**Panel 2, Subtheme 2 – Jurisprudential and practical approaches to elements of extraterritoriality and national sovereignty**

***Comments by Dr. Ariel Meyerstein, United States Council for International Business / ICC-USA on behalf of the International Chamber of Commerce***

**Madame Chair:**

The title of the subtheme of this panel is appropriate as it asks us to consider the both the law and the practical application of extraterritoriality in a world of co-equal sovereigns. Fortunately, this does not have to be a purely theoretical discussion; to the contrary, we have had a series of experiments with extraterritoriality in our global laboratory for several decades. So what have we learned?

The Business and Human Rights Resource Centre has profiled 141 human rights cases involving corporate actors. These were cases for civil remedies brought in both U.S. courts and in courts across the world. Of 141 cases collected:

77 of the 141, so just over 50%, allege violations of human rights in which a corporate actor was the primary actor in the allegations.

However, 56 of the 141, or approximately 40% of the cases, actually involve situations in which the State or its agents was the primary actor and the company was alleged to have been complicit in some way in the conduct of the State.

There are also a number of situations in which the State is intimately involved in a company’s violation, such as when a land permit is issued that is later contested by local communities, or in which environmental permits are granted that should not have been granted if both the company and the State did a more searching analysis of the potential impact on people from the activities in question.

What else have we learned from our experiments with extraterritoriality? Of the above sample of cases, *jus cogens* violations – genocide, crimes of war, crime against humanity, forced labor – were alleged against companies as the primary actor in only FOUR cases. The remaining 35 instances of *jus cogens* violations were alleged against States as the primary actor, with the company possibly complicit in some way. Thus, the vast majority of allegations in which companies are the primary actors involve a whole array of other rights violations, but not grave violations of human rights, even if they are still certainly impactful for the victims.

In considering this, what is troubling is that, according to the International Court of Justice’s *Jurisdictional* *Immunities of the State case (Italy v. Germany*), there is no general exception to the law of sovereign immunity for civil claims – even for those based on *jus cogens* violations. In that case, both Italy and Greece sought to open their courts to claims for reparations against Germany for *jus cogens* violations during WWII. Germany resisted and the ICJ ultimately sided with Germany, basing its decision on two bedrock principles of the international legal architecture: first, the sovereign equality of States, and second, the territoriality principle – the complete dominion of one sovereign over the territory and people under its jurisdiction.

So what does this mean? This means that States are peers – the should not sit in judgment of another. We see the tension in this precept play out in this very room several times a year. The second principle means that States should be able to control what goes on in their own territories. The court, in balancing these principles, decided that the current state of international law privileged the former over the latter, and particularly in situations involving a core sovereign power, such as the use of force in an armed conflict. Significantly, the ICJ did not consider that allegations involving *jus cogens* violations presented a special situation because the infringement of sovereignty occurs at the start of the case – when a court in one jurisdiction decides to accept the claims for consideration – regardless of what the claims might be.

Another data point worth considering: we are unfortunately now also witnessing a backlash against universal jurisdiction in even the clearest examples where it is needed – for criminal claims in international forum. Several states have been threatening to withdraw their consent to the jurisdiction of the International Criminal Court, and that Court has in place some of the important guardrails we would probably need in any assertion of extraterritorial jurisdiction: a principle of exhaustion or in this case, complementarity, which means that the ICC must defer to the sovereign where the alleged conduct took place to prosecute before asserting jurisdiction.

Another guardrail that seems to be implied from the above and from other cases is that there should be some connection – whether through nationality or territory – to the country whose courts are being asked to assert jurisdiction. This is precisely what the United States Supreme Court has done in the *Kiobel* case with the “touch and concern” doctrine. Limiting what was once understood to be a much broader instrument was controversial in some quarters, but not among Member States, most of whom submitted amicus briefs to the U.S. Supreme Court advocating that pursuing extra-territorial jurisdiction without any limiting principles would not be consistent with international law.

Why is this approach prudent? Like the other jurisprudential principles asserted by U.S. courts in such cases, this approach seeks at every opportunity to preserve the comity of nations. When a country asserts jurisdiction over a company for acts that took place in another country, the second country often prefers to have the ability to determine the matter itself. Even when it elects not to, it tends to not like another court sitting in judgment of how it may have failed to protect its citizenry and those in its territory from adverse human rights impacts. It creates undue international tensions.

To the extent that a binding instrument on business and human rights considers the extension of extraterritoriality, it would do well to consider having such safeguards in place.