Re: Big Tech Companies Profit from Cheap Child Labor in Developing Countries (2020)

The U.S. Trafficking Victims Protection Act and the 2019 U.S. class-action litigation filed by DRC child labor victims against U.S. technology companies

Forced labor, child labor and trafficking of children has been ongoing for many years. In 2019 13 cobalt child miners from the Democratic Republic of Congo (DRC) filed a class-action suit against **Apple, Alphabet, Dell, Microsoft, and Tesla** under the U.S. Trafficking Victims Protection Act.

The federal *Trafficking Victims Protection Act of 2000 ("*TVPA") [1] was last amended on January 3, 2018 by the *Trafficking Victims Protection Reauthorization Act of 2017* ("TVPRA").[2] The "Trafficking in Persons Reports" for 2018 and 2019, issued by the U.S. Secretary of State, are available on the department website. The U.S. Secretary of State issued the following message in 2018:

"Within the United States, the Trafficking Victims Protection Act of 2000, as amended, provides the tools to combat trafficking in persons both worldwide and domestically. The Act authorized the establishment of the State Department's TIP Office and the President's Interagency Task Force to Monitor and Combat Trafficking in Persons to assist in the coordination of U.S. government anti-trafficking efforts. Internationally, several conventions, in particular the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), set out international standards for combating trafficking in persons."[3]

The Trafficking Victims Protection Act applies to **any person who provides or obtains the labor or services of a person by force, threats, physical restraint, by means of serious harm to that person**, by means of abuse or threat of abuse or legal process or by means of any scheme, plan, or pattern intended to cause the person to believe that they would suffer serious harm if they did not perform such labor (18 U.S. Code § 1589 (a)). The Act addresses forced labor and trafficking anywhere in the supply chain. It has a very broad scope of application that includes importers, manufacturers, dealers, distributors, importers, agents, etc. if they participated somewhere in the supply chain. "The United States considers "trafficking in persons," "human trafficking," and "modern slavery" to be interchangeable umbrella terms that refer to both sex and labor trafficking".[4]

The TVPRA does not demand any particular action, but provides for fines or a prison sentence, if **any person** engages in the use of forced labor and child labor and trafficking. This is quite different from Section 307 of the Tariff Act of 1930 which only applies to **any importer** and prohibits the importation of merchandise that has been mined, produced or manufactured, wholly or in part, in any foreign country by forced labor, including prison labor and forced or indentured child labor. Its liability provisions consist of monetary penalties for fraud, negligence and gross negligence, with the burden of proof on the importer to prove that the merchandise was not mined, produced or manufactured in any part with use of forced labor (19 C.F.R. § 12.43 (a). See Chapter V. above, titled "Section 307 of the Tariff Act 1930". Withhold Release Orders by U.S. Customs and Border Protection for detained shipments effectively prohibit the importation of forced labor produced goods

The TVPRA further expands application by providing punishment with fines or prison to "whoever knowingly or in reckless disregard of the fact…**benefits, financially or by receiving anything of value**, **from participation in a venture** which has engaged in an act which is a violation of the Act und 18 U.S. Code 1589 (a) shall be punished with fines or a prison sentence up to 20 years, or life under aggravated circumstances, such as the death of a child (18 U.S. Code § 1589 (b)). The terms "**financial benefit**" and

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[1] 22 U.S.C. 7102

[2] 18 U.S.C. § 1581 et. seq.

[3] https://www.state.gov/reports/2018/-trafficking-in-persons-report/

[4] i.d.

"**receiving anything of value**" are broad terms which lend themselves to multiple applications and interpretations. Trafficking does not require the movement of persons across borders. The U.S. Secretary of State's website explicitly states: "*A victim need not be physically transported from one location to another for the crime to fall within this definition".*[5]

The TVPRA gives victims of forced labor, child labor or trafficking, legal grounds for filing a civil claim in U.S. federal courts (18 U.S. Code §1595 (a)). This is an important tool to effectuate the prohibition of forced labor, child labor, sex trafficking of children, sale into involuntary servitude, slavery and trafficking, all of which are covered by 18 U.S. Code §§1581 through 1596. Victims have the right to file a civil action against a perpetrator in any U.S. District Court for damages and reasonable attorney fees. §1595 (b) provides for "criminal action", including investigation and prosecution, of any violation. 18 U.S. Code § 1593 provides for mandatory restitution.

The child labor **class-action against Apple, Alphabet, Dell, Microsoft and Tesla by 13 cobalt child miners in the DRC** is a good example of the liability risks under the TVPRA.[6] On December 15, 2019 International Rights Associates ("IRA"), Washington, D.C., U.S. District Court) filed a class-action suit in Washington, D.C., against Apple, Alphabet, Dell, Microsoft and Tesla for aiding and abetting extreme abuse of children mining cobalt in the Democratic Republic of Congo (DRC).[7] The complaint alleges that 2/3 of the global cobalt supply is mined in the DRC (Complaint p. 5). It further alleges that every lithium-ion rechargeable battery requires cobalt in order to recharge (Complaint p. 6).

IRA reported on their website on December 15, 2019 that they are continuing to **investigate other tech and car companies and expect to add additional companies to the lawsuit**. At the core of the 79-page complaint lies the argument that tech companies financially benefitted, i.e. "**received something of value from the venture**" of cobalt mining due to the "below starvation wages" ($2 to $3/day or less) that young children are paid for dangerous and hazardous work in cobalt mines and tunnels without structural supports, working with primitive tools and without safety equipment. As a result of this "outrageous conduct" children have been being maimed or killed. The plaintiffs allege that the defendants knew or should have known of the true conditions in DRC cobalt mining, that they were deceitful and negligent, and hiding behind due diligence pretension.

Plaintiffs allege that **the defendants knew of the forced child labor** from public reports and that they knew that the DRC mining companies are controlled by Glencore (U.K.) which sells cobalt to Unicore (Belgium), with Unicore processing the cobalt and then supplying refined cobalt to tech companies. Zhejiang Huayou Cobalt Company Ltd. is named as an additional supplier to Apple, Dell and Microsoft.

The plaintiffs state that any claims made of a "**traceable cobalt supply chain"** from the DRC "by use of model sites, blockchain, or other technology …are preposterous to anyone who has spent even a small amount of time on the ground in the southeastern provinces of the DRC". (Complaint p. 61) Preempting defendants (expected) defense that their suppliers do not purchase so-called "**artisanal"** cobalt, mined by children or other forced labor, but only "**industrial**" cobalt, plaintiffs point to the fact that industrial and artisanal cobalt are mixed at various stages in the supply chain, including the transport by truck from mining sites and buying houses to refiners in the DRC or within refineries in the DRC, prior to export for additional processing by companies like Unicore and Huayou Cobalt. (Complaint p. 61)

An interesting aspect of **corporate due diligence** is addressed in the section "Defendants knew or should have known that their respective ventures had engaged in forced labor as defined by §1589" (Complaint, pp. 69 and 70). All defendants "made significant financial contributions to PACT, a Washington D.C. based non-profit organization working in the mining areas of the DRC", and must have received detailed reports of conditions in the DRC. Plaintiff's research team visited the DRC mine

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[5] id.

[6] DOE 1 et al. v. APPLE INC. et al., No. 1:19-cv-03737

[7] http://iradvocates.org/sites/iradvocates.org/files/stamped%20-Complaint.pdf

"Mutoshi" where PACT supposedly ran a model program. Senior staff gave them a tour, stating that cobalt by children is regularly mixed with cobalt mined on-site and that there was absolutely no tagging of cobalt bags mined at the site, "**contrary to claims made by PACT".** Plaintiffs conclude that the PACT program **"serves as a cynical poster child to give companies supporting it an opportunity to hide the reality of the use of forced child labor to mine cobalt for them". (Complaint p. 70)**

The DRC plaintiffs allege **claims for forced child labor** in violation of the TVPRA and **common law** claims for **unjust enrichment**, **negligent supervision** and intentional infliction of emotional distress. They demand the following:

- Monetary damages
- Consequential damages, loss of assets and of educational and business opportunities, anguish and pain
- Punitive and exemplary damages: "**disgorgement of all profits** resulting from these unfair business practices", such that restitution is made to the general public
- Establishing a fund for medical care

Subject matter jurisdiction for a federal legal action filed under the TVPRA is based on 18 U.S.C. §1596 which explicitly provides for extraterritorial jurisdiction. The plaintiffs in the case against U.S. tech companies also assert jurisdiction under 28 U.S.C. §1331 (Complaint p.19) which provides for jurisdiction of all civil claims arising under the Constitution, laws or treaties of the United States and 28 U.S.C. § 1332 (a) (2) based on diversity of citizenship.

In this case, **personal jurisdiction** is based on the long-arm-statute of the District of Columbia, D.C. Code § 13-423 (a) (1) and the general principle in transnational litigation to find jurisdiction proper because of "minimum contacts" between the defendant and the forum state. The threshold for minimum contacts is low. Personal jurisdiction for foreign companies doing business in the U.S. would be a given. Recent federal cases have expanded on personal jurisdiction in diversity cases by going beyond "minimum contacts" and making an additional argument for due process and fairness.

Corporate Social Responsibility (CSR) Risk Assessment

This class-action case addressing forced child labor in a **low wage country** shows the dangers of doing business abroad. If the location and the country are known for problems with forced labor and child labor, then the standard of CSR due diligence is vastly raised. All supply chains are at risk of investigation. Short of investigating local conditions there is no safe harbor for foreign companies. Suspicions are roused and it is not sufficient if a company makes "significant financial contributions" to a non-profit company that claims to affect "mitigation" efforts on location. Non-governmental organizations (NGOs) may have to up their game. Companies will not be able to hide the reality of labor conditions in low wage countries by claiming ignorance or by employing external third parties who either pretend to rectify illegal conditions or put up smoke-screens.

A company's reputation in the area of CSR due diligence may now become more important than in the past. In their allegations against Defendant **Apple**, plaintiffs point to the fact that "Apple manufactures much of its products in China, where it has faced recent and ongoing scrutiny for manufacturing at sweatshop facilities that require workers to work long hours for little pay under difficult and stressful conditions (Complaint p. 52). **Volkswagen** and **Adidas** have recently been accused of benefitting from slave or forced labor in the Xinjiang region of China where the Chinese government operates large internment camps for Uighurs. It appears that cheap labor is connected with forced labor, and that makes sense.

It is interesting that the 2019 Trafficking in Persons Report **lowered Germany from a Tier 1 country to a Tier 2 country**. The Secretary of State's report notes that "the Government of Germany does not fully meet the minimum standards for the elimination of trafficking". The Secretary points to high numbers of suspended sentences and a decline in convictions since 2009. The fact that Germany was given a lower rating of Tier 2, may raise additional doubts about awareness and intentions when looking at the actions

of German companies. The country ratings are significant as they are related to prevention and protection efforts against trafficking. For example: The DRC is a Tier 3 country. German countries doing business abroad need to understand that requirements for CSR due diligence will be more stringent in a Tier 3 country.

In February 2019, the **United States and Germany** signed a **Joint Declaration of Intent** to increase cooperation on labor trafficking issues, including within global supply chains. The U.S. Secretary of State noted on the website: “The (German) government had not appointed a national rapporteur, a key recommendation of GRETA’s 2015 report, as well as NGOs and some state-level officials.” The German government’s non-action has been acknowledged.

The U.S. has been enacting and enforcing laws to fight forced labor, child labor, servitude, slavery, sex trafficking etc. for many years. This is the first big case where poor disadvantaged children in Africa obtained effective legal representation in the U.S. **U.S. tech companies** have been in the news before because of abusive labor practices abroad, which increased negative public sentiment. The plaintiffs’ attorneys publicly stated that they wanted to investigate other tech and car companies and expected to add additional companies to the lawsuit. The focus of the litigation is on lithium-ion batteries and their wide application.

The outcome of the litigation: The class-action was dismissed by the U.S. District Court and the U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the complaint.