

Producing the Truth: The Bielefeld Trial and the Reconstruction of Events Surrounding the Execution of 100 Jews in the Bialystok Ghetto following the "Acid Attack"

Katrin Stoll

Between March 23, 1966 and April 14, 1967, the former commander of the Security Police and Security Service for the Bialystok District, Wilhelm Altenloh, stood trial, along with three other members of the Security Police, at the Bielefeld District Court. The defendants stood accused of involvement in the persecution and murder of Jews in the Bialystok District. Altenloh and his co-defendants,¹ Lothar Heimbach, Heinz Errelis, and Richard Dibus, were charged with having organized the deportation of Jews from the ghettos of Grodno (January-February 1943),² Bialystok (February and August 1943), and Pruzhany (Prużana/Próžany; January 1943), as well as the Zambrów transit camp, to the death camps of Auschwitz and Treblinka. The defendants were also accused of ordering the killing of Jews – acting upon orders they themselves had received, or on their own initiative – and of shooting Jews themselves. They were charged with murder and being accessories to murder, according to article 211 of the German criminal code.

- 1 See Freia Anders, Hauke-Hendrik Kutscher, and Katrin Stoll, "Der Bialystok-Prozess vor dem Landgericht Bielefeld 1965-1967" [The Bialystok Trials at the Bielefeld District Court, 1965-1967], in eadem (eds.), *Bialystok in Bielefeld Nationalsozialistische Verbrechen vor dem vor dem Landgericht Bielefeld 1958-1967* (Bielefeld: Verlag für Regionalgeschichte, 2003), pp. 76-133; Katrin Stoll, "Strafverfahren gegen ehemalige Angehörige der Sicherheitspolizei für den Bezirk Bialystok" [Criminal Proceedings against Former Members of the Security Police for the Bialystok District], PhD diss., University of Bielefeld, 2008; Katrin Stoll, "Hitler's Unwilling Executioners? The Representation of the Holocaust through the Bielefeld Bialystok Trials of 1965-1967," in David Bankier and Dan Michman, (eds.), *Holocaust and Justice. Representation and Historiography of the Holocaust in Post-War Trials* (Jerusalem: Yad Vashem and Berghahn Books, 2010), pp. 159-93.
- 2 See Katrin Stoll, "Selbst- und Fremddeutung von NS-Tätern im Bielefelder Bialystok-Prozess" [Nazi Criminals in their own Eyes and in the Eyes of Others in the Bielefeld Bialystok Trial], in Jürgen Finger, Sven Keller and Andreas Wirsching (eds.), *Vom*

On April 14, 1967, the Bielefeld District Court ruled that all four defendants had been jointly complicit in the murder of several thousand Jews. They were convicted on the grounds that they had acted as accomplices to the “principal perpetrators” of the National Socialist leadership, “primarily Hitler, Göring, Himmler, Heydrich, Kaltenbrunner, Müller, and Eichmann.”³ Altenloh and Heimbach were also found guilty of the execution by shooting of 100 Jews from the Bialystok ghetto in February 1943. These latter murders were committed in retaliation for the so-called “acid attack,” when a Jew, Icchok Malmed, threw sulfuric acid in the face of a German policeman who had broken into his home in order to deport him. The German was blinded and, in his confusion, accidentally shot and killed another German. As an act of reprisal, members of the Security Police rounded up 100 Jews and shot them.

The Bielefeld court convicted all four defendants of being accessories to murder, rather than of being murderers in the full sense of the term, and gave them only light sentences. The court’s rationale was that the motivation on the part of the defendants for committing these criminal acts did not come from within themselves as such. The court argued that they had carried out the deeds of others, namely the National Socialist leadership. Altenloh was sentenced to eight years in prison, Heimbach to nine years, Errelis to six years, and Dibus to five years. The defendants were acquitted of the other charges pertaining to “unauthorized actions” (*Exzesstaten*). The prosecution was unable to prove beyond a doubt that Errelis, who had been head of the Security Police in Grodno, had personally murdered Jews in the Grodno ghetto, or that Heimbach, the former head of department IV (Gestapo) of the Security Police, and Dibus had done so in the Bialystok ghetto.

Using the recordings⁴ of the main hearing of the Bielefeld trial, I have analyzed the court’s reconstruction of the events leading up to the massacre of the 100 Jews in

Recht zur Geschichte. Akten aus NS-Prozessen als Quellen der Zeitgeschichte [From Law to History: Proceedings from the Trials of Nazi Criminals as a Source for Contemporary Historiography] (Göttingen: Vadenhoek & Ruprecht, 2009), pp. 154-66.

- 3 See Verdict of the Bielefeld District Court, 5 Ks 1/65, in L/StADT [Landesarchiv, Staatsarchiv Detmold], D 21 A, no. 6195, p. 382.
- 4 The presiding judge at the Bielefeld Bialystok trial, Günter Witte, promised the witnesses and defendants that the recordings would be destroyed when the verdict came into force. We do not know why the 40 recordings – stored, since 1987, in the state archive in Detmold – were not erased. Due to their high quality (well-preserved in a suitable storage environment), these recordings have gone from courtroom aid to

the Bialystok ghetto following the acid attack. The basis for my investigation is the testimonies provided by the witnesses as well as the defendants themselves. My purpose is to ascertain why the court was convinced of the defendants' guilt, and how it defined Altenloh and Heimbach's involvement in the execution from a legal perspective.⁵

The use of trial recordings to analyze the court's attitude to the facts of the case and the interpretation of events by participants in the main hearing⁶ represents a new approach. Some studies have addressed the question of how Nazi criminals, among them defendants in the Auschwitz trials,⁷ appeared to themselves and to

historical record, documenting the course of events in the main hearing, and attesting to the atmosphere during the trial and the communication between the parties involved.

5 The following is a slightly modified and abridged version of a subsection in my dissertation. See Stoll, "Strafverfahren," pp. 431-84.

6 Hearings in legal proceedings for Nazi crimes in the Federal Republic of Germany were recorded exclusively as an aid to the court, and were thus erased once the verdict came into force, as in the case of the first Treblinka trial, for example. See Wolfgang Scheffler, "Der Beitrag der Zeitgeschichte zur Erforschung der NS-Verbrechen: Versäumnisse, Schwierigkeiten, Aufgaben" [The Contribution of Contemporary Historical Research to the Investigation of Nazi Crimes: Failures, Difficulties, Tasks], in Jürgen Weber and Peter Steinbach, (eds.), *Vergangenheitsbewältigung durch Strafverfahren? NS-Prozesse in der Bundesrepublik Deutschland* [Are Criminal Proceedings the Appropriate Way to Deal with the Past? Trials against Nazi Criminals in the Federal Republic of Germany] (Munich: Olzog, 1984), pp. 114-33 (on pp. 118f.). Apart from the Auschwitz trials (see Fritz Bauer Institut and Staatliches Museum Auschwitz-Birkenau, [eds.], *Der Auschwitz-Prozess. Protokolle und Dokumente* [Berlin: 2005]) and the Bialystok trial, only a few recordings have survived from the main hearings in Nazi trials. See Werner Renz, "Tonbandmitschnitte von NS-Prozessen als historische Quelle" [Recordings from Trials against Nazi Criminals as a Historical Source], in Finger, *Vom Recht zur Geschichte*, pp. 142-53 (on pp. 150f.).

7 See Heidrun Kämper, "Die Konstruktion der KZ-Welt im Gerichtssaal. Das Redeverhalten der Angeklagten im Auschwitz-Prozess" ["The Construction of the World of the Concentration Camp in the Courtroom: The Speech and Behavior of Defendants in the Auschwitz Trial"], in Dorothee Heller and Konrad Ehlich (eds.), *Studien zur Rechtskommunikation* [Studies in Legal Communication] (Bern: Lang, 2007), pp. 289-318. On the Auschwitz trial, see Werner Renz, "Der erste Frankfurter Auschwitz-Prozeß. Völkermord als Strafsache" [The First Frankfurt Auschwitz Trial. Genocide as a Criminal Matter], 1999. *Zeitschrift für Sozialgeschichte des 20. und 21. Jahrhunderts* 15 (2000), pp. 11-48; Irmtrud Wojak (ed.), "Gerichtstag halten über uns selbst ..." *Geschichte und Wirkung des ersten Frankfurter Auschwitz-Prozesses*

others.⁸ But this is the first attempt to analyze the legal process of truth-reconstruction in the case of a specific allegation, on the basis of a specific case. My aim is to show how the “facts” of the case were constructed by the court through a process of selecting those parts of the testimonies of witnesses and defendants that appeared internally consistent and credible. In this trial, as in others, the judges were presented with different versions of past events. The task of the judges was to isolate the relevant elements from the various accounts and create a narrative, essentially their own version of what actually occurred. In analyzing how the Bielefeld court produced the facts of the case, I have been influenced by the work of the German legal philosopher and prosecutor Walter Grasnack, who has noted that witnesses and defendants do not describe to judges “how it really was,” but rather recount stories of what they experienced, which, according to Grasnack, are “interpretative constructs.”⁹

The Acid Attack and its Aftermath: The Facts of the Case

In this section I shall analyze the manner in which the judge and court in Bielefeld interpreted the witnesses’ and defendants’ testimonies regarding the acid attack and its aftermath and how they arrived at the final version of events in the verdict. My point

[“Judging Ourselves ...” History and the Effect of the First Frankfurt Auschwitz Trial] (Frankfurt, Fritz Bauer Institut, 2001); Joachim Perels, “Die Strafsache gegen Mulka und andere 4 Ks 2/63: Juristische Grundlagen” [The Criminal Trial against Mulka et al. – Legal Principles], in Irmtrud Wojak (ed.), *Auschwitz-Prozess 4 Ks 2/63* [Auschwitz Trial 4 Ks 2/63] (Frankfurt, Cologne: Snoeck, 2004), pp. 124-47. Two dissertations have recently been published on the Auschwitz trial: Rebecca Wittmann, *Beyond Justice. The Frankfurt Auschwitz Trial* (Cambridge Mass.: Harvard, 2005); Devin Pendas, *The Frankfurt Auschwitz Trial, 1963-1965. Genocide, History, and the Limits of the Law* (New York: Cambridge, 2006).

- 8 Jan Kiepe, *Das Reservepolizeibattillon 101 vor Gericht. NS-Täter in Selbst- und Fremddarstellungen* [Police Battalion 101. Nazi Criminals in Their own Eyes and the Eyes of Others] (Hamburg: Lit, 2007).
- 9 Walter Grasnack, Entscheidungsgründe als Textcollage [Reasons for Decision as Textual Collage], in Friedrich Müller/Rainer Wimmer (eds.), *Neue Studien zur Rechtslinguistik. Dem Gedenken an Bernd Jeand’Heur* [New Studies on Legal Linguistics: In memory of Bernd Jeand’Heur] (Berlin: Duncker & Humboldt 2001), pp. 27-44, (on p. 29). On Grasnack’s theory of the production of the facts of the case and a critical assessment of it, and for an extensive bibliography on this topic cf. Stoll, “Strafverfahren,” pp. 432-6.

of departure is the court's final narrative¹⁰ concerning the reprisal killings of the 100 Jews in Bialystok.

Three matters should be noted. First, the number of witnesses called upon to testify about this incident was small compared to the number questioned with regard to the charges of deportation. Second, the crime pertains directly to whether and the extent to which the German Security Police were willing to commit murder. These killings did not occur at a distant location, like Auschwitz or Treblinka, but in the Bialystok ghetto itself, in full view of Security Police personnel and the prisoners in the ghetto. Omer Bartov writes that genocide is "ultimately, also about the encounter between the killer and the killed, usually with a fair number of spectators standing by."¹¹ In this shooting of 100 innocent civilians, together with the hanging of the man responsible for the acid attack, the encounter between German murderers and their victims was direct. The testimonies of the defendants and witnesses reveal how those involved experienced and judged the events. Third, Icchok Malmed's¹² act of self-defense was a significant event in the history of the Bialystok ghetto.¹³ It featured prominently in survivors' testimonies¹⁴

- 10 The court's final narrative displays the characteristic features of a historical narrative. According to Hayden White, "historical narratives refer to a real world (of which we have traces but which no longer exists) and present that world as having narratological coherence." Cf. Hayden White, *Historical Discourse and Literary Writing*, in Kuisma Korhonen (ed.), *Tropes for the Past. Hayden White and the History/Literature Debate* (Amsterdam: Editions Rodopi, 2006), pp. 25-33 (on p. 30).
- 11 Omer Bartov, *From the Holocaust in Galicia to Contemporary Genocide: Common Ground –Historical Differences* (Washington D.C.: USHMM, 2003), p. 19.
- 12 Chaika Grossman described Malmed as follows: "A simple Jew, a craftsman; in his time he had fled burning Slonim. His family had long since been murdered by the Nazis, and here he had decided to repay them as best he could." Chaika Grossman, *The Underground Army: Fighters in the Bialystok Ghetto* (New York: Holocaust Library, 1987), p. 204.
- 13 For a description of Jewish life in the Bialystok ghetto, see Sara Bender, *The Jews of Bialystok during World War II and the Holocaust* (Waltham, Mass.: Brandeis, 2008). On the history of the Bialystok ghetto, see also Ewa Rogalewska, *Getto białostockie* (Bialystok: Instytut Pamięci Narodowej, 2008).
- 14 David Klementinowski, *Leben un Umkum in Bialistoker Geto* (New York: 1946), p. 53; Rafael Rajzner, *Der Umkum fun Bialistoker Yidntum 1939-1945* [The Annihilation of Bialystok Jewry] (Melbourne: The Bialystoker Centre, 1948), pp. 121-3 (English edition: Rafael Rajzner and Henry R. Lew, *The Stories Our Parents Found too Painful to Tell* [Caulfield North, Vic.: AMCL, 2008], pp. 123-5); Grossman, *The Underground Army*, pp. 204-5.

and constitutes a significant part of the chronicle of the lives and deaths of the city's Jews.¹⁵

According to Ewa Rogalewska, Malmed's story first appeared in an article that Peysekh Kapłan¹⁶ wrote in the Bialystok ghetto, in Yiddish,¹⁷ in March 1943. According to Kapłan:

On the first day [of the *aktsia*] something particularly dramatic happened in the house at 25 Kupiecka Street.¹⁸ When the death squad came hunting, someone suddenly threw hydrochloric acid¹⁹ in the face of a German soldier. The soldier immediately fired [his weapon], but rather than hitting the Jew who had thrown acid in his face, he hit his comrade, that is to say another German soldier, killing him. Retribution was terrible. It consisted primarily of the random abduction of 100 men and women, from that building and other buildings selected at random. They were taken to the Praga Gardens, where they were shot.... It soon became known that the man's name was [Icchok] Malmed and that a reward had been offered for his capture: 5,000 marks at first, and then 10,000. He turned himself in on that same day, and was handed over to the Gestapo, which condemned him to death by hanging. The sentence was carried out the next day, at the site of the attack. It is said that he behaved heroically during the execution, hurling harsh words at his torturers. He was left hanging for a few days, with his feet touching the ground, as if a living person were standing there.²⁰

15 The street on which Malmed was hanged, on February 8, 1943, for his act of resistance against the German invaders, was subsequently named after him. There is a plaque at 10 Malmed Street, commemorating his murder.

16 Peysekh Kapłan was a teacher, journalist and writer, founder and editor of two Yiddish newspapers (*Unzer Lebn* and *Dos Naye Lebn*) in Bialystok. In the ghetto, he was in charge of the Judenrat's education department. On Kapłan, see Bender, *The Jews of Bialystok*, pp. 148-9.

17 See Rogalewska, *Getto białostockie*, p. 94.

18 Kapłan is mistaken here; it was 29 Kupiecka street.

19 According to other testimonies, including those given in court, it was vitriol (sulfuric acid).

20 Kapłan's article was translated from Yiddish to Polish by Adam Rutkowski. The translation here is based on the Polish version. See Pesach Kapłan, "Zagłada Żydów Białegostoku," *Biuletyn ŻIH* 12 (1966), pp. 77-88.

As Kaplan notes, the acid attack occurred during the course of the *aktsia* of February 1943.²¹ According to the Bielefeld court, in February 1943, at least 8,000 Jews were deported from the Bialystok ghetto, of which “at most 4,500 to Auschwitz, and the remainder to Treblinka.”²² The court defined the events of February 5-12 in the Bialystok ghetto as a “partial evacuation,” and established that the Security Police had carried it out “with unrelenting severity and cruelty.” During the course of the *aktsia*, “the Security Police evacuation squads shot hundreds of people – men and women, young and old – killing them indiscriminately.” The court also determined that the Security Police “indiscriminately shot the ill, those unable to walk, Jews who had tried to infiltrate the part of the ghetto already searched, and those who would not come out of hiding or failed to do so immediately, or quickly enough, or for similar reasons.”²³ The court estimated that at least 300 people were killed this way. Ghetto fighter Mordechai Tenenbaum-Tamaroff wrote in his diary,²⁴ which was produced as evidence during the trial, that the number killed was 800-900. The court did not find this number “exaggerated” but, giving the defendants the benefit of the doubt, it reached a “minimal estimate of only 300 [victims].”²⁵

The court found that Altenloh, as commander, oversaw the February deportation. All departments under his command acted on his orders, “with his knowledge and approval,” especially Gestapo Department IV,²⁶ which was also involved in the executions following the “acid attack.” The Bielefeld court described the entire range of actions entailed in “the execution by shooting of 100 retaliation victims” as follows:

On February 5, 1943, at about 5 a.m. – one hour after the beginning of the evacuation operation – a Jew [by the name of] Melamed [Malmed],²⁷ [who lived] at 29 Kupiecka Street, refused to follow the

21 For a detailed description of the *aktsia*, see Bender, *The Jews of Bialystok*, ch. 6.

22 “Of these 8,000 Jews, 500 at most were not executed immediately upon arrival.” Verdict, p. 101-2.

23 Ibid., p.102.

24 See Mordechai Tenenbaum-Tamaroff, Pages from the Fire, *Excerpts from his Diary, Letters and Articles* (Hebrew) (Tel Aviv: Hakibbutz Hameuchad, 1947).

25 See *ibid.*, pp. 102, 110.

26 See Verdict, p. 113.

27 Both spellings are used. The name is spelled מאלמעד (Malmed) in Yiddish, and מלמד (Malmed/Melamed) in Hebrew. As Yiddish was the official language of the Bialystok ghetto – all Judenrat announcements were written in Yiddish and most

orders of Security Policeman Muth to leave the building and report to the collection point, and threw vitriol in his face. Muth was gravely injured. In the confusion that ensued, serviceman Wilhelm – a member of Muth’s evacuation squad – was killed. Wilhelm was probably shot by Muth, who had been blinded by the vitriol. Dr. Altenloh rushed to the scene in the ghetto, saw to the needs of the injured man [Muth], and reported the incident, including the soldier’s death, to the Reich Main Security Office [RSHA]. That same morning he also went to the office of the head of the Judenrat, Barash, and demanded that he find the attacker and turn him in to the Security Police, failing upon which action would be taken. On the basis of the report it had received, the RSHA ordered the Security Police, by telegram, to shoot 100 Jews in retaliation. Dr. Altenloh read the telegram upon its arrival and relayed it to the defendant Heimbach, head of the executive department, for implementation. Consequently, on Heimbach’s orders and with the help of Friedel, head of the Department of Jewish Affairs, 100 Jews – men, women and children – from the building in which Melamed [Malmed] resided, where the act of resistance occurred, and from adjacent buildings, were taken to the Praga Gardens, which is the large square opposite the synagogue, and executed. Dr. Altenloh and Heimbach were aware of the fact that the objective of the orders of the RSHA and the orders for their implementation constituted a crime. They understood that it was retaliation against innocent people for what was, from Melamed’s [Malmed’s] perspective, an act of resistance against an attempt on his life and that of his family. On the evening of February 5, Altenloh reported to the RSHA, that [the orders] had been carried out. Melamed [Malmed] turned himself in on February 7, in order to avert further tragedy. He was publicly hanged on the following day. Heimbach, Friedel, Lange, and other members of the Security Police were present at the hanging. After the rope broke on the first attempt, Lange shot Melamed [Malmed], on Heimbach’s orders, in order to put

of the participants in the trial used “Malmed,” that is the form I have chosen to use throughout the article. The court, however, employed “Melamed,” so that is the form that appears in excerpts from the verdict, to which I have added the Yiddish form “Malmed” in square brackets.

him out of his misery. The body was then hung and left hanging for about two days, as a deterrent.²⁸

The court's narrative of the facts of the case included information concerning the criminal act, those responsible for it, the place in which it was perpetrated, its circumstances and victims. In their written judgment, the judges first offer a selective account of the facts of the case – based primarily on the testimonies of witnesses who were victims, such as Hirsch Ugajnik, Abraham Karasik, Meir Zawadzki, Abram Oniman, Chaim Kapłan and Szymon Datner;²⁹ of witnesses who were involved as perpetrators in the crime such as Heinz Lange and Jakob Muth; on the testimony of Franz Friedel, head of the Department of Jewish Affairs, given in 1949; and on information provided by defendants Heimbach and Altenloh. This is followed by a presentation of all of the material particulars that led to their decision. In a section entitled “The Basis of Evidence and its Evaluation,” which follows the description of the facts of the case, the judges consider the witness and defendant testimonies pertaining to the acid attack and the subsequent reprisal.³⁰ They adduce the relevant testimonies, and discuss assertions by the witnesses and defendants that the court found to be untrue. The court explains at length its finding that the defendants were implicated in the executions. The explanations provided in the verdict constitute an important source for analysis of the court's reconstruction of the truth. It is not always completely clear which of the versions presented convinced the court. Due to the primacy the German legal system assigns to the principle of free examination of the evidence during main hearings,³¹ there are no formal rules that determine whom

28 Verdict, pp. 232-4.

29 Szymon Datner (1902-1989) was questioned by the Bielefeld court both as an eyewitness and a historical expert. The court asked Datner to determine the authenticity of Judenrat documents from Bialystok which served as important evidence in the trial. See Katrin Stoll, “Die Bialystoker Judenratsdokumente als Beweismittel in der Strafsache gegen Dr. Altenloh und Andere,” [The Bialystok Judenrat Documents as Judicial Evidence in the Criminal Case of Dr. Altenloh et al.], in Freia Anders, Katrin Stoll, and Karsten Wilke (eds.), *Der Judenrat von Bialystok. Dokumente aus dem Archiv des Bialystoker Ghettos 1941 bis 1943* [The Bialystok Judenrat. Documents from the Archive of the Bialystok Ghetto 1941 to 1943] (Paderborn: Ferdinand Schöningh, 2010), pp. 427-47.

30 See Verdict, pp. 226-57.

31 Today, German judges are no longer bound by provisions concerning the conditions under which a fact can be considered proven or unproven. See Lutz Meyer-Goßner,

the judge should believe or how much of any given testimony or evidence the judge accepts or rejects.³²

In analyzing the sources, I focus on four aspects: the testimonies of the witnesses and the defendants, judicial dynamics and interactivity, the final narrative told by the court, and the reasoning behind the decision. While we have the reasoning of the judges as presented in their verdict, we have little in the way of information about their decision-making process. For reasons of confidentiality, judicial panels do not document their *in camera* deliberations. This places serious a priori limits on my attempt to analyze how the court determined the facts of the case in this trial.

My method is to reconstruct the statements regarding the facts of the case that the court had to examine, with attention given particularly to the credibility and coherence of their presentation. The recordings demonstrate that the question and answer sequence – the interrogation – is a central form of communication in the judicial process in Germany. The questioner – generally the presiding judge, in the case of defendants and witnesses – is in a position of power. The presiding judge thus controls communication,³³ and witnesses, defendants, general prosecutors and defense attorneys respond to the initiatives of the bench. The recordings indeed show that it was the judges who succeeded in prompting the defendants to speak. In German criminal law, defendants, unlike witnesses, are not required to contribute to the court's efforts to determine the truth. According to article 243, paragraph 4 of the German Code of Criminal Procedure, a defendant is free to decide whether “to relate to the allegations or to exercise the right to remain silent.”

I have deliberately cited the following excerpts from the trial examinations out of chronological order. The defendants were first given the opportunity to respond to the allegation that they had shot and killed the 100 Jews but, since the court's account of the facts of the case begins with Malmed's act of resistance, I first adduce the testimony of a perpetrator witness (*Täterzeuge*) regarding the acid attack. Many witnesses confirmed

Strafprozeßordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen [Code of Criminal Procedure, The Judicature Act, Bylaws and Supplementary Provisions] (Munich: Beck, 2001), p. 917.

32 Aldo Legnaro and Astrid Aengenheister, *Die Aufführung von Strafrecht. Kleine Ethnographie gerichtlichen Verhandeln* [The Performance of Criminal Law: A Short Ethnography of Judicial Proceedings] (Baden-Baden: Nomos, 1999), p. 68.

33 This is only the case in continental Europe. The role of the judge is somewhat different in Anglo-American criminal procedure. I thank Professor Thomas Vormbaum, who read my dissertation as a second advisor, for this comment.

that the acid attack indeed occurred – both victim witnesses and perpetrator witnesses stated, in the main hearing, that they had heard of the incident. The court examined an eyewitness, former Security Policeman Muth, the man in whose face the acid had been thrown. On July 15, 1967, Muth recounted to the court the events surrounding the beginning of the evacuation of the Bialystok ghetto. In February 1943, he related, he and his fellow serviceman Wilhelm forced their way into Malmel's home in order to capture those slated for deportation:

Muth: So, Wilhelm and I and the Pole went into the house _

Presiding Judge Günter Witte: Hmm.

Muth: And there was there ah a woman and a very dim bulb [lightbulb], somewhere.

Judge Witte: Hmm.

Muth: I said: Where is Pan [your husband]? Pan isn't here. The next door was locked. I said: What now? And Wilhelm said: Open [it]. We opened it, by force, and at that moment, from the dark, the liquid flew straight into my face. I didn't know what it was. There was a kind of hissing, and my skin burned. I heard only hissing, noise in my ears, yes?

Judge Witte: Hmm.

Muth: I jump back to the wall, recover for a second, jump forward and shoot.

Judge Witte: Hmm.

Muth: And I get out of there. I remembered the entrance, that is where it was. It was, like I said at the beginning. And downstairs, at the corner of the house ... ah there was another... We didn't come up from the street, but by the rear entrance.

Judge Witte: Hmm.

Muth: It must have been locked in front.

Judge Witte: Hmm.

Muth: And there was a big gate there. And then I shouted for help. So someone grabbed me and said: Man, look at you! Yes?

Judge Witte: Hmm.

Muth: I guess I [did] not [look] so great – I still have the scar – ah ... and the blood, all encrusted with blood and so forth. I must have looked like some negro.

Judge Witte: Hmm, hmm.

Muth: He grabbed me and, in the first vehicle he came across, took me to headquarters. And with this, my role in the event came to an end, yes?

Judge Witte: And ah Wilhelm stayed ah there, yes?

Muth: Yes, as I later heard, Wilhelm was dead, because I ...³⁴

Upon being asked by the presiding judge Günter Witte to tell, in brief, the story of his “unfortunate accident,” Muth spoke in broken sentences about the events in Malmed’s house. But he did so without referring at all to Malmed himself, even though he was an active participant. According to the policeman, the acid was not thrown in his face by a person. Rather, it “flew at him from the dark.” He did not mention that he had tried to shoot the Jew who was defending himself. Muth’s claim that his fellow-policeman, Franz Wilhelm, had not been shot by him, prompted Heimbach’s defense attorney, Klaus Heise to pose to Muth a number of questions after the examination by the presiding judge:

Heise: Mr. Witness, if I have understood you correctly, you said before that it could not have been you who shot Wilhelm. You said before that it could not have been _, if I have understood you correctly.

Muth: Yes.

Heise: It could not have been me who shot and killed Wilhelm.

Muth: Yes, because I was_...

Then Heise asked Muth whether anyone had told him that he might have killed Wilhelm. Muth was taken aback by the question and sought to evade it by retelling his story. He even tried to avoid answering Heise’s questions whether he had heard shots other than his own, and whether Wilhelm might have been killed by shots fired by someone else. Muth did not manage to convince the court. The judges found that Wilhelm had been “shot by Muth, who had been blinded by the vitriol.”³⁵ The court

34 Examination of Jakob Muth in the criminal trial against Altenloh et al., July 15, 1966, no. 6341, audio tape 23, front side. The above as well as the quoted excerpts that follow are verbatim transcriptions that I transcribed. Long pauses in speaking are denoted by the word “silence” in parentheses. Underscores indicate sentences that are incomplete due to interruption on the part of the speaker or others. Omissions are indicated by the use of three dots after a word.

35 Verdict, p. 232.

also presumed that the incident had occurred about an hour after the beginning of the evacuation operation, despite Muth's claim that the acid attack occurred in the operation's first ten minutes. Muth was unable to provide details about the remainder of the *aktsia*. He had been taken to a field clinic immediately after the attack.

The court considered Muth's testimony valuable because it demonstrated that there was no justification for the executions following the incident. According to the judges, Malmed did not assault Muth. He acted in self-defense, even if the German policemen present at the scene took it to be an assault, a criminal offense. The killings perpetrated by the Germans under the guise of "retaliation" were illegal.³⁶ The court stated that:

An act cannot be considered retaliation unless it comes in response to an unlawful act on the part of the other side. This is not the case here.... The evacuation of the ghetto was an unlawful act. It is in the context of this evacuation that Melamed [Malmed] was assaulted, and his so-called acid attack was an act of self-defense in response to this unlawful assault. If Melamed [Malmed] acted lawfully, there could be no retaliation, legally speaking, for his act. The so-called retaliation was therefore unlawful. This was also known to those who issued the orders at the RSHA. They knew that the evacuation operation was unlawful, and therefore knew that resistance in self-defense was justified. And if, nevertheless, they ordered that 100 Jews be shot to death for this act of resistance, they did so only to reinforce their unlawful evacuation orders. They reaffirmed one unlawful action by means of another unlawful action. They knew this and this is what they wished to do. Their action was thus intentional.³⁷

The court rejected the German claim of the time that resistance to deportation constituted unlawful assault. In ruling that the Security Police operation – which was termed an evacuation and was intended to prepare the ground for the murder of the inhabitants of the ghetto – was an "unlawful action" and Malmed's deed a lawful

36 Article 32 of the criminal code defines "self-defense" as follows: "(1) One who commits an act in self-defense does not act unlawfully. (2) Self-defense is an act of defense necessary to repel unlawful assault." Karl Lackner and Kristian Kühl, *StGB. Strafgesetzbuch mit Erläuterungen* [Criminal Code with Commentaries] (Munich: Beck, 2007), p. 230.

37 Verdict, pp. 393-40.

one, the court established that the deportations and the shooting of the 100 Jews were criminal acts. Based on the principle of the inviolability of human life, the court retroactively restored Malmed's right to self-defense – a right the German occupiers had denied him.

The prosecution posited that 50 people had been shot and killed. It accused Altenloh of reporting the acid attack in a telegram to the RSHA, to which he was subordinate, and of having suggested that 50 Jews be shot in "retaliation." The indictment stated that the Security Police subsequently arrested at least 50 people, including Malmed's wife and child. It also noted that the Judenrat had received orders to turn in the man responsible, "failing which, the entire ghetto would be liquidated." Consequently, Malmed turned himself in and was publicly hanged. The "telegram ordering the shooting of 50 Jews" was received by Heimbach, who then ordered the executions "without reporting to his superior and without waiting for his instructions."³⁸

Presiding Judge Witte asked Altenloh what "principal line of defense" he intended to offer against these allegations.

Altenloh: As I have already stated, I did not participate in the action itself. So ah they woke me at night and told me that one of my men had been shot and killed. We presumed, at first, that he had been shot by a Jew, and only afterward did it become clear that he had been shot by a member of the squad, who had lost his sight.

Judge Witte: Yes.

Altenloh: I immediately arranged for the man to be transferred to a field clinic, where there was an eye specialist. I then reported, as required, to the RSHA, that a man ah the facts of the case, that he had been shot and killed.

Judge Witte: Is that all?

Altenloh: I did not make any suggestion.

Judge Witte: You say, in a single sentence: Yes, I reported the attack and its consequences to the office to which I was responsible, but I did not suggest any retaliation. Question: Did an order arrive from Berlin to carry out a reprisal?

Altenloh: Yes.

38 Indictment by Dortmund Public Prosecutor's Office, Dec. 14, 1964 (45 Js 1/61), in L/StADT, D 21 A, no. 6270, p. 120.

Judge Witte: Did you, was this, was this order to exact revenge carried out by you?

Altenloh: I learned of the order only after it had been carried out.

Judge Witte: Ah, that is to say that you did not carry it out?

Altenloh: No.

Judge Witte: Then someone else?

Altenloh: Yes.

Judge Witte: Thank you very much.³⁹

It is striking that the presiding judge did not ask the defendant who this “someone else” was. In his initial examination of Altenloh, the judge was satisfied with Altenloh’s own statement regarding his behavior then. The defendant failed to tell the court whether he had reported to the RSHA who had shot the German policeman. It is reasonable to assume that he noted in his report that a German policeman had been shot and killed by a Jew, because that is what he had presumed at first. During the preliminary investigation he insisted that he had initially presumed that the policeman had been killed by a Jew and thus had presumably reported this. During this pre-trial questioning in September 1961 by Public Prosecutor Hubert Schaplow, Altenloh claimed that “only a few days later” – that is, subsequent to his report to the RSHA – did it become clear that the policeman had been shot by his comrade, Muth, who after his injury had fired in all directions. Altenloh claimed that he had believed at first, that the “dead man had actually been the victim of assault in connection with the acid attack.”⁴⁰ Furthermore, Altenloh did not omit to mention, in his trial testimony on March 23, 1966, that after the incident he had gone to see the acting head of the Judenrat, Ephraim Barash. Five and a half years earlier, he had told Public Prosecutor Schaplow that he had gone to see Barash to “have a talk” with him, and that he had told him that “the attacker had better turn himself in.” Altenloh admitted that “it might have been construed from the spirit of his words” that the attacker was expected to turn himself in by a certain time or “action would be taken,” without specifying what he meant by “action.” He claimed that it had only been a figure of speech, in order to “lend emphasis to his words,” and that he did not have anything “concrete” in mind at the time.⁴¹ He stressed that “under

39 Examination of the defendant Altenloh at the criminal trial against Altenloh et al, March 23, 1966, in L/StADT, D 21 A, no. 6341, audio tape 1, front side.

40 Examination of Wilhelm Altenloh by Public Prosecutor Schaplow, Sept. 21, 1961 (Az. 5 Js 342/59), in L/StADT, D 21 A, no. 6143, pp. 157-170 (on pp. 168f.).

41 Ibid., pp. 168ff.

no circumstances” did he threaten to shoot thousands of Jews. Yet what he really meant was evident from the context. He may not have said so explicitly, but it is safe to assume that Altenloh knew very well, both when he spoke to Barash and at the time of his examination, that the Security Police would retaliate for any attack on Germans. Security Police documents demonstrate that mass executions were a tactic integral to the German occupiers’ policy of persecuting and exterminating the Jews. When Altenloh said “action,” Barash would have known exactly what he meant.

During the trial’s main hearing, Altenloh claimed that he had not threatened action, but had merely conveyed a “pressing demand” to Barash.⁴² But, considering the evidence, the court rejected the possibility that “the commander had driven to the Judenrat, in the ghetto, early in the morning,” merely to put across “such an innocent message.” From the evidence, “it is reasonable to assume that massive threats were made regarding what would happen were the attacker not immediately handed over to the Security Police.”⁴³ Yet the court itself never specified what it believed Altenloh had actually meant. It merely cited Altenloh’s own version of his words, from his September 1961 examination, that “action would be taken.” In presuming that Altenloh had not been present at the executions, the court also accepted the defendant’s claim that he had not been directly involved in the shootings. In earlier examinations, Altenloh had not only denied any direct or indirect involvement in the shooting of the Jews who had been rounded up, but went so far as to incriminate his former subordinate, Heimbach. In his questioning by the public prosecutor in 1961, Altenloh said that he was not present at headquarters when the telegram ordering the execution of “50 hostages”⁴⁴ arrived from the RSHA. He claimed that he discovered, upon his return to headquarters, that the order had already been carried out. Heimbach had received the telegram and “taken care of the rest.” Altenloh said that, therefore, he was unable to provide any information about the executions. He claimed that “he had no idea whether 50 people had been shot and killed, or perhaps less”. Nevertheless, he said he had been told that 50 had been shot. He claimed that he did not know who commanded the operation, who fired, or who exactly was shot. After he discovered

42 Verdict, p. 243.

43 Ibid.

44 “Hostages “was the term used by the defendants as well as the prosecution. The use of the term “hostages “suggests that the Jews might not have been killed if Malmed had been captured or turned himself in. However, given the brutal nature of the German extermination policy it is clear that the 100 victims were going to be executed regardless.

that the “hostages” had been shot, he reported it to Berlin. He said that he may have sent the report by telegram himself.⁴⁵ In his testimony to the investigating magistrate two years later, he stated that he had been informed of the order sent by the RSHA to shoot 50 Jews in retaliation for the attack only after it had been carried out. He claimed that Heimbach told him that he had ordered the shooting of 50 Jews, as mandated by the RSHA. He claimed that he had later asked Heimbach why he had not waited for his, Altenloh’s, order, but that he was “inwardly glad” that he did not have to “deal with the matter any further.” According to his testimony, he “hardly saw anything” of the “operation itself.” The word “hardly” would seem to indicate that he intentionally concealed what he had seen, so as not to incriminate himself. He also claimed that he later heard that the Jewish “assailant” had been shot and killed, but that he did not know who had given the order. He said that he himself had not given the order to shoot Malmed.⁴⁶

In the courtroom, Altenloh attenuated his earlier claim that the executions had been carried out by Heimbach, asserting that it could just as easily have been Rolf Günther (a subordinate of Eichmann’s, sent to Bialystok in February 1943 by the RSHA).⁴⁷ At the end of the main hearing, on January 11, 1967, Altenloh stated that he had been informed of the “hostages’ execution by shooting”, and that Heimbach’s name had come up in this context. Nevertheless, Altenloh did not claim that Heimbach had been in charge of the executions, or that he had been involved in them.⁴⁸ Why, in court, did Altenloh retract his incrimination of Heimbach? To answer this question, we must remember that according to German criminal law, a defendant may not unjustly incriminate another person. Making a false accusation in court is, in itself, a criminal offense. Altenloh may have initially lied and blamed his former subordinate in order to protect himself. In its judgment, the court suggested that Altenloh, reluctant to “incriminate a former subordinate,” refrained from accusing Heimbach during the trial phase because “he may have feared that Heimbach would then incriminate him,” and because “sticking to the truth and incriminating Heimbach would merely have

45 Examination of Dr. Wilhelm Altenloh by Public Prosecutor Schaplow, Sept. 21, 1961, p. 168.

46 Examination of Wilhelm Altenloh by Investigating Magistrate Fischer, Aug. 19, 1963, no. 6156, pp. 114-25 (on p. 120).

47 Testimony of Wilhelm Altenloh in the criminal trial against Altenloh et al., Oct. 31, 1966, no. 6342, audio tape 37, reverse side.

48 See trial transcripts, no. 6178, p. 926.

strengthened the suspicion that he himself had participated in the execution of the retaliation victims.”⁴⁹

Regarding the number of victims, Altenloh insisted that only 50 people had been shot, directly contradicting the testimony of a number of witnesses who spoke of 100 victims. In this context, the presiding judge made a clear distinction between the execution order and its implementation:

Judge Witte: Ah regarding the number 100 of ah people executed by shooting following the attack. Do we agree on this point or not?

Altenloh: I was told at the time ah only that_ I remember that the telegram referred to more than 50.

Judge Witte: More than 50.

Altenloh: 50, no, ah 50, that is ah_

Judge Witte: 50.

Altenloh: 50.

Judge Witte. Hmm, and not 100.

Altenloh: Not 100.

Judge Witte: Who told you?

Altenloh: I saw the telegram after the fact.

Judge Witte: You saw it? Excuse me, I do not_

Altenloh: The telegram from the RSHA was given to me after the fact.

Judge Witte: Yes, that is what you_ We already know that. You told us that you received the telegram together with the report that the execution order had already been carried out. That is what you told us.

Altenloh: Yes.

Judge Witte: You found out about it at the same time.

Altenloh: Yes.

Judge Witte: You could do nothing at that point, and that is when you discovered that the number was 50. Do you also know_ Were you also informed that 50 hostages had been shot, or 100?

Altenloh: Fifty was [the number] reported to me.

Judge Witte: Fifty were reported. Who reported it? Heimbach?

Altenloh: I cannot say for certain today who reported it to me.⁵⁰

49 Verdict, p. 255.

50 Trial examination of Altenloh, March 28, 1966, no. 6341, audio tape 12, reverse side.

The court rejected the testimony of the defendant, who claimed that he was not involved in the implementation of the retaliation orders of the RSHA, but learned of them only after the executions had been carried out. The claim, the judges said, was internally inconsistent. The verdict explains at length why the court believed that Altenloh was aware of the order, and why he charged his subordinate, Heimbach, with its implementation – first and foremost, because this chain of events was internally consistent.⁵¹ Altenloh was commander of the Security Police in Bialystok. He was present on February 5, 1943, signed the telegram reporting the serviceman's death, and even conceded that the order from the RSHA regarding retaliation had been addressed to him, as commander. Moreover, the court found that Altenloh had “held the telegram in his hands,” read it, and did not reprimand Heimbach for having “carried out the retaliation order.” The court defined the retaliation as an “event of particular significance,” and as such would not have been “carried out without the commander's consent.”⁵² The Bielefeld court was thus convinced that Heimbach did not bypass his superior in this case. The verdict asserts that Altenloh's statements about the acid attack during pretrial questioning and the main hearing rendered “his denials implausible.” The judges termed absurd the claim that it had been Günther who ordered Heimbach, head of the Gestapo in Bialystok, to carry out the retaliation, because Günther had no reason “to mandate the implementation of an order not addressed to him – especially when the one to whom the order had been addressed was present and accessible.” According to the verdict, Altenloh “would not have reported that the operation had been carried out, had it been ordered by another commander.” Furthermore, the court believed that Altenloh “even incriminated himself in his testimony – correct in the view of the court – that Heimbach had carried out the executions by shooting.” It is “reasonably certain” that “Heimbach acted upon orders from his immediate superior.” The possibility that it had been Altenloh who ordered Heimbach to carry out the retaliation order is supported by Heimbach's statement that he did not act behind his commander's back.

In the main hearing, Heimbach denied both the shooting of the “retaliation victims” and his personal involvement in the incident. When asked about his involvement in his pretrial questioning, he provided contradictory answers. In May 1962 he told Public Prosecutor Schaplow that, contrary to Altenloh's claim, he did not order the killing of the 50 “hostages” arrested on the basis of a telegram from the RSHA. He argued

51 See Verdict, p. 240.

52 Ibid., p. 241.

that it was inconceivable that he would have “acted on his own, without informing Dr. Altenloh.” Heimbach testified that “he does not recall anything, today” about “the report or the telegram received from the RSHA regarding this execution operation.”⁵³ By the time of his examination by the investigating magistrate, a year and a half later, his memory had improved. In October 1963, he stated that a telegram had indeed arrived from the RSHA, ordering the shooting of the hostages. He claimed that the order was in keeping with the recommendations of the department. Heimbach said that he could not rule out the possibility that he had assumed the responsibility of carrying out the executions: “It is also possible that, on the basis of the telegram received from the RSHA, I ordered the execution by shooting of these Jewish hostages, but not without the knowledge of Dr. Altenloh.” The public prosecutor asked whether he had any “compunctions” about this order, under which the “wife and child of the attacker were also killed” (a fact corroborated by other findings). Heimbach replied that he did not imagine that the attacker’s wife and child were also shot in the incident. He considered the order to shoot the other Jews “legal, because they had sought authorization in advance.”⁵⁴

On the advice of his attorney, Heimbach did not, during his first examination in the Bielefeld court, relate to any of the allegations surrounding the acid attack.⁵⁵ During the taking of evidence, Heimbach also chose not to comment on any of these events. The presiding judge repeatedly asked him whether he wished to testify on the matter – for example, following the testimony of Bronisława Ferber on May 9, 1966:

Judge Witte: Mr. Heimbach, another question: You have not yet spoken of the Melamed [Malmed] affair, the execution by shooting of the attacker. I am just asking so as not to miss anything. Do you wish to speak of the attack, today?

Heimbach: Mr. President, I am prepared to speak of this matter at length. Nevertheless, I believe that, for reasons ah (silence), for reasons associated with the criminal proceedings, the time has not yet come to make this statement.⁵⁶

53 Examination of Lothar Heimbach by Public Prosecutor Schaplow, May 21, 1962 (Az. 5 Js 1/61), in L/StADT, D 21 A, no. 6148, pp. 133-58 (on p. 153).

54 Ibid., p. 90.

55 See examination of Lothar Heimbach at the trial, March 28, 1966, no. 6341, audio tape 13, reverse side.

56 Examination of Heimbach at the criminal trial of Altenloh et al., May 9, 1966, no. 6341, audio tape 13, reverse side.

Heimbach's response to Judge Witte's question was based on strategic considerations. From the defendant's point of view at this particular stage of the trial, the disadvantages of cooperating with the court by answering its questions, and thereby putting himself on the spot, must have outweighed any perceived advantages, namely the opportunity to present *his* version of events.

Heimbach spoke at length about the acid attack only at the end of the trial. On January 7, 1967, he stated that Malmed's action, which he termed "the act of a sniper," was "punished" with "all measures necessary to apprehend the perpetrator" but not "by indiscriminate shootings." He considered the executions following Malmed's act of resistance an invention of "postwar history." He recalled that the "forces deployed in the evacuation" of the ghetto merely acted "forcefully" when they entered people's homes. Heimbach asserted that he had never bypassed his superiors on the basis of a telegram from the RSHA, and that to do so would have gone against his "entire education" and against his "conception of service at that time." When asked by Judge Witte how Malmed's action was punished, Heimbach replied that he would not "go into details." Rather than present the court with a plausible version of events, to counter that of the prosecution, Heimbach denied the prosecution's claim that he had taken part in the shootings, thereby contradicting his previous statements:

Judge Witte: So, punishment was meted out for Melamed's [Malmed] action. First, by hanging the perpetrator, yes? Or perhaps not? And second, by shooting the hostages. Yes or no?

Heimbach: I maintain that the perpetrator... [silence] ...was put to death. I declare that I deny there was an execution by shooting of the hostages in relation to Malmed's action.

Judge Witte: I understand. There was no execution by shooting of the hostages. So how do you explain your statement that I have just presented to you – and you yourself have just said so explicitly – that obviously there were acts of retaliation, after a German official had been shot and killed?

Heimbach: Yes, I must have been misunderstood again.

Judge Witte: Please, I will present it to you again.

Heimbach: Yes, I know, Mr. President.

Judge Witte: Here, I have it in my hand. You said here: We can safely assume that threats of retaliation were made, [but] I do not know whether it happened or what happened. This is what you said in your

first examination. Correct? Regarding the executions by shooting, Dr. Altenloh's statement is correct, and you presented it at length. Later, during your examination in October, you said: It is true that a telegram arrived from the RSHA, with instructions to shoot the hostages, but this was done on the basis of our proposal. This proposal was the commander's. I myself may have handled this telegram, but not without the knowledge of my commanding officer. And then came the RSHA and said: Shoot them. That is what I did, with the knowledge of my commanding officer. And you yourself said: Listen, according to my entire education, Mr. President, it is inconceivable that I would have done such a significant thing without the knowledge and consent of my commanding officer. That is how I understood your statements. Now you surprise me by saying that there were no executions by shooting of the hostages. So what is correct?

Heimbach: Mr. President, I believe that at that time, I even went beyond that which was alleged against me. I always thought_

Judge Witte: Hmm.

Heimbach: And I presumed that there were reliable documents.

Judge Witte: Yes, yes.

Heimbach: Attesting to the fact that the executions by shooting actually occurred. And then I said that such a proposal must have been made by the SS commander or the chief of police, maybe even by our own department. And if such a proposal was made by our department, then it could only have happened in this way and not_

Another judge: Mr. Heimbach_

Heimbach: Otherwise.

Other judge: Then why didn't you say it that way? Why did you not say: If that is what happened, then the situation must have been such. Instead, you said: Indeed the telegram arrived.

Heimbach: Let them stone me, for all I care, or whatever they decide. It may all be true. But I would like to add the following: Regarding these matters – and I don't care if they don't value my mental capacity – regarding the matter of the hostages' execution by shooting, I never presumed it would become an indictment, yes, and that because of that, it would play a role. Besides, I believed that even if ah a German serviceman was ambushed and shot_

Judge Witte: Yes, yes.

Heimbach: We can certainly think that in such a case, they would do something.

Other judge: Correct, Mr._

Heimbach: And I said that had I received such an order, I would certainly have seen fit, yes, to carry it out on the spot, if I were_

Attorney Heise: Execution by shooting of the hostages, by hanging or execution by shooting?

Heimbach: Excuse me?

...

Judge Witte: It is clear, you wanted, wanted to say that you deny what is written here, to this extent. It was more of a theoretical thought. If such a thing had indeed occurred, then it would be safe to assume that retaliatory action was taken.

...

Judge Witte: What is important here, in effect, is that you relate to the matter itself: Did you send a telegram to Berlin, with the knowledge of Dr. Altenloh or without his knowledge? Did you receive an order from Berlin, yes or no? You seem to be in difficulty and are therefore trying to dissociate yourself from Dr. Altenloh now. And it seems that you do not want to be suspected, at the end of the trial, of having incriminated Dr. Altenloh, although you yourself said: I must incriminate him, because I am not a man who acts of his own accord, behind his commander's back. This seems to place you in tremendous difficulty. Am I mistaken?

Heimbach: Mr. President, I can only say the following fact: There was nothing irregular there. I repeat that I have never [sent] a telegram without the knowledge of my superior_

Judge Witte: Exactly.

Heimbach: I never carried out an action, legal or illegal, yes, and I cannot say from my perspective today, and I think that such a thing did not happen, that 40 or 50, as the prosecution claims, yes, that 40 or 50 people were stood up against the wall and shot by us. If I knew of such a thing, I would tell you, yes. I must say, I must confess that this business with Malmed, that he died, yes, that is the case.

Judge Witte: Is that what you wish to say?

Heimbach: Involved or not involved, I remember only vaguely. I remember also that while trying to apprehend the perpetrator,

something was done. If I just said, yes, the act was punished, then to my mind it was the men, then it happened ah certainly. They see a comrade bleeding, yes, and then shooting. And then they go into the houses, yes, and without warning they shoot inside, and people are killed. And it is possible, in the context of such measures, there were more losses on the other side than they expected. And again, according to estimates after the fact, there were 10 and, for all I know, even 15 killed.

Heise: Mr. Heimbach, again you are_

Judge Witte: Yes, done. We are finished with this matter. [To another member of the court] Ask, please.⁵⁷

In confronting⁵⁸ the defendant with his previous statements, the presiding judge revealed the contradiction between Heimbach's statements in his pretrial questioning and those he made in court, during the trial itself. Heimbach attempted to resolve the contradiction by explaining his previous statements, but the court rejected his claim that he had only made the earlier statements because he had believed that the prosecution had proof of the "hostages' execution by shooting." Heimbach simply made things worse, getting caught up in further contradictions. Although he did not admit that there had been executions by shooting or that he had been involved in them, he justified them, indirectly, by defining them as legal. Heimbach's wording, "losses on the other side," revealed that he viewed the Jews as combatants, opponents in a military confrontation – ignoring the fact that the Jews had no weapons with which to defend themselves. To Heimbach's mind, it was not Malmed's act of resistance, but the Security Police commander's "acts of retaliation" that constituted self-defense.

At the end of the presiding judge's examination, another member of the bench, Judge Horst Gaebert, again tried to extract a clear and unequivocal statement from the

57 Testimony of the defendant Lothar Heimbach, Jan. 6, 1967, no. 6342, audio tape 41, front side.

58 On the confrontation method, Pander Maat and Sauer wrote: "The tool of confrontation was intended, in the event, to highlight the existence of a contradiction between what has just been said and what is written, or between the expected response and the written record." Henk Pander Maat and Christoph Sauer, "Konfrontieren und Rügen im niederländischen Politierechter-Prozess" ["Confrontation and Reprimand in Dutch Criminal Law"], in Ludger Hoffmann, (ed.), *Rechtsdiskurse. Untersuchungen zur Kommunikation im Gerichtsverfahren* [Legal Discourse: Studies on Communication in Legal Proceedings] (Tübingen: 1989), pp. 129-63 (on p. 136).

defendant. With the presiding judge's permission, Judge Gaebert took over the session and began to examine Heimbach. His first question concerned the telegram sent to Berlin:

Judge Gaebert: Mr. Heimbach, briefly. Did you send the telegram to Berlin, yes or no? Do you recall? Answer yes or no, please.

Heimbach: Today, no. I could not_

Judge Gaebert: You do not recall.

Heimbach: Say.

Judge Gaebert: Do you recall whether Dr. Altenloh sent the_ such a telegram?

Heimbach: I couldn't say that either, today.

Judge Gaebert: You couldn't say that either. Do you recall this incident with the acid, that is to say that an acid was thrown at a member of your department, that is to say that there was an attack?

Heimbach: On this subject I have some idea.

Judge Gaebert: On this subject you have some idea. Who was injured?

Heimbach: Ah, it must be assumed now_

Defense Attorney Heise: No!

Judge Gaebert: I am just asking what you recall. Do you remember that_

Heimbach: Yes, first_

Judge Gaebert: That it was Wilhelm?

Heimbach: I want to relate_

Judge Gaebert: I just asked_

Heimbach: Since my defense, I no longer know what I should say.

Judge Gaebert: Mr. Heimbach, I would just like_

Defense Attorney Heise: Short and clear.

Judge Gaebert: I would like to hear your clear testimony.

Heimbach: It was someone from my Department IV.

Judge Gaebert: Good, but you no longer know who_ you do not recall_

Heimbach: It was someone from my Department IV.

Judge Gaebert: Good. Next question: Do you recall measures you ordered in order to apprehend the perpetrator? Or did others in your department order such measures?

Heimbach: Ah, I don't know whether I initiated them in particular or

not, but it is obvious that measures were taken and that Department IV dealt with it, yes.

Judge Gaebert: Good. And do you recall what measures?

Heimbach: If_

Judge Gaebert: What measures? Was a reward offered? Was a memorandum written?

Heimbach: It is very possible that a reward was promised.

Judge Gaebert: That is not_ I am not interested in your speculations right now, your theoretical possibilities.

Heimbach: I no longer have a clear idea about it.

Judge Gaebert: You do not. Do you recall the apprehension of the perpetrator Melamed [Malmed]?

Heimbach: I would say yes.

...

Judge Gaebert: Who apprehended him?

Heimbach: Excuse me?

Judge Gaebert: Who apprehended him, the perpetrator?

Heimbach: Ah.

Judge Gaebert: So what do you actually remember of the apprehension that you_

Heimbach: Now, I could of course, blurt out what I have learned in the meantime, what has been said since the completion of the inquiry_

Judge Gaebert: That is, you remember something vaguely.

Heimbach: He was informed on, if I may put it that way, he ah was turned in to us after having been informed on, yes, but in this too, I have no precise recollection.

Judge Gaebert: You have no precise recollection. Do you have a precise recollection regarding the perpetrator's death?

Heimbach: [Silence] I would ah like to_ as a result of the conclusions of the hearing.

Judge Gaebert: No, I mean what you remember from then.

Heimbach: About then I would like to say: the perpetrator was put to death.

Judge Gaebert: Where and how?

Heimbach: Ah I couldn't say today; it may have been death by hanging.

Judge Gaebert: But you do not remember it. It is what you deduce from the preparatory inquiry.

Heimbach: Excuse me?

Judge Gaebert: You do not remember it. You do not see him hanging_

Heimbach: That is not_

Judge Gaebert: in your memory.

Heimbach: Your honor, I don't remember it precisely_

Judge Gaebert: You remember it vaguely.

Heimbach: I would not rule out, based on what I knew then, I did not know that_

Judge Gaebert: That is clear. I am only interested in what you remember today. Question: What about the conducting of this hanging of Melamed [Malmed]? Did you conduct it?

Heimbach: I would like to say no.

Judge Gaebert: What does that mean: I would like to say?

Heimbach: [Silence]

Judge Gaebert: Do you wish to say: no,

Heimbach: No, no.

Judge Gaebert: I did not conduct it, or perhaps you wish to say,

Heimbach: No.

Judge Gaebert: I conducted it.

Heimbach: No, no.

Judge Gaebert: Or do you wish to say: I no longer know.

Heimbach: No, no.

Judge Gaebert: Do you wish to say: I did not conduct it.

Heimbach: Yes.

Judge Gaebert: You are aware that we_

Heimbach: Yes.

Judge Gaebert: Contradictory testimonies.

Heimbach: It is_

Judge Gaebert: In this matter_

Heimbach: One might say in this matter_

Judge Gaebert: Do you recall that the perpetrator ah fell when he was hanged?

Heimbach: No.

Judge Gaebert: That the rope broke.

Heimbach: No, no, no.

Judge Gaebert: Do you recall that then [silence], a shot was fired at him?

Heimbach: No.

Judge Gaebert: To put it carefully.

Heimbach: No, no.

Judge Gaebert: You do not recall. Well, about the circumstances of the hanging.

Heimbach: No.

Judge Gaebert: You do not remember details.

Heimbach: No. Well, I remember ah there is some confusion here, since the war ah I read a lot of the Polish literature. Only then did I discover the ah things.

Judge Gaebert: Now, what about the hostages' execution by shooting? Were you present during the February *aktsia*, when the hostages were shot?

Heimbach: No.

Judge Gaebert: Do you mean to say that you were not present, or that you do not remember?

Heimbach: No.

Judge Gaebert: I was not present. Are you aware that members of your department shot the hostages in this context?

Heimbach: I, I don't know.

Judge Gaebert: You don't know.

[All are silent]

Defense Attorney Heise: And how do you explain your contradictory testimony during your pretrial questioning?

Heimbach: [Silence]

Heise: Do you wish to say that you were misunderstood?

Heimbach: [Silence]

Heise: Or do you wish to say that you did not tell the truth then?

Heimbach: Mr_

Heise: Or do you wish to say that you remembered something else then?

Heimbach: Yes.

Heise: There must be some explanation.

Heimbach: Yes, yes, it's a matter of expression. I don't wish ah to say

at this point by any means, yes, that ah the gentleman from the public prosecution pressed me. I signed what was written in the transcripts at the time. That is what I said. I leave it to the court to judge.... It is hard for me to put this in words, but the facts of the case were not as I said then.

Heise: In other words, you wish to say: I cannot say today why I said something else then.

Heimbach: Yes.

Heise: Good.⁵⁹

Although Judge Gaebert and Defense Attorney Heise asked the defendant to describe only what he himself remembered, Heimbach repeatedly cited the results of the pretrial inquiry. Since Heimbach had been incriminated by other witnesses, his behavior appears at first glance to be surprising, even unwise. He may have sought to convince the court that it was impossible to reconstruct events so distant in time, given multiple accounts and interpretations. This, perhaps, explains his reference to the “Polish literature” that had supposedly recast his memory. Heise was clearly displeased with his client’s strategy. Toward the end of his examination, Heimbach retorted angrily to his counsel’s queries about the contradiction between the things he had said during his pretrial questioning and his statements in the courtroom. The statement “It was someone from my Department IV” sounds very antagonistic, as compared to his insecure “I no longer know what I should say.” Heise’s questions silenced Heimbach, who was unable to offer a convincing explanation of the contradictions in his testimony, leaving him speechless and discomfited. Lacking a convincing explanation, he had no choice but to assent to the version offered by his attorney.

The above excerpt from Heimbach’s examination demonstrates the importance that the court ascribed to the documents from the pretrial inquiry. Thomas Seibert has noted that, in German trial procedure, “paradoxically, preference is given to [court] dossiers, due to their function of collection and storage, contrary to all procedural principles.”⁶⁰ The dossier, in German procedure, is a file that contains both written documents and transcripts from the preliminary hearing. The dossier not only contains information

59 Examination of Lothar Heimbach at the criminal trial of Altenloh et al., Jan. 6, 1967, no. 6342, audio tape 41, front side.

60 Thomas-M. Seibert, *Gerichtsrede. Wirklichkeit und Möglichkeit im forensischen Diskurs* [Judicial Speech: Reality and Possibility in Forensic Discourse] (Berlin: Duncker & Humblot, 2004), p. 182.

“about what happened,” according to Seibert, it also “rejects all that is not written, as insignificant or half-truth – at least initially.” In keeping with this, in the case under discussion here, the court viewed Heimbach’s new statements as irrelevant. In the judges’ view, only what he had said during his pretrial questioning was germane to their task. Nothing Heimbach said during the main hearing could, in their eyes, trump statements he made during the prosecution’s pre-trial examination. They formed part of the case dossier and were produced again in court.

The examination transcripts show that the court believed that Heimbach’s testimony on the acid attack in October 1963⁶¹ was closer to the truth than his statements under examination at the trial. In their verdict, the judges wrote that “based on the examination transcripts of which he [Heimbach] was reminded in the courtroom hearings” as well as “90 days of the main hearing,” the court had determined “that Heimbach, for the most part, intentionally speaks in an indirect, equivocating, and vague manner.” In the court’s view, if Heimbach said “I may have ordered the executions by shooting”, it should be interpreted to mean “I ordered the shooting.”⁶² Heimbach’s statement, as recorded in the public prosecution transcripts, that “he did not act without the knowledge of Dr. Altenloh,” was interpreted by the court to mean that his former commander “received the order and relayed it to Heimbach to be carried out.”⁶³ The court was convinced that, when he said that he had not acted behind his commander’s back, Heimbach was telling the truth. The presiding judge presumed that Heimbach did not want to incriminate his former superior, and that is why he did not admit to

61 When asked by the public prosecutor, during his pretrial questioning, whether Altenloh himself had written the document containing the retaliation proposal and given it to him to send by telegram, or whether Altenloh had merely ordered the writing and sending of the document, Heimbach declared that the standing of the Reich Main Security Office in relation to the Command of the Security Police and Security Service in the Bialystok district determined that “only the commander may sign telegrams directed to the higher-ranking office.” Heimbach added: “Nevertheless, I cannot say whether he [Altenloh] himself wrote the document or merely signed it. Nor can I say whether I myself wrote it. The reason for the writing of the telegram was the requirement to report special events to the Reich Main Security Office. I recall a directive to that effect, and I believe we were required to add a proposal for further treatment of the matter to every such report.” Examination of Lothar Heimbach by Public Prosecutor Schaplow, case 13/62, Oct. 18, 1963 (continued from Oct. 16, 1963), no. 6157, pp. 92-101 (on pp. 100f.).

62 Verdict, p. 257.

63 Ibid., p. 259.

having received the order from Altenloh. In light of Heimbach's pretrial statements, as well as his testimony during the main hearing, the court concluded that he was a man experienced in criminal proceedings, who "generally knows exactly what is important and when to obfuscate." According to the court, Heimbach took care, "for 'most obvious' reasons, not to incriminate his former comrades (especially his former commander)." The court thus reached the following conclusion: "If Heimbach, who acted with extreme caution, said of Dr. Altenloh's testimony, which linked him to the implementation of retaliatory action, that he did not act without the knowledge of his commander, then he indeed meant it, and his words are credible and reliable."⁶⁴

The defendant's pretrial statements played an important role in the court's reasoning. Unlike the deportation charge, the court had no documentation on which to rely in reconstructing the events that culminated in the shootings. The court's findings were based on the assumption of a chain of command and the involvement of a number of parties in the operation.

What was the importance of the testimony of the victim witnesses in establishing guilt? First of all, these testimonies corroborated the fact of the executions by shooting. Furthermore, these witnesses provided detailed information on the number and identity of the victims. Based on the testimony of a survivor historian, Szymon Datner, regarding statements made by Friedel, the former head of the Department of Jewish Affairs, and on the testimonies of four former inhabitants of the ghetto, Hirsch Ugajnik, Abraham Karasik, Meir Zawadzki, Abram Oniman, the court found that 100 Jews – men, women and children – had been shot and killed. Altenloh insisted that the number was 50, and that there were no women and children among them. The victim witnesses however, all maintained that there had been women and children among those executed, and the court accepted this version of events. Regarding the number of the victims, the witnesses provided various counts, some precise numbers and some approximations, depending on the distance from which they observed the event.

Ugajnik, who spoke almost entirely in Yiddish, testified that 103 people were shot. He had been a member of the ghetto fire brigade at the time, and did not witness the executions firsthand. He testified that he had covered the bodies with snow and, the next day, helped transport them to the cemetery. They were buried in a pit, just outside the cemetery. One of the judges asked how he knew there were 103 bodies.

64 Ibid., p. 258.

Ugajnik: Because I counted...

Interpreter: So, he says ah that during the burial there was someone from the Gestapo, or someone German, there_

Ugajnik: Yes.

Interpreter: And he ordered that the bodies be counted as they were buried.

Ugajnik: And I counted them and I saw 103 people.

Public prosecutor: Were they men, women, and children?

Ugajnik: Women, children, and men.⁶⁵

In its verdict, the court accepted, without reservation, the testimony of this witness who, “due to the activity in which he engaged, was particularly close to the events.” Given this evaluation, it is perhaps surprising that the court did not accept Ugajnik’s count of 103 victims. It found Fritz Friedel, who claimed to have been an eyewitness to the executions, more reliable.

Unlike Ugajnik, Oniman, who viewed the executions from his hiding place, was unable to cite a precise figure for the number of victims. Yet his testimony proved crucial for the court, because through it the court learned that the executions had taken place in the Praga Gardens, and that the victims of the reprisal were from Malmed’s building. Oniman, who had emigrated to Australia after the war, testified in German, asking the interpreter for the German equivalent of a Polish word from time to time, and sometimes resorting to English.

Presiding Judge Witte: Tell the court what you saw from your hiding place.

Oniman: We kept switching. One of us always kept watch, in case ... in case the Germans came ah *opróźnić* to clear our part of the ah street.

Interpreter: Yes.

Judge Witte: Hmm.

Oniman: So I looked out, and I saw, using binoculars, that Jews were being taken to the synagogue. It was on the side [in English] “in front of us,” that is [in English] “in front,” opposite us.

Interpreter: On the side visible from the hiding-place.

Oniman: Yes, and ah men, women and children, and they were shot. We

65 Examination of Hirsch Ugajnik, at the criminal trial of Altenloh et al., May 4, 1966, no. 6341, audio tape 12, reverse side.

didn't know what had happened. When we came to the Judenrat, they told us that a certain Malmed, a Jew, did ... to a Gestapo man [continues in Polish].

Judge Witte: Ah.

Oniman: [Speaks Polish.]

Interpreter: Ah, someone with sulfuric acid_

Judge Witte. One moment. I'd like to focus on this. You saw things through the binoculars.

Oniman: Yes.

Judge Witte: What did you see? You could see only one street, correct?

Oniman: It was not a street; it was an area.

Judge Witte: Ah, yes. By your_

Oniman: It was once a park, but unfortunately, there was no wood for heating, so the Jews took wood from the park.

Judge Witte: Yes, yes.

Oniman: It was an area.

Judge Witte: An open area.

Oniman: An open area. [In English] "And in front" [continues in Polish].

Interpreter: And opposite, there was a structure, the synagogue, yes?

Oniman: Yes.

Judge Witte: Was this near the Praga Gardens?

Oniman: It was inside the Praga Gardens. The windows of the house I lived in faced Praga.

Judge Witte: I understand. From your house you could [look out] over the Praga Gardens_

Oniman: In ordinary times, in ordinary times,

Judge Witte: Yes.

Oniman: In such times from hiding.

Judge Witte: Yes, absolutely.

Oniman: Yes.

Judge Witte: You could look out over the Praga_

Oniman: Yes.

Judge Witte: The gardens_

Oniman: Yes.

Judge Witte: And the synagogue too, yes?

Oniman: Yes.

Judge Witte: So the synagogue was nearby?

Oniman: Yes.

Judge Witte: Yes, and other buildings didn't obstruct your view?

Oniman: No, it was all clear.

...

Judge Witte: And you had binoculars. So what did you see_

Oniman: We had a few binoculars.

Judge Witte: A few binoculars.

Oniman: Yes.

Judge Witte: What did you see?

Oniman: Ah. Men, women, and children were shot.

Judge Witte: Are you absolutely certain that it was not just men, that there were also women_

Oniman: Children and women. Yes. We saw them later, when we took the bodies.

Judge Witte: At what time was that?

Oniman: It was ah I don't remember exactly, but it was still broad daylight.

...

Judge Witte: And it was not snowing or raining, yes?

Oniman: No, the weather was beautiful.

Judge Witte: How many people do you think were there?

Oniman: I can't say how many, but there were certainly a few tens, more than 30, more than 40. I heard from someone that there were 100, but I don't know whether there were 100 or less, I can't say. I know only one thing: that they were all residents of ah the building, the apartment building, you understand, Mr. Director?

Judge Witte: Yes, I understand.

Oniman: So it was different apartments, many apartments_

Interpreter: An apartment building, yes.

Oniman: Yes, so, all of the residents of the building in which ah *podane* at the Gestapo man.

Interpreter: Was thrown at him.

Oniman: Was thrown at him.

Interpreter: Sulfuric acid.

Oniman: And the second one, I think the second one was called Wilhelm, ah was injured by the victim, and so, they took everyone.

Judge Witte: If I understand you correctly, you mean to say residents of the building in which_

Oniman: Yes_

Judge Witte: Melamed, also called Malmed_

Oniman: Yes_

Judge Witte: Lived_

Oniman: Were taken.

Judge Witte: They were taken.

Oniman: And shot.

Judge Witte: That is what you were told afterward.

Oniman: Yes, yes.⁶⁶

During the discussion of the number of people shot, Oniman grew very agitated. He spoke rapidly and interrupted the presiding judge repeatedly with a loud “yes” when Judge Witte tried to recapitulate his statement that the victims had lived in the same building as Malmed. The court was convinced by Oniman’s testimony about the execution site and the identity of the victims and included these details in its verdict. Although Oniman had only heard that the victims had lived in Malmed’s building and did not see them with his own eyes, the court accepted his information. The court expressed doubt, however, regarding Oniman’s statement that he had seen Gestapo agents Friedel, Dibus, Winkler and Lemke taking part in the execution.

Judge Witte: Did you recognize any German officials there? Did you see who was present?

Oniman: Yes, I have cited a number of names.

Judge Witte: These names_

Oniman: They were_

Judge Witte: Friedel ah Friedel, Dibus, Lemke.

Oniman: Lemke ah.

Oniman and Judge Witte together: Winkler.

Oniman: There were a few. I knew them all_

Judge Witte: Yes_

Oniman: But I don’t remember.

Judge Witte: Did you see whether any of those mentioned also fired?

66 Examination of Abram Oniman at the criminal trial of Altenloh et al. (5 Ks 1/65), May 16, 1966, in L/StADT, D 21 A, no. 6341, audio tape 16, front side.

Oniman: They all fired.

Judge Witte: [Silence] Hmm. [Silence] Yes.

...

Judge Witte: Was it possible to see how [these] people aimed their guns? Was it possible to see who fired?

...

Oniman: I can't say that I saw this or that person firing. But all those I have mentioned fired.⁶⁷

Oniman's testimony regarding the individuals involved in the shooting of the Jews – all members of the local Security Police – was not included in the court's reconstruction of the facts of the incident. We may ask why the court did not see fit to adopt this part of the witness' testimony, as Oniman worked as a forced laborer in the Gestapo building and thus knew many members of the Security Police. The court probably doubted the ability of a witness not physically present at the scene, but only observing from a distance, to positively identify the specific perpetrators of the acts in question. A closer examination of the communicative-interactive situation in the courtroom shows that the presiding judge indirectly expressed reservations about Oniman's testimony. The witness' assertion that all present had fired met with a lengthy silence on the part of the presiding judge, followed by a pensive "hmm" and further silence. The judge's taciturnity and his pointed questions regarding the details of the execution grew out of his doubts concerning Oniman's testimony. In their verdict, the judges limited themselves to finding that the executions were ordered by Heimbach, assisted by Friedel.

The court learned of Heimbach's involvement in the shooting as well as the hanging of Malmed from another witness, Szymon Datner, who recounted for the court the interrogation of Fritz Friedel that he carried out in the Bialystok prison in February 1949. Friedel, head of Jewish Affairs in Heimbach's Department IV (Gestapo), was tried, sentenced to death and executed in Bialystok in the summer of 1949. On May 23, 1966, Datner testified at the Bielefeld trial that Friedel had told him, during his interrogation in a Bialystok prison, that 100 people had been shot, including women and children. He said that the operation itself, in which Rolf Günther also participated, was commanded by Heimbach. Datner also testified that following Malmed's capture, Altenloh charged Heimbach with the task of organizing a firing squad and carrying out the executions. Datner told the court that during Malmed's hanging, the rope broke

67 Ibid.

and, on Heimbach's orders, Gestapo officer Lange shot and killed Malmed.⁶⁸ The court examined Datner on two occasions regarding the acid attack. The second session, held on October 31, 1966, focused on Friedel's statements, which Datner translated from Polish to German and presented to the court in full. The first session, held on May 23, 1966, dealt primarily with what Datner had learned of the circumstances of the shootings at the time of their occurrence.

Datner, although not a witness to the executions, lived in the Bialystok ghetto at the time. He said that, according to the rumors that circulated in the ghetto, 100 or 120 people had been killed. He recalled that among those shot was a woman who worked for the Gestapo: "I remember that a woman who worked for the Gestapo happened to be on the scene. She had a permit ... I think she was a seamstress ... but they ordered that everyone there should be shot."⁶⁹ According to Datner, it became known in the ghetto, that following the executions, Barash, the acting chairman of the Judenrat, was given an ultimatum that 5,000 people would be shot if the man who had thrown the acid were not found. "The perpetrator was not found during those six hours.... A day passed, or even two days. And then the rumor spread that the perpetrator had been caught and hanged at the site where he had performed his heroic act...."⁷⁰

68 Examination of Szymon Datner at criminal trial of Altenloh et al., May 23, 1966, no. 6341, audio tape 18, front side. See also court transcript, no. 6204. Friedel said the things attributed to him by Datner, on Feb. 14, 1949, in prison, in Bialystok. The original transcript is preserved at the Jewish Historical Institute in Warsaw. See *Protokoł przesłuchania zbrodniarza wojennego Friedla Fritza Gustawa, dok. odbytego dnia 14.2.1949 w Białymstoku, w gmachu więziennym pod kierownictwem ppor. Laskowskiego, w obecności przewodniczącego Wojewódzkiego Komitetu Żydowskiego Hakmjera i sekretarza tego Komitetu Białostockiego. Przesłuchania dokonał współpracownik Żydowskiego Instytutu Historycznego w Warszawie, Dr. Szymon Datner, in Archiwum Żydowskiego Instytutu Historycznego (AŻIH), 344/26, pp. 1-6 (on p. 3), pierwsza akcja w getcie białostockim.*

69 Examination of Szymon Datner at the trial of the criminal case against Altenloh et al., May 23, 1966, no. 6341, audio tape 18, front side.

70 Datner considered Malmed a hero. He stressed this at the beginning of his testimony and maintained that, in this case, the use of the term "perpetrator" was not intended in a negative sense. The presiding judge addressed the matter, and suggested using the word "attacker." Nevertheless, the presiding judge was aware of the fact that the more neutral term, "attacker," reflected the perspective of the Gestapo, as he explained in a question he posed to Datner.

We learned of it in the ghetto, and his name soon spread. Malmed, Icchok Malmed.”⁷¹

When Datner was asked by the presiding judge on what basis he claimed that chance passersby had been shot on that same day, he replied that it was common knowledge in the ghetto: “Just as I have never been to America, but know that it exists.... It was known in the ghetto that these people were shot that very day.”⁷² Datner used the same America analogy when asked by one of the other judges (Judge Karl-Heinz Hoppe) how he had learned of the number 120:

Datner: Ah, it is the same thing as with America.

Judge Hoppe: Yes.

Datner: It became known to everyone that 100 [people] in the ghetto, I don't recall whether they said 120 or 100. In my booklet, I wrote 100.⁷³

But there are two versions. It was common knowledge.

Judge: Good, that is what I wanted to know.

Datner: It was, after all, a sensation that, for the first time in the history of the ghetto, a German had been killed by a Jew. It aroused wonder. If there are members of the press here, and if I may say – without cynicism – that the matter created a sensation. I was not yet a member

71 Examination of Szymon Datner at the criminal trial of Altenloh et al., May 23, 1966, no. 6341, audio tape 18, front side.

72 Ibid.

73 The reference is to Datner's monograph *Walka i zagłada białostockiego ghetta*, published in 1946, by the Jewish Historical Commission. Datner indeed notes the number 100 there, as well as the German threat to shoot 5,000. See Szymon Datner, *Walka i zagłada białostockiego ghetta* (Lodz: Centralna Żydowska Komisja Historyczna, 1946), p. 23. On the “acid attack” and the behavior of the Germans, Datner writes: “At 29 Kupiecka Street, Icchok Małmed threw vitriol at a group of SS men. One was blinded, another was burned and shot at his comrade in the confusion, killing him. Małmed took advantage of the panic and fled. The furious Germans led 100 people – men, women and children – from nearby buildings to Prager's Garden and shot them, threatening to shoot another 5,000 people, if the attacker did not turn himself in within six hours. Małmed turned himself in, and was tortured and hanged at the entrance to the building on Kupiecka Street. Before his execution, he managed to make a fiery speech, in which he accused the Germans and predicted their imminent defeat and revenge.” Datner, *Walka i zagłada białostockiego ghetta*, p. 32. The passage cited offers no indication of Datner's source for his description of the acid attack.

of the resistance movement at the time.⁷⁴ It became a sensation; it aroused wonder. Yes, it is possible to shoot a German, that_

Judge: Yes, so this_

Datner: Who wants to kill you.

Judge: Excuse_

Datner: It was known.

Judge: Excuse me, please.

Datner: Yes.

Judge: You learned this number then, immediately?

Datner: Immediately.

Judge: It was mentioned?

Datner: Yes.⁷⁵

The parts of Datner's testimony cited above had no real legal significance. The information he possessed regarding the shootings was not based on his own experience, but on rumors he had heard – that is, unconfirmed reports of uncertain veracity. The court could not have proven the allegations on the basis of the testimony of witnesses such as Datner, who had only “general” knowledge of the events, fed by rumors. Yet the court nevertheless ascribed great importance to his testimony. In the section of the verdict that analyzes the evidence, the court asserts that Datner knew “from personal observation” that “women – including a woman of his acquaintance who had worked for the Gestapo – and children were also executed.”⁷⁶ The court may have viewed Datner as a serious and reliable witness. The verdict also notes that Datner, who became a Holocaust historian after the war, took care not “to present scholarship as testimony.”⁷⁷ The Bielefeld court may have believed the rumors to have been close to

74 Following the February *aktsia*, Datner joined the Communist partisan group led by Judyta Nowogródzka (Organizacja Judyty). See Szymon Datner, “Szkice do studiów nad dziejami żydowskiego ruchu partyzanckiego w Okręgu Białostockim,” *Biuletyn ŻIH* 73 (1970), pp. 3-46 (on pp. 15-6, n. 38).

75 Examination of Szymon Datner at the criminal of Altenloh et al., May 23, 1966, no. 6341, audio tape 18, front side.

76 Verdict, p. 74.

77 *Ibid.*, p. 205. The court alludes here to Datner's dual role, as a witness to the events and a historian of the murderous policies executed in Białystok. In his first examination in court, Datner asked the presiding judge to specify whether the questions posed to him were in his capacity as a witness or a historian.

the truth, since Datner learned of the executions immediately after they had occurred, and because the facts had also been confirmed by others. Furthermore, there was no indication that any of the rumors circulating in the ghetto had been false. The court also ascribed importance to the fact that Datner, as a historian, had seen no reason to doubt the figure of 100-120 offered by contemporary rumors.⁷⁸

According to the verdict, Friedel, who testified before Datner on the executions, spoke of 100 people.⁷⁹ Datner attested to what Friedel had told him regarding all of the events relating to the acid attack and its aftermath, leading Heimbach to declare, following the examination of the witness Heinz Lange on September 5, 1966: "Lange was one of my best officers.... If we or the court do not find the opportunity to get to the truth today, then I do not see how we will find a path to the truth. Allow me, in this matter, just a few more questions."

Presiding Judge Witte acceded to the request, and Heimbach presented his questions: "I remind the court that the witness Dr. Datner declared, with regard to Friedel's statements in the matter of the acid attack, that it was the witness Lange who had shot then, and that Günther had been present, so this is my first question to the witness: Were you present? ... I ask that the transcripts of the witness Datner be checked. I raise these things because they were raised at the time, in open court."⁸⁰ Heimbach repeatedly emphasized that it was the "foreign witness" Datner who had accused Lange, using the expression "foreign witness" five times and "Jewish witness" once.

It is safe to assume that in urging Lange to respond to Datner's statement, Heimbach sought to pit Lange against Datner in order to ensure the loyalty of his former comrade. The offensive terms employed by Heimbach were meant to undermine Datner's credibility as a witness, but the presiding judge asserted his authority and thwarted Heimbach's attempt to pose a direct question to the witness. Heimbach's gambit was unsuccessful. Lange confirmed, in court, that he had shot Malmed on Heimbach's orders.⁸¹ Judge Witte asked Lange whether it was true that the rope had broken during the hanging. The witness answered both this question and the question of whether

78 Verdict, p. 237.

79 Ibid.

80 Statement by Lothar Heimbach at the criminal trial of Altenloh et al., Sept. 5, 1966, no. 6341, audio tape 28, front side.

81 Examination of Heinz Lange at the criminal trial of Altenloh et al., Sept. 5, 1966, no. 6341, audio tape 28, front side.

the breaking of the rope had been the reason for the shooting in the negative.⁸² In its verdict, however, the court presumed that the rope had indeed broken during the hanging, and that this explained why Lange shot Malmed, on Heimbach's orders, in order to "put him out of his misery."

Karasik testified that Malmed was left hanging at the entrance to his building, at 29 Kupiecka Street, for three days. According to Karasik, Malmed turned himself in a day or two after his act of resistance but, by that time, the 120 people he had seen at the Praga Gardens were no longer alive. Karasik did not witness the shootings or count the bodies himself, but had heard from others that there had been 120 bodies. He told the court that those who had lived near Malmed were shot immediately after the act of resistance.⁸³ Karasik also corroborated Oniman's testimony that the victims of the shooting were residents of buildings adjacent to 29 Kupiecka Street. The court adopted Karasik's assertion that the executions occurred before Malmed turned himself in.⁸⁴ This was supported by an entry in Tenenbaum-Tamaroff's diary, dated February 6, 1943, noting that the Judenrat had posted notices "by order of the German authorities" promising a reward of 10,000 marks for the capture of Malmed or information regarding his whereabouts.⁸⁵ According to Datner's testimony, Friedel also mentioned that a reward of 10,000 marks had been promised.⁸⁶

What is the value of Friedel's testimony, produced in court by Datner,⁸⁷ in proving the defendant's guilt? In the case of Altenloh, the chronology provided by Friedel was significant. Friedel stated that Heimbach only started selecting the victims for execution at two o'clock in the afternoon. According to the court, Friedel's statement regarding the timing of the arrests disproved Altenloh's pretrial statement that he had "learned of the retaliation order and its implementation 'around noon'." The court posited that "it is possible that, at that time, steps had already been taken to carry out the executions ('giving the order'), but it is not possible that they had already been completed." On the contrary, the court believed that "it only occurred after noon,"⁸⁸

82 See *ibid.*

83 Examination of Abraham Karasik at the criminal trial of Altenloh et al., May 13, 1966, no. 6341, audio tape 15, front side.

84 Verdict, no. 6195, p. 244.

85 *Ibid.*, p. 245.

86 Examination of Szymon Datner at the criminal trial of Altenloh et al., Oct. 31, 1966, no. 6342, audio tape 38, front side. See also the Polish transcripts of Friedel's questioning, in *AŻIH*, 344/26, pp. 1-6.

87 Cf. Stoll, "Strafverfahren," pp. 473-5.

88 Verdict, p. 250.

citing Friedel's testimony that Heimbach's order to arrest 100 people and execute them in groups of five, was indeed given at two p.m. The court considered this "credible, because inner logic favors it."⁸⁹

If Friedel is to be believed, Heimbach was involved in the actions carried out by the Security Police following the acid attack, including all of the important measures taken in the aftermath of the incident. According to Friedel, Heimbach consulted with his commander and with Eichmann's representative, with whom he agreed that an ultimatum would be presented to Barash. Friedel further claimed that Heimbach ordered the arrest of 100 people, ordered the shootings, ordered Malmed's hanging, and ordered his subordinate Lange to shoot Malmed after the rope broke. The court presumed Friedel's testimony regarding Heimbach's involvement to be true – believing, for example, that Altenloh had consulted with Heimbach, due to the "inner logic" of the assertion. It was considered "self-evident" that Altenloh, following an act of resistance that he considered an "attack against the German police," would have "at least consulted with the head of his operations department, regarding the search [for the attacker] and retaliatory measures, if necessary."⁹⁰

With regard to Heimbach's involvement in the shootings, the court would appear to have taken into account Friedel's desire to exonerate himself by reducing his role to that of an onlooker, and placing full responsibility for the executions on Heimbach. The court found that both Heimbach and Friedel had been complicit in the arrest of the victims ("Heimbach ordered ... the arrest of 100 Jews, through his head of Jewish Affairs, Friedel"), and that Friedel had been involved in the preparations. Nevertheless, the court adopted Friedel's version, assigning most of the responsibility for the executions to Heimbach. The court believed that Friedel had only been present at the executions, but had not fired. The court saw Friedel's statement that he had been unable to look as proof that he had "felt revulsion at the executions," and that he had "pitied the victims."⁹¹ The court found Friedel's testimony credible. Since he said he had been an eyewitness, it accepted his claim that 100 people had been shot, including women and children.⁹² The court's reconstruction of the course of events lacks, however, precise details regarding the circumstances of the executions.

Friedel's testimony that Malmed's hanging had been preceded by a summary trial was omitted from the court's final narrative of the facts of the case. Altenloh

89 Ibid., p. 251.

90 Ibid., p. 264.

91 Ibid., p. 237.

92 Ibid.

claimed that he had no recollection of a summary trial, and the court believed that he “apparently does not wish to recall a summary trial, because were he to do so, he would be compelled to admit that he had been party to the death sentence.” The court considered such a trial “highly likely” but not “absolutely certain,” and viewed Altenloh’s denial of “knowledge of the execution and its details” as an attempt to exonerate himself.⁹³

Datner’s testimony played a special role in the communicative interaction in court. It provided Presiding Judge Witte with the opportunity to counterpose different versions of the events. The judge used Friedel’s examination to provoke Heimbach into presenting his own account.

Judge Witte: What do you say about that [Friedel’s testimony as presented by Datner], Mr. Heimbach?

Heimbach: [Silence] It is like a script from a Hitchcock film.

Judge Witte: Good. So what is correct and what is not?

Heimbach: Ah the witness noted the facts of the case in his first interrogation_

Judge Witte: Hmm.

Heimbach: Here, I don’t know whether ah I spoke about this at the time_

Judge Witte: Yes, so you will speak about it today.

Heimbach: Excuse me?

Judge Witte: Speak about it today. You have the transcript of Friedel’s testimony before you_

Heimbach: Then I can say only one thing: I emphatically deny it.

Judge Witte: Good. So what do you in fact deny and what is correct? What is correct according to your version?

...

Heimbach: There was, Mr. President, an attack against the operational forces.

Judge Witte: Yes.

Heimbach: And to the best of my recollection today, the matter is associated with a certain name, Malmed.

Judge Witte: Hmm.

93 Ibid., p. 246.

Heimbach: That is what I recall. I remember that there were one or two killed, and there were wounded. So let's assume, yes, that there was at least one killed and two wounded among the members of the department.

Judge Witte: Hmm.

Heimbach: It is also correct that search efforts were undertaken to catch the perpetrator.

Judge Witte: Hmm.

...

Heimbach: And it is correct that the perpetrator was caught. Nevertheless, I cannot tell you today the details of the events that followed. What is not correct, what is entirely incorrect – and were this the case I would remember – that in the context of such an attack, 10, 20, 50, or 100 – these are the numbers that have been mentioned here – so-called hostages, by order of the department, and that the events unfolded as they have been described here, and that Friedel had a camera. At that time, I never saw Friedel with a camera. It is impossible as far as I am concerned ah impossible that Friedel even knew how to use a camera, not to mention the fact that we did not have such a camera. We had a special instrument, that may have been_

Judge Witte: You are saying that_

Heimbach: And that_

Judge Witte: You are saying that 50 to 100 hostages were not shot. Maybe fewer were shot? Or were no hostages shot?

Heimbach: Mr. President, as far as I am concerned, I emphatically deny that anyone_

Judge Witte: Dr. Altenloh, you said.

Heimbach: Was shot.

Judge Witte: That authorization to do something ... came from the RSHA, but by the time it came to your attention, it had already been done.

Dr. Altenloh: It was not an authorization_

Judge Witte: Rather?

Dr. Altenloh: An order.

...

Judge Witte: An order to do what? To shoot the hostages?

Dr. Altenloh: Yes.

Judge Witte: And were they shot?

Dr. Altenloh: [Silence]

Judge Witte: When you received the order, you had already been informed that it had been carried out. Thank you. Mr. Heimbach, you have heard Dr. Altenloh. You know, you have known for some time, that this has consistently been his testimony.

Heimbach: Mr. President, excuse me, but I did not hear Dr. Altenloh say now that the hostages had been shot. I ask that he be questioned again.

Judge Witte: ... Mr. Heimbach, you have known this for six months. You have known that the time would come that you would have to relate to this testimony of Dr. Altenloh's. That time has come. Now, please answer.

Heimbach: Yes. I answer that the hostages were not shot. If Dr. Altenloh claims that they were shot, then it is not inconceivable that he was there, and that he saw bodies there.

Judge Witte: No. You have heard what he said: I was given a telegram with the order and, at the same time, the notification: Heimbach has carried it out. Conclusion: Dr. Altenloh's testimony is absolutely clear.

Heimbach: ... As far as I recall, from the moment I was confronted with this, or from the moment I read about it in the literature, that I stood there like Hitler with a mustache, yes, and with_

Judge Witte: Skip it, please! Don't sidetrack; stick to the issue!

Heimbach: That was the first time I had ever heard of it, yes, because an execution of that kind, by shooting the hostages, never happened. Regarding_

Judge Witte: Dr. Altenloh, were 10,000 marks promised to an informer, who was paid only 7,000 marks?

Dr. Altenloh: I don't know anything about a promise of 10,000 marks, or the payment of 7,000 marks.

...

Judge Witte: Do you know anything about the promise of a reward of 10,000 marks to an informer, and payment of 7,000 marks?

Heimbach: In my opinion, it is impossible, in the case of Malmed or in any other case, that a reward of 10,000 marks would have been promised. I also doubt that the Judenrat had sums of money in marks.

Judge Witte: Hmm.

Heimbach: And such sums, in marks, were also not_

Judge Witte: Good, thank you, that will be all. Mr. Heimbach: Did Friedel also fail to tell the truth about Günther?⁹⁴

...

Heimbach: I couldn't say. [Silence]

...

Judge Witte: Why couldn't you say?

Heimbach: Because I was not present at the confrontation between Friedel and Günther, if such a confrontation indeed took place.... I really did not deal with official matters.⁹⁵

By confronting Heimbach with Friedel's testimony, the presiding judge put Heimbach on the spot. Heimbach's narrative account of events was dismissed by the court.

Recipients of Orders without Criminal Intent? On the Court's Interpretation of Events

Since the Bielefeld court lacked documents from the period in question, its findings regarding the facts of the case relied on the testimonies of the defendants. The interest of the defendants themselves in contributing to the reconstruction of the events was, however, limited. This is illustrated, in particular, by Heimbach's statements before the court. They took advantage both of their right not to incriminate themselves and of their right to remain silent. The court thus had recourse to the defendant's statements in their pretrial questioning. In interpreting the events, that is to say in creating a collage of the facts of the case, the judges accepted not only those parts of the defendants' statements they deemed credible, but also the testimonies of witnesses. The verdict, or finished product of the judges' interpretation, includes information pertaining to the act in question, those responsible for it, the place in which it was perpetrated, and the circumstances that surrounded it. The role of the court was to reconstruct the events of February 5-7, 1943, in the Bialystok ghetto.

94 At the beginning of his examination, Datner said that, according to Friedel, in February an official of the rank of *Regierungsrat* (government councilor) and *Sturmabführer* arrived from the Reich Main Security Office in Berlin, and reported to Altenloh. He was accompanied by 200 Defense Police and 40 Security Police, and had also commissioned trains.

95 Testimony of Wilhelm Altenloh and Lothar Heimbach, Oct. 31, 1966, no. 6342, audio tape 38, front side.

In establishing the facts of the case with regard to the allegation of “execution by shooting of 100 retaliation victims,” the court limited itself to the crucial moments of the incident itself. The court’s narrative interpretation included only those elements it considered “certain,” and omitted detailed explanations of concepts such as “measures,” “casualty report” to the RSHA, and “disaster.” A number of different narrative accounts of events were presented in court. The verdict’s description of the facts of the case is, however, clear and internally consistent, while endeavoring to avoid mistakes. In other words, it seeks to establish a kind of minimal truth, as in the court’s approach to the number of victims, for example. Why did the court adopt the number 100 (as per Friedel’s testimony) and not 103 (as per Ugajnik’s testimony)? It may have taken into consideration the possibility that the witness Ugajnik had miscounted. In its evaluation of the evidence and recapitulation of the facts of the case, the verdict repeatedly affirms that “at least” 100 people were shot.⁹⁶ The court believed however, that “internal consistency” supported a count of 100 victims. The verdict cites a Wehrmacht High Command order, dated September 16, 1941, to shoot “50-100 foreign communists” for every German soldier killed, and the fact that “even stricter criteria” were applied to the Security Police.⁹⁷ The court’s reasoning is persuasive, in light of the practice of executing hostages in German-occupied territories. In Serbia for example, the Wehrmacht’s policy was to shoot 100 civilians for every German soldier killed, and Jews were the preferred “retaliation victims.”⁹⁸

According to the court’s interpretation of the events in question, Security Police officials acted in accordance with the orders of their superiors – obeying the instructions of the RSHA, as expected of them. The court relied on the premise – as stated by Heimbach during his pretrial questioning – that the Security Police was required to report “special events” to the RSHA, which then issued orders accordingly. The judges may also have based their assessment on the assertion of historian Wolfgang Scheffler⁹⁹ that, in such cases, executions were subject to instructions from

96 See Verdict, p. 239 and 393.

97 Ibid., p. 239.

98 See Peter Longerich, *Politik der Vernichtung. Eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung* [Policy of Extermination. An Overview of Nazi Persecution of the Jews] (München: Piper, 1998), p. 459.

99 Wolfgang Scheffler (1929-2008) testified as an expert witness in many West German Nazi trials. Scheffler’s opinion, submitted to the Bielefeld court was the only work by a West German historian on the murder of Jews in the Bialystok district until the publication of his student Christian Gerlach’s dissertation (see Christian Gerlach,

the RSHA.¹⁰⁰ The court rejected the possibility that the Security Police had carried out the executions on its own authority, finding rather that Dr. Altenloh had received an order from the RSHA, which he then conveyed to his subordinate Heimbach who, in turn, ordered the shootings. Nevertheless, it was impossible to determine with absolute certainty whether the RSHA had in fact issued such an order, and whether Altenloh had indeed “held the telegram in his hands,”¹⁰¹ as the document itself was never presented to the court.

Altenloh and Heimbach were convicted for their involvement in the shooting of at least 100 Jews, and for complicity in murder. Altenloh was sentenced to four years imprisonment, and Heimbach to three years. The court believed that the defendants knew that both the order issued by the RSHA and their own contribution to carrying it out were wrong. According to the judges, both Altenloh and Heimbach understood the criminal purpose of the order, knew that the evacuation of the ghetto was unlawful, and grasped that Malmed “found himself in a life-threatening situation, as a result of

Kalkulierte Morde: Die deutsche Wirtschafts- und Vernichtungspolitik in Weißrußland [Calculated Murders: German Economic and Extermination Policy in Belarus] 1941–1944 [Hamburg: Hamburg Edition, 2000]). Dieter Pohl wrote the following about Scheffler: “In retrospect, he can be considered the most knowledgeable Holocaust historian in Germany at the end of the 1960s. Scheffler’s expert reports were based on extensive research but also on Polish archives. Nearly all of his analyses stand the test of time.” See Dieter Pohl, “Prosecutors and Historians: Holocaust Investigations and Historiography in the Federal Republic 1955-1975”, in David Bankier and Dan Michman, (eds.), *Holocaust and Justice. Representation and Historiography of the Holocaust in Post-War Trials* (Jerusalem: Berghahn Books, 2010), pp. 117-29 (on p. 124).

100 See Wolfgang Scheffler, “Zur Organisation der Judendeportation unter besonderer Berücksichtigung des Schicksals der Juden im Bezirk Bialystok (1941-1943)” [On the Organization of the Deportation of the Jews, with a Particular Emphasis on the Fate of the Jews in the Bialystok District], in Barch [Bundesarchiv], B 162/153, 4063, pp. 1-94 (on p. 67). Scheffler writes in his expert report, referring to Bernard Marks’s book *Der Oyfshand in Bialystoker Geto* [*The Bialystok Ghetto Uprising*]: “Marks’s assertion is correct, that the commander of Department IV, the Security Police and the Security Service in the Bialystok asked the district Reich Main Security Office for instructions regarding the execution [of 100 Jews in the Bialystok ghetto]. This was the accepted procedure in such cases.” Scheffler further cites a telegram of Department IV B 4, dated May 23, 1942, concerning the police station at Ziechenau/Schröttersburg. See Scheffler, “Zur Organisation der Judendeportation,” p. 67.

101 Verdict, p. 241.

this unlawful assault.” Furthermore, the court stated, it was clear to the defendants that “all retaliatory measures against this act of resistance were therefore unlawful.”¹⁰² In the assessment of punishment the court made implicit reference to the fact that Altenloh and Heimbach spared neither women nor children.¹⁰³ The judges stated that in yielding to “the supposed impossibility of changing the orders from Berlin,” Altenloh “shouldered heavy blame.”¹⁰⁴

Since Altenloh and Heimbach had received orders, the court ruled that they had lacked independent criminal intent. Thus, for example, in the section addressing the facts of the case, the court found that Altenloh “had a hard time” carrying out the orders of the RSHA, and that “in his heart he opposed it.” The court therefore considered him “an accomplice rather than a co-principal”.¹⁰⁵ Heimbach’s role – receiving the order and effecting the executions – was also defined as complicity in murder. As with the deportations, the court assumed that Altenloh did not identify “with the objectives of the Nazi leadership.” According to the verdict, he acted “to further the action he was ordered to perform”, but it had not been demonstrated that he “desired that action, of his own volition”.¹⁰⁶

Seibert points out that German courts did not consider “testimony, expert reports and official documents alone,” but mainly “what they knew and saw before the trial began,” and that their view of events is thus predetermined.¹⁰⁷ In light of the practice at the time in criminal proceedings against those accused of involvement in Nazi crimes, it is doubtful that the Bielefeld court formulated its opinion solely on the basis of the various accounts it heard in the trial phase itself. The predominant approach in German jurisprudence at the time was that those involved in Nazi crimes were accomplices – recipients of orders, devoid of personal intent.¹⁰⁸ Whether an individual

102 Ibid., pp. 261-2 and 265.

103 See *ibid.*, pp. 414 and 418.

104 *Ibid.*, p. 414.

105 *Ibid.*, p. 395.

106 *Ibid.*, p. 400.

107 Thomas-M. Seibert, *Zeichen, Prozesse. Grenzgänge zur Semiotik des Rechts* [Signs, Processes: On the Semiotics of Law] (Berlin: Duncker & Humblot, 1996), p. 68.

108 For criticism of the “accomplice rulings,” see Fritz Bauer, “Im Namen des Volkes. Die strafrechtliche Bewältigung der Vergangenheit” [In the Name of the People. Dealing with the Past through Criminal Law], in Helmut Hammerschmidt, (ed.), *Eine deutsche Bilanz 1945–1965* (Munich: Desch, 1965), pp. 301–14; Barbara Just-Dahlmann and Helmut Just, *Die Gehilfen: NS-Verbrechen und die Justiz nach 1945* [The Accomplices: Nazi Crimes and the Judiciary after 1945] (Frankfurt a.M.: Athenaeum, 1988); Michael

was considered a principal perpetrator or an accomplice in a crime was determined not by the extent of that individual's contribution to the criminal act, but by "his inner attitude", i.e. the inner perception of the act. A principal was thus one who committed the criminal act "of his own volition", and an accomplice one who merely furthered the "actions of others".¹⁰⁹ In criminal trials for the murder of Jews this meant that "the court had to examine each case individually, to determine whether the criminal agreed in his heart with the mass murder of Jews, identified with the objectives of the leaders of the Nazi regime, and personally desired to exterminate the Jews, in collaboration with the Nazi leadership and the SS, because he believed that these actions were correct and served the Nazi regime. In such a case, he shared criminal intent, whereas one who merely wished to further the actions of the principal perpetrators, without emotional involvement, was merely an accomplice."¹¹⁰ The classification of defendants as principals or accomplices is particularly important, since article 211 of the German criminal code imposes a mandatory life sentence for the crime of murder.

Greve, *Der justitielle und rechtspolitische Umgang mit den NS-Gewaltverbrechen in den sechziger Jahren* [Judicial and Legal Policy in the Sixties Regarding Nazi Crimes] (Frankfurt a.M.: Lang, 2001); Kerstin Freudiger, *Die juristische Aufarbeitung von NS-Verbrechen* [The Prosecution of Nazi Crimes] (Tübingen: Mohr Siebeck, 2002); Joachim Perels, *Entsorgung der NS-Herrschaft? Konfliktlinien im Umgang mit dem NS-Regime* [Disposing of the Nazi *Herrschaft*? Conflicting Approaches to the Nazi Regime] (Hannover: Offizin, 2004). Perels sustains that the predominance of the "accomplices" approach was not merely the product of legal considerations, but that "the weakening of the concept of 'perpetrator', in favor of the idea of administrators and implementers of mass extermination" stemmed from "the prevailing, interest-driven historical approach of the 1950s and 60s," which virtually concealed the complicity of the military, judicial, economic, medical and academic elites in the Nazi regime and its crimes." See Perels, *ibid.*, p.231.

109 Ernst-Walter Hanack, "Zur Problematik der gerechten Bestrafung nationalsozialistischer Gewaltverbrecher" [On the Just Punishment of Nazi Criminals], *Juristische Zeitschrift* 22 (1967), pp. 329-38 (on p. 331).

110 Ursula Solf, "Wenn das Recht im Auge des Betrachters liegt: NS-Täter aus juristischer Perspektive" [When the Law is in the Eye of the Beholder: Nazi Criminals from a Judicial Perspective], in Helgard Kramer, (ed.), *NS-Täter aus interdisziplinärer Perspektive* [Nazi Criminals from an Interdisciplinary Perspective] (Munich: Meidenbauer, 2006), pp. 79-93 (on p. 90).

If a defendant is charged with complicity in murder, on the other hand, the sentence may be reduced, in accordance with article 49/44.¹¹¹

The court deduced the mitigating circumstances of the two defendants' actions – inner opposition (Altenloh) and unwillingness (Heimbach) – largely from their own accounts. In establishing the facts of the case, the court used the defendants' pretrial statements and the witnesses' testimonies during the trial (regarding the number and identity of victims). But in determining the two men's mental states at the time, the court resorted, in part, to relying on Altenloh's and Heimbach's own accounts, as related during the trial.

With regard to the charge of murdering 100 Jewish men, women, and children as a reprisal for the acid attack, the court did not view the operation itself as the decisive factor in establishing guilt and determining the appropriate sentence. It was not its implementation but rather the inner attitude of the two men that was decisive. The same was true with regard to the deportation charge. According to the organizational control model of criminal law, on the other hand, the decisive factor is the behavior of those directly involved. According to the model, developed by Claus Roxin in 1963,¹¹² a person is considered master of his own will if he controls the power apparatus of a given organization. From this standpoint, Altenloh was directly involved in the criminal action, because he controlled the Security Police and, through the authority of his command within that organization, was also able to exert control over others.¹¹³ Altenloh gave a subordinate, Heimbach, an operative order, thereby using his command authority for the perpetration of a criminal act. Both Altenloh and Heimbach had discretion regarding the timing and manner of the killings.

111 See Jürgen Baumann, "Die strafrechtliche Problematik der nationalsozialistischen Gewaltverbrechen" [On the Criminal Prosecution of Nazi Crimes], in Reinhard Henkys, *Die nationalsozialistischen Gewaltverbrechen. Geschichte und Gericht* [Nazi Crimes. History and Law] (Stuttgart/Berlin: Kreuz-Verlag, 1964), pp. 267–322 (on p. 305). From 1939 to 1974 the court was allowed to reduce the sentence for complicity in murder, whereas such a reduction became mandatory beginning Jan. 1, 1975. See Friedrich Dencker, "Täterschaft und Beihilfe bei NS-Gewaltverbrechen" ["Responsibility and Complicity in the Case of Nazi Crimes"], *Zeitschrift für Neuere Rechtsgeschichte* 27 (2005), pp. 49-61 (on p. 49).

112 Claus Roxin, "Straftaten im Rahmen organisatorischer Machtapparate" ["Criminal Acts in the Framework of Organizational Power Apparatuses"], *Goltdammer's Archiv für Strafrecht* 110 (1963), pp. 193-207.

113 Kai Ambos stresses that control of an organization inevitably means control over a collective of replaceable indirect partners, and is therefore also control *through* the

When Altenloh's attorney appealed to the German federal Supreme Court (BGH), the justices of that court's Fourth Criminal Panel accepted the determination that the defendants were accomplices. But they interpreted the factual findings of the Bielefeld court differently. According to the Supreme Court panel, the retaliation killings of the 100 Jews were "cruel" in the sense of article 211 of the criminal code. This was demonstrated "both by the ruthless behavior of the detail assigned to the task, and by the fact that women and children were also shot." Altenloh, "who was not himself present at the time of the executions was aware, at the very least, that the execution order would be carried out with cruelty, and approved it." This was apparent from the fact that "the operation, although independent from a legal perspective, was part of a larger operation" that "resulted in the deaths of tens of thousands of inhabitants of the ghetto," and was, "as he knew, carried out in a cruel manner."¹¹⁴

The example of the allegation of "execution by shooting of 100 retaliation victims" illustrates how legal proceedings can contribute to the study of Nazi crimes. In order to establish the defendants' guilt, the court first had to ascertain the precise facts of the case. The court thus reconstructed the details of the events that followed the acid attack, finding that there was no justification for the execution of 100 helpless and innocent people with no connection to Malmed's act of resistance, and that this action constituted a crime. The crime, according to article 211 of the German criminal code, in effect at the time the action was committed, was murder. In this way the court was able to thwart efforts to downplay ideologically-motivated Nazi crimes (crimes against humanity) and present them as standard war crimes. The court's findings thus transcend the investigation of a specific criminal act. It is also noteworthy that the court defined the events in question as criminal acts, and made an important contribution to the study of the factual and legal aspects of those crimes.

Ultimately, how should the conclusions and reasoning of the Bielefeld court be viewed? Joachim Lege wrote that a legal decision should be considered successful

organization. Such control increases "with greater decision-making authority and availability of human resources." Kai Ambos, "Tatherrschaft durch Willensherrschaft kraft organisatorischer Machtapparate. Eine kritische Bestandsaufnahme und weiterführende Ansätze" ["Control of Acts by Volitional Control through Organizational Power Apparatuses: A Critical Review and Proposals for Further Study"], *Goldammer's Archiv für Strafrecht* 145 (1998), pp. 226-45 (on p. 238).

114 Federal Court of Justice (BGH), Decision 5.2.1970 – 4 StR 272/68, no. 6197, pp. 318-29 (on p. 327). On the significance of this decision for the Bielefeld trial, see Stoll, "Strafverfahren", pp. 316-20.

if it offers “at least satisfactory reasons for a tolerable result.”¹¹⁵ By this standard, the decision of the Bielefeld court can be considered a success. But, as Raul Hilberg argued, the German annihilation of the Jews was not a centralized project. That being the case, it is doubtful that the shootings in Bialystok were an action resulting from a rigid hierarchy stretching from the RSHA to the Security Police, effectuated by the willingness of the men at the low end of the hierarchy to obey the orders received from above. For a jurist, it may be perfectly reasonable to consider the defendant a mere recipient of orders, lacking personal intent. A historian, however, must consider such an interpretation from a historical perspective. According to Hilberg, the persecution of the Jews could not have been carried out without individual initiatives at all levels. Furthermore, he wrote, the overarching German understanding of leadership was far more decisive than the command hierarchy. Hilberg argued that the destruction of the Jews would not have happened had it been entirely dependent on the execution of orders. It required intent, willingness, thought, and consent.¹¹⁶ The court believed that the defendants lacked such intent and willingness.

Although the court ruled that the defendants did not share the will of the principal perpetrators, and were thus merely accomplices, it clearly established the facts of the case and proof of individual guilt. Herein lies the historical importance of the Bielefeld trial. Few such trials in West Germany ended in conviction.¹¹⁷ The defendants in

115 Joachim Lege, *Pragmatismus und Jurisprudenz: Über die Philosophie des Charles Sanders Peirce und über das Verhältnis von Logik, Wertung und Kreativität im Recht* [Pragmatism and Jurisprudence: On the Philosophy of Charles Sanders Peirce and the Relationship between Logic, Judgment and Creativity in the Law] (Tübingen: Mohr Siebeck, 1999), p. 605.

116 Raul Hilberg, cited in Gerhard Paul, “Von Psychopathen, Technokraten des Terrors und „ganz gewöhnlichen“ Deutschen: Die Täter der Shoah im Spiegel der Forschung” [On Psychopaths, Technocrats of Terror and “Ordinary” Germans: The Perpetrators of the Shoah as Reflected in Research], in Gerhard Paul (ed.), *Die Täter der Shoah: Fanatische Nationalsozialisten oder ganz normale Deutsche?* [The Perpetrators of the Shoah: Nazi Fanatics or Normal Germans?] (Göttingen: Wallstein, 2003), pp. 13-90 (on p. 37).

117 According to data collected by Andreas Eichmüller, 36,393 criminal trials were held in West Germany between 1945 and 2005, involving 172,294 defendants accused of personal involvement in Nazi crimes, resulting in only 6,656 convictions. See Andreas Eichmüller, “Die Strafverfolgung von NS-Verbrechen durch westdeutsche Justizbehörden seit 1945” [Criminal Prosecution of Nazi Criminals by Legal Authorities in West Germany since 1945], *Vierteljahresshefte für Zeitgeschichte* 56 (2008), pp. 621-40 (on pp. 624, 625 and 639).

many trials for Nazi criminal acts during World War II were acquitted because the prosecution was unable to establish the facts of the case or present sufficient evidence. Altenloh and Heimbach appeared before judges who sought to investigate all details of the events in question, and took a critical approach to the defendants' statements.

Translation: Shmuel Sermoneta Gertel