Doe v. Unocal
SF Tues 6/17/03 8:30 a.m. Ctrm #1
#00-56603,00-56628, 00-57195, 00-57197
Before: Schroeder, Reinhardt, Kozinski, Rymer, TG Nelson, Tashima, Graber, McKeown, W. Fletcher, Fisher, Rawlinson, CJJ

Court: Good morning ladies and gentlemen. This is the time for rehearing on *** case of Doe v. Unocal Corporation. We understand that all counsel are present and ready to proceed. The Court has issued an order asking the parties to, in the course of their argument, to focus on a particular issue and we hope that . . . we ask the parties to do so. But, we are aware that the Court has taken the entire case en banc. And so with that we will proceed to hear the case and I assume that counsel has **** division of time. So, we will hear from the appellants.

Hoffman: Thank you your honors. May it please the Court. My name is Paul Hoffman. I'm appearing for the appellants in Doe v. Unocal. With me is Terry Collingsworth who is appearing for the appellants in Roe v. Unocal and we intend, with the permission of the Court to divide our time. We would also like to reserve 10 minutes for rebuttal, if we can.

Court: **** keep track of your own time because this is the entire time.

Hoffman: Yes, your honor. I'm going to start out by addressing the issue that the Court identified in its April 9th order as being the principal issue that we should concentrate on and our response to the Court's order is that we believe that federal common law analysis is what should apply to the issue of Unocal's . . . the standard of liability for Unocal in this case. We also believe that as part of that analysis that international norms should be used wherever they exist as part of federal common law. We believe the panel majority correctly identified aiding and abetting as being part of international law and therefore should be applied as part of the federal common law analysis and we agree with the way that the panel has defined aiding and abetting under both international and domestic principals. We also believe that Judge Reinhardt was correct in identifying a joint venture agency and reckless disregard theories as being enforceable through a federal common law analysis. And, one of the problems that occurred in the district court is that the district court did not address many of the theories that we had presented in our papers and so . . . in terms of the final decision and that was rectified to some degree in the way the panel dealt with it and we certainly assert those theories.

Court: . . . in your remarks address the difference, if there is, on the civil side because the panel in the district court looked to criminal international law and I'm curious as to what the status is if one simply looks to civil law and whether there's any difference between federal common law on the civil side and international law on the civil side.

Hoffman: Your honor, we don't think that there is a difference. I mean, we think that

basically . . .

Court: If there isn't, why would we have to choose between the two?

Hoffman: I don't think that . . . Our argument is that you could arrive at the same result whether you took what appears to be the panel majorities approach which is to apply international law directly or apply it indirectly through federal common law using domestic tort principals.

Court: Is it important for this Court to declare that in an ATCF case that we must apply federal common law and not international law or international law and not federal common law? Do we have to do that in this case?

Hoffman: Well, I don't know in the sense that . . . I don't think you have to in terms of the result. I think the result would be the same. We think that aiding and abetting . . . at least on the aiding and abetting question, which is the central bone of contention, I think. The Restatement section 876b, which we've always asserted as the proper standard for general principals, we think is essentially the same standard as has been elaborated at the international level from Nuremberg on. And, I'd also note . . . yes. Basically, we believe that the standard is essentially the same. Now, it may be that there are sub-issues within the definition of aiding and abetting that are not relevant in the facts of this case or there might be some slight difference, but we haven't identified any that would be relevant to the facts in this case.

Court: Mr. Hoffman, is this a Court analogized to ***** applied that analogy correctly? Why isn't that body of jurisprudence an appropriate source of law?

Hoffman: Your honor, if you're in a federal common law analysis I would think that looking to section 1983 jurisprudence might well be an appropriate body to look to. And, I think courts have, in fact, looked to Section 1983 jurisprudence. I think that our position though is that where there are international standards, those international standards ought to be applied before others. And, the reason for that, we think, goes back I think to the reason why federal common law should be applied in the first place, the need for . . . not only for uniform national standards, which you could get from looking at section 1983 or other sources of law. Section 1350 is a statute that was basically about to adjudicate the law of nations at a time in particular when the country found it an important element that being a new nation was to show to the world that our courts were available . . .

Court: Mr. Hoffman, I want to see if I understand your answer to Judge Rymer's question. Are you saying that the standard that we apply when you summon a police department in a labor dispute or you summon any law enforcement agency in the United States, your liability for their actions should be the same as when you summon the army of Myanmar

and the same principals should apply to the relationship between an American corporation that summons the LAPD and one that summons the army of Myanmar?

Hoffman: No. All my answer was intended to do was say that there might be some appropriate circumstances in which Section 1983 principals might be relevant. I don't think that though, as we've strenuously argued, that the *** line of cases deals with situations where an ordinary citizen requests police assistance. And, there's no on-going contractual relationship, there's no on-going exchange of money, there's no on-going joint cooperation and coordination of security. In fact, we've cited . . .

Court: Let me ask you, what concerns me is that I hear one statement that you seek uniformity because we're operating under a uniform federal law, and then on the other hand you say but, sometimes it would be 1983, sometimes it could be federal common law and it could be various ******. All of which leads me to think that has no predictability or uniformity. So, that's my first question. And, my second questions is I have trouble finding the international standards that we're talking about as related to this case. So, if you could point me to those.

Hoffman: Well, first of all, our position under federal common law is that we would apply international standards first where they exist. There are going to be some issues in the litigation of Alien Tort Claims Act cases that are not going to be susceptible to a lower decision based on international law because there are lots of decisions like the statute of limitations. I mean, there are a variety of issues that have to be decided. Under no situations . . . for example on the Forte case, which was decided before the Torture Victim Protection Act, the court in trying to find the statute of limitations looked to Section 1983 jurisprudence because that seemed like the most appropriate source of law in that analysis to find the statute of limitations. After the Torture Victim Protection Act was passed, there was a congressional mandate in a very similar context for a much longer statute of limitations and a panel of this Court in the Pappa case decided that a 10-year statute was appropriate because that was the most analogous statute was the Torture Victim Protection Act which had the same purposes as the Alien Tort Claims Act. And so, what we're saying is that, as we believe here it is the case, that there is an international standard on aiding and abetting.

Court: That is derived from what . . .

Hoffman: Well, first of all, if you go back to the Bradford opinion in 1795. In 1975 Attorney General Bradford said that there would be an Alien Tort Claims Act claim available against U.S. citizens, at the time, or the French fleet, if they could find it in the United States, for an attack on the colony in Sierra Leon. And, the opinion says that aiding and abetting . . . it talks about aiding and abetting being part of what could be enforceable remedy in a civil suit for a tort committed in violation the law of nations. Going back to 1795 both the ability to bring that kind of claim against a private party for **** outside the United States at the behest of a foreign

military and for aiding and abetting. Now, to fast forward that, in the Nuremberg cases there are many cases that talk about aiding and abetting *** in the context of crimes of the crimes that the military tribunals in Nuremberg were dealing with. If you go further than that, in the international court for the former Yugoslavia and Rwanda, the courts there have extensive jurisprudence about the meaning of aiding and abetting. And, it's not . . . I would rush to say that the way that the tribunals for Yugoslavia and Rwanda were set up, they were set up pursuant to security council resolutions, the report upon which they were based says explicitly that the norms to be applied by those tribunals were customary norms. The security council itself could not believe that as a law making authority it created a remedial mechanism in which international norms would be enforced. And, those decisions are not international law themselves. What they are is they're an accumulation of the international jurisprudence that leads one to find the meaning of aiding and abetting. The Rome statute . . .

Court: They go a
little far afield, don't they?

Hoffman: Excuse me.

Court: They go a little far afield *** for having discovered international law that was there all along, they include some stuff that even the author of the majority opinion. . . panel opinion couldn't quite accept.

Hoffman: The way that the **** are discovered by the courts. It was . . .

Court: I saw the quotations marks around discover. There's a sort of . . .

Hoffman: Basically though, your honor, if you look at United States v. Smith, if you look at the Paquete Habana, if you look at all the major international law cases in the 200 and some odd years of the country's existence, the way that courts have found whether something is a norm or not, at the international level, is to review the judicial decisions, is to review conventions, is to review state practice, is to review constitutions of countries around the world. I mean, there's an accepted analysis at the international level . . .

Court: Yeah. But, sometimes they get it wrong. They look at it, they look the authorities and low and behold they come up with something that's totally off the wall. Which a few of these standards in Yugoslavia and Rwanda and you'd say, whoa.

Hoffman: Well, but I think that the date certainly what Judge Reinhardt took issue with was the idea of moral support being part of the definition of aiding and abetting. And, I would just say two things about that. One, . . .

Court: I think it was a little deeper than that. It was a tribunal that comes up with a standard that includes moral support maybe isn't such a great authority for us to incorporate into our law, it may not be applicable in this case. Once we start going down that road we are . . . who knows what those tribunals are going to come up with.

Hoffman: Well, first of all, this Court is not bound by what the tribunal says, you're bound by whether the analysis . . .
Court: It's far more manageable though *** rely simply on domestic common law and you tell us if it doesn't matter in this case.

Hoffman: Well, it doesn't matter . . .

Court: See, we can't tell for sure, despite the record you all have been kind enough to give us . . . You know your case better than anybody else, the ins and outs of the case. So, if you're still going to say in my case, it does not make any difference **** any reason at all we need to go any farther in this case than to . . . then let's say as far as concurring ***

Hoffman: I think that

Court: Is there any reason to go beyond that?

Hoffman: I think one of the problems we have with concurrence is that it rejected aiding and abetting as a principal of liability and we just think that's wrong. I mean, we think that aiding and abetting is . . . has been a part of the Alien Tort Claims Act from the beginning, from the first Attorney General opinion expressing review. And, it is an international principal and there's a core of meaning of that principal that the majority came up with, which happens to be the same as, we believe, section 876(b) of the Restatement, which means that domestic law and international law are basically the same.

Court: How do you come up with . . . it's one thing to say that aiding and abetting is an international principal, it's another to figure out what would the district judge instruct the jury in terms of a standard for aiding and abetting. So, you have the Rome Treaty which says one thing, and they you have Rwanda which goes out on a limb with moral support. I'm having trouble kind of finding the kernel or the core of this international standard that you want us to import into the . . . import international into the domestic federal common law. But, what source to we use to do that, because it seems to me that we are lacking a universal standard within aiding and abetting.

Hoffman: I think that . . . I guess we disagree with that. I mean we think the majority did get right the what the core meaning of aiding and abetting is and it took a narrower meaning on some of the international authorities that were presented. There's no . . . I mean, there just isn't any

doubt that aiding and abetting liability has been used for the most egregious crimes. And, what we're talking about here . . . we're not just talking about a wage and hour claim here. We're talking about a summary execution. We're talking about forced labor . . .

Court: Mr. Hoffman, would you just, in kind of general terms, explain to me, following up on Judge Kozinski and Judge McKeown, how you would go about proving your prima facie case.

Hoffman: How we would prove our prima facie factually in the case?

Court: Yeah. There's some kind of step-by-step. What do you think you have to show?

Hoffman: Well, from our standpoint we believe we have to show practical assistance or encouragement as an act *** that has a substantial effect on the crime.

Court: To do what?

Hoffman: We have to show that first of all that there were violations of international law, which we believe they are clear in the case in terms of the forced labor and summary execution. And, we have to show that knowing that those violations were going on that Unocal provided practical encouragement and assistance that had a substantial effect . . .

Court: What does that mean though, practical encouragement ***** business that does business in a repressive country is becomes liable for a tort?

Hoffman: Absolutely not. Absolutely not. As we said from the beginning, that's not the position that we take.

Court: Specifically, what kind of encouragement are you talking about.

Hoffman: Well, in this case, what we're talking about the . . . Unocal was involved in a joint venture with Total and with the military through MOGE, which is a state controlled instrumentality knowing, from our view of the evidence, that MOGE is just an instrumentality of the generals. They knew going in, they were told by their consultants and everybody else, human rights groups, that SLORC used forced labor on a regular basis and was engaged in a reign of terror in that area, that they would bring . . . this was not an area where there was fighting at the time and so what happened was that, under our view of the facts, the joint venture hired the military to clear the path of the pipeline, to forcibly relocate the villages that our clients lived in, to build the infrastructure projects for the pipeline, including helipads that Unocal executives landed on . . .

Court: I have to look to the time is running on us. Assuming that . . . I'll say it outright. I'm a little uncomfortable with the aiding and abetting standard as you're arguing it as perhaps a little far beyond where the established international law consensus has gotten us. If I'm going to stay with for example the Nuremberg *** of cases. If I'm going to stay with the Flick case and the Pock case. What's the standard established by those cases? And, how does your case fit into the standard set forth . . .

Hoffman: I think in the Flick case, we think it's not that dissimilar. I mean, in Flick, basically what happened was that the defendant was aware of the criminal activities of *** and contributed money to the operation and . . .

Court: That wasn't the holding in Flick. They got Flick because Rice actively solicited the reproduction of cars with the knowledge and approval of Flick. That's why they got him on forced labor.

Hoffman: But, the thing is, we think in the Nuremberg cases it wasn't required that you had to actively want it. I mean, if you were contributing and unless you can prove a necessity defense, if you contributed money to that on-going operation, knowing what was going on, you could be found liable for aiding and abetting it. That's our understanding if you take all the cases together that that would be a proper standard of liability under the Nuremberg cases.

Court: I asked you at the beginning about civil versus criminal. We keep averting back to the criminal standard. Is there a civil standard that we can bring *** as Judge Reinhardt suggested under joint venture or agency . . .

Hoffman: Well, your honor. Restatement Section 876b is the civil tort standard. We believe that we're able to meet the standards that have been promulgated in the context of criminal law because these are the kinds of norms that tend to be international crimes and involve international criminal liability. I think several cases often do take, in that context, take the decisions of international criminal law tribunals and apply them in a civil context.

Court: In your case, what is it that comes in under encouragement to get you across the line that isn't covered under the traditional American standards for third party tort liability. What else do you ***

Hoffman: As we've said from the beginning, we think it's essentially the same standard and, in fact, . . .

Court: Add anything. If we add encouragement, it adds nothing to what we do with the traditional tort standard . . .

Hoffman: I think that's right. Even the Restatement talks about moral support and in its comment. And, I think what they mean by moral support in that is not a speech related thing, I think it's a question of . . . oh, I can think of examples in cases that have come up . . .

Court: But, if we didn't add aiding and abetting, it wouldn't change your case a bit, I gather.

Hoffman: In our particular case?

Court: Yes.

Hoffman: We certainly could prevail under the other theories. That's true. But, I think that we believe that we also have . . . that if you apply 876b as aiding and abetting, which is clearly also consistent with the international authorities, even if they go beyond that, that we should be able to prove the aiding and abetting in this case as well as a theory of liability and it's an extremely . . . I mean, not having aiding and abetting in Alien Tort Claims Act cases, even beyond this case, would be a disaster. I mean, that's why aiding and abetting has been there from the beginning. Having the ability to go after a third party for these kinds of egregious crimes in a situation where they provided assistance and encouragement that has that substantial effect is very important.

Court: Mr. Hoffman, you have about 8 minutes left.

Hoffman: Yes. I'm going stop there.

Collingsworth: Your honor, I will reserve *****

Oppenheimer: Your honors, may it please the Court, my name is Randy Oppenheimer and I would like to respond to the Court's order promulgated to us at the outset and I think it fits logically into this discussion. I'd like to start with a very fundamental concept though. I'd like to take one step back and just take one minute to do that because I think it's very important.

I think what we are seeing in this dialog is some remarkable levels of confusion and fundamental disagreement among principals. I think what we are seeing in operation are very basic issues about does international law come in to set a standard at all? Does it come directly from the international environment? Does it come in in some way through federal common law? Do we ignore all of that and simply apply some traditional rules of federal rules of common law? And, I'll address each of those in a second, but I want to suggest that one of the reasons this problem is with us is that the jurisprudence over 1350 has put us in a box and it comes from the fact that 1350, in fact, does not create a cause of action. The issues that we are struggling with to try to determine what the standards are are frankly ultimately issues of international law and a

determination of law of nations that are entrusted under Article I, Section 8, Clause 10 to Congress. And, I realize that this is an issues which has been much debated. I realize that there is an argument that if there is no cause of action, the statute makes no sense. And, finally that it's been with us for some 20 years since Filartiga, and that we should just continue to proceed down this road. But, I think it's a mistake. I think it's a mistake that leads us into a situation where we find ourselves asking questions like do we have a moral support standard that we're importing from international law.

And, if I may, let me just address it in the following quick way and then I'll move on to the standards. It is virtually without debate with this one exception 1350, the Judiciary Act of 1789 does not create causes of action. It's an architectural statute. It sets the court system for the country and it did so in this case. When it was originally established in 1789 . . .

Court: Are you asking us already to agree with the opinion in Alvarez Machain?

Oppenheimer: Your honor, I don't know that this was directly addressed in that case, though obviously by implication there . . .

Court: There's a statement in Alvarez Machain to the effect that this is following the jurisprudence of the 9th Circuit the 2nd Circuit and others, that this is not only a jurisdictional, but a cause of action. So, I guess that puts us back to Judge Tashima's question.

Oppenheimer: Well, phrased that way, then, your honor, yes. And, what I would request is that we focus on just one element that I don't think heretofore has been has been raised in this debate, but I think this might be important. When the statute was passed there was one area of international law that was very active and that, in fact, had a rare feature, which is that it provided for tort caused of action between individuals based on torts in international law. I'm specifically referring to the Prize cases. The Prize cases were very *** jurisprudence when this statute was passed and, in fact, all of the cases that the plaintiffs cite in response to the government brief are Prize cases. And, the relevance of that is that Congress had passed a series of statutes – pardon me, a series of treaties with the Netherlands, with Russia, with France and with Great Britain that did a rather remarkable thing in this area. It established a private cause of action by an individual in tort against another individual in circumstances where they had been hurt by the act of a privateer, by the acts of an agent of the government operating during acts of seizure. And, the reason it's significant is that this was one area where the state courts continued to assert some jurisdiction. And, it explains, I think, 1350. 1350 was designed to supplement the general grant of admiralty jurisdiction by making it clear that there was concurrent jurisdiction for this one type of tort, which is why the 1350 statute says tort only, to deal with these Prize cases. And the only cases that have come down from the statute have dealt with that issue. And, I think, your honor, if we follow that premise and we go back to the notion that it is Congress that defines the laws of the nations, then Congress would be resolving the issues that

we're dealing with. And, the best example of that would be the TVPA.

Court: Let's just assume for talking purposes, and also **** that we have *** that there is a cause of action here. The question I have is, if you separate slavery from forced labor do you need a state action in connection with forced labor because that seems to get tied up with whether we're looking at 1983-type cases or we're going off on some other tangent. So, trying to walk through the normal progression of analysis, maybe you can help us on these questions.

Oppenheimer: Absolutely, your honor. If we assume – and you'll appreciate from my perspective of the analysis this is a little bit of an artificial exercise –but, if we assume that there is a cause of action, then I think we go nowhere near aiding and abetting for a number of reasons. The one thing, there is no international aiding and abetting standard for civil actions. It just doesn't exist. There are a whole variety of conflicting and varied standards that have merged over the years for aiding and abetting in the international environment in the criminal side, but there is absolutely nothing that deals with civil liability. The aiding and abetting standards that have been reported through the decisions in this case so far are remarkably inconsistent. They partake of different standards. Some require knowledge. Some require intent. The most recent articulation is probably the Rome statute. The Rome statute has an intent requirement. Has a knowledge require. The United States parenthetically has not ratified, so we are dealing with all of the cases with standards that exist independent of an American impremator.

Court: Counsel, what ******* that would seem to moot the requirements of ****** international law. It would seem to meet any of these requirements to say that if someone conscientiously enters into a joint venture specifically to accomplish a violation of international law or knowing it would encompass a violation of international law. Why would that be insufficient ***?

Oppenheimer: Your honor, in fact, that's where I would go. If we're going to treat 1350 as having a cause of action then I think that the concurrence and the vacated panel opinion has many aspects which are commendable. Again, with my initial premiss that ultimately I think we could avoid having to go down this road in the first instance. But, one of the things that the federal common law, at least as articulated by the concurrence, has going for it is that it has notions of control. In almost each one of the categories that were identified, joint venture, agency and depending upon how it is interpreted, reckless disregard. And, the significance of that, I think, is that that is a related concept to the concept we seen in operation in the 1983 cases. I would note that the 1983 cases are a part of – or the jurisprudence there – are a part of the federal common law as well as being statutory. That the benefit of looking at that they of analysis is at least three-fold. One, we stay out of an international arena where the only standards we have to work with are aiding and abetting from the criminal side with a whole slew of conflicting interpretations. Some of them quite aggressive. We have the benefit of 1983 jurisprudence and whether we treat it as directly applicable or as a matter of guidance, it seems to me, it is the right

body of law to look at. It is highly instructive. And, I say that because we are dealing here with a relationship between a private actor and a government entity. And, the 1983 jurisprudence has struggled with that problem, with that concept, has set some guidelines for how we go about analyzing that relationship. It's a unique one. And, one of the features, I believe that's important from those cases is that they require that there be an element of control for proximate cause and they require that there be a relationship between the government and the actor that would justify holding . . .

Court: **** all those cases in the context of a democratic government where the people control the police department. The police department is law abiding. That you assume a relationship between the state and the private entity that you don't assume in a country where the army **** engaged in wholesale human rights violations. ****** totally different context ****.

Oppenheimer: Your honor, I would agree, thankfully that grows up in this country where as a general matter we do have those confidences in our government and our police. But, **** I think that the answer is that the 1983 cases actually deal with those situations where government officials or police are misbehaving. And, in fact, are acting to deprive people of their civil rights. And, I think that more than a presumption that the police would behave properly, guiding 1983 is a deeper issue which is that in most situations, and I believe ultimately in this case as well, private actors do not control state actors. And, when we hold private actors responsible for state actors, we're embarking upon an unusual operation and some rules have grown up that I think, prudentially, focus us on the elements of control and proximate cause that would make it acceptable in certain cases to hold a private actor responsible for a state actor. It's like ***

Court: Would you agree that the Nuremberg forced labor cases articulate a now established norm of international law?

Oppenheimer: No, your honor.

Court: I think *** particular of the Flick case and ***** involving ***** and why not?

Oppenheimer: I guess I should quality my answer initially. The Nuremberg cases are emblematic . . .

Court: *** referencing the forced labor aspect of the Nuremberg cases.

Oppenheimer: Okay, your honor. And, preliminarily, let me say that I think it's clear when you look at your three driving cases under the Nuremberg standard that you have active participation in the use of what was in fact slave labor in each of those cases. But, I think the important point from an international law doctrinal point of view is that the Nuremberg tribunals represent one of

the rare types of case where private actors, under international law, are held accountable. Those cases make very clear when you go back to counsel order no. 10 and international military tribunal that what the military powers were doing were dealing with war crimes and the genocide and they're analyzing those issues and slavery in those contexts. So, it is a unique situation under international law. There are very few circumstances . . .

Court: I'm not sure I understood your answer. Are you telling me that it is not an established norm of international law that a private party violates a norm if that that private party enslaves someone.

Oppenheimer: Your honor, I would agree that slavery, properly understood as opposed to temporary conscripted labor, but slavery is one of those rare types of norms . . .

Court: So, the question then would be is this forced labor slavery or forbidden forced labor. And, then the questions would be is Unocal sufficiently involved in, knowledgeable of and approving of that forced labor where it can be held accountable. That's the question.

Oppenheimer: I would break my answer into two parts. The first part is that, I don't believe the Nuremberg tribunals and specifically the Flick case can be understood apart from the war crimes and genocide features and the active participation. They do not, in my opinion, as I read them, implicate aiding and abetting at all. They implicate direct participation.

Court: I did not use the word aiding and abetting.

Oppenheimer: In that sense, yes. Because what they involved is a direct participation in the act of slavery and it's attendant to war crimes. So, in that context, that is correct.

Court: So, I think your answer then is that they do state an established norm. We may quarrel as to how that's articulated. But, there is an established norm there.

Oppenheimer: Yes, although I think for a variety of reasons it's inapplicable to this case.

Court: I understand.

Court: If we were operating under civil standards you said that you would adopt the concurrence of Judge Reinhardt, with some qualifications apparently. But, it we were looking strictly to civil standards and not criminal, what would you be looking to for your joint venture analysis? What would be the source of law?

Oppenheimer: Well, I think what I would focus on in the concurrence is in fact that the discussion there, at least as I read it, is primarily with respect to rule of civil liability would

derive from relationships, joint venture, agency and reckless disregard is, I think a more complicated issue. But, those . . . each of those claims is a civil crime.

Court: Would that come from federal common law, as Judge Reinhardt suggested or would there be any role in that analysis for principals of international law that address the same subjects?

Oppenheimer: Your honor, I believe that it would come from federal common law. I do not see, in this context, any particularly significant role for international law in the following respect. International law by and large, with these very few exceptions, does not deal with the relationship of individuals with each other. It deals with the relationship of states with each other. The exceptions are very narrow and as a result there really is, in my view, no international jurisprudence of the type that is addressed in the concurrence. The rules that deal with responsibility and control are simply not present in the international environment, which is fundamentally dealing with criminal matters and with – unless it's a treaty issue – and with matters of state to state relationships.

Court: That brings me back to the question then, if Nuremberg and Flick are not applicable in view because of their time related and genocide and war-related foundation, is there a place you can look in international law as to forced labor to determine whether it is limited to a state-to-state relationship or whether private actors are looped in. Because that then, it seems to me, that's a predicate before you would ever get to whether there is third party liability.

Oppenheimer: Your honor, I would answer that in the following way. There is predicate law in the international environment for dealing with individuals in the context of slavery. I think, a fair interpretation of the international standards, and they're quite varied, on temporary conscripted labor would show that that is not slavery and the result of that determination is . . . first, it is not clear at all that it even constitutes an international law violation. The whole issue of conscripted labor is a highly debated one. It is the subject of differing interpretations. But, temporary conscripted labor, generally speaking, is not slavery. So, it does not subject an individual to international law prescription. If an individual is not engaged . . . it requires state action if it's a crime at all.

Court: We start out in this case, whether ****, then it is state action.

Court: *** It's the individuals we hold liable for the state actions. So, I don't really understand the distinction you're drawing where you say state action is a part of it *****. Because the theory is either under their theory aided and abetted the state action or under another theory you're liable as ***** to the state action. But, in either case, there is state action.

Oppenheimer: Your honor, I was responding to the question of whether the individual would be

liable for temporary conscripted labor.

Court: Yes. For the state action.

Oppenheimer: Well, for the conduct at all, under international law. I understand that the alternative description of liability would be based upon federal common law establishing vicarious liability for the acts of the admitted state actor.

Court: But, I thought you were distinguishing between cases in where you can sue the private individual for violation and those in which you need state action. And, it seems to me that distinction doesn't apply in this case because they are not suing the private individuals directly for their actions. The forced labor, in theory, is accomplished by the government. And, the questions is, can a third party be liable for that governmental action.

Oppenheimer: *** your honor. I believe the doctrinal response is aiding and abetting is not a vicarious theory, it is a direct liability theory and that I believe we've addressed in . . .

Court: I thought you were saying that there are some acts that are jus cogens for which a private individual can be held liable. Others for which only a government . . . you need governmental action. That would be a relevant distinction in a case where you were suing a private individual for doing something directly. But, if that distinction of any relevance when you are suing the private individual for an act committed by the government?

Oppenheimer: It a little bit *** but, my answer is not if you're not seeking to hold them directly liable.

Court: Of course . . . you said not directly liable. You holding the liable for the act of the government.
Oppenheimer: That's correct. And, therefore if your theories are only vicarious then . . .

Court: Putting aside aiding and abetting and only vicarious, so the state action is basically subsumed. I mean you have state action.

Oppenheimer: Well, if you seek to impose aiding and abetting liability, which is a direct liability, then you would have to for the state action.

Court: Then you would have to go for the state action analysis. But, on a vicarious liability theory that falls out.

Oppenheimer: It does. But, I have a very . . . in theory it does. But, I have a very important caveat to that, which is, my belief that there is traction, if you will, on the federal common law, is

based importantly on the notions of control and proximate cause that have grown up in the 1983 jurisprudence because I think it provides important protections to individuals who are being charged with controlling state actors. And, I think this is a case that shows how critically important that analysis can be. I believe that as described in the concurrence to date that the articulation of the traditional tort theories as well share some of those important characteristics requiring that there be showing of control so that responsibility is not untethered . . .

Court: But, if you're saying . . . Let's take this under a joint venture analysis. Let's suppose Unocal knew full well that there was going to be what you could euphemistically call temporary conscripted labor. And, they knew it. And, knew that was part of the project, but they could not control the Myanmar military because obviously they couldn't. Are you saying because they couldn't control, even though they fully invested in the program knowing that that was going to be the source of labor, there would be no liability because there was no control?

Oppenheimer: Possibly, your honor. The analysis under 1983 would require two steps. It would require a determination of the relationship between the parties and then whether there was any proximate cause. The second step would definitely require a control determination. In this case, I believe, on the record, it may be an example of one part of what you are saying. I believe that it is clear, I do not think it's contested, that whether Unocal had made this investment or not this project would have proceeded. So, we have a situation here . . . now, again, I want to be very clear because I think it's important to the men and women who work at my client and because I believe it's consistent with the record. I'm just engaging in a hypothetical.

Court: I was posing it as a hypothetical. I'm testing your control theory, not so much the facts of this particular case.

Oppenheimer: Understood. I believe that if an investment is made in an environment in which there is no ability to control and the relationship would otherwise not have risen to the level liability under the 1983 jurisprudence, that you don't have liability in that situation.

Court: I was concerned about that because I was with you until you got to that point. And, it seems to me basically you've now endorsed the blind-eye theory, which is you can walk all the way to the water and then when the other guy pushes him in, as long as you're not looking your okay.

Oppenheimer: Well, I would say that that's actually not true in a couple of respects. One is, if there is a cognizable relationship between the parties that would cause there to be vicarious liability then you would be vicariously liable. But, I guess the circumstance where you have a truly passive environment raises the issue that you honor has pointed out. I would also point out that there is . . . is in the 4th Circuit in Austin against Paramount Parks, which was recently decided, there is a situation where the local police basically consign some of their policemen to a

park and they were largely under the control of the local police authorities that the park had in effect hired them. So, they had that relationship. The 4th Circuit's analysis required them to go through a 1983-type analysis, not withstanding that they had an employer-employee relationship. So, one caveat to this jurisprudence is, I don't think you can take tort concepts that don't embody some form of control or involvement with the entity that is actually acting. So, for example, to ****** respondeat superior in 1983 is not available. You don't have that option and recently that was also applied to individuals. So, you have to have more that just a bear relationship. But, the types of relationships that are identified thus far in the case under joint venture and agency have those elements of control that I think tether the responsibility and the control together.

One of the things that I think is important in this area is the fact that in the cases that impose liability on private actors for government conduct, there's either been active participation or a very distinctive relationship in which the private party has the ability to influence the outcome of the conduct. I also . . . I think we also have some other bases for taking advantage of the notion of federal common law in this area. Again, I appreciate it. I won't say this again, but for me this is a little bit artificial because I really do think we could circumvent this if we treated 1350 as not creating a cause of action. But, in Meyer v. Holly, we had a situation where the Supreme Court, I believe, endorsed resort to federal common law principals and circumstance in a statute created a tort liability. So, I think there is precedent for this approach. And, the Supreme Court jurisprudence, I think, also cautions strongly against trying to find some sort of aiding and abetting liability on the other side of the equation. And, obviously the example we cite . . . and I think it hits the nail on the head, is Central Bank. You do not imply an aiding and abetting liability standard in a statute that provides for money damages unless its clear on the face of the statute. And, you don't import . . . and the Supreme Court actually deals with this in Central Bank dead on, I think. You do not import from the criminal environment into the civil environment. The criminal environment has various different forms of aiding and abetting and the fact that it is there, indeed, the Supreme Court in Central Bank said the law of aiding and abetting under the criminal rules has been around since almost the beginning of the country. It's statutory. There's a general aiding and abetting criminal statute, but we're not going to pull it in to 10b because it's not on the face of the statute and strongly counsels against doing that. If the theory here is that 1350 is basically a court statute that Congress passed then it seems to me the rule applies here. And, so that is another reason, under Central Bank, why you would not want to go after an aiding and abetting standard because the Supreme Court didn't do it under 10b and for the same reasons one wouldn't want to do it here. Interestingly there's another parallel, I think, between Central Bank and this case. The jurisprudence in the 9th Circuit has grown up to limit the types of international law rules that would ever be considered a jurisdictional trigger for the statute. You have to be specific, universal, obligatory under Marcos II. The Supreme Court in Central Bank, I think, makes the good point that in a securities area you need specificity. The similarities are striking, it seems to me. So, I would argue that what Central Bank teaches in conjunction with Meyer against Holly is that when you have a statute, a statute for money

damages, a federal statute, you can't, unless it's clear on the face of the statute, import aiding and abetting liability in the civil context. You can look to federal common law. I believe that's the teaching of those cases combined.

In closing I think we see in virtually all of the international law standards that have been proposed for aiding and abetting a tremendous diversity of different approaches, different rules. We see doctrinally that there are rules, such as Central Bank, against importing aiding and abetting into the civil context and we see that we have an alternative, properly understood, under the federal common law and that the benefit of the latter is that it allows us to do something that, I think is of fundamental importance in an area where you're looking at the liability of private individuals for governments, which is do they have some ability, meaningfully, to effect the result in the circumstances.

Thank you, your honor.

Collingsworth: Good morning, your honors, I'm Terry Collingsworth. In our remaining time I'd like to address a couple of the questions raised and then try to fit this all together in a way that makes sense. First of all, I think it's extremely important to note that in your opinions in Marcos and in Alvarez and in both of the opinions in the original panel decision in this case the judges have all said the same thing about international law; that it is part of the federal common law. And, all the cases go back and cite Paquette Habana which says that it is well settled that the law of nations is part of the federal common law. That seems to me a given. Now, I think conceptually , the way to look at this is very similar to the situation we have in other areas such as section 301 of the Labor **** Relations Act in the Lincoln-Mills line of cases. You cannot, first of all, read the law of nations out of this. That we say that it's part of federal common law, but none-the-less, the statute explicitly uses the term the law of nations. That has to mean something. And, in the Torture Victims Protection Act, which this Court relied upon in the Hilao v. Marcos case to adopt the command responsibility doctrine, well the Torture Victims Protection Act also specifically references aiding and abetting liability. And, we think that that is grounding it in federal law and that is shows that it's consistent with principals that we can operate with. But, again, under section 301 in the Lincoln-Mills line of cases, even there the courts are charged with developing a federal common law. That's explicitly the charge. And, the courts have consistently applied state law principals if they aren't *** with federal law. And, I think that's the kind of relationship we need here. Now, it's not there yet because every single case that I've looked at the federal principal and the international principal were essentially the same, as we say they are here. The only time courts have really analyzed any differences in an opinion, at least, is the law of damages. And, there this Court in Alvarez and in several other opinions searched around to find something that would effectuate the remedial purposes of the Alien Tort Claims Act. Well, that's what the courts do consistently in Section 301 as well. And, in this Court the decision of Rose A. Transfers v. Local Freight Drivers, 850 F.2d 1351, applying Section 301, the Court applied tort-like remedies to a contract dispute because it was

charged with applying federal common law.

Court: Counsel in your view then, how would the aiding and abetting analysis flow under the federal common law rubric?

Collingsworth: Well, thank you your honor. The fact is that it is part of federal common law and the common law. What I think is, if you look at 876b of the Restatement, which has the provision that says if you knowingly provide assistance . . . and if you look at the Halberson v. Welch case, which we cite in our brief, it's 705 F.2d 472-478. Those are hooks for a federal common law of aiding and abetting. And, I would say that unless there's a conflict with those federal principals and the international principals then there is no reason to analysis it further. That that is the principal. If there is a specific conflict then I think that's why you want this grounded in federal common law, so that it's rooted in something and we don't get too far afield of concepts that we can develop here. And that seems to be the major concern – that we don't want to just pick and choose international standards that we can't ground in federal common law. But, in this case the grounding exists because of the Restatement, the Halverson case and the reference in the Torture Victims Protection Act to aiding and abetting liability.

I think though in the very limited time I . . . I want to conclude by emphasizing where this case is now. That this was a grant of summary judgment against the plaintiffs and the district court said there was no evidence to show that there was participation, no evidence of control and the court applied the Nuremberg principals, but applied the necessity defense in such a way as to exonerate anyone who did not have a gun to their head in making the decision to go forward. This case is consistent with the Nuremberg principals and the common law aiding and abetting. But, we meet any standard that has been discussed here today. I think that it's very important to take two minutes and look through the facts that. . .

Going into this project Unocal was warned by its internal consultants that doing business with the military would insure that they would be engaged in forced labor. In May '92, before the project even started, Control Risks, a firm they hired, told them that the potential profits would need to be unusually high to justify the high political risks involved in expanding the company's operations in Burma. There were public sources of information available at this time. Human rights reports, State Department reports, essentially saying that forced labor and slavery and human rights violations would

Court: ******

Court: Let's say a company decides to buy grain or some raw material, diamonds, knowing from all these sources that the stuff is grown or mined or fell or however they get it by use of slave labor in the country. So, what they do is they send ships to the harbors and ***** currency, the ships are loaded up with this stuff and, you believe, everybody involved in the

production, transportation, loading of that stuff is a slave. That would result in liability wouldn't it? Under your theory.

Collingsworth: Actually, your honor, no. That is a much different case. I'm not necessarily . . .

Court: How is it different? How is it different? They know this is going on. They know that when they pay the money, the money will go to people who are supporting, they help . . . enterprise happens is because our buyers. You don't believe they would not engage in slave labor if there wasn't somebody out there buying the stuff, right?

Collingsworth: I think it would depend, you honor, on whether it was a one shot deal or there was a long on-going relationship and then provided . . .

Court: Take your pick.

Collingsworth: Okay. I'll take the latter, then. I think if there was a one shot deal, I don't believe that you would have the known assistance, substantial assistance prong met of aiding and abetting.

Court: Really? Not even for purposes of summary judgment? ***** It's a big deal, you know. You have one contract. Involves several billion tons of the stuff. It takes months to load up. ******* one metric ton of the stuff.

Collingsworth: If you wanted to draw the line there I certainly would not quarrel that. That would be a helpful development.

Court: Well, the question is how do you draw the line there? Because what you're proposing has no limits at all. As I'm sitting at home using the stuff, the **** or whatever and I know that ultimately the stuff is produced by slave labor, then maybe I'm liable too.

Collingsworth: You honor, I see my time's up, can I answer the questions? The substantial assistance component is not absolutely crystal clear. But here, we have a situation where Unocal hired the military. We have evidence in the record at ER1863, their contract with the military. They characterize the contract as . . . according to our contract the government of Myanmar is protecting the pipeline. Now, from that point on, given the knowledge that I've already described, that they knew there was forced labor, they then went into this arrangement. They provided logistical support, they provided material support, vehicles. They provided assistance to them in terms of the design of the overall pipeline. They assigned the military to go out every day and this went on for seven years.

Court: I think *****.

Collingsworth: Okay. Thank you very much, you honor.

Court: **********