740,191	36,039	4.87	27,881	10,242	7,794	5,318	1,445
2004	720,417	39,511	5.48	30,907	11,915	8,397	5,730	1,640
2005	714,265	41,481	5.81	33,116	11,644	10,242	6,066	1,637
2006	730,971	44,701	6.12	35,993	12,131	12,150	6,041	1,676
2007	719,822	40,272	5.59	31,807	11,926	9,217	5,606	1,475
2008	726,106	36,969	5.09	28,720	12,218	7,290	4,558	1,338
2009	707,734	34,393	4.86	26,747	12,733	5,755	4,113	1,225
2010	700,214	30,207	4.31	22,843	10,162	5,212	3,664	1,096
2011	661,895	25,934	3.92	19,022	8,104	4,290	3,098	1,046

Marriage migration has slowed since 2007.<sup>16</sup> Numerous explanations exist for this trend; the drop in migration after the mid-2000's roughly coincides with the global economic crisis, with the drop in 2011 possibly attributable to the natural and nuclear disasters that hit northern Japan in March of that year. Japan's declining population generally, as well as other destinations simply becoming more attractive are all possibilities. Whether this downturn is temporary or the beginning of a longer trend is unclear, even to experts who have followed marriage migration for some time.<sup>17</sup> Additionally, the population of ongoing visa holders has dropped precipitously.<sup>18</sup>

#### *Regional comparisons*

Japan has the largest total number of marriage migrants among wealthy destinations in the region. However, neighboring South Korea and Taiwan have a larger number of foreign spouses per capita,

<sup>15</sup> Compiled statistics, Ministry of Health, Welfare and Labor, "Survey of Population Trends", *supra* note 15.

<sup>16</sup> This decline correlates with the global economic downturn, although the degree to which this accounts for the decline in new marriage registrations is unknown.

<sup>17</sup> Interviews with Prof. Masaaki Satake Nagoya Gakuin University, Jan. 31, 2013

<sup>18</sup> As of 2012, there were 162,291 dependent of Japanese visa holders, a marked decrease from the approximately 245,000 visa holders in 2008. The number also includes non-spouses on this visa, such as foreign parents with custody of Japanese children. The discrepancy between registered marriages and spouse visa holders can be partially explained by a potentially much larger pool of foreign spouses who have obtained permanent residency visas. All told, permanent residents numbered over 628,000 in 2012, up from 492,056 in 2008. Additionally, some number of spouses who were permanent residents have since obtained Japanese citizenship, further obscuring the true number of foreign-born spouses. *See* What Makes Korean Women Marry Japanese Men and Migrate to Japan? 14 (2010)

approximately 1 in 11 and 1 in 13 marriages respectively are international marriages, compared to Japan's 1 in 19.<sup>19</sup>

### 1.6 Japanese Policy on Marriage Migration

No national policy on international marriage or marriage migration exists in Japan. Such migration is most often addressed in terms of fighting illegal immigration.<sup>20</sup> Instead, prefectural and municipal governments are left to address the needs of local marriage migrants and their families, under the rubric of the “Multiculturalism Plan.”<sup>21</sup> Critically, despite the widespread existence of marriage brokers, the industry is not regulated.

In contrast, South Korea has developed specific family policy at the Ministerial level for so-called “multicultural families,” i.e. those that include a foreign spouse.<sup>22</sup> This policy is based on national law, the Support for Multicultural Families Act.<sup>23</sup> In Taiwan, the central government passed a family policy in 2004 that recognized the increase in what it termed “cross-cultural families,” and set out policy goals to “actively assist” such families in “adapting to the local society.”<sup>24</sup> It has a Foreign Spouse Care and Guidance Fund designed to support programs that provide services such as “counseling services, medical subsidies and educational assistance” to the 436,000 immigrant spouses currently residing in Taiwan.<sup>25</sup>

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<sup>19</sup> Statistics are as of 2011. See Statistics Korea, Marriage and Divorce Statistics in 2011, *available at* <http://kostat.go.kr/portal/english/news/1/1/15/index.board?bmode=read&aSeq=271591>; Taiwan Immigration Agency, Statistics of Foreign Spouses in Taiwan, 我國人與外籍人士結婚統計 (on file with author); compiled statistics, Ministry of Health, Welfare and Labor, “Survey of Population Trends”, *supra* note 15.

<sup>20</sup> See e.g. Ministry of Justice, The 4<sup>th</sup> Basic Plan On Immigration Control at 12-15, 24-25, 第4次出入国管理基本計画 (2010).

<sup>21</sup> “A ‘Multiculturalism Plan’ was initiated in the 1990’s as the foreign population began to increase. Local governments, faced with increasing need to respond to the education, health, employment and other needs of the foreign community, began offering such services around this time. The national government, in particular the Ministry of Internal Affairs, reportedly came late to the issue, finally instructing local governments to make their multicultural plans more robust. Masaaki Satake, FILIPINO-JAPANESE INTERNATIONAL MARRIAGES: IMMIGRATION AND MULTICULTURALISM—PROPOSALS FOR POLICIES AND ADMINISTRATIVE MEASURES THAT RESPOND TO THE REALITIES OF JAPANESE-FILIPINO MARRIAGES, MARRIED LIFE, AND MARRIAGE MIGRANTS at 2, フィリピン—日本国際結婚：移住と多文化共生：日比結婚の概要、結婚生活、結婚移民に対する施策、行政への提言. Nagoya Gakuin University (2011).

<sup>22</sup> Republic of Korea, Ministry of Gender Equality and Family, “Family Policy,” (2012) *available at* [http://english.mogef.go.kr/sub02/sub02\\_61\\_04.jsp](http://english.mogef.go.kr/sub02/sub02_61_04.jsp).

<sup>23</sup> This law came into effect in 2008. Support For Multicultural Families Act, Act No. 8937, Mar. 21, 2008.

<sup>24</sup> Executive Yuan of Taiwan, Social Welfare Promotion Committee, Family Policy Art. 5(1), *available at* <http://sowf.moi.gov.tw/english/3.htm> (2004).

<sup>25</sup> Republic of Taiwan, Ministry of Foreign Affairs, Social Welfare, (2011) *available at* <http://www.taiwan.gov.tw/ct.asp?xItem=44984&ctNode=1926&mp=1001> (explaining the Foreign Spouse Care and Guidance Fund).

While neither the Korean nor the Taiwanese models are perfect and have received criticism on various fronts,<sup>26</sup> governments in both destinations have been proactive in attempting to address the influx of foreign residents.<sup>27</sup>

### 1.7 Marriage Brokers

Japan does not regulate marriage brokers, and no data exists on the number of marriages arranged through matchmakers. While the Immigration Bureau asks visa applicants whether they employed a broker,<sup>28</sup> the Ministry of Health, Labor and Welfare, which compiles the above statistics, does not appear to have access to such information. Regardless, the literature on marriage migration routes to Japan from its major source countries highlights brokers' prevalence.<sup>29</sup>

As of the mid-2000's, the Japanese government estimated that between 3,700-3,900 brokers existed, with about 70% being individual operators. However, no statistics exist on the percentage who conduct international marriages.<sup>30</sup> Furthermore, many brokers may work informally and thus never register; a foreign spouse for example may become a broker, connecting people in her home network with men in Japan in return

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<sup>26</sup> See e.g., Hyuk-Rae Kim & Ingyu Oh, FOREIGNERS COMETH! PATHS TO MULTICULTURALISM IN JAPAN, KOREA AND TAIWAN at 21 Asian and Pacific Migration J. 105, 117-128 (Describing each government's ostensibly multicultural programs for foreign migrants, including marriage migrants, as programs of attempted cultural assimilation).

<sup>27</sup> Like Japan, both developed a strong self-image as monoethnic communities after World War II, precipitating the need to respond to this increase in an effort to smooth the entry of these non-traditional families into the society. See Kim and Oh, *supra* note 30, at 113-117. (Between 1945 and 1949 the three governments established a unified national ideology based on the myth that the population of Japan, Korea, and Taiwan was homogenous).

<sup>28</sup> See section 4.2.2.1 certificate of eligibility application materials. (spouse questionnaire asks for broker's information where marriage was arranged).

<sup>29</sup> See e.g. Saihan Juna, Marginalized Chinese Women Who Married Japanese Men, 周縁化される中国人女性の結婚移民, in Asia-Pacific Human Rights Review—2009: International Marriage from the Perspective of Women's Human Rights, Asia-Pacific Human Rights Center, 2009 (Chinese marriage migrants); Masaaki Satake, Marriage Migrants from the Philippines to Japan—Pre-departure guidance, Marrying Up, and Personal Agency, フィリピンから日本への結婚移民—出国ガイダンス・上昇婚・主体性, in Foreign Residents in Japan and Multiculturalism—From the Perspective of Local Communities, 在日外国人と多文化共生—地域コミュニティーの視点から, (Masaaki Satake, ed.) Akashi Press (2011). (Filipino marriage migrants).

<sup>30</sup> Additional research into the ratio between agencies that specialize in international marriage and those that also offer domestic-only partnering services is also needed. The total number of international marriages arranged by international matchmaking agencies is also unknown, either overall or by sending country.



for a fee.<sup>31</sup> As some foreign communities have grown in size, informal brokers have reportedly outpaced commercial business operations.<sup>32</sup>

While some brokers attempt to create successful marriages, the divorce rate for brokered marriages is still reportedly high in at least some cases.<sup>33</sup> Complaints about unscrupulous brokers have centered on misinformation from the broker, including misrepresentations about the husband's living situation, income, background, and opportunities to work outside the home, and about the wife's ability to speak the language, interest in being a housewife, and/or willingness to take care of the groom's elderly parents.<sup>34</sup> In particularly exploitative situations, brokers have deceived women into marriage with someone almost entirely unlike the person described, and upon marriage, are trapped from leaving the home.<sup>35</sup> These patterns also exist in Taiwan and South Korea,<sup>36</sup> and in any of the three destinations, those on a brokered marriage can experiences, a range of outcomes, from a successful marriage to outright human trafficking, as shown below.

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<sup>31</sup> At the same time, individual networks among their communities facilitated such marriages by introducing their relatives and friends to Japanese males. Asian-Pacific Human Rights Information Center, Nobuki Fujimoto, *Marriage Brokerage and Human Rights Issues* at 11, Focus Asia Pacific Newsletter Vol. 62 (Dec. 2010).

<sup>32</sup> This was reported for the Filipino and Thai communities. Interviews with Prof. Masaaki Satake Nagoya Gakuin University, Jan. 31, 2013 and Prof. Yuriko Saito.

<sup>33</sup> Interview with Professor Masaaki Satake. (Brokered marriages among Filipino brides and Japanese husbands in Shikoku region faced high divorce rate).

<sup>34</sup> Brokers are accused of selling stereotypes of foreign brides to Japanese men, holding these potential spouses up as more "traditional" Japanese wives who will follow the husband's wishes and happily take care of his elderly parents. Fujimoto, *supra* note 35, at 11.

<sup>35</sup> See Nobue Suzuki, TRANSGRESSING VICTIMS: READING NARRATIVES OF FILIPINA BRIDES IN JAPAN, 35 CRITICAL ASIAN STUDIES 399, 405. (Describing anecdotes of women locked in the home, serving the "...sexual and social needs of the men.").

<sup>36</sup> See, e.g., Hong-Zen Wang, *Hidden Spaces of Resistance of the Subordinated: Case Studies from Vietnamese Female Migrant Partners in Taiwan*, 41 INT'L MIGRATION REV. CTR. 706, 720 (2007); Hyun-Sil Kim, *Social Integration and Health Policy Issues for International Marriage Migrant Women in South Korea*, 27 Public Health Nursing 561, 563 (2010). (Survey of brides finding verbal, physical and sexual abuse prevalent in 25-33% of those surveyed)

## A Spectrum of Experiences in International Brokered Marriages

<p><b>“Successful” Marriage to foreign spouse. No signs of deception or coercion.</b></p>	<p><b>No signs of deception or coercion, but culture shock, language barrier, discrimination and limitations on personal freedom</b></p>	<p><b>Husband and/or his family mistreats the wife. Verbal and physical abuse. Some incidences of forced labor or sex with the husband</b></p>	<p><b>The broker or husband has withheld information about the husband, his living situation, and/or his expectations for the wife.</b></p>	<p><b>Bride and/or her family did not received money from broker as promised</b></p>	<p><b>Forced marriage OR slave-like conditions, including forced to work or perform sexual service. Husband prevents the wife from leaving.</b></p>	<p><b>Broker or husband sells the woman into labor or sexual servitude</b></p>
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The yellow area represents acts that are warning flags of human trafficking, and at the very least of domestic violence or fraud. While reports from Taiwan, South Korea, and even Mainland China have described unscrupulous brokers selling women into forced marriage as a form of human trafficking,<sup>38</sup> no more than anecdotal reports exists of such activities in Japan. Additional research into the level of exploitation marriage migrants face is needed. At present, identified victims of human trafficking on spouse visas have not been rescued from abusive marriages; they either knew in advance that they were entering a fraudulent marriage, or were deceived into thinking they were marrying, but then sold into prostitution upon arrival.

By comparison, South Korea has enacted laws specifically regulating marriage brokers, with additional regulations placed upon international marriage brokers.<sup>39</sup> Taiwan prohibits commercial marriage brokering for international marriages, allowing only non-profit introduction services.<sup>40</sup> Criminal penalties in both of these

<sup>37</sup> Douglas MacLean, *Commercial Marriage Trafficking: Uncovering a Growing New Form of Transnational Human Trafficking, and Shaping International Law to Respond*, 19 UC Davis J. of Int'l L. & Poly. 67, 76. For a description of slave-like conditions in brokered marriages in Japan, see Nobue Suzuki, *supra* note 39.

<sup>38</sup> See e.g. United Nations Inter-Agency Project on Human Trafficking, *Human Trafficking Sentinel Surveillance: Viet Nam-China Border at 2* (2010) (forced marriage case from Viet Nam to China). Interviews with Dr. Melody Chia-Wen Lu, Research Fellow, Asia Research Institute, National University of Singapore, interviews by phone from UNIAP, Bangkok, Thai. (Jun.-Jul., 2010). (describing forced marriages of Vietnamese brides to Taiwanese husbands.)

<sup>39</sup> Marriage Broker Management Act, Act No. 10301, May 17, 2010, Arts. 3-4 (S.Kor).

<sup>40</sup> Immigration Act, arts. 61,76, [入出國及移民法], *Zhonghua Minguo Xianxing Faigui Huibian*, (Taiwan), available at <http://law.moj.gov.tw/eng/LawClass/LawContent.aspx?pcode=D0080132> (2011). [hereinafter Taiwan Immigration Act]

destinations exist for those who broker without a license.<sup>41</sup> The implications of Japan's lack of marriage broker regulations will be discussed in the following sections on marriage smuggling and human trafficking.

Ultimately, marriage brokers have built an active business that easily allows for either smuggling or trafficking activities, as Japan's neighbors have long since discovered.

### **Conclusion**

Marriage migration is a growing phenomenon throughout the region, and Japan has had the longest experience as a receiving country. Marriage brokering, whether formal or informal, is a key piece of this phenomenon, connecting men who otherwise do not have the wherewithal to find a local spouse or directly travel abroad with a spouse from one of several countries in the region. This trend is not unique to Japan, as both South Korea and Taiwan have in recent years seen a rapid increase in marriage migrants as well, even surpassing Japan on a per capita basis. The regular flow of marriage migrants, and the established logistical machinery that brokers have established provides cover for marriage smugglers and human traffickers to operate. Unfortunately, unlike its neighbors South Korea and Taiwan, Japan has yet to establish either international marriage policy or establish laws regulating the marriage broker industry, leaving it bereft of the policy and legal tools necessary to directly shape and control this migration route. The demand for low-skilled labor, unmet by legal channels, is fulfilled through irregular migration, with marriage migration providing a low risk, high reward method of bringing both willing and unwilling laborers into job sectors where women are needed, including the restaurant, entertainment and sexual services sectors. With the background of marriage migration established, this report now turns to two key forms of criminal activity within marriage migration: human smuggling, covered in section 2, and human trafficking through marriage migration covered in section 3.

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<sup>41</sup> Marriage Broker Management Act, *supra* note 43; Taiwan Immigration Act, *supra* note 44, art. 76. (Taiwan).

## 2. HUMAN SMUGGLING VIA MARRIAGE MIGRATION

*A Japanese national connected with the mafia and a Chinese national acting as a middleman were arrested in January of 2012. The two brokered fraudulent marriages for Chinese women looking to stay in the country. In addition to the suspects, three other Japanese men and three Chinese women were arrested on suspicion as participants in fraudulent marriages. In addition to foreign brokers operating locally in Japan, cooperation between Chinese and Japanese mafia has been uncovered.—National Police Agency<sup>42</sup>*

### Introduction

This section examines the illicit use of spouse visas to smuggle foreign nationals into Japan. It begins with the definition of human smuggling under international law, followed by a ground-level view of marriage smuggling: available data, including demographics on the smuggled migrants, why demand for smuggling exists, the smuggling supply chain, and the role of the various actors in that chain. As over 75% of spouse visa holders are women, the risks of both labor and sexual exploitation are discussed.<sup>43</sup> The section then analyzes Japan's immigration policy and its response to the problem, and then examines the current legal regime designed to combat marriage smuggling. A set of key findings regarding marriage smuggling are made, and recommendations for how the government can improve its response to the problem are offered. Finally, as smugglers may also traffic human beings through this route, this section serves as background for the following section.

Human smuggling carries substantial costs to those smuggled and to the countries that are source, transit, or destinations for illicit migration. The UN Office on Drugs and Crime has highlighted five critical costs of human smuggling<sup>44</sup>:

- 1) Deadly risks and loss of human life due to the dangerous nature of human smuggling.<sup>45</sup>
- 2) Human rights abuses—including discrimination, exploitation and trafficking in persons.
- 3) Threats to state security—low-risk/high-reward empowers organized crime.
- 4) Smuggling generates funds that can fuel corruption in both sending and receiving countries.
- 5) Fighting smuggling takes up law enforcement resources.

Japan is an attractive destination country for human smuggling, as its ongoing demand for low-skilled labor, particularly in the sex trades, creates a customer base for operations that bring workers into the country illegally. At the same time, Japan's wealth makes it an attractive destination for labor migrants from nearby

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<sup>42</sup> National Police Agency, Situation of Arrests of Foreign Crimes Committed by Foreign Nationals in Japan—2012 at 13, 来日外国人犯罪の検挙状況平成 24 年, (Mar. 2013).

<sup>43</sup> However, a few cases of foreign men marrying Japanese women to fraudulently obtain a spouse visa have been reported. *See e.g. Tokyo Police: Vietnamese Man Arrested on Suspicion of Fraudulent Marriage*, 偽装結婚した疑いでベトナム人を逮捕, Asahi Newspaper October 29, 2011. (Japanese language).

<sup>44</sup> *See* UNODC, Transnational Organized Crime in East Asia and the Pacific—A Threat Assessment, 6, (2013).

<sup>45</sup> Note that those traveling on marriage visas are less likely to face such dangers, as their route is ostensibly legal.

emerging economies. The dangers that the UNODC has pointed out are apparent in smuggling in Japan. Exploitation of migrants is reportedly widespread (and reported in some news articles), both Japanese and foreign organized crime<sup>46</sup> groups are involved in the operation,<sup>47</sup> while the profits generated can fund expanded smuggling efforts or other criminal activities in Japan and abroad.

Finally, as shown in the previous section, the growth in marriage migration, especially in brokered marriages, makes smuggling difficult to uncover, and takes up limited budgetary resources that law enforcement could use to address more numerically prevalent crimes.

## 2.1 The Definition of Human Smuggling Under International Law

This report uses the definition of smuggling found in the UN Protocol Against the Smuggling of Migrants by Land, Sea, and Air.<sup>48</sup> It obligates state parties to criminalize the following activities as smuggling:<sup>49</sup>

- 1) **Obtaining illegal entry of another**—Directly or indirectly procuring the illegal entry of a person into a member state.<sup>50</sup>
- 2) **Enabling a person to remain in the country illegally**—Without meeting “the necessary requirements for legally remaining in the State,” either due to fraudulent documents they have previously obtained, or by any other illegal means.<sup>51</sup>

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<sup>46</sup> “Japanese mafia” are often referred to colloquially as the Yakuza. Rather than a single group, multiple groups exist throughout the country. Neither the existence of nor membership in a mafia group is illegal. Procedures exist to designate certain groups “violent organizations” under the law. *See* Act on Prevention of Unjust Acts by Organized Crime Group Members art. 3, 暴力団員による不当な行為の防止等に関する法律, Law 49, Jun.19, 2012 (Procedures for designating violent organizations) However, organized criminal activity outside of these designated groups is on the increase. Interview with Prosecutor’s Office, February 2013. (citing increasing difficulty of designating an individual as a member of such a group. The individual denies it, while their superior claims that the individual left the organization.)

<sup>47</sup> *See e.g.* “Fraudulent Marriage, Underground Banks serve as Foundation for Crime—NPA Establishes Response Office” Asahi Newspaper, 偽装結婚・地下銀行は犯罪基盤、警察庁に対策室, Mar. 10, 2011.

<sup>48</sup> United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, 2241 U.N.T.S. 507. [Hereinafter “Smuggling Protocol”] This Protocol supplements the UN Convention on Transnational Organized Crime. *See United Nations Convention on Transnational Organized Crime*, Dec. 12, 2000, 2225 U.N.T.S. 209.

<sup>49</sup> Note that as the Protocol exists as an optional legal instrument to the UN Convention on Transnational Organized Crime, states are obligated to criminalize such acts that are “transnational in nature and involve an organized criminal group.” Smuggling Protocol, art 4.

<sup>50</sup> Smuggling Protocol, *supra* note 52, Art (3) (“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”)

<sup>51</sup> Smuggling Protocol, *supra* note 52, Art(3)1(c).

3) **Involvement in fraudulent identification documents**—Production, procurement or possession of a fraudulent travel or identity document for the purpose of smuggling a migrant.<sup>52</sup>

Most significant in this definition is that it criminalizes the acts of the organizations that make smuggling possible, *and not the acts of the person smuggled*. This contrasts significantly with the common focus on irregular migrants seen in many countries. This focus on the smugglers is particularly appropriate for island countries like Japan; irregular migration is simply exceedingly difficult without organized networks that can recruit, send, and place smuggled migrants once in the country.

As a whole, All three activities focus on those *procuring* illegal entry rather than on the individual entering the country. While the irregular migrant is the most visible actor in smuggling, the smuggling network behind them poses the real danger to state security, as the UNODC has pointed out.<sup>53</sup> Second, the Protocol targets not only illegal entry, but also obtaining continued illegal residence in a member country. In Japan, smuggling via fraudulent marriage visas can be used to bring a person into the country, or to enable them to stay on an ostensibly valid, long-term visa. Finally, the third provision recognizes the need for ancillary services to accomplish human smuggling, such as legal document preparation, is particularly important in marriage smuggling. As will be shown in section 4, a significant amount of paperwork exists to obtain a spouse visa, and legal professionals are often needed to prepare them. In short, this definition covers the illicit activities and actors that have been uncovered in the marriage migration route in Japan. These will be discussed further below.

*Treatment of smuggled migrants under the Smuggling Protocol*

Critically, the Protocol’s purpose is not only for the prevention, investigation and prosecution of the crimes listed in the definition of smuggling, **but also the protection of the rights of those who have been the object of smuggling activities**.<sup>54</sup> (emphasis added) Migrants “shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in...this Protocol.” In other words, the Protocol criminalizes the acts of the *smuggler* while explicitly prohibiting attaching criminal responsibility for these acts to the person smuggled.<sup>55</sup> Note however, that the Protocol does not prevent a state party from “taking measures against a person whose conduct constitutes an offence under its domestic law.”<sup>56</sup>

### 2.1.1 The difference between human smuggling and human trafficking

Although significant overlap exists between the two crimes, the Smuggling Protocol and its sister protocol on human trafficking rightly separate the two acts.

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<sup>52</sup> Smuggling Protocol, Art. 6(1)(b)(i)-(ii).

<sup>53</sup> See UNODC, *Transnational Organized Crime in East Asia and the Pacific—A Threat Assessment*, 6, (2013). (Smuggling “empowers criminals and undermines state security due to links with organized crime, violence and corruption.”)

<sup>54</sup> Smuggling Protocol, *supra* note 52, art. 4.

<sup>55</sup> *Id.*, art. 5.

<sup>56</sup> *Id.*, art.6(4).

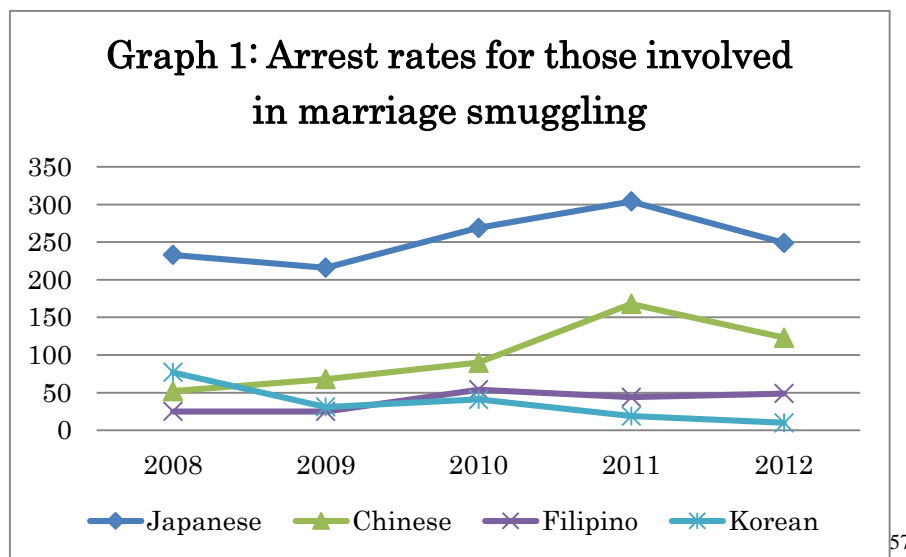
## 2.2 Available information on marriage smuggling

All smuggling is hidden, and marriage smuggling is particularly difficult to uncover for reasons that will be explored below. This report culled both statistical and empirical data from government and print media sources. It includes arrest statistics from police, a search of newspaper articles in the vernacular press over a 4.5 year period, as well as interviews with law enforcement and some non-governmental actors who have studied the issue. The section also includes information on demand for smuggling, what is known of the supply chain, the role of marriage brokers in marriage smuggling, the value of the smuggling enterprise, where proceeds of smuggling go, the role of organized crime, and the dangers that irregular migrants face in being smuggled.

Note however that the picture described below is only what is currently known; it is difficult to know how representative this information is of the full scope of marriage smuggling, including the true number of those smuggled, the full range of work done, and the of actors involved in the smuggling chain.

### 2.2.1 Data

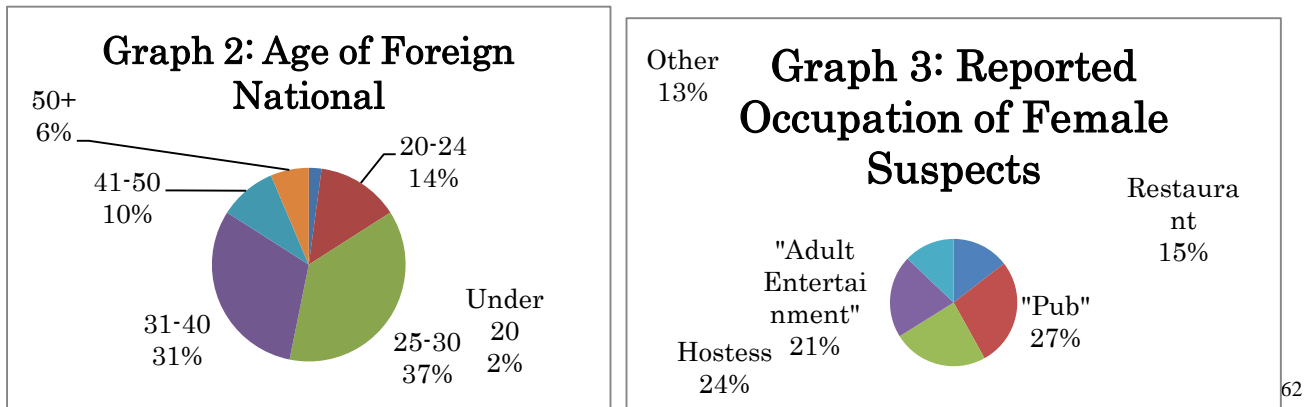
Over the last five years, police arrested approximately 450 individuals for participating in “fraudulent marriage,” whether as spouses, or for arranging or for facilitating such marriages. More than half of the arrestees were Japanese, with the lion’s share of foreign suspects coming from Japan’s source countries for marriage migration, namely Mainland China, the Philippines, and South Korea.



<sup>57</sup> Statistics compiled from “The Situation of Arrests of Foreign Crime,” 来日外国人犯罪の検挙状況, for years 2008-2012. Reports published annually by the National Police Agency. Note that arrest rates for Korean nationals for the year 2012 reflect only the first half of the year. Note these statistics include nationality, but no other demographic information.

Case statistics for marriage smuggling show approximately 2.8 people arrested per case, indicating that the spouses and a third party are often implicated.<sup>58</sup> Although the latter’s role in the crime is not mentioned, newspaper reports indicate these are brokers, employers, or other middlemen.<sup>59</sup>

For more specific data on the actors in these cases, articles related to marriage smuggling in one national newspaper over a 4.5 year period were examined.<sup>60</sup> Although the articles were inconsistent in their level of detail of each case,<sup>61</sup> the approximately 200 unique cases reported provide valuable data on the smugglers and others involved in the smuggling activity.



<sup>58</sup> *Id.*

<sup>59</sup> The police also attach a nationality to each case, with the nationality being that of the “main suspect.” Local police involved in the case determine who the main suspect is, although NPA staff noted that this individual is generally the one responsible for connecting the fake couple. Whether this person is a one-off broker, or someone more regularly involved in marriage smuggling is not included in the statistics, and would require a case-by-case analysis. Interview with Tokyo Police Office, conducted by e-mail, Apr. 5-10, 2013. However, in all but the most recent year, the majority of “main suspects” have been Japanese. Compiled National Police Agency statistics, *supra* note 61.

<sup>60</sup> Asahi Newspapers for dates 1/1/2009 to 6/22/2013. Search term used was “giso kekkon” (偽装結婚) or “fraudulent marriage” in English. All articles were in Japanese. The Asahi Newspaper is one of the three national newspapers with both local and national coverage. Note that most of these stories come from police press conferences or press releases. Examinations of the other two national newspapers, the Yomiuri Newspaper, and the Asahi Newspaper, yielded similar results. However, the slight difference in coverage raised concerns of potentially double-counting cases, leading the author to focus on one newspaper.

<sup>61</sup> Gaps in the reporting included incomplete or lack of information on age, place of employment, the presence of brokers, and the presence of criminal organizations, among others. Cases involving brokers did not always report the specific number of marriages the individual was charged with brokering.

<sup>62</sup> The word “pub” has been directly imported into Japanese language, but is often used to refer to locations where the waitresses not only serve a mostly male clientele, but also sits with customers, converses, drinks, and sings karaoke. Some pub’s feature women of a particular nationality, the most well-known being Filipino pubs. “Adult entertainment” includes “entertainment” (i.e. *fuuzoku*) that is impliedly sexual in nature, as well as establishments that serve various forms of legal and illegal sexual services.



The vast majority of irregular migrants arrested were women, with only a small handful of males smuggled on spouse visas reported.<sup>63</sup> Interestingly, two-thirds of those arrested were between 25-40, indicating that younger women are less often found on this route.<sup>64</sup>

Places of employment included work where female staff were prevalent, including “pubs” and hostess clubs, which are often different names for the same type of establishment, where women sit with male clients, serve drinks, and carry on conversation,<sup>65</sup> to establishments that provide sexual services that fall outside the law’s very narrow definition of prostitution.<sup>66</sup> Women in the former may eventually be pressured to provide sexual services, or be sent to work full-time in the country’s sex industry.<sup>67</sup>

Critically, data is missing on the working conditions in the various establishments. While the dangers to exploitation that smuggled migrants as a whole face are known on a general level, data on the prevalence of this exploitation among those who are arrested has not been collected. Collecting such information is not only important to determining whether treatment of smuggled migrants amounts to the abuse criminalized under the smuggling protocol, but is also a key step in proactively identifying instances of human trafficking.

Meanwhile, the Japanese nationals who served as fake spouses came from a broad spectrum of ages and occupations, although a high number of unemployed were reported. Both prosecutors and NGO experts have noted that fake husbands often low-income, suggesting that economic pressures push many to agree to participate in such fraud.

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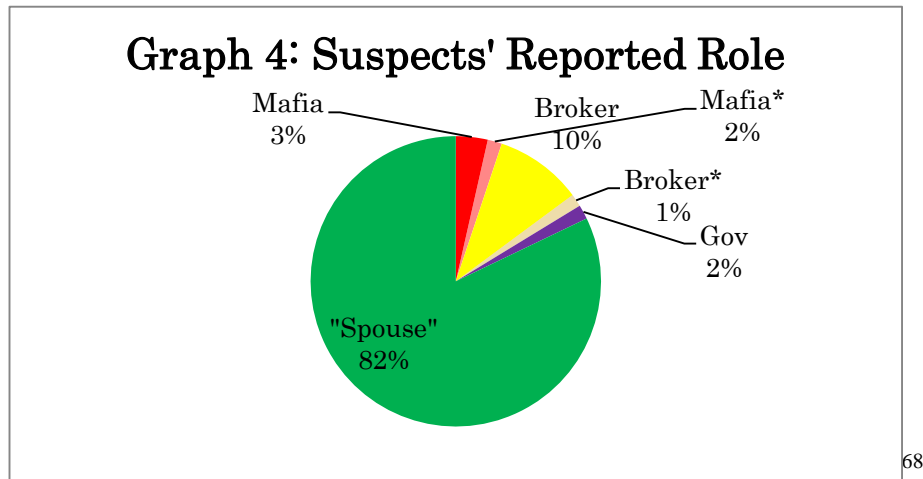
<sup>63</sup> Asahi Newspaper Analysis, *supra* note 64.

<sup>64</sup> Again, it is not clear how well these statistics mirror the true distribution of ages of those smuggled. Additionally, some percentage of the arrests involved individuals already residing in the country who sought a fraudulent marriage in order to stay longer. In such cases, organized crime may not be involved. For example, a Japanese friend or even the individual’s employer may directly marry or find someone to marry the individual.

<sup>65</sup> While not all such establishments are fronts for sex work, some do encourage, pressure, or force their workers to be available for or offer sexual services to the clients.

<sup>66</sup> Current law narrowly defines the act of prostitution as vaginal sexual intercourse. *See* Prostitution Prevention Act, Art. 2, 売春防止法, Amended Jun. 1, 2007, Law #88. Other sex acts are not covered by the law. *See* Hiroshi Nakasatomi, *The Human Rights Harms of the Sexual Pleasure Business—Court Cases Where Businesses Engaged in Providing “Sex-related Acts” Where Found Illegal*, 性風俗営業の人権侵害性—「性交類似行為」をさせる営業等の違法性に関する諸判決, 23.3 Regulation Society Journal 87, 行政社会論集 (2010). (Explaining why related sex acts not covered by anti-prostitution law, but may addressed tangentially in other laws)

<sup>67</sup> Japan’s sex industry represents an estimated 1-3% of GDP as of 2006. *See* Shared Hope International, DEMAND. A COMPARATIVE EXAMINATION OF SEX TOURISM AND TRAFFICKING IN JAMAICA, JAPAN, THE NETHERLANDS, AND THE UNITED STATES at 113. (2007) The establishments offering such services include “soap lands,” as well as euphemistically titled “spa”, “health”, “delivery health” (outcall service), “fashion health”, and massage parlors.



Aside from the spouses, newspaper accounts occasionally reported the involvement of brokers, mafia, and even local government officials. While these other actors appeared in only a minority of cases, their presence provides a window into the larger underground activities of smuggling.<sup>69</sup> In particular, the size of the smuggling operations were quite varied, with cases involving brokers and mafia often reporting multiple acts of smuggling. The largest cases in Japan saw the arrest of a broker alleged involved in “hundreds” of acts of smuggling.<sup>70</sup> In some cases, the broker was also the employer where the migrants worked.<sup>71</sup> These latter represented the smallest number of cases found, highlighting how seldom the final customer in the marriage smuggling business, i.e. the employer, are successfully implicated.

Ultimately, the data underscores the large gap between arrests of the relatively visible fraudulent spouses, and the far more hidden operation of brokers and other actors who drive marriage smuggling. There are multiple reasons why this may be, and it is unclear the degree to which each one plays a role. However, practical factors include the difficulty in amassing sufficient evidence to arrest the actual smuggler, rather than their “product” i.e. those smuggled, while current legal and policy mechanisms are structured to primarily incentivize investigation and arrest of the fraudulent couple, rather than the smugglers and their customers.

<sup>68</sup> Total individuals identified: 565 (20 Mafia, 55 broker, 8 possible broker, 9 government workers, remaining 464 fraudulent spouse or unknown). Asahi Newspaper Analysis, *supra* note 64.

<sup>69</sup> Employers rarely were arrested in connection to false marriage, highlighting the difficulties of connecting smugglers and those smuggled with those who employ them.

<sup>70</sup> Asahi Newspaper, “Former Administrative Scrivener, 56 Arrested on Suspicion of Brokering Over 100 Fraudulent Marriages,” 元行政書士、偽装結婚 100 件超仲介か 兵庫県警、56 歳を逮捕, Dec. 29, 2012. (Japanese language).

<sup>71</sup> See e.g., “Rare case of “Human trafficking” uncovered: Employer arrested on suspicion of fraudulent marriage, Filipino women identified as human trafficking victims,” 「人身取引」 異例の摘発 偽装結婚容疑で経営者ら逮捕 比女性、被害者に認定, Asahi Newspaper, Jan. 13, 2009. (Japanese language).

## 2.2.2 Demand for marriage smuggling

*A Philippine pub owner was arrested for arranging fraudulent marriages for one of his staff. Meanwhile, the owner of an adult entertainment business was accused of placing the worker into a false marriage, and compelling her to engage in sexual work.*<sup>72</sup> –*Philippine Pub Owner Arrested on Suspicion of Fraudulent Marriage*, Asahi Newspaper

As mentioned previously, demand for numerous low-skilled jobs that women primarily fill outstrips the available pool of eligible foreign workers. Spouse visas provide an unlimited right to work and a relatively low risk of detection. The data introduced above shows that the “entertainment” industry is one driver of demand for marriage smuggling. Japanese men who frequent hostess bars and the more sexually oriented adult entertainment services require women, willing or otherwise, to operate. This industry is quite large, amounting to between 1-3% of national GDP.<sup>73</sup> As these forms of work are now excluded from the available work visa categories,<sup>74</sup> workers on visas with unrestricted work provisions, including spouse visas, are in high demand.

While a legal route to these forms of work had existed until 2005 in the form of an entertainment visa,<sup>75</sup> restrictions on the visa to professional entertainers saw a relative spike in marriage applications. However, both government and NGOs sources reported that the reduction in legitimate work visas did not eliminate the demand for foreign hostesses and sex workers.<sup>76</sup> Instead, the spouse visa became an attractive alternative avenue for recruiting staff. In addition to legitimate spouses who were recruited to work, subsequent

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<sup>72</sup> *Philippine Pub Owner Arrested on Suspicion of Fraudulent Marriage*, Asahi Newspaper, Jan. 1, 2013. (Japanese language) As the data above shows, these stories are the exception rather than the rule. Employers rarely were arrested in connection to false marriage, highlighting the difficulties of connecting the activity with employers.

<sup>73</sup> See Shared Hope International, *supra* note 71, at 113.

<sup>74</sup> Japanese Immigration law lacks a general work visa that allows low-skilled workers into the country. None of the work visa categories currently in force enable foreign workers to be employed in such activities. *C.f.* Immigration Control and Refugee Recognition Act, 出入国管理及び難民認定法, Appended Tables I-II, 出入国管理及び難民認定法別表第一。[Hereinafter Immigration Control Act]

<sup>75</sup> The lack of work visas for hostess bar workers is somewhat recent. Until 2005, foreign hostesses, particularly Filipino women, came through an “entertainment” visa, a category that had originally been intended for professional entertainers, such as dancers and singers. However, the interpretation in practice included hostess bars and similar establishments, some of which acted as fronts for sexual services. Criticism from domestic and international sources accused the government of facilitating exploitation of workers via this visa, in some cases to the point of human trafficking. See *e.g.*, Shared Hope International, *supra* note 71, at 113,121. The government responded with far stricter application requirements, and the number of visas issued declined by 80% over the course of a year. See Ministry of Justice, The 4<sup>th</sup> Basic Plan On Immigration Control at 24, 第4次出入国管理基本計画 (2010). (Japanese language).

<sup>76</sup> Interview with Immigration Bureau—Osaka Regional Office, Feb. 1, 2013; Interview with Nobuki Fujimoto, Asian-Pacific Human Rights Information Center, Jan. 29, 2013.

years saw a small spike in marriage visas among Filipina migrants, the nationality that most used the entertainer visa.<sup>77</sup> Although the total number of applicants was far lower than that of entertainment visa holders in previous years, the number of fraudulent marriages uncovered in the adult services industry highlights the continued demand for such workers.<sup>78</sup>

### 2.2.3 The marriage smuggling supply chain

*A case of submitting application papers on behalf of another without a license led to uncovering a marriage smuggling case at a Chinese “beauty shop.”*<sup>79</sup> *The suspects included the shop’s manager, a Chinese woman, seven “instructors” at the shop, including four Chinese women and three Japanese men, as well as seven fraudulent couples, comprised of Chinese women and Japanese men...Further investigations led to the uncovering of marriage smuggling in two other establishments, including another “beauty shop”... In total, 39 people were charged, and all three establishments, along with the unlicensed legal scrivener office were facing closure.*<sup>80</sup> –Chinese “Beauty Shop” at Center of Organized Marriage Smuggling, National Police Agency

*A legal scrivener, arrested on falsifying marriage documents for a Vietnamese man and a Japanese woman eventually became implicated in over 100 cases of fraudulent marriage, including those with Chinese, Korean, and Russian women. The accusations eventually included fraudulent applications for permanent residency and change of residency status applications. The suspect admitted to submitting over 300 fraudulent documents.* – Former Administrative Scrivener, 56 Arrested on Suspicion of Brokering Over 100 Fraudulent Marriages,” *Asahi Newspaper*<sup>81</sup>

These quotes provide a glimpse into the well-established smuggling infrastructure that exists in Japan and connects with networks outside the country. More importantly, it emphasizes that smugglers and related actors enable irregular migration. Japan is an island nation, with not only physical, but language and cultural barriers that make individual irregular migration incredibly difficult. Marriage smuggling requires a network of people willing to connect the migrant with a spouse, a place of employment, and the other necessities of living

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<sup>77</sup> See Japanese Marriage Statistics, *supra* note 12.

<sup>78</sup> Although recruitment is not limited to marriage visas; those willing to risk prosecution can also employ those on visas with limited or no work authorization.

<sup>79</sup> Note that it is unclear from the report whether the “beauty salon” was a legitimate business engaged in facial care and other beauty services, or was engaged in sexual services. Similar to the term massage parlor, the term in Japanese can refer to either non-sexual or sexual services.

<sup>80</sup> National Police Agency, Situation of Arrests of Foreign Crimes Committed by Foreign Nationals in Japan—2012, *supra* note 46, at 13, 来日外国人犯罪の検挙状況平成 24 年, (Mar. 2013). (Japanese language)

<sup>81</sup> Asahi Newspaper, “Former Administrative Scrivener, 56 Arrested on Suspicion of Brokering Over 100 Fraudulent Marriages,” 元行政書士、偽装結婚 100 件超仲介か 兵庫県警、56 歳を逮捕, Dec. 29, 2012. (Japanese language).

in the country.<sup>82</sup> However, the “business” of marriage smuggling is not necessarily dominated by a few large operations; some operate on a small business scale, with one broker working on his or her own with an informal network of contacts.<sup>83</sup> Immigration Bureau officials and prosecutors both reported that information on initial recruitment and connections between smuggling organizations in the sending country and Japan is scarce.

It appears that recruiters in the migrant’s home country employ advertising, or directly approach potential workers through social networks. Foreign nationals already in Japan may also recruit friends and relatives back home. Such people may be filling requests by their employer, or may be independent brokers who supply workers to various establishments.

As mentioned previously, “husbands” in these marriages have been identified as other employees at an establishment intent on hiring the smuggled migrant, a mafia contact, or, perhaps more commonly, those who either have financial difficulties or who are seeking additional income.<sup>84</sup> In one case, a broker in the Ueno area of Tokyo had contacts among local taxi cab drivers. When she needed to find a fraudulent husband, she would inform a taxi driver, and through that network, someone willing would eventually respond.<sup>85</sup>

Other organizations and individuals also facilitate entry and job placement. These include legal practitioners who specialize in immigration applications,<sup>86</sup> brokers who take orders from either employers or women looking for work,<sup>87</sup> as well as middlemen who secure housing, employment, and provide for the daily living needs of migrants who have recently arrived in Japan.

*The owner of a staffing agency, along with five other Japanese men and three Filipino women were arrested on suspicion of submitting fraudulent marriage certificates. The agency owner also operated three “Filipino pubs”*

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<sup>82</sup>“Without an established route, entering on a fraudulent marriage would be considerably difficult. Without a marriage partner, paper work and other procedures, and a place to work, entry would be impossible. However, nobody [investigated or arrested] has spoken about these specifics.” Interview with prosecutors, February 2013.

<sup>83</sup> It is unclear the extent to which employers knowingly “order” delivery of new workers through marriage smuggling, and to which they remain willfully ignorant of where their recruiters obtain workers. The extent of participating in organized smuggling versus opportunistic smuggling acts among other stakeholders, including legal professionals and actual marriage brokering, is also unclear.

<sup>84</sup>“Many of these Japanese ‘spouses’ are at the level of social assistance, and thus face economic difficulties. They will willingly go along for even a modest payment. Those arrested repeatedly might face a prison sentence, so in order to limit the time to about a year, they will contact homeless advocates who will promise to make sure the individual does not sell his name again.” Interview with Prosecutor’s Office, February 2013.

<sup>85</sup> Interview with Prosecutor’s Office, Nov 2012.

<sup>86</sup> On the Japanese side, there is a specialist class of legal practitioner called a “administrative scrivener” who is empowered to submit a variety of legal paperwork, including marriage, divorce, and immigration documents.

<sup>87</sup>Asahi Newspaper, “*Kanagawa Prefecture: Skillful fraudulent marriage’ Marriages registered in both Japan and China lead to immigration on spouse visas: Eight Suspects Arrested*” 巧妙、偽装結婚 日中両方で婚姻届-->配偶者ビザで入国 計8 容疑者逮捕 神奈川県, Jun. 29, 2012. (Japanese language)

in Fukuoka's entertainment district, and pushed the three women into fraudulent marriages to enable them to stay in Japan long-term.<sup>88</sup> –*Filipino Pub Manager and Others Arrested on Suspicion of Fraudulent Marriage, Asahi Newspaper*

#### 2.2.4 Marriage brokers and smuggling

No research exists on the extent to which marriage brokers engage in marriage smuggling. Newspaper reports rarely mention professional marriage brokers, although this may be due to the reporter using the word “broker” without explaining whether the individual was also engaged in legitimate matchmaking or simply a human smuggler. Anecdotally, reports of foreign spouses who arrived, divorced their husband and quickly disappeared do exist, while brokers who have offered entirely fraudulent marriages have also been reported.<sup>89</sup>

A major issue obscuring a clearer picture is the lack of regulations on the marriage broker industry make tracking their activities difficult. Unlike in South Korea and Taiwan, where international marriage brokers have to report their activities, and the regulations give law enforcement or administrative officers a specific legal basis for investigations into their activities,<sup>90</sup> Japanese investigators have no such legal tools. Even economic evaluations of the industry are lacking, mean there is no clear picture of its size, the scope of operations in the major sending countries, nor the general practices of the industry overall.

##### *How brokers are regulated in neighboring countries*

Japan's neighbors have long since implemented regulations on international marriage brokers. South Korea has established a fairly comprehensive set of regulations related to international marriage brokers that delineate the nature of the contract, duties of disclosure and honesty towards the parties, and both administrative and criminal penalties for infractions.<sup>91</sup> Taiwan has banned commercial international marriage brokers altogether, permitting only non-profit organizations to engage in brokering.<sup>92</sup> Such organizations must provide particularly detailed information regarding all aspects of their operations.<sup>93</sup>

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<sup>88</sup> Asahi Newspaper, *Filipino Pub Manager and Others Arrested on Suspicion of Fraudulent Marriage, Asahi Newspaper*, フィリピンパブ経営者らを逮捕 偽装結婚の疑い, Jan. 20, 2013. (Japanese language)

<sup>89</sup> Interview with Immigration Bureau, February, 2013.

<sup>90</sup> C.f. Marriage Broker Management Act, *supra* note 43 (Korean marriage broker regulations); Taiwan Immigration Act arts. 58-61,76.

<sup>91</sup> See Marriage Broker Management Act, *supra* note 43; Decree on the Marriage Broker Management Act, Presidential Decree No. 23488, Jan. 6, 2012 (S.Kor); Enforcement Decree on the Marriage Broker Management Act, Presidential Decree No. 23488, Jan. 6, 2012, art. 3 (S.Kor).

<sup>92</sup> Taiwan Immigration Act, *supra* note 44, art. 58.

<sup>93</sup> See Taiwan Immigration Agency, “Cross-border Marriage License Application for Foundations/Non-profit Corporations,” (Taiwan), available at <http://www.immigration.gov.tw/np.asp?ctNode=29741&mp=1>.

### 2.2.5 The monetary value of human smuggling

Reported fees for smuggling via spouse visas vary widely. Those smuggled from outside the country have paid between US \$12,000-\$35,000, while those already in the country have paid between \$15,000-\$30,000 to obtain a spouse visa. Payments to the fake “husbands” ranges between \$3,000-\$15,000, with additional payments upon renewal or change of visa.<sup>94</sup> Interviews with law enforcement suggests that these ranges are legitimate, although it is not clear what specific factors raise or lower the cost in each case.

While estimates vary widely on the number of actual marriage smuggling cases that exist, 1,000 per year, or approximately 5% of international marriages registered annually, would amount to \$25,000,000 per year. This is a very rough estimate, and does not capture the full value extracted from irregular migrant workers, who work for less than their legal counterparts.<sup>95</sup>

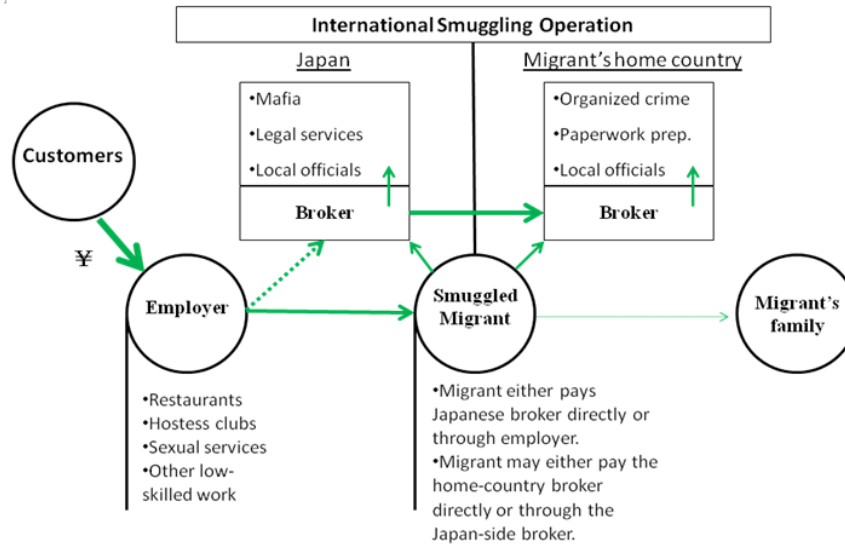
However, those smuggled are the ones who ultimately bear the burden of these fees. In the best cases, the individuals make a monthly payment, either to the employer or the broker, as well as to the fake husband. In the worst cases, the amount of money is either inflated, or additional “fees” are attached for room and board, with “penalties” further assessed for mistakes or other perceived errors on the part of the laborer. These latter cases are often clear cases of debt bondage, a form of human trafficking. Even in the best cases however, the amount paid will most often be lower than a legal migrant would be paid. The debt the migrant incurred in migration makes their actual salary even lower. Irregular migrants already endure low wages, and the debt burden involved in obtaining work in Japan is further exploitative.

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<sup>94</sup> Costs drawn from Asahi Newspaper Analysis, *supra* note 64. This range does not reflect what the most common fee levels are, and instead reflects the range of exploitative debt placed upon the migrant. Additionally, the range may reflect what an individual is willing to pay or how much the contact(s) she has may charge. Given the illicit nature of the activity, comparison shopping is likely difficult.

<sup>95</sup> “*Filipinos Entering on Entertainer Visas Drop Dramatically, Transition to Underground Entrance Advances Via Fraudulent Marriages*”, フィリピン人入国興行ビザ激減、偽装結婚進む潜在化, Kobe Newspaper, Apr. 16, 2012.

## 2.2.6 The flow of money in marriage smuggling



As with demand, funds for smuggling activities come from those who patronize businesses where domestic or legal migrant labor is insufficient. It is unclear how often employers pay brokers in advance to find irregular labor, and how often the employer merely forwards the worker's payment on to the broker. Brokers responsible for smuggling people directly into the country likely pay their counterparts in the sending or transit countries, and include those costs in the fees charged to those smuggled. Supporting actors, including labor brokers, mafia, and legal professionals, also take a part of the proceeds. Ultimately, some of this money exits the country, and may well fund criminal organizations operating internationally. The underground nature of this income stream makes it difficult to track, but it would certainly be available for criminal organizations to use to expand smuggling in Japan and other countries, "improve" smuggling routes by bribing officials in sending, receiving, and transit countries, and/or be used for other illicit activities, including smuggling other goods, such as drugs, weapons, exotic animals, timber or whatever else happens to be in demand.

## 2.2.7 Marriage smuggling and organized crime

International law approaches human smuggling and human trafficking from an organized crime perspective. However, the definition of organized crime is broad that it goes far beyond the traditional image of organized criminal groups, such as the Japanese *yakuza*, to include even small groups of three people operating in an organized fashion.<sup>96</sup> One critical unanswered question in marriage smuggling, as well as other forms of smuggling, is the degree to which the activity is performed by organized groups specialized in the activity, and

<sup>96</sup> UN Convention on Transnational Organized Crime, *supra* note 52, art. 2(a). ("Organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit").



the degree to which more general (and perhaps more “traditional”) organized criminal groups engage in smuggling as simply one of several illicit business activities.

Focusing on the Japanese mafia, newspaper analysis included twenty cases that directly mentioned Japanese mafia, while another nine cases suggested their involvement. National Police Agency (NPA) reports often included cases that involved mafia.<sup>97</sup> In fact, of the seven representative cases of marriage smuggling listed in the NPA’s 2012 statistics, four involved criminal organizations.<sup>98</sup> However, the number of cases reported is too small to be a representative sample of their involvement, and it is unclear the extent they directly broker, and the extent to which they serve in other roles in the supply chain. While some reports suggest domestic mafia groups cooperate with criminal organizations abroad,<sup>99</sup> it is unclear the extent to which this is a common practice,<sup>100</sup> or indeed how often Japanese mafia operate abroad.<sup>101</sup> Other important questions to investigate are the extent to which mafia are involved in small scale smuggling versus large scale smuggling, whether acting as middlemen, private security, or simply requiring brokers to pay them protection money. That said, mafia have reported recruiting fake husbands.<sup>102</sup> What can be said is that the Japanese mafia are active in marriage smuggling to at least some degree, although they are unlikely to be involved in every case.<sup>103</sup>

*Brokering businesses often operate like front businesses. There is no clarity on the flow of information in the business, and while an individual broker will have to admit their actions since they are generally the ones who submitted the marriage forms, there is no information forthcoming about the actions of their superiors or how they made connections [with others in the network] –Osaka Prosecutors.*

### **2.2.8 Dangers for irregular migrants**

*According to police, the owner of two “Philippine Pubs” employed over ten Filipino women. The women’s contracts stipulated a monthly salary approximately 1/3<sup>rd</sup> of prevailing wages, out of which came*

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<sup>97</sup> National Police Agency, Situation of Arrests of Foreign Crimes Committed by Foreign Nationals in Japan—2012, *supra* note 46, at 13.

<sup>98</sup> *Id.* at 13-14, 24.

<sup>99</sup> National Police Agency, *supra* note 44.

<sup>100</sup> Existing research on Japan’s sex industry, which includes many establishments where those on fraudulent spouse visas work, has revealed the mafia’s deep involvement in the smuggling supply chain. *See* Shared Hope International, *supra* note 71, at 129-135.

<sup>101</sup> Interview with Embassy of Japan in Thailand, Bangkok, Thailand, May 2013. (Consular officer stating he had heard that Japanese mafia reportedly find it hard to operate directly in Thailand).

<sup>102</sup> *See e.g.* “Fraudulent Marriage, Underground Banks serve as Foundation for Crime—NPA Establishes Response Office,” 偽装結婚・地下銀行は犯罪基盤、警察庁に対策室, Asahi Newspaper Mar. 10, 2011. (Japanese language)

<sup>103</sup> Beyond the mafia groups that are officially designated organized crime organizations, there may be other undesignated loose organized crime groups active in smuggling. The lack of a blanket ban on organized crime groups hampers the police’s ability to effectively uncover non-designated organizations.

monthly payments amounting to about \$500 per month<sup>104</sup> for 5 years. The women were forced to live two per unit in corner rooms in the same building as the pub. Their passports taken, their lives were strictly controlled, with rules including showers of no longer than 15 minutes for both occupants, or fines of \$10 if they gained another kilogram of weight.

Forced to shoulder total debts of about \$30,000, the women's work and lives were tightly constrained. They were able to send about \$200-\$500 per month home. Police stated that these conditions not only led to exploitation of the women's earnings, but also that they were under the psychological control of their exploiters. These conditions led to them being designated as victims. Rather than being charged as accomplices to fraudulent marriages as is normally the case, the women were given protection as trafficking victims.

-- Asahi Newspaper Jan. 13, 2009<sup>105</sup>

A common misperception in human smuggling is that an individual smuggled may have willingly decided to be smuggled, and that decision can impact whether or not she is a victim should smugglers, employers, or others exploit or abuse her. **The Smuggling Protocol does not question the will of the person smuggled.** (emphasis added) Although a somewhat dehumanizing statement, the person smuggled is the "product" of the smuggling operation. Without the person smuggled, the operation would not exist.

That said, those smuggled are human beings, and the illegal nature of their entry or residency in a country does not invalidate the human rights they are entitled to under international and domestic law. Like others migrating irregularly, migrants who are smuggled on spouse visas are highly dependent upon the smuggler and others for most aspects of the migration, including locating work and housing at the destination. From there, their presence in the country is wholly dependent upon the employer, with their illegal status ensuring that the employer can report the individual to the authorities at any time. As the current immigration system strongly incentivizes deportation, the individual is likely to be expelled from the country. As the newspaper statistics discussed previously bear out the employer and the broker face little risk of prosecution.<sup>106</sup> Employers' risk of prosecution is particularly low for fraudulent marriages; although they are legally obligated to confirm the foreign national's work eligibility, spouse visas are facially valid and have no work restrictions.<sup>107</sup> The employer can thus plausibly claim in all but the most blatantly obvious cases that he had no reason to suspect that the individual was in a fraudulent marriage.<sup>108</sup>

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<sup>104</sup> Close to half of the women's monthly salary.

<sup>105</sup> "Rare case of "Human trafficking" uncovered: Employer arrested on suspicion of fraudulent marriage, Filipino women identified as human trafficking victims," 「人身取引」異例の摘発 偽装結婚容疑で経営者ら逮捕 比女性、被害者に認定, Asahi Newspaper, Jan. 13, 2009. (Japanese language).

<sup>106</sup> See Asahi Newspaper Analysis, *supra* note 64.

<sup>107</sup> See Immigration Control Act, *supra* note 78, Appended Tables I-II.

<sup>108</sup> This becomes harder to claim when the foreign national lives alone in housing provided by the employer. Still, immigration officials have reported that smugglers have become more adept at avoiding detection, including ensuring that some of the foreign

The balance of power, and the low risk of smugglers facing prosecution leaves the migrant worker open to exploitation and abuse. These situations can easily amount to human trafficking.<sup>109</sup> Even where their treatment does not rise to the level of human trafficking, they can face a wide variety of otherwise illegal acts. Deception and fraud underpayment, non-payment of wages, excessive hours, harsh working conditions, steep fines and penalties for “mistakes” made at work, exorbitant fees for living expenses and meals can and do occur. With women making up the majority of those smuggled on spouse visas, sexual harassment and assault, as well as pressure to perform sex work are also among the many abuses that such workers may face. Threats of retribution for those who attempt to leave the job before the “debt” is repaid, restrictions on freedom of movement<sup>110</sup> and employers taking migrants passports, are also commonly reported.

Compounding their vulnerability, the language and cultural barrier in Japan make it difficult for many in such situations to seek help. Ignorance about where to go, fears about approaching law enforcement, threats against them or their family in their home country, and misconceptions that they are themselves responsible for their own situation are major reasons why many remain in such situations.

### **2.3 Policy and Law on Marriage Smuggling**

This sub-section introduces and examines the policy and legal machinery that drives Japan’s efforts to combat human smuggling. It begins with an examination of policy laid out by the Immigration Bureau and the National Police Agency (NPA). An examination of relevant international and Japanese law follow, with a separate sub-section devoted to implementation of the law. The sub-section closes by discussing the challenges that law enforcement face in uncovering marriage smuggling inside the country. For an in-depth analysis of the legal process of obtaining a spouse visa and its vulnerabilities to criminal exploitation, see Section 4.

#### **2.3.1 Government policy**

Immigration law and policy is primarily driven by the Ministry of Justice, which includes the Immigration Bureau. The 4<sup>th</sup> Basic Plan on Immigration Control,<sup>111</sup> the main policy document on immigration, focuses on fighting irregular migration, with “fraudulent residency” generally and fraudulent marriage in particular as categories of special concern. Proactive investigations and arrests, more vigorous revocation of fraudulent visas, increasing cooperation with police on investigations, and rapid deportation procedures are its

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“spouse’s” effects are at the address registered on her residency card. Interview with Immigration Bureau—Tokyo, November, 2012. As it is not uncommon for Japanese workers to be registered to live in one place but actually live in another due to the demands of work, those living separately from their spouse could still plausibly claim they are in a legitimate marriage.

<sup>109</sup> UNODC, *supra* note 191, at 8.

<sup>110</sup> This includes being unable to leave the worksite or housing provided, confiscating cell phones, and preventing interaction with anyone outside of the workplace.

<sup>111</sup> See *e.g.* Ministry of Justice, The 4<sup>th</sup> Basic Plan On Immigration Control at 12-15, 24-25, 第4次出入国管理基本計画 (2010).

main strategic points.<sup>112</sup>

Meanwhile, NPA policy considers fraudulent marriages to be part of what it terms “criminal infrastructure,” which it defines in part as “those activities that assist or make criminal activity easier to accomplish.”<sup>113</sup> For example, activities that facilitate importation or employment of illegal immigrants as constituent components of “criminal infrastructure.”<sup>114</sup> Strangely, the document and NPA public statements generally have charged that activities like fraudulent visas are a serious threat to public safety,<sup>115</sup> despite NPA acknowledgements within the plan that there is no direct connection between such activities and public safety.<sup>116</sup> The agency has drawn more convincing connections between fake marriages and organized crime,<sup>117</sup> with countermeasures focusing on information sharing and cooperation between law enforcement and immigration authorities.<sup>118</sup>

Both NPA and Immigration Bureau policy prioritize arrest and deportation of irregular migrants, rather than identification and prosecution of those who drive demand for and/or are active in smuggling migrants. This reflects the broader scrutiny and fear of foreign crime, despite its miniscule presence as a part of all crime cases, and the lack of significant differences in crime rates between citizens and foreign nationals.<sup>119</sup> These policy preferences create powerful incentives for the nation's law enforcement to focus on addressing the most obvious aspects of smuggling, i.e. those smuggled, rather than the actors behind them, let alone the root causes of smuggling.

### 2.3.2 Smuggling and the law

This sub-section begins with a recap of the relevant international law on smuggling, as well as an

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<sup>112</sup> *Id.* at 4-5.

<sup>113</sup> National Police Agency, Situation of Arrests of Foreign Crimes Committed by Foreign Nationals in Japan—2012, *supra* note 46 at 11.

<sup>114</sup> National Police Agency, Plan to Combat Criminal *Infrastructure* at 1, 犯罪インフラ対策プラン, Mar. 10, 2011. (Japanese language)

<sup>115</sup> See e.g. “*Fraudulent Marriage, Underground Banks serve as Foundation for Crime—NPA Establishes Response Office*” Asahi Newspaper, Mar. 10, 2011.

<sup>116</sup> 4<sup>th</sup> Basic Plan On Immigration Control, *supra* note 24, at 2.

<sup>117</sup> National Police Agency, Outline of Countering Organized Crime at 12, 組織犯罪対策要綱 (Jan. 05, 2012).

<sup>118</sup> National Police Agency, Plan on Combating Criminal *Infrastructure* at 4, 犯罪インフラ対策プラン (2011).

<sup>119</sup> In 2011, 5,889 foreign nationals, or 0.287% of the 2,047,349 registered foreign nationals were arrested 検挙 for penal code violations. By contrast, 299,742 Japanese nationals, or 0.254% of the approximately 118,000,000 nationals were arrested for penal code violations. Both statistics continue a general decline in crime rates that started in 2002 and continued through 2011, for which the latest data are available. See National Police Agency, 2011 State of Crime at 1, 平成 23 年の犯罪女性 (Jun. 2012). See also Immigration Bureau, Statistics on Foreign Residency by Region and Nationality at the end of 2012, 平成 24 年末における国籍・地域別在留外国人数.

Explanation regarding the treatment of smuggled migrants under the law. An examination of Japanese domestic law, particularly immigration and penal law, follow.

#### *International law*

Japan is a signatory to the Smuggling Protocol.<sup>120</sup> As mentioned earlier, the Protocol requires states to criminalize individuals who, acting as part of a criminal organization<sup>121</sup>: 1) obtain the entry of another, 2) obtain the continued illegal presence of another in a state party, or 3) who provide fraudulent documents to enable illegal entry and/or residence.<sup>122</sup> Again, the protocol's purpose is not only for the prevention, investigation and prosecution of the crimes listed in the definition of smuggling, ***but also the protection of the rights of those who have been the object of smuggling activities.***<sup>123</sup> (emphasis added) As stated earlier, the Protocol requires states to implement aggravated penalties for smuggling when such acts: 1) endanger or are likely to endanger the lives or safety of the migrants smuggled, or 2) entail inhuman or degrading treatment, including for exploitation.<sup>124</sup> Although protections for those smuggled is minimal in that the Protocol focuses only on prosecuting the perpetrators rather than preventing such abuse or protecting those harmed, the inclusion of these penalties points to a basic respect for the human rights of those smuggled, regardless of whether they have broken domestic law.

As will be shown below, Japan has criminalized the acts of smuggling listed above, but has not established aggravating circumstances for mistreatment of migrants as required. Note that as Japan has not ratified the underlying Convention on Transnational Organized Crime, it is unable to ratify any of its protocols at this point, meaning that Japan is not currently bound to implement the obligations within the Smuggling Protocol.<sup>125</sup>

#### *Japanese Domestic Law*

Relevant law on smuggling is divided between immigration law and the penal code. For illegal entry and residency generally, immigration law is largely directed against the immigrants themselves, and was recently amended to include severe penalties for even legal immigrants who fail to follow visa renewal and

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<sup>120</sup> See United Nations Treaty Collection, Chapter XXVIII: Penal Matters, 12, 12.a., *available at* <http://treaties.un.org/Pages/Treaties.aspx?id=18&subid=A&lang=en> (status of ratification for Smuggling Protocol).

<sup>121</sup> See Smuggling Protocol, *supra* note 52, art. 4.

<sup>122</sup> United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, *supra* note 52, arts. 3, 6.

<sup>123</sup> *Id.*, art. 4

<sup>124</sup> See *id.*, arts. 3(a)-(b).

<sup>125</sup> See UNCTOC, *supra* note 52, arts. 36(3), art. 37(2). (States must ratify or accede to Convention in order to be a Party. This is required to be a party to any of the Convention's Protocols)

other administrative procedures.<sup>126</sup> A brief overview of relevant provisions are included below, followed by an examination of how the laws are implemented. For an analysis of the legal process of obtaining a spouse visa, see Section 4.

## **Immigration law**

### **1. Penalties for illegal entry**

Among the multiple provisions criminalizing illegal immigration, entering on a fraudulent visa<sup>127</sup> carries a penalty of up to 3 years' jail time and/or up to a 3,000,000 yen fine.<sup>128</sup>

### **2. Penalties for direct smuggling**

Those who facilitate the illegal entry of another for the purpose of profit face up to 3 years prison and/or up to a 3,000,000 yen fine.<sup>129</sup> The act criminalized here is different from that criminalized Smuggling Protocol. Under the Protocol, the act is tied to procuring the illegal entry of another, while under domestic law, the focus is on facilitating another's criminal act of entering the country illegally.<sup>130</sup> Japanese law thus places the emphasis on the illegal migrant as the chief actor in the smuggling operation, rather than on the individuals who recruited them, requested, and facilitated their entry.<sup>131</sup>

Provisions focusing on the smugglers themselves exist only in the context of criminalizing smuggling "stowaways," defined as a group of people meeting at a specified place, and implies entry by boat.<sup>132</sup>

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<sup>126</sup> Failure to timely apply for visa renewal, or apply for a replacement card when lost carries up to a one year prison sentence and/or a \$2,000 fine. Immigration Control Act, *supra* note 78, art. 71-2(2). Failure to timely register one's place of residence or a change of residence carries up to a \$2,000 fine. *Id.* arts. 71-3(1)-(2).

<sup>127</sup> Immigration Control Act, *supra* note 78, Art.22-4 (4).

<sup>128</sup> Immigration Control Act, *supra* note 78, Art. 70(1).

<sup>129</sup> Immigration Control Act, *supra* note 78, Art. 74-6.

<sup>130</sup> C.f Shutsu Nyukoku Kanri Research Group, Immigration Control and Refugee Recognition Act Compendium at 164, 出入管理六, 法 Japan Kajo (Pub.) (2013 ed.). (Japanese language) Note that according to this explanation, the law was established to capture those who facilitated group smuggling, or stowaways. The succeeding paragraph states that the financial penalty was raised in an effort to combat the rise in fake passports, or illegal means of gaining such passports. It does not specifically address fraudulent means of obtaining visas. While the law is broad enough to allow interpretations that include brokers who facilitate fraudulent marriages, the law currently does not appear to be used in that fashion.

<sup>131</sup> One legal analysis states this section targets actors who make it easier for others intent on entering the country illegally. *Id.*, at 164.

<sup>132</sup> See Immigration Control Act, *supra* note 78, Arts. 74-74-5. For definition of "group stowaways", see Immigration Control and Refugee Recognition Act Compendium, *supra* note 134, at 161. (art. 74, explanation 3(iii)). The few court cases publicly available that examine these articles all involve groups of foreign nationals, rather than individuals, as is usually seen in smuggling through marriage

The strongest anti-smuggling provisions target foreign smugglers. A foreign national residing in Japan can be deported for: 1) preparing, using, offering or possessing any false document, 2) with the intent of helping or inciting another to help a foreign national obtain a certificate, 3) that would enable the national to enter the country on a legal basis.<sup>133</sup> Foreign nationals who procure and/or hire foreign nationals to work illegally can also be deported.<sup>134</sup>

### 3. Penalties for aiding smuggling

Those who facilitate illegal entry by using one or more wrongful means listed in the law to cause a government-empowered agency to produce specific travel-related documents face criminal sanctions.<sup>135</sup> The list of means does not however include causing a relevant agency to issue visas, let alone spouse visas.<sup>136</sup>

### 4. Penalties for employing illegal migrants

Those who place a foreign national under their control with the intent of making them work illegally face a 3 year prison sentence and/or a 3,000,000 yen fine.<sup>137</sup> Middlemen who connect employers and foreign nationals face identical penalties.<sup>138</sup> Additionally, neither employers nor middlemen can *unreasonably* claim ignorance of a foreign national's work eligibility status,

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migration. *See e.g.* Tokyo Kotosaibansho [Tokyo High Ct.], 平成 21 年 (う) 第 1 4 9 2 号, Dec. 12, 2009, Hei 21 (u) no. 1492, 60 Hanketsu Jiho 239. Furthermore, cases involving either Japanese or foreign nationals who have engaged in marriage smuggling have not used this provision. While this does not preclude their existence, the extensive newspaper reports of convicted marriage smugglers and fraudulent marriage partners never mention this law.

<sup>133</sup> Immigration Control Act, *supra* note 78, Art. 24 (iii).

<sup>134</sup> Immigration Control Act, *supra* note 78, Art. 24(iii)-4.

<sup>135</sup> Immigration Control Act, *supra* note 78, Art. 74-6-2.

<sup>136</sup> *Id.* (Materials listed include a passport, crew members pocket-ledger, or a re-entry permit.)

<sup>137</sup> Immigration Control Act, *supra* note 78, Art. 73-2(ii). Examples of “placing another under one’s control” would include cases where, a foreign national’s limited Japanese activity gives them a very low level of independence, living in housing provided by the employer and are in fact forced to reside there, and where the employer or broker otherwise creates situations that make it psychologically difficult for the foreign national to leave her living and working situation. Immigration Control and Refugee Recognition Act Compendium, *supra* note 134, at 157.

<sup>138</sup> Immigration Control Act, *supra* note 78, 73-2(iii). A subsequent court decision highlighted the importance of investigating and prosecuting both employers *and* middlemen in reducing illegal employment. Immigration Control and Refugee Recognition Act Compendium, *supra* note 134, at 157. For a court case dealing with this issue, and of human trafficking, *See* Tokyo High Court, 1993-11-11 5(u) #751.

(emphasis added).<sup>139</sup> An employer is thus obligated to check a foreign worker's residency card, which includes the individual's employment eligibility. *Note however that marriage migrants on spouse visas have no employment limitation stipulated in the immigration law.* Therefore, those smuggled into Japan on marriage visas have a facially valid license to work.

## 5. Visa revocation for spouse visas

For all visas, those found to have submitted fraudulent information face revocation procedures. Additional revocation provisions exist for spouse visas. Most critically, the Ministry of Justice may initiate visa revocation proceedings against spouse visa holders who "fail to carry out activities as a spouse of a Japanese national for consecutive six months." Those who can present "reasonable grounds" for why they have failed to carry out such activities are excepted.<sup>140</sup>

## 6. Powers of investigation

Immigration agents are empowered to investigate violations of immigration law only. However, they have wide latitude to investigate or even call in for an interview any foreign resident whom they have reason to suspect submitted false information.<sup>141</sup>

## Criminal law

Most reported marriage smuggling cases are charged under the Penal Code rather than immigration law. However, no specific smuggling provision exists in criminal law; instead prosecutors rely on a more general fraudulent information provision, which criminalizes knowingly making a false statement (including in written form) that induces a public official to make a false entry into a notarized document.<sup>142</sup> The law has been applied to most actors in marriage smuggling, including the fraudulent spouses, brokers, legal practitioners involved, and all others who directly participated in the fraud. Penalties include up to 5 years imprisonment, and up to a US \$50,000 fine.

In using this law, prosecutors look to the marriage registration document as the act of the fraud. Nullifying the marriage creates a domino effect, invalidating the visa.<sup>143</sup> For the foreign spouse and any foreign

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<sup>139</sup> Immigration Control Act, *supra* note 78, 73-2 (2)

<sup>140</sup> The courts have struggled to define what constitutes "marriage activity." *See* Saiko Saibansho [Supreme Court], *infra* note 155.

<sup>141</sup> Immigration Control Act, *supra* note 78, art. 19-19. (In order to continue to maintain information on medium-to-long term residents, immigration officers have powers to initiative investigation based on registration information submitted by these residents).

<sup>142</sup> Keiho [Penal Code] art. 157. (Japan) proper citation needed. Prosecutors in Osaka reported that about 80% of cases tried under this law were for fraudulent marriage. Interview with Prosecutor's Office, February 2013.

<sup>143</sup> Note it does not appear that the suspects face a second charge of false entry of information for submitting the fraudulent marriage certificate in order to secure a marriage visa.



broker, this usually leads to deportation proceedings.<sup>144</sup>

### 2.3.3 Implementation of the law

No cases in news reports, or in the limited court cases available, included use of immigration law in prosecuting acts of smuggling covered under the Smuggling Protocol. Criminal law was used in all cases to prosecute smugglers and those smuggled.

As the statistics introduced earlier bear out, most cases reported involve the fraudulent couple. The brokers appear much more difficult to charge, and implicating employers even more challenging. Immigration officials have reported that brokers are arrested only after investigators have compiled enough information across a wide number of cases to implicate a common broker.<sup>145</sup>

Complicating matters, judges hand out suspended sentences the vast majority of the time, regardless of whether the accused were simply fraudulent marriage participants, or were brokers or even members of the mafia. Of the over 200 cases found in the newspaper survey, only fifteen were reported to result in convictions,<sup>146</sup> with all but one carrying a suspended prison sentence.<sup>147</sup> More concretely, prosecutors in Osaka, a large urban region that reportedly accounts for a significant number of prosecutions annually, stated that about 35 cases led to convictions between 2011-2012, out of an estimated 200 cases annually, or about 17%.<sup>148</sup> Of these, just 4 resulted in prison terms, or 2% of all cases investigated. The rest were suspended sentences, including for both first time and repeat offenders.

In short, the vast majority of arrests and prosecutions are against those smuggled and those who agreed to be a fraudulent spouse. Those who have profited most from smuggling are either not found or insufficient evidence exists to arrest and convict them in most cases.

### 2.3.4 Challenges in uncovering marriage smuggling

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<sup>144</sup> International Labor Office, HUMAN TRAFFICKING FOR SEXUAL EXPLOITATION IN JAPAN at 37 (2005).

<sup>145</sup> Interview with Prosecutor's Office, February 2013.

<sup>146</sup> Although prosecutors note that there is a lack of follow-up by reporters on cases; most reports end at the announcement of the arrest, with deeper reporting occurring only when the story is particularly noteworthy, such as when those involved include a politician. Interview with Prosecutor's Office, December 2013. Prosecutors failing to publicize the conviction could also lead to a significant underreporting of case outcomes.

<sup>147</sup> In one case, a judge gave a suspended sentence to a member of an organized crime group. The judge found that the 35 year-old suspect's mother promising to watch after him was sufficient justification to suspend the sentence. *'Mother Will Supervise' Mafia Member in Exchange for Suspended Sentence—Accused Charged With Organizing Fraudulent Marriage(s)*, 「母親が監督」組員に刑猶予 偽装結婚計画の被告」, Asahi Newspaper, Feb. 10, 2011.

<sup>148</sup> Close to 99% of cases brought by prosecutors lead to convictions in all crimes. See J. Mark Ramseyer and Eric Rasmusen, WHY IS THE JAPANESE CONVICTION RATE SO HIGH?, *Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series*. Paper 240. (1998). Although somewhat dated, this article provides an excellent overview of the issue.

*Recently, investigations of fraudulent marriages involving Filipinos or others have gotten more stringent, to the point that they are now checking whether the couple is actually living together. There have been cases where the two are living together, but the man and the woman have separate rooms with locks on the doors. That said, investigators usually don't go into the house, as it generally requires a high level of suspicion. If the couple claim "we're married!," have pictures together, both have keys to the dwelling and are coming and going on a daily basis, then unless there is a real age difference, it is difficult to suspect them [of fraudulent marriage].*

—Prosecutor's Office

Human smuggling is an underground activity, making it difficult to uncover at the best of times, and particularly challenging when those smuggled have entered on facially valid visas, such as spouse visas. While the details of the visa application process will be covered in section 4, the challenges that immigration and police officials face in uncovering fraudulent marriages deserves attention here. Japan's visa system has drawn fairly clear lines about the kinds of activities holders of each type of visa are expected to engage in and what they are prohibited from doing. Immigration officials reported that in most cases, investigators simply need a checklist to make a determination whether an individual is following the requirements of their visa.

However, Japan's Supreme Court, along with other courts and the Immigration Bureau generally, have struggled with establishing the boundaries for what constitutes appropriate "activity" for those on a spouse visa. Essentially, the spouse visa authorizes an individual to "reside" in the country more or less permanently, for the "activity" of being the spouse of a Japanese national.<sup>149</sup> This concept of "activity" fits well for labor and education visas, but not as much for spouse visas.

At present, the spouse visa requires something more than a union that meets the minimum legal requirements for a marriage.<sup>150</sup> However, the exact additional requirements are unclear. The Supreme Court stated that the relationship between the individual and the Japanese national must be "based fundamentally on the mutual intent to be eternally joined emotionally and physically, and [the participants] are resolutely intent on carrying out a shared life."<sup>151</sup>

Where the marriage relationship has "lost its essential basis in social life," then the foreign national can no longer be considered to be carrying out activities as a spouse of a Japanese national.<sup>152</sup> Proving a lack of an "essential basis" requires showing that: 1) one or both spouses have lost (or presumably never had) the intent to carry out the above activities, 2) the couple are no longer actually carrying out a shared life, and 3) there is *absolutely* no chance of resuming a shared life. (emphasis added) This provides protection to couples who are

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<sup>149</sup> See Immigration Control Act, *supra* note 78, Appended Tables I-II, 出入国管理及び難民認定法別表第一。

<sup>150</sup> In other words, a marriage that was properly registered and was not fraudulently entered into.

<sup>151</sup> Saiko Saibansho [Sup. Ct.] Oct. 17, 2002, Hei 14 (hi) no 46, 56 Saiko Saibansho Minji Hanreishu [Minshu] 1823, Para 3(2).

<sup>152</sup> *Id.*

having marital difficulty and are temporarily separated.<sup>153</sup> This analysis is termed an objective one, and the simple act of filing for divorce will not be sufficient to influence the above analysis.

Unfortunately, this standard provides little guidance on what establishes a valid marriage for purposes of the visa in the first place. In obvious cases of fraud, where the foreign spouse cannot name her partner and/or his whereabouts, investigators are able to meet the evidentiary requirements for visa revocation relatively easily. However, should the couple claim to live together, even an investigation into the couple's dwelling will not necessarily produce sufficient information to make a case, particularly where the trappings of a shared life are present.<sup>154</sup> Even living apart may not be sufficient evidence; Japanese couples may often live apart for stretches of time, due to the (usually) husband's company transferring him to a branch office elsewhere in the country. So long as fraudulent couples have a superficially convincing story, investigators are often unable to assemble sufficient information to launch a case.<sup>155</sup>

As a result, investigators have complained that even where they are aware that a fraudulent marriage exists, they may not be able to bring a case. These difficulties speak to the attraction of spouse visas as a route for smuggling; the various lifestyles that actual married couples engage in provide excellent cover for smugglers, and without a massive invasion into the privacy of all international couples, such smuggling goes unnoticed.<sup>156</sup> Additionally, the success that law enforcement have had in the last several years in cutting down on irregular migration likely means that the remaining activity has been pushed further underground; in other words, the low-hanging fruit is largely gone.

## 2.4 Findings and Recommendations

**Finding #1: Demand for irregular migration, including fraudulent marriage, is driven by narrow immigration policy.**

Japan lacks a visa category for unskilled or minimally skilled workers. Despite this, demand for these workers remains, and in fact an estimated 70% of foreign residents in Japan are in fact engaged in low-skilled

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<sup>153</sup> Interview with Immigration Bureau, February 2013. (Those who are investigated for potential fraudulent marriages will claim they have recently had marital troubles and are currently living apart).

<sup>154</sup> Immigration officials have stated that suspected fraudulent couples will keep toothbrushes and other personal effects in the dwelling, even if both do not live together. In cases where they do live together, it is very difficult to prove a fraudulent marriage. Interview with Immigration Bureau, Nov. 2012.

<sup>155</sup> Interview with Immigration Bureau, February 2013.

<sup>156</sup> In fact, some human rights groups have complained of the existing level of intrusion into the lives of international couples. See Nobuki Fujimoto, Asia-Pacific Human Rights Information Center (HURIGHTS OSAKA) Government "Peeping" Into Bedrooms of International Couples – The Gray Zone of "False Marriages," International Movement Against All Forms of Discrimination and Racism – Japan Committee (IMADR-JC) Newsletter No. 154, (English translation available at <http://www.dbpia.co.kr/Journal/ArticleDetail/3148621>). (2008)

labor.<sup>157</sup> However, the current number of legal workers appears insufficient to meet demand, and thus employers in these sectors seek alternative routes to obtaining the needed workforce. As those on spouse visas enjoy unrestricted rights to work, such visa holders are in demand in low-skilled jobs but constitute a very limited available pool of workers.<sup>158</sup> This is particularly true in sectors where women are prevalent, whether it is restaurants, hostess work, or the commercial sex industry. As the number of legitimate marriage migrants and others with unrestricted work authorization is insufficient to meet demand, the result is that smuggling via marriage visas becomes one method of meeting demand.

**Finding #2: Law enforcement efforts alone are insufficient to combat marriage smuggling.**

Despite illegal residency dropping by more than 60% from 2007-2012,<sup>159</sup> arrests for fraudulent marriage have shown no trends of increasing or decreasing between 2008-2012.<sup>160</sup> The number of smugglers and employers arrested continue to be small, meaning that increased law enforcement efforts have not led to increased prosecutions or a decrease in smuggling activity. In short, increased investigation efforts may have simply driven marriage smuggling further underground.

There are rapidly diminishing returns to more aggressive investigations. Harassment of legitimate couples can become an issue, while further efforts would simply lead smugglers and their clients to better hide their activities. It is already difficult to prove that a couple living together is a fake couple without severely invading their privacy. At the end of the day, law enforcement is attacking the side-effects created by current immigration policy. They are not in a position nor should be expected to address the root cause of demand or the side-effects brought about by narrow immigration policy.

**Finding #3: Anti-smuggling law and policy focuses most on the irregular migrant and least on the smugglers.**

Despite the previous finding, law enforcement can increase their effectiveness by refocusing on the more important actors in the smuggling chain. However, in contrast to the Smuggling protocol, Japanese immigration law is structured to most penalize the acts of those illegally entering the country, followed by those who employ them. The legal system and immigration policy deemphasizes the central role that actors in the smuggling operation play in recruiting and encouraging people to migrate illegally. The law's provisions on smugglers conceptualize them in a supporting role, where they are working to make an illegal migrant's entry or

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<sup>157</sup> Yasushi Iguchi, WHAT ROLE DO LOW-SKILLED MIGRANTS PLAY IN THE JAPANESE LABOR MARKETS?, 56 *American Behavioral Scientist* 1029, 1055 (2012). ("The acceptance of low-skilled labor is not permitted, according to the long-standing principle of the government of Japan, but 70% of the foreigners actually employed are low-, semi-, or unskilled workers.")

<sup>158</sup> Interview with Immigration Bureau, February 2013.

<sup>159</sup> Those staying after their visa has expired or become invalid dropped from 170,839 to 67,065 from 2007-2012. Immigration Bureau, Trends in Illegal Overstaying by Visa Status, 在留し格別 不法残留者数の推移, 2013.

<sup>160</sup> See Statistics compiled from "The Situation of Arrests of Foreign Crime," *supra* note 61.

residence easier. Immigration authorities are thus incentivized to prioritize resources in identifying, apprehending and deporting individuals, rather than focusing on the networks that make such smuggling possible. Finally, no aggravated penalties exist for smugglers who endanger or otherwise abuse those who are smuggled.

These policies trap law enforcement in an endless cycle of investigation, apprehension and deportation, with the smuggling supply chain largely undisturbed. While law enforcement policy warns of the danger to public safety from illegal migration, such migrants are unlikely to commit crimes that threaten public safety. First, they tend to work long hours in order to repay their debts and then send money home to their families, and second, arrest and deportation would prevent them from earning money in the first place. The criminal organizations that continue to profit from these activities are the greater threat.<sup>161</sup> Those who profit from smuggling continue to do so with minimal risk of apprehension, and the far more dangerous criminal organizations involved derive income from these activities goes on largely unimpeded.

**Finding #4: Existing criminal law used in prosecutions is overly general, and convictions with prison time are rare.**

Despite immigration law provisions, law enforcement uses one statute in criminal law for all actors apprehended in marriage smuggling.<sup>162</sup> There is no differentiation in this law between those who smuggle, those who employ smuggled migrants, and the smuggled migrants themselves. In the cases reported in Osaka, not one resulted in a prison term of more than two years for brokers, although all those who faced prison sentences were in the smuggling operation rather than the fraudulent marriage participants.<sup>163</sup> The lack of differentiation between the various actors provides little direction to law enforcement in prioritizing their efforts, nor to judges regarding the relative seriousness of the acts of a fraudulent spouse versus a broker, facilitator or employer.

**Finding #5: Brokers are largely unregulated, tracking the industry's activities are difficult, and no standards are present to ensure brokers do not conduct or collude in smuggling.**

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<sup>161</sup> Some immigration officers and police have recognized this fact. Instead, it is the funds generated by smuggling networks that can fuel crime dangerous to public safety.

<sup>162</sup> Although this cannot be confirmed for all cases, the criminal law provision carries a stiffer maximum sentence, five years, as compared to the immigration law penalty of only three years. *See* Penal Code, *supra* note 146, Art. 157; Immigration Control Act, *supra* note 78, Art. 74-6. Conversations with prosecutors on other laws shows a tendency to use laws that carry steeper penalties. Interview with Prosecutor's Office, February 2013.

<sup>163</sup> The longest was reportedly two years exactly, and involved a broker who had a fairly long criminal history, and had been tried and convicted previously for brokering three fraudulent marriages. Interview with Prosecutor's Office, February 2013.

At present, the government has no regulatory structure in place to monitor the activities of commercial marriage brokers. The lack of available data on the industry as well as legal provisions to regulate their activities makes policing the industry against smuggling particularly difficult.<sup>164</sup>

**Recommendation #1: Develop legal migration channels for industries where marriage smuggling is most prevalent.**<sup>165</sup>

Most jobs where marriage smuggling has been uncovered are low-skilled jobs in the service industry, including positions in the adult services industry.<sup>166</sup> While clamping down on the entertainment visa decreased the total number of women migrating for such positions, the remaining flow simply went underground. Immigration Bureau officials and some outside experts interviewed agreed that a legal route for these positions would be preferable to the current underground routes currently used.

In fact, a legal visa specifically for such low-skilled positions would have the greatest impact on the income stream of brokers and mafia who smuggle migrants. At the same time, legal migration routes are generally safer for migrants, who would be residing legally in the country. While such visas do not solve exploitative practices by labor brokers in sending countries,<sup>167</sup> the trade in illicit migration to Japan would be impacted. That said, a legal visa alone is not sufficient; the visa status would need to sufficiently address vulnerabilities to exploitation by the employer,<sup>168</sup> and vigorous enforcement of labor law would be needed to ensure abuses seen in the entertainment visa are quickly addressed. Otherwise, both domestic and international pressure could force the legal route to close, as occurred with the poorly regulated entertainment visa.

Additionally, whether the visa is strictly a limited-term one, or instead provides a path to more permanent residence for some segment of the migrant population would need to be considered. Should the visa be too limited, workers who wish to remain in the country (and employers who prefer a more stable workforce) could still turn to smuggling in order to secure long-term residence, as already occurs. Still, if designed correctly,

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<sup>164</sup> There is no enforcement of these rules, although businesses found to have broken the pledge can lose the right to display the seal if they do not amend their activities. Japan International Marriage Agencies Association [国際結婚紹介業適正協会], Membership Regulations [国際結婚紹介業適正協会会員規約], available at <http://www.omiai-kekkon.jp/tekisei.html> (Businesses can lose membership if they do not make improvements recommended by the Association).

<sup>165</sup> This report does not take a position on whether commercial sexual services should be legal or not. For an in-depth analysis of the Japanese market's demand for commercial sex, see Shared Hope International, *supra* note 71. Note however that this organization is opposed to legal commercial sexual services.

<sup>166</sup> Those working in factories or other low-skilled manual labor jobs may also include those who came on spouse visas. Enforcement and news reports have simply focused on raids of restaurants and adult entertainment.

<sup>167</sup> Ippei Torii, Zentoitsu (All United) Workers Union, Presentation given at Institute for Developing Economies, Chiba, Jul. 24, 2013.

<sup>168</sup> Tying the visa to a single employer without giving the visa holder the ability to change jobs creates a high level of vulnerability to exploitation, for example.

a legal route would be effective in reducing smuggling through marriage and overall.<sup>169</sup>

Although immigration policy as a whole is beyond the scope of this report, the amount of low-skilled labor brought in through other legal channels, the existence of undocumented labor and the government's efforts to crack down on it show that there is a fundamental demand not met by current immigration policy. While the government's fear of wage depression by allowing in foreign labor is understandable, there are sectors of the economy where the domestic workforce is not interested in participating, and which have found ways to obtain foreign labor in any case. Making sure those routes are legal and regulated will impact organized crimes' revenue stream, and lower migrants' vulnerabilities to exploitation.

### **Recommendation #2 Develop policies that prioritize uncovering smuggling networks.**

*“Without an established route, entering on a fraudulent marriage would be considerably difficult. Without a marriage partner, paper work and other procedures, and a place to work, entry would be impossible. However, nobody [investigated or arrested] has spoken about these specifics.” –Prosecutor's Office*

As in other forms of illicit criminal activity, such as drugs, weapons, and human trafficking, disrupting the supply chain is far more effective than in focusing on the “end product,” i.e. the people who are smuggled. Law enforcement is unlikely to be able to apprehend even a majority of smuggled migrants hiding in the marriage migrant population, while brokers and other actors rarely face prosecution, let alone arrest. With a large pool of workers in other countries willing to migrate, current deportation efforts do not place much risk pressure on those involved in the business of smuggling.<sup>170</sup> Even where smuggled migrants are caught, smugglers can always find new recruits.

Instead, reframing apprehension of fraudulent marriage migrants as merely the first step in reaching the actors who operate the supply chain could yield greater success in uncovering and breaking up smuggling operations. As these migrants are often in the best position to provide information about both the supply chain and their employers' knowledge of smuggling, the ability to provide incentives for cooperation, including withholding prosecution, need to be seriously considered.

Equally important, revisions should be made to criminal and/or immigration law in order to penalize smugglers and connected employers for endangering or violating the human rights of those smuggled, as the Smuggling Protocol requires. It would further refocus scrutiny on smugglers and their customers, and as victims of crime, those smuggled would be able to seek redress, and could be incentivized to cooperate with police and

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<sup>169</sup> Note that Japan is alone among destination countries in the region in its exclusion of legal routes for low-skilled labor. South Korea, Taiwan and Singapore all have varying visa regimes for low-skilled labor.

<sup>170</sup> In fact, even where migrants are caught, smugglers and other actors have either already been paid, or the smuggled migrant still owes a debt, which those waiting in the host country can force them to repay, either through migration (and corresponding additional debt) to another country, or by seizing any assets held as collateral.

prosecutors in bringing their abusers to justice. Ensuring that those abused could seek justice would also harm smugglers' current ability to act with impunity.

These recommendations are opposite of current policy on illegal migration and foreign crime generally, and are in contrast to the prevailing view among law enforcement interviewed that illegal migrants should be treated as criminals. However, the current policy framework continues to work to smugglers' and employers' advantage. Reframing illegal migrants as the instruments of crime, as the Smuggling Protocol does, would create an environment more conducive to developing priorities and incentives that will enable law enforcement to better directly attack the operations that fund domestic and international organized crime.

**Recommendation #3: Enact laws that provide specific penalties for smugglers and those who help them.**

Japanese law is not currently well equipped to respond to the organized nature of human smuggling. The legal system continues to lack an effective conspiracy statute, as mandated by the UN Convention on Transnational Organized Crime, making it difficult to hold those directing but not directly participating in such operations accountable. Such a law would make uncovering and indicting individuals involved in the business of smuggling easier.<sup>171</sup>

In the meantime, laws that more directly address the actions involved in smuggling, with additional weight placed on those responsible for facilitating entry or residence in the country, would help channel law enforcement activity to focusing on smuggling operations. Given the separate jurisdictions and competencies of immigration and police investigators, provisions in both criminal and immigration law could be established. Penalties however must be commensurate to that provided under current criminal law, with additional penalties for those engaging in large-scale smuggling, and for those who expose those smuggled to harm or degrading treatment. As judges' tendencies to hand down suspended sentences is beyond the control of law enforcement, laws that emphasize the serious nature of smuggling activity and of the particularly deplorable acts of abusing migrants, along with policy and legislative statements to this effect, will likely be necessary to make judges aware that the purpose of jail sentences are to increase the risk and lower the reward of such activity.

**Recommendation #4: Develop regulations on international marriage brokers, as Korea and Taiwan have done.**

While the stories of abusive marriages are reason enough to regulate international marriage brokers, the industry's international reach enables it to operate outside of the government's supervision. Comprehensive studies of the industry are highly needed, to develop regulations that both ensure safe migration, while deterring illicit migration. South Korea and Taiwan's systems offer attractive case studies, as both destinations have similar demographic issues and cultural backgrounds as Japan.

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<sup>171</sup> Indeed, prosecutors, immigration, and police officials interviewed all stated they were strongly supportive of such laws. However, all attempts at passing appropriate legislation have failed to date.



Ideally, appropriate government agencies<sup>172</sup> would conduct studies of both systems, with an eye towards developing a regulatory infrastructure appropriate to Japan. Both systems contain advantages and disadvantages: criminal penalties in the Korean system are stricter than those in Taiwan,<sup>173</sup> but commercial marriage brokers are still allowed.<sup>174</sup> The latter in contrast prohibits commercial brokering, allowing only non-profit brokers to operate,<sup>175</sup> in theory allow strong government oversight while combating the profit motive that can be at the root of much of the exploitative practices seen in the industry.

Additionally, regulations provide an opportunity to protect not only legitimate customers, including both the Japanese and the foreign spouse, but to also criminalize illegal brokering. A regulatory system that includes penalties for unauthorized brokering, as well as for those who intentionally use spouse visas to smuggle or traffic others, would enable comprehensive control and enforcement of an industry that can be vulnerable to infiltration by criminal actors.

### Conclusion

Fraudulent spouse visas are just one method of human smuggling, but the combination of low-risk and high reward inherent in this method provides an attractive source of income for both traditional organized criminal groups, as well as loosely organized operations. Japanese law enforcement are well-aware of the problem, and have made combating it a priority in their anti-illegal immigration campaigns. At the same time, efforts to date have largely been effective in uncovering only the smuggled migrant and her fraudulent Japanese spouse; the number of brokers, employers, mafia, and other supporting actors arrested and convicted have remained quite low. As a result, while the number of fraudulent marriages has decreased over the last several years, it is unclear the extent to which the activity has actually been curtailed, and the extent to which it has gone underground.

Unfortunately, there are no easy steps left to take in combating marriage smuggling, or indeed other forms of labor smuggling. The demand for low to unskilled foreign workers outstrips the small amount allowed by Japan's strict immigration policy, while current law and policy on smuggling specifically focuses on the person smuggled rather than on the operations that make such irregular migration possible. This is in contrast to

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<sup>172</sup> Likely the Ministry of Economics, Trade and Industry, along with the Cabinet Office. (METI) Note that METI considered legislation for marriage brokers generally, i.e. both domestic and international marriages. However, reported opposition from the industry led METI to scrap the plan, and the voluntary industry seal of approval system was created instead. Interview with Nobuki Fujimoto, Asian-Pacific Human Rights Information Center, Jan. 2013. See Fujimoto, *Marriage Brokerage and Human Rights Issues*, *supra* note 35, at 12.

<sup>173</sup> Compare Marriage Broker Management Act, *supra* note 43, art. 26 (prison sentences of up to 3 years for certain marriage broker violations), and Taiwan Immigration Act, *supra* note 44, arts. 76-78 (monetary fines only for those violating marriage broker regulations).

<sup>174</sup> See Marriage Broker Management Act, *supra* note 43.

<sup>175</sup> Taiwan Immigration Act, *supra* note 44, arts. 58-60.

international law, which focuses on the operation and not on the person smuggled. Improving the country's current response to marriage smuggling will require rethinking both immigration policy, and anti-smuggling law and policy as well. Both of these will require significant political will and effort to realize.

Finally, the lack of provisions penalizing smugglers who abuse migrants highlights the current stance of viewing the person smuggled as merely a criminal. Doing so obscures the level of exploitation and human rights violations that occur in sectors where smuggled workers exist, prevents those who have been harmed from seeking redress, and takes away potentially valuable sources of information on the smuggling operations. This particularly an issue when the treatment reaches levels of human trafficking, and the government's anti-trafficking efforts are considered. The following section turns to the separate but related crime of human trafficking, with a focus on marriage migration, and examines these issues in greater detail.

### 3. HUMAN TRAFFICKING IN MARRIAGE MIGRATION

#### **Fraudulent marriage and labor trafficking**

*A former coworker contacted a woman in her 20's with an offer to work at a food processing plant in Japan. Arriving at the designated meeting point in Manila, she was surrounded by several Japanese and Filipino men she did not know. They forced her to agree to a fraudulent marriage, and upon arrival in Japan she was taken to her workplace, a snack pub, and was locked into an apartment upstairs. Forced to work from her day of arrival, the managers kept most of the money, with some funds automatically going to the fake husband. She escaped one day when her room's door was left unlocked, found a taxi and eventually escaped to the Immigration Bureau.<sup>176</sup>*

*--International Organization for Migration, Japan Office*

#### **Introduction**

Human trafficking is separate but often found within human smuggling operations. It can occur in both legitimate marriage migration as well as marriage smuggling. Marriage migration overall in fact presents an attractive route to traffickers for many of the reasons mentioned in the previous section, and often smugglers can be involved in human trafficking. However, given the presence of human trafficking throughout the marriage migration route, and the legal differences between smuggling and trafficking, a separate examination of current anti-trafficking policy and law, as well as law enforcement efforts to combat trafficking generally is important.

Unfortunately, unlike other countries in the region, there is a dearth of research on the current state of human trafficking in Japan. The bulk of research by domestic scholars is rapidly becoming dated, with only a handful of significant work published in the last several years.<sup>177</sup> Few NGOs are primarily engaged in anti-trafficking work, and their limited resources keeps publications few and far between. Worse yet, very little legal analysis of Japan's response to human trafficking has been conducted to date. These gaps in the research require an initial examination of the relevant law. While this report focuses on one particular route, the legal analysis will focus on Japan's anti-trafficking system more broadly, with particular attention to prosecution and victim identification.

This section thus begins with a basic introduction to one international definition of human trafficking, the patterns of human trafficking through marriage, and how these patterns fit the definition. Connecting with the previous section, the differences between smuggling and trafficking are explained, and their occurrence in

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<sup>176</sup> International Organization for Migration, Japan Office case study. On file with author.

<sup>177</sup> See e.g., Yumiko Yahagi, *infra* note 299 (analyzing usage of the criminal provision on human trafficking); Seira Ohno, DEVELOPMENT AND TOPICS WITHIN HUMAN TRAFFICKING RESEARCH: APPLICATIONS TO HUMAN TRAFFICKING RESEARCH IN RECEIVING COUNTRY JAPAN, 13 Gender Kenkyu 29, 人身取引研究の展開と課題——受け入れ国日本における人身取引研究のために (2010) (Exploring human trafficking research paradigms in Japan).

the marriage migration stream examined. In addition to available data on human trafficking, this section will examine on a general level Japanese policy on human trafficking, current law, the law's implementation and critically, how victims are identified. Throughout, implications for addressing human trafficking through marriage migration will inform the analysis. The section closes with a summary of findings, and a set of recommendations to address the issues identified.

### 3.1 The International Definition of Human Trafficking and Patterns of Trafficking Via International Marriage

This report uses the definition of trafficking in persons found within the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,<sup>178</sup> (“Palermo”) supplementing the United Nations Convention against Transnational Organized Crime.<sup>179</sup> Japan is a signatory to both instruments, although ratification is still pending.<sup>180</sup>

Simplifying somewhat, Palermo contains three elements that comprise “trafficking in persons.”<sup>181</sup>

- 1) **The act:** Recruitment, transportation, transfer, harboring, or receipt of a person
- 2) **The means:** Through force, coercion, abduction, fraud, deception, or paying a person having control over another
- 3) **The purpose:** For exploitation, which includes at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.<sup>182</sup>

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<sup>178</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *opened for signature* Nov. 15, 2000, 2237 U.N.T.S. 319 [herein Palermo Protocol].

<sup>179</sup> United Nations Convention on Transnational Organized Crime art. 2(a), *opened for signature* Dec. 12, 2000, 2225 U.N.T.S. 209 [herein UNCTOC]. Currently, 173 countries are parties to UNTOC and 154 are parties to the Protocol. *See* United Nations Treaty Collection, Chapter XXVIII: Penal Matters, 12, 12.a., *available at* <http://treaties.un.org/Pages/Treaties.aspx?id=18&subid=A&lang=en> (status of ratification for UNTOC and Palermo, respectively).

<sup>180</sup> Although this issue is beyond the scope of this article, Japan has yet to create a law criminalizing either conspiracy or participation in a crime, as mandated by UNCTOC. UNTOC, *supra* note 52, art. 6(b)(ii). Such a law, or a reservation to the treaty provision is needed for the ratification of the treaty and its optional protocols.

<sup>181</sup> The full definition reads: “The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” Palermo Protocol, *supra* note 11, at art. 3(a). Additional provisions remove the means prong for victims under 18. *See* Art. 3(c).

Like the definition of smuggling, the definition of trafficking only considers the acts of those operating the criminal organization, *the actions of the person trafficked are irrelevant*. (emphasis added) Thus, illegal entry, or indeed whether or not a victim has committed any crimes is irrelevant to the consideration of whether trafficking took place. Additionally, this definition means that recruiters, brokers, transporters, *as well as* the person who directly forces a victim to work is consider a human trafficker under this definition. Additionally, like the Smuggling Protocol, these acts take place in the context of organized criminal activity.<sup>183</sup>

In terms of marriage migration, the route has been repeatedly identified as a route for international human trafficking into Japan and other destination countries.<sup>184</sup> The author's previous research on brokered marriage migration found three general patterns of human in other parts of the region. Grouping these patterns under the label "Commercial Marriage Trafficking,"<sup>185</sup> they are:

- 1) A person is forced into a marriage via force, fraud or coercion by a broker and/or the spouse.<sup>186</sup>
- 2) Promises of marriage that end in "traditional" forms of human trafficking, such as forced labor, whether sexual or otherwise
- 3) Promises of work that involves (fraudulently) obtaining on a spouse visa, and ending in either forced marriage or another form of human trafficking.

The vast majority of available information on human trafficking through marriage migration in Japan have been the second and third patterns of trafficking, with reports of forced marriage rare. This is not to say that cases of marriage brokers (and their clients, the husband and his family) forcing a woman into a marriage against her will do not exist; the dearth of existing research on the marriage broker industry simply means the prevalence of such exploitative activities has yet to be explored.

### 3.2. Human smuggling versus Human trafficking

Human smuggling and human trafficking are easily confused, and making the distinction clear is of critical importance in fighting both criminal acts. Driving the confusion in part is that while human smuggling

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<sup>183</sup> Palermo Protocol, *supra* note 11, at art.4. ("offences [that] are transnational in nature and involve an organized criminal group").

<sup>184</sup> See e.g. Ministerial Meeting Concerning Measures Against Crimes, Japan's 2009 Action Plan to Combat Trafficking in Persons, 人身取引対策行動計画 2009, (Provisional English translation and Japanese versions available at <http://www.cas.go.jp/jp/seisaku/jinsin/>); United Nations Inter-Agency Project on Human Trafficking, HUMAN TRAFFICKING SENTINEL SURVEILLANCE: VIET NAM-CHINA BORDER at 2 (2010); and United States Department of State, Trafficking in Persons Report 2013 at 112,212,353 (reports of trafficking through marriage in Myanmar, Japan, and Taiwan).

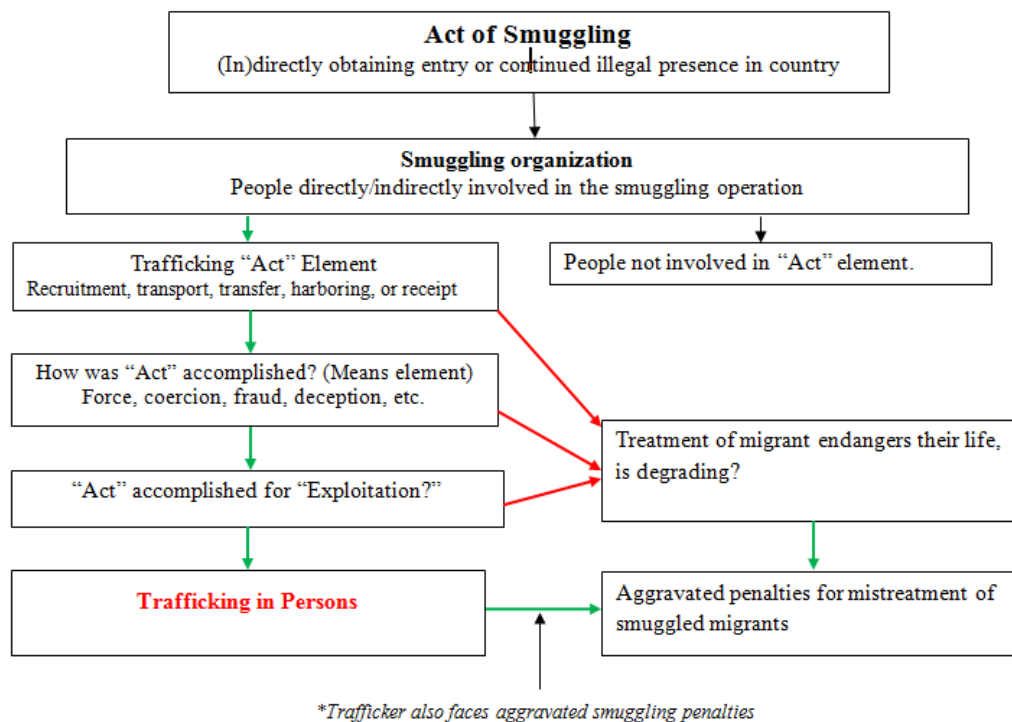
<sup>185</sup> The author examined the legal aspects of marriage as a form of exploitation, and of commercial marriage brokering as a vehicle for human trafficking generally. See MacLean, *supra* note 41.

<sup>186</sup> Although Palermo does not specifically address forced marriage, the purpose element is worded as a minimum standard and is open-ended, making the instrument flexible enough to address new forms of human trafficking as they arise. See Palermo Protocol, *supra* note 152, art. 3(a)

and human trafficking are distinct, they can be closely interlinked.<sup>187</sup> Put very simply, human trafficking “defines conscious acts that lead to and create situations in which people are forced to work against their will, while ‘smuggling’ is the act of assisting irregular migration, motivated by material or financial gain.<sup>188</sup>” The difference goes beyond a mere technicality, and the overlap between smuggling and trafficking is quite pronounced. As the UNODC has noted:

Irregular migrants are extremely vulnerable to exploitation, including human trafficking, as they are generally not protected under any relevant labour standards. Law enforcement responses to this problem can further persecute victims if officers do not understand the linkages, as well as differences, between migrant smuggling and human trafficking.<sup>189</sup>

Below is a simplified flowchart showing where the two acts can overlap:



The two crimes part ways when acts of smuggling lack one of the three elements required under Palermo,<sup>190</sup> when trafficking occurs following legal entry into the country, or when there are no borders

<sup>187</sup> UNODC, *Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment* at iii, 2013. (Examples focused on Greater Mekong Region cases)

<sup>188</sup> *Id.* at 7.

<sup>189</sup> *Id.* at 140.

<sup>190</sup> The exploitation element is often the hardest to prove. As noted earlier, the level of exploitation required to constitute human trafficking is still open to debate.

crossed at all.<sup>191</sup> Indeed, an individual can become a victim of trafficking either before or long after they have crossed a border.<sup>192</sup>

Practically, how a member state implements its anti-smuggling and anti-trafficking obligations, as well as the varying evidentiary requirements between laws and between legal systems, creates situations where law enforcement will be able to prove the one easier than the other. For example, an employer who has placed an employee in debt bondage, threatened her with violence, and forces her to stay in a housing that the employer owns, often makes a provable case for trafficking. However, particularly for spouse visa holders, the employer may be able to plausibly claim ignorance of her fraudulent status, and avoid charges of smuggling.<sup>193</sup> A smuggled migrant may well be charged for breaking domestic law, and as a result not identified as a trafficking victim.

*Marriage migration: legal migration versus smuggling, and the presence of human trafficking*

When looking at marriage migration as a route, the divide between fraudulent and genuine marriages, while somewhat hazy,<sup>194</sup> is quite clear compared to the divide between trafficking and “just” exploitative behavior. Including these gray zones, the migration route and the overlap between smuggling and trafficking can be roughly represented as follows:

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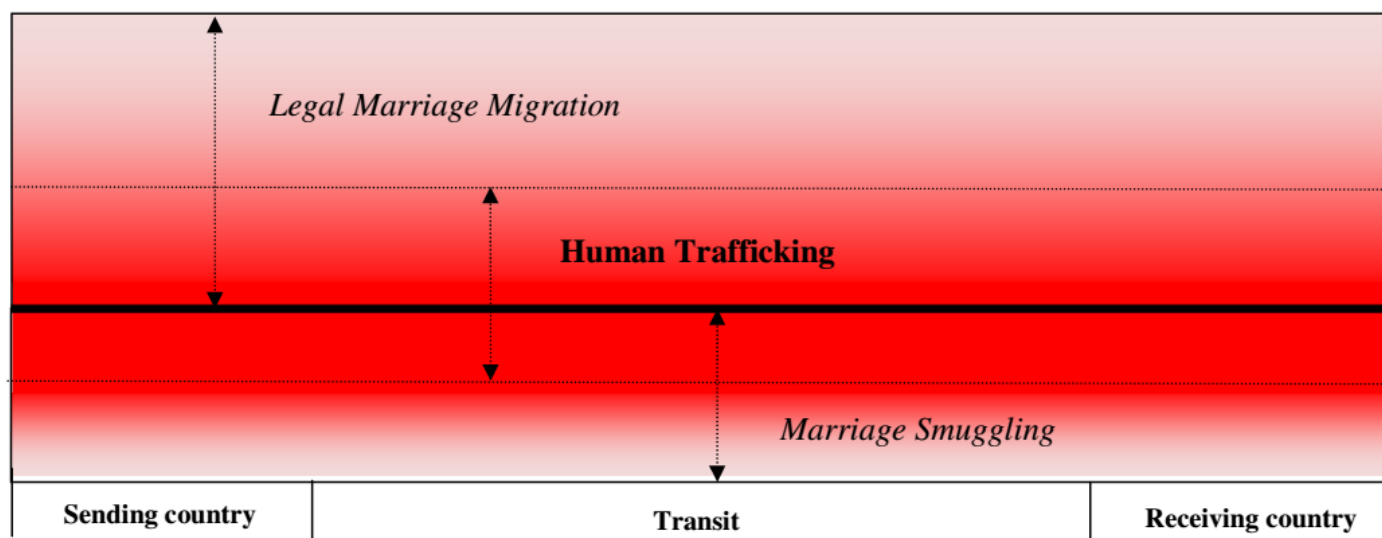
<sup>191</sup> Despite the English name, *human trafficking does not require movement*.(emphasis added) C.F. Palermo Protocol, *supra* note 152, Art. 3(a). (For example, act element includes harboring and recruiting, which do not require movement)

<sup>192</sup> It should also go without saying that a national of a country can be a victim of trafficking.

<sup>193</sup> The opposite is also possible. For example, the victim’s illegal residency is readily provable, but the “means” of exploiting the victim is less visible, such as via psychological rather than physical forms of coercion.

<sup>194</sup> There is no clear line between a “genuine” and a “fraudulent” marriage. The standard the Supreme Court set is subjective, vague, and difficult to substantiate. *See Saiko Saibansho [Supreme Court]*, *supra* note 155. Although it goes against contemporary stereotypes of marriage requiring love, people can marry for purely economic reasons as well. *See Piper*, *supra* note 7.

## The Marriage Migration Route: A Spectrum of Experiences



The heavy horizontal line marks the divide between a legitimate marriage and a fraudulent one. The bright red zone represents clear-cut cases of human trafficking, with lighter areas representing cases where it is not immediately clear that human trafficking is involved. This zone overlaps both legitimate and fraudulent marriages. Although the graph does not reflect the actual ratio of legitimate to fraudulent marriages, nor the relative prevalence of human trafficking among each form of migration, the vulnerabilities to trafficking are higher in fraudulent marriages.<sup>195</sup> Commercially brokered marriages are also more prone to involve elements of fraud, coercion, and exploitation, and thus cases of trafficking may be more prevalent in such marriages.<sup>196</sup>

### 3.3. Human trafficking and marriage migration in Japan

This section examines what is currently known about human trafficking in Japan, with a focus on marriage migration. Data, research, and empirical information on human trafficking generally in Japan is quite scarce. Very little scholarly attention has been devoted to the problem domestically, while the very low level of victim identifications in the country provide insufficient basis for drawing conclusions about the current state of human trafficking. Examinations of one particular stream, such as marriage migration, is thus even more challenging. However, the data that does exist from the law enforcement side includes a disproportionately large number of marriage migrants identified as trafficking victims. Beyond data, empirical reports of human trafficking patterns, as well as what is known about the supply chain for trafficking are included. Given the overlap between

<sup>195</sup> See section 2.2.8: Dangers for irregular migrants.

<sup>196</sup> Based on research conducted at UNIAP, reasons include inability to confirm the representations that the broker makes, lack of knowledge about the destination country, and little if any initial contact with the prospective husband. Even when the marriage is legitimate, the broker may make misrepresentations about the husband and his living situation. Additionally, prospective marriage migrants may not have sufficient information to distinguish a legitimate marriage broker from those using brokering as a front for human trafficking.



marriage smuggling and human trafficking, the information provided in Chapter 2 on smuggling is also likely descriptive of human trafficking as well.

### 3.3.1. Available data

#### Official statistics

The Japanese government has identified 142 victims in the last five years, or approximately 28 per year. In a country of over 120,000,000 people, this number is too small to draw any substantive conclusions about the current situation of human trafficking in the country. However, it is useful for understanding the focus of law enforcement efforts in identifying perpetrators and victims. Critically, the statistics contain a significant minority of spouse visa holders, and the presence of trafficking within the adult service industry,<sup>197</sup> where smugglers and those they have smuggled have been found.<sup>198</sup>

The Immigration Bureau (IB) and the National Police Agency (NPA) report separate statistics on identified trafficking victims based on each agencies' own investigations. The IB statistics contain only foreign nationals, while the NPA's contain Japanese victims as well.

In 2012 alone, both IB and NPA statistics show that approximately half of foreign victims identified arrived on spouse visas,<sup>199</sup> up slightly from 41% between 2010-2012. It is not clear how many arrived knowing that they were on fraudulent visas, and how many arrived believing they were in a bona-fide marriage.<sup>200</sup> That said, of the nine victims to whom the IB gave protection or repatriation assistance, only 1 in 2012 was identified as illegally residing in the country. In other words, of the victims identified on a spouse visa, none were found to be on fraudulent marriages.<sup>201</sup>

The NPA statistics provide a much deeper snapshot of suspected traffickers and their victims. These are examined below.

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<sup>197</sup> The Japanese term is directly translated as the "entertainment industry." However, actual usage of the term is often meant as a euphemism for "entertainment" that focuses on men, whether it is a hostess pub (women serving drinks and sitting with men), certain types of massage parlors, or establishments that provide services up to but not including vaginal intercourse.

<sup>198</sup> See Graph 3: Reported Occupation of Female Suspects, Graph 2: Suspects' Reported Role.

<sup>199</sup> Immigration Bureau, *Number of Victims of Trafficking Who Received Protection or Repatriation Assistance in 2012*, 平成 24 年に保護又は帰国支援した人身取引の被害者数 (5 of 9 victims, or 55%); National Police Agency, *Information on Cases of Human Trafficking in 2012*, 平成 24 年中における人身取引事犯について (Feb. 7, 2012). (In 2012, 54% reported, no breakdown by nationality). The IOM's Japan office noted that 15 victims it served from 2007-2010 decided not to return home, and among them were 5 on spouse visas. International Organization for Migration—Japan Office. (2010) (Materials on file with author).

<sup>200</sup> Anecdotal reports suggest that some women may not be aware that they are being tricked into a false marriage. One such case is included in Section 3.5: Victim Identification. See Oshita Fusae, *infra* note 331.

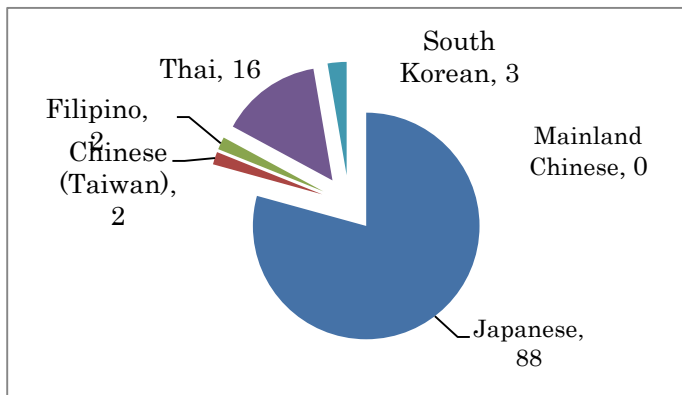
<sup>201</sup> Immigration Bureau, *Number of Victims of Trafficking Who Received Protection or Repatriation Assistance in 2012*, *supra* note 203.

**Figure 2: NPA Trafficking Crime Statistics<sup>202</sup>**

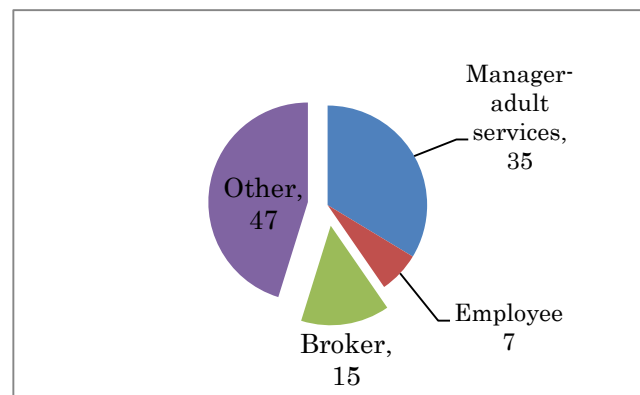
	2008	2009	2010	2011	2012	Total
<b>Cases</b>	<b>36</b>	<b>28</b>	<b>19</b>	<b>25</b>	<b>44</b>	<b>152</b>
Suspects	33	24	24	33	54	168
(brokers)	7	6	3	6	6	28
<b>Total victims</b>	<b>36</b>	<b>17</b>	<b>37</b>	<b>25</b>	<b>27</b>	<b>142</b>
Filipino	7	4	24	8	11	54
Japanese	2	2	12	4	11	31
Taiwanese	5	1	0	1	1	8
South Korea	-	-	1	-	1	2
Macao	2	-	-	-	-	2
Hong Kong	-	2	-	-	-	2
Mainland China	1	-	-	-	-	1
Bangladesh	1	-	-	-	-	1

From 2010-2013, police reported the vast majority of suspects were Japanese.<sup>203</sup> While most of these were male, all foreign suspects apprehended were female.<sup>204</sup> Additionally, a majority of perpetrators either worked in the adult services sector, or were brokers.

**Graph 5: Suspects' nationality**



**Graph 6: Suspects' occupation**



Traffickers who operated adult services venues represented approximately 40% of the 104 suspects arrested

<sup>202</sup> National Police Agency, *supra* note 157. (Report includes annual statistics from 2001-2012).

<sup>203</sup> 21 of 24 in 2010, and 24 of 33 in 2011, and 43 of 54 in 2012. See National Police Agency, *Information on Human Trafficking Cases*, (Annual Report. 2012 report contains data for 2010-2011. 2013 report contains 2012 data only).

<sup>204</sup> In 2010, the three foreign suspects were one Filipino, Thai, and South Korean. In 2011, seven Thai and two South Korean suspects were apprehended. *Id.*

from 2010-2012.<sup>205</sup>

The data shows that, despite accounting for less than 2% of the population, the vast majority of victims identified overall are foreign nationals. Thailand and the Philippines represent the majority of foreign victims identified, while Mainland Chinese and South Korean victims are heavily underrepresented, despite being the first and third largest sending population of marriage migrants, respectively. These trends do not reflect what is seen in arrests for fraudulent marriages, where statistics roughly mirror the proportions of marriage migrants from each of these countries.<sup>206</sup>

## News reports

A few news reports of fraudulent marriage describe indicators of human trafficking, such as debt bondage, confiscated passports, or forced labor. For example, one article noted that the route can involve women being placed under the control of another, and be forced into prostitution.<sup>207</sup> However, only two of the over 200 cases examined specifically mentioned the connection between marriage migration and human trafficking.<sup>208</sup>

### 3.3.2. Reported patterns of trafficking

The information below was gathered from interviews with IB agents, prosecutors, police, NGO workers, the IOM, and a legal practitioner with experience on the issue. However, these are anecdotal reports; further research that gathers, confirms, and analyzes reports from these disparate sources is still necessary.

All stakeholders interviewed reported anecdotal evidence of marriage migrants and those on fraudulent spouse visas encountering trafficking-like circumstances. Most common were anecdotes of those who knowingly entered on a fraudulent visa intent on securing work, only to face exploitation amounting to human trafficking. However, at least one case of a woman forced into a fake marriage was reported.<sup>209</sup> A very small number of anecdotal stories from NGOs regarding women who thought they were arriving for marriage only to be trafficked into forced sexual labor also exist.<sup>210</sup>

### 3.3.3. The supply chain and demand for human trafficking

*“The Governor of Chiba Prefecture reported that cases involving victims of human trafficking brought into*

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<sup>205</sup> Police documents do not explain what “other” contains.

<sup>206</sup> See statistics compiled from the National Police Agency, *supra* note 61.

<sup>207</sup> See e.g. “*Fraudulent Marriage, Underground Banks serve as Foundation for Crime—NPA Establishes Response Office*,” 偽装結婚・地下銀行は犯罪基盤、警察庁に対策室, Asahi Newspaper 3/10/2011.

<sup>208</sup> “*Filipinos Entering on Entertainer Visas Drop Dramatically, Transition to Underground Entrance Advances Via Fraudulent Marriages*,” フィリピン人入国興行ビザ激減、偽装結婚進む潜在化, Kobe Newspaper, Apr. 16, 2012.

<sup>209</sup> See IOM, *supra* note 203.

<sup>210</sup> There is no publicly available information on the specific details of each case.

*the country by means of bogus marriages to unemployed and/or homeless Japanese men were on the rise. Criminal organizations would buy family registers from unemployed or homeless people for 200,000 to 300,000 yen, and falsify these documents by faking a marriage between the foreign woman and the Japanese man abroad. In this way, the “spouse of a Japanese national” can be brought into Japan without immigration scrutiny. The criminal organization then imposes a debt of several million yen on the woman who will subsequently be forced into prostitution in order to pay it back, and will thus be victimized.<sup>211</sup>”*

Smugglers and/or their customers may also engaged in acts that constitute human trafficking, making the supply chain of human trafficking victims quite similar. Where husbands are found to have trafficked their spouses, legitimate international marriage brokers and their supply chains may also be implicated. The illegal nature of their residency makes such migrants vulnerable to exploitation, some of which will rise to the level of human trafficking.

Earlier research on the sex industry in Japan highlighted it as a prime area for trafficked women,<sup>212</sup> and as marriage migration to Japan is dominated by female migrants, those who are trafficked are quite likely to end up in this sector. Where they do not enter the sex industry, the demand for foreign workers among the various foreign-themed hostess clubs and “snack pubs” means that they can and do appear in such businesses as well.

Less well-known are the exact patterns of trafficking from each country. Some anecdotal reports suggest Japanese and Filipino actors involved in the Philippines,<sup>213</sup> while reports from Japanese authorities in Thailand have cast doubt on Japanese mafia operating there.<sup>214</sup> Fraudulent marriage brokers in China cooperate with their Japanese counterparts,<sup>215</sup> and some of those smuggled may eventually be trafficked. Meanwhile, those posing as international marriage brokers in Korea have been reported to traffic victims to Japan.<sup>216</sup>

Ultimately, demand for trafficked victims are much the same as for smuggled migrants. They diverge mostly where the level of exploitation reaches human trafficking.<sup>217</sup> While employers are the direct customers of trafficking, those who patronize their establishment, whether they suspect the victim has been coerced or not, feeds the underground industry that drives importation of victims through marriage migration.

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<sup>211</sup> International Labor Office, HUMAN TRAFFICKING FOR SEXUAL EXPLOITATION IN JAPAN at 63 (2005).

<sup>212</sup> Shared Hope International, *supra* note 71, at 113.

<sup>213</sup> See e.g. Oshita Fusae, *infra* note 331.

<sup>214</sup> Interview with Japanese Embassy Consular Official, Bangkok, Thailand, May 2013.

<sup>215</sup> See National Police Agency, *supra* note 46.

<sup>216</sup> See Sawa and Utsumi, *supra* note 10, at 18.

<sup>217</sup> Human trafficking is more likely to occur in positions that carry significant stigma, such as sexual services, as willing participants may be difficult to find. At the same time, even in “legitimate” work, such as hostess clubs or restaurants, employers may subject workers to slave-like and horrific conditions simply to extract as much profit from them as possible.

### 3.4. Policy and Law

This subsection analyzes the relevant provisions of Japanese anti-trafficking policy, followed by an analysis of the legal system's response to the crime. While Japan lacks a comprehensive anti-trafficking law, law enforcement utilize a broad range of laws in investigating human trafficking. Immigration law, criminal law, labor law, and other legal provisions will thus be examined.

#### 3.4.1. Japanese Policy on Human Trafficking

##### *Inter-ministerial Liaison Committee on Human Trafficking (Task Force)*

No centralized authority exists to guide the government's anti-trafficking efforts. Instead, the Prime Minister's Cabinet Secretariat assembled the Cabinet office and four government ministries to establish a task force on human trafficking in 2004.<sup>218</sup> The task force established the National Action Plan on Human Trafficking in the same year, which it renewed in 2009.<sup>219</sup> Since then, it has held annual follow up meetings to discuss the progress of the Plan.<sup>220</sup> In 2010 and 2011, it also released guidance documents on victim identification and victim protection, respectively.<sup>221</sup>

##### *The Action Plan*

The Task Force has set national anti-trafficking policy through the Action Plan. Key relevant features include:

- **Trafficking definition**—Palermo's definition of trafficking in persons.
- **Marriage migration**—Recognition that fake marriages have been increasingly used in recent years, due to the visa's unrestricted work authorization, thus pushing trafficking further underground.<sup>222</sup>
- **Immigration controls**
  - Improve visa screenings at consulates. Increase visa process staff and conduct "more detailed

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<sup>218</sup> See Inter-Ministerial Liaison Committee to Combat Trafficking in Persons, Action Plan to Combat Trafficking in Persons 2009, 人身取引対策行動計画 2009 (2009). Provisional English translation available at [http://www.cas.go.jp/jp/seisaku/jinsin/kettei/2009gaiyou\\_en.pdf](http://www.cas.go.jp/jp/seisaku/jinsin/kettei/2009gaiyou_en.pdf).

<sup>219</sup> *Id.*

<sup>220</sup> See Inter-Ministerial Liaison Committee to Combat Trafficking in Persons, 人身取引対策に関する関係省庁連絡会議, *website* <http://www.cas.go.jp/jp/seisaku/jinsin/>.

<sup>221</sup> *Id.*

<sup>222</sup> Action Plan to Combat Trafficking in Persons 2009, *supra* note 222 at 2. (English version page number cited) While the Action Plan notes that fewer victims were recognized in the five years between the initial and updated action plan, domestic and international sources have charged that actual victim numbers are far higher, and that the decrease in recognition could be attributed to either overly strict recognition procedures, and/or changing tactics by traffickers. The plan itself notes in the very next paragraph that a change from the entertainer visa to fraudulent marriages and other tactics have pushed trafficking further underground.

individual interviews to prevent trafficking in persons.”<sup>223</sup>

- Prevent more illegal entry into Japan
  - “Crack down on false marriages” and other illegal residency. Follow-up investigations on foreign residents on spouse visas who work at adult entertainment locations.
  - Additional efforts to “crack down on illegal stays, *as well as brokers and other perpetrators who are involved in these cases.*” (emphasis added)
  - Crack down on employers who force victims to work illegally. Public awareness raising on preventing illegal employment.
- **Victim identification**—“make efforts” to identify victims as quickly as possible and “thoroughly crack down on the crime.”
- **Anti-crime provisions**
- Attempt to identify criminal organizations behind individual cases, and apply a range of laws, including criminal, immigration, entertainment, and labor standards laws.
  - Crack down on prostitution services<sup>224</sup>
  - “Make efforts” to crack down on malicious employers and brokers.
  - Crack down on transnational crime through consular conventions with the Philippines and Thailand, and a joint task force with the latter.
- **Victim protection**
- Make brochures and place them where victims of trafficking are likely to see them.
  - Make efforts to publicize protection policies to potential victims
  - Identifying victims during crackdowns—investigators will “make efforts to find such cases as quickly as possible by creating an environment where people feel comfortable and do not hesitate to report such cases from fear or anxiety.”<sup>225</sup>
- **Victim services**
- Protection and support at Women’s Consulting Offices
  - Interpretation, counseling, and medical care, publicizing legal assistance policies to victims.
  - Notify victims<sup>226</sup> of protection policies, potential ability to stay in the country, regardless of current immigration status.<sup>227</sup>

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<sup>223</sup> Action Plan to Combat Trafficking in Persons 2009, *supra* note 222 at 4.

<sup>224</sup> Note that prostitution is interpreted only as vaginal penetration. *See* Nakasatomi, *supra* note 66, 88-91.

<sup>225</sup> This provision is focused on enabling victims to report exploitation, rather than on investigators to uncover signs of trafficking. The onus is still on the victim to come forward.

<sup>226</sup> This assumes victims are identified. *See* Section 3.5: Victim Identification.

<sup>227</sup> “In addition, the [Government of Japan] will respect the wishes of victims who cannot return to their home countries, and institutions concerned will cooperate with each other to provide necessary support while giving consideration to their reasons,

- “Thoroughly consider the situation of the victim while looking at future investigation activities” where the victim has committed a crime as part of trafficking.
- Comprehensive repatriation assistance.

### Analysis

The Plan’s focus on cracking down on illegal migration mirrors the government’s initiatives on fighting “criminal infrastructure<sup>228</sup>” by preventing marriage smuggling and other forms of illegal migration. As before, uncovering the actors behind human trafficking is secondary to immigration control. Objectives for the former include a very general “make efforts” clause, while the latter are more fully detailed. Additionally, the focus on illegal migration misses the reality that many human trafficking victims arrive on otherwise valid visas. As noted before, Immigration Bureau statistics show that the vast majority of those identified are on valid visas.<sup>229</sup> The result is that the *Action Plan* reinforces the incentives for law enforcement to focus on uncovering and arresting illegal migrants, rather than the perpetrators of human trafficking and their customers.

Operationally, the lack of a separate office on human trafficking, or in the author’s opinion, even a full-time secretariat within the Cabinet Office, hampers efforts to implement the Action Plan, and provides little direction to the various agencies involved.<sup>230</sup> Neither the Ministry of Justice nor the National Police Agency have specific policy documents to implement the Plan, although the Plan is mentioned in parts of other policy materials.

Given the overlap between smuggling and trafficking, immigration policy plays a key role in addressing human trafficking through marriage migration. The 4<sup>th</sup> Plan on Immigration Control states that full consideration must be made for victims who in many cases “fall into illegal residency due to individual issues beyond their control” the needs of these victims must be fully taken into consideration.<sup>231</sup> Unfortunately, this section comes in a “miscellaneous” section near the end of the document, while the Plan’s fraudulent residency policy is silent on the potential for human trafficking, suggesting a disconnect between anti-illegal immigration

languages, etc.” The Ministry of Justice will grant a status of residence that allows to work if it is deemed necessary after comprehensively examining the individual. *See* Action Plan to Combat Trafficking in Persons 2009, *supra* note 222, at 10.

<sup>228</sup> *See* National Police Agency, Situation of Arrests of Foreign Crimes Committed by Foreign Nationals in Japan—2012, *supra* note 46 at 11.

<sup>229</sup> *See* Immigration Bureau, *Number of Victims of Trafficking Who Received Protection or Repatriation Assistance in 2012*, *supra* note 203. Some NGOs charge that trafficking victims illegally present in the country are generally treated as illegal migrants, and are deported without official identification of their victim status. Interview with Nobuki Fujimoto, Asian-Pacific Human Rights Information Center, Jan. 29, 2013.

<sup>230</sup> United Nations Human Rights Council, Report Submitted by the Special Rapporteur On Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo—Mission to Japan, UN Doc A/HRC/14/32/Add.4 ¶18. (2009).

<sup>231</sup> 4<sup>th</sup> Basic Plan On Immigration Control, *supra* note 24, at 31.

and the potential for human trafficking victims within that population.<sup>232</sup>

### 3.4.2. Human trafficking and the law

Japan lacks a comprehensive anti-trafficking law, similar to that found in Taiwan, or a set of laws that together comprehensively address human trafficking, as Korea now has.<sup>233</sup> However, a set of laws together addresses most of the elements of human trafficking that are mandated under Palermo. In contrast, no law providing specific protections exists.<sup>234</sup>

This section will briefly introduce these laws, and examine the extent to which they cover various aspects of human trafficking, with particularly those trafficked on spouse visas.

#### 3.4.2.1 Immigration law

##### The definition of trafficking

The Immigration Control and Refugee Recognition Act (Immigration Act) is the only domestic law containing a specific definition of human trafficking. It requires proof of

- 1) Kidnapping,<sup>235</sup> buying or selling<sup>236</sup> of persons
- 2) for the purpose of profit,<sup>237</sup> indecency<sup>238</sup> or threats to a person's life or body.

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<sup>232</sup> *Id.* at 31. Trafficking victims and domestic violence victims are grouped together in the same paragraph.

<sup>233</sup> Korea has recently implemented changes to their criminal law that addresses labor trafficking. *See* Trafficking in Persons Report 2013, *supra* note 188, at 223. (“The government enacted an amended criminal code in March 2013 that defines trafficking in persons as a distinct crime and prohibits all of its forms.”)

<sup>234</sup> Only immigration related provisions, described below, exist.

<sup>235</sup> Note that English translations often conflate two terms into kidnapping. Both terms cover the purpose of separating a victim from their living environment, and placing them under the effective control of either the perpetrator or a third party. The first, *ryakushu*, often translated as “abduction” is intended to have a somewhat broad meaning, of using force or coercion to achieve the means described. The second, *yuukai*, is generally translated as kidnapping, and is intended to include fraud or temptation as the means element. Together the two terms cover force, coercion, fraud, and temptation as means for achieving this purpose. Compare Ministry of Justice, Immigration Control and Refugee Recognition Act art. 2(vii)(a), Japanese Law Translation, *available at* [http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=&vm=2&id=173](http://www.japaneselawtranslation.go.jp/law/detail_main?re=&vm=2&id=173) (using only the word “kidnapping”) with Immigration Control Act, *supra* note 78, art. 2(vii)(a). (Japanese version using both *ryakushu* and *yuukai*)

<sup>236</sup> Buying and selling involves a transaction that results in the transfer of unlawful control of the victim from one party to the other. *See* Hidenori Sakanaka and Toshio Saito, Immigration Control and Refugee Recognition Act—An Article by Article Explanation at 63, (3<sup>rd</sup> ed.) (2007)

<sup>237</sup> One reference book followed by practitioners defines the purpose of profit as obtaining a material benefit for oneself or enabling another to obtain that benefit. That benefit need not necessarily come at the expense of the individual who was kidnapped. Sakanaka and Saito, *supra* note 240, at 62.



Separately, “delivering, receiving, transporting or hiding such persons who have been kidnapped, bought or sold,” is also criminalized.<sup>239</sup>

Compared to Palermo,<sup>240</sup> the above definition covers to some extent the act, means and purpose elements of human trafficking.<sup>241</sup> It lacks the “harboring” element seen in the Protocol, opting instead for the more restrictive “hiding.” Should the broader definition of “kidnapping” hold true in actual use, the term would actually cover most of the “means” elements listed in Palermo.<sup>242</sup> While the term “exploitation” is not included, the elements listed could easily be interpreted to be wider than Palermo, as “indecenty” and “harm to the body” are certainly broader terms. Ultimately, it is the use of the law that determines how well domestic law meets the requirements of international law.

### **Penalties**

Immigration law only penalizes foreign perpetrators of human trafficking. Those who have engaged in trafficking, or have “incited or aided another” to traffic may be refused entry into the country,<sup>243</sup> and may be deported if already residing in Japan.<sup>244</sup>

### **Victim Protections**

Immigration law contains the following protections for foreign victims of human trafficking:

- Approval of entry into the country, or revocation of deportation order even after appeals have been exhausted for those who have been placed “under the control of another” for purposes of human trafficking.<sup>245</sup>

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<sup>238</sup> Indecency includes the use of the kidnapped individual in the role of either performer or receiver of an indecent act. 逐条三版 62.

<sup>239</sup> Immigration Control and Refugee Recognition Act, 出入国管理及び難民認定法 Art. 2(7)(a). [hereinafter “Immigration Control Act] For victims under the age of 18, kidnapping, buying, or selling need not be proven. *Id.* Art. 2(7)(b)-(c).

<sup>240</sup> Note that while the Protocol’s definition is not explicitly included in the Immigration Control Act, one reference manual that immigration officials report using includes the Protocol’s definition as “reference”. Ssakanaka and Saito, *supra* note 240, at 64.

<sup>241</sup> Immigration Control Act, *supra* note 78, Art 3(a).

<sup>242</sup> Palermo Protocol, *supra* note 152, Art. 3(a).

<sup>243</sup> Immigration Control Act, *supra* note 78, Art. 5(vii)-2

<sup>244</sup> Immigration Control Act, *supra* note 78, Art. 24(4)(c) Note that entry into the country is a prohibition, while deportation becomes possible, but not obligatory under the law.

<sup>245</sup> The Minister of Justice has the discretion to allow landing or to cancel deportation orders for those who, “due to human trafficking,” were placed under the control of another. Immigration Control Act, *supra* note 78, Art. 12(2) (landing permission); art.50(3) (deportation). In this context, “placing under the control of another” means not only unlawfully taking someone away from their normal living environment, but also that the victim is in a state of being robbed of their freedom at the time of entering the country. However, neither force, coercion or other means of control need be present at the time of entry; in cases where it is recognized that the ongoing influence of such previous acts may create a situation where the individual cannot leave the control of another, that person need not be presently confined. Sakanaka and Saito, *supra* note 240, at 64.

- Exemption from deportation for working illegally in the country, and/or in any business directly connected with prostitution.<sup>246</sup>
- Special visa provisions available for those residing in Japan who are under the control of another as a result of human trafficking.<sup>247</sup>

### 3.4.2.2 Criminal provisions

A fairly large gap exists between Japan’s trafficking law on paper, and the laws that police and prosecutors actually use in charging human traffickers. In the vast majority of cases, victims are identified when law enforcement investigates crimes other than human trafficking. The crime of human trafficking is first examined, followed by the other laws carrying criminal penalties that law enforcement have reported using.

### Human Trafficking

Japan’s penal law was amended in 2005 to better address human trafficking, via a provision directly translated as “buying and selling of people.”<sup>248</sup> The law now criminalizes:<sup>249</sup>

- 1) purchase of a human being for any purpose,
- 2) purchase or sale of any person for the purpose of
  - i) profit, indecency, **marriage** or threat to life or body, or (emphasis added)
  - ii) transporting a person from one country to another
- 3) handing over, receiving, exporting, harbors or hides a person who has been bought or sold, for the purpose of helping an individual guilty of the above crimes,<sup>250</sup> or for the purpose of profit or indecency.<sup>251</sup>

This law theoretically covers the acts of the recruiter, any middlemen who transport the victim, and those throughout the supply chain who buy or sell the victim. The purpose prong listed above read more broadly than the exploitative purpose in Palermo. However, domestic law requires proof the victim has been bought or

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<sup>246</sup> Immigration Control Act, *supra* note 78, Art. 24(iv)(a),(j). (Prostitutes not allowed in Japan. Definition of prostitution not given, meaning it may follow Japanese law’s more restricted meaning of the term as vaginal penetration) *See* Nakasatomi, *supra* note 66 at 88.

<sup>247</sup> Immigration Control Act, *supra* note 78, Art. 50(iii) This is at the discretion of the Minister of Justice, and thus via recommendations from the Immigration Bureau. Note that the Justice Minister also set conditions for this residency status. *See* Immigration Control Act, *supra* note 78, Art. 50(2).

<sup>248</sup> Penal Code, *supra* note 146, Art. 226-2.

<sup>249</sup> Penal Code, *supra* note 146, Art. 226-2. See chart on the following page for specific sub-sections.

<sup>250</sup> Penal Code, *supra* note 146, art. 227 (note the law also applies to those assisting individuals who have abducted or kidnapped another).

<sup>251</sup> Penal Code, *supra* note 146, art. 227(3).

sold. Prosecutors reported that proving a sale at a single point in time is a very high evidentiary hurdle that often prevents use of this law.<sup>252</sup>

Instead, police and prosecutors have reported using a broader range of laws to prosecute traffickers.<sup>253</sup> These include:

### **Unjust confinement**

A very general criminal law that penalizes unlawful confinement has also been reportedly used to prosecute some traffickers, including employers.<sup>254</sup> Unlike the human trafficking law, this provision simply requires proof of ongoing confinement over a period of time, rather than proving confinement at a specific point in time, as the crime of human trafficking does. The easier evidentiary requirements, the heavier penalty than that of simple “human trafficking,” and prosecutors’ and judges’ familiarity with the crime make it more attractive to use.

### **Other penal code provisions**

Additional provisions on kidnapping through force or enticement for purposes of transporting an individual out of a country,<sup>255</sup> for the act of transport itself,<sup>256</sup> and for delivery of a kidnapped person<sup>257</sup> could theoretically apply to human trafficking cases. However, no extant cases for these laws show they have been used as such, and have not been included in police or prosecutor reports on the laws they have reported using.

### **Labor code—Prohibition on forced labor or forced brokering**

Provisions on forced labor include prohibitions on employers using force, physical violence, coercion, restraint, or “other unfair restraint” on a person’s physical or mental freedom to force him or her to work against their will. Labor brokers who use similar means to recruit individuals for labor, or who simply recruit

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<sup>252</sup> One prosecutor interviewed stated that interpretation of the law focuses on the point in time that the sale of the victim occurred. Unless the sale at that point cannot be proven, the law cannot be used. Where evidence of a labor contract exists, prosecutors must prove that the labor contract was entered into under duress. Interview with Prosecutor’s Office, February, 2013.

<sup>253</sup> Yuichiro Tachi, PROBLEMS IN INTERNATIONAL HUMAN TRAFFICKING—REALITIES AT THE INTERNATIONAL AND DOMESTIC LEVELS AND COUNTERMEASURES TO THEM: PART 2, 国際的な人身取引に関する諸問題(下)—国際的及び国内の実情並びにその対策, 68 Keisatsu Koron 25, 25 (2013). (Japanese language)

<sup>254</sup> Interview with Prosecutor’s Office, December, 2013.

<sup>255</sup> Penal Code, 刑法, Art. 226.

<sup>256</sup> *Id.* Art. 223-3.

<sup>257</sup> *Id.* Art. 227.

individuals for jobs “harmful to public health or morals”<sup>258</sup> are also penalized. Critically, missing from either provision is a prohibition on deception or fraud. While the general catch-all provision of “other unfair/unjust restraint” could be interpreted to include such acts, the lack of these specific elements creates an additional interpretive step that may not occur consistently across cases.

Additionally, an anti-debt bondage provision prohibits those working in adult services from being forced to pay the full amount of any loans they have taken out as a condition of quitting the job, if the amount would obviously be beyond what they would be able to pay.<sup>259</sup> Confiscating the worker’s passport as a condition for the loan is also prohibited.<sup>260</sup>

### **Prostitution law—Prohibitions on forced “prostitution”**

Although Japan’s Prostitution Prevention Act<sup>261</sup> prohibits commercial sex transactions, “sex” means only vaginal intercourse.<sup>262</sup> The many businesses offering sexual services can thus easily skirt this law by allowing everything up to but not including vaginal intercourse.<sup>263</sup> Assuming an act of “prostitution” does take place, using fraud, deception, violence, coercion, or a family relationship to force someone to engage in prostitution is prohibited.<sup>264</sup> Using debt or contracts to induce someone into prostitution is also illegal.<sup>265</sup> Those who place another under their management, into an establishment under their control, or **force** them to live in a residence for the purpose of running a prostitution business are also penalized.<sup>266</sup>

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<sup>258</sup> Such jobs include those requiring performance of sexual services up to but not including vaginal intercourse. C.f. Nakasatomi, *supra* note 66, at 92. (Describing court cases finding work that involved “related sexual acts” as labor activities harmful to public morals under both the Work Security Act and the Labor Standards Act).

<sup>259</sup> Fuzoku Eigyo no Kisei Oyobi Gyomu no Tekiseikanado ni kansuru Horitsu [Law on Control and Improvement of Amusement Businesses], Art. 18-2(i). (Japanese language)

<sup>260</sup> *Id.* Art. 18-2(ii).

<sup>261</sup> Prostitution Prevention Act, *supra* note 70, art. 3.

<sup>262</sup> *See* Nakasatomi, *supra* note 66 at 88.

<sup>263</sup> *Id.* at 88.

<sup>264</sup> Prostitution Prevention Act, *supra* note 70, art. 7.

<sup>265</sup> *Id.* Art. 8(2).

<sup>266</sup> *Id.* Art. 12.

**Figure 3: Human trafficking and relevant laws**

Provision	Definition and elements	Penalty
<b>Human Trafficking</b> <sup>267</sup>	A person who buys another <sup>268</sup>	Prison with work 0.25-5 years
	If the victim is a minor <sup>269</sup>	Prison with work 0.25-7 years
	Buys <sup>270</sup> or sells <sup>271</sup> another for the purpose of profit, indecency, <b>marriage</b> or threat to the life or body. (emphasis added)	Prison with work 1-10 years
	Buys or sells another for purposes of transporting victim from one country to another <sup>272</sup>	Prison with work 2+ years
	1) Handing over, receiving, exporting, harbors or hides a person who has been bought or sold, for the purpose of helping an individual guilty of the above crimes, <sup>273</sup> 2) or for the purpose of profit or indecency. <sup>274</sup>	1) Prison with work for 0.25-5 years.  2) Prison with work for 0.5-7 years.
<b>Unlawful capture and confinement</b>	Unlawfully capturing or confining another <sup>275</sup>	Prison with work for 0.25-7 years. Heavier penalties possible for acts

<sup>267</sup> The unofficial translation of the Japanese term is “buying or selling of human beings”, although the term in Japanese is understood as an older term for human trafficking that is still used in conversation.

<sup>268</sup> Penal Code, *supra* note 146, Art. 226-2(1).

<sup>269</sup> *Id.*, Art. 226-2(2).

<sup>270</sup> *Id.*, Art. 226-2(3).

<sup>271</sup> *Id.*, Art. 226-2(4).

<sup>272</sup> *Id.*, Art. 226-2(5).

<sup>273</sup> Penal Code, *supra* note 146, art. 227 (note the law also applies to those assisting individuals who have abducted or kidnapped another).

<sup>274</sup> Penal Code, *supra* note 146, art. 227(3).

<sup>275</sup> *Id.*, Art. 220.

		causing injury or death. <sup>276</sup>
<b>“Prostitution” by enticement or other acts<sup>277</sup></b>	Compelling another into prostitution through: 1) Fraud, deception, or using family relationship to force someone to engage in prostitution <sup>278</sup> 2) Coercion or violence <sup>279</sup>	Up to 3 years prison and/or a 100,000 yen fine.  *If the actor took, demanded, or extracted a promise to receive all or part of the proceeds of compulsory prostitution, up to 5 years prison and/or a 200,000 yen fine. <sup>280</sup>
<b>Loans and contracts to compel “prostitution”</b>	<ul style="list-style-type: none"> <li>• Advancing payment or providing other valuable goods in exchange for the other person engaging in prostitution,<sup>281</sup> or</li> <li>• Contracting to engage in prostitution.<sup>282</sup></li> </ul>	Up to 3 years prison and/or a 100,000 yen fine.
<b>Managing prostitution</b>	Putting another under one’s control, or in a place under one’s management, or making someone live in a designated place in order to carry out prostitution as a business. <sup>283</sup>	Up to 10 years’ prison and/or 300,000 yen.
<b>Regulations on restraining</b>	Demanding immediate and full	<ul style="list-style-type: none"> <li>• Local public safety committee</li> </ul>

<sup>276</sup> Penalties for the crimes of injury or death are compared with the penalty for this crime, with the heavier penalty applied. Penalties for injury are up to 10 years, and for death, with a definite term lasting a minimum of 3 years. *See* Penal Code, *supra* note 146, Arts. 204 and 205, respectively.

<sup>277</sup> Make sure enticement = 困惑

<sup>278</sup> Prostitution Prevention Act, *supra* note 70, Art. 7.

<sup>279</sup> *Id.*, Art. 7(2).

<sup>280</sup> *Id.*, Art. 8. Penalty is lighter for those who used their position as a family member to demand money earned from prostitution. *See Id.*, Art. 8(2).

<sup>281</sup> *Id.*, Art. 9.

<sup>282</sup> *Id.*, Art. 10.

<sup>283</sup> *Id.* Art. 12.

<p><b>employees who serve customers in certain establishments</b><sup>284</sup></p>	<p>repayment of unreasonably high debt as a condition for terminating employment.<sup>285</sup></p> <p>Holding the above employee's passport, driver's license or other personal identification.<sup>286</sup></p>	<p>can issue "necessary guidance"<sup>287</sup></p> <ul style="list-style-type: none"> <li>• Guilty of compulsion under criminal law. All or part of business operation can be halted for up to six months.<sup>288</sup></li> <li>• "Appropriate actions" must be taken when there is suspicion that the manager of such an establishment has violated the above prohibitions, or engages in the prostitution prohibitions listed previously in this section.<sup>289</sup></li> </ul>
<p><b>Harmful brokering</b><sup>290</sup></p>	<ul style="list-style-type: none"> <li>• A person who has carried out or engaged in employment placement, labor recruitment or labor supply by means of</li> </ul>	<p>Prison with work from 1-10 years, and/or 250,000-3,000,000 yen fine.</p>

<sup>284</sup> Law on Control and Improvement of Amusement Businesses, *supra* note 263, Art. 18-2. In most cases under this article, "serving customers" refers to establishments where an employee sits with the customer, provides alcohol, tobacco and otherwise provides company. Such venues have various names, such as "pubs" and "hostess clubs" among other names. Additionally, brick and mortar sexual entertainment venues (i.e. massage parlors, bath houses, and other services that include a sexual component up to but not including vaginal intercourse) are covered under the law. *See Id.*, Art. 2-11. For explanation of the definition of the types of adult entertainment mentioned above, *see See Fukuoka Prefectural Police, Basic Interpretations for Implementation of the Law on Control and Improvement of Amusement Businesses, 風俗営業等の規制及び業務の適正化等に関する法律等の解釈運用基準*, Art. 10(4)(9) (2011)(Japanese language).

<sup>285</sup> *Id.* Art. 18-2(i). More appropriately, the term can be translated as: "Placing a condition on an employee [who serves customers] that when they end their job, they must immediately repay all remaining debt, where it is clear from their ability to pay that the amount is inappropriately high." Such debts are governed by laws on interest rates, and such debts can be partially or entirely eliminated when found to be unlawful, e.g. when the contract violates public policy, or the debt was created through fraud or coercion. *See Fukuoka Prefectural Police, supra* note 289, art. 16(5)(2)(iii) (2011).

<sup>286</sup> Law on Control and Improvement of Amusement Businesses, *supra* note 263, Art. 18-2(ii).

<sup>287</sup> Law on Control and Improvement of Amusement Businesses, *supra* note 263, Art. 35-4(1).

<sup>288</sup> *Id.* Art. 35-4(2).

<sup>289</sup> *Id.* 18-2(2).

<sup>290</sup> This category does not have an official name in the law. *C.f.* Shokugyo Antei Hou [Employment Security Act], art. 63.

	<p>violence, intimidation, confinement or other unjust restraint on mental or physical freedom<sup>291</sup></p> <ul style="list-style-type: none"> <li>• A person who has carried out or engaged in employment placement, labor recruitment or labor supply with an intention of having workers do work harmful to public health or morals.<sup>292</sup></li> </ul>	
<b>Prohibition on Forced Labor</b>	An employer shall not force workers to work against their will by means of physical violence, intimidation, confinement, or any other unfair restraint on the mental or physical freedom of the workers. <sup>293</sup>	Prison with work from 1-10 years, and/or 200,000-3,000,000 yen fine.

### 3.4.3 Application of the law

Much of the data on how Japanese law is actually used is unavailable to the public. Interviews with police and prosecutors have yielded the following information.

#### Immigration law

The only available information on the immigration laws mentioned previously relate to visas for identified victims. While the vast majority of victims departed the country, the International Office for Migration (IOM) reported that from 2007-2010, of the foreign victims who did not return to their home countries, three received special residency status.<sup>294</sup>

#### Human trafficking law

In the first eight years (2005-2013) of this criminal provision's existence, prosecutors have reported

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<sup>291</sup> *Id.* art. 63(i).

<sup>292</sup> *Id.* art. 63(ii).

<sup>293</sup> Rodo Kijun Hou, [Labor Standards Act] Art. 5.

<sup>294</sup> The remaining either had valid spouse or dependent of Japanese national visas. IOM statistics, on file with author.



only eight convictions under the law.<sup>295</sup> The requirement to prove the transaction has been the primary cause for its lack of use. Additionally, one prosecutor interviewed reported that very little training or awareness of the law existed among prosecutors, and other interviews alluded to a similar lack of training, although the true scope of any existing programs is unknown. Complicating matters, one high court decision has placed a higher evidentiary standard upon the law, making its use less attractive.<sup>296</sup>

### Other laws

Information on which laws the traffickers or the brokers were prosecuted under is unavailable. However, the false imprisonment law has reportedly been used more frequently.<sup>297</sup> Among the human trafficking cases, a number of the other laws mentioned above have been used. For those found in sex work, brokers have been prosecuted for placing people into jobs “harmful to public morals,”<sup>298</sup> while the elements of forced labor inherent in forced work at snack pubs and even adult services would fall under the labor laws mentioned

### Analysis

Together, the laws described are theoretically broad enough to encompass most of the acts of trafficking that an individual on a spouse visa would encounter, whether it is force, fraud, coercion, or debt bondage, and regardless of the form of labor she is forced to engage in. However, the current legal structure amounts to a patchwork system. Some laws cover certain acts but not others, while evidentiary requirements among these laws vary. Investigators focused on trafficking must either build their cases piecemeal or else simply focus on one aspect of the act in order to obtain a conviction. At the same time, investigators focused solely on one or more of these crimes may fail to connect what they find with human trafficking.

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<sup>295</sup> Interview with Prosecutor’s Office, February 2013. Details of the cases cited are not publicly available. However, one researcher has compiled a list of cases reported in the news that approximate the cases prosecutors have on hand. See Yumiko Yahagi, REALITIES AND STRUCTURE OF HUMAN TRAFFICKING CASES IN JAPAN, FOCUSING ON 2005 ONWARD, 日本における人身取引事犯の実態と取り組み—2005年以降を中心に—, 19 Tokiwa Journal of Human Science 91, 92-93 (2010). (Cases examined showed seven instances of purchasing, and nine instances of selling, i.e. some cases, the purchaser was not charged). Note interviews with Prosecutors corroborated these cases, although their official case data reportedly differed somewhat, but not significantly from what Yahagi uncovered in newspaper searches.

<sup>296</sup> Tokyo Kotosaibansho [Tokyo High Ct.] Jul. 13, 2010, Hei 21(u) no. 992, 61 Tokyo Koto Saibansho (Keiji) Hanketsu Jihou 167. (Finding lack of evidence sufficient to prove “a condition where the [defendant] had sufficient psychological influence over [the victim] to control [their] will.”) For an analysis of the case, see Yuichiro Tachi, *supra* note 257, at 31. (Arguing that the victim’s subjective state was an inappropriate basis for determining whether an individual had placed another under their control, and that an objective analysis would be proper).

<sup>297</sup> Interview with Prosecutor’s Office, February 2013.

<sup>298</sup> See Nakasatomi, *supra* note, 66.

Such a system results in uneven enforcement, wildly varying penalties from case to case, and a far lower count of trafficking cases than what is actually prosecuted, simply because investigators may not identify a particular case, such as one involving unlawful capture and confinement, as potentially involving acts of human trafficking. This system requires extensive and ongoing training of local police, prosecutors and judges to ensure law enforcement is aware of and can utilize this system to address human trafficking crimes. However, in the absence of a set of laws focused on human trafficking, prosecution efforts will likely ad-hoc, rather than systematic. Lacking such a law, gathering relevant data to measure progress will also be difficult.

### 3.5. Victim Identification

*The prompt and accurate identification of victims lies at the heart of successful responses to human trafficking. By failing to identify trafficking victims, states deny victims the ability to realize their rights and the protections to which they are legally entitled and simultaneously allow traffickers to act with impunity.*<sup>299</sup> –UNODC

*The manner in which victims are identified has a direct impact on their awareness of assistance options and often, by implication, their willingness or opportunity to access this assistance.*

*[B]ecause investigations and prosecutions depend so heavily on victim cooperation, successful and effective identification is vital to the successful enforcement of anti-trafficking laws.*<sup>300</sup> –Nexus Institute

Victim identification is the most vital component of a country's anti-trafficking response. As a hidden crime, properly identified victims are often the criminal link to uncovering criminal organizations that sell human beings into exploitation. For law enforcement, victims can also be important allies in uprooting criminal networks.<sup>301</sup> Most importantly, however, proper identification is critical to ensuring those who have a right to victim protections can receive them.

In 2010, the Government's Task Force on human trafficking released guidance on victim

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<sup>299</sup> UNODC, *supra* note 191, at 141.

<sup>300</sup> Anette Brunovskis and Rebecca Surtees, Fafo/Nexus Institute, OUT OF SIGHT? APPROACHES AND CHALLENGES IN THE IDENTIFICATION OF TRAFFICKING IN PERSONS at 12 (2012).(*citing* Gallagher, A & P Holmes (2008) "Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the frontline". 18 *Int'l Criminal Justice R.* 318, 329. (2008)).

<sup>301</sup> While victims should not be required to cooperate, and in fact the traumatic experiences many have faced can be too extreme to render them willing or able to cooperate, those who do cooperate can lead to prosecutions of critical actors in a trafficking or smuggling network.

identification.<sup>302</sup> Unfortunately, while the document explains the importance of creating an environment conducive to identification, and the necessary responses once a victim is identified,<sup>303</sup> it does not explain *how* to identify a victim. In particular, it is silent on the indicators of trafficking, and does not reference internationally recognized methods of identification, such as those published by the IOM or UNODC.<sup>304</sup>

Currently, only police and the Ministry of Justice have the authority to identify victims. Prosecutors are reportedly involved in the identification process, and interviews with prosecutors bear this out. All practitioners interviewed stated that their department follows the Palermo protocol in identifying victims. However, the Protocol is an international law document and is thus too general to serve as a guide to on the ground identification. While police have stated that they do have identification procedures and criteria, they have not made them available to the public, citing fears that traffickers will use the information to better hide their activities.<sup>305</sup>

Neither Immigration officials nor prosecutors could point to official guidelines, citing that they make determinations on a “case-by-case” basis. This implies that identification may be heavily dependent upon the officer making the determination along with input from his or her immediate superiors. Additionally, while the IB and the Prosecutor’s office are national institutions whose staff are rotated throughout the country on a semi-regular basis, the police force has a more distinct local structure; the NPA sets policy, while actual policing is organized by prefecture, meaning that police awareness, training and response to human trafficking can vary considerably from jurisdiction to jurisdiction.

Given these considerations, and the central role of the MOJ in both immigration and prosecution, the

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<sup>302</sup> Inter-ministerial Liaison Committee on Human Trafficking (Task Force), Handling Cases of Human Trafficking (Measures for Identifying Victims), 人身取引事案の取扱方法（被害者の認知に関する措置）について, (2010) *available at* <http://www.cas.go.jp/jp/seisaku/jinsin/100623jian.pdf>. (Japanese language)

<sup>303</sup> *Id.* at 4-5.

<sup>304</sup> IOM, Handbook on Direct Assistance for Victims of Human Trafficking, *available at* [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published\\_docs/books/CT%20handbook.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/CT%20handbook.pdf) (includes chapter on victim interviews and screening); UNODC, Online Toolkit to Combat Trafficking in Persons, *available at* <http://www.unodc.org/unodc/en/human-trafficking/2008/electronic-toolkit/electronic-toolkit-chapter-6-victim-identification.html> (includes guidelines on identification, indicators, and screening checklists from multiple governmental and non-governmental organizations).

<sup>305</sup> Immigration authorities stated very general guidelines, but did not state that they had any concrete ones. Some prosecutors interviewed stated that they were unaware of any concrete procedures in their office. However, one long term legal expert on human trafficking in Japan has charged that prosecutors have stricter guidelines than police, and may reject positive determinations that police make. Yoshida Yoko, *Legal Options in Response to Victims of Human Trafficking in Japan*, Presentation at “Victims of Human Trafficking in Japan,” United Nations University, Tokyo, Oct. 6, 2012. (Presentation noted that prosecutors can override police investigators’ victim status determination. In interview following presentation stated that prosecutors seem to have stricter standards for positive victim identification.)

research for this report focused on immigration officials, who have direct jurisdiction over marriage migration, and with prosecutors, who are responsible for ultimately trying the cases. Additionally, the latter have been reported to have influence over police determinations of victim status, making their victim identification procedures particularly important.<sup>306</sup>

Lacking publicly available information on official identification procedures, Immigration officials and prosecutors were interviewed regarding the identification process generally. They were also shown case samples from a legal practitioner who has represented marriage migrants in the past to gauge the identification process.<sup>307</sup> The samples included six cases with various levels of detail that included some indicators of human trafficking.

Although most of the cases would require additional information to make a determination, one case provided clear indicators of human trafficking.

### **Case Sample: Woman deceived into fraudulent marriage**

*In 2003, a Filipino woman took lessons from an entertainment staffing agency in order to qualify for an entertainment visa and go to work Japan. One day a Filipino man operating a marriage brokerage business and a Filipino Pub came to the studio with a Japanese man searching for a wife. An audition immediately took place, the woman was selected, she married the Japanese man, and in mid-2005 went to Japan.*

*Upon entering the country, she was not taken to the husband's house, but directly to a Filipino pub, where she was told the marriage was fraudulent. A broker took her passport, she was not allowed outside, and was promised her freedom only after working for two years. Both the pub and the housing for the pub workers were in the same building. Unable to flee, she wondered every day why the police officers at the station across the street were not coming to help her.*

*Her salary was initially about US \$400 per month, with an increase of \$100 every three months. Working hours were about seven hours per day. After two years, (mid-2007) she was able to leave the pub, but the owner charged her \$36,000 for the visa renewals that he had previously obtained for her. Her boyfriend at the time to pay \$12,000 while she paid the remaining \$24,000 in monthly installments of \$1,000. Whenever*

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<sup>306</sup> *Id.*

<sup>307</sup> Interview with Fusae Oshita, Administrative Scrivener, Dec. 2012. Ms. Oshita has served clients in marriage migration issues for many years, and claims that some clients exhibit indicators of human trafficking. Lawyers and NGOs involved human trafficking issues, as well as experts at the IOM are familiar with and have vouched for work. These same individuals also found the case summaries Ms. Oshita provided to be believable, given their own experiences, although they could not vouch for the veracity of the claims that the clients made. were shown to multiple experts in the field, including NGOs, such as the Asian-Pacific Human Rights Information Center.

*her payments were late, the broker would call and threaten her with violence.*<sup>308</sup>

Like many actual cases, the following example is incomplete and raises questions. Ignoring whether the story above is true, as a fact pattern, it contains multiple indicators of human trafficking.<sup>309</sup> The marriage broker and the Japanese “husband” both recruited the woman, using false promises of marriage to convince her to come to Japan. Once inside the country, they transported her to the pub, where they harbored her either in the establishment itself or in the dwelling above it at other times. They prevented her from leaving by taking her passport, and prohibited her from quitting her job. Although there is no direct indication of threats of violence should she try to leave, her inability to do so during that time strongly suggests that those involved had a high degree of control over her. The broker’s threats during repayment also suggest that violence would have been possible before. Finally, even after leaving, she was forced to repay an exorbitant sum, and threatened with violence if she failed to do so.

However, no law enforcement officer who was shown this case stated it represented human trafficking. Immigration officials stated they would need additional information, and this may reflect a reticence on officers’ part to make a determination off the cuff. However, many prosecutors interviewed stated outright that they would not identify this individual as a victim. Responses included:

- If the person worked in Tokyo, she should have had friends whom she could have reached out to.
- She is not a victim, as she came of her own free will. The broker is an accomplice.
- If the police were just across the street, why didn’t she simply shout for help?
- She probably knew the marriage was false.
- Was she locked into her room when not working? This might impact the analysis.<sup>310</sup>

These statements reflect a filtering strategy where the victim’s actions are used to disqualify her from victim status. In more general discussions about victim identification, the perpetrator’s acts were generally weighed against these actions. In some cases, the former were not considered at all. Factoring these statements, as well as more general statements about identification led to five points that law enforcement appear to use in considering whether an individual should be designated as a victim.

1. *Did the individual claim that she was trafficked or else directly ask for help?*
2. *Did the individual come of her own will to Japan?*
3. *Where fraud, deception or coercion was uncovered, was it extreme?*
4. *Would the amount of money obtained be considered sufficient if the work had been performed in the*

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<sup>308</sup> *Id.*

<sup>309</sup> Note that victim identification does not require any court procedures and thus does not have to meet judicial evidentiary standards. Police and the MOJ set what constitutes sufficient evidence.

<sup>310</sup> In this case, the prosecutor was likely examining the case to determine whether it fit under unjust imprisonment. Interview with Prosecutors, December 2013.

*individual's home country?*

5. *Did the individual previously engage in prostitution?*

Given the lack of publicly available criteria, the potential for varying standards between local offices, and the likelihood these considerations are not explicitly mentioned even in internal documents, these criteria may not necessarily reflect the entire consideration process and may be the result of how the individuals interviewed would determine human trafficking, although the consistency of statements across interviews suggest that these criteria do hold to at least some degree.

### *Analysis*

The guidelines provided above amount to a very high bar to clear. Three of the five considerations are focused on the victim's acts, while only two<sup>311</sup> focus on the actions of the potential trafficker (whether a broker, employer, or other actor). An individual can thus disqualify themselves from victim status, regardless of the acts of the trafficker.

Palermo by contrast focuses on what one actor has done to another; the target's actions are not considered at all. Using the victim's actions as grounds for disqualification from victim status not only leads to under-identification, it provides perpetrators, particularly organized and professional traffickers, with a loophole to avoid responsibility for their actions.<sup>312</sup> The criteria is examined individually below:

#### **1. Did the individual claim that she was trafficked or else directly ask for help?**

First, victims who come forward are more likely to be identified.<sup>313</sup> This however rarely happens, as all law enforcement interviewed confirmed. However, it does not appear that police forces, the Prosecutors Office, or the Immigration Bureau have systems in place to proactively detect trafficking.

Traffickers are adept at ensuring their victims remain silent. Effective tactics of silencing victims include: threats or actual physical abuse against victims or their families, threats to withhold all payment, or warnings that police will not believe an illegal immigrant. The psychological trauma victims routinely undergo also makes it difficult for them to speak out.

While victims do not or cannot speak up for a variety of reasons,<sup>314</sup> those who do not or cannot escape

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<sup>311</sup> (numbers 3 and 4)

<sup>312</sup> If a trafficker can induce a victim to perform one of the disqualifying acts, prosecutors may be less likely to identify the person as victim.

<sup>313</sup> In fact, one prosecutor stated firmly that they would be very responsive in such cases. Interview with prosecutor, November 2012.

<sup>314</sup> See Brunovskis and Surtees, *supra* note 304, at 37-38. (Describing confusion and disorientation at time of identification, and language and cultural barriers as reasons victims do not come forward.)

will be unable seek law enforcement. For marriage migrants and other foreign victims, where the initial suspicion is that the individual is simply an illegal migrant, a lack of proactive identification procedures means they are likely to be arrested and detained pending deportation. Such treatment can further prove traumatic, and there is little likelihood such individuals would often speak up about their ordeals, particularly when they are not even aware that assistance may be a possibility. Perversely, while the Action Plan mandates informing victims of available services, the lack of information before identification may dissuade potential victims from stepping forward in the first place.

## **2. Did the individual come of her own will to Japan?**

*From the perspective of human trafficking, a person who has been bought or sold while on a fraudulent marriage is perhaps a victim of human trafficking, but from prosecutors' perspective, if she came of her own will, paid money to get into a fraudulent marriage, enter the country and work, she is an illegal resident and we will unfortunately only see her as a suspect. –Japanese Prosecutor<sup>315</sup>*

Among prosecutors especially, the question of whether an individual came of her own will is considered crucial in cases where the individual illegally entered or resided in the country. The act of entering illegally may expose the victim to criminal liability under domestic immigration law. However, the analysis of whether an individual committed a domestic immigration law violation and whether they have suffered an act of trafficking are separate considerations entirely, as Palermo does not focus on the actions of the perpetrator rather than the potential victim.<sup>316</sup>

In the cases examined, the victim's "decision" to migrate irregularly was ultimately an empty one, as fraud plays a key role in almost every instance. Traffickers do not tell the victim about the true nature of the work conditions, or that any debt bondage will take place. Victims' decisions in these cases were thus based on erroneous or incomplete information. Even in the rare case where fraud is not present, the coercion inherent in debt bondage, the seizure of passports, prevention from leaving their accommodations (which they may be forced to live in) or other limits on their freedom are sufficient means to override the will of the victim.

From a practical standpoint, examining the will of the victim establishes a dangerous loophole: traffickers, especially employers who can plausibly claim ignorance about a victim's fraudulent immigration status,<sup>317</sup> merely need to ensure their victims have broken immigration law in order to avoid prosecution for a human trafficking offense.

## **3. Where fraud, deception or coercion was uncovered, was it extreme?**

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<sup>315</sup> Interview conducted in 2013. Additional interview details withheld to protect source's identity.

<sup>316</sup> In fact, Palermo specifically mandates that the will of the victim is not considered where the means element is met, i.e. where force, fraud, deception or other listed means are used. Palermo Protocol, *supra* note 152, art. 3(b).

<sup>317</sup> See Section 2.2.8: Dangers for Irregular Migrants.

Law enforcement has readily identified clear cases of extreme fraud and abuse. For example, an individual suddenly charged US \$30k-\$50k for the trip is more likely to be identified as a victim of trafficking. Those who were confined or prevented from leaving, who suffered injuries, and/or who were forced to engage in prostitution and had neither done so before nor expected to do so upon arrival were more likely to be identified.

#### **4. Would the amount of money earned be considered sufficient in the individual's home country?**

Those who received some remuneration are less likely to be identified as victims. While extreme underpayment, one figure given was about \$100 per month, would qualify as an element of trafficking, an individual who receives remuneration at a level commensurate with what she could earn in her home country is reportedly less likely to be recognized as a victim.<sup>318</sup> In practice, this raises the bar for what constitutes sufficient exploitation for trafficking to a very high level. It also ignores the act of fraud that occurred, a key element in human trafficking.<sup>319</sup>

Prosecutors did however state that such activity violates Japanese labor law. However, even in such cases, a certain level of payment was likely to disqualify the victim from trafficking victim status. The result is that traffickers can avoid prosecution if they pay at least a minimal amount. Traffickers may already understand this fact and may advise their clients to pay at least a token sum.

#### **5. Did the individual previously engage in prostitution?**

Those who previously engaged in commercial sex work are reportedly far less likely to be identified as victims.<sup>320</sup> Interviews suggested a belief that such individuals may have been aware of the kind of work they were expected to do in Japan, and so could not claim to be victims. This stance is not uncommon in other countries, where sex workers are sometimes deemed to be at least partially responsible for their own exploitation.<sup>321</sup> Perceptive traffickers may thus either actively recruit sex workers or force an individual to engage in sex work before coming to Japan.

#### **“Filtering” of victims**

As shown above, the acts of the victim receive considerable weight in the identification process. These criteria result in a filtering process weeds out potential victims who are seen to be blameworthy or less

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<sup>318</sup> Interview with Prosecutor's Office, Dec. 2012.

<sup>319</sup> It stands to reason that, had the individual known that the actual amount of remuneration was roughly similar to what she would gain at home, then she would have no interest in going into considerable debt to migrate and work elsewhere.

<sup>320</sup> Interviews with Prosecutor's Office, December 2012.

<sup>321</sup> Studies of identification practices in Southeastern Europe for example noted that: “it is worrying that female migrants who have been abroad before, and possibly engaged in prostitution through trafficking or independently, were not considered eligible for assistance.” Brunovskis and Surtees, *supra* note 304, at 40.



deserving of protection. In particular, the separate crime of illegal entry often makes victims ineligible for identification. Note that such considerations are not unique to Japan, or indeed to human trafficking, particularly where the victims are female and/or foreign.<sup>322</sup>

Additionally, politics may play a role in hampering increased identifications. As mentioned in the previous section, much of immigration policy is focused on stopping illegal migration, and anti-trafficking policy shares this focus. Fears of political repercussions for granting victim status to those who may not qualify, or simply the political pushback against protections for irregular migrants, even if they were victims of human trafficking may play a part. Finally, the preamble to the 2009 updated Action plan claims that lower identification numbers after 2005 were a sign of the success of anti-trafficking efforts. A renewed increase in identified victims may invite criticism that the Action Plan has actually not been effective.

Finally, in deciding whether to rescind any criminal charges against the individual for violating immigration law, law enforcement will balance the exploitation they faced against the infractions they committed. In short, the more “innocent” the individual, the more likely she is to be identified as a victim and also not be charged with any legal violations.

#### *International Comparison—Taiwan*

The Taiwanese National Police Force has made public its identification criteria. A four page document that police are expected to use in the course of investigations, the document provides a simple procedure for making an initial determination. Critically, no consideration of the victim’s acts are included. While the document is less rigorous than the procedure that the IOM or UNODC have publicized, it provides guidance in the critical first stages of victim protection. While there are likely to be issues in terms of proper determination, including whether a determination actually ever is initiated, and how often incorrect determinations are made, the document is easy to follow and contains many of the key indicators for human trafficking. The public nature of the document enables both government and non-government actors to be on the same page, and to in theory debate further improvements to detection.

### **3.6. Findings and Recommendations**

**Finding #1: Law enforcement are aware of marriage migration as a potential route of trafficking and they have identified numerous victims who arrived on spouse visas. However, anti-trafficking policy repeats rather than compliments anti-smuggling policy, and focuses on detecting illegal entry rather than identifying victims.**

Both the NPA and IB, as well as other governmental bodies, have identified marriage smuggling as a route of human trafficking. Policies that link the two can receive at least some credit for nearly half of the trafficking victims identified being those on spouse visas.

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<sup>322</sup> This has also been termed a sifting process. See Brunovskis and Surtees, *supra* note 304, at 40. (“Noting that only the most ‘worthy’ or ‘innocent’ cases are identified and referred on for assistance.”)

However, the Action Plan over-emphasizes residency status and cracking down on illegal immigration, potentially at the expense of uncovering other tell-tale signs of human trafficking. While human trafficking through marriage migration will often involve fraudulent marriage, in some cases the husband in a legitimate marriage could himself be a trafficker. Additionally, the challenge of uncovering fraudulent marriages, particularly once inside the country, means that trafficking policies that mirror those focused on uncovering illegal immigration will be confined to the same scope of investigation and will miss indicators of trafficking beyond that are.

Progress reports on the Action Plan describe continued focus on illegal immigrants as the problem.<sup>323</sup> As with smuggling, victims of trafficking are the “product” that human trafficking organizations profit from. Policies that incentivize arresting and deporting illegal migrants, including those on fraudulent marriages, rob law enforcement of valuable information about trafficking rings, and enable both traffickers and their customers to continue operating with little risk of detection.

Furthermore, unlike smuggling, human trafficking can take place through legal channels. An individual can initially arrive on a valid visa only to be trafficked long after entry. A heavy focus on illegal immigration puts immigration authorities in danger of missing other warning signs of trafficking. Traffickers meanwhile are likely to notice this heavy focus and simply shift their victims to facially valid visas, such as spouse visas. Further, as victims can be forced to marry following entry, the review process for spouse visas within the country deserves particular scrutiny.

**Finding #2: Law enforcement is likely to identify cases of extreme exploitation as human trafficking, and have stated they are willing to help victims who come forward. However, identification powers are confined to law enforcement, criteria are very strict, and proactive and comprehensive detection is less developed.**

The few cases of human trafficking reported in detail by the police represent clear-cut cases of trafficking, where the victim was forced to enter illegally and/or faced horrific exploitation. In these cases, the victim was fortunate enough to escape or be found and was able to clearly relate her experiences. Such cases are the exception rather than the norm.

Even where victims may be able to report their abuse, the legal nature of their work or residency status can dissuade them from speaking, while threats by brokers on victims’ or their families’ lives may further prevent them from speaking to law enforcement, even during a raid. Police recently reported that they are making efforts to make questioning areas less psychologically pressuring, and to provide female interviewers to the extent possible where the victim is a female, among other efforts that would hopefully enable a victim to feel safe enough to speak up,<sup>324</sup> but law enforcement cannot rely on the victim’s initiative. As one expert noted:

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<sup>323</sup> Cabinet Office, *Action Plan to Combat Human Trafficking 2009—Follow Up*, 「人身取引対策行動計画 2009」フォローアップ (May 2013). (Japanese language).

<sup>324</sup> *Id.*

*Victims' physical and mental state post-trafficking can further complicate identification. Many victims...were frightened, traumatized, and disoriented, which hinders victims from openly sharing their experiences.*<sup>325</sup>

Complicating matters, police and prosecutors are not tasked with providing victim assistance. No matter how well trained, their position as law enforcement can dissuade some victims from seeking help.<sup>326</sup> Victim service provision comes from the Ministry of Health, Labor and Welfare, which has jurisdiction over the government's women's consultation shelters. In addition to domestic violence support, the Action Plan tasks the shelters with providing support to trafficking victims. In some cases, victims may seek shelter there without approaching law enforcement and without being officially identified; this is particularly true when victims first reach NGOs, who then refer them on to shelters. Requiring victims, either directly or indirectly to approach law enforcement to obtain victim status will prevent some from coming forward.

Furthermore, a lack of proactive comprehensive screening techniques, particularly among vulnerable populations in the entertainment industry, and among those identified to be on fraudulent visas, leaves many victims undetected, at risk of prosecution for immigration and other violations, and eventually deported. This not only increases their chances of revictimization, but may enable traffickers to re-send them to Japan via another route, erasing any work that law enforcement had done in finding the victim in the first place.

Finally, current identification criteria ensures that only a small percentage of victims will be properly identified. These criteria often focus on the victim's actions, rather than on the perpetrators, as stipulated in Palermo. Whether due to preconceptions about migrants generally,<sup>327</sup> the overemphasis on fighting illegal migration in current government policy, or political pressure to keep identification numbers low, the current strict criteria enables trafficking operations to continue business with a high degree of impunity.

**Finding #3: The current legal system gives prosecutors relatively few tools to prosecute trafficking.**

Law enforcement efforts are hampered by the limited set of legal tools available to prosecute acts of human trafficking. The very narrow definition of human trafficking under criminal law excludes a large number of cases. In practice, the requirement to prove selling or buying means that prosecutors will be unable to bring such cases in many instances. While other legal provisions can provide sufficient penalties for individuals convicted, these laws were not designed to address human trafficking, and in fact do not mention the crime. While they are sufficiently broad to capture the acts of human trafficking to one extent or another, and are often

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<sup>325</sup> Brunovskis and Surtees, *supra* note 304, at 37.

<sup>326</sup> Bad experiences with law enforcement in their own country, in Japan, or a simple fear of approaching law enforcement when they are aware their residency status is illegal can play a big part. This is true in other regions of the world as well. *See id.* at 38.

<sup>327</sup> Note however that prejudicial views of labor migrants, sex workers, and irregular migration in particular is not unique to Japan. The author's own experiences and research in the United States, as well as in Southeast Asia, found similar prejudices existed to varying degrees among law enforcement.

used in contexts where trafficking may be rampant, the facts of human trafficking do not always line up with evidentiary requirements in these laws. This can thwart prosecution of traffickers on the one hand, while law enforcement's natural focus on obtaining convictions may result in them collecting only the evidence necessary to convict for a particular crime, thus missing the additional details that could lead to identifying traffickers or their victims.

Although it is vital that law enforcement are vigilant for potential human trafficking across all of their investigations, and their identification of victims in various investigations show that police-level training is having a positive effect in uncovering victims, the lack of a robust anti-trafficking law complicates human trafficking investigations, forcing prosecutors to take a piecemeal approach to prosecuting human traffickers. The result is likely to be uneven enforcement, conviction and penalties across jurisdictions.

**Recommendation #1: Develop a trafficker and customer-focused counter-trafficking strategy.**

As with marriage smuggling, it is the actors who perpetrate human trafficking, and not those trafficked, who are the criminal actors. The Japanese government has recognized that human trafficking is an especially serious crime, and in addition to the terrible costs it visits on individual human beings, it is an important income stream for domestic and international criminal organizations, which can fuel additional criminal activity.

While uncovering illegal immigration can be a first step to identifying some forms of human trafficking, this approach should be a means to uncovering international trafficking networks, rather than an end in itself. This shift in focus would align anti-trafficking efforts with Palermo's emphasis on the perpetrators, and would incentivize law enforcement to focus more strongly on the root causes of trafficking in Japan.

**Recommendation #2: Develop a comprehensive set of human trafficking laws**

A comprehensive set of trafficking laws that explicitly state the definition of human trafficking, criminalize the acts specified in Palermo, and explicitly list predicate offenses, such as false imprisonment, rape, money laundering, and other crimes would empower law enforcement to investigate arrest and prosecute trafficking actors without resorting to a patchwork strategy of charges under a variety of separate laws. It also goes without saying that an increase in successful prosecutions will increase the risk of trafficking activity, lowering criminal organizations' ability to operate with impunity, and impacting their revenue streams.

**Recommendation #3: Formalize victim identification across agencies, consider identification specialists, and give identification power to the Ministry of Health, Labor and Welfare**

A unified identification process would ensure that identification is more consistent across agencies and across the country. The Action Plan rightly prioritizes information sharing,<sup>328</sup> and setting a common standard supported by sharing case determinations would allow a body of knowledge to accumulate and drive improvements in determination processes. Additionally, agencies may find it helpful to consider having

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<sup>328</sup> Cabinet Office, *supra* note 327, at 4.

specialists whose job it is to specifically identify trafficking victims. While this already exists within the IB,<sup>329</sup> the regular rotation of staff that is a hallmark of the Japanese civil service makes building expertise and institutional memory more difficult. Although a permanent position may be challenging in this system, some sort of longer-term specialist position may be helpful. Annual trainings are less useful for individual law enforcement who may only encounter potential victims rarely. Training sufficient for front line actors to notice red flags, and then pass those cases up would centralize and regularize the process. UNODC notes that specialists are critical in correctly identifying victims, and where irregular migration is involved, preventing the individual from being mistakenly identified as an illegal migrant.<sup>330</sup>

Finally, given the limitations that law enforcement naturally face in identifying victims, expanding identification power to the Ministry responsible for victim assistance will ensure that those who do not approach law enforcement can be identified and receive help. Additionally, this Ministry is under far less political and policy pressure to identify illegal migration, allowing it to better focus on victim identification. Although law enforcement and the MOJ may be reticent to share this power, an increase in victim identification would lead to additional victims rescued and additional information on criminal organizations in the long term.

**Recommendation #4: Publicize general victim identification criteria.**

Although police have voiced concern that public identification criteria would only aid traffickers, the fact is that such criminals are already largely able to avoid detection at this point. The low numbers of victims identified each year, less than 50 in a country of 120 million, means they currently face little risk of detection. Additionally, international standards are already in existence and are publicly available, even in Japanese.<sup>331</sup> Publicized standards can help NGOs who serve potential victims more productively request identification for clients, while enabling input within and outside the government to shaping and improving the identification criteria. This is particularly important as traffickers constantly work to hide any signs of their activities.

**Recommendation #5: Bring identification procedures into line with international standards.** The current list of standards outlined previously create numerous reasons to disqualify an individual from victim status, and bring a trafficking investigation to an abrupt halt upon disqualification. This has real costs for law enforcement; these standards allow traffickers to easily avoid detection. The lack of proper identification means that law enforcement loses access to valuable information the victim may have had, and the investigation never reaches the brokers or even the customers. By adopting standards more in line with Palermo, law enforcement will be far more likely to identify victims, be more likely to obtain victims' testimony in some cases, and be able to reach the traffickers more effectively.

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<sup>329</sup> Interview with Immigration Bureau, *supra* note 80.

<sup>330</sup> UNODC, *supra* note 191, at 142.

<sup>331</sup> See IOM, Handbook on Direct Assistance for Victims of Human Trafficking, *supra* note 308. (also available in Japanese).

## **Recommendation #6: Improve victim protections**

While victim services are outside the scope of this report, it is important to note that both prior to and after identification, victim support services are critical, both to the health and well-being of the victim, and to law enforcement in their investigation efforts. While they should not be required to, victims willing to cooperate and/or testify can make the difference between successfully prosecuting one or more actors in a trafficking ring, and seeing such actors continue to operate with impunity. The recommendations of the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children provide a list of critical supports that a victim protection law should provide.<sup>332</sup> Additionally, the example of Taiwan, which provides wrap-around services even for *suspected* victims provides an excellent example for policymakers to consider.<sup>333</sup>

### **4. The legal route to a spouse visa: procedures and vulnerabilities**

#### **Introduction**

This section dissects the process of obtaining a spouse visa, evaluating each step to determine the procedure's strengths against and vulnerabilities to exploitation by criminal organizations. The analysis considers both smuggling generally and human trafficking in particular. Recommendations for strengthening the process address not only the danger of smuggling but also to address human trafficking. As even legitimate marriage migrants may be trafficked after their entry, recommendations for improving identification and outreach are made as appropriate.

After the permanent residency and “fixed resident” visa, the “Spouse or Child of Japanese National” visa<sup>334</sup> (hereinafter spouse visa) provides one of the most stable forms of residence in Japan. So long as the marriage remains valid, and subsequent renewals are approved, the visa has no time limit, provides a nearly unrestricted right to employment, as well as a path to permanent residency and eventually citizenship.

Preventing human smuggling and human trafficking before a migrant enters the country is far more productive than attempting to uncover either crime after the fact. Additionally, effective pre-entry detection can identify those who are or who might be trafficked before they disappear into the country, pre-empting the horrific treatment they are bound to face. Prevention is also less resource-intensive than investigation efforts, as

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<sup>332</sup> The UN Special Rapporteur on Trafficking in Persons, Especially Women and Children recommended that Japan adopt victim protection laws that would provide for comprehensive assistance to victims of trafficking, including “through specialized shelters and assistance, including: psychological, medical, social assistance to be provided in the native languages of victims of trafficking; legal assistance to seek redress through judicial authorities; rehabilitation (recovering) programmes for victims to learn skills and be able to reintegrate into Japanese society; the possibility to assist victims for longer periods and grant longer residence permits with work permits; and appropriate budget to be allocated for these purposes.” Human Rights Council, *supra* note 234, ¶ 102.

<sup>333</sup> Human Trafficking Prevention Act [人口販運防制法], arts. 16, 17, 28, Zhonghua Minguo Xianxing Faigan Huiban, (Effective May 26, 2009) (Taiwan), *available at* <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=D0080177>

<sup>334</sup> Immigration Control Act, *supra* note 78, Appended Table II.

all spouse visa applicants are filtered through the same system. Finally, it cuts short any revenue that smugglers, traffickers and their customers were expecting.

A recent article from a major newspaper gives an excellent overview of how smugglers (and potentially human traffickers) have worked their way through the marriage migration system:<sup>335</sup>

*Eight people were arrested in connection with a marriage smuggling case involving Chinese women and multiple Japanese nationals who assisted in the operation. Subsequent investigations uncovered organized connections between Chinese and Japanese brokers. Japanese brokers searched for two taxi drivers to serve as husbands, while the Chinese side introduced women.*

*The taxi drivers, acting as husbands, obtained certificates of unmarried status from the Ministry of Justice, which they took with them to China. There, they met women who wanted to go to Japan. Taking pictures together as evidence of their marriage, they included the certificates of unmarried status, and submitted marriage registrations to the local government office. Upon receipt of a marriage certificate, the men would return home, where they would submit both the Chinese proof of marriage and a Japanese application for marriage registration at a local government office in Yokohama. Upon receiving a proof of Japanese marriage registration, they would obtain a certificate of eligibility which they would send to the Chinese women. Before leaving China, the women would pay the Chinese broker between 200,000-250,000 Chinese Yuan.<sup>336</sup> The husbands would receive approximately 1,000,000 Japanese yen through the broker. Afterwards, they saw their “husbands” only to renew their visas, to whom they paid an additional 300,000 to 800,000 yen.*

*-- Skillful fraudulent marriage’ Marriages registered in both Japan and China lead to immigration on spouse visas: Eight Suspects Arrested, Asahi Newspaper*

#### **4.1 Basis of Analysis**

This section will focus on spouse visa application procedures for those applying from outside of the country. Visa renewal, changing to and changing from a spouse visa will also be briefly examined. Throughout, the analysis will focus on the following points:

- 1) What checks are in place to ensure the reliability of documents required for application?
- 2) What role do the required documents play in detecting, deterring or preventing human smuggling or human trafficking?
- 3) To what extent does the process enable immigration or consular officers to directly interact with applicants and/or their Japanese spouse?

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<sup>335</sup> “Skillful fraudulent marriage’ Marriages registered in both Japan and China lead to immigration on spouse visas: Eight Suspects Arrested” Asahi Newspaper, [Japanese title] 6/29/2012. Translation by author.

<sup>336</sup> Exchange rate CITE.

The primary goal of the application process is to confirm the validity of a spouse visa application. First, unlike undocumented migration, fraudulently obtained visas are facially valid, making detection of human smuggling and human trafficking particularly difficult. Document integrity is important for preventing approval of fraudulent applications. Second, proper documentation requirements can play a role in either preventing or exposing indicators of human smuggling or human trafficking. Finally, in-person interviews in-person interviews allows direct contact with applicants, which offers better opportunities to identify indicators of smuggling or trafficking than a paper-based application allows. In particular, while criminal operators can prepare a facially valid paper-based application, they cannot take the place of applicants in interviews. Although any amount of coaching is possible, if done properly, interviews can uncover fraudulent applications and even save those who are destined for exploitation and abuse in Japan.

#### 4.2 Application process

Japan's immigration system offers three ways to apply for a spouse visa: 1) obtain a visa directly from the Japanese embassy or consulate in the foreign spouse's country,<sup>337</sup> 2) obtain a visa directly from the Immigration Bureau in Japan, or 3) apply for a Certificate of Eligibility (COE) for a visa, and then submit the certificate to the local Japanese embassy or consulate.<sup>338</sup>

The first two ways exist primarily for couples who both already reside in either the foreign spouse's home country or in Japan. For example, Japanese men who directly applied for a visa in Thailand are often businessmen stationed at their company's local office who met their future spouse while living in the country.<sup>339</sup> In the latter case, the foreign spouse is already present in Japan on a different visa, and seeks to change to a spouse visa.<sup>340</sup>

The third approach is the most common, and is the focus of this section. An overview of the application process for foreign spouses residing abroad is broadly laid out below.

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<sup>337</sup> Cases where the couple live in a third country are not covered in this report.

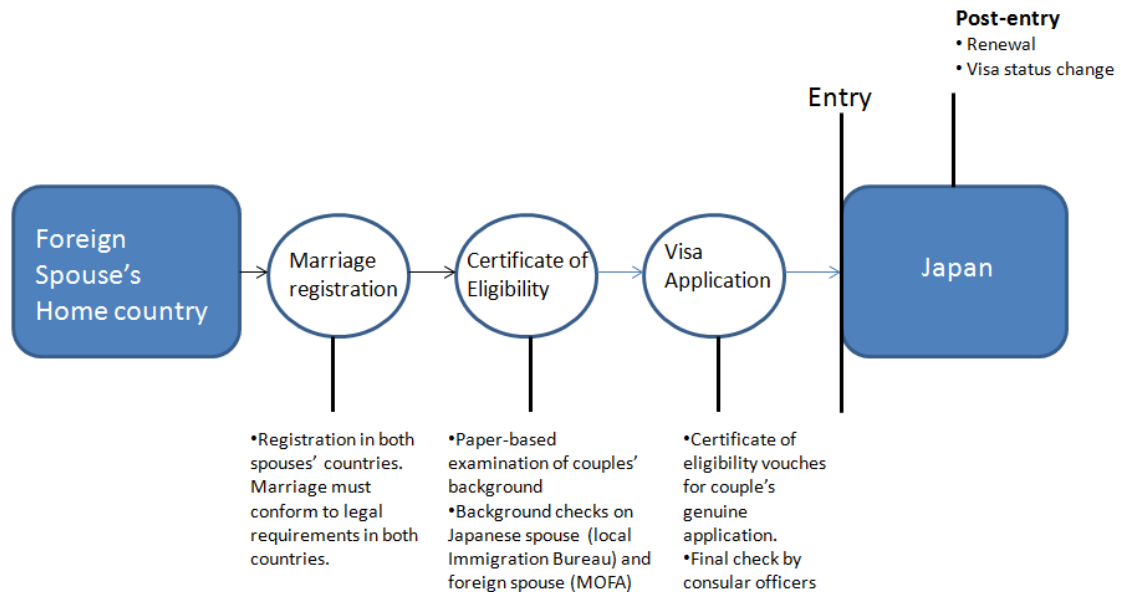
<sup>338</sup> For those spouses living together in either the sending or the receiving country, the certificate of eligibility is reportedly not required. Particularly where the couple can provide evidence of their relationship in the country of residence, either the Japanese embassy or the local immigration office in Japan can investigate both parties' backgrounds. Where that is not possible, particularly when the couple is currently living apart, a certificate of eligibility is generally necessary. Interview with consular official at Embassy of Japan in Thailand, May 2013.

<sup>339</sup> The consular bureau of the Japanese embassy in Thailand stated that the... Interview with consular officials at Embassy of Japan in Thailand, May 2013.

<sup>340</sup> This group can include those already married abroad and arrive in Japan on a tourist visa specifically to get married, as well as those who have lived in Japan for some time, for example as a student or worker, and are in the process of changing their visa status.



**Figure 4: The Spouse Visa Application Process**



Each of the major stages in the process is outlined below, beginning with marriage registration.

#### **4.2.1. Proof of Marriage—Marriage registration**

The Ministry of Justice (MOJ) requires that the marriage be valid in both partners' home countries. Proof of marriage must be no older than three months. It does not matter whether the couple obtains registration first in Japan or in the spouse's country. If the couple marries in Japan, the spouse must then submit the Japanese registration documents to her home government to obtain proof of marriage.<sup>341</sup> Among these documents are proof from the spouse's home country government that she is single and otherwise eligible to marry.<sup>342</sup> Should the couple marry outside Japan, the Japanese spouse may either submit an application for marriage with the local consulate, or submit the materials directly to his home municipality.<sup>343</sup> However, in most cases, the husband is not required to submit the materials in person, either at the embassy or at his local

<sup>341</sup> Proof of marriage from the spouse's home country prevents those already married in their home country from falsely representing that they are single. The requirement appears to have been made at the Ministerial level, and is listed as a requirement at Japanese embassies in the four main sending countries of Mainland China, South Korea, the Philippines, and Thailand. *See e.g.* Embassy of Japan in China, *available at* [http://www.cn.emb-japan.go.jp/consular\\_j/konin\\_j.htm](http://www.cn.emb-japan.go.jp/consular_j/konin_j.htm).

<sup>342</sup> As polygamy is prohibited, proof of non-married status is required. *C.f.* Civil Code, art. 732 (polygamy prohibited). For an example of the form used to prove non-married status, *see e.g.* City of Kobe, Records Division, Proof of Eligibility to Marry, *available at* [www.city.kobe.lg.jp/life/registration/shomeisho/19\\_yokengubi.html](http://www.city.kobe.lg.jp/life/registration/shomeisho/19_yokengubi.html) (Japanese language).

<sup>343</sup> As the consulates ultimately send the materials to Japan for inspection, the process can take 1-2 months in some cases, *see id.*, meaning that directly submitting the materials once the Japanese spouse has returned to Japan is much faster. *See e.g.* Embassy of Japan in China, *supra* note 345.

office; a properly designated legal representative can do so. The exception is the consular offices in the Philippines, where the Japanese spouse must obtain the certificate in person.

### *Analysis*

Marriage registration represents the first point of interaction with the applicants, and thus the first opportunity to detect fraud or indicators of trafficking. However, with no requirement to apply in-person, the registration process is vulnerable to fraud. On the other hand, Japan's requirement of registering the marriage in both spouse's countries provides the opportunity for two different governments to independently confirm the marriage is genuine. It also prevents criminal organizations from freely recruiting those already married.

That said, with the exception of South Korea, the rule of law in Japan's main sending countries is such that document integrity is a concern. Criminal organizations can certainly arrange fraudulent marriage certificates, or in the case that they first register in Japan, fraudulent proof that the Japanese "spouse" is single and eligible to marry. This safeguard is thus most effective in preventing double-marriages, but it is dependent on accurate record keeping, official documentation that is resistant to forgery, and a lack of corruption.

#### **4.2.1.1. Recommendation: In-person registration, training to identify indicators of smuggling and trafficking, and increased information outreach to applicants [Cite reread this section]**

Requiring both partners to appear for registration provides an opportunity for government officers to detect the presence of fraudulent or coercive activity. Ideally, registration would take place at the Japanese embassy or consulate in the foreign spouse's country. Consular staff can receive specialized training in distinguishing genuine from forged host country documents, and could be trained to identify indicators of fraud or trafficking. As professional smugglers and traffickers will shift marriage applications to either foreign embassies or domestic registration offices depending on which is more vulnerable to fraud, requiring in-person registration at only one of these two locations would remove the choice and would force them to send fraudulent husbands abroad, which is time consuming and more costly.

An additional advantage to requiring marriage registration in the foreign spouse's home country is that at present, marriage registration officials in Japan have reported that if the paperwork is in order, they must process the registration.<sup>344</sup> These public officials cannot be expected to be experts in counter-smuggling or trafficking activities, minimal training on indicators of fraud or trafficking would improve officials' ability to identify red flags and then pass them on to the appropriate authorities.

However, this requirement would place a significant burden on the vast majority of legitimate couples. One compromise would be to require in-country registration for couples where foreign spouses are from "hot

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<sup>344</sup> One government worker responsible for marriage registrations stated "We only confirm that there are no problems with the paperwork as submitted. We do not deal with the actual conditions of the marriage." Asahi Newspaper, "Man and Woman Receive Suspended Sentence for Submitting Fraudulent Marriage and Birth Certificates", 男女被告に猶予判決 偽の婚姻届と出生届提出した罪, Jun. 6, 2013.

spot” countries that primarily send smuggled and trafficked victims to Japan. With the exception of Thailand, these countries are no more than a few hours’ plane trip from Japan. Additional provisions to allow in-Japan registration for such foreign spouses on non-tourist visas who have lived in Japan for a certain length of time should also be considered, as these individuals are more likely to be legitimate marriage migrants than people recently recruited by smugglers or traffickers.

#### **4.2.2. The Certificate of Eligibility**

For cases where the couple do not yet reside in Japan together, applicants must first obtain a COE. The certificate represents a two-step process that involves both the MOJ (via the Immigration Bureau) and the Ministry of Foreign Affairs (MOFA). Authority to determine whether a foreign national may legally enter the country rests with the Ministry of Justice, which is tasked with enforcing immigration law. MOFA is responsible for issuing visas, and has developed a set of internal regulations to determine who may receive one.<sup>345</sup> The COE streamlines the application process,<sup>346</sup> as a valid certificate acts as the MOJ’s sign-off on the application. While it does not obligate MOFA to issue a visa, it shifts the burden of proof to the government to deny either visa issuance or landing permission later.<sup>347</sup> Application procedures are divided into general procedures for all applications, and slightly varying requirements based on the country of origin.

##### **4.2.2.1. COE application materials**

Applicants must submit their applications to the local immigration office in Japan either in person,<sup>348</sup> through a legal representative,<sup>349</sup> or through a family member residing in Japan.<sup>350</sup>

Along with the form itself, applicants must submit<sup>351</sup>:

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<sup>345</sup> These regulations are not publicly available.

<sup>346</sup> “While it would be best for consular officers who are responsible for approving visa issuances to decide whether the evidence is in line with provisions stipulated under the status applied for...a large amount of relevant evidence, particularly about the relevant parties and institutions, is often in Japan...the officer would need to send the materials to and request the relevant authorities in Japan to carry out the investigation. This would ultimately take much time and effort. Given the available knowledge, information, and ultimate authority of the Minister of Justice to determine whether the application for landing matches the requirements of the visa status being sought, there was merit to creating Certificate of Eligibility.” Kosuke Ikuta et al., *Commentaries on The Immigration Control and Refugee Recognition Act 2012* at 95-96, (Koichi Kodama et al, eds.) (Gendai Jinbun Sha Pub.). (2012)

<sup>347</sup> *Id.* at 97.

<sup>348</sup> Regulations for Implementing the Immigration Control and Refugee Recognition Act, 出入国管理及び難民認定法施行規則、Art. 6-2.

<sup>349</sup> *Id.* art. 6-3.

<sup>350</sup> *Id.* Appended table 4.

<sup>351</sup> Ministry of Justice, “Application for Certificate of Eligibility,”在留資格認定証明書交付申請, *available at* <http://www.moj.go.jp/ONLINE/IMMIGRATION/16-1.html>, *accessed* Aug. 26, 2013.

1. A copy of the Japanese national's family register showing proof of marriage.<sup>352</sup>
2. Proof of marriage issued by the foreign spouse's home government.
3. A questionnaire form, detailing specific personal information about the couple.
4. 2-3 pictures of the couple together.
5. A copy of the Japanese national's certificate of residence, showing all individuals who live at that residence.
6. The Japanese national's personal identification card.
7. Proof of Japanese national's payment of taxes
8. Additional materials as requested by the IB.

While the application is entirely paper-based, either the Immigration Bureau or consular officers can request the Japanese or the foreign spouse to appear for an interview.

#### **4.2.2.2. The Questionnaire**

This document requires applicants to detail their history together, and is one of the key sources for determining whether a suspicion of smuggling or trafficking exists. Relevant sections include:<sup>353</sup>

##### **1. Background of the couple's relationship leading up to marriage**

The exact date and where the couple first met, whether they met through an "introduction," and a detailed accounting of their relationship up until their marriage. Pictures, letters, and records of international phone calls are also suggested for additional proof.

##### **2. Whether someone "introduced" the couple**

Regardless of whether the introduction was through a friend or a broker, the applicant must fill out the introducer's name, address, birth date and contact information, as well as the relationship that each of the spouses has with the person who introduced them. Where the introduction occurred through a broker, the name of the brokerage firm must also be included.

##### **3. Language ability**

This includes common language spoken, each spouse's native language and their partner's ability to speak it. Where the foreign spouse indicates Japanese language ability, they must explain their history of Japanese language study.<sup>354</sup>

##### **4. Marriage ceremony**

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<sup>352</sup> If the register does not contain information on the marriage, proof of submission of an application of marriage with the Japanese government must be provided. Proof of such application must not be older than 3 months. Ministry of Foreign Affairs, "Application for Certificate of Eligibility," available at <http://www.moj.go.jp/ONLINE/IMMIGRATION/16-1.html>.

<sup>353</sup> Ministry of Foreign Affairs, "Questionnaire," available at <http://www.moj.go.jp/content/000007383.pdf>. (Japanese language)

<sup>354</sup> Where the couple is not able to communicate in a common language, they must explain how they communicate. If they use a translator, the translator's name, nationality, and address must be included. *Id.*, sec. 3.

Where the couple has already held a ceremony, the date, location, presence of specific family members and total number of participants are required.

**5. Marriage history**

This includes whether the participants were previously divorced or widowed, and how long the previous marriage lasted.

**6. Previous visits to each other's countries,** along with dates of travel.

**7. Foreign spouse's deportation history from Japan, if any.**

**8. Names and contact information for both spouses' family members,** including parents and siblings, and who among these people knew about the marriage.

Following submission, the application undergoes a two-stage process. It is first sent back to the Immigration Bureau in Japan, where the Japanese spouse's background is investigated. Should the Agency determine that further investigation is required, it may request more information from the Japanese spouse, or request that he appear for an interview. The guidelines for appearance are not published, and may not be explicitly established within the agency; rather it may depend on the decision of the investigating officer and/or his superiors.

Where the investigation turns up no issues, the process shifts back to the spouse's home country, where the Japanese consular office investigates the foreign spouse's background. Again, the consular officials have the power to request additional information or that the foreign spouse appear for an interview. However, as MOFA officials, consular officers do not enjoy the powers of investigation that the Immigration Bureau does. MOFA officials reported that this limits their ability to investigate the spouse's background.<sup>355</sup> While officials have reported that they receive information on some brokers and criminal organizations, and may be able to obtain some information from the host government, this level of information flow is relatively passive, and dependent on cooperation with outside actors.

### **Analysis**

The questionnaire takes the place of a mandatory face-to-face interview, although the information it contains may lead to a request for an interview with either spouse. The document's level of specificity does create a useful barrier to more casual attempts at smuggling or trafficking. While the specificity of the questions have raised concerns about the couple's privacy, particularly given that domestic spouses are not required to give such information,<sup>356</sup> the questionnaire serves to root out clearly fraudulent marriages. For example, calls to the Japanese spouse's family can act as a check against Japanese entering a marriage fraudulently. However,

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<sup>355</sup> Note however that in at least one case (Thailand) the consular officer interviewed was seconded from the Immigration Bureau. However, as his post is within the Ministry of Foreign Affairs, his investigative powers would be limited to that ministry. Interview with consular officer, Embassy of Japan, Bangkok, Thailand, May 2013.

<sup>356</sup> See Nobuki Fujimoto, *Marriage Brokerage and Human Rights Issues*, *supra* note 35, at 11.

where a Japanese national has no family, or else does not speak with them, such information will not be helpful.

Overall the document would theoretically require a fair amount of work for smugglers and traffickers to effectively fabricate. However, much of the information will be difficult to substantiate. The couple's relationship background, the presence or lack of a third party introduction, and cases where the applicant states that much of the relationship was conducted abroad or over the internet may not be independently verifiable. While neither the Immigration Bureau nor MOFA publicize their guidelines for application examinations, competent smuggling operations will have enough experience and information to know the nature and quality of information necessary to obtain approval, and what is needed to avoid requests for in-person interviews.

As a result, the questionnaire provides an initial screening method to capture more blatant attempts at fake marriage, but as a paper document, professionals can simply fabricate the entire application. Applicants can either claim they met through a "friend" or simply met by coincidence, and where a broker actually was used (for example where a broker engages in both legitimate international marriages as well as marriage smuggling), the broker can simply claim they believed the couple to be genuine. As noted below, brokers in the foreign spouse's country are particularly difficult for Japanese law enforcement to investigate, as they usually operate outside of Japanese jurisdiction. At best, law enforcement can simply hope that when fake marriages or human trafficking is uncovered, they are lucky to find the same broker's information on multiple applications. The number of brokers uncovered in Japan is small, and most are Japanese. Foreign brokers outside of the country are rarely, if ever caught.

These shortcomings highlight the challenges immigration inspectors face in detecting fraudulent marriages, let alone human trafficking, when depending on paper-based applications. Professionals can prepare these materials in advance, and as Japanese staff rotate posts on a 1-3 year basis, criminal organizations will be able to amass far more experience than any individual inspector can. Furthermore, the lack of on the ground information regarding brokers and human trafficking impedes government efforts to target limited resources in problem areas.

#### **4.2.2.3. Regional comparison: Taiwan's spouse visa system [grab the English version of the regs]**

Taiwan's system offers several very useful policy options. Starting in 2008, the government introduced mandatory, in-person interviews for all international marriages between Taiwanese and spouses from selected countries.<sup>357</sup>

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<sup>357</sup> Flor Wang, *Interviews Help Reduce Mixed Marriages of Convenience: Officials*, TAIWAN NEWS, Apr. 06, 2009. Guidelines for interviews can be found at Taiwan Ministry of Foreign Affairs, "Guidelines for the Ministry of Foreign Affairs and Diplomatic Missions of the Republic of China (Taiwan) Regarding Interviews with Foreigners Applying for Entry into Taiwan on the Basis of Marriage to ROC Citizens," Order Bu Shou Ling Er Zi No.0996800492 (2010) (on file with author).

For example, Vietnamese brides and their potential Taiwanese husbands must register their marriage together at one of the local Taiwan Economic and Cultural Offices (TECO) in Vietnam.<sup>358</sup> Tourist visas are reportedly difficult to obtain for Vietnamese nationals, and those who enter on a visiting family visa are not allowed to marry while in Taiwan.<sup>359</sup> An agent of the Household Registration Office may investigate false marriages and enlist the aid of relevant authorities in the investigation.<sup>360</sup>

The mandatory in-person interviews had an immediate effect. In 2008, Taiwan refused 35% of applicants at the Hanoi TECO office, a substantial increase from previous years.<sup>361</sup> In-person interviews were seen as a major success in rooting out fraudulent marriages.<sup>362</sup>

Additionally, Taiwan's system directs much of the marriage visa traffic to TECO offices abroad. This enables a very small number of offices focus on applications, ensuring an accumulation, at least in theory, of expertise and institutional memory, while ensuring that the more generalist practitioners in domestic immigration and marriage registration offices are not faced with international marriages from "hot spot" locations.

However, it is not clear how many of these would have resulted in human trafficking. Taiwan's immigration policy has been criticized for focusing more on preventing irregular migration than in ensuring safe channels of immigration.<sup>363</sup> Some reports indicate the government views women looking to marry in order to work in Taiwan as participating in fraudulent marriages.<sup>364</sup>

#### 4.2.2.5 Recommendations

##### 1. Introduce in-person interviews at consular offices in "hot spot" source countries.

The instances of fraudulent marriages, and the prevalence of identified trafficking victims who entered

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<sup>358</sup> See Regulations Governing Marriage Registration at Household Registration Office [戶政事務所辦理結婚登記作業規定] art. 3(3), Department of Household Registration, Ministry of the Interior (2007) (Taiwan) available at [http://www.ris.gov.tw/ch1/eng\\_09712\\_mar1.doc](http://www.ris.gov.tw/ch1/eng_09712_mar1.doc) (English), [http://www.ris.gov.tw/version96/ris\\_law\\_007.html](http://www.ris.gov.tw/version96/ris_law_007.html) (Chinese Traditional) [hereinafter Regulations on Marriage Registration].

<sup>359</sup> Interviews with Dr. Melody Chia-Wen Lu, Research Fellow, Asia Research Institute, National University of Singapore, interviews by phone from UNIAP, Bangkok, Thai. (Jun.-Jul., 2010). However, one anecdotal pattern of brokered marriage involves bringing a woman into the country on a visiting family visa, performing the matchmaking and then going through marriage registration once they return to Vietnam. *Id.*

<sup>360</sup> Regulations on Marriage Registration, *supra* note 362, art. 5(4).

<sup>361</sup> Flor Wang, *supra* note 361.

<sup>362</sup> *Id.*

<sup>363</sup> Interviews with Dr. Melody Chia-Wen Lu, Research Fellow, Asia Research Institute, National University of Singapore, interviews by phone from UNIAP, Bangkok, Thai. (Jun.-Jul., 2010).

<sup>364</sup> Danièle Bélanger et al., Ethnic Diversity and Statistics in East

Asia: 'Foreign Brides' surveys in Taiwan and South Korea, 2833 ETHNIC & RACIAL STUD. 1108, 1114 (2010).

on spouse visas highlights the need for more personalized examinations of spouse visa applications. Regulations that establish mandatory in-person interviews for nations that produce a high level of Japan-bound brokered marriages, fraudulent marriages, or trafficking victims on marriage visas should be introduced. Specially trained staff will be far more effective at uncovering illegal activity in a face-to-face meeting than they can through a paper-based examination. The process also decreases brokers' ability to control the application process, as the actual participants must appear. Although coaching by the broker is always a possibility (see Taiwan), the interviews erect a higher barrier to criminal activity, driving up the cost of illegal activity. Note that this will not prevent such activity entirely, but will act as a greater deterrent.

Taiwan's prohibition of those on certain temporary visas applying for spouse visas once in Japan provides an effective way to channel all applications to consulates and embassies who can then develop a more specialized knowledge in the field. While some exceptions should be allowed in exceptional cases, the policy would prevent smugglers and traffickers from attacking marriage migration from the side-route of a temporary visitor status. This is especially worth consideration in light of the more liberal regulations on tourist visas now available to certain Southeast Asian countries, including Thailand.<sup>365</sup> Again however, the cost to the majority of legitimate marriage migrants must be considered, and shaping the regulations to have the least impact on them as possible should be a high priority.

Finally, an in-person interview gives consular officials the opportunity to examine the individual for indicators of trafficking. As many migrants are not aware of the danger of their situation, or worse may be facing coercion to remain silent, interviews that employ proactive detection methods can help officials identify potential cases of trafficking before the victim reaches Japan. Even where such indicators cannot be detected—in some cases, trafficking may not actually occur until after a victim is passed off to others inside Japan—the consular official can still provide the interviewee information about potential dangers as well as contact points domestically. The National Police Agency for example already prints anti-trafficking pamphlets in multiple languages, and these should be given to foreign interviewees. Although traffickers are likely to take such items from the victim, an initial notification can alert migrants to potential exploitation, and possibly remediate fears about approaching law enforcement if the need arises. Note that such information also goes beyond helping the individual in question; as a new member of their expatriate community in Japan, the migrant may well be in a position to help others from her country should she become aware of a potential trafficking situation.

In-person interviews of course are more costly than paper-based reviews, particularly in one-time set-up costs. The structure and content of the interviews are also vital to their success. A study of Taiwan's existing program can provide valuable information in crafting a process appropriate to Japan. The interview process itself needs to be crafted carefully in order to ensure that the process is no more invasive than it needs to be, and that the questions are geared to not only finding fraud, but also coercion and other signs of trafficking. A

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<sup>365</sup> Mizuho Aoki, *Relaxed Visa Program for Southeast Asian Visitors Starts*, Japan Times, Jun.26, 2013. (visa requirements waived for tourists from Thailand and Malaysia, multi-entry visas for Filipino and Vietnamese tourists).



pilot project at one or more of the most heavily visited embassies in the key sending countries would be the best way to test any new programs.<sup>366</sup>

Finally, the cost to legitimate couples will not be insignificant. Thus, ensuring that those who want to marry can undergo the interview at a stage where they will likely already be in the country is important. Requests for multiple appearances by the Japanese spouse could be prohibitively expensive, so any necessary follow-up interviews should be allowable within Japan.

## **2. Improve source country information by increasing cooperation with sending country governments, relevant NGOs and similar receiving governments.**

The international nature of marriage smuggling and human trafficking mean that law enforcement must rely on cooperation with sending and transit countries to effectively combat transnational organized crime. Given jurisdictional limitations, detection efforts can benefit from stronger information exchanges with both the host government in the sending country, and with NGOs that support migrants and victims in both sending and receiving countries.

NGOs serving victims in the source country or in Japan are often privy to otherwise unobtainable information about criminal organizations. However, their first priority is to serving and protecting victims. Law enforcement must build trust with these organizations by demonstrating the benefit to victims of cooperation, and by making credible assurances that the victim's safety and immediate needs will be met in any cooperation with law enforcement. At the same time, NGOs can benefit from stronger ties with law enforcement, as the latter can alert these organizations of potential victims found, and help secure protection for victims who are threatened by their former brokers or employers.

Additionally, destination countries that share similar source countries can benefit from information sharing. Japan's source countries also send migrants to the United States, Australia, and some European countries, among others. These nations face similar concerns about misuse of marriage migration, and, depending on their consular staffs, are each likely to have information useful to all. This is particularly true in the event that brokers and/or traffickers are discovered to work in multiple countries. Understandably, political and diplomatic considerations may make information sharing difficult. In these cases, an inter-governmental agency, such as the UNODC, INTERPOL, or another similarly situated organization could facilitate information sharing between embassies, while observing political and diplomatic sensitivities.

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<sup>366</sup> Perhaps the most difficult aspect will be avoiding the often unconscious biases that consular staff in all countries can have towards believing their own nationals. Traffickers and smugglers may rely upon such biases, and it can inevitably lead to overlooking key indicators of illegal activity, such as fraudulent marriage. At the same time, while some foreign nationals willingly go along with smugglers, trafficking victims often do not know what will befall them until after they have entered the country. Suspicions towards marriage migrants, particularly those from less developed countries, can easily lead officials to take superficial signs of the victim's willingness to mean there is no sign of force, fraud or coercion.

### **4.3 From certificate to visa issuance**

While the COE is not the final step in obtaining a visa, it is in practice often the last close check of an applicant's background. Upon receipt, the spouse submits the COE, along with a visa application, marriage registration and other documents to the local Japanese consular office. While this provides an additional opportunity to scrutinize the visa application again, and officers have stressed that the embassy is under no legal obligation to issue a visa, the system is set up to prevent a second and time consuming check.<sup>367</sup> As such, it is difficult to believe that many additional cases are caught at this point.

This step does however provide another point of interaction with the applicant. Where they do not do so already, consulates should prominently display information about human trafficking,<sup>368</sup> numbers to call or text in Japan, and should proactively mention briefly and hand out pamphlets in multiple languages to those applying for such visas.

### **4.4. Entering the country**

By this point, the clear imperative will be to ensure that information on human trafficking is once again available. Officials at the Immigration Bureau have claimed that information about human trafficking is made available somewhere visible at international airports, such as at Tokyo (Narita and Haneda), Osaka, and others, but during the author's personal trips into and out of the Japan, no such materials were ever visible either at immigration checkpoints or other points between leaving the plane and exiting the secure section of the airport.

In addition to training front-line staff about the signs of smuggling and trafficking, making similar materials available is vital. Proactive distribution for first time entrants could occur as immigration officers hand the immigrant their new residency card.<sup>369</sup> The goal again is to ensure that both potential victims and other immigrants and/or travelers from the same country are aware of potential danger, and have the opportunity to obtain information. Obviously, many victims will lose these documents and may not even have access to a telephone, but even for these individuals, the repeated message that the government is there to help may lessen their fear about going to the authorities should they encounter trouble.

### **4.5. Post-arrival—Additional opportunities for detecting fraudulent activity**

Identifying smuggling and human trafficking post-arrival is considerably more difficult. As mentioned

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<sup>367</sup> Note that this is not a criticism of the government's efforts to streamline the application process, which is beneficial to the overwhelming majority of applicants who are attempting to enter the country legitimately. *See* Kosuke Ikuta et al., *supra* note 350. Instead, policies that require in-person interviews for certain hot spot countries would provide extra scrutiny where needed without scrapping the expedited system for other visa applicants.

<sup>368</sup> It is important that the information describes trafficking rather than simply using the phrase as most who migrate are unfamiliar with the term.

<sup>369</sup> Handing out materials in the migrant's native language can also help avoid alerting potential traffickers or other middlemen of the document's contents.

in the section on human smuggling, those on fraudulent marriage visas can assemble the trappings of a legitimate marriage, thwarting detection even during home visits. This is true whether the migrant is already on a spouse visa or is attempting to change from another visa status to a spouse visa. Application requirements in both cases however provide another opportunity to detect human smuggling and human trafficking. The following sub-section examines both applications, and includes a comparison with the requirements for visa renewal in Taiwan. Recommendations for improving detection of criminal activity are included for each form of application.

#### **4.5.1. Visa Renewal**

Spouse visas can be renewed indefinitely. Initial and renewal terms can be set at 6 months, 1 year, 3 years, or 5 years.<sup>370</sup> While there is no published guidelines for length of time, IB officials have reported that they set the time based on the holder's country of origin and personal information. Repeated renewals reportedly result in longer periods of validity. Renewal simply requires filling out a renewal application form, copies of the Japanese spouse's family registry and resident card, along with their passport. However, while the renewal must be made in-person, a face-to-face interview is not required,

##### **4.5.1.1. International Comparison: Renewal in Taiwan**

As a point of comparison, spouses from Southeast Asian countries immigrating to Taiwan first receive a six-month visa.<sup>371</sup> They must return home to their country to renew it, at which time they receive a one-year residency permit.<sup>372</sup> This permit may then be renewed in Taiwan. A return trip to the foreign spouse's home country provides an extra level of scrutiny on foreign marriages. Additionally, it can provide an avenue of escape for trafficked victims, and those in bad marriages, although clearly determined criminals and bad husbands can continue to control the victim's movement during the renewal process. Worse yet, if the husband or his family does not allow the wife to return home, she becomes an illegal resident.

Taiwan's visa renewal requirements for certain nationalities merits some consideration. On the one hand, it can provide an important means of escape for those in exploitative situations. On the other hand, it represents a significant cost for the migrant, particularly where they are already indebted to brokers for the initial trip. As such, the move may actually increase debt bondage among some populations. However, the mandatory return may increase the cost of smuggling, incentivizing criminal organizations to send their charges elsewhere. The additional interview in the spouse's home country also presents another hurdle for smugglers to get through. The end result may be a decrease in smuggling and trafficking to some extent, but with the remaining flows pushed even further underground. This is a cost-benefit analysis that officials would need to consider carefully.

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<sup>370</sup> 出入国管理及び難民認定法施行規則平成 24 年 10 月 24 日, Appended Table II. English translation needed.

<sup>371</sup> Hong-Zen Wang, *supra* note 40, at 720.

<sup>372</sup> *Id.*

#### **4.5.1.2. Recommendation: Establish face-to-face interview procedures, consider Taiwan’s system for specific countries.**

In addition to considering the advantages and drawbacks of Taiwan’s system, visa renewal provides an additional opportunity to uncover irregular migration, and particularly human trafficking. Face-to-face interviews for spouses from source countries that often send smuggled and trafficked migrants would enable immigration officials to better detect criminal activity and identify potential victims of human trafficking or other forms of exploitation. At the same time, it gives potential victims an opportunity to speak away from the watchful eye of their “spouse” or the broker who accompanied them. It is also another opportunity for government officials to give migrants information about where to obtain assistance in their language if and when they or someone they know needs it. Again, such information may be confiscated, but even a brief explanation by officials can empower those in exploitive situations to seek help and to educate those who are in a position to help. Of course, this information is not a replacement for proactive identification procedures, but it plays an important role in empowering those closest to criminal and particularly exploitative activity.

#### **4.5.2. Changing to a spouse visa—procedures for those already residing in Japan**

Beyond marriage migrants, Japan accepts other short-term and long-term foreign nationals, as well as an increasing number of those on tourist visas. While the procedure remains similar to what is described in previous sections, reports from immigration officials suggest that those seeking to change their visa status to spouse visas face more strict scrutiny than those who apply in their country of origin. What a higher level of scrutiny implies is not clear but the concern for increased scrutiny is well-founded. Reports of fraudulent marriages between those whose previous visa has or will soon expire have appeared not infrequently in the media. Additionally, the government has recently relaxed visa requirements for tourists from certain Southeast Asian countries, creating concern among some within the Immigration Bureau that a portion of these tourists will seek out brokers in an effort to secure a marriage partner and the accompanying visa.<sup>373</sup>

##### **4.5.2.1. Recommendation: replicate overseas application mechanisms.**

Mandatory in person interviews for applicants from “hot spot” countries is as vital as those recommended for overseas applicants. Otherwise, smugglers and traffickers would simply shift from embassy to in-country spouse visa applications. Budget concerns for in-person interviews, while real, should not be overwhelming: a total of 8,104 Chinese spouse visas for brides were approved in 2011, representing about 22 applications per day. As many of these were conducted outside of the country, the actual number of applicants inside the country should be much lower. Proper questions, designed to root out smuggling and particularly to identify indicators of trafficking should be prioritized. As described in Sections 2 and 3, while the immediate goal is to detect such irregular migration, the ultimate goal of the interviews is to uncover information about smuggling and trafficking rings, rather than simply stopping irregular migration. Victim identification,

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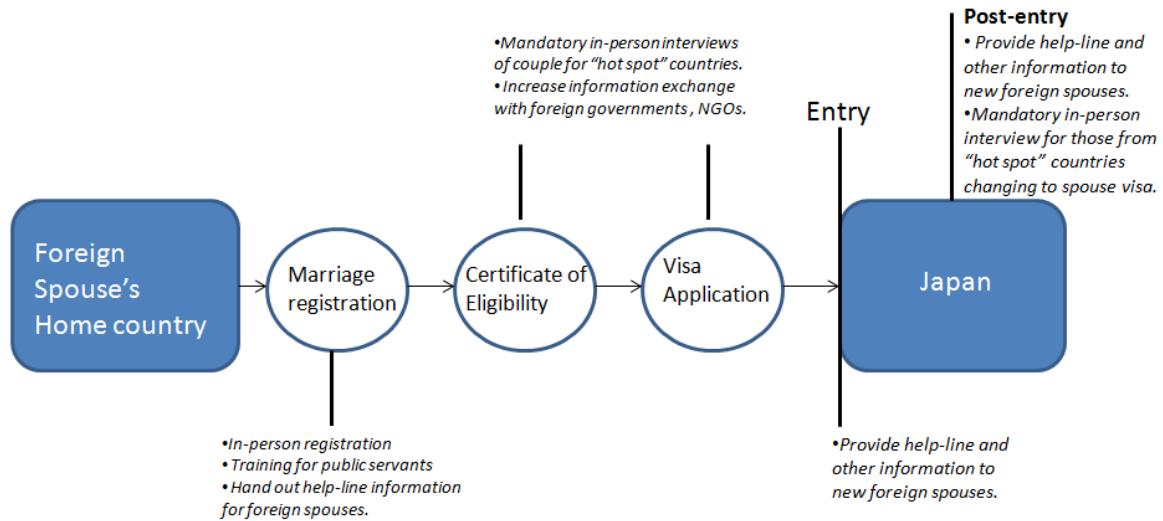
<sup>373</sup> Interview with Immigration Bureau officers, June 2013.

particularly at a stage where the individual may not have been victimized yet, is especially important, as prevention saves the individual from horrific treatment, and deprives criminal organizations of an income source.

#### 4.6 Recommendations for strengthening the spouse visa application process

This section collects the recommendations made previously. Should they be implemented, the application process would be updated as below:

**Figure 5: Recommendations for strengthening the spouse visa application process**



**Recommendation #1:** *In-person marriage registration for “hot spot” source countries, training to identify indicators of smuggling and trafficking, and increased information outreach to applicants.*

Those who handle marriage registration are currently tasked with simply making sure that the applications are facially valid. However, as the first opportunity for direct contact, these officials are in a position to notice indicators of smuggling or trafficking. Requiring in-person registration for those from “hot spot” countries prevents criminal actors from entirely controlling the process. Even basic training on the key indicators of smuggling or trafficking can increase identification, which is particularly important for those migrants already or about to face exploitation. Additionally, as criminal organizations rely on migrants’ ignorance about where to turn for help if they are abused or trafficked, proactively providing information in the applicant’s language will decrease those vulnerabilities and improve the chances that victims not identified may be able to get assistance later on. Even where migrants do not face such situations, the increased awareness raising that the materials provide may lead to identification of human trafficking by those in the immigrant’s community.

**Recommendation #2:** *Introduce in-person interviews at consular offices in “hot spot” source countries.*

In contrast to marriage registration staff, visa application inspectors are best equipped to carry out in-person interviews. Again, for cases where the foreign spouse is from a “hot spot” country, mandatory in-person

interviews of both spouses removes smugglers' and traffickers' direct control over the application process. Although the interview process must be properly crafted to ensure that legitimate couples are not falsely screened out, and that the rights and dignity of both the foreign and domestic spouse are respected, a process properly structured can be far more effective in identifying indicators of smuggling or trafficking.

**Recommendation #3:** *Increase cooperation with outside groups, including NGOS, and other receiving countries to improve gathering on the ground information in hot spot countries.*

National sovereignty complicates Japanese law enforcement and consular efforts to directly conduct investigations in source countries. This is particularly problematic where brokers in the source country were involved in matching the couple. Information sharing with those NGOs that do have on the ground information is an important way to leverage limited consular resources. Additionally, criminals in Japan's "hot spot" countries send smuggled migrants and human trafficking victims to other countries, including South Korea, the United States and other developed countries. In addition to direct cooperation with these hot spot countries' governments, information sharing among receiving countries' consular officers can amplify information gathering efforts, benefiting all, and promoting better cooperation on attacking this aspect of transnational organized crime.

**Recommendation #4:** *Establish face-to-face interview procedures, consider Taiwan's system for specific countries.*

Visa renewal is one of the few set opportunities for immigration officials to touch base with marriage migrants. In-person renewal with a mandatory interview for spouses from hot spot countries can provide not only an opportunity to uncover criminal activity, but to also provide a chance to identify victim of exploitation or human trafficking. While the need for mandatory interviews after the first renewal should be studied, a separate meeting at the first renewal would be most helpful. Appropriate interview questions calibrated at identifying indicators of smuggling or trafficking, along with again providing information on local help resources can lead to some victims eventually coming forward, and to educating the foreign community about human trafficking.

**Recommendation #5:** *Post-entry: replicating overseas application mechanisms.*

For those changing their visa status to a spouse visa, the procedures should be identical to those recommended for applications made at embassies abroad. For spouses from hot spot countries, those seeking to change from another visa status to a spouse visa should undergo the same in-person interviews that those who apply abroad at Japanese embassies do.

## **Conclusion**

The spouse visa application process is the first line of defense against both human smugglers and human traffickers. Japan and other destination countries must balance their nationals' (and permanent residents') interest to be united with their spouses against criminal organizations' attempts to smuggle and even

traffic individuals through this route. While these two interests are not necessarily mutually exclusive, overly-strict regulations can yield diminish results in anti-crime while threatening to prevent citizens and other residents from living in their own country with their foreign spouses.

At present, the system provides some barriers to criminal exploitation via dual-country marriage registration requirements, a detailed questionnaire and other background materials, separate investigations of both spouses, and investigators' powers to call either participant in for an in-person interview. While the opportunities for detection decline considerably once migrants have arrived in the country, visa renewal and visa change application requirements give immigration inspectors an additional opportunity to interact with marriage migrants. These procedures do not appear to prevent legitimate couples from applying or renewing their visa.

At the same time, Japan's spouse visa process has room to institute additional safeguards and detection processes. As marriage smuggling statistics, and the prevalence of trafficking victims who arrived on spouse visas attests, the current process is still vulnerable to criminal exploitation. The main recommendations made focus on maximizing the opportunities that face-to-face interaction provides, including enabling government officials to better identify indicators of smuggling or trafficking, while also providing an opportunity to proactively reach out to applicants and provide information that could be helpful, if not lifesaving, further down the road. The recommendations are collected together below for reference:

### **CONCLUDING OBSERVATIONS: SECURING THE MARRIAGE MIGRATION ROUTE FROM CRIMINAL ORGANIZATIONS**

International marriage has created migration routes that tie Japan with countries throughout East and Southeast Asia. Along with South Korea and Taiwan, these migration routes serve as the main driver for international marriage brokers and the ancillary services that the business needs to match individuals from across the region. Despite some recent dips in marriage migration to Japan, the long-term need for immigration locally, and the increasing gender imbalances seen in wealthier parts of the region mean that this migration, and particularly marriage brokers, will continue to be a growing phenomenon in the region. While the benefits that marriage migration brings to both nations and local communities are many, international criminal organizations can also exploit the route for their own ends.

Human smuggling patterns in Japan mirror the relative migration flows from its four major source countries. Smuggled migrants, almost all women, largely come to meet the demand in the lower end of Japan's service sector for unskilled or sexual work. Japan's government, and particularly its law enforcement arms, are well aware of these patterns. Policy and other public documents released by the government describe the role of fraudulent marriage as a revenue source for criminal organizations, and law enforcement have made cracking down on fraudulent marriages a priority. Unfortunately, these efforts focus mostly on identifying and deporting the migrants smuggled on spouse visas. Brokers, employers, mafia and other actors in the smuggling operations are only occasionally identified, with very little information on the deeper workings of these activities available. Even where smugglers are prosecuted, the legal system does not provide specific anti-smuggling provisions to

properly hold them accountable. Tried under the same law as those who are smuggled, perpetrators in practice face no more than a 2-year prison sentence. Those who profit most from human smuggling can thus do so with minimal risk of capture.

The lack of available information and research on human trafficking means that comparatively few conclusions can be drawn about the overlap with marriage smuggling. Under-identification of victims is a critical issue, particularly of trafficked victims from two of Japan's major source countries. On the ground research by domestic sources is sparse or outdated, further complicating efforts to estimate the scope of the crime overall, let alone in one migration stream. However, what information does exist shows marriage smuggling to be a clear route for trafficking foreign victims.

The government has developed national-level policy to combat human trafficking, but no individual office or mechanism is responsible for promoting implementation or evaluating progress. Additionally, this policy strongly focuses on anti-illegal immigration, creating a blind spot to trafficking that occurs through legal migration, and incentivizing law enforcement to uncover irregular migrants as an end purpose rather than as a first step to uncovering trafficking operations. The legal system also hampers investigators by providing only a very narrow human trafficking criminal statute, forcing law enforcement to use a patchwork of various laws in order to bring traffickers to justice. Without a comprehensive trafficking law, investigators risk overlooking acts of human trafficking, or being unable to properly hold a trafficker to justice, due to the facts of a case not meeting the particular evidentiary requirements of a tangential law.

Complicating matters, national policy provides no guidance for identifying human trafficking victims. With both policy and law (and likely political pressure) incentivizing law enforcement to apprehend irregular migrants, the current identification criteria, as deduced by interviews with prosecutors, is incredibly strict and does not conform to the Palermo protocol. Many victims are thus likely misidentified simply as smuggled migrants and deported, exposing them to revictimization and depriving law enforcement of potentially vital information about the criminal organizations that imported and exploited the victim.

As a case study step-by-step examination shows that the spouse visa application process contains several vulnerabilities to exploitation by criminal organizations, but also offers opportunities for increased examination of applicants, leading to better recognition of indicators of human smuggling and human trafficking. In-person contact lessens smuggler's control of the process, and if properly structured, can lead to better identification of smuggling or trafficking. Prevention is significantly less expensive than investigations after the fact, and identifying migrants who already are or who may be vulnerable to exploitation can save them from horrific treatment. In-person contact with the applicant at several points also enables officials to provide information about the dangers of exploitation and trafficking, and where they can get help once inside the country.

Finally, the recommendations made are designed to better focus government resources on the actors behind both crimes, while increasing consideration for those who are smuggled or trafficked. The hidden nature of this crime means that law enforcement more often than not first encounter the objects of the business, the migrants smuggled and/or trafficked, and not those who made their presence in Japan possible. These



organizations benefit most when policy and legal responses target the migrants, and are all too happy when an investigation ends only in the migrant's deportation. These recommendations are neither simple nor complete fixes, and will in some cases require significant political will to accomplish. The challenges Japan faces in this area are not unique to the country, and like elsewhere, require adjusting current practices to keep pace and overtake the changing tactics that criminal organizations employ. Otherwise, criminal organizations will continue to profit from low-risk, high-reward operations that threaten the country's control over its borders, fund crime at home and abroad, and result in sometimes horrific treatment for those who come to satisfy the domestic demand for low-skilled, expendable workers.