Editorial Comment

Hans Kelsen

October 11, 1886–April 15, 1973 *

The death of Hans Kelsen will be mourned by his family, his friends, by jurists, and scholars in the many fields to which he turned his keen analytical mind and pen. His literary output during a rich and long life was prodigious.[1] His fame spread rapidly and he attracted students from the four corners of the world. As early as 1934, Dean Roscoe Pound,[2] after reviewing the significant names in contemporary juristic thought—Jhering, Stammler, Gény, and Duguit—said:

> Kelsen, now that Stammler[3] has retired, is unquestionably the leading jurist of the time. His disciples are devoted and full of enthusiasm in every land. His ideas are discussed in all languages. His followers are probably the most active group in contemporary jurisprudence.

Though Kelsen, throughout his fruitful and productive life, attracted not merely disciples but also many and vigorous opponents, there are probably few among the latter who would challenge his leadership in juristic thought, acceding to Pound's judgment.

Kelsen's academic career in Vienna after a somewhat uncertain start[4] was brilliant. On the strength of his *Hauptprobleme der Staatsrechtlehre* which appeared in 1911, he became a Privat Dozent at the University. Although essentially a critical analysis of what Kelsen was fond of calling the dominant theory or theories of public law, it laid out some of the main features of what later he called Pure Theory of Law: the conception of the

* Honorary Member of the American Society of International Law since 1938; Honorary Vice President of the Society in 1954, and since 1959; Member of the Board of Editors of the AJIL in 1951, and Honorary Member since 1952. Kelsen also received the first Annual Award of the Society in 1952 for his work The Law of the United Nations supplemented by his Recent Trends in the Law of the United Nations (New York: Praeger, 1950 and 1951 respectively), Proceedings of the ASIL at its 46th Annual Meeting, 1952, pp. 174–75.

[1] For a list of Kelsen's writings in the original as well as translation into 24 languages, *see* Rudolf Aladár Métall, Hans Kelsen. Leben und Werk (Vienna: Deuticke, 1969) 124–55. It consists of 604 books and articles. A supplement raising the total to 620 by the same author was published in: Festschrift Hans Kelsen zum 90. Geburtstag. Adolf Merkl, René Marcic, Alfred Verdross, and Robert Walter (eds.) (Vienna: Deuticke, 1971) 325–26.

[2] *Law and the Science of Law in Recent Theories*, 43 Yale L. J. 525–36, at 532 (1934). For other tributes to Kelsen and an overview of his theory *see* William Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, in Essays in Honor of Hans Kelsen, 59 Calif. L. R. 617–53, at 619, n. 2 (1971).

[3] Of Stammler, Pound wrote: "Stammler has had the widest following on the Continent and now claims the greatest number of disciples of any jurist of the time." *Ibid.*, 531.

[4] Métall, *supra* n. 1, at 10.

science of law as a normative science of positive law which must not concern itself with matters which belong to psychology or sociology, the contrast between laws of causality and norms, and between the *Sein* and the *Sollen* (the Is and the Ought), the notion of imputation (Zurechnung) which links norms with norms just as causality links cause with effect, the untenability of the dualism between state and law, between public and private law, and between the application and the creation of law.[5]

In the fall of 1911 Kelsen gave his first course at the Faculty of Law. *Tres faciunt collegium* and we have it on reliable authority that there were three students in his class; one of them was Adolf Merkl who became Kelsen's first disciple, later colleague, and, together with Alfred Verdross, a founding member of the Vienna School of Law.[6] Kelsen's academic career was very rapid and as early as 1919 he became a full professor for state and administrative law. The war years, 1914–1918, were spent in uniform, most of the time in the Ministry of War. When he returned to the University he published in 1920 his famous book on the problem of sovereignty,[7] his first contribution to the theory of international law. Between 1918 and 1920 he was instrumental in drafting the constitution of Austria which included a Constitutional Court. This, his brainchild, he considered his most important and innovative contribution to the constitution and he became one of twelve of its members elected for life.

Kelsen's writings and teaching attracted large numbers of students from Austria and abroad. When I attended his course on the general theory of law in 1923–24, he lectured in one of the large rooms in the Faculty of Law. Wherever he lectured, whether in Cologne or Geneva or The Hague, at Harvard or Berkeley, or any of the many universities in Europe or North or South America, he always attracted large audiences.[8] In his preface to the second edition of the *Hauptprobleme* in 1923, Kelsen could point out with satisfaction that the Pure Theory of Law had become the product of the work of a growing number of theoretically like-minded scholars.[9] In 1925 Kelsen published his *Allgemeine Staatslehre*[10] in which he brought together systematically his preceding thoughts and gave them a precise and, for many years to come, a definitive formulation. He had reached a, if not the, high point or plateau of a career as a scholar and, mainly through his

[5] Concerning the relevance of Kelsen's critique of these dualisms in contemporary juristic thinking in Germany, *see* Peter Römer, *Die Reine Rechtslehre Hans Kelsens als Ideologie und Ideologiekritik. Hans Kelsen zu sienem 90. Geburtstag am 11. Oktober 1971 gewidmet.* POLITISCHE VIERTELJAHRESSCHRIFT, 579–98, at 582 ff. (1971).

[6] Alfred Verdross, *Österreich-Heimat der Rechstheorie* in PHILOSOPHIE HULDIGT DEM RECHT. Hans Kelsen, Adolf Merkl, Alfred Verdross. Erinnerungsband zum 1 Juni, 1967 (Vienna: Europa Verlag, 1968, p. 50).

[7] DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTES (Tübingen: Mohr, 1920).

[8] Only in Prague, where he was a professor from 1936–38, were his lectures "as a rule attended by as few as four students and myself—a grotesque enough set-up which might have appealed to the imagination of Franz Kafka." Hans Georg Schenk, *Hans Kelsen in Prague: A Personal Reminiscence, see* ESSAYS *supra*, n.2, 614–616, at 616.

[9] p. xxiii. This preface is an authoritative summation of Kelsen's theoretical objectives in this work.

[10] Berlin: Springer.

activities at the Constitutional Court, practitioner of the law. He was a prominent figure in Vienna which at that time had been, and for a few more years was to remain, a flourishing intellectual and artistic center. For Kelsen the end of this, his most productive era, came sooner than for the rest of his contemporaries.

On July 15, 1927, I had an appointment to deliver to Kelsen my revised doctoral dissertation which he intended to have published.[11] On that fateful day the Palace of Justice was burned down and clashes took place between the police and workers. Kelsen and I went down into the main street and watched trucks bringing wounded from the outlying districts to the General Clinic. Kelsen was visibly shaken. This was the beginning of the reactionary attack on the democratic constitution which reached its peak with the establishment of a corporate state in 1934. But the immediate goal of the reactionary forces was the Constitutional Court and the specific target was Kelsen, who was held personally responsible for the jurisprudence of the Court relating to a highly controversial issue in Catholic Austria, namely the validity of certain marriages.[12] They succeeded in pushing through a Constitutional Amendment in 1929, the main thrust of which was to remove all life members of the Court who were to be replaced by members appointed for a term. Kelsen considered this an onslaught on the independence of his "brainchild" and as a personal affront to himself. His decision to leave Vienna was facilitated by a very attractive offer from the University of Cologne, which he accepted. In 1930 he moved to Cologne, where he was to teach international law among other subjects. Thus began his "Wanderjahre" which took him from Cologne to Geneva, to Prague, to Harvard, and finally to the University of California at Berkeley where he settled down in 1943 temporarily, and definitively in 1945 when he was appointed a full professor.

The years in Cologne (1930–1933) were far from peaceful. To be sure his scholarly work continued, although no major single book appeared during that period. His new preoccupation with international law was reflected in the lectures on the General Theory of International Law delivered at the Hague Academy of International Law in 1932 before large audiences.[13] The dramatic changes in German politics during that summer were very much on his mind, although he did not discourage me from pursuing my plans to join him in Cologne in the fall and prepare for an academic career there. On January 30, 1933, Dr. Erich Hula, who was in

[11] It was, after some more revisions, eventually published in 1931 under the title: PAZIFISMUS UND IMPERIALISMUS. EINE KRITISCE UNTERSUCHUNG IHRER THEORETISCHEN BEGRÜNDUNGEN. (Vienna: Deuticke).

[12] For details see Métall, supra, n.1, pp. 47–57. The constitutional issue related to the conflict of competence between administrative authorities and the ordinary courts. The substantive issue related to the dispensation from the "impediment of an existing marriage" granted by the former and invalidated by the latter. *See* Albert A. Ehrenzweig, Preface, in ESSAYS, supra, n.2, at 610, n.3. The Court upheld the separation of powers and thereby invalidated the judgments of the latter thus upholding the validity of the dispensations and the marriages celebrated pursuant thereto.

[13] 42 REC. DES COURS, 116–351 (1932), in French.

charge of the Institute of International Law, and I escorted Kelsen's daughters, Anna and Maria, to the "Juristen Ball." When the news arrived that President Hindenburg had appointed Adolf Hitler Chancellor, one of the senior professors observed: "They are making carnival in Berlin." The widespread notion that once in power Hitler would not or not fully carry out his antisemitic program vanished almost at once. Kelsen's name was on the first list of professors relieved of their posts.

At the Graduate Institute of International Studies in Geneva, Kelsen found a most congenial atmosphere. The only diversion from his scientific activities was devoted to learning French. The intermezzo in Prague was due almost solely to Kelsen's worries about his future. In Geneva he could expect no pension, but in Prague he could. The pension rights he earned in Vienna had been taken over by the University in Cologne but all that was wiped out by Hitler.[14]

In Geneva Kelsen's interests ranged over a very wide field. He worked on a book on positivism and natural law but withdrew it from publication after it was set in galley proof. He felt that a great deal more work was required in the field of cultural anthropology. But this enterprise remained unfinished,[15] although the fruits of his labors were presented in later publications.[16] However, in his narrower field of interest, he completed, in addition to numerous essays, a systematic presentation of his theory[17] and an analysis of the Covenant of the League of Nations[18] which was inspired by and intended to serve the then current demand for a revision of the Covenant.

World War II caused an exodus from Geneva. Segments of the League Secretariat and the International Labor Office were transferred to the United States and Canada. In addition, the reduction of the staff of these international administrations resulted in a further migration to safe havens overseas. Kelsen and his devoted and selfless wife, Grete, joined this exodus in the summer of 1940. Roscoe Pound arranged for Kelsen to be invited to the Harvard Law School to deliver the Oliver Wendell Holmes lectures in 1940–41[19] and for a time—two years altogether—his office in Langdell Hall became the center of intense activity. However, there was no future for him at Harvard. Here was the man whom Pound had called in 1934 "unquestionably the leading jurist of the time" and who was unquestionably still the leading jurist eight years later. On conferring upon him the honorary degree of Doctor of Laws (LL.D.) on the third day of the

[14] However, these rights were honored after World War II and assured Kelsen, together with the substantial "Feltrinelli Price" which he received in 1960, a reasonably comfortable life after his retirement from Berkeley. *See* Métall, supra, n.1, at 87.

[15] *See* Métall, *ibid.*, at 66–68.

[16] *E.g.* SOCIETY AND NATURE. A SOCIOLOGICAL INQUIRY. (Chicago: The University of Chicago Press, 1943). *See also* Métall, *ibid,* at 109–10.

[17] REINE RECHTSLEHRE (Vienna: Deuticke, 1934).

[18] LEGAL TECHNIQUE IN INTERNATIONAL LAW. A TEXTUAL CRITIQUE OF THE LEAGUE COVENANT. (Geneva Research Center. 10 Geneva Studies 1939).

[19] They were delivered in March 1941 and published under the title: LAW AND PEACE IN INTERNATIONAL RELATIONS (Cambridge: Harvard University Press, 1942).

Harvard Tercentenary Celebration, September 18, 1936, President James Bryant Conant read the following citation:

> Hans Kelsen, a leader of juristic thought, professor at Vienna, Cologne and Geneva, his teachings shape the jurisprudence of a continent.[20]

Yet there was to be no permanent place for him in the University. To be sure, Roscoe Pound was no longer dean of the Law School. His successor was Professor James Mc. Landis whose interests were neither in jurisprudence nor in international law and who moreover was on leave of absence during most of 1941–42 when Kelsen was a "research associate in comparative law" at the Law School. Under less critical circumstances, Dean Pound had provided a firm place for another Austrian, Professor Josef Redlich. The Department of Government had found a place for Dr. Heinrich Brüning, the German ex-Chancellor, who was not a scholar. Only once, for the fall term from September 1, 1950 to January 31, 1951, did the Department invite him as "Visiting Lecturer on Government." And that was the sum total of Kelsen's connection with Harvard. His many warm friends in Cambridge could not make up for the disappointment. Kelsen was not bitter but hurt, and the experience rankled him for the rest of his life.

Under these circumstances, Kelsen accepted in 1942 a temporary appointment in the Department of Political Science at Berkeley. This led to a full professorship in 1945 which he was permitted to hold beyond the normal retirement age until 1952. In spite of all the uncertainties and initial frustrations, the years in America were extremely fruitful in every respect. He continued to attract gifted disciples, he was very popular with students (his reputation as an easy grader may have been an additional factor), his scholarly productivity reached new heights, invitations from abroad poured in, honors were showered upon him everywhere, particularly in Austria.[21]

One well-established method of honoring a scholar is to present him with a Festschrift. Kelsen was a recipient of this particular honor more often than any other scholar.[22] The first one, on the occasion of his fiftieth birthday, was edited by Alfred Verdross and consisted of fifteen essays by former students and friends from seven countries.[23] On the same occasion, Dr. Métall arranged for a special issue of the journal for public law which included essays by more junior students.[24] The last volumes were published on Kelsen's ninetieth birthday. One is the special issue of the California

[20] THE TERCENTENARY OF HARVARD COLLEGE (Cambridge: Harvard U.P. 1937) 217.

[21] For details *see* Métall, *supra*, n. 1, at 94–101.

[22] For a list *see* Métall, *ibid.*, at 94–95.

[23] GESELLSCHAFT, STAAT UND RECHT. UNTERSUCHUNGEN ZUR REINEN RECHTSLEHRE. (Vienna: Springer, 1931).

[24] I contributed an essay which presented my experiences in my first encounter with the common law and international law at the Harvard Law School under the title: *Der Rechtsbegriff des Common Law und das Völkerrecht*, 11 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT, 353–67 (1931).

Law Review[25] and the other, published in Vienna, was edited by two of Kelsen's oldest students and friends, Merkl and Verdross.[26]

While Kelsen's bibliography lists about the same number of publications for his first 30 years of scholarly activity (1911–1941, namely 300), as for the next 30 years, there is a difference in that the later period appears to cover an even wider range of problems to which Kelsen was attracted. Many monographic studies were in the fields of sociology, political theory, and cultural anthropology.[27] He continued to reformulate and refine the Pure Theory of Law first in the *General Theory of Law and State*[28] and finally in the second, substantially larger edition of his *Reine Rechtslehre.*[29] This is probably to be regarded as the final statement of Kelsen's theory.[30] Of more direct interest here are his writings in the field of international law and organization. In addition to his Holmes lectures,[31] he published a small book *Peace through Law,*[32] expounding two approaches to peace: compulsory adjudication of international disputes and individual responsibility for violations of international law. His commentary on, and textual critique of, the Charter of the United Nations has remained the standard work to this day.[33] The American Society of International Law awarded Kelsen its Annual Award for this work but not without some controversy. It is interesting that the controversy, as usual with Kelsen's writings, centered on what Kelsen considered its chief merit: the absence of political preferences.[34] It is this feature of the commentary which made it possible

[25] *See supra,* n. 2. It may be noted that there is no contribution from the Department of Political Science of which Kelsen had been an active member for ten years. He gave only occasional lectures in the Law School.

[26] *See supra.,* n. 1. In addition to Merkl and Verdross, Professors René Marcic and Robert Walter appear as editors. Merkl and Marcic died before the publication of the volume.

[27] Notably SOCIETY AND NATURE, *supra,* n. 16, and WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE. (Berkeley: University of California Press, 1957).

[28] Published by the Harvard University Press in 1945. The book went through several printings but Kelsen received no royalties from the Press. *See* Métall, *supra,* n. 1, at 81.

[29] Vienna: Deuticke, 1960. An English translation by Max Knight appeared in the University of California Press in 1967 under the title: THE PURE THEORY OF LAW.

[30] *See* in this connection his essay: *Professor Stone and the Pure Theory of Law,* 17 STANFORD L.R., 1128–57 (1965).

[31] *Supra,* n. 19.

[32] Chapel Hill: University of North Carolina Press, 1944.

[33] THE LAW OF THE UNITED NATIONS. A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS. (New York: Praeger, 1950). Although issued in this country by Praeger the merit of accepting the manuscript, which was rejected by several American publishers, belongs to Stevens & Sons, Ltd., in London. In 1951 Kelsen added a supplement RECENT TRENDS IN THE UNITED NATIONS. The task of bringing the commentary up-to-date was entrusted to Professor Salo Engel, a Kelsen student from his Geneva years, who died prematurely in 1972.

[34] The Chairman of the Committee on Annual Awards, the late Professor Charles G. Fenwick, reported: "But we believe that we can respect the scholarship of a work without endorsing the particular principles upon which it is based or the conclusions at which it arrives. It is important to emphasize this, because there was much discussion in the Executive Council about whether it was wise to give the award to a

for delegates of the most diverse persuasion to invoke its authority in debates in the United Nations.[35] The central concept of the Charter, collective security, formed the subject of a monograph written in connection with the professorship in international law at the U.S. Naval War College held by Kelsen from 1953 to 1954.[36]

Although Kelsen had been concerned with international law since his 1920 study on sovereignty and had devoted a good deal of attention to it in numerous publications, the first book *eo nomine* appeared only in 1952.[37] Kelsen's objective was to present a theory and the general principles of international law. He drew on law created by treaties "merely in order to show the possibilities of developing international law in a technically progressive way." He insisted, as he had done on numerous other occasions, on the purely juristic character of his approach. In an extremely lucid passage he explained one of the salient features of his Pure Theory of Law:

> If, nevertheless, I think it necessary to emphasize the purely juristic character of this book, I do so in opposition to a tendency widespread among writers on international law, who—although they do not dare to deny the legal character and hence the binding force of this social order—advocate another than a legal, namely a political, approach as adequate. This view is in my opinion nothing but an attempt to justify the nonapplication of the existing law in case its application is in conflict with some interest, or rather, with what the respective writer considers to be the interest of his state. If the writer thinks that it is his duty to suggest to his government a power policy, that is to say, a policy determined only by the real or assumed interest of his state and restricted only by its actual power, he may do so under his own responsibility. But if he tries to make his readers believe that his policy is in conformity with international law interpreted "politically," he does not present a scientific theory of international law but a political ideology.[38]

It was never Kelsen's intention to disparage politics or, for that matter, legal politics. What he constantly and consistently opposed was the presentation of legal politics or politics or power politics or the *raison d'état* in the guise of legal science. He urged a clear separation of science from politics and the renunciation of the deep seated habit of presenting political demands in the name of science and claiming for the subjectivities of the former the objectivity of the latter.[39] When he insisted on a separation of the cognition of law from sociological inquiries into or about the law, he

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work which appeared to reach conclusions which did not seem to take into account certain practical aspects of the problem, but confined themselves to pure theory." 1952 PROCEEDINGS at 174. In short, it was not policy—that is, United States policy—oriented.

[35] Métall, *supra*, n. 1, at 83–84.

[36] *Collective Security under International Law.* N.W.C. 49 International Law Studies (Washington: GPO, 1957).

[37] PRINCIPLES OF INTERNATIONAL LAW (New York: Rinehart & Co., 1952). The second edition (1966) by one of Kelsen's students and friends, Professor Robert W. Tucker, departs to some extent from Kelsen's basic conception in order to make it more serviceable.

[38] p. viii of the first and pp. ix-x of the second edition.

[39] REINE RECHTSLEHRE, *supra*, n. 29, at iv.

wished to avoid methodological syncretism.[40] It was certainly not his intention to discredit sociology or psychology. He contributed to both, but neither is a science of positive law conceived as a normative system. He was acutely conscious of the limits of his method. Thus he firmly held the view that if both municipal law and international law are regarded as valid legal orders, a monistic construction was inevitable and the traditional dualistic construction was untenable.[41] But he was equally firm in denying that the choice between the monistic constructions—that which starts with the primacy of international law and that which starts with the primacy of a particular municipal legal order—could be made on the basis of the science of law.[42] He assumed, of course, that the content of international law remained the same whichever monistic construction was selected.[43] Those leaning to the ideology of pacifism will select the primacy of international law whereas those leaning to the ideology of imperialism will opt for the primacy of municipal law which favors the dogma of state sovereignty. Both ideologies can be advocated or opposed with political arguments but "the Pure Theory of Law opens the road to either the one or the other political development, without postulating or justifying either, because as a theory, the Pure Theory of law is indifferent to both."[44] There has been much opposition to Kelsen's stand in this matter, as there was with respect to his theory of the basic norm, even among Kelsen's supporters but he inflexibly, and possibly rightly, maintained it in his last major work after having stated a more flexible view forty years earlier in his book on the problem of sovereignty. Perhaps the experiences of those years convinced him of the limits of scientific inquiry and the potency of—disguised or undisguised—politics.

The task of the science of law was to indicate choices but the selection of one or the other scientifically possible option was a matter of will or value preferences. Nowhere is this made clearer than in Kelsen's approach to the perennial question whether international law was truly law in the sense of the prototype of all law, domestic law. The answer depends on the place of war in the international legal order: if war is permitted only as a sanction against a delict, then international law is truly law. This was in substance the stand taken by those who adhered to the *bellum justum* theory. In his Holmes lectures, Kelsen summed up his scientific position as well as his value preference as follows:

> It is not a scientific, but a political decision which gives preference to the *bellum justum* theory. This preference is justified by the fact that only this interpretation conceives of the international order as law, although admittedly primitive law, the first step in an evolution which within the national community, the state, has led to a system of norms which is generally accepted as law. There can be little doubt that the international law of the present contains all the potentialities of such an evolution; it has even shown a definite tendency in this direc-

[40] THE PURE THEORY OF LAW, ibid., at 1.
[41] *Ibid.*, at 33.
[42] *Ibid.*, at 346.
[43] *Ibid.*, at 339.
[44] *Ibid.*, at 347.

> tion. Only if such an evolution could be recognized as inevitable would it be scientifically justified to declare the *bellum justum* theory the only correct interpretation of international law. Such a supposition, however, reflects political wishes rather than scientific thinking. From a strictly scientific point of view a diametrically opposite evolution of international relations is not absolutely excluded. That war is in principle a delict and is permitted only as a sanction is a possible interpretation of international relations, but not the only one. We choose this interpretation, hoping to have recognized the beginning of a development of the future and with the intention of strengthening as far as possible all the elements of present-day international law which tend to justify this interpretation and to promote the evolution we desire.[45]

Kelsen is certainly not the only writer who has tried to help international law along on its way toward a true or a better legal order but, to me at any rate, he was not quite at ease in this role of midwife. Be that as it may, Kelsen remained faithful to the assumption that "international law is law in the true sense of the term" in his *Principles* [46] as well as in his final *Pure Theory of Law*.[47] Obviously he still wanted to strengthen the evolution of the international legal order. However, his stand on this, to him, crucial issue of the theory of international law scrupulously observed the thin line which separates cognition from volition. Nothing could have been more abhorent to him than the policy-science approach to international law which disguises policy in a pseudoscientific apparatus of procedures for determining what the law is.

Finally, a word may be in order about Kelsen's theory of interpretation. Interpretation to him "is an intellectual activity, which accompanies the process of law application in its advance from a higher to a lower level." [48] It may be noted in passing that Kelsen adopted the "higher-lower level" approach (Stufenbau) from Merkl as he adopted the concept of the unity of the legal order (monistic construction) from Verdross.[49] Every law-applying act is seen as a law-creating act, from the highest norm, the basic norm, to the lowest act of application. Legal norms are frames "within which several applications are possible" and, "if 'interpretation' is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame." [50] Kelsen rejects the notion that any of the usual methods of

[45] *Supra*, n. 19, at 54–55.

[46] PRINCIPLES OF INTERNATIONAL LAW, *supra*, n. 37, at vii of first, and ix of the second edition.

[47] *Supra*, n. 29, at 322. Here he said that "the assumption . . . that war, like reprisals, is a sanction of international law, is well founded," in reliance on the Kellogg-Briand Pact and the Charter of the United Nations.

[48] THE PURE THEORY, supra, n. 29, at 348.

[49] ALFRED VERDROSS, DIE EINHEIT DES RECHTLICHEN WELTBILDES AUF GRUNDLAGE DER VÖLKERRECHTSVERFASSUNG (Tübingen: Mohr, 1923).

[50] THE PURE THEORY, *supra*, n. 29, at 351.

interpretation yields only one meaning, the meaning which is then claimed to be the "correct" or "true" one. For him "the question which of the possibilities within the frame of the law to be applied is the 'right' one is not a question of cognition directed toward positive law—we are not faced here with a problem of legal theory but of legal politics." [51] The choice between several possible interpretations is dictated not by positive law but by social values. It is the law-applying organ which makes the choice; its interpretation Kelsen calls authentic and it creates law: "All other interpretations are not authentic, that is, they do not create law." [52] The theorist must practice self-discipline and self-limitation. He is not designated by the legal order, national or international, as a law-applying organ. His task, modest but important, is to show all logically possible interpretations and thereby pave the way towards tighter, more precise formulation of the law or treaty in the future. This is what Kelsen attempted to do in his analysis of the Charter of the United Nations. He summed up his view of the role and object of interpretation as a scientific and not as political enterprise, no matter how carefully disguised in the trappings of pseudoscience, as follows:

> . . . the strictly scientific interpretation of a statute or international treaty, exhibiting on the basis of a critical analysis all possible interpretations (including the politically undesired ones and those not intended by the legislator or the contracting parties, yet included in the wording chosen by them) may have a practical effect by far outweighing the political advantage of the fiction of unambiguousness, of "one meaning only": such scientific interpretation can show the law-creating authority how far his work is behind the technical postulate of formulating legal norms as unambiguously as possible, or, at least, in such a way that the unavoidable ambiguity is reduced to a minimum and that thereby the highest possible degree of legal security is achieved.[53]

Kelsen, for his part, was not only willing but determined to draw a line between his political desires and the results which legal, rigorously controlled, analysis could furnish. He was well aware that much of the opposition to his approach on the part of jurists, at any rate, came precisely from their unwillingness to accept what they felt was a downgrading of their position from that of legal advocates in the guise of scientific analysis to that of mere technical experts of the law.[54] In a highly politicized profession—and it was politicized when Kelsen started and it remained politicized when he finished his work—this reaction to the Pure Theory of Law was perhaps inevitable. But what Kelsen cherished more than anything else was freedom to pursue his bent for scientific inquiry.

In his farewell lecture in Berkeley on May 27, 1952, he addressed himself once again to the question: What is justice? As on earlier occasions he argued that "absolute justice is an irrational ideal or, what amounts to

[51] *Ibid.*, at 353.

[52] *Ibid.*, at 354–55.

[53] *Ibid.*, at 356.

[54] Kelsen elaborated this in his Preface to the REINE RECHTSLEHRE *supra*, n. 29, at iv-v.

the same, an illusion—one of the eternal illusions of mankind. From the point of view of rational cognition there are only interests of human beings and hence conflicts of interest." [55] In a democracy imbued with the spirit of tolerance, there is freedom for different interests to assert themselves and to contend for recognition. And so Kelsen ended his lecture, as I shall end this essay, with the words:

> It would have been more than presumptuous to make the reader believe that I could succeed where the most illustrious thinkers have failed. And, indeed, I do not know, and I cannot say what justice is. the absolute justice for which mankind is long.ng. I must acquiesce in a relative justice and I can only say what justice is to me. Since science is my profession, and hence the most important thing in my life, justice, to me, is that social order under whose protection the search for truth can prosper. "My" justice, then, is the justice of freedom, the justice of peace, the justice of democracy—the justice of tolerance.

LEO GROSS

CHARLES GHEQUIERE FENWICK

1880–1973

With the passing of Charles G. Fenwick, whose association with the American Society of International Law spanned more than sixty years, the Society and the world fraternity of international lawyers have lost one of their most distinguished and beloved colleagues. His departure is an ineffable personal sadness for the present writer, evoking recollection of several decades of warm friendship with one who was indeed a courtly and cultured gentleman of the old school. There are not many of his mold in present day America; it is doubtful that his like will pass our way again very soon. His roots tapped deeply into the soil of this nation: an ancestor shared in the travail of revolutionary independence. For those who were not privileged to know Charles as I did, let it be said merely that their lives are the poorer for being so deprived. He would have been 93 years old on May 26, and his exemplary life was rich in professional and literary achievement.

Not long after receiving his Ph.D. at Johns Hopkins in 1912, Dr. Fenwick joined the Bryn Mawr faculty as a professor of political science, a post he retained until his appointment as the United States Member of the Inter-American Neutrality Committee (which soon became the Inter-American Juridical Committee) of Rio de Janeiro in 1940. This, however, was not his first responsibility in a governmental capacity; for during World War I he was a special agent of the Treasury Department on war risk insurance at Fort Sam Houston, Texas, and was subsequently engaged in the preparation of confidential reports for the American Delegation to the Paris Peace

[55] WHAT IS JUSTICE? *supra*, n. 27, at 21. The next quotation in the text is at 24.