Double standards and the quest for justice

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William A. Schabas

A major part of my academic career has been devoted to what is now called international criminal justice. Prevention and punishment of the crime of genocide and of crimes against humanity sits at the core of modern international criminal justice. Indeed, it has been central since the first suggestion that a country's leaders might be put on trial for an attempt to destroy a national, ethnic, racial, or religious group. I am referring to the declaration issued by France, Russia, and the United Kingdom in May 1915. Referring to what were then being called the "Armenian massacres," the declaration spoke of "these new crimes of Turkey against humanity and civilization." We now speak of the "Armenian genocide," but in 1915 the word genocide had yet to be invented. Although the term "crimes against humanity" had been used as early as the eighteenth century, by writers including Voltaire and Beccaria, this was the first time it was invoked in an international law context.

An early draft of the declaration revealed in archival research indicates that the original formulation of the three "Powers" was "crimes against Christianity and civilization." In replacing the word "Christianity" with "humanity," those who finalized the text of the declaration transformed the nature of what was being charged. To speak of "crimes against Christianity" was nothing new or innovative. For centuries, European powers had been insisting upon their right or duty to intervene in the Ottoman Empire in order to ensure the security of Christian populations. Treaties with the Turks contained "capitulations" by which a right to intervene was recognized so as to protect Christians. But when they replaced "Christianity" with "humanity," France, Russia, and Britain were transforming the concept. I do not think they themselves fully appreciated the consequences. What they were saying, in effect, was that Turkish leaders could be punished by foreign or international courts for acts of persecution directed not just against "Christians," who had long enjoyed some special protection from the coreligionists in Europe, but against all minorities, groups, and individual victims. It took little imagination to realize that the Ottoman Empire was not the only one to perpetrate atrocities against peoples within its jurisdiction. Although at the time the French, the Russians, and the British could not be blamed for crimes on the scale of the Armenian genocide, they were nevertheless responsible for a range of "crimes against humanity and civilization" perpetrated within their own imperial territories.

The Turks tried a few of their own for the crimes immediately following the end of the war, as Taner Akçam and Vahakn Dadrian have demonstrated in *Judgment at Istanbul*. But most of those responsible went unpunished. In 1920, the victorious powers dictated the Treaty of Sèvres to the Turkish government. In article 230, it revived the pledge to bring those to justice who had committed the "massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914." The Turks refused to accept the Treaty. Its replacement, the Treaty of Lausanne, contained a clause granting full amnesty.

International justice returned to the agenda during the Second World War. I was born several years after the Nuremberg Trial. I think that my first real awareness of the event was in the early 1960s, when my father took me and my brother to see the Stanley Kramer film, *Judgment at Nuremberg*. Three hours in length, it is based on a play by Abby Mann that was produced in the late 1950s and shown on national television on a program called *Playhouse 90*. The Hollywood version had an A-list cast that included Spencer Tracey, Marlene Dietrich, Burt Lancaster, Judy Garland, Montgomery Clift, and Richard Widmark. It was fiction, not a documentary, although much of it was largely derived from one of the Nuremberg Trials in which judges and prosecutors were the defendants. It also borrowed from the main Nuremberg Trial, that of Goering, Hess, and the others, with an episode in which a horrific documentary film about the concentration camps was shown in court. The original documentary film had been made by John Ford and was actually shown at the first week of the Nuremberg Trial in November 1945. Many viewers were shocked, but not my brother and I, because our dad held his hands over our eyes so that we would not see it.

There were other troubling aspects to the film. It was unsettling because it left viewers troubled about the fairness of the proceedings. I don't mean a concern that the rights of the defendant were being observed. On that score, the film made it clear that the accused were properly treated and very ably defended. The stern and principled defense lawyer for the main accused in the trial was played by Maximilian Schell. His character was named Oskar Rolfe. The performance earned Schell an Oscar for best actor. At the very end of the show he makes his final plea to the court. It is perhaps his finest scene in the entire film. Let me show the clip, available on YouTube (www.youtube.com/watch?v=AjCGpBUCOOM):

> OSKAR ROLFE: Your Honors, it is my duty to defend Ernst Janning. And yet Ernst Janning has said he was guilty. [*Turns to look over at Janning in the dock.*] There is no doubt he feels his guilt. He made a terrible mistake in going along with the Nazi movement, hoping it would be good for his country. But … [*Wheels on the judges; says what he has felt for years.*] … if he is to be found guilty, there are others who also went along who must also be found guilty. Herr Janning said we succeeded beyond our wildest dreams. Why did we succeed? [*Bends forward.*] What about the rest of the world Your Honors? [*Smiles scathingly.*] Did they not know the intentions of the Third Reich? Did they

> not hear the words of Hitler broadcast all over the world? Did they not read his intentions in *Mein Kampf*, published in every corner of the world? [*Pauses; bends forward.*] Where is the responsibility of the Soviet Union, who in 1939 signed a pact with Hitler and enabled him to make war? Are we now to find Russia guilty? [*Pause.*] Where is the responsibility of the Vatican who signed the Concordat Pact in 1933 with Hitler, giving him his first tremendous prestige? Are we now to find the Vatican guilty? [*Bends forward.*] Where is the responsibility of the world leader, Winston Churchill, who said in an open letter to the *London Times*, in 1938 – 1938! Your Honors, "Were England to suffer a national disaster, I should pray to God to send a man of the strength of mind and will of an Adolf Hitler." Are we now to find Winston Churchill guilty? [*With special emphasis.*] Where is the responsibility of those American industrialists who helped Hitler to rebuild his arms and profited by that rebuilding? Are we to find the American industrialists guilty? [*Pause.*] No, your Honor. Germany alone is not guilty. The whole world is as responsible for Hitler as Germany. It is easy to condemn one man in the dock. It is easy to condemn the German people – to speak of the "basic flaw" in German character that allowed Hitler to rise to power – and at the same time, comfortably ignore the "basic flaw" of character that made the Russians sign pacts with him, Winston Churchill praise him, American industrialists profit by him! Ernst Janning says he's guilty. If he is, Ernst Janning's guilt is the world's guilt – no more and no less.

The film left Oskar Rolfe's eloquent questions unanswered.

I don't think that I gave much concern to Nuremberg for another 20 years or so. When I studied law at university, there were no courses in international criminal justice, as there are today. There had been no repetition of the Nuremberg experiment. A few specialists knew that in 1948 the United Nations General Assembly had asked the International Law Commission to pursue work on the establishment of a permanent international criminal court. The activity was halted by the Assembly in 1954 and, by the early 1980s, when I was at law school, it had yet to be revived. At the end of the 1970s, the General Assembly had authorized the International Law Commission to renew its work on something called the Code of Crimes Against the Peace and Security of Mankind. In 1983, about the time I was finishing law school, the International Law Commission suggested to the General Assembly that it made no sense to draft a Code of Crimes and not, at the same time, to create an institution for its enforcement. The Assembly ignored the suggestion for several years.

I don't recall that we were ever taught about the Nuremberg Trial at law school. I don't think it was ever even mentioned. Perhaps in a course on human rights law there might have been an isolated reference.

I do, though, think that the message in Oskar Rolfe's speech continued to haunt me as, I am sure, it did others. Much later, as a scholar engaged in a

discipline for which the Nuremberg Trial is the seminal event, I came to fully understand and respect its accomplishment. I also became aware of the attacks on the judgment from sinister sources, including racists who call themselves pseudo-historians and whom we now label as "deniers." They attempt to stigmatize Nuremberg as "victors' justice."

"Victors' justice" is a nebulous term. Perhaps it has several meanings. The Holocaust deniers lump together several challenges to the authority of Nuremberg: they say the trial was unfair because this was *ex post facto* justice, convicting men of crimes that had not been codified when they were committed; they claim the Allies did the same thing and were not punished; they insist that the trial was run by the victors in order to convict the vanquished, rather than by neutral judges and prosecutors. There are good answers to each of these complaints, although I don't propose to deal with them all in detail here. That the crimes were being prosecuted retroactively was satisfactorily addressed when the judges said that the prohibition of *ex post facto* prosecution was a rule of justice, and that it would be contrary to justice to leave the Nazi crimes unpunished. The charges about a lack of procedural fairness do not stand up to any scrutiny either, although it should be obvious enough that we cannot use today's fair trial standards to assess what happened 70 years ago.

More attention is required with respect to the claim that the Nuremberg Tribunal failed to deal properly with the crimes of the Allies. This point should not be confused with that of the double standards implicit in the creation of the Tribunal, something that I think is very close to Abby Mann's argument, expressed through the voice of Oskar Rolfe. I will return to this in a few minutes. There are two main issues with respect to the treatment of Allied crimes by the Nuremberg Tribunal: submarine warfare directed at neutral merchant shipping, and the Katyn massacre. Both are invoked in attacks on the credibility of the judgment. The suggestion is that they showed improper motives, inconsistent with fair and impartial judgment. Let us take a closer look.

Two of the defendants, Karl Dönitz and Erich Raeder, were admirals. Amongst many other crimes, they were charged with waging unrestricted submarine warfare upon merchant ships, whether enemy or neutral, in violation of the 1936 Naval Protocol that Germany had accepted. The defense produced evidence from an American admiral, Chester Nimitz, stating that the United States had done the same thing, and an order from the British Navy to the same effect. It is widely believed that Dönitz and Raeder were acquitted of the charge for this reason. The implication is that if the United States and Britain had carried out the same practice, the judges refused to convict out of their own misguided and improper loyalty. But the truth is that Dönitz and Raeder were not acquitted. The judgment states:

> In view of all of the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answers to interrogatories by

> Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war, the sentence of Donitz is not assessed on the ground of his breaches of the international law of submarine warfare.

As I read these words, the judges at Nuremberg did not exonerate the German admirals, and they did not exonerate the British and the Americans either. Rather, they confirmed that such conduct was contrary to international law. Out of fairness to the accused, they declined to "assess" a sentence. The judges acted in a principled, not a cynical, manner.

The other charge concerns the Katyn massacre of approximately 20,000 Polish officers. In early 1943, mass graves were discovered at Katyn and other locations deep within the Soviet Union by the Germans. The Germans assembled a team of friendly scientists and conducted a rather superficial inquiry. It concluded that the Soviets were responsible for the killings, claiming they took place after the partition of Poland, in September 1939, but before the German attack on the Soviet Union, in June 1941. Several months later, the Soviet armies retook the territory in what was by then their inexorable march westward. In turn, they held their own inquiry that set the date of the killings in late 1941, and that the Germans were responsible. To the outside world, this was the fog of war. Both sides were, of course, quite capable of committing the crime.

When the prosecution teams met to prepare the Nuremberg Trial, the Soviet lawyers insisted on including a reference to Katyn in the indictment. A 65-page document, the indictment devotes all of 13 words to the Katyn charge – a reference that was quite literally drowned by other Nazi atrocities, some of them much larger in scale. The Soviet prosecutors thought they could prove German responsibility for Katyn by filing the report of the commission of inquiry that their government had convened. But the uncooperative defense lawyers objected, insisting that they be allowed to call evidence to rebut the allegations. The final two days of the evidentiary portion of the trial was taken up with hearing witnesses called by the German and then the Soviet lawyers.

Many of today's historians look at the transcript and think the German lawyers wiped the floor with their Soviet counterparts. That is not my reading of the transcript. I practiced criminal law for several years and think that I know how to read – and interpret – a transcript. If anything, the Soviet evidence was more compelling. That's not to say they carried the day, because they had the burden of proof. They had to establish German guilt beyond a reasonable doubt. At that task, they certainly did not succeed. But the defense witnesses did little more than deny any knowledge of the massacre. The defense lawyers even failed to produce the report of the commission of inquiry that the Nazis had organized in 1943. Diplomatic observers at the trial, according to records I have consulted in the British archives, did not find the German case to be very impressive. The reaction of journalists from the *New York Times* and the *London Times* was to the same effect.

The judgment, issued at the end of September 1946, does not even mention Katyn. Unlike the judgments of modern-day international criminal tribunals, the judges did not review all of the evidence systematically. Many details of the prosecution evidence were not referred to explicitly. But Katyn had been a big issue during the trial. The silence of the judgment on the subject is quite eloquent. Perhaps even more striking is the reserve of the Soviet judge, who wrote an important dissenting opinion on several points. But he, too, preferred to say nothing.

In effect, the German defendants were acquitted of the Katyn charge. I think the judges did not speak to the subject explicitly because of the nature of the crime. Here was a criminal act on a large scale for which there were only two suspects. It was hard to speak of German innocence without implying Soviet guilt. But the Soviets were not charged by the Tribunal and it would have been unfair to blame them. Under the circumstances, the judges probably did the right thing. Moreover, the Soviet judge, Iona Nikitchenko, behaved honorably.

Both of these episodes of the trial – the submarine warfare charge and the Katyn massacre – were dealt with in an appropriate manner. Within the framework of the Charter of the International Military Tribunal, and bearing in mind its jurisdiction, the judges cannot be faulted. Justice was done. The judges did the right thing. But did those who established the Tribunal do the right thing? The prosecutors of the International Military Tribunal had no authority to charge anyone other than "the major war criminals of the European axis." The judges had no jurisdiction to consider cases of war crimes perpetrated by anyone other than "the major war criminals of the European axis." The four victorious powers (the United States, Great Britain, France, and the Soviet Union) that agreed to establish the Tribunal at the London Conference in July and August 1945 were quite free to enlarge the jurisdiction so as to include crimes committed by other parties to the conflict. It does not appear that they gave the matter any thought. In his report to the President of the United States following the trial, the American Prosecutor, Robert Jackson, said that there had been some dispute with the Soviets who wanted to define the crimes in such a way that only Germans could be perpetrators. He explained that he had insisted that international crimes could only be defined in broad terms applicable regardless of the nationality of the offender. But was there really a disagreement between Washington and Moscow? If there was no prospect of punishing Americans or Russians for war crimes, did it matter whether the crimes were defined generically, applicable to all?

Nearly half a century elapsed before a second generation of war crimes tribunals was contemplated. In the early 1990s, the United Nations Security Council established the international criminal tribunals for the former Yugoslavia and Rwanda (the ICTY and ICTR, respectively). Their jurisdiction was essentially defined in terms of territory. The ad hoc tribunals did not solely target one of the parties to the conflict. To that extent, they were hailed as an improvement on Nuremberg. But in fact they suffered from the same flaw, because those who

created the tribunals – in this case, the United Nations Security Council – tried to make sure that their own vital interests were immune. At this, they were relatively successful. Probably because the United States had not really anticipated direct military intervention without Security Council authorization, it inadvertently left a door ajar. In 1999, when NATO forces attacked Serbia, the Prosecutor initiated an investigation into their conduct. Some American senators were scandalized. It was a false alarm, because the Prosecutor quickly concluded that there was no basis to pursue charges of war crimes.

The real breakthrough was the International Criminal Court. In a rebellion against UN Security Council domination of international justice, a broad coalition of small and medium powers – ranging from Germany and Canada to South Africa, Argentina, and Singapore – successfully campaigned for a court with a truly independent prosecutor. Unlike the predecessors at Nuremberg and the ad hoc tribunals, the Prosecutor of the International Criminal Court can decide to take cases anywhere they can establish jurisdiction. The Prosecutor can also refuse to exercise jurisdiction even when asked to do so by the Security Council. It is a huge improvement.

The full extent of this radical transformation was not initially apparent because the first Prosecutor of the International Criminal Court showed great deference to powerful, wealthy states, notably those that were permanent members of the UN Security Council. For example, according to *Wikileaks*, US diplomats reported that the Prosecutor of the court had quietly and unofficially assured them that he would not meddle in the Iraq situation. His successor, who took office in mid-2012, slowly began to occupy the sensitive zones that the first Prosecutor had avoided. By 2015, she was reporting on preliminary investigative activities with respect to four of the most powerful armies in the world, those of the United States, the United Kingdom, Russia, and Israel. Hitherto, these countries had been untouchable because of the protection provided by the Security Council, or untouched because of the timidity of the Prosecutor.

This is probably the biggest step since Nuremberg towards tackling the double standards' critique articulated by fictional defense lawyer Oskar Rolfe in *Judgment at Nuremberg*. Actual prosecutions relating to the activities of the United States, the United Kingdom, Russia, and Israel, only one of which is a party to the Rome Statute (the United Kingdom), poses great legal and practical challenges. Already, even at this early stage, the messages being sent are extraordinarily important. In the immortal words of Nobel laureate Bob Dylan, in "The Lonesome Death of Hattie Carroll," they show that "the ladder of law has no top and no bottom" and that "even the nobles get properly handled."

In one form or another, most of my work for the past quarter of a century has been devoted to the promotion of human rights, including accountability for genocide, crimes against humanity, and war crimes, and justice for the victims of atrocities. I have been haunted throughout this activity by the ideas expressed in Oskar Rolfe's concluding speech to the Nuremberg Tribunal. Unease about

the double standards problem has prompted some to abandon the whole project, out of a conviction that if justice cannot be delivered in an even-handed manner, it is somehow fatally flawed. From my perspective, that is taking things too far. The challenge, today and in the future, is to deliver as much justice as can be achieved while constantly trying to dislodge those obstacles that perpetuate double standards. I've seen some measure of progress over the years. It is enough to convince me that there will be more in the future. Things are moving in the right direction. As stated in the concluding line of Jean-Paul Sartre's play *Huis clos*: "Continuons…" ("Keep going…").