The American Legal Profession and the War Crimes Trials in Germany, 1942-1951

Robert G. Waite
The American Legal Profession

and the Post-War Trials in Germany, 1942 - 1951

Dr. Robert G. Waite

bwaite9@verizon.net
Robert G. Waite worked as a Senior Historian in the Office of Special Investigations, U.S. Department of Justice, Washington, D.C., from 1989 to 2009 where he was involved in the prosecution of individuals residing in the United States who had assisted Nazi Germany and its allies in the persecution of individuals because of race, religion, national origin or political belief. He worked on numerous cases of former concentration camp guards and members of local militias and auxiliary units that carried out mass executions. Dr. Waite’s research interests are the history of law enforcement and crime. He is currently based at the Forschungsstelle Widerstandsgeschichte Gedenkstätte Deutsche Widerstand (Berlin) where he is conducting research on women and crime in Germany, 1914 to 1945.
Summary.

As reports of Nazi atrocities became more common in the summer of 1942 the calls from within the American legal profession for the prosecution of those responsible grew too. A number of attorneys advocated strong criminal sanctions and they urged the leaders of those nations allied against Nazi Germany to establish tribunals to handle these cases. Advocates of stern legal measures and criminal prosecution believed that such actions were essential to the ensure justice for those who had been persecuted. These calls were soon overshadowed by those legal scholars who viewed legal action as crucial to the development of a body of international law that they believed would prevent future conflict and thereby protect rights of the individual. Their views prevailed and this marked the triumph of legal positivism within the legal community after a decade of intense debate over the nature of law, jurisprudence, and social change. The discussions within the American legal profession went far in shaping the issues that came to dominate the Nuremberg Trial and the trials that followed in occupied Germany.
During the summer of 1942 newspapers throughout the United States began to publish accounts of Nazi atrocities in Eastern Europe. President Roosevelt issued a statement on August 21st warning that those responsible for “crimes against innocent people” will, once the war is over, “stand in courts of law in the very countries which they are now oppressing and answer for their acts,” as the attention of America was drawn to Nazi atrocities. Within the American legal profession the discussion of war crimes broadened when the National Lawyers Guild, the American Society for International Law and the American Bar Association, three of the most prominent professional organizations, called for legal sanctions against those who had ordered and carried out atrocities. From late 1942 through the conclusion of the proceedings of the International Military Tribunal at Nuremberg members of the American legal profession shaped the discussions of the legal issues and guided policy makers toward the prosecution of the major offenders. The call for trials came from attorneys and law professors who, distressed by the violence directed against the Jews of Europe, argued for the vigorous prosecution of those responsible for the wanton destruction of human life. These scholars argued that sound, rational and moral judgments are the basis of law, and for them the apparent immorality of the policies of the Nazi regime threatened the very fabric of law.

The initial calls within the American legal profession for justice for the victims of Nazi genocide were soon overshadowed, however, by an ambitious program to reestablish the rule of law in international relations, to the development of a body of international law that many believed would prevent future conflagrations and thereby protect the individual. This marked
the triumph of legal positivism within the legal community after a decade of intense debate over
the nature of law, jurisprudence, and social change, a time when scholars had been frightened
by the relationship between the “moral relativism” of the positivists, and the “amoral totalitarian
dictatorships.”

The developments within the American legal profession, its influence on the
war crimes trials, and in particular the shift of attention from the victims to the assertion of
international law, are the issues examined in this article, topics which have received little
attention in the voluminous literature on the Nuremberg Trial and the subsequent proceedings.

Beginning in late 1942, concern among members of the legal profession mounted as
accounts of atrocities and the systematic murder of Jews in Eastern Europe became more
common in the American press. Professor Sheldon Glueck wrote to President Roosevelt on
August 21, 1942, that he was “much interested in President’s statement that the Axis Powers
would be held strictly accountable for atrocities.” This letter and an article by Glueck on the
“Trial and Punishment of Axis War Criminals” in which he proposed a ten-point program for
bringing perpetrators to justice reached the desk of the President who reviewed both and
forwarded the material to the Secretary of State.

While Glueck had gained Roosevelt’s attention on the issue of justice for the victims, professional organizations were demonstrating
their concern with the applicability of international law. During 1942 and 1943, some 200
American and Canadian lawyers and jurists met more than a dozen times under the auspices of
the American Society for International Law with the expressed purpose of "revitalizing and
strengthening international law" and in "laying the basis of a just and enduring world peace
securing order under law of all nations.” Those attending these meetings believed that the legal
profession had a "special responsibility" to address these issues.⁶

After a series of meetings, a handful of announcements condemning the Nazi barbarities, and calls for the punishment of those responsible for war crimes "through the channel of organized justice," the American Society of International Law’s subcommittee on the trial and punishment of war criminals issued its report on July 20, 1943.⁷ The report called for legal sanctions prepared in strict accordance with international law and identified some of the current difficulties in bringing to justice those who perpetrated or participated in atrocities. For example, evidence had to be gathered carefully and thoroughly, with the focus on the most serious offenses. The trials, be they before civil or military courts, had to be conducted according to the law because their main purpose was "the vindication of the rule of law." The subcommittee concluded that the holding of war criminals answerable in a court of law "may contribute substantially to the reestablishment of order and decency in international relations" and that was the major objective.⁸

In October 1943, the President of the American Bar Association (ABA), the largest and most influential organization of attorneys in the United States, weighed in and issued a statement on what he identified as the most pressing issues, namely "the successful prosecution of the war," "the maintenance of those normal activities which are essential even in war times," and "preparation for the post-war world," with the latter topic receiving the most attention. Lawyers had a special interest and the legal profession would make a unique contribution to the maintenance of "orderliness and true peace," of "justice among the peoples of all the world," he wrote.⁹ These statements, made at the annual meeting of the ABA, did not include the condemnation of crimes committed against individuals. The profession’s "manifest duty" was,
according to the ABA’s president, to ensure the rule of law.¹⁰

Not all of the professional organizations agreed with this point of view. While the ABA and other established organizations emphasized the application of international law to the trials of those responsible for aggressive war, the National Lawyers Guild, founded in 1936,¹¹ argued against the “uncritical application of abstract dogma and empty concepts” to the issues of war crimes in the lead article in its November-December 1944 publication and challenged “the vague doctrines of act of State, superior order, territoriality of jurisdiction, political crimes and sovereign immunity” that others applied to the prosecution of war criminals.¹² Copies of the article, “The Punishment of War Criminals,” went to newspapers across the country. The Washington Post published the article on January 15, 1945, and voiced its strong support for “swift and sure” “retribution for war criminals” in an editorial.¹³ The National Lawyers Guild also mailed the article to members of the cabinet, diplomatic representatives of the Allied nations, and the White House, with a cover letter that stated “we believe it will be of assistance to our Government and the other members of the United Nations in the formulation of policy on this important subject.” The Guild advocated an “agreement among lawyers on the subject of war criminals” that would lead to prosecutions.¹⁴

The National Lawyers Guild called for the recognition of the dimensions of the crimes committed by Nazi Germany and urged the prosecution of those responsible. The individuals who carried out “the cold-blooded massacres and the incredible horrors of Maidanak [sic], Lidice, Kharkov and Nanking” must be brought to justice for “swift and sure punishment” in order that the international legal system and the law be vindicated. In these matters, the National Lawyers Guild wrote, the legal profession had a “special responsibility” and it
identified the prosecution of war criminals for their illegal acts against civilians as a key element in America’s war policy.\textsuperscript{15}

At a time when questions about the jurisdiction of international law over particular crimes were being raised, the National Lawyers Guild was “convinced” that the just punishment of war criminals had, in fact, “a firm basis in well-established principles of law.” Its December 1944 call for the prosecution of those responsible addressed these issues earlier and more forcefully than other professional organizations of America’s lawyers. The “basic legal and practical considerations” vigorously debated in the law journals and challenged by the National Lawyers Guild included the nature of war crimes, the collection of evidence, jurisdiction of the injured state where the war crime had been committed, responsibility of the individual, the plea of superior orders, and lastly, the prosecution of heads of state, higher officials and industrialists, those who “planned, inspired, and directed the organized criminal activities.” In short, the National Lawyers Guild asserted that the punishment of war criminals was essential for the establishment of a lasting peace, because “as long as they are permitted freedom they will constitute a threat to the security of the world and a source of disunity among the United Nations.”\textsuperscript{16}

Other issues of law divided the American legal profession, including the prosecution of individuals for war crimes. Writing in 1943 in \textit{The American Journal of International Law}, Professor George Manner, for example, presented a detailed argument that individuals were not subject to international law, that those who committed offenses against the rules of war were not subjects of the law of nations. In his opinion, there existed no international war crimes chargeable to individuals or the persons constituting a nation. Manner argued that countries had
the duty to adopt measures and to enforce these against persons in their control. In addition, prosecutions could only be undertaken on the basis of an international agreement, but there was none.\textsuperscript{17} Other scholars who did not fully agree on the question whether international law provided for the prosecution of individuals, who had committed war crimes, noted the formidable obstacles. The problem of punishment was “truly complex,” wrote Columbia University law professor Charles Hyde, and involved such issues as securing conclusive evidence of guilt, the definitions of criminality applied by the court or courts hearing the cases, and the matter of superior orders.\textsuperscript{18}

Members of the American legal profession debated these and other issues of law in journal articles and conference papers. No clear consensus emerged, however, other than the conclusion that international law must guide the post-war adjudication. The decision to prosecute and punish war criminals was ultimately a political one,\textsuperscript{19} as was made clear in the several joint declarations issued by Roosevelt, Churchill and Stalin, such as the Moscow Declaration of November 1, 1943, when they announced that individuals would be held responsible for the “atrocities, massacres, and executions” that typified “Hitlerite domination.”\textsuperscript{20} In late March 1944, Roosevelt issued another warning that “none who participated in these acts of savagery shall go unpunished.” The President called upon “free peoples” to “open their frontiers to all victims of oppression” and he referred to the “systematic murder of the Jews of Europe” as “one of the blackest crimes of all history.” Other statements followed, as Roosevelt voiced his commitment to the victims of Nazi oppression.\textsuperscript{21}

The debate among legal scholars and jurists shaped and molded the discussions within the Roosevelt administration and defined the structure of the proceedings of what would be the
International Military Tribunal at Nuremberg and the subsequent trials. In August 1943, U.S. government officials, particularly in the War Department under Henry L. Stimson, began to focus on the legal basis for the prosecution of war criminals. An October 30, 1943, memorandum prepared for Secretary Stimson addressed the main issues which had been argued in law journals and which included the authority to establish tribunals, their jurisdiction, and the definition of war crimes, trial procedures, sentencing guidelines and punishments. The debate reached the desk of the President when a March 1945 article by Professor Sheldon Glueck, an early advocate for criminal prosecution of war criminals, was sent to the White House. President Roosevelt’s Administrative Assistant reviewed the article and wrote to Glueck, “I shall be glad to make it available to the President at the first opportunity.”

During the spring of 1945, the details of the official American position on the trial and punishment of war criminals before an international tribunal became clearer and the Departments of Justice, War, Navy and State prepared a tentative plan for President Roosevelt to bring to Yalta for the discussions with Churchill and Stalin. The death of Franklin Roosevelt interrupted this planning, but Harry Truman took little time in announcing his support for an international tribunal. President Truman relied on a detailed memorandum prepared by Samuel Rosenman, a judge and advisor to President Roosevelt on the matter of war crimes, which laid out in detail the issues involved and the legal basis for a trial.

On April 26, 1945, barely two weeks after Roosevelt’s death, Truman reached out to one of the most prominent members of the legal profession, Robert H. Jackson, an Associate Justice of the United States Supreme Court. Rosenman transmitted Truman’s proposal that Justice Jackson lead the American prosecution and described the anticipated prosecution before a
military tribunal on charges of a general conspiracy “by illegal means, by violation of treaties, by wholesale brutality, to conquer Europe and the world.” President Truman wanted Jackson to head the American delegation because of his “experience and ability as a trial lawyer.” Jackson told Rosenman of a speech he had delivered on April 13th to the American Society of International Law outlining his views. As he explained then, Jackson opposed trial in civil courts or international tribunals modeled on them, and he saw the opportunity for international law to become a powerful force in world peace, offering what he termed “an honorable alternative to war.” The acceptance of international law and a court to adjudicate matters of conflict among nations was dependent “on acceptance of the Court as an independent body above obligation to any nation or interest.”

On April 27th, Judge Rosenman gave Jackson a memorandum submitted January 22, 1945, to the President that embodied the administration’s views on a tribunal and addressed the “ways and means for carrying out the policy regarding the trial and punishment of Nazi criminals.” While the memo did not address the legal basis for trials, it identified and summarized the issues involved; many had already been the subject of discussion in law journals. For example, the crimes to be prosecuted consisted of individual criminal acts “perpetrated in pursuance of a premeditated criminal plan.” Those to be punished were not only the major offenders but also the “numerous organization[s]” that had been involved in “carrying out the acts of oppression and terrorism.” In addition, the memo discussed the “legal difficulties,” the problems raised by the call for punishment of those who committed atrocities in the pre-war years from 1933 to 1939, which, it noted, were “neither ‘war crimes’ in the technical sense, nor offenses against international law.” President Truman was advised that the
nations united in the fight against Nazism called for the punishment of these crimes and the memo noted that postwar interests of peace and security, the “rehabilitation of the German peoples,” and the “demands of justice” mandated such.31

The largest part of the memorandum addressed the legal basis for the criminal prosecution and the influence of the discussions in the American law journals is clear throughout. The memo called for “the judicial method,” placing the offenders before a tribunal to answer for the “commission of their atrocious crimes,” serious violations of international law and the laws of war. Following these proceedings, those offenders not returned to the site of their crimes would be brought before occupation courts as would members of the criminal organizations. The findings of the main court constituted “a general adjudication of the criminal character of the groups and organizations,” thereby expediting the operations of the subsequent proceedings when “the only necessary proof of guilt of any particular defendant would be his membership in one of those organizations.”32

Rosenman assured Jackson that as Chief Counsel the President gave him “a free hand in the selection of staff and in all that went with the responsibility.” On April 29th, Jackson accepted and he urged the President to move quickly in the preparation of a document on the composition of the tribunal and a code of procedure.33 On May 2nd, the President issued the Executive Order appointing Robert Jackson Chief of Counsel “in preparing and prosecuting charges of atrocities and war crimes.”34 Jackson assembled a staff of prominent legal scholars, gathered materials on international law for his library, and made plans for this collection to be transported to Germany.35 While developing the case for the prosecution during the summer of 1945, Jackson’s staff wrote more than 40 trial briefs on key legal issues, such as preparations
for aggressive war and the responsibility of individuals under international law for war crimes.\textsuperscript{36}

The latter topic was particularly important and also contested in the legal writings because of the widely held view that international law applied not to individuals but solely to nations. Jackson reviewed this important matter and decided expeditiously. In a brief memorandum, dated July 5, 1945, Jackson cited the writings of Professor Hans Kelsen and concluded that persons “may be held individually responsible.”\textsuperscript{37}

Justice Jackson and his staff worked intensely and soon identified the salient issues facing the United States. On June 7, 1945, Jackson gave President Truman a report on the legal basis for the trial of war criminals, a widely circulated document that revealed both the influence of the American legal profession on Jackson and the compromises made to the other Allied powers.\textsuperscript{38} His mandate was to organize the prosecution of the major offenders in accordance with the Moscow Declaration of November 1, 1943, those individuals whose offenses had no specific geographic boundary and who would be punished by joint action of the Allied governments, Jackson wrote. Eager to proceed, Jackson told the President that the American case was already being prepared because the United States had “an inescapable responsibility” to “conduct an inquiry...into the culpability of those whom there is probable cause to accuse of atrocities and other crimes.”\textsuperscript{39}

Jackson’s report to the President clarified the American position, reflected the changes underway in American legal thinking, and he asserted repeatedly that the proceedings would be scrupulous and thorough, that they would “determine the innocence or guilt of the accused after a hearing as dispassionate as the times and the horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.” The defendants would, however, not be
tried under the American system with its constitutional rights; Jackson called for proceedings that barred the “obstructive and dilatory tactics” seen in U.S. courts because he feared that without such restrictions the trial could turn into a forum for the defeated Nazis.  

The defendants brought before this tribunal, Jackson wrote, were to answer for the “grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world,” the conspiracy charge, and not specific incidents; those would be left up to courts in the countries where the crimes had been committed. Jackson was aware of the attention this report would receive and he spent much of it discussing the basis for the proceedings under international law, identifying the treaties and agreements violated by Nazi Germany. As he told the President, the United States had a rare opportunity to advance peace, a chance to direct the world “toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.”

In the preparations for the trials of war criminals in Germany and the operations of the International Military Tribunal, the United States played the central and most prominent role in formulating the legal basis for the prosecutions through Justice Jackson, the individual responsible “more than any other man” for “formulating the legal philosophy of the trial as expressed in the Charter.” Justice Jackson led the negotiations through the summer and the charges he laid out became the basis for the London Agreement, signed on August 8, 1945, and the Charter of the International Military Tribunal. In addition to identifying the crimes, the Charter established the structure of the Tribunal and the rules by which it would operate to insure fair trials for the defendants, measures adopted from the American judicial system. In a
statement issued by Jackson with the release of the agreement between the United States, Great Britain, Soviet Union and France creating an international tribunal, he announced that “for the first time, four of the most powerful nations have agreed not only upon the principle of liability for war crimes and crimes of persecution, but also upon the principle of individual responsibility for the crime of attacking the international peace.” While cautioning the public not to expect a quick trial, he emphasized the significance of establishing aggression of one state against another as an international crime and the accountability of those responsible for “persecutions, exterminations and crimes against humanity.”

The tribunal issued the indictment of the major war criminals on October 18, 1945, and it was immediately published in the American press and in a number of legal journals. The hearings began on November 20th and these too were covered extensively in the American media. With the publication of the indictment and the start of the trial the vigorous debate within the American legal profession on the legality of the Tribunal and the application of international law to Nazi war criminals and organizations largely dissipated. The focus of discussions in the professional journals shifted to the operations of the Tribunal and its long term impact, especially the contribution to the maintenance of peace; there was little discussion of justice for the victims.

A number of American lawyers went to Nuremberg to observe the proceedings of the Tribunal, as the government sought to boost support for the trials and the principles guiding them. Herman Phleger, a prominent San Francisco attorney, attended the trial in December 1945 and published one of the first in-depth accounts. “Only the trial itself could answer the question whether it was to be no more than an exercise of victorious power under a cloak of
legal form, or whether it was to be a dispassionate application of the principles of international justice, and a significant step forward in the long struggle to establish the supremacy of the law,” Phleger wrote in an article for the *Atlantic Monthly*. He answered critics who had maintained the defendants were being tried under *ex post facto* law, described the evidence and the international law that had been violated. Phelger, an articulate advocate for the Tribunal, concluded that the trial was indeed fair and that the outcome, the determination that “any person who commits the acts of which these defendants are accused shall be subject to individual accountability under international law,” would be of immense importance.

In the spring of 1946, the War Department sponsored a trip by several members of the American Bar Association and gave them broad access to the courtroom. Willis Smith, the president of the American Bar Association, attended the proceedings in April and in a letter to President Truman described the trial as conducted “with dignity and dispatch and in the best traditions of English and American jurisprudence.” Smith recognized that some compromises had to be made with the French and Soviets, but he praised the work of Justice Jackson. “I believe that history will record the Nurnberg trial as a milestone in jurisprudence, both laudable and effective in results,” Smith wrote. In a speech to ABA members, he gave his impressions on the solemnity of setting and the awe he felt when standing so close to those persons who had been “emblazoned on world history for the evil deeds they have done.” After describing the courtroom and the defendants, Smith explained the nature of the tribunal, the charges it addressed, and the proof offered. He argued that the charges had largely been proven, that the proceedings were being carried out “in an orderly manner, and somewhat in accordance with English and American tradition,” and that the prosecution was fully just and in accordance with
international law. “No where have I ever seen a more dignified and orderly trial,” Smith concluded, clearly pleased with the contributions his organization and the American legal profession had made to the tribunal.\(^53\)

Review and evaluation of the decision reached at Nuremberg came swiftly after the announcement of the verdict on October 1, 1946. Among the American law journals following the activities of the International Military Tribunal was the *Temple Law Quarterly* which published a special issue with the most salient Nuremberg documents, including Justice Jackson’s “Closing Arguments” and the decision. As Justice Jackson wrote in an introduction to these texts, this journal had “early sensed the importance of the Nürnberg proceedings and promptly made the arguments of the prosecution available to the profession.”\(^54\) Several other law journals published insightful analyses of the proceedings because, as George A. Finch, editor-in-chief of *The American Journal of International Law* wrote: “The invocation of principles of doubtful legality in the punishment of the Nazi defendants may lay the entire proceedings open to challenge by future generations of Germans.”\(^55\) A distinguished legal scholar, Finch framed his discussion in the January 1947 issue with the individual allegations, the charges presented in the indictment, and he reminded the readers that in “accepted international law...a belligerent has authority to try and punish individuals for crimes which constitute violations of the laws and customs of war, as well as of the laws of humanity, when such persons fall within his power,”\(^56\) thereby summarizing the prevailing thought that emphasized the legal process over substantive commitments to the value of the individual victims.

Finch looked to the future when he identified the specific pre-war agreements and
treaties violated by Germany, and called upon those governments responsible for the
Nuremberg decision to show through firm actions that the prosecutions were not “political
punishment of the vanquished by the victors but were intended to establish international law
applicable to all future generations.” The victorious allied nations “should make the Nuremberg
principles and procedures applicable to all future aggressors,” Finch argued. He called upon the
United States “to assume leadership in initiating the outlawry of aggressive war by making
crimes against international peace punishable in national as well as in international courts.” 57
Francis Biddle, a member of the Tribunal, supported this argument and told President Truman
that the true significance of Nuremberg was dependent upon the readiness of nations to draft a
code of international criminal law that banned the waging of aggressive war. Truman voiced
his endorsement of the Nuremberg principles that aggressive war was criminal and expressed
his hope that the United Nations would codify the principles of Nuremberg in the context of
“offenses against peace and security of mankind.” 58

American legal scholars examined aspects of the Tribunal in detail, discussing issues
raised during the preparations for the Tribunal and its deliberations, issues that were of interest
and importance to the American legal profession and their expectations for the future. The
announcement of the Tribunal’s verdict “stirred a new wave of sharp criticism of the moral and
legal foundations” of the entire proceedings, wrote Professor Leo Gross in an April 1947 article,
and the discussion spread quickly from the legal press to mainstream periodicals. 59 Critics,
largely ignoring the victims of Nazi oppression, attacked the juridical basis for the Tribunal and
charged that the Tribunal, and the substantive law upon which it operated, were ex post facto.
In this view, the Nuremberg trials were but an expression of victor’s justice because only the
vanquished came before the Tribunal. The latter point, Gross concluded, was unfortunately the
case and “the ends of a true international legal order in time of peace as well as in time of war
would unquestionably be better served if equal justice were meted out to all offenders against
the law of nations, irrespective of whether the ultimate fortune of battle placed them in the camp
of the victor or of the vanquished.”

Defenders of the Tribunal argued vigorously that the trial was not *ex post facto*,
insisting that the criminality of aggressive war and the issue of individual responsibility had
indeed been part of international law on September 1, 1939, when Germany invaded Poland.
Advocates cited a number of international agreements as providing the legal foundation. They
also called for a more flexible interpretation and application of international law. “It is more
important to vindicate and crystallize the world’s repugnance for aggressive war than
mechanically to apply” legalistic formulas, wrote University of Chicago law professor Bernard
Meltzer. A critic concluded that the “outstanding accomplishment” of Nuremberg was that it
“crystallized the concept that there already is inherent in the international community a
machinery both for the expression of international criminal law and for its enforcement.”

The criminal prosecution of war criminals continued in Germany after the International
Military Tribunal had reached its verdict and announced the sentences. Under Control Council
Law No. 10, enacted by the American military government in Germany on December 20, 1945,
crimes against peace, war crimes, crimes against humanity, and membership in organizations
declared criminal by the Tribunal were to be prosecuted, and this law provided the basis for a
number of subsequent proceedings. The American government sponsored visits to these trials
too. An Associate Justice of the Supreme Court of Nebraska, Edmond Carter, attended the
proceedings and wrote, “My experiences in Nurnberg convince me that the trials there were as fair as those conducted here at home.” Judge Carter called for decisive international action to prevent future aggressions and he voiced concern for the victims. Although some “decry our participation in the enforcement of war crimes...we dare not wait until the holocaust of some future Hitler is hurled among the people of this nation before we pray for world sanctions against wholesale murder, atrocious brutality and the wanton destruction of property,” he added.

Summing up a widespread sentiment, Judge Carter added, “If our sense of justice has become so stultified that we can watch the outrage of justice and the arrogant disregard of the laws of war with complacency, we should erase the name of the United States from the list of enlightened peoples.”

During 1946 and 1947, the major issue of debate was the application of the Nuremberg Tribunal as the foundation for lasting peace among nations, as the legal profession reviewed its significance and looked to the future, much as Justice Jackson had advocated in his June, 1945, report to President Truman. Judge Francis Biddle amplified Jackson’s position in his November 9, 1946, report to President Truman. The lessons of Nuremberg might be “ephemeral or may be significant,” depending upon how the world acted, Biddle wrote. “The time is therefore opportune for advancing the proposal that the United Nations as a whole reaffirm the principles of the Nürnberg Charter in the context of a general codification of offenses against the peace and security of mankind.” The world had the opportunity to develop “permanent procedures and institutions” to enforce international law. “It is of the utmost importance to crystallize the experience of these trials while the conscience of mankind in all counties has not yet forgotten the hideous misdeeds there recorded,” the editor of *The American Journal of International Law*
wrote in April 1947. He and others looked to the United Nations “to extend the institutions of positive international law as a deterrent against the repetition of such crimes in the future.”

A few steps were taken in this direction. On December 11, 1946, the General Assembly of the United Nations affirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal” and directed that these principles become part of the general codification of offenses against peace, part of an international code to prevent war and to insure the security of the peoples of the world. The General Assembly asked the International Law Commission to formulate the Nuremberg principles for its adoption.

In the spring of 1947 a number of members of the American legal profession turned to the issue of world peace, as they sought “to find ways in which the precedent can be turned to its greatest use in promoting the future peace and welfare of mankind,” wrote Professor Philip Jessup, who looked to the United Nations and the establishment of an International Court of Justice. Steps had already been taken to codify these principles. In March 1945, the U.S. State Department, acting with the other nations convening the United Nations Conference, invited representatives to a preliminary meeting to be held on April 9, 1945, in Washington to “prepare a draft of a statute for the International Court of Justice” that would be a component of the international organization. At the mid-April 1945 meeting of the American Society of International Law, Professor George Finch told his colleagues that “the most fundamental and vital international problem of the future is the maintenance of a durable international peace and the lasting prevention of international aggression by legal precept and organized procedure not dependent upon the lives or wills of a few living statesmen.” He believed that the United
Nationals organization would do that, largely because it would be empowered with effective sanctions.\textsuperscript{71}

Discussions on the implementation of these goals continued over the next several years, and the issue gained attention again in the summer and fall of 1951 when the American Bar Association submitted a draft Statute for an International Criminal Court to the United Nations.\textsuperscript{72} This proposal called for the jurisdiction of this court to be extended to those offenses identified in Article 6 of the Charter of the International Military Tribunal. The court’s jurisdiction, the selection of judges, the nature of the proceedings, and other issues were debated not only by the American Bar Association but also the Department of the Army.\textsuperscript{73} These discussions acknowledged the importance of the Nuremberg decision, the contributions made to international law, but by the early 1950s its urgency had subsided as other issues gained national attention. The hopes of those who had led the prosecution and adjudicated at the International Tribunal remained in part unfulfilled.

In conclusion, as World War II came to an end, some members of the American legal profession called for the prosecution of those responsible for Nazi atrocities and urged justice for the victims. The emphasis shifted and the main focus became the re-affirmation of international law and its role in insuring peace among nations. Late in the war and in the years that followed, there was little comment on the victims of Nazi oppression within the legal profession for whom the sanctity of the law and its application to the cause of peace was of paramount importance.

The role of members of the American legal profession in the war crimes trials in Germany was decisive. While a few law journal articles from the years 1943 to 1945 expressed
outrage over Nazi atrocities, most voiced support for trials because of their importance for international law and world peace. Intense debate on the trials and criticism of the legal foundations persisted for a number of years. The profound influence of the American legal profession on the Nuremberg Tribunal came largely through Justice Robert H. Jackson whose views, molded by his legal training and professional experience, shaped the Tribunal. Jackson’s personal papers reveal the extent of his reliance on a staff of American lawyers which he had assembled and the briefs they prepared, all based on their legal training and the discussions in the law journals. For Jackson, and most members of the American legal profession, the Nuremberg trial remained “an attempt to answer in terms of the law the most serious challenge that faces modern civilization–war and international lawlessness.”

The legacy of Nuremberg, the trial of the major offenders and the subsequent trials, meant for the American legal profession, above all, the identification of aggressive war as a violation of international law, an act that would be sternly punished. Scarce were the calls for justice for the victims of the heinous crimes, even though their fate had been central to the proceedings at Nuremberg. The American legal profession returned largely to the ideals of legal positivism that had been challenged and attacked throughout the late 1930s and 1940s. Legal positivism prevailed and overcame the arguments from those who advocated the “intersection between law and morals.” To the positivists, the trials’ major contribution was the reestablishment of an international legal order, one that would ensure future peace and, they believed, prevent future atrocities.


5. “Memorandum for Honorable Cordell Hull,” September 10, 1942; The White House, “Memorandum for MAC,” November 11, 1942; and letter from M.H. McIntyre, Secretary to the President, to Dr. Glueck, November 12, 1942, FDR Library, OF, Box 5152.


8. Dickinson, “Report of the Subcommittee on the Trial and Punishment of War Criminals,” 664-665. See also the comments of the distinguished international law scholars George A. Finch, "Retribution for War Crimes," AJIL 37(1943), 81-88; and Clyde Eagleton,


12. “The Punishment of War Criminals,” *Lawyers Guild Review* 4(November-December 1944), 23. The National Lawyers Guild issued the article as a separate reprint and distributed it widely. A copy is in the JAG Library, the collection of war crimes materials put together by the Judge Advocates Office, see National Archives and Record Administration, College Park, Maryland (hereafter NA), Record Group 153, JAG Library, L-342.


Contrary to the Laws of War,” *AJIL* 37 (1943), 406-410, 415, 421-424. For a differing view, see Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals,” *California Law Review* 31(1943), 530-571, especially pages 532-534. The issue of individual responsibility for criminal acts committed during wartime by members of the armed forces was addressed by the Versailles Treaty, see James W. Garner, “Punishment of Offenders against the Laws and Customs of War,” *AJIL* 14(1920), 70-94.


21. “Statement by the President,” March 24, 1944, Library of Congress, The Papers of Robert H. Jackson, Manuscript Division, Box 95. The Public Papers and Addresses of

23. Memorandum for the Chief, Civil Affairs Division, Office of the Chief of Staff, W.D.G.S., “Subject: Trial of War Criminals,” October 30, 1943, NA, Record Group 153, JAG War Crimes Branch, Box 11.


27. Memorandum for the President. “War Crimes Trials,” April 19, 1945, and Memorandum for the President, “Subject: Trial and Punishment of Nazi War Criminals,” Harry S. Truman Library, President’s Secretary’s File.


32. Ibid., 4-5. A May 17, 1945, “War Crimes Prosecution. Planning Memorandum,” elaborated these issues and identified the proposed charges: conspiracy to establish “complete German domination of Europe and eventually the world;” the launching of illegal wars of aggression; violation of international law and the laws, customs and rules of war; and perpetrating “atrocities and other crimes...in violation of international law or treaties, or the laws of Germany or one or more of its allies, co-belligerents, or satellites,” NA, Record Group 153, JAG War Crimes Branch, Box 10, 2. The memo also addresses the issues of evidence, its admissibility, and the charges. On the subsequent trials, see Eli E. Nobleman, “American Military Government Courts in Germany,” AJIL 40(1946), 803-811; Telford Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10 (Washington, D.C., 15 August 1949); and Ueberschär, Die alliierten Prozesse gegen Kriegsverbrecher und Soldaten 1943-1952.


Newspaper clippings on his appointment are in The Papers of Robert H. Jackson, Box 95.


37. Memorandum on individual responsibility, July 5, 1945, The Papers of Robert H. Jackson, Box 104. See Kelsen’s 1943 article “Collective and Individual Responsibility in International Law.”

for Trial of War Criminals,” *Temple Law Quarterly* 19(1945), 144-156. This volume of the *Temple Law Quarterly* was devoted to the war crimes issue. In 1947, Jackson published a book of documents on the trial as he strived to make this material widely available in the United States; see *The Nürnberg Case as Presented by Robert H. Jackson* (New York: Alfred A. Knopf, 1947).

39. The Moscow Declaration also called for the return of those responsible for or who participated in atrocities to the countries where these occurred to be “judged and punished;” see “Declaration on German Atrocities [Moscow Declaration],” Released on November 1, 1943, *Trials of War Criminals*, Volume III, X. “Justice Jackson’s Report to President Truman on the Legal Basis for Trial of War Criminals,” 147-148.


41. “Justice Jackson’s Report to President Truman,” 149.


44. Letter, Robert H. Jackson to President Harry S. Truman, October 12, 1945, Truman Library, Papers of Harry S. Truman, White House Central Files, Confidential Files. The
London Agreement reiterated the warnings of the November 1, 1943, Moscow Declaration, that those responsible for or participants in atrocities and crimes would be sent back to the countries where they were committed and the major war criminals, “whose offenses have no particular geographical localisation,” before a tribunal, and established an International Military Tribunal; “London Agreement of 8 August 1945,” in *Trials of War Criminals*, Volume III. XI-XII.


46. See, for example, Raymond Daniell, “Big Four Indict 24 Top Nazis for Plotting Against Peace; Atrocities in War Charged,” *New York Times*, October 19, 1945, a front page article summarizing the allegation. The full text of the indictment ran on pages 11-14. The *American Bar Association Journal* 31(September 1945), 454-457; and *Temple Law Quarterly* 19(1945), 172ff, also published the indictment.


51. On the discussions with the Russians who desired the trial to be a “ratification of the decision to execute,” which was “not acceptable to the American public,” see the memo from the US Military Attache, London, to The President of the United States, June 30, 1945, Truman Library, Papers of Harry S. Truman, White House Central Files, Confidential Files. Letter, Willis Smith to President Truman, May 1, 1946, Truman Library, Papers of Harry S. Truman, Official File.


53. Ibid., 391.

Organizations,” *Temple Law Quarterly* 20(1946), 168-317. That issue also published the “Dissenting Opinion of the Soviet Member of the International Military Tribunal” (318-337), and “Justice Jackson’s Final Report to the President Concerning the Nurnberg War Crimes Trial” (338-342).


70. “Meeting of the Committee of Jurists,” *Department of State Bulletin* 12(April 1, 1945), 533; and “Meeting of the Committee of Jurists. First Plenary Session,” *Department of
State Bulletin 12(April 15, 1945), 672-673.


73. Memorandum for Major General Miles Reber, Subject: Proposed draft statute for an International Criminal Court, April 1, 1952, and Memorandum for: General Counsel, Subject: Geneva Convention on the establishment of an International Criminal Court, July 27, 1951, NA, Record Group 153, Box 35.


