tial data by categories susceptible of generalization is impossible in the absence of a greater number of cases on each type of administrative problem. Whether the multiplication of public administration cases can be pursued to the point where they may lead to valid generalization is a question both of method and resources; and the question need not be faced squarely at present, as the cases already prepared and to be prepared in the immediate future serve other ends and serve them admirably

It is enough that teachers and students for the first time receive a truly intimate view of how decisions are made by public administrators; that objective portrayal of values and realities avoids both Pollyanna and muckraking interpretations; and that the user of the cases gains deepened understanding of public policy and of the processes for its determination and execution. These are gains that should not be confined to students specializing in public administration. It is important that the insights be shared by others who will have to do with administration. Lawyers, whether as judges, legislators, agency counsel, administrators, or private practitioners, are among those who would gain by such a sharing.

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RECENT TRENDS IN THE LAW OF THE UNITED NATIONS. By Hans Kelsen. New York: Frederick A. Praeger, Inc., 1951. Pp. 911-994. $2.50.

IN this slender volume—which is a supplement to his 900-page treatise *The Law of the United Nations* [1]—Professor Kelsen has continued his critical and "purely legal" analysis of the Charter and its application. The problems dealt with are: the organization of collective self-defense through the North Atlantic Treaty; the action in Korea; the reappointment of the Secretary-General; and the resolution of the General Assembly "Uniting for Peace." In the preface Kelsen points out that his analysis does not in every respect affirm the constitutionality of the actions under consideration—indeed that these actions may be considered unconstitutional when "viewed retrospectively with regard to the Charter." At the same time he adds: "But directing our view towards the future we may see them [these actions] as the first steps in the development of a new law of the United Nations." The maxim, *ex injuria jus non oritur,* he somewhat dryly notes, may be replaced in these cases by its opposite, *ex injuria jus oritur.*

No doubt this approach will appeal to many who have tired of the lengthy and complicated constitutional debates in the United Nations. It has the appearance of being both objective and realistic; it seems to afford an easy political answer to difficult legal questions; at the same time it rests on the

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1. See Schachter, Book Review, 60 YALE L.J. 189 (1951).

indubitably sound legal principle that the law of a community can adapt itself to changing circumstances by a process of interpretation as well as by formal amendment. That Professor Kelsen has put forward this view may even be regarded as a victory by those who have deplored the rigidity and formalism of his previous volume. Perhaps one should remain satisfied with this preface and skip the analysis that follows.

Still, the preface is not quite as innocuous as it appears. It does after all assume that the United States, and indeed the majority of United Nations members, have violated the Charter in order to gain political ends. Surely this is not a matter which can be passed over simply by referring to the emergence of new law or the misuse of the veto. Whether or not the Charter has been consistently violated is not a mere legal technicality. It involves the good faith of the countries concerned, their readiness to abide by agreed principles and procedures regardless of expediency. These are matters which go to the heart of the issues dividing the world today. Even the "realists" recognize that considerations of this kind exert an influence on the attitudes and conduct of those concerned with international affairs.

For this reason it is of some importance, despite Kelsen's disarming preface, to examine the analysis on which he bases his judgments of unconstitutionality. Kelsen's technique here is similar to that used in the previous volume. Attention is focused on the words of the Charter and their meanings; the structure of the rules and their inter-relationships are carefully analyzed; legal obligations are emphasized rather than functions, purposes or ideals. In accordance with the pure theory of law, politics and ideological considerations are avoided or at least not openly expressed.

As in the main volume, the predominant feature of the analysis is a marked tendency to restrict and narrow the terms of the Charter. In some cases this is done simply by introducing into the Charter a somewhat arbitrary definition without regard to either the ordinary meaning or legislative intent. An illustration of this is found in Kelsen's argument that the attack by the North Korean forces did not constitute a breach of the peace within the meaning of the Charter because, according to Kelsen, a breach of international peace can be committed only by a state in its relation to another state.[2] Since North Korea had not been recognized as a state by the Security Council, it could not break the international peace. This somewhat surprising conclusion, it should be noted, does not rest on the circumstance that some Koreans attacked other Koreans (which is the Russian argument for calling it a "civil" war) but rather on the formal premise that only the forces of a state can wage war. Thus if the North Korean forces had attacked Japan or if Eastern Germany (which like North Korea has not been considered a state by the majority of the United Nations) were to attack a United Nations member, neither case would fall within Kelsen's special definition of "breach of peace."

2. P. 930.

At times Kelsen's tendency to circumscribe the authority of United Nations bodies even overrides his avowed opposition to relying on legislative intention. For example, in discussing the Security Council's recommendation that members assist in repelling the attack of the North Korean forces, Kelsen recognizes that the Charter in Article 39 not only expressly provides that the Council may make recommendations after it has found a breach of peace but also that no limitations are imposed on the content of such recommendations. Despite this explicit textual authority, Kelsen questions the legality of the Council resolution on the ground that it was doubtful if the framers intended to authorize the Council to "recommend," rather than to order, the use of armed forces.[3] Kelsen introduces no evidence for his finding of presumed legislative intent other than the fact that the United States Congress in the United Nations Participation Act did not authorize the President to provide armed forces in response to a recommendation of the Council. Even if one does not share the author's theoretical objection to the use of legislative history, the evidence Kelsen introduces in this case must be considered slim grounds for overriding an express provision of the Charter.

These examples are characteristic of Kelsen's analysis; they indicate better than any general observations why his judgments of unconstitutionality fail to be convincing. For the most part the arguments he presents are the same as those already put forward in United Nations debates. He adds little to them other than an emphasis on fixed and arbitrary definitions and a complicated manner of presentation.

There is also a curious sort of backtracking throughout the book. After arguing that a particular action is of doubtful constitutionality, Kelsen in most cases observes that the contrary interpretation is not excluded. Now, this should mean, according to his own theory of interpretation,[4] that the law-applying organ has been entirely free to select either of the possible interpretations; in other words, that either choice would be equally correct from a legal standpoint. It is somewhat perplexing to consider how this theory—which would afford the widest range of discretion to United Nations organs—can be reconciled with Kelsen's actual criticism of United Nations actions and his conclusion that in many respects these actions have been unconstitutional. Both his theory and his practice run to opposite extremes: the theory so broad as to eliminate virtually all standards of legal relevance; the actual interpretation so narrow as to place an arbitrary strait-jacket over the acts of United Nations bodies. In both respects, Kelsen ignores those considerations which make legal interpretation a significant creative art, capable of effectuating the major purposes of an instrument when unforeseen events have revealed the inevitable ambiguities and inconsistencies of the text.

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3. P. 932.

4. See preface, "On Interpretation," in KELSEN, THE LAW OF THE UNITED NATIONS xiii-xvii (1950).

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