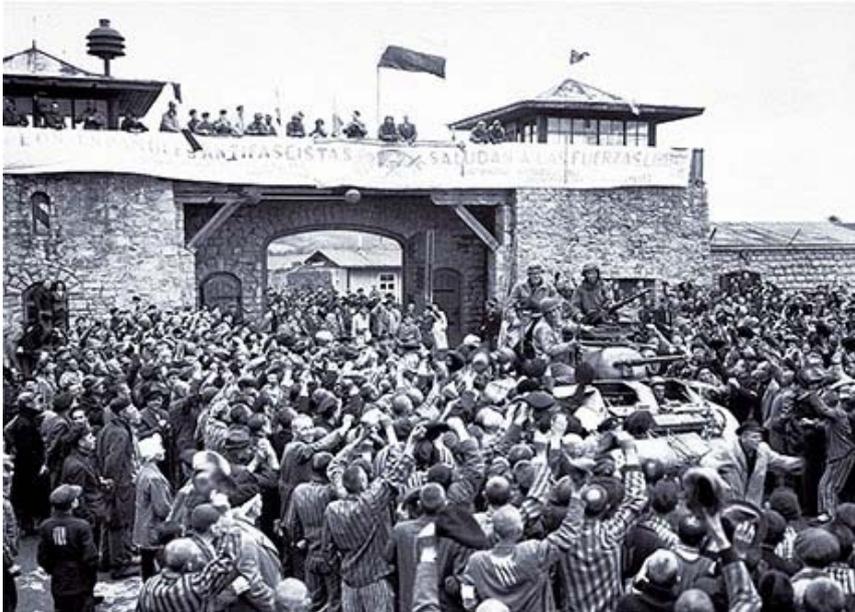


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# Varieties of historical justice

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The Nuremberg trials were not typical of how the Allies dispensed justice after the second world war, writes **Klaus Neumann**



Above: Liberated prisoners in the Mauthausen concentration camp welcome the 11th US Armored Division. The banner across the wall made by Spanish Loyalist prisoners, reads, “The Spanish Antifascists greet the Liberating Forces.”

Photo: Donald R. Ornitz, US Army

## [The Mauthausen Trial: American Military Justice in Germany](#) [1]

By Tomaz Jardim

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BETWEEN 1991 and 1995, Ratko Mladić played a leading – and infamous – role in the Yugoslav wars, first in Croatia and then in Bosnia. From 1992, he commanded the military forces of the Republika Srpska, the state created in 1992 by Serbian nationalists opposed to the independence of Bosnia and Herzegovina. He is considered one of the masterminds of the siege of Sarajevo, in the course of which some 10,000 civilians, including more than 1000 children, were killed.

Mladić has also been held responsible for the Srebrenica massacre, the murder of more than 8000 men and boys in July 1995. Since 1992, tens of thousands of Bosnian Muslims had sought refuge in the town of Srebrenica, a Bosnian-held enclave in territory controlled by Serbian forces. In April 1993, the UN Security Council [declared](#) [2] Srebrenica a “safe area.” Those who had gathered there were under the protection of a small contingent of Dutch peacekeepers who were part of UNPROFOR, the United Nations Protection Force set up in 1992.

In July 1995, Republika Srpska forces under Mladić’s command overran Srebrenica. Mladić’s troops ostensibly agreed to the evacuation of the Bosnian refugees, but detained

thousands of able-bodied men, as well as some older men and boys as young as fourteen, and executed them. The Dutch troops were in no position to mount any meaningful resistance; but seven years later a [report](#) <sup>[3]</sup> laid some of the blame for the Srebrenica massacre at their feet, precipitating the resignation of the Dutch government.

In November 1995, the International Criminal Tribunal for the Former Yugoslavia [indicted](#) <sup>[4]</sup> Mladić and the then president of the Republika Srpska, Radovan Karadžić, for the murders in Srebrenica. Both had already been [indicted](#) <sup>[5]</sup> for genocide, crimes against humanity and violation of the laws of war over other episodes of the war in Bosnia. Mladić was arrested in Serbia in May last year and extradited to The Hague within days. His trial opened in The Hague on 16 May this year.

So far, despite almost a year of preparations, the proceedings have lasted just one day. On 17 May, the trial was suspended after it was revealed that prosecutors had failed to disclose some of their evidence to the defence team, as required under the tribunal's rules. The judges dismissed the defence's claim that another six months were needed to study evidence it hadn't yet seen, but [granted](#) <sup>[6]</sup> a four week adjournment.

The hearings are expected to take several years. The prosecution alone has named more than 400 witnesses. The 7000 exhibits which the prosecution failed to make available to the defence, are [said](#) <sup>[7]</sup> to constitute only 3 per cent of the total material. All this is an indication of how closely the court will examine Mladić's role in the ethnic cleansing that took place during the Yugoslav wars.

Created by a United Nations Security Council [resolution](#) <sup>[8]</sup> in 1993, the tribunal has indicted 161 people and [tried](#) <sup>[3]</sup> most of them. Its highest profile defendant has been Serbia's former president, Slobodan Milošević, who died of natural causes in his Dutch prison cell before the conclusion of his trial. The maximum sentence the tribunal can award is life imprisonment. With about [900 staff](#) <sup>[9]</sup> on its books, it is well-equipped to run complex trials.

In many respects, the tribunal is modelled on the International Military Tribunal at Nuremberg, which tried twenty-three leaders of Nazi Germany between November 1945 and October 1946 and passed twelve death sentences, ten of which were carried out. It too was well-resourced: chief prosecutor Robert Jackson had a staff of 650 at his disposal. The Nuremberg Tribunal was the first of its kind, and is rightly regarded as the ancestor of the International Criminal Court (established in 2002), the Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda (set up in 1994).

But the Nuremberg Tribunal is not the only available model from the 1940s. The vast majority of convicted Nazi war criminals were tried in courts that operated according to national rather than international rules. The Americans, for example, set up military commission courts, which tried war crimes suspects in 462 trials on the site of the former Dachau Concentration Camp near Munich.

One of the largest of those trials, the first to deal with crimes committed in the Mauthausen Concentration Camp, is the subject of Tomaz Jardim's book, *The Mauthausen Trial*. In this case, the prosecution team comprised no more than twenty-two staff at any one time, and the trial of sixty-one men lasted a mere thirty-six days. The prosecution's closing arguments took no more than half an hour –some thirty seconds per defendant. The proceedings nevertheless resulted in fifty-eight death sentences, forty-nine of which were carried out. No other trial in American history has resulted in as many executions.

Jardim's meticulously researched book throws new light on a trial that was overshadowed by the proceedings in Nuremberg at the time and barely registered with the public in Germany and Austria or in the United States. It is now all but forgotten, leaving the

impression that the trial of the twenty-three Nuremberg defendants was all there was to the Allies' attempts to put Nazi Germany in the dock.

This lack of attention can't be attributed to the nature of the crimes for which the accused were being tried. [Mauthausen](#) <sup>[10]</sup>, the largest concentration camp in Austria, had come into operation in August 1938, a few months after the so-called *Anschluss*, the integration of Austria into Nazi Germany. It wasn't liberated by American troops until 5 May 1945, three days before Germany's unconditional surrender. Close to 200,000 people had been imprisoned in Mauthausen; about half of them did not survive.

Reinhard Heydrich, who was in charge of Nazi Germany's security services, assigned a unique role to Mauthausen: it was reserved for criminals or hardened enemies of the regime who were likely to defy any attempts to re-educate them. Like the death camps in German-occupied Poland, Mauthausen had a gas chamber. But most of those who died in Mauthausen were worked to death, in accordance with the Nazis' resolve to deal with their enemies by means of *Vernichtung durch Arbeit*, extermination through work.

Well before the end of the war, the Allies began preparing for prosecutions. But when the judicial arm of the US Army, the Judge Advocate General's Office, was put in charge of implementing the American government's war crimes policy, the extent of Nazi Germany's criminality was still grossly underestimated. Initially, the investigations focused on the mistreatment and murder of American servicemen (including the lynching of air crew shot down over Germany and the execution of eighty-four American prisoners of war near Malmedy in November 1944). It wasn't until the liberation of the first concentration camp by the US army in early April 1945 that the Americans became convinced of the need to address crimes against civilians, including those who were not American nationals.

The courts set up by the Americans were military commissions comprised of seven to nine officers. All of the officers had to have previously sat on courts-martial, but only one was required to be a trained lawyer. They were to try war crimes, including "offenses against persons or property which outrage common justice or involve moral turpitude, committed in connection with military operations" that had taken place since the United Nations was established on 1 January 1942. This fairly elastic brief made it possible for the courts to try perpetrators for crimes committed outside the theatre of war, even if they had been civilians at the time.

While the crimes carried out by German nationals against fellow citizens didn't fall under the courts' jurisdiction, the prosecution was permitted to introduce evidence about such crimes. Because it allowed them to paint a comprehensive picture of the operations of the camp and their murderous nature, that evidence was crucial in trials dealing with the atrocities that had taken place in concentration camps.

The court procedures were designed to be expedient. Even in cases where the court had handed down the death sentence, there were no provisions for a court of appeal. The rules of evidence were less stringent than in a domestic American court of law. According to the procedural guidelines, "Hearsay evidence, including the statement of a witness not produced, is... admissible, but if the matter is important and controverted every effort should be made to obtain the presence of the witness." That leeway was crucial, too, because sometimes there were no surviving witnesses.

According to Jardim, the military commission courts relied heavily on the novel concept of "common design." Unlike at the International Military Tribunal at Nuremberg, where the prosecution had to prove the defendants' role in the planning, preparation or initiation of the crime with which they were charged, the prosecutor in the Mauthausen military commission trial was required "merely to illustrate that the accused had participated in the maintenance of a criminal enterprise that resulted in the death of inmates."

The concept allowed the Americans to try not just those ultimately responsible for the camps, but all camp personnel — including guards and medical staff, for example — irrespective of whether or not they had personally harmed anybody. The prosecution needed only to provide evidence of the existence of a scheme to commit atrocities and then show that the defendants were aware of and played their part in it. As Jardim explains, “At least in theory, the camp cook was therefore as criminally culpable as the hangman, and could be caught within the same judicial net.” The concept of a common design made the so-called Nuremberg defence, the plea of superior orders, irrelevant. And it didn’t require “illustration of a motive.”

Unlike the Nuremberg tribunal, however, the military commission courts didn’t consider charges such as “crimes against humanity,” which had been introduced specifically in order to try the Nazi leadership. Instead they relied on the fact that the rules of international law, including the Hague and Geneva conventions, had formally remained part of German law.

DESPITE these advantages, thirty-two-year-old Lieutenant Colonel William Denson had a gargantuan task in front of him when he was assigned to prosecute the Mauthausen case. He needed to select a group of defendants whose conviction could serve as a blueprint for any further proceedings brought against Mauthausen personnel. He and his team needed not only to understand the concentration camp system, but also to come to grips with the intricacies of Mauthausen, a massive operation involving hundreds of SS men and a large number of civilians and kapos (prisoner-functionaries).

The trial began less than a year after the camp’s liberation and only twelve weeks after the Deputy Judge Advocate for War Crimes had appointed a prosecutor. Clearly, the job would have been beyond the capacities of Denson and his small staff had they not been able to rely on outside help. That help was provided by those most interested in the defendants’ conviction, survivors of the camp.

As in other concentration camps, prisoners in Mauthausen had been able to establish an underground organisation. When the camp was liberated, that organisation took control of the camp and ensured that many of those responsible for the suffering were detained and protected from acts of summary justice. Camp inmates had kept records of many of the atrocities committed in Mauthausen, and they provided these to the American investigators. Survivors also helped out by tracking down witnesses and translating their statements, and some took part in the interrogation of suspects.

The survivors who played particularly prominent roles in assisting Allied investigators during this period tended to be former political prisoners — often socialists or communists — who had been imprisoned for many years. Many of them conceived of the concentration camps primarily as instruments designed to crush the Nazis’ political opponents. They failed to tell Denson and his team that about a quarter of Mauthausen’s victims were Jews, even though Jews had been sent to Mauthausen in large numbers only from mid-1944. The picture built up during the trial, which relied heavily on the testimonies of a particular group of survivors, was accordingly skewed.

Tomaz Jardim takes the reader through the various stages of the efforts to bring Mauthausen’s perpetrators to justice: the setting-up of the military trial program, the establishment of the rules governing its operation, the investigation of the crimes committed in the camp, and the trial itself. But he barely mentions the broader — and perhaps uncomfortable — questions that his findings raise. How legitimate, for example, are courts staffed by nationals of country A set up to try nationals of country B who are accused of crimes against nationals of country C? Under which circumstances is the creation of a parallel system of law, with rules that differ substantially from those governed by a domestic criminal code, justified? Anybody familiar with survivor testimonies of Mauthausen could be excused for approving of the justice served by the military court in 1946. But how does a military commission court sitting at Dachau in 1946 differ from the very controversial body created under the US Military Commissions Act of 2006 and sitting

at Guantanamo Bay?

UNTIL at least the 1960s, West Germans frequently invoked Nuremberg in order to claim that justice had been done when the Allies had dealt with a small clique of criminal masterminds. They could conveniently be held responsible for whatever wrongs were committed between 1933 and 1945. With the conviction of the twenty-three Nuremberg defendants, everybody else could invoke versions of the Nuremberg defence and be miraculously exculpated.

With the establishment of the Federal Republic of Germany in 1949, the responsibility for dealing with war crimes shifted to German courts. Most of those who had been given lengthy prison sentences in the first couple of years after the war were soon released. By the end of 1951, the twelve Mauthausen defendants who hadn't been hanged in 1946, and were instead serving life sentences, had all been set free. It wasn't until the Frankfurt Auschwitz trials, which began in late 1963, that German courts took seriously the crimes committed in the camps, thereby reminding the West German public of the fact that the Nuremberg defendants represented only the apex of a pyramid.

The Frankfurt trial is a reminder of the fundamental if unavoidable flaw shared by war crimes tribunals now and in the immediate aftermath of the second world war: all have been set up by third parties (rather than by Germans after 1945, or by Serbs, Croats, Bosnians and Kosovars after the Yugoslav wars). But the Mauthausen trial, and other proceedings like it, might provide a better lesson than Nuremberg. For one, it proposed that not only those ordering mass murder were responsible, but also many others: those abetting the atrocities, those condoning them, and those who were aware of them but decided to carry out their duties regardless. At the conclusion of the first of the 462 trials held by the Americans at Dachau, Denson reminded the judges that "this case could have been established without showing that a single man over in the dock at any time killed a man." Then, too, all defendants had been found guilty, and thirty-six of the forty men in the dock had been sentenced to hang.

The Mauthausen trial was also a significant advance over the Nuremberg proceedings because of the role played by survivors, first in the preparations and then as witnesses. While the Nuremberg trial relied on documentary evidence and on the defendants' willingness to implicate each other, the Mauthausen trial provided a space where survivors could confront their tormenters.

THE International Criminal Tribunal for the Former Yugoslavia prides itself on having individualised guilt. "Leaders and other individuals can no longer hide behind the 'nation' or any other group," according to one of its [reports](#) <sup>[11]</sup>. "They have to take responsibility and answer for their own actions. Accordingly, communities are shielded from being labelled as collectively responsible for others' suffering." That is indeed an important achievement. But does it not also allow people who are implicated in actions such as ethnic cleansing, but who could not be charged, to hide behind leaders whose guilt can be proven beyond reasonable doubt?

The judgements given in the Mauthausen trial were contestable – even at the time. They relied on information that turned out to be historically inaccurate, and on the testimonies of survivors rather than on documentary evidence. By contrast, the judgements in the Nuremberg trial, which were meant to be unimpeachable, relied on documentary evidence. By and large, they have stood the test of time.

But ought the standards of justice necessarily always be the same for everybody in all cases? I suspect that for many of the survivors of Mauthausen, justice was served when, on 27 and 28 May 1946, forty-nine of the Mauthausen defendants were executed. For them, it would have been important that the testimonies of several fellow prisoners had been accorded much weight during the trial. The liberated inmates would have felt that they had

made the right decision when they handed over kapos and guards to the Americans rather than beat them to death (as happened in other camps).

Reports of the suspension of the Mladić trial last month also seemed to make reference to two standards of justice. The rule of law demanded that the prosecution afford the defence every opportunity to disprove its case. The suspension was a triumph for Justitia, the blind goddess balancing the scales of truth; for her, the video footage depicting Mladić in Srebrenica on the very days the massacres of thousands of Muslim Bosnians took place has not yet been admitted as evidence and is therefore immaterial. But the survivors who had travelled to The Hague to attend the trial may care little for Justitia's impartiality.

The involvement of survivors as witnesses presents perhaps the most important difference between the Nuremberg model and the tribunal in The Hague. The court that will, over the next five years or so, try to establish whether Ratko Mladić is guilty of the crimes with which he has been charged, [sees itself](#) <sup>[11]</sup> also as an institution with an obligation to survivors: "By displaying exceptional courage in testifying at the Tribunal, [witnesses] contribute to the process of establishing the truth. In turn, the Tribunal's proceedings provide these victims and witnesses the opportunity to be heard and to speak about their suffering."

As far as prospective witnesses for the prosecution are concerned, though, I suspect that it was wrong to give Mladić the opportunity to provoke the survivors in the audience repeatedly when the court sat on 16 May. It was unjust that it took seventeen years to bring him to trial. It was not fair that after only one day, the proceedings were interrupted, initially indefinitely, denying those who had lost fathers, sons or brothers in Srebrenica the opportunity, at least for the time being, to testify against the person they know is ultimately responsible for their murder. And who are we to say that the survivors' sense of outrage is irrelevant, if not illegitimate? •

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