

The Nuremberg Trial and Aggressive War. By Sheldon Glueck. New York: Alfred A. Knopf, 1946. Pp. xv, 121. \$2.00.

Professor Glueck is one of the intellectual fathers of the Nuremberg Trial and the host of other war-criminal trials which are now being conducted in the American Zone of Germany. That the war criminals were to be brought to account was obvious, at least since the Declaration of St. James' Palace on January 13, 1942. Since the American mentality demands that such an undertaking conform to legal patterns, it was necessary to find and to shape the necessary legal weapons. Among those who forged these weapons Professor Glueck occupies a prominent place.

In his earlier book, *War Criminals: Their Prosecution and Punishment*,¹ he developed the legal bases for the prosecution of those who were to be accused of violations of the laws and customs of war. No less an authority than Mr. Jackson himself states that Professor Glueck's "original plan is substantially the system pursued throughout the Nuremberg trial." In that book of 1944, however, Professor Glueck was not yet convinced of the legal feasibility of prosecuting the National-Socialist leaders for the arch crime of aggressive war. "I was not at all certain that the acts of launching and conducting an aggressive war could be regarded as 'international crimes.' I finally decided against such a view, largely on the basis of a strict interpretation of the Treaty for the Renunciation of War (Briand-Kellogg Pact), signed in Paris in 1928."

In his new book of 1946, Professor Glueck states the opposite view and presents the legal arguments for it. These are based upon the idea that there has developed among civilized nations an international *custom* to regard aggressive war as an international crime and that the time has arrived to express this international custom as a rule of international law. The rise of this international custom is seen by Professor Glueck in the following developments. The Hague Convention of 1899 and 1907 regulating the conduct of war and the Geneva Convention of 1929 regulating the treatment of prisoners of war constituted "signposts on the road toward a growing conviction that aggressive war must somehow be abolished." The *draft* of a treaty of mutual assistance sponsored by the League of Nations in 1923 declared "that aggressive war is an international crime." Similar statements were contained in the Preamble to the League of Nations' 1924 Protocol for the Pacific Settlement of International Disputes (which never legally came into force), in a Declaration adopted at the Plenary Meeting of the Assembly of the League of Nations on September 24, 1927, in various Inter-American Resolutions, and in pronouncements by Senator Borah and other members of the United States Senate. Finally, in the Briand-Kellogg Pact of 1928, the Powers solemnly renounced resort to war as an instrument of international policy. Undoubtedly these documents and pronouncements, to which others might be added, indicate a strong tendency to regard aggressive war as an unjustifiable and perhaps even an illegal act. But one cannot overlook the fact that until Nuremberg the outlawry of aggressive war constituted at best a *lex imperfecta*, i.e., a rule which was not sanctioned by any threat of punishment either of the guilty state or of its individual leaders, and that the rule of *nulla poena sine lege* has hitherto been interpreted as excluding punishment not only in those cases where an act has not clearly been declared illegal, but also where an "illegal" act has not clearly been threatened with criminal punishment. Professor Glueck argues against a liberal interpretation of this principle where its application would result in concrete injustice. But is that idea not the same as that which was expressed in the infamous National-Socialist amendment to the German Criminal

¹ See Professor Quincy Wright's review of this book, 12 Univ. Chi. L. Rev. 296 (1945).

Code which declared punishable any person "who commits an act which . . . deserves punishment according to the general principles underlying criminal law and to the sound feelings of the people?" This rule was declared to be incompatible with a democratic legal order by the World Court at the Hague, when it had to decide whether or not the Free City of Danzig, whose democratic constitution was guaranteed by the League of Nations, could receive this rule into its law. It was also among the very first National-Socialist laws to be repealed by the Allied Control Council for Germany. That even Professor Glueck is not perfectly sure of his case is indicated by the cautious phrasing of that crucial sentence in his first chapter in which he says that "the Pact of Paris *may*, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed *custom* to be acceptable as international law."²

The rule pleaded for by Professor Glueck and Mr. Justice Jackson has meanwhile been adopted by the International Military Tribunal and will thus, for the future, constitute a rule of international law. None of the defendants was sentenced solely for the crime of waging aggressive war and one might thus say that as far as they were concerned, no injustice was done. But this is not the point. The feeling for law and justice has not been undermined only in Germany by the events of the last thirty years. Its restoration is among the most urgent of our present-day tasks. In Germany in particular we have solemnly stated that we are determined to help establish a democratic, i.e., a just, way of life. While a plausible legal argument can and has been made for the punishment of the National-Socialist leaders for the crime of waging aggressive war, in the eyes of laymen, and of Germans in particular, the Nuremberg judgments appear to be based upon an *ex post facto* law. The precedents set there are already being widely applied. The German *Länder* have been ordered by the United States Military Government to enact a law punishing with hard labor, confiscation of property, fine, and loss of civil rights, the mere act of having joined the National Socialist German Workers' Party and having participated in it in a more than nominal capacity. When committed, these acts were not only legal but highly laudable under that legal and social order to which alone the now criminals were then subject. At Dachau, the War Crimes Tribunal is sentencing to prison men whose sole crime consisted in having been guards at concentration camps and who cannot be proved to have participated in any traditional crime. German courts are sentencing people who have denounced to the then proper authorities of their country individuals who had violated rules which at the time had behind them all the appearance and authority of law or who obeyed orders of men who at the time were their superiors not only in legal appearance but also in actual power. At the same time we are publicly denouncing *ex post facto* laws and announcing equal justice before the law. No wonder that thoughtful people are shaking their heads and that those, of whom there were quite a few in Germany, who were hoping for and working toward a restoration of law and security are in despair when they hear the masses cynically state that Nuremberg and its aftermath are clear proof that right is nothing but might and law nothing but the command of the victor.

Whatever legal arguments may be adduced by the keen mind of a lawyer, the problem of punishing the instigators of an aggressive war is also a political one. There are weighty political reasons for welcoming for the future the existence of a judicial judgment which, over the signature of the representatives of the four big powers of the world, declares liable to punishment the individual instigators of an aggressive war.

² Reviewer's italics.

But there are also weighty political arguments against nipping in the bud the promising beginnings of a revival of the feeling for law in a country which, whatever plans one may hold today, will one day again occupy an influential place in the world.

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El Derecho en el Derecho Judicial. By Carlos Cossio. Buenos Aires: Editorial G. Kraft Ltda., 1945. Pp. 252.

Carlos Cossio first presented a systematic statement of his theory of law in an earlier book published in 1944.¹ In this, his second book, compiled from a series of lectures given before large audiences of Argentinian jurists and judges, Cossio goes further in the development of his theory. In his previous book he had introduced the "phenomenology of the judicial decision," and the present book is entirely devoted to an amplification of this subject.

The author starts from the three fundamental modern philosophies which form the bases of his theory, those of Husserl, Kelsen, and Heidegger. Applying Husserl's phenomenology to the problem of the essence of law, he finds law to be "human conduct in its inter-subjective relationship." Law concerns the ego, hence the name "egological theory of law" for his doctrine. Law is "living human life," and therefore the science of law is an empirical science, a science of reality and the object of this dogmatic science of law is human conduct, not norms. But just as every science needs logic, so does the law, and of necessity it must work with concepts. At this point Kelsen's "pure theory of law" is introduced but Cossio reduces it to a mere formal juridical logic, indispensable, it is true, but not the science of law itself. Kelsen's great merit, according to Cossio, is in having discovered a new logic applicable to the egological theory of the science of law, namely, the logic of "oughtness." The objectives of a formal juridical logic are the norms, representing human conduct. Human conduct cannot be neutral to values and therefore values cannot be eliminated from law, but if law is truly a science, it must approach its objectives in a spirit of neutrality and impartiality. Hence, it is the "positive values" given to the jurist in a positive legal order which must be taken into account rather than the "ideal values" assignable to the realm of politics and metaphysics. Heidegger's philosophy of life, which is next introduced, stresses human conduct as the full life of man as distinguished from his mere biological life, a phenomenon of liberty, not of necessity, occurring in existential time as opposed to chronological time.

The judicial decision is a fact of juridical experience, indeed, for Cossio, the primary fact of juridical experience. Statutes are only possibilities in the abstract which come to life only when individualized and made concrete in the decisions of the judge. To Kelsen, the judicial decision created by the judge is a concrete, individual norm; for Cossio it is juridical experience merely represented in thought by a norm. Like all juridical experience, the decision is made up of three elements: the formal-logical and necessary structure (e.g., the statute), the material-contingent element (the "circumstances of the case"), and the juridical valuation, which is both material and neces-

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¹ See this writer's review of Carlos Cossio's *La Teoria egológica del Derecho*, 12 Univ. Chi. L. Rev. 226 (1945).