

The Interrogation of Karl Hermann Frank & the Kristallnacht Documents

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[1] There are two items in this installment of the Nuremberg documents.

[2] The first item is a significant part of the interrogation of Karl Hermann Frank (referred to in the Judgment of the International Military Tribunal at Nuremberg as Carl Herman Frank).¹ The interrogation, which took place in Wiesbaden on June 11, 1945,² concerns his (and others') role in the imposition of Nazi rule, first in the Sudetenland area during 1938 and 1939 and then in the remainder of the Czech territory, Bohemia and Moravia, over the next two to three years.

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¹ See *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, reprinted in 41 AM. J. INT'L L 172 (1947) [hereinafter *Judgment*]. Frank was not tried by the International Military Tribunal at Nuremberg, nor in the subsequent trials carried out in Nuremberg pursuant to Control Council Law No. 10. Allied Control Council Law No. 10, CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE No. 3, Jan. 31, 1946, at 50. He should not be confused with Hans Frank, Governor-General of the occupied Polish territory, who was one of those hanged in Nuremberg by decision of the International Military Tribunal. *Id.* at 332. Karl Hermann Frank was handed over to the Czechs who tried and hanged him publicly in 1946. Lionel Kochan, *Frank, Karl Hermann*, in 2 ENCYCLOPEDIA OF HOLOCAUST 526, 526 (Israel Gutman ed., 1990) [hereinafter *Frank*].

² Interrogation by Dr. Ernest Hochwald of Karl Hermann Frank: The Economic Elimination and the Expulsion of the Jews in the Sudet Territory and in the Protectorate, Wiesbaden 9 (June 11, 1945), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 1, at <http://www-camlaw.rutgers.edu/publications/law-religion/> [hereinafter *Interrogation*].

[3] The second item is a batch of documents concerning the attack on Jews, especially on their synagogues and other properties, which occurred throughout the Reich on the nights of November 9 and 10, 1938. This event is known as “Kristallnacht.”³

[4] Frank offers some interesting information concerning Kristallnacht in Sudetenland and on the activities of Reinhard Heydrich (the source of the most significant of the Kristallnacht documents here reproduced), during his time in Bohemia and Moravia before he was ultimately assassinated in 1942 while in Prague.⁴ Heydrich thus provides a striking link between the two items.

[5] In what follows, I offer some remarks on the material in each of the items and then make a few comments on the legal characterization of the events described within them.

I. The Frank Interrogation

[6] The Munich Pact, signed on September 29, 1938, required Czechoslovakia to cede Sudetenland,⁵ the largely German-speaking part of its territory. Frank, a Sudeten German,⁶ was appointed in November as “deputy ‘Gauleiter’ (Provi[n]cial leader) of the Sudet Province.”⁷ He held that post until mid-March 1939.⁸ He then became Secretary of State⁹ to Konstantin Freiherr

³ Leni Yahil, *Kristallnacht*, in 2 ENCYCLOPEDIA OF HOLOCAUST 836, 836-37 (Israel Gutman ed., 1990).

⁴ Shlomo Aronson, *Heydrich, Reinhard*, in 2 ENCYCLOPEDIA OF HOLOCAUST 655, 657 (Israel Gutman ed., 1990).

⁵ *Judgment*, *supra* note 1, at 196.

⁶ *Frank*, *supra* note 1, at 526.

⁷ *Interrogation*, *supra* note 2, at 1.

⁸ *Id.*

Von Neurath,¹⁰ who was appointed the Reich Protector of Bohemia and Moravia when Germany occupied those territories (essentially the rest of what is now the Czech Republic) and placed them under a “Protectorate.”¹¹

[7] Von Neurath, who does not seem to have had the stomach for the job, “went on leave, on [September 27,] 1941, and refused to act as Protector after that date,” although he did not officially resign until August 1943.¹² He had objected to Hitler’s decision to send the ruthless Gestapo official, Reinhard Heydrich, deputy to Heinrich Himmler, to the Protectorate to combat Czech resistance.¹³ Heydrich acted as Protector until he was shot in May 1942 by Czech patriots who had been parachuted in by the Czechoslovakian Government in exile in London.¹⁴ Frank continued in office throughout this period, thus the interrogation covers events both in Sudetenland shortly after its annexation and during the early period of the occupation of Bohemia and Moravia.

⁹ *Id.*

¹⁰ *Frank, supra* note 1, at 526.

¹¹ *Judgment, supra* note 1, at 325. Technically their sovereignty remained, subject to a German Protectorate, but they were governed much as though they were part of Germany proper, and just as dictatorially. *See id.* The other part of Czechoslovakia, Slovakia, although nominally independent, became a German puppet state. *See* Yeshayahu Jelinek & Robert Rozett, *Slovakia*, 4 ENCYCLOPEDIA OF HOLOCAUST 1364, 1364-65 (Israel Gutman ed., 1990).

¹² *Judgment, supra* note 1, at 326.

¹³ *See id.*

¹⁴ *See* Goshen, *Lidice*, in 3 ENCYCLOPEDIA OF HOLOCAUST 870, 871 (Israel Gutman ed., 1990); *see* Aronson, *supra* note 4, at 657.

[8] What the interrogation fails to reveal is that after Heydrich's death, Frank, as Minister of State, "became [the] virtual ruler" of Bohemia and Moravia.¹⁵ In retaliation for the killing of Heydrich, Frank organized the liquidation of the Bohemian village of Lidice,¹⁶ with which the Heydrich assassins were supposed to have had some vague connection.¹⁷ All the men in Lidice and close to a third of the women were killed, the rest of the women were sent to the Ravensbruck concentration camp, the children were deported, and the village "was razed to the ground."¹⁸

[9] The somewhat bland title of the subjects discussed in the interrogation, "The Economic Elimination and the Expulsion of the Jews in the Sudet Territory and in the Protectorate," does not quite capture the horror of the time.¹⁹

[10] Be that as it may, the first topic dealt with in the interrogation refers to what happened during Frank's time in the Sudeten territory. He notes the introduction of the 1935 "Nuremberg Laws" in the area.²⁰ These laws deprived German Jews of civic rights and prohibited inter-marriage between Jews and non-Jews.²¹ He also notes that the Kristallnacht actions were

¹⁵ *Frank, supra* note 1, at 526.

¹⁶ *Id.*; *see* Aronson, *supra* note 4, at 657.

¹⁷ Goshen, *supra* note 14, at 872.

¹⁸ *Id.* at 871-72.

¹⁹ *See* Interrogation, *supra* note 2.

²⁰ *Id.* at 1.

²¹ David Bankier, *Nuremberg Laws*, in 3 *ENCYCLOPEDIA OF HOLOCAUST* 1076, 1076 (Israel Gutman ed., 1990).

extended to the Sudeten territory.²² He makes an interesting effort to distance himself from the latter, explaining that at the time he was in Munich for the annual celebration of the 1923 “Beerhall Riot,”²³ the occasion when Hitler had made an unsuccessful coup attempt against the Bavarian Government.²⁴ He attributes the burning down of Jewish places of worship in the Sudeten province to the “express order of the Party” in Munich, “the head of which at that time was Rudolf Hess.”²⁵ (Unfortunately, the documents that we reproduce do not provide a detailed account of the Party’s leading role in Kristallnacht, including the use of its storm troopers.²⁶ What we have is an account of the events as seen from a police and bureaucratic point of view.)

²² Interrogation, *supra* note 2, at 1-2.

²³ *Id.* at 8.

²⁴ *Judgment*, *supra* note 1, at 177.

²⁵ Interrogation, *supra* note 2, at 1. The enigmatic Hess would ultimately become the only one of the major war criminals of Nuremberg to remain imprisoned for the remainder of his life: he was said to have committed suicide (although believed by his family to have been murdered) in August 1987 at the age of ninety-two. See Marian Mushkat, *Trials of War Criminals: Nuremberg Trials*, in 4 ENCYCLOPEDIA OF HOLOCAUST 1489, 1491 (Israel Gutman ed., 1990); David Hadar, *Hess, Rudolf*, in 2 ENCYCLOPEDIA OF HOLOCAUST 654, 655 (Israel Gutman ed., 1990). Walther Funk and Erich Raeder, also sentenced to life, Mushkat, *supra*, at 1491, were released a few years before they both died in 1960. See Zvi Bacharach, *Funk, Walther*, in 2 ENCYCLOPEDIA OF HOLOCAUST 534, 535 (Israel Gutman ed., 1990). Of the remaining twenty-four defendants at Nuremberg (only twenty-two were tried – “Robert Ley committed suicide and Gustav Krupp Von Bohlen was too ill to stand trial”), Karl Donitz (ten years), Baldur Von Schirach (twenty years), Albert Speer (twenty years), and Von Neurath (fifteen years) received fixed sentences of imprisonment that failed to take account of the periods each of them had remained in detention before and during the trial. See Mushkat, *supra*, at 1488, 1491, app.3 at 1788. Donitz spent eleven years and four months in captivity. Von Schirach remained incarcerated for a period of less than six years and was released on grounds of ill-health. Speer was released in 1965 after serving less than half of his sentence, and Von Neurath’s liberty was restored at the age of eighty-one after having served eight years of his sentence. Three of the defendants were acquitted; all of the other defendants convicted by the International Military Tribunal were sentenced to death and were duly executed. Mushkat, *supra*, at 1490-91.

²⁶ Yahil, *supra* note 3, at 837.

[11] Frank claims that he, along with the Sudeten Germans in general, desired “restraint of the Jewish element . . . in the economic sphere.”²⁷ They especially “wanted the removal of Jews from influential positions like the press, . . . and first of all [a] reduction [in] the number of Jewish lawyers, high school teachers and physicians.”²⁸ Exhibiting great generosity of spirit, he offers a prescription that was new to me: “The extreme of what I then considered as a correct solution of the Jewish question was a compulsory expulsion into a closed territory outside of Europe, for instance, Madagascar.”²⁹ There is a certain lack of reality in this statement, but perhaps no more so than that demonstrated by many others in the German leadership of the period.³⁰

[12] The interrogation then turns to the Protectorate.³¹ Frank makes an interesting effort to mitigate his own role by emphasizing his subordination to the Protector, Von Neurath, who was said to have “made his decisions and resolutions independently of my person” (although he did so after receiving oral advice daily from Frank).³² The fingers were, as might be expected,

²⁷ Interrogation, *supra* note 2, at 2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ During the inter-war years, British, Dutch, French, and Polish anti-Semites had pressed the idea of forcibly transferring Jewish populations to Madagascar, then a French colony. Christopher R. Browning, *Madagascar Plan*, in 3 *ENCYCLOPEDIA OF THE HOLOCAUST* 935, 935 (Israel Gutman ed., 1990). Serious planning to this end was begun by the German leadership, especially Heydrich at the SS and Rademacher at the Foreign Office, in 1940 following the early victories over France. *Id.* at 936. The plan, whether aimed at liquidation or re-settlement, never came to anything. *See id.* at 937; Julius Streicher, *Madagascar*, *DER STÜRMER*, 1938, <http://www.calvin.edu/academic/cas/gpa/ds9.htm>.

³¹ *See* Interrogation, *supra* note 2, at 2-4.

³² *Id.* at 2.

pointing both ways: at Von Neurath's trial before the International Military Tribunal in Nuremberg, he

“argued that the actual enforcement of the repressive measures [were] carried out by the Security Police and SD who were under the control of his State Secretary. Carl Herman Frank, [sic] who was appointed at the suggestion of Himmler and who, as a Higher SS and Police Leader, reported directly to Himmler. Von Neurath further argue[d] that anti-Semitic measures and those resulting in economic exploitation were put into effect in the Protectorate as the result of policies decided upon in the Reich.”³³

The Tribunal was not persuaded by Von Neurath's efforts to avoid responsibility, although he did escape execution.³⁴

[13] Other details that Frank remembered are worth noting. For example, it is hard to carry out an occupation without local collaborators. He had been one himself in the Sudet territory. Frank notes his “presumption” “that good national socialists had been chosen for the leading posts in the industry and the chambers of the professions [even] before the foundation of the Protectorate.”³⁵ They apparently took over quickly and smoothly. For example, “a central emigration fund[,] . . . created out of Jewish p[r]operty of private and public nature,” was established to effectuate Jewish “emigration.”³⁶ Apparently the (non-Jewish) inhabitants of

³³ *Judgment, supra* note 1, at 326.

³⁴ *Id.* Von Neurath ceased to be a major player in the Reich war effort after resigning in Bohemia and Moravia; the Tribunal sentenced him to only fifteen years in prison. *Id.* at 332. Himmler committed suicide while in British captivity in May 1945. Lionel Kochan, *Himmler, Heinrich*, in 2 *ENCYCLOPEDIA OF HOLOCAUST* 660, 662 (Israel Gutman ed., 1990).

³⁵ Interrogation, *supra* note 2, at 3.

³⁶ *Id.* at 4.

Terezin (Teresienstadt), located forty miles north of Prague,³⁷ also were reimbursed out of this fund after they were moved out in order to make way for the Jewish ghetto.³⁸

[14] Frank assures the interrogator that he had nothing to do with the creation of the ghetto in Terezin (inhabitants of the ghetto were ultimately sent to Auschwitz), which he attributes to Heydrich.³⁹ Frank claims he knew “nothing about the deportation of the Jews [who, according to Frank, once numbered approximately 38,000] from Teresienstadt to concentration and extermination camps.”⁴⁰ He claims that the only time he was in Terezin “was to make sure that everything was in order” for an official visit by the International Red Cross.⁴¹ Again, there seem to have been collaborators; “the guards and their command . . . consisted only in . . . small part of Germans and [in] predominant part of Czech gendarmes.”⁴²

[15] “[O]n the occasion of Heydrich’s funeral,” the German press published an “in memoriam” article under Frank’s name extolling the virtues of his deceased “friend” in expelling the Jews, and promising “to complete his work in Bohemia and Moravia.”⁴³ Even prominent Nazis, it seems were blessed (or cursed) with ghost writers. The text was, for the most part,

³⁷ Paul Lewis, *Alfred Kantor Dies at 79; Depicted Life in Nazi Camps*, N.Y. TIMES, Jan. 26, 2003, § 1, at 22.

³⁸ Interrogation, *supra* note 2, at 4.

³⁹ *See id.* at 4-5.

⁴⁰ *Id.* at 5.

⁴¹ *Id.* There is an interesting corroboration of this or a similar visit by the Red Cross to Terezin in a recent New York Times Obituary. *See* Lewis, *supra* note 37, at 22. Alfred Kantor, imprisoned at Terezin and later Auschwitz, survived to publish his paintings, one of which dealt with the “new shops and fresh food that suddenly appeared in the town [Terezin] when an International Red Cross delegation visited.” *Id.*

⁴² Interrogation, *supra* note 2, at 5.

⁴³ *Id.* at 6-7 (internal quotations omitted).

“submitted to [him] already ready [sic] composed.”⁴⁴ Frank assures the interrogator that the “article [did] not correspond with [his] honest convictions” and that “Heydrich was never [his] friend in the true sense of the word.”⁴⁵ He explains that on this, as on other occasions, he needed to go along with the system lest he suffer “unpleasant consequences,” such as even being sent to a concentration camp.⁴⁶

[16] On a personal note, I might add that the tone of the period recounted by Frank came vividly alive to me a few years ago when I participated in a conference on the prosecution of war crimes in the International Criminal Court, held at Masaryk University in Brno. Brno is the largest city in Moravia (as Prague is in Bohemia). The Law School building where we held the conference had been taken over as Gestapo headquarters during the occupation (as had the Law School building at the much older Charles University in Prague). Jewish faculty (and some who supported them) were purged. It was a very emotional venue for a conference on how to punish (and deter) those who would engage in such activities in the future.

II. The Kristallnacht Documents

[17] On October 28, 1938 some 17,000 Polish Jews were seized and forced across the Polish border.⁴⁷ Since Poland did not want them, they were trapped in camps set up between Poland and Germany.⁴⁸ Zindel Grynszpan, one of the deportees, had a seventeen-year-old son,

⁴⁴ *Id.* at 6.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 8.

⁴⁷ Yahil, *supra* note 3, at 837.

⁴⁸ *Id.*

Herschel, who was living in Paris.⁴⁹ Upset by these events, and determined to make a statement, Herschel went to the German embassy in Paris on 7 November.⁵⁰ His plan was to assassinate the German Ambassador but the Ambassador was not there.⁵¹ Herschel settled for shooting a person Karl Frank describes as “the German Embassy Councillor Baron Von [sic] Rath.”⁵² (Other accounts describe him as the Third Secretary of the German Embassy.)⁵³ Frank notes that “[t]his affair gave occasion for increased and ruthless proceedings against the Jews.”⁵⁴ His account of what followed on the night of November 9, continuing into November 10, in the Sudet territory mirrors what happened in Germany proper: “Jewish property was looted, the show windows of Jewish shops were smashed and the shops of non-Aryan owners made recognizable by signs ‘Jewish Business’ in a yellow circle.”⁵⁵ The Jews had already been removed from the political life of the country; the time had come to remove them from its economic life.⁵⁶

[18] Herschel Grynszpan provided the pretext to put into place plans that must have been in the works for some time. As Frank put it, “I presume that these excesses and transgressions in

⁴⁹ See *id.*; Michael R. Marrus, *Grynszpan, Herschel*, in 2 ENCYCLOPEDIA OF HOLOCAUST 628, 628 (Israel Gutman ed., 1990).

⁵⁰ Marrus, *supra* note 49, at 628.

⁵¹ *Kristallnacht*, Jewish Virtual Library, at <http://www.us-israel.org/jsource/Holocaust/kristallnacht.html> (last visited Jan. 13, 2003) (hereinafter *Kristallnacht*).

⁵² Interrogation, *supra* note 2, at 1-2. His full name was Ernst Vom Rath. Marrus, *supra* note 49, at 628.

⁵³ Marrus, *supra* note 49, at 628.

⁵⁴ Interrogation, *supra* note 2, at 2.

⁵⁵ *Id.*

⁵⁶ See *id.*

the whole Reich and not only in the Sudet territory were demonstrations ordered by higher party offices, and not the spontaneous expression of the will of the people.”⁵⁷ The documents in the present collection provide a useful window into the way in which the police, acting on the instructions of the “higher party offices,” went about their task. It is not necessary to comment on each of the documents, but some remarks on the highlights are in order.

[19] The remarkable “Flash Munich” dated November 10, 1938 from Heydrich, in his capacity as Deputy Chief of the Gestapo (acting presumably with the full knowledge of Himmler), deals with “[m]easures to be taken against Jews tonight” and gives a fair indication of the arranging that went into what he calls “planned actions.”⁵⁸ German lives and property were not to be endangered.⁵⁹ Jewish shops and homes could be destroyed but not looted⁶⁰ (this was a public event, not an opportunity for personal gain; the contents or the proceeds of their sale would be needed for Government purposes). “Special precautions will be taken in business streets, in order to protect . . . the Non-Jewish shops. [Finally,] foreigners, even if Jewish, will not be molested.”⁶¹

⁵⁷ *Id.* at 8.

⁵⁸ Letter from Reinhard Heydrich, Chief of Security Police, to All State Police Headquarters and Branch Offices, All Security Service Commands in Main and Subordinate Branches 1 (Nov. 10, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, *at* <http://www-camlaw.rutgers.edu/publications/law-religion/> [hereinafter Heydrich Nov. 10].

⁵⁹ *Id.* at 1.

⁶⁰ *Id.*

⁶¹ *Id.* An embarrassing breach of this order, involving the arrest of an American Jew, is noted in the last of the Kristallnacht documents. Letter from Secret State Police Headquarters, to All State Police Headquarters and Branch Offices 1 (Feb. 2, 1939), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, *at* <http://www-camlaw.rutgers.edu/publications/law-religion/>. The Secret Police were obviously annoyed at “unpleasant complaints by foreign officials.” *Id.*

[20] This was not all. As the confidential orders sent a few hours earlier indicate (and as Heydrich's order confirms, although without the numbers), "[p]reparations will be made for the arrest of some 20- to 30,000 Jews in Germany. Primarily well-to-do Jews will be chosen."⁶² Consistent with the existence of a careful plan is the urgent document from Von Eberstein, Regional Police Chief, instructing that the "uniformed (regular) police will at first do nothing to hinder these demonstrations. However, incendiarism, looting of shops and homes, and attempts to kill, will be prevented."⁶³ He adds that "Criminal and State Police officers assigned to this duty will wear civilian clothes. Contact will immediately be established with all Party formations, so that clashes (with them) may be avoided."⁶⁴ Meanwhile, an estimate was made "that the [c]oncentration [c]amps at Dachau, Buchenwald and Sachsenhausen can hold 10,000 prisoners each."⁶⁵ Overcrowding was (at this stage at least) to be avoided.⁶⁶

⁶² Letter from Muller, Secret State Police Headquarters, to All State Police Buros – Chiefs or Deputy Chiefs 1 (Nov. 9, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, *at* <http://www-camlaw.rutgers.edu/publications/law-religion/>; *see* Heydrich Nov. 10, *supra* note 58, at 2.

⁶³ Letter from Freiherr von Eberstein, Chief of Police, to State Police Headquarters of Augsburg, Nurnberg, Wurzburg, and Neustadt a.d. Weinstrasse 1 (Nov. 10, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, *at* <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁶⁴ *Id.*

⁶⁵ Letter from Muller, Secret State Police Headquarters, to All Headquarters of State Police 1 (Nov. 10, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, *at* <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁶⁶ *See id.*

[21] A follow up circular sent on behalf of Heydrich gives further insight into the plan.⁶⁷ Information was to be provided on the number of destroyed shops (approximate figures would suffice), damage claims already reported to insurance companies, and “employees and workers rendered jobless by the destruction of Jewish shops.”⁶⁸ The Jews themselves were not to be asked for the information.⁶⁹ Jewish women and children who were arrested were to be released.⁷⁰ By November 12, 1938, Buchenwald was “filled to capacity with current deliveries” and people (other than those in transit) had to be sent elsewhere.⁷¹

[22] By the time of Kristallnacht, emigration was apparently no longer the primary method of dealing with the Ethnic Cleansing of the Jewish population. Nevertheless, Heydrich’s instructions dated November 14 approved the release of “Jews who already possess the necessary papers enabling them to emigrate within three weeks” so they could meet their deadline for emigration, “provided there are no political or economic grounds for their

⁶⁷ Letter from Baumann, Secret State Police Headquarters, to All Main-Franken District Offices, Chief Mayors and Mayors of Aschaffenburg, Kissingen, Kitzingen and Schweinfurt 1 (Nov. 11, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁶⁸ *Id.*

⁶⁹ *Id.* Ultimately, the regime confiscated the insurance proceeds and forced the Jewish population to pay an indemnity for the assassination and for getting themselves attacked. *Kristallnacht*, *supra* note 51.

⁷⁰ *Id.* at 2.

⁷¹ Letter from Headquarters of Secret State Police, to All State Police Headquarters and Branch Offices 1 (Nov. 12, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/>.

detention.”⁷² Some strains may also have been showing in the Aryanization program.

Heydrich’s order permitted the temporary release of “Jews considered absolutely indispensable for . . . [A]ryanizing their firms,” but only in cases that appeared especially urgent and only for a short period of time.⁷³

[23] A message from the Criminal Police Headquarters in Berlin, also dated November 14, notes that “a few irresponsible elements” used the “recent spontaneous defense measures[,] which the German people took in reply to the Jewish provocation” as an opportunity to loot and to profit personally.⁷⁴ Every effort was to be made “to recover the stolen objects, in particular items containing gold and precious stones.”⁷⁵ State theft was one thing – private looting was another!⁷⁶

⁷² Letter from Reinhard Heydrich, Chief of Security Police, to All State Police Headquarters and the Inspectors and Commandants of Concentration Camps 1 (Nov. 14, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, *at* <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁷³ *Id.*

⁷⁴ Letter from Reichs Criminal Police Headquarters Berlin, to The Chiefs of All Criminal Police Headquarters and Branch Offices Except the Berlin Headquarters 1 (Nov. 14, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, *at* <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁷⁵ *Id.*

⁷⁶ Note the curious comment in the message dated November 17 from “Signature illegible:” “In principle, [the] use of Jewish property confiscated or taken into custody in the course of these events is prohibited. This includes in particular use of motor vehicles. Requests for permission to use such property, submitted by Government and Party agencies, or private individuals, will therefore serve no purpose.” Letter from Signature Illegible, to the Office of the Chief of Police of Wurzburg, the 22 District Administration Offices of Kainfranken, and the District Chiefs Acting as City Commissioners of Aschaffenburg, Schweinfurt, Bad Kissingen and Kitzingen 2 (Nov. 17, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, *at* <http://www-camlaw.rutgers.edu/publications/law-religion/>.

[24] Two days later, Heydrich ordered “[t]he planned arrests of Jews . . . to cease at once.”⁷⁷ Apparently, the system was under some stress and full capacity had been reached, at least for the time being, in all the camps. Moreover, he ordered the immediate release of Jews arrested “if they are over [sixty] years of age, ill or physically incapacitated. In the very near future only healthy Jews fit for labor are to be found in the concentration camps.”⁷⁸ Heydrich also approved the release of those who were useful for Aryanzation and for the German economy, especially the German export business.⁷⁹ The following week (November 24, 1938), Heydrich was distressed to find that, in spite of his best efforts, “Jews up to [eighty] years of age, obviously ill, imbeciles, etc. have been transferred to the camps.”⁸⁰

[25] His order dated November 25 also reflects some stresses in the system: “The Reichs Ministry of Justice requests that those Jewish counsellors [sic] at law[,] which on the basis of a detailed arrangement with the competent authorities will be able to resume their practice on 1 December 1938, will be released from protective custody.”⁸¹ He notes that “[t]he Presidents of the competent Courts of Appeal” will submit appropriate lists and requests for release.⁸² “Such

⁷⁷ Letter from Reinhard Heydrich, Chief of Security Police, to All State Police Headquarters and Branch Offices 1 (Nov. 16, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1-2.

⁸⁰ Letter from Reinhard Heydrich, Chief of Security Police, to All State Police Headquarters and Branch Offices 1 (Nov. 24, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁸¹ Letter from Reinhard Heydrich, Chief of Security Police, to All State Police Headquarters and Branch Offices 1 (Nov. 25, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁸² *Id.*

requests,” said Heydrich, “are to be complied with.”⁸³ By November 28, Heydrich’s generosity in ordering releases extended to “Jewish arrestees who were combat soldiers.”⁸⁴ Participating in the First World War counted for something!

[26] I am not sure what to make of the memo dated December 9, 1938, which speaks of an intercepted letter (real?) “directed to a Jewish addressee” from an “unknown Berlin sender.”⁸⁵ Supposedly, the letter advised that “proof of imminent emigration in the form of purchase of a steamship ticket is sufficient.”⁸⁶ This drew the attention of authorities to the need for more “proof of imminent emigration” to justify a release.⁸⁷ The memo states that the letter informed the recipient that the police could “be sufficiently persuaded of . . . emigration by submission of a receipt covering the down payment[, and that a] request for a refund of the money paid could be made after the release, if the voyage were not actually undertaken.”⁸⁸ The memo expresses fear (real?) that “this deception evidently will soon be practiced generally in Jewish circles.”⁸⁹

⁸³ *Id.*; see also Letter from Secret State Police, to State Police Wurzburg 1 (Nov. 26, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/> (ordering the “release of rabbis and employees of the Jewish community”).

⁸⁴ Letter from Reinhard Heydrich, Chief of Security Police, to All State Police Headquarters and Branch Offices 1 (Nov. 28, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁸⁵ Letter from Mueller, Secret State Police Headquarters, to All State Police Headquarters and Branch Offices 1 (Dec. 9, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

Thus, the police were exhorted to release prisoners “only in cases where evidence of emigration is produced in a form made foolproof and complete by submission of other appropriate documents.”⁹⁰

[27] Also of interest is Heydrich’s orders concerning the prosecution of excesses in connection with Kristallnacht.⁹¹ It takes a while to get to the basic rule in paragraph seven that “[c]ases of arson, wilful [sic] destruction, demolishing of synagogues and Jewish cemeteries will definitely not be prosecuted.”⁹² Nonetheless, Heydrich ordered investigations for cases involving “the crime of manslaughter, heavy [serious?] assault and battery, extortion, moral offenses, or looting.”⁹³ The motives of the actors were to be examined. If no “idealistic” (anti-Semitic?) motives were established then the criminal motive (such as “[s]elf-interest, sadism, brutality, etc.”), was to be reported.⁹⁴ In addition, it should be determined whether there were “possible orders from superiors.”⁹⁵ All of this is very general and does not really reveal how decisions to prosecute were made. Distinctions seem to have been made between the way party members and non-members were treated, but party membership was not necessarily a ground for complete exoneration.⁹⁶

⁹⁰ *Id.*

⁹¹ See Letter from Reinhard Heydrich, Chief of Security Police, to All Police Headquarters (Dec. 10, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁹² *Id.* at 2.

⁹³ *Id.* at 1.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *id.*

[28] The final document of special interest is Heydrich's directive of December 21, 1938 concerning "Jewish School Affairs."⁹⁷ This directive announces that "[c]ompulsory education of Jewish children will be continued[,] but only in Jewish Private Schools."⁹⁸ It also permitted the release of Jewish teachers if they were "considered necessary for further school instruction[]." ⁹⁹

[29] Kristallnacht marked an important turning point in the journey to the Holocaust.¹⁰⁰ The international community protested but its protests were muted. Hitler and his minions felt free to continue.

III. The Events in Question and International Law

[30] Article Six of the Nuremberg Charter provided that:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:

⁹⁷ Letter from Reinhard Heydrich, Chief of Security Police, to All Police Headquarters 1 (Dec. 21, 1938), 3 RUTGERS J. OF L. & RELIG. NUREMBERG 2, at <http://www-camlaw.rutgers.edu/publications/law-religion/>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ The anniversary of Kristallnacht is very emotional for the survivors. Dr. Danieli notes that Bruno Bettelheim, the Austrian-born developmental psychologist who was rounded up on Kristallnacht and sent to Dachau but freed to migrate to the United States the following year, committed suicide on November 9, 1991, the fifty-third anniversary of Kristallnacht. Yael Danieli, *As Survivors Age: Part II*, 4(2) NAT. CENTER FOR POST TRAUMATIC STRESS DISORDER CLINICAL Q. 20 (1994).

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity:

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.¹⁰¹

[31] There are two issues concerning the application of Article Six to the events described in the documents that I must confess had never appeared as starkly to me until I read these documents. I shall try to articulate these two issues in this section.

[32] The first issue is whether the occupations of Sudetenland, and of Bohemia and Moravia, were regarded by the Nuremberg Charter and Tribunal as Crimes against Peace within the meaning of the Charter (Article 6 (a)). The second is whether or not the attacks on the Jewish people in the Sudet territory on Kristallnacht amounted to War Crimes or Crimes against Humanity within the meaning of the Charter (Article 6 (b) and (c)).¹⁰² The answers to these questions have historical significance, in terms of the development of the offenses, and current relevance, in terms of the future application of the offenses.

¹⁰¹ *Judgment, supra* note 1, at 174-75.

¹⁰² Bohemia and Moravia were not acquired until later.

A. Sudetenland and Bohemia/Moravia: Crimes Against Peace?

[33] Article 6 (a) of the Charter regards a “war of aggression” as criminal. Neither “war” nor “aggression” is defined. Indeed, at the London Conference at which the Nuremberg Charter was drafted, the effort to define aggression was avoided. I have not been able to find any careful attempt to define the terms in the opinion of the Military Tribunal either. The Tribunal first used the term “aggressive war” unequivocally to describe the invasion of Poland on September 1, 1939.¹⁰³ In leading up to this discussion, the Tribunal commented that “[b]y March 1939 the plan to annex Austria and Czechoslovakia . . . had been accomplished. The time had now come for the German leaders *to consider further acts of aggression . . .*”¹⁰⁴ The only plausible interpretation of this discussion is that the Tribunal regarded the acquisition of the Czech territories as having taken place by means of an “aggression” but not through a “war of aggression.” “War,” as the Tribunal understood it in practice, seems to have meant an invasion with accompanying fighting. There is no doubt that Germany, as a State, incurred state responsibility for the pre-September occupations, but criminal responsibility for a Crime against Peace required a “war of aggression.”

[34] The matter is of contemporary relevance. The main unfinished business in the negotiations concerning the International Criminal Court is to complete the definition of aggression. Some versions of the drafts currently on the table are broad enough to include the acquisition of territory by aggression, while others require that there be a “war” for the

¹⁰³ *Id.* at 203. The Judgment continues by discussing the invasions of Denmark and Norway; Belgium, the Netherlands, and Luxembourg; Yugoslavia and Greece; and the Soviet Union as “aggressive wars.” *Id.* at 203-13. Germany is also said to have joined Japan’s “aggressive war” against the United States. *Id.* at 214.

¹⁰⁴ *Id.* at 197 (emphasis added).

acquisition to be criminal. Personally, I have no problem with a definition broad enough to catch events prior to the invasion of Poland, but the matter remains one that needs to be resolved and the historical example is of considerable interest in exploring where the solution might lie.¹⁰⁵

B. Kristallnacht in Sudetenland as War Crimes or Crimes Against Humanity

[35] On the face of it, the attacks on the Jewish population described in these documents straddle the line between the Nuremberg offenses of War Crimes and Crimes against Humanity. Murder and the use of slave labor (implicit in the concentration camps) fit both categories. Crimes against Humanity includes “other inhumane acts” and “persecutions on political, racial, or religious grounds.” By and large, the way that the Nuremberg Tribunal distinguished, for practical purposes, between the two categories was that Crimes against Humanity were committed against Germans and War Crimes were done in occupied territories.¹⁰⁶ How to treat the territories acquired from the Czechs can easily be considered an ambiguous case. In its discussion of the responsibility of Von Neurath for “Criminal Activities in Czechoslovakia,” the Nuremberg Tribunal determined that the occupation of Bohemia and Moravia was “a military occupation [governed] by the rules of warfare” because the consent of the Czech leadership to

¹⁰⁵ The final discussion paper that came out of the Preparatory Commission for the International Criminal Court before its term expired in the middle of 2002 contained two main approaches. For the first approach, the “crime of aggression” would include all of the kinds of aggression contained in the General Assembly’s 1974, Definition of Aggression, G.A Res. 3314 (XXIX), U.N GAOR, 29th Sess., Supp. No. 31, at 24, U.N. Doc. A/9631 (1975). For the other, the crime would include only those aggressions within the meaning of the Definition that also amount to a “war of aggression or an act which has the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof.” Either way, the current draft would catch the Sudeten and Czech cases as “criminal,” but there is no guarantee at this point that these approaches will prevail. *See generally* Roger S. Clark, *Rethinking Aggression as a Crime and Formulating its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court*, LEIDEN J. INT’L. L. (forthcoming 2003) (on file with author).

¹⁰⁶ *Judgment, supra* note 1, at 248-49.

the protectorate had been achieved through duress.¹⁰⁷ Even though Czechoslovakia had not, after its independence in 1919, become a party to the Hague Convention of 1907, the Tribunal regarded the rules of land warfare in that convention as declaratory of customary law and thus binding in the situation under review.¹⁰⁸ I have not been able to discover any characterization of the situation in the Sudet territory. The embarrassing difference here was that the British, as well as the Czechs, had agreed in this instance. Nonetheless, if the Sudet territory could be regarded, like Bohemia and Moravia a little later, as an occupied territory then Kristallnacht could be seen as a war crime.

[36] The implication of this is curious. In principle, Kristallnacht in Germany itself could be regarded as a Crime against Humanity. Yet due to the way in which the Nuremberg Charter was written, for a Crime against Humanity to be within the Tribunal's jurisdiction, it had to be committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal."¹⁰⁹ The most sensible interpretation of "crime within the jurisdiction" in this formulation is that it referred to the Crime against Peace or a "war of aggression." For the Tribunal, though, while the aggressions began earlier, the war or aggression did not begin until the invasion of Poland in September 1939.¹¹⁰ The Tribunal was of the view that there had been plenty of terror and persecution in Germany before the outbreak of the War in September

¹⁰⁷ *Id.* at 325. Military force was threatened. *Id.* at 273. Hermann Goring even threatened to destroy the beautiful city of Prague from the air. *See id.* There was ultimately a military occupation. *Id.* at 325.

¹⁰⁸ *Id.* In analyzing Von Neurath's responsibility, the Tribunal deals with his activities from the very beginning of his appointment as Protector on March 18, 1939. *Id.*

¹⁰⁹ *Id.* at 175.

¹¹⁰ *Id.* at 186.

1939.¹¹¹ Nevertheless, it concluded that “revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime.”¹¹² Thus, the pre-September 1939 Crimes against Humanity did not come within the jurisdiction of the International Military Tribunal.¹¹³ But the Tribunal concluded that “from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.”¹¹⁴ The occupation of Sudetenland, the aggression against it, preceded the “aggressive war.” Thus, the laws of armed conflict, but not those dealing with Crimes against Peace and Crimes against Humanity, appear to apply to the situation in November 1938!

¹¹¹ *Id.* at 249.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* I have argued elsewhere that this limitation on what could be charged at Nuremberg was a jurisdictional limitation, not a substantive one inherent in the concept of a crime against humanity itself. See Roger S. Clark, *Crimes Against Humanity at Nuremberg*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 177, 195-96 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990). In reaching the factual conclusion that the pre-1938 crimes such as Kristallnacht had not been shown to be sufficiently connected with the plan for aggressive war, the Tribunal downplayed the argument made by the prosecution that the imposition of the billion marks fine on the Jewish community after Kristallnacht, and the confiscation of Jewish holdings was made at a time when armament expenditure had put the German treasury in difficulty. See *Judgment*, *supra* note 1, at 244-45. The prosecution also argued that the connection of anti-Semitic policy with aggressive war was not limited only to economic matters but encompassed also the whole ideology of Nazism. *Id.*