

# REVIEWS

THE LAW OF THE UNITED NATIONS. By Hans Kelsen. New York: Frederick A. Praeger, Inc., 1950. Published under the auspices of The London Institute of World Affairs. Pp. xvii, 903. \$18.75.

IN accordance with his "pure theory of law", Professor Hans Kelsen has presented in this 900 page treatise a "juristic—not a political—approach to the problems of the United Nations." The task of a scientific commentary such as this, according to the author, is to find by analysis all the possible interpretations of the legal norms (i.e. the provisions of the United Nations Charter); and then to reveal their consequences, leaving it to the law-applying organs to choose from the various possible interpretations the one which they for political reasons consider to be preferable and which they alone are entitled to select (p. xvi). The view that it is the function of interpretation to find the 'true meaning' of law is for Kelsen a fiction, adopted to maintain the illusion of legal security. The legal function of interpretation is, rather, to render binding one of the several meanings of a legal rule, all of which are logically possible. Consequently, authentic interpretation can only be performed by those who are authorized by the law to do so. Interpretation by a person not authorized is legally irrelevant; hence the scientific commentator should present all interpretations, including even those which are in his opinion undesirable. It is on the basis of these principles that the author claims to have separated law from politics in this "critical analysis" of the United Nations Charter.

There is an element of irony in the fact that this non-political study was thrust almost immediately after publication into the political arena of the United Nations. It was Mr. Vyshinsky, I think, who first commended it to the attention of the General Assembly; but western representatives were not far behind in finding passages to support their views.<sup>1</sup> No doubt there will be many more citations, for there is a number of reasons why this book is bound to appeal to delegates as a source of quotation. One such reason obviously is the international reputation of its author, particularly his prestige in European and Latin American countries. Another is the comprehensive and systematic character of the book, which covers almost all of the basic legal problems presented by the Charter.

More important, perhaps, is the fact that delegates—and other readers—are likely to be impressed with the fundamental approach of the book: its close analysis of the structure of rules and their inter-relationships; the eschewing of political and ideological considerations; the emphasis on legal duties rather than purposes and functions; the awareness of the creative role played by the law-applying organs. These guiding principles (which are derived from, though not logically dependent on, Kelsen's pure theory)

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1. See Summary Records of 362d, 363rd and 364th meetings of First Committee of General Assembly (October 13 and 16, 1950).

are welcome elements in a study of this kind; they promise objectivity, toughmindedness and technical skill, attributes which in a legal treatise will command more respect than idealism or imagination.

For these reasons, the book may exert a significant influence on developments in the United Nations. A reviewer is, therefore, under a special obligation to examine it critically; to see, first, whether the book does, in fact, live up to the principles it preaches; and secondly, to consider the implications of the approach taken.

The first question is whether Kelsen does present, as he claims to do, "all possible interpretations" (p. xvi). Of course, he does not; and it hardly seems worthwhile to speculate on the special meaning he might give to the word "possible". What is more to the point is that on a number of questions Kelsen fails even to present the interpretations which have, in fact, been advanced by member states and in some cases adopted by the competent organs of the United Nations. Instead, Kelsen has presented as "correct" his own interpretation, either ignoring the other views or merely characterizing them as doubtful. To demonstrate this fully would take far more space than a book review permits; but it does not seem superfluous, considering the reputation of the author, to give some specific examples.

I am tempted to begin with the following quotation: "At the moment the League of Nations ceased to exist, not only its Covenant but also the Mandate Agreements to which the League was a contracting Party—and its existence was an essential condition—ceased to be valid." (p. 598). As far as I can see, no other "possible" interpretation is presented by Kelsen. But the interesting fact is that the International Court of Justice, the principal judicial organ of the United Nations, has expressed precisely the opposite opinion: it concluded in the recent South West African case that the international Mandate applicable to that territory has continued in force despite the dissolution of the League.<sup>2</sup> Even more striking is that the Court's opinion was unanimous with respect to this point, a rare occurrence for fifteen judges representing diverse legal systems. It is true that this advisory opinion would have been mentioned by Kelsen had it been rendered prior to the writing of this book; but this only underlines the fact that Kelsen could present as his unqualified interpretation a position which was subsequently unanimously rejected by the Court and, for that matter, previously rejected by a considerable number of Governments in the United Nations and at the last session of the League of Nations.<sup>3</sup>

Another example which warrants mention is Kelsen's conclusion that the United Nations has legally only the power to enter into those international agreements which it is authorized by specific provisions of the

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2 I.C.J. REPORTS 128 (1950).

3. See statements by United Kingdom, Union of South Africa, Australia, New Zealand (all mandatory Powers) in LEAGUE OF NATIONS OFFICIAL JOURNAL, Spec. Supp. No. 194 (1946). See also Res. 181 (II) of the General Assembly of the U.N. (1947) making a recommendation to the U.K. as the mandatory Power for Palestine.

Charter to conclude (p. 330). This opinion is presented without discussion of any other possible interpretation, although the General Assembly of the United Nations, which is surely a competent organ for this purpose, has concluded a half dozen important agreements which are not specifically authorized by the Charter. Nor does Kelsen mention in this connection the advisory opinion of the International Court of Justice in April 1949 with respect to reparation for injuries suffered in the service of the United Nations, perhaps because it too came too late for the book. Nevertheless, it is pertinent to note that in this opinion the Court stated that "Under international law the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."<sup>4</sup> It was noted by the Court that this "principle of law" was also applied by the Permanent Court of International Justice in an advisory opinion concerning the ILO given in 1926. It would have been interesting to have Kelsen consider this principle rather than to have assumed that the Organization necessarily had only those special capacities conferred upon it by particular provisions.

On many other questions Kelsen manifests the same tendency to give the Charter a more restrictive interpretation than that adopted by the competent organs. Even in the case of the Security Council, whose broad responsibilities and powers are recognized by Kelsen, he is inclined to adopt a narrower interpretation than the Council or Member Governments. Thus, he states flatly (on page 284) that it is "impossible" to interpret Article 24 (which is the basic article setting forth the Council's responsibility to maintain peace and security) so as to confer upon the Council powers not specifically given to it by other articles of the Charter. However, the Security Council itself (Australia alone dissenting) adopted this "impossible" interpretation when it assumed the responsibilities conferred on it in regard to Trieste by the Peace Treaty with Italy.

Another instance in his suggestion that the Security Council is not allowed to consider disputes under chapter VI (which relates to peaceful settlement) if in the opinion of one of the contesting parties the dispute is essentially within its domestic jurisdiction, even though there may be no doubt that the dispute may endanger international peace (pp. 788, 789). Although Kelsen cites statements by the Netherlands and British delegations in support of this view, he does not in this connection point out that the majority of the Council rejected this position in both the Indonesian and Spanish cases.<sup>5</sup> In the light of the record, there is little reason to believe that the Council would regard the domestic jurisdiction clause as applicable to a dispute or situation deemed likely to endanger international peace.

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4. See I.C.J. REPORTS 182 (1949).

5. See, for example, REPORT OF SUB-COMMITTEE ON SPANISH QUESTION, U.N. DOC. S/75, p. 14 (1946).

As might be expected, Kelsen's rigid analysis leaves little room for measures against aggression taken in the Korean case and included in the Acheson proposals recently adopted by the General Assembly. To Kelsen "effective collective measures" can only mean enforcement action taken by the Council under Articles 41, 42, 43 of the Charter (pp. 204, 281). In fact, in the Korean case the Council provided for the use of armed force merely by means of a "recommendation" under Article 39, which was certainly an effective measure in that case, although it presumably would not have been considered proper by Kelsen (p. 734). In adopting the Acheson proposals, the General Assembly decided that it may make recommendations for collective measures, including the use of armed force. As noted by Vyshinsky in the debate on this resolution, Kelsen's analysis of the term "action" as used in Article 11(2) suggests that such recommendations may not properly be made by the General Assembly but must be referred to the Security Council (p. 205). The General Assembly itself, by a large majority, has implicitly rejected this narrow interpretation of its competence.

It is also not surprising in the light of the examples just given, that on somewhat more controversial issues Kelsen consistently adopts what might be called the "principle of ineffectiveness" of the Charter. Thus, he considers the many references to human rights as essentially the expression of pious hopes, devoid of legal obligation (p. 29); and he rejects the pertinent "pledge" in Article 56 (considered important in San Francisco) as legally "meaningless and redundant" (p. 100). Admittedly, these are debatable questions and Kelsen's analysis has considerable force. But here again, it must be noted that Kelsen's practice varies from his principles, for he does not really present the other possible interpretations, although such other interpretations may easily be found in the records of the General Assembly debates on various human rights resolutions.<sup>6</sup>

It might perhaps be said in reply to this point that the fact that Governments and U.N. organs have taken certain positions shows only that such interpretations are politically or psychologically "possible", not that they are logically possible; and that Kelsen is, *ex hypothesi*, concerned only with logical criteria, not with a description of actual behavior. It is of course true that the validity of a purely logical analysis, like that of pure mathematics, is independent of actual cases; but the examples cited above (and many other similar cases could be cited) have more than a factual significance. They reveal, it seems to me, the logical (as well as the empirical) weaknesses of Kelsen's analysis. For there is nothing in the "laws of logic" to warrant Kelsen's rejection of these other interpretations; indeed, in some cases, his narrow interpretation may be attributed to a failure to use logical analysis.

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6. Kelsen quotes the resolutions on Indians in South Africa (1946) and Russian wives (1948) but does not present the statements of delegates which in support of these resolutions give interpretations which are at variance with his conclusions. In general, the most impressive answer to Kelsen on these human rights questions can be found in Prof. Lauterpacht's valuable study on INTERNATIONAL LAW AND HUMAN RIGHTS (1950).

Thus, when he says the Organization may only make agreements which are specifically authorized (*supra*), he fails to consider (as a logician would and as the International Court did) the "necessary implications" to be drawn from the specific powers. After all, it is a primary function of logical analysis to deduce consequences from postulates and thereby to broaden the scope of principles and widen the range of possibilities.

Kelsen's apparent use of "logic" to support restrictive interpretation results largely from his tendency to give the concepts of the Charter fixed and limited meanings, almost as though they were precisely defined mathematical symbols. Obviously this tendency makes it easier to find logical inconsistencies and technical deficiencies. But there are certainly no "logical" reasons why the admittedly vague and imprecise language of the Charter must be restricted in meaning. The Charter is surely not to be construed like a lease of land or an insurance policy; it is a constitutional instrument whose broad phrases were designed to meet changing circumstances for an undefined future. Any doubt as to the flexibility and adaptability of the Charter must surely have been resolved by recent developments.

These observations seem so close to truisms that one is inclined to wonder whether Kelsen's neglect of them is not due to his own bias—or, to put it another way, whether his "purely juristic" analysis has not actually been influenced by ideological (or shall we say, crypto-political) considerations. For throughout the book there seems to be so sustained an effort to discover the maximum of inconsistency—even absurdity—in the Charter, to characterize provisions as "superfluous" and "meaningless", to cast doubt on the legal basis of even the most innocuous decisions of U.N. organs<sup>7</sup> that one is apt to infer that Kelsen's underlying objective is a revision of the Charter (see p. xvii) and a building of a new Organization closer to his own heart's desire. This is not the place to debate the political wisdom of tearing down to build anew; but it might be said that in the present state of affairs, many of us are grateful that we have at least an imperfect instrument for world order and, more important, that this instrument is being construed not in terms of its deficiencies but in order to make effective its principles and purposes.

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AN INTRODUCTION TO LEGAL REASONING. By Edward H. Levi. Chicago: University of Chicago Press, 1949. Pp. 74. \$2.00.

ALTHOUGH he begins with a statement as to the "pretense" of law, Dr. Levi's book is much more temperate than most of what has been said of the

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7. There is even the suggestion that the General Assembly had no legal basis for adopting a U.N. flag or declaring "United Nations Day"! (p. 194, footnote 5).

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