

**Submission of the United Nations High Commissioner for Refugees  
on  
Criminal Code Amendment (Trafficking of Persons Offences) Bill 2004**

In accordance with its supervisory responsibilities and Article 35 of the 1951 Refugee Convention relating to the Status of Refugees, the Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes this opportunity to provide comments on the Criminal Code Amendment (Trafficking of Persons Offences) Bill 2004, insofar as it may impact upon asylum-seekers and refugees.

**Comments:**

1. UNHCR has reviewed the Criminal Code (Trafficking in Persons) Amendment Bill 2004 and notes that the proposed amendments do not explicitly make reference to asylum-seekers or refugees. There is a risk that through this omission, the legislation could overlook the possibility that there could be asylum-seekers or refugees among traffickers and/or victims of trafficking. UNHCR recommends that the Committee considers the protection of asylum-seekers and refugees, and the importance of ensuring access to asylum systems for victims of trafficking.
2. UNHCR also recommends that the Committee ensure that acts of trafficking that are penalised are limited to those which are motivated by profit, leaving intact the notion of "humanitarian smuggling". This recommendation refers to situations where people, including refugees, are smuggled by persons motivated by the desire to help and protect them, including *inter alia* family members or church organisations. Such actions will still be considered breaches of immigration rules and punished as such but should not be considered to constitute the transnational organised crime of smuggling as defined by the UN Convention.
3. UNHCR refers the Committee to the saving clause(s) found in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, Article 14:

"1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the grounds that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”
4. UNHCR would also like to highlight UNHCR’s Executive Committee Conclusion No. 89 (LI) – 2000, which states:

“Noting the discussions in the Standing Committee on the interception of the asylum-seekers and refugees, and recognizing the importance of adopting comprehensive measures, between all relevant States and in cooperation with UNHCR, international organizations and other appropriate organizations, to deal effectively with irregular migration, trafficking and smuggling of persons, potentially including refugees and asylum-seekers, and ensure in this context that international protection and assistance needs of asylum-seekers and refugees are identified and fully met, consistent with international protection responsibilities, in particular the principle of non-refoulement.”
5. In addition, we draw your attention to the Office of the High Commissioner for Human Rights, "Recommended Principles and Guidelines on Human Rights and Human Trafficking", Guideline 1.6:

“Promotion and protection of human rights

Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.

States and, where applicable, intergovernmental and non-governmental organizations, should consider: ...

Ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.”
6. Attached herewith is a copy of the "Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organised Crime and Protocol Thereto" for the Committee's convenience and ease of reference.