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## THE PRINCIPLE OF SOVEREIGN EQUALITY OF STATES AS A BASIS FOR INTERNATIONAL ORGANIZATION

By HANS KELSEN †

At the historic conference held in Moscow in October, 1943, the Governments of the United States of America, the United Kingdom, the Soviet Union, and China jointly declared that they recognized "the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security."<sup>1</sup> The extraordinary importance of this statement for the fate of the world after this war justifies the present attempt to examine the question whether the principle of "sovereign equality" of States proclaimed by the Declaration of Moscow can be the basis of an international organization ensuring a lasting peace.

### I.

The term "sovereign equality" used in the Four Power Declaration probably means sovereignty *and* equality, two generally recognized characteristics of the States as subjects of international law; for to speak of "sovereign equality" is justified only insofar as both qualities are considered to be connected with each other. Frequently, the equality of states is explained as a consequence of or as implied by their sovereignty.

What is the meaning of the ambiguous term "sovereignty" as used in the Declaration? We may justifiably assume that in this declaration "sovereignty," usually defined as "supreme authority," has a meaning not incompatible with the existence of an international law which imposes duties and confers rights upon States. For "the re-establishment of law and order and the inauguration of a system of general security" are,

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1. N. Y. Times, Nov. 2, 1943, p. 16, cols. 1-4.

according to the same Declaration, a war aim of the four States, and the "law and order" to be reestablished for the purpose of inaugurating a system of general security can only be the Law of Nations, the international legal order as a set of norms binding upon the States. If it is premised that the States have duties imposed and, consequently, rights conferred upon them by international law, they must be considered as subjected to international law, but the figurative expression "to be subjected" means only the relationship of subjects to a legal order which imposes duties and confers rights upon them. Therefore, the sovereignty of the States, as subjects of international law, is the legal authority of the States under the authority of international law. If sovereignty means "supreme" authority, the sovereignty of States as subjects of international law can mean, not an absolutely but only a relatively supreme authority. A State's legal authority may be said to be "supreme" insofar as it is not subjected to the legal authority of any other State; and the State is then sovereign when it is subjected only to international law, not to the national law of any other State. Consequently, the State's sovereignty under international law is its legal independence from other States. This legal independence is the usual significance attributed to the term by writers on international law.

Occasionally, sovereignty is also defined as supreme "power," and under this definition power must mean the same as authority, legal power, the competence of imposing duties and conferring rights. For if "power" does not refer to the realm of norms or values, but to the realm of reality determined by laws of causality, and means capability of producing an effect, it is then easy to demonstrate that sovereignty as a supreme power in this sense cannot be a characteristic of States as legal entities. For States differ very much from each other with respect to their actual power. Compared with and in relationship to a so-called Great Power, a State like Lichtenstein has no power at all, although it is also called a Power in diplomatic phraseology. If "power" means actual power, that is, the capacity to bring about an effect, "supreme" power would, moreover, mean to be a first cause, a *prima causa*, and, in this sense, only God as the Creator of the world is sovereign. This concept of sovereignty in terms of causality is a metaphysical, not a scientific one, derived from a tendency to deify the State which inevitably leads to a political theory which is rather a theology than a science of the State. Sovereignty in the sense of international law can mean only the legal authority or competence of a State limited and limitable only by international law and not by the national law of another State.

The term "equality," designating an essential characteristic of the States as subjects of international law, seems at first glance to signify that all States have the same duties and the same rights. This statement, however, is obviously not correct for the duties and rights established by

international treaties constitute a great diversity among States. Consequently, the statement must be restricted to general customary international law. But even according to general customary international law, all the States have not the same duties and rights. A littoral State, for example, has other duties and rights than an inland State. The statement must be further modified as follows: According to general international law all the States have the same capacity of being charged with duties and of acquiring rights; equality does not mean equality of duties and rights, but rather equality of capacity for duties and rights. Equality is the principle that under the same conditions States have the same duties and the same rights. This is, however, an empty and insignificant formula because it is applicable even in case of radical inequalities. Thus, a rule of general international law conferring privileges on Great Powers could be interpreted as in conformity with the principle of equality, if formulated as follows: any State, on the condition that it is a Great Power, enjoys the privileges concerned. The principle of equality so formulated is but a tautological expression of the principle of legality, that is, the principle that the general rules of law ought to be applied in all cases in which, according to their contents, they ought to be applied. Thus the principle of legal equality, if nothing but the empty principle of legality, is compatible with any actual inequality.

It is, therefore, quite understandable that most of the writers on international law try to attribute a more substantial import to the concept of equality. When characterizing the States as equal, they mean that according to general international law no State can be legally bound without or against its will. Consequently, they reason that international treaties are binding merely upon the contracting States, and that the decision of an international agency is not binding upon a State which is not represented in the agency or whose representative has voted against the decision, thus excluding the majority vote principle from the realm of international law. Other applications of this principle of equality are the rules that no State has jurisdiction over another State (and this means over the acts of another State) without the latter's consent—*par in parem not habet iudicium*—and that the courts of one State are not competent to question the validity of the acts of another State insofar as those acts purport to take effect within the sphere of validity of the latter State's national legal order. Understood this way, the principle of equality is the principle of autonomy of the States as subjects of international law.

According to traditional doctrine, the equality of the States in the sense of autonomy is derivable from their sovereignty. Actually, however, it is not possible to derive from the sovereignty of the State—that is, from the principle that a State is subjected only to international law, not to the national law of another State—the rules that no State can be legally bound without or against its will, that international treaties are binding

only upon the contracting States, that a State cannot be legally bound by the decision of an international agency if it is not represented in this law making body or if the State's representative has voted against the decision, that no State has jurisdiction over the acts of another State, and so on. These rules may or may not be rules of positive international law and the sovereignty of the States may be a consequence of these rules, not the rules a consequence of sovereignty.

It is an illusion to believe that legal rules can be derived from a concept such as sovereignty or any other legal concept. Legal rules are valid only if they are created by legislation, custom, or treaty; and the legal rules constituting the so-called equality of States are valid not because the States are sovereign, but because these rules are norms of positive international law. But these norms have, according to the same international law, important exceptions. There are international treaties which, according to general international law, impose duties upon third States, as, for example, treaties establishing so-called international servitudes, or treaties establishing a new State and at the same time imposing obligations upon it.<sup>2</sup> There are cases where a State has jurisdiction over the acts of another State without the latter's consent. By a treaty an international agency may be established in which only a part of the contracting States are represented and which is authorized by the treaty to adopt by majority vote norms binding upon all the contracting States. Such a treaty is not incompatible with the concept of international law or with the concept of the State as subject to international law; and such a treaty is a true exception to the rule that no State can be legally bound without or against its own will. The fact that the competence of the international agency is based on the consent of all the States concerned because the competence of the agency is the result of a treaty concluded by all the States which may be bound by the majority decisions of the agency, does not permit the conclusion that all the decisions of the agency are adopted with the consent of all the States which are contracting parties to the treaty and that, consequently, no decision is adopted without or against the will of one of the States bound by the decision. This is a fiction, which is in open contradiction to the fact that a State which is not represented in the agency has in no way expressed its will with reference to the decision and that a State whose representative has voted against the decision has expressly declared its opposite will.

The fact that a State has, by concluding the treaty, given its consent to the competence of the agency established by the treaty is quite compatible with the fact that the State can change its will, expressed at the conclusion of the treaty. This change of will is legally irrelevant, however, since the contracting State remains legally bound by the treaty, even

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2. As, for example, Danzig or the Vatican State.

if it ceases to will what it declared to will at the moment it concluded the treaty. Only at that moment is concordance of the wills of the contracting States necessary in order to create the duties and rights established by the treaty. The fact that the contracting State remains legally bound by the treaty without regard to a unilateral change of will clearly proves that a State can be bound even against its will and that the autonomy of the State under international law is not, and cannot be, unlimited. The will whose expression is an essential element of the conclusion of the treaty is not at all the will which the State has, or has not, with respect to the decision adopted by the agency established by the treaty.

Since it is undoubtedly possible that such a treaty can be concluded by sovereign States on the basis of general international law, it is a misuse of the concept of sovereignty to maintain that it is incompatible with the sovereignty of the States to establish an agency endowed with the competence to bind by a majority vote States represented or not represented in the law-making body. This is not a logical impossibility, as is supposed by those who base their arguments on the concept of sovereignty. What is logically possible may, however, be politically undesirable. By a treaty establishing an agency competent to adopt decisions binding upon the contracting States that are not represented in the law making body or have voted against the decision, the freedom of action of the contracting States is certainly much more restricted than by any other treaty. Still the difference remains only a quantitative, not a qualitative one, since under any legal order unlimited freedom of action is impossible. Moreover, by the establishment of an agency endowed with true legislative power, an international community is constituted which differs from any other international community, but only in the degree of its centralization. But this, too, is a relative not an absolute difference because even this centralized community is based on an international treaty and, consequently, has an international character. It is not correct to say that such a community because of its centralization is a State and ceases to be an international community. There is no absolute border line between these two kinds of communities, one of which is constituted by national, the other by international law, for there is no absolute difference between national and international law; and national law can, upon occasion, arise from international law, as is the case when the constitution of a federal State is established by an international treaty. Therefore, neither the fact that a treaty establishing a legislative agency does very much restrict the freedom of action of the contracting States nor the fact that the community constituted by such a treaty is more centralized than other international communities usually are, justifies the argument that the establishment of a legislative agency is incompatible with the nature of international law or, what amounts to the same, with the sovereignty of the

States. It may, however, be incompatible with the interest of the States, whose governments do not wish to be so much restricted in their freedom of action by a relatively centralized international organization, and, therefore, refuse to conclude a treaty constituting such centralized community.

We can, of course, define sovereignty as we please and thus define it in a way that submission to an agency endowed with legislative power is incompatible with sovereignty. We can, however, derive from this concept of sovereignty only what we have purposely put into its definition. Consequently, the incompatibility derived from our definition means, at bottom, that something is incompatible with our wishes. And it is characteristic of jurists to present as logically impossible that which is politically undesired because at variance with certain interests. The concept of sovereignty has served this important function ever since the French writer Jean Bodin introduced this idea into the theory of the State in order to prove that the power of his king could not be restricted because it was by its very nature "sovereign," and because sovereignty meant "the absolute and perpetual power within a State."<sup>3</sup> From this definition he deduced the "rights" of sovereignty and secured to the doctrine its overwhelming success.

## II.

The declaration that the Powers of the Moscow Conference intend to establish an international organization on the principle of "the sovereign equality of all peace loving States" probably means that these Powers are not willing to conclude a treaty constituting an international community more centralized than such communities usually are. Clearly, it means that the Governments concerned have not in view the establishment of an international agency endowed with legislative or executive power, an agency having the character of a true government. As far as the governmental functions of the future international community are concerned, we can hardly expect a more efficient competence than that which the Covenant of the League of Nations conferred upon the Council and the Assembly. Both were hampered by the principle of sovereign equality carefully maintained by the Covenant—the principle that no State can be bound without or against its will. Consequently, both agencies were able to adopt decisions binding upon the members only by unanimous vote and with the consent of the members not represented in the body. It is superfluous to remind that these agencies did not and could not fulfill their task of guaranteeing the collective security, the peace of the world, the task for which the League was erected. If this end is to be pur-

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3. BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* (Paris, 1576) 125.

sued more successfully, but within the narrow limits of the principle of "sovereign equality," the center of the international organization must, then, not be placed in an agency which presents itself as its government and which can be, in reality, only a sham government. The center of gravity must be shifted to an agency whose functions are not paralyzed by the principle of sovereign equality.

The only agency not so paralyzed is an international court. It is a fact that the sole international organs whose procedure is not subjected to the rule that no State can be legally bound without or against its will are international tribunals. These agencies are competent to adopt decisions by a majority vote, and their decisions are binding upon the States which have established the tribunal by an international treaty. Nor are the contracting States "represented" in the tribunal. For a person is legally "represented" by another person if the latter is bound by the instructions of the former; and an international judge in the true sense of the term is, at least in principle, independent, particularly from the State by which he has been appointed. To be appointed by an authority does not necessarily imply to be subjected to that authority. And an international "judge" does not "represent" the State by which he has been appointed, in contradistinction to a member of an international government who, indeed, "represents" the State which has appointed or delegated him, since he has to carry out the instructions given to him by his State. A person has the character of a "judge" only if he is not legally bound by instructions of the government which has appointed him. There are even international tribunals whose members are not or, at least partly not, appointed by the States bound by the decisions of the tribunal, such as the Permanent Court of International Justice, whose members are elected by the Council and the Assembly of the League of Nations, not by contesting States, or a tribunal of arbitration composed equally of judges appointed by the contesting states and authorized to choose together a chairman or umpire.

Yet the establishment of an international tribunal composed of judges not representing the contesting States and competent to adopt by majority vote decisions binding upon the contesting States is generally considered compatible with the sovereignty and equality of the States. This compatibility may be attributed to the idea that international tribunals are competent only to apply positive international law to the disputes they have to settle, and cannot impose by their decisions new obligations or confer new rights upon the contesting States. It seems that the principle of the sovereignty and equality of the States is maintained only for the purpose of foreclosing the possibility that new obligations might be imposed upon an unwilling State (implying new rights of its opponent).



## III.

The League of Nations had not only a kind of government, the Council and the Assembly, but also a tribunal, the Permanent Court of International Justice. This Court, however, was not placed at the center of the League but, so to speak, at its periphery. For the members of the League were not obliged to submit their disputes to the Court or to any other tribunal. And the Permanent Court of International Justice established according to Article 14 of the Covenant has no compulsory jurisdiction. Even the so-called "optional compulsory" jurisdiction provided for by Article 36 of the Statute of the Court is not compulsory jurisdiction in the true sense of the term because the States are free to submit to this jurisdiction or to submit merely for a certain period of time or only with respect to certain disputes. In general, the members of the League had the choice of submitting their disputes to the Court, to a special tribunal of arbitration, or to the Council of the League; and the procedure of the Council did not guarantee a peaceful settlement of all the disputes brought before it. This agency was a political, not a judicial organ and, consequently, in no respect fitted for that purpose. Nor did the Covenant of the League of Nations exclude the possibility of disputes which could not be settled in a peaceful way, and, consequently, the Covenant could not exclude war as a means of settling disputes. The Briand-Kellogg Pact, which tried to do this, was doomed to failure from the moment of its inception because it did not provide any obligatory procedure for the peaceful settlement of disputes.

The only way to establish on the principle of "sovereign equality" an international organization able to "maintain international peace and security" more efficiently than the League of Nations did, is the establishment of an international community whose main organ is an international court endowed with compulsory jurisdiction.<sup>4</sup> This means that the

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4. For many years the author has tried to show that the establishment of a court with compulsory jurisdiction is the first and indispensable step to an effective reform of international relations. See Kelsen, *LAW AND PEACE IN INTERNATIONAL RELATIONS* (1942); *THE LEGAL PROCESS AND INTERNATIONAL ORDER* (1934); *Revision of the Covenant of the League of Nations* in *WORLD ORGANIZATION, A SYMPOSIUM OF THE INSTITUTE ON WORLD ORGANIZATION* (1942) 392, *Discussion of Professor Whitehead's Paper* (1942) 75 *PROC. AM. ACAD. ARTS & SCIENCES* 11; *Essential Conditions of International Justice* in *PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* (1941) 70, 77 *et seq.*; *International Peace—by Court or Government?* (1941) 46 *AM. J. SOC.* 571. Since the outbreak of World War II, the demand for an international court with compulsory jurisdiction as a means for the maintenance of law and peace is supported in a steadily increasing degree by American public opinion. The American Branch of the International Law Association, the American Foreign Law Association, and the Federal Bar Association have adopted the following Resolution: "1. That a primary war and peace objective of the United Nations is the establishment and maintenance at the earliest possible moment of an

members of the new League are obliged not to resort to war or reprisals against each other, but to submit all their disputes without any exception to the decision of the court, and to execute the decisions and all the orders of the court in good faith. It does not mean the establishment of a centralized executive power, for the decisions of the court are to be executed against a reluctant State at the orders of the court (or an administrative agency as an auxiliary organ of the court) by the armed forces of the other members of the League. The establishment of a centralized executive power, a police force of the League, just as a central legislative organ, is certainly not compatible with the principle of "sovereign equality" in the sense of the term used by the Declaration of Moscow. Only the centralization of the judicial, not of the legislative or executive functions, is the direction in which a real reform of interstate relations can be sought within the limits laid down by the Moscow Conference for the future international organization.

#### IV.

This proposition is based on the fact that the establishment of international courts competent to settle disputes by majority vote decisions, binding upon States not represented in the court is actually considered to be compatible with the sovereignty and equality of the States. But is the statement still true if the court is endowed with compulsory jurisdiction, if it is competent to decide all disputes without any exception, not only so-called legal but also so-called political disputes? This question must be answered in the negative if it is assumed that so-called political conflicts are by their very nature not justiciable, so that they cannot be settled by the decision of a court applying positive international law. Political conflicts, in contradistinction to legal conflicts, are disputes in which the parties, or at least one party, base their respective claims and

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effective international peace among all nations based on law and the orderly administration of justice, and 2. That the administration of international justice requires the organization of a judicial system of interrelated permanent international courts with obligatory jurisdiction. 3. That instrumentalities, agencies and procedures should be instituted and developed to declare and make effective the considered will of the Community of Nations." Somewhat similar resolutions were adopted by the House of Delegates of the American Bar Association. The Federal Council of the Churches of Christ in America (New York), the National Catholic Welfare Conference (Washington), and the Synagogue Council of America adopted a common Catholic, Jewish, and Protestant Declaration on World Peace, Point 5 of which reads: "International institutions to maintain peace with justice must be organized. An enduring peace requires the organization of international institutions which will (a) develop a body of international law, (b) guarantee the faithful fulfillment of international obligations, and revise them when necessary, (c) assure collective security by drastic limitations and continuing control of armaments, compulsory arbitration and adjudication of controversies, and the use when necessary of adequate sanctions to enforce the law."

the rejection of the other party's claim, not on a rule of positive international law but on other principles, such as justice and the like. A party which bases its claim or its rejection of the other party's claim on other factors than positive law does so because it considers positive law unsatisfactory. But a recognition of political conflicts as not justiciable is the equivalent of a recognition that a State which in a certain case considers positive international law unsatisfactory to its interests has a legitimate reason for not submitting the case to the decision of a court applying positive international law. And this implies admission that international law is not binding upon a State if the latter does not recognize it as satisfactory to its interests. Obviously, this admission is in contradiction to the generally accepted principle that positive international law—such as it actually is—is binding upon the States regardless of whether they consider it satisfactory or not. And the doctrine that political conflicts, by their very nature, cannot be decided by a judicial decision applying positive international law is presented merely for the purpose of disguising this contradiction. While such a decision may be, from one viewpoint or another, politically not desirable, it is logically possible. In any dispute between two States, one State demands that the other behave in a certain way, and the other refuses to comply with the former's claim. The application of positive international law to the dispute means the establishment of whether or not a rule of positive international law exists obliging the State against which the claim is directed to behave in the way claimed by the other State. If such a rule exists, the claim has to be granted by the law applying agency; if no such rule exists, the claim has to be rejected. There is no third possibility. Any conflict is, therefore, logically justiciable,<sup>5</sup> and the doctrine of the unjusticiable character of so-called political conflicts is merely another example of the fallacy of declaring what is politically undesirable logically impossible.

Since it is possible to apply positive international law to so-called political conflicts, the establishment of a court with compulsory jurisdiction to which all disputes, so-called political conflicts included, must be submitted, is not incompatible with the sovereignty and equality of the States insofar as this incompatibility means that new obligations must not be imposed upon States against their will. If the States are obliged to submit all their disputes (political disputes included) to the decision of a court applying positive law, the States are obliged to treat all their disputes as legal disputes, just as the subjects of a State are obliged by national law to treat all their conflicts as legal disputes. The establishment of compulsory jurisdiction does not, therefore, abolish the sovereign equality of the States in the sense in which the term is generally understood; it merely puts an end to the possibility of settling a conflict by the employ-

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5. See Kelsen, *Compulsory Adjudication of International Disputes* (1943) 37 AM. J. INT. L. 397, 401 *et seq.*

ment of force in case the law to be applied to this conflict is considered by one or the other party to the conflict as not satisfactory to its interests. The establishment of compulsory adjudication of international disputes is a means—perhaps the most effective means—of maintaining positive international law.

It may be doubted, however, whether a court endowed with compulsory jurisdiction always will apply only and exclusively positive international law to the disputes submitted to its decisions, even though the court is not expressly authorized by its statute to apply other norms. It is probable that a court which has the power to decide all disputes without any exception will, in cases in which a strict application of positive law seems unsatisfactory to the judges, adapt the positive law to their idea of justice and equity. A new obligation may then be imposed and a new right conferred upon the contesting States, and the establishment of a court with compulsory jurisdiction may be considered incompatible with the sovereign equality of States, at least insofar as such a court does not apply only and exclusively positive international law. It is difficult, moreover, to prevent a court endowed with compulsory jurisdiction from applying other norms than those of positive international law.

This is not a decisive argument against the compatibility of a court exercising compulsory jurisdiction with the principle of sovereign equality. Insofar as an international tribunal creates new obligations by its decisions, it does not differ fundamentally from ordinary tribunals restricted to the application of positive law. The view that the decisions of such tribunals, though adopted according to the principle of majority vote by judges who are not exactly representatives of the States bound by the decisions, are compatible with sovereignty and equality is based on the idea that the application of positive law by a judicial decision has only a declaratory, not a constitutive character, and that the application of law differs essentially from the creation of law.

According to traditional doctrine, the law to be applied by the judicial decision exists prior to the decision; this preëxisting law is disputed only in respect to the relationship between the parties to the conflict. The dispute may refer to facts (*questio facti*) or to the law (*questio juris*), that is, to the existence of a general rule of law or to its interpretation. But a dispute referring to facts is also a dispute referring to law, although it is not the existence or interpretation of a general rule of law which is disputed; it is the applicability of this rule in the concrete case which one party claims and the other party denies; and this means that the individual norm, the concrete duty or right is disputed, which can, or cannot, be derived from the general rule depending upon the existence of the facts. Traditional doctrine maintains that a judicial decision applying positive law does not create law; it merely ends the dispute by establishing in an authoritative way the law valid for the case at hand.

It transforms, so to speak, disputed law into undisputed and, finally, undisputable law by ascertaining the general or individual norm which, though objectively existing, is subjectively disputed by the parties.

The mistake creeping into this doctrine consists in the failure to recognize that the authoritative establishment of a disputed fact as well as a disputed rule of law is not a merely declaratory, but a highly constitutive act. In case a fact is disputed, the judicial decision which determines that the fact has occurred in truth "creates" legally the fact and consequently constitutes the applicability of the general rule of law referring to the fact. In the sphere of law the fact "exists," even if in the sphere of nature the fact has not occurred. If a court of last instance declares that an individual has concluded with another individual a contract and has not fulfilled it, or that an individual has committed murder, the disputed non-fulfillment of contract or commission of murder are legal facts, even if, in reality, the defendant has not concluded a contract nor the accused committed murder. As a "legal" fact, that is as a fact to which the law attaches certain consequences (duties or rights), the fact and, accordingly, its consequences are "created" by the judicial decision; and it is only as a legal fact that it has significance. In case a general rule of law is disputed, because the existence or the meaning of the rule is doubtful, the decision of the court interpreting the legal order or a special rule of that order is not less creative than the authentic and final ascertainment of a fact as the essential condition of the application of a general legal rule. There is no absolute antagonism between application and creation of law, since even a law applying act is at the same time a law creating act.

There is, to be sure, a certain difference between a judicial decision applying an undisputed rule of positive law to a disputed fact or a disputed rule of positive law to an undisputed fact, and a judicial decision applying a new, that is, not preëxisting rule, thus altering existing law and adapting it to changing circumstances. But the difference is not so strongly marked as it seems to be, because the interpretation of positive law, necessarily connected with every act of applying law, always implies more or less an alteration of law. Ordinary national courts authorized to interpret law and not to alter it always tend to bring about a gradual evolution of the law. Consequently, the difference between an international court endowed with compulsory jurisdiction and, therefore, more inclined to adapt existing law to changing circumstances than other international tribunals, and an international court without compulsory jurisdiction is not so great that submission to the former could be refused because of incompatibility with the principle of sovereign equality of States. It is not the difference between courts with and courts without compulsory jurisdiction which is decisive in respect to this principle. It is the essential difference which exists between the slow and almost imperceptible evolution of law through judicial decisions and the more or less

drastic change of the law through legislative agencies, that is, organs created for the sole purpose of substituting new for old law. This difference explains why submission to legislative organs, but not to courts, is considered incompatible with the principle of sovereign equality. The principle works as a protection against quick and relatively important changes, not against any change of the law which, by its very nature, is a dynamic, not a static, system.

A realistic examination of the actual administration of international justice would disclose that the true reason for the generally accepted view that submission to the decision of an international tribunal is not incompatible with the principle of sovereign equality is not so much the fact that those tribunals cannot impose new obligations upon contesting States, for this effect is almost unavoidable. It is rather the fact that judicial decisions are objective and impartial, and that they are not political decrees issued according to the principle that might goes before right, which is a negation of law. It is the fact that judgments, even if not the strict application of a preëxisting legal rule, are based on the idea of law, that is, on a rule which, although not yet positive law, should, according to the conviction of independent judges, become law and really becomes positive law for the case settled by the judicial decision. It is the submission to the law as a body of slowly and steadily changing norms which is not incompatible with the principle of sovereign equality, since it is only this law that guarantees the coexistence of the States as sovereign and equal communities.<sup>6</sup>

It is, therefore, not too optimistic, perhaps, to expect that within the international organization to be established, according to the Moscow Declaration, for the maintenance of international peace and security a court endowed with compulsory jurisdiction may be instituted. Such a court or system of interrelated international courts endowed with compul-

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6. A court with compulsory jurisdiction was the object of the Convention for the Establishment of a Central American Court of Justice, signed on December 20, 1907, at Washington, by the Governments of the Republics of Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador. Article I of the Convention reads: "The High Contracting Parties agree by the present Convention to constitute and maintain a permanent tribunal which shall be called the 'Central American Court of Justice,' to which they bind themselves to submit all controversies or questions which may arise among them, of whatsoever nature and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding." According to the preamble the Convention was concluded by the contracting States "for the purpose of efficaciously guaranteeing their rights and maintaining peace and harmony inalterably in their relations, without being obliged to resort in any case to the employment of force." Submission to the compulsory jurisdiction of the court was not only considered as compatible with the sovereignty and equality of the contracting States, but a means of guaranteeing their rights as sovereign and equal subjects of international law. The Convention was concluded only for ten years. The court came to an end in 1918.

sory jurisdiction, even if not combined with a centralized executive power and a police force, would constitute the first indispensable step toward a real pacification of the international community. If, however, this hope is, indeed, too optimistic, if it shall be impossible to realize this minimum of centralization because it will be considered as incompatible with the "sovereign equality of all peace loving States," there will, then, be no hope at all for a real improvement of international relations, and the peace organized by those States will prove to be nothing more than a short armistice between this and another world war.