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Applying the United Nations Trafficking Protocol in the Context of Climate Change

Mikaila V. Smith*

Abstract

Climate change will increasingly lead to widespread environmental degradation which will in turn spur large-scale vulnerability, displacement, and migration. This phenomenon is now well recognized in the literature, although causal pathways continue to be debated. However, scholars and practitioners have so far largely neglected to examine the related ways in which climate change will significantly impact the scale and scope of global trafficking in persons. This Comment responds to a lack of scholarship on the climate change-human trafficking nexus by exploring the predicted impacts of climate change on human trafficking. In light of these forecasted developments, this Comment argues that the United Nations Trafficking Protocol contains a textual basis through which states may recognize people who have been made vulnerable to trafficking by climate change. Finally, this Comment asserts that any apparent or actual consent by those who are trafficked is irrelevant within the framework of the Protocol.

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I. INTRODUCTION

In a 2019 speech on World Day Against Trafficking in Persons, U.N. Secretary-General António Guterres recognized climate change as a phenomenon that “exacerbate[s] the vulnerabilities and desperation that enable [human] trafficking to flourish.”¹ Human trafficking, also called trafficking in persons, occurs when a person (the trafficker) has a purpose of exploitation and recruits, transports, or harbors another person (the victim) through means such as force, coercion, fraud, or abuse of [the victim’s] position of vulnerability.² Exploitation in trafficking may take a variety of forms; prevalent examples include forced labor, sexual exploitation, and organ removal.³ All forms of human trafficking have been prohibited under international law since 2003, when the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) entered into force.⁴

This Comment addresses instances where a victim has been made vulnerable to trafficking through climate change-related processes of environmental degradation. This relationship is referred to as the climate change-human trafficking nexus, a term that describes the multicausal and multidirectional intersection between environmental phenomena spurred by global warming and developments in global and regional patterns of trafficking in persons. The nexus will be elaborated upon in Section III, but a brief overview may serve to indicate where the discussion is headed: in short, climate change will increase natural disasters and forced migration. Both of these factors will increasingly make it a daunting and complex task to prevent human trafficking and protect vulnerable people from exploitative and coercive situations.

For example, a 2007 study conducted in Bangladesh after Cyclone Sidr found that:

criminal networks began to operate in the disaster-affected region, preying on widows, men desperate to cross [an international border] to find employment and income, and sometimes entire families. Victims of trafficking were forced into prostitution and hard labour, some working in sweatshops. . . . Some disaster-affected families also began to collude with the traffickers in order to

¹ *Conflict, Climate Change Among Factors that Increase ‘Desperation that Enables Human Trafficking to Flourish,’ Says UN Chief*, U.N. NEWS (July 31, 2019), <https://perma.cc/9QEN-U7EC>.

² United Nations Office on Drugs and Crime (UNODC), *What is Human Trafficking*, UNODC, <https://perma.cc/QD7G-RCUG>.

³ *Id.*

⁴ United Nations Convention Against Transnational Organized Crime, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, art. 2, opened for signature Dec. 15, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003) [hereinafter Trafficking Protocol].

earn money. . . . Women-headed households were identified as especially vulnerable to human trafficking and the associated forms of exploitation.⁵

Research performed in countries such as Bangladesh, the Philippines, Nepal, Pakistan, and Cambodia has documented similar post-disaster patterns.⁶ Although much of the available research concentrates on post-disaster upticks in trafficking on the Asia-Pacific region,⁷ this phenomenon occurs all over the world, including in the U.S.⁸

Many of the cases arising from the climate change-human trafficking nexus may lack the level of coercion or force traditionally associated with trafficking cases.⁹ Rather, the victims may have implicitly or explicitly consented to a trafficking situation as the least bad choice after a climate-related natural disaster.¹⁰ The lack of full-scale coercion and potential presence of consent raise concerns of a protection gap: victims of climate change will remain in exploitative situations without the possibility of gaining a protective legal status as a victim of trafficking. To address this protection gap, this Comment sets forth a textual argument for the inclusion of victims of the climate change-human trafficking nexus under the Trafficking Protocol.

The goal of this argument is to prevent the harm caused by human trafficking without vitiating the definition contained within the Trafficking Protocol. This is the central tension underpinning this Comment: extending legal protection to people who are trafficked as a result of climate change while maintaining some limiting factor to reassure administrative agents that this solution is, at least in theory, feasible.

Human trafficking is a massive industry that impacts a significant number of people and carries tangible financial repercussions. According to 2017 estimates, at any given time, 24.9 million victims of human trafficking are enduring modern slavery.¹¹ Sixty-four percent of trafficking victims are in forced labor situations,

⁵ Sabira Coelho et al., *The Climate Change–Human Trafficking Nexus* (citing Alice Poncelet et al., *A Country Made for Disasters: Environmental Vulnerability and Forced Migration in Bangladesh*, in ENV'T, FORCED MIGRATION & SOC. VULNERABILITY 211–22 (Tamer Afifi & Jill Jäger, eds.)), at 6 INT'L ORG. FOR MIGRATION (2016).

⁶ *See generally id.*

⁷ For good reason, the Asia-Pacific region will be most impacted by the climate change-human trafficking nexus. The region already has a high rate of irregular migration and “extreme vulnerability to climate change” due to its “diverse topography.” *Id.* at 5.

⁸ *See, e.g.*, Jasmine Garsd, *Human Trafficking is a Hidden Aftermath of Natural Disasters*, PUB. RADIO INT'L (Oct. 5, 2017), <https://perma.cc/X97W-RH7D>.

⁹ *See generally id.*

¹⁰ *Id.*

¹¹ This is likely a conservative estimate. *See Human Trafficking by the Numbers*, HUMAN RIGHTS FIRST (Jan. 2, 2017), <https://perma.cc/274N-BJL8>; Anna Stephens, *Climate Change and Human Trafficking: An Investigation into how Climate Change and Natural Disasters Increase the Risk of Human Trafficking and How it Can be Intercepted in the Future*, LUND UNIV. CTR. FOR SUSTAINABILITY STUD. 9 (2019).

spanning sectors such as construction and manufacturing, domestic care, and agriculture.¹² Globally, human traffickers earn roughly 150 billion USD, per year.¹³ Sexual exploitation is a disproportionate source of financial benefit, making up sixty-six percent of the industry's financial earnings, although only nineteen percent of victims are trafficked for sexual exploitation.¹⁴

Despite these staggering statistics, human trafficking is a growing problem, and there is little reason to think this will change anytime soon.¹⁵ The rate of successful prosecutions of human traffickers is extremely low,¹⁶ and very few victims of trafficking are ever detected, offered protection, or provided with the services they need to extricate themselves from coercive situations.¹⁷

Climate change likely exacerbates these trends. The planet's warming results in more numerous, severe, and unpredictable natural disasters.¹⁸ These disasters fall into two categories: sudden onset disasters, such as cyclones, and slow onset events, such as sea level rise.¹⁹ Both types of environmental disasters commonly result in loss of home and livelihood for people in the area.²⁰

Those with fewer resources initially are especially likely to be impacted and face severely limited options for survival post-disaster.²¹ As a result, they become easy targets for recruitment by traffickers.²² Recruitment can take a variety of forms, ranging from widespread online advertisements to targeted physical approaches.²³ Such interactions generally involve promises of easy money, housing, or food, with few or no details about the work to be performed in exchange.²⁴ This recruitment may occur almost immediately after a natural disaster,²⁵ or it may be a more distant result as, for example, when people begin

¹² HUMAN RIGHTS FIRST, *supra* note 11.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ UNODC, *Global Report on Trafficking in Persons 2018*, 41 (Dec. 2018).

¹⁶ HUMAN RIGHTS FIRST, *supra* note 11.

¹⁷ UNODC, *supra* note 15.

¹⁸ Coelho et al., *supra* note 5, at 3–4.

¹⁹ Denise Chow, *Time is Fast Running Out: World Meteorological Organization Warns Climate Efforts are Falling Short*, NBC NEWS (Mar. 10, 2020), <https://perma.cc/W8ES-LJJ2>.

²⁰ Coelho et al., *supra* note 5, at 3–4.

²¹ *Id.*

²² KOKO WARNER ET AL., *IN SEARCH OF SHELTER: MAPPING THE EFFECTS OF CLIMATE CHANGE ON HUMAN MIGRATION AND DISPLACEMENT*, iv, 2 (2009).

²³ Garsd, *supra* note 8.

²⁴ *Id.*

²⁵ As with the well-documented increase in trafficking that occurs after sudden onset disasters, see WARNER ET AL., *supra* note 22; see Part III.A.1.

migration journeys as a form of proactive climate change adaptation.²⁶ In this way, climate change compounds existing vulnerabilities and will likely increase the situations in which people succumb to coercive situations due to a lack of intervening options or support.

Human migration is another important facet of the climate change-human trafficking nexus. The International Organization for Migration (IOM) estimates that by 2050 the world will have over 200 million forced migrants, largely due to environmental degradation.²⁷ The IOM acknowledges that this may be a conservative number. Yet, it is already more than twice the current number of displaced people worldwide (79.5 million).²⁸ While estimates vary, top scholars in the field confidently assert that the “scope and scale [of migration] could vastly exceed anything that has occurred before.”²⁹

Of course, it is difficult to accurately estimate what number of these migrants might become trafficking victims.³⁰ Data about the prevalence of trafficking among forced migrants is not yet available.³¹ But the predicted rise of forced migration means that even relatively low rates could have a big impact on global rates of human trafficking. For example, if one in four forced migrants became trafficked, this would more than double the current number of global human trafficking victims. Additionally, climate change may alter the means that traffickers use and the type of trafficking that people experience through, for example, the increased prevalence of debt bondage.³² Each of these impacts has enormous significance for advocates and practitioners.

A great deal of this migration will be intrastate, with many people moving from rural agricultural areas to urban slums, where traffickers often recruit.³³ However, migration across international borders is also likely to increase significantly due to climate change.³⁴ As the effects of climate change intensify and combine with pre-existing factors, such as violent conflict or a dearth of resources, people will travel greater and greater distances in search of safety and

²⁶ Coelho et al., *supra* note 5, at 3–4.

²⁷ WARNER ET AL., *supra* note 22.

²⁸ *Figures at a Glance*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) (June 18, 2020), <https://perma.cc/8B2Y-LSMB>.

²⁹ WARNER ET AL., *supra* note 22.

³⁰ *Human Trafficking*, MIGRATION DATA PORTAL (July 3, 2020), <https://perma.cc/QXG3-Q7XM>.

³¹ *Id.*

³² David Brown et al., *Modern Slavery, Environmental Degradation and Climate Change: Fisheries, Field, Forests and Factories*, 0 NATURE AND SPACE 1, 6 (2019).

³³ Coelho et al., *supra* note 5, at 4.

³⁴ WARNER ET AL., *supra* note 22.

opportunity.³⁵ In the face of global populist sentiment and lack of political will to support legal international migration, people will increasingly enlist the services of human smugglers to make these journeys, thereby increasing the likelihood of eventual trafficking.³⁶ Whatever the relative proportions of differing types of migration, the effect is the same: increased vulnerability to human trafficking as a result of environmental displacement that has disrupted livelihoods and systems of support.

Despite the urgency and significance of the climate crisis for efforts to eradicate sexual exploitation and forced labor, the climate change-human trafficking nexus has received relatively little attention from policymakers and academics.³⁷ Secretary-General Guterres is one of just a handful of public figures who has sought to increase awareness of the climate change-human trafficking nexus.³⁸ The IOM is one of the few international organizations that has formally begun to publish on the nexus, and their work so far encompasses just one publication.³⁹

The climate change-human trafficking nexus also continues to be largely ignored by the U.N. Office on Drugs and Crime (UNODC), the U.N. agency tasked with addressing human trafficking through research and policy development. For example, in 2018, the UNODC's 88-page biannual report on global human trafficking contained no mention of or reference to climate change or the environment.⁴⁰

Agencies focused on responding to climate change and natural disasters have similarly neglected to address trafficking as a consequence of environmental events, despite substantial evidence that supports a positive correlation between natural disasters and increased rates of trafficking.⁴¹ A thorough review of the disaster response and emergency preparedness documents of various U.N. agencies, the American Red Cross, and Federal Emergency Management Agency

³⁵ John Podesta, *The Climate Crisis, Migration, and Refugees*, BROOKINGS (July 25, 2019), <https://perma.cc/224G-85FM>.

³⁶ Brown et al., *supra* note 32.

³⁷ Coelho et al., *supra* note 5. The Vatican is one of the first and only entities to situate its work on human trafficking within the context of environmental issues. In 2015, the Vatican convened over seventy city mayors to issue a declaration . . . that committed to “reduc[e] exposure [of the poor] to climate-related extreme events . . . which foster human trafficking and dangerous forced migration.” *Id.*; *Modern Slavery and Climate Change: The Commitment of the Cities*, PONTIFICIA ACADEMIA SCIENTIARUM, at 6 (July 21, 2015).

³⁸ Coelho et al., *supra* note 5, at 3.

³⁹ *Id.*

⁴⁰ UNODC, *supra* note 15.

⁴¹ Stephens, *supra* note 11, at 27.

yielded zero documents that mentioned human trafficking as a potential post-disaster phenomenon.⁴²

This Comment proceeds in Section II by examining the current international legal regime governing human trafficking and interrogating the smuggling-trafficking binary that currently exists in international law. Section III analyzes the mechanisms and predicted impacts that are central to the climate change-human trafficking nexus, with a focus on identifying the potential challenges for the existing legal regime. Section IV argues that the potential legal protection gap for populations impacted by the climate change-human trafficking nexus is in fact less prominent here, as the international legal regime on human trafficking already contains an existing textual basis to include these types of cases. This Comment concludes by centering this legal solution within broader discussions around the suitability of various political, legal, and social responses to environmental displacement, human trafficking, and modern-day slavery.

II. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING

No existing international legal tool is explicitly aimed at the climate change-human trafficking nexus. The U.N. Framework Convention on Climate Change (UNFCCC) “is the principal international mechanism for dealing with climate change,” but its focus is almost exclusively on “reducing greenhouse gas emissions.”⁴³ The UNFCCC does not consider the impact of climate change on displacement and migration, much less on human trafficking. In 2015, at the Conference of the Parties (COP) 21, a formal committee agreed “to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.”⁴⁴ But this has not led to tangible impact on international or domestic legal frameworks to support migrants displaced by environmental degradation.⁴⁵ There are several advisory, non-governmental groups (such as the Nansen Initiative) that have “propos[ed] procedures for the protection of people displaced by climate change,” but these proposals have not yet resulted in concrete mobilization or action, and none of them address trafficking directly.⁴⁶

Of course, climate change and human trafficking are each individually the subject of numerous legal and policy regimes and academic studies; it is only their nexus that remains widely under-examined. The U.N. has prioritized ending

⁴² *Id.*

⁴³ Michael B. Gerrard, *Climate Change and Human Trafficking After the Paris Agreement*, 72 U. MIAMI L. REV. 345, 360 (2018).

⁴⁴ UNFCCC, *Rep. of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 Nov. to 13 Dec. 2015*, ¶ 49, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

⁴⁵ Gerrard, *supra* note 43, at 361.

⁴⁶ *Id.*

modern slavery and human trafficking through the 2030 Sustainable Development Goals (SDG), adopted in 2015.⁴⁷ SDG Target 8.7 calls for states to take “immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.”⁴⁸ SDG 13 emphasizes taking “urgent action to combat climate change and its impacts.”⁴⁹

This Comment argues that the Trafficking Protocol’s definition of trafficking in persons appropriately includes people who are trafficked as a result of climate-related vulnerability. This argument is rooted in a recognition of the significant and wide-ranging consequences of characterizing certain conduct as ‘trafficking.’⁵⁰

First, states are obligated to respond to trafficking with a “range of criminalization and cooperation [efforts] both internally and in relation to other [s]tates.”⁵¹ Second, people whose actions are criminally prosecuted as trafficking are often subject to a different legal regime and face harsher sanctions than if they were determined to not be partaking in trafficking.⁵² Finally, and perhaps most critically, people who are victims of trafficking are “entitled to special measures of assistance and protection that [are] unavailable to those who are considered to have not been trafficked.”⁵³ Importantly, the definition of trafficking contains both political and legal dimensions, such that “the parameters around what constitutes ‘trafficking’ are not yet firmly established.”⁵⁴

A. The Trafficking Protocol

The primary international legal instrument on human trafficking is the U.N. Trafficking Protocol, adopted by the General Assembly in 2000.⁵⁵ The Protocol “is the first global legally binding instrument with an agreed definition on trafficking in persons.”⁵⁶ Crucially, the Trafficking Protocol is only binding on

⁴⁷ INTERNATIONAL LABOUR ORGANIZATION (ILO) & WALK FREE FOUNDATION, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INT’L LABOUR OFFICE 15 (2017).

⁴⁸ UNODC, *Sustainable Development Goals*, <https://perma.cc/4QQX-DPPQ>.

⁴⁹ *Id.*

⁵⁰ UNODC, *Issue Paper: The Role of ‘Consent’ in the Trafficking in Persons Protocol*, UNODC 15 (2014).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ UNODC, *Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ Within the Definition of Trafficking in Persons*, UNODC 8 (2013).

⁵⁵ Trafficking Protocol, *supra* note 4.

⁵⁶ UNODC, *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (2004).

ratifying states. As of January 2021, 178 states have ratified and are thus obligated to take steps to fulfill the core purposes of the Trafficking Protocol: the prevention of trafficking, the protection of trafficking victims, and the promotion of international cooperation to meet the first two objectives.⁵⁷

The exact scope and scale of required state action is not set forth in great detail.⁵⁸ The Trafficking Protocol is a strong norm-setting instrument and model document, but it leaves implementing states with significant flexibility. Thus, jurisdictional approaches to anti-trafficking legislation and policies vary greatly.⁵⁹

This legal context highlights a significant challenge to the implementation of this Comment's proposed solution. The Trafficking Protocol is a flexible instrument, a feature that simultaneously fuels this Comment's argument and limits its impact. Although the Trafficking Protocol is binding on states, the extent of each state's exact obligations is largely discretionary as a result of relatively non-demanding language used. Thus, the willingness and ability of states to act in accordance with this Comment's analysis and extend protection to victims hinges on the political will and available resources of each state.

These challenges contextualize—rather than invalidate—this Comment's argument, as well as the Trafficking Protocol's role as “an international framework that has impelled a global anti-trafficking movement.”⁶⁰ The Trafficking Protocol sought to formalize a global legal definition of “trafficking in persons” in order “to provide some degree of consensus-based standardization of concepts.”⁶¹ This in turn could “support efficient international cooperation in investigating and prosecuting cases,” “giv[e] a clearer global picture of the problem,” and provide global standards for efforts to provide “support and assistance for victims.”⁶²

Article 5 of the Trafficking Protocol directs signatories to criminalize the offense of trafficking in persons as defined below, as well as attempting or participating indirectly in trafficking.⁶³ Under the Trafficking Protocol, the crime of “trafficking in persons” is defined as:

⁵⁷ Trafficking Protocol, *supra* note 4, art. 2.

⁵⁸ For example, Article 5 of the Trafficking Protocol obligates states to “adopt such legislative and other measures as may be necessary to establish [participating in trafficking or being an accomplice to trafficking] as criminal offenses.” The details of such measures—including prosecutorial processes, penalties, and assistance for the victims—is largely left to each state's discretion, although the Protocol does direct that all measures be “[s]ubject to the basic concepts of the [the party state's] legal system.” *Id.* art. 5.

⁵⁹ Joy Ngozi Ezeilo, *Achievements of the Trafficking Protocol: Perspectives from the Former UN Special Rapporteur on Trafficking in Persons*, 4 ANTI-TRAFFICKING REVIEW 144, 145 (2015).

⁶⁰ *Id.*

⁶¹ UNODC, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto* 269 (2004).

⁶² *Id.*

⁶³ Trafficking Protocol, *supra* note 4, art. 5.

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. . . .⁶⁴

The Trafficking Protocol thus sets forth three distinct elements for the crime of trafficking in persons: (1) an act, which can be fulfilled by the recruitment, transportation, transfer, harboring or receipt of persons, (2) a means by which the action occurs or is made possible, and (3) an intent, meaning the purpose behind the action, which is required to be one of exploitation.⁶⁵

Consider the application of these three elements to an example. The following is a description of a 2015 case in the U.S.:

Andras Janos Vass and two others convinced gay Hungarian men, ages 20 to 22, to come to the United States under false promises of jobs with good pay. The defendants then brought the young men to Miami, Florida, where they forced the victims to engage in commercial sex entirely for their own profit, working up to 20 hours a day. The traffickers isolated the victims from each other, confiscated their travel and identification documents, kept them confined to the apartment, and used financial manipulation to keep the victims from leaving or seeking help. The traffickers monitored their communications with family and with others.⁶⁶

The first element, the act, was present from the moment that the defendants recruited the victims. That element was further developed when the defendants, through financial support and encouragement, enabled the victims to come to the U.S. (transportation), and also when they harbored the victims in an apartment. Any of these actions on their own would likely have been enough to fulfill the act element. Similarly, the traffickers used a variety of means (coercion, threat, deception, and fraud), any one of which in isolation would likely have satisfied the second element. Finally, the presence of the intent element is extremely well-supported here. The fact pattern evinces a premeditated and well-planned method of exploitation. As this example shows, analysis of individual cases under the Trafficking Protocol's definition is highly fact specific.

As far as victim protections, the Protocol emphasizes the participation of the victim in criminal proceedings against the trafficker by mandating that "[i]n appropriate cases and to the extent possible under its domestic law," a party state

⁶⁴ Trafficking Protocol, *supra* note 4, art. 3.

⁶⁵ UNODC, *The Role of 'Consent' in the Trafficking in Persons Protocol*, *supra* note 50, at 24.

⁶⁶ NATIONAL HUMAN TRAFFICKING RESOURCE CENTER, TEN YEARS OF SEX TRAFFICKING CASES IN THE UNITED STATES 2 (2016).

shall provide information on court proceedings and allow the victim's "views and concerns to be presented."⁶⁷ Article 6 encourages, but does not mandate, states to "consider implementing measures to provide for the physical, psychological and social recovery of victims" through the provision of housing, counseling, legal assistance, medical and material assistance, and employment or educational opportunities.⁶⁸

1. The Role of Consent

The Trafficking Protocol specifies that whenever the definition set forth in Article 3 has been fulfilled, then the consent of the person being trafficked "shall be irrelevant."⁶⁹ Although this language seems clear on its face, including terms like "abuse of authority" and "abuse of a position of vulnerability" in the means part of the definition of trafficking complicates matters.⁷⁰ As a result, interpretive questions remain. In particular, stakeholders continue to debate whether the means must rise to the level of impairing or negating the consent of a particular alleged victim in order to satisfy the definition.⁷¹

In the U.N. system, the travaux préparatoires are documents that represent the "negotiation, discussions, and drafting of a final treaty text."⁷² They are sometimes used to shed light on ambiguous parts of a treaty. Unfortunately, the travaux préparatoires for the Trafficking Protocol are sparse and "do not provide clarity" on unresolved issues related to consent.⁷³ This is likely because the Protocol's ambiguous stance is the result of disagreement between non-governmental organizations and states during the drafting process over "whether trafficking should be permitted to occur if an individual consents to the process, and, similarly, whether prostitution and sex work are activities to which individuals are (or should be) capable of freely consenting."⁷⁴ The language that the drafters settled on is likely intentionally vague so as to allow implementing states to align the Trafficking Protocol to their unique perspective on this issue.⁷⁵ But it also

⁶⁷ Trafficking Protocol, *supra* note 4, art. 6.

⁶⁸ *Id.* arts. 6–7.

⁶⁹ *Id.* art. 3.

⁷⁰ Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 477 (2003).

⁷¹ UNODC, *The Role of 'Consent' in the Trafficking in Persons Protocol*, *supra* note 50, at 7.

⁷² U.N., *What Are Travaux Préparatoires and How Can I Find Them?*, DAG HAMMARSKJÓLD LIBRARY, <https://perma.cc/B6ZX-DRRT>.

⁷³ UNODC, *The Role of 'Consent' in the Trafficking in Persons Protocol*, *supra* note 50, at 27.

⁷⁴ Abramson, *supra* note 70, at 474–75.

⁷⁵ *Id.* at 496.

means that the Protocol itself “does little to answer the question of whether consent can be accommodated within the parameters of trafficking activity.”⁷⁶

The role of consent in domestic legislation varies from state to state. Some states emulate the language of the Trafficking Protocol and others implement their own explicit considerations of consent.⁷⁷ In surveying states, the UNODC also found frequent differences between what the law says on paper and how law enforcement and judicial actors treat consent in practice.⁷⁸

For example, U.S. domestic trafficking law contains no explicit references to consent, which would seemingly indicate that consent is not meant to play a role in the adjudication of trafficking cases.⁷⁹ But surveyed practitioners agreed that issues of consent frequently arise through investigatory and prosecutorial processes, including trials, when trying to determine the trafficker’s intent to coerce.⁸⁰ Moreover, practitioners acknowledged that a victim’s clear consent “may present an obstacle to successful prosecution and such cases may not be pursued for that reason, particularly if the exploitation is at the less severe end of the scale.”⁸¹

Academic studies, too, are suffused with disagreement and confusion on whether consent is relevant to determinations of when someone is trafficked. Depictions of the typical trafficking situation range widely. For some scholars, trafficking encompasses only the most extreme examples of coercive or abusive situations, such as when a child is directly sold into servitude.⁸² For others, trafficking is more aptly characterized as “an extended form of migration, spurred by the same economic and political factors that trigger people to seek the services of smugglers.”⁸³ This faction of scholars tends to view people who are trafficked less as victims and more as “enterprising people who overcame a lack of options at home.”⁸⁴

Perhaps seeking to respond to these debates, in 2009 the UNODC issued a Model Law on Trafficking in Persons, which offers the following guidance on Article 3(b) of the Trafficking Protocol:

[O]nce the elements of the crime of trafficking, including the use of one of the identified means (coercion, deception, etc.), are proven, any defence or allegation that the victim ‘consented’ is irrelevant. . . . While being aware of

⁷⁶ *Id.* at 477.

⁷⁷ UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Abramson, *supra* note 70, at 481–82.

⁸³ *Id.*

⁸⁴ *Id.* at 482.

the nature of the work, the person may have been misled as to the conditions of work, which have turned out to be exploitative or coercive. This provision restates existing international legal norms. It is logically and legally impossible to ‘consent’ when one of the means listed in the definition is used. Genuine consent is only possible and legally recognized when all the relevant facts are known and a person exercises free will.⁸⁵

Additionally, growing awareness of the confusion around the role of consent prompted the UNODC in 2014 to publish an issue paper on consent in the Trafficking Protocol.⁸⁶ The issue paper’s findings come from surveys of domestic legislature and numerous interviews with practitioners and policymakers in signatory states to identify areas of confusion and promulgate guidance.⁸⁷ The paper highlights a general consensus that the consent of an alleged victim “should not be permitted to trump fundamental human and social values such as dignity, freedom, and protection [of the vulnerable]” by preventing prosecution of their trafficker or a victim status determination.⁸⁸ However, interviewees disagreed on “what those values are and how they should be understood and applied,” indicating that irrespective of the Trafficking Protocol’s text, the issue of consent is a live one in many jurisdictions.⁸⁹

These ongoing debates over the role of consent must be properly framed. Pragmatist actors arguing for strict exclusion of consenting victims are often concerned with issues of feasibility. The fear is that if the scope of the trafficking definition becomes overly broad, the utility of defining trafficking as a unique crime whose victims are entitled to certain legal protections is diminished. This broadening may lead to exponential growth in the number of cases and victims. This growth will detract from a state’s ability to take anti-trafficking measures and protect victims.

In responding to these “floodgates” concerns about the role of consent, it is worth emphasizing the conceptual distinction between defining human trafficking and effectively responding to human trafficking. Temporal, financial, and political constraints necessarily mean that states have limited resources to prosecute traffickers and offer services to people who have experienced trafficking. But there “is no limit to how many cases may constitute human trafficking” and the applicability of the trafficking definition to one victim’s circumstances do not adversely or positively affect another individual’s case.⁹⁰ This Comment is more

⁸⁵ UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50, at 27–28.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1.

⁸⁸ *Id.* at 9.

⁸⁹ *Id.* at 9.

⁹⁰ Jane Kim, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bridge Industry*, 51 *VIR. J. INT’L L.* 487, 495 (2010). It is important to note, however, that in many countries this “lack of

concerned with protecting the theoretical application of the Trafficking Protocol to all relevant cases. Questions of enforcement and feasibility are certainly important, but they are somewhat tangential to this Comment's argument.

Under the language of the current Trafficking Protocol, if an act is not carried out by way of one of the articulated means, "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," even if the act is accompanied by exploitative intent, then the act is not trafficking.⁹¹ The most critical part of this Comment's argument, then, is that victims of climate change are in a position of vulnerability as defined by the Protocol. The abuse of this position of vulnerability constitutes trafficking, irrespective of the victim's consent. This argument will be elaborated upon in Section IV.

B. The Smuggling-Trafficking Binary

The international legal system treats human trafficking and smuggling as completely distinct types of crimes, a framework referred to as the smuggling-trafficking binary. This binary is already at odds with what practitioners see on the ground and acts as a legal concept that allows governments to get out of obligations they might otherwise owe to trafficked victims.⁹² This Comment's discussion highlights how the binary is especially problematic within the context of the climate change-human trafficking nexus.

As climate change progresses, rates of irregular migration across international borders will increase.⁹³ In the face of greater border controls, many of these migrants will enlist the services of a human smuggler.⁹⁴ A number of factors will cumulatively increase the risk that people who are smuggled ultimately become trafficked.⁹⁵ Strict adherence to the binary thus presents an easy out for states. States may categorize many people who are in fact victims of trafficking as

impact" is only true from a theoretical point of view. Pragmatically, there are finite benefits and resources that countries are willing to extend to victims of trafficking. For example, the U.S. sets a cap on the number of visas that may be given to victims of trafficking per year, thus creating some sense of prioritization between cases. U.S. Dep't of Homeland Security, PM-15-4344: U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE 5 (2020).

⁹¹ Abramson, *supra* note 70, at 477.

⁹² See, e.g., THE GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANIZED CRIME, UNDERSTANDING CONTEMPORARY HUMAN SMUGGLING AS A VECTOR IN MIGRATION: A FIELD GUIDE FOR MIGRATION MANAGEMENT AND HUMANITARIAN PRACTITIONERS (2018) [hereinafter GLOBAL INITIATIVE].

⁹³ SCHUYLER NULL & LAUREN HERZER RISI, NAVIGATING COMPLEXITY: CLIMATE, MIGRATION, AND CONFLICT IN A CHANGING WORLD 17–18 (2016).

⁹⁴ *Id.*

⁹⁵ *Id.*

people who have been smuggled and are thus deportable and not entitled to protection.

The smuggling of migrants became a crime under international law in 2000 with the adoption of the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol).⁹⁶ The Smuggling Protocol defines human smuggling as:

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident⁹⁷

The Smuggling Protocol prohibits states from criminally prosecuting migrants who have been smuggled but goes on to clarify that “[n]othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.”⁹⁸

The Smuggling Protocol makes little provision for allowing people who are smuggled to stay in the destination country. Article 18 in fact anticipates automatic deportation by requiring states to “facilitate and accept, without undue or unreasonable delay, the return of a person [who has been smuggled].”⁹⁹ The Smuggling Protocol makes clear that each state must “take all appropriate measures to carry out the return in an orderly manner with due regard for the safety and dignity of the person [who has been smuggled].” However, this ambiguous language is very different from the specific references to physical and psychiatric care for victims in the Trafficking Protocol.¹⁰⁰ This difference in protections highlights the stakes of the smuggling-trafficking binary.

In sum, under the current international law framework there are three primary distinctions between smuggling and trafficking. First, smuggling always involves crossing an international border, while human trafficking may consist only of intrastate movement (or, indeed, no movement at all). Second, the intent or purpose of the trafficker is to exploit the victim, while the absence of exploitative intent (or at least, the same degree of exploitative intent) characterizes a smuggler’s actions.¹⁰¹ Third, “people who have been trafficked are (or should be) treated as victims, [while] people who have been smuggled are regarded as

⁹⁶ United Nations Convention Against Transnational Organized Crime, *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, opened for signature Dec. 15, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209 (entered into force Jan. 28, 2004).

⁹⁷ *Id.* art. 3.

⁹⁸ *Id.* arts. 5–6.

⁹⁹ *Id.* art. 18.

¹⁰⁰ *Id.*

¹⁰¹ GLOBAL INITIATIVE, *supra* note 92, at 5.

criminals.”¹⁰² This is key to this Comment’s discussion of the binary: the fact that “in the case of smuggling, the victim is the state rather than the person who is smuggled, whereas, in trafficking, the crime is against the victim of trafficking.”¹⁰³

The third distinction is especially problematic within the context of the climate change-human trafficking nexus. Increased rates of irregular migration and greater barriers to cross-border migration will lead to higher rates of smuggling.¹⁰⁴ And data suggests that those who enlist the services of smugglers will be increasingly desperate and willing to exchange labor in the destination country as a way to pay the smuggling fee.¹⁰⁵ This makes it especially likely that human trafficking will result from a smuggling situation.¹⁰⁶ Where an individual falls on both sides of the smuggling-trafficking binary, states may focus on the fact that they were smuggled in—and are thus deportable—instead of the fact that the individual is a trafficking victim, and therefore entitled to protection under international law.

As with so many other areas of international law,¹⁰⁷ the disparate approaches presented in the trafficking-smuggling binary are also heavily influenced by gendered notions of vulnerability and choice. The prototypical trafficking victim is a vulnerable and desperate woman who is coerced into sexual servitude or forced labor, while the Smuggling Protocol generally envisions reaching “a male economic migrant who has weighed his options and chosen to migrate for better economic opportunities.”¹⁰⁸ In reality, the line between trafficking and smuggling is often blurred, and people of all genders may fall under one or both definitions.

Moreover, the smuggling-trafficking binary encourages states to engage in a securitized response towards human smuggling, which likely perpetuates and increases rates of violent and exploitative smuggling that more frequently lead to human trafficking—a counter-productive result.¹⁰⁹ To understand this process, consider the different types of barriers that may compel people to seek the services of human smugglers: physical barriers, such as crossing a sea, desert, or border fence; political barriers, like navigating a violent conflict zone, a heavily militarized border, or an impenetrable visa regime; and cultural barriers, such as language

¹⁰² Gerrard, *supra* note 43, at 366 (citing Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 166 (2011) and TAINA BIEN-AIMÉ, A RIGHT NOT TO BE TRAFFICKED, N.Y. ST. B. ASS’N. J. 22, 23–24 (2017)).

¹⁰³ GLOBAL INITIATIVE, *supra* note 92.

¹⁰⁴ Brown et al., *supra* note 104, at 6.

¹⁰⁵ GLOBAL INITIATIVE, *supra* note 92, at 5.

¹⁰⁶ Abramson, *supra* note 70, at 481.

¹⁰⁷ Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CANADIAN J.L. & JUR. 281 (2002).

¹⁰⁸ Abramson, *supra* note 70, at 479.

¹⁰⁹ GLOBAL INITIATIVE, *supra* note 92, at 5.

differences or ethnic differences that may give rise to suspicion of the irregular migrant.¹¹⁰ To overcome these barriers, migrants enlist the services of smugglers, who traditionally help migrants to reach their destination safely and often provide protection from bad actors.¹¹¹

But the harsh criminalization of human smuggling has “tipped [the power dynamic between smuggler and migrant] in favor of the smuggler, eroding the safeguards traditionally protecting migrants and making them increasingly vulnerable to abuse.”¹¹² Whenever the state constructs a novel barrier for irregular migrants by, for example, militarizing a border section or initiating a law enforcement crackdown in a migration hub, demand for smuggling services increases. The smuggling market responds by offering new and increasingly risky routes and raising prices to compensate for the increased risk. As fees and demand simultaneously increase, the ability of migrants to pay upfront decreases. This means that migrants are more likely to exchange promises of free labor for a smuggling journey, which renders them more susceptible to exploitation and debt bondage.¹¹³

For example, Thailand is one of the world’s largest fishery exporters and has repeatedly come under fire for failing to address the prevalence of forced labor and victims of trafficking in its fisheries.¹¹⁴ As the Thai government has “sought to balance negative public attitudes about migration...with strong economic demand for low-cost labor,” they have engaged in “contradictory and inconsistent migration policymaking.”¹¹⁵ Limited opportunity for legal migration of low-skilled workers has pushed migrants (predominantly from Burma and Cambodia) towards “more expensive and less safe border crossings, thereby increasing profits for smugglers and traffickers.” In short, “[t]he higher the barriers and the more complex the routes, the higher the demand for smugglers becomes, the more specialized they need to be and, consequently, the more they charge.”¹¹⁶ And the more they charge, the more likely it is that their clients will be unable to pay those charges without becoming exploited.¹¹⁷ Climate change will exacerbate these dynamics by increasing the demand for smuggling services and simultaneously

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.* at 2; see also Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PENN. L. REV. 1609, 1612 (2010).

¹¹² GLOBAL INITIATIVE, *supra* note 92, at 2.

¹¹³ *Id.* at 3.

¹¹⁴ See generally *Hidden Chains: Rights Abuses and Forced Labor in Thailand’s Fishing Industry*, HUMAN RIGHTS WATCH (Jan. 23, 2018), <https://perma.cc/3BZ2-V7Z3>.

¹¹⁵ *Id.*

¹¹⁶ GLOBAL INITIATIVE, *supra* note 92, at 3.

¹¹⁷ *Id.*

implementing new types of physical and political barriers, a point which will be further elaborated upon in the next Section.

Treating smuggling and trafficking “as twin threats” in this way “allows partners to take [] relatively neutral and security-focused actions to combat ‘trafficking,’ while overlooking the broader requirements for suppressing smuggling and better managing migration [and] at the same time claiming to have complied with the spirit of an international agreement [on trafficking].”¹¹⁸ This strategy contributes to the project of building a nation state by contributing to an “us” and “them” mentality drawn along sovereign borders. Antitrafficking discourse and policymaking has drawn upon and perpetuated “myths of migrant criminality”¹¹⁹ by depicting traffickers as noncitizen men, particularly noncitizen men of color, in a way that is completely detached from the complicity of citizen consumers of trafficked labor.¹²⁰ This framing “fits comfortably within the larger narrative that has been constructed around unauthorized migration”¹²¹ and justifies extensive border control efforts “that may, ironically, give traffickers more business.”¹²²

In addition to being premised upon oversimplified conceptions of gender and shortsighted views of the consequences of a securitized response to human smuggling, the smuggling-trafficking binary presents state governments with misplaced incentives. The stark differences between what is owed to someone who is smuggled and someone who is trafficked mean that fighting human smuggling is more expedient and less resource intensive. States are incentivized to “see all trafficked people—non-consenting ‘victims’ and consenting adults—as people who have consented to enter [the country] illegally and therefore are not in need of protection.”¹²³

¹¹⁸ *Id.* at 5.

¹¹⁹ Chacón, *supra* note 111., at 1616

¹²⁰ *Id.* at 1616, 1627.

¹²¹ *Id.* at 1616.

¹²² *Id.* at 1635.

¹²³ Abramson, *supra* note 70, at 493. Another factor is the practical difficulty of prosecuting human trafficking, because doing so requires establishing the malintent of the trafficker. GLOBAL INITIATIVE, *supra* note 92, at 23 (“Under the UN Trafficking in Persons Protocol, the defining feature that allows one to establish whether the crime of human trafficking has been committed is the intent of the perpetrator. Neither the victim’s consent nor what they experience en route is relevant to identifying a victim of trafficking. Instead, it is the ‘action’, ‘means’ and ‘purpose’ of the trafficker that establishes the crime. The perpetrator must have intentionally planned to exploit his victim, and all three elements must be present to constitute the crime of trafficking in persons. However, the task of identifying the motivations of criminal groups is not easy. Migration and protection agencies rarely concern themselves with gathering data or performing analysis that identifies the groups behind smuggling or trafficking – this is seen as the role of law enforcement. And there is a fear that documenting this would compromise their humanitarian neutrality.”).

As the impacts of climate change become more severe, such that deporting people to their place of origin becomes an increasingly inhumane option, it will be important to ensure that states are not (whether accidentally or intentionally) dismissing bona fide victims of trafficking as people who have willingly participated in smuggling. In addition, deportation will not address the cyclical nature of the climate change-human trafficking nexus: many people are likely to attempt the perilous journey to another country again after deportation, since the on-the-ground conditions in their place of origin will likely only have deteriorated. This Comment thus operates within the context of this smuggling-trafficking binary and seeks to illustrate how climate change will continue to disrupt the bases upon which the binary is built.

III. THE CLIMATE CHANGE-HUMAN TRAFFICKING NEXUS

In 2019, natural disasters displaced 22 million people globally.¹²⁴ This number is more than twice the yearly average number of people who are displaced due to violence, underscoring that environmental degradation—not human conflict—is one of the most significant drivers of instability on our planet.¹²⁵ Moreover, environmental degradation and human conflict will likely continue to intersect, with disastrous consequences. For example, one study on the Syrian war and refugee crisis concluded that persistent drought attributable to climate change led 1.5 million Syrian farmers to move from rural areas into overcrowded cities in search of work, “contributing to social turmoil and ultimately a civil war.”¹²⁶

Over the last few decades, anthropogenic climate change has more than doubled the frequency of natural disasters that lead to widespread displacement and insecurity.¹²⁷ Legal and policy responses to climate-induced migration have been few and far between, in part because distinguishing “climate change migrants” from “economic migrants” is difficult, since “migration is never solely due to climate change, but rather a compounding result of vulnerabilities.”¹²⁸

However, this Comment subscribes to a relatively maximalist understanding of environmental migration by asserting that environmental migration does exist

¹²⁴ WORLD METEOROLOGICAL ORGANIZATION, WMO STATEMENT ON THE STATE OF THE GLOBAL CLIMATE IN 2019 29–30 (2020).

¹²⁵ NORWEGIAN REFUGEE COUNCIL, 2016 GLOBAL REPORT ON INTERNAL DISPLACEMENT (GRID), INTERNAL DISPLACEMENT MONITORING CTR. (IDMC) 4–5 (2016).

¹²⁶ Gerrard, *supra* note 43, at 349 (citing Colin P. Kelley et al., *Climate Change in the Fertile Crescent and Implications of the Recent Syrian Drought*, 112 PROC. NAT'L ACAD. SCI. 3241, 3241–42 (2015)); Ian Sample, *Global Warming Contributed to Syria's 2011 Uprising, Scientists Claim*, THE GUARDIAN (Mar. 2, 2015), <https://perma.cc/X73C-VGRV>.

¹²⁷ Stephens, *supra* note 11, at 9.

¹²⁸ *Id.*

and can be identified as a distinct phenomenon.¹²⁹ Such an approach is already prevalent in the scholarship on climate change and migration. One notable example is the typology offered by Fabrice Renaud et al., which provides three categories of climate change-induced migrants: (1) environmental refugees, who flee immediately after sudden onset disasters, (2) environmentally forced migrants, who have to migrate to avoid destitution, and (3) environmentally motivated migrants, who proactively leave an area impacted by slow onset disasters “in order to preempt the worse.”¹³⁰ Additionally, advancements in climate science will continue to offer solutions to problems of proof and causality. Through extreme event attribution, for example, scientists are now able to calculate with increasing levels of certainty the impact of anthropogenic climate change on the occurrence and severity of natural disasters.¹³¹

Of course, climate change and environmental degradation never act in isolation. Climate change is a vulnerability multiplier, meaning that its impacts greatly exacerbate pre-existing conditions, such as water and food shortages, poverty, low educational attainment, and gender inequality, that make people vulnerable to the recruitment of human traffickers.¹³² The above discussion illustrates how climate change may be sufficiently isolated so as to identify a distinct group of people who are trafficked as a result of climate vulnerability. Despite ongoing issues of multicausality, empirical evidence makes clear that climate change is responsible for a growing number of natural disasters that lead to displacement and force people into desperate situations where they are more likely to be trafficked.¹³³ Given this urgency, the multicausal nature of the climate change-human trafficking nexus “should not be an excuse to ignore the necessity of developing a protection framework for climate-induced displacement.”¹³⁴

¹²⁹ David J. Cantor, *Environment, Mobility and International Law: A New Approach in the Americas*, 21 CHI. J. INT'L L. 2, 8–9 (2020).

¹³⁰ Fabrice Renaud et al., *Control, Adapt or Flee: How to Face Environmental Migration?*, U.N. UNIV. INST. FOR ENV. AND HUM. SECURITY 29–30 (2007).

¹³¹ Chelsea Harvey, *Scientists Can Now Blame Individual Natural Disasters on Climate Change*, SCIENTIFIC AMERICAN (Jan. 2, 2018), <https://perma.cc/8MXL-2ZJR>.

¹³² Null & Risi, *supra* note 93, at 17–18. Climate change is anticipated to displace as many as 200 million people by 2050, both within and across national borders. While climate change is rarely the sole cause of migration and displacement, it acts as a threat multiplier, exacerbating existing vulnerabilities and leaving people with little alternative but to flee. Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT'L L.J. 366, 367–68 (2019).

¹³³ Harvey, *supra* note 131.

¹³⁴ Mostafa Mahmud Naser, *Climate Change, Environmental Degradation, and Migration: A Complex Nexus*, 36 WM. & MARY ENV'T L. & POL'Y R. 713, 767 (2015) (noting further that “[e]ven the existing refugee structure itself is not immune from this causal complexity. Indeed, it is impractical to assess each individual against the Refugee Convention definition of a refugee, especially in cases involving

A. Environmental Mechanisms Impacting Human Trafficking

There are two primary environmental mechanisms through which climate change impacts human trafficking: sudden onset disasters and slow onset disasters.¹³⁵ In general, sudden onset disasters “lead to mass amounts of displaced persons leaving quickly, while [slow onset disasters] steadily bring strife to natural resources, employment prospects, and agricultural accessibility, leading to a slow movement of people out of the area.”¹³⁶ Disaster-related displacement is rarely driven by a sudden or slow onset event alone; instead, environmental factors work in tandem with socioeconomic and political factors that curtail or eliminate people’s ability to stay in their habitual land.¹³⁷ Additionally, sudden and slow onset disasters may simultaneously impact certain regions, furthering the destructive effects.

Importantly, the consequences of the displacement and migration spurred by sudden and slow onset disasters are not yet fully known.¹³⁸ In the absence of comprehensive data, the ensuing discussion about the mechanisms underlying the climate change-human trafficking nexus provides a coherent narrative by utilizing disparate case studies and common-sense assumptions.

1. Sudden Onset Disasters

Sudden onset disasters are unexpected and rapidly developing environmental events such as flooding, mudslides, earthquakes, and tsunamis.¹³⁹ Climate change is expected to significantly increase the intensity, unpredictability, and number of sudden onset disasters.¹⁴⁰ These disasters frequently “cause unexpected loss of land and lives, and destruction of means of livelihoods, instantly plunging those without safety nets into poverty.”¹⁴¹ Since 2004, the IOM has monitored trafficking trends after natural disasters and incorporated the issue of post-disaster trafficking into its crisis response frameworks.¹⁴² As a result, a substantial amount of research on post-disaster trafficking patterns has been conducted. Although this research has yet to incorporate explicit discussions of

massive numbers of forced migrants. Instead, the current refugee framework, including UNHCR and other international organizations, treats a large number of people who flee their homes because of persecution, war, and famine as ‘persons of concern’ and extends protection and assistance.”)

¹³⁵ Coelho et al., *supra* note 5.

¹³⁶ Stephens, *supra* note 11, at 19.

¹³⁷ *Id.*

¹³⁸ *Id.* at 21.

¹³⁹ Platform on Disaster Displacement, *Key Definitions*, <https://perma.cc/22Y4-3QXP>.

¹⁴⁰ Elizabeth Ferris, *Disasters and Displacement: What We Know, What We Don’t Know*, BROOKINGS (June 9, 2014), <https://perma.cc/A9SV-LNUU>.

¹⁴¹ Coelho et al., *supra* note 5, at 3.

¹⁴² *Id.* at 6.

the impact of climate change, the data establishes a strong positive correlation between the severity of natural disasters and increased rates in human trafficking.¹⁴³

For example, after Hurricane Harvey wreaked havoc in 2017 in the American South, law enforcement agents, policymakers, and journalists documented increases in trafficking, especially sex trafficking.¹⁴⁴ Former Congresswoman Linda Smith analyzes human trafficking through fundamental market principles, noting that “if someone is going to pay good money, lots of money, somebody else is going to bring a product to that market.”¹⁴⁵ Sudden onset disasters frequently have an impact on both the supply and demand side of the trafficking market. For example, after Hurricane Harvey, women were more likely to lose their jobs and homes and thus become ready targets for traffickers, and hundreds or thousands of male aid workers arrived in the area as potential ‘customers.’¹⁴⁶ These patterns are facilitated by the widespread prevalence of smartphones, as the internet provides an easy and relatively discrete way for traffickers to recruit both customers and victims. Smartphone usage is increasing rapidly across the globe, such that people who lose their homes and livelihoods in a disaster are likely to retain their mobile phone and internet connection.¹⁴⁷

In addition to sex trafficking, sudden onset disasters are also likely to lead to trafficking for forced labor. As the number of natural disasters increases, the capacity of the international humanitarian aid system to adequately respond will continue to decrease. This will lead to more and more victims of natural disasters undertaking migration journeys. When these journeys stay within the borders of the individual’s state of origin, they are likely to involve moving from rural agricultural areas to urban slums, and research indicates that people in this situation are highly vulnerable to trafficking recruitment efforts.¹⁴⁸

If an individual’s migration journey involves crossing an international border, they are likely to “seek assistance from human smugglers, [which subsequently] plac[es] them[] at risk of many of the forms of exploitation that are

¹⁴³ Anuj Gurung & Amanda D. Clark, *The Perfect Storm: The Impact of Disaster Severity on Internal Human Trafficking*, 21 INT’L AREA STUDIES R. 302 (2018).

¹⁴⁴ Garsd, *supra* note 8.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*; *see also* Elizabeth M. Wheaton et al., *Economics of Human Trafficking*, 48 INT’L MIGRATION 114, 114 (2010).

¹⁴⁷ Garsd, *supra* note 8. The internet’s role in this phenomenon is not limited to developed countries like the U.S. Already, fifty-eight percent of the world’s population are active internet users, and access is growing rapidly in developing countries as 27,000 people per hour become internet users. Mobile phones are the most common way to access the internet, with 1 million new smartphones coming into use every day. *Digital Around the World*, DATAREPORTAL (July 2020), <https://perma.cc/5XUE-R2PS>.

¹⁴⁸ Coelho et al., *supra* note 5, at 4.

commonly associated with trafficking, such as sexual exploitation, forced labour, forced marriage, as well as organ removal.”¹⁴⁹ Global responses to the refugee crises of the last few decades—in particular, the hostility of receiving countries to forced migrants and lack of political will to facilitate legal migration—indicate that use of smugglers will only continue to increase.¹⁵⁰ As a result of climate change, people have fewer viable options for livelihoods and simultaneously experience displacement more frequently. Thus, disaster-induced migration, regardless of the immediacy with which migration begins or the duration and extent of the migration, places people in positions of vulnerability to trafficking. Climate change will significantly impact rates of disaster-induced migration and, by extension, trafficking.

2. Slow Onset Disasters

Slow onset disasters include drought, coastal erosion, desertification, salinization, sea level rise, and glacial retreat.¹⁵¹ Because slow onset disasters occur over time, there may be more opportunity for the development of mitigation and adaptation systems and infrastructure to offset their negative impacts, but these measures require access to resources. This means that communities with fewer resources (who were already more vulnerable to trafficking) are less likely to be insulated from the impacts of slow onset disasters and more likely to resort to migration as a “necessary tool for survival.”¹⁵²

In addition to being a last-resort survival mechanism, migration is a key proactive strategy to diversify income in the face of environmental degradation that challenges the sustainability of traditional agricultural livelihoods.¹⁵³ As with sudden onset disasters, migration may be intrastate or involve crossing an international border, but in either scenario, increased vulnerability to trafficking is a likely result.¹⁵⁴ Moreover, “households with extremely limited resources may not be able to migrate at all,” and “[a]s these households remain in inhospitable environments associated with intensifying deprivation, [their] members are also made [increasingly] vulnerable to trafficking.”¹⁵⁵ There is a particular concern about inhabitants of very rural areas, who may not have the ability to migrate and

¹⁴⁹ *Id.* at 3.

¹⁵⁰ Gonzalez, *supra* note 132, at 367–68.

¹⁵¹ Coelho et al., *supra* note 5, at 3.

¹⁵² UNFCCC, *Synopsis of Technical Paper: Slow Onset Events*, UNFCCC Technical Papers 2 (Nov. 26, 2012); Stephens, *supra* note 11.

¹⁵³ Coelho et al., *supra* note 5, at 3–4.

¹⁵⁴ See WARNER ET AL., *supra* note 22; see Part III.A.1.

¹⁵⁵ Nicole Molinari, *Intensifying Insecurities: The Impact of Climate Change on Vulnerability to Human Trafficking in the Indian Suburbs*, 8 ANTI-TRAFFICKING REVIEW 50, 58 (2017).

may receive delayed or limited assistance by governments and humanitarian organizations after a disaster.¹⁵⁶

A case study from the Sundarbans region of West Bengal, India, may serve to further illustrate how these mechanisms will operate within the climate change-human trafficking nexus. The Sundarbans is a region of low-lying islands with a population of 4.4 million people, the vast majority of whom experience “severe impoverishment and insecurity.”¹⁵⁷ Gender inequities are prevalent, particularly in regards to educational attainment, workforce participation, and gender-based violence.¹⁵⁸ In addition, the region is home to a number of particularly vulnerable populations, including a high number of “undocumented Bangladeshi migrants and landless households that have historically and contemporaneously faced discrimination, marginalization, and poverty.”¹⁵⁹ The Sundarbans contain one of the world’s largest and most biodiverse mangrove ecosystems on earth, and the region’s peoples have long relied on the soil and water of this ecosystem.¹⁶⁰ But in recent years, “[s]tronger and more recurrent floods and cyclones, erratic rainfall, increased temperatures, and encroaching sea-level rise have contributed to soil and water salinization, crop losses, soil infertility, and significant long-term reductions in agricultural yields, adversely impacting local livelihoods.”¹⁶¹

In the face of converging environmental challenges, many of those who are able to do so have chosen to migrate in search of better prospects and greater security.¹⁶² This migration occurs steadily as slow onset disasters progress and spikes as a result of sudden onset disasters. For example, in 2009, after Cyclone Aila swept through the region, seventy-five percent of households in the Sundarbans reported that at least one family member had migrated out of the region in search of labor, and children comprised twenty percent of those migrating.¹⁶³

This type of irregular and insecure labor migration—often, as in this case, undertaken in the context of “degraded environments, unviable livelihoods, destitute, and survival need”¹⁶⁴—is highly likely to amplify vulnerability to trafficking for forced labor and sexual exploitation. But there may be little alternative; the same unsustainable conditions that compel people to undertake perilous journeys in search of survival simultaneously impede their ability to return

¹⁵⁶ Gurung & Clark, *supra* note 143.

¹⁵⁷ Molinari, *supra* note 155, at 56.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 58.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

home if they do become the subject of trafficking and exploitation.¹⁶⁵ This is a unique aspect of people who are trafficked due to climate change-induced vulnerability: once freed from a trafficking situation, there may be no safe home to which they can return.

3. Cycles of Causality

Human trafficking is not only an effect of climate change but also undergirds the structural systems that *cause* climate change and worsen its impacts. Many of the industries that contribute to environmental degradation are “underpinned by large numbers of migrant workers in forced labor situations” who often enter these situations as a result of being trafficked.¹⁶⁶ For example, the lucrative palm oil industry in South East Asia is responsible for widespread rainforest destruction and is “heavily dependent on less-than-ethical recruitment of foreign labour, as well as coercive labour practices.”¹⁶⁷ In fact, data suggests that “up to half of illegal deforestation globally is dependent on slave labour” and these practices are estimated to be responsible for emitting an estimated 2.54 billion tons of carbon dioxide each year—more than any nation in the world except for China and the U.S.¹⁶⁸

Fishing is another global industry that simultaneously worsens the impact of climate change¹⁶⁹ and relies on modern slavery to make up its workforce and supply chains.¹⁷⁰ The IOM seeks to highlight the prevalence of forced labor in fishing and provide assistance to victims of trafficking on fishing boats and within onshore seafood processing facilities.¹⁷¹ In 2017, the IOM’s Global Assistance Fund, which serves trafficking victims and other vulnerable migrants, took part in efforts to assist 600 men who were found in forced labor situations on fishing boats (from various nations) in Indonesian waters:

Some had not been on dry land for years. One of the victims had been separated from his family, without any contact, for 22 years. . . . Many migrant fishers enter the destination country through networks of recruitment agents,

¹⁶⁵ *Id.*

¹⁶⁶ Coelho et al., *supra* note 5, at 5.

¹⁶⁷ *Id.* (citing E. Benjamin Skinner, *Indonesia’s Palm Oil Industry Rife with Human-Rights Abuses*, BLOOMBERG BUS. (July 20, 2013), <https://perma.cc/S7U9-4J6M>).

¹⁶⁸ Brown et al., *supra* note 32, at 8.

¹⁶⁹ See, e.g., MARINE STEWARDSHIP COUNCIL (MSC), *Climate Change and Fishing*, <https://perma.cc/X679-VN66> (“Oceans play a major role in climate dynamics, absorbing ninety-three percent of heat that accumulates in the Earth’s atmosphere, and a quarter of the carbon dioxide (CO₂) released from fossil fuels. . . . [I]t’s vital that we manage the oceans in a sustainable way.”). Illegal, unregulated and unreported fishing—which Thailand has been accused of multiple times—threatens the ecosystems that are necessary for oceans to continue to serve as an important source of climate change mitigation. *Id.*

¹⁷⁰ HUMAN RIGHTS WATCH, *supra* note 132; Brown et al., *supra* note 32.

¹⁷¹ ILO & WALK FREE FOUNDATION, *supra* note 47.

often incurring high brokerage fees, even when they are engaged through legally recognised recruitment agencies, leading to personal debts that must be repaid through deductions from wages. And when the labour brokerage is informal and the workers have no contracts of employment, there is considerable risk of further abuse. Debt bondage in the context of labour migration and trafficking is a trend that can be seen across a number of countries and sectors.¹⁷²

There is a third layer of causality, too: as the impacts of climate change are more keenly felt, such as ocean acidification, increased prevalence and severity of storms, and declining fish stocks, fisheries face increased economic pressure and are “forced to extend their operations, both geographically and temporally, for ‘ever diminishing returns’ of fish catches.”¹⁷³ As the market becomes more competitive and economic pressures on fisheries increase, the appeal of utilizing low-cost forced labor increases and demand for trafficked workers grows.¹⁷⁴

B. Predicted Impacts

1. Increased Number of People Impacted by Trafficking

Climate change has already begun to increase the number of people who become victims of human trafficking.¹⁷⁵ Although scientists have varying estimates of the exact rate at which the impacts of climate change will worsen, there is consensus that we are just at the beginning of witnessing these effects.¹⁷⁶ Time is “fast running out for [humans] to avert the worst impacts of climate disruption.”¹⁷⁷ The next few years are a critical tipping point for worldwide action on climate change, and international will to take action is being challenged in unprecedented ways by the COVID-19 pandemic and faltering economies.¹⁷⁸ Through the mechanisms discussed in the previous Part, it is almost certain that climate change will lead to a large increase in the number of people who become vulnerable to the recruitment efforts of traffickers.

In addition to an increased number of trafficking victims, evidence suggests that climate-related environmental degradation will contribute to a simultaneous rise in the number of people who collude with traffickers or become active traffickers themselves. This is especially true after sudden onset disasters, when a

¹⁷² *Id.* at 35.

¹⁷³ Brown et al., *supra* note 32, at 4.

¹⁷⁴ *Id.*

¹⁷⁵ Coelho et al., *supra* note 5.

¹⁷⁶ See, e.g., Henry Fountain, *How Bad is Climate Change Now?*, N.Y. TIMES (Apr. 19, 2020), <https://perma.cc/SGJ9-U4UK>.

¹⁷⁷ Chow, *supra* note 19.

¹⁷⁸ Renee Cho, *COVID-19’s Long-Term Effects on Climate Change—For Better or Worse*, EARTH INSTITUTE (June 25, 2020), <https://perma.cc/83JX-XNRD>.

sharp spike in the supply of trafficking victims will necessarily contribute to a high demand for traffickers to facilitate the distribution of these trafficked people into forced labor situations.¹⁷⁹

2. Altered Methods of Trafficking

In its 2018 *Global Report on Trafficking in Persons*, the UNODC reported that fifty-eight percent of trafficking victims were detected within their own borders, and eighty-six percent were detected within the same sub-region of their point of origin.¹⁸⁰ Thus, current trafficking data indicates that the crime predominantly occurs close to the victim's point of origin. The subset of trafficked people who arise from the climate change-human trafficking nexus will likely dramatically change these patterns, as more people will need to travel far away from home to escape the impact of environmental degradation.

Additionally, as discussed in Section II, increased rates of climate-related migration are likely to be accompanied by a growing willingness on the part of human smugglers to provide loans for their customers:¹⁸¹

[smuggling] recruiters encourage migrants who lack the funds needed to embark on their journey on the understanding that they can work to earn the fee at a later point in the journey . . . in most cases, migrants find themselves working as temporary indentured labor . . . it has become increasingly common for the 'pay later' migrant to be kidnapped and held for ransom . . . [t]he migrant may be forced to work for the kidnap gang while being held . . . In other instances, debt collectors seek payment at the end of the journey . . . these debt collectors [often] have links to human-trafficking networks and, in the likely scenario that the migrant is unable to pay, the migrant is sold to traffickers in lieu of payment.¹⁸²

Humanitarian practitioners have already noticed a significant increase in these 'migrate now, pay later' smuggling schemes, which offer unprecedented mobility opportunities to the poorest segments of society for whom migration was "previously unthinkable."¹⁸³ Another implication of the rising prevalence of these schemes is that the rising price of smuggling services due to market forces

¹⁷⁹ Gurung & D. Clark, *supra* note 142; see WARNER ET AL., *supra* note 22; Part III.A.1.

¹⁸⁰ UNODC, *supra* note 15.

¹⁸¹ This is well-documented through a series of case studies, as well as global data. For example, in 2017 when the IOM conducted over 2,500 interviews with people who crossed the Mediterranean into Europe, 79% of people "answered 'yes' to at least one of the four indicators of human trafficking and other exploitative practices. In particular, 67% said they had been 'held . . . against their will during the[ir] journey[] by armed individuals or groups other than . . . government authorities'; 47% had worked without getting the expected payment; 36% were forced to work; 75% suffered physical violence of some kind; and 0.3% were approached by someone with offers of an arranged marriage." Gerrard, *supra* note 43, at 357 (quoting IOM, *Analysis: Flow Monitoring Surveys the Human Trafficking and Other Exploitative Practices Prevalence Indication Survey*, (June 2017)).

¹⁸² GLOBAL INITIATIVE, *supra* note 92, at 17.

¹⁸³ *Id.*

will do “little to quash demand, and migrants will merely seek alternative methods to pay, compromising their safety in the process.”¹⁸⁴

The increased willingness of smugglers to engage in these schemes undoubtedly contributes to rising rates of debt bondage as a mechanism of coercion.¹⁸⁵ A recent report presented to the U.N. Human Rights Council found that debt bondage is the primary means used to control trafficking victims in North America, Europe and the Middle East and is prevalent across a wide variety of sectors including construction work, domestic work, agricultural work, factory work, and sex work.¹⁸⁶ The converging influences of climate-induced migration and related changes in the human smuggling market will result in some of society’s most vulnerable people becoming at risk of trafficking in new ways.

IV. THE TRAFFICKING PROTOCOL APPLIES TO VICTIMS OF CLIMATE CHANGE

This Comment has so far sought to situate the climate change-human trafficking nexus within the existing legal frameworks that govern these issues and illuminate the mechanisms underlying the nexus. In this Section, the Comment argues that part of the response to the climate change-human trafficking nexus involves recognizing that the Trafficking Protocol provides a textual basis for extending its protections to victims of climate change. This argument is not without its challenges. Climate change-induced vulnerability necessarily “entails uneven, uncertain, and complex processes contingent on myriad factors, [which] does not fit neatly into dominant criminal justice-oriented anti-trafficking initiatives.”¹⁸⁷ The ways in which states have thus far implemented the Trafficking Protocol very much reflect “particular forms and dynamics of capitalism and capital and state relations that structure conditions of insecurity and exploitation.”¹⁸⁸ Effective responses to the nexus compel the interrogation of “broader contemporary capitalist modes of production and [] the need for continual capital accumulation.”¹⁸⁹ In short, the climate change-human trafficking nexus complicates mainstream narratives about trafficking.

¹⁸⁴ *Id.*

¹⁸⁵ United Nations Human Rights Council, *Report of the Special Rapporteur on Contemporary Manifestations of Slavery, Its Causes and Consequences*, thirty-third session, Agenda item 3, July 2016 (UN Doc. A/HRC/33/46) (noting that high rates of debt bondage are “due primarily to the often illicit and prohibitive recruitment fees taken by recruiters and/or employers to enable the migration.”).

¹⁸⁶ *Id.*

¹⁸⁷ Molinari, *supra* note 155.

¹⁸⁸ *Id.*

¹⁸⁹ Brown et al., *supra* note 32, at 12.

In contrast to the story of “inherently vulnerable women being sold or abducted and forced into sexual slavery”¹⁹⁰ and the state stepping in to play hero, the application of the Trafficking Protocol to people experiencing climate-related vulnerability requires acknowledging the reality of climate change as something that the global North (namely the U.S. and the 28 E.U. member states, and not including China) has historically contributed to, with people in the global South bearing many of the worst impacts.¹⁹¹ Additionally, “blame and responsibility for the conditions and outcomes of [the climate change-human trafficking nexus] cannot be easily pinned to deviant and malevolent perpetrators, organized crime rings, or patriarchal, backward communities,” as much of the blame lies squarely on developed Western nations.¹⁹²

A. Victims of Climate Change are in a Position of Vulnerability

The wide range of potential means included in Article 3 of the Trafficking Protocol “generally confirms the position . . . that individuals can end up in a situation of exploitation through indirect methods such as deception and fraud as well as by sheer physical force.”¹⁹³ This Comment argues that victims of climate change who are trafficked fulfill the means component of the Trafficking Protocol definition because these traffickers will have necessarily engaged in an “abuse of a position of vulnerability” (APOV) by taking advantage of climate-related vulnerability. In part, this Comment is motivated by and seeks to overcome prominent global trends in the prosecution of trafficking that establish the presence of an implicit presumption against someone being a victim of trafficking when overt, physical means are not present in the case.¹⁹⁴

This approach is less radical than it may initially seem. Criminal justice systems are already “routinely being called on to distinguish between situations characterized by poor conditions of employment and situations where a person is

¹⁹⁰ Molinari, *supra* note 155.

¹⁹¹ The U.S. and the twenty-eight countries of the European Union cumulatively account for approximately fifty percent of global CO₂ emissions since 1751. Hannah Ritchie, *Who Has Contributed Most to Global CO₂ Emissions?*, OUR WORLD IN DATA (Oct. 1, 2019), <https://perma.cc/82R7-RQGL>; Gonzalez, *supra* note 132, at 374–75 (“Scholars, activists, and Southern states sought to infuse climate justice into the legal instruments governing climate change by arguing that the North has incurred a climate debt to the South for its historic and current contribution to climate change. Between 1880 and 1990, the Global North produced 84 percent of the planet’s fossil fuel-based carbon dioxide emissions and 75 percent of deforestation-related carbon dioxide emissions. These emissions can remain in the atmosphere for more than two hundred years, and affect the climate for generations to come. Although China is currently the world’s top carbon dioxide emitter, the historic emissions of the Global North and the per capita emissions of Northern countries continue to surpass those of the Global South.”).

¹⁹² Molinari, *supra* note 155.

¹⁹³ UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50.

¹⁹⁴ *Id.*

the victim of trafficking.”¹⁹⁵ This Comment suggests, then, that criminal justice systems incorporate an additional factor into their analysis: the presence (or absence) of climate-induced vulnerability. When the temporal and causal connection between the situation and the experienced environmental degradation is sufficiently strong and is accompanied by evidence of an intent to exploit, decision makers should consider this to strongly indicate that an abuse of a position of vulnerability has occurred, thereby fulfilling the definition of the Trafficking Protocol.

APOV remains a relatively vague, undefined, and under-litigated component of the Trafficking Protocol. Scholars and practitioners to date have not substantively discussed whether “there needs to be requisite seriousness or the extent of the . . . abuse of a position of vulnerability that could constitute a ‘means’ for the purposes of the definition of trafficking.”¹⁹⁶ Despite this vagueness, APOV is widely viewed as a “distinct and important part of the international legal definition of trafficking” and has endured the test of time, having “survived intact in all major treaties adopted after the Protocol that incorporate a definition of trafficking in persons, as well as in policy documents and interpretative texts.”¹⁹⁷

While the formal legislative history of the Trafficking Protocol “does not shed light on how or why the concept [of APOV] was included,” the UNODC notes that informal records indicate that its inclusion was “motivated by an intention to ensure that all the different and subtle ways by which an individual can be moved, placed or maintained in a situation of exploitation were captured.”¹⁹⁸ The drafting history and Legislative Guide of the Trafficking Protocol offer some—albeit slightly circular in nature—elaboration by explaining that APOV “is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”¹⁹⁹ It is certainly arguable that a wide range of applications of this interpretation would comport with conceptions of climate-induced vulnerability that push people into perilous migration journeys or exploitative conditions with no real alternatives.²⁰⁰

The UNODC has noted that establishing APOV generally requires two distinct evidentiary findings: (1) “proof of the existence of a position of vulnerability on the part of the victim,” and (2) “proof of abuse of (or intention

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ UNODC, *Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ Within the Definition of Trafficking in Persons*, *supra* note 54.

¹⁹⁸ *Id.*

¹⁹⁹ UNODC, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto*, *supra* note 61 (citing Interpretive Note A/55/383/Add.1, para. 63).

²⁰⁰ WARNER ET AL., *supra* note 22; *see* Part III.A.1.

to abuse) that vulnerability as the means by which a particular act (recruitment, harboring, etc.) was undertaken.”²⁰¹ Surveys of countries that have APOV within their domestic definition of trafficking reveal that in practice, “the focus of the inquiry is generally on establishing the fact of vulnerability, rather than on proving its abuse.”²⁰² This reality establishes some precedent for this Comment’s proposal that adjudicators and decision makers take the existence of climate-related vulnerability, once proven, as a strong indication of the presence of abuse.

Though few in number, prior applications of APOV support this Comment’s argument for the application of APOV to climate-related vulnerability. In Belgium, domestic legislation implementing the Trafficking Protocol specifically enumerated examples of positions of vulnerability such as “illegal or uncertain immigration or residency status, minority status, or conditions such as illness, pregnancy, or physical or mental disability.”²⁰³ Academic literature considers North Korean women who are living in China in situations of exploitative labor or sexual exploitation to be trafficked through the “abuse of their vulnerable position as refugees who fear deportation.”²⁰⁴

In addition, scholars have argued that foreign brides who initially consent to travel to another country and marry their husband sight unseen fulfill the definition set for in the Trafficking Protocol because recruiters abuse the vulnerabilities “that come from the woman’s national experience from political, legal, economic, and social structures that are not experienced by their husbands by virtue of his gender and nationality.”²⁰⁵ These examples bolster the argument that APOV already encompasses a wide variety of vulnerabilities and may be properly extended to include environmental vulnerabilities.

B. Consent is Not Dispositive

The climate change-human trafficking nexus further complicates existing debates about the applicability of “traditional liberal theory that emphasizes the free will of people to make choices about their lives” to human trafficking.²⁰⁶ Consent is likely to be at issue in many of the situations that arise from climate change-related environmental degradation and resulting exploitation. For many people, beginning a migration journey that entails enlisting the services of a smuggler or undertaking labor in exploitative conditions may be the best or only

²⁰¹ UNODC, *Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ Within the Definition of Trafficking in Persons*, *supra* note 54.

²⁰² *Id.*

²⁰³ UNODC, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto*, *supra* note 61, at 268 n.13.

²⁰⁴ Kim, *supra* note 90.

²⁰⁵ *Id.*

²⁰⁶ Abramson, *supra* note 70, at 483.

option in light of the devastating impacts arising from both sudden and slow onset environmental disasters.

Choice and coercion represent a spectrum, rather than a binary. It is highly likely that many of the trafficking situations considered in this Comment will involve some level of implied or express consent. This is their position of vulnerability, and when abuse of that position has occurred, then the means of trafficking in the Trafficking Protocol has been established and the consent of the trafficked person becomes irrelevant.²⁰⁷ Indeed, the UNODC has anticipated exactly this type of issues, noting that “[i]n cases where more ‘indirect’ or ‘subtle’ means [of trafficking] are used,” such as APOV, then “indications or assertions of consent are more likely to be raised” and become central to “ascertaining whether a crime of trafficking in persons has in fact been committed.”²⁰⁸

In some jurisdictions the relationship between consent and APOV is made explicit. In Moldova, for example, APOV is in fact only considered as a potential means when the victim has provided consent: the prosecution then uses the victim’s vulnerability to “explain away and nullify the apparent consent.”²⁰⁹

The UNODC has issued guidance that comports with the position of this Comment that consent is not a barrier to applying the Trafficking Protocol within the context of the climate change-human trafficking nexus. Specifically, in discussing the role of consent in criminal cases within Anglo-American common law, the UNODC has noted that the Trafficking Protocol “does not precisely correspond” to common law conceptions of consent.²¹⁰ At common law, the key inquiry is whether the coercive circumstances have been caused by the person to whom consent is given.²¹¹ Thus, “a person’s compulsion to choose between working or starving does not render the apparent consent to work involuntary,” so long as the employer did not directly cause the conditions giving rise to this choiceless choice.²¹² The UNODC explicitly notes that this view does not extend to the Trafficking Protocol’s position on APOV; there, “the person to whom consent is given must have abused an existing or created vulnerability (the origin of which is irrelevant) in order to secure an act intended to result in exploitation.”²¹³

There is also some indication that this Comment’s position may find support among practitioners. In a global survey of antitrafficking practitioners, the UNODC found “widespread agreement” among interviewees that legitimizing

²⁰⁷ Kim, *supra* note 90.

²⁰⁸ UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50, at 82.

²⁰⁹ *Id.* at 83–84 n.139.

²¹⁰ *Id.* at 22.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

consent to exploitative labor conditions by people “who are made vulnerable through lack of economic alternatives” would “fail to uphold basic principles of human dignity and non-discrimination.”²¹⁴ However, many practitioners rejected the idea that people who lack economic alternatives and undertake work in exploitative labor conditions should always be considered to be victims of trafficking, as this idea was “unrealistic and unworkable in competitive and difficult labor markets.”²¹⁵ Climate-related vulnerability, coupled with an abuse of that vulnerability and an intent to exploit, contains more limiting principles than does the hazy notion of “lack of economic alternatives.” This group of people can be distinguished from other economic migrants because the situation that compels such consent is the product of intentional global state action (through the release of greenhouse gases).²¹⁶

Moreover, practitioners expressed support for requiring legal decision makers to consider the full range of circumstances under which consent was given, including the “cultural, socioeconomic and psychological situation of the victim before the trafficking occurred.”²¹⁷ The presence of climate-related vulnerability and experienced environmental degradation would be a highly relevant and determinative factor in these considerations.

Maintaining clear boundaries of the limiting principles governing the application of the Trafficking Protocol to the climate change-human trafficking nexus will be highly important. Climate change is likely to further exacerbate cyclical patterns of coercion and choice by severely restricting the options available to people who are trafficked. This will be true even once they are no longer in the control of their traffickers or being directly coerced. For example, recent research in the Philippines has documented how many women who were trafficked as teenagers for sexual exploitation gain their freedom and return to their home villages, only to later opt to return to urban centers as sex workers because their villages are experiencing devastating environmental degradation and offer limited routes to survival.²¹⁸

²¹⁴ *Id.* at 75.

²¹⁵ *Id.*

²¹⁶ Of course, one could argue that global economic inequality and the uneven distribution of resources that generally contribute to typical economic migration are also the result of intentional state action through, for example, colonialist regimes and imperialist systems of capital and labor. This argument is not without force, but this Comment is premised upon a maximalist understanding of environmental migration, which asserts that “even if [environmental factors do] interact with other factors, [environmental degradation] may product distinct forms of mobility, as in circumstances of sudden or extreme environmental change,” an approach which has seen an increasing “empirical evidence base” and growing acceptance in the literature. Cantor, *supra* note 129, at 9.

²¹⁷ UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50, at 79.

²¹⁸ Justine Calma, *Sex Trafficking in the Philippines: How Typhoons and Desperation Make Women and Children Vulnerable*, GROUNDTRUTH PROJECT (Apr. 21, 2017), <https://perma.cc/YT3R-33NP>.

Decision makers should respond to this complicated intersection between choice and coercion by interpreting what it means to ‘abuse’ the position of vulnerability that people impacted by climate change may find themselves in. These interpretations may continuously be updated and adapted to ensure that the right balance is being struck. This tension is hardly novel; stakeholders of the Trafficking Protocol have long discussed the risk that “a liberal interpretation of the more ambiguous means—including a low threshold for establishing abuse of a position of vulnerability—can result in apparent consent being overridden to the point that “trafficking” comes to include a very broad range of conduct that otherwise may be treated as a lesser offence.”²¹⁹

Over-inclusion is a very real concern, one that must be taken seriously. However, as this Comment’s exploration of the climate change-human trafficking nexus highlights, under-inclusion is also a critical point of fallibility in the fight against human trafficking. The answer to this tension is to develop a nuanced and multi-factor standard by which individual cases may be assessed, rather than wholesale exclusion of cases where consent may be an issue.²²⁰

V. CONCLUSION

This Comment has demonstrated that the Trafficking Protocol may be fairly applied to people who are made vulnerable or displaced as a result of climate change and subsequently become victims of trafficking through the abuse of this vulnerable position. This legal solution could help to decrease the protection gap for millions of people who may become trafficked because climate change has exacerbated their existing vulnerabilities or forced them to flee from their home. Of course, successfully applying the Trafficking Protocol in this way greatly depends on whether individual countries incorporate such an approach into their existing domestic trafficking laws. To effectively combat human trafficking as a result of climate change, the international community and the signatory states of the Trafficking Protocol must recognize the mechanisms and power dynamics underpinning the climate change-human trafficking nexus and commit to a holistic antitrafficking approach that proactively prevents climate-related vulnerability, recognizes and protects people who are trafficked as a result of climate change, and prosecutes those who exploit climate migrants and climate-impacted people. There is room to critique both the viability and suitability of this legal solution.

The Trafficking Protocol already receives sharp criticism on all sides, and many of these critiques gain fresh potency in the context of the climate change-human trafficking nexus and this Comment’s argument. One principal critique

²¹⁹ UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50, at 84.

²²⁰ See Warner, *supra* note 22; see Part II.A.1.

views the Trafficking Protocol as a politically motivated band-aid solution to systemic global inequities.²²¹ Critics contend that although the Trafficking Protocol sets forth three primary purposes (prosecuting traffickers, protecting people who are trafficked, and preventing trafficking in the first place), states are in practice overly focused on prosecution, emphasizing crime control at the expense of human rights protections.²²² Through heavy criminalization of trafficking and sporadic prosecution of traffickers, states are able to clearly define a bad actor against whom they have taken action and create a fictional account wherein the state's own behavior is irrelevant.²²³ In this way, states can avoid any meaningful acknowledgment of and response to “the underlying social, economic, political, and environmental drivers of vulnerability to trafficking” and instead continue to ignore the “material conditions and power relations that contribute to [that] vulnerability.”²²⁴

Extending legal protections to victims of climate change under the Trafficking Protocol may well become yet another band-aid solution. It is entirely possible that the existence of a legal safety net for people suffering within the climate change-human trafficking nexus could cause state and non-governmental actors to approach preemptive action with less urgency. This Comment takes the position that this concern should be assuaged not through wholesale rejection of post-disaster legal protections, but instead through vigorous advocacy for pairing legal protective solutions with extensive efforts to prevent the vulnerabilities that lead to trafficking in the first place. Such efforts should include “protecting legal economics and ecologies, strengthening social supports and entitlements, guaranteeing labour and migration rights and protections, supporting and diversifying local livelihoods, and ensuring meaningful climate action.”²²⁵ Both the law²²⁶ and our sense of justice compel the diligent pursuit of these proactive efforts to meaningfully protect and provide for the most vulnerable people in our world. Nowhere is this truer than within the context of the climate change-human trafficking nexus—a monster of our own making.

²²¹ Molinari, *supra* note 155.

²²² *Id.*; Abramson, *supra* note 70, at 497.

²²³ Molinari, *supra* note 155.

²²⁴ *Id.*

²²⁵ *Id.*; Abramson, *supra* note 70, at 499.

²²⁶ Article 9(4) of the Trafficking in Persons Protocol requires party states to take positive steps to address the underlying causes of trafficking.