"States would not have been disposed to unite, however loosely, in order to regulate their conduct with respect to each other by principles regarded as unresponsive to what were conceived to be the requirements of international justice; and there could have been no common zeal for that justice unless States were by their nature and composition intolerant of international disorder and incapable of remaining isolated from each other. Inasmuch as they were entities composed of human beings possessed as such with moral sensibilities and social instincts which grew in vigor and fineness as civilization strode forward, there was solid cause for a system of jurisprudence applicable to the requirements of the common life.2/ As soon as general acquiescence concerning those requirements became assured, an international law was capable of being and sprang into life.

"The discovery and use of new methods of communicating intelligence, the development of means of transportation by sea and land and air, together with the transformation of instrumentalities employed in the military and naval operations of a belligerent, have, since the close of the eighteenth century, and particularly since the beginning of the twentieth, served to weld together the society of nations by fresh and enduring ties. The resulting growth of international social and commercial intercourse has not ceased to influence profoundly the trend of the law. Certain results seem to be already apparent. It has been perceived, for example, that rules of conduct, however definitely established, if applied under conditions differing sharply from those prevailing when they were laid down, fail to reflect, and may even oppose, the underlying principles to which their origin was due. Again, The World War has served to bring home to peoples and statesmen alike, a vivid sense of the oneness of interest binding the States of every continent, and a corresponding realization of the harm sustained by all through contempt by a single State for definite obligations acknowledged by the international society to govern each of its members.

"Thus it is now recognized on all sides that the welfare of each member of the family of nations, and, therefore, of the international society itself, demands fresh enunciation, by codification or otherwise, of the

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2/ "The real appeal of Grotius was not to 'man in a state of nature', but to the sense of justice, humanity, righteousness, evolved under the reign of God in the hearts and minds of thinking men. His appeal was not to a 'contract made in the primeval woods', but to the hearts, minds, and souls of men, developed under Christian civilization." Andrew D. White, "The Welfare of Humanity with Unreason: Hugo Grotius", Atlantic Monthly, XCV, 105, 114.

The basis of the law imposing common rules of restraint has been the consent of the several independent States which were to be governed thereby. That consent has, moreover, been yielded by necessary implication by each new State as a condition essential to its recognition and admission to membership in the international society.[2] Thus the law of nations may be fairly deemed to reflect at any given time what the several members thereof have in fact accepted as the law governing their mutual relations.[3] Important consequences follow. While, on the one hand, there may be difficulty in ascertaining the extent to which the several independent States have accepted a particular principle or rule declaratory of it, still greater difficulty is encountered when attempt is made to effect alterations in the face of substantial opposition. It is not conceivable, for example, that the United States would admit the right of the principal European powers to deprive it against its will of privileges long acknowledged to be the possession of each independent State.[4] Nor would it be admitted that a mere group of States could so amend the law of nations as to increase the obligations of members of another less powerful group without their

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2/ See Recognition, In General, infra, § 11.

3/ "The consent of the international society to the rules prevailing in it is the consent of the men who are the ultimate members of that society. When one of those rules is invoked against a State it is not necessary to show that the State in question has assented to the rule either diplomatically or by having acted on it, though it is a strong argument if you can do so. It is enough to show that the general consensus of opinion within the limits of European civilisation is in favour of the rule." Westlake, 2 ed., I, 16.

Story, J., in the case of La Jeune Eugenie, 2 Mason, 409, 448, declared:

"What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations which is not universally recognised as such, by all civilized communities, or even by those constituting, what may be called the Christian States of Europe . . .

"But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligations, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations which may be evidenced by their general practice and customs, it may be enforced by a court of justice whenever it arises in judgment."

4/ It is not suggested that the opposition of a strong and solitary State could ultimately prevail against the consensus of opinion of the entire civilized world, or that such a State would not be finally compelled to acquiesce in changes which it once opposed. The reason, however, for its impotence would doubtless be in part the unsoundness of its stand; for it is hardly probable that a single isolated State could rightly denounce as unjust a proposed change which had won the approval of all other civilized powers.

acquiescence, unless it wrung consent by the sword, and by the sword also stifled opposition until in fact no real objections were heard for a long period.[1] On principle, therefore, changes in the law of nations require the consent of the States affected thereby. For that reason the likelihood that proposals designed to effect a change will receive the necessary approval, must be proportional to the degree to which they are generally deemed to promote respect for fundamental principles of international justice. Doubtless any individual State may propose changes; and if they are accepted it is because the international society is convinced of the benefits derivable from them.[2] Modifications may also be wrought gradually and imperceptibly, like those which by process of accretion alter the course of a river and change an old boundary. Thus without specific conventional arrangement, and by practices manifesting a common and sharp deviation from formerly accepted rules, the society of States may in fact modify the regulations governing its members.

The duty of a State to observe a rule of conduct with respect to any other is incompatible with a right on its part to free itself from such an obligation. If civilized States feel themselves bound to observe rules of international conduct established by general consent, and purport to do so from a sense of legal obligation, it is because they acknowledge that that consent has been irrevocably given. Such a theory has obtained in practice, forbidding the individual State to free itself from the operation of restrictions which the law of nations was deemed to impose.[3] The Department of State has on numerous occasions denounced attempts of delinquent States to invoke a looser doctrine.

1/ Thus the States signatory to the Declaration of Paris of 1856 announced that "The present declaration shall not be binding except upon those Powers which have acceded, or shall accede to it." Nouv. Rec. Gen., XV, 791.

Compare the theory of Art. XVII of the Covenant of the League of Nations.

2/ The United States has at times proposed changes ultimately winning general approval, and that because of their inherent worth as a means of promoting international justice. Its action as a neutral before the close of the eighteenth century is illustrative, infra, §§ 844-847.

3/ The Schooner Nancy, 27 Ct. Cl. 99, 109.

§ 3. Sources. Evidence.

"The sources of international law, that is, the places where the principles and rules governing the conduct of States first appear as such, as distinct from the causes responsible for that law and the evidence of what it is, are deemed to be primarily, custom, and secondarily, certain agreements or treaties.1/ Few treaties are to be regarded as sources of international law, because, apart from the design of the contracting parties, the provisions of such compacts infrequently give expression to new rules of conduct which, through their reasonableness and general responsiveness to the needs of the international society, win its full approval. Some agreements have, however, been so operative, serving to register not only the views of the contracting parties, but also the beginnings of rules of restraint which ultimately met with general acquiescence.

"Custom as a source of international law must not be confounded, as Westlake has observed, 'with mere frequency or habit of conduct.' It signifies rather 'that line of conduct which the society has consented to regard as obligatory.'2/ In such a sense international custom is indicative of a general practice which may be fairly accepted as law.3/

"The evidence of international law is to be found in many places. A variety of acts and documents bear testimony as to the principles which are deemed actually to govern the conduct of States. The views of text-writers or commentators are oftentimes cited as authoritative. The Supreme Court of the United States has observed, however, that 'such works are resorted to by judicial tribunals, not for the speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.'4/

1/ Frantz Despagnet, Cours de Droit International Public, 4 ed., §§ 55-60; Bonfils-Fauchille, 7 ed., § 46; Oppenheim, 2 ed., I, § 16.

2/ Westlake, I, 2 ed., 14, where it is added: "In any state or other society in which customary law is admitted, custom as a part of law means the conduct which is enforced as well as the strict or loose nature of the society allows - not always very well, as in the case of national law, in the ruder stages of national existence - and which is followed as well from the fear of such enforcement as from the persuasion that the received rule requires such conduct to be followed."

3/ See Art. XXXV, Section 2, of Draft-Scheme for the institution of the Permanent Court of International Justice, presented to the Council of the League of Nations by the Advisory Committee of Jurists, and communicated by the League to numerous States August 27, 1920.

4/ Mr. Justice Gray, in the opinion of the Court, in The Paquete Habana, 175 U.S. 677, 700.

According to Art. XXXV of the Draft-Scheme for the institution of the Permanent Court of International Justice, communicated by the Council of the League of Nations, August 27, 1920, "the teachings of the most highly qualified publicists of the various nations" were declared to be "subsidiary means for the determination of rules of law."

Whenever such writers do not evince a disposition to mirror the practice of their time, the views expressed lack evidential value.1/

"Doubtless some treaties afford evidence of international law. Those which, for example, purport to enunciate general rules of conduct, to which substantially all enlightened States consent, embracing those which have not formally adhered to the arrangements, are of such a kind.2/ Certain conventions of the Hague Peace Conferences of 1899 and 1907 may be deemed to fulfill such a function."

1/ The inclination of distinguished scholars to heed the views of other theorists rather than those upon which States act from a sense of legal obligation, tends in certain countries to weaken the respect entertained for treatises purporting to be declaratory of international law, because doubt is felt whether the authors have in fact made serious attempt to bear witness to the rules actually governing the relations of independent States.

See Lord Alverstone, C. J., in West Rand Central Gold Mining Co. v. The King (1905) 2 K. B. 391; Evans, Cases, 15.

2/ "There is no doubt that, when all or most of the great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among States which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time. As among men, so among nations, the opinions and usage of the leading members in a community tend to form an authoritative example for the whole. A striking proof oi this tendency was given in the war of 1898 between Spain and the United States. Neither belligerent was a party to the article of the Declaration of Paris of 1856 against privateering; the United States had in fact refused to join in it. Moreover, the Declaration of Paris was not, in point of form, an instrument of the highest authority. Nevertheless, when the war of 1898 broke out, the United States proclaimed its intention of adhering to the Declaration of Paris, and the rules thereby laid down were in fact observed by both belligerents. It is quite possible that some of the recommendations recorded at the Peace Conference at the Hague in 1899, may sooner or later, in like manner, be adopted as part of the public law of civilized nations by general recognition without any formal ratification." Sir Frederick Pollock, in Columbia Law Rev., II, 511, 512.