

## CHAPTER 3

### **Atrocity Then, Trial Now: The Aesthetics, Acoustics, and Visualities of Prosecuting Oskar Gröning**

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#### **Abstract**

Charged with aiding and abetting in the murder of three hundred thousand Hungarian Jews deported to Auschwitz between 16 May 1944 and 11 July 1944, Oskar Gröning, the ‘bookkeeper of Auschwitz’, was sentenced in 2015 by the Lüneburg Regional Court to four years’ imprisonment.

After a series of unsuccessful appeals, Gröning died in 2018, at the age of 96, having never spent a day in jail. This contribution unpacks the charges against Gröning and his resultant conviction; examines the involvement of elderly victims as accusers and their roles in this trial; and, ultimately, contemplates how it all ‘looked’ and ‘sounded’. The focus is thus not only on Gröning himself, but on the totality of the trial of Gröning. Throughout, this contribution gazes upon the *aesthetics, acoustics, and visualities* of this trial and interrogates the representational credibility of dallied proceedings that occur seventy – increasingly, eighty – years after the fact.

This chapter concludes by positing that however absurd it may seem to put a feeble old man on trial, the feebleness that oozes from *not prosecuting* such a man may prove even more absurd.

#### **Keywords**

Atrocity trials; Aging; Criminal procedure; Holocaust; Witnesses; Forgiveness.

Wherever man is, there is Auschwitz, because it is not Satan who created Auschwitz, but I and you ... . I am no longer haunted by the monstrous nightmare at night; it appears before my eyes in the light of day.

Ka-Tzetnik 135633<sup>1</sup>

[M]an is that being who invented the gas chambers of Auschwitz; however he is also that being who entered those gas chambers upright, with the Lord's Prayer or the *Shema Yisrael* on his lips.

Viktor Frankl<sup>2</sup>

## 1 Introduction

Oskar Gröning was born in 1921 into a nationalist and conservative upbringing. The son of a textile worker, Gröning joined the Waffen-SS in 1940 without informing his father.<sup>3</sup> Gröning's mother had died when he was four years old. Gröning arrived at Auschwitz-Birkenau in 1942, at the age of twenty-one, to serve as an accountant.<sup>4</sup> On 'Planet Auschwitz',<sup>5</sup> this meant stripping the newly

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<sup>1</sup> Ka-Tzetnik, *Shivitti: A Vision (Ha-tsofen - The Code)* (Gateways Books & Tapes, Penn Valley, 1999; original 1989), p. 113.

<sup>2</sup> V. E. Frankl, *Man's Search for Meaning: The classic tribute to hope from the Holocaust* (Beacon Press, Boston, 2006; original 1946), p. 134.

<sup>3</sup> M. Geyer, 'An SS Officer Remembers: The Bookkeeper from Auschwitz', *Der Spiegel* (9 May 2005), <https://www.spiegel.de/international/spiegel/an-ss-officer-remembers-the-bookkeeper-from-auschwitz-a-355188.html>, accessed 10 November 2023. On Gröning's youth, see L. Rees, *Auschwitz – A New History* (MJF Books, New York, 2005), pp. 129-131 and L. Rees, *Auschwitz – The Nazis & The 'Final Solution'* (BBC Books, London, 2005), pp. 139-141.

<sup>4</sup> Young, but not a minor like Bruno Dey (though Dey was not at Auschwitz). For an analysis of the trial of Bruno Dey, see M. Vormbaum and J. Streuer, 'Performing Justice: The Trial of Bruno Dey and Its Protagonists', in this volume, pp. 11-12.

<sup>5</sup> See generally Ka-Tzetnik, *Sunrise over Hell (Salamandra)* (W. H. Allen, London, 1977; original 1946); Ka-Tzetnik's Testimony at the *Eichmann* trial, United States Holocaust Memorial Museum, *Eichmann Trial – Sessions 68 and 69*

transported inmates of whatever cash (in various currencies) and precious possessions to which they still clung, recording those amounts, and then dispatching the stolen proceeds to Berlin to assist in the Nazi war effort. Gröning exited Planet Auschwitz in the fall of 1944. He had in fact petitioned to transfer out; his request was granted and he subsequently joined a combat unit. Gröning had made two earlier transfer requests, both of which had however been denied.<sup>6</sup>

**<Insert Figure 1: Oskar Gröning in his Waffen-SS uniform>**

Photo credit: DPA/Museum Auschwitz-Birkenau

Even though investigations against him had commenced in West Germany already in 1977, Gröning managed to avoid trials for several decades.<sup>7</sup> That said, a change in German law following the trial of John Demjanjuk<sup>8</sup> (a Ukrainian POW enlisted by the Nazis) enabled the prosecution of anyone who had been employed in one of the extermination camps. And Gröning, despite self-identifying only as a ‘small cog’ in the macabre ‘gears’ of a vast industrial death-machine, became a target. He was put on trial – thrust into Ka-Tzetnik’s ‘light of day’ – in April 2015 at the age of ninety-three. That same year, a German court (the Lüneburg Regional Court) convicted and sentenced him to four years’ imprisonment on account of his being an accessory to the first-degree murder of 300,000 Auschwitz’s inmates.<sup>9</sup> In addition to his accountant responsibilities, and his

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– *Testimonies of Y. Dinur, Y. Bakon, A. Oppenheimer, A. Beilin*, <https://collections.ushmm.org/search/catalog/irn1001698>, accessed 19 May 2023.

<sup>6</sup> V. Homola, ‘Ex-Nazi on Trial in Germany Admits Complicity’, *New York Times* (2 July 2015), <https://www.nytimes.com/2015/07/02/world/europe/ex-nazi-auschwitz-oskar-groening-trial-in-germany.html>, accessed 10 November 2023. See L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 128 and L. Rees, *Auschwitz – The Nazis & The ‘Final Solution’*, *supra* note 3, pp. 138-139.

<sup>7</sup> See L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 295 and L. Rees, *Auschwitz – The Nazis & The ‘Final Solution’*, *supra* note 3, p. 299. See also M. Hall, ‘“Bookkeeper of Auschwitz” could serve less than two years’, *The Telegraph* (7 July 2015), <https://www.telegraph.co.uk/news/worldnews/europe/germany/11723935/Bookkeeper-of-Auschwitz-could-serve-less-than-two-years.html>, accessed 10 November 2023. One of Gröning’s arguments regarding sentence was that he was entitled to a sentence reduction because it took so long for authorities to bring him to trial even though they had known for decades of his case.

<sup>8</sup> See Munich Regional Court II, 1 Ks 115 Js 12496/08, 12 May 2011.

<sup>9</sup> Lüneburg Regional Court, 27 Ks 9/14, 27 Ks 1191 Js 98402/13 (9/14), 15 July 2015.

rifling through the suitcases and pockets of the newly arrived inmates, Gröning had also participated in the infamous ‘selections’ – between instant death or slave labor – that immediately followed their arrival to the camp. Health-wise, Gröning had been well enough to face trial. That said, after being definitively summoned to start serving his sentence, he died early in 2018, never having spent a day in jail.

This commentary unpacks the charges against Gröning and his resultant conviction; examines the involvement of elderly victims as accusers and their roles in this trial; and, ultimately, contemplates how it all ‘looked’ and ‘sounded’.<sup>10</sup> In this respect, the lack of available transcripts did not hamper our reflections. Perhaps the exact opposite. As pointed out by Eltringham, ‘[t]he domination of the ‘text based view of the law’ ... obscures much that happens in the courtroom despite the profuse production of documents therein’.<sup>11</sup> Turning specifically to transcripts as inapt to record ‘the very thing that brings the courtroom to life’,<sup>12</sup> Eltringham notes that they ‘are only a residue of a process and omit not only important elements of talk, including ... ‘gestures, hesitations, clothing, tone of voice, laughter, irony’’.<sup>13</sup> It is precisely the ‘extratextual and subtextual language’<sup>14</sup> of the courtroom that this commentary tries to capture, using a diversity of sources, including media articles, images, and documentaries.<sup>15</sup>

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<sup>10</sup> On the looks of atrocity prosecutions, *see generally* J. Burnham Sedgwick, ‘Optical Allusions, Indecency, and Injustice in the Trial of Japanese War Criminals’, in this volume, pp. , and S. Machado, ‘Putting Things in Play: The Spectacle of International Criminal Justice’, in this volume, pp. . On the sounds of atrocity prosecutions, *see generally* A. Fino, ‘The Sound and Taste of Atrocities: From Cambodia in the 1970s to Bosnia and Herzegovina in the 1990s’, in this volume, pp. , and A. Jones, ‘Hearing Voices: Victim and Witness Demographics at the International Criminal Court’, in this volume, pp. .

<sup>11</sup> N. Eltringham, *Genocide Never Sleeps – Living Law at the International Criminal Tribunal for Rwanda* (Cambridge University Press, Cambridge, 2021), p. 9.

<sup>12</sup> *Ibid.*, p. 58.

<sup>13</sup> *Ibid.*, p. 9. Here quoting J. Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* (Harvard University Press, Cambridge, 1988), p. 290.

<sup>14</sup> C. Martin, ‘Bodies of Evidence’, 50(3) *The Drama Review* (2006) 10–11. Quoted in Eltringham, *supra* note 11, pp. 9 and 59.

<sup>15</sup> *See* Section 2. The authors did not personally attend the trial – the analysis herein is thus based on publicly available material.

Hence, the focus is not only on Gröning himself, but on the totality of the trial of Gröning. Throughout, and mapping onto a broader project of ours,<sup>16</sup> this commentary gazes upon the *aesthetics, acoustics, and visualities* of this trial. Our lens is not one of legalisms or capacities or competences but, rather, of time, aging, and the liminal space – as planetized (*pace* Ka-Tzetnik) in the courtroom and disseminated beyond the courtroom – between the world of the living and the netherworld of the deceased. What does it ‘look like’ to prosecute defendants who are fading and falling fast? What to say about justice delayed, which these prosecutions sorely reflect, but then also a hastily accelerated justice to avoid justice denied? Secondly, and conjecturally, breaking new bread for us, we wonder in this commentary what might happen were a decision to be made not to proceed at all – in other words, what would it ‘look like’ to decline to prosecute for whatever reasons? These questions, to be sure, are particularly salient in that German officials are still planning to put approximately a dozen more individuals on trial for their involvement in Holocaust-era crimes.<sup>17</sup>

This commentary therefore interrogates the representational credibility of dallied proceedings that occur seventy – increasingly, eighty – years after the fact. In this space, we invoke Konstantinos Tsinas’ notion of ‘asymmetry’, which he identifies as the unexpected pathos that may ensue when elderly individuals, shadows and shells of their former selves, are prosecuted for serious crimes,

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<sup>16</sup> See M. Drumbl and C. Fournet (eds.), ‘Special Issue: The Visualities and Aesthetics of Prosecuting Aged Defendants’, 22(1–2) *International Criminal Law Review* (2022).

<sup>17</sup> See e.g. T. Axelrod, ‘Germany looking to prosecute a dozen more Nazi war criminals’, *Jerusalem Post* (6 August 2021) discussing *inter alia* impending prosecutions of a 100-year-old man in Brandenburg, who has been found fit to stand trial for up to 2 and a ½ hours per day, and of a 96-year-old woman in Schleswig-Holstein). See also I. Vincent, ‘How Germany is prosecuting its final Nazis – now in their 90s or older’, *New York Post* (6 August 2022), <https://nypost.com/2022/08/06/germany-is-prosecuting-its-last-nazis-in-their-90s-or-older/>, accessed 9 July 2023 and K. Connolly, ‘Former Nazi camp secretary found guilty of complicity in 10,500 murders’, *The Guardian* (20 December 2022), <https://www.theguardian.com/world/2022/dec/20/nazi-camp-secretary-irmgard-furchner-stutthof-germany>, accessed 9 July 2023, both discussing the trial of 97-year-old Irmgard Furchner in Itzehoe.

and when erstwhile bullies appear bullied by law.<sup>18</sup> How does the anti-impunity message that these trials aim to convey mix with various other messages that these trials may deliberately or inadvertently generate?

Section 1 sets out the details of the prosecution – including facts and legal theories – against Gröning, and places these in a broader context of his trial as rendered possible because of the *Demjanjuk* conviction. Section 2 unpacks the visualities and vocalities of Gröning’s trial narratives as well as the narratives’ spun about the courtroom in other spaces – film, documentary and media. Section 3 presents the accusers against Gröning, also elderly, and their vim, vigor, vitality, and their agency even to forgive and embrace. Section 4 concludes by positing that however absurd it may seem to put a feeble old man on trial, the feebleness that oozes from *not prosecuting* such a man may prove even more absurd. In this regard, this paper builds upon scholarship that suggests that ‘doing nothing’ in the case of an infirm and aged erstwhile Holocaust perpetrator amounts to a rebuke of the agency and citizenship of the elderly and, in this vein, may contribute to a collective infirmity of a different sort.<sup>19</sup>

## 2 Prosecuting ‘the Small Cog in the Gears’<sup>20</sup>

I would describe my role as a small cog in the gears. If you can describe that as guilt, then I am guilty.

Legally speaking I am innocent.

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<sup>18</sup> K.P. Tsinas, ‘Prosecuting Asymmetrically: On Some ‘Preconditions’ of Criminal Liability of Aged Defendants for Atrocities’, 22(1-2) *International Criminal Law Review* (2022) 43-62. See also K.P. Tsinas, ‘Elaborating on the ‘Asymmetry’ of Prosecuting Aged Defendants for Atrocities: A ‘Multimodal-Visual Argumentation’ Perspective’, in this volume, pp. .

<sup>19</sup> See K.J. Fisher, ‘The Expressive Value of Prosecuting Aged Defendants: A Rebuke of Ageism’, 22(1-2) *International Criminal Law Review* (2022) 63-85. See also K.J. Fisher, ‘Atrocity Prosecutions, Cultural Representation, and the Invisible Older Individual’, in this volume, pp. .

<sup>20</sup> A. Smale, ‘Trial of Former Auschwitz Guard, 93, Opens in Germany’, *New York Times* (21 April 2015), <http://genocidewatch.net/2015/04/21/trial-of-former-auschwitz-guard-93-opens-in-germany/>, accessed 10 November 2023. See also L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 283 and L. Rees, *Auschwitz – The Nazis & The ‘Final Solution’*, *supra* note 3, p. 287.

Auschwitz-Birkenau straddled 40 square kilometers. Approximately 1.1 million Jews were deported to this grotesque place.<sup>22</sup> Auschwitz-Birkenau dually operated as both a concentration camp and a death camp.<sup>23</sup> The concentration camp was comprised of inmates who labored under brutal conditions for the German Reich. The laborers ended up laboring because they survived the initial selection upon arrival, as mentioned previously, in which Gröning had a hand. The selection, as recalled by writers Primo Levi and Imre Kertész, involved the Nazis determining, immediately after the railway cars crammed with deportees opened, who would be sent to the ‘left’ promptly to be gassed and who would be sent to the ‘right’ to join a work detail.<sup>24</sup> On other days, the directions flipped: with left being the road to survive another day and right bringing an immediate death. Those too young, too gaunt, too elderly, and too weakened – the overwhelming majority of the selected – went straight, whether from the right or left, to the gas chambers and *Krematoria*. The Auschwitz-Birkenau camp oversaw the murder of the largest number of *Häftlinge* among all the camps.<sup>25</sup>

## 2.1 Gröning – The ‘Bookkeeper’ of Auschwitz

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<sup>21</sup> Quoted in T. Paterson, ‘Oskar Gröning to Stand Trial for Being Auschwitz Guard in Case That Could Make German Legal History’, *Independent* (14 February 2015), <https://www.independent.co.uk/news/world/europe/oskar-groning-to-stand-trial-for-being-auschwitz-guard-in-case-that-could-make-german-legal-history-9931731.html>, accessed 10 November 2023.

<sup>22</sup> See Memorial and Museum Auschwitz-Birkenau, *The unloading ramps and selections*, <http://auschwitz.org/en/history/auschwitz-and-shoah/the-unloading-ramps-and-selections>, accessed 19 May 2023.

<sup>23</sup> See L. Douglas, ‘Der Wachmann und die Sekretärin’, in M. Vormbaum (ed.), *Spätverfolgung von NS-Unrecht* (Springer, Berlin, 2023), pp. 109-118.

<sup>24</sup> See P. Levi, *If This Is A Man* (Abacus, London, 2003; original 1947). See also I. Kertész, *Fateless* (Vintage Classics, London, 2017; original 1975).

<sup>25</sup> On Auschwitz-Birkenau see generally R. Hilberg, *The Destruction of the European Jews* (Yale University Press, New Haven, 2003; original 1961).

Gröning's name scarcely appears in the works and literature on Auschwitz:<sup>26</sup> for instance, no mention of him is made in *Kommandant Rudolf Höß's* brutally candid memoirs.<sup>27</sup>

Hence, the terms 'accountant' or 'bookkeeper' – coupled with the scant interest Gröning seems to have generated – could be misinterpreted as meaning that his function was purely bureaucratic. Such was not the case: on several occasions Gröning attended the infamous selection ramp.<sup>28</sup> What is more, as the accountant, Gröning inspected the luggage of arriving prisoners; he recorded what they brought and sent money back to Berlin.<sup>29</sup> He orchestrated the *en masse* robbery of all the victims' goods and belongings and registered all the details of this coordinated theft and utterly dehumanising final strip-step. As he would continuously recall at his trial, Gröning didn't directly kill anyone.<sup>30</sup> And no, indeed, he didn't. But he took everything (and anything) the victims still had and, in his chilling words, '[i]t was amazing all the goods the Jews came with'.<sup>31</sup> When asked

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<sup>26</sup> Two noticeable exceptions are the following works written by Laurence Rees in which Gröning features rather extensively (a picture of him is even inserted), having accepted to be interviewed by the author: see L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 127. See also L. Rees, *Auschwitz – The Nazis & The 'Final Solution'*, *supra* note 3, p. 138.

<sup>27</sup> R. Höß, *Death Dealer: The Memoirs of the SS Kommandant at Auschwitz* (Da Capo Press, Boston, 1996; original 1956). For a detailed discussion of this case, see M. Drumbl, 'Stepping Beyond Nuremberg's Halo: The Legacy of the Supreme National Tribunal of Poland', 13(5) *Journal of International Criminal Justice* (2015) 903-932. Höß had established Auschwitz and commanded it from 1940 to 1943, and then went to Berlin as head of SS camps. He returned to Auschwitz in the summer of 1944 and presumably overlapped with Gröning when the camp was operating at great capacity murdering Hungarian Jews, these being the massacres that constituted the core of the case against Gröning. Höß was prosecuted in March 1947 before the Supreme National Tribunal of Poland. He was thereafter executed by hanging.

<sup>28</sup> See L. Rees, *Auschwitz – A New History*, *supra* note 3, pp. 127-128 and L. Rees, *Auschwitz – The Nazis & The 'Final Solution'*, *supra* note 3, p. 138.

<sup>29</sup> See L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 156 and L. Rees, *Auschwitz – The Nazis & The 'Final Solution'*, *supra* note 3, pp. 165-166. What is more, Gröning 'admit[ted] that he himself was an active participant in the corruption and theft that were rife among the SS members in the camp, stealing from the cash that surrounded him in order to buy goods on the flourishing Auschwitz black market' so much so that he 'was known as the "King of the Dollars"'. *Ibid.*, p. 174 and p. 182.

<sup>30</sup> Rees recalls the impressions left by his meeting with Gröning: 'To meet Oskar Groening today, and listen to his attempt to explain his time at Auschwitz, is a strange experience. Now in his eighties, he talks almost as if there was another Oskar Groening who worked at Auschwitz sixty years ago – and about that "other" Groening he can be brutally honest. Crucially, he shields himself from taking full responsibility for playing a part in the extermination process by constantly referring to the power of the propaganda to which he was exposed, and the effect on him of the ultra-nationalist family atmosphere in which he grew up.' L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 133 (see also p. 295) and L. Rees, *Auschwitz – The Nazis & The 'Final Solution'*, *supra* note 3, p. 143 (see also p. 298).

<sup>31</sup> See documentary film: Matthew Shoychet (Director), *The Accountant of Auschwitz* (Signature Entertainment, London, 2019).



at trial about the fate of the victims' belongings he replied: 'They belonged to the State. The Jews had given them up to us. They didn't need them anymore'.<sup>32</sup>

Gröning left Auschwitz in October 1944 to join a combat unit in the Ardennes, he was captured by the British. He served as a forced laborer and musician in the UK after the war. He returned to Germany in 1947.<sup>33</sup> There he worked in a glass factory, rode the wave of the German economic miracle, and rose into management.<sup>34</sup> Perhaps assured that he would remain shielded from prosecution, Gröning reached out to the media on two distinct occasions.<sup>35</sup> He gave interviews. He did so in order – so he claimed – to combat Holocaust denial while refuting any idea of his own legal guilt. And indeed, under German law, for decades he simply couldn't be prosecuted.

## **2.2 Gröning after Demjanjuk**

This all changed after the trial of John Demjanjuk. As explained by Mary Fulbrook,

in 2015, following the Demjanjuk case, Gröning was finally put on trial. This was because of the change in the law achieved in the Demjanjuk case: merely by virtue of having worked at the camp at the time, Gröning could be considered to have played a role in the machinery of mass murder. ... It sufficed to show that he had merely been employed at Auschwitz – even in a non-killing role.<sup>36</sup>

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<sup>32</sup> *Ibid.*

<sup>33</sup> See L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 284 and L. Rees, *Auschwitz – The Nazis & The 'Final Solution'*, *supra* note 3, pp. 287-288.

<sup>34</sup> *Ibid.*, p. 295 and p. 298.

<sup>35</sup> See Geyer, *supra* note 3.

<sup>36</sup> M. Fulbrook, *Reckonings – Legacies of Nazi Persecution and the Quest for Justice* (Oxford University Press, Oxford, 2018), p. 350.

*Demjanjuk* twitched the jurisprudence and switched a liability theory, embraced vicariousness, and thereby cleared a path for the law. In convicting Demjanjuk of serving as an accessory to the murder of at least 28,060 Jews at the Sobibor death camp and sentencing him to five years,<sup>37</sup> the Munich Regional Court opened the door to further prosecutions. In the *Demjanjuk* case, the legal argument reposed on the fact that Sobibor was solely an extermination camp (like Treblinka and Belzec): at these three camps, 1.3 million Jews were killed and no more than 125 survived.<sup>38</sup> Hence, it was obvious what a guard's or official's responsibilities and contributions were. Gröning extended this logic to Auschwitz.<sup>39</sup> While it may have been that Gröning's book-keeping may not have sufficed, on its own, his presence on the selection ramp on several occasions together with his pilfering of belongings embedded him within the nexus of responsibility.<sup>40</sup>

The *Gröning* and *Demjanjuk* trials are thereby connected. Demjanjuk opened the jurisprudential door – formerly sealed – to finding ‘cogs’ criminally guilty for integrally ‘being there’, so to speak colloquially, while the camps were running, murdering, and exterminating. If, at the time of the Demjanjuk proceedings, pundits had opined that his would be the ‘last great Nazi war-crimes trial’,<sup>41</sup> this proved to be a premature prediction in light of Gröning and future planned trials.<sup>42</sup>

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<sup>37</sup> See Munich Regional Court II, Judgment, 12 May 2011. Demjanjuk moved to Cleveland, USA, in 1952 and began work as a machinist in a Ford plant. He became a US citizen by naturalization in 1958. After extensive litigation in Israel, and deportation from the United States, Demjanjuk went on trial in Munich.

<sup>38</sup> L. Douglas, ‘Ivan the Recumbent, or Demjanjuk in Munich: Enduring the “last great Nazi war-crimes trial”’, *Harper's Magazine* (March 2012), p. 49 (‘Everyone who served [at Sobibor] *had* to be involved in the killing process . . . Sobibor guards were accessories to murder because facilitating murder was their job description.’), <https://harpers.org/archive/2012/03/ivan-the-recumbent-or-demjanjuk-in-munich/>, accessed 10 November 2023.

<sup>39</sup> Douglas concludes that the *Demjanjuk* legal logic was properly and fairly applied to the *Gröning* case, in light of Gröning's actual role at Auschwitz-Birkenau. He was not too attenuated or holding too much of an attendant role. See Douglas (2023), *supra* note 23.

<sup>40</sup> Note that the exact dates of his presence on the selection ramp were not established. See Douglas (2023), *supra* note 23.

<sup>41</sup> See Douglas (2012), *supra* note 38, pp. 45 *et seq.* (citing these words from the German daily *Süddeutsche Zeitung* and also predicting that it is ‘likely to be the last Holocaust case to galvanize international attention’).

<sup>42</sup> As Fulbrook reports: ‘A trial was opened in Detmold against former Auschwitz guard Reinhold Hanning, who was charged with being an accessory to the murder of more than 170,000 people, whom he claims he had merely escorted to the gas chambers; he was given a sentence of five years. The planned trial in Hanau of another former Auschwitz guard, Ernst Tammel, did not take place because he died at the age of ninety-three, just a few days before the trial

### 2.3 *Gröning on Trial*

In 1945, Lüneburg – a small town in northern Germany – hosted the ‘first Nazi trial ever’, namely, the Belsen trial which preceded the Nuremberg IMT trials.<sup>43</sup> Seventy years later, Lüneburg hosted Gröning’s trial. To accommodate a wide audience, Gröning’s trial took place in the Ritterakademie, a community center specifically transformed into a courthouse.

Although, as mentioned before, Gröning worked in Auschwitz for nearly two years, the indictment focused on ‘Operation Hungary’, namely, the deportation to Auschwitz of 425,000 Hungarian Jews on 137 trains between 16 May 1944 and 11 July 1944, three hundred thousand of whom were instantly murdered.<sup>44</sup> Gröning was charged with aiding and abetting in their murder; ‘[s]ince his role on the ramp was to collect valuables, he was further accused of supporting the systematic killing of the Jews, while providing the Nazi regime with ‘economic advantage’ by taking the belongings of those about to die’.<sup>45</sup> Put differently, the heart of the charges was that Gröning ‘had helped the camp run smoothly’<sup>46</sup> and that, in Auschwitz, there was no such thing as ‘a small cog in the gears’. Rather, going back to Ka-Tzetnik’s and Frankl’s opening words to this commentary, Gröning was prosecuted as a man who sustained and ran Auschwitz.

Gröning consistently claimed his involvement was involuntary, but ‘routine’;<sup>47</sup> he also noted his predisposition toward the ‘comfort of obedience with which [he was] raised’ and other devices of

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was to begin. A case against an Auschwitz doctor, Hubert Zafke, was suspended because, at the age of ninety-five, he was held to be too unwell to stand trial.’ Fulbrook, *supra* note 36, p. 352.

<sup>43</sup> See ‘Transcript of the Official Shorthand Notes of ‘The Trial of Josef Kramer and Forty Four Others’, 17 September 1945 – 17 November 1945’, [http://www.bergenbelsen.co.uk/pages/TrialTranscript/Trial\\_Contents.html](http://www.bergenbelsen.co.uk/pages/TrialTranscript/Trial_Contents.html), accessed 19 May 2023.

<sup>44</sup> See K. Kacer with J. Lebowitz, *To Look a Nazi in the Eye – A teen’s account of a war criminal trial* (Second Story Press, Toronto, 2019), p. 97.

<sup>45</sup> *Ibid.*, p. 98.

<sup>46</sup> BBC, ‘“Auschwitz book-keeper’ Oskar Groening sentenced to four years’, *BBC News* (15 July 2015), <https://www.bbc.co.uk/news/world-europe-33533264>, accessed 19 May 2023.

<sup>47</sup> Rees (2005), *supra* note 20. See also L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 156 and L. Rees, *Auschwitz – The Nazis & The ‘Final Solution’*, *supra* note 3, p. 165. Gröning seemed to hold rather fond memories of

psychological repression that he had availed himself of in his time at Auschwitz.<sup>48</sup> In this regard, then, he too bears some trauma from his role in traumatizing so many others so extensively.<sup>49</sup> The argument that SS men had no agency, no choice, and that all labored under duress may beguile but the fact nonetheless remains that '[n]o amount of research has ever established a single example of a German executed during the Nazi era – or even severely punished – for asking to opt out of genocide'.<sup>50</sup> Gröning himself openly complained about his assignment to his supervisors.<sup>51</sup>

Gröning was sentenced to four years, a touch longer than the three-and-a-half that the Prosecutor had requested. Although the Prosecutor noted Gröning's limited contribution to the deaths, the 'nearly incomprehensible' number of victims animated the sentencing request.<sup>52</sup> Judge Franz Kompish commented upon Gröning's willingness to take 'a 'safe desk job' in a system that was 'inhumane and all but unbearable for the human psyche'.<sup>53</sup>

In 2016, the German Federal Court of Justice denied Gröning's appeal.<sup>54</sup> A year later, the Federal Constitutional Court rejected the appeal 'that at the age of ninety-six he was too old and frail to serve a prison sentence'.<sup>55</sup> In 2018, Gröning's request for pardon was rejected. He died in hospital on 9 March 2018. In the meanwhile, Gröning had also brought a case before the European Court of Human Rights, in which he claimed that the length of the proceedings against him, putatively initiated in 1977, violated his right to a fair trial under article 6 of the European Convention on

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his time in Auschwitz, recalling the camp as 'a small town' with 'fun and entertainment' and as a place that 'led to friendships which ... [he] think[s] back on with joy'. *Ibid.*, p. 157 and p. 166.

<sup>48</sup> Homola, *supra* note 6.

<sup>49</sup> For discussion of perpetrator trauma, and critique of the neglected status of such trauma, see S. Mohamed, 'Of Monsters and Men: Perpetrator Trauma and Mass Atrocity', 115 *Columbia Law Review* (2015) 1157 *et seq.*

<sup>50</sup> Douglas (2012), *supra* note 38, p. 50.

<sup>51</sup> See L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 128 and L. Rees, *Auschwitz – The Nazis & The 'Final Solution'*, *supra* note 3, pp. 138-139. Rees however notes that: 'Significantly, Groening did not complain to his boss about the *principle* of murdering the Jews, merely its practical implementation'. *Ibid.*, emphasis in original.

<sup>52</sup> Hall, *supra* note 7.

<sup>53</sup> BBC (15 July 2015), *supra* note 46.

<sup>54</sup> Federal Supreme Court, 3 StR 49/16, 20 September 2016.

<sup>55</sup> German Federal Constitutional Court, 2 BvR 2772/17, 21 December 2017. See Fulbrook, *supra* note 36, p 352.

Human Rights. Following his death, his sons were allowed to pursue the case. On 20 October 2020, his application was declared inadmissible by the Strasbourg Court.<sup>56</sup>

Writing for *The Guardian*, Connolly reported that '[t]he verdict makes Gröning the 6,657th person to be convicted of Nazi war crimes in Germany, out of a total of 172,294 people who were investigated between 1945 and 2005'.<sup>57</sup> Gröning's conviction, over seventy years after the fact, thereby layers itself upon an impoverished judicial sediment. Reports of how many people, exactly, have been convicted for their roles in Auschwitz vary wildly. The *New York Times* for example claims that of the roughly 6,500 SS members 'employed to administer Auschwitz-Birkenau, only 49 have been convicted of war crimes'.<sup>58</sup> Ultimately, '[t]he total number of persons convicted in the Federal Republic for Nazi crimes was in itself fewer even than the number of people who had been employed at Auschwitz alone'.<sup>59</sup>

### 3 The Visualities and Vocalities of Gröning's Trial

The messaging that occurs in a courtroom can be retransmitted, or rechanneled, through other narrative pathways, including media and documentaries, thereby leading to multiple aesthetics all at once. To assess the visualities of Gröning's trial we relied on pictures published in the media as well as on two documentaries: *Auschwitz: The Nazis & The 'Final Solution'*<sup>60</sup> and *The Accountant of Auschwitz*.<sup>61</sup> In viewing these images, we have borne in mind the inherent limits and intrinsic bias of camera recording, as aptly explained by Katarina Ristić:

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<sup>56</sup> ECtHR, *Gröning v. Germany*, Application No. 71591/17, Decision, 20 October 2020.

<sup>57</sup> K. Connolly, "'Accountant of Auschwitz' Jailed for the Murder of 300,000 Jews', *The Guardian* (15 July 2015), <https://www.theguardian.com/world/2015/jul/15/accountant-oskar-groning-auschwitz-jailed-for-the-of-300000-jews>, accessed 10 November 2023.

<sup>58</sup> Homola, *supra* note 6.

<sup>59</sup> Fulbrook, *supra* note 36, p. 355.

<sup>60</sup> Rees, *Auschwitz: The Nazis & The 'Final Solution'* (BBC Documentary, 2004).

<sup>61</sup> See Shoychet, *supra* note 31.

At first glance, courtroom images of the accused might seem to neutrally represent the trial in the courtroom. Contrary to the conventional and false assumption that in the news the camera is simply recording the event, the camera recording inevitably ‘becomes a comment on an event. It is comment or opinion because choices always have to be made whenever a shot is recorded’. Hence, the visual recording is always a segmented, framed excerpt, which produces a specific image of the accused and of the trial ...<sup>62</sup>

One of the first images of Gröning in Lüneburg in the documentary *The Accountant of Auschwitz* shows him getting out of a car and, in front of the media and assembled people, saying: ‘They won’t start without me’. Gröning entered the court assisted by a walker and with the help of members of the Red Cross. Throughout the proceedings his composure and demeanour show that he was both physically and mentally fit to be tried. He was nonetheless exempt from having to stand up when the judges entered the courtroom and when the verdict was read out. When he testified, ‘Groening cleared his throat, took a sip of water, pushed his glasses up on his nose; and began to speak’.<sup>63</sup>

Gröning is one of the few Nazi defendants who truly wanted to talk. As mentioned earlier, he had already expressed himself in the media, admitting to moral guilt but not to legal guilt and claiming he wanted to combat Holocaust denial. And he did so again in court.

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<sup>62</sup> K. Ristić, ‘Accused War Criminals qua Perpetrators: On the Visual Signification of Criminal Guilt’, 2(2) *Journal of Perpetrator Research* (2019) p. 168, here quoting P. Ward, *Picture Composition for Film and Television* (Focal Press, Oxford/Boston, 2nd edition, 2003), p. 134.

<sup>63</sup> Kacer, *supra* note 44.

Gröning in fact openly acknowledged his ‘moral guilt,’ and his contribution to the functioning of Auschwitz, but alternately surrendered (to the court) or contested (before the court) his ‘legal guilt’.<sup>64</sup> He cycled back, repeatedly, to the ‘cog’ metaphor – notably, an involuntary one.<sup>65</sup> Yet he welcomed his trial as a device to denounce Holocaust denialism in Germany, which he himself initially heard among an acquaintance in his stamp club and found problematic, and also to authenticate the atrocities that occurred at Auschwitz.<sup>66</sup> At trial, Gröning was nevertheless always very careful to specify that he had not killed anyone. In Laurence Rees’ documentary *Auschwitz: The Nazis & The ‘Final Solution’*,<sup>67</sup> Gröning ‘made it clear that although he had once witnessed a gassing and had been shocked at the shootings, violence, and selections on the ramp, he had not personally committed any crime’.<sup>68</sup> And even if he claimed ‘he abhorred the manner of killing, he [also] said that at that time he had seen it as necessary to deal with an ‘enemy’ in wartime – which is how, under the influence of Nazi propaganda and socialization, he had come to perceive the Jews’.<sup>69</sup>

In court, Gröning re-affirmed: ‘No question that I am morally guilty. I ask for forgiveness. Whether I am criminally responsible is for you to decide’.<sup>70</sup> He also exhorted that he could only ‘ask forgiveness from the Lord,’ and failed to apologize for his deeds during the trial.<sup>71</sup> Gröning

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<sup>64</sup> BBC, ‘Auschwitz guard trial: Oskar Groening admits ‘moral guilt’’, *BBC News* (21 April 2015), <https://www.bbc.co.uk/news/world-europe-32392594>, accessed 19 May 2023.

<sup>65</sup> S. Kaplan, ‘Accountant of Auschwitz sentenced to four years in prison for 300,000 deaths’, *Washington Post* (15 July 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/07/15/accountant-of-auschwitz-sentenced-to-four-years-in-prison-for-300000-deaths/>, accessed 10 November 2023.

<sup>66</sup> See L. Rees, *Auschwitz – A New History*, *supra* note 3, pp. 296-297 and L. Rees, *Auschwitz – The Nazis & The ‘Final Solution’*, *supra* note 3, p. 300.

<sup>67</sup> Rees (2004), *supra* note 60.

<sup>68</sup> Fulbrook, *supra* note 36, p. 350.

<sup>69</sup> *Ibid.*, here referring to Rees (2004), *supra* note 53, and Rees (2005), *supra* note 20. See also L. Rees, *Auschwitz – A New History*, *supra* note 3, p. 139 and p. 143 and L. Rees, *Auschwitz – The Nazis & The ‘Final Solution’*, *supra* note 3, pp. 128-129 and pp. 132-133.

<sup>70</sup> See Shoychet, *supra* note 31.

<sup>71</sup> Homola, *supra* note 6.

referenced the enormity of his guilt as the reason why it was impossible for him to ask for forgiveness from mortals, survivors, and relatives. To which plaintiffs' legal representative acidly retorted: 'This is about earthly guilt, not guilt before God. We're not at the Last Judgment. We're at the last Auschwitz trial on earth'.<sup>72</sup> Gröning's choice at the time was to beseech the divine. Yet at the time the judge read the verdict, and he sat convicted, Gröning did apologize.<sup>73</sup>

Notwithstanding this eventual recognition of moral guilt and apology, the fact remains that Gröning's spoken words at trial were unbearably cold and terrifyingly factual. He explained that he 'was told that all the people who couldn't work were disposed of' and that 'Jews needed to be exterminated, that was part of the war'.<sup>74</sup> He also reported a 'shocking incident in 1942 on the ramp', telling of a screaming baby who had been 'pulled out of the suitcase he or she was hidden in and smashed against a truck'.<sup>75</sup> All Gröning added was that 'the crying stopped' but that '[t]hat wasn't nice'. To the judge's questioning him about what he would have done, Gröning answered: 'Maybe shoot him. That would have been the nice thing'.<sup>76</sup>

When these words resonated in the courtroom, the *Gröning* trial offered a vivid illustration of what prosecuting former Nazis may sound like while exposing the striking dichotomy between the *visualities* of prosecuting aging defendants – who might look frail and fragile, perhaps triggering some form of compassion and pity – and the chilling *acoustics* of such prosecutions, during which the unwordable might be worded, the unpronounceable might be pronounced, the unspeakable might be spoken ... and the unhearable might be heard. And this is exactly what happened when Gröning spoke during his trial.

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<sup>72</sup> *Ibid.*

<sup>73</sup> Kaplan, *supra* note 65.

<sup>74</sup> See Shoychet, *supra* note 31.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*



Contrary to Demjanjuk who repeatedly dissembled, joked, stalled, and played dumb down to the bitter end before deciding to enter the courtroom on a hospital bed, dark sunglasses on his nose and a cap on his head, Gröning kept his composure and remained avuncular. Gröning described what happened in great detail. Demjanjuk's silence – his unflinching refusal to describe what he experienced, saw, heard, or observed – dogged the proceedings and soured their aftermath.<sup>77</sup> Hence the *Gröning* trial, owing to the defendant's idiosyncracies, had the ingredients for a more tangible act of expression. The *Gröning* trial fell short, to be sure, and generated its own frustrations, but it triggered some additional recognition of death in Auschwitz and, what is more, strove to combat the perfidy of Holocaust denial. Perhaps, then, the expressive value of a trial hinges upon the peculiarities of who exactly is being tried? If so, might this introduce a new variable into prosecutorial case selection? And, on a broader note, it suggests considerable diversity and individuality within this collective group of extremely aged defendants who once had been brutal human rights abusers.

Yet, Gröning's spoken words bounce around to the point that they beg the question whether these voices of perpetrators are worth hearing. When he spoke out, was Gröning genuinely aiming at combating Holocaust denial or merely recollecting his youth with some sort of pride? After all, 'the role of staged performance and theatricality during the prewar Nuremburg rallies'<sup>78</sup> has been well researched and, with respect to guards in Nazi concentration camps, Inga Clendinnen has shown that '[t]hey had been sensitized to the transformative power of theatre long before their arrival at the camps, and they brought that predilection with them ... . Theater was everywhere in Auschwitz'.<sup>79</sup> This 'full immers[ion] in the dramaturgical aesthetics of death and dying' and 'the

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<sup>77</sup> Douglas (2012), *supra* note 38, p. 52.

<sup>78</sup> E. Weisband, *The Macabresque – Human Violation and Hate in Genocide, Mass Atrocity, and Enemy-Making* (Oxford University Press, Oxford, 2017), p. 13.

<sup>79</sup> I. Clendinnen, *Reading the Holocaust* (Cambridge University Press, Cambridge, 1999), p. 145. Footnote in original.

theatricality of performative transgression reflected in their desires from ‘glamour’ and for ‘self-image’ among themselves’<sup>80</sup> could indeed have well survived the war.

Gröning’s words and the way he pronounced them additionally shed doubt on his crusade against Holocaust denial. Further doubts arose as to how helpful it would be actually to deploy him to eradicate denialism. For instance, Max Eisen, one of the co-plaintiffs who traveled from Canada to testify in Lüneburg, had initially

thought he should be given a sentence to go into schools with an escort and tell students about Auschwitz. He said that he never denied what happened. So, telling young people the truth would be the best thing he could do ... . Now I know that this would have been the worst mistake of all ... . I would never want to put this man in front of students. He apologized for what he *saw*, not for anything that he *did*. For that, he assumed no responsibility.<sup>81</sup>

And it is to these witnesses, elderly too, and their words, that this commentary now turns.

#### **4      A Tale of Three Accusers, and their Differences**

In the German system, criminal charges are brought by the state but private accusers also play a role. Germany’s criminal justice system allows victims and their family members to serve as *Nebenkläger* (lay accusers): as such, they are entitled to legal representation and can testify.

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<sup>80</sup> Weisband, *supra* note 78, p. 13.

<sup>81</sup> Kacer, *supra* note 44, p. 110. Emphases in original.

One key feature of testifying at Gröning's trial was that the 'survivors were not required to prove anything specific pertaining to Gröning's role at any particular time. Their testimony was very general, specifically, personal stories of horror and suffering'.<sup>82</sup> For Fulbrook,

Witnesses had gained a new significance in this trial, testifying not only to actions or immediate consequences of actions but also to indirect, long-term reverberations of the past ... . This kind of indirect testimony about the wider consequences of the Holocaust was a far cry from the way in which survivor testimonies had been solicited or dealt with in the major trials of the 1960s and 1970s. So, too, was the burden of proof – now changed to mere presence at a place whose functions were known at the time of employment there.<sup>83</sup>

All the co-plaintiffs went to Lüneburg to share their personal stories before the court. Susan Pollack, born in Hungary, was one of them. Pollack, for her part,

traveled from her home in the United Kingdom at the age of eighty-four to testify to her experiences. Deported from Hungary to Auschwitz, she was immediately separated from her mother, who was gassed. As she recalled, 'The terror stills my soul. On arrival it was like the terror that stops faculties of thinking'.<sup>84</sup>

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<sup>82</sup> Fulbrook, *supra* note 36, p. 350.

<sup>83</sup> *Ibid.*, pp. 351 *et seq.*

<sup>84</sup> L. Osborne, *The Guardian*, 'Oskar Gröning trial: British Auschwitz survivor takes the stand' (13 May 2015), <https://www.theguardian.com/world/2015/may/13/oskar-groning-trial-british-auschwitz-survivor-susan-pollack>, accessed 19 May 2023.

Pollack survived Auschwitz by lying about her age at the last second, after another inmate whispered to her to do so, although she was ‘repeatedly being exposed to Mengele for selections’ and these horrors are what she ultimately had to survive.<sup>85</sup> After slave laboring in an armaments factory in Guben, and surviving death marches and a period in Bergen-Belsen, Pollack ‘was finally liberated in April 1945’.<sup>86</sup>

At trial, Pollack’s statements pointed to the responsibility of Hungarians, Austrians, and ordinary German people – that is to say, many others beside the SS. She intoned: ‘people wanted the fascists’.<sup>87</sup> Fulbrook notes that her ‘heart-rending testimony barely related to Gröning’s role counting the possessions and money confiscated from arriving victims at Auschwitz’.<sup>88</sup> Ultimately, with respect to Gröning, Pollack said: ‘I have no feelings of hate towards him. But I cannot forgive him. He did not have to work at Auschwitz’.<sup>89</sup>

Bill Glied also traveled to Lüneburg (in his case from Toronto, Canada) as a co-plaintiff. He entered Auschwitz at the age of thirteen and was the only one from his family to survive. Glied had no recollection of Gröning, but he, too, testified of the horrors he generally saw and endured. Glied nonetheless claimed that Gröning volunteered for the Waffen-SS, that he must have played a part and that, in any event, the mere fact of being in Auschwitz amounted to complicity. Yet, he thought that, if convicted, Gröning should not go to jail.

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<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> D. Charter, ‘‘I can’t forgive’, says Briton orphaned at Auschwitz’, *The Times* (14 May 2015), <https://www.thetimes.co.uk/article/i-cant-forgive-says-briton-orphaned-at-auschwitz-n8t5hf59tb5>, accessed 10 November 2023.

<sup>88</sup> Fulbrook, *supra* note 36, p. 351.

<sup>89</sup> Charter, *supra* note 87.

Perhaps the most memorable witness was Eva Mozes Kor.<sup>90</sup> Eighty-one-years-old at the time of the trial, Kor came to Lüneburg from Indiana and was one of the first witnesses to testify and to tell her own personal story of pain and suffering:

Separated from her parents and older sisters, none of whom she ever saw again, in Auschwitz Eva and her twin sister, Miriam, were subjected to ‘medical’ experiments at the hands of Josef Mengele and came very close to death. Had either one of them died at the time of the experiments, the other would have been killed in order to make a comparison of the corpses. But both managed to survive, although permanently harmed by their treatment.<sup>91</sup>

The reason why Kor made headline news – the scene is even viewable on Youtube<sup>92</sup> – was the fact that she physically approached and embraced Gröning in what has been called an ‘extraordinary display of compassion toward the accused’.<sup>93</sup> They looked at each other as would two elderly people sharing in common the other’s completion of the same life-cycle. This moment was applauded by the audience; the applause was however short-lived as the presiding judge pithily intervened: ‘Not in my court’.<sup>94</sup> Indeed, the hug seemed spontaneous. And perhaps it was. That said, Kor’s gesture ‘built on two decades of work for peace and forgiveness, during which Kor had founded CANDLES, an organization for surviving twins who had been subjected to Nazi

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<sup>90</sup> Information regarding Eva Kor taken from: ‘He was no longer a Nazi guard’: The hug seen round the world’, [www.wane.com](http://www.wane.com) (29 April 2015), (document available on file with one of the authors). Eva Kor testified in different trials of the Holocaust and notably in that of Josef Mengele. On this, *see* Y. Dori-Deston, ‘A Trial without a Defendant: The Mock Trial of Dr. Josef Mengele in Jerusalem’, in this volume, pp. .

<sup>91</sup> Fulbrook, *supra* note 36, p. 350.

<sup>92</sup> [www.youtube.com/watch?v=W70\\_eRdBUZk](http://www.youtube.com/watch?v=W70_eRdBUZk), accessed 19 May 2023.

<sup>93</sup> Fulbrook, *supra* note 36, p. 350.

<sup>94</sup> *See* Shoychet, *supra* note 31.

experiments and had also met and achieved a degree of reconciliation with another Auschwitz doctor, Dr. Münch'.<sup>95</sup> So perhaps it was aforethought, if not scripted.

**< Insert Figure 2: Eva Mozes Kor and Oskar Gröning >**

Credit: CANDLES Holocaust Museum

Kor subsequently explained her gesture as 'two old people reaching out' and specified:

My forgiveness has nothing to do with the perpetrators. It is for my healing alone. The reason I am speaking out is because so many survivors are still suffering emotionally, 70 years later, and they do not understand they have the power and the right to forgive.<sup>96</sup>

For Kor, '[f]orgiveness is the best revenge because then the perpetrator doesn't have any more power over your life'.<sup>97</sup> While Kor believed that prosecutions and trials of former SS should be discontinued, she saw value in truth-telling and advocated for some form of community service for Gröning – an obligation to reach out to audiences and tell the truth.<sup>98</sup>

Perhaps unsurprisingly, Kor's gesture stirred controversy. Other plaintiffs questioned why she even was taking part in the criminal proceedings as a co-plaintiff.<sup>99</sup> As Tsinas notes, 'some agree

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<sup>95</sup> Fulbrook, *supra* note 36, p. 351.

<sup>96</sup> *Ibid.*, p. 352.

<sup>97</sup> ADL Mountain States, Eva Mozes Kor, Holocaust Survivor and Mengele Twin, Shares her Story (2 April 2015), <https://mountainstates.adl.org/eva-mozes-kor-holocaust-survivor-and-mengele-twin-shares-her-story/>, accessed 19 May 2023.

<sup>98</sup> See Fulbrook, *supra* note 36, p. 352.

<sup>99</sup> See e.g. Shoychet, *supra* note 31; D. Scally, 'Auschwitz survivors row over forgiveness', *The Irish Times* (27 April 2015), <https://www.irishtimes.com/news/world/europe/auschwitz-survivors-row-over-forgiveness-1.2191094>, accessed 19 May 2023. The exact number of plaintiffs is subject to some slight uncertainty – one source says 49 and another source says 50. Compare Scally with B. Knight, 'Auschwitz survivor angers co-plaintiffs in SS officer trial by saying prosecutions should stop', *The Guardian* (27 April 2015),

with Kor's forgiving attitude against the former Nazi bookkeeper accused of accessory to the murder of approximately 300,000 people while others, perhaps the majority of the victims, totally disagree'.<sup>100</sup>

Tsinas nicely sums it all up, beginning with his stylization of this moment as a 'monopolising scene' that 'manages to retain a powerful, symbolic impact':

The scene created a kind of 'paradox' ... : instead of paying attention to the crimes of the accused under trial, by imagining him as a young person conducting atrocities against fellow men of a young age (even against little children), the then-viewer of the scene, as well as anybody else observing this unique moment of Kor and Gröning today, is moved to focus on completely different things: the calmness and meekness of old age, the kindness in which two people converse with each other, the wisdom that characterises their exchange of words and the peace that their interaction exudes.<sup>101</sup>

Kor's gesture perhaps inspired another such moment in the trial of former Nazi camp guard Bruno Dey when 'Moshe Peter Loth, the 76-year-old American witness and co-plaintiff . . . tearfully hugged the accused in court and said, 'Watch, everyone, I will forgive him.''<sup>102</sup> Following this interaction, however, the German media questioned Loth's reliability and even cast doubt as to whether he had been a victim in a Nazi concentration camp.<sup>103</sup> Loth subsequently withdrew as a

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www.theguardian.com/world/2015/apr/27/auschwitz-survivor-angers-plaintiffs-trial-forgiveness, accessed 19 May 2023.

<sup>100</sup> Tsinas, *supra* note 18, p 44.

<sup>101</sup> *Ibid.*

<sup>102</sup> N. Schmidt and T. John, 'Questions over testimony of US witness in Nazi guard's trial', CNN (15 January 2020), <https://edition.cnn.com/2020/01/14/europe/nazi-trial-germany-witness-intl/index.html>, accessed 19 May 2023. On this, see Vormbaum and Streuer, *supra* note 4.

<sup>103</sup> Schmidt and John, *supra* note 102.

co-plaintiff.<sup>104</sup> Kor's co-plaintiffs did not react as vehemently to Kor's willingness to forgive, nor were they themselves in a particularly retributive mindset. Glied, after all, did not think he should go to jail and Pollack did not hate him. Rather, they expressed frustration with the fact that Kor's gesture was made publicly as they felt that her opinions as to the validity of prosecution were counter-productive. In a sense, Kor messed up the visualities of the prosecution proceedings. Through their lawyers, the other co-plaintiffs chided Kor for her 'public staging' of her 'forgiveness', and added:

Our clients would not comment here – who better than a survivor of Auschwitz knows that everyone needs to find their own way to overcome their suffering – [but] [t]he subject of this criminal procedure is NOT that Mr Gröning has done anything personally to Mrs Kor or any of the other co-plaintiffs ... . Whether it is Mrs Kor's place to forgive Mr. Gröning's participation in the murder of her relatives is up to everyone to decide for themselves. But Mrs. Kor says, 'These prosecutions must stop'. Then she should not have become a co-plaintiff.<sup>105</sup>

If anything, this judicial episode and its aftermath demonstrates that agency is unrelated to age.<sup>106</sup> Majorly delayed justice – and Gröning's trial was no exception – perhaps inevitably features aging participants, either as defendants or as witnesses. Yet, all of them retain the ability to act and think for themselves and there can be as many different reactions as there are individuals.

## **5 Concluding by Counterfactual: The Aesthetics of Silence amid Bee-Keeping and Book-Keeping**

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<sup>104</sup> *Ibid.*

<sup>105</sup> Knight, *supra* note 99.

<sup>106</sup> See Fisher, *supra* note 19, pp. 63 *et seq.*



Conversations about the legalities and aesthetics of delayed justice predicate on a trial that actually happens, such as Gröning's. This means, following investigation and persuasive evidence compilation, that a choice has been made to prosecute. But what about when, following investigation and persuasive evidence compilation, a choice is made *not* to prosecute? What story would be told by *refusing* to prosecute, *abandoning* the case, *tarrying* it further until death do all part, or *not caring* to proceed after seventy years? Or, less decisively, what about the juridical silences that emerge when an alleged human rights abuser simply runs out the clock? When there are only loose media narratives unauthenticated by law since courtroom narratives never had a chance to gel?

Let us consider the case of Vladimir Katriuk. Born in Ukraine, Katriuk was alleged to be a member of a Ukrainian battalion of the Waffen-SS between 1942 and 1944. He is specifically accused of having participated in the brutal 1943 massacre of the Khatyn village in what is now Belarus, in which 150 people were murdered. Katriuk was a long-time occupant of a prominent position on the Simon Wiesenthal Center's list for notorious war criminals. A survivor vividly recounts Katriuk's gleeful and energetic participation in the 'terrible, painful' deaths of so many.<sup>107</sup> Katriuk moved to Canada in the 1950's. He was a bee-keeper on a farm in Ormstown, Québec, a lovely little place 40 miles from Montréal. When visited by a journalist in 2012 – and in his nineties – he spoke only of bees, not about his 'own affairs'.<sup>108</sup> Katriuk remained in control, unyielding, unflinching.

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<sup>107</sup> S. Larimer, 'Why one of the world's most wanted suspected Nazis never faced justice', *Washington Post* (30 May 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/05/30/suspected-nazi-war-criminal-who-became-a-beekeeper-in-canada-dies-at-93/>, accessed 10 November 2023.

<sup>108</sup> *Ibid.*

Katriuk died – by ‘stroke or something to do with a stroke’ – in May 2015, while Gröning was on trial.<sup>109</sup> Both were contemporaries in age, but very different in the *dénouement* of their life trajectory. In 2012, in the meeting with the journalist, Katriuk cruelly taunted: ‘When it’s time to talk, I will talk. Right now is not the time for me to talk’.<sup>110</sup>

Katriuk’s peaceful passing, disturbed only by the occasional journalist, contrasts with Gröning’s apparent hunger (whether performative or genuine) to repudiate Holocaust denial and lay down his moral guilt while remaining ironically phlegmatic about his legal responsibility. True, Katriuk faced legal challenges, including a court finding that he had falsely obtained Canadian citizenship; but the Canadian government never stripped him of his citizenship. When the Russian Federation requested his extradition to Moscow to be tried for alleged war crimes, the Canadian government balked. Canada did not hesitate because of due process concerns, or legal worries, or rectitude regarding jurisdiction, or concerns about the declassified evidence from Soviet interrogators about Katriuk’s conduct. Rather, the Canadian government ignored the request because of ‘Moscow’s annexation of Crimea and its interference in Ukraine’, according to press reports.<sup>111</sup> So, then, it was politics – pure and simple – that parlayed what could have been delayed justice into defeated justice. Is that a pleasing ‘look’ or ‘sound’?

Perhaps therein lies a justification for persevering with delayed justice. There is no deterrence for an old man who has committed no crimes since his war crimes; there is paltry specific retribution for someone who has lived out a good life and who risks only a handful of future months or years

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.* Katriuk is not the only former Nazi in Canada to run out the clock on long-term languishing extradition proceedings. Helmut Oberlander, an interpreter for the Einsatzkommando, died in September 2021 at the age of 97 after fighting for nearly 26 years to remain in Canada. See L. Carter, ‘Nazi war crimes suspect dies before extradition’, *Deutsche Welle* (23 September 2021), <https://www.dw.com/en/nazi-war-crimes-suspect-in-canada-dies-before-extradition-to-germany/a-59275568>, accessed 19 May 2023.

that, for compassionate reasons, could not be spent in jail anyway; and, not to be cynical, rehabilitation seems pointless. But silences speak, too. Juridical blankness may trigger stymied stories and stalled tales, and these might teach us something even more absurd than putting a feeble old man on trial, namely, the greater feebleness in not trying such a man.

What is more, and last for now: Tsinas' notion of 'asymmetry' – the pathos that results from the imagery of a grandfatherly and gentle old man being prosecuted for atrocity – offers an important reminder. This is that the weak and frail, the kindly and the huggable, are capable – now, and in their former selves, in times past – of committing terrible acts of violence. Atrocity is not only the province of the big and tough and monstrously tall; indeed, so much pain can flow from the hands of the meek and weak and soothingly small. Power, after all, is situational, just as it is temporal. It ebbs and flows, lapses even, through time; it shifts and shrinks and widens, within particular spaces and places. Perhaps delayed justice for defendants transitioning from life to death can help the public better appreciate this vexing etiology of mass atrocity.

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