Commercial Marriage Trafficking

Uncovering a Growing New Form of Transnational Human Trafficking, and Shaping International Law to Respond

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Abstract

Drawing from my work at the United Nations Inter-Agency Project on Human Trafficking, this article exposes the phenomenon of commercial marriage trafficking, a rapidly growing but critically overlooked form of human exploitation, and the conceptual gap in international law that has led to inaction by the international community. I address this gap by 1) creating a definition of commercial marriage trafficking consistent with the Palermo Protocol, the most widely accepted international agreement on fighting human trafficking, and 2) promoting immediate state action by repurposing existing international legal provisions on marriage to enable effective initial domestic responses to this crime while revisions to the Palermo Protocol advance.

In both the developing and the developed world, a rising demand for brides has led to an increase in marriage migration. As those who migrate for international marriages seek better lives, they become targets for criminal groups engaged in human trafficking. Like labor migrants, marriage migrants are vulnerable to sale into forced commercial sex work or other forms of labor exploitation. This same increased demand for brides has also recently fueled the sale of women into forced marriages. Unfortunately, international law on human trafficking, intended as a floor for coordinated action, has instead become a ceiling; its silence on forced marriage has resulted in little movement on the international or domestic levels to tackle this growing new crime. As a result, marriage migrants, and even some labor migrants, are left at the mercy of commercial marriage traffickers.

This article proposes concrete steps to solve the conceptual shortcomings in international law that allow such traffickers to act with impunity. It introduces human trafficking as defined under international law, and discusses such acts in the context of marriage migration. The failures of current international law on human trafficking to directly address this form of exploitation are then
exposed and discussed. A new legal definition addressing the real-world realities of commercial marriage trafficking is introduced, turning the focus of scrutiny to the key point of exploitation—the act of marriage itself. The features of this definition are highlighted through examples drawn from real-world case studies, followed by a discussion of effective strategies for integrating the new definition into international law. Finally, this article repurposes existing international legal provisions on marriage to develop a set of key first steps that states can immediately take to begin fighting commercial marriage trafficking.

Overall, this article provides a foundation for understanding a critically overlooked problem in human trafficking, while proposing a set of effective strategies that both the international community and individual countries can use to address this growing threat.
Introduction

Cross-border marriage is a common phenomenon in our place, and not only local authorities but also people in the community believe that this kind of marriage is one of the most effective poverty reduction strategies. – Vietnam Women’s Union official

For several years the gang cajoled young girls, mostly from rural regions in the Mekong River Delta, to go to Taiwan for marriages. Once there, they were sold like chattels. – “Six Jailed for Selling Vietnamese girls to Taiwan, Malaysia,” Than Nien News Agency

While the names of the countries differ by region, the story is the same: women are increasingly seeking international marriage as a way out of impoverished homelands and into a better life in a wealthier destination. In Southeast Asia, thousands of Vietnamese women travel to both nearby and distant places for commercially brokered marriages. Human traffickers have picked up on this growing migratory flow, and are acting to exploit what they see as a lucrative income stream. For example, in the poor rural areas of Vietnam, single women connect with relatives, friends, or acquaintances for introductions to brokers who promise a better life abroad with a kind, wealthy husband. Having seen neighbors prosper from remittances sent by those married to husbands in Taiwan or South Korea, many potential brides believe the broker’s promises and go forward with an offer. If she is lucky, the woman will meet her future husband before she leaves

Due to the confidential nature of some of the UNIAP field reports, the Journal of International Law & Policy was unable to verify the content of some of the cited materials. These confidential reports are on file with the United Nations Inter-Agency Project on Human Trafficking, (UNIAP) and the author, and are identified in the footnotes.

Some internal data and research originated from field work conducted between 2009-2010 by UNIAP, where I worked during the summer of 2010. Mentions throughout the text to internal field research or internal reports indicate work done by UNIAP. I developed the theoretical framework in this article both during my time at UNIAP and afterwards. The final product presented herein is my own; it reflects only my opinion, and does not represent those of UNIAP or any other person or entity. I would like to thank the staff at UNIAP, particularly Matt Friedman and Dr. Lisa Rende Taylor, Professors James Feinerman, Karen Knop, and Gerald McAlinn, Dr. Melody Chia-Wen Lu, Sun Xiaoying, Dr. Caroline Grillot, Ms. Lily Phan and many others too numerous to mention for their invaluable feedback.

Hong Xoan Nguyen Thi, Contemporary Cross-Border Marriage Migration in Vietnam: Pattern and Consequence, presented at Contemporary Dynamics of International Marriage Migration in South-East Asia,” in Manila, 12, (Dec., 2009).

Vietnam, but there is no guarantee. In the best cases, she will indeed land in a wealthier destination, facing culture shock and loneliness, but with a good marriage and a better life than she believed possible at home. In other instances, the husband is someone entirely different than advertised, and who subjects her to grueling domestic work and forced sex, treating her much the same as any other victim of modern day slavery. Equally horrifying, she may arrive to discover that sale into a brothel or forced labor is all that awaits her.

These examples show that marriage migration can lead to vastly different outcomes, and can be as risky as migrating for work. Sadly, despite a world-wide campaign to fight human trafficking, the international community has paid little attention to the growing phenomenon of marriage migration in many parts of the world, and the exploitation of this migratory flow by human traffickers, whether for “traditional” outcomes like forced labor or sex, or for forced marriage. The constantly shifting movement of traffickers between far-flung source, transit and destination countries means human trafficking cannot be solved solely at the local or even regional level. A coordinated international response is required, one that creates an effective legal framework that captures the patterns of criminal activity on the ground, and harmonizes the efforts of sending and receiving countries to protect their marriage immigration routes from exploitation by traffickers.

Fortunately, an appropriate legal vehicle exists at the international level to promote coordinated action: the Palermo Protocol. Ratified by over 150 countries, its definition of human

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trafficking enjoys widespread support in the international community,\(^5\) in effect harmonizing the conceptual legal structure of human trafficking among a majority of the world’s nations, and providing a blueprint for coordinated action by the international community. While it currently does not mention marriage as a potential form of exploitation, its open-ended definition of human trafficking was specifically designed to be inclusive of new forms of trafficking as they arise. Since amending the Palermo Protocol is a very long-term goal, quicker steps to developing international consensus on addressing marriage trafficking can be taken through Palermo’s supporting administrative machinery, which can develop, test, and help states implement an effective definition of human trafficking through marriage.

Interpretive revisions will require a definition of marriage trafficking that not only fits within the framework of Palermo, but that also reflects the facts on the ground. As time is of the essence in addressing this rising new crime, states should also turn to long-standing treaties that contain marriage-related provisions that can be reinterpreted to immediately provide important basic protections against marriage trafficking. Most of these treaties enjoy broad support, and employing their provisions for anti-trafficking initiatives will leverage existing international law to more rapidly and effectively respond to a growing criminal activity.

Crafting effective solutions, however, will first require understanding why and how marriage migration works on the ground. My research focused on the Greater Mekong sub-region,\(^6\) which sees

\(^{5}\) See Anne Gallagher, The International Law of Human Trafficking 42 (2010) (“Since 2000, the majority of States have enacted comprehensive anti-trafficking laws that generally reflect the internationally agreed definition”).

\(^{6}\) Generally defined as the nations along the Mekong river basin, including Cambodia, Laos, Myanmar (Burma), the People’s Republic of China (specifically Yunnan province and the Guanxi Autonomous Region), Thailand, and Vietnam. My research also included South Korea and the Taiwan jurisdiction, which are popular destinations for many marriage migrants from the Mekong sub-region, particularly Vietnamese women.
an increasing number of women\textsuperscript{7} looking to commercially arranged marriages as an avenue out of poverty and into a life that provides either immediate access to wealth through their husband, or to job opportunities within their new communities. At the same time, criminal organizations exploit gaps and loopholes in marriage registration laws between source and destination countries to obtain immigration visas that allow them to move victims across borders into forced marriage, sex work, or other forms of labor.

While news sources in the region have reported marriage trafficking as a growing problem that has attracted some police and prosecutorial attention,\textsuperscript{8} very little research exists on the ability of these domestic legal systems to respond to this crime.\textsuperscript{9} It is clear however that the lack of a concrete definition of marriage trafficking in domestic law hampers efforts to combat such criminal acts. As domestic legislation in many countries has been guided by treaty obligations surrounding human trafficking,\textsuperscript{10} the absence of an international definition of marriage trafficking has created a blind

\textsuperscript{7} All cases of marriage migrants examined for this article were women. Men may migrate for marriage in other regions, and the issues discussed here could easily be applied to them as well.


\textsuperscript{9} Most of the existing literature on human trafficking through marriage comes from the anthropological world, which generally do not touch on domestic law. See, e.g., Le Bach Duong et al., Transnational Migration, Marriage and Trafficking at the China-Vietnam Border, in WATERING THE NEIGHBOR’S GARDEN: THE GROWING DEMOGRAPHIC FEMALE DEFICIT IN ASIA 393, 393-425 (Isabelle Attané and Christophe Guilmoto eds., 2007). The only legal analysis found comes from a Vietnamese Ministry of Justice examination of domestic law related to human trafficking, which includes analyses of the connection between marriage brokers, marriage migration and human trafficking. Unfortunately, this research is now out of date, as Vietnam has since introduced a new comprehensive law on human trafficking. See Ministry of Justice, REPORT: SURVEY FINDINGS ON THE ENFORCEMENT OF LAWS AND REGULATIONS ON INVESTIGATION, PROSECUTION, AND TRIAL OF CRIMINALS IN WOMEN AND CHILDREN TRAFFICKING, Project 4-CT130/CP (2008) (Viet.) (English draft on file at UNIAP).

\textsuperscript{10} See Gallagher, supra note 5, at 42-43.
spot in national and international anti-trafficking initiatives, resulting in almost no action on the issue by individual states. Instead, anti-trafficking efforts focus almost entirely on sexual and labor exploitation; this approach overlooks victims sold into forced marriage and fails to address vulnerabilities in international marriage migration systems to even these “traditional” forms of human trafficking.

In order to spur effective domestic and international action against this rising new crime, this article addresses the conceptual gap in international anti-trafficking law by proposing a concrete definitional framework, which I label “commercial marriage trafficking.” Built on case studies covering criminal brokers who exploit countries’ marriage and immigration systems to move trafficked victims to buyers in various destinations, the definition encompasses a discrete subset of the still poorly-understood crime of marriage trafficking. Section A discusses the Palermo Protocol’s definition of human trafficking and its conceptual shortcomings in the marriage trafficking context. Section B introduces the phenomenon of marriage migration, discussing how it occurs, and how human traffickers exploit both migrants and migration flows. Section C returns to the Palermo Protocol to examine why marriage trafficking is absent from the instrument. In section D, a definition for commercial marriage trafficking to address this conceptual gap is proposed, centering scrutiny on marriage migration as a route that human traffickers and their customers can exploit, whether the goal is marriage or “traditional” forms of human trafficking. Implementation of this definitional framework within Palermo is then discussed through hypothetical examples drawn from actual case studies. Section E introduces strategies for integrating this new definition into Palermo. Finally, recognizing that further developing Palermo will take time, and that effective protections against commercial marriage traffickers are needed immediately, section F repurposes provisions in
currently available international law to drive basic but readily achievable domestic responses to commercial marriage trafficking. The article concludes with next steps to implement this article’s recommendations at both the international and domestic levels.

A. Human trafficking under international law

The flagship anti-human trafficking instrument under international law is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,11 (herein Palermo) supplementing the United Nations Convention against Transnational Organized Crime.12 (UNTOC) This latter instrument informs the Palermo Protocol, and their relationship deserves a brief explanation.

UNTOC is a framework treaty; it lays out the contours of organized criminal activity, but does not detail specific types of criminal businesses.13 Supplementing this framework are a number of optional legal instruments, called protocols, that define specific criminal enterprises and mandate actions tailored to effectively combat them.14 The protocols are interpreted together with UNTOC’s provisions, taking into account that particular protocol’s aims.15 The reasons for this general-specific bifurcation in UNTOC’s case were twofold. First, some negotiating states worried that attempts to

13 Among other things, UNTOC defines criminal organizations (art. 2(a)), criminalizes participation in such groups (art. 5), laundering proceeds of crime (art. 6), and corruption (art. 8), details cooperation between states on a wide range of issues (art. 13,16-19), as well as witness protection (art. 24), and treaty implementation assistance (art. 29-30).
14 These Protocols are ratified in the same manner as treaties, with the additional requirement that states must already be parties to UNTOC. Although legally binding like a treaty, the Protocols’ optional status means that state parties are not mandated to ratify it. C.f. United Nations Treaty Collection, Definitions: Protocols, available at http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#protocols.
15 See UNTOC, supra note 12, at art. 37(4).
agree upon a definitive list of criminal activity would likely fail to be all-inclusive, and could exclude newly emerging criminal activities.\(^\text{16}\) Specific crimes would likely require specialized responses, and separate Protocols would enable states to negotiate these responses without endangering the comprehensive nature, effectiveness or operability of the underlying treaty.\(^\text{17}\)

Second, cabining individual crimes from the convention was also expected to facilitate the speed of negotiations, which it did—adoption of UNTOC by the UN General Assembly in 2000 essentially took four years,\(^\text{18}\) a short time in the world of UN treaty development. The Palermo Protocol and another protocol on human smuggling\(^\text{19}\) were ultimately adopted at the same time as UNTOC. A firearms trafficking protocol\(^\text{20}\) was also adopted just six months later.\(^\text{21}\)

Palermo’s specific focus on human trafficking combines with UNTOC’s general framework to create a legal system designed to address transnational criminal organizations engaged in human trafficking, and to delineate state responses to prevent, suppress, and punish these traffickers and their customers. By ratifying the Convention and Palermo, state parties commit to aligning their domestic law with the definitions and specific actions detailed in each instrument, and to working


\(^{17}\) Id.


with other member states in combating transnational organized crime and human trafficking. In short, this framework guides action at the domestic, regional and international level.

Turning to Palermo, article 3 contains three elements that define “trafficking in persons:”

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.

While promises of marriage used to deceive someone (the means prong) into forced sex or other forms of labor (the exploitative purpose prong) are covered, forced marriage, and indeed the word “marriage” itself, are conspicuously absent from the definition. That said, the phrase “at a minimum” makes the purpose prong open-ended, and even within the listed acts defining exploitation, “practices similar to slavery” or “servitude” could easily include forced marriage. However these terms have yet to be defined within the context of Palermo. State parties therefore do not have a

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22 See Palermo Protocol, *supra* note 11, at arts. 5-6, 9-10 (states required to criminalize certain activities, legally protect victims, establish measures preventing trafficking in persons, and exchange information with other member states, respectively).

23 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).
direct obligation to address marriage trafficking, and Palermo fails to even provide guidance on identifying and combating the crime. 25

In short, a conceptual gap exists in Palermo. While it theoretically covers forced marriages (and all other unmentioned forms of trafficking) that meet all three prongs, the current conceptual frame naturally focuses implementation on those activities explicitly stated in the exploitative purpose prong. Countries acting in good faith to address acts that fall into the conceptual gap must do so without guidance from Palermo on what constitutes marriage trafficking, and without the benefit of the cooperative framework that the instrument established for the state parties. The floor established in the exploitative purpose prong in practice operates as a ceiling, limiting Palermo's effectiveness against new forms of human trafficking.

As explained later in the paper, the concept of marriage trafficking is likely far larger than the definition proposed, but given the current lack of any definition, beginning with a concrete subset is an important first step. In order to set the stage for this definition, we begin with a brief overview of marriage migration and the context in which this particular form of human trafficking takes place.

B. What is marriage migration?

Marriage migration is a far broader phenomenon than the traditional “mail-order bride” image may imply. On the most general level, those who marry someone from another country and settle outside of their own home country are marriage migrants. They can meet their future spouse in

their home country, in their spouse’s country, or somewhere else abroad. Couples can meet through relatives, acquaintances, over the internet, or through a broker. People can migrate for work and then meet someone in their host country, eventually marry, and then settle down. Couples can be of the same or different ethnic background, religion, and/or socio-economic class. Whatever the circumstances, marriage migration is an increasing phenomenon as globalization leads more people to travel outside of their home country.

Commercially brokered marriages have become a visible subset of marriage migration in the Greater Mekong sub-region26 and in other parts of the world. Men, the buyers in all cases studied, who are unable to find wives in their home countries create a demand for marriageable women from abroad. At the same time, the rising economic imbalance within and between countries in the region has created a large population of women who are willing (and sometimes eager) to migrate, and a broker’s offer of an arranged marriage can be a viable avenue to opportunity abroad. Like those who migrate through labor brokers, the experiences of those who use marriage brokers range from generally positive to downright horrific. The chart below describes a spectrum of experiences that show where marriage migration and human trafficking intersect.

The two cases on the far right are or should be classified as instances of human trafficking. Experiences in the middle three sections may, depending on the facts, legally represent trafficking, domestic violence, contract fraud, or other breaches of domestic law. It is important to note that the situations in this middle area are not ordered by level of severity. Instead, they are broad areas in which, depending on the exact circumstances, could reach the level of human trafficking. It is in this area that the often indistinct boundary between human trafficking and related acts of domestic violence, fraud, rape and similar crimes exists. To the extent that a clearer boundary is desirable, it

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27 This spectrum of experience is drawn from UNIAP internal field research conducted by researchers from 2009-2010. The figure above is developed from a similar model by Lily Phan. See E-mail from Lily Phan, field researcher, UNIAP, to Lisa Rende Taylor, Counter Trafficking Technical Specialist, UNIAP (Oct. 25, 2009, 23:00 IST 11) (on file with author).

28 While the left two cases will not contain facts sufficient to constitute human trafficking, it is important to note that other issues, from domestic violence to a simple need for various social services, should not be ignored. Appropriate services available to marriage migrants and their spouses will go a long way to addressing acculturation and other issues present in any marriage, while at the same time serving as a lookout and an additional point of contact for those trapped in human trafficking situations.
will most likely have to develop through litigation on the domestic level, as well as through additional negotiation among the parties to Palermo.

Finally, this spectrum also highlights how human trafficking can occur at different points along the migration process. While individuals deceived at the outset can be considered victimized from the very beginning, others can undertake entirely knowing and voluntary migration until the husband, unbeknownst to the broker, sells his new bride into commercial sex work. Similarly, where a series of brokers are involved in helping the woman migrate, it may be a broker somewhere in the middle of the process, or perhaps at the end of the process, who seeks to exploit the woman. Understanding that victimization is not simply an all or nothing proposition is important on two fronts: first, for identifying where particular vulnerabilities to trafficking exist in a given migration flow, rather than mistakenly seeing the entire route as suspect, and second, in terms of victim support policies, for understanding that individuals are not uniformly victimized from the beginning. They have diverse experiences, and thus require a more individualized approach. 29 While both of these considerations require additional examination in their own right, the importance of understanding the diversity of experiences that marriage migrants face is critical to putting this article's proposed definition into practice, and to ultimately developing policies at all levels that promote safe migration and deter exploitation by human traffickers. As in other areas of human trafficking, it is very easy to see victims as passive subjects whom the brokers or husbands control until they are rescued. These images are often far from reality. Mirroring other cases of human

29 In fact, the very decision to migrate calls into question the woman as a passive object even when she is victimized. 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. 706 (2007).
trafficking, part of the woman’s trajectory may be voluntary, while other parts may be coercive or exploitative. Many also actively work to improve or escape from their situations.  

“Sham” marriages as a means of labor migration and human trafficking

Because marriage provides an avenue to legal residence in many countries, some women enter so-called “sham marriages” with a citizen or permanent resident of a destination country in order to gain access to better job markets. Human traffickers also use sham marriages as a way of bringing victims into a receiving country. In some cases, the victim may know that she is entering a false marriage, but discovers upon arrival that the job she was promised does not exist. Instead, she is sold into sex work or other forms of labor. In other cases, the victim is unaware the marriage is not real until she is already in the destination country, where she is forced into commercial sex work or labor. For the moment, it is enough to say that gaps in domestic marriage and relevant immigration law, inconsistencies between such laws in sending and receiving countries, and insufficient coordination in enforcement provide numerous loopholes for traffickers to exploit.

C. Why “marriage trafficking” is not included in the Palermo Protocol

30 An example from one internal case study at UNIAP involved a woman trafficked from Tay Ninh province in Vietnam to Hubei province in China. Having memorized the final leg of her journey to the husband’s house, she used a cell phone to call another Vietnamese woman, who connected her to the police. She then relayed the exact directions to her husband’s house. When police arrived and the husband’s family told them no Vietnamese lived there, they called the wife’s number and heard her cell phone coming from the basement. Her rescue owes as much to her resourcefulness as to her good fortune in having a working cell phone within earshot of visitors. UNIAP internal field report, May 2010 (on file at UNIAP).

31 Internal case studies conducted by UNIAP field researchers from 2009-2010 (on file at UNIAP).


33 There are important legal and policy differences between smuggling, where the victim is willing, and trafficking, where the victim is not. A discussion of this issue is beyond the scope of this article. See generally Special Rapporteur on the Human Rights of Migrants, Report of the Special Rapporteur on the Human Rights of Migrants, ¶¶51-59, Human Rights Council, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008) (by Jorge Bustamante).
Given the patterns of trafficking mentioned in the previous section, one might wonder why Palermo did not include a specific reference to marriage. In fact, efforts to include some form of forced marriage actually existed during initial negotiations, according to Palermo’s *Travaux Préparatoires*. Several states had suggested the term “forced marriage” be included, either as part of a definition of forced labor, or as a separate item under the definition of exploitation. The Special Rapporteur on Violence Against Women recommended adding the term “slave-like” in order to capture practices not normally within the rubric of forced labor, including domestic work, forced marriages, and forced motherhood.

Ultimately, marriage was not included; instead the phrase “practices similar to slavery” was adopted as a catch-all, with “at a minimum” inserted to ensure that “exploitation” was flexible enough to encompass other acts that might emerge in the future. While neither slavery nor practices similar to slavery are defined in the instrument, an official UN guide to national implementation for legislators does reference existing international instruments related to slavery. For example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery includes perhaps the broadest definition of forced marriage as a slave-like practice:

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34 Like a legislative history, this is a document that details negotiations, proposed text development, and input from a variety of interested parties. It serves to give context and illuminate the drafters’ and initial state parties’ intended meanings of the Protocol’s provisions.
35 *Travaux Préparatoires*, *supra* note 16, at 333 n.5.
“A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group” \(^{39}\) (emphasis added)

The definition is useful for capturing many forms of coercive marriage, including acts involving individuals and organizations outside of the family. The inclusion of an exchange of money or other valuable consideration reflects the profit motive that drives almost all forms of human trafficking. At the same time, the definition brings up an inevitable and difficult debate over where to draw the line between “marriage trafficking” and cultural practices of forced marriage that international law condemns. \(^{40}\) Arranged marriages, with money changing hands, are not uncommon in many parts of the world, including the regions covered in this article. Dowry, including the “bride price” system in numerous countries, introduces an economic component that invites analogies to exploitation, a critical element in human trafficking. To my knowledge, the interaction between existing prohibitions against forced marriage and human trafficking has not been fully studied. Complicating matters, none of the legal systems examined for this article define “marriage trafficking,” nor to my knowledge has any of the published research covering the region.

Wading into such undisputedly important but culturally charged topics quickly halts productive discussion on how to effectively fight human traffickers, who are increasingly trading in forced marriages as a criminal enterprise. While addressing traditional marriage practices, i.e. those not involving criminal enterprises, that contravene widely accepted international law must be addressed, the complicated interplay of culture and human rights requires a broader forum than is

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\(^{39}\) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1(c)(i), Sept. 7, 1956, 226 U.N.T.S. 3 [hereinafter Supplementary Convention on Slavery].

\(^{40}\) This condemnation is in the form of any infringement of the right of individuals to freely choose whom to marry, a tenant of many international treaties. I explore these instruments infra Part F.
possible or productive under Palermo's rubric. Part of Palermo’s effectiveness stems from its sharp focus on activities that the international community largely recognizes as the worst forms of human exploitation. Although the exact reasons for the negotiating parties’ failure to include marriage as a form of exploitation is unclear, it is likely that disagreement over what forms of forced marriages would qualify as human trafficking was at least one issue. Thus, it is important to begin with those practices that most closely resemble other forms of human trafficking, namely commercial transactions that bear little resemblance to traditional arranged marriages, as well as those marriages that are executed solely to deliver an individual into forced labor, whether sexual or otherwise.

**D. Integrating marriage trafficking into Palermo**

Preventing human trafficking through brokered marriages will require the cooperation of the international community at large. Palermo, with its broad support, provides the perfect vehicle to develop coordinated action. A concrete definition of marriage trafficking that addresses the realities of the activity and that fits within Palermo's framework is thus the most achievable and arguably most effective strategy to addressing this new form of human trafficking. Such a definition would help guide coordinated action between the over 150 member states in formulating responses that make their territories inhospitable to these forms of trafficking, while simultaneously helping to shut off international routes to criminal exploitation. On a national level, member states are more likely to incorporate definitions developed by the Palermo apparatus into their own domestic systems. Countries will be able to more rapidly and effectively work together in preventing the crime, prosecuting traffickers and their customers, and protecting victims.
On a practical level, Palermo’s scope of application also makes it an attractive instrument. It covers “offences [that] are transnational in nature and involve an organized criminal group.” A criminal organization is defined as a “structured group of three or more persons” that exist for a certain period of time. The phrase “structured groups,” in fact, describes loose-knit, informal networks; the definition only excludes those groups that form immediately before a crime takes place. The group need not have a formal structure, defined roles for its members, or even the same members over time. Such a broad definition covers both traditional criminal organizations as well as informal networks of brokers, transporters, fixers, and go-betweens that often typify human trafficking operations in the regions studied.

While the definitional contours of the term “marriage trafficking” are vague and open to controversy, some clearly identified exploitative activities seen in the field can be addressed with a fairly concrete definition that avoids long-standing debates around cultural practices of marriage. I label such exploitative activities “commercial marriage trafficking,” which emphasizes that I am addressing a discrete subset of the as-yet undefined larger universe of marriage trafficking. Integrating the key facets of this subset into Palermo’s three element framework, commercial marriage trafficking can simply be defined as:

1) **The act:** Recruitment, transportation, transfer, harboring, or receipt of a person

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42 UNTOC, *supra* note 12, at art. 2(a).
43 UNTOC, *supra* note 12, at art. 2(c).
44 *Id.*
45 “Traditional” organized crime groups are not widely reported in the internal case studies at UNIAP, although the relatively small number of such studies may simply overlook their activities in human trafficking. Internal case studies conducted by UNIAP field staff from 2009-2010 (on file at UNIAP).
2) **The means:** Through force, coercion, abduction, fraud, deception, or paying a person having control over another; *(fraud or deception being understood to include false promises of marriage)*

3) **The purpose:** For exploitation, which includes at a minimum *either the act of marriage as part of a commercial transaction or* 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 removal of organs.

Additions to the Palermo Protocol definition are in italics. While no change is made to the means element, the explanatory phrase in parentheses highlights the role of the promise of marriage in many commercial marriage trafficking scenarios. The revision to the purpose prong properly moves the analysis of exploitation back from what takes place within the marriage to the act of marriage itself. This is a critical distinction that will be discussed in the next sub-section.

First, however, three crucial points in this definition deserve examination. The term “commercial transaction” reflects the business-oriented, profit-driven nature of modern brokered marriages; it does not include traditional cultural practices of arranged marriages. Second, the explicit reference to marriage also helps to inform analysis of the means prong, raising scrutiny on promises of marriage that might rise to the level of fraud or deception. Finally, this revision, in conjunction with other existing purpose elements, captures three broad patterns of commercial

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46 *See Palermo Protocol, supra* note 11, at art. 3(a).
47 A discussion of the distinctions between traditional brokered marriages and their modern commercial counterparts is beyond the scope of this paper. However, a clear if somewhat simple distinction from the Taiwanese context is that a traditionally brokered marriage served to tie two families together. The money exchanged serves to seal a bond, and the relationship between the families is supposed to be deep and long-lasting. In contrast, commercially brokered marriages are driven by profit-oriented market forces; the quality of the union is less important than securing a profit. *See* Melody Chia-Wen Lu, *Commercially Arranged Marriage Migration: Case Studies of Cross-Border Marriages in Taiwan,* 12 INDIAN J. OF GENDER STUD. 275, 286 (2005) (“The business deal ends the moment the bride arrives in Taiwan for the first time.”). For a broader discussion of traditionally brokered marriages, see *id.* at 289-90.
marriage trafficking seen in the field: 48 1) a brokered marriage based on false representations that induce the woman into agreeing to a marriage, 49 2) deception based on an offer of work that ends in a woman sold into a marriage, 50 and 3) a promise of marriage that ends in the woman sold into another form of human trafficking as defined in the Palermo Protocol. 51 Combining these seemingly disparate acts of human trafficking into one conceptual package captures the reality seen in the case studies that traffickers are willing to use the promise of marriage and marriage migration systems to sell people into either forced marriage or other forms of exploitation. 52 Including all of these outcomes creates a framework that will focus scrutiny on how secure marriage-related immigration systems are against all forms of human traffickers.

i. Why the act of marriage is a point of exploitation

For those cases where a commercially brokered forced marriage has taken place, Palermo’s purpose prong strongly lead one to look within the forced marriage for activities that would fit the list of terms included under “exploitation.” All cases studies examined focused on what happened

48 Field Research Conducted by UNIAP Staff Researchers (2009-10) (on file at UNIAP). Additional examples in published research are mentioned in succeeding footnotes.

49 See, e.g., Graeme Hugo & Nguyen Thi Hong Xoan, Marriage Migration Between Vietnam and Taiwan: A View from Vietnam, in WATERING THE NEIGHBOR’S GARDEN supra note 9, at 365, 378 (“Many migrants who are not kidnapped in the conventional version of trafficking are by no means fully voluntary movers…. Many are not given accurate information about their lot at the destination”).

50 See, e.g., Le Bach Duong et al., supra note 9, at 410 (documenting a Vietnamese victim who was supposedly hired to sell oranges across the border in China, but was sold into marriage instead).

51 See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 346-47 (2011), available at http://www.state.gov/documents/organization/164458.pdf. (“Some women and girls from China and Southeast Asian countries are lured to Taiwan through fraudulent marriages . . . for purposes of sex trafficking and forced labor.”).

52 For example, Vietnamese investigators in one case had evidence that a Taiwanese brokerage group arranged fake marriages in Malaysia for more than 100 women, and then forced the women to remarry or work as prostitutes when they arrived. See Taiwanese Man to be Tried in Vietnam for Trafficking Women, THANH NIENT NEWS (Viet.), July 6, 2007, http://www.thanhniennews.com/2007/pages/20077622362029746.aspx. In another case, a number of Vietnamese women promised marriage were forced to work in brothels until they were ‘registered’ by a suitor. Nga, supra note 3.
within the marriage, examining whether sexual or labor exploitation had occurred.\textsuperscript{53} Indeed, even a
global estimate on forced labor released by the International Labor Organization in 2012 stated that
its figures did not include trafficking for forced marriage \textit{unless} the practice lead to a situation of
forced labor or service.\textsuperscript{54} Such analyses, however, run into two critical problems, one practical and
the other theoretical.

First, my own research in Southeast Asia has shown that affairs within the family (the so-called "domestic sphere") are often hidden from public view and thus law enforcement scrutiny. This
is assuredly true for many other parts of the world as well. Whether it is reticence on the part of law
enforcement to enter into essentially “private” affairs, or fear and/or shame on the part of victims to
discuss matters that occur in the household, what takes place within the domestic sphere is often off-
limits to the law. Even obtaining victims’ cooperation in testifying to what took place within the
home remains exceedingly difficult within these legal systems.\textsuperscript{55} One can imagine how even less
likely witnesses are to testify if faced with cross-examination that questions whether what they
endured rises to the level of exploitation. Simply put, the domestic sphere is very difficult for the law
to pierce.

Second, focusing solely on what occurs within the forced marriage misses an earlier point of
exploitation: the act of marriage itself. A person, whether a broker, the potential husband or a
middleman, has deceived or compelled another to enter a marriage contract against her will because

\textsuperscript{53} In fact, practitioners I spoke with in both Southeast Asia and the United States in preparation for this article almost all
stated that they would look for forced sex or labor in the marriage in order to determine whether exploitation had
occurred.

\textsuperscript{54} International Labor Organization, ILO 2012 \textit{GLOBAL ESTIMATES OF FORCED LABOR, EXECUTIVE SUMMARY AT 1 (2012)} \textit{available at}

\textsuperscript{55} This is also true from my own experience working in the anti-trafficking field in the United States and Japan while at
the Polaris Project, an international anti-trafficking organization based in Washington, DC.
her ability to marry is in itself valuable; brokers and middlemen profit from the sale of the woman to a willing buyer, and the man obtains a wife. No matter what takes place within the marriage, whether it is exceptional treatment (albeit while preventing the wife from ending the marriage) or domestic servitude and sexual abuse, exploitation has already occurred through the very act of forced marriage.

Shifting the analysis back to the marriage act solves both practical and theoretical issues. In most cases, entering the marriage is generally a public action that requires registration with the government, creating a public point of scrutiny. Although matrimony may create the private sphere, the act of marriage is not hidden from public view. Focusing on the act of marriage as a point of exploitation catches all actors before cultural taboos about discussing the domestic sphere come into play. At the same time, what occurred within the marriage is no longer exposed to a debate about “sufficient” exploitation. Because the marriage itself was a non-consensual transaction and thus exploitative, all acts performed within the marriage by definition are coerced and exploitative as well. Courts at the local level are then free to treat acts within the marriage as either continuations of the same crime of commercial marriage trafficking, or additional counts of trafficking as appropriate.

ii. Applying commercial marriage trafficking to brokers: definitions, fact patterns and case examples

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A definition is only as useful as its ability to address realities on the ground. We now turn to applications of commercial marriage trafficking to situations drawn from case studies to explore the contours of the proposed definition. The analysis focuses on 1) “brokers,” i.e. those people at the beginning, middle, or end of the chain who are primarily responsible for recruiting the woman, passing her on to other brokers, or finally connecting her with the ultimate buyer, and 2) “husbands,” those who employ a broker to find a marriageable woman and then marry her. Each sub-section includes a description of the analysis, followed by a table of case situations.

Using the definition introduced earlier, a broker’s actions would constitute commercial marriage trafficking when he or she:

1) **The act:** Recruits, harbors, transports, transfers, or receives a person, and

2) **The means:** Using force, coercion, abduction, fraud or deception (which may include the promise of marriage), or paying someone having control over the woman to obtain her compliance

3) **The exploitative purpose:** To place her in either

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57 An analysis of the people surrounding the broker who facilitate human trafficking is beyond the scope of this article, but it is sufficient to say that Palermo criminalizes the actions of accomplices. Thus, those people who willingly help traffickers should be treated as traffickers themselves. *See* Palermo Protocol, *supra* note 11, art. 5(2)(b).

58 As this definition arose out of my research in the Mekong Sub-Region, a word about how certain domestic systems in that region address commercial marriage trafficking is in order. In both Vietnam and Mainland China, the domestic legal systems view the exchange of money as a necessary element to the crime of human trafficking. This is in contrast to the Palermo protocol, which has no similar requirement. The purpose and not the completion of the act is in fact the key element; money or other forms of remuneration are not directly mentioned. *See* Palermo Protocol, *supra* note 11, art. 3(a). However, because commercial marriage brokers generally receive money or other forms of remuneration for their work, anti-trafficking laws in these countries consider this an important element. Their laws can thus in theory address commercial marriage trafficking without examining what took place in the marriage, as the act of money changing hands is essentially a public one. *C.f.* MINISTRY OF JUSTICE, SURVEY FINDINGS ON THE ENFORCEMENT OF LAWS AND REGULATIONS ON INVESTIGATION, PROSECUTION, AND TRIAL OF CRIMINALS IN WOMEN AND CHILDREN TRAFFICKING 10, Project 4-CT130/CP (2008) (Viet.) (on file at UNIAP) (interpretation of human trafficking statute same as that of child trafficking, which includes buying or selling for personal gain); Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by National People’s Congress, Mar. 14, 1997, effective Oct., 1, 1997) art. 240 reprinted in WEI LUO, THE AMENDED AND ANNOTATED CRIMINAL CODE OF THE
a. Marriage to another person or

b. Sexual labor, physical labor or services, or other forms of exploitation detailed in the Palermo Protocol.

*Examples of the broker’s liability for commercial marriage trafficking*

*Cases assume the broker receives payment from the husband, his family, or from another broker.*

<table>
<thead>
<tr>
<th>Broker’s action</th>
<th>Broker’s liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kidnaps, drugs, or otherwise uses physical force to obtain a victim. Through physical force or threats, s/he compels the woman to marry. The broker receives money from the husband or his family.</td>
<td>Liable for commercial marriage trafficking. S/he has 1) obtained a woman using 2) physical or threatened force to 3) compel her to marry.</td>
</tr>
<tr>
<td>Deliberately misrepresents vital information about the husband, his family, and/or his living situation. Includes economic status, expected domestic work, criminal history, or other major characteristics. The woman agrees to marry based on these false representations.</td>
<td>Liable for commercial marriage trafficking. S/he has 1) recruited a woman using 2) fraudulent promises of marriage to 3) compel her to marry.</td>
</tr>
<tr>
<td>Promises work at the destination, such as domestic labor or work in a restaurant, but during transit or at the destination, forces her to marry.</td>
<td>Liable for commercial marriage trafficking. S/he has 1) recruited a woman using 2) fraudulent promises of work to 3) compel her to marry.</td>
</tr>
</tbody>
</table>

59 These examples are drawn from internal case studies compiled at UNIAP. Field Research Conducted by UNIAP Staff Researchers (2009-10) (on file at UNIAP). Which patterns are more common has not yet been researched, and is likely to vary depending on the source-destination route examined.
<table>
<thead>
<tr>
<th><strong>Broker’s action</strong></th>
<th><strong>Broker’s liability</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Promises marriage, but during transit or at the destination, sells or forces the woman into prostitution or forced labor</td>
<td><strong>Liable</strong> for commercial marriage trafficking. S/he has 1) recruited a woman using 2) fraudulent promises of marriage to 3) compel her into a form of exploitation covered in Palermo.</td>
</tr>
<tr>
<td>Presents one potential husband to the woman and she agrees to marry. At the destination, another broker forces the woman to marry someone different. Both brokers receive money as part of the transaction.</td>
<td><strong>Unclear.</strong> The first broker will be <strong>liable</strong> for commercial marriage trafficking if s/he knew the transaction’s ultimate purpose. Failing to tell the woman of her ultimate fate is fraud by omission, and they intended to exploit the woman’s ability to marry by selling her to another broker. The second broker will be <strong>liable</strong> for commercial marriage trafficking.</td>
</tr>
<tr>
<td>Promising payment to the bride or her family in exchange for the woman’s agreement to marry, but then fails to pay.</td>
<td><strong>Unclear.</strong> Depending on interpretation of domestic law, this may qualify as a trafficking situation. It would depend on the</td>
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60 “Domestic law” here refers to either or both the sending or receiving country's laws depending on the facts of the case and each country's legal system. To offer a few simple examples, a sending country broker promising payment would fall under the sending country's law, while a payment traced back to the husband could implicate either or both sending and receiving country jurisdictions, as the promise of payment was made in the sending country but the harm might have occurred in the receiving country. These examples highlight one of the many complications of prosecuting criminal activity that has a transnational effect. Where the act occurred and where the harm resulted could implicate laws in multiple countries. It is for this very reason that a common definition of the crime and a coordinated response that includes harmonized (although not necessarily identical) laws across multiple domestic systems is vital.
importance of the payment to the woman’s
decision to marry. If without payment the
woman would have decided against marriage,
then the broker is liable for commercial
marriage trafficking. If lack of payment would
not have greatly

<table>
<thead>
<tr>
<th>Broker’s action</th>
<th>Broker's liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failing to perform due diligence in uncovering</td>
<td><strong>Not liable</strong> for commercial marriage trafficking.</td>
</tr>
<tr>
<td>information about the husband that would affect the</td>
<td>May be liable under civil action for negligence.</td>
</tr>
<tr>
<td>woman’s decision to marry.</td>
<td></td>
</tr>
<tr>
<td>Husband abuses the wife, forces her to work,</td>
<td><strong>Not liable</strong> for commercial marriage trafficking.</td>
</tr>
<tr>
<td>to engage in sexual activity, or exploits the wife</td>
<td>May be liable for negligence under civil action.</td>
</tr>
<tr>
<td>in other ways once the marriage has begun. The</td>
<td></td>
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<tr>
<td>broker was not complicit in these activities and</td>
<td></td>
</tr>
<tr>
<td>had no knowledge of the husband’s intention to</td>
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<tr>
<td>perform these acts.</td>
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Three points stand out from these examples. First, like the definition of human trafficking in the Palermo Protocol, this definition also criminalizes attempt. Thus, whether the potential buyer of the victim completes the transaction or not is irrelevant to the analysis of the broker’s potential guilt. As long as he/she has met the act and means prongs, and intends the purpose prong of the definition, then he/she is guilty of commercial marriage trafficking.

Second, the chain of brokers and go-betweens may make it more difficult to assess criminal liability. It is entirely possible that a broker working in a source country has no intention of trafficking his or her customers, and may be arranging either purely legal international marriages, or at worst conducting smuggling operations. However, those further up the chain who knew or should have known of the woman’s ultimate fate should also be liable as traffickers, as their purpose in recruiting and/or passing along the woman is to profit from her eventual exploitation. Investigators would therefore need to examine the entire chain of movement in order to determine where trafficking took place, and the culpability of those before and after the point(s) of exploitation.

Third, the most difficult cases within the gray zone of potential liability are those involving payment to the families. Commercial marriage brokers often give some payment to a bride’s family, although this can be quite small relative to what the groom has paid the broker. Still, money changing hands may raise the specter of criminal liability for the family. A broker’s offer “leads some families to send their daughters away for marriage in exchange for a sum of money. Without

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61 The best-case scenarios from the Vietnam context describe families receiving $1,000-$2,000, out of a total of $7,000-$10,000 that brokers charge clients. See Hugo & Nguyen Thi Hong Xoan, supra note 49, at 377, 379.
fully realizing what they are doing, some parents participate in the trafficking and selling of their daughter.\footnote{Le Bach Duong et al., 393, \textit{supra} note 9, at 400. How much parents who arrange marriages with commercial brokers understand the potential for exploitation, and even the simple realities of international marriages needs to be further examined. Clearly however, in places where desperate poverty is the norm, the ability to send a daughter away in exchange for money may serve three complimentary purposes: the family receives money it badly needs, an unmarried woman who is often dependent on her family leaves the house, and she gains the chance, however small, of better opportunities abroad than she would at home. I list these reasons not to defend the practice, but to illustrate the impossible decisions that some families face. There are certainly families guilty of simply selling their daughters for profit, and they should be held liable for human trafficking. However, there are many others who are not. Enforcement of whatever domestic laws that implement the Protocol’s obligations should therefore be applied with great care against family members. A better, if longer term solution, is to address cultural practices that impair the freedom to choose one’s spouse, while also removing the economic, gender, and ethnic disparities that may motivate parents to interact with commercial marriage brokers.}

iii. Elements of the husband’s liability for commercial marriage trafficking\footnote{In some cases, the groom’s parents or a third party may directly pay the broker. Such “buyers” who meet the other elements listed here would also be liable for commercial marriage trafficking.}

Husbands and their families are in many ways the most important element of commercial marriage trafficking. They drive demand for women, and are the source of the traffickers’ revenue. Without people willing to purchase a forced marriage, one large part of commercial marriage trafficking would not exist.\footnote{The remaining part that would continue to exist would be those cases involving the promise of marriage that ends in forced prostitution or other forms of forced labor.} Under our definition, the husband would be liable for commercial marriage trafficking when he:

1. **The act:** Recruits, harbors, transports, transfers, or receives a woman (usually through paying a broker) and

2. **The means:** Through force, fraud, deception,\footnote{The husband engages in fraud or deception when the woman agrees to marry, based on any false representations he makes regarding himself, future living conditions, responsibilities in the new household, amount of payment to either the bride or her family, or any other information upon which she bases her decision. He can make these representations either directly to her, her family, or through the broker. His wilful failure to disclose information that could impact her decision to marry would also constitute fraud or deception.} or coercion

3. **The exploitative purpose:**\footnote{In some cases, the groom’s parents or a third party may directly pay the broker. Such “buyers” who meet the other elements listed here would also be liable for commercial marriage trafficking.} Marries the woman knowing she was coerced into the marriage, or upon learning of the coercion, keeps her in the marriage against her will. Any labor or
sexual activity that the wife performs while in the marriage constitutes additional acts of exploitation.

**Examples of the husband’s liability for commercial marriage trafficking**

<table>
<thead>
<tr>
<th>Husband’s action</th>
<th>Husband’s liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>The broker used deception to obtain the wife’s agreement to marry. She discovers the deception before or after the marriage is completed and attempts to back out of the marriage, but the husband prevents her from leaving.</td>
<td><strong>Liable</strong> for commercial marriage trafficking. The husband has 1) received the woman, 2) used force or other means to prevent her from refusing or ending the marriage, and 3) has exploited her ability to marry, thereby attaining married status and its associated benefits.</td>
</tr>
<tr>
<td>The husband provides false information or fails to disclose facts that would change the woman’s decision to marry.</td>
<td><strong>Liable</strong> for commercial marriage trafficking. The husband 1) received the woman, using 2) deception or fraud by omission, 3) for the</td>
</tr>
</tbody>
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67 These examples are drawn from internal case studies compiled at UNIAP. Field Research Conducted by UNIAP Staff Researchers (2009-10) (on file at UNIAP). Which patterns are more common has not yet been researched, and is likely to vary depending on the source-destination route examined.

68 This could include his expectations of her to perform domestic work, take care of family members or engage in more odious activities, such as outside sex work, or even sex with other male relatives. These latter examples are drawn from internal research at UNIAP. Field Research Conducted by UNIAP Staff Researchers (2009-10) (on file at UNIAP).
<table>
<thead>
<tr>
<th>The husband transfers his wife to another person, knowing she will be subjected to some form of exploitation detailed in Palermo or for a forced marriage.</th>
<th>Liable for commercial marriage trafficking. The husband essentially is acting as a broker, and has used marriage as a vehicle for trafficking the woman.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The wife enters the marriage willingly. The husband later prevents her from leaving the house, forces her to perform work, or otherwise badly mistreats her.</td>
<td>Unclear. Depends on when the activity occurs. If it occurs soon after marriage, liability is probable, as the husband has deceived the wife into marriage and then prevented her from leaving. If some time passes after marriage before these activities occur, the husband may not be liable for commercial marriage trafficking, as it would be difficult to prove his intent at the time of marriage to exploit her. However, the husband may be liable for domestic violence or similar criminal acts under domestic law.</td>
</tr>
<tr>
<td>The husband confiscates the wife’s passport and other official papers. He constrains her</td>
<td>Unclear. As above, when this activity happens, and whether an exploitative purpose was</td>
</tr>
</tbody>
</table>

69 As with the analysis of brokers, the attempt is also a criminal act. Thus, the marriage need not be completed or even begun in order to find liability.

70 My thanks to Dr. Melody Chia-Wen Lu, Research Fellow, Asia Research Institute, National University of Singapore, for suggesting this idea.
movements and/or prevents her from leaving the house. However, neither the husband nor the broker deceived her about the conditions of the marriage.

intended, is key. Depending on the situation, remedies for domestic violence may be available. Confiscating personal documentation should be criminalized under domestic law.

While timing issues surrounding seemingly exploitative behavior create difficult gray area cases, the focus throughout all of the examples remains centered on whether the initial act of marriage contained an exploitative purpose. Although victims may need to testify to what occurred during the marriage, it will be in the context of establishing exploitation in the marriage act, and not whether the acts perpetrated within the marriage themselves rise to the level of exploitation required to establish human trafficking. Having evaluated the proposed definition for commercial marriage trafficking, we now turn to the issue of integrating it into existing international law on human trafficking.

**E. Revising the Palermo Protocol**

An amendment to Palermo addressing commercial marriage trafficking would be an ideal response from the international community, as it would create new legal obligations. Unfortunately, it would also involve a monumental political effort. Palermo has not to date ever been amended, and the large number of member states would make progress on any changes a very long process. Setting up a new legal instrument on marriage trafficking is even more unattractive, as it would be largely devoid of the institutional machinery and experience gained from implementing Palermo. Instead, a more practical approach would be to use the administrative apparatus supporting Palermo to build international consensus on addressing commercial marriage trafficking.
The underlying treaty, UNTOC establishes administrative machinery, known as the conference of parties (COP), that enables member states to coordinate and guide implementation of the treaty and its assorted Protocols. Over the eleven years of the treaty’s existence, the COP has created working groups focusing on each of the optional protocols. The working group focused on trafficking in persons is charged with facilitating implementation of Palermo, including making recommendations to the COP, and most importantly for our purposes, “contributing to the identification of weaknesses, gaps and challenges” in Palermo. It is within this working group that coordinated action against commercial marriage trafficking and other forms of marriage trafficking can best develop. While neither Palermo nor any relevant background documents suggest that it could provide interpretations that are binding on member states, the working group’s role in facilitating implementation would lend its interpretations authority and would at the very least provide a guide for addressing this crime within the Palermo framework.

In practical terms, the working group could approach a conceptual gap-filling project by calling for all member parties to examine and report on the issue within their own borders. Combined with international legal and transnational migration analysis, this work could lead to both a picture of the problem globally and elaborations on the legal definition introduced in this article.

The definition would then be tied to one of the terms explicitly defined in the Palermo Protocol, e.g.

71 UNTOC, supra note 12, art. 32.
slavery, or practices similar to slavery, and would guide discussion among member states on developing coordinated plans of action that address both the domestic and transnational aspects of the crime. Such an activity, while admittedly a long-term project, would still be faster than the amendment process, and would benefit from the Palermo Protocol’s existing support and structure. While it would not necessarily have the formal force of treaty law, the updated framework would have significant normative power, and could serve as a blueprint for developing other parts of Palermo, UNTOC and the other Protocols as new forms of existing crimes emerge.

**F. Domestic implementation: Using existing international legal obligations to protect marriage migrants from human traffickers**

Negotiations within the working group will be a lengthy process, possibly taking years. In the meantime, countless women who migrate for work or marriage will continue to fall victim to commercial marriage trafficking. While international consensus and coordinated action within the Palermo framework develops, states can immediately repurpose other existing international law to strengthen their responses to commercial marriage trafficking. Most of the provisions discussed below come from widely ratified international treaties and provide a set of basic provisions to protect vulnerable migrants and national marriage immigration systems from traffickers. Note that the provisions are not a panacea and will not by themselves lead to the proactive coordinated action

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75 The Working Group might instead state that its elaboration of commercial marriage trafficking is a development beyond the “minimum” level established in the Palermo Protocol’s definition of human trafficking. See Palermo Protocol, supra note 11, art. 3(a). This however would carry weaker normative force than attaching the definition to an existing term, as states that are not already meeting the minimum definition would likely first focus on doing so, while those content to simply rest at the minimum level would have little incentive to go beyond it.

necessary to effectively address the transnational nature of commercial marriage trafficking. However, common implementation of these provisions will help create a shared minimum standard of protection, while also improving the implementation of each of these legal instruments.

The relevant provisions on marriage most useful in the fight against commercial marriage trafficking come from five international instruments: the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Consent); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Although binding only to the extent that it reflects customary norms of international law, I have also included the Universal Declaration of Human Rights to underscore the long-respected nature of several of the provisions.

Together, these instruments mandate five requirements for marriage: 1) free and full consent, 2) a minimum age of marriage (determined by each state party), 3) compulsory registration of the marriage, 4) registration in person by both parties, and 5) equal rights and responsibilities upon dissolution of the marriage.

77 For completeness’ sake, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery contained qualified provisions on minimum marriage age, and non-binding provisions on marriage registration in front of a public servant. See Supplementary Convention on Slavery, supra note 39, art. 2.
The ability to freely choose one’s spouse is a fundamental human right, and its absence in commercially brokered forced marriages is a key indicator of human trafficking. Its inclusion in all of the above instruments, as well as the UDHR, suggest that it may now be customary international law. A minimum age requirement meanwhile reflects the understanding that adolescents and children lack the adult capacity to make freely informed decisions and are also more susceptible to pressure from adults, particularly their families. The ICCPR and CEDAW enjoy large memberships, and with no party reserving on the minimum age requirement, it may also be customary international law. However, none of the instruments mandate a specific age, only that a minimum age be set. Additionally, if the minimum age is greater in the destination than in the source country, even legitimate marriages could become invalid once the immigrant arrives, jeopardizing both their marital and residency status.

<table>
<thead>
<tr>
<th></th>
<th>UDHR 84</th>
<th>Consent 85</th>
<th>ICERD 86</th>
<th>ICCPR 87</th>
<th>ICESCR 88</th>
<th>CEDAW 89</th>
</tr>
</thead>
<tbody>
<tr>
<td>Free and full consent</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Minimum age requirement</td>
<td>X</td>
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<td>Marriage registration</td>
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<tr>
<td>Registration in person</td>
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<tr>
<td>Equal rights, responsibilities</td>
<td>X</td>
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<td>X</td>
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84 All three provisions are within the same article. Note that the minimum age requirement is implied by the phrase “of full age.” See id., art. 16.
85 Consent, supra note 78, arts. 1-3.
86 ICERD, supra note 79, art. 5.
87 ICCPR, supra note 80, art. 23.
88 Note that the mandate is relatively soft. See ICESCR, supra note 81, art. 10(1) (requiring that State parties recognize that marriage “must be entered into with the free consent of the intending spouses.”).
89 CEDAW, supra note 82, art. 16.
90 A full examination of child marriage within the human trafficking context is beyond the scope of this article. However, like other forms of human trafficking, commercial marriage trafficking involving children should not require the means element. See Palermo Protocol, supra note 11, art. 3(b)-(d) (act and purpose elements are alone sufficient to constitute human trafficking for victims under eighteen years of age).
Marriage registration provides both national security and human rights related protections. From a security perspective, it enables governments to confirm that the marriage is legitimate and is not an effort to traffic or smuggle individuals into the country. Requiring both individuals to register in person further reduces a trafficker’s ability to exploit marriage immigration systems, and provides an opportunity to directly assess whether individuals may be in danger of or have already been trafficked. At the same time, marriage migrants’ legal residency in their spouse’s country is often initially predicated on their marriage status.\(^91\) Official status gives the spouse many of the rights, privileges and protections that citizens enjoy, and removes at least some of the fears of deportation that may lead those illegally in a country to submit to exploitative practices.

In the context of forced marriage, equal rights following divorce implies that a woman will not be penalized for ending the marriage. This includes a guarantee to assets accumulated during marriage and to some form of custody of children. In some countries, custody enables a foreign spouse to legally remain in the country after divorce.\(^92\) Lacking such a right, a spouse in a forced or simply abusive relationship may hesitate to terminate the marriage for fear of deportation and loss of her children. Note, however, that provisions from the three relevant conventions vary in strength. The ICCPR provides the clearest mandate: states must “take appropriate steps to ensure equality of rights and responsibilities of spouses” upon divorce, and that “provisions necessary to protect any

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\(^91\) See sources cited supra note 56 (providing examples of national laws requiring marriage for legal residency of a foreign spouse).

\(^92\) See, e.g., Ruchuguo Ji Yiminfa (入境及移民法) [Immigration Act] art. 31(4), MINISTRY OF JUST. (Nov. 23, 2011), http://law.moj.gov.tw/eng/LawClass/LawAll.aspx?PCode=D0080132. (Taiwan) (allowing a foreign spouse to remain in the country after a divorce if she was the victim of domestic abuse or has custody of permanent resident children).
children shall be made.” 93 This formulation provides the best guide in implementing and enforcing effective domestic law.

As the table above shows, almost all of the features of the marriage regime enjoy support through widely adopted international legal instruments. The only exception is the requirement to register in person, which is only covered in Consent. 94 Regardless, all five provisions discussed above should be established and implemented in domestic law in order to decrease exploitation of marriage immigration systems, protect vulnerable marriage migrants, and ensure that victims are not further disadvantaged after escaping and ending a forced marriage.

**Conclusion: The road ahead**

The international community faces a new form of human trafficking that takes advantage of both increasing mobility and persistent ignorance about marriage migration. As in other types of human trafficking, criminal organizations are adept at exploiting legal gaps and a lack of coordination between countries. A large community of member states and an active administrative support structure make the Palermo Protocol the most practical and effective platform for framing effective legal counter-measures and for bringing a majority of countries together to address what is ultimately a transnational problem. This article’s definition of commercial marriage trafficking serves as an effective solution to a critical conceptual gap in Palermo and the ceiling that such a gap creates on coordinated and effective state action. While application of this article's proposed

93 ICCPR, supra note 80, art. 23.
94 Consent, supra note 78, art. 1(1). In contrast to the other conventions, which have between 160 and over 180 states parties, Consent is confined to 55 parties. However, seven of these, including most recently France, have ratified the treaty since the turn of this century, suggesting that momentum to ratify this treaty may be on the rise. See Status of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&lang=en. (last visited Nov. 24, 2012).
definition focused on the Greater Mekong Sub-Region, the definition itself is sufficiently general to serve as a common foundation for developing international responses to similar situations in other parts of the world. It can also serve as the first step in developing a comprehensive legal framework that responds to the realities of marriage trafficking more generally, including those within and outside of the commercial marriage broker context.

Translating international legal frameworks into effective action on the ground, however, requires understanding the dynamics that drive marriage migration and human trafficking in each country. Domestic action should begin as soon as possible, starting with an assessment of the country’s present responses to activities that constitute commercial marriage trafficking, using this article’s definition of the term. Combined with assessments of how domestic marriage laws measure up to provisions in other relevant international legal instruments, such an analysis should identify weaknesses in a country’s legal system and provide first steps towards formulating responses that address those shortcomings.

Finally, the ability of international criminal organizations to exploit gaps between legal systems means that anti-trafficking initiatives are only as effective as the weakest legal system in a given migration pattern. International and domestic law must be harmonized to create an effective protective system between source, transit, and destination countries. A subsequent paper will include an analysis of national legal systems, using Vietnam as a source country, with destinations including Mainland China and Taiwan as case studies. The analysis will also serve as an analytical framework for examining other such migration flows elsewhere in the world, and to further inform development of Palermo.
As we move further into the twenty-first century, increasing globalization will continue to fuel demand for brides in many parts of the world. Women migrating for marriage often face serious risks to human trafficking, as criminal exploitation of these women and their migration routes have often gone overlooked. A more thorough understanding of commercial marriage trafficking, reflected in a clear conceptual framework that promotes coordinated action, will be the most effective way to ensure that marriage migrants are protected throughout their journey and to secure marriage migration routes against exploitation by human traffickers of all kinds.