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FURTHER COMMENTS ON THE REVISED DRAFT PROPOSAL
BY THE CANADIAN JUDGES' ASSOCIATION ON THE IAJ's
UNIVERSAL CHARTER OF THE JUDGE

The Hon Justice Michael Kirby

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Art.1

1. Not "divisible". This word is still awkward in the English language. What does it mean?
2. What are "institutions" How do they differ from "authorities"?

Art.2

3. What is "judicial status"? If it means "the rights, privileges and duties shall be provided by law" it says nothing more than the next sentence.

President of the International Commission of Jurists. Justice of the High Court of Australia.

4. "Absent of" is awkward; better to say "free of". It is a bit naive to say that judges must be "completely free of pressure". What is forbidden is deliberate pressure designed to affect judicial decisions as distinct from the inevitable pressures of living in a society and hearing free debate on public issues.

Art 3

5. I have difficulty with disciplinary bodies being "representative of the judges", certainly if that means exclusively so. What of lay participation in judicial and professional commissions as we have (beneficially I think) in Australia. What of Parliamentary removal - the ultimate discipline, which is common to all common law countries? Such procedures are in a body which is certainly *not* "representative of the judges".

Art 7

6. I am still troubled by "dignity". It tends to be confused by many judges with pomposity. But I could live with it.

7. What about the duty to make himself or herself aware of the law - so as to apply the law accurately and to keep up to date with the law and alert to changes in society. [This is something Louise Arbour emphasised, rightly, at the Quebec

conference and is, in my humble opinion, just as important as "dignity"].

Art 8

8. I simply cannot agree that a judge is forbidden from taking part in appropriate national or international organisations. In Australia (and many common law countries) these are permitted and "national and international arbitration" totally forbidden during office. Take Louise Arbour's work in the International Criminal Tribunal for the Former Yugoslavia or my work for the United Nations in many bodies and offices. There may be a need to search for a general phrase such as: "Shall not take part in any national or international body, participation in which would damage the judicial office or be incomparable with judicial duties".

9. In most common law countries there is no "independent body representative of the judiciary" capable of giving consents for judges. Better to say something like: "with consent or otherwise in accordance with local law or established conventions".

Art 9

10. I would add after "political" in line 2 "or controversial".

Art 10:

11. To say "A judge is irremovable" is too absolute. It should read "irremovable, except in accordance with law". This is said in the second sentence. I would combine irremovability and except as provided by law and put the rule on suspension and standing aside into a second sentence.

12. My comment on "representative of the judiciary" in par 5 is repeated. In any case, consistency of language with Art 3 is desirable ("representative of the *judges*" or of the *judiciary*").

13. Express non-retroactive reduction of retirement age should be expressed in terms identical to non-reduction in salary (Art 16).

Art 11:

14. The intervention of an independent body that is representative of the judiciary in judicial appointments may be common in civil law countries and many developing common law countries. It is not true of Australia, New Zealand, the United States of America, the United Kingdom, Papua New Guinea, Solomon Islands or, as far as I know, Canada. Some judges in such countries (including myself) have real hesitations about judicial appointment commissions - especially if they are dominated by judges. Such bodies tend

to produce, clone-like, images of themselves. Many modern governments at least tend to be more alert to issues affecting women, indigenes, racial minorities, gays etc, than the average judge is. He (and I mean he) tends to be a middle-aged, white, conservative male. This Article is very controversial.

Art 14

15. Some comment on "representative of the judiciary". At the very least this expression should be changed to "including representatives of the judiciary".

16. The Article makes no recognition of the ultimate rights of the people, in the legislature, to remove a judge. The very fact that this is reserved by strong constitutional principle, to the legislators is a guarantee of its solemn and exceptional character. [It has happened only once this century in Australia and never in the United Kingdom]. It would be extremely odd if this central constitutional provision, won in 1688-1700 in England, and common to most common law constitutional arrangements, were totally ignored in the draft Charter with preference for what looks to a common lawyer to be a rather bureaucratic, lower level, club-like system appropriate to lowly officials; not to judges of our tradition. The article needs more work to find an acceptable common formula.

Art 18

17. This draft is an improvement but may need to have added "In those countries where judges may, by law, perform prosecutorial functions". As you know, this is completely alien to the common law tradition and inconsistent with its notions of the independent judicial office. The problem has lately been examined in the European Court of Human Rights in respect to Switzerland.