proposed convention and the submission of it to interested governments will not have been in vain if they are moved thereby to declare at the appropriate time how far they are willing to go and what they are prepared to offer for what they conceive to be the requirements of international justice, and in particular, for the sake of gaining recognition of the singleness of nationality of the adult person whom more than one state claimed as a national at the time of his birth.

CHARLES CHENEY HYDE.

DIPLOMATIC PRIVILEGES AND IMMUNITIES

In the whole range of the international rules of conduct governing the relations of states, there is probably no matter more ripe for codification than the privileges and immunities of diplomats. If we could go back beyond the dawn of history, the inviolability of envoys would no doubt be found generally to have been respected, for among the surviving savage tribes of the uttermost and most widely separated regions of the earth the sanctity of envoys seems to be well recognized. Evidently a rule so generally observed and so potent to restrain rival populaces from doing harm to one another's representatives must be consonant with practical needs.

Unless envoys were free to enter into discussions for the prevention or termination of hostilities, agreements to those ends could not be reached, and wars of utter extermination or enslavement would be the only alternative. International agreements, the fruit of diplomatic negotiations, are then a means to conserve human energy, to help to secure and preserve the peace, which means in the end to help to develop a greater measure of the coöperation essential to the progress of each state. It is evident then that those states or political communities that respected envoys and facilitated the discharge of their mutually helpful mission would, in the struggle for national survival, have a distinct advantage over the communities that did not accord to envoys adequate protection and immunity in order to enable them to fulfil their important functions.

When the institution of chivalry prevailed throughout Europe, the rights of envoys were watched over by the Colleges of Heralds. The universal character of chivalry gave to their rules a superior status such as is held today by what we now call the rules of international law relative to diplomatic privileges and immunities. The rules of heraldry tried by actual practice, and the accumulation of precedents derived from the experience of so many states down through the centuries, have supplied us with a somewhat disjointed set of rules, but these rules may well be coördinated and formulated in the articles of a code. Already this has been attempted with more or less success, notably by the Institute of International Law at the session held in Cambridge, England, in 1895, and more recently by the American Institute of International Law through its committee of jurists meeting in Havana in

1925. We must not forget the no less important individual attempts at codification, such as those of Bluntschli and of Field, contained in their comprehensive outlines of the whole subject of international law. Individual attempts such as these will usually be found to constitute the basis of the subsequent conference codes. For after all, a conference of jurists cannot do much more than put the seal of its approval upon what it considers to be the most practical of the rules proposed for its consideration and to smooth out some of the inconsistencies.

In this situation of affairs it was a foregone conclusion that the Committee of Experts appointed by the League of Nations would decide that the matter of diplomatic privileges and immunities was one of those ripe for codification, and place it accordingly on the agenda for the consideration of the conference later to be called for the purpose of formulating a general agreement in regard to the rules of international law.

Following the appropriate procedure, the Committee of Experts, in accord with the results of the thorough and scholarly investigation and report of the subcommittee, consisting of M. Diena and M. Mastny, recorded their opinion that the whole question of diplomatic immunities and privileges was suitable for treaty regulation, and will so report to the Council. The subcommittee appointed to consider this question, after mature consideration, felt that it would be premature to formulate definite provisions, and the Committee of Experts has therefore merely made public the results of the subcommittee's investigations as contained in their report.

In order to fulfil the mandate of the Assembly of the League of Nations and to obtain and examine the opinions of the governments of the states, whether members of the League or not, the committee has transmitted the report and the outline of the "particular questions falling within the general subject of diplomatic privileges and immunities which the Committee considers might advantageously be dealt with in a general convention." [1]

In the statement accompanying the questionnaire or outline the Committee of Experts has placed these privileges and immunities upon the proper rational foundation in that "the basis to be adopted in examining and answering the various questions raised" therein should, according to the indication, be "the material [practical] considerations which make the existence of diplomatic privileges and immunities useful and desirable." The committee, applying this criterion, further states that it does "not consider that the conception of exterritoriality, whether regarded as a fiction or given a literal interpretation, furnishes a satisfactory basis for practical conclusions. In its opinion, the one solid basis for dealing with the subject is the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the State which he represents and the respect properly due to secular traditions."

[1] For this outline, see Special Supplement to the JOURNAL, July, 1926, Vol. 20, pp. 149–151.

The report of the committee ought, and in all probability will, secure strong support from the governments to which it is referred, and also from the scientific bodies that are coöperating in the effort to assist the League to secure the most scientific codification possible of the various matters ultimately to be referred to the conference called for the purpose.

One or two minor points of criticism may perhaps be made of this admirable report. In regard to ceremonial rights, the view adopted seems to have been that expressed by M. Mastny in his letter to M. Diena that this "matter relates, not to a right, but to etiquette prescribed by usage in the country where the diplomatic agent resides." Nevertheless, it must be admitted that anything which involves the indication of respect towards another state in the person of its representative is not an ordinary matter of social etiquette. In times of international stress a misunderstanding as to the requisite ceremonial is likely to be misinterpreted and considered as an intentional affront. So understood, it may lead directly to war or cause bad blood which may subsequently engender further unfriendly acts. It becomes then a matter of real importance to formulate the legal requirements of international ceremonial procedure. It will be remembered that when the Wilson Administration demanded that Huerta salute the American flag, the question as to whether the salute should be returned gun for gun was not a trivial matter, and the difference in regard to this ceremony might well have led to a war which neither of the parties really desired or intended. While it is true that these matters no longer occupy the attention which they formerly did, they are still properly to be regarded as an important part of international law.

It is encouraging to note that the subcommittee report rejects the wornout fiction of exterritoriality as the basis of diplomatic immunities, and adopts instead the viewpoint that these immunities are to be explained and defined by their purpose of facilitating the discharge of the diplomatic mission.

Notwithstanding all this careful preliminary preparation and the accumulation of precedents, it is to be feared that a rational codification may still be difficult to attain, because the states of the world are not yet agreed—nor apparently are they ready to agree—upon certain fundamental and preliminary questions, such as the nature of sovereignty and the equality of states. M. Mastny touches upon this tender spot in that portion of his letter which relates to the right of asylum in the diplomatic residence. As he truly says "the question still remains without any doubt exceedingly difficult when we are dealing with political refugees in countries which have not yet attained that degree of civilization which we are justified in expecting in normal international life." But will the less developed states be willing to accept the express formulation of that inferiority of status which is essential for rational codification of any kind? Will they not rather insist that the conference stultify itself by repeating *ad nauseam* the paradox of absolute sovereignty and independence, which is itself the negation and repudiation of all international law?

M. Mastny in his letter has injected somewhat unnecessarily the matter of the arbitration of disputes in regard to diplomatic immunities. This is really a separate question, namely, that of the settlement of differences in regard to the interpretation of the rules of international law. Nevertheless it would seem that diplomatic immunities might first be made the object of a general treaty of obligatory arbitration. For important though they be, in that they relate to the question of national dignity, these immunities do not withal involve any great economic interests such as arouse the animosities of the states. Such economic interests, especially those in regard to which the future development and exploitation is somewhat uncertain, can with difficulty be subject to codification by states whose prime consideration seems still to be competition rather than coöperation. This very situation makes it important to take the first step toward codification in regard to a matter like diplomatic immunities, which is not likely to interfere with national designs of aggrandizement.

When the Conference for the Codification of International Law finally assembles, we may expect it to devote its early attention to the matter of diplomatic immunities. The First Hague Conference gave us an outline codification of the adjective law of arbitration. May the forthcoming conference be equally happy in formulating peace-preserving rules to protect the agents of peaceful international intercourse in their peace-intending mission. In this way, more than one unnecessary war may perhaps be avoided in the years to come.

ELLERY C. STOWELL.

RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORIES TO THE PERSON OR PROPERTY OF FOREIGNERS

The subcommittee of the Committee of Experts of the League of Nations which reported on the international responsibility of states[1] consisted of M. Guerrero, of Salvador, reporter, and M. Wang Chung Hui of China. As the committee states, the report of the subcommittee is based upon one theory of the principles of state responsibility; it is for that reason that the implication or hope that the report may be accepted by all governments as the basis for a convention is likely to be disappointed, though many of the proposed rules merit general acceptance. It is highly desirable that there may be agreement among states on a subject matter which daily occupies their Foreign Offices and which more than most others permits of fairly adequate legal regulation, substantive and procedural.

Before legal regulation is possible, however, there must be some measure of accord on the underlying political theory. The theory suggested by the subcommittee, in the report now under discussion, starts from a major postulate that the foreigner must accept the legal conditions which he finds

[1] Printed in Special Supplement to this JOURNAL, July, 1926, pp. 177-203.