régime of frontier coöperation, and the renouncement of war in the settlement of present problems and future differences, substituting the Hague Court for the arbitrament of the sword.

L. H. WOOLSEY

THE UNITED STATES-PANAMA CLAIMS ARBITRATION

Mr. Hunt's Report as Agent of the United States-Panama Claims Commission under the treaty of 1926,[1] will take its place with the reports of Kane, Hale, Ashton, Boutwell, Fuller and Nielsen, American representatives on earlier claims commissions, as a useful contribution to international law. While the Panama Commission is not as important, in the light of the claims examined, as are some of the earlier commissions, Mr. Hunt's report, prepared with the aid of his competent Assistant Agent, Mr. E. Russell Lutz, and his Counsel, Mr. Benedict M. English, embodies certain features which deserve special commendation.

In an introduction to the report, Mr. Hunt sets out for the benefit of future negotiators, certain suggestions for the improvement of arbitration deduced from his experience with the Panama and other commissions, *e.g.*, a necessity for great clarity in the jurisdictional clauses, notably as to the time period for the origin of claims and for their submission to the commission; for the preparation of tentative rules of procedure before the commission formally meets; for limiting, by time and conditions, the submission of new evidence; for limiting the time within which pleadings must be filed in order to give the other side a fair opportunity for counterpleading, and to give the commission the longest opportunity possible under the treaty period to deliberate upon and decide the claims submitted; suggestions as to the time to be allowed after final hearing for the commission's decision and a preference for a flexible period based upon the number of claims to be decided rather than a rigid time limit, a restriction which compelled the Panama Commission to decide all its claims within a period of four months; clearer provisions for the filling of vacancies on the commission; better provisions for distinguishing the pleading and proving of facts from the briefing of cases on the facts and the law; better methods of overcoming the difficulties arising out of the use of two languages; and other suggestions for the improvement of arbitration by special commission.

Each of the 26 cases submitted by Panama and the United States is then reported by Mr. Hunt with considerable completeness. In addition to the full decision of the commission, he includes a headnote syllabus of the opinion and a statement of the facts in the case, supplemented by an extended abstract, with quotations, from the briefs of both parties and ending with

[1] Department of State, Arbitration Series, No. 6, American and Panamanian Claims Arbitration, under the Conventions of July 28, 1926, and Dec. 17, 1932, Report of Bert L. Hunt, Agent for the United States. (Washington, Government Printing Office, 1934, pp. 872.)

Mr. Hunt's comments upon the decision in the light of the pleadings. As Mr. Hunt is reporting to the United States Government on the result of the arbitration, he is privileged to express dissatisfaction with the commission's opinions.

Mr. Hunt's method of presenting his report has the advantage of enabling the reader better to understand the decision and to supply its deficiencies, for the very necessity of deciding so many cases in so short a period has made most of the decisions exceedingly brief and for that reason often unsatisfactory; so that without a presentation of the arguments of both agents it might be difficult to estimate the validity, value, or scientific effect of the decisions. It seems unfortunate that the commission was so hurried in its deliberations, for it is possible that with adequate time it might have made more helpful contributions to international law. It is probably true that our best opportunity for source material comes from the impartial decisions of tribunals, a method which formed the matrix of the common law.

A third feature of Mr. Hunt's report which will be of special interest is an extended index of all the cases and most of the authorities cited by either agent, arranged under the legal rubric, rule or principle to which they were cited. This should be very helpful to students of international law.

The awards to the United States were nineteen in number amounting to about $115,000, the awards to Panama four in number amounting to $3,150. Several claims were dismissed. The American claims appear to have been presented with uniform thoroughness. The cost to the United States, in addition to salaries of the participating departmental officials, was about $54,000, a sum which cannot be justly measured against the awards made, for important cases were disallowed on both sides and numerous cases were disposed of by the American Agent before presentation on the ground that submission was unwarranted because of insufficiency of facts or deficiencies in law. It is commendable that the American Agent was willing to assume this responsibility, for it seems questionable whether a commission having only a short life should be burdened with the labor of examining unsubstantial cases which the claimant government is actually unwilling unreservedly to support, and of assuming the exclusive responsibility of dismissing these cases. Nor is such proceeding fair to the defendant government. The opportunity of disposing in one judicial proceeding of numerous claims which for years defied diplomatic settlement and of cleaning the slate of long-standing differences is an advantage not calculable in pecuniary terms and altogether disproportionate to the amounts involved in a particular arbitration. The efficiency of the American Agency was facilitated by the fact that its staff was drawn in part from the personnel of the Department of State, under the practice adopted by the present Legal Adviser of having the Department prosecute or defend American arbitration cases wherever possible. The practice has the advantage of enlisting the experience of claims attorneys in the conduct of an arbitration, of bringing about

closer coördination between the government's policies or legal positions and its occasional excursions into litigious advocacy, and also of minimizing costs. Its disadvantage possibly lies in the fact that agents may become too closely identified with their views as advocates, and may take these positions back into the Department to shape their quasi-judicial views as legal advisers. But the necessity of close coöperation between the Department of State and its agents before claims commissions cannot be over-emphasized, for the agent speaks for the United States, and his unfortunate or mistaken positions, practices or policies may redound to the disadvantage of the United States as a government. It is still a regrettable fact that arbitrators are often chosen for political reasons without regard to their special technical qualifications in international law; yet their decisions are supposed to be accepted by the profession as source material.

While the present commission is not so vulnerable in this respect as some, their opportunities as contributors to international law were handicapped by the fact that the treaty under which they sat dispensed with the local remedy rule, predicated state liability upon "losses or damages originating from acts of officials or others acting for either government, and resulting in injustice," and authorized them to decide according to the "principles of international law, justice and equity." The leeway thus afforded seems to have influenced several decisions which, while possibly sustainable as fireside equity, including a stretch of the treaty word "officials," can hardly be deemed warranted by international law. For example, several awards in which the injury was inflicted on an individual by the alleged negligence of some inferior employee,[2] and awards for acts of pillage by sailors on shore leave [3] seem hardly supportable in international law. The failure of the police to protect an alien, after adequate opportunity, from the consequences of mob violence,[4] especially participation by the police in assaults upon aliens,[5] are traditional grounds for redress. It is reasonable to conclude that when the protective machinery of the state not only fails to function through negligence but actually coöperates in assaults upon foreigners, "the minor official" rule is superseded by the "state participation in the

[2] Manzo (p. 679, permitting a small boy to clean machinery); it is doubtful whether Mr. Hunt's distinction between the privilege of submitting and favorably deciding such claims is altogether well founded. Añorbes (p. 751; a similar case).

The Colunje decision (p. 733) is more sustainable, because the enticement of the claimant into American jurisdiction from Panama by a Canal Zone policeman, was followed by the assumption of jurisdiction by an American court, on a charge which was later nolled by the District Attorney.

[3] Ruiz (p. 635); Diaz (p. 639); although in these cases the commission predicated liability on "international law".

[4] Banks (p. 117); Denham (p. 201); Richeson (p. 247), really Langdon; Baldwin (p. 311). In the Noyes case (p. 155), the claim was disallowed on the ground that it is insufficient to assert that *more* police protection might have averted the injury at the hands of private individuals, a mob. Under the facts, this may be sustainable.

[5] Langdon (p. 247), Adams (p. 275).

wrong" rule, although it should certainly be possible for the state to reduce the damages, if not to release itself from liability, by expressing its positive disapproval through adequate punishment of the minor officers. Such punishment, though deemed insufficient, did reduce the damage in the Adams case.[6] The difficulties of distinguishing a personal from an official act are not inconsiderable.

The failure to punish a criminal adequately was made a basis of liability in the Denham case,[7] where the murderer's sentence of eighteen years was first commuted by one-third and then reduced further by a general amnesty, so that only three years were actually served; the award was limited to $5,000, a sum which Mr. Hunt deemed insufficient. Too close adherence to the "condonation" theory often overlooks the special facts of a case. International law, like private law, seems entitled to its own metaphysics; in some cases the failure to prosecute or punish may be deemed an approval or ratification of the wrong. But why cannot allowance be made for differences in fact? We recognize degrees of negligence, and juries constantly grade the amount of their verdicts on that principle. Why cannot there be degrees of negligence in governmental punishment, especially when, as must be admitted, the award is exclusively punitive. To speak of compensation to the next of kin for failure to punish a private criminal is something of a strain on the imagination; rigorous insistence on the view that *any* degree of negligence for failure to punish to the full is equivalent to condoning the original crime will strengthen the demand of certain countries to abolish the rule altogether.

In one case[8] an award was made for a wrongful arrest and conviction deemed without sufficient cause, based on the fact that local hostile sentiment dictated the conviction. But to draw from this the conclusion of Mr. Hunt that it would be an advantage to subject to international review the decisions of municipal courts is open to question. The difference between a grossly unfair and biassed judicial proceeding resulting in a "palpable injustice", and an error of the court resulting in injustice, is not always easy to draw. The only basis for sustaining the Solomon award is to assume that a considerable degree of bad faith or outrage entered into the judgment of conviction. Whether that was true in fact is hard to say. But short of that, the decisions of municipal courts passing on the facts and on *municipal* law cannot in principle be challenged internationally. Any other rule would impair international relations. Manifest and intentional failure to accord an alien his rights under local law is an established basis of international responsibility;[9] but a review of local judicial proceedings to dis-

[6] Dismissal from the service and short punishment deemed insufficient to release state from all liability.

[7] P. 201; see also Baldwin (p. 311), failure to prosecute. [8] Solomon (p. 457).

[9] Perry (p. 33). In the Denham case (p. 491), no violation of local law or bad faith was found.

cover an "improper" application of the local law is always a delicate proceeding.

Another interesting decision of the commission related to a deprivation of private property[10] by governmental negligence in permitting outsiders successfully to file claims to the ownership or use of property already lawfully registered in the claimant's name; yet it is not altogether common to challenge internationally the adequacy of a statutory procedure for contesting improper claims, in order to afford an alien the protection to which he is deemed entitled. But in the De Sabla case this was done. Somewhat similar claims to property were disallowed in the Browne[11] and Chase[12] cases. The largest American claim, of the Mariposa Development Company,[13] based on the alleged cancellation of land titles, was disallowed for lack of jurisdiction on the ground that the injury, if any, occurred after the ratification of the claims treaty. Other minor cases have no special interest for international law.

The most important case before the commission from the point of view of international law and the most questionable of all its decisions was that of the Panamanian *Compañía de Navegación Nacional* against the United States.[14] The case arose out of a collision on the high seas between the claimant's vessel, *David*, and a vessel belonging to the General Petroleum Company. Cross libels had been filed in different courts, the *Compañía* winning its case in the Panama courts by default and the Petroleum Company's suit in the Canal Zone District Court remaining still undecided. While it was pending and over two years after the collision, a United States sheriff arrested the *David* while passing through Canal Zone territorial waters in innocent passage, and a bond had to be filed as a condition of release; after some further judicial proceedings, the General Petroleum Co. settled the case by paying some $16,000, thus disposing of both suits. The *Compañía* contended that the wrongful seizure of the *David* compelled it to settle the case for less than the amount of the judgment obtained by it in the Panamanian courts, and that the United States was hence liable for that loss and incidental consequences.

The commission in denying the claim held that:

> The general rule of the extension of sovereignty over the 3-mile zone is clearly established. Exceptions to the completeness of this sovereignty should be supported by clear authority. There is a clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters.
>
> There is no clear preponderance of authority to the effect that such vessels when passing through territorial waters are exempt from civil arrest. In the absence of such authority, the commission cannot say that

[10] De Sabla (p. 379). [11] P. 523.

[12] P. 341. (Estopped because of settlement effected through mediation of American Minister in Panama). [13] P. 533. [14] P. 765.

> a country may not, under the rules of international law, assert the right to arrest on civil process merchant vessels passing through its territorial waters.

While it is very doubtful whether the claimant could properly assert that the settlement it effected was proximately caused by the alleged illegal arrest, the commission's view of international law on the subject seems even more questionable. The fact that no country's officials had apparently ever done what the United States sheriff purported to do in this case—arrest a ship in innocent passage through territorial waters on a civil suit arising out of an earlier and extraterritorial cause of action—is alone a strong ground to challenge the commission's view. The statement that the sovereignty of the riparian state extends to the three-mile limit, or even the suggestion that general jurisdiction so extends, would not solve the issue. The question here is whether the arrest of a passing ship, not for an offense it has then committed, but as a means of obtaining forcible jurisdiction in a pending litigation between the owner and a private plaintiff, is a proper or an improper impairment of the right of innocent passage. Innocent passage historically is not an "exception" to sovereignty nor is the burden on the passing ship to prove such an "exception." The privilege of innocent passage, it is believed, has as solid a legal standing as territorial "sovereignty." The legal relations involved cannot be resolved by abstract formulae, but by a historical interpretation of the privileges attached to innocent passage and of the need of the riparian state to assert control. Both approaches warrant the conclusion that the interruption of a voyage by arrest for such a purpose as was involved in the *Compañía* case is an unjustified assertion of power. The Hague Codification Conference, both in Basis of Discussion No. 24 and in Article 9 of its draft on territorial waters annexed to the Final Act, as well as the Harvard Research in its Article 16,[15] all concurred in the view that the passing ship is free from arrest in such cases. Professor Gidel seems to share the view of the conference,[16] although it is true that the replies of the governments are not satisfactory, because so many of them are vague and ambiguous. Professor François, reporter of the Hague codification commission on territorial waters, in his recent work[17] approves the conclusion of the Codification Conference by expressing the opinion:

> The coastal State may not arrest a vessel passing through the territorial sea for the purpose of exercising civil jurisdiction. No measures for the purpose of any civil proceedings may be taken against the vessel, save only in respect of obligations incurred for the purpose of the voyage or in respect of a liability arisen during the voyage in the territorial sea or in the inland waters, for instance as the result of a collision.

[15] These articles are quoted conveniently in Mr. Jessup's comment in this JOURNAL, Vol. 27 (1933), pp. 748–749.

[16] Article in *Revue Critique de Droit International*, XXIX, p. 16, at 38–46.

[17] *Handboek van het Volkenrecht, Eerste Deel*, 1931, p. 303.

That seems much the sounder view; in the interests of the freedom of the seas, and in the interests of states whose citizens are engaged in shipping and navigation, of which the United States is one, it may be hoped that the decision of the commission will not be regarded as a precedent worthy of emulation or application in the future.

EDWIN M. BORCHARD

THE GENERALIZATION OF THE MONROE DOCTRINE

In its note of September 10, 1931, to the Secretary-General of the League of Nations accepting League membership, the Mexican Government stated "that she has never recognized the regional understanding mentioned in Article 21 of the Covenant of the League." This dissent from the Monroe Doctrine was not considered a reservation,[1] but as an expression of the Mexican point of view it found vigorous reiteration in President Carranza's message to the Mexican Congress on the subject of League membership wherein he stated: "Mexico had not recognized this doctrine, since it established without the choice of all the peoples of America a criterium and a situation in which they have not been consulted." [2] In even stronger terms the Mexican attitude was expressed in a note addressed by the Mexican Minister for Foreign Affairs to several governments while Article 21 of the Covenant was under discussion at the Paris Peace Conference. The position of the Mexican Government at that time was that it had "not recognized and will not recognize the Monroe Doctrine or any other doctrine that attacks the sovereignty and independence of Mexico." [3] These frank expressions of official Mexican opinion lend added interest to the memorandum on the Monroe Doctrine presented by Dr. J. M. Puig Casauranc, Mexican Minister for Foreign Affairs, to United States Ambassador Daniels in October, 1933. This memorandum was first made public in one of an interesting series of volumes published by the Mexican Ministry for Foreign Affairs this year.[4]

This memorandum was prepared after consultation with the Ministers of Ecuador and Peru, accredited to the Mexican Government. From the text of the memorandum, it appears that its preparation was inspired by the belief that the new policies of the present Roosevelt administration encouraged the belief that the time was ripe to bring about a new basis of solidarity among the American republics and to remove from their relations with one another what has been a constant source of misunderstanding and suspicion.

The memorandum reviews briefly the circumstances under which President

[1] See Hudson, "Mexico's Admission to Membership in the League of Nations," this JOURNAL, Vol. 26 (1932), pp. 114, 116.

[2] Philip Marshall Brown, "Mexico and the Monroe Doctrine," *ibid.*, p. 117. [3] *Ibid.*

[4] *Séptima Conferencia Internacional Americana, Memoria General y Actuación de la Delegación de México, presentada por el Dr. J. M. Puig Casauranc, Jefe de ella y Secretario de Relaciones Exteriores.* (*México: Imprenta de la Secretaría de Relaciones Exteriores*, 1934), p. 261 ff.