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MM &D

The Criminalization of Human and Humanitarian Smuggling

Scott Watson

Abstract. This paper critically examines how states manage international migration through the criminalization of smuggling. I contend that the smuggling narrative relies on three categories to reduce the ambiguity associated with smuggling and undocumented migration: smugglers/humanitarians, legal/illegal entry, and agents/victims. The insistence on pure and unambiguous categories has renderd migration legible to states by denying the complexity of international migration, redefining humanitarian practices, reinforcing problematic depictions of organized crime and humanitarian actors, and denying the culpability of the state in the prevalence and danger of smuggling.

Stories that valourize humanitarian smuggling are now anachronistic, confined to stories of the Underground Railroad, the Second World War, or on occasion, the mass exodus of boat people from Vietnam, Laos, and Cambodia in the 1970s. In these cases, the men and women who helped migrants escape across international borders are now understood to be humanitarian actors, or as refugees themselves. In recent decades, however, the criminalization of smuggling has rendered this representation of smuggling obsolete. The current discourse on human smuggling describes those who assist others cross borders without permission as criminals, potentially traffickers, or in the colourful language of former Australian PM Kevin Rudd, as "absolute scum" who deserve to "rot in hell" (Cameron 2013).

This paper challenges the dominant existing accounts of human smuggling, and moves scholarship on the issue toward the examination of the discursive and legal processes through which humanitarian smuggling has been criminalized, and the forms of harm legitimated through this process. This is of particular interest to those who study migration in the Asia-Pacific region, which is frequently characterized as an area of pervasive human smuggling and trafficking. The UN Office on Drugs and Crime (UNODC) depicts the rise of transnational organized crime in the Asia-Pacific region as endemic and a significant threat in the region. According to the UNODC, human smuggling in Asia does immense damage to its victims and remains a high-profit and low risk activity for organized crime, due to stalled economic development and low conviction rates for smugglers (UNODC, 2013). The problem of smuggling in the Asia-Pacific regions for the UNODC is clearly understood in terms of crime and the solution is in strengthening the rule of law and legal capacity to prosecute smugglers. Even those who call into question the effectiveness of criminalizing migration in Asia advocate for the "harmonization of border policies" in the Asia-Pacific region and the "criminalization of violations of immigration laws" (Schloenhardt 2001, 371).

This paper subjects the process of criminalization to sustained critique, with particular reference to the implementation of international smuggling laws into domestic smuggling legislation in Canada and Australia, two key recipients of migrants in the Asia-Pacific region. The process of criminalization redefines particular acts as crime and individuals as criminals, and therefore subject to criminal penalty. It represents a particular way of understanding and ordering the world that produces neatly defined categories that reduce the ambiguity of human mobility and justify the use of coercive force by the state.

The criminalization of migration, for instance, has rendered a wide range of activities and people subject to criminal penalty, from crossing borders, use of false identity documents, and harbouring migrants, to marrying, renting property to, and employing undocumented migrants (Chacon 2009). Criminalization also renders forms of non-criminalized but "equally injurious acts," usually those perpetrated by the state against those criminalized, as appropriate and necessary (Michalowski 2007). Criminalizing smuggling, which is often the sole means of escape for those facing violence and endemic poverty, justifies numerous "equally injurious acts" against vulnerable populations and those who assist them. The process by which these acts are rendered appropriate and necessary requires increased attention.

HUMANITARIANISM, BORDER CONTROL, AND ORGANIZED CRIME

As the 2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air (the Smuggling Protocol) attests, smuggling is a relatively new crime; although it continues a long historical trajectory of controlling human mobility through the categorization and documentation of people, and the criminalization of certain forms of mobility (see, Torpey 2000; Salter 2003; Fahrmeir, Faron and Weil 2005). The 1951 Refugee Convention promotes a humanitarian obligation, which is recognized and reproduced in the Smuggling Protocol, that effectively decriminalizes illegal entry for refugees. In doing so, it introduces a key source of ambiguity in the state's effort to manage human mobility across international borders. The creation of the crime of smuggling attempts to reduce this ambiguity, and parallels other recent efforts to target other humanitarian initiatives, such as the sanctuary and anti-deportation movements, that challenged the authority of state to regulate cross border movement (see, Colbert 1986; Coutin 1995; Nyers 2003; De Genova and Peutz 2010). Seen from this perspective, the criminalization of smuggling represents another significant milestone in the ongoing process of asserting state control over human mobility and of undermining and redefining humanitarianism.

There are several distinctive and problematic aspects of the criminalization of smuggling. Criminalization is one of a number of mechanisms employed by states that relies on the creation of abstracted and simplified categories to make sense of complex social phenomena and to achieve specific objectives, one of which

is controlling human movement (Scott 1998, 2, 23). Attempts to control human movement do more than just limit access to a state, it produces populations susceptible to precarious and exploitative employment (Goldring et al 2009; Provine and Doty 2011), and to coercive measures such as interception, detention, deportation, and criminal prosecution. I suggest that the criminalization of smuggling relies on and reinforces oversimplified and pure categories that deny the complexity of undocumented migration, redefine and restrict humanitarian practices, reinforce problematic depictions of organized crime and humanitarian actors, and deny the culpability of the state in the prevalence and danger of smuggling. The criminalization of smuggling attempts to remove all ambiguity associated with cross border movement and insists on purity or iconic representations of both asylum seekers and smugglers to reassert categories, to make legible these liminal groups, and ultimately to reauthorize the state's "ultimately unauthorized authority" to control human mobility (Suganami 2007).

Central to the criminalization narrative on human smuggling is that it is a business run by international criminal networks interested solely in maximizing profit (Zhang 2007, 88; Barker 2013). That this representation captures some of what goes on in border crossing is not in dispute. Rough estimates suggest that close to 50 million people worldwide have been smuggled, with revenues from smuggling exceeding $3.5 billion per year (Kyle and Koslowski 2011, 13). Smuggling is not just a business, as the UNODC notes, it can be a "deadly business" (McAdam and Baumeister 2010, 2). The exact human costs of smuggling are impossible to determine, but in recent years thousands of migrants have perished while clandestinely crossing international borders (Kyle and Koslwoski 2011). The International Organization for Migration (IOM) estimates that in 2014, over 4,000 people died while migrating, and that since 2000, well over 40,000 migrant lives have been lost (Brian and Laczko 2014).

These numbers are indeed troubling, but the overwhelming focus by political and media actors on dramatic events of migrant deaths, particularly mass deaths, misrepresents the phenomenon of human smuggling. The majority of smuggling operations do not end in death, and may not even entail particularly difficult or dangerous passage (Zhang 2007). Smuggled migrants rarely view their smugglers as dangerous criminals who should be imprisoned, rather they see them as "the people who most helped them" (Sharma 2003, 60). In short, smuggling is far more varied and complicated than is captured by media accounts, official government narratives, or academic reports on the numbers of deaths while migrating.

To be sure, governments, NGOs, and academics should be concerned with the escalating number of migrant deaths in smuggling operations. Yet, the focus on migrant deaths through the lens of the criminalization narrative places the responsibility for the economic and human costs of smuggling entirely on criminals, gangs and "unscrupulous" smugglers. By extension, the criminalization discourse ignores and/or denies that many state officials are actively involved in these international border crossings (Zhang 2007, 88; Lundquist 2012, 7, 22) and

more importantly, that increasingly restrictive border control measures knowingly encourage migrants and refugees to enlist the help of smugglers and toward riskier forms of travel (Spijkerboer 2000; Castles 2004; Carling 2007; Kyle and Koslowski 2011). The death of migrants taking dangerous routes of entry is a foreseeable, and in some senses, intentional outcome of restrictive border control policies.

The discursive exoneration of the state for these deaths is accomplished by creating categories that remove ambiguity regarding the identity and intention of all actors involved in the movement of people across borders. The criminalization narrative operates through three inter-related binaries: humanitarians/smugglers, legal/illegal entry, and victims/agents. These categories makes human mobility legible to states and in turn authorizes the state to regulate cross border movement and humanitarian activity, to make migration more difficult and deadly, and to criminalize those who assist refugees seeking asylum. By interrogating these categories, and demonstrating the inconsistencies within these categories, this paper challenges the foundations of criminalizing smuggling.

Smugglers and Humanitarians

The United Nations Smuggling Protocol defines 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" (Protocol 2000, 2). In this document, motivation is an important factor as it distinguishes between those who smuggle for personal gain and those who do so for humanitarian purposes. Indeed, the UNODC suggests that the Smuggling Protocol does not "criminalize...family members, non-governmental or religious groups that facilitate the illegal entry of migrants for humanitarian or non-profit reasons" (McAdam and Baumeister 2010, 5).

Yet, the profit/non-profit or self-interested/altruistic binary that sustains the criminalization of smuggling rests on a problematic understanding of smuggling, an inconsistently applied standard of humanitarianism, and increasingly limits the possibility of humanitarian action. As noted, the smuggling narrative depicts smugglers as part of a larger organized crime network whose sole motivation is to maximize profit (Zhang 2007, 88; Barker 2013). The assumption of profit maximization has led to the conflation of smuggling and trafficking in media accounts (Cumming-Bruce 2014; Smith-Park 2014), and in academic discourse and state policies (see, Aronowitz 2001; Icduygu and Toktas 2002).

This stands in contrast with humanitarians, who are assumed to operate on altruistic motives and as part of a recognized humanitarian entity, usually international or Western based NGOs and NPOs (non-profit organizations). However, the distinction between altruistic and financial/self-interested motivations that sustain the categories of smuggler and humanitarian is problematic. The insistence on a single guiding motivation, determined exclusively by the exchange of money or other material goods, obscures the fact that the many individuals in the complex network necessary to facilitate irregular entry act on altruistic intentions and

receive little or no compensation (Kyle and Dale 2011, 50). Even in cases where individuals do receive compensation, it is not immediately evident why this should be the sole focus. Given the costs of securing documentation or of arranging transportation, people assisting migrants across borders bear a substantial financial cost in addition to the potential danger raised by assisting persecuted persons. While charging a fee for a dangerous and expensive service is viewed as justifiable in many contexts (Koser 2011, 258), in the realm of border crossing it automatically disqualifies one as a humanitarian or altruistic actor.

Moreover, the insistence on no financial compensation or personal benefit is inconsistent with the existing practices of humanitarian work. The professionalization of humanitarian organizations has raised the prospect of self-interested motivations of actors (Rieff 2002; Leader 2000). Heavy dependence on funding from states and the rise of a professional class of humanitarians displacing 'altruistic' volunteers introduced previously neglected motivations, such as the prioritization of organizational survival and individual career success (Barnett 2005). As Liisa Malkki has aptly demonstrated, few humanitarian practitioners view themselves as iconic, altruistic humanitarians, they view themselves and each other as professionals, often self-interested individuals looking for work experience or "competitive compensation packages" (Malkki 2013, 216-7). While few would dispute that most humanitarian practitioners are motivated in part by humanitarian concerns, they are also motivated by sustaining their donor base as well professional considerations of pay, promotion, and status - and a great many are motivated by religious beliefs or nationalist sentiments (Ferris 2011).

The myth of purity of humanitarian action is further belied by the heavy reliance of humanitarian organizations on funding from states (Stoddard 2003); who are in general recognized as acting on political rather than humanitarian interests in their allocations of humanitarian assistance (Brauman 2004). Yet, many analysts imply that it is possible to differentiate between humanitarian assistance motivated primarily by political interests and foreign policy goals from those primarily directed toward humanitarian ends (Weiss and Campbell 1991; Pugh 1998; Roth, 2004). Unlike smugglers, NGOs and states are not held to a standard of pure motives or of demonstrating no other benefit other than humanitarian outcome.

Smuggling also challenges another iconic aspect of humanitarian work, namely that it is primarily carried out by professionals from advanced, powerful states going to other parts of the world to alleviate suffering. This is evident in numerous humanitarian initiatives. Take, for instance, the Sphere project's Humanitarian Charter, which states "all people affected by disaster or conflict have a right to receive protection and assistance...wherever they may be," and subsequently calls on disaster affected states to ensure humanitarian entities have such access (Sphere 2011). Key UN General Assembly Resolutions on humanitarian assistance also stress the importance of UN agencies having access to victims through the reduction of barriers on the importation of relief personnel, food, medicine, shelter and health care (United Nations 1991, 16). The humanitarian narrative

encourages the mobility of humanitarians from donor states, while neglecting, or even criminalizing, the mobility of vulnerable populations. As numerous scholars have noted, humanitarianism often acts as a policy of containment, designed in part to prevent large-scale migration movements and reduce commitments to refugee protection in recipient states (Aleinikoff 1992; Hyndman 2000; Crepeau 2003).

The smuggling narrative, which operates in and through the humanitarian narrative, relies on a distinction between humanitarians as purely altruistic actors who move expertise and charity across borders from secure spaces to insecure spaces, and smugglers as profit oriented actors who move people across borders from insecure spaces to secure spaces. The need to establish a clear distinction between smugglers and humanitarians arises in response to the ambiguity created by the 1951 Convention, and the recognition that there may be compelling humanitarian reasons for international movement of people from insecure to secure spaces, even 'illegally.' The ambiguity created by the humanitarian exception for illegal entry threatened to undermine these distinctions, and has become a site of contestation and closure, accomplished through the criminalization of smuggling.

Legal and Illegal Entry

The inclusion of financial motivation as a defining feature of the crime of smuggling in the Smuggling Protocol accomplishes two important tasks: it preserves a certain amount of ambiguity by sustaining the possibility of decriminalized illegal entry for humanitarian purposes, while simultaneously sustaining the illusion that all border crossings are unambiguously legal or illegal. This distinction is used, for instance, to differentiate between smugglers and immigration brokers/consultants. Both receive financial compensation for assisting people and goods cross borders (and thus are not humanitarians), but brokers facilitate legal residency, while smugglers enable illegal residency.

Yet the line between legal and illegal entry, and between smugglers and brokers, and even traffickers, is often difficult to separate in practice (Kyle and Dale 2011; Lundquist 2012, 7, 22); this is why consultants and brokers are subject to regulation and a fair amount of suspicion. Brokers may use falsified information to facilitate legal entry, just as smugglers and traffickers may use legal methods of entry, such as visas, green cards, and marriage licenses (Zhang 2007, 2). Nonetheless, the legal/illegal binary makes it possible for states to understand and control people who charge money for helping others cross borders, by criminalizing smuggling and licensing/regulating brokers and consultants.

The legal/illegal distinction that maintains the smuggler/consultant categories is even more problematic in the case of asylum seekers. As noted, Article 31 of the Refugee Convention states that refugees should not be punished for entering the state illegally, given the compelling humanitarian rationale (UNHCR 1951). In essence, the Refugee Convention decriminalizes illegal entry for refugees,

but offers no such protection to asylum seekers whose refugee claims are not recognized or to those who help refugees cross borders, though this may be implied by existing practice and subsequent clarification. In fact, the UNODC has explicitly stated that the Smuggling Protocol does not "criminalize…family members, non-governmental or religious groups that facilitate the illegal entry of migrants for humanitarian or non-profit reasons" (McAdam and Baumeister 2010, 5).

The inclusion of a profit motivation as a key component of the crime of smuggling in the Smuggling Protocol offers no clear resolution to the humanitarian ambiguity. Consequently, states have given increasing focus to illegal entry rather than motivations for entry as the defining criteria for establishing the identity of those who cross borders, and those who assist them. This is evident in the depiction of undocumented asylum seekers as 'economic migrants', 'bogus refugees', 'queue jumpers' and potential threats to the state rather than 'deserving' refugees based solely on mode of entry (Pickering 2001; Sales 2002; Neumeyer 2005; Watson 2007, 2009). As part of this shift, states are enacting different forms of protection for resettled refugees and on-shore claimants; in essence, penalizing asylum seekers and refugees for illegal entry (Goodwin-Gill 1986; Steel et al 2006; Hailbronner 2007).

A similar shift is evident for those who assist refugees as well. Numerous states, including Canada, Australia, the United Kingdom, and the United States define the crime of smuggling based exclusively on illegal entry. The Australian Migration Act does not include motivation for financial gain at all in its depiction of human smuggling (Government of Australia 2014, 233a). In Canada, material benefit or the exchange of money is simply an additional criterion to consider during sentencing, along with exploitation, or "connection with a criminal or terrorist network" (Government of Canada 2001, 117, 3.1a). The US State Department explicitly states that "financial gain is not a necessary element of the crime" of smuggling, since smuggling may also be intended to achieve other goals such as family reunification (US State Department 2006). Courts in both Australia and Canada have ruled that the Smuggling Protocol does "not exempt humanitarians and family members" from prosecution for smuggling (Schloenhardt and Davies 2013; Regina v. Appulonappa 2014, 129).

By removing motivation as a defining feature of smuggling, these states have elevated the legal/illegal binary to the sole defining aspect of smuggling and excluded humanitarian motivations, which are already rendered suspect due to the expectation of pure humanitarianism outlined in the previous section. The shift to mode of entry alone makes the complex process of human mobility legible to state policy makers and border enforcement by removing any ambiguity about the identity of arrivals and smugglers and eliminating the complexity of determining their motivations and/or establishing material or financial benefit. It is particularly problematic for those who assist asylum seekers cross borders. In both Canada and Australia, humanitarian actors have been charged with human smuggling for assisting recognized refugees to access protection in these states (Preson 2007; CBC 2012; Schloenhardt and Davies 2013). Not only has this led to detention and

fines for humanitarian actors, it produces "a chilling effect" on humanitarians and refugee advocates (CCR 2008).

In incorporating the Smuggling Protocol into domestic legislation, a number of states have dropped financial motivation as a defining feature of smuggling to focus exclusively on mode of entry. These states have, in principle, eliminated the possibility of humanitarian smuggling. While a number of cases are still before the courts in these countries, the evidence from Australia and Canada thus far indicates that courts accept that the criminalization of smuggling does not include a humanitarian exception, and that those who assist refugees across borders, even those who receive no material benefit, are subject to arrest, detention and fines.

Victims and Agents

A third categorical distinction necessary for the criminalization of smuggling is that of the victim and the agent of rescue. Although there were many questions during the "Indo-Chinese" refugee exodus in the 1970s about the refugee status of those fleeing Vietnam, Laos and Cambodia, few distinguished between the pilots of boats carrying refugees and their human cargo, that is to say there was no distinction drawn between the victim and the agent of escape. This has changed with the criminalization of smuggling, in which the refugee is constructed as a passive victim, rather than an active agent. The existing literature covers well the construction of refugee and asylum seeker identity, and it is not my intention to extensively survey that literature. Rather, I am interested in how the construction of the smuggled person as victim or agent fits into the criminalization narrative, and specifically how it negates the possibility of a refugee being the agent of her, and others,' escape/illegal entry.

As noted in the previous sections, the smuggler/humanitarian/trafficker identity is produced through and with the identity of the smuggled person. The foundation of these identity categories is that they are categorically distinct; the agent (smuggler/ humanitarian/trafficker) is not the same person as the smuggled object (migrant/ refugee/trafficked person). The asylum seeker, already a liminal category due to her yet-to-be-determined status, challenges the basic distinction between agent and passive object, particularly when she participates in the smuggling operation in some capacity.

As noted, migrants and asylum seekers are distinguished from the trafficking victim by their consent or choice to be smuggled (Koser 2011, 257). The victim of trafficking is represented as a "passive object of exploitation," the iconic representation of which is a female trafficked for sex, who is cooperative with the investigation and prosecution of traffickers, and who is rescued by others rather than escaping on her own (Srikantiah 2007, 160, 187). Each of these iconic representations negates the complexity of trafficking: the multiple industries involved, the possibility of consent, and the complex responses of trafficked persons to their traffickers and state authority (Sharma 2003). Of course, the

majority of smuggled persons are not recognized as and do not claim to be the victim of trafficking, rather they appeal to another pure victim narrative – that of the refugee.

As with the pure victim of trafficking, the pure refugee victim is depicted as both passive and innocent. Refugees are portrayed as pure victims, as a "speechless, helpless," group of passive actors operating in an environment stripped of historical and political context (Malkki 1996; Rajaram 2002). In this idealized representation, true refugees have not participated in the conflict in their home state, are forced from their homes into refugee camps where they passively await a resolution by the international community, the last and least desirable of which is resettlement in third states (Watson 2009). Political elites and border enforcement officials in a growing number of states interpret deviation from the behavioural expectations of genuine refugees as signalling their identity as not-refugees. For instance, those who may have participated in conflict, even if they were coerced, may be categorized as combatants or terrorists and excluded from refugee determination. Asylum seekers, by their very presence within a third state, challenge this representation of the iconic refugee; and thus are subject to harmful practices by state actors.

The international migration system is designed to prevent asylum seeker arrivals and to discipline asylum seekers to behave as proper refugees through preventive and "remote control" policies. These include interdiction, visa requirements, and carrier sanctions that collectively limit the possibility of people to move globally, including those fleeing persecution, war and poverty (Lahav and Guiradon 2000). Those that do bypass these preventive measures and circumvent the traditional modes of refugee resettlement to receiving states are subject to more draconian measures such as detention, deportation and restricted socio-economic rights (Gale 2004; Pickering 2001). In many states, the refugee determination process treats asylum seekers as suspect bodies whose credibility must be interrogated and confirmed by the state (Kagan 2002). This often involves "reading off the body" by using skin color or visible signs of trauma/torture (Fassin and d'Halluin 2005), or through the expert analysis of accents and speech patterns (Eades 2009). Numerous studies demonstrate that this process has led to erroneous decisions on refugee status and to the further traumatization of refugees including refoulement to territories where they face persecution (Crepeau et al 2002; Steel et al 2004; Silove et al 2006).

While the process of determining refugee status has exposed asylum seekers to potentially harmful practices, the criminalization of smuggling eliminates the possibility of some asylum seekers applying for refugee status altogether. This means that these asylum seekers face refoulement to another state without any assessment of the dangers they face. The asylum seeker who actively participates in the smuggling operation that facilitated their illegal entry not only violates the representation of the refugee as a passive object of smuggling, but also disrupts the categorical separation of agent from object. In Canada, the Immigration Refugee

Protection Act (IRPA) deems smugglers inadmissible and prohibits them from making a refugee claim on the grounds that they participated in human smuggling. This means that participation in smuggling supersedes refugee eligibility and demonstrates an insistence on purity of action; one cannot be a refugee and an active participant in helping others gain entry. It reinforces a radical distinction between those who need protection (victims) and those who help others find protection (humanitarians).

The exclusion of smugglers from refugee determination in Canada has already led to devastating outcomes. Two Sri Lankan asylum seekers charged with smuggling related to the arrival of *MV Sun Sea* in 2010 on the west coast of Canada were deported to Sri Lanka after being found inadmissible on the grounds of human smuggling. One of the men was imprisoned and allegedly tortured by Sri Lankan authorities, and was subsequently killed under suspicious circumstances (Bell 2013). The second deportee has gone missing since being deported to Sri Lanka (Woodward 2013).

In Australia, Schloenhardt and Davies (2013) show that the most viable defence for asylum seekers charged with smuggling is to show that they were coerced into participating, in essence altering their identity from agent/smuggler to passive object/victim. Similarly, in Canada, lawyers for asylum seekers charged with smuggling have argued that their clients were coerced into participating (Canadian Press 2014; Desjardins 2014; Mainville 2013). What these cases show is that states make legible international migration by enforcing a clear distinction between smugglers and refugees, and that the only way for asylum seekers to assert their identity as refugees is to demonstrate that they are a passive object of smuggling rather than active agents of their own escape and of helping others cross international borders for protection.

Conclusion

This article suggests that the criminalization of smuggling in both international and domestic legislation negates the very possibility of humanitarian smuggling. This is not to elide differences between the international Smuggling Protocol and domestic legislation on human smuggling. Clearly, the inclusion of financial gain as a constitutive component of the crime of human smuggling provides protection for some humanitarian actors that many states have removed from their domestic legislation. The important difference notwithstanding, the criminalization process reproduces a series of categories designed to make international migration legible to and manageable by states. Liminal categories, such as the asylum seeker and the humanitarian smuggler complicate these simplified categories on which the entire criminalization process depends. The goal of this article is to expose the inconsistencies and faulty premises of these categories, and to demonstrate their impact on those who would assist vulnerable people cross international borders.

It is difficult to challenge the dominant representations of smuggling at a time when large numbers of asylum seekers and migrants suffer and die as a result of dangerous tactics employed by smugglers, traffickers, and states. However, for this very reason it is necessary to stress that the criminalization of smuggling functions first and foremost to prioritize the management of international migration by states and to restrict the mobility of vulnerable people than it is to offer protection to migrants forced to leave their homes. In many cases, smugglers take on great risks to help vulnerable people find protection.

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