

CASE NO. 03-15252

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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DOES I THROUGH XXV,  
On behalf of themselves and all others similarly situated,  
Plaintiffs/Appellants,  
v.  
THE GAP, INC., et al.,  
Defendants,  
and  
LEVI STRAUSS & COMPANY,  
Defendant/Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANAS ISLANDS  
CIVIL CASE NO. CV 01-00031 ARM

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**BRIEF OF AMICI CURIAE USWA, UNITE AND SEIU  
IN SUPPORT OF APPELLANTS**

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## **STATEMENT OF INTEREST OF THE AMICI CURIAE**

The United Steel Workers of America (“USWA”), the Union of Needletrades, Industrial and Textile Employees (“UNITE”), and the Service Employees International Union (“SEIU”), file this joint brief as amici curiae supporting the Plaintiffs-Appellants in this case. The amici unions represent nearly 2 million workers employed in a wide variety of industries and occupations throughout the United States (including its offshore territories and possessions) and Canada. These unions and their members have a vital economic as well as solidarity interest in the conditions and treatment of workers throughout the world because those working conditions, in an integrated global economy, directly affect the job security, livelihood and welfare of the unions’ members and their families.

Thus, the amici unions have long been active in protecting and defending international human rights and workers’ rights. Among other things, the amici unions actively participate in and support international labor and human rights organizations; consistently work to secure fair and enforceable legal standards protecting fundamental human rights and labor rights in the global economy; and seek to hold accountable the many entities and enterprises – including governments, quasi-governmental agencies, and domestic, foreign and multi-national corporations – who commit, foster or benefit from human rights and labor

abuses and the exploitation of workers. To this end, the amici unions have initiated and/or participated in legal proceedings, in domestic and international forums, seeking enforcement of those legal standards and redress for victims of abuse. Such legal proceedings include federal cases filed on behalf of alien workers under the Alien Tort Claims Act. Given the absence of independent and effective judicial systems in many areas of the world, the amici unions have a particular interest in preserving access to the U. S. federal courts and maintaining the effectiveness of remedies provided under federal law.

In this case, the amici unions seek to preserve the ability of victims of forced labor in the offshore textile industry to maintain a cause of action under the Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350. As our brief demonstrates, forced labor is a universally acknowledged, fundamental violation of international law clearly actionable under the ATCA. Indeed, forced labor has been recognized as a modern variant of slavery. By sufficiently pleading the elements of “forced labor” under the Trafficking Victims Protection Act (“TVPA”), 18 U.S.C. §1589, a United States statute defining “forced labor” consistently with than the international standard, the plaintiffs below more than satisfied the requirements for pleading a forced labor violation under customary international law and the ATCA. Our brief further shows that an ATCA forced labor claim against a non-

governmental defendant does not require state action. Nonetheless, even if state action were an element of an ATCA forced labor claim, the Third Amended Complaint in this case sufficiently alleges participation and involvement by the Chinese government, as well as by government-owned recruiters, in the alleged forced labor scheme.

Accordingly, the court below clearly erred in dismissing the complaint under Rule 12(b)(6) for failure to state an ATCA forced labor claim.

## ARGUMENT

### THE COMPLAINT IN THIS CASE SUFFICIENTLY STATES A FORCED LABOR CLAIM UNDER THE ALIEN TORT CLAIMS ACT

**A. Allegations satisfying the definition of “forced labor” under the Trafficking Victims Protection Act suffice to plead “forced labor” under customary international law and the Alien Tort Claims Act**

The ATCA confers jurisdiction on the federal courts, and creates a cause of action, for any tort committed against an alien in violation of “specific, universal, and obligatory” international norms. *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (en banc); *Hilao v. Estate of Marcos*, 103 F.3d 789, 794 (9th Cir. 1996). The universe of such specific international norms enforceable under the ATCA includes, by definition, the smaller subset of *jus cogens* norms, which transcend the consent of states. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 715 (9th Cir. 1992). Torture, murder, genocide and slavery, in particular, not only violate customary international norms, but further rise to the level of *jus cogens* violations of international law. *See, e.g., United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995).

Forced labor, a universally acknowledged violation of fundamental human rights, has been recognized as one of the modern variants of slavery. *See* Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed

Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), ILO, Part IV.9.A, ¶ 198 (1998), *cited in Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1308 (C.D. Cal. 2000).<sup>1</sup> Indeed, forced labor has attained the level of a *jus cogens* violation in its own right. *See* Universal Declaration of Human Rights, G.A. Res. 217(A)III (1948), art. 4 & art. 23(1); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 280. Accordingly, a violation of the universally recognized prohibition on forced labor – whether that prohibition is deemed *jus cogens* or merely a “specific, universal and obligatory” international norm – is actionable under the ATCA.

The International Labour Organization (“ILO”) has defined forced labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” ILO Convention No. 29, Article No. 2 (1930); *see also Doe I v. Unocal*, 110 F. Supp. 2d at 1308. The ILO is the arm of the United Nations that establishes international

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<sup>1</sup> The recently enacted TVPA similarly describes trafficking in persons as “a contemporary manifestation of slavery” and finds that trafficking in persons “includes forced labor.” 22 U.S.C. § 7101(a), (b)(3).

labor standards, *see id.*, and ILO Convention No. 29 has been ratified by 162 countries. *See ILO Ratification Information for Convention No. 29, available at <http://www.ilo.org/ilolex/english/convdisp2.htm>.* As a general rule, therefore, we submit that the definition of forced labor found in ILO Convention No. 29 – i.e., involuntary work obtained under the menace of any penalty – should furnish the substantive standard governing forced labor claims under the ATCA.

In their pleadings below, the Plaintiffs aimed at, and clearly satisfied, a definition of forced labor consistent with the customary international law standard that controls under the ATCA. Specifically, Plaintiffs asked the district court to evaluate the sufficiency of their ATCA forced labor allegations by applying the definition of “forced labor” found in the TVPA. That statute defines “forced labor” as the providing or obtaining of

the labor or services of a person—

(1) by threats of serious harm to, or physical restraint against, that person or another person;

(2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) by means of the abuse or threatened abuse of law or the legal process . . . .

18 U.S.C. § 1589.

By its terms, the TVPA definition of “forced labor” requires a showing that

the victim's labor was obtained by means of physical, legal, or psychological coercion.<sup>2</sup> There can be no question, then, that the TVPA's detailed and specific definition comports with the more generally phrased international law standard, i.e., involuntary work obtained under the menace of any penalty. Though the two definitions may be framed differently, the pleadings below alleging "forced labor" under the TVPA definition unquestionably satisfy the definition of forced labor

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<sup>2</sup> In *United States v. Kozminski*, the Supreme Court held that, absent a definition provided by Congress, "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." 487 U.S. 931, 952 (1988). In response to that decision, Congress defined "involuntary servitude" and crafted a careful definition of "forced labor" as well:

Section 1589 [of Title 18, defining forced labor, was] intended to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence. Section 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation *that do not rise to the level of involuntary servitude* as defined in *Kozminski*.

H.R. Conf. Rep. No. 106-939, at 101 (2000) (emphasis added). Hence, it is clear that "forced labor" was intended to encompass work obtained through psychological and other nonviolent forms of coercion, as well as that obtained through physical and legal coercion.

under customary international law as well.<sup>3</sup>

Nonetheless, the court below inexplicably, and erroneously, refused to consider Plaintiffs' satisfaction of the TVPA standard in determining whether their Third Amended Complaint ("TAC") stated a forced labor claim under the ATCA. The court so ruled because it found "no compelling reason to adopt [the TVPA] standard in this case," adding that "there is simply no indication that Congress, in defining the offense of forced labor in Section 1589 of Title 18 and attaching criminal penalties to such conduct, also intended to create a new tort actionable under the ATCA." Order Denying-in-Part and Granting-in-Part Defendant Levi Strauss & Co.'s Motion to Dismiss Plaintiffs' Third Amended Complaint ("TAC Order") at 13.

This rationale, we respectfully submit, is a *non sequitur*. The question before the district court on the motion to dismiss was not whether the TVPA itself created a "new tort" under the ATCA, but, rather, whether allegations that

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<sup>3</sup> The amici do not mean to suggest that all claims for forced labor under the ATCA should be limited to the TVPA definition. Indeed, given the broad definition of forced labor established by the international community, any involuntary work obtained under the menace of "any penalty" would suffice to state a claim under the ATCA. However, because the plaintiffs framed their claim using the TVPA standard, and because that TVPA definition comports with the international norm, it was plainly error for the district court to reject that standard as insufficient for an ATCA claim.

indisputably satisfy the elements of criminal “forced labor” under the TVPA suffice to plead the already existing tort of “forced labor” in violation of international norms recognized under the ATCA. The district court’s failure to address and decide that question in favor of the plaintiffs was clearly wrong and demands correction on appeal.<sup>4</sup>

**B. The Third Amended Complaint sufficiently alleges “forced labor” as defined under international law and the TVPA**

A motion to dismiss for failure to state a claim is “viewed with disfavor” and is “rarely granted.” *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). “A complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt that the plaintiff can prove no set of facts in*

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<sup>4</sup> We also note, in passing, that the district court’s rationale is inconsistent with its treatment of Plaintiffs’ separate involuntary servitude claim under the ATCA. In dismissing that ATCA claim “for the same reasons [it] dismissed the involuntary servitude claims as a RICO predicate act,” *id.* at 12, the court ultimately relied on a definition of involuntary servitude derived from a companion criminal statute to the TVPA, 18 U.S.C. § 1584. *See* Order Granting in Part and Denying in Part Customer Defendants’ Motion to Dismiss the Plaintiffs’ Second Amended Complaint (“SAC Order”) at 33-37; Order Re: Motion to Dismiss Plaintiffs’ First Amended Complaint (“FAC Order”) at 43-46. Yet while freely importing a federal criminal law standard to dispose of the ATCA claim for involuntary servitude, the district court simply ignored that reference point in evaluating whether Plaintiffs sufficiently alleged a forced labor claim under international law and the ATCA.

