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QUESTIONNAIRE FOR JUDGES INVOLVED  
WITH THE INTERNATIONAL CONFERENCE OF  
CHIEF JUSTICES OF THE WORLD

Michael Kirby

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*1. Every nation has a different process for putting judges into their positions. Some have elections, some have nominations, some are nominated by their Executive, some their legislative body. How were you implemented as a judge? How does this implementation procedure vary at different levels of your government?*

In Australia appointments are made by the relevant Executive Council (Federal, State or Territory). There are no elections requiring consultation with identified persons or bodies. Nor is there any requirement for Parliamentary or Opposition approval. Which is still a pure executive decision.

*2. The Lucknow Treaty was implemented at the 15<sup>th</sup> ICCJW held in 2014. Were you there? If yes, were you present for the approval of the Lucknow Treaty? If yes, do you recall the events of the day? If so, what are they?*

I was not present. Therefore not applicable.

*3. If you were present for the approval of the Lucknow Treaty, have you done anything to support implementation in your nation? If so, what?*

Not appropriate. I have not supported implementation and had not heard of the “Lucknow Treaty” until your letter.

*4. What do you recommend we do to raise support from your national leadership? Are there national leaders with whom you can connect us for this process?*

Support for it would depend on its terms. The Universal Declaration for Human Rights was accepted by Australia, a foundation member of the UN. However, it is not a binding treaty. And even this, under Australian law, must become part of local law before it is binding. That can occur (usually) by legislative enactment or exceptionally) by judicial application rendering a principle of international law part of Australia’s domestic law.

*5. Is there anything else we need to know?*

It may be desirable to creation a United Nations court:

- \* It must be validly created as recognised in municipal law;
- \* This cannot be done effectively by a small group of municipal Chief Justices or Justices;
- \* The Lucknow Treaty is not a “treaty” in the normal use of that term;
- \* The body must have national and municipal powers recognised as such by the informed UN member states.

- \* Powers must be those comparable with that contained in the *Universal Declaration for Human Rights* (as in the ICCPR).
- \* Caution must be limited in calling proposed [informal] tribunals a “court”. There should be no dilution of the international meaning of a “court”, being a body created under national or international governmental power; consisting of trained and independent members usually called “judges”. They must exhibit integrity and impartiality and professionalism that are essential components of judicial integrity.
- \* In international human rights law, use of the word “court” comes with connotations.
- \* Given the divisions and dangers of the world at present, I am doubtful that the international community or even the international judiciary (if this is within their powers) has exhibited the will to create a world court of human rights. Human rights remain highly controversial in some circles. The global community is divided on them. In a recent vote of the Human Rights Council on 8 July 2022 in Geneva, the continuation of the mandate of an Independent Expert with aspects of human rights in the HRC membership was considered and voted upon. The ultimate vote in the HRC was For 23: Against 17: Abstain 7. India abstained although the Supreme Court of India in 2009 held that article 377 of the *Indian Penal Code* was incompatible with fundamental rights and therefore invalid and unconstitutional in India. The detail of human rights must be considered carefully and agreed upon by people with relevant powers before establishing a world court of human rights. Such a court should be subject to most thorough advice and discussion. Hopefully followed by agreement.

We should not interfere with the European Court of Human Rights; Inter-American Court of Human Rights; and the African Court of Human and Peoples' Rights. There is no such regional court in the Asia/Pacific Region. I question whether it is possible/desirable for a group of distinguished present and retired Chief Justices to alone create and establish such a court. Instead of purporting to "create" such a "court" without legal power to do so, it would be preferable (in my view) for such distinguished jurists to identify steps and methodology of creating such a world court; the justifications for doing so; the practicalities of achieving this end; and the powers of funding and legal requirements of such a "court". Some well-meaning people purport to create "courts". However, in the real world, that can only be done by persons and entities with appropriate legal powers to so act. The precious independence and authority of "courts", properly so called, should not encourage informal bodies to set up so-called "courts" without the most thorough consultation and preparation.

Michael Kirby,

Former Justice of the High Court of Australia (1996-2009)

Former President of the Court of Appeal of Solomon Islands (1995-6)

And the Court of Appeal of New South Wales (1984-96)

President of the International Commission of Jurists (1995-7)

Member of the Judicial Integrity Group on the Bangalore Principles for Judicial Integrity (1999 - )