

Implementing Treaty Obligations to Combat Human Trafficking: The Japanese Law Reforms of 2005

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Abstract

Throughout the twentieth century international organizations attempted to address human trafficking. As the trade increasingly became associated with transnational organized crime, the UN responded by creating a global legal framework, namely the *Convention Against Transnational Organised Crime* and three supplementary Protocols, one of which was the *Trafficking Protocol*. In 2002 Japan signed the *Trafficking Protocol*. The Japanese Government maintained that existing laws fulfilled its international obligations. At the same time reports identified Japan not only as a major destination for the trafficking of women for sexual exploitation, but also as a country lacking an adequate legal framework to combat the trade. In 2004 the Japanese government published an 'Action Plan of Measures to Combat Trafficking in Persons' which outlined the reforms necessary for it to meet its international obligations. Legislation was passed in 2005 aimed at providing a comprehensive framework to combat the increasing problem of human trafficking for sexual exploitation into Japan, ensuring the government implemented its treaty obligations.

I. Introduction

Human trafficking is a worldwide problem that international organisations have attempted to address since the early part of the twentieth century. The League of Nations dealt with the issue in the context of the so-called white slave trade.¹ The League later addressed the specific topic of trafficking in the *International Convention for the Suppression of the Traffic in Women and Children*² and the *International Convention for the Suppression of the Traffic in Women of Full Age*.³ Additionally, in 1926, the League passed the *Slavery, Servitude,*

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1 In 1904, under the auspices of the League of Nations, an International Agreement on the Suppression of the White Slave Trade was concluded. This was followed by the 1910 *International Convention for the Suppression of the White Slave Trade Traffic*, opened for signature on 4 May 1910, 211 Consol. T.S. No. 20 (entered into force 8 February 1913).

2 *International Convention for the Suppression of the Traffic in Women and Children*, opened for signature 30 September 1921, 9 LNTS 416 (entered into force 15 June 1922).

3 *International Convention for the Suppression of the Traffic in Women of Full Age*, opened for signature on 11 October 1933, 150 LNTS 431 (entered into force 24 August 1934).

Forced Labour and Similar Institutions and Practices Convention.⁴ The International Labour Organisation ('ILO'), which enshrined principles against forced labour in its 1919 Constitution and later adopted the *Convention (ILO No. 29) Concerning Forced or Compulsory Labour*⁵ in 1930, complemented the abovementioned work carried out by the League. These early attempts at combating slavery and trafficking were followed by the United Nations ('UN') in some of its first legal instruments.

Article 4 of the *Universal Declaration of Human Rights* ('UDHR') states that no one 'shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms'.⁶ The UN proceeded to address the issue of slavery in more detail in 1956 when it adopted the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*.⁷ In the interim between the UDHR and the *Supplementary Convention on the Abolition of Slavery* the UN recognised that a more specific aspect of the slave trade needed to be addressed by international law, namely the movement of humans across national boundaries for the purpose of sexual exploitation. Accordingly in 1949 the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*⁸ was approved by the UN and subsequently came into effect in 1951. Although not expressly linked to human trafficking, the *1957 Convention (ILO No. 105) Concerning the Abolition of Forced Labour*⁹ added to the protection framework.

Later UN legal instruments moved away from the prevention of specific activities (such as slavery, forced labour, and prostitution) towards a more general humanitarian approach aimed at protecting the human rights of victims.¹⁰ However, it was not until the 1990s that the international community recognised that human trafficking, like drug

4 *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*, opened for signature on 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927). Japan was not a signatory to these international instruments.

5 *Convention (ILO No. 29) Concerning Forced or Compulsory Labour*, opened for signature on 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932). Japan ratified this Convention in 1932.

6 UNGA Resolution 217A (III) (1948), art 4.

7 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature on 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957).

8 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, opened for signature on 21 March 1950, 96 UNTS 271 (entered into force 25 July 1951).

9 *Convention (ILO No. 105) Concerning the Abolition of Forced Labour*, opened for signature on 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959).

10 *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1967) ('ICCPR'); *International Covenant on Economic Social and Cultural Rights*, opened for signature on 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature on 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature on 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('CERD'); *Convention on the Rights of the Child*, opened for signature on 28 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature on 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').

trafficking, was a transnational crime organised by international criminal gangs.¹¹ Providing a global response to such a challenge through international law resulted in the *UN Convention against Transnational Organised Crime* ('*Organised Crime Convention*'),¹² adopted by the General Assembly ('GA') of the UN in 2000.¹³ The *Organised Crime Convention* was supplemented by the following three Protocols: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ('*Trafficking Protocol*');¹⁴ the *Protocol against Smuggling of Migrants by Land, Sea and Air* ('*Smuggling Protocol*');¹⁵ and the *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* ('*Firearms Protocol*').¹⁶ Collectively the *Organised Crime Convention*, the *Trafficking Protocol* and the *Smuggling Protocol* contextualised human trafficking as a human rights issue. Their aims were to increase international cooperation and encourage nations to develop their domestic law so as to prevent trafficking, protect those who are trafficked, and prosecute traffickers.

Japan became a member of the UN in 1956. Later it became a signatory to the six major international human rights law instruments.¹⁷ For many decades it was not a destination country for immigration, asylum or trafficking in persons, but with economic stability and growing economic success, that situation changed. During the 1980s Japan became a destination country in all three categories.¹⁸ Its rigid migration policies together with restrictive immigration and asylum laws initially prevented the international community identifying Japan as a major destination for irregular migration and trafficking. Furthermore, as a major donor to humanitarian aid and assistance programmes, Japan was perceived by the international community to be a full and responsible participant.¹⁹ Until recently these two factors combined to obscure Japan's

11 Mary M. Kritz, Lin L. Lim & Hania Zlotnick (eds), *International Migration Systems: A Global Approach* (1992); Janie Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts' (1998) 11 *Harvard Human Rights Journal* 65; Donna M. Hughes, 'The "Natasha" Trade: The Transnational Shadow Market of Trafficking in Women' (2000) 53 *Journal of International Affairs* 625; Ryszard Piotrowicz, 'Irregular Migration Networks: The Challenge Posed by People Traffickers to States and Human Rights' in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan & Erika Szyssczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004); Tomoya Obokata (ed), *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (2006) Chapter 1.

12 *United Nations Convention against Transnational Organised Crime*, opened for signature on 12 December 2000, 2225 UNTS 275 (entered into force 29 September 2003).

13 UNGA Resolution 55/25 (2000).

14 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 November 2000, (entered into force 25 December 2003) ('*Trafficking Protocol*'); UNGA Resolution 55/25 Annex II (2000).

15 *Protocol against Smuggling of Migrants by Land, Sea and Air*, opened for signature on 15 November 2000, (entered into force 28 January 2004) ('*Smuggling Protocol*'); UNGA Resolution 55/25 Annex III (2000).

16 *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, opened for signature 31 May 2001, (entered into force 3 July 2005) ('*Firearms Protocol*'); UNGA Resolution 55/255 (2001).

17 ICCPR, ICESCR, CAT, CERD, CRC, & CEDAW, above n4. A full list can be found in Ministry of Foreign Affairs of Japan, *Diplomatic Bluebook 2005* (2005) available at [194] <www.mofa.go.jp/policy/other/bluebook/2005/index.html> accessed 6 May 2008.

18 Mike Douglass & Glenda S Roberts (eds), *Japan and Global Migration: Foreign Workers and the Advent of a Multicultural Society* (2003).

limited domestic implementation of international legal obligations, particularly in relation to human trafficking.²⁰

Japan is now considered a major destination country for the trafficking of humans, in particular the trafficking of women for sexual exploitation.²¹ In this regard it is not alone since human trafficking is a worldwide problem from which almost no country is exempt.²² Nevertheless, a government's response to international legal obligations in incorporating them into national law, may not only act as a measure of the efficacy of humanitarian legal instruments but may also serve as a measure of the seriousness with which the international legal framework is viewed within a national context. Although national law determines the status and force of law that treaty obligations are given, some caution needs to be exercised since the impeccable *de jure* implementation of a country's international legal obligations is no guarantee that those obligations will be fulfilled in practice. Thus, whilst an examination of a national legal framework may contribute to an evaluation of a country's response to a particular issue addressed by international law, it does not necessarily measure its *de facto* implementation. Accordingly, part of that examination requires consideration of whether a country, in this case Japan, has merely sought to meet its international obligations through formal revision of national law, or whether genuine attempts have been made to fulfil the purpose of those obligations (namely by putting a stop to trafficking).

From the late 1990s onward a number of reports identified Japan as a country that did not fully comply with minimum international standards aimed at combating human trafficking.²³ In 2004 the Japanese Government published an 'Action Plan of Measures to Combat Trafficking in Persons' ('2004 Action Plan').²⁴ This set out a programme of reforms focused on proposed changes to the domestic law. In 2005, important changes to the law came into effect and established the foundation for the significant progress that

19 UN High Commissioner for Refugees ('UNHCR'), *Government of Japan – UNHCR Donor Profile and Donor History* (January 2007) <www.unhcr.org/partners/PARTNERS/3b9f63177.html> accessed 6 May 2008.

20 The Periodic Reports that the Japanese Government are required to submit under the six major human rights conventions have resulted in highly critical observations by the various committees, in particular the Human Rights Committee. The last Periodic Report submitted under the ICCPR was in 1997. Human Rights Commission, *Fourth Periodic Report of Japan*, 69th session, UN Doc A/54/40, 21 October 1999. The next report was due in 2002 but has yet to be submitted. See also Yuji Iwasawa (ed), *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (1998) at 7–11; Meryll Dean, *Japan: Refugees and Asylum Seekers* (February 2006) <www.unhcr.se/Pdf/Position_countryinfo_papers_06/Japan_refugees_asylumseekers.pdf> accessed 6 May 2008.

21 US Department of State ('US Dept of State'), *Trafficking in Persons Report* (2001–2006) <www.state.gov/g/tip/rls/tiprpt/> ('TIP Report') accessed 6 May 2007; UN Office on Drugs and Crime ('UNODC') (eds), *Trafficking in Persons: Global Patterns* (2006); International Organisation for Migration ('IOM') (eds), *Trafficking in Women to Japan for Sexual Exploitation: A Survey on the Case of Filipino Women* (1997); Human Rights Watch ('HRW') (eds), *Owed Justice: Thai Women Trafficked into Debt Bondage in Japan* (2000); International Labour Office ('ILO') (eds), *Human Trafficking for Sexual Exploitation in Japan* (2004); Organisation of American States ('OAS') (eds), *Rapid Assessment Report: Trafficking in Persons from the Latin American and Caribbean (LAC) Region to Japan* (2005).

22 UNODC, above n21.

23 IOM, above n21; HRW, above n21; ILO, above n21; US Dept of State, above n21; OAS, above n21.

24 The Ministry of Foreign Affairs of Japan ('MOFA'), *Japan's Action Plan of Measures to Combat Trafficking in Persons* (December 2004) <www.mofa.go.jp/policy/i_crime/people/index_a.html> ('2004 Action Plan') accessed 6 May 2008.

Japan is currently making towards providing a legal framework aimed at combating trafficking in persons.

The purpose of this article is to consider the impact of international human rights law in assisting Japan in implementing its obligations to combat human trafficking. The international legal framework and the law reforms in Japan aim to combat all forms of human trafficking. However, since the vast majority of those trafficked into Japan are women brought into the country to work in the sex industry, this article will focus on that topic.²⁵ There will initially be an examination of the international and domestic legal frameworks in part one of this article, which will be followed by an analysis of the challenges presented by Japan's ratification of the *Trafficking Protocol* in part two. The article will then critically assess the recent law reforms in Japan, and will conclude with an evaluation of the likely impacts that these reforms will have on tackling human trafficking for exploitation at a national and international level.

2. Japan's International and Domestic Legal Framework

Trafficking in persons involves a serious infringement of an individual's human rights.²⁶ So enormous is the scale and seriousness of human trafficking that there are those who argue that it is now capable of being viewed as a crime against humanity.²⁷ Moreover, if the trafficking takes place in a situation of armed conflict it is capable of being treated as a war crime.²⁸ As a signatory to the major human rights instruments that condemn human trafficking, Japan has accepted express obligations in international law to take steps to circumvent the practice, punish perpetrators, and protect those who fall victim to this transnational trade. Article 98(2) of the *Japanese Constitution* states that the 'treaties concluded by Japan and established laws of nations shall be faithfully observed'. Whilst the theoretical primacy of international law is acknowledged as overriding domestic law, in practice the observance of international law norms, together with their implementation and enforcement in national law and domestic courts, is problematic.²⁹ In human rights litigation the Japanese courts 'are generally reluctant to adjudicate on the basis of international human rights law'.³⁰ Instead Japanese courts will often restrict their interpretation by avoiding international human rights law, relying instead on Japanese constitutional provisions.³¹ Thus, without carrying out a detailed analysis of the

25 UNODC, above n21; IOM, above n21; HRW, above n21; ILO, above n21; US Dept of State, above n21; OAS, above n21.

26 *Informal Note by the United Nations High Commissioner for Human Rights*, UN Doc. No A/AC.254/16 (1 June 1999); *Report of the Secretary General on Trafficking in Women and Girls*, UN Doc. No E/CN.4/2003/74 (20 January 2003). The Japanese Government has also acknowledged that 'trafficking in persons constitutes considerable abuse of human rights' in The Ministry of Justice (eds), *Basic Plan for Immigration Control* (3rd ed) (2005) at 22.

27 Tomoya Obokata, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2005) 54 *International & Comparative Law Quarterly* 445.

28 *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) refers specifically to 'enslavement' 'sexual slavery' and 'enforced prostitution' as crimes against humanity and war crimes: articles 7(1)(c), 7(1)(g), 7(2)(c) and 8(2)(xxii). Japan is not a signatory.

29 Iwasawa, above n20.

30 Id at 293.

substance of international human rights law, Japanese courts tend to dismiss arguments based thereon, preferring instead to interpret the Japanese constitutional provision and apply the same reasoning to the relevant provision in a human rights treaty.³² The problem with this approach is that if the actions of the government are found to be lawful under the *Japanese Constitution* then they are automatically regarded as lawful under international human rights law.

Thus far, Japanese courts have shown themselves to be reluctant to deal with international human rights law and even more reluctant to find that there has been a violation of those laws.³³ The reasons for this are complex. First, Japanese judges are not well versed in international law, the subject having been introduced only recently in the training curriculum.³⁴ Secondly, for historical reasons Japanese engagement with international law norms is a relatively recent feature of post-1945 legal practice. Finally, the courts' approach to issues of international law reflects a prevalent culture of judicial restraint, which makes them reluctant to invalidate legislation on constitutional grounds or to find the actions of government unconstitutional.³⁵ As the new generation of post-war educated lawyers and judges move through their professions, this is changing slowly. Hence, in recent years the lower courts have shown a greater awareness of, and willingness to apply, international law norms.³⁶ In addition the recent high profile changes in the areas of immigration and refugee law, together with the measures to combat human trafficking, have served to highlight the importance of international law as a vehicle for domestic legal change.³⁷ The work of the UN High Commissioner for Refugees' ('UNHCR') Tokyo Office has also been instrumental in enhancing awareness of international humanitarian law obligations. It provides training courses and lectures for Ministry of Justice officials, legal professionals and others, provides specific legal advice to the Courts and the Ministry of Justice in individual cases, and comments on proposed legislative changes.³⁸ The foundations for a better understanding and application of international law are in place but the measure of success will be their implementation and enforcement in domestic law. Japan's new anti-trafficking legislation provides an opportunity to put this to the test.

31 Ibid.

32 Id at 294.

33 Id at 292–303.

34 Meryll Dean, Interview at the Supreme Court of Japan (10 December 2004).

35 Hiroyuki Hata & Go Nakagawa (eds), *Constitutional Law of Japan* (1997) at 78; Hidenori Tomatsu, 'Judicial Review in Japan: An Overview of Efforts to Introduce US Theories' in Yoichi Higuchi, *Five Decades of Constitutionalism in Japanese Society* (2001); J. Mark Ramsayer and Eric B. Rasmussen (eds), *Measuring Judicial Independence: The Political Economy of Judging in Japan* (2003).

36 Iwasawa, above n20.

37 Ibid; Dean, above n20; K. Kodama, *Nanmin Hanrei-Shu* (2004).

38 UNHCR, *UNHCR Country Operations Plan 2006 – Japan* (September 2005) <www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.pdf?tbl=RSDCOI&id=4332c54d2> accessed 18 January 2007; UNHCR, *UNHCR Country Operations Plan 2007 – Japan* (September 2006) <www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.pdf?tbl=RSDCOI&id=44f7f6312> accessed 18 January 2007; UNHCR, *Advisory Opinions by UNHCR Representation in Japan* (December 2003 – March 2006) <www.unhcr.or.jp/protect/u_protection/index_e.html> accessed 18 January 2007.

3. The Challenge of the *Trafficking Protocol*

The *Trafficking Protocol* challenged the international community to work together to criminalise and eliminate the global trade in human trafficking. Japan became a signatory to the *Trafficking Protocol* in December 2002. In the 2004 Action Plan, the Japanese Government clarified its intention to implement laws necessary to meet the requirements of the *Trafficking Protocol* with a view to ratifying the Protocol as soon as practicable. Japan did not have specific laws directly prohibiting or punishing human trafficking. The combination of the Japanese *Penal Code 1907* ('*Penal Code*') as well as Japanese labour, immigration, anti-prostitution, and child protection laws addressed the issue in a limited and often tangential manner.³⁹ This framework lacked any meaningful way to address the international dimension of the trafficking trade, save that article 226 of the *Penal Code* refers to the abduction and 'transportation' of persons out of Japan. Thus, when it signed the *Trafficking Protocol*, Japan was without either a comprehensive law against human trafficking or a clear definition of trafficking.

Two main issues arise for all countries seeking to address their international obligations under the *Trafficking Protocol*: firstly, the problem of defining human trafficking and secondly, the difficulties arising from the perception of trafficked persons as voluntary participants, something which impacts upon both prevention initiatives and the protection of victims. The latter is of particular relevance to Japan since its visa regime has hitherto provided a simple means of facilitating the migration of women for sexual exploitation and has thereby fed the trafficking trade.⁴⁰

Article 3 of the *Trafficking Protocol* provides the current internationally recognised definition of trafficking. It states:

- (a) 'Trafficking in persons' shall mean 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 by 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 or

39 *Penal Code (Law No. 45 of 1907) 1907 (Japan)* ('*Penal Code*'), arts 220–221 (Crimes of Unlawful Capture and Confinement), arts 222–223 (Crimes of Intimidation), arts 224–229 (Crimes of Kidnapping and Buying or Selling of Human Beings); arts 174–182 (Crimes of Obscenity and Rape); *Labour Standards Law (Law No. 49 of 1947) 1947 (Japan)*; *Immigration Control and Refugee Recognition Law (Cabinet Order No. 319 of 1951) 1951 (Japan)* ('*Immigration Law*'); *Law for the Prevention of Prostitution (Law No. 118 of 1956) 1956 (Japan)* ('*Prevention of Prostitution Law*'); *Child Welfare Law (Law No. 164 of 1947) 1947 (Japan)* ('*Child Welfare Law*'); and *Law on Punishing Acts Related to Child Prostitution and Child Pornography and on Protecting Children (Law No. 52 of 1999) 1999 (Japan)* ('*Child Prostitution and Pornography Law*').

40 The use of 'entertainment visas' has been identified by a number of reports as one of the primary routes of access to Japan that has been abused by traffickers and blurred the lines between voluntary migrants and those persons that have been trafficked for sexual exploitation. See the 'Introduction' of US Dept of State, *TIP Report* (June 2004) <www.state.gov/g/tip/rls/tiprpt/> accessed 6 May 2008; ILO, above n21 at 33–35. For comparative visa statistics, including entertainment visas see Immigration Bureau of Japan (eds), *2005 Immigration Control* (2005) at 6–21, 170–171.

forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) 'Child' shall mean any person under the age of 18 years of age.

Article 3 provides a minimum standards definition upon which states can model their own legislation. In the United States the *Trafficking Victims Protection Act 2000* ('US TVP Act') extends the general definition of trafficking to include 'severe forms of trafficking in persons'.⁴¹ However Japan decided to adopt the benchmark definition provided by article 3 rather than an enhanced or more comprehensive definition.⁴²

Article 3 makes a clear distinction between trafficking and smuggling and articulates the differences between trafficked adults and children. More importantly, it states that the consent of the victim is irrelevant. The smuggling of migrants to facilitate illegal entry generally involves individual or collective consent and is therefore not classed as trafficking. However, distinctions between smuggling and trafficking often break down. A person might initially consent to be 'smuggled' to a country but then as a result of deception, coercion or abusive behaviour will find him or herself in a situation of debt bondage from which exploitative labour or prostitution is the only escape. This has been reported to be a particular problem for women 'transported' to Japan.⁴³

Following the signing of the *Trafficking Protocol* the Japanese Government maintained that existing laws were sufficient to fulfil its obligations. Moreover, there was an unwillingness to accept that human trafficking for sexual exploitation was a serious problem in Japan. Instead the government pointed to a highly regulated 'entertainment industry' as the source of large numbers of women from Asia entering the country. In contrast, NGOs and international organisations reported the widespread abuse of the 'entertainment visa' system whereby hundreds of thousands of women, in particular Filipino women, have entered Japan to work in the 'entertainment industry'.⁴⁴ In 1999 the International Organisation for Migration ('IOM') reported that Japan had the largest sex market for Asian women with over 150,000 non-Japanese women involved, predominately from Thailand and the Philippines.⁴⁵ In 2000 it was estimated that of the 120,000 foreign women in Japan, 75,000 were working under duress in the sex industry.⁴⁶

41 *Trafficking Victims Protection Act 2000* (United States of America) ('TVP Act').

42 The Japanese Government expressly states its intention to 'adopt' the article 3 definition in its 2004 Action Plan. See MOFA, above n24 at 1.

43 IOM, above n21; HRW, above n21; ILO, above n21; US Dept of State, *Japan: Country Reports on Human Rights Practices – 2005* (March 2006) <www.state.gov/g/drl/rls/hrrpt/2005/61610.htm> accessed 6 May 2008.

44 Ibid.

45 IOM, 'Trafficking in Migrants' (1999) 19 *Quarterly Bulletin* 1.

46 Velisarios Kattoulas, 'Bright Lights, Brutal Life' (2000) 163 *Far Eastern Economic Review* 50.

The absence of specific laws on human trafficking meant that no official statistical data was compiled on trafficking offences. In 2000 that changed and the National Police Agency ('NPA') now collates information on cases involving trafficking. Nevertheless, it is widely believed that these statistics do not provide an accurate picture since many victims of trafficking are deported following arrest for violations of immigration laws and therefore do not feature in the NPA trafficking statistics.⁴⁷ In 2005 the Ministry of Justice estimated that there were 240,000 illegal foreign residents in Japan of which 30,000 had entered illegally that year.⁴⁸ The remainder were persons who had overstayed their visa permission to remain.⁴⁹ Taken together with the reports of international organisations and NGOs, these figures not only provide a context within which to place the discussion but also hint at the scale of the problem.⁵⁰

In 2001 the United States Department of State published its first annual Trafficking in Persons Report ('US TIP Report').⁵¹ By reference to the *TVP Act 2000*, these reports place countries in one of three tiers determined by an evaluation of their efforts towards complying with minimum standards aimed at combating trafficking.⁵² This annual process provides an influential account of national anti-trafficking measures. In 2002 Japan was the only G8 member country included in the Tier Two List, which was mainly comprised of developing countries. Then in 2004 Japan was placed on the Tier Two 'Watch List'.⁵³ These reports added significant weight to the previous reports of human trafficking problems in Japan. In 2004 the Japanese Government published its Action Plan proposing legislative reform. As a consequence, Japan returned to Tier Two where it remains the only G8 and advanced industrialised country to feature in that group of countries.

The particularities of the visa regime in Japan have a tendency to blur the distinction between migration and trafficking. A serious problem exists in distinguishing migration for sexual services in what might euphemistically be called the 'entertainment industry'

47 In 2000 the Japanese National Police Agency ('NPA') reported that there were 80 cases involving trafficking, 64 in 2001, 44 in 2002, 51 in 2003, 79 in 2004 and 54 in 2005. Collated information from US Dept of State, *Japan: Country Reports on Human Rights Practices* (February 2001- March 2006) <www.state.gov/g/drl/rls/hrrpt/> accessed 6 May 2008. Local NGOs claim that these figures seriously under represent the magnitude of people trafficked into Japan; Meryll Dean, Interview with Polaris Project Japan and the Asia Foundation, (23 May 2006). See also IOM, above n21; HRW, above n21; ILO, above n21; US Dept of State, above n43.

48 Immigration Bureau of Japan, above n40 at 44.

49 Ibid.

50 Ministry of Justice officials declined to discuss any statistics on trafficking at an interview with the author on 26 May 2006.

51 US Dept of State, above n21.

52 Tier One: Countries whose governments fully comply with the Act's minimum standards; Tier Two: Countries whose governments do not fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards; Tier Three: Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.

53 The same as Tier Two and (a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or (b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or (c) The determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.

and the trafficking of women for sexual exploitation. There are four main types of visa which are potentially open to abuse by traffickers: (1) Temporary Visitors visa, generally granted upon arrival for up to 90 days to foreign visitors for tourism, educational visits and meetings, family visits or attending sporting events; (2) Entertainer visa; (3) Trainee visa; and (4) Spouse or Child of a Japanese National visa. Of these the Temporary Visitor and Entertainer visas are generally accepted as the main categories used by those organising migration of women for sexual exploitation.⁵⁴ In particular, the Entertainer visa has been particularly effective in facilitating the quasi-legal access of women to Japan. From the early 1980s onwards the figures rose steadily so that by 2004 the number of those entering Japan as ‘entertainers’ had reached 134,879.⁵⁵ The majority of these (82,741) came from the Philippines. However, whilst an individual may be in possession of a visa that gives them limited legal status, reports from NGOs and international organisations have established that the visas are often obtained by traffickers who sell the women to criminal gangs once they arrive in Japan.⁵⁶ It has been widely reported that such women are held and exploited in situations of debt bondage and forced labour for sexual services contrary to Japan’s international legal obligations.⁵⁷

The extent of the abuse of the visa regime was acknowledged by the Japanese Government in its 2004 Action Plan when it stated: ‘It has been recognised that not a few people (*sic*) who have entered Japan with the status of residence as “entertainer” have become victims of trafficking in persons.’⁵⁸ Following the publication of the 2004 Action Plan the government implemented measures aimed at limiting the abuse of the Entertainer visa regime. In 2005 the Ministry of Justice introduced new requirements for the Entertainer visa that were aimed at tightening the application procedure and reducing the potential for abuse.⁵⁹ Applicants are now required to demonstrate that they have completed at least two years of study at an educational institution in the particular entertainment sector for which they are applying or, at least two years of relevant work experience outside Japan. This means that the Artist Record Book and Artist Accreditation Certificate issued by the Philippine government, documents often obtained through corrupt means, are no longer recognised.⁶⁰ A further amendment to the criteria for the Entertainer visa was introduced in 2006 that was aimed at the owners and operators of businesses who wished to employ foreign entertainers.⁶¹ This requires that there be an express term in the employment contract that an employee be paid a

54 ILO, above n21 at 35.

55 Immigration Bureau of Japan, above n40 at 14.

56 ILO, above n21 at 33–35; IOM, above n21. US Dept of State, above n21; author interviews, above n47; Meryll Dean, Interview with the Empowerment Centre for Women (Fukuoka, 20 January 2006).

57 Ibid.

58 Section III (2)(3) of the 2004 Action Plan. See MOFA, above n24.

59 *Ministerial Ordinance to Provide for Criteria Pursuant to Article 7, Paragraph 1(2) of the Immigration Control and Refugee Recognition Act 2005* (Japan) (‘Ministerial Ordinance’).

60 Meryll Dean, Interview with Polaris Project Japan and the Asia Foundation, (23 May 2006); Interview with the Empowerment Centre for Women (Fukuoka, 20 January 2006).

61 On 13 March 2006, there were further amendments made to the *Ministerial Ordinance*. These provisions came into effect on 1 June 2006.

minimum wage of ¥200,000 a month. Furthermore if an owner, operator or employee of the establishment is found to have been involved in the employment of illegal workers or the falsification of immigration documents in the previous five years, the visa will not be granted.

The tightening of the Entertainer visa regime had an immediate impact on the numbers of visas granted, particularly through a reduction in Filipino visas. However it is too early to conclusively decide whether this is the start of a permanent downward trend or whether other visa categories will be used to ‘compensate’ for the reduction in Entertainer visas.⁶² At the moment, Filipino ‘entertainers’ still account for around 48 per cent of Entertainer visas granted.⁶³ Filipino nationals also constitute the highest number of trafficking victims that come to the attention of the authorities, although in recent years there has been an increase in the number of other nationalities, in particular, women from Thailand and Indonesia.⁶⁴ The abuse of the Temporary Visitor visa was also acknowledged in the 2004 Action Plan as a mechanism for facilitating trafficking to Japan as a country of destination as well as one of transit.⁶⁵ Following the tightening of the Entertainer visa requirements, the number of Temporary Visitor and Trainee visas are likely to rise as traffickers seek alternative ways to facilitate entry to Japan. Although less of a problem, the 2004 Action Plan also recognised that false marriages are used by traffickers to obtain visas as the Spouse or Child of a Japanese national.⁶⁶ Accordingly, it outlined the Japanese Government’s intention to review the criteria for the granting of visas. The new measures so far implemented by the Japanese Government are positive steps towards combating trafficking.⁶⁷ However, the 2004 Action Plan also outlined plans to review other relevant laws, in particular those related to prostitution, with the aim of revising the law in order to provide protection for victims and establish preventative measures aimed at combating trafficking. Such a revision was required for Japan to fulfil its obligations under the *Trafficking Protocol*.

62 Immigration Bureau of Japan (eds), *2006 Immigration Control* (2006) at 14–15 & 148–149.

63 Id at 83–84; MOFA, *The Recent Actions Japan has Taken to Combat TIP (Trafficking in Persons)* (August 2006); MOFA, *The Recent Actions Japan has Taken to Combat TIP (Trafficking in Persons)* (December 2007) <www.mofa.go.jp/policy/i_crime/people/action0508.html> accessed 20 February 2008.

64 Immigration Bureau of Japan, above n62 at 83–84; MOFA, above n63. The 2006 US Dept of State TIP Report puts the Philippines and Thailand on its Tier 2 list but acknowledges the efforts made by their governments to address the issue of trafficking. Indonesia is on the Tier 2 Watch List and whilst recognising the government’s efforts to address the issue singles out examples of women trafficked to Japan for prostitution. See US Department of State, *TIP Report* (June 2006) <www.state.gov/g/tip/rls/tiprpt/2006/65987.htm> accessed 15 January 2007. Since the 2004 Action Plan the Japanese Government has engaged in bilateral work leading to measures being taken to combat trafficking, particularly with the Philippines, Thailand, and Colombia. See n65 above & ‘Slamming the Brakes on Human Trafficking’, *The Asahi Shimbun*, 9 June 2006.

65 Section III (2)(1) of the 2004 Action Plan. See MOFA, above n24.

66 Section III (2)(4) of the 2004 Action Plan.

67 MOFA, *The Recent Actions Japan has Taken to Combat TIP (Trafficking in Persons)* (December 2007), above n63.

4. The Recent Reforms

Human trafficking is based upon demand and supply. The conventional approach to penalising such criminal activity within a domestic criminal justice framework would be to punish the provider of services. In the context of international human trafficking this is not an effective deterrent. Since the primary supplier is outside the jurisdiction in which the delivery of those services takes place, it is necessary to implement prevention and protection laws within the jurisdiction of the victims of human trafficking. Together with other destination countries, Japan needs to provide a legal framework capable of addressing the challenges presented by this transnational criminal activity. However, unlike many other destination countries, Japan has a long established and multi-faceted sex industry that is not only tolerated but also officially accepted and, to a considerable extent, enabled through its visa regime.⁶⁸ Whilst prostitution, child prostitution, and pornography are not recent developments in Japanese society, the imperative of addressing the transnational trade that feeds these activities is new.⁶⁹ International pressure to address these problems has resulted in various international legal instruments giving rise to obligations that need to be implemented in domestic legislation. An early example of this was the *Law on Punishing Acts Related to Child Prostitution and Child Pornography and on Protecting Children* enacted in 1999 ('*Child Prostitution and Pornography Law*') that followed Japan's ratification of the *Convention on the Rights of the Child* in 1994.⁷⁰

The 1947 *Child Welfare Law*⁷¹ provided minors with limited protection.⁷² It aimed to protect children from sexual exploitation, particularly prostitution. Thus, it prohibits inter alia the following: inducing a child to practice indecent acts; keeping a child under the control of a person for purposes harmful to the child; and transferring a minor to another person's custody with the knowledge that such an act violates criminal law. These offences render the offender liable for up to ten years in prison and/or a fine of ¥3million.⁷³ The *Child Welfare Law* does not apply where the control of the child is in the context of employment, although in certain situations the 1947 *Labour Standards Law*⁷⁴

68 Mike Douglass, 'The Singularities of International Migration of Women to Japan: Past Present and Future' in Mike Douglass & Glenda S. Roberts (eds), *Japan and Global Migration: Foreign Workers and the Advent of a Multicultural Society* (2003).

69 Ibid.

70 It is debatable whether this legislation was drawn up as a result of moral concern over the trade in child pornography or, as is claimed by some commentators, bad publicity associated with Japan being identified as the primary source of the commodity on the internet. See Jeff Kingston, *Japan's Quiet Transformation. Social Change and Civil Society in the Twenty-First Century* (2004) at 28 & 273. Nevertheless, the *Child Prostitution and Pornography Law* is a useful part of the child protection and anti-trafficking measures available to the Japanese authorities, with the first case involving a 13-year-old Thai girl sold to a broker in Japan reported in July 2005. See MSN-Mainichi Interactive (July 2005) <www.mainichi-msn.co.jp/shakai/jiken/news/p20050704dde041040066000c.html> (Japanese only) accessed 14 November 2006.

71 *Child Welfare Law* as amended by Law No 88 of 1974 and Law Nos 54 and 55 of 1978.

72 For the purposes of the *Child Welfare Law* a minor is defined as a person less than 18 years of age. Upon attaining that age a person loses the protection of the *Child Welfare Law* but has such protection as the *Penal Code* affords up to the age of reaching majority at the age of 20 (Article 3 Civil Code).

73 *Child Welfare Law*, arts 34 & 60.

74 *Labour Standards Law 1947 (Law No. 49 of 1947)* (Japan), art 5. Additional protection may be provided by the *Employment Security Law 1947 (Law No. 141 of 1947)* (Japan), art 63.

may provide limited protection since it prohibits forced labour. These laws proved too narrow to provide adequate protection against child trafficking and pornography.

The *Child Prostitution and Child Pornography Law* provides specifically for the prosecution of child traffickers. Under this law a child is a person under 18 years of age and the trade in children for the purpose of child prostitution and child pornography is punishable by imprisonment for up to ten years.⁷⁵ Article 8(2) states that any Japanese national who transports a minor who has been abducted, kidnapped, sold or bought in a foreign country for the purpose of producing child pornography or to engage in prostitution is liable to a term of imprisonment of not less than two years. Of particular note is the fact that the *Child Prostitution and Child Pornography Law* is extra-territorial in scope.⁷⁶ Thus, a Japanese national outside of Japan who commits offences set out in this legislation is punishable under the provisions of the Japanese *Penal Code*.⁷⁷

In January 2005 Japan ratified the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.⁷⁸ This signalled a further advance in Japan's willingness to address the international trading and trafficking of children and provided a platform for future changes aimed at tightening the existing laws. Additionally, in 2005, Japan implemented legislative reforms aimed at providing a comprehensive framework to combat inward human trafficking for sexual and labour exploitation. In April of that year the government submitted a Bill to Parliament aimed at ensuring compliance with all the requirements of the *Trafficking Protocol*. In particular, it proposed amendments to the *Penal Code* and the *Immigration Control and Refugee Recognition Law* ('*Immigration Law*').⁷⁹ The Bill became law on 22 June 2005 and took effect on 12 July of that year. The result was a package of revisions to various laws (the '2005 revisions'). These enhanced existing laws aimed at combating human trafficking, provided a clearer definition of 'trafficking in persons' based upon article 3 of the *Trafficking Protocol*, and focused on introducing specific provisions targeting traffickers and protecting victims.

The Japanese *Penal Code* contains provisions that criminalise kidnapping and abduction (articles 224, 225 and 227). Though the *Penal Code*, prior to the 2005 revisions, did not specifically criminalise trafficking a person into Japan, it did however punish those who abducted or sold a person so that they may be transported overseas (article 226). Nevertheless, there are no reported cases of human traffickers being punished under these provisions. This can partly be attributed to the practice of Japanese prosecutors charging offences according specific criminal provisions rather than under general provisions.⁸⁰ Consequently, the lack of specific reference to the term 'trafficking'

75 *Child Prostitution and Pornography Law*, art 8(1).

76 The *Penal Code* adopted the principle of unlimited jurisdiction over Japanese nationals. This has remained despite many amendments and the extent of its extraterritorial application is set out in the *Penal Code*, arts 2–4.

77 *Penal Code*, art 10.

78 *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature on 25 May 2000 (entered into force 18 January 2002).

79 *Immigration Law* as amended by the *Law for Partial Amendment of the Immigration Control and Refugee Recognition Act* (Law No. 73 of 2004) 2004 (Japan) & *Law for Partial Amendment of the Immigration Control and Refugee Recognition Act* (Law No. 43 of 2006) 2006 (Japan).

in the articles of the *Penal Code* reduced the likelihood of traffickers being prosecuted under those articles. As a result of the 2005 revisions the *Penal Code* now makes human trafficking a specific criminal offence punishable by imprisonment for three months to ten years (article 226–2).⁸¹ It is significant that the revised *Penal Code* provides for the prosecution of non-residents who buy, sell or traffic a person out of their country of residence (article 226–2). This is a specific recognition of the transnational nature of trafficking.

Article 226–2 is titled ‘Trafficking in Persons for Value’ but does not contain a definition of what is meant by trafficking. Instead the section outlines offences in terms of ‘buying’ and ‘selling’. In the context of international human trafficking, this is extremely vague and far removed from the definition contained in article 3 of the *Trafficking Protocol*. However, article 2(7) of the revised *Immigration Law* contains a fuller definition more closely aligned to article 3 of the *Trafficking Protocol*.⁸² Apart from the vagueness of the criminal offences outlined in the *Penal Code*, the evidentiary burden is high and there has been considerable difficulty in obtaining the required level of documentary evidence necessary to prove a trafficking crime.⁸³ This is in addition to the strict requirements that need to be satisfied to obtain search warrants at the start of an investigation. Article 35 of the Japanese Constitution places clear limits on search and seizure by the authorities and permits such powers only upon the issuing of a warrant for ‘adequate cause and particularly describing the place to be searched and things to be seized.’⁸⁴ Article 35 was modelled upon the Fourth Amendment to the United States Constitution but is much stricter in requiring *adequate* as opposed to *probable* cause. Nevertheless, the strictness of article 35 is mitigated somewhat by article 220 of the *Code of Criminal Procedure*, which allows for search and seizure without a warrant in limited circumstances.⁸⁵ Despite the strictness of article 35, judges in Japan rarely reject a police application for a warrant.⁸⁶

80 Trafficking and related prosecutions have traditionally been brought under a diverse range of laws concerned with organised crime groups, anti-prostitution, the regulation of the entertainment business as well as labour and immigration laws and the child prostitution and pornography laws.

81 Since the 2005 revision of the *Penal Code* there has been one conviction, although this is currently under appeal.

82 Article 2(7) states: ‘The term “trafficking in persons” means any of the following acts: (a) the kidnapping or the buying or selling of persons for the purpose of making a profit, committing an indecent act or causing injury to their life or physical being, or delivering, receiving, transporting or harbouring such persons who have been kidnapped or bought or sold; (b) except for the acts set forth in sub-item (a), placing persons under the age of 18 under one’s own control for the purpose of making a profit, committing an indecent act or causing injury to their life or physical being; (c) except for the acts set forth in sub-item (a), delivering persons under the age of 18, knowing that they will be or might be placed under the control of a person who has the purpose of making a profit, committing an indecent act or causing injury to their life or physical being.’

83 US Dept of State, above n64 at 150.

84 Further provisions on the issuing of warrants are contained in the *Code of Criminal Procedure* (Law No. 131 of 1948) 1948 (Japan) replacing the *Code of Criminal Procedure* 1890 & 1922 (Japan), arts 218 & 219.

85 Setsuo Miyazawa, *Policing in Japan: A Study on Making Crime* (1992) at Chapter 7.

86 Toshikuni Murai, ‘Critical Issues in the Lawmaking Policy of Japanese Criminal Procedure: The Wiretap Act and the Adversary System at the Pre-Trial Stage’ in Malcolm M. Feeley and Setsuo Miyazawa (eds), *The Japanese Adversary System in Context* (2002) at 195.

In spite of these challenging procedural and evidentiary requirements, in recent years there has been a noticeable increase in trafficking and trafficking-related law enforcement activities by the NPA, resulting in a rise in the number of arrests and prosecutions.⁸⁷ Between 2002 and 2005 the number of prosecutions rose from 26 to 75.⁸⁸ However the number of convictions is low and most offenders receive suspended sentences.⁸⁹ Such sentences will usually involve a fine being imposed with a condition that the offender does not commit another crime during a set period of time. The apparent disparity between the number of trafficking and trafficking-related crimes reported by the NPA and those cases prosecuted might, in part, be explained by the tension that exists between the police and prosecutors office.⁹⁰ The latter are known to criticise the poor quality of police investigative work and use this as an excuse for not bringing more cases to court.⁹¹ Another factor is that many reported offences involve 'offenders' who are dealt with by the Immigration Bureau of Japan for immigration law violations.⁹² Ultimately this leads to deportation rather than prosecution for criminal offences related to trafficking.

The 2005 revisions of the *Immigration Law* focused more on the protection of victims as opposed to the prosecution of human traffickers. The 1956 *Law for the Prevention of Prostitution* ('*Prevention of Prostitution Law*') had previously afforded de jure protection by prohibiting prostitution as well as providing protection and rehabilitation.⁹³ In practice a foreign national engaged in prostitution was unlikely to be able to avail themselves of the limited protection afforded by the *Prevention of Prostitution Law* since they were most likely to have violated immigration laws and would therefore have been deported.⁹⁴ Even a trafficking victim would have been refused permission to remain in Japan due to past conduct. However, the revised *Immigration Law* now provides exceptions for victims of trafficking who have been previously engaged in prostitution or any business connected with prostitution.⁹⁵ Furthermore, under the 2005 revisions, the Minister of Justice may grant special permission to a person to remain in Japan where that person has entered the country under the control of a trafficker.⁹⁶ Whilst these revisions are a significant step forward in providing greater protection for victims of trafficking, they may be limited by what has hitherto been a restrictive definition of prostitution as a result of a narrow interpretation of 'sexual intercourse' under the *Prevention of Prostitution Law*.⁹⁷

87 MOFA, *The Recent Actions Japan has Taken to Combat TIP (Trafficking in Persons)* (August 2006), above n63 at 3; National Police Agency, *Crimes in Japan in 2005* (2006) at 51 <www.npa.go.jp/english/seisaku5/20061211.pdf> accessed 22 January 2007.

88 MOFA, *The Recent Actions Japan has Taken to Combat TIP (Trafficking in Persons)* (August 2006), above n63 at 3.

89 US Department of State, *Trafficking in Persons Reports 2006*, (June 2006) <www.state.gov/g/tip/rls/tiprpt/2006/> accessed 6 May 2008.

90 David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (2002) at 51–61.

91 Meryll Dean, Interview at US Embassy (Tokyo, 22 May 2006).

92 Immigration Bureau of Japan, above n62 at 41–63.

93 *Prevention of Prostitution Law*, arts 3, 5 17 & 34.

94 *Immigration Law*, art 5.

95 Revised version of the *Immigration Law*, arts 5(7) & 24(4)(a) & (j).

96 Revised version of the *Immigration Law*, art 50. Article 24 also provides that the Minister of Justice may grant leave to enter the country where a person has entered the country under the control of a trafficker.

Articles 6 and 7–13 of the *Prevention of Prostitution Law* are also relevant to trafficking, but similarly restricted by the definition of prostitution. These provisions penalise those acting as brokers or intermediaries in procuring prostitutes and those who engage in associated activities such as managing a prostitute, providing accommodation, and living off a prostitute's earnings. The 1990 amendments to the *Immigration Law* introduced broader categories of trafficking related activities. Article 73–2 penalises those who (1) employ a foreign national in contravention of their immigration status; (2) place a foreign national under their control with the purpose of engaging them in illegal work; or (3) procure foreign nationals to engage in such illegal activities. A person found to have committed any of these offences was liable to penal servitude of three years and a fine. The 2005 revisions increased the fine from ¥2 million to ¥3 million. Article 74 of the *Immigration Law* penalises activities related to the smuggling of persons for the purpose of using them in illegal work. This carries a range of penalties from one to ten years of penal servitude and fines from ¥3 million to ¥10 million. The 2005 revisions also introduced new offences penalising those who facilitate or attempt to facilitate illegal entry through the use of fraudulent documents or other illegal means.⁹⁸ These offences are punishable with three to five years of penal servitude or fines from ¥3 million to ¥5 million.

These 2005 revisions signal a firming of attitudes towards those engaged in trafficking, although their efficacy will be measured by the law enforcement activities of the police. Similarly, the granting of special permission to stay depends on the exercise of ministerial discretion. Since it is not known on what basis that discretion will be exercised the impact of this provision is unclear. It is most likely that it will be used where the victim is willing to act as a witness for the prosecution. It may also be used in circumstances where returning the person to their country of origin would put their life at risk, or the person's health is poor, or alternatively if the person is pregnant. The exercise of discretion on humanitarian grounds seems less likely when, in the context of refugee cases, the granting of humanitarian status is of itself extremely low.⁹⁹ Nevertheless, the granting of limited status of leave to remain in Japan is a positive step forward and further creates the possibility of victims being able to sue in the civil courts.

Under article 33 of the *Code of Civil Procedure 1996*,¹⁰⁰ foreign nationals may sue or be sued in the Japanese courts. Before the 2005 revisions this was impractical because victims of trafficking were classed as 'illegal aliens' and deported without being able to pursue any legitimate claim, for example, for money owing or other damages. However, although article 24–4 of the *Immigration Law* grants trafficking victims special permission to stay in special situations, it is unlikely that a victim's status as a party to a civil action

97 Article 2 of the *Prevention of Prostitution Law* defines prostitution as sexual intercourse for payment, or promise of payment, with an unspecified other party. However, sexual services other than vaginal intercourse are not considered to fall within this definition. As a result those involved in Japan's entertainment and sex industry have been able to avoid this Law. Information obtained from author interview with the Polaris Project, Meryll Dean, Interview with Polaris Project Japan and the Asia Foundation, (23 May 2006).

98 Revised version of the *Immigration Law*, arts 74–6–2 & 74–6–3.

99 Ministry of Justice, (February 2006) (*in Japanese*) <www.moj.go.jp/PRESS/060224-1/060224-1-4.html> accessed 22 January 2007; See also Dean, above n20 at 33.

100 *Code of Civil Procedure (Law No. 109 of 1996) 1996* (Japan).

will be considered sufficient for the exercise of ministerial discretion under article 50. Moreover, such victims are liable to face financial difficulties as they are unlikely to receive social security benefits and in all probability, will be unable to obtain legal aid or assistance.¹⁰¹ The only other avenue of redress might be under the 1947 *State Redress Law* whereby national and local governments are required to indemnify a person for a wrong caused by the intentional or negligent act of government employees in the exercise of their public authority.¹⁰² The likelihood of success under this law is limited by the fact that it only applies where Japan has a mutual recognition agreement with the victim's country of origin.¹⁰³

Conclusion

The attitude of the Japanese Government towards legislating and reporting on human rights has been described by a leading Japanese academic as 'conspicuously defensive in nature'.¹⁰⁴ This will often take the form of stating that no new legislation is necessary and that the existing domestic legal framework fulfils the country's international legal obligations. That was initially the position in relation to human trafficking. However, the impact of international law together with the adverse reports of Japan being a destination country combined to provide the impetus for the government to address the issue; first, through its 2004 Action Plan and, second, with the 2005 revisions. The legal reforms have weaknesses, most notably as a result of their piecemeal nature. A comprehensive law against human trafficking would have provided a clearer framework for action by the authorities as well as affording a more detailed and thorough definition of trafficking that went beyond the benchmark provided by article 3 of the *Trafficking Protocol*. In addition, the reluctance of the regulatory authorities to investigate combined with the high threshold of procedural and evidentiary proof, is likely to reduce the probability of a significant number of successful prosecutions. This undermines the preventative and punitive intent of such legislation. Further reforms are needed to provide better protection measures that allow victims of trafficking a more permanent residence status with access to appropriate social services. Nevertheless, whilst the de facto situation may be less encouraging, these de jure improvements are a major step towards Japan fulfilling its international obligations.

101 Japan's ratification of the *ICCPR* means that foreigners living in Japan are entitled to social security benefits, however in practice these laws are not applied equally. Article 2 of the *Civil Litigation Assistance Law 2000* (Japan) prohibits legal aid organisations providing assistance to 'illegal aliens'. Whilst NGOs and *pro bono* lawyers assist victims in legal matters, this does not extend to the pursuit of civil damages in similar circumstances.

102 *State Redress Law* (Law No. 125 of 1947) 1947 (Japan).

103 In 2002 the Tokyo District Court stated that Japan is not required to provide relief to a foreign national where Japanese nationals are not entitled to the same state reparation. See *Hanrei Jibo* 1809 (Tokyo District Court, 28 June 2002) at 46.

104 Iwasawa, above n20 at 5.