

# Indiana Int'l & Comp. Law Review

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## SYMPOSIUM

### INTERNATIONAL LAW AND HUMAN RIGHTS UNDER A NEW ADMINISTRATION

#### TRANSCRIPT

##### WELCOME & INTRODUCTION

JUSTICE FRANK SULLIVAN, JR.\* AND KHOA TRINH\*\*

Khoa Trinh, 3:01PM:

Hello everyone, my name is Khoa Trinh and on behalf of the Indiana International and Comparative Law Review and the Indiana University McKinney School of Law, thank you for joining us today. Before I hand the event over to our host with the most. We want to make sure that those in the audience seeking CLE credit are not dialed into this event via phone number. Please make sure you're signed into your Zoom account via your computer or personal device in order for us to recognize your CLE credit. In order to log audience engagement for CLE purposes, you will see nine poll questions pop up throughout this evening. Please be sure you answer them within two minutes. And if you do not need CLE credits, or you have no idea what I'm talking about, feel free to ignore anything I've just mentioned and the questions from the pop-up screen and they will disappear. Finally, you will find on the bottom of your screen that the Q&A button is for your use. So please use them to submit questions you have for our speakers who will reserve about ten minutes at the end of their presentations to answer your questions.

We have an exciting agenda for you all today, so I will now hand it over to our MC Professor Frank Sullivan, Jr. Justice Sullivan served on the Indiana Supreme Court for twelve years prior to becoming Professor Sullivan in 2012 here at IU McKinney. He is an adored member of the IU McKinney community, and we could not think of a better person to host this symposium. And so, with

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\* Indiana Supreme Court Justice; Professor of Law, Indiana University – Robert H. McKinney School of Law Indiana University Bicentennial Professor; President of the Indianapolis Civilian Police Merit Board; an Adviser to the American Law Institute; a Commissioner from Indiana to the Uniform Law Commission; appointed a member of the Indiana State Employees' Appeals Commission and the Indiana Business Law Survey Commission; A.B., 1972 *cum laude*, Dartmouth College; J.D., 1982 *magna cum laude*, Indiana University Maurer School of Law; LL.M., 2001, University of Virginia School of Law.

\*\* J.D., 2021, Indiana University Robert H. McKinney School of Law; B.A., 2017, Purdue University.

that, the stage is yours, Professor Sullivan. And I will mention that Professor Emmert, our scheduled speaker, had an immediate emergency and is not able to join us today, but we will proceed as usual.

Frank Sullivan, Jr., 3:03PM:

Thank you, Khoa Trinh. And good afternoon to all of you. On behalf of Dean Karen E. Bravo. I am pleased to welcome you to the Indiana University–Robert H. McKinney School of Law. And the annual symposium of the Indiana International and Comparative Law Review, in which we will be considering international law and human rights law under a new administration. I am Frank Sullivan, a teacher here at the McKinney School of Law, and have been honored by being designated as your master of ceremonies today.

It is altogether fitting that the McKinney School of Law is hosting this important discussion, for our law school is truly international in its perspective, in its curriculum, and in its constituencies. You sense this from the moment you enter our buildings, soaring Tuchman Bobrick atrium, decorated with scores of flags—each representing the nation of birth of a current McKinney student. You encounter this when you meet our many students from around the globe studying in our LLM and, to a lesser extent, MJ, SJD, and JD programs. Students from large countries like China, Vietnam, and Nigeria; and small countries like Kyrgyzstan, Mongolia, and Eritrea. And you realize this when you inspect the wide range of our course offerings in both public and private international law. And our renowned and revered program in international human rights law, in which now more than two hundred of our students have provided pro bono services in over sixty-five countries around the world. I myself remember how proud I was of this law school after visiting such an intern in London one summer, certainly several years ago, who was working in a law firm defending deportation proceedings against HIV-positive immigrants who had entered the UK illegally in desperate attempts to obtain medical treatment. And it's fitting as well that the symposium is being produced by the Indiana International and Comparative Law Review, which for 30 years has published and produced scholarly and practical inquiry into pressing questions of international and comparative law through both its journal and its annual symposium.

And if I might take a point of personal privilege, I'd like to acknowledge my own association with the IICLR almost since its inception. One of my very first law clerks when I was a justice of the Indiana Supreme Court, was a very early editor-in-chief of the IICLR, Franklin E. Breckenridge, Jr. Now very much an international lawyer himself practicing in the UAE. A decade later, the IICLR publish my LLM thesis on the celebrated Pinochet case under a distinguished local practitioner, Tanya J. Bond. And since I've been working here at the law school, I've had the great good fortune of participating in one way or another in almost all of the IICLR's annual symposiums, including today's. And today's symposium, promises to make still another significant contribution to our understanding of pressing questions of international law. Thanks to the willingness of two true international citizens. To share their insights and observations with us.

Justice Stephen H. David of the Indiana Supreme Court, former Chief

Defense Counsel under the Military Commissions Act of 2006, and an adjunct professor here at the McKinney Law School. And the Honorable Michael Kirby, retired Justice of the High Court of Australia—that nation’s court of last resort, one of the world’s best-known and most eloquent human rights advocates. And a particular friend of Indiana University, from which he holds an honorary doctorate. On behalf of the McKinney Law School and the Indiana International and Comparative Law Review. I want to thank Justice David and Justice Kirby for spending their time with us today. Before I introduce Justice David, I want to say to all of the members of our audience that our speakers plan to talk for approximately fifty minutes and then be available for your questions. If you place your questions in the Q & A function on our Zoom app, I will do my very best to ask them to our speakers at the conclusion of their prepared remarks.

**NEVER DOUBT THE OATH THAT YOU HAVE TAKEN:  
HUMAN RIGHTS MATTER IF THE RULE OF LAW  
MEANS ANYTHING!**

JUSTICE STEVEN H. DAVID\*\*\*

Frank Sullivan, Jr., 3:09 PM:

Justice Steven H. David has served on the Indiana Supreme Court for the last decade. In his announcement appointing Justice David to the Court in 2010, Governor Mitch Daniel said, “he compiled a highly decorated military career during which he was tested in one of the most sensitive and challenging assignments imaginable.” The assignment of which Governor Daniel spoke was service as Chief Defense Counsel under the Military Commissions Act of 2006, which meant that Justice David’s clients had been all of the detainees at the American prison at Guantanamo Bay, Cuba. To many, this assignment conjured up memories of John Adams representing the alleged perpetrators of the Boston Massacre at the dawn of our republic. The story of Justice David services, Chief Defense Counsel, cannot be told in this setting. Suffice it to say that while he was being considered for appointment to the Indiana Supreme Court, a military colleague from the Navy, no less, wrote to Governor Daniel saying that “Steve David is a warrior for the rule of law.” That probably says it all. But it doesn’t. His Chief Defense Counsel service aside, Steve David has been noted for his dedication to troubled children and children in trouble as a leading Indiana juvenile court judge. And since his appointment to our state’s court of last resort, he has been a leader in both the development of our state’s jurisprudence and in

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\*\*\* Senior Justice, Indiana Supreme Court, 2010 – present; Chief Defense Counsel for the Military Commissions at Guantanamo Bay, Cuba, 2007-2008; Circuit Judge, Boone County, Indiana, 1999-2007; J.D., Indiana University – Robert H. McKinney School of Law, 1982.

Justice David’s Presentation is based upon his previous publication *Dear Mom and Dad*, 24 Ind. Int’l Comp. L. Rev. 419 (2014).

improving our state's legal system. Among his most recent initiatives is an ambitious program designed to enhance diversity, equity, and inclusion in the Indiana legal profession. Justice David.

Steven H. David, 3:11 PM:

Well, good afternoon, everybody. Thank you, Professor Sullivan. You, my friend, are one of this law school's greatest assets, and I'm happy to see on my tiny little screen my Hollywood Squares screen that Professor Emmert has been able to resolve his emergency, and he's present. So, I'm gonna go first, and set up Professor Emmert and Chief Justice Kirby, hopefully as the warm-up act for those two.

Thank you first of all, to the International and Comparative Law Review for this International Human Rights Symposium. And for hosting essentially what I'm calling a revival, a human rights revival, and we'll talk a little bit more about that in a few minutes. And thank you, personal thank you to Khoa and Ariel for such a kind invitation and in the very kind e-mail. I don't want to forget to give you my disclaimer, and that is the opinions expressed are mine are not of the Robert H. McKinney School of Law and certainly not of the Indiana Supreme Court. But I do have some opinions and I'll share them with you in this academic setting.

I want to focus my comments indeed focus my efforts on all of you, the audience. Of course, as it is expected, this is my opportunity and Professor Emmert's opportunity and the Chief Justice's opportunity to hopefully deputize you, to recruit you, to move a bit in this area of human rights—this broad area of human rights. And to share some things maybe perhaps you have not considered. I want to talk to you about what you might do, what you can do to influence not only President Biden's administrative policies on international human rights but what you can do to influence, to change, to improve human rights, right here in the United States, right here in the state of Indiana. And while doing so, influence change, make a difference worldwide. There's no limit to the ripple effect that one of you may cause. You might not ever see the full consequences of your good deeds, your efforts beyond a particular advance for cause or client. But it happens, it really does. Trust me. I am also mostly going to focus my comments on all of you, the attendees because to me, you are far and away. The most critical component. You're the future. You are the future. You represent the present and certainly the future of our profession. And we need your commitment and your efforts to make right what isn't right.

It was about eight years ago, one of the first classes I taught as an adjunct here at McKinney was contract law for LLM students. And at the end, near the end of the semester, I always ask them, once we develop that relationship, "So tell me, are you staying here? Going to find a job? Going to law school, further education? Are you going back home? And if you're going back home, what do you want to do?" I always got honest and interesting responses. Then I got one from Muhammad that I will never, ever forget. Muhammad was and is from Saudi Arabia. Obviously, a very smart young man, just like all of the students at McKinney. Very smart, very personable. He could have easily stayed in the United States and furthered his education or found gainful employment. I asked

him, “So Muhammad, what do you intend to do?” And this is what he said, and I quote, “Professor David, in my country, we have many humans but very little rights. I’m going to return to my home country in practice human rights law.” I told him that was one of the most profound statements I’d ever heard, and I could not have been more proud of a student of mine than I was and am of Muhammad. Maybe we should have zoomed with Muhammad today and ask him how that noble, necessary, difficult, and just plain hard work is going for him.

So, here we are on February 25, 2021, trying to get out from under a pandemic. The scope and tragedy of which we never would have imagined in our lifetimes. Indeed, the last one of such evil magnitude was approximately a hundred years ago. Add to the pandemic, four hundred years of racial injustice and racism. And the twenty-first century in some respects looks like the nineteenth century or the eighteenth century or the seventeenth century or worse. But we have each of you had the opportunity to be something more grand, to be part of something more grand, more fair, more just for all. Justice for all. And to keep that dream alive and to make it a reality. I hope and firmly believe that each of us in this place in time, in this moment that have not suffered injustices are convinced that injustice suffered by others can no longer be ignored, no longer be minimize, can never be rationalized, and therefore must be understood and remedied. We must have dialogue and education, but talk must translate into action and into change. When we’re willing to admit that tolerating injustice is just another way to sustain injustice, then we can move mountains. Let me say again, tolerating injustice is aiding and abetting a conspiracy to commit injustice. A conspiracy to sustain injustice, whether it’s intentional, reckless, or just plain, negligent or naive.

And let’s be frank, right? Very few of us, if any of us are not guilty of some lesser included offense—no one’s perfect. Quit trying to be perfect. Be the best you can be and try a bit harder tomorrow. We can all be better stewards of freedom, better guardians of Justice, better enemies of injustice. And anyone can join this army of human rights advocates. Everyone is welcome. The old—I don’t like to use that phrase, that word—the more experienced, okay, the more experienced, the young, the restless, the rich, the poor, the just getting by-ers; the i’s, j’s, k’s, reds, whites, yellows. All, all are invited, and all can contribute, and all have a responsibility. So, let’s rip these labels off of who does support human rights and who doesn’t support human rights. It’s not about being anti-anything; it’s about being for human rights. Let’s ensure that we identify and focus and frame the issue and just like that.

So, thank you for being here. Perhaps you’re curious, perhaps you’re committed, perhaps you’re conflicted. Perhaps you want to do something but aren’t exactly sure what. Maybe you’re hurting a bit for those who are hurting a lot. Maybe you’re a bit too comfortable. We invite you to listen; to learn; to ask. Subsequently, to taught, debate about these presentations, learn, think and reflect. Learn—have I said learn enough? I’m smarter today than I was yesterday, but I still have so much to learn about so many things, and that’s okay. It’s okay. We’re all learning. We’re all works in progress. I’m not done learning. I’m not done trying to make a difference in the lives of others. Whether it’s here in Indiana, across the United States, or across the world. We can all learn a bit more,

do a bit more just in our everyday lives to ensure human rights for all humans. Right?

So, I'm honored and humbled to work for you. I'm so proud to be a graduate at the Robert H. McKinney School of Law; the best law school for Indiana lawyers and judges and everybody else that wants to practice law. This is my contact information. If you'd like my comments, let me know. If you don't, let me now. I need to learn. Do you have questions? Or if there's something we're not able to discuss today, reach out to me. And within my lane, I'll have that dialogue with you. I'm available for you because the better you are, the better we that we are.

"Injustice anywhere is a threat to justice everywhere." Everyone should be familiar with this quotation from Martin Luther King, Jr. He was right; Muhammad was right. What does this mean? Besides the obvious injustice anywhere is a threat to justice everywhere. Think about it. It's not just a statement that we better not be complacent. It's not just a warning danger, danger, don't get too comfortable, or you might be the next one to lose rights. It's not just a challenge. It's a call to action. Vigilance. Vigilance. Vigilance.

I was a soldier for 28 years of active and reserve duty. Three more years if you add Law School; four more years if you add ROTC. I was commissioned as a Second Lieutenant in United States Army Infantry. I've taken more oaths to support and defend the Constitution than most people. I have always been prepared to take a bullet for this country and for any one of you. My wife as an attorney, sailor, Iraq, Guantanamo Bay and on and on—active duty and reserve. Active reserve with grade of a 05 commander sworn to defend the rule of law of the United States of America with her life if that is what is necessary. Now, I'm not here to recruit any of you for the military, although that would not be a bad option. I am here to suggest that this country is far from perfect. And it's not always the role model for justice and fairness. But I'm here saying, "I will take this country as is anytime because as bad as it may be on any one particular day, we, you, together, us can continue to make a difference. And I believe we will make a difference because our country is founded upon the rule of law. And just like myself, my wife, my son, my dad, my grandfather, my brother in law's my father-in-law, and millions of others were expected to be on duty 24/7 all the time that's what soldiers, and sailors, and Marines, and Coastees, and Air Force personnel do. It takes all of us, all of you to be on duty all the time to preserve justice for all.

John Mellencamp, Hoosier, singer-songwriter—all those that know me know that I had to work in John Mellencamp or some country music lyrics or both. This song: *Your Life is Now*, speaks my mind right now: "See the moon roll across the stars, see the seasons turn like a heart. Your father's days are lost to you. This is your time to do what you will do. Your life is now; your life is now. In this undiscovered moment, lift your head up above the crowd. We could shade this world. If you would, only show us how your life is now." Are you ready? Your life is now, your time is now. Or I promise you, your time will come. Will you be ready? I say again, your time will come. I promise you. It may not be on a big stage. You may think you are backstage or that what you do just doesn't matter. But hear my words: there are no close; there's no such thing as "close injustice";

there's no "almost injustice"; there's no "getting better injustice." There is either justice or injustice. There are either human rights for all or no human rights, fairness or unfairness. Either all humans have the same critical rights, or there are no human rights. It just can't be for some and not for all. Your oath demands it or will demand it once, taking the oath means what you do with that most professional undertaken of your life matters. And so, what does that oath mean?

Next slide, please. That's the lawyer's creed. My gift to you. I won't read it. You can read it. But I will mention it. John Adams, Belva Lockwood, Macon Allen, fought for freedom, justice. They fought against violations of human rights. You're all familiar with John Adams. You better know, Belva Lockwood fought for the women's right to vote, ran for president United States twice when women could not vote, fought to get admitted before the United States Supreme Court, fought against injustice, fought to sponsor the first African-American Attorney at practice before the U.S. Supreme Court. And Macon Allen fought injustice. Unfortunately, his entire life right here in the United States of America. Born in Indiana, unfortunately had to move away to find better opportunities. Recognize as the first African American lawyer in the United States, and the first African American judicial officer in the United States.

This creed means that you must be in all the time. All, in all the time. Some days will be better than others and some base will be just playing God awful, trust me, I know. But don't let a bad day deter you or a bad experience. Deter you from the glorious cause of the practice of law and fighting injustice. You must be all in, or you risk your sense of self-worth and self-respect. Someone once said that "Injustice is relatively easy to bear." Its injustice that hurts, right? It's hard to fight for something sometimes than it is to accept something unfair. Unfortunately, true. I urge you to fight, urge you to take the road oftentimes less traveled. The high road, oftentimes the hard road. I urge you to be bold; speak up; stand up for injustice everywhere, anywhere, anytime. Stand up for human rights for all. If we are to have any legacy as a human race, legacy must be human rights for all. It must be one of freedom and justice and the rule of law for all. Not a few, not many, not most, but all. And not all who live where I live or you live or look like I do, or some of you or believe what I believe or worship how I believe. But all must mean what it says: all.

And let me give you some advice that is hard to hear and even harder to follow: "Doing what is right, especially as it relates to justice, particularly human rights, is not easy. Doing what is right is hard. Anyone can do easy, but usually doing what is right is not easy. Usually, the choice is between doing what is easy and doing what is right. What is hard is usually the right thing to do." When finding injustices anywhere even on the smallest of matter, the tiniest of issue, remember the works of Abraham Lincoln in his letter of April 6, 1859 to Henry L. Pierce who was a Massachusetts Congressman. He'd invited Lincoln to come to Boston, and Lincoln was writing to decline the invitation. But in that letter, he articulated his position on slavery. In 1859, he was fiercely anti-slavery. And he said, "those who deny freedom to others deserve it not for themselves." Not only was he a lawyer, a very good lawyer, a president and a very good one. But he's also a human rights lawyer and a human rights president. He did not choose easy; he did not choose what was politically expedient. He chose what was right. He

was often by himself. It was hard. It probably cost him his life. I cannot imagine a more noble way to die than for the cause of justice, of freedom for all. As an aside, read the entire letter sometime. It's full of gems of the day, many of which are very relevant today. But I digress.

Next slide. Thank you. I included this slide for several reasons. The most significant reason is that we must always retain our sense of humor. Because our sense of humor is one of our relief valves. It's one of our best coping mechanisms, particularly during COVID. So, you can see yes, it says, "no photography." And yes, I do know who took that picture and no, I'm not going to tell you that. The picture I will tell you. I pass through that gate many times. I want to share some of my experiences as Chief Defense Counsel at Guantanamo Bay. Why? Because they are relevant to our subject matter. It is something that we as Americans should be aware of, and we as lawyers should be very aware of. Finally, it reinforces my point that life is now. Your time is now, or your time will come.

My father-in-law was a World War II veteran, 22-year-old, 22 year military veteran. And this flag of honor hung in my office, the state house, when I was chosen to be the Chief Defense Counsel. Right? Human rights work is hard. Seeking justice and fairness for all is hard. This flag honors the victims of 9/11 and the attack upon the United States of America. I purchase this shortly after it was made available as a fundraiser for the victims' families. It hangs proudly in my office here in Indianapolis. You can see the bottom portion of it on the screen that it hung in my office, the Boone County courthouse when I was selected by the Secretary of Defense to be the Chief Defense Counsel. The most difficult, professional and personal experience of my life. I've had my share of challenges.

When I was selected to be the Chief Defense Counsel. I was responsible for let me quote, just a small portion of my job description:

As Chief Defense Counsel, supervise and manage all defense activities, personnel, and resources, or the Office of Chief Defense Counsel. A unified command, facilitate the proper in zealous representation of all accused, refer to a trial before military commissions, support the National Security Strategy of the United States by ensuring conformity with the rule of law and a vigorous ethical, adversarial process that will withstand domestic and international scrutiny.

I will stop there. It went on and on. That dad I mentioned, when I was mobilized, he was eighty-five. And we were talking about what I was going to be doing. He said, "Stevie," he called me Stevie, "What are you going to do?" And I said, "Dad, I'm going to be defending the 9/11 terrorists. And my father leaned forward, and he got a little grin, and he said, "Well, don't work too hard." And then he sat back up, and he said, "Son, do your duty. Son, do your duty." We'll come back to that in just a moment.

So how did all this go? Well, that's not a picture of me praying, although I did. That's me trying to adequately respond to the world media and reconcile the rule of law, our U.S. Constitution, justice, and fairness. Reconcile all that against torture, lack of transparency, fear of the rule of law, and our legacy as a democratic nation and world leader in the fight for human rights. Any one of you

want to raise your hand and offer a good explanation or reconciliation of those? I did my best. About two months into my tenure as Chief Defense Counsel in 2007, when this was the number one legal mission in the military. I wrote a message; I sent a message back to the Boone County Bar Association. You see, I had created in 1995 a CLE on the first of its kind local. And we held it in the courtroom in Boone County, invited local attorneys and out-of-county attorneys, and actually it's a pretty darn good CLE. And I was going to miss it for the first time. And I was writing to my friends and colleagues, back in Boone County. It was ultimately published later, but I was trying to share with them: what I was doing it; what it was like. I called it, "A Message from Judge David" because I was the mobilized Judge David. I'm gonna read just a portion of it to you to put in perspective what it was like for me and perhaps put in perspective what it's like for many people, not us, but many people who may not perceive the system they're in or may not have the access to justice or may not feel they have the human rights that you and I have. So, I said,

Imagine being a senior partner in a hastily organized law firm that is understaffed, under-resourced, and exclusively practices criminal defense work. Imagined that all the cases you are involved in have the potential for life sentence. While some are brought as capital in addition to a life sentence allegation. Now, imagine the court system is brand new with rules and regulations that might be same or similar to some of those that you have some experience with. But in this new system, there's some new laws, new rules, new procedures that you're completely unfamiliar with. And, yes, there's this interest "in the interest of national security." This issue that you and your client consequently may not even have access to some evidence, perhaps some exculpatory evidence, and you can't even share all the evidence that you have access to with your client.

I went on to say,

If that's not enough, consider that the judge can admit evidence obtained by torture, although we don't call it torture. We call it things like, "coerced testimony" or "aggressive interrogation" or "enhanced interrogation." For example, simulated drowning, although we don't tell them it's simulated drowning; we don't tell them that they're not going to be drowned. All the rest of the civilized world of which we consider ourselves to be a part of, condemn such action, and certainly would forbid the evidence and testimony obtain by it from being used in a criminal proceeding against the person who was the victim of such action.

I went on to say, "The fact that we're even talking about this torture, in 2007, is nonsense. This is 2007 A.D.; not 2007 B.C. It's not the dark, dark, dark ages. Do we really believe that torture can be justified?" And went on to say several paragraphs later:

My point is I firmly believe that history will look back on this period. And neither the wealth of our great nation nor its technological advances will define our legacy. Instead, how this period of history will be looked

upon will be whether in a time of national fear and perceived uncertainty, we followed the rule of law. We practiced fundamental principles of due process and demonstrated to the world that we are that shining example on the hill. That human rights apply all humans—not just Americans. Did we prove ourselves that we are, again, that shining city on the hill, that great experiment. And even under the most difficult times, did we practice what we've been preaching to the world? Or did we let the fear, our fear and our fear of the rule of law consume us and change how we practice?

I did say thereafter, "I've never been more proud to be a lawyer. I've never been more proud to be just a little trial court judge from Indiana being asked to participate in some small way."

Fast forward to when I returned home some twenty months later, some nine months after that, that father of mine that World War II veteran that retired military officer came to me and he said, "Son, I need to talk to you." And I'm thinking, he doesn't say "son" unless something bad has happened. He says, "Son, I have to tell you. I have to tell you; what you did was wrong. They're all terrorists. They should be shot. I just had to tell you that." And I said, "Dad, you're not the only one feels that way. Maybe we can talk about this some time, and I can explain to you some things you might want to consider." Well, we never talked about that. Not in the four years after that before he passed. I never had the courage to have that conversation with them.<sup>1</sup> I regret that. I hope you never have such regrets. I urge you to find the courage to show up, to speak up, to change other's minds when necessary, to take a stand, to do what is right no matter how hard it is, to fight injustice—be it called racial injustice or human rights violations. If it is not justice for all, it is not justice. And each of you have the opportunity, and the obligation to do something about it.

Next slide, please. This is Colonel Lowry. He's one of my best friends. He's about to retire. He's also retired Army Colonel, [but] about to retire from the civilian employment. He's wearing civilian clothes and military clothes. This was an ad by his company for support of military forces, particularly reserves. But note what the ad says, "Bulletproof, unrelenting, undaunted, unrelenting, untouchable." That's Colonel Lowry, but that's also who I believe each of you are. I put Colonel here to convey an image, an image I want you to be familiar with. I want you to aspire to be. And that is not to be afraid of being who you want to be. Be "bulletproof, undaunted, unrelenting, untouchable," particularly in the cause for justice. Stand taller than the rant. Be tolerant. Advocate with passion, but mercy. Be humble; be proud. Bring your "A" game every day if you possibly can. Do your best every day. If we were to have any success fighting injustice, combating human rights violations, seeking a better world, we must be

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1. Although, Justice David did not have that conversation with his parents, he did write a letter to them after they had passed, which was published in an earlier volume of this Review, see *Dear Mom and Dad*, 24 IND. INT'L & COMP. L. REV. 419 (2014), available at <https://mckinneylaw.iu.edu/iiclr/pdf/vol24p419.pdf>. It was based upon this letter that we asked Justice David to come present at this Symposium.

Colonel Lowry like: bulletproof, undaunted, unrelenting, untouchable. I love this country. Now on any given day, I might be upset with her or disappointed with her, but I love it. And I refused to give up on her or let anyone else give up on her. I still believe we, the collective, we are the best last chance for all that we stand for and all that we want for all of the world. Muhammad must not do this work alone.

Next slide. This is the “rule of law” wristband. I’m wearing it right now. This is what it’s all about. I’ve been wearing it for over ten years. Well, not the one I’m wearing right now, but one like it. They’re being worn throughout Indiana and across the United States and in places like China and Russia and Vietnam and Peru and Thailand and South Korea and Mongolia and Egypt and Saudi Arabia, Ghana, Nigeria, and on-and-on-and-on. As a lawyer, you are a guardian of the rule of law. An evangelical promoter of it worldwide. It is the embodiment body of John Adams, Abraham Lincoln, Belva Lockwood, Macon Allen, and millions of others. Just like you who believe in it and who will fight for it.

Leaders put their name on it. Don’t be afraid to put your name on it. You are well-trained, well-equipped. Don’t doubt your ability to withstand storms and challenges. Don’t be afraid to stand up with that wristband and what it means and what you believe in and what you’ve worked so hard to earn. So many people in this world have given their time; their talents; their contributions, financial and otherwise; and their lives for freedom, for justice for all. Isn’t it John Mellencamp song, “you’ve got to stand for something, or you’ll fall for anything.” It’s one of his songs, right? It’s a song from 1985. I know for some of you that was a long time ago. For some of us, not very long. He’s got a line in that song: “We got to start respecting this world, or it’s gonna turn around and bite off our face.” Now there’s a graphic. Maybe that motivates you to do more for justice and more like human rights. So, what’s your choice? Stand for something, or fall for anything?

When I was the Chief Defense Counsel, whenever an individual was charge, or the military commissions act, I would be the one responsible for taking that charge information to them in their cell. So, that was a challenge in and of itself. The first time I did that, I had a life-changing experience. I went to the detention facility, went through a very thorough security check. Of course, I was wearing my uniform—the camouflage uniform with of course my rank and name, David. That’s what it looked like. It was Velcro; velcroed on the uniform. Security forces said, “Sir, you can’t go in there with any personal identification or purposes. You must remove your name tag.” Obviously, for national security reasons and personal security reasons, we cannot use names or anything that would identify us—could result in harm to us, our families. You never know. Strict rules: it makes perfect sense. The guard force had numbers on their uniforms and that changed regularly. So, I remove my name strip. Thank goodness for Velcro, and [I] was escorted to the cell where I met the detainee who had just been charge. On this first occasion, the detainee spoke English, so I did not need an interpreter. And as I walked into the cell, I made a decision. I put that Velcro name tag, “David,” back on my uniform and said, “Good morning. My name is Colonel Steve David. I’m the Chief Defense Counsel for the Military Commissions. My office and I will be representing you before the Military Commissions. I’m here to read you the charges and talk to you about what we will do next to defend you.

I will be assigning you specific defense counsel soon, but I wanted to meet you personally and tell you who we are and what we're gonna do for you. Can you remember the most difficult, awkward, uncomfortable conversation you've ever had with one of your clients or you might ever have with a client? Multiply that times ten or one hundred or one thousand. I think I may one up on you on that one. We can talk about that someday if you'd like. My point is, fighting injustice, representing every client you have, put your name on it.

So where do we go from here? What can I do? What can you do to make a difference? To do your part, to ensure human rights or to fight injustice. Fight against laws that are unfair, practices that are unfair here, Nationally or throughout the world. Let me make one thing clear before we talk about this. Number one, you can do this. I believe in each one of you. If you're McKinney Grad or going to be a McKinney Grad, there's a whole bunch of us that believe in every one of you. You need to believe in yourself. So, let me share some suggestions. Number one, you are not responsible for what is going on in the world as it relates to human rights or lack thereof. You are, however, responsible for what you do to make the world a better place, a more just, a more humane place.

Number two, remember the world can be a small place as your individual client and ensuring that he or she is treated fairly and justly. Or it can be as large as the greatest cause in which you will participate—even if you only contribute a tiny bit to that great cause. Racial justice, anti-racism, international human rights work. Pick one or all or find your passion. But use your education, your law degree, not just for yourself, to better yourself, and that's perfectly acceptable. You can make a good life for yourself. But will you try to make a better life for as many other people as you possibly can? Use it. You're part of a greater good. I quote President Franklin D. Roosevelt years ago: "Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights or keep them. Our strength is our unity of purpose to that high concept. There is no end save victory." I say, your victories may be big. Maybe your victories will be small. It may take several of those victories to add up to anything of any measure. And that's okay; that doesn't matter. You will, and your clients will suffer setbacks, may suffer disappointments, may suffer frustrations, right? Work through them. Get over them. Let them go. Let them be singing the song, "Let It Be" if you need to. Get over it. Get beyond it. My point is don't give up. Your first victory may only be the planting of a seed that you will reap over time. You may be successful in getting someone a seat at the table. Maybe not a full meal deal, but progress. Right? One step closer to your objective. Big firms, small firms, solos. Unfortunately, there is plenty of work for all of us in the area of human rights and ensuring justice. And it might not even be called or referred to as human rights. But I submit to you, if it's related to justice, it is promoting and ensuring Human Rights.

Number three, never underestimate the power of one: one person, one client, one issue, one, cause one challenge, one opportunity. Number four, never underestimate yourself. It was Mark Twain once said, "Keep away from people who try to belittle your ambitions or your dreams." Small people always do that because the truly great people make you feel that you too can become great. Let's

face it: for all practical purposes, I'm a nobody. I'm a kid from Ogilville, Indiana. Well said you don't even know where that is. And shouldn't and probably don't care. But I am a kid from Ogilville, Indiana. Eleventh, twelfth, thirteenth generation Hoosier; I don't know, but in my particular family, from my paternal, my father's, direct line, I'm the first one to go to college. So, we're a little slow, okay? And my grandfather and grandmother, on my father's side, for all practical purposes were sharecroppers. But if I can go to college and I can graduate from law school and I can be selected by the Secretary of Defense to be the Chief Defense Counsel and if I can get elected by the people at Boone County and serve them as a trial court judge. If I can get selected to serve you on the Indiana Supreme Court. Your potential is unlimited. Not only to define success as you define success, but while you're doing that, make the world a better place.

Next slide. Come back to Abraham Lincoln, right? I circled back to Abraham Lincoln. He said it. I believe he meant it. I believe him; I believe in what he said. I hope you do too. Now, remember that human rights violations, injustices, can be caused by many factors. Ignorance, anger, fear, hatred—oftentimes learned behavior. So, as you fight to right injustices here and throughout the world, think about all the ways in which you can use your skill sets to change the laws and change the behavior. Change the perception. Change the narrative. Change the attitudes. Allay the fears lessen the hate, raise the caring, and do what is right. Failure is not an option. In many respects, our fight for justice in this country, racial justice, the fight against injustice, this may be our last great opportunity to make a difference. You may be called upon to make that difference. I'm optimistic. I'm excited about the opportunity because I believe in us, and I believe in the power of you. Again, failure is not an option. I hope you're excited about the possibilities that await you. I hope that you're excited to be you with all that you can do.

Remember, I used the word "revival" earlier. Do you remember? Right? Merriam-Webster defines revival as an act or instance of reviving, such as a renewed attention to something. Are you writing this down? Have you written anything down that I've said? Just kidding. I submit to you that this symposium is a good old-fashion legal revival, a human rights revival. If we were all together, I'd say, "Can I get a hallelujah?" It's renewed attention to something that—think about it—it's really—there really isn't anything more important, right? Except for our basic personal survival, our love and obligation to our family, and our faith, right? Maybe those three things. What's fourth? I mean right behind me, surviving, me carrying for my family and my faith, what should be number four? Caring for others; human rights for all; injustice eliminated; justice for all. So, please consider keeping your guard up and your interests in human rights right here in the corner of your dashboard. You know, imagine your dashboard in front of you, or your screen somewhere so that it's always in your vision. Maybe it's not center all the time, but it's always somewhere right here. Where am I on justice? Where am I on human rights? What am I doing to ensure justice? What am I doing to ensure that I am doing everything I can to live my oath as an attorney? And yeah, I like some of what that creed said. So, it should always be on your mind. So, mankind and the betterment is always on your mind. So again, if you have a suggestion or need an encouraging word, I want to talk

more about this since my time is about up, there's my contact information.

I will close by sharing the closing of that message years ago that I sent to the Boone County Bar Association. I think it fits here in closing my comments to you today. This is why I said to the Boone County Bar Association closing that letter:

As you've gathered today—and I'm not able to attend—understand the oath you have taken. Be proud that you are a lawyer. Hold your head high. Being criticized or misunderstood sometimes is part of the badge of courage we wear. You are advocates, advocate zealously and reasonably. Always act like a professional, even in the most unprofessional most circumstances. Try not to make it personal. Take the high road, or you will look like your nemesis: injustice—no one will be able to tell you apart. Be a protector of the Constitution, our laws, and our system. Be, proud of our rule of law. Fiercely defend it; fiercely promote it. Each day, you, the men and women, really do make a difference in the lives that you represent.

It's been an honor to chat with you this afternoon. I'll look forward to my colleagues' presentation. Thank you very much.

Frank Sullivan, Jr., 4:00PM:

Thank you, Justice David for most interesting and inspiring presentation on behalf of the law school. We're deeply indebted to you for spending such a measure of your valuable time with us today. We do have in the Q&A function of our Zoom site. [There's] several questions that I'd like to pose to you if you'd be willing. And if others in our audience would care to use the Q&A function, if they wish to pose additional questions. I'll ask as many as we have time for.

The first question, Justice David, I think goes a little bit to the nitty-gritty of your assignment at Guantanamo. And that—but I think it's one that has some application here in Indiana as well—and that is, "How did interpreters affect the process of meeting with your clients?" And the reason I say that that has salience here in Indiana is that I know that the courts of our state have litigants for whom English is not their first language with great regularity. And indeed, remember that well over one hundred different languages are spoken in Indiana courts. And so, the issue of due process is inextricably linked with the ability of lawyers to operate through interpreters.

Steven H. David, 4:02PM:

Well, I certainly brought back from my experiences as Chief Defense Counsel a significantly greater understanding and appreciation for the challenges that individuals [who] don't have command of English like most of us, or [who] don't speak English as a first language regardless of how intelligent they are. If you just can't communicate, you just can't communicate, and you're going to suffer accordingly. I'm also very proud of all of the efforts that the Supreme Court and partners, including law schools and the bar associations, how far we've come in a very short time to make that experience much better, much more fair, and to ensure fundamental Due Process.

I will tell you, I tried very early my career very quickly a case involving a

breach of contract and stock fraud. The plaintiff, the defendant and the third-party defendant, none of [whom] spoke English as a first language. As a practical matter, the court—the trial court and Indiana—appointed an interpreter and none of us knew how to ensure that interpreter, including the judge, was qualified. All of us had a family member of our client serving as our de facto interpreter. And the conversations were oftentimes: “That’s not what he said! The interpreters not interpreting this correctly.” Then, we would have to stop and decide what we’re going to raise with the judge, what we’re not going to raise with the judge—so very challenging.

At Guantanamo Bay, it was incredibly challenging because in addition to identifying an interpreter, we couldn’t use the same—we cannot use the same interpreters, right, as the prosecution. That’s not going to work. So, it would take months and months to get an interpreter through the security process; to get them to Guantanamo Bay; to be privy to a confidential communication between someone from my office and the detainee; and occasionally, unfortunately, after all that effort, lo and behold, the detainee was from a village twenty miles away, fifteen miles away, and the dialects were not the same, or they were of different conflicting religions or tribes. So, there was a conflict that transcended and usurped; preempted the ability to use that interpreter. So, it was a challenge. It got better over time, but it was very, very difficult. Very difficult.

Frank Sullivan, Jr., 4:05 PM:

Thank you. The next question is quite a different one. And it may skate a little closer to the line of everyday politics than a Justice of the Indiana Supreme Court would care to go. But one of our audience asks, “Whether you would care to comment on election fairness, issues of gerrymandering, truthful campaigning, fair election processes, etc. from a human rights perspective? And what that means in America today and across the globe?”

Steven H. David, 4:06 PM:

I think that’s a great question, and a very important conversation to be having. Unfortunately, my ability to express an opinion on that is greatly restricted. You know, your Indiana Supreme Court must respect its lane and must respect others’ lanes. And, you know, we may be called upon to answer a question of whether or not a statute, a law, existing or past, is unconstitutional. We don’t look for those. We don’t advertise for them. We don’t talk about them, but it’s necessary. That’s one of our constitutional functions to be prepared to do that. The conversation is a fair conversation for everyone else to have, right? But it’s like watching college basketball right now: you know, I may be watching Indiana and Purdue, and I may be rooting for one. And I maybe secretly yelling, screaming as to what play needs to be run and what I would do. But I’m wearing that referee shirt, so I’ve got to keep my mouth shut.

Frank Sullivan, Jr., 4:07 PM:

Your answer seems right to me. We’ve seen over the last ninety days, courts called upon again and again to resolve election disputes. And I think it’s important that the judges be perceived as deciding such cases based on the law

and the proven facts, and not based on any expressed opinions of their own.

We have a question here that I suppose in some respects is sort of the subject of our entire afternoon together. But maybe at a certain level here, as we wind down our time together, you'd care to comment about "What kind of a balance in your own mind you've been able to reach between the demands of human rights and the demands of national security."

Steven H. David, 4:08 PM:

Sure. I do not think they are mutually exclusive. I think they are mutually inclusive. It is definitely a balancing, but you know, my experience over time—and it got better at Guantanamo Bay—is you had very competent, highly qualified prosecutors and very competent, highly qualified defense counsel, civilian and military, maybe I would exclude myself from that group. But they each had—both sides had—the requisite security clearances. And both of them had access to the same information. So, there is a way to navigate that. But it's difficult, and it's hard sometimes for non-lawyers to appreciate that because our language is a little bit different than what some people might be used to or familiar with. But it's necessary to balance that. But there are ways to do that to ensure that human rights are protected. When problems happen, problems usually happen because one side or the other believes that national security, for example, trumps human rights, or that human rights trump national security. I do not think they're mutually exclusive, and I think there is a way to navigate both of those.

Frank Sullivan, Jr., 4:10 PM:

Would you go so far as to say that "a nation that has a reputation for respecting the human rights, even of its adversaries, is a nation that is less likely to provoke threats to its national security?"

Steven H. David, 4:10 PM:

Absolutely. Absolutely. To a great extent, what is the fundamental assumption, a fundamental principle of the rule of law? It is credibility; it is trust; it is respect. It is it is not a law enforcement officer on every street corner. It is not a standing army. It is not a cadre of lawyers dispatched to every neighborhood, every church, every synagogue, every house of worship, every school, every public building. It is a foundation of trust and credibility—respect that when times are difficult, fairness will prevail. There is a process; it is trusted; it is tried; it is not perfect; it is adjusted; it is debated from time to time. It may have some dents; it may take some hits. But it withstands scrutiny, and over time it gets better and better. That's the foundation. If you whittle away and what I said publicly and what I say publicly, what I believe is, is the rule of law is what separates the United States of America, in many respects, from the rest of the world. It makes us the envy of most of the world, right? And the enemy as some of the world. And when we don't, for whatever reason, demonstrate justice, promote justice. And we get the issues confused or people get concerned or they misunderstand or misconstrue the issues, misunderstand the narrative, then the conversation goes awry and we get away from our fundamental principles: due process, fairness, and justice. We need to ensure that our credibility in the system,

all of us—and it’s a responsibility of all citizens—But that’s the challenge. That’s the challenge.

Frank Sullivan, Jr., 4:12 PM:

Justice David, we have about two minutes remaining. And the last question I think we’ll have time for is one that I think relates quite closely to an important initiative that you’ve undertaken under the auspices of our State Bar Association. And the question is this, “how do we reconcile laws and policies that have disproportionate impacts on historically oppressed communities with the spirit of your comments?”

Steven H. David, 4:13 PM:

Sure. I think we have to have the dialogue. And we have to have those dialogues—that dialogue, that conversation in a safe environment. We have to encourage each other to be tolerant and respectful and learn by listening and believe what we are hearing. To try not to deflect or deny or become defensive, but to think in terms of: why did that happen? And most importantly, where do we go from here? And how can we improve? We can spend a lot of time blaming or trying to get to the bottom of it, or we can work on moving forward. But we have to be prepared to listen, and we have to be willing to believe. I think sharing stories and experiences from people we know and people we don’t know and being engaged and listening is critical. That’s what our State Bar Association in partnership with the Indian Supreme Court, most all of the major bar associations in Indiana, and McKinney, Mauer, Barnes and Thornburg, the Taft law firm, Indiana Chapter of NAACP, Cummins Engine Company—I think another national corporation is about to join that conversation as a supporter and many other entities—that’s what we’re trying to do: foster those conversations, foster that understanding, move from conversations to action. This is a long term commitment, and I’m confident that together we will make real sustainable change.

Frank Sullivan, Jr., 4:15PM:

Well, thank you Justice David, for your leadership in that regard, for your splendid remarks today, and for your candid answers to our questions. We’re deeply grateful to you.

Steven H. David, 4:15PM:

Thank you, sir.

Frank Sullivan, Jr., 4:16 PM:

We will now pause for a five-minute break and resume promptly at 4:20 PM Indianapolis time when we will hear from Professor Frank. Thank you all.

## AN INTERNATIONAL LAW AGENDA FOR THE BIDEN ADMINISTRATION

FRANK EMMERT\*\*\*\*

Frank Sullivan, Jr., 4:20 PM:

Hello. Welcome back everyone to our program. I'm very pleased to be able to report that Professor, Dr. Frank Emmert, the John S. Grimes Professor of Law and Executive Director of the Center for International and Comparative Law here at the McKinney Law School has been able to join our panel as originally advertised along with Justice David and Justice Kirby. And I will introduce Professor Emmert in a moment, but, again, to remind all of you that Professor Emmert will speak for about 50 minutes and then be available for your questions. If you place your questions in the Q&A function on our Zoom app, I will do my very best to ask him, as I did to Justice David, as many of the questions as we have time for. Professor Frank Emmert has been a cherished member of the McKinney Law School faculty since 2003, where he teaches European Union law, Comparative Law, and a panoply of international commercial law courses. The second edition of his book, "international business transactions," which I hold in my hands, has just been published, and while it purports to be a textbook, it is really a manual for the international business practitioner full of checklists, forms, and practical advice for any lawyer engaged in the international sale of goods, shipping contracts, international insurance contracts, international financing contracts, and more. If among the 225 or so of you in our audience are lawyers who find yourself or may find yourself working on such a transaction, I heartily recommend this book. Beyond that, Professor Emmert has taught law at universities throughout central and eastern Europe, Mexico, and Egypt. He is, as I said a moment ago, the Executive Director of our Center for International and Comparative Law, and regularly advises governments and multinational enterprises in matters of business and trade law, law reform, and court reform. Above all else, though, Frank Emmert is a teacher, revered and admired by his students to whom he gives a very full measure indeed of his commanding intellect and personal warmth. I'm very pleased to welcome our second speaker, Professor Dr. Frank Emmert.

Frank Emmert, 4:23 PM:

Thank you so much, Professor Sullivan for this very kind introduction. I am very flattered and grateful for the shoutout for my book and your summary of my

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various activities. I also want to thank, of course, the International and Comparative Law Review for inviting me to participate in this symposium. It is an honor and a pleasure to be here today and to be amongst these very distinguished justices and to be treated as one of their equals. I hope very much that I can live up to these expectations. When I was starting in my career, I had an opportunity to work with Wallin Bieber who at the time was the chief legal counsel at the parliament but also a professor at a couple of European universities, and he told me once that as an academic, our job is to sit between the chairs. And what he meant was that we should never cozy up with any of the authorities, governments, or otherwise because the very notion of academic freedom and the protection that tenure provides us gives us an opportunity and a responsibility. And what I mean is to be critical. And to say things that may be uncomfortable, that may be unpopular. Investigative journalists are doing this job in their own way, but academics are doing it in what is hopefully a more scientific way. And working together, we can all contribute to making this world a little bit of a better place. And in this period, I would like to share my remarks today, and I will also try now to share my screen. I have a couple of slides that hopefully will help you along as we are looking at a couple of ideas and suggestions for the Biden administration. Can you see this screen now, the cover page? May I assume? Yes. Excellent.

Frank Sullivan, Jr., 4:25PM:

Yes, yes Frank, we can.

Frank Emmert, 4:26 PM:

Perfect. So, we just have to move along. So, my first is that what the United States does and does not do matters in international law and relations. And it matters more I would argue than what any other nation and state does around the world. The eyes of the world are on the United States. The United States is still viewed, whether it's justified or not, as the city on the hill, and it has to lead, and it will lead, whether it likes it or not, by example. Others will follow, and they will follow wherever the United States goes. So, if in the United States we have a turn back to rule of law and a return to the international respect of human rights and an approach to international law based on rules rather than political convenience or an eye on domestic elections and other experiences, then the world will take notice, and we can influence other countries either way. International relations are heavily determined by political statements, actions, often symbolic acts. This is not our chief point of inquiry. We are lawyers, not political scientists. But, of course, in international law, these international statements, actions, they matter. Many of you will be aware of the rules for international law, namely that, for example, ambassadors or delegates to international conventions where treaties are negotiated, they have to present their credentials, their powers of attorney, whereas the heads of state and government and the foreign ministers of a country do not need to do that. And indeed, whatever they do always represents their country. And I would like to recount a small vignette of history to illustrate the point. There was a time when Denmark and Norway were arguing over the sovereignty over Greenland. And they were

actually, since both of these were civilized countries, they took this dispute to the International Court of Justice rather than sending troops or trying any other ways of dispute resolution. So, they had a case pending in the International Court of Justice in the Hague over which of these two countries was actually the sovereign over Greenland. And we have been reminded in more recent times when President Trump voiced an interest in purchasing Greenland that this is not only a lot of ice, but it's also a very large island with a lot of potential resources, fishing, et cetera, et cetera. So, it was an important dispute, and the resolution was eagerly anticipated in both of these countries. And at some point, the Norwegian Foreign Minister was traveling to Denmark, and it was invited at a state banquet in his honor. And at in the course of that evening at some point before he could plead that the alcohol had clouded his sense of--or his judgment too much, he made a statement along the lines of yes, of course, Norway does not have a solid claim over Greenland. And everybody around was astonished and said, oh, thank you so much. And the next day they took this so-called E-land declaration because the foreign ministers name was Eland, they took it to the International Court of Justice, and the case was quickly decided in favor of Denmark because obviously Eland had made an official statement on behalf of Norway. I wish that this truth and this principle and this case example would have been brought to Trump's attention when he started his time in office because according to international law, every single tweet issued by the then-President would actually be issued on behalf of the United States of America. Now, international law is, of course, heavily determined by political statements and actions, but it is also determined by law. And we have three primary forms of law in international law. First and foremost, we have treaties. Secondly, we have customary law. And thirdly, we have certain general principles of law. And we will look a little bit more closely at treaties and then importantly at customary law because that's what we do because we believe that we have to, because it's the right thing to do that we are bound by it. And when we cannot make treaties, we can often still make customary international law. So, what should President Biden do more of and what should he do less off? That's really the question behind my idea of an agenda, basically. Do more of this and do less of that, and I hope that together with you and the questions and the discussion we are having, we may actually come up with some useful suggestions, and then we just need someone who is going to bring it to the attention of the President. And, of course, we will look at some treaties that I would like the United States to sign and ratify, but I am no -- I am German by birth, as you know, but I am no -- not entirely innocent of U.S. constitutional law, and therefore I know that we have a problem with ratification of treaties in this country, and it's called the Senate, because according to the U.S. Constitution, we need a two-thirds majority in the Senate to ratify an international treaty or convention. And that has been hard to come by, and that's not just a recent phenomenon. So, the question that we will also ask and discuss a little bit, what can President Biden do without having that two-thirds majority in the Senate supporting him? So, I have a couple of treaty examples. And I really do not propose to go into great details. But I think the examples can still illustrate my point. The first treaty I want to bring to your attention is the 1989 United Nations Law of the Child Convention. Now, this treaty is, on the one hand, important and

interesting because it is really compiling a set of rules that are entirely in the benefit of children, of all kinds, including orphans, children who are struggling with disabilities, et cetera, children who have not the fortune of being in intact families and properly taken care of by their parents in particular. But this convention has been ratified by more than 190 countries around the world. I think the latest number is 194. And there are a little bit less than 200 countries around the world, and one of the two or three countries or four that have not ratified is the United States of America. And the rest of the world cannot understand that. I think there is, on the one side, a constitutional law explanation that goes beyond the majority requirement in the Senate, namely this convention touches upon state laws. Prerogatives of the several states. So, the federal government has had issues with ratifying this convention, but I think this is a very poor explanation.

Michael D. Kirby, 4:34 PM:

There's no audio. We've lost the audio.

Frank Sullivan, Jr., 4:34 PM:

Ladies and gentlemen, please stand by. We're attempting to correct the audio difficulty.

Frank Emmert, 4:35 PM:

Is this working better?

Frank Sullivan, Jr., 4:35 PM:

We can hear you now, Professor Emmert. Yes, I think you can continue.

Frank Emmert, 4:35 PM:

Sorry, I don't know what happened. So, when did it cut me off? Did you still hear me talk about the law of the child convention?

Frank Sullivan, Jr. 4:35 PM:

Yes. I think it was just at the point you are transitioning from the law of the child to the discrimination against women convention. So maybe you would start with the discrimination against women convention?

Frank Emmert, 4:35 PM:

Yes. Thank you so much. I apologize. Yes. What I was saying is that in this convention, there is truly nothing that any of us in this audience or in this forum, in this symposium today would object to. It prohibits various traditional forms of discrimination, but also blanket any forms of discrimination against women. And it was ratified in the meantime by 189 countries around the world. I believe is the latest number. And again, the United States are one of the very, very few countries that have not expressed their support for this convention. These kinds of issues are hard to explain around the world. In particular, because when the United States is not supporting one of these acts, there will always be authoritarian governments who say there must be something wrong with the convention. Even the Americans are against it. And I think the sad thing is that

in the United States, we are not against this convention, but we also do not care about supporting it. And that is a problem. We of course have the Inter-American Convention on Human Rights where we have the arrogance of the United States of saying, well, we do not need international supervision of what we do on human rights. We are anyways the gold standard in the Americas. I think ever since the last Gulf War and then the ensuing issues, for example, in Guantanamo Bay, we should know better. And any lawyer who wants to see whether an International Court of Human Rights can actually benefit the members only needs to look at the European, the Council of Europe in Stratsburg. We used to take our students to the court when we had the study abroad program in France. I have the pleasure of joining an event with our alumni association in March with Justice Boštjan Zupančič. I think he was the longest serving judge on the European Court of Human Rights. And there are many, many cases where, for example, the United Kingdom or Germany, or Sweden or Switzerland, all countries that we would probably think of beyond reproach and with strong bills of rights in their domestic constitutions were actually benefiting from some international oversight by the European Court of Human Rights. And I have no doubts that the United States would not only make a very valuable contribution to the Inter-American Court but would also sometimes be taught a lesson from participating in this convention and this mechanism. Of course, we have the Rome Statute of the International Criminal Court that was originally signed and then unsigned by the United States. This, of course, is more problematic. It's more political. But the fact that the United States is worried that its armies and its CIA and other international agents might be prosecuted in this court does not speak well for the kinds of actions the United States is undertaking on the international plane. This is a court that is supported by most of the democratic and rule of law-abiding countries around the world. And the United States' absence, again, speaks volumes. I don't have time to go into great details here. There are various Hague conventions on private international law. They are mostly about mutual assistance. When it comes to the enforcement of judgments and other kinds of activities where rule of law-abiding countries should be supporting each other. And again, the United States has been cherry picking a handful of those, and they are quite many others that it has so far not endorsed and supported and ratified. The same is true for various conventions of the International Labor Organization that provide a number of social security and minimum standards and employment and so forth. And it is not easy to understand why the United States have been very, very selective in supporting these international treaties. And of course, one of the biggest problems that we have is what I have already alluded to, namely the requirement or the rule in Article 2, Section 2 of the U.S. Constitution that international treaties are made by the President with the advice and consent of the Senate. And we may ask the question now, why does the Senate not support the ratification of treaties that are objectively good for the United States and the world? And this is not a new phenomenon. Unfortunately, in international law circles, the United States Senate has the nickname "the graveyard" because that's where international treaties go to die. And it is unfortunate. But it is not something that we will easily fix. Namely that if the Senate is not controlled with a strong majority by one of our two political parties, it is often the case that the

other political party will not want to give what they perceive as a victory to the executive in the White House. Whether that is sensible from the point of view of rule of law, international relations, or even the interests of the United States or not. If we want to do something about this hyper-partisanship that is developing or has developed in American politics, I think we have to start with the Citizens United decision of the Supreme Court that has opened the floodgates to money flowing into politics. Everything has only become worse since then. It's a decision that I would like to have explained to me by any of the justices on the Supreme Court because I cannot see one ounce of wisdom in that particular decision. I don't have an answer what we can do however, about it, and maybe that is for a different symposium to explore.

Now a couple of points that I would like to raise about examples of things that Biden, as president, should do less of. Even without sufficient majority in the United States for treaty ratification. The U.S. administration does not have to threaten the International Criminal Court and its judges and prosecutors for taking up a case brought by the Palestinian Authority against Israel. Simply threatening this is contempt of court in its worst form. This has nothing to do with questions. Whether the court can be trusted or not, to do the right thing at the end and to weigh the evidence appropriately, but to start and threatening a court, I think, I would hope that my colleagues here in the symposium, my justice colleagues would agree that this is just inappropriate. There are other ways of interacting and maybe providing Amicus support or other support for Israel to defend itself properly. Making sure that the due process and rule of law are respected by basically saying that if these judges or prosecutors should set foot on United States soil, they will go, they will be arrested, is, in my view, is just ridiculous. Similarly, the United States does not have to continue undermining the United Nations and its various emanations like the World Health Organization. This has not done anything good for the world on any level. President Biden does also not have to continue with trade wars based on flimsy grounds like national security that were invoked for all kinds of imports including rebar steel, as if they were issues of life and death. These kind of attacks on the international trading regime, that is all treaty-based, treaties ratified by the United States, of course, is not helpful and is actually undermining international rule of law, undermining the credibility of the United States, and encouraging other countries to do the same and also flout their obligations under international law.

I don't expect and I have no concern that President Biden will be doing things like legitimizing systemic racism with blanket bans against Muslim immigrants or visa applicants or offensive labels like bad hombres is for young and old men from Central and Latin America and the like. But the general idea of the Eland declaration and the very fact that whatever an American official of high rank and status says and does will be seen and observed by the world cannot be emphasized enough. We have to look at the procedures at the southern border for refugees that under the Trump administration really, in particular, as they were accumulating, did not meet a single requirement of due process and other safeguards imposed by the Geneva Convention. That were ratified, again, by the United States. It is also not helpful to abandon or belittle our traditional allies who are strong democracies and committed to rule of law while at the same time

associating with dictators and autocrats like Russia's Putin or North Korea's Kim Jong-un. Picking the wrong kind of friend sends a strong message about the direction that this country is going and the kind of values that it is endorsing.

And historically, I want to say something about regime change. It sounds so innocent and so elegant. Excuse me. And I would challenge anyone who is a friend or a supporter of U.S. policies pursuing regime change in other countries to show me a single country where this has effectively been implemented. The first major example and along these lines is the regime change we undertook in Iran when it had a parliamentary democracy and a legitimately elected government and then we disposed of this government with the help of the CIA and planted the Sha in its place who was a dictator. Yes, he was friendly to the west but also with his domestic policy paved the way for the Islamic revolution and the coming of Ayatollah Khomeini and the current regime in Iran. There are so many other examples. We could fill an entire symposium with just those, whether it's from Cuba, across El Salvador, Nicaragua, Venezuela in most recent times, I would like to see a single case, a single one that we could sell as a success story where the United States actually achieved its goals with policies pursuing regime change in other countries. And similarly, of course, I would argue that no good has ever come from torturing our enemies. And Guantanamo Bay is an excellent example. And if you don't believe me, then please go and see the movie, "the Mauritanian" that is brand-new in our streaming services. I don't think you can go in a cinema yet, but it is outlining the story of a man who got caught up in these dragnet operations and ended up for 14 years in Guantanamo Bay without ever being charged with any evidence or any crimes. That is not the kind of example the United States should be setting around the world. More things to do less of. Namely, even small things like undermining public trust in experts and investigative journalism. Or undermining public trust in democratic elections. I think this is just not even in the DNA of President Biden, but it is a good reminder of the kind of damage that Trump has done during his time in office and that needs time to be healed and repaired. And this is something that we very, very urgently have to go about. Remember, what the United States does at home is seen around the world. For better and for worse. We need to be the shining city on the hill and not the example that others do not want to look at because they're ashamed of it, and that is the kind of message that I have seen with my friends in Europe and in Asia and in Latin America and around the world in the last couple of years. And then, of course, there are things that the Biden administration can go after without even having a Senate majority for the ratification of an international convention. Trump's executive actions can be undone by Biden executive actions. For example, rejoining the Paris Climate Accord that we have seen. We could again, strive to win back the confidence, the trust of our partners in the Palestinian territories and in the Arab world by becoming a real arbitrator—a neutral arbitrator for the conflict between Israel and Palestine. Taking one side does not qualify a country like the United States to be, - to play that role of the arbitrator and to support a peaceful resolution and a human rights-oriented resolution of this intricate conflict. Resubmitting to the United Nations international court of justice. When I was at The Hague at the international court of justice in 1986, we had a case brought by Nicaragua against

the United States. It was a very interesting story. If you are not familiar with, I absolutely encourage you to read up on it. Under the statute of the international court of justice, countries are members, by being members of the United Nations, but they can only be sued in the international court of justice if they have submitted to its jurisdiction by a separate act. So, we have 200 member states of the U.N. that are members of the international court of justice, but not all of them - not nearly all of them are also submitted to its jurisdiction. The United States, like most of the European and various other countries, had a standing submission in the international court of justice. That means they had deposited a declaration submitting without reservations and without time limits to its jurisdiction. And countries like Nicaragua who were, you know, torn between left and right regimes, usually not of the very democratic kind, they rarely submit to the jurisdiction of an international body because they have things that they do not want this kind of laundry washed in public. Now, in order to bring a case, you have to also be subjected to the jurisdiction. You can't hide behind, you know, not being subject and then attacking other countries. So, in 1986, Nicaragua suddenly subjected itself to the compulsory jurisdiction of the international court of justice, and then a couple of hours on the same day filed a case against the United States of America. And, of course, in the state department, when Nicaragua came and accepted the jurisdiction, they knew what was going to come. And in these couple of hours between the Nicaragua declaration of submission and then the filing of the case against the United States, the United States tried to limit its own submission to exclude cases coming out of Central America. The background to the story is that at the time the leftist regime under Daniel Ortega in Nicaragua was very unpopular with various politicians in Washington, and the United States started supporting the right-wing organization in Nicaragua that wanted to topple the left-wing government. And this support went as far as sending CIA agents with weapons and land mines into Nicaragua to work with them mining harbors and other activities, and some of them got caught. Now, Nicaragua wanted to bring this to the attention of the international court of justice. They subjected themselves to the jurisdiction and filed the case a little bit later. But in the meantime, the United States had tried to get out of this jurisdiction. Now, the case was at the end decided, I think it was a very unfortunate moment for the American justice who was the sole dissenter, trying to uphold the American right to carve out this area of jurisdiction at short notice because the United States got caught red-handed. And, of course, the international court of justice at the end declared that the United States was in breach of international obligations and should discontinue these violations and pay compensation to Nicaragua. And we all in this forum know exactly the dollar amount of compensation and Nicaragua ever received which is exactly 0. And that's one thing. That may be something that we may be able to understand. What I do not understand is that ever since 1986, through a number of different United States administrations, The United States has not renewed its automatic and standing submission to the international court of justice. Think of the message that we are sending to the world by not accepting any longer the jurisdiction of the international court of justice because we got caught with our hands in the cookie jar, and we rejected this idea to be held accountable for what we had been

doing down there. This is a blemish on the face of the United States that will not go away until we finally have an American administration who is going back to this court like every democratic state around the world, every country that cherishes the rule of law should be doing. And we can take it further. The United States was suspicious originally when the World Trade Organization was created and had a reservation in its ratification that it wanted to see whether or not it would get fair treatment in the dispute settlement body of the WTO. Once this got under way, the United States accepted the jurisdiction of the WTO, dispute settlement body, and participated in many cases until the Trump administration took over and started doing things that were not acceptable under WTO rules, but that were justified with flimsy arguments, for example, national security arguments against various kinds of imported goods, and since they anticipated the Trump administration that this would not go down very well in Geneva at the WTO, it started undermining the WTO and the dispute settlement body. We are not the shining city on the hill when it comes to international rule of law. In fact, we have become a rogue country. And if anybody wants to tell me that the United States is a model for international rule of law, then I have to say I am sorry, it is not a good model, at least not until recently. There are things that Biden can actually do without a Senate majority. We are changing - I think we're in the middle of it - the migrant protection protocols on our southern border. The Biden administration has currently suspended these while it is reviewing how we can recognize interact with the immigration crisis on our southern border. We have to finally shut down that abomination in Guantanamo Bay. If you don't believe me, watch that movie, "the Mauritanian" that I mentioned of this man who got caught in this prison and was - had spent 14 years there without any accusation, any case being officially brought against him. And he is not the only example. How about instead doing a Marshall Plan for Central America, instead of a war on drugs? Building up these countries and creating real jobs as alternatives for people who are now seeing little hope for themselves or feeding their families and surviving and having a chance at a decent life than by giving in to the drug Lords and participating in the smuggling of these drugs into the United States. We have not even seriously explored these kinds of options, and we do not need a two-thirds majority in the Senate for a new approach to this problem. But also, mundane things like appointing the professionals we need in our state department, embassies and international organizations. Trump simply did not care about these, and many of these positions were left unfilled in the last four years, and the United States has lost a lot of influence, a lot of standing, a lot of opportunities around the world for that very reason. What do we need to do in the world? We need intelligent, compassionate, and moral leadership more than anything. With a commitment to human rights of all human beings. We need a commitment to a rule of law in international relations. And if the United States is not providing this kind of leadership, we leave the field wide open for others to become the thought leaders and the action leaders. Unfortunately, many of those who would be not the kind of leaders that anyone should follow. Thank you very much. I look forward to your comments and questions.

Frank Sullivan, 4:58 PM:

Professor Emmert, thank you very much. We're very grateful to you for your comprehensive look at some of the many issues facing our new national administration. I might say, before we get to the questions - and they are accumulating in the queue - that a student of ours at the law school is writing a paper this semester on another of the kinds of treaties that you are talking about. This is called the convention on persons with disabilities. And this is a treaty that is really quite ironic in the sense that it is modeled on the Americans with Disabilities Act. And yet the United States Senate has not found it possible to ratify it. It has come up for a ratification vote on one occasion. I've learned from this student's paper, and although it received a strong majority, it fell short of the two-thirds. It had unanimous democratic support, and the support of a number of Republican Senators including our former very distinguished Senator, Senator Richard Lueger, but not quite enough. So, this might be another treaty to add to the list of things that the Biden administration and the new Senate foreign relations committee under the chairmanship of Senator Menendez might look forward to. I might say in this regard, before going to the questions, if you'll permit me, that I think one of the key players in this drama over the next few years will be a graduate of our law school, our senior United States Senator Todd Young, who as a member of the Senate foreign relations committee on a number of occasions, most notably the war in Yemen broke with the Trump administration and stood for an independent voice among Republicans in respect of American foreign policy, and it seemed to me at least, that perhaps he's following in the footsteps of Senator Lueger as a distinguished Republican Senator from Indiana as a member of the Senate foreign relations committee. Thank you again for your remarks. Let's go to the chat. Or the questions and answers. And the first question that we have is how do you see the Biden administration handling the Iran nuclear deal coming up? What should the administration do different from the previous two administrations?

Frank Emmert, 5:01 PM:

Yeah, I think that Iran is a very intricate problem. I had the privilege of traveling to Iran a couple of years ago, and I had a couple of very, very interesting experiences that have really shaped my opinion considerably about this country, including the fact when I was returning and landing at New York, the immigration officer saw from the forms it I had filled in that I had been to Iran. And he started sort of pumping himself up and basically getting ready to arrest me and asked me what I was doing there. And my answer was, "well, I was doing human rights training for the state department, at which point, oh yeah. Thank you for your service. And please proceed. And indeed, I had the opportunity to visit a couple of universities there, but also speak with a number of officials, and I met several of the leading clerics, Ayatollah's in the country, and I learned that the country is very much torn between hard-line forces on the one hand but also conciliatory forces on the other. The problem in Iran is that we have a hard-liner in charge, Ayatollah Khomeini, and we have the revolutionary guards as the elite force of the Iranian military, not only supporting that, but they have a lot of investments in the economy, and they are not about to let go of these very

lucrative businesses that they control or own. So, the situation with Iran is extremely complicated. We cannot trust the Iranian leadership. They will try to hold on to power by all means. But on the other hand, if we box them into a corner and we basically say we are not going to talk to you, we are sanctioning you on all sides, we are repeating the mistakes we have been making for decades in Cuba. By isolating a country, you are not engaging with it, you are not giving an opportunity to interact on terms as equals and strengthening pro-democracy, pro-international relations forces inside Iran that very much exist. By cutting off these contacts and by just addressing them as the devil like they return the favor to us, of course, we are only reinforcing these hard lines that do nothing to promote dialogue or collaboration. And what we are ultimately unable to do, unless we want to start another world war, is to stop them from developing nuclear weapons. Because they are seeing this not only as their security policy against, you know, potential invasion of war that is brought on them by the west, but they see it also as basically the only opportunity they have in being taken seriously on the international plane. And they are able to source these materials, and they are running more centrifuges now and enriching more uranium and so on than they have done ever before. And I did a presentation - the title was, you can look it up on my research page side where I have most of my publications and presentations. If you just Google Frank Emmert ResearchGate, I made a presentation years ago, why the United States is losing the war on terror, and the conflict with Iran. And in that I have outlined how Iran has dispersed these nuclear installations around the country. They're deep underground. They are frequently close to the Persian Gulf. So, if we would try to take out these bases, we would need a very powerful weapons that would pollute the entire environment and destroy the oil industry, also in Saudi Arabia and the Emirates. So, they are very smart at developing this infrastructure in a way that we will not be able to destroy it like we destroyed a nuclear reactor that Iraq built decades ago. This is not an option. What we have instead is we have to engage constructively with them. And this was actually done in a way that I thought was quite smart when we had the Iran nuclear deal in which they promised, first of all, to stop the enrichment of nuclear materials but also to subject themselves to inspections on that, on that ground. And the Trump administration never brought a single good claim or evidence that there was actual cheating going on, on a worrisome level by Iran. So, what my view here is simply we have to talk to them. This confrontation of not having a conversation of basically shutting them off only encourages the hard-liners in Iran, and they are getting the materials enriched whether we like it or not. We made progress a while ago. We took a lot of enriched materials out of the country. They agreed to a moratorium for years to come. And right now, we are in a situation where they are pumping away and enriching away, and we have no communication lines of any constructive sort with this country.

Frank Sullivan, 5:06 PM:

Thank you, Professor Emmert. And I think that the most recent news reports are that perhaps the Biden administration will try to soften the tone a little bit and maybe some of the progress that we all hope for will be possible. Another

question is, could you comment on the Abraham Accords, which I take to be the joint statement of the United States, the UAE, and Israel, I think subsequently joined by Bahrain back in the early autumn of last year.

Frank Emmert, 5:07 PM:

Yeah, we, we have a bit of an intricate problem. They are, namely, we are, I think, the United States is currently going down a road like we did with the conflict is between Israel and the Palestinians. The United States, originally in that of the world was trying to be the honest broker between the two conflict parties, and we have abandoned that position. We have taken a unilateral stand in support of Israel, pretty much no matter what Israel does, we will stand with Israel. This has not helped, and I think we are, we have started going down the same route by aligning ourselves unilaterally with the, the United Arab Emirates, with Saudi Arabia, Bahrain, and others. The Iranians have not done themselves any favors there. I was actually—when I was in Tehran—I was invited to the National Library where they are working on the Encyclopedia of Islam. It is modeled, a bit on the Encyclopedia Britannica. It will be a much, much greater document at the end, hundreds of volumes. And I saw, and I was told the worldview that is communicated in that encyclopedia is that both sides of the Persian Gulf should be Persian. And that of course includes the Emirates and Bahrain and parts of Saudi Arabia. So, there's definitely this kind of an expansionist streak based on various points in history in Iran. And what we are doing now is doing nothing to reduce that. So, the United States, in my view, should take the position of the honest broker. This is how we achieve more rather than taking one side here. But I don't have easy answers, and I cannot claim that I would know, for example, how to end the war in Yemen in the best possible way. I just want to say one thing that what we have been doing did not work. And I think we should rethink this and work with our partners around the world who are democratic, rule of law oriented States, be they in Europe, Asia, or elsewhere. We work together. I've said this so many times to my students. If the United States and Europe and other partners pull in the same direction, we can move the world. If we pull in opposite directions, we just cancel each other out.

Frank Sullivan, Jr. 5:09PM:

Next question is, how would you prioritize the possible actions that the Biden administration can take without a two-thirds Senate Majority? What are the most urgent issues among those that you discuss in your presentation?

Frank Emmert, 5:10 PM:

Yeah. Where do I begin? [Laughter]. I think what the Biden Administration needs to do first and foremost is to rebuild trust. Trust. First that the United States is committed to rule of law and human rights in international relations. Second, that it will honor its treaties and obligations, right? That is part of rule of law. But we have seen a time in our history in recent years where the, the administration was pursuing politics over law. Whatever seemed expedient, politically expedient in the moment, was prioritized rather than following commitments and legal rules and obligations that the country had undertaken during earlier times. So, we need

to see how can the United States, first of all, regain the trust of its partners because what we all have to understand the United States is by far the most powerful military in the world. The United States is in many ways the most powerful economy because the European Union, theoretically, if they would speak with one voice, they would be equally strong, maybe stronger and in economic terms. But the Europeans are also struggling to agree on things amongst themselves. And if they talk with different voices, it just becomes a talk shop, and then they are ineffective just like at the United Nations and elsewhere. So, the United States, whether it likes it or not is giving the lead and the example in so many ways. So really committing to the treaties that we have ratified and declaring this publicly that the United States will honor its commitments. I think it would be a good start. And then we have to see how we can work together with partners because the world has become multipolar. Yes, the United States is the single most important nation and the single most important moving factor in international law and relations. But it is not the only one. And whenever the United States is not working together with like-minded democratic countries that also honor and follow the rule of law, it is weakened; it achieves less. And we're opening the playing field for autocratic regimes. And unfortunately we have many of those around. We have a populist in Brazil; we have an autocrat in Russia; we now have an autocrat in China. China has a tradition of honoring its international commitments that is no longer taken for granted these days. So we have, by these difficult times during the Trump administration when the United States openly flouted its international obligations, they have benefited. They have added to the opportunities and to the emboldened, these other leaders in countries like Russia and China and Brazil and many others. And we need to return to a different approach. We need to discourage this kind of action on the international playing field where the law is no longer the guiding light and force. So, I think we have to basically analyze our existing commitments and assure our allies and everyone else around the world that we are recommitting these. And only then does it make sense to go out and look, well, what else should we commit to? What else should we put in place? Because if we do not honor their existing commitments, why should anyone else believe us that we're going to honor any new commitments that we are subscribing to.

Frank Sullivan, Jr., 5:13 PM:

This next question is on a somewhat different theme. It starts by asking, what are the prospects for holding multinational corporations accountable for their transgressions abroad? But then the question goes on to call attention to the dispute between Ecuador and Chevron for oil contamination there. Where, if I recall correctly, decision of the Ecuador courts in favor of the plaintiffs was overturned by the International—an international tribunals in the Hague as having been procured by fraud. It seems like a real a rat's nest.

Frank Emmert, 5:14 PM:

Yeah, so we, we have an interesting framework for multinational corporations. And I would like to look at it in two different ways. The first one is that we have many—fortunately—many multinational corporations nowadays

who are increasingly taking their commitments under corporate social responsibility, under international rule of law even, in the direction of protecting the climate around the world very seriously. So, there's a lot of good things happening, and we have to acknowledge that as well. At the same time, we have a very poor regulatory regime for multinational corporations around the world. So essentially, the regulatory, the legal regime says, "You are regulated by your home country for everything you do. Then, you are regulated by the host country just for the local activities." This is the traditional approach that international law is taking to activities of multinational corporations. And then it comes unfortunate, for example, that the United States has strong anti-trust rules domestically but has declared that they do not apply to what these enterprises do abroad. So, for example, price fixing in the United States markets is illegal and will be punished. Whereas if American enterprises fix their prices in other markets, that is not of interest to the American regulators, which is surprising and is not good because, of course, it's almost an invitation American enterprises to do abroad. Sort of the idea of "what happens in Vegas stays in Vegas"—as long as it's not happening inside the United States, it's all good. And then the question is: what can these foreign countries now do to regulate American enter or international enterprises? These are, of course, also European and others with their activities in a country like Ecuador. And the answer is: theoretically they have full sovereignty. They can allow and prohibit whatever they want. However, at the same time, many of these countries have signed investment treaties with the United States and either bilateral or multilateral treaties. And these treaties have evolved in a way that a lot of the older treaties basically protect the investment of international companies against any kind of interference in the host countries, including sensible social or environmental regulations, for example. And the truth is we do need investment protection treaties because if we don't have those, we will see ex-appropriations of foreign companies. We will see all kinds of interference with foreign companies that is unjustified simply because, for example, the local regime wants to have a bigger share of the profits or does not agree with some of the politics of an international investor. When we look at international investment, it's often a long-term strategy, right? We want to encourage investment that is strategic. That is not a hit-and-run kind of investment for quick profits. And so these corporations, when they develop natural resources or they develop any kind of business in a less developed nation, we want them to be there for the long-term—to educate the workforce, to invest in infrastructure and other kinds of production and service facilities. And to do that, we need to provide them with a measure of legal certainty that they will not randomly be appropriated because the government has changed and its opinion has changed about American or international involvement. Or if they are not otherwise in compliance with various more or less arbitrary rules, they will be restricted or worse. But we have to find a better balance, and there are various proposals on the table. For example, the European Union is now putting its money on an international investment court. They want to build a court that would hear those kind of cases as the final instance, and hopefully provide a better balance between the rights of an investor and the rights of the host country to regulate that investment. The traditional approach, however, is international

commercial arbitration. And this happens, for example, in Washington, D.C. at the International Center for Settlement of Investment Disputes, but also at the ICC, the International Chamber of Commerce, and other providers of investment dispute settlement procedures. In these procedures, however, the multinational corporations are usually fairing better because they are more savvy. They are bringing their cases more eloquently. Often, the arbitrators are bound—their hands are bound by the language of these bilateral and multilateral investment treaties. Now it's interesting that you should bring this up today because I have actually launched a research group with a couple of colleagues and friends around the world. We will produce a study, probably as a book project on reforming the international investment protection system. And my chapter in this forthcoming publication will be a model for a fifth-generation Bilateral Investment Treaty trying to strike a better balance. I would be very happy if someone in the audience is seriously interested, I can connect you with this group. We have regular meetings with this group, and you could follow our work and maybe even give an input in the sense of asking good questions or making comments about what is happening here with this research group,

Frank Sullivan, Jr., 5:21 PM:

Professor Emmert, I'm afraid we're going to have to keep it there, stop there. But your most recent project sounds most interesting. And I know that you would welcome e-mail or other communication from members of our audience who would be interested in it.

Frank Emmert, 5:21 PM:

Absolutely. Sorry, e-mail is always the best way to reach me.

Frank Sullivan, Jr., 5:21 PM:

At this point, we will take another short break and we will return at 5:25 Indianapolis time to hear from Justice Kirby. Thank you all.

## **RETREAT FROM MULTILATERALISM: PEACE AND SECURITY ON THE KOREAN PENINSULA**

HONORABLE MICHAEL D. KIRBY\*\*\*\*\*

Frank Sullivan, Jr., 5:25PM:

Welcome back. It's now my great honor to introduce the Honorable Michael

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\*\*\*\*\* Chair of the U.N. Commission of Inquiry (COI) on Human Rights Violations in the Democratic People's Republic of Korea (DPRK) (North Korea) (2013-14); Justice of the High Court of Australia (1996-2009); and Co-Chair of the Human Rights Institute of the International Bar Association (2018-21). The author and Marzuki Darusman (former Attorney-General of Indonesia) and Sonja Biserko (Human Rights expert Serbia) were the appointed members of the COI on North Korea.

Kirby—don't forget the justice bit. A wonderful documentary on the life of our next speaker that is readily available on the web. A leading Australian lawyer says that "even early on in Michael Kirby professional career, he was the Atticus Finch of New South Wales civil liberties." Now, Michael Kirby retired from his great nation's court of last resort, the High Court of Australia, in 2009 on which he had served from 1996. His record there—where he was often referred to as the great dissenter—places him in the pantheon of legal greats in not only Australia but the English-speaking world. But it's perhaps the Atticus Finch incident presage his service. There was probably not much more than a tangent to the arc of a most remarkable career. He was a member of the World Health Organization's Inaugural Global Commission on aids, for example, and has held many formal and ad hoc leadership positions addressing the HIV/AIDS pandemic and health as a human right. He is well known as a gay man who has been an outspoken advocate of LGBTQ rights around the world, including critiquing the attitude of certain organized religions toward LGBTQ rights. Indeed, there is a striking photograph on the web of him addressing the Cardinal Secretary of the State of the Vatican on this very issue in 2019. And he's been a great friend of our University. He has served on the board of the Kinsey Institute. He has lectured at IU on multiple occasions, including one memorable talk in 2004 in Bloomington on the international response of courts to terrorism. Perhaps the finest lecture I have ever heard. Ladies and gentlemen, I know you share the sense of honor I feel that we have with us today a great citizen of the world: the Honorable Michael Kirby.

Michael Kirby, 5:28 PM:

Thank you very much, Frank for that excessive introduction. I'm getting used to that from you, and it's always a delight. I had a judicial colleague who once said, "when somebody says flattering things about a judge, they never say, 'stop, stop; I don't want it'—they always encourage even more. I'm very proud to be involved in this webinar, and I congratulate the two excellent speakers who have spoken earlier: Justice David, with his very interesting story from his own life, which had resonances of my own, and Professor Emmett, for his wonderful and often passionate remarks about the United States of America and multilateralism and international law and institutions.

Today, the 25th of February, in 1998—33 years ago—I was in Bangalore, India. At a very interesting conference of judges, most of them from Commonwealth countries. But there were two judges who were not on final courts. One of them was myself—I was then the President of the Court of Appeal of New South Wales, Australia, which is the busiest appeal court in the Australian nation, but not a final court. And the other was a young judge from Washington D.C.: Ruth Bader Ginsburg. She was a Judge of the D.C. Circuit, the appeal courts in the federal system. And we formed a close friendship. The Bangalore meeting was actually about the international application by municipal judges, domestic, national judges of international human rights norms as contextual matters in the course of deciding cases in their jurisdictions. And that was something which Ruth and I put our signatures to. We supported it, and in fact, it had a number of supporters on the United States Supreme Court. But it had a

lot of, a number of justices of that distinguished court who thought it was complete hearsay. And the leader of that brigade was my old friend Justice Scalia. Often when he came to Australia, we would have sellout debates because he took a view that anything that happened outside the United States you can completely ignore. Whereas the Bangalore principles urged every judge to move with the times of the Boeing 707s and the great developments of the world that have occurred. And that became a very controversial thing in my own court in Australia. So, it's something upon which, at least in Australia and the United States, there are still people who think it a hearsay. But of course, in most countries of Europe and in many countries of the world, living in the world of internationalism and in the world of international problems like COVID-19, We've gotta live and work together. That involves taking as a contextual matter, the developments of international law. But my contribution to this webinar today falls somewhere between the particular excellent contribution by Justice David about his inspiring story as a young American military person who was assigned the task to represent people who were charged and in detention in Guantanamo Bay—and we in Australia in the course of deciding many refugee cases in islands off the coast of our country to which we had sent refugee applicants had cause to look at the unfolding decisions of the United States Federal Courts and the United States Supreme Court on the issues of Guantanamo Bay and the way we were dealing with terrorism suspects and also with refugee applicants. So, Justice David sets one course on our mind's journey to come to grips with the world of international law, and the magnificent address which we've just heard by Professor Frank Emmert shows how this is right up to date. This is something that is really critical to peace and security in the world. Because you're not going to have peace and security in our world in a very dangerous time of nuclear weapons and nuclear proliferation again, unless international law can be brought to bear on the problems of our age.

And in my life, especially when I was on the Court of Appeal of New South Wales, where I wasn't subject to strictures of our federal constitution, I served on a number of international bodies as Justice Sullivan has pointed out. One of them was the Global Commission on AIDS. And another of them was as Special Representative of Secretary General for Human Rights in Cambodia. So, these were experiences of trying to utilize international cooperation for the benefit of humanity and utilize international law and international institutions. But the biggest challenge I faced was one that was given to me in 2013 by the Human Rights Council of the United Nations. When I was appointed by the president of that council, the Ambassador of Poland as the chair of the Commission of Inquiry on Human Rights Violations in North Korea, the Democratic People's Republic of Korea, as it is formally called. And with two colleagues, brilliant colleagues with a background in international law and international human rights law. Marzuki Darusman, who had been the Attorney General of Indonesia and the Prosecutor General of Indonesia. And Sonja Biserko, who was a professor in Serbia and leading advocate of human rights in the war torn country of Serbia in the former Yugoslavia. We three were the three members of a Commission of Inquiry, which was established to investigate human rights violations in North Korea. There was already a special rapporteur who was appointed to investigate

human rights, and that was Marzuki Darusman. But North Korea would not allow him to enter the country. They have a very closed off country and society. And the numbers of reports that are coming in of violence, cruelty and breaches of human rights and discrimination was so powerful that when the President of the Human Rights Council pause for a call for a vote. The Human Rights Council adopted the establishment of the Commission of Inquiry. No call was made for a vote. It's the only time that has ever happened in the history of the Human Rights Council, and it happened because there was, by 2013, a great deal of evidence of the human rights violations in North Korea. And we were given a mandate with nine paragraphs. Our job was to report to the Human Rights Council. And we set about work efficiently.

We met within weeks. We met in Geneva in those pre-COVID days. And although the normal way that European countries conduct inquiries is not the way we tend to conduct them in English speaking countries. And although the way the Europeans do it has from the beginning of the United Nations greatly affected the way the United Nations does inquiries. I was able to persuade my two colleagues, both of whom were from civil law traditions of Europe. The Serbians in Europe, the Indonesian because their legal system was based on that of the Netherlands, they do inquiries very efficiently behind closed doors generally. And they gather the material quickly and effectively. We in the Anglo-American world, do it more slowly, a bit more inefficiently. But it is based on really medieval views of the British in England that they should conduct inquiries in public. Because they had this theory that if you do that, you're more likely to get material to come forward and you're more likely to persuade those who are the subject of the inquiry and the community around them that what you have done is fair, has been conducted fairly, and has reached conclusions that are compelling, convincing, and right. And so within weeks of our establishment, that's what we decided to do. And they'd never had a commission of inquiry, the Human Rights Council, that did an inquiry that way. So, we had a whole series of public hearings of a kind that a lawyer from Indiana would be very familiar with. And a lawyer from Australia and from Britain, from the United States. We had public hearings. We invited the media. We invited the people who came as witnesses. Where it was safe, we invited them to give their testimony in public. Most of them agreed and wanted to speak in public of the terrible wrongs that had been done to them. We recorded what they said. We recorded on film, and we have put that record on the Internet and it's available tonight. You can go home and Google the U.N. Commission of Inquiry on North Korea. And you will go straight into the testimony of the people who gave witness of the way human rights had been breached in their cases. Those records are still there. They are a compelling case for action by the United Nations in dealing with the problem of North Korea and problem it is.

But the problem that I want to speak about with you is relevant to what Professor Emmett has said and what Justice David has said about the world in which nuclear weapons and extremely dangerous situations can sometimes present an impediment to the action by the United Nations following up findings of human rights violations in countries of our world. And this is the essential problem we face in North Korea. How do we deal with a State which is a rogue State and conducts itself in ways that terribly offensive to human rights' treaties

and principles and the general law of human rights? How do you deal with those issues? When, if you even mention human rights, they don't want to take any part. They say this is antagonistic to our country and it's great, just Revolution. They do not want to cooperate in any way. So, this is the essential problem I want to focus on.

But I will tell you something about what the Commission of Inquiry did. I will recount what I see as its successes and its failures. And I will, then, confront the issue that was presented by the steps that were taken by President Trump when he was in office. And the potential for President Biden to do things in a somewhat different and more Orthodox way. Now, so far as the work of the Commission, we had a wonderful secretary—don't let people tell you that the U.N. is riddled with time servers and people who make up their mind and have political agendas. We had a Secretariat. They were about twelve. Most of them had been offices of the Office of the High Commissioner for Human Rights. But just as we, the commissioners, had to take an oath or make an affirmation that we would uphold the principles of international law, reach conclusions by fair process that were conformable to international law. So, the offices of the Secretariat worked independently for the Commission of Inquiry, and they had to do the same.

We got our report written effectively in the year of our appointment in 2013. It, then, had to be translated into the major United Nations languages. And it was presented to the world media in February of 2014. And it was a formally presented to the Human Rights Council in March of 2015.<sup>2</sup> We were unanimous in our conclusions. The conclusions were expressed in our report. I was the only native English speaker amongst the three commissioners. I made it my task to ensure that the report was written in English was comfortable and readable. Many U.N. reports that I've read are not readable, and I'm sure Professor Emmert would agree with that. But the report of the Commission of Inquiry on North Korea, here it is. It should—you know, the U.N. produces these reports and some of them are readable and some of them are very readable. This report is very readable, but the U.N. is not good at publishing. The report is only this size. It should have been—if the thing had been done in the most effective way, it should have been taken on, published by the private sector or published by the U.N. and available at every airport—when the airports worked—and every bookshop. But that didn't happen. But it's on the web; it's on the Internet, but the Internet is not available in North Korea. In North Korea, the only groups that can get access to the Internet are the friends of the government and those who are supporters of the regime of the supreme leader, Kim Jong-un.

Anyway, we produced our report. It was produced by the methodology that I mentioned. It is readable. And the next question is, okay, "What's happened?" Well, the report, followed faithfully the nine matters of agenda that we were given by the Human Rights Council. People who do inquiries and don't attend to

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2. Commission of Inquiry on Human Rights, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014) [hereinafter COI Report].

their terms of reference are a menace. But also, I found—and I'm sure that Justice Sullivan and Justice David will agree with this—on a final court or a state final court, another menace are judges who give decisions and don't record their findings. You now gotta go searching for what on earth their findings were. But we made our reports, and we very specifically and clearly said what we found relevant to our terms of reference. But more than that, in the course of writing our report, we wrote them as an inquirer in the United States or in Australia or in the UK would do. We, on every page of the report or at least every second page, in dealing with the matter that had been referred to us by the Human Rights Council, we would quote what a witness had said had been their experience where we accepted it. Because so much more powerful than the language of the reporter, of the report writer, is the language of the victim. And they, if you accept that they're telling the truth, they can put it more powerfully and more sharply and with greater emphasis for action than you can. And therefore, every second page has quotes. And in this way, people who had suffered human rights abuses were given the facility of speaking truth to power and speaking to the Secretary General of the United Nations and speaking to the Human Rights Council of the United Nations.

Well, whether it was on the locking up of people who were political prisoners, the public executions that take place in North Korea, the drowning of babies in a bucket of water when they were brought by their mothers from China back into North Korea, all of the matters we dealt with were extremely powerfully, and I think convincingly dealt within the report. Of course, North Korea said, these are all self-selected people. They have come forward, most of them were refugees in South Korea. And in South Korea, there are some 30,000 refugees, more now who have escaped during the winter months in North Korea. They can walk across the frozen rivers into China, or at least they could for a period of time, and then get onto an escape line in China, and get out of China to Laos, to Cambodia or Vietnam or to Thailand. And under the Constitution of the Republic of Korea, South Korea, if they can get to a ROK Republic of Korea embassy, they can get a passport. That's as it was in Germany. They have a right to be a citizen of the Republic of Korea, which claims that it is the only Republic of Korea. Likewise, North Korea claims it is the only democratic People's Republic of Korea. But if you can get the passport, you can then get on a plan and you can then get into South Korea, and you can be given support and financial aid and education and other opportunities. So that is what we did. We gave this chance to speak truth to power. And let me pause to say here, if we never did anything else, if nothing else happened out of the report of the Commission of Inquiry on North Korea, this was a good thing that the United Nations did. And it brought the truth of what is going on to this day North Korea to attention.

North Korea desperately wanted to have a meeting with the President of the United States. But under President George W. Bush and under President Obama, you could only get that meeting if you would give verifiable and irreversible guarantee of ending the nuclear development. Because from early in the 21st century, North Korea, in order to establish its power and credentials, had begun developing nuclear weapons. It has to be said that the development of nuclear weapons by North Korea and the development moreover of missile systems for

delivering the weapons astonished the West. No one expected that they would be able to do it as quickly and apparently effectively as they have done. And there is now the belief in informed circles that they have at least thirty nuclear warheads. And more especially they've developed the missiles that can deliver them. You'll remember from the very first atomic bomb. It was called the Fat Boy, the Big Boy. And the problem with it was it was a very big bomb. But what you had to do with the nuclear weapons in Korea was to develop a smaller warhead. And apparently, North Korea has been able to do that. And therefore, it makes it not only difficult and dangerous for Japan, over which territory the missiles have been delivered. But potentially dangerous, at least to the West Coast of the United States and possibly elsewhere. So it's a very dangerous situation, a very dangerous situation. And the world has to face up to the dangers that it now faces not only in Korea, but as Professor Emmert said, in Iran and in other countries that have developed or are developing nuclear warheads and missiles to deliver them.

So, when President Trump came to office, you'll remember his first speech to the General Assembly of the United Nations was a very antagonistic speech addressed at North Korea. He said, that little rocket man, as he called Kim Jong-Un, would pay a price if he did anything to endanger the United States or its allies. And he threatened in that event, the Democratic People's Republic of Korea would be laid waste. Which was itself a rather, I'm lawful assertion because that would be a shocking breach of international law as well. But then suddenly, President Trump astonished the world by arranging the meeting that was held in Singapore, the first meeting between him and Kim Jong-Un. And of course, as with most things that President Trump did, it was full of razz ma taz and lots of television and lots of media, and inevitably lots of tweets. I remember thinking at the time that actually, this might be a good step, because I agree with Professor Emmert that in a very dangerous situation, simply refusing to have any dialogue is not necessarily going to get any progress. And therefore, I thought, well, at least he's trying something new and different. And I was hopeful that he would produce results. But a problem arose at the very beginning that President Trump could not get his magic lips around the words "human rights." He was like President Reagan, who by the way, with the support of Senator Lugar and other Republicans in the Senate, did some very good things in Nuclear Non-Proliferation. But President Trump could not. Reagan couldn't get his magic lips around the acronym "AIDS." In the first term in office, he never once referred to HIV/AIDS. Meanwhile, lot of Americans got infected with AIDS. Whereas we in Australia, were talking about it and responding to it and dealing with it. But President Trump had difficulty dealing with things he was uncomfortable with. And one of them was COVID-19 when it came along. But another was the issue of human rights. Global human rights. Human rights for everyone. It's astonishing to me that an American president would not understand that human rights are one of the great gifts of the United States, universal human rights.

When I was a little boy in Sydney, Australia, in my local public school, we all got a copy of the Universal Declaration of Human Rights. And as a little boy in 1944, I saw Eleanor Roosevelt go past my school, representing President F.D. Roosevelt, to a big new hospital in a nearby suburb, which had been built with

American aid for veterans, American and Australian, from the Pacific War. And I remember seeing this great lady go past my school. I swear that we locked eyes. I saw her, and ever since, I've been interested in and committed to the Universal Declaration of Human Rights. As it happened, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations meeting in Paris. This was before they had their headquarters in New York. Meeting in Paris to adopt the Universal Declaration of Human Rights. Name call—No one voted against it. South Africa and Saudi Arabia didn't vote for it, but no one including the Soviet and the Soviet states voted against it. And this was something Eleanor and her committee had developed. And it was brought into effect by an Australian Dr. H.V. Evert, Herbert Evert, who was the President of the General Assembly at the time, 1948, December '48, a great moment in world history. And so why a President of the United States would not understand that this was a very important gift of the United States to the whole world and that you couldn't get peace and security in the Korean Peninsula if you ignored the terrible situation of human rights within the Democratic People's Republic of Korea. But President Trump never spoke about human rights in North Korea, and he never talked about it at any of the three meetings he had with Kim Jong –Un in Singapore, in Hanoi, and in the demilitarized zone of Korea. And this has been the problem that we are in. And it's the problem that we must solve.

Notwithstanding that the Commission of Inquiry on North Korea had a number of achievements, the public hearings, the establishment of a field office in Seoul to continue the work of gathering the data. North Korea didn't let the Special Rapporteur on Human Rights enter, but they did let the Special Rapporteur on Disabilities go into North Korea, and they have improved, apparently, their law and policies on disabilities. The exchange of military remains. That was something which was specifically agreed in Singapore, and that has been fulfilled. International media have increased their coverage of North Korea. The BBC is restarted its Korean language broadcasts. But, of course, it's a serious offense in North Korea to be caught listening, though some people listen to the voice of America and the BBC.

So, there were a number of achievements, but there were a number of failures. The failures include the Commission of Inquiry recommended that the report be delivered to the Security Council and placed on the Security Council agenda and that the Security Council should refer the case of North Korea to a prosecutor of the International Criminal Court. That is the alternative way that you can get a case of human rights abuses to the International Criminal Court even in a country that is not a party to them. That step has not been taken, and it's unlikely to be taken whilst China and the Russian Federation oppose taking that step. Family reunions, which are very urgent because many of those who are in divided families are now very old. And unless the reunions conducted soon, then people will not be able to have reunions. They don't even have postage between North Korea and South Korea. They don't allow people to telephone from North Korea to South Korea. And China has not been cooperative in respect of refugees who have escaped from North Korea into China. China has a memorandum of understanding simply to send them back to North Korea. Although under international refugee law, that cannot be done if there is a well-founded fear of

persecution on the part of the refugee. That's called reformant. And the economic breakdown, the humanitarian issues, the COVID-19 pandemic as it affects North Korea. All of these areas of failure. And that has to be acknowledged.

So we have some achievements and we have some failures. And we then come to what is the central issue that I want you to focus on. And that is, how do we get North Korea to be answerable to the international community, the United Nations, and answerable to the crimes against humanity, which have been found in the report of the Commission of Inquiry. After the Second World War, with the discovery of the crimes against humanity, the world promised that it would never again turn its back on crimes against humanity. Crimes against humanity are not just human rights abuses. Every country has human rights abuses, including my own country, Australia. The way we deal with refugees, by sending them out to be kept on islands off the coast, is not in conformity with human rights principles and rules, including treaties we've signed up to. But crimes against humanity are something bigger. Crimes against humanity are violent crimes done with state authority that shock the conscience of humanity. And the Commission of Inquiry found crimes against humanity and said these have to be attended to. Well, we're not attending to them. And how do we attend to them if just mentioning them turns North Korea to walk out of the discussion? This is the quandary. This is the essential problem. And it's true also of Iran. And it's the problem that Professor Emmert mentioned in his wonderful address today. So this brings me to, in the specific case of North Korea, to the general problem. How does the world deal with crimes that shock the conscience of humankind everywhere when just to mention that is going to make it difficult to deal with problems of nuclear weapons delivering missiles. Now, in our report on North Korea, we didn't really deal with the nuclear issue. In part because it not fully developed at that stage. But in part because we had other fish to fry, and we thought that was something the Security Council would deal with. But looking back, I think we should have dealt with the nuclear issue because obviously, nuclear weapons present the risks and threats of crimes against humanity and of other great crimes for those that are affected by them.

So this is what I wanted to tell you about today. It all comes together in the Charter of the United Nations and in the Universal Declaration of Human Rights. In the realization after Hiroshima that unless we got our act together on this little blue planet and deal with problems as an international community, we're just not going to survive as a species. And that is terribly, desperately urgent. So how do we deal with that and do what we promised we would do after the Second World War. Respond to the problems of crimes against humanity, at least. And that's the challenge. And it's not going to go away because we don't talk about it. And it's important to talk about it. And one particular case, but only one case, is the report of the Commission of Inquiry on North Korea. And unless we get this right in the case of North Korea, we're not going to get it right in the case of other states that develop nuclear weapons and endanger the future of humankind. So that's what I came to tell you at Indiana University. It's not the evening over there. Over here in Sydney, it is summer. There is sunshine outside. Lots of people are at the beach and enjoying themselves. But I'm in here slaving away, as judges the ex-judges and professors tend to do. But I'll do anything for Indiana University. You've got

an Aussie as your president. He's about to step down. But Michael McRobbie has done a great job as President of Indiana University. And I feel a great admiration for Dr. Kinsey, the work he did on sexuality and liberating LGBTQ people around the world by the knowledge of truth. And I'd love to be associated with the Indiana University and especially when Justice Sullivan is in charge because I know he'll tell me to shut up and to allow time for questions.

Frank Sullivan, Jr., 6:10 PM:

Well, thank you, Justice Kirby, for really a splendid talk and most interesting set of observations. And, and I think what I would say most of all is that as interesting as the specific comments about North Korea are, the transferability to so many other issues and problems of the way in which you went about doing your work and the issues that remain will stick with all of us as we as we face issues in the years to come. Neither you nor I will be around when a great many of the students and others watching this broadcast today confront the problems of the future. But they will have learned a great deal from your presentation. We have several questions for you. If I could detain you from going to the beach just a just a little bit longer. One question is, do you think that any kind of satisfactory human rights reform in North Korea is feasible while the Kim Dynasty retains absolute control?

Michael Kirby, 6:12 PM:

In our report, as we were a United Nations' committee which had been set up by the Human Rights Council, we did not accept an option of regime change. I mean, the United Nations has members. North Korea is a member, a member state. There is an issue as to whether like South Africa, because of its non-cooperation, it should be suspended. But then that would run into the problem that Professor Emmett mentioned that you suspend them, and then you put them out of the dialogue. And therefore, in many ways, it's better to have them in the dialogue. What we've got to do is to get the germ of the idea that was a good idea that President Trump had. And that is, have dialogue and dangle before them the possibility of economic development. He dangled before Kim Jong-Un the wonderful alluring possibility of Trump hotels all over North Korea, and people coming into North Korea and playing golf, which is very popular in that part of the world and so on. And you know, after the Second World War, the magnificent, wonderful work of President F.D. Roosevelt and after the war, President Truman and of George Marshall and the Marshall Plan and helping those who had been our enemies to build their economies and to build stable democratic regimes. Now, not enough attention has been paid to that period of transition and how that could be done successfully in cases like North Korea, Iran, and other countries. But I think up there in the State Department, whether there are all these very, very brilliant people. You know, I work with those guys in the State Department, and it was during the Obama Administration. They were very clever people. And I think they should be going back to 1945 and '46, getting out the files of the Marshall Plan and seeing what, how was it done then? How did it, the times are not the same, the countries are not the same. The challenges are greater. The challenges are certainly more urgent because of the

nuclear weapons. But we've got to think outside the circle. We mustn't ignore human rights, especially crimes against humanity, but we've got to think in a more imaginative way of what we can do to allure North Korea into dialogue about human rights and peace and security. There will never be peace and security on the Korean Peninsula until the issues of human rights are dealt with effectively.

Frank Sullivan, Jr., 6:15 PM:

Thank you, Justice Kirby. I have another question here about North Korea and then still another about China. Why don't we stay with North Korea here and focus rather than on human rights, on the nuclear issue. Our questioner asks, one of the justifications that North Korea has given for its nuclear program, and I suppose one might say the same thing about Iran, is that nothing else will ensure its sovereignty, citing the fate of nations such as Iraq. Given this fact, do you think that there's any realistic way to convince the regime to pursue nuclear disarmament?

Michael Kirby, 6:16PM:

Well, without the kind of originality and fresh thinking that I mentioned in the answer to the last question, I don't think there's any chance that North Korea is just going to give up its nuclear weapons. That's why there was an element of unreason in the approach with respect, I have to say as a foreigner, that President Trump took to North Korea, just asking them to give up their nuclear weapons and missiles on the chance that they would get Trump hotels was really not a sensible, rational way to proceed. But there is a sensible and rational way to proceed. And what we have to do is explore it. And we owe this to ourselves because I don't think North Korea and Iran are going to be the last to countries that are going to go down this nuclear track. I mean, we thought for a time, well, at least the only countries that have nuclear weapons are the P-5, the permanent serious countries in the Security Council. But then more began to develop and secure nuclear weapons. And now a very small player, North Korea. North Korea has even fewer people than Australia. We've got 26 million. They've got 24 million. And here is this country with a small population, but these remarkable and extremely dangerous weapons. As many observers say, nuclear weapons are not just dangerous for leaders who fall into rage. They're also dangerous for mistakes, for errors, for accidents, for misunderstanding of events. And if you look at our species, which has lasted so many thousands of years, and all the wonders of J.S. Bach's music and the great painters and poets of the English language, all of that could be wiped out in a couple of days. I mean, this is the truth. And this ought to mobilize the world community. But how you get that, that's what we've got to get those guys in the State Department and in human rights organizations and important academics and lawyers and judges thinking about, because it literally is a matter of survival of the species.

Frank Sullivan, Jr., 6:19 PM:

I think that as I recall, the cover of The Economist magazine, just within the last sixty days, was on this subject. That headline was something like "Who's

Next?” So a lot of people are thinking these same terrifying thoughts. Let me switch to China, if I could. The question asks, and I’m going to amplify it in just a second, whether there is a better way the international community can deal with China in respect of human rights abuses. And I suspect this question here particularly concerns the Uighurs, and of course, there are a number of ethnic minorities around the world for whom we all share a concern. The Rohingya are very much in mind these days, too. I just wanted to say as to the Uighurs, the very first time that I heard about the Uighurs was in respect to Justice David’s assignment at Guantanamo where a number of, as I recall, Uighurs had been imprisoned, right, Muslims, and they didn’t really want to go back to China, as I recall and, and sort of became stateless people. But in any event, China is a real conundrum in this respect, isn’t it?

Michael Kirby, 6:21 PM:

Well, it is a conundrum, and it’s not simply the Uighurs. It’s also the issue of Taiwan, the issue of Hong Kong. China has a great fear of what it calls splitism. That is to say, it’s very afraid that in the outlying regions of China, including Tibet, that parts of the nation will split away, and that that will start a course of events that will be greatly damaging to the integrity of the Chinese nation and the economy of the Chinese nation and its capacity to keep together. And therefore, if you read any material coming out of China under President Xi, it’s got plenty of material of fear of splitism. And, of course, it’s not the only country that has these fears. Burma is another country that does, and this is a problem where the old issue of self-determination of peoples that exercise the mind of President Wilson at the end of the First World War is still with us, and it’s still a source of great potential disruption. But China is a special case because China is extremely large and very powerful. On the other hand, China, as I think Professor Emmert said, has at least in the past, pre-President Xi, been very favorable to the international rule of law in the sense of sticking to a rules-based system. And even on the case of North Korea, if there have been sanctions imposed by the Security Council against North Korea, as they have, that could not have happened without the vote of the Russian Federation and the People’s Republic of China. So that signals that at least on the matter of Korea, China is concerned itself for the dangers to China of they break down—sudden breakdown of the regime in North Korea. And it’s concern that, that could be dangerous to the integrity of China because there’s a large population of Korean Chinese in the Northeast corner of the People’s Republic of China. So, the issues of splitism and the issues of respecting China’s national sovereignty are important. But all of that has to be seen in the context of the United Nations and the Charter of the United Nation. The one thing we learn as judges is context. Context. Context. Context. That’s how we can understand a particular problem. That’s how we can understand the particular problem of Guantanamo Bay, in the context of the traditions of the United States and international posture. But this is what we’ve got to look at. The Commission of Inquiry had a lot of problems with China. China would not cooperate. The Russian Federation did cooperate. It was very interesting going to meet the Russian ambassador. He said, “We know where our comrades, friends in North Korea are coming from because we went through all this.” That’s what

the ambassador for the Russian Federation in Geneva said. And he said to us, "If ever they do something which is favorable to human rights, give them due credit."

Frank Sullivan, Jr., 6:25 PM:

Yes, yes.

Michael Kirby, 6:25 PM:

We did, but it was not rich pickings. But anyway, this is, this is what we have to do. We've got to reach out to China and try to engage with it because it's not going away. It's very powerful and it's very concerned about splitism among the break-up of the Chinese nation.

Frank Sullivan, Jr. 6:36 PM:

Yeah. Yeah. Yeah. Well, thank you very much. Justice Kirby, you've been very generous with your time, as you always are. And in saying goodbye to you, I would want to say to the members of our audience who may not know this, that you were scheduled to be at our law school in-person almost exactly one year ago. And at the very last minute of due to COVID related issues, you did not make the trip to North America, and as much as we missed having you, maybe it was just as well because I understand that some Australians who are absent from their country at the time had difficulty getting back home. But we were very grateful to you for your willingness to travel here last year. We're very grateful for your being with us today. And we hope that you will be able to visit our law school in person before too long.

Michael Kirby, 6:27 PM:

Thank you. Thank you very much Justice Sullivan. My respects to everyone.

Frank Sullivan, Jr., 6:28 PM:

Thanks for your splendid remarks this afternoon. Well, we've come, ladies and gentlemen, to the end of a really quite wonderful afternoon. And I want to take this opportunity to thank a number of people who made this possible. First and foremost, of course, our speakers, Justice Stephen David, Professor Frank Emmert, and Justice Michael Kirby. In addition, there are a number of other individuals associated with Indiana University, with our law school, and with the law review, who I want to thank by name. First of all, behind the scenes, making this webinar possible are Brandon and Chelsea Roberts from the University's central staff. From our own External Affairs Office, Jonna MacDougall and Liz Allington, have done a great deal to make this possible, including managing the very complicated Continuing Legal Education requirements that we have all been able to take advantage of here. At least those of us who need Continuing Legal Education credits, which probably includes just about all of us except Justice Kirby. Finally, a particular word of praise and thanks to three of our wonderful students who, as leaders of the Indiana International and Comparative Law Review, conceived of and executed this afternoon's program. Zach Reichle, the Associate Editor of this symposium; Khoa Trinh, the Symposium Editor; and the

Editor-in-Chief of the Indiana International and Comparative Law Review, the woman for whom we all work: Ariel Anderson.

Ladies and gentlemen, this brings us to the end of our program today. Thanks so very much for joining us. My hope is that you'll continue to support our law school and this law review. Justice Kirby and I are signing off here with our masks on to remind all of you that it's still quite, quite dangerous out there and that we should all take care. Thanks very much.