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# KNOWINGLY BENEFITTING: BLOCKING RELIEF FOR DRC CHILD COBALT MINERS

by Austin Clements\*

*John Doe I v. Apple, Inc.*, a recently decided<sup>1</sup> class action lawsuit in the District Court for the District of Columbia, sought to hold multinational corporations liable for labor abuses that exist within the cobalt supply chain in consumer electronics products.<sup>2</sup> Extractive industries in the Democratic Republic of Congo (DRC) are a prevalent site of human rights abuses and exploitation and, in many ways, are a relic of the DRC's colonial past.<sup>3</sup> Artisanal mining in the country has led to increasingly dangerous working conditions for miners and a rise in the use of child labor to mine cobalt for electronics, such as cell phones, electric cars, and laptops.<sup>4</sup> Artisanal

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<sup>1</sup> While this article was being written, this case was dismissed in the D.C. District. See *John Doe I et al. v. Apple, Inc.*, No. 1:19-cv-03737 (D.D.C. Nov. 2, 2021). A timely appeal has been filed with the D.C. Circuit Court.

<sup>2</sup> Amended Complaint at 1-2, *Jane Doe I v. Apple Inc.*, No. 1:19-03737 (D.D.C. June 6, 2020) [hereinafter Amended Complaint].

<sup>3</sup> *Accord* GEORGES NZONGOLA-NTALAJA, *THE CONGO: FROM LEOPOLD TO KABILA* (2002); JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* (2011); ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA* (1998) (accounting historical exploitation of the mineral, human, and other natural resources by colonial powers that transitioned from foreign colonial state control to foreign private corporate ownership.)

<sup>4</sup> *Is My Phone Powered by Child Labour?*, AMNESTY INT'L, <https://www.amnesty.org/en/latest/campaigns/2016/06/drc-cobalt-child-labour/> (last visited Dec. 1, 2021).

mining is informal mining that is carried out using primitive tools in largely unsupervised zones without safety equipment.<sup>5</sup> Often in these zones, tunnel collapses and child labor are rampant.<sup>6</sup> However, the plaintiffs fell short of proving the burden required under U.S. law to show that they could recover damages from the defendants, which begs the question of whether plaintiffs can recover at all from U.S. based corporations for supply chain abuses committed abroad.

In *John Doe I*, the plaintiffs filed a claim against five tech giants—Alphabet, Apple, Dell, Microsoft, and Tesla—for violations under the Trafficking Victims Protection Reauthorization Act (TVPRA).<sup>7</sup> The plaintiffs alleged that the companies knowingly benefitted from participation in a venture, which engaged in child labor, thus violating the plaintiffs' rights.<sup>8</sup> For a claim under the TVPRA to prevail, the plaintiffs must prove: (a) the companies knew or should have known child labor was being used; (b) with this knowledge defendants continued to participate in a venture; (c) the defendants *knowingly benefitted* from the participation in the venture; and (d) the child plaintiffs were subjected to child labor.<sup>9</sup> The corporate defendants acquired cobalt from Glencore and Umicore and Huayou Cobalt, which operate mines and artisanal mining zones (AMZs) in the DRC.<sup>10</sup> The plaintiffs allege that in the AMZs they were injured as children, which squares the fundamental legal question of whether a U.S.-based corporation be held liable for human rights abuses that occur in its opaque supply chain right in the middle of the plaintiffs' claim.

<sup>5</sup> *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, \*2 (D.D.C. Nov. 2, 2021).

<sup>6</sup> *Id.*

<sup>7</sup> Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

<sup>8</sup> Amended Complaint at 4.

<sup>9</sup> *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, at \*20.

<sup>10</sup> *Our evolving approach to ASM: a plan for co-existence and transformation*, GLENCORE (Aug. 24, 2020), <https://www.glencore.com/media-and-insights/insights/our-evolving-approach-to-artisanal-small-scale-mining>.

Corporate responsibility in domestic human rights law is widely debated and is a recurring barrier for plaintiffs seeking redress.<sup>11</sup> The issue is further complicated when supply chains are as diffuse and complex as the global cobalt supply chain,<sup>12</sup> and when local governments fail to exercise proper oversight.<sup>13</sup> In the United States, there are three major pieces of legislation that plaintiffs have attempted to use to gain relief: the Alien Tort Statute (ATS),<sup>14</sup> the Trafficking Victims Protection Act

(TVPA),<sup>15</sup> and the Trafficking Victims Protection Reauthorization Act (TVPR).<sup>16</sup>

The Alien Tort Statute (ATS), which includes the Torture Victim Protection Act (TVPA),<sup>17</sup> allows for jurisdiction over a non-citizen tortfeasor if the tort was “committed in violation of the law of nations or a treaty of the United States.”<sup>18</sup> The original *John Doe I* Complaint included an ATS claim; however, the plaintiffs dropped the ATS claim in their Amended Complaint. The TVPA explicitly calls for an “individual” to perpetuate the act.<sup>19</sup> In cases where there is no way to know who the identity of the exact actor imposing the forced or coerced labor, U.S. courts have been very wary of imposing liability. For example, most recently, the Supreme Court decided *Nestlé USA, Inc. v. Doe I*, in which it held that if the alleged tort was not committed in the United States and the only domestic activity alleged was general corporate activity, relief could not be pursued under the ATS.<sup>20</sup> This effectively bars the pursuit of trafficking or labor abuse claims under the ATS in most cases, and thus, survivors must seek relief through other means. In the case of DRC cobalt mining, the pursuit of relief under the ATS is further complicated because the TVPA requires proof of torture or an extrajudicial killing.<sup>21</sup> However, the definitions of torture under the act require a level of

<sup>11</sup> See generally STÉPHANIE BIJLMAKERS, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW (2018) (arguing generally for the responsibility of the multinational corporation to the communities that are exploited by the corporation); Shuangge Wen & Jingchen Zhao, *The Bumpy Road of Home States’ Regulation of Globalized Business—Legal and Institutional Disruptions to Supply Chain Disclosure under the Modern Slavery Act*, 69 CATH. U. L. REV. 125, 127, 129–30 (2020) (examining the impact of British soft law and common law on corporate responsibility and arguing that states remain the primary enforcers of human rights law because of the complexity of supply chains).

<sup>12</sup> See Galit A. Sarfarty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L L.J. 419, 423, 431–432 (2015) (analyzing the impact of domestic legislation and accountability for multinational mineral supply chains). Cobalt supply chains are almost entirely operated by a third-party in the mining, refining, and manufacturing processes. This exchange of ownership throughout the supply chain makes the cobalt nearly impossible to track. See Susan van den Brink, René Kleijn, Benjamin Sprecher, & Arnold Tukker, *Identifying Supply Risks by Mapping the Cobalt Supply Chain*, 156 RES., CONSERVATION & RECYCLING 2 (May 2020) (mapping the physical diversity and diffusion of the cobalt supply chain).

<sup>13</sup> The DRC is attempting to control the artisanal cobalt industry by creating a state-based monopoly on purchase of the cobalt, although this has still yet to materialize. See Hereward Holland & Stanys Bujakera, *Congo creates state monopoly for artisanal cobalt*, REUTERS (Jan. 31, 2020), <https://www.reuters.com/article/congo-mining/congo-creates-state-monopoly-for-artisanal-cobalt-idUSL4N2A020N>.

<sup>14</sup> The Alien Tort Statute was the first U.S. law to grant universal jurisdiction, since expanding to allow violations under the “law of nations” to be pursued in U.S. courts. 28 U.S.C. § 1350.

<sup>15</sup> The TVPA uses a three-pronged approach: protection for foreign nationals, creation of new crimes and definitions, and increased prevention to ensure that foreign countries are not sites of trafficking as well. Victims of Trafficking and Violence Protection Act of 2000, 2000 Enacted H.R. 3244, 106 Enacted H.R. 3244, 114 Stat. 1464, 106 P.L. 386, 2000 Enacted H.R. 3244, 106 Enacted H.R. 3244

<sup>16</sup> While there has been several TVPRAs, the most important for the current discussion is the 2008 reauthorization, which added the language of “knowingly benefits”. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110 P.L. 457, 122 Stat. 5044 § 221 (2)(A)(ii).

<sup>17</sup> The language of the Torture Victim Protection Act was added as a provision on the Alien Tort Statute in 1991.

<sup>18</sup> 28 U.S.C. § 1350.

<sup>19</sup> Torture Victim Protection Act of 1991, 1992, H.R. 2092, 102nd Cong., § 2(a).

<sup>20</sup> *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021).

<sup>21</sup> 28 U.S.C. § 1350.

specificity that the AMZ child labor practices do not meet.<sup>22</sup> The ATS, while an avenue for some victims of child labor to hold American individuals accountable, has been held to be insufficient to hold corporate defendants liable.<sup>23</sup> And to further complicate jurisdictional matters, the Court in *John Doe I* believed that the TVPRA did not apply extraterritorially.<sup>24</sup>

*John Doe I* may have abandoned its ATS claim early into the proceedings, but the TVPA and TVPRA theoretically remained viable avenues for potential relief.<sup>25</sup> Under this statutory approach, it is well established that plaintiffs may sue an individual or a corporation,<sup>26</sup> which removes one of the barriers to liability that is imposed in the ATS. The TVPRA's main evidentiary barrier is proving whether the defendant *knowingly* benefits from the child labor, which is exceedingly difficult to prove in the cobalt supply chain.<sup>27</sup>

The cobalt supply chain is, both by nature and through intentional obfuscation, a very difficult

<sup>22</sup> Artisanal Mining Zones, by their design, are freelance and require assumption of risk by the miners themselves. The tunnels and mining techniques used are not standardized or safe, and cave-ins are common. Additionally, although child labor is supposed to be discouraged, in practice it is regularly allowed and observed through pseudo-willful blindness.

<sup>23</sup> See generally *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021).

<sup>24</sup> See *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, \*26-30 (D.D.C. Nov. 2, 2021).

<sup>25</sup> While the TVPA and TVPRA added distinct provisions, they are treated as the same avenue of relief in this article.

<sup>26</sup> See *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1276 (11th Cir. 2020) (interpreting the language of the TVPA to include corporations and holding the congressional intent to not be so narrow to exclude corporations); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1008 (S.D. Ind. 2007) (Claiming in dicta it is common to assert a claim against a corporation under the ATS).

<sup>27</sup> Whoever *knowingly* benefits, financially or by receiving anything of value, from participation in a *venture* which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in *reckless disregard* of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished. . . . (emphasis added). While the TVPRA requires two other conditions to be met —participation in a venture and knowledge of child labor— only the first is discussed here.

environment to prove that a defendant “knowingly benefits” from child labor. The cobalt supply chain, by its inherent nature, is complex and hard to track, with many different entities controlling various parts of the extraction and manufacturing of cobalt biproducts.<sup>28</sup> To complicate matters further, the supply chains for conflict minerals and cobalt were intentionally made more confusing following the passage of the Dodd-Frank Act.<sup>29</sup> This was to circumvent new requirements for reporting<sup>30</sup> on the sourcing of 3T minerals and cobalt.<sup>31</sup> In practice, the lack of an adequate reporting mechanism makes enforcement of the first provision of the TVPRA untenable. Without an adequate reporting system, large corporations can continue to claim that they have no knowledge of the child labor within their supply chains, even when it is a very real possibility. Some NGOs have attempted to encourage reporting in cobalt supply chains, although these reporting attempts have not achieved widespread success because of corporate reluctance.<sup>32</sup> It is for the very reason of the distance and obfuscation of the cobalt

<sup>28</sup> Raw cobalt is often mixed from different sites to purify the ore into pure metal that can be refined. During a 2014 Government Accountability Office inquiry, sixty-seven percent of companies could not determine if their minerals came from the DRC or not. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-561, SEC CONFLICT MINERALS RULE: INITIAL DISCLOSURES INDICATE MOST COMPANIES WERE UNABLE TO DETERMINE THE SOURCE OF THEIR CONFLICT MINERALS 2 (2015).

<sup>29</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law No. 111-203, Part 3 of 3, 124 Stat. 1376, 111 P.L. 203, § 1502, 2010 Enacted H.R. 4173, 111 Enacted H.R. 4173. The Dodd-Frank Act is the only legislation to mandate reporting of source information for conflict minerals.

<sup>30</sup> This reporting mechanism is no longer enforced by the SEC. U.S. Sec. and Exch. Comm'n, Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule (Apr. 7, 2017), <https://www.sec.gov/news/public-statement/corpfm-updated-statement-court-decision-conflict-minerals-rule>; See *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 520 (D.C. Cir. 2015) (holding mandated disclosure was compelled speech under the First Amendment).

<sup>31</sup> See Lisa Reisman, *Loophole in Conflict Minerals Law Creates Opportunity for Scrap Dealers*, METALMINER (Feb. 24, 2011), <https://agmetminer.com/2011/02/24/loophole-in-conflict-minerals-law-creates-opportunity-for-scrap-dealers/>.

<sup>32</sup> *Cobalt*, RESPONSIBLE MINS. INITIATIVE, <http://www.responsiblemineralsinitiative.org/minerals-due-diligence/cobalt/> (last visited Dec. 1, 2021).

supply chain that the District Court held that the plaintiffs' injuries in *John Doe I* were too distant and could not be linked to the defendants.<sup>33</sup>

The plaintiffs in *John Doe I* relied upon the transactions between the defendants and Huayou and Glencore, alleging that widespread knowledge that these two companies are notorious bad actors is sufficient to show that the defendants "knowingly benefitted."<sup>34</sup> The plaintiffs alleged that these companies are known to be serial abusers of human rights law, specifically regarding child labor practices, and thus they should be known as "notorious bad actors." Merely receiving ore supply from these companies, the plaintiffs argued, should be enough to show that the defendants "knowingly benefitted" from child labor practices.<sup>35</sup> However, there is no precedent to assert that proving someone is a bad actor is sufficient to show that the company knew they were benefitting from child labor. The plaintiffs alleged that Apple knew, or should have known, because they suspended purchases from Huayou in 2014 over concerns of child labor in their supply chain, but they later resumed purchases in 2018 without evidence that Huayou made any real changes in practice.<sup>36</sup> However, this was not sufficient to prove that Apple knew or should have known they were engaged with a company who continued to engage in child labor, as Huayou has since stopped buying cobalt from AMZs in the DRC following the filing of the lawsuit.<sup>37</sup> The District Court pointed out that merely engaging business partnership to gather and supply cobalt is not a venture itself to induce or provide child or forced labor.<sup>38</sup> It is unclear if the reputations of these "notorious bad actors" may be sufficient evidence to show that the defendants "knowingly benefitted" from child labor. Indeed, the

<sup>33</sup> *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, \*15–16 (D.D.C. Nov. 2, 2021).

<sup>34</sup> See Amended Complaint, at 75.

<sup>35</sup> *Id.* at 65.

<sup>36</sup> See *id.* at 79.

<sup>37</sup> Harry Sanderson, *China's top cobalt producer halts buying from Congo miners*, FIN. TIMES (May 28, 2020), <https://www.ft.com/content/ce9af944-fb70-4576-88d0-dc76821facfd>.

<sup>38</sup> See *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, \*12 (D.D.C. Nov. 2, 2021).

District Court saw it as an almost nonexistent claim, treating it only in passing on its way to determining that it was impossible for the defendants to have "knowingly benefitted."<sup>39</sup> The court saw the plaintiffs' injuries as too distant to be possibly be traced to the defendants under § 1589.<sup>40</sup>

While there are multiple avenues by which plaintiffs could seek damages for child labor in cobalt supply chains using U.S. law, the oversight necessary to make these valid claims is not present in international supply chains. *John Doe I's* complete rebuttal of TVPRA claims on the grounds that corporate defendants could not knowingly benefit from these practices lays bare the inadequacy of U.S. law to cover corporate liability. The U.S. government has taken no steps to ameliorate this issue through legislation, which makes its ratification of the Worst Forms of Child Labor Convention seem hollow.<sup>41</sup> Attempts to make mineral supply chains more transparent (which is the only way to know if child labor exists in a supply chain) were ruled unconstitutional in the past.<sup>42</sup> The TVPA and the TVPRA seem to be clear avenues of relief for foreign nationals who have faced child or forced labor in a U.S. corporation's supply chain. However, the both natural and intentional lack of reporting in supply chains, like the cobalt supply chain, make the evidentiary burden required almost impossible to prove. For U.S. law to provide for a reliable avenue of relief for abuses that occur in supply chains, Congress must further amend the language of the TVPRA to also cover willfully blind corporations that did not take adequate measures to ensure their supply chains were free of child labor.

<sup>39</sup> *Id.* at \*24.

<sup>40</sup> *Id.* at \*22.

<sup>41</sup> International Labour Organization [ILO], Worst Forms of Child Labour Convention, No. 182 (June 17, 1999). [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100\\_ILO\\_CODE:C182](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:C182).

<sup>42</sup> See *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 520–521 (D.C. Cir. 2015).



Regional bodies are some of the primary creators of international law and are on the front lines of human rights protections. The Regional Systems Team seeks to provide up-to-date coverage of the world's regional bodies. For the first time, the Regional Systems team is expanding beyond coverage of the Inter-American Court of Human Rights and Inter-American Commission on Human Rights to cover both the European Court of Human Rights (ECtHR) and African Court for Human and Peoples' Rights (ACHPR). The Regional Systems team seeks to not only cover these issues but also analyze them within the context of their respective regions.

The following articles examine some recent decisions from the ECtHR and ACHPR. The first article follows the case of Vedat Şorli, a Turkish national who was convicted for his posts on Facebook under a Turkish law that criminalizes insults against the President. Şorli has since sought a judgment from the ECtHR on the compatibility of this law with the European Convention on Human Rights. The second article examines the ECtHR's new standard for evaluating mass surveillance regimes as outlined in two recent decisions, *Big Brother Watch v. UK* and *Centrum för rättvisa v. Sweden*. The final article discusses an advisory opinion from the ACHPR on criminal vagrancy laws and analyzes the potential impact of the ACHPR's recommendations. Each of these articles highlights the critical role of regional courts in shaping the human rights landscape of the future and putting an end to the abuses of the past.

