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Introduction by George A. Bermann

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IMMUNITY AND ACCOUNTABILITY: IS THE BALANCE SHIFTING?

INTRODUCTION BY GEORGE A. BERMANN*

The accountability of states and state actors on the international scene is on a forward march. The fora in which this development is playing itself out are multiple: national courts of the state actor, national courts of other states, international tribunals of a more or less public law variety, private international law tribunals, and all manner of hybrids.

The claims that may be advanced in these fora are also expanding. Yet, in none of these fora has accountability of states and state actors become coterminous with the liability of otherwise similarly situated private actors. We find, and will continue to find, what we call here, collectively, immunities.

The immunities we encounter when we examine the jurisprudence of the various tribunals, or look at the legislative and treaty texts that are emerging around the globe, are being curtailed and refined—if only to ensure that the new claims that have been recognized are not themselves effectively nullified. But the immunities that remain are a good deal more than vestigial.

Immunities embody values and interests that are substantive and institutional alike. The greater “accountability” and “deterrence value” that the new claims hope to produce will probably never be achieved unless the contours of the immunities to which they are subject are seriously thought through, and unless some consensus is arrived at as to their own proper reach.

The panel that has been assembled here to elucidate these issues is nothing short of stellar. Each member has worked long years in the field and at various times under all the relevant hats. Each individually assembles just the combination of professional, governmental and academic experience that equips him to address the subject in a thoughtful and balanced manner.

IMMUNITY AND ACCOUNTABILITY: MORE CONTINUITY THAN CHANGE?

by David P. Stewart*

Forty-some years ago, in 1961, C. Wilfred Jenks wrote a slim volume titled *International Immunities*, in which he concluded that “[t]he general trend has been to restrict the scope of immunities granted to individuals.”¹ Jenks was of course writing from the perspective of a longtime and high-ranking official of the International Labor Organization. (He had not yet become the director general). He was writing more with regard to the requirements of international organizations and institutions vis-à-vis their host states than to those of diplomats, consular officers, or other government officials functioning in a bilateral context, much less those of sovereign states or governments themselves in the context of litigation in foreign courts. Over four decades later, his conclusion continues to ring largely true.

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*Office of the Legal Adviser, Department of State. These remarks were made in the author’s personal capacity and do not necessarily represent the views of the Department of State or the U.S. government.

¹ C. WILFRED JENKS, *INTERNATIONAL IMMUNITIES* xxxv (1961).