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## *Personal Recollections\**

### **Gaetano Arangio-Ruiz**

*A.C.: Of the many international lawyers you have met during your career who impressed you most?*

A.R.: In addition to Perassi, Morelli and Ago, I would say Kelsen. I met Kelsen because when I was at the College of Europe I managed to get him as a visiting professor for three lectures in 1952 or 1953 (I think it was the spring or winter of 1953). There are three small episodes I can relate to you.

First, when I went to pick Kelsen up at the station at Bruges, the man who came off the train had such a young face that I hardly recognized him. I had seen his picture in the *Recueil de Cours* where he also looked rather young. I thought I would meet an elderly fellow. Instead he looked as young as in the *Recueil*, the course on international law and municipal law he had given in 1932. So I was rather struck by this.

There was also something else that struck me. Since most visiting professors were from the field of economics, and indeed there had been some important economics lecturers only a few days earlier, I introduced him to the students by saying that we had here a champion in the field of law and I hoped they would enjoy his lectures. The result, however, was that the second and third lectures were attended by so few students that I had to go and rustle up some teachers, professors and assistants, and anyone else who was available so that he would not get the impression that nobody wanted to listen to him.

*A.C.: Was he a bit tedious?*

A.R.: Certainly not for me. But he was very abstract for the student audience. The majority of the College of Europe students were not from law schools, and so the lectures were very hard for them to understand. I do believe, though, that they should have made a greater effort.

Then, because Kelsen was not engaged in conversation by the students after the lectures, we were free to go and walk about Bruges. And this is the third episode that I wanted to recount. Kelsen liked trees very much so we visited the Bruges parks. I tried to get into a discussion with him on the relationship between international law and municipal law — I had just published my book on international law persons,

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\* The following extracts are taken from a forthcoming publication of in-depth interviews with leading international lawyers. The interviews were conducted by Antonio Cassese, member of the *EJIL* Editorial Board, in 1996, 1993 and 1995, respectively.

especially concerning the state in the sense of international law. Kunz wrote a review of that work in the *American Journal of International Law*, arguing that one of the purposes of my book was to prove the strength and the validity of the dualist theory; he said that my book was thought-provoking, searching, etc., etc., but, in his opinion, I had not demonstrated the validity of the dualist, as opposed to the monistic, view, which Kunz incidentally shared.

When I started discussing this with Kelsen, he pretty quickly dismissed my argument with the very simple statement that there was certainly a flaw in his theory, but he was the only one to know where that flaw was. He said it was no use for me to try to convince him. I told him that the strength, or the greater strength, that everybody saw in the monistic theory was the appeal that theory had for people who believed in the unity of mankind at one point under a universal legal system — a system in which international law would be just the superior part of a universal law and the legal systems of states would only be a part of the whole. I said that in spite of this I believed that from a scientific point of view the monistic standpoint was unduly helped by the fact that the dualists had never really studied the state — as I believed I had done — from the viewpoint of international law: I mean *der Staat im Sinne des Völkerrechts*.

But clearly, it was useless for me to try to have a good argument with him. Despite my admiration for his tremendous powers of logic, and despite the fact that I accepted much of his general theory of law, I was rather disappointed. I did feel that even though I was only a beginner as a scholar, he could have been a little less conceited in our exchange of views.

A.C.: *You are undoubtedly familiar with Kelsen's commentary on the UN Charter. What is your opinion on it?*

A.R.: Even though this work was written a long time ago and was indeed one of the earliest commentaries, together with the famous article on collective security and collective self-defence published in the *AJIL* in 1948, to be written on the Charter, I believe that nobody can seriously deal with any issue of Charter interpretation without at least consulting Kelsen's *Law of the United Nations*. When I use the book, though, I am often puzzled by Kelsen's incredible ability to play the Devil's Advocate with himself. He manages to suggest more than one interpretation on many issues. He does so, for instance, with the question of 'Chinese representation', with the definition of enforcement action and with the interpretation of paragraph 2 of Article 94 of the Charter. Kelsen's ingenuity in this respect is of course very useful. But I find it disconcerting at times. It looks somewhat as though he were playing a game with the text or with the reader.

## Eduardo Jimenéz de Arechaga

A.C.: *Who was the international lawyer who most influenced your thinking at the beginning of your scholarly activity?*

E.J.: You may be a bit disappointed to know that it was Hans Kelsen.

A.C.: *Why disappointed? I think he was a great international lawyer.*

E.J.: Yes. Of course, but I am not a Kelsenian in any respect. When I was about to finish my law studies, I was appointed to give lectures on international law to young students who wanted to enter law school in Montevideo. And I wrote a book called *Introducción a derecho (Introduction to Law)*, which is Kelsenian. At that time I also contacted Kelsen. He came to visit South America, Argentina and then Uruguay. He had a great intellectual influence in Mexico, and right throughout Latin America. His invitation came from an Argentinian philosopher of law, Cossio, who thought he had invented something that went beyond Kelsen; he called it the 'ecological doctrine of law'. He wrote some interesting books, but he went a bit too far. So when Kelsen came to Montevideo I asked him what he thought of Cossio's philosophy of law. And Kelsen, who was speaking in French, replied: 'Ce n' est pas de l'écologie, c' est de l'égalatrie'.

Later, when I had become a practising lawyer, I was in contact with him during my first case when I had to deal with topics of international law. It is strange, at that time I was not specializing in international law, but the cases that came my way always had an international law aspect. One of them concerned the Italian Peace Treaty. In that treaty there was a clause according to which Italy renounced claims against the states which had broken off relations with it during the war. My country had declared war on Japan and Germany but not on Italy, although it had broken diplomatic relations with the Fascist regime during the war. Italian ship-owners made a claim in our courts against the state for having utilized two ships which were sunk by Axis' submarines. I was at that time advising the national authorities who had taken over the ships (they were the respondent). When the Peace Treaty was published in the *American Journal of International Law* I said: 'There is a stipulation here in favour of Uruguay, it's a third party stipulation.' At that time the claimant got the support of a well-known Argentinian international lawyer, Podesta Costa, who had been counsel for the League of Nations. This was 1948 or 1949. In order to strengthen my opinion, I asked Kelsen for an opinion on the subject and he wrote a magnificent opinion on third party stipulations in favour of sovereign states, saying that the renunciation applied *in casu*; the case was settled on the basis of that consultation. Kelsen was so modest that when I asked him how much he would charge for his opinion (20-pages) he asked for 1,000 dollars. It was not very much, even at that time. When later on I told this story to one of my colleagues in the *Barcelona Traction* case, he said '*Mais ce Monsieur crée des difficultés pour notre gagne-pain.*'

A.C.: Did Kelsen publish his opinion afterwards?

E.J.: No, he did not. But it has been published because from that case I wrote a 50-page booklet and there I transcribed Kelsen's opinion in full (he wrote in English and I translated it into Spanish).

I must add that when I read Kelsen's book on the UN Charter I felt discouraged because I recalled the comment Hersch Lauterpacht had made about it. He said: 'It is a desperate effort to strike the maximum amount of fault from an admittedly imperfect instrument. You should not interpret the Charter of the United Nations as if it were an insurance contract.' This was a book review by Lauterpacht.

A.C.: There were other book reviews criticizing Kelsen's formalism, his sort of bookish attitude to a political document.

E.J.: Some people attribute Kelsen's attitude on the drafting of the Charter to the fact that he was not a friend of Pawlosky, who had been the Legal Adviser to the State Department in Dumbarton Oaks. Kelsen had not been consulted. You know, he had written a book on the drafting of the Covenant of the League of Nations. It has been stated that he was not sufficiently consulted, he was not taken into consideration by Pawlosky and that is why he was so critical of the drafting of the UN Charter.

A.C.: *You mean just for personal reasons. Was he so mean?*

E.J.: No, I don't think so.

A.C.: *In what respect were you influenced by Kelsen?*

E.J.: In my lectures to the younger students I had to explain the definition of law, objective law, subjective rights and in these areas I followed Kelsen's formulation.

## Oscar Schachter

A.C.: *Did you ever meet Kelsen?*

O.S.: Yes, in a curious way. When I was an Assistant General Counsel at the United Nations Relief and Rehabilitation Administration (UNRRA) in 1944 or 1945 (located in Washington), I was asked by the Personnel Office to interview a job-seeker with a legal background. When he presented his card to me, I said in some astonishment, 'Are you *the* Hans Kelsen? He then said, 'I have been looking for a job in Washington and you are the first person to recognize my name.' It was, of course, not surprising that government lawyers or officials did not know of Kelsen's eminence.

A.C.: *Did he get the job?*

O.S.: No. My chief, Abe Feller, did not think that it would be fitting to have Kelsen deal with our mundane legal questions and that it would be undignified for him to have a librarian's post. Actually, Kelsen's problem arose because the law school at Berkeley — where he had been lecturing — had to 'downsize' because student enrolment during the war had been reduced.

A.C.: *You later reviewed Kelsen's book on the Law of the United Nations and criticized him strongly.*

O.S.: Yes, in a sense I did, but I also praised the book. My main criticism was that Kelsen departed from his own stated doctrine — namely that if a provision of the UN Charter allowed for two (or more) different positions, the choice would properly be made by the competent political organs. However, in his book he treated several important disputes concerning the meaning of a provision as if only one interpretation was valid, even though in fact the governments were divided in their interpretations. My point was simply that his reading of provisions on which reasonable views were divided as though open only to one meaning departed from his own theory of interpretation. I understand he was angry over my review. As I recall, I also praised the book for its impressive scholarship and close reading of texts. In fact, over the years I found it to be — to this day — a valuable exposition of the UN Charter. I might add that I also have a very high regard for Kelsen's general book on international law (which was edited for the English edition by Tucker.)

*A.C: When you met Kelsen had you read his jurisprudential works?*

O.S.: I had read some of his writings on the Pure Theory of Law for a college course on legal philosophy. At that time I regarded his approach as somewhat arid for its sharp dichotomy between 'pure law' and policy. My own practical work as a legal advisor had been impressed with the importance of considering the purposes or functions of a legal rule in determining how it should be interpreted and applied. It also seems to me that this 'functional approach' (as it was once called) required a broad view of the aims of law and in that sense was an aspect of the political process. This did not mean that law was reducible to politics; law had its sphere of autonomy that rested on the postulates of the legal system. However, choices had to be made between competing legal principles and rules and that required recourse to the underlying reasons — in effect, the ends to be given preference. In this sense, I saw no sharp divide between law and policy; law in practice could not be 'pure' — and, in this respect, I did not follow Kelsen.

Still, I greatly respect Kelsen's contribution and admire his analytical power. I still often refer to his major works on international law and on United Nations law. And I still strongly reject a simplistic 'policy approach' that would reduce the process of law-making and application to political preferences and power.

It is interesting to me that Kelsen's theory has recently been invoked by Koskenniemi, usually regarded as something of an iconoclast on the basis of his influential work, *From Apology to Utopia*. In a talk to the American Society of International Law, Koskenniemi argued for treating the state in Kelsen's terms as pure juridical form. As a creature of 'pure law', the state would be neutral in respect to social policies and would provide the structure of authority through which contending policies and demands could be resolved in a democratic way. I bring this up here to indicate that Kelsen is still influential and that even a so-called 'post-modernist' finds value in his theory of pure law.