

TRANSCRIPT

"INCITEMENT ON TRIAL: PROSECUTING INTERNATIONAL SPEECH CRIMES"

A conversation with Richard Ashby Wilson, Linda Lakhdhir, Marko Milanovic and Nadine Strossen

Moderator: Aryeh Neier

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ANNOUNCER:

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ARYEH NEIER:

Good evening. I'm Aryeh Neier. I am-- president emeritus of the-- the Open Society Foundations. And-- it's my pleasure to-- preside-- this evening over a discussion of-- what I think is an extraordinary book. (COUGHS) The book is entitled *Incitement on Trial: Prosecuting International Speech Crimes*. And it is-- written by Richard Ashby-- Wilson.

I will-- introduce the-- the speakers-- this evening before-- we start-- the discussion. But I-- I want to say-- just a few words-- about the book be-- before we get started. I think it's an extraordinary book because-- Professor Wilson-- draws not only on-- international law-- but also on-- social science, research and also on the philosophy of language-- in-- discussing the-- the question (COUGHS) of-- incitement-- to commit-- great crimes.

And incitement has been-- an immensely-- important issue-- in-- the-- international criminal-- jurisprudence-- that has taken place-- in the-- the nearly quarter of a century-- since the establishment of the-- the International Criminal Tribunal-- for the former Yugoslavia. It has figured in-- the-- the jurisprudence of the ICTY. It has

figured in the-- jurisprudence of the International Criminal Tribunal-- for Rwanda. It has figured in the-- the jurisprudence-- of the-- the International Criminal Court.

And-- it has figured in in-- this-- International Criminal-- Jurisprudence-- because the kinds of crimes-- that are-- adjudicated-- by those tribunals-- often-- result-- or may result-- from periods in which-- there has been an effort to-- to generate-- hatred-- against-- a minority-- that is-- ethnic cleansing-- in-- ex-Yugoslavia-- genocide in-- Rwanda-- and-- other-- such crimes-- involve the-- the dissemination of hate.

We have-- a number of-- current-- examples-- of that sort of thing. One-- that I think is-- particularly-- significant is-- what is now taking place in-- in Myanmar, (SLAP) in Burma-- with-- respect to the-- the Rohingyas. To what degree-- did-- the incitement of hate-- or the incitement of-- of crimes-- play a part-- in-- the-- forced exodus of-- several hundred thousand-- Rohingyas and-- the-- the killing-- and rape and-- other abuses-- suffered by-- the Rohingyas?

So all-- all of that is-- part of our-- discussion-- this evening. The author of-- *Incitement on Trial*-- Richard Ashby-- Wilson-- is going to-- to speak f-- first and talk about some of the-- the main-- arguments-- of the book. Richard Wilson is the-- Gladstein Distinguished Chair of Human Rights-- at-- the University of Connecticut.

I should say to-- those who-- who may know the-- the Open Society Foundations, the name Gladstein-- actually is very important-- in-- this institution. That is, Gary Gladstein-- was a business associate-- of George Soros. He was the-- the business (NOISE) associate-- George relied on most-- in the-- the creation-- of the-- the Open Society Institute. So I-- dealt with Gary Gladstein quite extensively-- in the period as-- that the Open Society Institute was being-- established.

And independently, Gary Gladstein-- has-- endowed the-- the chair of-- of Human Rights-- at the-- the University of Connecticut. Professor Wilson is also professor of Law and Anthropology at-- the University of Connecticut. And he is currently a visiting scholar-- at the Russell Sage Foundation. And then in the order in which we'll-- proceed-- we are very fortunate to have-- Nadine Strossen-- my longtime friend and colleague-- on-- video.

Nadine-- was the-- the president of the American Civil Liberties Union from-- 1991 to-- to 2008. She is the John Marshall Harlan-- Professor of Law at New York-- Law School. And one of the reasons-- or the reason that she is on video rather than present here-- this evening is, she has a class-- this evening. And therefore by taking part in-- this discussion by video-- she can go-- directly-- into her-- her class. And Nadine is also-- known particularly-- as a scholar and advocate-- for freedom of speech. And she is the author of a-- forthcoming book-- on-- hate speech.

And then-- we have-- with us on the-- the panel-- Professor Marco Milanovic. He is associate professor of Law at the-- (NOISE) University of Nottingham-- School of Law. And he is-- (NOISE) vice president of the-- European-- Society of-- International Law. And-- I asked him-- before the panel started-- whether he might say something about-- one extraordinary case-- that-- is discussed-- in-- Professor Wilson's book,

discussed at length-- in Professor Wilson's book.

And that is the-- the unfortunate-- trial-- of-- Vojislav Šešelj-- before the-- the International Criminal Tribunal-- for the-- the Yugoslavia (SIC). I-- I'd make my-- my own comment. And that is, for those of you who (NOISE) like me-- followed the-- the wars in the-- former Yugoslavia-- many of you may-- think that of all the scoundrels-- in-- that conflict-- Šešelj deserves to be-- put at the-- the top of the list.

Nevertheless-- after spending a long period in confinement in advance of trial, in part-- because of contempt of court that he had engaged in a number of times-- during the-- the pretrial-- proceedings-- Šešelj was-- eventually acquitted-- by the-- the International Criminal Tribunal for the former Yugoslavia.

And there is a lengthy but-- to me, riveting chapter-- of Professor Wilson's book-- that deals with the-- the Šešelj-- case. And then-- last but not least, we have also on the-- the screen-- I can't see her at this moment, but I think you can-- and I'll move-- to the-- audience when she speaks-- Linda Lakhdir-- the legal advisor of the-- the Asia Division of-- Human Rights Watch. And-- Linda Lakhdir is a-- former-- federal criminal prosecutor with the U.S.-- Department of Justice.

And we particularly wanted her-- to-- talk a little bit about-- the-- the current-- situation in-- Rakhine-- s-- Ra-- Rakhine-- state in Burma-- and the-- the exodus of the Rohingyas and the degree-- to which-- incitement-- may have played a part-- in-- the disastrous events that have been-- unfolding-- in-- in Myanmar. So with that, I w-- I would now like to-- call on-- on Professor Wilson-- to-- to-- tell us about his book.

RICHARD ASHBY WILSON:

Thanks very much, Aryeh. And welcome to all of you. I'm gonna summarize the book in-- (SLAP) I was given 12 to 15 minutes. And-- as you can see, it's-- it's a very thick book. So I'm just gonna pull out a few of the themes. But I'd just like to start with a thanks to-- Sandra Coliver for her excellent coordination of the event and-- Aryeh Neier for moderating and taking an interest, also to the commentators-- (COUGHS) Linda Lakhdir, Marko Milanovic and Nadine Strossen.

I can't think of a better panel to-- to review the book and comment on it. So writing a book-- entails toiling in years of solitude when you think no one cares. And when I picked this issue, I really thought it was kind of marginal. (LAUGH) And-- a wonderful event like this makes it-- makes it all worthwhile. So, thank you all for coming.

I was originally drawn to this question of incitement, particularly incitement to genocide, in 2003 when the media trial gave its judgment-- at the Rwanda Tribunal in (SLAP) Arusha in Tanzania. And it convicted broadcasters of RTLM for inciting the genocide, for instigating the genocide, for aiding and abetting the genocide. And crucially, it held media owners criminally liable for their ownership of-- RTLM, for their position of ownership.

This was later overturned by the Appeals Chamber. But this was really-- a groundbreaking decision on the part of an international tribunal. And it generated a lot of controversy. Diane Orentlicher, a law professor from American University, supported by-- OSF at the time, wrote a scathing review of the inconsistencies in the judgment, the overreach. And her concerns were well-founded.

So-- (NOISE) this was a very messy and controversial area of international law. There's a lot of agreement on war crimes. And the conviction rate is very, very high. War crimes go back, you know, to Grotius. You can-- 400 years of documented-- national and international law on war crimes. But-- incitement and speech crime's very new, (NOISE) it's very unsettled, it's very uncertain, lots of contradictions and very little in the way of international consensus. So, I-- I took a quick look at the-- the constitutions of the world. And only 34 out of the 198-- that were on the database that I checked, had any kind of incitement to hatred, incitement to violence provision.

So that's-- that's really a minority. So, I started within-- a bunch of questions. "Why is this such an unsettled area of law, of international law?" "How might it be more consistent?" "Why do speech crimes' trials as-- Aryeh Neier mentioned at international tribunals-- trials like the Šešelj trial, so often end in acquittal?" Here is Šešelj, the s-- the-- the-- the worst scoundrel, calling for-- the worst kinds of crimes to be committed against non-Serbs, and he's acquitted of all nine counts.

Now that was a strange trial in many ways. But it-- there's something deep there, which is that it's kind of indicative of international laws' (BEEP/S) towards-- suppressing freedom of expression, even during armed conflict and even during ongoing and systematic attacks on a civilian population.

Another question I had was, "How might the preventative capacity of incitement be augmented," since it's only ever been charged after a genocide has already occurred. So incitement is put into the convention on prevention and punishment of genocide in 1948, but it's never used preventatively. It's only been charged in the Rwandan case after all the bodies are already in the ground. So, "How can this area be more-- area of law be more consistent and be used preventatively in the way that it was designed to be used?"

I do wanna say I'm not gung-ho about-- suppressing speech and prohibiting forms of expression. I-- I try and take a cautious and sensible approach to-- to d-- delineating the limits of these prohibitions and trying to provide clearer boundaries for when it's relevant and when it's not relevant.

So-- just to pick up on-- on one thread through the book, I'll-- I'll start with this question of, "Why is the rate of conviction so low?" So the majority of convictions for spree-- for speech crimes in the international setting are for inchoate crimes. This is the only bit of law jargon I'm gonna use today. Inchoate crimes are crimes where the conduct is the crime, the act itself not the consequences.

So in U.S. law we have three types of inchoate crimes-- attempt, conspiracy and

solicitation. So, solicitation of a murder is a crime, regardless of whether the person you're soliciting takes up the idea and-- and-- and makes-- takes substantial steps to complete the-- the underlying crime. So, the majority-- 75% of convictions-- are for inchoate crimes. And the vast majority are for direct and public incitement to genocide, but really only two inchoate crimes-- inciting genocide and hate speech.

But hate speech is not well established. There's really only one case that's been confirmed on appeal. The vast majority of convictions are for inciting genocide. And they're all in the Rwanda Tribunal. The acquittals mostly happen in another area of-- of-- of completed crimes. For instance, instigating crimes against humanity or inducting crimes against humanity, where the prosecution has to show a causal nexus between the speech act (COUGHS) the subsequent offenses.

This is very hard to prove. It's very hard to demonstrate that the speech was the cause of the crimes and not some other reasons. Maybe the people had planned the attack already on the village. Maybe the army had been involved arming them. Maybe practical assistance (SLAP) had been provided elsewhere. Maybe they were going to do it anyway and the speech was simply an act of confirmation of the plans that already existed.

So it's very hard to show that the speech act itself-- as it should be hard to prove-- (LAUGH) that it had a direct causal effect beyond a reasonable doubt. There are logistical reasons for this. You need insiders, you need followers to testify that they heard the words of Šešelj, for-- for example, and they acted on it. But often they drop out. These insiders drop out during the course of the trial. M-- many times they're bribed or intimidated or worse they get on the stand and then recant and defect to the defense, as we saw in Šešelj a couple of times.

There are deeper conceptual reasons (SLAP) for why it's so hard to prove this direct causal connection. And that is, according to my review of the social science literature, this is simply not how propagandistic speech works. Its effects are indirect. And it seldom makes an essential contribution to a genocide or an attack on a population.

So while the criminal court is looking for this direct causal nexus, that's simply not the way speech works. Its effects are more unconscious. They're more (COUGHS) indirect. It may be jointly sufficient, (NOISE) but seldom is it-- making an essential contribution of the type a criminal court is looking for.

As a result of the insiders dropping out and the deep conceptual problems, prosecutors often-- and I've seen this in Šešelj but in many other trials as well-- particular at the (NOISE) Yugoslav Tribunal-- they turn to rather weak (?) chronological arguments. "This is where the defendant spoke, and look what happened next." "This is where he spoke, and then there was this violence." "He gave this inflammatory speech, and then look what happened next." But judges are not often persuaded by this. They ask questions of the kind that I've just mentioned, "What else was going on in the scenario? How do we know the speech itself was causal? Perhaps plans were in place. Perhaps the-- the speech was mere rhetoric that

was icing on the cake and the cake was already (COUGHS) cooked everywhere." I just used a metaphor.

When judges are convinced, they often use metaphors in their judgments. If you read the Rwanda convictions, there're all these metaphors about how speech is a fire or a conflagration or speech spread petrol around the country and then lit the match. They refer-- and this is at Nuremberg-- they referred to anti-Semitism as a virus spread by Streicher and Fritz that (?)-- then poisoned the minds of Germans. (THROAT CLEAR)

So they use these metaphors, the fire, a poison-- weapons. And these metaphors are misleading and I would argue, just plain wrong. No social scientist of persuasion and communication uses a hypodermic (NOISE) needle metaphor to say that a virus of Anti-Semitism is injected into the minds-- those-- those models are from the 1950s. But judges are still using them, even though social science has left them-- long behind.

So-- (SIGH) that's ten minutes. So I'm gonna come to my-- (LAUGHTER) this impossible-- I'm reminded of the artist who said, "What does your--" when-- when asked, "What does your painting mean," he said, (COUGHS) "If-- if-- if I could express it in words, I wouldn't have painted it." So, if I-- (LAUGHTER) if-- if I could express my book in ten minutes, I wouldn't have (SLAP) written 356 pages.

So anyway, (SLAP) that being said, recommendations-- my recommendations are to prosecutors, "Charge inchoate crimes, not completed crimes. Use the framework of international criminal law more preventatively, but cautiously and only in the most egregious cases where a speech act directly advocates a crime such as genocide and where the context is such that mass atrocities are imminent and likely."

For lawyers in the room who thinks (SIC) this sounds like Brandenburg, it sounds a lot like Brandenburg, which is the U.S. First Amendment case on incite. This involves, however, an assessment of risk, which is always speculative (SLAP) and very difficult to conduct. So that comes to recommendations two. That brings us to recommendation two.

When assessing risk in a deteriorating situation where a political leader or leaders or radio-- broadcasters or media figures are calling for attacks on protected groups, steer away from these folk models of speech and instead try and rigorously identify the conditions most likely to lead to imminent lawless action, which requires us to look at the social science of persuasion and political communication, which is telling us that there are factors that elevate risk. And I include these in my book.

They include the authority of the speaker, their credibility, their charisma, their graphic use of language, their calls for revenger. There's some research in the-- in the book that shows that revenge language seems to be-- the type of language which has the strongest effects on listeners in the kinds of scenarios we're speaking about, perhaps even more than dehumanizing language.

Look at the emotional state of the-- of the audience. So these are the kind of factors.

And-- and something that's been crucially identified by persuasion research is that you can persuade people, but often they'll be persuaded and then go away and do nothing. So if a speaker identifies a clear and tangible violent course of action that can be undertaken imminently and (NOISE) by the audience, then it's much more likely to occur.

So I've tried to outline some of these. And I've listed 11 factors that-- courts may use. (FEEDBACK) And I argue not just prosecutors but judges in pretrial, defense attorneys, too-- let's tie ourselves to the mask of some rigorous factors that we all agree on. The pro-- the problem is, you often have the prosecution emphasizing one group of factors and the defense another. So we need to get-- (FEEDBACK) over time, to build up a consensus of the types of situations where the risk is elevated to such an extent that it justifies this very rare intervention on the part of an international tribunal.

A note of pragmatism. Knowing what types of speech acts in situations may cause violence doesn't solve the problem of how to react to it. This is a policy choice. And I think, in my experience, the only way to get lawyers to agree to a role for social science or science generally, is by-- in-- insisting on a strong distinction between understanding the material facts and then making the legal and policy determination separately from that.

The problem in international courts is that these-- (FEEDBACK) that these processes of determining the facts and determining the policy happen all together and they're mashed up. And I'm trying to separate them so that we can bring in the social science to understand the material fact patterns and that we still may decide-- well-- put it this way. It doesn't determine what our policy choices may then be.

How we do apply this? So, I thought of a few examples. S-- Sandra Coliver asked me to talk a little bit about Burma, but thankfully we have Linda here to speak about it-- and-- and-- and other es-- experts who-- who wish to apply it. I-- I would say that-- while there have been a lot of failures with regard to the conviction of political leaders for inciting crimes against humanity and genocide, indictments do concentrate (?) the mind and may deter further calls for violence.

And I think we have seen this in Africa over about the last two to three years. In Kenya, (COUGHS) I think there has been a deterrent effect by the indictments issued by-- the International Criminal Court, in the case-- particularly of Ruto and Sang.

Even though that case failed and they were acquitted-- the elections, the recent elections were less marred (?) by interethnic violence than-- certainly than in the 1990s or than in previous-- previous election episodes. In-- during the Nigerian elections of 2015, the chief prosecutor-- Bensouda who-- who went to-- law school in Nigeria-- went to Lagos twice. And she gave press conferences that were very well covered by the Nigerian media, saying the ICC is monitoring the Nigerian elections, monitoring the language of incitement very closely and will issue indictments if political leaders-- whip (NOISE) up interethnic violence during the elections, as they

have done in the past.

And I think (BEEP/S) that did have an effect. It's interesting that she went there twice, and what she talked about was inciting language. (BEEP/S) Now these are secondary effects of international tribunals. The aim of the book is to make the primary effects of tribunals on speech crimes more consistent and coherent. Buy the book. Read it. Decide yourselves-- whether I've succeeded-- or-- even just buy the book. (LAUGHTER)

(OFF-MIC CONVERSATION)

ARYEH NEIER:

Thank you very much. I'm-- I'm now going to-- call on Nadine. Before I do so-- I want to-- raise-- (FEEDBACK) a free speech concern-- myself. And-- and the free speech-- concern-- you said this is-- like Brandenburg and-- you talked about the imminence-- of-- violence.

It's very different-- when-- we are-- in the-- the international-- arena. You mention in your book the-- the Streicher case-- in which-- the Nuremberg Tribunal convicted and-- Julius Streicher was hanged-- after-- his-- conviction. He was-- essentially hanged because of-- the virulent-- anti-Semitism-- in-- his newspaper, *Der Stürmer*-- several years prior to the-- the war.

His newspaper did-- function-- during the-- the war itself. It had-- at that point, a-- fairly miniscule-- circulation. And-- Telford Taylor, who was-- a prosecutor at-- at Nuremberg and-- afterwards the-- the chief prosecutor at Nuremberg-- expresses doubt about whether Streicher-- should have been-- convicted and-- and hanged-- a despicable character-- no doubt.

But-- Taylor says he had no contact with the-- the forces that were-- committing the-- the crimes-- in-- Poland-- and in the-- the Soviet Union. He wasn't in contact with-- with Himmler, who was-- in charge-- of-- the-- the campaigns-- against the-- the Jews. Can we really talk about-- imminence in the-- the Brandenburg-- sense-- when we have somebody-- removed in that fashion, both in time-- and in-- in space-- from the-- the actual-- commission of the-- of the crimes? Any rate-- let-- let me know-- turn this over to-- to Nadine Strossen. Nadine?

NADINE STROSSER:

Well, thank you so much, Aryeh. And it's delightful to be there and at MiraCosta (?) at the same time, so I-- I have to thank (UNINTEL) technology for that-- wonderful possibility of what I thought was impossible. Richard, I agree with Aryeh that it's just really-- a fascinating and important book.

And I've only had time to read it once, which is not enough. And it's-- it really is

gonna give me a lot to think about and to integrate into my own analysis about the American situation. I was struck that at the very beginning, literally on page two of your book-- you say it is worth noting at the outset that the speech acts adjudicated at international criminal tribunals are generally far removed from the typical instance of threatening or denigrating speech found in national criminal courts.

And I think this contextual distinction is really important. You go on to say, "Speakers charged with international speech crimes have generally articulated the most extreme animus and conscious intent to harm and have gone beyond mere insult, libel and slander to incite others to commit mass atrocities. Moreover, their utterances usually occur in a context of an armed conflict genocide and a widespread or systematic attack on civilian populations."

So I took that from the outset as imposing a lot of limiting contextual criteria on the still relatively limited and, I think-- it's very-- as you said, consciously speech respectful standard that you lay out. That said-- like Aryeh, I still have some questions.

Ab-- as a pr-- law professor, of course, I'm-- tempted to ask you directly what application, if any, you would propose for U.S. Would you propose, for example, that we should honor an inchoate crime of hate speech-- or incitement other than the Brandenburg standard? I-- I think the answer is no, but I-- (NOISE) I'd like to-- like to hear that. I would like to-- my one-- quibble is that you make a statement-- also fairly early on in the book-- I believe on page 19-- that-- hate speech has a specific legal meaning in United States.

And that in fact is-- is not true. It is not a legal term of art (?)-- for a very important reason-- namely that U.S. Supreme Court has never recognized or defined any content-defined category of speech called hate speech or speech that has a hateful message, which is for that reason unprotected under the First Amendment. Rather, along with speech, when any message or content the Court has said, in certain contexts when it directly causes a specific eminent serious harm, then but only then may speech with a hateful-- or inciting message be-- be punished.

And one of the subcategories of speech that satisfies what I call an emergency standard is, of course, the incitement standard-- very strict incitement standard from the Brandenburg case. I wanna say a little bit about that because it is the basis of your definition, Richard, as we've already discussed.

But I also think it's important because I'm-- I-- I'm s-- assume audience members are concerned about the American situation as well, where we have had a lot of calls recently to increase our punishment of speech that is geared to-- that carry a hateful message and (UNINTEL) to incite or instigate various-- adverse consequences, including-- including violence-- but also psy-- psychological and emotional harm.

The Brandenburg case, which came about from an ACLU case, although before both Aryeh's and my time-- with the ACLU in 1969. Although the immediate (SLAP) beneficiary of a very speech-protected standard-- was a member of the Ku Klux Klan

(SLAP) who was making this statement at a rally of Klan members-- the Court said that this speech had to be not only intended to but likely to bring about immediate harm or, you know, violence or-- or (UNINTEL) breaking. So both intended (SLAP) and likely, and the harm had to be imminent.

And it drew a bright line distinction between what it called mere advocacy versus intentional incitement. So the immediate beneficiary was a racist white supremacist. But in 1969, there's no doubt that given the social political-- context, the Court was very aware that attempts were made to suppress (UNINTEL) by activists on the complete opposite end of the ideological spectrum, right (?)?

Civil rights demonstrators all over the country were attempted to-- and were-- shut down by local officials, arguing that they were inciting violence and-- bringing about great harm to nat-- even national security and stability. The women's movement was then engaged in-- s-- controversial demonstrations-- representative freedom movement-- and the Stonewall-- s-- riots, let's not forget-- were-- were on the horizon. So, beneficiaries of this very speech-protective standard-- certainly included human rights (SLAP) advocates.

And I always have to remind people of that because-- when people (LAUGH) wanna suppress speech they always think it's gonna fall on the speech that-- that da-- they dislike. But-- but beware, the-- the opposite message is-- is also gonna be in danger.

Once-- you know, when-- when you think of those extreme contextual examples that you set out at the beginning of your-- of your book, Richard, and some of the other examples that you describe in the context of ongoing genocide-- and-- and you also talk s-- you-- at another point use the phrase-- "mass atrocities"-- this is what we're talking about in the international context-- it's a very far cry from what's beginning attacked and sought to be suppressed and in many cases actually suppressed here in the United States under the same rubric, right?

People use the word "hate speech" and "hate crime"-- and even violence and assault against-- most recent (UNINTEL) example I'm aware of is-- a new play by Michael Weller-- that was attacked as-- hate speech and therefore-- suppressed by (?) Brandeis University. Yesterday there was an article in *USA Today* by-- a Cor-- Cornell law professor who was attacked for engaging in hate speech and posing a danger at Vassar College because he was giving a lecture entitled, "Why Hate Speech is Protected: Free Speech under the First Amendment."

So, I think it's very sobering-- to consider speech that actually satisfies a very appropriately rigorous standard for directly contributing to genocide and other mass atrocities as opposed to the kinds of alleged harm that are being raised in this country as a supposed justification for the suppressant (?) speech.

One of the things that I found so fascinating about your-- your book, Richard, is this-- drawing together-- and apparently unique drawing together-- of (BEEP/S) legal standards with a rigorous analysis-- and drawing upon social science dr-- as Aryeh said, not only-- social science but also-- w-- language, linguistics and-- various other

empirical studies-- to rigorously break down factors that would be considered in determining whether there is a sufficient intent-- and whether there is a sufficient causal impact. And how do we assess that?

And you really highlighted the extent to which we often rely on common sense and assumptions. And-- and what is very sobering and a real wakeup call is the extent to which social science and evidence belies standard assumptions. For example, I think it's-- it's very common-- this has already been touched upon-- it's widely assumed that the most harmful kinds of hate speech or hateful (?) speech are those that are dehumanizing.

And-- and you yourself underscore what a surprising result it was that at least in some factual contexts-- and you're very careful to say that from one context to another it may vary-- but at least in some, it was not-- dehumanizing speech that had the greatest potential-- harmful impact. So this is-- very interesting and very exciting.

I think in the United States, to the best of my knowledge-- the-- empirical-- evidence that's beginning to be-- cited in debates about-- so-called "hate speech" has to do with-- psychological harm, emotional harm. And again, the-- the common sense assumption is, "Well, if words are hurtful or-- and hateful, it must be psychologically damaging to you. And therefore, shouldn't colleges protect students against that speech?"

And it's very interesting that you have-- Jonathan Haidt, another prominent social psychologist, saying, "Well, no. Actually, there is psychological evidence that it-- at least in certain contexts with certain kinds of educational-- responses, exposing students to that kind of speech can actually be positive for their mental health and for their-- their psychological development."

So this is part of an-- emerging-- blending of scientific knowledge and legal theory that I think is-- is very promising and very exciting. In fairness, in the United States-- probably because we have such a strong presumption in favor of free speech-- judges have been very skeptical about social scientific evidence that supposedly justifies suppressing speech because of some harm that it can cause. There have been two major categories-- contexts in which this has arisen here.

And one is certain speech is either outlawed all together because it is believed to lead to-- certain people who view it to engage in (?) harmful acts. And-- the most recent example in a case that went to the Supreme Court was violent videogames that are marketed to minors. And the Court found that the social scientific evidence just didn't show any causal connection at all between minors being exposed to violent video games and actually committing any kind of violent act.

On the other context which hasn't gotten to the Supreme Court but to a lot of lower courts, is-- trying to hold distributors or creators-- and-- and here, our target has mostly been expressly violent-- media seems to be in the-- in the spotlights of-- of legislators and-- and litigators-- so there have been attempts-- by tort lawsuits to hold producers of violent-- media productions p-- at least partially capable-- culpable

for crimes that are committed, like the school shootings committed after-- after visiting certain violent websites.

And again-- the courts have been very skeptical of the social scientific evidence there. So, I'm going to-- definitely be citing-- a lot of the empirical evidence that-- that you cited, Richard, in my future talks, asking people-- to be very skeptical about the allegedly adverse impact of-- of hateful or hate-- or-- hated (?) inciting speech in United States. And-- I really look forward to your answers to Aryeh's question on to-- and to my s-- my question.

ARYEH NEIER:

Thank you very much, Nadine. Professor Milanovic?

MARKO MILANOVIC:

Well, thank you. (THROAT CLEAR) It's-- it's a pleasure-- as always, Richard. And-- I had th-- I have, like-- like th-- my-- my predecessors, very much enjoyed reading your book. And the book really does have many virtues that d-- deserve-- (SLAP) it being bought. (THROAT CLEAR)

(OFF-MIC CONVERSATION)

MARKO MILANOVIC:

Especially for lawyers. And-- (SIGH) the-- the-- analytically, the part that I really d-- there are two parts that I really like the most about the book. (SLAP) One is the exploration of causation, because causation is something that lawyers have-- for example, like issues of intention as well-- always been-- questions that lawyers have been-- y-- you know, (SLAP) (UNINTEL) that y-- lawyers have used all the time for thousands of years, literally, but have been mythologically (?) really sloppy about that.

And the other is use of expert evidence and the role of experts in the courtroom and so and so. So-- those-- those parts of the book really fascinated-- me-- me the most. Now, I think it's important to-- to distinguish-- you know, between several different issues that we could be talking about here. So one is the question that Nadine was really discussing which is hate speech and this sort of domestic internal context, which produces some social harms but does not lead to or is not the precor-- precursor to-- or does not arise in the context of something that happen in my country, which is mass atrocity.

So, the-- you know, the American context and the American-- approach to free speech is not the same problem as hate speech in Germany or hate speech in-- in-- in-

- in-- in Yugoslavia. So, I-- m-- my-- my one item of caution with regard (?) to what just-- Na-- Nadine just said, is that we should not generalize also from this book necessarily to the American experience and should not generalize from the American experience to other-- societies.

So, f-- what-- what's good for the United States need not be good for Germany or for Serbia or who-- (SLAP) whoever. (BEEP/S) My second point is that I think we w-- should all agree-- and w-- we-- we are in agreement-- that most cases (SLAP) of hateful propaganda will not be legally actionable under international criminal court-- even in principle, let alone in practice.

So, in-- the-- the in principle question is what the law substantively would cover and-- and treat as a crime. The in practice issue is, (SLAP) if you are a prosecutor with very (SLAP) limited resources (THROAT CLEAR) and you have many, many, (SLAP) many fish to fry, who are you gonna focus on?

And it is rare that a pure propagandist-type case will actually be prosecuted. There are many worse cases that are easier to prove or-- or more deserving of-- of-- of legal action. And this will be true even in cases where you had a huge propaganda effort that probably had n-- an impact on these societies that is easy to prove in aggregate but difficult to prove (SLAP) when it comes to specific crimes being committed.

I think very few people will dispute that hateful propaganda had an enormous impact on the wars in the Balkans, for example. But that is not (SLAP) necessarily the same thing as proving that specific person X committed crime Y because of (?) any instance of speech. And, indeed, most-- if I-- if I look at the experience of the former Yugoslavia, most of the examples of hateful propaganda there were, I wanna say subtle, 'cause these are not exercises in subtlety.

But they are not, "Let's go kill some Croats and Muslims," whatever. It's not that type of 6. Most of that revolves around creating, molding these victimhood narratives. If you look at, for example, all the people in the former Yugoslavia, they all think they're the biggest victims in the world-- and have been such victims for hundreds of years-- at (?) normal yet the hand of the other group, no?

So, this is not ty-- the type of stuff that internationally we'd ever prosecute, I would-- I would-- I would suggest. Domestically, the irony is, you can have domestic crimes-- and in the former Yugoslavia we have-- the-- ac-- the whole (?) code crime of hate speech in most of these societies, not that anybody of these hate mongers has ever been p-- properly prosecuted for crimes that actually exist on the books. So, you know, the mere existence or not of these crimes is not necessarily something that-- that leads to actually, enforcement.

My third point is that you make many, many useful contributions in your book. But I think there's some caution that needs to be exercised in the sense that your sample is very small. So when you say the conviction rate is lower in these cases of-- of-- of-- of speech crimes, we're talking about a handful of cases. Some of these cases-- and I will now-- now turn to the Šešelj case-- really do not need to-- to be overthought. One

does not need a great theoretical--

RICHARD ASHBY WILSON:

But we're academics--

MARKO MILANOVIC:

--explanation.

RICHARD ASHBY WILSON:

--Marko.

MARKO MILANOVIC:

Sure.

RICHARD ASHBY WILSON:

We overthink, therefore (LAUGH) we are.

MARKO MILANOVIC:

Who need to sell books. (SLAP) Who need to sell books. (NOISE) Šešelj case, you know, is one of those examples of-- of-- of situations that tell you that individual decisions matter, and that it matters who gets to do what and who (COUGHS) (UNINTEL) which kind of job in some kind of institution.

And we have the wrong people in the wrong place at the wrong time, you're gonna have disaster. So the-- you know, the-- nobody in the Šešelj case was the A team of the ICTY. Let me put it that way. When it comes to the judges, we're not talking about A, B or even C.

And the French presiding judge of that trial was a crazy person. I mean, I'm being very generous here, (LAUGHTER) okay? And so when you have somebody like that in that-- you know, a guy who express his admiration towards the defendant while the trial is going on-- we have that type of thing happening-- what-- what exactly do you expect?

And then the irony of that trial was that it wasn't the French guy alone who torpedoed the-- the-- the case. It was w-- the fact that one of the two reasonable

judges, who, if I can quote the third one, Judge Lattanzi, "suffered greatly through the trial." This is what she said through-- in-- in her interview-- given to an Italian newspaper immediately after the trial was concluded, that the only way she could cope was because she had other cases there (?). (SLAP)

So the third judge, Harhoff, is the one who (SLAP) torpedoed that trial in the end because he made this (LAUGH) error of judgment in writing this email to a bunch of friends where he accused the president of the tribunal as being involved in an American conspiracy, etcetera, etcetera, etcetera, which led to his disqualification from the case, which led to his g-- replacement with-- a fourth guy who was also not in the A team, etcetera. Yeah?

So these cases have explanation that, again, do not require necessarily grand theories. And in this case, in particular, I think does not. Okay. (NOISE) Now, my-- my main point would be this. And-- and-- and let me-- let me wrap up with that. I-- I agree with (SLAP) most of what you said here. What I do not necessarily agree with-- or at least I do not think you-- is a matter you have approached with the same level of social scientific rigor, is the question of prevention.

RICHARD ASHBY WILSON:

Yeah. It's 'cause it's--

MARKO MILANOVIC:

I don't--

RICHARD ASHBY WILSON:

--impossible.

MARKO MILANOVIC:

Because it's impossible. (LAUGH) Agreed. So when you say, you know, "My hope is that a better approach (SLAP) to this stuff will lead to a better calibration of the role of international criminal law in preventing or deterring crime," that is wishful thinking.

RICHARD ASHBY WILSON:

Yeah.

MARKO MILANOVIC:

I-- judges don't understand causation. (NOISE) Thinking that a potential-- (OVERTALK)

MARKO MILANOVIC:

--perpetrator will be deterred from committing a crime because, "Aha, the judges have reached a better understanding of causation," is-- I don't-- I don't think that-- that-- that-- that's gonna happen. No. If I am thinking of waging a hateful campaign against a group because I want to get power, money, etcetera, etcetera from it, the-- the kind of things you are looking at in the book do not really touch me.

As in most of these cases, what matters to me is the likelihood somebody's gonna come after me, for whatever that might be, whatever the particulars of the legal theory or the causal theory or whatever, no? So, the-- (FEEDBACK) the fine conceptual theoretical points that you make, I think matter for us. I don't think they matter for the perpetrators of these crimes. And in particular, I don't think-- you know, the distinctions between, say, incitement and aiding and abetting and whatever, you know, that these things matter for them.

Finally, my one cautionary note is this. There is one clear (SLAP) inchoate crime of this type-- which is direct public incitement to genocide, which is in the Genocide Convention, unfortunately, which has not been translated in that way (?) into the Rome Statute of the ICC. And you spent quite a bit of time-- (NOISE) discussing it in the book. My one cautionary note is that most mass atrocities committed in the world today are not legally genocide. (NOISE)

So if I say, for example, "We should kill all the Serbs in New York," that is direct public incitement to genocide. If I say, "Let's kill all disabled people," or, "all gay people in New York," that's not genocide, because gay people, disabled people are (?) not protected groups under the Genocide Convention. See what I mean? Cambodia-- everybody here will say "The Cambodian Genocide"-- not legally a genocide because one group of Cambodians was killing another group of Cambodians for the basis-- on the basis of their social class, not on the basis of ethnicity, religion, race, yeah?

So, there is this tendency that we see all the time in activist communities and not, in using this G word-- for purposes which I think ultimately leads to devaluing other international crimes. And there's a pot-- because crimes against humanity are not less bad than genocide. Huh? (SLAP) So-- and it is not an inchoate crime to directly and publicly incite to commit crimes against humanity or to directly and publicly incite to commit war crimes. It's only for genocide. So, there's-- there-- there's the danger when-- if we focus on this crime, that we will devalue other crimes against international law, which is something I think needs to be avoided. (SLAP) Thank you. (OVERTALK)

ARYEH NEIER:

--thank you very much. But one case-- which-- may qualify-- for-- genocide or at least-- attempted-- genocide and-- attempted genocide is-- also a crime-- under the-- the Genocide-- Convention and-- is what is happening today-- with respect to the Rohingyas.

And so-- we're now going to turn to Linda Lakhdhir. Do we know-- to what degree-- incitement may have been-- a factor-- in the-- the crimes-- that have-- taken place? And I-- I should say that there are-- some-- I'm-- one of them-- who believe that-- an effort should be made-- to refer the-- the Rohingya-- case-- (BEEP/S) to the-- the International-- Criminal Court. (NOISE) And a few organizations are joining (NOISE) together-- to try to-- to secure-- a Security Council-- referral. Linda--

LINDA LAKHDHIR:

Thank you. I do feel at a bit of a disadvantage because I haven't read your book, Richard, because I (UNINTEL PHRASE) in late. But I look forward to reading it and-- hearing what you have to say. I would first say that-- we at Human Rights Watch certainly have not made a determination that this is a genocide or an attempted genocide.

But we have made a legal determination that it is ethnic cleansing that amounts to crimes against humanity. And we also released a statement yesterday or the day before calling for an ICC referral. So we definitely are in agreement with you on that-- the need for that referral. In terms of the role that hate speech may-- play, should I assume that people know what's going on or should I give them a little bit of background on what's been happening?

RICHARD ASHBY WILSON:

I say nothing.

ARYEH NEIER:

I think a little bit of background would be helpful.

LINDA LAKHDHIR:

Okay. So, the Rohingya Muslims in Burma are a-- a population living in Rakhine state on the western part of Burma. They're-- before-- August of this year, there were approximately 1.1 million of them living in that area. They are effectively deprived of citizenship by Burmese law. They have been-- discriminated against for decades.

And part of what's been going on over a period of time is sort of a continuing and progressive demonization of the Rohingya population. What has happened most recently is that there was an attack by-- a group, a militant group calling itself the Arakan Rohingya Salvation Army on-- military posts in Rakhine state that resulted in fatalities. And in response to that attack, the security forces, together with some local Rakhine Buddhists have launched essentially-- a sort of scorched earth campaign of arson, rape, killing-- and have driven over 600,000 of the population to flee to Bangladesh.

So-- the question here is really, I guess, what role has hate speech played in that? And has there been direct incitement? And I think looking at the discussion that we've had, and certainly the-- the standards that we-- at Human Rights Watch take for what actually constitutes incitement, I-- it's-- there's a lot of hate speech out there, there's a huge propaganda campaign to make the Rohingya other, both as non-Burmese-- and as non-Buddhist. But-- as far as direct incitement to kill them-- I think you're gonna-- that's much harder to find.

There is a very strong narrative that the Rohingya are not Burmese, that they are Bengali, that they came from Bangladesh, that they don't belong in Burma. People refuse to use the term Rohingya. They call them "so-called Rohingya" or "Bengalis" or the term "kalar (PH)," which is-- a derogatory term used to refer to people often of Indian origin.

And there is also-- a big-- connecting (?) of them being Muslims, not Buddhists, and Muslims being equated with terrorists (?) and violence. There's a lot of-- things on social media talking about other countries where-- there's been violence committed by Muslims, that that-- Islam is a violent religion. There's a lot of dehumanizing sort of talk, comparing-- Muslims to dogs, to-- to carp that breed and eat their young, to-- what are some of the other ones-- to dis-- despicable fleas, I believe, was one of them.

There's a lot of that sort of talk that's been going on for quite some time. But the-- I think the most troubling aspect of it, really, is that a lot of this speech is coming not just from, you know, ordinary citizens, but it's coming from people with roles of respect in society. So, a lot of it is actually coming from a group of Buddhist monks. And they are presenting this-- conflict with Muslims as a conflict for sort of the soul of Burma, for protection of Buddhism, to keep Burma a Buddhist country, to keep Burman-- Burmese identity intact.

And-- some of the most virulent hate speech has actually come out of Buddhist monks. And given the role and the-- the-- that Buddhist monks play and the reverence in which they're held, that makes that speech quite problematic. There also has been some very troubling speech coming from-- government officials-- including members of the National League for Democracy, which is the ruling party.

A lot of it, this whole idea that there are no Rohingya in Burma, that they're Burm-- Rohingyas are not Burman (PH), these are all Bengalis, that comes direct out of the mouth of government officials. That comes also out of the mouth of the commander-

in-chief of the military who, as recently as last month, said, "There are no Rohingya in Burma--" and that "we have to solve the Bengali problem."

Now he didn't say, "We're gonna go kill the Bengalis." And he didn't say, "You should all go kill the Bengalis." But there-- there is language of that type that is-- has been coming from people in a position of authority which makes it-- quite problematic. But in looking at certainly what we h-- you know, what-- what I have seen-- and I have to say, I haven't been able to do a sort of comprehensive review of hate speech-- and (UNINTEL PHRASE) Burmese I don't speak, so I-- I've relied heavily on a Burmese-speaking colleague to cull some of these examples-- there hasn't been that much direct incitement-- to violence.

And to the extent there has been direct incitement to violence, I don't think you would be able to tie it to the recent attacks in Rakhine state, which were in response to these attacks on-- a security post. Now the response has been disproportionate. The response has been vicious. And there, you know, may someday be evidence that this was all preplanned. We don't actually know. But at this point, to say that someone-- to prosecute someone for actually inciting that, I think that that would be a hard case to make. So, I think I'll stop there unless people have questions.

RICHARD ASHBY WILSON:

These are great--

(OVERTALK)

RICHARD ASHBY WILSON:

--points and questions. And I-- (SLAP) I-- you know-- will respond inadequately. But I'll do my best to respond directly to a qu-- to questions 'cause it's really annoying when speakers don't address the questions posed to them. But I-- I accept-- you know-- some of the limitations that you've identified.

Just to start with-- Aryeh Neier's questions about his free speech concern-- whether Brandenburg is applicable because of the imminence requirement. And you're absolutely right, Aryeh, that Streicher-- is a questionable case. He was-- publisher of *Der Stürmer*, which has a circulation in 1933, four, of about 300,000. It's read by literally millions of Germans 'cause it's put up in the town square--

(OVERTALK)

RICHARD ASHBY WILSON:

--on notice boards. But by the time the Second World War starts, it's gone down to 3,000. Streicher is under house arrest. And even Hitler considers him a crank. So the

question is, how-- really, what kind of role does he play? Interestingly, he's convicted and hanged, whereas Hans Fritz, who was active during the war as number two to Goebbels, is acquitted.

Now, the questions have been asked about that-- distinction. And I think we need to just take a step back and say, "What was Streicher convicted for?" He's the only-- defendant at Nuremberg convicted-- on one count. And that's one count-- count four of crimes against humanity.

But being convicted of crimes against humanity itself, a very uncertain category of law at the time, doesn't tell us what the mode of liability is-- whether it's perpetration, whether it's-- aiding and abetting, whether it's inciting or what it is. So we actually don't know.

What they cite in the judgment is his statement. And I think this is what gets him convicted and not Hans Fritz, who says nothing like this. Fritz is anti-Semitic, he's horrible, but he never says something like Streicher says in 1940-41, which is this. "The Jews of the East must be exterminated, root and branch." And he says this as a m-- at a moment when German troops are going into Poland and East-- and-- and-- and Eastern-- Europe and in-- in-- into Russia and exterminating the Jews of the East, (SLAP) root and branch.

And so I think that's what the-- the judges-- identify as the speech act which incurs the criminal liability and rises to the level of-- a conviction for count four. Now only afterwards when interviews are made with the prosecutors, do the prosecutors like Griffith-Jones, who's the British prosecutor-- they identify the mode of liability.

And Griffith-Jones says in-- in-- in an interview in the '60s that they were working off accomplice liability and complicity which is different from incitement. And just a bit of nerdy minutia, Griffith-Jones, having convicted Streicher, goes on to prosecute-- Penguin Books in 1961 for publishing *Lady Chatterley's Lover*. (LAUGHTER) You can't make this stuff up. (LAUGHTER) Nadine's question-- about the applicability, if any, of Brandenburg-- I like Brandenburg because I think it-- it moved the United States' First Amendment-- principles beyond mere advocacy.

So in the '50s you have these awful cases like Dennis. You have cases before the First World War like Whitney, where mere advocacy-- and mostly it's socialists and mostly it's Jewish socialists who are getting hammered (NOISE) with-- with-- very repressive approaches to speech. The Red Scare in the '50s, merely advocating Communism could get you thrown in jail until about 1961 or two. Just think about that. And Brandenburg is obviously a huge improvement on that, because it has an imminence requirement and it has a likelihood requirement.

So in-- to go directly to Nadine's question, "What application, if any, does Brandenburg h--" or, "What-- what application does your work have to Brandenburg in the U.S.," Brandenburg-- in the subsequent jurisprudence-- there's a lot of definition of advocacy, so it can't just be abstract advocacy, it has to be specific crimes, specific acts that are committed.

So there's a lot of jurisprudence on that. There's a lot of information about imminence. It has to be within 24 hours. It can't be just an indefinite period of time. That's *Hess, 1973*. There's very little unlikelihood. That's the third prong. And the jurisprudence says almost nothing about what threshold of risk and likelihood there has to be. That's where I think the social science model comes in as relevant. And the factors that I delineated to you all, the 11 factors which-- need to be present for there to be a very strong likelihood, can give guidance to the courts on these matters.

Now you're right that judges don't like taking advice from social scientists. And they wanna say junk science when they wanna say it. But at the same time, U.S. judges and Supreme Court ju-- j-- justices make empirical claims all the time about speech, completely unfounded. I'll give you two examples that come to mind.

In *Texas vs. Johnson*, which is a flag burning case, they say taking offense doesn't necessarily elevate the risk of violence. It sounds totally implausible to me. I'll say it again. Taking offense does not elevate the risk that there'll be violence. Where's your empirical evidence for that claim? There isn't any. Here's another. *R.A.V. versus St. Paul*, which is a cross burning case. They say that insulting people on the basis of race or religion or ethnicity is not qualitatively different than any other form of insult, for example, based on personal characteristics.

Where's your evidence? That's a big claim. I'd like to see it. You may be right. But let's see some empirical evidence. How would you decide that being a Supreme Court justice who went to Princeton, then Harvard, then back to Princeton again? (LAUGHTER) Really, what do you know about how it feels to be insulted on the basis of religion, race or any other form? You have to refer to the empirical evidence. You have to be a consumer of that information to some degree or another to make a verifiable claim about that. I'd like to see those claims better evidenced than they are.

You asked a direct question, Nadine, about hate speech. Generally, you know-- having worked in these contexts of genocide and armed conflict and crimes against humanities, it-- it-- I have-- I think a higher tolerance for hate speech in the domestic setting, particularly the U.S. setting.

And generally, I would only want to see hate speech that has an additional call to imminent lawless (SLAP) action or an ad-- an additional call to violence suppressed and basically everything else, no matter how reprehensible or horrible-- we probably have to let go on the grounds that there are other good reasons for doing that. And they're (?) good reasons about having-- open political discourse on important questions and allowing people to express themselves in forceful and robust ways.

(OFF-MIC CONVERSATION)

RICHARD ASHBY WILSON:

But I think there are some difficult and gray areas. So just to give you a hypothetical, there is an angry mob outside a house of-- undocumented immigrants from Mexico

in Brownsville, Texas. (SLAP) Let's say Donald Trump builds his wall. Let's say there is forced deportation of 11 million undocumented to Latin America. Let's say there's an angry mob outside the house in Brownsville, Texas, and an authority figure, a political party leader or a sheriff, comes up and says the words, "You know, those undocumented Mexicans, they're the problem in this country."

And that triggers a violent attack on the house or the persons. And there is harm to property and persons. It's not a call to violence explicitly. It's hate speech. But in that context, that's a hard case, I think. So my-- r-- r-- reply to Nadine was that most speech we have to let go, but there will be hard cases where hate speech is such an implicit call to violence in a particular context that we may have to consider it incitement-- or-- an argument could be made that judges would have to hear. Coming to Marko's points-- I accept all of that. You were the most critical, Marko, but s-- that-- that's fine. (LAUGHTER) And--

MARKO MILANOVIC:

I love you, too.

RICHARD ASHBY WILSON:

--that-- you know-- (LAUGHTER) so, most cases are not actionable, yes. My N (?) is very small. Just to be clear, my N is-- is 30 out of about 350 cases. So it's about 10% of all the cases. So you're right, it's small. But there is-- a number there of cases that one can speak about.

Prevention is an optimistic scenario. And you're absolutely right. But I think I'm gonna win over the audience more than you, (LAUGH) you cynic, because this is the Open Society Foundation for cryin' out loud! (LAUGH) (UNINTEL PHRASE) optimist in this room, then I'm not gonna--

(OVERTALK)

RICHARD ASHBY WILSON:

--fine them. (LAUGHTER) So, I guess what I was trying to do was to say, "What are the legal impediments to using the inchoate crime of incitement to genocide preventatively?" And there is a major legal impediment, which is that the ICC statute includes it as a mode of liability and not a standalone crime (?).

So we're not even gonna have the conversation about prevention until that question is addressed. And I argue along with some others-- I'm not the first to think of this-- that-- incitement to genocide needs to be placed very squarely in Article 5 and 6 and taken out of Article 25, 3-E (PH), or we need to rewrite 25, 3-E-- I'm sorry this is

getting boring for the non-technicals (LAUGH) here-- we need to r-- (COUGHS) rewrite 25, 3-E so that it says, "Inciting any of the crimes in the statute, which includes crimes against humanity, war crimes and the crime of aggression."

So you're right to point out that genocide excludes many people. It excludes the murder of nearly-- a million people in Indonesia in 1965. It-- it-- it-- it-- neglects and omits the murder of communists in Latin America-- during the-- the Cold War. It-- it excludes-- you know, the-- the mass murder of the disabled and-- and-- and persons on the basis of sexuality.

So one answer to that is to make an (BEEP/S) amendment-- which includes-- the incitement of all the crimes in the statute. Again, it's optimistic. I recognize that. But, you know-- you gotta try. Perpetrators don't read international criminal law. (LAUGH) Really? 'C-- dang.

(OVERTALK)

RICHARD ASHBY WILSON:

Well--

ARYEH NEIER:

Maybe they'll get the paperback.

RICHARD ASHBY WILSON:

Uh-huh (AFFIRM). (LAUGHTER) So you're absolutely right. But I think the debate about-- well, I think the actions of-- and I don't have any evidence for this-- but I expect that the recruitment of child soldiers has been chilled somewhat (SLAP) by the conviction of Lubanga, the conviction of Charles Taylor and the ongoing trial of Dominic Ongwen.

And no-- actually, Charles Tr-- Taylor probably did read international law and probably does now that he has a lot of time-- (LAUGH) 'cause he has a degree from Grinnell College. So I-- I think that yes-- the deterrent effect is very hard to measure. It's very far down the road. But I-- I-- I would make the argument on the basis of no empirical evidence thus far, that the ICC's-- focusing on this issue has trickled down to commanders in the field in certain African conflicts. So I'll stop there. Thank you. (SLAP)

ARYEH NEIER:

Thank you very much. Sandy, I'm-- I'm looking at you. Can we continue-- for a few

moments? Or-- 'cause we're at 7:00.

(OFF-MIC CONVERSATION)

ARYEH NEIER:

Okay. Let-- let's go for-- ten minutes. If there are a couple of questions-- from the floor? Yes, over here.

FEMALE VOICE:

Thank you. With regard to the hypothetical, I think such a statement would be prosecutable as a hate crime in Western Europe but not in the U.S., as would Candidate Trump statements about Muslims and about Mexicans. So which system do you think is better? And which (NOISE) would you like to see in the international system?

(OFF-MIC CONVERSATION)

ARYEH NEIER:

Why-- why don't you--

RICHARD ASHBY WILSON:

Okay--

ARYEH NEIER:

--respond to that?

RICHARD ASHBY WILSON:

So yeah, so-- Section (NOISE) 130 (?) of the German criminal code-- criminalizes incitement to hatred. And-- many of these kinds of statements would be illegal. Which is preferable? It's hard to say. I can understand why Germany would want to create those criminal law provisions in the wake of the Second World War.

Perhaps they were important and useful-- at the time. The suppression of denial of the Holocaust, I think, has served its purpose now and probably should be lifted-- and-- and met with counterspeech, and not, of course, tolerated but challenged. But-- criminalizing it is probably the wrong approach now, although I understand why

that-- policy was chosen in-- in the wake of the Second World War.

It's not a question of which is better. I do take-- much of-- of what Marko has to say about-- there being different kinds of political traditions and respecting those p-- political traditions. We have a tradition of-- w-- wide tolerance of speech, although it's not as long and as deep as many would like to imagine in the United States. I really think it's only about 50 years old.

(OFF-MIC CONVERSATION)

RICHARD ASHBY WILSON:

It-- and-- (NOISE) you know, I would recall the Alien and Sedition Act of 1802 and the very strong suppression of speech really until-- the n-- late 1950s, early '60s. And it's really a product of-- the Civil Rights Movement and the efforts of-- individuals in the ACLU and others. Not-- I would say that even if-- Aryeh wasn't sitting next to me-- or I have--

ARYEH NEIER:

And-- and-- and--

RICHARD ASHBY WILSON:

--said that--

(OVERTALK)

ARYEH NEIER:

--and-- and if I could also-- respond-- to that-- and-- essentially-- repeat a point that-- Nadine-- made. When you-- criminize (SIC) hate speech-- you have to recognize that-- the determination as to when to engage in prosecutions-- is going to be made by the law enforcement authorities who are in charge-- at a particular time.

So, w-- we're dealing with-- a vast array of speech. And they're making a hateful of selections-- as to which cases to pursue. So if the Hungarian Civil Liberties Union tells me that most of the cases-- of-- the prosecution of hate speech in Hungary-- are-- prosecutions of Roma-- for hate speech against-- ethnic-- Hungarians-- it is because the prosecutors-- and the police in those circumstances-- are making the determinations-- as-- to-- to when to invoke those powers.

And-- one of the things about speech-- is-- there is inherent imprez-- imprecision. You can't say that particular words-- are prohibited. Because anybody can always come up-- with a word-- that-- will be readily understood-- by the audience. So if a

speaker says-- "We need to prosecute the cows"-- we don't know ahead of time who the cows are, but instantly-- the audience makes-- a determination on the basis of what they know about the-- the speaker and what the circumstances are at a particular time.

So the concept of hate speech or prosecuting hate speech vast-- vests-- enormous discretion-- in the power of prosecutors. Now maybe in Germany-- they're going to exercise-- that power responsibly. And maybe in Hungary-- they're not going to-- to exercise that power-- responsibly. Or maybe there will be particular prosecutors in Germany who will not-- exercise that power-- responsibly. So one of the reasons that free speech advocates are very skeptical-- about-- criminalizing hate speech has to do with the discretion that is vested in law enforcement authorities.

FEMALE VOICE:

And-- and I-- if-- thank you, Aryeh and-- and Richard, if I could just add because the hypothetical refers to the United States with a Trump Administration-- not a hypothetical-- anniversary of the election today-- so bear in mind that it--

RICHARD ASHBY WILSON:

I'm still imagining (?)--

FEMALE VOICE:

--would be the Trump Administration at the national level and many Republicans-- government officials throughout the country that would be making these inherently subjective determinations. And I could tell you from my-- research for my book that-- many people consider hate speech to be Black Lives Matter speech, right?

We know that Donald Trump himself and-- and others consider-- flag burning to be hate speech, to be taking the knee to be hate speech. So, if we want to loosen up the standards and go back to-- what used to be the standard before the Supreme Court's (LAUGH) desire to empower the Civil Rights Movement opened up freedom of speech-- make no mistake about it. It would be those-- well, by and large, those who are advocating for immigrants' rights, for racial justice, for social justice reform who would be-- who would bear the brunt and (?) the prosecutions.

RICHARD ASHBY WILSON:

Yeah, I would just endorse that. I mean, if you look at who gets prosecuted for fighting words and threat, it-- it's in the hands of-- of-- of prosecutors and law enforcement. And it replicates all of the inequalities of the si-- sici-- of the society in

which the actions are embedded. Look at Gooding--

FEMALE VOICE:

Thanks for giving--

RICHARD ASHBY WILSON:

--versus Wilson--

(OVERTALK)

FEMALE VOICE:

--I'm sorry.

RICHARD ASHBY WILSON:

--which is-- a case of threat of an African-American inmate. You know-- so, I-- I am-- aware of that-- that caution. At the same time, it's very interesting that this case is still ongoing-- Guanguma (PH)-- it's a case where Black Lives Matter protester is suing Trump and the Trump (NOISE) campaign. And that case is (NOISE) still ongoing.

I would-- I would encourage you to look at the judge's decision, where he grants the-- the-- (NOISE) the plaintiffs leave to-- to-- to-- bring their suit. That came out in about-- June. And then-- there was another opinion in August. And those are very well-written opinions applying (NOISE) Brandenburg to a March 6th, 2016 rally at w-- at which Trump encouraged his supporters to "get 'em out of here." And he used the expression, "get 'em out of here," many times (NOISE) as protesters were being physically assaulted and being pushed out of the hall.

And in fact one of them, who's a Korean War veteran-- who got expelled from his-- his-- Veterans of Foreign (NOISE) Wars chapter, wrote a letter to them asking to be reinstated back into the chapter. And he said, "You know, I heard Donald Trump saying this. And I wasn't gonna do anything, but he told me to push 'em out of here. And that's why I did it."

So you have, you know, the-- r-- for-- for-- for the lawyers bringing the case, you have the smoking memo of intentionality and mental causation that you're looking for. It'll be interesting to see where that case goes. It's not a criminal case. It's a civil case.

MALE VOICE:

Okay.

ARYEH NEIER:

Jennifer Leaning's hand and-- you-- you get the last question.

FEMALE VOICE:

Okay. Jennifer Leaning of-- of (UNINTEL). I've done a fair number of human-- sorry, thank you. I've done a fair number of human rights investigations in-- in conflict, post-conflict war-torn areas. And I would endorse the list of the social scientists and would say not in the legal context-- certainly not within the United States-- but in the context of-- the Rohingya and in many other countries and populations around the world, there is an early warning element of hate speech that the U.N. has adopted now-- risk factors and trigger factors.

It's a (?) Framework for the Prevention of Atrocity Crimes, 2014. It's a really great list, very erudite-- and useful. And hate speech is there, a trigger. Risk factors are others. And in my own (NOISE) experience-- I think that-- and it's not in your list exactly but it's in-- you hint at it when you were talking about Serbia-- is that an honor code and a sense of humiliation-- humiliation and speech that evokes a sense of humiliation is extremely powerful.

It's something that-- Benish talks about in some of her work. And I think it's increasingly more relevant in the situations of Muslim countries where humiliation is a latent provocation of rage going back to World War I or earlier. And-- so, I just endorse what you were saying. I think Marko, your point about the law is-- you know far better than I-- but I think this notion that-- kinds of speech that can provoke people to do bad things is becoming increasingly more important for us to look at, and not necessarily from prosecutorial edicts, that then judgments, that then create a sense of-- prohibition or-- or constraint, but from the early warning community, which is more a political science and social science-- world, where you can say, "This-- this country, this society is beginning to get to a boiling point."

And we have many techniques for doing that, including data analysis of social media and the density, as well as the characteristics of the speech. So, I'm-- I would really endorse your 11 points. And I think they're very important. And I think that-- that-- I understand now the difficulty of adjudicating this and litigating this in the context of the United States. But there are many other societies that are actually closer to firestorm. And there's a metaphor. (LAUGHTER)

ARYEH NEIER:

Okay. Richard, any-- any final words or--

RICHARD ASHBY WILSON:

Thank you. I-- I-- you know, accept-- and embrace all these points. Yeah.

ARYEH NEIER:

Okay. (SLAP) All right-- we-- we have gone past-- our-- allotted time. Again, I think-- the book is-- enormously important. And-- I-- I recommend it highly. And I'm very grateful to-- to Richard, to-- to Marko, to Nadine, to Linda and to-- those of you who took part as the audience-- for what I think was a stimulating discussion. Thank you very much.

* * *END OF TRANSCRIPT* * *