

self be valid it should not be hamstrung by the invalidation of these powers because they are to be exercised beyond the period of the Rule against Perpetuities. The failure to distinguish between the two kinds of powers would seem to have arisen from the tendency already deprecated of making the law of perpetuities a mechanical thing turning exclusively on remoteness of vesting.²³

The fourth edition is worthy of its predecessors.

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LAW AND PEACE IN INTERNATIONAL RELATIONS. By Hans Kelsen.† Cambridge: Harvard University Press. 1942. Pp. xi., 181. \$2.00.

In these six lectures, delivered at Cambridge in March 1941, the distinguished Viennese scholar, Dr. Kelsen, now at Harvard, presents his views, some previously announced, on (1) the concept of law, (2) the nature of international law, (3) international law and the State, (4) the technique of international law, (5) federal State or confederacy of States, and (6) "international administration" or "international court." The first four deal with analytical jurisprudence, disconnected from any social content; the last two present the author's views on the nature of the new organization, federation or confederation of States, which seems likely to evolve from the present conflict as a means of assuring a more intelligent international life, and concludes that the postwar effort of states should concentrate on the creation of an international court with compulsory jurisdiction of "all" disputes. This he thinks reflects a workable analogy to the growth of law within the primitive State, courts preceding legislation, and affords a basis for the hope that international development will follow the same course.

Since it cannot be assumed that Dr. Kelsen is unaware of the economic and political source of international conflict and their potency in qualifying the claims of law as a social control, it must be assumed that the author's treatment of the legal concepts is a deliberate choice of one aspect of the subject only, and in the reviewer's opinion, by no means the most significant. International law in a revolutionary period weakens before the

²³ See page 157 *supra*.

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immediate prevalence of force, and among so dynamic a group of power entities, never had more than a limited claim to social control. The attempt of some erroneously labeled "peace" advocates to endow it with the coercive instrumentalities of municipal law has been a peace-destroying agency, for coercion, centralized or decentralized, is not congenial to peace among theoretical equals. By seeking to "enforce peace" among power entities that device, elaborated in the Covenant of the League of Nations, has invoked war to promote "peace," postponing the end to the Greek Calends but insuring the perpetuity of the means.

The first four lectures of this book are admittedly conceptual in character. While the author realizes that international law cannot be law in the same sense as municipal law, he is nevertheless tempted to seek in international law the element of coercion which he regards as the essence of municipal law, and the characteristic which distinguishes law from other forms of social control, like ethics and morals. The State's power internally to establish the norms of behavior, to establish by courts the existence of departures from the norm, called delicts, and the State's power through societal agents to penalize or apply sanctions like damages, are the indicia of a mature legal system. Since some of these elements are necessarily lacking from a system which purports to govern, within certain limits, a group of independent, so-called sovereign States, the learned author might have clarified the subject by pointing out the fundamental *differences* between international law and municipal law, instead of exploiting doubtful analogies. He is correct in saying that any "community" is possible only if there is mutual respect for the members' rights, and might have added that this necessary element of cohesion is now sadly lacking in international relations, thus making exceedingly difficult the uphill task of restoring confidence. This, the author admits (p. 167), is an indispensable condition of obtaining the consent of States for the compulsory jurisdiction of an international court, and, he might have added, for the existence of workable relations, legal, economic, or political, among States.

In dealing with the nature of international law Dr. Kelsen recognizes that the limits of the attainable in international organization is a confederation or union with limited centralization which shall not impair statehood too greatly. While probably true, the author would doubtless admit that this proposal is purely formal only, and that whether this is a "solution of the

peace problem" (p. 28) depends upon hundreds of other substantive social facts, like tempering the unfair competition which distinguishes the life of States. Dr. Kelsen, in building a supposed analogy between municipal and international law, is much concerned with the establishment of international delict and sanction, the former not privileged under the system, the latter a penalty and privileged. He concludes that reprisals and war may be either delicts or sanctions, the latter depending upon whether the reprisal or war is "rightful." Stumped by the necessity of establishing a criterion of rightfulness and a qualified judge of the question, he is led to espousing the ancient criterion of the "just war," for which he confesses a predilection as a factor in considering international law as "true" law. But he fails to make clear that the "just war" has always been a theoretical conception only and has proved unworkable (even in the Covenant of the League and the Kellogg Pact), because every State asserts righteousness in its cause and there is or can be no impartial or accepted judge. And if war is deemed "morally" wrong, how account for the recent announcement of an eminent statesman that it is "absurd and suicidal" for neutrals to stay out of the present war?

The "*bellum justum*," the author is constrained to admit, is actually an intellectual issue, arising only during a period of great wars. As an honest scholar, Dr. Kelsen is forced to concede the impracticability of a workable distinction between licit and illicit wars (p. 47) and might have added the corollary that the concept of "aggressors" is equally useless.

The eradication of international conflict, like the cause, lies infinitely deeper than any legal apparatus could supply. For that reason, objections to the *bellum justum* conception are not, as the author states (p. 48), objections to the legal character of international law, but objections founded on practical grounds, which have nothing to do with legal criteria. Dr. Kelsen concedes that international law is a primitive system, but sometimes does not draw the necessary conclusions from that admission. At one point (p. 33) he admits that there is a school of thought—to which the reviewer confesses allegiance—which regards war as neither a delict nor a sanction, in other words, as a disease which afflicts mankind, and that it is better, while taking every measure to cure the disease and remove its causes, to regulate it than to leave it unregulated. That function of international law should have had more of the author's attention, since the human race seems pretty recalcitrant and cannot be

greatly changed by scholars. Self-help is not the greatest of evils, although it evidences a primitive system. I should doubt whether the author would insist upon his statement that if we do not regard war as in principle forbidden, then international law cannot be considered a legal order. Quite the contrary; it is merely a narrowly limited legal order, a qualification which militates against such grandiose solutions as provided by articles 12-17 of the Covenant of the League, which Dr. Kelsen correctly criticizes, and which also militates against the likelihood of any early adoption of Kelsen's suggestion of a compulsory jurisdiction of an international court for "all" disputes. Even if war were denounced as illegal, that would not help to eradicate it. By admitting at the very end of the chapter that the *bellum justum* is a theory and not a fact (p. 54), Dr. Kelsen, it is presumed, would hardly wish to subscribe to the view that international law is also a theory and not a fact. If he says that it is not "true" law, that is only because he has made his own definition of law in the guise of a mature municipal law, as did Austin, and necessarily finds divergencies from that system in international law.

In the third chapter, Dr. Kelsen, having deplored the non-legal character of international law, comes now to its defense and goes so far as to say (p. 56), "International law can be regarded as true law because it can be regarded as a coercive order which reserves to the international community the use of force—establishes a monopoly of the use of force." This sounds strange, since he had just stated that this is a condition contrary to fact, as it of course is. There is and can be no centralized community force, and the illusion of the League of Nations centralizing the command of force at Geneva was bound to be punctured. The verbalism is saved by Dr. Kelsen's suggesting that a State which exerts self-help as a sanction [approved (by whom?) reprisal or war] is acting as an organ of the international legal community. So Corfu was sanctified by the Conference of Ambassadors in 1923, but that hardly enhanced the prestige of law or the League. But "forceful" interferences by some nations in the sphere of interests of other nations, as the author suggests, are by no means the only ones that awaken interest and stimulate sanctions, community or otherwise. More injurious are tariffs, quotas, trade and immigration restrictions of all kinds. These arouse deep resentments, but they are licit under international law, and a court of compulsory jurisdiction would under existing law only confirm them; if it were to have

jurisdiction to change them and thus impair what is deemed a national prerogative, we would truly be living in a new world hardly conceivable. Its jurisdiction cannot be self-assumed, but would have to be granted by the nations, a fact which militates against optimism as to its powers. Dr. Kelsen criticizes Austin's view that international law is international morality because there is no superior-inferior relation as in municipal law; Kelsen disputes such a position, even in municipal law, and concludes that the relation of the State (law) to the individual is not materially different from the relation of international law to States—the relation of a part to the whole.

In the chapter on international law and the State, Dr. Kelsen endeavors to show that international law can be called law in the same sense as national law, which the second chapter, it seems to the reviewer, had undertaken to deny. Obviously, labels do not solve this issue, but perhaps confuse it. Clear it is, that international law is created in a different way, is on the whole applied in a different way, and has sanctions that are different from those of municipal law. It is a different type of law than municipal, applied by different agents and deals with a subject matter, national States, entirely different from individuals. Why time should be taken to assimilate the irreconcilable, even for academic purposes, is hard to see, and if time were available, it could, I think, be proved that the effort has done the cause of clear thinking and the cause of peace irretrievable injury.

Dr. Kelsen introduces many ingenious devices and conceits which are of interest to the student of jurisprudence, e.g., the centralization and decentralization in the creation and application of law in the two systems, the control of individuals by international law through the agency of national States, etc. His view on piracy differs from that of Professor Bingham in the *Research on International Law* (p. 92). Dr. Kelsen in the fourth chapter concedes a difference in technique between the municipal and the international system. That the sanctions are directed to States as a whole does not, I think, indicate that the principle of collective responsibility has any special significance, since obviously States are composed of numerous individuals; it is true that many international obligations must be transmuted into municipal legislation before the individual can be effectively bound to any societal agents. But only State agents and not the individual citizen can as a rule bind the nation, the subject of international law. Dr. Kelsen might have mentioned the

important topic of civil responsibility of the State in international law, one of the most legal of the subjects of international law, which has been worked out by diplomacy and arbitration to an established place in the hierarchy of public liability. Since this is still largely based on fault, it is hard to perceive how the statement is justified (p. 102) that neither intent nor negligence, but only absolute liability, forms an essential element of the international legal delict. Hundreds of cases to the contrary have been systematized by international tribunals and writers. One might therefore be disposed to refute the suggestion (p. 112) that the norms of general international law—customary law—provide only the possibility of establishing treaty relations. And this depreciation of the scope of the norms of international law might weaken the force of the proposal that an international court with compulsory jurisdiction affords a way out of our difficulties.

The fifth chapter, on the distinction between a federal State or confederacy of States, covers ground familiar to the American student of political science. Kelsen deplores the unanimity rule which a confederacy, the only feasible international organization, implies. This is one of his reasons for questioning the propriety or efficacy of international "administration" along either League or federation lines, and for preferring an international court, which might deal with important questions by majority vote. Kelsen points out what should always have been plain, that the execution of a sanction by a confederacy against a member State having control of its own army means war. Too bad that the framers of article 16 of the Covenant did not recognize this elementary axiom. Yet while demonstrating the impracticability of any league of States defending members against nonmembers (p. 155) or trying to compel member States to take part in a joint war in which they have no interest, Dr. Kelsen seems to think that members can be made to assume military duties against other members of the group "even if the only purpose is to maintain peace among the members." This seems to the reviewer highly doubtful, as it did to Hamilton and Madison in its application to knit so closely a federation as the United States. It is believed that no organization of so-called independent States can be devised on any wide scale "within which peace is assured" (p. 137). That is because no organization yet proposed has been assumed to have power to go to the heart of the problem, but has dealt with formalism and symptoms only.

Kelsen, with some justification, would leave States relatively unchanged, but lightly posits the idea that such States will agree to an international compulsory jurisdiction of "all" disputes. He insists on the democratic requirement of self-determination of States, whereas several students have demonstrated that this is profoundly inconsistent with sensible economic relations and ultimately with peace itself, even if there were agreement on what shall be the scope of the unit of self-determination.¹ Kelsen is skeptical of any union among transcontinental States and would approach the problem of international organization by gradual advances, omit community sanctions, and confine the next step to the establishment of an international court with compulsory jurisdiction. Aside from the objections to such jurisdiction which the author cites—and seeks to refute—there are many which he has overlooked, notably, the fact that such an organization needs a trustful atmosphere not likely soon to be restored, that nations have never been willing to grant a compulsory jurisdiction except within narrow legal limits, that the problems which cause conflict are rarely legal but economic and political in character, hardly of a type which a court could practically deal with and which nations are hardly today likely to entrust to an international court. Indeed, most conflicts do not arise out of particular disputes at all, but out of deep-seated resentments and hostile attitudes. Even if the court were expanded to include the power of conciliation, much ground must first be covered to remove the substantive barriers to international concord. Moreover, before progress can be made, all idea of "enforcing peace" by sanctions on the disfavored must be scotched, since that only militates against any chance of a willingness to cooperate in submitting economic or political problems to an international forum or to surrender any of the prerogatives of national sovereignty. While Dr. Kelsen fails to grapple with the fundamental factors making international relations what they are, he nevertheless covers a considerable sphere of State activity and with his customary learning and power of analysis has given us a provocative book.

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¹ See CARR, *CONDITIONS OF PEACE* (1942) c. 3; BUTLER, *THE LOST PEACE* (1942).

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