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Congressman Smith, Senator Merkley, honorable Members of the Commission, thank you for the invitation to appear before you today.

Critical minerals remain at the core of further technological advancement from vehicles to defense industry, raising the issue of control over their extraction and application to the highest levels of national and corporate interest. Despite this unique value, we are faced with the paradox of almost no meaningful U.S. or Western corporate presence in the supply chain. Indeed, while the final products containing these minerals may be assembled in the markets of the U.S. or its allies, the critical areas of mineral extraction and refining remain far out of reach. Absolute power corrupts absolutely, as the saying goes, giving those who wield it impunity and influence beyond the scope of mineral production. While U.S. and European manufacturers may insist on implementing measures to ensure that every stage of production is free from intolerable human rights abuses, the reality of the monopolized supply chain, and the power behind it, makes it very difficult to actually achieve such an objective, at least not without concrete and aggressive action.

Understanding the problem

The story of **cobalt** is an unfortunate example of *de facto* informed silence and continued inaction in response to the unfathomable devastation of the basic human rights of the most vulnerable. It has been fourteen years since the Department of Labor added cobalt mined in the DRC to its "List of Commodities Produced by Child or Forced Labor."¹ Since

¹ See e.g. US Department of Labor, "List of Goods Produced by Child Labor or Forced Labor" (2009); see also US Department of Labor, "List of Goods Produced by Child Labor or Forced Labor" (2022), at p. 50.

then, it is estimated that between 35,000² and 40,000³ children, some as young as 6⁴ to 9⁵ years old, have been continuously involved in diverse mining operations in the DRC. In addition to life-threatening hazardous conditions,⁶ children are subjected to inhumane working hours,⁷ exposure to potentially toxic materials,⁸ physical abuse, and sexual exploitation.⁹ And yet, instead of receiving protection over the years, the DRC National Army itself was recently declared “complicit in the worst forms of child labor” as forced mining expanded to include other minerals such as gold, tin ore, tantalum ore, and tungsten ore.¹⁰ Transparency International’s Corruption Perceptions Index 2022 ranked the DRC among the 15 most corrupt nations worldwide,¹¹ with significant reports connecting corruption to the country’s mining sector.¹²

Unfortunately, these truly horrific practices are unlikely to change until and unless the incentives and impunity for wrongdoing are removed. Recognizing that the assumption of a simple solution does not do justice to the actual complexity of the matter, the remainder of the testimony seeks to address the various underlying causes of the crisis at hand, coupled with the powers available to the U.S. to counteract in line with its current policies.

² See e.g. US Department of Labor, Bureau of International Labor Affairs, “2022 Findings on The Worst Forms of Child Labor, Congo, Democratic Republic of the” (2022), at p. 2; See also Siddharth Kara, “Is your phone tainted by the misery of the 35,000 children in Congo’s mines?” (2018) in The Guardian: <https://www.theguardian.com/global-development/2018/oct/12/phone-misery-children-congo-cobalt-mines-drc>

³ See e.g. US Department of Labor, “List of Goods Produced by Child Labor or Forced Labor” (2022), at p. 50; see also UNICEF, “Factsheet: enfants dans les mines” (2014) cited in Amnesty International “THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt” (2016), at pp. 6, 28.

⁴ See e.g. US Department of Labor, “List of Goods Produced by Child Labor or Forced Labor” (2022), at p. 50.

⁵ See e.g. Amnesty International “THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt” (2016), at p. 29.

⁶ See e.g. OECD, “Interconnected supply chains: a comprehensive look at due diligence challenges and opportunities sourcing cobalt and copper from the Democratic Republic of the Congo” (2019), at p. 36; Amnesty International “THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt” (2016), at pp. 29 et seq; US Department of Labor, Bureau of International Labor Affairs, “2022 Findings on The Worst Forms of Child Labor, Congo, Democratic Republic of the” (2022), at p. 2; US Department of Labor, “List of Goods Produced by Child Labor or Forced Labor” (2022), at p. 51.

⁷ See e.g. Amnesty International “THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt” (2016), at p. 29.

⁸ See e.g. Amnesty International “THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt” (2016), at p. 30; see also Federal Ministry of Economic Cooperation and Development of Germany, “Child labour in the extractive sector” (2022).

⁹ See e.g. US Department of Labor, Bureau of International Labor Affairs, “2022 Findings on The Worst Forms of Child Labor, Congo, Democratic Republic of the” (2022), at p. 6; OECD, “Interconnected supply chains: a comprehensive look at due diligence challenges and opportunities sourcing cobalt and copper from the Democratic Republic of the Congo” (2019), at p. 37; Amnesty International “THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt” (2016), at pp. 30 et seq.

¹⁰ See US Department of Labor, Bureau of International Labor Affairs, “2022 Findings on The Worst Forms of Child Labor, Congo, Democratic Republic of the” (2022), at p. 1.

¹¹ Transparency International, 2022 Corruption Perceptions Index, Democratic Republic of the Congo: <https://www.transparency.org/en/countries/democratic-republic-of-the-congo>

¹² See e.g. The Sentry, “The Backchannel: State Capture and Bribery in Congo’s Deal of the Century” (2021).

The **upstream** segment of the cobalt supply chain generally includes mining, mineral trading, and subsequent processing in smelters or refineries. Two distinct sets of considerations can be observed in practice in the DRC:

Absolute poverty affects over 60 million Congolese who have to live on less than US\$2.15 a day.¹³ In addition, 33 million Congolese have limited or no access to drinking water, and 43% of children under the age of 5 across the country suffer from malnutrition.¹⁴ Free education remains largely unavailable.¹⁵ It is rather impossible to speak of free will in such a state of effective survival. Hence, the families become a target for exploitation or worse. Children who end up working in cobalt mines are paid as little as US\$1-2 per day by the traders.¹⁶ They may additionally be subjected to extortion by local law enforcement or security guards.¹⁷ Danger and objective exploitation notwithstanding, having no meaningful alternative leaves less than a choice but to comply at any personal cost. Put it differently, the only source of income is participation in this circle of abuse.

The other side of the same upstream coin is the demand. Over 70% of world's supply of cobalt comes from the DRC.¹⁸ Between 20%¹⁹ and 30%²⁰ of those quantities may be traced back to artisan mines powered *inter alia* by child labor. Traders (commonly referred to as "buying houses") purchase cobalt from children and then sell it to processing plants connected to collection ports. At these stages, it is often inevitable that illegally obtained cobalt will be mixed into the mass of exported minerals.²¹ In 2020, Chinese companies imported nearly 90% of their cobalt needs from the DRC.²² It is publicly known that at least eight of the fourteen largest cobalt mines in the DRC are controlled by Chinese companies, but the actual number is likely to be much higher. In addition, mainland China accounts for 80% of the world's cobalt refining capacity.²³

¹³ The World Bank in DRC, country overview: <https://www.worldbank.org/en/country/drc/overview>.

¹⁴ UNICEF, "Water, sanitation and hygiene: Every child has a right to water, sanitation and a safe and clean community": <https://www.unicef.org/drcongo/en/what-we-do/water-sanitation-and-hygiene>

¹⁵ See e.g. Amnesty International "THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt" (2016), at p. 31.

¹⁶ See e.g. Amnesty International "THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt" (2016), at p. 31.

¹⁷ See Bureau of International Labor Affairs, "2022 Findings on The Worst Forms of Child Labor, Congo, Democratic Republic of the" (2022), at p. 6; see also Amnesty International "THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt" (2016), at p. 30.

¹⁸ See e.g. US Department of Labor, "List of Goods Produced by Child Labor or Forced Labor" (2022), at p. 51.

¹⁹ See e.g. Amnesty International "THIS IS WHAT WE DIE FOR: Human Rights Abuses in The Democratic Republic of The Congo Power the Global Trade in Cobalt" (2016), at p. 46.

²⁰ See e.g. Federal Ministry of Economic Cooperation and Development of Germany, "Child labour in the extractive sector" (2022).

²¹ See e.g. US Department of Labor, "List of Goods Produced by Child Labor or Forced Labor" (2022), at p. 51.

²² See e.g. US Department of Labor, "List of Goods Produced by Child Labor or Forced Labor" (2022), at p. 51.

²³ OECD, "Interconnected supply chains: a comprehensive look at due diligence challenges and opportunities sourcing cobalt and copper from the Democratic Republic of the Congo" (2019), at p. 5.

The **downstream** segment of the cobalt supply chain generally includes manufacturing activities – from components to lithium-ion batteries. In 2020 alone, 41% of all batteries containing cobalt was imported from China.²⁴ U.S. battery imports were even more significant, reaching 47% in the same calendar year.²⁵ **These figures suggest an absolute monopoly on what has become one of the most critical supply chains**, and may help explain why years of reporting on the link between the worst forms of child labor and the cobalt supply chain have regularly fallen on deaf ears.

Path forward

Despite the challenges, progress has been made to address at least some of the supply chain issues, reducing the overall state of potential dependence. Since 2020, battery manufacturing activity has been aggressively attracted to the U.S. This is indeed a big step in the right direction. However, despite its obvious potential, it does not address the rest of the upstream issues, which necessarily remain tied to the DRC and wrongful practices in its mining sector.

From the corporate perspective, there have been public signals of willingness to act and remedy the situation for more than five years. However, the promises of change may have fallen desperately short of expectations. In 2017, Amnesty International concluded that the majority of downstream companies had taken minimal action to improve their due diligence on the issue of child labor involvement in their supply chains.²⁶ Just two years later, a report subsequently cited by the OECD found *“low levels of due diligence disclosure, with none of the 42 companies examined having described the steps taken to manage risks or summarized their risk mitigation strategies related to child labor.”*²⁷ Similarly, the German government reaffirmed in 2022 that up to 30% of cobalt in the DRC will continue to come from artisanal sources,²⁸ while in the same year the Department of Labor announced minimal progress in efforts to eliminate the worst forms of child labor in the DRC's extractive industries.²⁹

²⁴ See e.g. US Department of Labor, “List of Goods Produced by Child Labor or Forced Labor” (2022), at p. 51.

²⁵ See e.g. US Department of Labor, “List of Goods Produced by Child Labor or Forced Labor” (2022), at p. 51.

²⁶ Amnesty International “Time to Recharge: Corporate Action and Inaction to Tackle Abuses in the Cobalt Supply Chain” (2017), cited in OECD, “Interconnected supply chains: a comprehensive look at due diligence challenges and opportunities sourcing cobalt and copper from the Democratic Republic of the Congo” (2019), at p. 40.

²⁷ Bayer, C., and Cooper A., “Worst Forms of Child Labour in the Democratic Republic of the Congo: Cobalt Refiner Due Diligence Reporting” (2019) cited in OECD, “Interconnected supply chains: a comprehensive look at due diligence challenges and opportunities sourcing cobalt and copper from the Democratic Republic of the Congo” (2019), at p. 40.

²⁸ Federal Ministry of Economic Cooperation and Development of Germany, “Child labour in the extractive sector” (2022).

²⁹ US Department of Labor, Bureau of International Labor Affairs, “2022 Findings on The Worst Forms of Child Labor, Congo, Democratic Republic of the” (2022), at p. 1.

According to recent estimates, demand for cobalt is expected to quadruple by 2030 as compared to 2019.³⁰ As demand for cobalt increases, so does unfortunately the risk of child labor in mining. Considering this, it may be critical to examine what powers the U.S. and its companies have under these circumstances to further address practices that so flagrantly violate fundamental rights and freedoms.

While **corporate pressure** is theoretically possible, it requires a high degree of market dominance or importance, which can then be translated into pressure on upstream actors to aggressively address child labor in the cobalt supply chain. Intel's success in ensuring a conflict-free supply chain in the microprocessor industry³¹ is an example of a successful outcome. Nevertheless, the argument that Western companies themselves currently have the power or incentive to force Chinese-backed counterparts to comply with international standards is a difficult one to make.

As noted above, Chinese companies control almost all the mines and refineries needed to produce batteries. In addition, China is expected to remain the world's largest EV market in the short term, with a market share of up to 45%.³² Finally, current projections suggest that Chinese EV manufacturers will gain over 20% of the global market share by 2030.³³

Another commercial reality is that the current supply chain is affordable, and any readjustment could well lead to higher costs and negatively affect the prices of final products. Therefore, in the absence of **positive incentives** such as non-market interventions and direct governmental support, Western companies may have little motive to enter additional segments, such as refining or mining, themselves. An example of a legislative initiative that recognizes some objective commercial barriers to change may be the "Cobalt Optimizes Batteries and Leading Technologies Act of 2022," which provides for the development of cobalt refining capacity in the U.S., with potential funding from the Defense Production Act. However, further cooperation with industry leaders from the U.S. and allied countries is likely required, since without their participation the risk of negative dependency is unlikely to be resolved.

³⁰ World Economic Forum, "A Vision for a Sustainable Battery Value Chain in 2030: Unlocking the Full Potential to Power Sustainable Development and Climate Change Mitigation" (2019), at p. 16.

³¹ See e.g. Intel's efforts to Achieve a "Conflict Free" Supply Chain: <https://www.sec.gov/comments/s7-40-10/s74010-419.pdf>

³² See e.g. Sheila Chiang, "Automakers promote advanced tech to compete in China — the world's top EV market" (2023), CNBC: <https://www.cnbc.com/2023/08/04/ev-makers-promote-advanced-tech-to-compete-in-china.html#>

³³ See e.g. Simon Evans, "Carmakers to lose 20pc of share to Chinese electric vehicles" (2023), The Australian Financial Review: <https://www.afr.com/companies/transport/carmakers-to-lose-20pc-of-share-to-chinese-electric-vehicles-20230904-p5e1v2>

Notwithstanding potentially supportive U.S. actions, as long as crimes go unpunished and actors responsible for the worst forms of child labor enjoy effective impunity, it is difficult to expect rapid and meaningful change in practices on the ground in the DRC. Careful consideration of **tangible consequences** for unlawful actions may therefore be required. Three types of measures are arguably available to the U.S. authorities assuming the facts as stated:

A potential action affecting all market participants, without legal effect on their individual ability to operate generally as commercial entities and without regard to their actual involvement in any proven illegal practices, is a **temporary suspension** of international trade in or imports of cobalt into the U.S. – to the extent that there is a risk of importation of cobalt or cobalt-containing products sourced through child labor. The positive potential effects of such an approach are that the U.S., by virtue of its market position, can exert far more dominant pressure than commercial actors acting independently, and thus influence the triggering of remedial market practices. It should be noted, however, that an absolute ban on imports may have negative short-term effects on the U.S. market – an issue that can be perhaps addressed through licensing and due diligence requirements overseen by the authorities. In this regard, the draft legislation “Countering China's Exploitation of Strategic Minerals and Child Labor in the Democratic Republic of the Congo Act” may be of interest for further discussion. Similarly, it may be possible to consider amending the conflict minerals list in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act to include cobalt and child labor.

Secondly, the sheer scale of uninterrupted violations of fundamental human rights for over more than a decade, and potentially lethal nature of the worst forms of child labor in the DRC, continue to provide sufficient basis under both domestic and international law for the U.S. and its allies to impose **sanctions** on states, companies, and individuals found to be engaged in these activities. The U.S. has already taken significant steps in this regard. However, it is important to understand the nature of sanctions in order to appreciate their limited power: sanctions are neither permanent nor punitive measures under international law; their sole purpose is to correct and halt an unlawful act pending a future resolution. Once the wrongful conduct ceases, the legal basis for sanctions disappears, leaving many directly responsible free of any responsibility.

Therefore, **criminal investigations** may be initiated, at least with respect to the organizers and those directly responsible for promoting the worst forms of child labor in the extractive industries of the DRC. In this regard, like many of my colleagues, I believe that child labor in hazardous conditions constitutes a violation of peremptory norms of international law prohibiting slavery. Peremptory norms (lat. *jus cogens*) are those norms

of international law from which no country may derogate up to any degree. In addition, “inhumane acts [...] intentionally causing great suffering, or serious injury to body or to mental or physical health” can rise to the level of crimes against humanity if they are “widespread” or “systematic”, and “directed against a civilian population.”³⁴ In the present case, the Bureau of International Labor Affairs explicitly declared the armed forces of the DRC to be “complicit in the worst forms of child labor.”³⁵ Thus, the U.S. and the international community in general would arguably have a **legal obligation to act** to protect against acts analogous to slavery and potential crimes against humanity. In any event, international law permits the initiation of national proceedings, especially when there is a nexus between the violations mentioned and another territory that receives the proceeds of such violations.

Finally, the local Congolese population should be given alternatives to forced mining. Let there be no doubt: Artisanal mining cannot be made safer or more humane. Without tangible investment, whether through meaningful social initiative projects by companies present in the country or USAid initiatives, they may be left with a bitter end without any source of income.

Concluding remarks

As someone who has personally seen this suffering, as a father whose young children, if born in the DRC, could have ended up in the same cycle of abuse, and as a true believer in the rule of law, I ask you to consider a series of actions that can put an end to the worst forms of child labor in the DRC's extractive industries. I also take a moment to note that the U.S. Congress and the U.S. Administration are truly the last human hope for millions of people in this region.

I thank you for your attention.

This testimony is an independent expert opinion provided at the request of the U.S. Congress and does not necessarily represent the views or opinions of Washington University School of Law or any other third party, court, or institution.

³⁴ Rome Statute of the International Criminal Court, Article 7.

³⁵ See US Department of Labor, Bureau of International Labor Affairs, “2022 Findings on The Worst Forms of Child Labor, Congo, Democratic Republic of the” (2022), at p. 1.