

## BOOK REVIEWS

**War Criminals: Their Prosecution and Punishment.** By Sheldon Glueck. New York: Alfred A. Knopf, 1944. Pp. 250. \$3.00.

Professor Glueck is filled with indignation at the failure to punish any large number of war criminals after World War I, and is very insistent that it shall not happen again. He realizes the influences of sentimentalism, appeasement, professional military gallantry to the enemy, business interests in German cartels, and others which may tend to defeat the program accepted by the United Nations. His concern, however, is particularly with lawyers. He finds that some "oppose resort to the elaborate processes of trial" and wish to proceed against the principal malefactors politically, and that others follow a "bitter end conceptualism" by insisting on a strict construction of legal principles which oppose *ex post facto* criminal laws, individual responsibility for acts under state authority, subjection of individuals to any but national criminal jurisdiction for acts within the states' territory, liability for acts committed by soldiers under superior orders, and liability of chiefs of state. The author favors

prosecution of ordinary offenders in the victim's domestic tribunals (military or civil, as locally provided) and leading culprits (Heads of State, members of general staffs and certain other high-placed classes . . .) in an International Criminal Court to be established by the United Nations and such neutral states as wish to participate.

This program, which is not unlike that set forth in the Moscow Declaration of November 1, 1943, though the latter did not specify an International Criminal Court, is recommended by Professor Glueck firstly because

trials in courts constitute a necessary symbol of the reestablishment of the rule of law on a world plane; and secondly, it can be shown that the advantages of such a plan far outweigh the disadvantages, while the dangers referred to above are more theoretical than practical.<sup>1</sup>

Most of the book is devoted to demolishing legal obstacles to a comprehensive application of this plan. It must be admitted that the first blows in this process of demolition are not reassuring. The author finds that the difficulties arise from "two very questionable assumptions."

First, that a victorious state is legally bound to observe all the technical niceties of local peacetime administration of justice in dealing with a vanquished state and its nationals, who have themselves played havoc with every civilized concept of law and justice; secondly, that international law is a fully developed and highly exact science. Such dogmas are not only extremely doubtful but their adoption as guiding lines to a United Nations policy will lead to the discrediting and weakening of the very international law they purport to protect. For they play directly into the hands of governments which, by their notorious flouting of the law, prove themselves to be but bands of international gangsters who, when finally brought to book, appeal hypocritically to the protection of the most devious technicalities of the very law they have done their utmost to destroy.<sup>2</sup>

A suggestion that retaliation may be justified under international law is not an argument proving that war criminals will receive due process of law even if principles of

<sup>1</sup> P. 10.

<sup>2</sup> P. 12.

criminal justice are ignored, and an assertion that international law is not exact does not prove that due process of law would be observed by giving a biased interpretation to doubtful points. As the Judicial Committee of the Privy Council said in the case of *The Zamora*,<sup>3</sup> "If the court is to decide judiciously in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its direction from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order."

If Professor Glueck's initial suggestion that international law should be adapted to United Nations policy, hardly stimulates confidence in the impartiality of his exposition, concern increases when we read:

The fact that the victorious United Nations could, if they chose, impose any conditions on the Axis States—including the surrender for execution *without trial* of a long list of leading militarists, politicians and industrialists believed to be involved in the murders, lootings and other crimes—is of basic importance. It is something that can legitimately be thrown into the scales whenever traditional conceptualistic argument or some unrealistic, outworn or basically irrelevant technicality inclines them against vindication of justice. In a relatively undeveloped and plastic field of law, it is but following an historical process to blend "political" with legal concepts in stimulating the growth of standards and principles. Much of the law of nations has its roots in custom. Custom must have a beginning; and customary usages of states in the matter of national and personal liability for resort to prohibited methods of warfare and to wholesale criminalism have not been petrified for all time.<sup>4</sup>

That might can act without law does not prove that its acts are right. Certainly the fact that political considerations have contributed to the growth of international law does not justify such an identification of might and right. One of the reasons for having trials of war criminals, as Professor Glueck himself recognizes, is to restore respect for law, and this can hardly be done unless the trials are conducted with scrupulous respect for law.

The author properly recognizes "that not only the rights but the international duties of the victor state in an illegitimate war forced upon it by a ruthless and lawless aggressor state are among the data legitimately to be taken into account in reasoning about the application of the principles of law to the problem of war criminals."<sup>5</sup> But strangely enough, he rejects the main legal ground on which that recognition might affect the right to punish individuals who had committed acts of a criminal character in behalf of the Axis powers. Professor Glueck writes:

The Kellogg-Briand Pact, signed in Paris in 1928, condemned recourse to war for the solution of international controversies, renounced it as an instrument of national policy, and bound the signatories to seek the settlement of all disputes by pacific means only. But that Pact too failed to make violations of its terms an international crime punishable either by national courts or some international tribunal. Therefore, the legal basis for prosecutions for violations of the Pact of Paris may be opened to question, though the moral grounds are crystal clear.<sup>6</sup>

Professor Glueck's detailed analysis is, however, better than his statement of fundamental principles. Most of the book is devoted to examining in detail violations of law by Axis nationals, the legal liabilities of individuals for such violations, the availability of national and international tribunals for enforcing these liabilities, and the availabil-

<sup>3</sup> [1916] 2 A.C. 77.

<sup>4</sup> Pp. 13 and 14.

<sup>5</sup> P. 13.

<sup>6</sup> Pp. 37-38.

ity to the culprits of defenses arising from the alleged immunity of heads of state and the alleged immunity of individuals for acts in pursuance of an act of state or under superior orders. Finally, the process of capturing the accused if they flee to neutral territory and the forms of punishment most appropriate are discussed. "Capital punishment or long-term imprisonment at hard labor—especially in rebuilding shattered Europe—will be the lot of most convicted Axis war criminals," in the author's opinion.<sup>7</sup>

In these discussions the author exhibits familiarity with the arguments and precedents and considerable acuteness in detecting the weakness of some of these alleged defenses. He recognizes that the immunity of a chief of state in the court of another state in time of peace hardly applies to the enemy in time of war or in an international tribunal.<sup>8</sup> He also properly recognizes that an act of state cannot serve as a defense for behavior which the state was clearly incompetent to authorize.<sup>9</sup> He is particularly clear in pointing out the relativity of the defense of superior orders both to the definiteness of the order and the gravity of the offense.<sup>10</sup> The author is often so excellent in the detailed exposition of law that the reader should not permit himself to be discouraged by the prejudicial introduction. Lawyers turned philosophers or politicians are not always at their best.

The author assumes that the trial and punishment of war criminals is a good thing and he gives a generous definition of the term "war criminals." He goes beyond the concept common among military men of one who has violated the laws of war. Professor Glueck defines war criminals as

persons—regardless of military or political rank—who, in connection with the military, political, economic, or industrial preparation for or waging of war, have, in their official capacity, permitted acts contrary to (a) the laws and customs of legitimate warfare or (b) the principles of criminal law generally observed in civilized states; or who have incited, ordered, procured, counseled, or conspired in the commission of such acts; or, having knowledge that such acts were about to be committed, and possessing the duty and power to prevent them, have failed to do so.<sup>11</sup>

This would seem to include Axis individuals who murdered fellow-nationals in their own country, provided they did it in an official capacity in connection with the preparation for or waging of the war. Persons who furthered such offenses directly or indirectly would also be liable.

The author pays little attention to the social value of punishing war criminals, whether defined narrowly or broadly, but indicates his attitude by warning that a particular examination of the question, which he cites, did "not emanate from Herr Joseph Goebbels but from an American 'sociologist.'"<sup>12</sup> He, however, does treat the subject briefly and his justification for punishing war criminals consists in the need to prevent a revival of a German military cult, to "establish a vital symbol of the existence of the law of nations," to deter war atrocities in the future, to separate the goats from the sheep as a first step toward reform of the German masses, and to "take into account the understandable cry for retribution that arises from the anguished hearts of the countless victims of Nazi Fascist bestiality."<sup>13</sup>

<sup>7</sup> P. 174.

<sup>8</sup> P. 123.

<sup>9</sup> P. 134.

<sup>10</sup> P. 142 ff.

<sup>11</sup> P. 37.

<sup>12</sup> P. 195.

<sup>13</sup> Pp. 16-17.

The problem of carrying out the declared United Nations policy of punishing war criminals efficiently but with consideration for legal principles and for sociological consequences is complex and controversial. While Professor Glueck's preconceptions on the subject must be taken into consideration, a careful reading of his book will contribute to understanding of the problem and its solution.

QUINCY WRIGHT\*

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*Philadelphia Lawyer, an Autobiography.* By George Wharton Pepper. Philadelphia: J. B. Lippincott Co., 1944. Pp. 407. \$3.75.

To the average reader George Wharton Pepper's autobiography, *Philadelphia Lawyer*, is interesting; to a lawyer, fascinating. He is undoubtedly a leader of the American bar. He is a great advocate, and he knows it as well as, if not better than, anyone else. This shines out everywhere, and I admire him for his forthright self-admiration. To show I mean this, I am willing to go on record that I am sure I was a good Senator! The people of Michigan cast some doubt on it in 1942, but I still think so. So Pepper is a better lawyer, and any man is a better man, because he thinks so.

Coming from a distinguished Philadelphia ancestry, he was born to be a leader, and he has been a leader in law, education, and religion in his home city and state. In politics, the Philadelphia Vares were evidently too much for him. In legal affairs he is a national figure.

He loves the outdoors. His vacations, long and full of vigorous enjoyment, were just what a man of sedentary occupation needed, and his zest for it all inspires in the reader the desire to do the same. I think his concluding chapter, in which he glorifies the outdoors, particularly the last two paragraphs, are written in beautiful English.

Naturally I am interested in his senatorial career. It was in the early twenties. The issues as he names them, except the one involving the World Court, seem a bit petty to me. For example, he dwells on the Isle of Pines treaty. Senator Pepper seems to view the Republican Presidents with favor, but turns thumbs down on F. D. R. It is strange, but a fact nevertheless, that the legal mind—perhaps I should say the advocate's mind—is such that he finds little difficulty in justifying what he approves, and in condemning what he does not like. It is not only difficult but impossible for Mr. Pepper to see even a glimmer of light in the Roosevelt administration. He admires President Coolidge greatly. We simply admire him. He courageously points out many good but forgotten actions of President Harding, and reminds me that while generally we, as a people, look with disfavor on that administration, there were redeeming features. But candor compels me to say "not enough."

In the chapter entitled "Cloud Banks and Thunderheads" he describes, I think better than I have seen it anywhere else, the evolution of American thought and opinion toward our participation in the war, toward our duty to civilization, and to our own future security. Pepper's mind moved with the nation's. He missed a rare opportunity to show good sportsmanship (nowhere does he exhibit bad sportsmanship, even where in the *Dupont* tax case he calls his own criticism, "close to a squeal") by commenting on the President's farsighted leadership of the country in this crisis. To my mind that was President Roosevelt's greatest contribution to the nation and to civilization. He saw clearer and earlier than any other important public figure in America the coming

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