

OPINION NOTE

The Bystander, the Good Samaritan and the Just in the Holocaust and international humanitarian law

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Despite the thousands of pages written and words said about the Holocaust, I still am at a loss in trying to understand it. How a European people with a rich cultural tradition that produced some of the world's greatest composers, philosophers and poets could invent, enforce and docilely follow the first industrial genocide in human history remains, for me, an enigma. This essay focuses on the Jews, both numerically and ideologically the principal, but not the only, victims, the Roma being the other principal victims.

In my reflections, I will not speak of the architects and enforcers of the Holocaust, nor of the victims. Rather, I will speak of three categories of

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non-participants: the Bystander, the Good Samaritan and the Just. I define the Bystander as one who is aware of harm but nonetheless looks away or chooses not to act. The Good Samaritan is one who complies with a duty to help others – so long as they take on no major risk themselves. The Just is a person who risked his or her life to save Jews. I realize that these categories are fluid and interchangeable, rather than static – a Bystander who denounced a Jew in hiding would transform, at least temporarily, into a participant or facilitator of the Holocaust. A change in behaviour therefore changes the categorization, at least temporarily.

For example, thousands of French police transformed from Bystanders into participants or enforcers in rounding up Jews in Paris in the infamous Vel d'Hiv deportations of July 1942. Half a century later, in 1995, President Jacques Chirac nobly admitted the responsibility of France for Vichy complicity in the Holocaust.

This paper looks at the Bystander, the Good Samaritan and the Just, drawing from Christian tradition to examine the behaviour of the (largely Christian) populations of Europe during the Holocaust.

The Bystander

Murders on the scale of the Holocaust are not possible when the body politic stands up for the rule of law, human dignity and equality for all. The murder of 6 million Jews would not have been possible without the acquiescence, if not complicity, of the peoples of Germany and of occupied Europe. In other words, the Holocaust could not have happened without those who had a good idea of the harms being perpetrated but who averted their eyes and did and said nothing.

As a collective, Bystanders bear a heavy moral responsibility. What is more difficult to assess in the abstract, however, is the moral responsibility of each individual Bystander. Bystanders may be involved in various ways – via acquiescence, complicity or participation – and each of these corresponds to a different and increasing degree of moral responsibility. Every person's situational circumstances, such as their knowledge, proximity and ability to help, must be taken into account in order to assess responsibility.

In rare cases, would-be Bystanders banded together to reject complicity with the Holocaust as immoral, and as a result, Jews were saved – as in Denmark, or in the Protestant hamlet of Chambon sur Lignon in France. Why, then, did majorities stand by in most cases?

The fear of German retribution against the rescuer and his or her family was a major factor. It was not only the rescuer who faced the danger of the death penalty, but also the protester who faced the heavy risk of Nazi retribution. And while the French cardinal Pierre-Marie Gerlier and a number of French bishops made statements in support of Jews and were not sanctioned by Nazi occupiers, this did not provide adequate reassurance for lower-profile priests or private individuals.

So what, then, motivated Bystanders to *be* Bystanders?

There was, of course, the anti-Semitism so effectively disseminated by the Goebbels propaganda machine, but this is an incomplete explanation. After all, a

country as anti-Semitic as Poland in those days had the highest number of the Just proportional to the population as a whole – that is, of those who risked their lives to save Jews.

There was the societal stigma attached to Jews, which discouraged others from speaking up on their behalf.

There was the satisfaction of getting rid of perceived competition or persons who were often different from, and resented or even envied by, the majority. For some, there was even sadistic joy in getting rid of Jews.

There was the Catholic Church, with its great influence, which often espoused anti-Semitic sentiment and was mostly conspicuously silent in the face of suffering – but which nevertheless saved a great many Jews, largely through its convents and monasteries.

There was the tradition of respect for and obedience to authority and leadership, even to manifestly unjust and brutal laws. This was a major factor for compliance in Germany and even in a country as historically friendly to Jews as the Netherlands.

There was the prospect of material advantage, as multitudes benefited from assets, businesses and apartments left behind by Jews murdered in death camps or shot by the Einsatzgruppen.

And finally, there was the ubiquitous tendency to turn away from the person in need next door. Nobody expressed this better than Pastor Martin Niemöller, in a poem first delivered in prose in a speech in 1946.¹

*First they came for the Communists
And I did not speak out
Because I was not a Communist*

*Then they came for the Socialists
And I did not speak out
Because I was not a Socialist*

*Then they came for the trade unionists
And I did not speak out
Because I was not a trade unionist*

*Then they came for the Jews
And I did not speak out
Because I was not a Jew*

*Then they came for me
And there was no one left
To speak out for me*

1 Matthew D. Hockenos, *Then They Came for Me: Martin Niemöller, the Pastor Who Defied the Nazis*, Basic Books, New York, 2018.

Some might read this poem as an argument for action out of self-interest. I would suggest, rather, that it is an argument for action against injustice out of morality and shared humanity – even if we come to recognize our shared humanity most readily through shared suffering. Whether or not others speak out for me, I should still speak out for the ill-treated.

I end my discussion of the Bystander, or the Bad Samaritan, by paraphrasing the war historian Professor Sir Michael Howard's wish, expressed in his Holocaust memorial lecture at the Oxford University Habad Society in 2008, that we will not be those who simply let this happen – that we will not think the kind of thoughts and tolerate the kind of behaviour that ultimately makes genocides possible.

The Good Samaritan

The biblical story of the Good Samaritan is inextricably linked with the duty to love one's neighbour and with the identity of that neighbour. Who is the neighbour whom the Good Samaritan has a duty to help? Did the Jews persecuted by the Nazis "count" as such neighbours?

When challenged by a lawyer as to how to inherit eternal life, Jesus answers, first, that he must love God, and second, that he should "love thy neighbour as thyself". The lawyer then asks, "And who is my neighbour?"² Jesus answers with the Parable of the Good Samaritan,³ in which a man on his way from Jerusalem to Jericho is attacked by robbers who strip him, beat him, and leave him "half-dead". Passing by, first a priest and then a Levite⁴ see the man but fail to act. But a Samaritan who travels by, moved by compassion, treats him and takes care of him. Jesus concludes that it was the person who showed mercy that acted as a neighbour to the victim.

The parable is thus not neutral as to who has acted justly, but rather clearly favours the Samaritan and compassionate mercy. Saint Paul goes further in his first epistle to the Corinthians, when he prioritizes charity ("love") even over faith.⁵ And historically, it is always the Samaritan who has been favoured by readers of the parable, across the centuries.

Helping a person in need is advocated not only by the Gospels, but by philosophers of ethics as well. As Kant explained, "the maxim of common interest, of beneficence toward those in need, is a universal duty of human beings, just because they are to be considered fellow men".⁶

This, too, is reflected in the Parable of the Good Samaritan. The parable describes the Samaritan – himself a member of an unpopular minority – as the

2 Luke 10:25, 29–30.

3 *Ibid.*

4 Levites were members of the Tribe of Levi who acted as assistants in the temple.

5 Corinthians 13:13.

6 Immanuel Kant, *The Metaphysics of Morals*, Cambridge University Press, Cambridge, 2017, p. 217.

good person, who helps a stranger. Meanwhile, the parable says nothing about the victim or his ethnicity or religion.

Already in the Old Testament, Leviticus commands “thou shalt love thy neighbour as thyself”.⁷ Saint Augustine advocates the idea of universality of the concept of the neighbour: “Every human being is neighbour to every other human being”,⁸ whether Christian or not.

Both when these texts were written and today, “neighbour” usually refers only to someone physically near you, with whom you presumably share some common identity and periodically interact. By making the victim anonymous, the parable makes proximity and identity irrelevant to our duties to universal humanity. And in the Sermon on the Mount, Jesus goes further still, extending the duty to love one’s neighbours to loving one’s enemies as well.⁹

Why did the Parable of the Good Samaritan choose a priest and a Levite to blame, rather than two ordinary Jews? Perhaps it was part of the campaign of Christ against the temple establishment’s emphasis on rituals, rather than on the ethical aspects of Judaism.

Another interpretation is advanced by Pastor Tyler Kleeberger, who argues that Jesus’s contemporaries would have known that Leviticus forbids priests to touch a dead body, as it would render them impure for their priestly duties and unable to consume temple offerings.¹⁰ These contemporaries would have found it natural that a priest would pass on the other side of the road to avoid contact with a person who looks “half-dead”. Thus, the priest and the Levite had to balance the conflicting demands of not touching a dead body versus loving their neighbour, and they chose the former.

Even in this more accommodating understanding of the priest and the Levite’s choices, however, the fact remains that the Parable of the Good Samaritan presents a positive view of the Samaritan. Of course, if we consider Kleeberger’s argument, we should remember that the Samaritan, in aiding the victim, is not compelled to choose between two conflicting laws, as the priest and the Levite were.

So, is the Good Samaritan a model for those who helped Jews to escape death in the Holocaust? The answer is both yes and no.

Yes, as the parable promotes the universal version of the duty to love one’s neighbour and to take appropriate actions to help them. A Christian must love all humans, including Jews.

And also, no. The relevance of the parable is not complete, as the Good Samaritan does not risk his own life for his neighbour, as did those who tried to rescue victims of the Holocaust.

If we think of a Good Samaritan as a person taking on a risk-free or low-risk action, as distinct from taking on risk to their own life, then we must accept that it

7 Leviticus 19: 18.

8 Saint Augustine, Bishop of Hippo, *The Works of St. Augustine: A Translation for the 21st Century*, New City Press, New York, 1990, Sermon 229.D.1.

9 Matthew 5:43–44.

10 Leviticus 21–22.

was extremely rare to be a Good Samaritan during the Holocaust. Those who aided Jews faced harsh punishment; most people were Bystanders unwilling even to protest. The category of Good Samaritans was squeezed out, pushing people into the ranks of the Bystanders.

Perhaps the best-known examples of Good Samaritans were the people of Denmark. They transported all Danish Jews to Sweden in an extraordinary rescue operation during the dark days of the Holocaust.

How can we explain and understand the Danes' willingness to act as Good Samaritans? The massive participation by the Danish people, combined with leadership from the king down, likely reduced the real and perceived risk faced by individual Danes, as they acted within a broader culture of resistance that provided some protection from betrayal and punishment.

The German government, too, recognized that the situation was different in Denmark and its neighbours. The heads of the SS and the involved German ministries met in the Wannsee Conference of 20 January 1942. At that conference, where they agreed on the master plan for carrying out Hitler's "final solution", the undersecretary of State of the Foreign Office warned that deportations of Jews to the east would cause difficulties in the Scandinavian States and requested that "actions" there be deferred. He did not expect great difficulties elsewhere.¹¹

The salutary model of the Good Samaritan has survived to modern times and continues to exercise beneficial influence, including on the laws of many countries – mostly civil-law countries which have legislated penal sanctions for Bad Samaritans. The most important of such laws is Article 223-6 of the 1994 French Penal Code, which imposes a prison sentence and a heavy fine for any person who wilfully neglects to aid a person in peril, so long as that aid would pose no risk to themselves or others. Interestingly, the first version of this law was adopted on 25 October 1941, by the Vichy government of German-occupied France. That early version was *not* driven by a desire to motivate citizens to help their fellow citizens in peril – rather, as Professor Edward Tomlinson has pointed out, it was intended to punish French citizens who stood by and did not assist Nazi soldiers attacked by members of the French resistance.¹²

On the moral plane, as a text enforced during the Nazi occupation of France, this law presents some hard questions. Consider a German soldier, lying in the street, bleeding after an attack by the French resistance. A French patriot may well choose to render aid – but suppose the wounded person wears an SS or Gestapo uniform, or is even a senior Gestapo officer. What should the patriot do then? What would *you* do?

Germany, too, had a law punishing those who failed to render assistance to persons in danger – and one that was in force during World War II.¹³ Of course,

11 Protocol of the Wannsee Conference, 20 January 1942.

12 Edward A. Tomlinson, "The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement," *NYLS Journal of International and Comparative Law*, Vol. 20, No. 3, 2000, pp. 470–471.

13 German Criminal Code, Section 330 (now 323c).

Jews in danger were not seen as human enough to warrant assistance, despite the law. Not surprisingly, the Reichssicherheitshauptamt imposed a decree on 24 October 1941 which required “custody for education detention”, or in some cases, deportation to concentration camps, for German-blooded persons who maintained friendly relations with Jews. It is hard to think of a stronger deterrence to aiding Jews in distress.

Despite its questionable provenance, the 1941 French law remained in force in the post-war French Republic. The duty to aid a person in distress has become an integral part of the French vocabulary – *non-assistance à une personne en danger* – and thus an important articulation of the moral disapproval of the Bad Samaritan. Of course, the law was never applied to persons failing to assist Jews as they tried to escape the long arm of the Nazis – but then again, the text was designed to apply only when the rescue would not pose a risk to the Good Samaritan, and in helping Jews, the risk was of course enormous.

The Good Samaritan and international humanitarian law

In the Good Samaritan parable, the anonymity of the victim facilitates the Good Samaritan’s humanitarian role. How does this relate to war and the laws that regulate war?

One of the best-known duties of modern international humanitarian law (IHL) is the requirement of combatants to care for the wounded and sick – regardless of which side they belong to. Yet, until the mid-nineteenth century, international law had no such requirement. The Battle of Solferino, in which wounded and sick enemy soldiers were abandoned and left to die on the battlefield, was a major turning point, serving as the inspiration for modern IHL and for the establishment of the International Committee of the Red Cross (ICRC).

The First Geneva Convention of 1864 was the first multilateral treaty to introduce the duty of combatants to care for the wounded and sick, regardless of the party to the conflict to which they belonged. This resonates with the Parable of the Good Samaritan and Jesus’s admonition in the Sermon on the Mount to go beyond the duty to love one’s neighbours and to include a duty to love one’s enemies.¹⁴

The notion of neutrality originally involved ambulances and medical corps, and only by implication the wounded themselves.¹⁵ The 1864 Convention then established that the wounded and sick – regardless of the nation to which they belong – must be collected and cared for. The later Geneva Conventions introduced the terms “respect and protect”, which imposed a further obligation on the enemy to come to the aid of fallen and unarmed soldiers and to provide

14 Matthew 5:43–44.

15 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 134.

them with the care they require.¹⁶ In his Commentary on Geneva Convention I (GC I), Jean Pictet rightly observes that the 1864 Convention's obligation to care for the sick and wounded, whatever nation they belong to, reflects the idea that a combatant who is sick or wounded ceases to be an enemy.¹⁷

In October 1863, the founding conference of the Red Cross met in Geneva. The *compte rendu* of that Conference contains a wealth of material on medical personnel, but none on the duty to care for enemy wounded.¹⁸ The same is true of the *Secours aux blessés communication*, issued in 1864.¹⁹ Soon after the 1864 Convention was adopted, however, that began to change. In his 1870 *Étude sur la Convention de Genève*, Gustave Moynier – himself a Swiss delegate to the Geneva Conference and a major figure in the International Red Cross Movement – briefly addressed the obligation towards enemy wounded.²⁰ He also addressed in greater detail the protection of local residents who help the wounded and sick, as well as the repatriation of the wounded and sick.

In particular, Moynier elaborates that helping the wounded does not constitute a hostile act.²¹ Given the frequency of leaving the enemy wounded and sick on the battlefield at the time, it is strange that he calls the duty to care for those soldiers, whichever nation they belong to, a “banal truth”.²² He argues that, while care rendered to such combatants depends on the generosity of the victorious party, the interest of reciprocity mitigates against a refusal to render such care. In any event, he explains that the 1864 Geneva Convention transformed what was once only a moral obligation into a legal duty.²³ In practice, the Convention establishes the prohibition against making any distinction between victims on the grounds of nationality, which also implies that the wounded of one's own party should not be given priority in rescue compared with the sick and wounded of the enemy.²⁴

Indeed, even in then-recent wars, Moynier acknowledges that the wounded did not have much trust in the mercy of the victors. In the Italian wars of 1859, fearing their enemies, a thousand wounded and hungry Austrian soldiers hid in the caves of Magenta.²⁵ Likewise, in the Battle of Solferino, the wounded panicked, fearing another offensive by the Austrian military.²⁶

Given that whatever obligation had previously existed was only moral in nature, and given the recent history of fear among wounded soldiers, Moynier

16 *Ibid.*

17 *Ibid.*

18 *Conférence Internationale Réunie de Genève: Compte Rendu*, Geneva, 26–28 October 1863, available at: https://library.icrc.org/library/docs/AF/AF_3012.pdf (all internet references were accessed in May 2023).

19 ICRC, *Secours aux blessés: Communication du Comité International, faisant suite au compte rendu de la Conférence Internationale de Genève*, Jules-Guillaume Fick, Geneva, 1864.

20 Gustave Moynier, *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*, Paris, 1870, pp. 189, 198–200.

21 *Ibid.*

22 *Ibid.*, p. 200.

23 *Ibid.*, p. 201.

24 *Ibid.*

25 *Ibid.*, p. 204.

26 *Ibid.*, p. 208.

concludes that there was good reason to codify in law the obligation to care for all sick and wounded soldiers in the 1864 Convention. He praises the extension to the wounded of protections previously reserved for medical personnel.²⁷

The duty of protection and care to the wounded and sick has been confirmed and expanded by later Geneva Conventions and Additional Protocols thereto, as well as under customary law. Article 12 of the 1949 Geneva Conventions I and II, for example, concerns the scope of the Conventions' applicability, making clear that they apply to the wounded, sick and shipwrecked without any distinctions based on nationality. Rule 109 of the ICRC Customary Law Study similarly notes that each party has a duty toward the wounded, sick and shipwrecked "without adverse distinction".²⁸

Article 10 of Additional Protocol I (AP I) confirms that all wounded, sick and shipwrecked persons, whichever party they belong to, shall be respected and protected. It adds that no distinction may be made among the wounded and the sick on any non-medical grounds.²⁹ Article 75(1) of AP I prohibits adverse distinctions among persons in the power of a party to the conflict.³⁰ The ICRC's Commentary on the Additional Protocols clarifies that Article 75, and indeed the entire section of AP I to which Article 75 belongs, applies also to a party's own nationals, except where the article itself indicates otherwise.³¹

Particularly important here is the ICRC's 2016 Commentary on GC I. In that Commentary, the ICRC notes that "limiting protection under common Article 3 to persons affiliated ... with the opposing Party is ... difficult to reconcile with the protective purpose of common Article 3".³²

The Commentary speaks not only of protection but also of applicability of criminal liability for violations of provisions of IHL vis-à-vis members of the same forces:

Another issue is whether armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party. Examples would include members of the armed forces who are tried for alleged crimes – such as war crimes or ordinary crimes in the context of the armed conflict – by their own Party and members of armed forces who are sexually or otherwise abused by their own Party. The fact that the trial is undertaken or the abuse committed by their own Party should not be a ground to deny such persons the protection of common Article 3. This is supported by the fundamental character of common Article 3 which has been recognized [in the 1986 *Nicaragua* judgment of the

27 *Ibid.*, pp. 208–209.

28 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 109, available at: <https://ihl-databases.icrc.org/en/customary-ihl>.

29 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Arms Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 10.

30 *Ibid.*, Art. 75(1).

31 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 2915.

32 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, para. 546.

International Court of Justice] as a “minimum yardstick” in all armed conflicts and as a reflection of “elementary considerations of humanity.”³³

The Commentary quotes for support the International Criminal Court’s (ICC) *Ntaganda* decision on confirmation of charges of 2014,³⁴ and the ICC’s *Katanga* decision on confirmation of charges of 2008.³⁵ In the *Ntaganda* judgment on appeal against the second decision on jurisdiction (2017), the ICC Appeals Chamber recognized that common Article 3 grants protection against inhuman treatment “irrespective of a person’s affiliation”.³⁶

These texts are clear and categorical and are increasingly regarded as involving persons in relation to their own forces, not only in relation to enemy forces. This concerns both war crimes (intra-force crimes) and protection/care.

While departing from classical international law, this development enhances the humanitarian values of the Geneva Conventions, and it supports the adage that charity begins at home. It remains to be seen, however, whether this humane interpretation is accepted by States.

The prohibition against adverse distinction – or, put another way, this duty to care for the wounded, whichever party they belong to – applies to both international and non-international armed conflicts. Thus, common Article 3 establishes the duty to care for persons taking no active part in the hostilities and those made *hors de combat* by sickness or wounds. Article 2(1) of Additional Protocol II provides for the application of the Protocol, without any adverse distinction, to all persons affected by the armed conflict.³⁷ Article 4(1) of the same Protocol prohibits any adverse discrimination against persons who do not take or have ceased to take a direct part in the hostilities.³⁸

Of course, the Universal Declaration of Human Rights and human rights treaties prohibit discrimination on many grounds, but IHL appears to go further in requiring that even enemy wounded be cared for without adverse distinction. In other words, it prohibits discrimination against non-nationals, even enemies. In this way, it resonates with the noble spirit of the Parable of the Good Samaritan.

33 *Ibid.*, para. 547.

34 ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-309, Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda (Pre-Trial Chamber), 14 June 2014, paras 76–82.

35 ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/0-01/07-717, Decision on the Confirmation of Charges (Pre-Trial Chamber), 14 October 2008, para. 248.

36 ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06 OA5, Appeal against the Second Decision of Jurisdiction, 15 June 2017, para. 60.

37 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 2(1).

38 *Ibid.*, Art. 4(1).

The Just, or the Righteous Gentile

The Just, or the Righteous Gentile, risked their lives to save Jews, and did so not for personal gain or advantage, but out of a sense of morality and shared humanity. The Just seem tiny in number compared to the millions of Bystanders, but after the Holocaust, a full 30,000 were recognized via the Yad Vashem “Righteous Among the Nations” title – in other words, recognized as the Just.

In addition, there were many more who saved Jews with no one to bear witness or report on their deeds. On a personal note, I think of unknown and unsung heroes, including Polish Catholics and even a German policeman who saved my own extended family members.

We should admire the Just – not only for risking their lives and the lives of their families, but also for doing something that was simply not popular within their communities. I admire their altruism, their shared perception of a common humanity, their readiness to swim against the social current, and their heroism. It is the Just and the Good Samaritan, though always vastly outnumbered by the Bystanders, who might restore our faith in humanity.

Conclusion

I end with the biblical story in which Abraham pleads with God that, in destroying the wicked Sodom, he should not treat alike the righteous and the wicked. God replies, “If I find fifty righteous ones within the city of Sodom, on their account, I will spare the whole place.”³⁹ After Abraham’s pleading, God reduces the required number of righteous to just ten.⁴⁰ But as even ten righteous could not be found, God rained burning sulphur on the town and its inhabitants, saving only the righteous Lot.

So, perhaps the number of the Just during the Holocaust was tiny in comparison to the number of Bystanders – but nevertheless, as the biblical story of Sodom illustrates, even ten righteous people can justify the salvation of many more.

39 Genesis 18:25.

40 Genesis 19:24.