



THE MAUTHAUSEN TRIAL: AMERICAN MILITARY JUSTICE IN GERMANY

BY TOMAZ JARDIM

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Reviewed by Jon Sands

On May 27, 1947, the largest mass execution in the history of American war crimes trials began in a prison near Munich. Shortly after 9:00 a.m., the first of 49 men condemned to death for war crimes at Mauthausen concentration camp mounted the gallows. Every seven minutes, another defendant was read the U.S. Army's execution order, given a chance to make a last statement, heard a prayer by a chaplain, and hanged. The executions, carried out over two days, followed an American military trial conducted at Dachau before a military commission. The trial involved 61 defendants and lasted 36 days. The proceeding was the largest of a series of trials designed to judge and punish Nazi war criminals in a fair but expeditious manner. Tomaz Jardim, in this definitive history of the Mauthausen trial, chronicles the development of the commission that conducted the trial, the use of innovative legal theories, the empowerment of survivors by their testifying, and the verdicts rendered. He also examines whether the goals of the trials—to provide proceedings that would prove the terrible atrocities that occurred, prove the Nazi defendants guilty, and prove the righteousness of the judicial process—were achieved. Of this, he has some reasonable doubts.

The mention of Nazi war crime trials invariably brings to mind the International Military Tribunal held between November 1945 and October 1946 at Nuremberg. This tribunal tried 22 political and military leaders of the Nazi regime and executed 10. The Allies cooperated in holding the tribunal and in fashioning a body of international law to apply in doing so. Nuremberg is now synonymous with international human rights, international prosecution of genocide, and international requirements of process. The International Military Tribunal was followed by other trials of high-placed Nazi officials and professionals, such as judges and doc-

tors. Nineteen tribunals in all were held.

Yet Nuremberg was the exception. Close to 2,000 defendants were tried in other proceedings in 1946 and 1947, most notably before American military commissions. These commissions were established by the Army, designed to be expeditious and to punish those responsible for the terrible offenses discovered with the liberation of the concentration camps. Prosecutors in the commissions, operating near Dachau, did not look to Nuremberg for trial precedent. The Army prosecutors looked to their own jurisprudence and, notably, to the commission cases arising from the American Civil War. The rules of procedure and evidence were military but were changed and relaxed because of the theater of operations and the nature of the offenses. After rudimentary investigations and minimal defense representation, the commissions meted out judgments and punishments to those responsible for the atrocities. Many Germans and others, including some Americans, questioned the fairness of the proceedings, because of dubious interrogation techniques, lax rules of evidence, novel legal theories of responsibility, and a lack of appellate review. In *The Mauthausen Trial*, Jardim examines these issues.

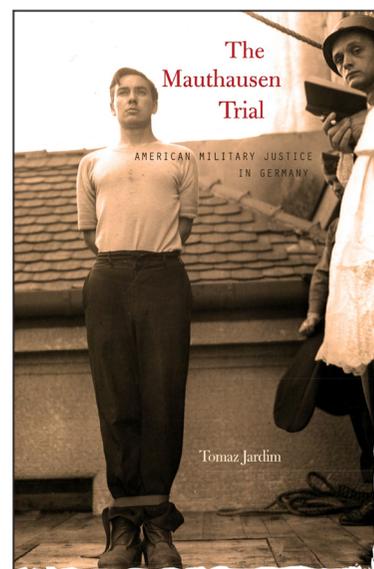
The Mauthausen camp was in Austria. In 1938, after the Anschluss (the absorption of Austria by Nazi Germany), the Nazis established the concentration camp to house political opponents and religious and racial minorities, and, later, prisoners of war. Historians have distinguished concentration camps from death camps. Death camps were designed solely to kill: Treblinka, Sobibor, Majdanek, and Auschwitz-Birkenau. Concentration camps were severe penal institutions. Slave labor, disease, and cruel deprivations resulted in high death rates, but the purpose of the camps was not to murder.

Mauthausen was both a death camp and a concentration camp. The main camp had 49 satellite camps, where slave laborers worked in the quarries, mines, and factories. Yet Mauthausen also had a gas chamber and processes for killing. The Nazis inflicted gruesome medical experiments there. Over the course of the war, at least 100,000

Mauthausen inmates—more than half—died. The toll could well be much greater. Of all the camps, Mauthausen continued operations the longest.

When the American military reached the concentration camps, it was unprepared for the degree of atrocity and mass murder it discovered to have occurred. The military regarded the acts as war crimes and established military commissions to begin cataloging offenses, arresting those involved, assessing responsibility, and prosecuting. However, resources were limited and investigators were too few. Many of them were shell-shocked tank commanders, sent to investigate to keep them busy. Translators were untrained, grabbed from the ranks and from camp prisoners.

At Mauthausen, liberated on May 5, 1945, numerous camp prisoners were enlisted to gather information needed to prosecute. They combed files and records, wrote down names, identified *Schutzstaffel* (SS) prisoners brought to them, and acted as translators. This use of victims definitely introduced bias and prejudice, yet it also empowered them. They were valued, and they could take an active part in seeking justice. One notable volunteer was Simon Wiesenthal, the future Nazi hunter, who had been a camp prisoner. On May 25th, Wiesenthal wrote a letter to the American commander, offering to apprehend Nazis. Wiesenthal was one of many volunteers whose efforts resulted in the capture and



detention of roughly 200 SS men, from officers down to guards, who had worked at the camp.

This book cannot have a hero after the horrors. It can have individuals who behaved admirably and sought to do justice. Chief among them was the Army's lead prosecutor, Lt. Col. William Denson. A 32-year-old West Point and Harvard Law graduate, who, before the war, practiced law in Birmingham, Alabama, with his father, he had little experience in criminal law. With limited resources, Denson faced the complex problem of trying a multi-defendant case. He knew that he had too many defendants to prosecute for individual criminal acts, and he had to develop a legal theory to wrap them all in. He decided to put the camp itself on trial. If he could prove that Mauthausen was a criminal institution, then, he reasoned, everyone who contributed to running it, no matter how small his role, would be guilty. If Mauthausen were proved to be a criminal enterprise, then, in subsequent trials, courts could take judicial notice of that fact. If a defendant was proved to have been at Mauthausen, that would establish his guilt. Denson called this concept a "common design" to commit war crimes.

With this end in sight, Denson selected 61 of the 200 SS prisoners to cover the spectrum of responsibility. The defendants included camp commanders, administrators, doctors, guards, and even kapos who were accused of abusing fellow inmates. (A kapo was a prisoner who was assigned by the SS guards to supervise forced labor or carry out administrative tasks in the camp.) The defense objected strenuously that presence did not mean intent. A cook, the defense argued, could not be held as responsible as an officer, and the cook, in fact should not bear any responsibility at all if he had been ordered to the camp. A guard outside the camp differed from administrators inside making decisions. The commission rejected such objections.

Denson laid out his theory in a succinct opening statement. He stated that he was going to present evidence of atrocities, but that he did not need to show that any specific defendant committed any specific act of atrocity. All he needed to show was that the defendants were present at Mauthausen and that they had helped the system to function.

At trial, that is what Denson did. His witnesses described acts they had seen and experienced. Jardim, though a historian and

not a lawyer, describes the trial strategy effectively. The first witness, for example, was an American prisoner of war who had been at Mauthausen for five weeks. Denson decided to use him because the commission's panel of three judges would relate to an American who spoke English. Then came the camp prisoners, who testified to acts of murder and brutality for each stage or role or level of defendant. Mauthausen, observes Jardim, was one of the few trials where prisoner testimony and prisoner evidence stood front and center. By operating with relaxed evidentiary rules, the commission made it easier for the surviving victims to tell their horrific accounts of atrocities afflicted upon them and countless others.

Denson also had the damning statements of the defendants. All the SS prisoners confessed to varying degrees. Their statements had been gathered by several investigators, with the first investigators using physical threats. Subsequent interrogators employed a more sophisticated approach, asking for explanations and pitting the defendants' versions of responsibility against each other. The coercion of the first series proved problematic, as defense counsel called the truthfulness of the confessions into question, and the use of coercive techniques shifted attention to the interrogators.

The trial lasted 36 days. At the end of closing arguments, on May 13, 1946, the judges recessed for an hour and returned guilty verdicts on all 61 defendants. Sentencing was held a few days later, and death sentences were handed down on 58 of the 61. The three who were spared were guards on the outside towers. The evidence was that guards had shot prisoners who were attempting to escape, and defense counsel had argued that prison guards the world over, even in America, shot to kill such prisoners.

There was no appeal, only a review of the verdicts and sentences by a panel, which reduced nine of the 58 death sentences to life in prison. As the 49 remaining convicted prisoners were executed, only a few accepted responsibility or expressed remorse. Most remained defiant as black hoods were placed over their heads, the gallows' trap door sprung, and their necks snapped in the hangman's noose.

A half century later, reflecting back on the trial, Denson "felt the accused had been dealt with fairly and had received their just deserts. ... The judgment of the court,

Denson maintained, had illustrated that his attempt to condition the Dachau judges to truly understand the level of atrocity within the Mauthausen camp system had paid off. ... Denson concluded that his greatest achievement was to help put 'teeth into the written word,' making it 'apparent to those who violate the Laws and Usages of War that they would be punished.' For Denson, justice, at least for the time being, had been served." Yet Denson's innovative "common design" theory proved too controversial and legally suspect, running counter to established norms of due process, to survive as viable precedent. More proof than mere presence is demanded.¹

After Mauthausen, other commission trials were soon underway. Sixty other proceedings took place, with hundreds of defendants convicted. However, the army's enthusiasm began to wane. The Cold War was beginning, and the lack of resources was felt. Moreover, Germans became increasingly hostile to the commissions. The Army formally ended the commissions on Dec. 31, 1947. The Mauthausen defendants who had been sentenced to life imprisonment were all released by the end of 1951.

For Jardim, the verdict on the Mauthausen trial was mixed. Clearly guilt was established, and the guilty were punished. The selection of the defendants had a randomness, but all in the docket had bloodstained hands. The amount of blood on each could be debated, but Jardim is satisfied that no innocent person was convicted. The trial was also quick: The offenses were investigated, the defendants arrested, and the trial commenced within months rather than years, and lasted 36 days. The 61 verdicts were handed down in an hour—an average of one minute of deliberation per defendant. Sentencing was just as fast. Instead of appeals, truncated reviews took place, at which swift judgments were rendered. Lastly, the trials allowed, and needed, the involvement of the victims. Victims played a prominent role in the investigation, evidence gathering, and testimony. More than in most proceedings, the prosecutor made sure that the victims' voices were heard and validated. Without a doubt, a desire for vengeance trumped dispassionate evidence gathering, but, under the circumstances, it seems hard to fault the process.

Jardim, however, would not wholly agree. Although the verdicts and sentences strike him as justified, he questions the means

used to achieve them. Fairness was required for the pedagogical purpose of causing the German people to accept the outcome, yet attention was diverted from the crimes committed to the trial's procedural flaws. Allegations of the use of coercion to secure confessions, the novel theory of responsibility, the relaxed evidentiary rules, and the lack of appeals, angered some Germans and gave them reason to discount the verdicts. But the goal of the commission—to showcase the benefits of liberal democracy while delivering an unassailable and wholly accepted verdict—was unattainable. Consequently, Jardim's disappointment in this failing is unrealistic. The commission could not have hoped to be a beacon: It was a military panel assembled to render a verdict on the terrible atrocities committed. It held the trial with the ashes from the crematoria still falling and with the surviving victims still present to bear witness. It did so in a defensible and ultimately correct process. Jardim's conclusion that the commission failed to convince members of the populace

of their own complicity is understandable. But that goal was outside its competence. Its primary job was to hold a trial, rendering verdicts and punishments, not to conduct a pedagogical exercise. Individual guilt was assessed here, not societal blame. That would come later, and it would come in part from the records made by the commissions. "Born of the exigent circumstances of its time, the Mauthausen trial leaves a legacy tainted by questionable legal practices and yet fortified by the invaluable historical record produced."

Jardim concludes his history of the Mauthausen trials by observing the discomfort of many with the present military commissions sitting in Guantánamo Bay, Cuba, trying suspected terrorists. Jardim's and others' uneasiness comes from having "a parallel system of law," apart from the standard federal criminal codes, enacted for the sole purpose of "prosecuting abroad alleged perpetrators of historically significant crimes." This parallel system of law differs from the federal criminal code in

its unprecedented secrecy, skewed rules, new theories, and taint of torture. It may result in convictions, but the pedagogical purpose of the commissions—of establishing a record through a transparent proceeding that is accepted worldwide as fair—has already been compromised. ☉

Jon Sands is the federal public defender for the District of Arizona.

Endnote

¹An article states that a recent German trial of one of the last surviving Auschwitz guards seems to introduce the concept of "common design" in the guise of alleging thousands of counts of "accessory to murder." The author of the article wonders whether, at this late date, any trial of such monstrous acts can actually be a proper trial or instead becomes a form of collective remembrance theater or memorial ceremony. Elizabeth Kolbert, "The Last Trial," *The New Yorker*, Feb. 16, 2015.