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Talking Foreign Policy: Jesner v. Arab Bank

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TALKING FOREIGN POLICY: JESNER V. ARAB BANK

Broadcast quarterly, "Talking Foreign Policy" is a one-hour radio program, hosted by Case Western Reserve University School of Law Co-Dean Michael Scharf, in which experts discuss the salient foreign policy issues of the day. The broadcast one September 4, 2015, addressed the controversial Iran Nuclear Accord.

Dean Scharf created "Talking Foreign Policy" to break down complex foreign policy topics that are prominent in the day-to-day news cycles, yet difficult to understand. "Talking Foreign Policy" is produced in partnership between Case Western Reserve University School of Law, the only U.S. law school with Ideastream, Cleveland's National Public Radio affiliate. Archived broadcasts are available for viewing in the video format online at law.case.edu/Academics/Academic-Centers/Cox-International-Law-Center/Talking-Foreign-Policy.¹

This broadcast featured:

- *Judge Thomas Buergenthal, the youngest survivor of the Auschwitz death camp, who went on to become the Dean of American University Law School, to serve for twelve years as a judge on the Inter-American Court of Human Rights, and then another ten years as the U.S. Judge on the World Court;*
- *Carsten Stahn, one of the foremost experts on the International Criminal Court and the Program Director of the Grotius Centre (The Hague) as well as a professor at Leiden University in The Netherlands;*
- *Milena Sterio, Associate Dean and Professor of Law at Cleveland-Marshall College of Law. Sterio is also one of six permanent editors of the IntLawGrrls blog and an expert in the field of international law;*
- *Avidan Cover, Director of the Institute for Global Law & Policy at Case Western Reserve University School of Law and an expert in national security law. Cover has also litigated national security cases in federal and state courts;*

1. Transcribed and annotated by Chelsea Fletcher, Amy Kochert, and Vito Giannola.

- *Timothy Webster, Associate Professor of Law, Director of Asian Legal Studies and U.S. Director, Joint Program in International Commercial Law and Dispute Resolution at Case Western Reserve University School of Law;*

TALKING FOREIGN POLICY: JESNER V. ARAB BANK –
OCTOBER 5, 2017 BROADCAST

MICHAEL SCHARF: You probably remember the tragic story of the 1984 Bhopal disaster, where negligence at Union Carbide Corporation's pesticide plant in India resulted in the release of toxic gas that severely injured or killed over 200,000 local residents.² Unfortunately, Bhopal is not an isolated case. It is in this context that Fatou Bensouda, the Chief Prosecutor of the International Criminal Court, recently announced that investigating corporations will be a priority for her office.³ And on October 14, the U.S. Supreme Court is set to hear the case of *Jesner v. Arab Bank*,⁴ a case that will determine if corporations can be sued in U.S. court for the human rights abuses that they commit abroad.

For this broadcast of "Talking Foreign Policy," we've assembled a panel of human rights experts, including Tom Buergenthal, a judge of the International Court of Justice, who will discuss the cutting-edge issue of corporations on trial, right after the news.

----- Station Break -----

MICHAEL SCHARF: Welcome to "Talking Foreign Policy." I'm your host, Michael Scharf, the Dean of Case Western Reserve University School of Law. In this broadcast, our expert panelists will be discussing corporate liability for human rights abuses. For our program today, we've assembled a panel of leading human rights experts from the United States and Europe.

We'll begin with a one-on-one conversation with Tom Buergenthal, the youngest survivor of the Auschwitz death camp, who went on to become the Dean of American University Law School, to

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2. See Stuart Diamond, *The Bhopal Disaster: How it Happened*, N.Y. TIMES (Jan. 28, 1985), <http://www.nytimes.com/1985/01/28/world/the-bhopal-disaster-how-it-happened.html?pagewanted=all>.
 3. See International Criminal Court, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, ¶ 41, (Sep. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, (giving special consideration to crimes involving destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land).
 4. *Jesner v. Arab Bank*, PLC, 137 S. Ct. 1432 (2017).

serve for twelve years as a judge on the Inter-American Court of Human Rights, and then another ten years as the U.S. Judge on the World Court. Thanks, Judge, for being with us today.

THOMAS BUERGENTHAL: It's a great pleasure.

MICHAEL SCHARF: So, let's start. In 2007, you published *A Lucky Child*,⁵ a memoir of surviving Auschwitz as a young boy. How did that experience shape the rest of your life and especially your work in the human rights field?

THOMAS BUERGENTHAL: Well, I suppose I would not have written about human rights if I had not been in the camps. It also shaped me in terms of a need to write about it, and to contribute in one way or another to a situation where we can prevent the things that happened to me and that are still happening to a lot of people in the world.

MICHAEL SCHARF: You were just mentioning before we came on the show that you are currently working on a report about the North Korean concentration camps, and I hadn't heard anything about that. Do you want to tell us a little bit about that project?

THOMAS BUERGENTHAL: Well, it's a project about, as you mentioned, about the work camps, what they call work camps, but, in fact, they are worse than concentration camps. I thought I knew everything about concentration camps and how bad things can be in it. I must say, what I heard, if it is true, and I have no reason to assume that it's not true, this is much worse than anything I've experienced in the camp.

MICHAEL SCHARF: That's hard to believe because many people know about what you went through in Auschwitz, and North Korea is worse.

THOMAS BUERGENTHAL: Now this is, for example, something. They would arrest one person and then, because he was guilty of something that they say he was guilty of, they would take the entire family with him. They had methods of cruelty in terms of getting rid of babies [of women] that were impregnated by the guards. Methods that, I must say, I'd never heard of, what you can do, when it would be just as easy to kill the baby. Just the utter cruelty and inhuman cruelty that, to me, was something I'd never heard of. So, if all of this is true, it is

5. THOMAS BUERGENTHAL, *A LUCKY CHILD* (2010).

the worst, I think, that the world has ever heard of, what's happening in these camps.⁶

MICHAEL SCHARF: And this is from somebody who not only lived through that, but you were a judge in so many human rights cases, and also human rights cases that came before the World Court. Let me ask you about one of the cases you presided over when you were at the Inter-American Court of Human Rights, which you ended up being the President of. This was the case about whether the Honduran government had to pay compensation to families of victims of forced disappearances that had occurred during the 1980s.⁷ Many people say that was the most important of the Inter-American Court's cases. What was the significance of that precedent?

THOMAS BUERGENTHAL: Well, for one thing, it was really the first, really important case to reach us. And secondly, there had been no decisions in international courts about international law and disappearances. So, we really had to deal with the subject and come up with a theory in which we could deal with these terrible, again, cruelties.

MICHAEL SCHARF: And part of that case was that the government was responsible for prosecuting the people, and they couldn't give amnesty to the individuals who were involved, right? So, if the US...

THOMAS BUERGENTHAL: Let me just interrupt you, because what was interesting particularly in this case was that the government would say, "Well, this person hasn't disappeared if he went to see his girlfriend." But the problem was, how do we prove that somebody, that the government, is responsible for a disappearance, when everything was done to keep it secret? And so, to develop the theory in these cases, we've set precedents for many others that are now happening in many parts of the world.

MICHAEL SCHARF: But the idea that governments are, after these things come to light, responsible for making sure that there are remedies to the individuals, is one of the biggest things that came out of that line of cases. If the U.S. Supreme Court decides that corporations cannot be sued for human rights abuses that they commit abroad, would that violate the spirit of the line of cases we were discussing?

6. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 2016 HUMAN RIGHTS REPORT 3 (2016).

7. Velásquez-Rodríguez v. Honduras, 28 I.L.M. 291 (July 29, 1988).

THOMAS BUERGENTHAL: Very much so. I mean the whole idea that corporations somehow are exempt or immune, and can only be tried in their own countries, and [under] certain circumstances, and even not that - that's not international law.

MICHAEL SCHARF: So then let's take your career forward to the International Court of Justice where you served for ten years. This is the court that is in The Hague. It's known as the World Court. It's the court that hears cases between countries. While you were there, it's pretty rare, I think, that a judge of that Court will side against his own country. And there were several cases involving the United States that you sat on, and in two of those cases, you did decide that the US was wrong.⁸ These are the cases that you held that the United States failed to advise foreigners of their consular rights in proceedings that resulted in death sentences, and that that was a violation of international law. Did you feel at the time that it was risky to exercise that kind of independence to go against your own government?

THOMAS BUERGENTHAL: No, and I should tell you that this question was asked even by my colleagues. And my reply was always, "I'm sure I'm not going to end up in Siberia for proceeding the way I proceeded." It seemed to me, first of all, the U.S. put me there because they had confidence in me. And that meant that they also had to take my interpretations, the way I felt it should be interpreted.

MICHAEL SCHARF: But that's rare, and in other countries, many times, the individual judges don't feel that kind of security.

THOMAS BUERGENTHAL: I suppose, but, I must say, it was easy for me. Because, and I should tell you that nobody ever from the U.S. Government even mentioned it to me, which is interesting. So, no, I'm not a hero in that regard. I just felt I was free. And also, it was important that somebody set the precedent that you can do that.

MICHAEL SCHARF: Well, you were a little bit heroic in the eyes of many who followed your career. Not only by standing up to the U.S. Government from time to time as a judge, but also, you weren't very shy about dissenting from the majority of other judges, and especially in cases involving human rights, which is really your bailiwick, your

8. LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466 (June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12 (Mar. 31).

expertise. So, I'm thinking about the Belgium arrest warrants case.⁹ There, the majority held that the foreign minister of the Congo was immune from suit for crimes against humanity. Why do you believe that that was the wrong decision?

THOMAS BUERGENTHAL: Well, because I think they were applying international law that maybe was valid twenty, thirty years before the case was decided, but international law had changed. At that point, we already looked at the Rome Statute, or the drafts of the Rome Statute, and people holding these positions were not immune anymore. So, it seemed to me that it was a new world, new international law, new international law that was needed. And if anybody can make those pronouncements, it's the International Court of Justice, and it should have done it. I was fortunate to be accompanied by two people whom I regard as great international lawyers, so it was easy.

MICHAEL SCHARF: Now, unfortunately, they didn't follow your advice on that, and I think that that did setback international law. I noticed that in Africa there is a new court of Africa criminal law being set up, and it will exempt the heads of state from responsibility.¹⁰ And so, it seems like that, you know, sometimes a case like that can propel international law forward or set it back.

THOMAS BUERGENTHAL: I shouldn't be saying that about the International Court. But I think the problem, at that time, in the International Court of Justice, was that too many former diplomats sat on the court.

MICHAEL SCHARF: Instead of career judges?

THOMAS BUERGENTHAL: Career judges, or academics, or human rights specialists – and that has an impact. And of course, they should be there, but it's very difficult to change their minds.

MICHAEL SCHARF: You know, even career judges can be political, and I think we see that especially at our Supreme Court. Later in the program, we're going to be discussing the U.S. Supreme Court's case of *Jesner v. Arab Bank*, which will decide whether corporations can

9. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14).

10. See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 46A *bis* (June 27, 2014), <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

be sued for human rights violations. If you, who are non-political and have had such a career in the human rights world, were sitting on that bench, how would you decide the case?

THOMAS BUERGENTHAL: Oh, I would hold that corporations, like individuals, can be tried for violations of international law, particularly serious violations of international law.

MICHAEL SCHARF: And you think that's an easy case?

THOMAS BUERGENTHAL: Well, it's not easy because two lower courts, well, one lower court, held the other way.

MICHAEL SCHARF: I mean they basically said that international law only applies to states, not corporations, do you think that's right?

THOMAS BUERGENTHAL: I mean that's another notion. That in the 21st century, to say that in itself, shows a misunderstanding of what contemporary international law is all about.

MICHAEL SCHARF: You know, even back after World War II, for the kinds of atrocities that were committed to you and the many people who didn't survive Auschwitz, they did prosecute the Krupp corporation leaders for that.¹¹ And so, it's not like there's not precedent for going after corporations. It's not like corporations haven't been involved in atrocities. So, you're now working on a sequel to your book. Can you tell us a little bit about that?

THOMAS BUERGENTHAL: Well it's, I call it preliminarily, "My Second Life." I was told by a number of publishers in Europe that they heard from their readers who said "Well, your *Lucky Child* book, your first book, you stopped writing it when you arrived in the U.S. at the age of seventeen, and what happened to him afterwards?" And, particularly in Europe, they wanted to know what happened to this kid after all those years. And so, they asked me whether I would be interested in doing it and, of course, I couldn't resist. And it's not as easy to write, because the first book was easy to write, it just flowed out of me. First of all, I've gotten a little more mature about what I can say and what I cannot say. But it's just much harder and, of course, all these years I've spent in the U.S. But I'm writing it in a way as dealing with episodes of my life, because I've come to the conclusion that if I began at the beginning of, say, when I arrived in New York, I would have to have about at least a hundred twenty years of my life.

11. U.S. v. Krupp, Trial 10 U.S. Military Tribunal III (1948).

MICHAEL SCHARF: It'd be like Winston Churchill's many volumes. We only have a couple of seconds left before our station break, but can you tell us what you think the theme of your life has been?

THOMAS BUERGENTHAL: Well, the title of my first book was *A Lucky Child*, and I'm often asked by people who say that luck is not really the way to deal with it. It was luck. Because if people speak of divine intervention and things like this, that would be such an arrogant notion. And I felt I survived out of luck because so many, a million and a half Jewish children, did not survive. So that's the theme, and the theme is to prevent that from happening to other children.

MICHAEL SCHARF: Judge Buergenthal, I think all of us who have had the privilege of knowing you feel that we are the lucky ones, and that you have given so much to the world of human rights law. It's time for a short station break. When we return, we will dive more deeply into the case of *Jesner v. Arab Bank* with our panel of experts. We'll be back in just a moment.

----- *Station Break* -----

MICHAEL SCHARF: Welcome back to Talking Foreign Policy brought to you by Case Western Reserve University and WCPN 90.3 ideastream. I'm Michael Scharf, the Dean of Case Western Reserve University School of Law. We're talking today about whether corporations should be liable for human rights abuses committed abroad. In this segment, we're going to bring some local human rights experts into conversation. We're being joined today by Milena Sterio, the Associate Dean of Cleveland Marshall College of Law, who is a regular guest on our show. It's great to have you back.

MILENA STERIO: It's a pleasure to be here.

MICHAEL SCHARF: We also have with us Case Western Reserve Law Professor Avidan Cover who is director of the school's Institute for Global Security Law and Policy and runs the school's human rights clinic.

AVIDAN COVER: It's great to be here.

MICHAEL SCHARF: Avidan is sitting where Judge Buergenthal was just. We are also joined by Case Western Reserve Professor Tim Webster, who teaches human rights law and has published cutting-edge research in this area.

TIM WEBSTER: Thank you, Michael.

MICHAEL SCHARF: Finally, we have Carsten Stahn, who is our special guest from Europe. He is an expert in international criminal law. He's the Director of the Grotius Center and a professor at Leiden University. Carsten thanks for coming all the way in from The Hague.

CARSTEN STAHN: Thank you. Wonderful to be here Michael.

MICHAEL SCHARF: I understand there's a big human rights case about to be argued at the U.S. Supreme Court. Let's start with some background. Milena, can you start by telling us what this case is all about?

MILENA STERIO: Sure, the case is called *Jesner v. Arab Bank*. The plaintiffs are a group of victims of terrorist attacks that took place between 1995 and 2005 in Israel, the West Bank, and Gaza.¹² The defendant, the Arab Bank, is a bank located in Jordan which has over 500 branches throughout the world.¹³ The plaintiffs alleged that the bank supported terrorism by maintaining accounts for known terrorists, by accepting donations that the bank knew would be used to fund terrorism, and by distributing millions of dollars of payments to families of suicide bombers.¹⁴ Now the bank says none of this is true. It says basically "I'm a bank, I'm a normal bank. I don't engage in or I don't support terrorism." And the bank describes itself as an active and leading partner in the socio-economic development in the Middle East.¹⁵

MICHAEL SCHARF: So the victims are from what country?

MILENA STERIO: The victims are mostly from Israel and from the Middle East.

MICHAEL SCHARF: And the bank is from what country?

MILENA STERIO: The bank is based in Jordan, although it has branches throughout the world, but based in Jordan.

MICHAEL SCHARF: This case isn't before an international court, it's right here in the United States. What is it about U.S. law that allows

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12. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144, 149 (2d Cir. 2015).
 13. *Id.*; *Arab Bank: Global Network*, ARAB BANK, <http://www.arabbank.com/en/globalnetwork.aspx>.
 14. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d at 149.
 15. *Chairman's Message*, ARAB BANK, <http://www.arabbank.com/en/messagefromchairman.aspx>.

foreigners to sue other foreigners for human rights violations in U.S. quarter?

MILENA STERIO: The plaintiffs are actually using a U.S. federal statute called the Alien Tort Claims Act (ATS).¹⁶ The Alien Tort Claims Act is a federal law that gives U.S. federal court's jurisdiction over civil actions by aliens for torts committed in violation of the law of nations or a treaty of the United States.¹⁷ And so here we have plaintiffs who are aliens, foreign citizens, who are suing another alien, a bank located in Jordan, for a tort committed in violation of international law which would be support of terrorism.

MICHAEL SCHARF: Well this seems like a very modern statute, when was it adopted?

MILENA STERIO: The statute was adopted back in 1789, and was part of the original Judiciary Act¹⁸ which essentially set up our federal courts. It basically sat dormant until 1980, so for almost 200 years nobody had ever used it. Then in 1980, arose this case called *Filartiga*,¹⁹ where two plaintiffs from Paraguay decided to resurrect this federal statute and use it to bring a lawsuit against another Paraguayan citizen for torture. In that case the United States Appellate Court, the Second Circuit, held that the Alien Tort Statute could be used for this kind of a lawsuit by a foreign plaintiff, an alien, if the tort is a violation of international law.²⁰

MICHAEL SCHARF: Now Tim Webster, you teach human rights law; you teach the Alien Tort Claims Act litigation area. It doesn't seem like the U.S. Supreme Court likes this Alien Tort Claims Act very much. In two recent decisions the *Sosa*²¹ case and in the *Kiobel*²² case the Supreme Court has greatly cut back on the usefulness of this statute. Can you tell us about those cases?

TIM WEBSTER: Sure, yeah so there's two cases, and again our Supreme Court is there to help clarify what federal statutes mean and what they can do. The first case is from 2004, it's called *Sosa*. The second case is a more recent one called *Kiobel* from 2013. Let me go

16. 28 U.S.C. § 1350 (2012).

17. *Id.*

18. *Id.*

19. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

20. *Id.*

21. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

22. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

back to *Sosa* for a minute. What *Sosa* did, and this gets to what Professor Milena was just talking about, *Sosa* says that this law, this Alien Tort Claims Act, is jurisdictional.²³ What that means for people who are not lawyers is that this opens up U.S. Federal Courts to lawsuits from anywhere around the world. It doesn't talk about the cause of action, it doesn't tell us what the remedy is, it says only that U.S. Federal Courts can hear these kinds of actions. The second piece of *Sosa* suggests that the kinds of actions, the kinds of torts that are permissible in the United States have to be very specific.²⁴ They say if we go back and look at the 1789 law, there needs to be a high degree of specificity. And the Supreme Court said in 2004 that it has to be something along the lines of piracy or torture.²⁵ Torture wasn't one they actually mentioned, but they said these need to be very specific norms we're talking about, we're not letting everybody in here. These norms have to have been articulated clearly and specifically in order for our federal courts to be open for these foreign plaintiffs. So that's the *Sosa* decision. But again you can see by requiring this specificity, how other kinds of acts would be excluded.

MICHAEL SCHARF: So human rights violations that are short of torture or even terrorism, it's not clear that the Court would think there's a universal definition of terrorism or for piracy?

TIM WEBSTER: Absolutely, yeah. The Supreme Court said the norms that we're going to allow these cases to proceed under have to be very specific, clearly defined, and there has to be a widely accepted definition.

MICHAEL SCHARF: Okay then, what about the *Kiobel* case?

TIM WEBSTER: *Kiobel* comes around you know nine years later, and you set this up quite nicely with Professor Sterio, you said look here we in the *Jesner* case, we have a foreign plaintiff suing a foreign defendant for actions that took place abroad. The concern here is why are we here in the United States? Why are we having these lawsuits where there's very little discernible U.S. interest at all? The Supreme Court in *Kiobel* said we are going to place a presumption against extraterritoriality application.²⁶ That's a mouthful. What that means is: what is the United States interest in having our courts hear this case? The language there said there is a presumption that we should

23. *Sosa*, 542 U.S. at 714.

24. *Id.* at 725.

25. *Id.* at 724-25.

26. *Kiobel*, 569 U.S. at 117.

not hear these cases, but that presumption can be overcome. We will allow these cases if the plaintiff can show that the action somehow “touches and concerns.”²⁷ That’s the magical language. Does this case touch and concern the United States? Now what does “touch and concern” mean? No one is exactly sure, it’s somewhat vague language. In one of the concurring opinions offered by Justice Breyer, he said “touch and concern” means the following: (a) it means the conduct took place on U.S. soil; (b) it means the defendant is an American; or (c) this is the arguably the catch-all, the defendant’s conduct affects an important national interest of the United States.²⁸ So the first two are quite clear, quite specific. The third one says: “Does this affect an important national interest of the United States?” You could argue that preventing terrorism or preventing the financing of terrorism, which is what *Jesner* is about, represents an important U.S. national interest. But that’s the hurdle, that is the obstacle that *Jesner* needs to surmount in order to continue.

MICHAEL SCHARF: The Arab Bank in this case also has branch offices in New York and does business in the United States. Maybe some of the counter the terrorist financing in this case went through U.S. banks.

TIM WEBSTER: Absolutely, yes. If we can show that, then it would touch and concern the United States.

MICHAEL SCHARF: Right so the issue that the Supreme Court wanted to use this case for is based on the defendant’s argument that corporations cannot be liable under the Alien Tort Claims Act because only governments can violate international law. Milena Sterio told us that the statute only allows the courts to prosecute suits for violations of international law. Judge Buergerthal—who was here in our earlier segment, he said that’s old think. What do you think? Is there anything to this argument?

TIM WEBSTER: To take that argument on frontally, you and I were talking about piracy, and even in 1789 piracy was a violation of international law. Now piracy back then and even now is generally not committed by governments, right? It’s human beings and arguably even groups of human beings, arguably even corporations, that participate in piracy. There are opinions from the 1790’s, there were opinions from the early 20th century that say particularly with regard to the Alien Tort Claims Act that the Attorney General of the

27. *Id.* at 124 25.

28. *Id.* at 127 (Breyer, J., concurring).

United States penned that said corporations can be liable.²⁹ Even though we haven't seen a lot of cases, and of course there are Alien Tort Claims Act that have held corporations can be liable, this idea that corporations can't be liable, only governments can be liable for international law has been if not debunked at least challenged for a couple of centuries now.

MICHAEL SCHARF: We'll see where the Supreme Court goes on this one. Professor Avidan Cover, you teach human rights clinic, you litigate these kinds of cases, you're a national security law expert. From a human rights perspective, what do you think is at stake in this case? Big picture, what's this precedent likely to do?

AVIDAN COVER: To use a certain international leader's terminology, this is a huge case. I think what's at stake for human rights is that the United States is in step with the developing trends in the world on human rights. There's a general growing recognition that corporations should be held liable for human rights violations. We've seen it a number of the United States allies, the United Kingdom and the Netherlands have recognized corporate liability in their domestic statutes regarding genocide and such other crimes.³⁰ I think this case is a great support for that. Now it's interesting that the issue the court accepted as it's formally presented is whether corporations are categorically exempt from liability under the Alien Tort Statute. From that language, a lot of court critics suggest and infer a favorable position in terms of finding there will be at least at some level corporate liability. Just the way that the Court phrased the question is limiting and shows that the court is not going to buy into that kind of prohibition. But it's interesting what Tim was focusing on in that second issue; one question is whether the court may be able to yet again kick the can down the road and avoid that question by simply finding that the matter is basically extraterritorial, right, and there's no nexus and evade at least for the time being whether indeed corporations can be held liable.

MICHAEL SCHARF: So, Professor Webster was saying that there's a national security interest, you're saying there's this huge human rights interest. Against that is the business law interests in the business community and often courts are very concerned about that.

29. See Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 509 (2012) (suggesting that the 1795 opinion supported some extraterritorial application of the ATS).

30. See SR Art. 51, lid 2, (Neth.) (applying the act to all "persons"); Interpretation Act 1978 c. 30, § 5, sch. I (U.K.) (stating that the word "person" includes a body of persons corporate or unincorporated").

Milena Sterio, the U.S. Chamber of Commerce and other business groups have filed briefs³¹ with the defendants. What's their argument?

MILENA STERIO: From the business side, from the corporate side, the fact that corporations could potentially be liable for human rights abuses is not a good thing. The U.S. Chamber of Commerce and other business groups have filed briefs with the Supreme Court arguing against extending the Alien Tort Statute to cover corporate liability.³² Some of the arguments that have been raised in these briefs is that the Alien Tort Statute lawsuits against corporations have run rampant in recent decades. That there have been dozens, if not hundreds of ATS cases against U.S. and foreign corporations that do business in two dozen industry sectors arising in corporate activity throughout the world. And, how holding corporations liable is not a good thing because it will stifle their business activity, it will harm everyone's interested in sense. So they're really squarely against this.

MICHAEL SCHARF: Avidan, did you meet Justice Gorsuch when he came to Case Western a year ago?

AVIDAN COVER: Yes, very briefly.

MICHAEL SCHARF: Okay so the newest Justice of the Supreme Court, a conservative justice nominated by Republican President Donald Trump, confirmed by Republican controlled Senate, is Neil Gorsuch. What do you think his addition to the court is likely to do to the outcome of what might be a very close case?

AVIDAN COVER: Right, it's very interesting. Justice Gorsuch only joined the court four days, or he was confirmed, only a few days after cert was granted in this matter. He didn't play any role in deciding whether to take this case or not. He is a Justice who he had been part of the Tenth Circuit *Hobby Lobby* decision holding that corporations have perhaps certain religious liberty interests.³³ So he may be viewed as someone who is certainly very sympathetic to corporations. Certainly, plenty of his jurisprudence while he was on the Tenth Circuit as an Appellate Judge suggests that he would be sympathetic to the corporation's position. That said, he also served in government.

31. Brief for the Chamber of Commerce of the United States of American, the National Foreign Trade Council, USA Engage, the United States Council for International Business, and the American Petroleum Institute as Amici Curiae Supporting Neither Party, *Jesner v. Arab Bank, PLC*, 137 S. Ct. 1432 (2017) (No. 16-499).

32. *Id.*

33. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014).

And the federal government's position on this, while acknowledging that corporations can be and even should be held liable under the Alien Tort Statute, is of the view that the extraterritoriality decision should be determined first. And that, in fact, national security implications, of perhaps improvidently deciding this case and affecting the relationship with Jordan in particular, could adversely affect national security concerns. I could certainly see Justice Gorsuch who holds himself to be a strict constructionist reading the statute as narrowly as possible, reading the courts role as narrowly as possible, might opt for that second route. Which is to say that there is no nexus and so again to kick that can down the road.

MICHAEL SCHARF: Now for the other Justices they sort of painted themselves into a corner with the *Citizens United* case.³⁴ *Citizens United*, as the listeners might recall, is this case that President Obama said was the worst decision the Supreme Court ever had.³⁵ It's the case that said that corporations are people for purposes of the First Amendment and therefore have a right to contribute to political campaigns and cannot be constrained by the federal legislation.³⁶ So if corporations are people for purposes of giving a lot of money to political campaigns, Milena Sterio or Avidan Cover, why can't they be people for purposes of human rights violations?

MILENA STERIO: I actually think that the Supreme Court in this case, in *Jesner*, will actually decide the corporations can be liable. I think it will be a very narrow holding. I think Justice Roberts will write an opinion where he will specify a very narrow set of circumstances under which corporations can be held liable for human rights violations. I think that would be in line with the *Citizens United* case, because if corporations have free speech rights then certainly they can commit human rights violations. I think it would be very unpopular for the Supreme Court to rule that corporations are categorically exempt from this line of lawsuits.

MICHAEL SCHARF: Carsten Stahn, you've been very patient over there from the Netherlands and we're going to bring you into the next segment. Are you over in Europe following this case? Is this something that is on the radar of Europeans?

34. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

35. *Statement from the President*, THE WHITE HOUSE (Jan. 21, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/01/21/statement-president>.

36. *Citizens United*, 558 U.S. at 365-66.

CARSTEN STAN: The issue is very much on the radar of Europeans. I've seen a couple of cases in the Europe where cases have been brought. For instance, there have been some proceedings concerning Mercedes-Benzes for it's involvement in enforced disappearance during the Argentinian dictatorship.³⁷ It's an issue which, because of the diversity of different domestic systems, raises a lot of interest.

MICHAEL SCHARF: All right, so with the few seconds we have left in this segment, Avidan Cover, how do you think the case is going to be decided?

AVIDAN COVER: I kind of like Milena's take on it. I can't imagine it will be an unequivocal embrace of corporate liability under ATS, but I think they'll try and limit it as much as possible.

MICHAEL SCHARF: So five four in favor of the plaintiffs?

AVIDAN COVER: Yeah with a certain narrow exception.

MICHAEL SCHARF: Milena?

MILENA STERIO: I absolutely agree. The way the Supreme Court has framed the issue is taking the plaintiffs way of framing the issue which indicates the Supreme Court is more likely to side with the plaintiffs.

MICHAEL SCHARF: Professor Webster, you were saying they might dodge the case, the issue, altogether. What do you think?

TIM WEBSTER: I would agree with my co-panelists here, but I would just underline that they will take the narrowest possible ruling that they can.

MICHAEL SCHARF: Which might be to say since the bank isn't an American bank and there's not enough of a connection, that the case will not go forward, right?

TIM WEBSTER: Possibly, or they can say this does implicate a major national interest of preventing the financing of terrorism, so we do think again citing Justice Breyers concurrence that this does affect U.S. national interests in a significant robust manner.

MICHAEL SCHARF: Well everybody out there who's following the Supreme Court this term hold on to your seat belts cause it's going to

37. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

be a bumpy ride, and this is just one of the first cases that will be decided. I hope this discussion has shed some light on the importance and likely outcome of the *Jesner v. Arab Bank* case. It's going to be time for another break in just a few seconds. When we return we'll talk about the international effort to criminally prosecute corporations for human rights violations. Back in a moment.

----- *Station Break* -----

MICHAEL SCHARF: This is Michael Scharf, and we're back with talking foreign policy. I'm joined today by some of the world's foremost international law experts. We've been talking about the liability of corporations for human rights abuses. In this final segment, we will look at the International Criminal Court's new focus on prosecuting crimes committed by corporations. In the studio, we have Professor Timothy Webster from Case Western Reserve University School of Law, Associate Dean Milena Sterio from Cleveland-Marshall School of Law, Avidan Cover, the Director of the National Security Law Center at Case Western Reserve University, and all the way from The Hague the Netherlands we have Carsten Stahn, a professor at Leiden University.

Carsten, you are one of the foremost experts on the International Criminal Court. This is not the World Court that Judge Buergenthal sat on, this is the court that prosecutes individuals for the worst crimes known to humankind. Instead, it lies in The Hague where you're located, and you run, and I assist you with an International Criminal Court Moot Court Competition where students from all over the world participate and learn about it. So, can you give the listeners some background about how the ICC works and what kinds of cases it focuses on?

CARSTEN STAHN: Thank you, Michael. The ICC is the first global court, which tries international crimes like genocide, war crimes, and potentially in the future, aggression. First, its jurisdiction is very limited, so it only tries individuals.³⁸ That means it doesn't try corporate criminal responsibility as such. Second, the court can only try nationals of State Parties or crimes which have been committed on the territory of states parties. A couple of states like the United States, Russia, and China are not a party to the statute, and recently African states like Burundi or South Africa have indicated their intention to even withdraw from the statute, so these are issues that

38. See Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, AMERICAN SOC'Y OF INT'L LAW (Aug. 11, 1998), <https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court>.

the court has to struggle with.³⁹ In addition, it's complementary to domestic jurisdiction. That means whenever there is a good domestic case the ICC will not step in. The role of the court in this will remain limited.⁴⁰ But, the few cases that the ICC does is usually important regarding the impact that they have. It's the message that the court sends that is important.

MICHAEL SCHARF: You said that when they drafted the court statute, they purposely left out liability for juridical persons, which means corporations. Only natural persons who are people can be prosecuted by the court. In your opinion does that create a gap in international criminal law that corporations can exploit?

CARSTEN STAHN: Indeed, it goes back to the famous Nuremberg precedent, which states that crimes are committed by men, not by abstract entities.⁴¹ Since then, France proposed in 1998 that the ICC should have jurisdiction over corporation's precisely to increase the rights of victims including access to compensation through criminal proceedings.⁴² This, obviously, didn't get enough consensus because our domestic systems still differ on how to treat corporations.

MICHAEL SCHARF: I was talking briefly with Judge Buergenthal on the first segment about the Krupp Corporation which was prosecuted at Nuremberg. There's an interesting story behind that. Krupp Sr., the real president and head of the corporation, was too ill and frail to be prosecuted. So, they grabbed his son Krupp Jr., because he had the same last name. However, he was one of the three that were acquitted at the Nuremberg trial and the reason for that, what most experts say, is that the father was guilty—not the son. Ultimately, it should have been the corporation that they went after, but they didn't have jurisdiction.⁴³ So that's the problem: if a court doesn't get the right defendant, corporations who are made up of a collective of board members and officers, can get away with heinous things. So, Carsten, even after the Krupp corporation case there has been a lot of cases against corporate officers in international tribunals. I know in

39. See Abraham Joseph, *Why Did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court?* THE WIRE (Jan. 1, 2016) <https://thewire.in/76869/why-did-south-africa-burundi-and-gambia-decide-to-leave-the-international-criminal-court/>.

40. See *Summary of the Key Provisions of the ICC Statute*, HUMAN RIGHTS WATCH (Dec. 1, 1998, 3:22 PM), <https://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute>.

41. *Id.*

42. *Id.*

43. U.S. v. Krupp, Trial 10 U.S. Military Tribunal III (1948).

the Rwanda tribunal they went after the president of a tea company that had facilitated genocide using his employees. Also, the president of a radio program that broadcasted all sorts of incitement to commit genocide. So, there's nothing really new about going after corporations is there.

CARSTEN STAHN: There's a distinction between the extent we can hold corporate agents accountable for what the corporation as such has done. Here we've seen recent developments in the context of both the International Criminal Court as well as in the African context to hold to try to bridge the gap and to increase business accountability. The ICC prosecutor wanted to bring cases against corporations at the beginning of the situation in the Democratic Republic of Congo on diamonds is this the obvious example.⁴⁴ However, the court has to be very selective in its focus so only recently did the problem gain attention. The ICC prosecutor developed a new policy paper in which they then identified some of the types of violations that the ICC might look into even if it can't look into the issues of corporate criminal responsibility as such.⁴⁵

MICHAEL SCHARF: So, what were those?

CARSTEN STAHN: For instance, illegal exploitation of resources, land grabbing or destruction of the environment. There has been a communication brought against Chevron for instance for intoxicating the environment in Ecuador through its activities.⁴⁶ So, these are the potential issues that might come before the ICC.

MICHAEL SCHARF: So, in those cases what you think will happen is the ICC will investigate the corporations but ultimately, they won't prosecute the corporations as such—they'll go after some officer who they believe is most responsible.

CARSTEN STAHN: Indeed, this is probably what will happen. They will try to trace the patterns of crimes, they might identify some of the violations. Some of the cases might not even go to trial. It might be that the ICC looks into something that it identifies as a violation

44. *International Criminal Court Investigations DRC*, GLOBAL POLICY FORUM, <https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/28595.html>.

45. ICC OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITIZATION, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

46. See Lachlan Markay, *ICC Won't Prosecute Chevron*, THE WASH. FREE BEACON (Apr. 2 2015, 3:15 PM), <http://freebeacon.com/issues/icc-wont-prosecute-chevron/>.

which might have a tremendous impact on domestic states, on corporate policies. Of course, if you're in the headlines with the ICC what you have done is made transparent and can have a grave impact on the corporation.

MICHAEL SCHARF: You know there are a lot of corporations that were involved in the Nazi holocaust atrocities that still exist today under different names. However, you can trace their ownership all the way back to the war. Would you say that it's a failure only to prosecute an individual, if the corporation can continue to exist? When you prosecute individuals for individual crimes, you lock them up sometimes for life if it's genocide and then they can't commit the crimes anymore. But if you only take an officer out of a corporation and the corporation continues to exist. What's the deterrent?

CARSTEN STAHN: Absolutely. I think a fraction of the corporate injustice and I think the big tragedy is that in most of these cases, particularly in inferential environments, if we try individuals the profit that companies gained from these investments from the activities—they're not taken into account. That means that victims often miss out on remedies. That's the big tragedy that we face, and this is why some more recent instruments, for instance like the Malabo Protocol established in the African Union, now charge corporate criminal responsibilities precisely to close this gap.⁴⁷

MICHAEL SCHARF: It's not likely that they're going to amend the ICC statute so maybe you can prosecute people in Africa or maybe domestically in Europe or even in the United States. However, in front of the International Criminal Court, a corporation is going to be free and clear, but its officers may not be. Now a prosecutor of the ICC wants to go after the corporation's even if it's only the officers that they can get a hold of. Avidan, Milena, and Tim, do you think that's a good idea? Is the new priority that the prosecutor has announced (going after corporations) the right thing for the International Criminal Court to be focusing on?

AVIDAN COVER: I think it's a critical piece of what she should be focusing on. As Carsten identified, we know of issues of minimal mineral extraction and appropriation. These sorts of things are being done at the hands of corporations, and whatever kinds of accountability (retribution or deterrence) can be achieved through

47. *Malabo Protocol: Legal and Institutional Implications of The Merged and Expanded African Court*, AMNESTY INTERNATIONAL (Jan. 22, 2016) <https://www.amnesty.org/en/documents/afr01/3063/2016/en/>.

those investigations through the notoriety that is achieved. I think those are a critical piece of our legal system.

MILENA STERIO: I think it is important because, as Carsten and Avidan already pointed out, there are cases where going after the corporate officers is really difficult because if you're trying to impose individual criminal responsibilities on some of the corporate officers, you have to show for example that they had the requisite criminal intent to commit specific acts. That they committed the acts or somehow aided and abetted in the commission of the acts, that sometimes is very difficult to do. So, going after the officers is sometimes going to be impossible despite the fact that corporations might be committing pretty horrific violations of human rights and other crime. So, I think this will, you know, going after corporations is important to close that gap.

MICHAEL SCHARF: Tim, do you agree if you have cases about genocide and cases about corporate damage to the environment is there equality of those two?

TIMOTHY WEBSTER: I'm going to take a slightly different approach than the co-panelists here and again thinking about the ICC as an institution and as an institution that's trying to make sure that its legitimacy is respected around the world like Professor Stahn mentioned a couple of countries in Africa had signaled their intention to withdraw. We know that China, Russia, the United States and numerous other Asian countries have not joined the ICC.⁴⁸ So here, I would say we need to look at the Rome Statute. We had this conversation back in 1998 the French government said why can't we have criminal corporate liability?⁴⁹ The discussion said no we couldn't have that. I don't fancy myself a strict constructionist, but I think when we have an institution that is fighting for a legitimacy, I think it may overreach to investigate corporate criminal liability when it has not been specifically authorized to take that within its mandate.

MICHAEL SCHARF: You don't agree, Milena?

MILENA STERIO: I would just mention this, the U.S. Ambassador for war crimes David Scheffer who was present at the Rome Statute negotiation has written and spoken about this and he says that one of the reasons that this issue of corporate responsibility was dropped and wasn't adopted as part of the Rome Statute was that the consensus at the time was that most national laws at the time did not have

48. See Scharf, *supra* note 38.

49. *Id.*

provisions for criminal liability for corporations and that most national laws have evolved since then and now do.⁵⁰ So that would be a counter-argument.

TIMOTHY WEBSTER: Some countries have now imposed corporate criminal liability.⁵¹ I believe the minority. So, if we can say a hundred and twenty states do it, yes but if we just say well France, Netherlands and Germany have done it and therefore everyone does it, I think that's a bit of a stretch.

MICHAEL SCHARF: So, the thing about interpreting a statute, it's like interpreting the US Constitution, are we going to be strict constructionists or can we evolve with the times. Going back to Carsten. The Special Tribunal for Lebanon, which is another one of these international tribunals, had this precedent-setting decision on contempt. Can you tell us about that and why it might be relevant to the question that we're talking about and interpreting the ICC statute?

CARSTEN STAHN: Indeed, this was a very special decision of the Special Tribunal for Lebanon who had to decide whether contempt of court could be exercised against a media company and it's not in the statute in itself.⁵² It just uses the term "persons," it doesn't specify whether its natural or legal persons and it then found that corporate criminal responsibility is a general principle of law which is, of course, a very far-reaching statement.⁵³ If we look at it, this decision has been disputed—some scholars have said this is wishful thinking, but we don't have enough evidence for it. Others have endorsed it, so I don't think first of all it's only related to contempt powers not to international crimes. Secondly, it was influenced by the fact that Lebanon has corporate criminal liability in its domestic code.⁵⁴ So that means I think we shouldn't overstretch the decision. It might have an important effect in signaling, like the ICC, through a decision you

50. *Id.*

51. See CLIFFORD CHANCE, CORPORATE LIABILITY IN EUROPE (2012) https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf.

52. See De Jonge, *International Corporate Criminal Liability at the Special Tribunal for Lebanon: Prosecutor v. Karma Al Khayat and Al Jadeed*, PALACE PEACE LIBRARY (May 8, 2015) <https://www.peacepalacelibrary.nl/2015/05/international-corporate-criminal-liability-at-the-special-tribunal-for-lebanon-prosecutor-v-karma-al-khayat-and-al-jadeed/>.

53. *Id.*

54. *Id.*

might trigger domestic reform. You might make NGOs think differently about the issue, and it's about the shadow of the law where this decision might be important.

MICHAEL SCHARF: Now assuming that the ICC prosecutor is going to be going against corporate officers for corporate actions let's take a specific, concrete example and see how that might play out. Milena let's talk about human trafficking. So, what's that crime what does it involve? Could it be a crime against humanity?

MILENA STERIO: So, there's actually a definition of trafficking in the so-called Palermo product protocol which is a protocol adopted as a supplementary protocol to the UN Convention against transnational organized crime. The Palermo Protocol defines trafficking is persons as the recruitment transportation transfer harboring or receipt of persons by means of the threat or use of force or other forms of coercion.⁵⁵ Now, when it comes to prosecuting trafficking, arguably you could prosecute it as part of Article 7 of the Rome Statute of the ICC, which is the article on crimes against humanity and that article actually has a so-called trafficking clause in Article 7-1(c) which explicitly refers to trafficking in persons and in particular women and children.⁵⁶ Trafficking has been investigated and essentially prosecuted as part of crimes of sexual violence within the Yugoslavia and the Rwanda tribunals and it could be potentially prosecuted in the ICC. However, if it's prosecuted as a crime against humanity, it would have to take place on a widespread and systematic scale like an attack against the civilian population. Obviously, any time we talk about the ICC, as Carsten already identified, there are significant jurisdictional and admissible hurdles to any ICC prosecution.

MICHAEL SCHARF: So, here is the thing about corporations: they're unlikely to be involved in prostitution per se or slave labor per se well some of them might be, but they are more frequently going to be facilitating the trafficking. So, let's talk to Tim Webster about a situation where a corporation creates a website that allows traffickers to advertise let's say the availability of child prostitutes. Could the corporation and its officers be liable for the actual trafficking simply by allowing them to advertise on their website?

55. *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, Nov. 15, 2000, U.N.R 15/25.

56. Rome Statute of the International Criminal Court, art. 7, sc. 3, July 17, 1998 2187 U.N.T.S. 90 (entered into force July 1, 2002).

TIMOTHY WEBSTER: I think the aiding and abetting decisions under alien tort have all been about corporations aiding and abetting governments, so this would be distinct from that. Here you're talking about one corporation, you know, helping another one set up a website so that may pose some problems. On the other hand, as we talked about with *Kiobel*, if we can say that human trafficking is a part of international law, there was sufficiently crystallized customary international law, and it affects an important U.S. national interest. Then, yes, I could certainly see the jurisdiction being allowed and the case moving forward. But, again, I haven't seen that case unfolding just yet

MICHAEL SCHARF: So that's the website type of case. Tim, let's take a different scenario. What if a corporation purchases goods from a group that is involved in human trafficking? Could the corporation be criminally liable if it knew that it was getting those goods and they were being exploited by these laborers? So, I'm thinking for example of corporations that purchase shrimp from the shrimp peeling shed operators in Thailand. I don't know if you're familiar with this case, it's pretty horrific, but these people are paid almost nothing, they are migrant workers and they're almost enslaved there. Then other companies around the world, including many of our producers of shrimp, are just buying their shrimp, you know, with full knowledge of what's going on.⁵⁷ Could those companies be prosecuted for the human trafficking, for their involvement in aiding and embedding?

TIMOTHY WEBSTER: Yeah, that's a tough question. I would say you know we need to, if we're talking about criminal prosecution, we need to make sure that we have a clear statute on the book that a federal prosecutor can hang his hat on. I haven't heard of that particular case, and I suspect the reason is because federal prosecutors have enough to deal with when they're trying to handle US domestic crimes. So, they may feel that their resources are best targeted or best spent targeting issues that are of more central concern to the United States. Now that's not to say it's impossible, maybe if this does become a major issue, does attract a lot of media attention—it could be. But, I just I can't see a state or federal prosecutor using those resources to prosecute shrimp production as opposed to human trafficking here in Ohio.

57. See Felicity Lawrence & Kate Hodal, *Thailand Accused of Failing to Stamp Out Murder and Slavery in Fishing Industry*, THE GUARDIAN (Mar. 30, 2017, 2:00 AM), <https://www.theguardian.com/global-development/2017/mar/30/thailand-failing-to-stamp-out-murder-slavery-fishing-industry-starvation-forced-labour-trafficking>.

MICHAEL SCHARF: That's going to have to be the last word as we're running out of time. I think we learned a lot about the civil and criminal prospects for liability of corporations. Judge Buergenthal, Dean Sterio, Professors Cover and Webster, and Carsten Stahn, thank you all for providing your insights on the liability of corporations for human rights abuses. I'm Michael Scharf, you've been listening to "Talking Foreign Policy."

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