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American Bar Association Rule of Law Initiative¹ Trafficking in Persons in Sub-Saharan Africa's Supply Chains Legal and Policy Framework Methodology Overview and Summary

Background

The American Bar Association Rule of Law Initiative (ABA ROLI) partnered with Verité, the African Labour Research Network (ALRN), and the Solidarity Center to conduct a two-year investigation of global supply chains and trafficking in persons (TIP) risks in sub-Saharan Africa as part of the program *Identifying Trafficking Risk and Best Practices for Combating Risk in Sub-Saharan Africa's Supply Chains: An Interdisciplinary Approach*. The project examined four topics: 1) African supply chain characteristics; 2) TIP risks associated with global supply chains in a range of African contexts; 3) company and industry practices that either enable or help prevent TIP in African supply chains; and 4) legal and policy frameworks in which global supply chains operate in sub-Saharan Africa, and in which TIP takes place and/or is prevented and addressed. ABA ROLI was principally responsible for the fourth topic, and developed a legal and policy framework methodology which was used to research and draft the 8 country and 11 thematic reports presented on this website. The purpose of this document is to explain the methodology and methods used to research and write the country and thematic reports.²

Research Questions

ABA ROLI approached the development of the legal and policy framework with two research questions: 1) "If I were general counsel to a company that produced, handled, or distributed a product in a country in sub-Saharan Africa, what would I want to know about that country's laws and policies in order to advise my company on how to reduce the risk of TIP in our supply chain?" and 2) "If I were to pursue or advocate for legal reforms to reduce TIP risks associated with global supply chains in a sub-Saharan African country, what laws and policies would I need to examine, amend, and/or adopt?"

Definition of Trafficking in Persons

ABA ROLI's reports define TIP according to the terms of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Trafficking Protocol)³ and the United States (U.S.) Trafficking Victims Protection Act (TVPA).⁴ According to the UN Trafficking Protocol, "trafficking in persons" or "human trafficking" is the recruitment, transportation, transfer, harboring, or receipt of persons [act—what is done], by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of

¹ The statements and analysis contained within this report are the work of the American Bar Association Rule of Law Initiative, which is solely responsible for its content. The views expressed herein should not be construed as representing the policy of the ABA. This report was funded by a grant from the United States Department of State. The opinions, findings and conclusions stated herein are those of the author[s] and do not necessarily reflect those of the United States Department of State.

² ABA ROLI additionally implemented two field-based and two desk-based case studies, the results of which are included in this website. While these case studies complement the legal and policy framework analysis as well as the industry and commodity analyses conducted by Verité, they are outside the scope of the methodology discussed in this document.

³ Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (entered into force Dec. 25, 2003).

⁴ Trafficking Victims Protection Act, 22 U.S.C. §§ 7101-7114

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 [means—how it is done], for the purpose of exploitation [purpose – why it is done]. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.⁵

The U.S. government defines TIP as the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud or coercion.⁶ Under the TVPA, and consistent with the UN Trafficking Protocol, individuals may be trafficking victims regardless of whether they once consented, participated in a crime as a direct result of being trafficked, were transported into the exploitative situation, or were simply born into a state of servitude. Despite a term that seems to connote movement, at the heart of the phenomenon of TIP are the many forms of exploitation, not migration or the activities involved in internal or international transportation of persons.

Scope of the Legal and Policy Framework

The ABA ROLI research team began development of the methodology by identifying 43 factors based on areas of law and policy that are relevant to TIP and/or to supply chains.⁷ ABA ROLI then conducted research into relevant international legal standards and best practices, and developed an analytical framework that included a statement of best practices, areas of inquiry, mapping of international and regional laws and standards, and key domestic sources for each of the 43 factors. Recognizing that while this 43-factor analysis would represent a gold standard for assessing the laws and policies that either augment or mitigate TIP risks in supply chains, ABA ROLI determined that it was impractical to implement that analysis in multiple countries within the scope of the program. Therefore, ABA ROLI preserved the 43 factors for a potential future in-depth analysis, and then grouped these factors into nine topics: I. TIP Legal and Institutional Framework; II. Governance and Justice Systems; III. Economic System; IV. Corporations and Contracts; V. Property and Natural Resources; VI. Individual Rights; VII. Rights of Children, Communities, and Indigenous Peoples; VIII. Migration and Border Security; and IX. National Security, Humanitarian Emergencies, and Post-Crisis Reconstruction. These nine topics form the basis of ABA ROLI's country and thematic reports.

In the internal methodology manual given to researchers, the nine topics are laid out with a statement of risk factors and best practices for addressing those risks, a list of areas of inquiry for researchers, mapping of regional and international laws and standards, and a list of key domestic sources to consult during country research. Topic I, TIP Legal and Institutional Frameworks, looks at the TIP-specific laws and policies of a country in order to provide context for the legislative and policy analysis of the other topics. Topic II, Governance and Justice Systems, looks at the institutional infrastructure of the country's legal system and seeks to identify the governmental, judicial, criminal justice, and other institutions that are involved in addressing TIP. Unlike other sections, which are based heavily on the international standards and seek to identify areas of risk, this section is focused on mapping out a country's governance and justice system in order to understand the institutional context for the other sections. Topics III, IV, and V look at the economic and commercial laws under which businesses operate in the country, with focus on identifying the areas of the commercial and economic laws and institutions where risk of TIP may occur or which may be used to address TIP. Topics VI and VII focus on identifying the country's compliance with

⁵ UN Trafficking Protocol art. 3, *supra* note 2.

⁶ TVPA § 7102, *supra* note 3.

⁷ See Appendix.

relevant international humanitarian norms. Topic VIII examines the country's migration and border policies that may affect persons involved in or affected by TIP, while topic IX examines TIP risks in the context of crises such as political instability, armed conflicts, and natural disasters.

Research Limitations

ABA ROLI approached methodology development and the subsequent research with several limitations. First, the main research method was desk-based (secondary) research, which limited ABA ROLI to conducting *de jure* (textual) law and policy analysis. The country reports do not include a primary source research or a *de facto* (contextual) analysis of how laws and policies are being implemented. Second, the geographic scope of the research was limited; while the legal and policy framework methodology could be applied to any of the 49 countries in sub-Saharan Africa (and beyond), for practical reasons, ABA ROLI limited research to ten countries. Third, because ABA ROLI lacked personnel with expertise in the laws of each country researched, in many cases ABA ROLI was unable to make confident conclusions regarding the existence or interpretation of laws and policies. Generally, ABA ROLI removed from the analysis questions that could not be answered with certainty for a majority of countries; when ABA ROLI was unable to answer an area of inquiry with certainty for a given country, the inability to confirm the information is indicated in the report. This led, in some cases, to gaps in the analysis. Finally, the research is limited by the scope of the program itself: it looks only at those forms of TIP which could be involved in multi-country supply chains, and although the laws and policies of non-African investor countries can significantly affect TIP in supply chains, only countries in sub-Saharan Africa were included in the program.

Country Selection

ABA ROLI began country selection by compiling a matrix of core indicators based on demographics, security and rule of law, human development, gender equality, rights and freedoms, employment and labor, and health, and also strove for regional and linguistic diversity. However, again for practical reasons, ABA ROLI ultimately chose to conduct legal and policy research in the six countries in which our partner organization ALRN was implementing case studies, both to complement ALRN's research and to benefit from having a partner organization on the ground. Those six countries included Ghana (on TIP risk related to the oil and gas industry), Lesotho (textile manufacturing), Malawi (agriculture), Namibia (fishing), Uganda (apparel and accessories manufacturing), and Zambia (mining). Due to the presence of Eritrean and Ethiopian attorneys on ABA ROLI's research team, ABA ROLI chose to conduct legal and policy research for these two countries; ABA ROLI also prepared desk-based case studies for Eritrea (mining) and Ethiopia (garment manufacturing). While ABA ROLI researchers did conduct field-based case studies for the Democratic Republic of the Congo (DRC; artisanal mining) and the Central African Republic (CAR; forestry), ABA ROLI was unable to complete legal and policy research to complement the DRC and CAR case studies.

Research Methods

ABA ROLI's research team included attorneys, international development professionals, and social scientists with expertise in one or more of the nine topics. Researchers began by mapping general areas of law and policy that were likely to correspond to the nine topics, and created a checklist of the types of laws, policies, institutional mandates, and other materials that should be collected from each country. Researchers then conducted desk-based research to collect laws, written policies, and other *de jure* materials related to the areas of inquiry corresponding to each of the nine topics. When possible, ABA ROLI relied on attorneys and researchers from the selected countries, but much of the research was done by U.S.-based researchers using library and online resources. These

laws and policies were then compiled, tagged by country and topic, and shared among the research team.

Simultaneous to the law and policy research, ABA ROLI prepared questionnaires for each of the nine topics, based on the areas of inquiry in the methodology. Using Qualtrics, researchers filled out questionnaires on each topic for each country. The questionnaires consisted of yes/no or multiple choice questions, followed by a text field for respondents to explain their answer and cite the source or authority. Subsequently, researchers generated comparative charts of responses, comparing the eight countries for each topic. Based on this comparison, ABA ROLI eliminated several areas of inquiry, primarily because there was insufficient information for most or all countries, and broke apart or restructured several topics. ABA ROLI ultimately identified 11 themes to be covered in the country and thematic reports: institution mapping, national anti-TIP legal and institutional framework, justice system, economic system, corporations, natural resources and property, individual rights, labor rights, rights of communities and indigenous people, immigration and border security, and national security and humanitarian emergencies.

Report Structure and Content

ABA ROLI chose to present both country and thematic reports so that interested parties could read comprehensive information on all themes for a single country, or multi-country information on a single topic. Given that the primary forum for presenting the information contained in the reports is a website, the reports were designed and formatted in such a way that each part of any given report could be broken out and presented on its own.

The topics covered in each country and thematic report are detailed below. Writers were given general guidelines for the introductory sections; for the other sections, writers were given prompts in the form of questions and asked to write their analyses in narrative format.

Introductory Sections

Thematic reports begin with an overview explaining the relevance of the theme to TIP risks, with reference to best practices or special considerations to be taken into account when analyzing how laws and policies related to that theme augment or mitigate TIP risks.

Country reports begin with introductory sections, which include a country overview and TIP context. The country overview covers the country's background and history, with focus on the structure of the government and the legal system. TIP context gives general background on TIP including the country's State Department Trafficking in Persons Report⁸ tier placement and other relevant information from the State Department TIP Report.

Lists of inquiries for each of the subsequent sections are presented below.

⁸ U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016, available at <https://www.state.gov/j/tip/rls/tiprpt/2016/> (last visited August 23, 2017). An explanation of tier placement is available at <https://www.state.gov/j/tip/rls/tiprpt/2017/271117.htm> (last visited August 31, 2017).

Institution Mapping

Give an overview of institutions that affect or regulate relevant industries in the country⁹ as well as institutions that could affect TIP in terms of the 4Ps: prevention, protection, prosecution, and partnerships. Institutions mapped may include (not an exhaustive list):

- Government Institutions
- Executive Branch
- Legislative Branch
- Judicial Branch
- Anti-Trafficking in Persons Institutions
- Criminal Justice Institutions
- Anti-Corruption and Ethics Institutions
- Regulatory Authorities (Trade, Labor, Industry, Commerce, etc.)
- Traditional Justice Systems

National Anti-TIP Legal and Institutional Framework

Anti-TIP Legal Framework:

- Has the State established a national anti-TIP legal framework?
- Does the legal framework include TIP-specific legislation?
- Does the legal framework include a TIP national action plan?
- Does the legal framework establish a specific criminal offense of TIP?
- Does the legal framework include provisions relevant to TIP in supply chains?
- Has the State established other laws relevant to TIP?

Anti-TIP Institutional Framework

- Has the State established a national anti-TIP institutional framework?
- Does the institutional framework include a national anti-TIP coordinating body?
- Does the framework include a national TIP monitoring and reporting mechanism?
- Has the State established other institutions with mandates relevant to TIP?

Justice System

- Do justice system institutions and procedures exist to assist TIP victims?
- Do criminal justice institutions have mandates that encompass TIP?
- Does the State have mutual legal assistance and extradition treaties or laws?
- Does the State restrict legal standing or access to justice institutions for marginalized groups including women, minorities, foreign citizens, and stateless persons?
- Does the State provide legal aid for indigent parties?

Economic System

- Do State laws prohibit the following economic and financial crimes?
 - Money laundering
 - Financial fraud

⁹ ABA ROLI primarily focused on industries that were the subject of the case studies conducted by ABA ROLI and ALRN.

- Identity theft
- Forgery & counterfeiting
- Terrorist financing
- Other financial crimes
- Does the law require financial institutions to monitor transactions for suspicious activity?
- Does the State regulate international financial transactions?
- Does the law allow for the freezing of assets during criminal, civil, or administrative proceedings, including those related to TIP?
- Does the State promote remittance economies?
- Does the State regulate financial flows from remittances?

Corporations

- Can legal persons be held legally liable for violations of the State's laws?
- Can officers/directors/shareholders of a legal person be held legally liable for the entity's violations of the State's laws?
- Does the State have an oversight mechanism to ensure corporate compliance with the requirements for incorporation?
- Does the State require or incentivize corporations to undertake corporate social responsibility initiatives, such as human rights standards or other forms of ethical standards?
- Does the law address transparency and accountability in supply chains?
- Does the law address conditions under which a contract is void or voidable?

Natural Resources and Property

- What are the major areas in which the laws regulate the right to natural resource extraction and harvesting? In particular, focus on the case study areas of agriculture, fishing, logging, mining, and oil and gas.
- What are the major areas in which the laws regulate environmental matters? Are there laws regulating:
 - Air quality & emissions
 - Drinking water quality
 - Hazardous waste management
 - Forest conservation
 - Wildlife conservation & poaching?
- Does the State restrict land ownership?
- Are there legal protections against land grabbing for individuals and communities?
- Does the law allow for eminent domain?

Individual Rights

- Has the State ratified or acceded to human rights treaties?
- Are there State institutions with mandates to protect human rights and freedoms?
- Do the Constitution or laws guarantee equality and non-discrimination?
- Does the law explicitly protect the rights and freedoms of foreign citizens and stateless people, including the right to access education and healthcare?
- What civil and political rights are protected by the laws and Constitution?

Labor Rights

- What labor practices and protections are established by law?
- Does the law provide for a system of labor inspection or oversight?
- Does the State have a process by which migrant workers may obtain work permits?
- Are migrant, domestic, seasonal, and informal economy workers included in the work and labor protections mentioned above?
- Is the State a party to any bilateral or regional agreements about foreign employment or migrant workers?
- Does the State specify a minimum age for employment?
- Does the law prohibit the worst forms of child labor?¹⁰

Rights of Communities and Indigenous People

- Does the law recognize customary land rights?
- Does the law recognize communal land rights?
- How does the law govern lands without a formal titleholder?
- Does the law protect community or indigenous groups' rights related to land-based development and investment projects?

Immigration and Border Security

- Does the State's law prohibit TIP and migrant smuggling?
- Does the State's immigration law provide special visas or other protections for TIP victims?
- Does the State's law prohibit sanctioning or holding liable TIP victims for immigration violations that directly result from being trafficked?
- Does the State's law require the State to obtain explicit permission from TIP victims for their repatriation? Does the law specify condition under which TIP victims can be repatriated?
- Does the State's immigration law permit denial of entry or revocation of visas to persons engaged in TIP?

National Security and Humanitarian Emergencies

- Does the State have a national security law or strategy?
- Does the State have an emergency management law or strategy?
- Does the State regulate the import and export of firearms?
- Does the State regulate the import and export of conflict resources?

Each country report ends with a conclusion giving a broad perspective on TIP risks related to the laws and policies of the country and highlighting the most important issues discussed in the report.

Country reports were written first and subsequently broken apart by theme and compiled into thematic reports.

¹⁰ International Labor Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 5 (entered into force Nov. 19, 2000).

Timeframe

Methodology development began in September 2015 and concluded in January 2016, although some revisions were made to the methodology after the country research had begun. Research for the country and thematic reports began in January 2016 and was completed in December 2016. The reports were written in the first two quarters of 2017 and finalized in July 2017.

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Appendix

Complete list of factors in the Legal and Policy Framework methodology:

Theme One: Rule of Law

Section I. Trafficking in Persons Legal and Institutional Framework

1. Legal and policy framework
2. Institutional infrastructure and cooperation
3. Prevention of trafficking in persons
4. Criminalization, prosecution, and accountability for TIP
5. Assistance to and Protection of TIP victims

Section II. Governance and Justice Systems

6. Governance institutions
7. Accountability and transparency
8. Criminal justice institutions
9. Civil and administrative justice institutions
10. Informal or traditional justice systems
11. Access to justice

Theme Two: Business and Commerce

Section III. Economic System

12. Trade
13. Tax, investment, and other economic incentives
14. Finance and banking
15. Public procurement
16. Remittances

Section IV. Corporations and Contracts

17. Corporate liability
18. Corporate formation and dissolution
19. Reporting and disclosure
20. Contract law
21. Mandates or incentives for CSR initiatives

Section V. Property and Natural Resources

22. Natural resources and environment
23. Land and buildings
24. Intellectual property and other property

Theme Three: Human Rights and Fundamental Freedoms

Section VI. Individual Rights

25. Equality and non-discrimination
26. Civil and political rights
27. Right to health
28. Right to education
29. Right to work

Section VII. Rights of Children, Communities, and Indigenous Peoples

- 30. Rights of children and youth
- 31. Economic rights
- 32. Rights to social protection and material assistance
- 33. Community rights
- 34. Rights of indigenous and tribal peoples

Theme Four: Security, Stability, and Migration

Section VIII. Migration and Border Security

- 35. Status of victims in receiving states
- 36. Repatriation of TIP victims
- 37. Border measures
- 38. Special categories of migrants at risk

Section IX. National Security, Humanitarian Emergencies, and Post-Crisis Reconstruction

- 39. National security
- 40. Humanitarian emergencies
- 41. Arms and defense sector
- 42. Conflict resources
- 43. Post-crisis reconstruction