

150th
2018 Year

EXPERT GROUP MEETING ON İSTANBUL DECLARATION IMPLEMENTATION MEASURES



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20 October 2017 - Ankara

**“ETHICS, TRANSPARENCY AND TRUST PROJECT OF
THE COURT OF CASSATION”**

This book is prepared and published within the scope of the “Ethics, Transparency and Trust Project of the Court of Cassation” which is financed by the Court of Cassation and implemented by the Court of Cassation and UNDP.

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**ETHICS, TRANSPARENCY AND TRUST
PROJECT OF
THE COURT OF CASSATION**

**EXPERT GROUP MEETING ON İSTANBUL
DECLARATION ON TRANSPARENCY IN
JUDICIAL PROCESS**

20 October 2017, ANKARA

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FOREWORD

As we all know, transparency is a fundamental element of the judicial process. “Transparency in judicial process” is a bridge between individual and justice. We should solidly and trustfully set up this bridge so that individuals could reach the justice! Therefore, the Istanbul Declaration on Transparency in Judicial Process that was developed by the Court of Cassation in cooperation with United Nations Development Programme, is a very important guide that designates the basic principles of transparency in judicial process.

The Istanbul Declaration was initially scrutinised and accepted by a representative group consisted of Chief Justices and Senior Justices from 13 different countries from Asian Region. Thereafter the Declaration was examined and approved by Chief Justices and Senior Justices of the Balkan Region. Finally, on 20 October 2017, in Ankara, we have developed Implementation Measures of Istanbul Declaration on Transparency in the Judicial Process with the participations and contributions of Honorable UN Judicial Integrity Group Coordinator Dr. Nihal Jayawickrama, Honorable Chief Justice Kashim Zannah, Honorable Justice John Dowd, Honorable Justice Shiranee Tilakawardane, Honorable Justice Jeffrey Apperson, Honorable Justice Michael Buenger. Honorable First Vice President of the Court of Cassation Abdülhalik Yıldız, Honorable President of Chamber, Fahri Akçin, Honorable President of Chamber Seracettin Göktaş, Honorable President of Chamber Ahmet Er, Honorable Secretary General Yusuf Ziyaattin Cenik, and Honorable Deputy Secretary General Dr. Mustafa Saldırım presented their very precious contributions at this meeting. I can not thank them enough for their extraordinary performance and creativity on 20 October 2017. I strongly believe that this valuable study will fill an important gap in the international field in terms of transparency in judicial process.

İsmail Rüştü CİRİT
President of the Court of Cassation

“The Draft Implementation Measures of the İstanbul Declaration on Transparency in the Judicial Process” has been developed with the valuable contributions and expert views of the below-mentioned judges and international experts in the scope of the “Expert Group Meeting on İstanbul Declaration on Transparency in the Judicial Process” held in Ankara on 20 October 2017, hosted by Mr. İsmail Rüştü CİRİT, the First President of the Republic of Turkey Court of Cassation.

1. **İsmail Rüştü CİRİT**, First President of the Republic of Turkey Court of Cassation,
2. **John DOWD**, Justice of the Supreme Court of Australia,
3. **Prof. Dr. Nihal JAYAWICKRAMA**, UN Judicial Integrity Group Coordinator,
4. **Shiranee TILAKAWARDANE**, Justice of the Supreme Court of Sri Lanka,
5. **Kashim ZANNAH**, Chief Judge of the High Court of Nigeria,
6. **Jeffrey APPERSON**, Vice-President of the National Centre for State Courts of the United States of America,
7. **Michael BUENGER**, Justice, Administrative Director of Ohio High Court of the United States of America,
8. **Wojciech POSTULSKI**, Justice, Secretary-General of European Judicial Training Network (EJTN),
9. **Abdülhalik YILDIZ**, First Vice President and President of the Assembly of the Criminal Chambers of the Republic of Turkey Court of Cassation,
10. **Fahri AKÇİN**, President of the 8th Civil Chamber of the Republic of Turkey Court of Cassation,
11. **Seracettin GÖKTAŞ**, President of the 22nd Civil Chamber of the Republic of Turkey Court of Cassation,
12. **Ahmet ER**, President of the 12th Criminal Chamber of the Republic of Turkey Court of Cassation,
13. **Yusuf Ziyaattin CENİK**, Secretary General of the Republic of Turkey Court of Cassation,
14. **Dr. Mustafa SALDIRIM**, Deputy Secretary General of the Republic of Turkey Court of Cassation.

PROGRAMME OF THE MEETING

20 OCTOBER 2017 - Ankara

08:45-09:00 **REGISTRATION**

09:00-09:15 OPENING SPEECH

Hon. President İsmail Rüştü CİRİT, First President of the Court of Cassation

09:15-09:30 Self-introductions by Court of Cassation Presidents of Chambers

09:30-09:40 **Dr. Mustafa SALDIRIM**, Deputy Secretary General
Court of Cassation Strategy for Ethics and Transparency

09:40-09:50 **Prof. Dr. Nihal JAYAWICKRAMA**, UN Judicial Integrity
Group Coordinator
*Briefing on the Basics of Istanbul Declaration and Its
Development Process*

09:50-10:00 **Family Photo Ceremony and Tea/Coffee Break**

10:00-11:15 SESSION I

Session Co-Chairs:

Hon. President İsmail Rüştü CİRİT and Prof. Dr. Nihal JAYAWICKRAMA

*Review of the Action Plan on the Implementation of Istanbul Declaration for
Principle 1, Principle 2, Principle 3 and Principle 4*

11:15-11:30 **Tea/Coffee Break**

11:30-12:30 SESSION II

Session Co-Chairs:

Hon. Justice Fahri AKÇİN and Hon. Justice John DOWD

*Review of the Action Plan on the Implementation of Istanbul Declaration for
Principle 5, Principle 6, Principle 7 and Principle 8*

12:30-14:00 **Lunch Break**

14:00-15:15 SESSION III

Session Co-Chairs:

Hon. Justice Ahmet ER and Hon. Justice Kashim ZANNAH

Review of the Action Plan on the Implementation of Istanbul Declaration for Principle 9, Principle 10, Principle 11 and Principle 12

15:15-15:30 Tea/Coffee Break

15:30-16:45 SESSION IV

Session Co-Chairs:

Hon. Justice Seracettin GÖKTAŞ and Hon. Justice Shiranee Hesta TILAKAWARDANE

Review of the Action Plan on the Implementation of Istanbul Declaration for Principle 13, Principle 14 and Principle 15

16:45-17:00 Tea/Coffee Break

17:00-18:00 SESSION V

Session Co-Chairs:

Prof. Dr. Nihal JAYAWICKRAMA and Dr. Mustafa SALDIRIM

Reception of Final Comments and the Closing Session



OPENING SPEECH

İSMAİL RÜŞTÜ CİRİT (First President of Court of Cassation)-

Dear guests, valuable participants; first I would like to express my honor and contentment to be here with you at the Istanbul Declaration on Transparency in the Judicial Process, Experts Group Meeting. I extend my gratitude to the preeminent specialists, foreign specialists and distinguished department chairs who accepted our invitation. We are more than proud to welcome our four well respected foreign guests. Additionally, our three specialists will participate online with their valuable contributions. It is particularly important and meaningful to us that the participants have travelled a long way to attend this meeting, which shows that friendships are not bound by time or place. Dear Mr. Nihal and Mrs. Shiranee, came from Sri Lanka, Dear John Dowd from Australia and Dear Kashim Zannah from Nigeria. I hereby thank our distinguished foreign specialists who have joined us in this challenging endeavour for the realization of our universal ideals of a better justice system and I welcome you all.

In the Experts Group Meeting, we will discuss the İstanbul Declaration on Transparency in the Judicial Process. The participating field specialists with vast background will share their knowledge and experience with us. According to the schedule, we will execute our operations based on the action plan for the implementation of the İstanbul Declaration prepared by Mr. Nihal. I would like to express special thanks to Mr. Nihal for his substantial contributions to our operations.

Now, allow me to briefly share my opinions on the subjects of the meeting. Dear guests and distinguished participants; as you may know, the European human rights system that our country is a party, is based on three pillars, democracy, rule of law and human rights. It is for certain many civilizations from different regions have contributed during history to these concepts and the values embedded in the core of these concepts. To clarify, democracy, rule of law and human rights are concepts and values which have originated from the cultural center of human history. They are not the monopoly of any state, region or ideology. You may find the intellectual foundations of these values in the opinions of Aristotle and Plato in Ancient Greece, Rumi's Masnavi and Yunus Emre's saying "*Love the created for the Creator's sake*". I cannot think of any civilization where especially the concept of justice which is the essence of the state is not known and its importance is not emphasized. According to Omar Khayyam, justice is the soul of the universe. According to Rumi, it is to put everything in its right place. According to him, watering the rose is justice, watering the thorn is tyranny. We can trace the Constitutionalism arising from the need

to limit the government back to the Magna Carta in England and Charter of Alliance during the rule of Mahmud II in the Ottoman Empire. One of the most important assurances of human rights is undoubtedly the separation of powers. The separation of powers is the guarantee of human rights and the Constitution. This political and legal fact is expressed with the laconic saying in the 16th article of the French Declaration of the Rights of Man and of the Citizen that a society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.

The Universal Declaration of Human Rights adopted by the United Nations in 1948 defines the main foundations of the human rights system as freedom, equality and solidarity. What we need to do today is to cherish, glorify and diversify the content of these common values of humanity which are not bound by time and space, and to assure that these values are exercised with a human oriented approach. Otherwise, these concepts will merely be slogans and the international documents on human rights will not go beyond being an object of purposeless bragging.

Dear guests and distinguished participants, historically and institutionally, supreme courts have two main functions, namely to ensure equal practice of law in the entire country and to make legal inspections. Considering courts of appeal also make legal inspections, the highest-level supreme courts are essentially characterized by ensuring equal practice of law in the country beyond conducting legal inspections. Therefore, supreme courts also have an educational mission. Due to its objective function, the decree of a supreme court should not only concern the parties of the respective case, but also have legibility and content for everybody irrespective of citizenship. For this reason, our role is highly critical, and our responsibility is very serious as the highest court of judicial justice in realization of our ideals with regard to a better justice system. Fulfillment of the educational duty of supreme courts requires all decisions to be open to public access. Moreover, access to decisions is considered a minimum standard of the principle of transparency not only in the European human rights system but also in the fundamental texts of the United Nations. Therefore, one of the most important reforms realized in recent years was opening the decisions of the Court of Cassation to public. Another important reform was adopting the ethical principles for the Court of Cassation personnel on every level according to ethical approach. We have completed the necessary practices for ethical principles for members of the Court of Cassation investigation judges, Court of Cassation public prosecutors and Court of Cassation personnel. The ethical principles for those other than the members of the Court of Cassation were adopted and put into practice as of yesterday. In the upcoming days, we will complete our works for the members of the

Court of Cassation, submit them to approval and put them into practice. You have been delivered the English versions of our ethical principles today. We undertake the responsibility of developing the best practice examples of these principles in the Court of Cassation while putting in effort to introduce the İstanbul Declaration to the world. We formed our ethical principles according to the standards prescribed in principal 14 and thus, we realized another one of the best practice examples for the İstanbul Declaration. Each of us is a member of the family of humanity, equal to each other and of equal value with each other. We should create a universal culture of law with which justice and human rights are realized equally for all. Therefore, we need to come together more frequently and search for ways to progress safely towards the ideal of a universal culture of law that we have targeted, in cooperation. Today, acknowledging the importance of this superior responsibility, we will discuss “*transparency in the judicial process*”, an essential component of jurisdiction, with prominent judiciaries here. Transparency in the judicial process is a bridge between the individual and justice. We need to build this bridge sturdily and with trust so that individuals may attain justice. We previously created the İstanbul Transparency Declaration by working with the valuable representatives of the supreme courts of the Asia Pacific and the international community. Today, we will have the opportunity to discuss these principles again and enrich them in terms of meaning and substance. We will also gain information about the practices in different countries. Thus, we will take a step further towards the ideal of a universal culture of law with which justice and human rights are guaranteed on an equal basis for everyone. Thank you all for your kind interest and courtesy for listening me.

Dr. MUSTAFA SALDIRIM - According to the schedule, we will be very pleased if our distinguished Department Chairs could briefly introduce themselves. Dear President, let us begin with you.

Justice ABDÜLHALİK YILDIZ- Thank you. I am Albülhalik Yıldız, First Vice President of the Court of Cassation and the President of the General Assembly of Criminal Chambers.

Justice FAHRİ AKÇİN- I am the President of the Court of Cassation 8th Civil Chamber. We thank our distinguished President for this opportunity. I would also like to welcome our guests that have joined us from far lands.

Justice SERACETTİN GÖKTAŞ- I am the President of Court of Cassation 22nd Civil Chamber and the President of the High Board of Arbitration, the final authority in collective labor disputes. I thank our distinguished President for this opportunity. I extend my regards to our valuable guests.

Justice AHMET ER- I am the President of the Court of Cassation 12th Criminal Chamber. Dear President, valuable guests, good morning to all, I salute you all with my sincere regards. We are honored to welcome our guests in Turkey. I hope for a successful İstanbul Declaration on Transparency in the Judicial Process Experts Group Meeting. We believe our field specialist guests will provide utterly important contributions and thank them in advance. I also thank our distinguished President for this opportunity.

Justice YUSUF ZİYAATTİN CENİK- I am the Court of Cassation Secretary-General and a Court of Cassation member. I am the administrative assistant to our President, for this reason I do not have a court duty yet. I also welcome our foreign guests and greet you all with respect.

Dr. MUSTAFA SALDIRIM - Now, if we may, let's hear our foreign guests and let them introduce themselves. Everybody knows Mr. Nihal but I am sure he would like to say a few words before the meeting begins.

Prof. Dr. NIHAL JAYAWICKRAMA- Thank you very much. I am probably the only non-judge present at this meeting, although I was, for some years, a member of a court, but a court that rarely sat. Also, I had the privilege of participating in the appointment, transfer and disciplinary control of judges in my own country. I am happy to be present here and I thank you for inviting me to participate in this meeting and for the hospitality which you have extended and which you have always extended to me whenever I had the pleasure of being in this beautiful country. Thank you.

Dr. MUSTAFA SALDIRIM- Thank you very much. Mr Dowd?

Justice JOHN DOWD- Thank you, Mr. President and to the judges of the Court of Cassation, may I congratulate you on this initiative? It is a great honour to be here. I am a former judge, a Justice of the Supreme Court of New South Wales and a member of the Court of Criminal Appeal. I am retired from that. Before that, I was the Attorney General for the elected government of New South Wales, responsible for the laws and guiding the government for some years. I am the President of the Australian Section of the International Commission of Jurists, also. Thank you.

Justice KASHIM ZANNAH- Thank you very much. I am the Chief Justice of the High Court of Borno State, one of the States in Nigeria. I am also a member of the National Judicial Council that is charged with the administration of the courts where I serve in a few of the committees of relevance to this conference including Anti-Corruption and Transparency Committees. Also, I chair the Court Technology Committee where we are trying to automate court processes all over Nigeria. At the state level, where

I have been a chief judge too, I have had the opportunity to undertake similar reform efforts in partnership with other United Nations body, the UNODC, where we have had a transparency initiative called the Capacity and Integrity Project where we did baseline studies and then, progress assessment test before we were interrupted by certain circumstances. I am happy to be here in Ankara for the first time to enjoy the hospitality of Turkey. This is my first time in Ankara, although I have been to Istanbul many times. I am almost an addict of Istanbul. I went to Istanbul so many times I cannot even count it. Any time I spend more than one year without passing through Istanbul, I find an excuse to route my travel through Istanbul so that I can be in Bosphorus to enjoy the fish restaurants there. I am interested in a novel by a Turkish author to make myself familiar with enjoying Istanbul. I am an *Istanbullu* by heart. But this is my first time in Ankara. Thank you very much for the hospitality. Thank you.

Justice SHIRANEE TILAKAWARDANE- Good morning. It is, indeed, my privilege and pleasure to be here with you this morning. And particularly, thank you for the great hospitality and kindness from the very moment we arrived. I started my life as a prosecutor, then with 37 years' experience on the bench and ending up as a Supreme Court Judge and as Acting Chief Justice. I am retired. I am presently the consultant to Sri Lanka Judicial Institute and one of the subjects I teach is judicial ethics and I have been using the formats and the material that Dr. Nihal Jayawickrama has formulated and which benefits greatly the development of judicial ethics. I have also worked for many years on human rights for all including the discriminated and particularly on children and environmental law. Thank you for having me here.

Dr. MUSTAFA SALDIRIM- We thank our guests. At the Court of Cassation, recently we have been trying to realize very serious reforms under the vision and leadership of the President of the Court of Cassation. We have a very short film of these reforms, a 5-minute film with English subtitles, let's have a look at it.

(Film Screening)

Dr. MUSTAFA SALDIRIM- As you may have seen in the short film, we have discussed ethics very seriously, especially this year. This forms an important step in the reform movement of the Court of Cassation. Allow me to briefly discuss the importance of ethics and transparency to the Court of Cassation and its stages according to the schedule.

Our project has three main purposes: 1. To develop and expand ethical principles, 2. To ensure transparency. Ensuring transparency both within and outside the organization is expected. 3. In this kind of work,

gaining the trust of the society is an important purpose. To introduce the most important element of the transparency component of the project, the İstanbul Declaration, to the world and while doing so, to give the best examples of the İstanbul Declaration in the Court of Cassation is also among our main goals.

The purpose of ethical principles, as explicitly stated in the preamble to the Bangalore Principles is to ensure public attorneys understand the judiciary better through legislative and executive bodies, to ensure public attorneys are provided guidance during professional conduct, to elevate the current standards for professional conduct and complement the current standards, to fulfill the requirements of the Principle (14) of the İstanbul Declaration, to ensure harmonization with the United Nations work under the 11th Article of the Convention against Corruption to which Turkey is a party to and to realize the targets for ethics and transparency set forth in the strategic plan of the Court of Cassation with the development plan adopted by the Turkish Grand National Assembly.

We held our opening event and workshops on the subject of ethic component. Dear Mr. Nihal provided valuable contributions to the opening. In the second stage, we made our comparative law studies and compiled them in a book. In the third stage, we created our principles of ethical conduct. In the fourth stage, the education modules are developed and in the fifth and sixth stages, both education modules and manuals of ethical principles are prepared. Mrs. Shiranee provides valuable contributions in this respect. She is also our project specialist. In the upcoming stages, we will work on expanding ethics education and sharing our work with the public.

As I just stated, our efforts to create a global network for integrity in the judiciary are continuing within the scope of the Convention against Corruption that Turkey is a party to. Our project is also extremely important in this respect. The transparency component is critical as supreme courts have an educational role. As our President mentioned in his speech, transparency is a bridge between the society and courts. Building a solid bridge is of capital importance for our transparency component. Our comparative law reviews on the transparency component are ongoing. After that, we will work for an international conference. Software is being developed to measure the satisfaction of the society in our public relations department. When the software has been completed, we will measure the satisfaction of all court users who receive service from the Court of Cassation on a periodic basis and thus, we will fulfill another requirement of the İstanbul Declaration. After that, a transparency strategy will be formed as a result of the meetings to be held with our stakeholders, an action plan will be created

and we will continue with our work according to that plan. The Turkish International Disputes Resolution Center has been established within the Court of Cassation as a concrete example of the multi door courthouse system in the İstanbul Declaration. You may find the related brochures in the bags that were handed to you by our colleagues.

As mentioned in the film we have just watched, the reference to the İstanbul Declaration in the United Nations report on “*a transparent and accountable justice system*” 2016 was an important achievement for us. Thereafter, we will strengthen our relations further with society with the trust component and complete our projects this way. Thank you for your attendance, I salute you all and would like to leave the floor to dear Mr. Nihal Jayawickrama according to the Schedule.

Prof. Dr. NIHAL JAYAWICKRAMA- Thank you. The Honourable President of the Court of Cassation, Distinguished Judges of the Court of Cassation, Distinguished Fellow Participants, I am required to provide a briefing on the basics features of the İstanbul Declaration and its development process. I will first focus on the development of the İstanbul Declaration. The process of the adoption of the İstanbul Declaration began early in 2013 when a draft was forwarded to the chief justices of the Asian and Pacific region who were being invited to the Summit of High Courts to be held in İstanbul in November of that year. Their comments were sought on the draft and these comments when received proved very useful in revising the original draft. Thereafter in November 2013, the chief justices of the Asian and Pacific region participated in the Second Summit of High Courts held that year in İstanbul. At that conference, the draft principles were scrutinized very carefully in different groups by the chief justices who participated. There were several amendments and Justice John Dowd who is with us today made a very significant contribution not only by adding a new principle but also in helping to revise the commentaries. We had other international experts as well there. One was Mr. Param Kumaraswamy who was the former United Nations Special Rapporteur on the Independence of Judges and Lawyers, and the other was the President of LAWASIA, who came from Singapore.

Thereafter, the İstanbul Declaration was presented to the chief justices of the Balkan Region meeting in the historic city of Bursa in June 2016. At that conference, the Third Summit of High Courts, the Declaration was again examined, scrutinized, commented on and finally endorsed by the chief justices of the Balkan region without any amendment. So now, we have the document with us, and the Court of Cassation has proposed to have an action plan for the implementation of the İstanbul Declaration and I believe that is what we are here today required to examine. I think

we should get down to that business as soon as possible because we have received comments from other experts who are not able to be present with us and they have made very detailed comments and I think we should take the time to examine them. I should mention one thing. I recently came across on the Internet, an advertisement by the United Nations for some position in which the requirements included knowledge of the Bangalore Principles of Judicial Conduct, the Guidelines for the Implementation of Article 11 of the UN Convention against Corruption and the Istanbul Declaration on Transparency. That is an important development towards its global acceptance. Thank you very much.

Dr. MUSTAFA SALDIRIM- Thank you very much Mr. Nihal. Now, according to the schedule, we have a family photo ceremony and then a coffee break.

SESSION I:

Review of the Action Plan on the Implementation of Istanbul Declaration for Principle 1, Principle 2, Principle 3 and Principle 4

Dr. MUSTAFA SALDIRIM- Let's begin Session 1. This session will be facilitated by the President of the Court of Cassation, İsmail Rüştü Cirit and Mr. Nihal Jayawickrama together. We also had a Polish specialist who was expected to make a Skype connection today. Unfortunately, last night he stated that he would not be able to connect us today and instead shared a one-page commentary in English. I talked with Mr. Jayawickrama during the break. As it was shared with us last night, we did not have the time to translate it, but if possible, our interpreters will translate the one-page text now so that we will be able to address the contributions of our Polish specialist too. Now I leave the floor to our session facilitators.

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation) - Thank you, our dear friends who come from abroad to provide very valuable contributions with regard to the İstanbul Declaration on Transparency in the Judicial Process. Our foreign specialists who are well known jurists in this respect and who had worked on the Bangalore Principles of Judicial Conduct, especially Prof. Dr. Jayawickrama, and colleagues who have helped to make the Bangalore Principles to be known and referred to in the entire world today. We are working together for the İstanbul Declaration. A certain progress has been achieved with the İstanbul Declaration. As he mentioned, this study which started with the Asia Pacific Countries High Court Justices Summit in 2013 gained momentum with the Balkan countries last year. However, we need to put more effort and work harder to let it be known better worldwide and this study we conduct with the United Nations to be more widespread. I would like to extend my gratitude to Prof. Dr. Jayawickrama and colleagues who guided us in this respect. Our four specialists from Sri Lanka, Australia and Nigeria are competent jurists. They have proven themselves with their work and I would like to thank them again for their assistance in this respect.

As you may know, now we will discuss the first four Principles of the İstanbul Declaration on Transparency in the Judicial Process; *“(1) Judicial proceedings must, as a general rule, be conducted in public. (2) The judicial system should ensure easy access to court premises and to information. (3) The judiciary should facilitate access to the judicial system. (4) The judiciary should provide court-users with translation and interpretation facilities, free of charge.”* We will share our opinions about these principles. After my introduction, I would like to leave the floor to Prof. Dr. Jayawickrama and listen to what he has to say. Thank you again.

Principle 1

Prof. Dr. NIHAL JAYAWICKRAMA- How shall we proceed? I think we should go principle by principle. There is a document sent by the American expert. Has it been translated? Is it available? This is from Jeff Apperson. Thank you. There are some issues mentioned here and we can deal with the issues as we go along. We will deal with their proposals first. For Principle (1), what is suggested is simply a change of language. I think what is being suggested is better than what we have in the draft. If I may read out? It says: *“Public trust and confidence in the open administration of justice being essential to the independence of courts, the Judiciary should - and it goes on to say- (1) Establish procedures and provide adequate facilities that, within acceptable limitations, guarantee that court proceedings are open to the public and the media (2) Undertake measures that provide sufficient seating space in courtrooms for the public to attend and witness judiciary proceedings; (3) Establish procedures to ensure that the public is well-informed in advance of the time and venue of court hearings.” It recommends the deletion of (4) and there is a new (4) which is the old (5): “Establish uniform procedures requiring judges to deliver their judgments in public or as an alternative publish judgments in a time they open manner.”* I would suggest that we accept the reformulation because I think it is clearer and perhaps expresses it better.

Justice JOHN DOWD- Mr. Chairman, can I make just one comment? Today, courts and facilities in most countries go beyond the budget of the Judiciary as such. The Judiciary will have a budget provided by the Parliament and to put the onus only on the judiciary is too limiting and I think we should add in the words “Legislature and the Judiciary”, because the legislature will provide budgets for translators, court staff and actual court buildings which will go beyond the Judiciary as such and we shouldn't put the onus only on the Judiciary.

Prof. Dr. NIHAL JAYAWICKRAMA- Thank you. I think that that is good. Mr Apperson has suggested the deletion of Paragraph (4) *“adequate facilities should be provided and access for attendance of the media...”* I don't know why. I think that ought to be there.

İSMAİL RÜŞTÜ CİRİT (President of the Court of Cassation)- Yes, of course we should be able to express our opinions freely. Dear Mr. Jayawickrama, necessary assistance should be provided to media as Paragraph (4) states. In our country, proceedings are essentially open and public. In extremely exceptional situations such as juvenile proceedings etc. proceedings may be conducted as closed hearings following the decision of the judge. However, the role of media is important for public information to

convey the proceedings safely to the public. I believe press members should observe proceedings. It is the right way for healthy information, otherwise it might cause speculations and doubt about proceedings. I think the Paragraph (4) of the Principle (1) should remain in this respect. We have recently established a press office in our Court of Cassation and provided them with all kinds of capabilities. I believe media is important for informing the public. Please allow me to leave the floor now to the Chamber President. Our Chamber President Mr. Göktaş is also our arbitrator and oversees business cases.

Justice SERACETTİN GÖKTAŞ- Dear President, thank you. I agree with Dr. Jayawickrama. However, the Paragraph (1) already states that the judiciary should ensure proceedings are open to the press. This Principle also covers Paragraph (4). I believe that the Paragraph (4) is not necessary. It is also covered by facilitating the proceedings to be held open to press. In this respect, I think the Paragraph (4) is not necessary.

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- Although the two articles seem similar, there is a difference between allowing for observation and providing adequate facilities. Providing adequate facilities means providing press members with a room, communication technologies, a computer as necessary to easily share the information they obtain from the hearing to their own media organizations and puts a positive responsibility on courts. Perhaps, it would be useful to consider it not only allowing them to be present in the court room. These two may be different.

Prof. Dr. NIHAL JAYAWICKRAMA- I do not know the reason why he suggested that. It could be because it is a repetition. On the other hand, we also have Principle 11 which deals with the media. The judiciary is required to establish an office to facilitate media coverage and respond to and manage requests from journalists. I think, this is dealing with a different aspect.

Justice JOHN DOWD- As another issue, as someone who built many courthouses when I was in the government of my State of New South Wales, my worry is with the word “adequate”. I had 160 courthouses throughout New South Wales and most of them were just small courts. We have got to remember that television now is an increasing part of media communications, sadly more so than newspapers. I am suggesting that instead of the word “adequate facilities”, we use “appropriate facilities”. If we use the word “appropriate facilities”, it caters to the need and demand. In Australia, we don’t have many television cameras going into courthouses. Sometimes they do and there’s a limit to what you can provide - if it’s a high-profile international case. So, I suggest instead of “adequate”, we put in the word “appropriate”.

İSMAIL RÜŞTÜ CİRİT (First President of Court of Cassation)- I have not been able to understand the statement. Can you please clarify it Mr. John?

Justice JOHN DOWD- My only comment was about the word “adequate”, which connotes size. It should be “appropriate” to cover small courthouses, which the bulk of courts are, and big courthouses, as well. So “appropriate” instead of “adequate”. Adequate means to the extent that is necessary. Appropriate means depending on the size of the court and the nature of the court.

Prof. Dr. NIHAL JAYAWICKRAMA- Of course. Paragraph (1) proceeds to say: “*provide adequate facilities that, within acceptable limitations, guarantee that court proceedings are open to the public and the media*”. I wonder whether the phrase “acceptable limitations” in some way will have any effect on “adequate” facilities or whether if it is “appropriate facilities”, we should delete “acceptable limitations”.

Justice JOHN DOWD- I suggest that “acceptable limitations” is too vague and is not capable of meaningful definition.

Prof. Dr. NIHAL JAYAWICKRAMA- Then we delete “within acceptable limitations”.

Justice JOHN DOWD- Yes.

Prof. Dr. NIHAL JAYAWICKRAMA- Is it agreed then that paragraph (1) will read “*establish procedures and provide appropriate facilities that guarantee that Court proceedings are open to the public and the media*”?

Justice SHIRANEE TILAKAWARDANE- I just want to go back to the question that John brought up between appropriate facilities and adequate facilities. Adequate can be minimum standards, whereas appropriate would include the new types of communications that we have. So, that seems like a good suggestion. I’m a little worried about the next few words that say “within acceptable limitations” and if you read the entirety of that particular paragraph, what it says is that proceedings must be open, but we know that law provides that there are certain cases which are held in camera, that is without public present and those are sensitive cases like children’s matters. So, could we not say instead of saying “acceptable limitations”, we say “within legal limitations”. What does the word “acceptable” mean there? So, you always have to have open and public proceedings except where there are legal limitations. Does that make sense?

Prof. Dr. NIHAL JAYAWICKRAMA- The problem is that “legal limitations” could in a particular country be given a very expansive meaning.

There have been instances where governments have imposed a blanket prohibition on media access to cases of a political nature.

Justice SHIRANEE TILAKAWARDANE- But those are not in the law.

Prof. Dr. NIHAL JAYAWICKRAMA- In the law?

Justice SHIRANEE TILAKAWARDANE- There is no such clause in the law.

Prof. Dr. NIHAL JAYAWICKRAMA- In a particular country where this happened, the matter went to the court and the court held that that law was in excess of the powers of the legislature. So, I think, the paragraph should read: “establish procedures and provide appropriate facilities that guarantee that Court proceedings are open to the public and the media.” Do we delete “acceptable limitations”?

Justice KASHIM ZANNAH- I think it still poses a problem, because she has highlighted the situation where in proceedings involving children, for example, and some of these abuse cases, it may be inappropriate to allow open coverage by the media. That exception needs to be acknowledged. I think, probably, what is posing a problem for us is that these “limitations” appear to limit both “procedure” and the “facilities”. If we detach the “limitation” and attach it to the “procedure” and allow “appropriate facilities” without “limitations”, that may solve the problem, because as it is now, “acceptable limitations” limit both the “procedures” and “provision of facilities”. Or we might expressly or in parentheses after “procedures” put “except for, for example where proceedings involving infants and children are concerned”.

Justice JOHN DOWD- Mr. Chairman, the only problem about that is the terrorism issue. There are sometimes Court proceedings where the informant who has given information about a terrorist must be protected and I agree with the protective nature of children, but you have to deal with terrorism and national security as well. That is where it gets very tricky. I agree with the children protection and I must say, I think the use of the word “appropriate” covers inappropriate action and so “appropriate” may get us to solve part of our problems. But we need to address the children and terrorist issues.

Prof. Dr. NIHAL JAYAWICKRAMA- Would that be covered if we leave the phrase “within acceptable limitations”?

Justice KASHIM ZANNAH- I think our problem has been as to who defines “acceptable” and whether we should allow the definition to be done by anybody or whether we should attempt to limit this definition.

Justice SHIRANEE TILAKAWARDANE- Because if you leave it out, you are saying that all proceedings must be public and open.

Prof. Dr. NIHAL JAYAWICKRAMA- If you look at the Principle 1, it says: “Judicial proceedings must, as a general rule, be conducted in public”. The words “as a general rule” attracts the universally-accepted exceptions which are in regard to matters concerning children, matrimonial disputes, etc. I think, the phrase “as a general rule” is one that introduces limitations.

Justice SHIRANEE TILAKAWARDANE- That sounds good. So, you take out “acceptable limitations”?

Prof. Dr. NIHAL JAYAWICKRAMA- Yes. We delete that and have “appropriate”.

Justice JOHN DOWD- Mr. Chairman, I always used to say you should never trust the government including that of which I was a member.

Prof. Dr. NIHAL JAYAWICKRAMA- I agree with that. Shall we proceed?

İSMAİL RÜŞTÜ CİRİT (First President of Court of Cassation)- Valuable colleagues, the meaning and consequences of Paragraph (1) and Paragraph (4) are different. I think, the judiciary should ensure proceedings are conducted in public and open to the media, and in Paragraph (4), media should be provided with adequate facilities, it means physical facilities should be provided. What do acceptable limitations mean? Should we state it as “provide adequate and appropriate facilities”?

Prof. Dr. NIHAL JAYAWICKRAMA- May I read out what appears to be the agreed formula? “Public trust and confidence in the open administration of justice being essential to the independence of the courts the legislature and the Judiciary should (1) Establish procedures and provide adequate facilities that...

Justice JOHN DOWD- “appropriate”.

Prof. Dr. NIHAL JAYAWICKRAMA- Sorry? ..“appropriate facilities that guarantee that court proceedings are open to the public and the media; (2) Undertake measures that provide sufficient seating space in courtrooms for the public to attend and witness judicial proceedings; (3) Establish procedures that ensure that the public is readily informed in advance of the time and venue of Court hearings; (4) Provide adequate facilities....

Justice JOHN DOWD- I wonder whether “appropriate” there would be sufficiently flexible instead of “adequate”. “Adequate” connotes large enough, whereas “appropriate” covers large and small.

Prof. Dr. NIHAL JAYAWICKRAMA- OK? “(4) provide appropriate facilities for the attendance of members of the media; and (5) Establish uniform procedures requiring judges to deliver their judgments in public or, as an alternative, publish their judgements in a timely and open manner.” Would that formulation be acceptable? Ok. Can we then proceed to Principle 2?

Principle 2

Prof. Dr. NIHAL JAYAWICKRAMA- We should now consider the amendments proposed by our American colleague to Principle 2. May I read Principle 2 as proposed by him—*“Physical access to justice being an essential component to promoting public trust and confidence in the judiciary and the fair administration of justice, courts should; (1) Wherever possible and within the limits of resources, locate court facilities near public transportation hubs; (2) Support innovations in delivering court services such as mobile courts or night court programmes, telephone or video conferencing, or the conducting of pre-trial hearings in online chat rooms, with particular consideration being given to persons who are physically unable to attend court proceedings or access court programmes; (3) Install clearly and easily identifiable signage providing directions to offices within the facility; (4) Establish information counters or customer service desks at the court entrance to provide information to court users; (5) Publicly and clearly post in the courthouse as well as electronically schedules of hearings and proceedings and the location of courtrooms and court programmes; (6) Hire and retain court personnel who have the ability to speak the language of court users or in the alternative can readily obtain the assistance of interpreters; (7) Provide comfortable waiting areas for court users including areas that provide appropriate security to witnesses, if needed; (8) Provide suitable facilities for the special needs of particular categories of court users such as children, victims of sexual violence or domestic violence, and special needs users; (9) Maintain safe, clean, convenient, and user-friendly court premises. He recommends the deletion of paragraph (10). So, we will come back to that. May I proceed to read? (11) Publish in simple clear and accessible formats user guides and posters and other informational material; (12) Institute and mandate management training programmes for judicial officers and court staff; and (13) Establish a public website containing information useful to court users such as courts sitting times, courthouse guides, and relevant case information.”* I think that this reformulation reads better than the original. If you agree, and unless

there are any further amendments you wish to propose, I would suggest that we consider the question whether paragraph (10) should be deleted as proposed by him. Paragraph (10) requires a resource centre to be established to provide single-window service delivery.

Justice SHIRANEE TILAKAWARDANE- Can I just add that this is an important service, because today we are talking about multidisciplinary networking. If there is one place where the public can go and access information, I think it would be a wonderful delivery module. I don't know whether we should really think about taking that out.

Justice JOHN DOWD- Chairman, on another matter, if you want to deal with that first. This covers courts only and courts do not have the power to do all of these things and it should say "legislature and courts should", because training will be done under laws governing education and courts can't institute new laws governing things like admissibility of evidence. The second issue is that the training of court staff can't be done under court budgets. Normally it is done through educational facilities such as governments and universities and universities are normally independent from governments. So, we should include the words "legislature and courts". Sometimes it will be done in conjunction with each other. We should say "legislature and courts". We have one University in New South Wales that has a law degree and a registry-type training for court officials. Courts can't create training programs, but universities can.

Prof. Dr. NIHAL JAYAWICKRAMA- I would like to agree. I don't think it's possible for the judiciary to ensure that courts are established near public transportation hubs. That is a matter for the state authorities. Should we add "legislatures as appropriate" because there are certain things that do not fall within the province of the legislature such as maintaining safe, clean, convenient user-friendly court premises. Of course even that may need the assistance of the government.

Justice KASHIM ZANNAH- I agree with the proposition that these responsibilities should not be left to the courts. In certain areas, even making the legislature and the courts responsible may not be adequate. Why not the government? Why should we leave a window for the executive arm of government to say to us, "None of our business!"? There are some jurisdictions where the executives' influence on the budgetary process is high, to put it mildly.

Justice JOHN DOWD- Can we then accommodate in the text the words "governments and courts"?

Justice KASHIM ZANNAH- That's better.

Justice JOHN DOWD- Rather than legislature. Thank you.

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- I also agree. Now, governments do the budgeting in many jurisdictions in the world, but in the end, the budget is executed after being approved by the legislature. We have our share of this budget. For example, we want to build a big building for the Court of Cassation, but there is a land problem in terms of the physical conditions in Ankara. With these land problems, a certain share should be reserved for it from the budget. On the other hand, we are currently constructing a building for the Court of Cassation near public transport hubs to the highest possible extent by working with the government. I think it can be the government or the executive branch in cooperation with the courts.

Dr. MUSTAFA SALDIRIM- Now if I may, I would like to bring up a different point of view. As you may know, a statement was included in the preamble of the Bangalore principles: “They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary.” The provisions are applicable to judges, but there is also a message to the legislative and executive branches. They assist execution of these provisions. Can we apply that design here? Because in the end, as in the Bangalore Principles, the implementation of many provisions requires the support of the legislative and executive branches, even including salaries. Otherwise, if we do not avoid repetition, we may need to refer to the legislative and executive branches in respect of every Principle.

Justice KASHIM ZANNAH- There is wisdom in having them repeated specifically. This not a very large document.

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- I think we have not discussed the removal of the Paragraph (10) of Principle (2).

Prof. Dr. NIHAL JAYAWICKRAMA- In my view, I think we should retain that, because the single-window would help court users enormously. I think, in Nigeria, you tried that.

Justice KASHIM ZANNAH- Yes. Where you have single-window delivery, you aid access.

Justice SHIRANEE TILAKAWARDANE- The trend today is towards multi-sectorial, multidisciplinary. So, it is a modern concept which is very progressive, and I think it is a good paragraph to retain.

Justice AHMET ER- I would like to share my own experience regarding Paragraph (10). I was the Chief Public Prosecutor of Aydın before I came to the Court of Cassation. A project was developed there for all of Turkey to facilitate access to justice. The Aydın Courthouse was the pilot courthouse in this project. A front office was established like in the Court of Cassation. We provided applications, fee deposits and allocation services in the front office. Therefore, it was concluded that operations could easily be executed when there is a single center. Before, citizens had applied to the front office, deposited fees at another location and applied for allocations at another location. They would visit three separate locations, but we combined these three in a single center. I think it would be useful to retain it.

Prof. Dr. NIHAL JAYAWICKRAMA- So, we retain that.

Justice SHIRANEE TILAKAWARDANE- And it is economical, it is much more economical.

Principle 3

Prof. Dr. NIHAL JAYAWICKRAMA- Can we then proceed to Principle (3) *“The judiciary should facilitate access to the judicial system”*. I will read the action plan with the amendments proposed by Jeff Apperson.

Prof. Dr. NIHAL JAYAWICKRAMA- Principle (3) - the Judiciary should facilitate access to the judicial system: *“Public and litigant understanding of the judicial process, being an essential component of judicial transparency, accountability and the fair administration of justice, courts should; (1) Develop and implement standard, user-friendly forms and instructions; (2) Clearly and accurately publish information on matters such as filing fees, court procedures, and hearing schedules. If resources permit, such information should be disseminated via the Internet or with automated telephone systems; (3) Implement systems that enable court users to download forms from the Internet and make online payments of court fees (4) Implement systems that enable the public and litigants to obtain case information and public judgments on a website; (5) Establish an office of Public Defender whose intervention may be sought in respect of any criminal matter; (6) Require any attorney who has attained the rank of Senior Attorney to provide pro bono services to litigants unable to afford legal representation in criminal and non-criminal proceedings; (7) Establish Legal Aid Clinics to provide legal services to the indigent; (8) Implement a multi-door courthouse approach to dispute resolution that offers a variety of dispute resolution processes including case evaluation, mediation, arbitration, conciliation and complex case management. These services should be provided by skilled, qualified and experienced mediators,*

case evaluators and arbitrators, and made available before the filing of a lawsuit or at any other stage of litigation.(9) An amicable dispute resolution centre that offers litigants a cost-effective alternative to the conventional means of resolving civil disputes, especially in matters such as inheritance, maintenance, custody, and marriage disputes, should be established. (10) A Data Protection Act and Evidence Act to enable parties to present evidence through electronic tools should be enacted.(11) Existing legislation should be reviewed to allow ICT based material to be presented as evidence in court. (12) Permission may be granted by the judge for appropriate non-qualified persons to represent parties in court.

Mr Apperson recommends the deletion of Paragraph (9) but he does say why. Next, in regard to Paragraph (10) he asks: “Is this really an ‘access’ issue or a procedural issue? I don’t see presenting evidence electronically as necessarily an access issue. It may be highly desirable, convenient and important to today’s world, but I don’t know that it is ‘access’ in the sense of enabling the public to obtain dispute resolution services.” In regard to Paragraph (12), his comment is; “I’m not sure I understand this. Is this intended to provide that in the absence of legal counsel, parties may be represented by ‘non-qualified’ individuals’? What is a non-qualified individual? Could this be a relative who has no training or understanding of the law and/or legal proceedings? Under what circumstances would a non-qualified individual be appropriate?”

Justice JOHN DOWD- Mr. Chairman, could the usual phrase “government and courts should..”. be added to the introductory paragraph. In regard to Paragraph (5), I established a public prosecutor in my state. He or she has the right to intervene irrespective of what parties have sought and could go in and terminate proceedings. That should be an independent function of the public prosecutor. Therefore, in Paragraph (5) the reference should be to a public prosecutor and not to a public defender. If there was a public defender I would always want the public defender to come in and defend me rather than get private professional assistance. So, I would like to change Paragraph(5) to read “*establish an office of the public prosecutor whose intervention may occur in respect of any criminal matter*”. Public defenders would expand the whole of the court system if we have public defenders everywhere. The other matter I would like to raise is about the proposed Paragraph(9) This is not an appropriate place for this provision, but it’s a good thing to have it because you need to have government enabling legislation to allow electronic presentation of evidence. For instance, in one Court proceeding that I heard, it was an injunction matter, I made the service of the injunction to the email address in the computer of the defendant because he couldn’t be found.

Prof. Dr. NIHAL JAYAWICKRAMA- May I ask how the introduction of a public prosecutor could facilitate or enable access to the judicial system? A public prosecutor will be likely to deny access by taking over a private persecution. A public prosecutor can come there, take it over and terminate it.

Justice JOHN DOWD- That is, in fact, the case, but we have vexatious litigants and sometimes courts have to deal with those. It is in the interest of Justice. It is not always in the interests of litigants but remember that the government is the most common litigant in all Court proceedings. That is why an independent prosecutor should have the right to take over or to terminate proceedings.

Prof. Dr. NIHAL JAYAWICKRAMA- Wouldn't that be provided for in criminal procedure laws? Here the principle is that the Judiciary should facilitate access to the judicial system –facilitate access for the community, for the people, for citizens. And the office of public defender would enable that. When a person is unable to retain a counsel to defend him, the office of the public defender would facilitate it.

Justice JOHN DOWD- I agree that my proposal is not appropriate here. I just say that it should be stated somewhere. On that basis I withdraw my suggestion. So, I withdraw my proposal at this point and leave it as it is.

Prof. Dr. NIHAL JAYAWICKRAMA- Any other comments or proposals?

Justice KASHIM ZANNAH- My comment is on the suggestion to delete Paragraph (9). I try to understand the reason as it being seen as a repetition of Paragraph (8). I understand the American experts' belief that the American model of the amicable dispute resolution centre is already captured by the multi-door courthouse. My understanding is that there are significant differences. For example, we practice it and we have known that the difference is not even small, it's not even marginal. We have the multi-door courthouse and they have the amicable settlement corridor. In certain jurisdictions, the way it works is that this settlement corridor is much more appropriate as it deals at the micro level with small disputes in society. In fact, in my state, the multi-door courthouse has had maybe only three cases, while the amicable settlement corridor has had thousands, because it addresses small issues and keeps them out of the legal system. Also, it facilitates the settlement of disputes that are even difficult to litigate in the ordinary courts. It is much more popular at the grassroots. So, I think we should retain that.

Prof. Dr. NIHAL JAYAWICKRAMA- I should also mention that this paragraph, the suggestion of an amicable dispute resolution, was inspired by the success of the Nigerian experience.

Justice SHIRANEE TILAKAWARDANE- May I just add to what you have said. If you see the services in Paragraph (8), it says that the service should be provided by skilled and experienced persons. It leaves out “qualified”. I think, it is critical to have at least a basic critical qualification for those who are doing mediations. In our country, we started mediation and the mediators were really from government appointees and they were not qualified at all and very soon, it was just another corrupt body. So, we have to have that minimum qualification.

Prof. Dr. NIHAL JAYAWICKRAMA- What do you suggest?

Justice SHIRANEE TILAKAWARDANE- I suggest “skilled, qualified, and experienced”.

Justice KASHIM ZANNAH- In the case of the Paragraph (9) no qualification is stated. It is important that it remains that way, because the way our’s work is that the parties themselves can make use of a database of respected individuals in society to settle their disputes or they can use others who are considered fair enough to settle it for you. So, they can choose from the data bank or can even say: “We both respect the mufti in our area, the imam of our mosque and there is one retired civil servant who is very good. We will trust these three individuals”. Both parties trust them. Then they can just choose, and their disputes will be heard, and their case will be settled. There should be no limitations, because it is really grass-roots-based.

Justice JOHN DOWD- May I address to Paragraph (12)? Australia is a country that is difficult to use as an example, but there are many others like it. It has a hundred and twenty different language groups and sometimes, in quite simple proceedings, someone for whom English is a second or even a third language, may not have the slightest chance of getting a lawyer or affording a lawyer or getting legal aid to assist. Very often, a helpful friend who is intelligent and has some level of education or some level of language can help that person to represent him in the proceedings. It may be getting somebody who is a friend or an independent person totally non-qualified but with enough common sense to help resolve the matter. I think that paragraph should remain.

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- Because developing alternative solution methods has the capacity of resolving disputes faster considering the increasing work load in the courts, it ensures both social peace and resolves disputes more easily.

It is very important, Nigeria is a very successful example. There are many successful examples in the world in respect of reconciliation, arbitration and mediation. I would like to comment on the Paragraph (5). Does it refer to free of charge voluntary advocacy?

Justice JOHN DOWD- No, it is a government-appointed position, not with volunteers. There may be volunteer lawyers available sometimes from bar association legal aid systems, but a public defender is an employee paid by the government to provide assistance to the public, to appropriate litigants. So, Paragraph (5), (6) and (7) are separate things, but they are necessary in most court systems.

Justice KASHIM ZANNAH- I don't understand the difference between Paragraphs (8) and (9). I also have reservations about Paragraph (11). Yes, indeed, the judge is granted significant authority here about allowing suitable non-qualified persons to represent the litigants in court. But representation is different from assisting a person who does not speak the language. Representing him, making decisions for him, even signing papers for him is another thing. It may especially disturb attorneys. It can be used to interfere with parental rights or with guardianship. In this respect, I believe Paragraph (11) should be removed.

Prof. Dr. NIHAL JAYAWICKRAMA- May I just explain that in some countries, there is provision in the criminal procedure code for individuals who are charged with trivial offenses, usually in rural areas, in courts established in those rural areas, to be defended by a friend. They don't have to go to the city to find lawyers. They can bring a friend and it could be something about cattle theft or someone breaking a fence. It has been found acceptable in some countries for a person to be defended by a friend. That would not prevent or exclude lawyers from their business. In particular circumstances permission may be granted by the judge. So it is left to the judge's discretion. Most certainly, I would not think that the judge would grant permission for a non-qualified non-lawyer to appear in a case of serious crime. On the other matter, there is a difference, because the amicable dispute resolution centre is for matters such as family disputes including inheritance, maintenance, custody, marriage and those kinds of matters. In multi-door courthouses, there are options made available to a litigant depending on whether he wants to go through the court process or have the matter referred to mediation or arbitration. So, these are two different situations that we are contemplating.

Dr. MUSTAFA SALDIRIM- Please, let me add my comments. First, I would like to start with Paragraph (5). In Paragraph (5), especially in jurisdictions without an efficient legal aid system, for example in certain states in USA, there is not an efficient legal aid system, it is completely up to

bar associations and it is completely voluntary. I think Paragraph (5) rather means those kinds of systems. Paragraph (8) is a general article about the importance of alternative resolution methods. Paragraph (9) has a different character.Paragraph (8) is about public order and in many jurisdictions, we know that mediation is only applicable on topics outside the public order in which individuals have free discretion. It is the same in our country, but in some advanced systems, we know that mediators can also take part in topics on public order. As far as I know, Australia has a very good family mediation system. Judge mediators sometimes can take part in cases about public order. Thus, for example, much trouble and suffering arise from a custody case which takes about 3-5 years. When a judge mediator takes part, peace in the family is also maintained to a significant extent. Therefore, underlining its importance, it is also meaningful to state that mediation is sometimes possible in issues regarding public order.

Paragraph (12) also has a provision in our law. For example, in the law, those who are not litigants can assign their relatives and spouses as proxy, and pardon me, Mr. President, spouses can object to detention, right? Spouses can also appeal, for example, cadastre, in villages, remote areas. Such examples can be seen in legal systems. They may also be found in our legal system. I extend my regards.

Justice KASHIM ZANNAH- I apologize but, these issues are permitted by law; what we are discussing here will be subject to permission from the judge.

Justice FAHRİ AKÇİN- I would like to share my opinion on Paragraph (11). It has been determined who can represent litigants both in Turkey and in many other countries. They are attorneys, parents for minors, guardians if assigned, legal counsel and spouses in the cadastre court or relatives in criminal proceedings. To elaborate, above all to underline, non-qualified means in a way that he is non-qualified and inadequate. I believe it is not correct and might cause doubt to allow a non-qualified person to represent. Thank you.

Justice KASHIM ZANNAH- Would it make a difference if we remove the word “represent” and insert “assist”? That is: “Permission may be granted by the judge for appropriate non-qualified persons to assist parties in court.”

Justice SHIRANEE TILAKAWARDANE- Would it be important to emphasize non-qualified? It can be somebody who is an expert in a certain cultural practice in the village; is this what we want to bring to the court? The voice of not just the legal but the social context in the court. These are non-lawyers.

Prof. Dr. NIHAL JAYAWICKRAMA-Non-qualified here means not qualified in law.

Justice SHIRANEE TILAKAWARDANE- But that is not very clear. Perhaps we can use “suitable persons”?

Prof. Dr. NIHAL JAYAWICKRAMA- We already say “appropriate” non-qualified persons”. It is here.

Justice SHIRANEE TILAKAWARDANE- Then take “non-qualified” out.

Principle 4

Prof. Dr. NIHAL JAYAWICKRAMA-I understand that we are not ready for one of the Skype presentations. May we please proceed and complete Principle 4 before we move on to the next session? (4) states that: *“Litigant understanding of the judicial proceedings in which they are involved being an essential component to parties accepting the judgment of the court, the court must (1) Ensure that the parties before the court understand the official language in which the proceedings will be conducted and (2) Provide free interpreter assistance to a court user or a witness if he or she cannot understand or speak the official language in which the court proceedings will be conducted”*. Is that acceptable?

Justice JOHN DOWD- Chairman, firstly in the introductory part it should read “governments and courts”. The problem with the official language is that in Timor West, the official languages are Portuguese and Tetun and the non-official languages or the secondary languages are Indonesian and English. There judgments are given in Portuguese even though none of the parties may speak Portuguese or understand it. I think, we should take out the word official.

Prof. Dr. NIHAL JAYAWICKRAMA- In both paragraphs?

Justice JOHN DOWD- Yes.

Justice KASHIM ZANNAH- Is it that we want to have the parties to understand the proceedings or to understand the language?

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- To understand the proceedings and the language.

Justice KASHIM ZANNAH- The language is the means of making the parties understand the proceedings. So, I would think what it is

intended here is to ensure that the parties in front of the court understand the proceedings.

Prof. Dr. NIHAL JAYAWICKRAMA- But what about speech? Sometimes a party may wish to give evidence or call a witness to give evidence.

Justice KASHIM ZANNAH- When we say, “understand the proceedings”, the second part will read “to ensure that they understand the proceedings with the assistance of interpreters”.

Prof. Dr. NIHAL JAYAWICKRAMA- I see. What is being proposed here then? “To ensure that parties before the court understand the proceedings” or “the language in which the proceedings will be conducted”. Then, “provide free interpreter assistance to a court user or a witness if he or she cannot understand the language in which the court proceedings will be conducted”. We have now completed examining the action plans for Principles (1) to (4).

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- It has been a successful and efficient session. Now we shall have a coffee break.

SESSION II:

Review of the Action Plan on the Implementation of Istanbul Declaration for Principle 5, Principle 6, Principle 7 and Principle 8

Principle 5

FAHRİ AKÇİN (President of the 8th Civil Chamber)- I extend my regards to you. We will examine our Principles 5, 6, 7 and 8. We will discuss them and their sub- headings. Principle 5: *“The judiciary should ensure transparency in the assignment of cases”*. The first of the two clauses under this principle: *“The division of work among the judges of a court, including the distribution of cases, should ordinarily be performed under a predetermined, transparent arrangement provided by law or agreed by all the judges of the relevant court. For example, the allocation of cases may be made by a system of alphabetical or chronological order or other random selection process”*. The second clause: *“A case should not be withdrawn from a judge without valid reasons, such as serious illness or conflict of interest. Permissible reasons for withdrawal, and the procedure for withdrawal, should be provided by law or rules of court”*.

Now, I think an important principle is divided into two which, in my opinion, is a very appropriate approach. The first one ensures transparency in the allocation process; the second one applies the principle during the proceedings. Of course, exceptions are regulated too. These include serious illness and conflict of interest. Mostly an automation system is used in the allocation of cases in Turkey. It truly makes an objective and fair allocation. There are alternative methods too, but automation, alphabetical order, whatever system is in use, citizens should know about it in advance and allocation should be made with unanimity and agreement of the judges of the court. We are waiting for your opinions.

Prof. Dr. NIHAL JAYAWICKRAMA- We have two paragraphs in the action plan, and two more have been proposed by our American colleagues. With the proposed amendments, the reformulated action plan for Principle 5 now reads as follows: *“Transparency in case assignments being an essential component in ensuring that the public has full confidence in judges’ objectiveness in court proceedings and to eliminate concerns of favouritism or unfairness, courts must; (1) Establish a predictable, objective and transparent system either under law or by agreement of all the judges of the relevant court for allocating and assigning cases. Such systems may be based upon alphabetical, chronological order or some other random*

selection process that ensures objectivity in case assignments”; (2) Establish procedures by law or rules of court for the withdrawal of cases from a judge based on objectively transparent standards designed, in particular, to eliminate the appearance or fact of a conflict of interest. Permissible reasons for withdrawal and the procedure for withdrawal should be provided by law or rules of court”.

Then it is proposed to add a new Paragraph (3); *“Mandate that judges must disclose to litigants and their legal representatives any real or potential conflicts of interest that might lead a person to reasonably question a judge’s ability to be fair and objective to all litigants and provide the litigants and their legal representative with the opportunity to contest whether the judge should continue to preside over the proceedings”.* It is also proposed to add a new Paragraph (4): *“Establish a system requiring judges, at the time of initial appointment, to identify to the court conflicts or potential conflicts of interest in order to enable courts to assign cases to judges not having a conflict and require all judges to update conflict information at least annually.”* I would commend these amended paragraphs.

Justice JOHN DOWD- Can I maintain, because Paragraph (2) deals with procedures by law or the rules of court that the introductory part should include “governments and courts”. Courts cannot introduce laws and that is the first matter. I am happy with the first paragraph. The difficulty in Paragraph (2) is that in common law countries no one may remove a case before a judge and it is a matter for the judge himself or herself to do it. An application for apprehension of bias may be made, and it is determined by the judge and if necessary is dealt with in appeal. Therefore, rather than leaving as it is, instead of “withdrawal”, if we put in the words “and removal”, that means the judge may remove it from him or herself. It is the court that determines the apprehension of bias and not any external body, because if you leave it as it is, who does it - a clerk in the court, the Chief Justice? So, as I say, if we can leave it to cover both the civil law system and the common law system about the removal of cases, that would be better. The third point is that in Paragraph (3), which establishes procedures that mandate the judges, all it needs to say is that judges must disclose. We can take out the word “mandate” and state “judges must disclose” making it mandatory on the judge. The judge has to say, “I am associated with or know this party”. Otherwise, I support the proposed amendments.

Mr JEFFREY APPERSON- I agree with those comments.

Mr. MICHAEL BUENGER- The only comment I would make is that I agree as a general principle that in common law countries it is up to the judge. For example, in many state courts in the United States, and I’m

not sure if this applies to other courts around the world, if a judge refuses to remove himself or herself from a case, there is an appeal to a higher authority to hear the case or to require the judge to recuse. So, it is not simply the decision of the presiding judge. If a party believes that the presiding judge is biased or has a conflict of interest and the judge refuses to get off the case, then there are mechanisms by which a higher authority can mandate that the case be reassigned.

Justice JOHN DOWD- A refusal of a judge to remove himself or herself for bias is an independent decision to be addressed by the Superior Court.

Mr. MICHAEL BUENGER- In some countries.

Justice JOHN DOWD- Yes.

Mr. MICHAEL BUENGER- For example there are other countries where it is more an administrative decision then it is a legal decision.

Justice JOHN DOWD- Well, I would be opposed to any intervention of any other body where there is an apprehension of bias. It is a legal decision and should then be determined by the court of appeal that can deal with this sort of decision without any difficulty at all. To create some other alternative agency to deal with It is very dangerous indeed and that decision would be appealable anyway. I think, if necessary, put in “subject to appropriate appealable procedures” to make it clear, but otherwise, it should be the appeal process that should deal with it.

Mr. JEFFREY APPERSON- That is fine. About civil law and common law approaches, there is a little difference in this regard, but I think, that covers it. I also appreciate the broad views that are being considered for the purposes of establishing these revised principles and it is very good.

Dr. MUSTAFA SALDIRIM- Mr Apperson, Mr Buenger, now the President of the Court of Cassation will do the introduction of the participants to you, because we immediately started with the Principles without doing the introductions. We are sorry for that. I will give the floor to him.

Mr. JEFFREY APPERSON- Thank you.

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- Thank you. Republic of Turkey First President of the Court of Cassation İsmail Rüştü Cirit, I would like to thank our dear friends who join us from the USA both for your participation and for your written contributions. Dr. Jayawickrama explained your proposals in the morning. We are agreed on most of them. We had a few reservations which we discussed among ourselves. Now, we are discussing Principle (5) of the İstanbul

Declaration on Transparency in the Judicial Process which is comprised of four paragraphs. Your contributions will continue to be valuable to us. In our national law, if there are apprehensions about the judge, it can be due to affinities or relationships based on interest, conflict of interest, the judge can express it first in person. The judge may make an explanation in the first place. He or she says there is a conflict of interest in this case or that there is a relationship based on interest with one of the litigants, therefore he/she withdraws from the case. There is a rule in our procedure. If, despite this rule, despite the conflict of interest, if the judge does not withdraw, again within the rules of court and rules of procedure, if there are reasons for challenging the judge, the parties apply to another judge, a superior judge or the judge of the next court or the chief arbitrator. If there are valid reasons, the superior court or the next court will make an assessment.

Secondly, the statement added by Dr. Jayawickrama as the third paragraph can be considered. Again, I welcome our valuable friends who join our workshop from the USA, I hope for your continued success there and thank you.

Mr. JEFFREY APPERSON- Thank you, your Honour. It is a privilege to be with you.

Mr. MICHAEL BUENGER- Thank you very much. I concur with Jeff. It's a pleasure.

Mr. JEFFREY APPERSON- Even though we are a little bit sleepy.

Justice KASHIM ZANNAH- Jeff, Hi! I am glad you have made it back to Williamsburg. Or are you in Virginia?

Mr. JEFFREY APPERSON- Yes sir. I'm in Virginia, your Honour.

Justice KASHIM ZANNAH- And I am here in Ankara at last.

Mr. JEFFREY APPERSON- Great! I wish we were there.

Justice KASHIM ZANNAH- Well, I know that you tried to. My quick comment is on the Paragraph (2). I would suggest retaining it as it is. I do appreciate the concerns of Justice Dowd, but I believe it captures both situations. It captures a situation where it is a decision for the judge and where he rules and when there's a disagreement, it can be appealed against and it goes through the appeal process. That is good. But, in quite a number of jurisdictions, leaving it only to that method is going to lead to a lot of Injustice. The appellate process is not evenly fast in all jurisdictions. In certain jurisdictions, if you leave it only to the judicial process, you can rest assured that the case may even stay on for three years before this is finally resolved. So, I think, since this captures both, the underlying principle being

that it should be known in advance that this is the procedure, and this is an objective procedure. I believe we should retain it as it is to do justice to the Declaration.

Dr. MUSTAFA SALDIRIM- I think it is 5.00 AM in Virginia now. We have woken you up very early. I would like to say, thank you very much. As you have stated, conflict of interest can be present before allocation or it can occur following allocation. Some unpredictable complications can occur during the proceedings. In that case, what shall be done? Withdrawal means a judge withdrawing from a case or a judge being withdrawn from a case. I think this is regarded as withdrawing in our country too. I think this revision is a correct one.

Prof. Dr. NIHAL JAYAWICKRAMA- I would like to suggest that we retain Paragraph (2) as proposed by Jeff, because our original paragraph was that *“A case should not be withdrawn from a judge without valid reasons such as serious illness or conflict of interest. Permissible reasons for withdrawal, and the procedure for withdrawal, should be provided by law or rules of court”*. There have been reported instances from other jurisdictions where cases have been withdrawn from a judge in the middle of hearings by the head of the court. There is often the suspicion that that had been done at the instance of some high political official. That is why we earlier referred to grounds such as serious illness or conflict of interest. I think, Paragraph (2) as formulated by Jeff should be retained. That would be my suggestion.

Justice JOHN DOWD- I can remember sitting on a case when my chief justice, who was Jewish, indicated that he knew one of the parties. One of the parties was Jewish and it didn't actually take me a lot of time to make out who it was. I thought that was inappropriate for him to do that. “Withdrawal” in a common law system would connote that some other court would take that decision. In my state I have 160 courts. Then there is a court of appeal which is the next higher court. If that court had to determine applications for the removal of Judges, the system would just break down. I think if we substitute the word “removal” instead of “withdrawal” it would cover both systems. It means that in countries where there is a court readily available that can remove the case, then it is good. But in common-law countries, removal means that the judge has to do it first and then, it goes on appeal. To impose on a common law country the obligation for an appellate court to “withdraw” a case would be a gross interference with a system that works extremely well. Therefore, I would strongly urge that we substitute the word “removal”.

Prof. Dr. NIHAL JAYAWICKRAMA- May I ask what is the difference between “withdrawal” and “removal”?

Justice JOHN DOWD- “Removal” means removal by oneself; “withdrawal” is by an outside party. It is more likely that if there is a power to withdraw someone will interfere, the government or attorney general and so on. It is a matter for the judge to determine on apprehension first and then, that decision can go on appeal. “Removal” is a neutral word. It is not the best word, but it is a more objective word than withdrawal that can involve someone else.

Prof. Dr. NIHAL JAYAWICKRAMA- May I ask about the situation where, for example, in an original court which has two or three judges, a case is begun to be heard by one judge and the case is then assigned to another judge by the chief judge who has authority over that court, in the middle of the hearings, the case is withdrawn from that judge and assigned to another, on a request made by some political authority? There are some reported instances where that has happened in some jurisdictions. The evil we want to prevent is a judge who has authority over others from withdrawing a case from a judge and handing it to another judge due to some kind of influence being exerted on him. It is withdrawing the case and transferring it to somebody else.

Justice JOHN DOWD- Well in fact, when a judge is removed from a particular case, no other judge has authority over that case. We do not want a procedure whereby somebody else can intervene, the chief justice or someone else, and say that somebody else should hear that case. If the judge is removed, then that is the end of the matter. That is what judicial independence is all about. The fact that someone may ultimately determine on appeal that the judge had made a mistake in not recusing himself or herself is the appropriate way to do it and not to have any procedure for withdrawal because the litigants will do anything they can politically or through the chief justice or somebody like that to prevent the judge from hearing the matter. You can’t run a court system where people are able, if they don’t like the way their case is going, to run off to somebody else to try and stop the judge from determining the matter. The judge should determine it, unless the judge finds himself or herself in a situation where there is the apprehension of bias in which case he or she should decide by themselves not to hear the matter further.

Mr. MICHAEL BUENGER- What happens if there is an appearance of conflict but the judge refuses to get off the case?

Justice JOHN DOWD- Then you appeal that decision at that instant. In the rare cases where the judge refuses, then that goes on to appeal. The case is adjourned until that appeal is determined.

Mr. JEFFREY APPERSON- May I make a comment on this principle? My perspective on this principle is this: in my career and at the federal courts in the United States, we were concerned initially about the fact that whenever there is a conflict arising, after the case was assigned, it became complicated and our view was to design a system that anticipated conflict once a case was filed before it was assigned in order to reduce the number of disclosures required. I think that to not only establish a post assignment approach, but also to have a goal for establishing a pre-assignment anticipation of conflict approach, is an important one for the purpose of systematically addressing these issues for the court and not just for the judge. But it was just the point I wanted to make - that we developed a system in the Federal Judiciary. I just wanted to mention that.

Justice JOHN DOWD- Thank you, but here we are determining every case.

Mr. JEFFREY APPERSON- I understand, but what I'm saying is that, Your Honour, the case can be determined by the court by procedure before assignment if a conflict exists. What I'm trying to say is that it is important to intervene before the conflict arises and the conflicted case is assigned. That's all I'm saying.

Justice JOHN DOWD- I understand, but I don't think that we want a new procedure. That's a matter for...

Mr. JEFFREY APPERSON- Obviously. I just wanted to say for the record. I think that's an important consideration. That is all.

Prof. Dr. NIHAL JAYAWICKRAMA- Would the original paragraph be acceptable? I think that it is taken from the Bangalore Principles, the Commentary, because it was seeking to address the situation where a case is withdrawn midstream by a chief judge from another judge, not for reasons of conflict of interest, but at the request of some other authority. That was the evil we were seeking to address. We have Paragraph (1) which requires procedures to be drawn for the assignment of cases and this is dealing with midstream withdrawals and that is usually done by a superior judge or another authority. That is the mischief we are seeking to avoid. A case should not be withdrawn from a judge without valid reasons such as a serious illness or conflict of interest. Permissible reasons for withdrawal and the procedure for withdrawal should be provided for by the law or the rules of court.

Justice KASHIM ZANNAH- I think that having the original wording doesn't address his concerns. I think he has made a good proposal. Changing the word "withdrawal" for "removal" would address his concerns. I think that is an easy way.

Justice JOHN DOWD- Thank you.

Mr. JEFFREY APPERSON- Yes.

Justice SHIRANEE TILAKAWARDANE- I think that it is important, the point made by the justices. I absolutely concur with your opinions. It is very important that the procedure must be succinct, and the procedure must allow review of such things. I just wanted to make that point. Thank you.

Justice JOHN DOWD- Does anyone have a problem with Paragraph (3)? Anything more on paragraph 5? If not, we will move on to Principle (6).

Mr. JEFFREY APPERSON- Excuse me, can we go back to Principle (5) just for a moment and the change in Paragraph (3)? I don't disagree with it, but if you go up to the introductory paragraph, it ends with "courts must". So, if you wind up striking out "establish procedures", it would read "courts must".

Justice JOHN DOWD- The introductory paragraph has been altered to say, "governments and courts must".

Prof. Dr. NIHAL JAYAWICKRAMA- May I just intervene? It's not "governments must". You cannot bring governments into the assignment of cases. So, it should remain as "courts must".

Justice JOHN DOWD- But in Paragraph (2), courts cannot establish procedures by law, only governments can. You cannot have a court establishing a procedure by law. That's a matter for the government.

Prof. Dr. NIHAL JAYAWICKRAMA- "Establish procedures... by rules of court"

Justice JOHN DOWD- "By law or court rules".

Prof. Dr. NIHAL JAYAWICKRAMA- You could delete "law" and make it "establish procedures by rules of court".

Justice JOHN DOWD- In which case, that solves the problem.

Prof. Dr. NIHAL JAYAWICKRAMA- What would be the objection to retaining the words "establish procedures that mandate?"

Justice JOHN DOWD- It doesn't need to be a procedure. If the obligation is on the judge, in the middle of a hearing to say, "I am sorry, I know this litigant" or "I have an association with a particular company". I think, the obligation must be on the judge not with an external procedure. The law should provide for the judge to recuse or remove him or herself. The

idea is to get it through the judge at the instant that an issue has arisen - either before or after. The obligation is on the judge at whatever time to remove him or herself.

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- Yes. A Judge should explain to the parties in case he/she has a conflict of interests by having relations with any of the parties. A sense of obligation should be added. I think this paragraph should be read to give the meaning of “the judge is obliged to explain his/her relations that would cause a conflict of interest”.

Principle 6

Justice JOHN DOWD- Thank you. We should now go to Principle 6. You all have the proposed amendments. I won’t read them all through. Does anyone wish to propose any alterations?

Here, I do think the registry will not necessarily in some countries be run and staffed by the courts. In New South Wales, for instance, the government appoints the staff to run the court and provides a minimum budget, and that is the case in a lot of countries. I think, this Principle should begin with “governments and courts must” in my view. Now, I have a problem with Paragraph (2) - *“Establish systems to provide public access to information pertaining to judicial proceedings, both pending and concluded, including court pleadings, motions and evidence”*. That that would create a problem where affidavits have been filed, but not read, because there may be certain evidence in the affidavit that may never be admissible in court as evidence. The Press should not be provided with such materials. Therefore, I am very worried that would happen if we retain “including pleadings, motions, and evidence”. I think those words should be deleted.

Has anyone any issue with that?

Justice SERACETTİN GÖKTAŞ- Thank you. Now, this Paragraph (2) requires judgments being open to public access. Personal data is very important, there is no problem with making judgments available to the litigants but making personal data of the litigants and others open to access might cause problems. Therefore, I think a preventive statement should be used here. Thank you. We could say “on condition of excluding the personal data” or “on condition of keeping the personal data confidential”. It should be open to public access on condition of the confidentiality of the personal data.

Mr. JEFFREY APPERSON- I agree.

Justice JOHN DOWD- Yes.

Justice SHIRANEE TILAKAWARDANE- Justice Dowd, wouldn't the point that you're making be covered by just saying "including court judgements", because that is what is important as you rightly pointed out. There will be a lot of inadmissible material in the pleadings, and we don't want those to be taken out of context and highlighted on the headlines of a newspaper. So, isn't it the judgments that are important? Shouldn't that be what is on the website?

Prof. Dr. NIHAL JAYAWICKRAMA- May I say something? We already have the Istanbul Declaration which contains the Principles and a Commentary. We cannot deviate from that. What the commentary for Principle (6) says is: *"Subject to judicial supervision, the public, media, and court-users should have reliable access to all information pertaining to judicial proceedings, both pending and concluded. Such information should include reasoned judgments, pleadings, motions, and evidence. Affidavits and like evidentiary document that have not yet being admitted in evidence may be excluded. Access to court documents should not be limited to case-related material but should also include administrative materials"* and so on. It says that affidavits and evidentiary documents that have not yet been admitted as evidence may be excluded.

Justice JOHN DOWD- Therefore, we should repeat that here so that there is not a conflict between the two.

Dr. MUSTAFA SALDIRIM- Yes, 3 million judgments of the Chambers of the Court of Cassation are now open to public access in our jurisdiction. With 30 personnel in our bureau, before we make them open to public, we extract or delete personal data to fulfill this requirement. We open them to public access after removing locations, names, surnames etc. As dear President of the Chamber, Mr. Göktaş stated, I believe, if we make an amendment to the statement that it should be open to public access after removing personal data, we may be able to prevent possible misunderstanding in the future.

Mr. JEFFREY APPERSON- I was concerned as well about privacy considerations.

Mr. MICHAEL BUENGER- Could we add at the beginning of Paragraph (2), before the word "establish" the following words; "subject to national privacy laws"?

Justice JOHN DOWD- You don't need the word "national" because in some federal countries like the United States and Australia, there are state and federal privacy laws and here we can just say "privacy laws".

Mr. MICHAEL BUENGER- Yes.

Mr. JEFFREY APPERSON- That would be fine.

Justice JOHN DOWD- My only problem with what the Honourable President has said is that not all cases need to be anonymized. I think in terms of the principle of transparency, assuming we take out the unread evidence, the public and the press have an interest in what decisions are made between X and Y or companies or with the government. I understand the procedure in Turkey and that is a matter for that country to deal with it. But most countries in the world, I think, do want to know what happens in cases between Smith and Brown and so on because they are matters of public interest. I don't think that we should interfere with what Turkey does, but I think that taking out the affidavits, Paragraph (3) is alright as it is.

Justice SHIRANEE TILAKAWARDANE- In sexual offenses against women and children, isn't there something about the anonymity of their identity which we need to protect?

Justice JOHN DOWD- "subject to sexual offences and terrorist cases".

Dr. MUSTAFA SALDIRIM- About opening reasoned judgments to public, we have discussed it with academicians. Most of them did not understand why we excluded personal data from these decisions. Their strongest argument was that: "*The European Court of Human Rights publishes the decisions and they do not exclude any personal data*". Now, we are developing a universal text. Therefore, there might be some sensibilities, but our principle is transparency, I believe it would be more suitable to maximize these standards rather than minimizing them.

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- I think we need to make a distinction: Persons who are public figures, and who are not, should be distinguished. Personal data are private and confidential. Disclosure of personal data to the public is prohibited under various national laws. It is also subject to sanctions. Maybe, we can make such a distinction. Information about public figures, politicians etc. may be open to public access. Perhaps we should pay more attention to the disclosure of information about ordinary citizens.

Justice JOHN DOWD- Another issue that arises is that this deals with all courts. Inferior courts don't have their judgments published except

in terms of the decision given; there is no computer access to judgments of lower courts. I think, we need to look carefully at the distinction between judgments of superior courts which bind others and those of inferior courts, and between public figures and ordinary citizens. For someone seeking political office who has been charged with a sexual offense, transparency obliges us to make this accessible.

Justice KASHIM ZANNAH- The concern is only to protect the victim. Insofar as issues of victim protection and terrorism are considered, I think reduction should be allowed.

Justice SHIRANEE TILAKAWARDANE- Talking about the victims. It is really the protection of their identities.

Justice JOHN DOWD- But in terrorism, it is protecting your national interests.

Justice SHIRANEE TILAKAWARDANE- Correct.

Justice JOHN DOWD- Where do we go on this now? Has anyone any comment? Do we leave Paragraph (2) as “subject to” and adding the words from the **Istanbul Principles**? It will now read; “Establish systems to provide public access to information pertaining to judicial proceedings, both pending and concluded” and then adds on the words...

Prof. Dr. NIHAL JAYAWICKRAMA- “including reasoned judgments, pleadings, motions, and evidence”. Then, we add the words: “Affidavit and like evidentiary documents that have not yet been admitted in evidence may be excluded.” That makes a new sentence.

Justice JOHN DOWD- Thank you. That’s the new Paragraph (2). About Paragraph (3) that is a proposal from Jeff. Now, I agree with that as it is. What additions or qualifications will people like to propose? I accept Turkey’s position, but I don’t think, when we deal with that, we can consider that a country particularly wants to anonymise judgments. Because we are trying to attract more countries to adhere to these new Principles, we must not make them too restrictive. I think we should leave the Turkey situation as it is, as it would be in some other countries too.

Anyone proposing any amendments to Paragraph (3)? Paragraph (3) will stand. Paragraph (4); “*Regularly publish information regarding court caseloads statistics and case clearance rates.*” Has anyone any problem with that? If not, we will proceed to Paragraph (5). Now, the difficulty with Paragraph (5) and I don’t know how necessary (5) is - is that in some countries it is the government which provides the budget for the courts and in others the courts retain fees. The court makes its money in some cases. I don’t know how necessary Paragraph (5). is.

Mr. JEFFREY APPERSON- I agree. I don't know how necessary that is.

Prof. Dr. NIHAL JAYAWICKRAMA- It reflects what is in the Istanbul Declaration.

Justice JOHN DOWD-But do we need to repeat it then? All right then. Unless there is somebody that has another view, Paragraph (5) is eliminated.

Paragraph (6) is; *“Require members of the judiciary to disclose to the litigants, their legal representatives and to the public in writing or on the court registry affiliations, outside activities and other non-financial interests”*.

I am concerned about the privacy of judges and their families. For instance, my personal address is not disclosed anywhere and I'm not on an electoral roll that is published, and I own a home unit and an apartment 100 meters away from my home where my daughter and grandchild live. Why should they be put at risk if I have to disclose that and why should my wife's personal financial circumstances be disclosed to the public? She is already stuck with me, married to me. That would be enough disadvantage without thrashing her privacy.

Justice KASHIM ZANNAH- This is disclosure where there is no potential for a conflict of interest. I don't see the necessity of that and share Mr. Dowd's concerns about the other effects of it, too. I don't see why this is proposed.

Mr. MICHAEL BUENGER- Isn't that issue in Paragraph (5) taken care of by the addition of Paragraph (3) in Principle (5) above? That is the one that requires judges to disclose to litigants and their legal representatives any conflict of interest.

Justice JOHN DOWD-I think, we have covered this.

Justice KASHIM ZANNAH- Exactly.

Justice JOHN DOWD- Is there anyone who objects to the elimination of this new Paragraph (5)? Then Paragraph (5) goes out and so the Paragraph has been amended, and the Principle has Paragraphs (1) to (4) with those various amendments.

Principle 7

Justice JOHN DOWD- Can we proceed then to Principle (7)? You have seen the proposed amendment. Does anyone have any objection or addition to those? If you have had time to read it.

Can I say here; there are various systems throughout the world of inspection of prisons and most prisons that I have been in and I have been in many times both here and in other parts of the world and they are not suitable to take judges through at all. I am concerned that there should be alternative procedures rather than having judges necessarily go in. I know that there are prisons I would want to go in, particularly where I put people away.

Prof. Dr. NIHAL JAYAWICKRAMA- Actually, I should remind Justice Dowd that this Principle was introduced by him at the Istanbul Summit in 2013.

Justice JOHN DOWD- In all those years, consistency has never been one of my characteristics. There is nothing authorizing the judges. If we go to the introductory remarks; *“The unlawful or inhumane incarceration of individuals being contrary to the rule of law, the fair and open administration of justice, and the principle of due process of law, laws should be adopted that: Paragraph (1) “Establish a system of structured prison visits to ensure independent oversight of executive detentions”. Paragraph (2): “Require that persons held in administrative or executive detention be brought before the court in a timely manner and that authorities be required to disclose to the court the reasons and legal justification for the detention of the individual”.* This is the principle of habeas corpus. It goes on as follows; Paragraph (3): *“Order that individuals in administrative or executive detention be released if authorities fail to provide adequate factual and legal justification for the detention”.* Does anyone have any problems with any of that?

Justice KASHIM ZANNAH- Who undertakes the visits?

Justice JOHN DOWD- We have a system of prison visitors. They are individual people who go around the prisons. But, if we say, “establish a system”, that will need to be dealt with by the courts. You bring forth a habeas corpus application and then the court calls upon the custodial body to justify why the person is being held. Establishing a system is sufficient.

Justice KASHIM ZANNAH- My only concern is that as an implementation mechanism, we need much more positions than leaving it just as it is.

Prof. Dr. NIHAL JAYAWICKRAMA- Structured prison visits could be used to ensure independent oversight of executive detention. It need not necessarily be judges.

İSMAİL RÜŞTÜ CİRİT (First President of the Court of Cassation)- Our President of the 12th Criminal Chamber served as an Attorney General for long years in our country. May I ask him to briefly explain our system.

Justice AHMET ER- Thank you Mr. President. I served as a prosecutor for 25 years before I came to the Court of Cassation. I was an Attorney General for 18 years of it, I served as an attorney in 6 different cities of Turkey. First, I would like to state: In this Principle of the Declaration, there are terms such as judge and court. Here, we call them members of the judiciary. Let's not get stuck with only the judge. Members of the judiciary can include prosecutors and penal directors. We have prison surveillance commissions in our system. Our prison surveillance commissions are comprised of 5 members, who are civilians from NGOs. These commissions visit prisons in certain periods, they observe how the law is applied in prison, prison conditions, physical conditions and listen to detainees and prisoners and report. They submit their report to the Ministry of Justice. The General Directorate of Prisons and Detention Houses and our Government takes necessary measures if there is any violation.

I will go back to the Principle after I explain the procedure we apply. Let's not understand only the judge when we refer to members of the judiciary. It can be an externally established prison surveillance commission. They are also considered members of the judiciary, likewise a public prosecutor. Therefore, the word is very comprehensive. Until the 7th Principle, there were judges, courts, court users; but in this Principle, there are members of the judiciary. Therefore, it seems like an appropriate word here. We also have the office of judge of execution. A prisoner can apply to the prison's judge of execution with a petition. He/she has a right to submit a complaint about prison conditions. We worked with our Secretary-General Yusuf ZiyaattinCenik at two locations. He was my prison prosecutor at both locations. He was in the prison almost every day, I used to go to the prison two days a week. We would not leave it without inspection. We were also members of the judiciary. Judges might not go there because they are a part of the decision-making process. Undesirable situations might occur if they do so. Thank you.

Justice JOHN DOWD- I see. I accept the importance of that system because you have the judges assuming different functions. Common law systems don't have that. We don't have the prosecuting judges, we don't

have enforcement judges. We just have judges. I think, the words “as proposed” are sufficiently general to cover the Turkish procedure and to cover the common law procedure. I don’t think we can import any other words that would easily solve that problem.

Prof. Dr. NIHAL JAYAWICKRAMA- The words “by members of the Judiciary” has been proposed to be deleted. They have been deleted.

Justice KASHIM ZANNAH- The Principle says: “the Judiciary should have supervisory powers over executive detention”. We are talking about executive detention and permitting the executive to conduct the prison visits too. How comfortable are we with that?

Justice JOHN DOWD- If you look at the whole thing, “requiring persons held in executive detention being brought before the court in a timely manner.” The court is important. It is a whole provision.

Justice KASHIM ZANNAH- If it is sufficient, then by all means.

Justice JOHN DOWD- Alright. Are there any objections to the paragraphs as they now stand? If not, we can proceed to Principle 8.

Prof. Dr. NIHAL JAYAWICKRAMA- The original Paragraph (1) talked about structured prison visits by members of the judiciary.

Justice JOHN DOWD- Yes.

Prof. Dr. NIHAL JAYAWICKRAMA- A law should be adopted to establish a system of structured prison visits to ensure independent oversight over executive detention.

Justice JOHN DOWD-What are you proposing?

Prof. Dr. NIHAL JAYAWICKRAMA- This Principle really says that the judiciary should have supervisory power over executive detention. That is the principle.

Justice JOHN DOWD- But, that is covered in Paragraph (2) with the courts... “And disclose to the court”.

Prof. Dr. NIHAL JAYAWICKRAMA- The supervisory function then can only be exercised when persons are brought before court.

Justice JOHN DOWD- Yes. The heading covers all things and that is the message of the provision.

Justice AHMET ER- A structured system of prison visits should be established. We have a prison surveillance commission, it is a structured system in this respect. A structuring process was conducted. We have two

types of law enforcement; administrative, the judge orders administrative detention with regard to the prohibition of return of refugees, for example, and administrative detention is ordered by judges of the criminal courts according to our law. Normal judicial law enforcement is provided in prosecutor supervision. Laws should be adopted in this respect. Both clauses, both sub-clauses are accurate, I don't think there are any provisions that must be added.

Justice SHIRANEE TILAKAWARDANE- I think it is important to know that if you take a prisoner who has been abused or assaulted inside the prison, very often they delay the production of that person before the court. Paragraph (2) talks about somebody else bringing the person before the court. So, if a complaint is made to a judge in a case, the judge can surely give an order to bring the person before court.

Justice JOHN DOWD- The words are covered by "establish a system that requires..." "Establish a system" is sufficiently clear and that requires the person to come before the court.

Prof. Dr. NIHAL JAYAWICKRAMA- I think the President was referring to the original version of that. I think the President has before him the original version.

Justice JOHN DOWD- Yes.

Prof. Dr. NIHAL JAYAWICKRAMA- Which has not been found acceptable and we have now deleted the old version and substituted it with these three paragraphs.

Justice JOHN DOWD- Yes. Are you all okay with that?

Prof. Dr. NIHAL JAYAWICKRAMA- Which one? Paragraph (2) of the original one. "*A law should be enacted to confer to the judiciary the power to bring before court persons held in administrative or executive detention*".

Justice JOHN DOWD- I will read it from the start. The new clause as adopted is "*The judiciary should have supervisory powers over executive detention.*" The wording is: "*Unlawful or inhumane incarceration of individuals being contrary to the rule of law, the fair and open administration of justice, and principle of due process of law, laws should be adopted;*(1) *Establish a system of structured prison visits to ensure independent oversight of executive detentions;* (2) *Require that persons held in administrative or executive detention be brought before the court in a timely manner and that authorities be required to disclose to the court the reasons and legal justification for the detention of an individual;* (3)

Order that individuals in administrative or executive detention be released if authorities fail to provide adequate factual and legal justification for the detention.” Is there any opposition to that? Thank you.

Principle 8

Justice JOHN DOWD- Principle (8); *“The judiciary should ensure that judicial decisions of the superior/ appellate courts are regularly published.”* Has anyone any oppositions to the clauses with the proposed amendments laid out in the document before you?

The only thing I would propose is the addition to the introductory notes “governments and courts” because some of that is going to be government matters. Does anyone have any objection to the addition of the word “government”? Or take out “courts” and insert “government or courts should...” Otherwise, it remains as it is. Is there any opposition to the new clause as proposed? If not, we will carry on and I will hand over.

İSMAİL RÜŞTÜ CİRİT (First President Of The Court Of Cassation)- I believe this is the end of our morning session. It has been a fruitful session. I apologize to all participants as I will not be able to attend the afternoon session. I must attend the meeting of the High Disciplinary Board this afternoon. I will not be able to be with you. But we will continue our work. Everything is about the effort to create a better justice system that everybody can trust. Democracy and rule of law are solutions to many problems in the world. We believe so. We do our best to do so. We would like to organize a High Courts Summit next year with valuable participation and contributions of Dr. Jayawickrama and all our specialists here. We would also like to plan it and welcome Presidents of the Supreme Court and senior Justices. Now I need to leave. We will be attending lunch. I want to say good morning to our friends in Virginia, USA.

Mr.JEFFREY APPERSON- Morning! Thank you, Thank you, your Honour.

FROM THE HALL- The afternoon session starts at 14.00 hrs.

Mr. JEFFREY APPERSON- We will be here, too. At 7 a.m., we will be ready.

SESSION III:

Review of the Action Plan on the Implementation of Istanbul Declaration for Principle 9, Principle 10, Principle 11 and Principle 12

FROM THE HALL- Mr. Apperson, can you hear us?

Mr. JEFFREY APPERSON- I can hear you fine. Can you hear me?

FROM THE HALL- We cannot see Mr. Buenger. Do you know why?

MrJEFFREY APPERSON- I will have him rejoin us.

FROM THE HALL- OK, we will wait for him, then.

Mr. JEFFREY APPERSON- No, we can start. I will just tell him we are starting. Please proceed.

Principle 9

Justice AHMET ER- Distinguished guests, dear participants, together with Honourable Justice KashimZannah, we will be looking at the Principles (9), (10), (11) and (12) of the Draft Implementation Measures of the Istanbul Declaration. Principle (9) says *“The judiciary should organize visits to courts by judges, classroom appearances by judges, role playing, the use of audio-visual material, and the active teaching of judicial procedures”*. Of course, this is how it is written in the Turkish text that we have here right now. However, as there was no time for translating the additions and the revisions, we do not know what is added and changed in the text. We are informed about these changes through you, distinguished guests.

Justice KASHIM ZANNAH- I think this is where your method of having the co-chair system is going to prove very successful. I will complement exactly because I will go on from where he stopped. I am going to read the amended suggestions. I will read it slowly so that it can be interpreted. By the time we have finished, we will all be on the same page. We will know what we are talking about. But, as a preamble, I should state that there are no changes proposed, it is just redrafting to bring out the meanings in a much clearer way and in some instances also to reduce the number of words used. Then there are suggestions. I will start with

Principle (9). It starts with the preamble to explain why the rule has come into being and that is “*Promoting and entrenching respect for the rule of law and the role of the judiciary being dependent upon a multi-generational understanding of important legal principles and individual rights, courts should*”; Paragraph (1): *Establish regular programs of student engagement that include organizing student visits to courts, classroom appearances by judges, civics education, and the active teaching of judicial procedures*”. This is the proposal that we have or rather the redraft that we have, which again captures and explains the intentions of the original draft in a clearer way. The only deletions are “role playing” and “the use of audio visual materials”. It is explained that that is because these are particular methodologies and there could be other methods as well. So long as active teaching is there, it covers everything and allows other methods of teaching to be used. It looks good. But now it is on the floor for discussion.

Justice JOHN DOWD- May I? I think the references in the original draft: “These visits may include visits to courts, classroom appearances by judges, role playing and the use of audio-visual materials” were taken from the Istanbul Declaration. The explanatory paragraph is the source. This is an action plan to implement Principle (9). Now, should not the action plan at least contain what is in the Declaration? In addition to anything else concerning materials.

Justice KASHIM ZANNAH- Probably using the word “including” should cover that concern. That is, we can keep it by saying including and this would not exclude others. Then as an action plan, I think it is also good practice to have a situation where it is not limited to just one model.

Justice JOHN DOWD- We included students’ visits to courts, classroom appearances by judges, civic education, and active teaching, but excluded role-playing which is different.

Justice KASHIM ZANNAH- I understand.

Justice JOHN DOWD- The use of audio-visual can be left out. Role playing is a different form of activity.

Justice KASHIM ZANNAH- I think both can be allowed to stand, because in the first sentence, “establish regular programs for student engagement that include” is the starting point and the fact that it starts with the word “include” means that we can leave out role-playing and we can even leave out the use of audio-visual materials. It doesn’t necessarily mean that we are excluding any other methods. There is an explanation as to why it is suggested to delete role-playing and audio-visual materials. They seem to focus on particular methodologies and less on the importance of delivery.

Justice JOHN DOWD- I am wondering whether since this is an action plan we ought to add more to assist by including words such as “in conjunction with the profession and the teaching institutions or universities”.

Justice KASHIM ZANNAH- OK.

Justice JOHN DOWD- It is implicit, but I think we ought to get explicit because there are too many classrooms to get around and universities will happily pick up any course and earn the money. I think we should give an indication of how they can go about.

Justice KASHIM ZANNAH- This is a suggestion for addition.

Justice JOHN DOWD- “Promoting in conjunction with the legal profession and universities etc.”

Justice KASHIM ZANNAH- Are we extending the sentence by saying “in conjunction with the legal profession and educational institutions”.

Justice JOHN DOWD- Yes.

Justice KASHIM ZANNAH- Is it acceptable? Okay. I take it then that it is accepted. We will then proceed to Principle 10.

Principle 10

Justice KASHIM ZANNAH- Thank you. I will be happy to do that. So, we will go to Principle 10: “*The Judiciary should initiate and/or support outreach programmes designed to educate the public on the role of the justice system. The preamble reads: General public support for the independence of the judiciary being contingent on the public understanding of the courts and the judicial process, courts and judges should be encouraged to: (1) Establish civic outreach programs including town hall meetings that provide an opportunity for court users to interact with the judiciary on the problems they have experienced; (2) Appear on radio and television programs to disseminate information on the functioning of the judiciary, its civic role, and judicial processes; (3) Publish short, clearly worded, and easily understandable pamphlets and other materials that provide basic information on arrest, detention, and bail, criminal and civil procedures, and useful contacts for crime victims, witnesses, and other users.*”

Justice SHIRANEE TILAKAWARDANE- Do you use pamphlets or fliers? I think now we have fliers, but you use the word pamphlets. Still sticking to the older one.

Justice JOHN DOWD- Because this is educational, I think we should include the words - “including the use of the internet”. In the British Commonwealth we have some 60 members and we contact each other by exchanging ideas. If we publish all of the things on the web, anyone can access them and pick up the ideas and develop them.

Mr. MICHAEL BUENGER- Could you just add at the end of Paragraph (3): “such materials should be available on the internet”?

Justice JOHN DOWD- Yes that will do

Justice KASHIM ZANNAH- OK. That is it.

Mr. JEFFREY APPERSON- I just wondered if “clearly worded and easily understandable” are redundant. Do we need one or both.

Justice KASHIM ZANNAH- It conveys an emphasis maybe. Sometimes it is not redundancy but emphasis. I am comfortable with removing it and I’m comfortable with leaving it as it is.

Mr. JEFFREY APPERSON- OK.

Justice KASHIM ZANNAH- Any other observations on this one or can we move on to Principle 11?

Dr. MUSTAFA SALDIRIM- Short movies can also be very effective. Recently, one-minute videos have started to be used on the internet through Youtube for promotional purposes. Pamphlets are both costly and very hard to access; I wanted to draw attention to this issue. Could we add this? Thank you.

Justice KASHIM ZANNAH- I think other materials read in conjunction with our added sentence concerning availability on the internet probably adequately covers this. I think we have covered it.

Principle 11

Now we can move to Principle 11. *“The judiciary should afford access and appropriate assistance to the media to enable it to perform its legitimate function of informing the public about judicial proceedings, including decisions”.* The preamble reads: *Public knowledge of and support for strong, independent courts often being dependent upon good relationships with the media, courts should; (1) Establish a press or public affairs office to facilitate media coverage of judicial proceedings by liaising with the media representatives, responding to and managing requests from journalists, issuing press releases, and generally providing accurate information about*

judicial decisions and legal issues. This office should provide schedules of upcoming cases, monitor the media for accurate reporting, and design media campaigns that promote public understanding about the judiciary; (2) Establish a program that builds trust between the media and the courts by providing training of journalists that includes basic education on court structure, court procedures, methods to access court information, and legal issues”.

Prof. Dr. NIHAL JAYAWICKRAMA- I think a question has been raised here by our colleagues from the United States. “Monitoring the media for accurate reporting” could be seen as advocating media censorship. Is the intent here to say that the Court will assist the media in reporting accurately on the courts? Accurate reporting is often a question of understanding and not necessarily a question of objectivity. According to them, monitoring the media for accurate reporting could be misconstrued as advocating media censorship.

Justice KASHIM ZANNAH- I see the concerns that are raised, but I do not see what can be done about this because it could be misconstrued. A situation where the courts are not concerned about whether their activities are accurately reported is rather counterproductive to the entire aim of having the public educated. I think it should just stand.

Justice SHIRANEE TILAKAWARDANE- Also I think that the perspective of the media is sometimes to overemphasize for the sake of sensationalism, because papers sell better. It is just sensationalism. So, I think we need to say that it should be factually correct.

Prof. Dr. NIHAL JAYAWICKRAMA- Wouldn’t “accurate reporting” suffice?

Justice SHIRANEE TILAKAWARDANE- Yes. “Monitor for accurate reporting”.

Justice KASHIM ZANNAH- I think it should stand. Any other comment or observation? In the absence of which we will move to the next Principle.

Principle 12

Justice KASHIM ZANNAH- Principle (12): *The judiciary should assess public satisfaction with the delivery of justice, and thereby seek to promote the quality of justice. The preamble states: The professional and*

qualified judges and court personnel being an essential component in high functioning courts and public trust and confidence in the fair administration of justice, courts should; (1) Establish a Public Complaints Committee comprised of judges, attorneys and citizens to receive, review, and act upon court users' complaints against judicial officers and court staff; (2) Install public complaints boxes in every court facility where the public can present even anonymous complaints about judicial officers, court staff or court procedures; (3) An "Open Door" policy for complaints should be adopted by the Chief Judge and/or Registrar; (4) Establish a regular performance evaluation system for court staff that accesses."

Mr. MICHAEL BUENGER- I think the question is for the group to consider when you use the term "regular performance evaluations", what is it that you are evaluating? I think there should be some examples of what it is that is being evaluated and that is why I think the sentence was not completed.

Justice KASHIM ZANNAH- Let me go on and then we can come back to discuss it. *"(5) A Court User Committee should be established in every court; (6) Establish a system to meet with and conduct surveys of court-users and other stakeholders, to identify systemic challenges or weaknesses; (7) Mandate that judges and court personnel conduct a regular case audit to ensure the timely disposition of cases; (8) Establish a program through which judges and court personnel conduct regular reviews and analysis of non-case related court user complaints and develop responses to those complaints when warranted; (9) The judiciary should conduct un-scheduled court inspections; (10) The judiciary should encourage critical assessments of its performance by academia; (11) Formulate a comprehensive system-wide strategy designed to correct negative public perceptions and eliminate inefficiencies or other obstacles in the judicial process that lead to such perceptions; (12) Publish an annual report of its activities, including any difficulties encountered and measures taken to improve the functioning of the justice system."*

Justice JOHN DOWD- There will need to be certain editorial changes. "The court should..." Some of the paragraphs should be amended.

Justice KASHIM ZANNAH- Yes. There are suggestions made by our American colleagues. Since they are with us on Skype, maybe I should read them out. (1) The public complaints committee should be comprised of judges, attorneys, and citizens. That is the suggestion. That is exactly what we have in my own courts. It is comprised of police officers, members of the public, and judges - predominantly judges - and bar associations too. I am comfortable with. Are you?

Justice JOHN DOWD- In New South Wales and in other Australian States, we have established an independent commission against corruption which covers non-judicial matters. We have a judicial commission which deals with complaints against judges. They have members of the public as well. They dismiss some judges and recommend judges for removal. This is a model which I helped to install in New South Wales and it's worked very well, and it also does a lot of the functions that are proposed in Principle (12). The only problem I have is the reference in Paragraph (9) to unscheduled court inspections. I am concerned about that.

Mr. MICHAEL BUENGER- One of the things I struggled with as I read this was, what is the difference between a public complaints committee, a court user committee, and then further down, in one of the other Principles, a kind of judicial disciplinary process a judge can be referred to. There are three models or three entities that these Principles establish, and I am wondering what the difference is in terms of the purpose between those three models or those three entities.

Justice JOHN DOWD- Can I answer? The court itself is the best place to deal with complaints that concern judges and attorneys and with the toilets being too near to the back door etc. Those are matters internal to the court and which the court can deal with through its own committees. Complaints against judges and such matters can be dealt with by a separate body, for which we have a judicial commission. They have different perspectives.

Justice KASHIM ZANNAH- Exactly. In addition to what Judge Dowd said, the court user committee is not necessarily a complaints committee, but it is an avenue for suggestions, improvements, and myriad of other observations. On the other hand, the complaints committees usually deal with allegations of wrongdoing against judges.

Justice JOHN DOWD- Can I ask who proposed Paragraph (9) relating to the courts conducting unscheduled court inspections and what is its purpose because I am concerned about the efficacy of such a body? If no one wants to answer that, I will argue that it should be deleted. What happens to the poor litigant when one day the Chief Justice suddenly appears at the back of the court and starts watching the proceedings?

Justice KASHIM ZANNAH- How about the poor judge?

Justice JOHN DOWD- The litigants, the judge, the legal practitioners, and so on...

Justice KASHIM ZANNAH- Can anybody answer? Yes, go ahead, please.

Dr. MUSTAFA SALDIRIM- I would like to give an example from our system (Turkey). We used to have justice inspectors, and now we have inspectors from the Council of Judges and Prosecutors. They periodically may visit the courts. When they conduct an unscheduled visit, they see how many cases there are, or if the cases have been unnecessarily postponed, or the proceedings of the prosecution. They can find that a judge has postponed a case three to four times. When the inspections are conducted on a scheduled basis, the judges know the time of the inspection and they act towards it, so that they avoid the criticism of the inspector, but during an unscheduled visit, it can be discovered that this judge has postponed cases three or four times. In this sense, this paragraph refers to those who oversee the inspection. I don't see a very serious problem when it comes to our implementation.

Justice KASHIM ZANNAH- Yes, I think, this is administrative. It is like he said...

Dr. MUSTAFA SALDIRIM- I am thinking the same as Honourable President. That is to say that the inspection referred here is not an inspection during a proceeding. Mr. Dowd's concerns are valid. If the Chief Justice comes during a hearing for an inspection, the parties and the judge would be in difficulty. But, I think here it doesn't refer to the proceedings, it is the administration, the secretariat, this is what I understood. If it were otherwise, it would say "proceeding", not "court". When it says court, it means inspect the secretariat of the court.

Justice KASHIM ZANNAH- When we look at the principle again, it will also become clearer; "*Judiciary should assess public satisfaction with the delivery of justice, and thereby seek to promote the quality of justice.*" So, it is an inspection by the judiciary of the court staff or the administration to ensure that this Principle is being achieved.

Justice JOHN DOWD- Therefore, remove the word "court" and make it clear that it is not the court.

Justice KASHIM ZANNAH- Yes, it is not the hearing, it is the court. It could include availability of good toilet facilities in the court, availability of good seating areas for litigants waiting for their cases.

Prof. Dr. NIHAL JAYAWICKRAMA- It doesn't refer to monitoring the proceedings. It is about unscheduled court inspections.

Justice KASHIM ZANNAH- We take that to include the court building. Yes, go ahead, please.

Justice FAHRİ AKÇİN- Would it be possible if we remove the word "unscheduled" too? The word "unscheduled" makes it look like the work of a

detective. Instead of it, why not say “Judiciary should conduct inspections”? It will cover both scheduled and unscheduled inspections.

Justice KASHIM ZANNAH- Unscheduled has a reason to be there, I don’t know who put it there, but if you want to ensure public satisfaction, you want the staff to know that they could be inspected at any time. We come from different systems and diverse backgrounds and diverse regions. It is about keeping them on their toes.

Prof. Dr. NIHAL JAYAWICKRAMA- This is taken from the recommendations of the UNODC Resource Guide on Strengthening Judicial Integrity. They recommended unscheduled audits. It is important to have unscheduled inspections where you don’t give notice to the registrar that you are coming.

Justice KASHIM ZANNAH- I can clearly understand why this was put there, because the toilets may be just left unattended, and they couldn’t do anything about it and if they know that the audit will be on the 1st of April, I assure you by the 31st of March, the toilets will be spotless. By the 3rd of April, they will all go back to the original condition. Unscheduled audits are informed by these issues.

Justice SHIRANEE TILAKAWARDANE- If the purpose is checks, unscheduled visits have their meaning in that context.

Justice KASHIM ZANNAH- It is not the judicial process that is being inspected.

Justice JOHN DOWD- Would it be more explicit if it says, “court inspections without notice”?

Justice KASHIM ZANNAH- That’s okay if it makes everybody feel comfortable about it, as it achieves the same goal.

Mr. MICHAEL BUENGER- Or you could say “conduct internal investigations”. I also see that this is related to good practices in the area of internal control and regulation that promotes accountability and trust in the Judiciary.

Justice KASHIM ZANNAH- Yes.

Mr. JEFFREY APPERSON- To make it more consistent with the rest of the paragraph, there should be some established program of regular internal audits or a program should be implemented that is aimed at doing something rather than what ought to be done.

Justice KASHIM ZANNAH- Can you tell me precisely where the suggestion should be inserted?

Mr. JEFFREY APPERSON- Yes, for example, if you look at most of the other Principles, they start with some action words- establish, implement, etc. So there needs to be something to maintain the flow of the Principles that says, for example, on the inspection “the courts should” and for paragraph (9) “establish a program or Implement a program” to make sure that there is a consistent flow of what the courts are supposed to do”.

Justice KASHIM ZANNAH- I think that can be taken care of editorially.

Mr. JEFFREY APPERSON- That is a more stylistic approach.

Justice KASHIM ZANNAH- Any other observation? Yes, go ahead, please.

Dr. MUSTAFA SALDIRIM- What I had in my mind was a little bit different from what is understood from “unscheduled”. Here in Turkey, the courts are inspected by inspectors from the Council of Judges and Prosecutors, which means external bodies are conducting the audit. It is certain that the audits conducted by the external bodies are much more beneficial. Therefore, if we say the courts should conduct their internal audits unscheduled, which they should, it would be very beneficial too. But the importance of the unscheduled external audits should not be ignored. For this reason, I find it disadvantageous to use the words which will exclude the external audits.

Justice KASHIM ZANNAH- That is a suggestion. But, do we think that “establish regular court user committees, town hall meetings” would cover that, or should we also say that an outside party should come in and inspect the courts. I would think that town hall meetings and court user meetings already cover that. Judge Mustafa, do you think so? The fact that we have regular court user committees, town hall meetings and other venues where excellent persons may contribute, doesn’t that take care of your concern?

Dr. MUSTAFA SALDIRIM- Not really, because even though these committees are common in the Anglo-Saxon system, it is not very common in Continental Europe. In judicial institutions in Continental Europe, the external audits could be conducted by the high judicial councils like the Council of Judges and Prosecutors, and the audits concerning the secretariat could be conducted by the Ministry of Justice. I suggested these systems in Continental Europe in order not to exclude these systems

Justice JOHN DOWD- These are responsibilities being imposed on the court. But that does not exclude other inspections by other bodies, the High Council of Judges and so on. But these are for the particular court. We should say that – “court inspections without notice should be conducted

by the judge of the court”. That is what is being referred to, and the responsibility, the duty, is being imposed on the judge of a particular court to inspect without notice. That does not mean that others cannot do that. These are being imposed as responsibilities of the court. We are not referring to the High Council of Justice or the Judicial Service Commission as they would have their own ways of functioning. If you want to impose responsibilities on them, this might get a bit unrealistic.

Justice KASHIM ZANNAH- This document doesn’t exclude any particular judiciary from having any external procedures to give effect to these provisions. We don’t need to make it mandatory for courts to have that system, so long as they can do it if they want to. There is nothing stopping them.

Justice SHIRANEE TILAKAWARDANE- I think, Justice Zannah, it doesn’t take anything else away. They can add to it, they can develop it and that way, you can certainly bring in other methods of doing that. But this would impose a certain onus on the judges when it says, “You also have certain functions”.

Prof. Dr. NIHAL JAYAWICKRAMA- For example, the responsibility of publishing an annual report is on the particular judge. That does not prevent a High Council of Justice or any other body from publishing any report. These are innovations, things that are not normally done, which we are now highlighting and saying, “ought to be done”.

Justice KASHIM ZANNAH- Any other observations on this one? Otherwise, our work is done, and I will hand over to my colleague.

Dr. MUSTAFA SALDIRIM- May I please have the last word? The rule we would like to write here is on the basis of the Principle. For this reason, these rules should be more general and abstract, and they should cover a larger context. If we put a rule for every special occasion, then we may have to put thousands of rules. Accordingly, I think if Paragraph (9) says “the judiciary should conduct court inspections”, it will cover scheduled/unscheduled and internal/external inspections. In other words, “the judiciary should conduct court inspections” is a general phrase. I think it will cover all inspections, including the judge’s internal inspections, and inspections of the Council of Judges and Prosecutors and Ministry of Justice and also public and media inspections”, it would be very good. Thank you very much.

Prof. Dr. NIHAL JAYAWICKRAMA- If I may explain, this is an action plan that we are discussing. It describes the steps that should be taken to implement the Principle. It is important here to emphasise that there should be unscheduled inspections – not that there should be court inspections, but

unscheduled inspections, without notice. I would like to emphasise that that is the main objective. When I was Justice Secretary in my country, I found them very productive.

Justice KASHIM ZANNAH- I agree the action plans need to go a step further than the Principle to give a sense of direction for implementation. We are done with that. I will now hand over to Ahmet.

Justice AHMET ER- Even though Paragraph (7) is similar to Paragraph (9), it is as much important. One talks about the case audit and the other one talks about the court audit, and while doing this it emphasizes the “unscheduled” inspections, which means it is important. In Paragraph (7) it says “regular”, the other one says “unscheduled”. So, it is not only about the case and court inspections. It says, “the court, you should hold yourself together, I will come to inspect everything of you without giving you a notice”. I would be very happy if Judge Zannah could continue with the Paragraphs (10), (11), (12).

Justice KASHIM ZANNAH- I think, our session is over.

Justice AHMET ER- There are still Paragraphs (10), (11), (12).

FROM THE HALL- I have things to say about Principle 12, and we still have time, so may I?

Dr. MUSTAFA SALDIRIM- We have not had much discussion on measuring public satisfaction. It is a very detailed subject. If we decide to measure public satisfaction, we will have two options: 1. Satisfaction of the court users, 2. Satisfaction of the other citizens who are not court users, who don't do business with the court. We call it “the perception of the citizens”. These are evaluated by our experts as two different things that should be technically separated. In the end, we were so confused. And we came to this conclusion: we, as the Court of Cassation, cannot be independently perceived from all of the judiciary. Therefore, if the Court of Cassation functions very badly or perfectly, the perception of the citizens towards the Court of Cassation remains the same as their perception of the general judiciary. This doesn't change. It is not approached as something different than the general judiciary. I wonder if it would be suitable if we say, “measuring both the satisfaction of the court users and the public”? I wanted to draw your attention on this.

Justice KASHIM ZANNAH- Do you have any suggestion as to adding or removing something?

Dr. MUSTAFA SALDIRIM- I suggest not to say only “public”, if we would say measuring the satisfaction of the court users and the public,

there would be a chance for comparison. For the actual measure, the answers of the court users to the survey will be the indicators. If the perception of the court users is good, but that of the public is negative, it could mean that the Court may not represent itself very well. So, could we add court users next to the public?

Justice KASHIM ZANNAH- What is your suggestion? I heard that one. What is your suggestion as to what we should add to achieve that goal?

Prof. Dr. NIHAL JAYAWICKRAMA- Which paragraph is that?

Dr. MUSTAFA SALDIRIM- The survey issue is mentioned in Paragraph (6). it says: “should conduct surveys”. It would be advantageous if we emphasize the court users here. Therefore, the court users and the other stakeholders should be asked for their opinion separately and separate surveys should be conducted.

Justice JOHN DOWD- Could you not say, “court users, other stakeholders and the public”? That covers all. The purpose here is to identify systemic weaknesses.

Justice KASHIM ZANNAH- Would that be OK? (To Dr. Saldırım): I think this reflects your concern, especially with the suggestion that the public should now be mentioned with “court users, other stakeholders and the public”. This is a way to provide surveys for court users, surveys for other stakeholders, and surveys for the public. This concludes our session and I hand it over to the Secretary-General to announce the coffee break.

Dr. MUSTAFA SALDIRIM- If you would find it suitable, we are going on a 15-minute break.

SESSION IV:

Review of the Action Plan on the Implementation of Istanbul Declaration for Principle 13, Principle 14 and Principle 15

Principle 13

Justice SHIRANEE TILAKAWARDANE- *Teşekkür ederim.* Mr. Chairperson, members of the conversation, Justice Michael Buenger, and Mr. Jeffrey Apperson, I think one of the most important things in today's context is public confidence in judges and the administration of justice. Without it, the rule of law loses its legitimacy. In the era of digital communication, there are cyber-attacks on judges, both individually and collectively, and these can only be countered by active judicial transparency. These three provisions which we are going to deal with – Principles (13), (14) and (15) – deal with judicial transparency.

Justice SERACETTİN GÖKTAŞ- Thank you very much. I would also like to thank Mrs. Shiranee Tilakawardane for these beautiful words about our country. Mr. Presidents, dear guests, valuable participants; I salute all of you with respect. The aim of transparency is to ensure the public trust; trust is purely system-oriented. This system is not only about the judicial process. This process, this system, which includes the appointment procedure of the judge, as well as the assignment of the judge from one profession to another, the promotion in the profession, change of location, review of the complaints about judges and the disciplinary procedures, is a large system. Here, we are discussing the transparency of this system, the Principles (13), (14) and (15) of the Draft Action Plan of the Istanbul Declaration on Transparency in the Judicial Process. They deal with the appointment procedure of the judge, the transparent examination of complaints regarding the unethical conduct of the judge, and the transparency of disciplinary procedures of judges. Here, I would like to hand over to Mrs. Shiranee Tilakawardane who has more to say on this issue.

Justice SHIRANEE TILAKAWARDANE- I am going to read the first of the three Principles that are under discussion right now, Principle (13): *“There should be transparency in the appointment process of judges. The preamble states: Competent and capable judges being essential to establishing and maintaining the public's trust and confidence in the fair and effective administration of justice, relevant authorities should by law or rule; (1) Establish an independent body with broad professional and civic representation, to receive and review applications or nominations for*

judicial office, and for appointing, or nominating persons for appointment, to judicial office; (2) Require that all judicial vacancies, including for high judicial office, be advertised, with information on the qualities required from candidates for such offices; (3) Require publication of a list of vacant offices, and the list of candidates for such offices; (4) Promulgate procedures to ensure that the public and the media have access to candidate interviews conducted by the body responsible for appointing or nominating persons for judicial office; (5) Establish a merit-based recruitment and promotion process that reflects the diversity of the society; (6) Promulgate procedures governing the transfers of judges for regular rotation and on an emergency basis."

I hope that has been translated and all of us are on the same page in this discussion. May I please proceed with Principle (13)? Any additions, alterations or deletions?

Mr. JEFFREY APPERSON- We have submitted a point for consideration on Principle (13). Basically, what we are saying is that in many countries what occurs after appointment is that before the judge begins to perform judicial duties, the judge submits a list of possible conflicts of interest. That list is then incorporated into the assignment process in order to avoid controversial disputes in the courtroom in front of the public.

Justice SHIRANEE TILAKAWARDANE- I have the text. Would you like me to read it?

Mr. JEFFREY APPERSON- That would be perfect. Thank you.

Justice SHIRANEE TILAKAWARDANE- The amendment is to add a new paragraph (7). It reads thus: "Establish a system requiring judges at the time of initial appointment to identify to the court conflicts or potential conflicts of interest in order to enable the courts to assign cases to judges not having a conflict and require all judges to update conflict information at least annually." Any further comments on that or is that sufficient?

Justice JOHN DOWD- May I? I have some real concerns about the mechanics of this. If I may explain, I was an elected member of a state parliament and became attorney general in the government of my state. There were no formal procedures about appointment of judges. I had virtually an absolute discretion about judicial appointment. I decided to impose on myself a series of protocols to limit my absolute discretion. So, I would tell the head of the state government who I was going to appoint, and then I would consult the head of the jurisdiction. I had six different jurisdictions in my state including an environment court, a district court, a local court, an industrial court and a supreme court. I didn't ever appoint anybody who

was not qualified. I was from the legal profession. We had the English divided profession with solicitors and barristers. I also knew everybody in the profession and there was some four or five hundred of them. I would approach them and if the person accepted, provided I had the authority of the head of jurisdiction, I would announce it to the cabinet. It wasn't debated in the cabinet, because if it was known publicly that you were rejected by the cabinet, people wouldn't apply. For instance, the big problem comes with superior courts where sometimes the head of that court is appointed from within that court and sometimes from the profession and sometimes it could be a solicitor or an academic. Those are the sort of people who don't apply for judicial posts. People who are earning the equivalent of one and one-and-a-half to two million US dollars every year are not the sort of people who would put their hand up and say, "I want to be a judge". When I had to appoint the Chief Justice of New South Wales, I had a couple of people who tried to persuade me about two people who were suitable, but they were not suitable, because I knew certain problems concerning them. And the one that I approached accepted the position and he went on to become the Chief Justice of Australia. He said to me one day, "a particular Senator made a complaint about you, saying that you had appointed me because we are Catholics". I said to him, "I am sorry, I couldn't get everything right". I have had some experience of it.

One of the difficulties here is with the preamble. Instead of the word "relevant authorities shall by law or rule", it should say "governments or courts", because some of the measures will need legislation and some will need rules of court. One of the problems about the independent body is that sometimes people may be academically qualified, legally qualified, but be unsuitable in terms of their personalities: alcohol, moral issues, or ancient history that is known in the profession. These will not be brought out in an inquiry. Remember, we don't want to exclude anybody, but we don't want to include everybody. So, if you are going to set up a system of advertising judicial vacancies, and I understand that it is desirable and that happens in most Australian jurisdictions now, it should publish what is available, but remember that heads of different courts and appointment to an appellate court such as a direct appointment to the court of appeal or the office of chief justice or the president of the court of appeal ought to be done by a mechanism that just doesn't allow for a popularity vote. I raise that as a concern without necessarily having an answer to that. I think, it should not just be application to the judicial office, but it should be application or nomination for judicial office to cover people who are earning a couple of million dollars a year who may be prepared to accept a nomination but would not themselves apply. We need to cover that situation. Then, if we publish

the proceedings of the interview, a lot of people will not apply, and we don't want to exclude the best people who might be available. The proceedings for appointment should not always be public. Judges are entitled to privacy. There may be issues that come up that are known in the profession, why somebody is not suitable - and a lot of people are not suitable for judicial office. I am very concerned about publicity like in the American system of appointment. I don't want to exclude competent people because of these issues.

The next issue is about the transfer of judges by rotation. It is good to promulgate the procedures, but there should be nothing made public about why someone has been removed from a particular area. Forgive me for the time, but I just wanted to explain my experience and in New South Wales, we have a judicial commission which can be used for vetting. Too much publicity might lose us some highly competent judges who would be very suitable but wouldn't necessarily apply for office themselves.

Justice SHIRANEE TILAKAWARDANE- Thank you, Justice Dowd. Can I just go over that? Justice Dowd made certain points. The first one was, in the paragraph beginning with competent and capable judges, he said, after the words "administration of justice" should come "government or the courts shall". He made a second point that it should be "application or nomination" and I think we all agree on that because there are many competent people we would like to see in the judiciary and we ask them why they wouldn't apply because we need talent, we want to build up a body of talent, we want the best people in the judiciary. But exactly where do you want that inserted Justice Dowd?

Justice JOHN DOWD- Paragraph (1) with "review applications or nominations for judicial office".

Justice SHIRANEE TILAKAWARDANE- The third was about publication, and he said that many people would not apply if it was going to be published. I think what he is fearing is that, in the digital era of today, in Facebook, there could be hundreds of terrible, really bad comments or likes or dislikes. It could be all thumbs down which is something that affects the judge in a way.

Justice JOHN DOWD- I don't have any problems with Paragraph (2). Now, the list of candidates. I think that if a judge in an inferior court wishes to go to a superior court, that should not become a public matter. The appointing authority will determine that. The public need not know. I had one federal judge who wanted to come to the state and he may or may not have wanted it to be made public, but he should be entitled to make that application without it being made public. I once appointed an acting judge

who was the son of the prime minister who was in my opposing political party and the prime minister said, “Interesting appointment” to which I said, “I appoint judges on quality not on politics”. But not everybody does that.

Justice SHIRANEE TILAKAWARDANE- Could we in Paragraph (3) say: “require publication of new vacancies in offices”?

Justice JOHN DOWD- Or just “vacancies”?

Justice SHIRANEE TILAKAWARDANE- Vacancies.

Prof. Dr. NIHAL JAYAWICKRAMA- May I ask what is the difference between “vacant offices” and “vacancies”? There is no difference.

Justice SHIRANEE TILAKAWARDANE- He was making the point that if you are already a judge you surely don’t have to go through this process.

Justice JOHN DOWD- If you are a partner in a solicitor’s firm or a member of the bar of some eminence, why should the fact that you applied for judicial office and was rejected, be made public? People wouldn’t forget that. I don’t know what we gain by having it known. Especially in this digital age, it is so easy for people to make comments. Mud sticks sometimes. So, I don’t see that we gain anything by publishing the names of applicants for judicial office.

Prof. Dr. NIHAL JAYAWICKRAMA- This principle is about transparency in the appointment process of judges and one essential element of transparency is that those who have applied for judicial office should be made known. Otherwise, it will be like an “Old Boys’ Club” where it is all done in secret and nobody knows who applied or who was nominated, and the appointing body does everything in secret. There will be no transparency. If we have adopted a Principle that there should be transparency in the appointment process, there should be disclosure of not only the vacant positions but also the list of candidates. The concept is transparency in the appointment process and I want to say that we should not fall back on the current International standards. The Consultative Council of European Judges have made certain recommendations on this matter, and the UN has made certain recommendations. I think, we should at least keep in line with them rather than fall back.

Justice JOHN DOWD- Can I say that there are, of course, correct principles put forward by this Consultative Council and I understand that. I simply want to point out the downstream consequences of transparency. Remember, not only judges have their privacy rights; their family, their children and their friends also have these rights. I think there are enough

checks and balances in the appointment processes. I am not saying that I disagree with anything that the Consultative Council has said, but I am saying that I want you to know the consequences of that kind of transparency.

Prof. Dr. NIHAL JAYAWICKRAMA- We are not discussing the appointment of directors to some private limited company, this is for the judiciary of the country.

Justice SHIRANEE TILAKAWARDANE- It is a public office. We now have two views.

Justice KASHIM ZANNAH- I have been contemplating on these. The fact of it is I quite understand the concerns of Justice Dowd. If I am applying to be appointed to an office and if I am rejected for whatever reason, it would be a stamp on me. However, this provision addresses concerns raised about the judicial process and how appointments are made, and they are very general. Usually, when public office is concerned, we have to bear with the consequences of entrenching transparency.

Justice SHIRANEE TILAKAWARDANE- I can sympathize with what you are saying because when I first applied to be a prosecutor in my country, I was told that I was a woman and I couldn't do that job.

Justice KASHIM ZANNAH- That I can live with.

Justice SHIRANEE TILAKAWARDANE- But, I was so humiliated. My self-esteem was destroyed. In today's context, when we say that we need transparency, probably they will have to be less sensitive to being upset because of the larger picture. Because people are saying we need transparency and transparency is the need of the society. Could we have the opinions of anybody else around the table who would like to contribute?

Justice KASHIM ZANNAH- My point is that there are general legitimate concerns that lack of transparency has brought undesirable consequences also. One of these consequences is that even when the appointment process is good, and things have been done in good faith, lack of public confidence is observed in that process. And I would trade that for public confidence and tolerate and accept the downside. Some men may not offer themselves or allow themselves to go through the process for fear of whatever that they will be stamped with after being rejected, but I would rather take that than losing the confidence of the public. It is a trade-off. It is a fact.

Justice SHIRANEE TILAKAWARDANE- Thank you, Justice. Is that all?

Justice JOHN DOWD- The reason I disclosed my absolute discretion is that I am of the view that no one should have that discretion and it is too wide a power. I gave you the history, so that you would understand it. I must say I have no criticisms of any of my appointments except one. It was where the head of jurisdiction wanted somebody appointed. I appointed him, and he proved to be suitable temperamentally. He was a reformed alcoholic and a very good person. But no one should have the discretion that I had, and I would rather have transparency than have an absolute right such as I had.

Justice SHIRANEE TILAKAWARDANE- Thank you, Justice Dowd. May I invite you to speak?

Justice SERACETTİN GÖKTAŞ- Thank you. I would like to add something as well. If I am not mistaken what we are discussing at the moment is related to publishing a list of candidates for the vacant positions. I would like to give an example from Turkey. I do not remember exactly when, but there was one time when the President at the time appointed a former Bar Association President to the Constitutional Court. Following the appointment, it turned out that this new member was a political party member and when the press exposed this the appointee had to quit. Here is the conclusion we can draw from this example: Had the list of candidates been made public, the public would have inspected this, perhaps the press would have brought it up before the appointment and prevented this appointment altogether. Hence, I too agree that a list of candidates should be made public prior to the appointment to inform the public. I think this is what transparency requires. Thank you.

Justice SHIRANEE TILAKAWARDANE- Can I ask, Justice Saldırım?

Dr. MUSTAFA SALDIRIM- Now, if we are to protect transparency, of course we will have to take steps in that direction, but from what I understand from the Anglo-Saxon legal system, there are many mechanisms to ensure transparency. I mean to say that perhaps the Anglo-Saxon legal system is not that much in need of further measures for transparency, but in the Continental European system we need to take important measures for transparency. We know how judges are appointed to the European Court of Human Rights. Lists of candidates are made. Really just like when they ask if anyone objects before pronouncing the husband and wife in a wedding ceremony. Because these are really high-level positions, if members of a community have any objections, these need to be heard. But there must be a balance; if the person does not wish to be a candidate, his/her candidacy may not be announced. But that person could still be recommended by someone else, or a list of people meeting the required qualifications may be announced. The truth of the matter is, where such critical high-level positions

as supreme court membership are concerned, the people have the right to know who is appointed, for what reasons, or with what qualifications, as well as holding the appointing authorities accountable for their decisions. That is my opinion on this matter.

Justice SHIRANEE TILAKAWARDANE- You would like it to stay as it is? So, Paragraph (3) should read “require the publication of the list of vacant positions and the list of candidates for such office”. Is that alright?

Justice JOHN DOWD- I would like to add “who have applied or been nominated”.

Prof. Dr. NIHAL JAYAWICKRAMA- We are talking about an independent body with broad professional and civic representation including members of civil societies. I am not so sure whether that is necessary. If we say “broad professional and civic representation”, that would be adequate. What does “civil societies” mean here? Which ones? I think that it should be left out.

Justice SHIRANEE TILAKAWARDANE- Justice Zannah, do you agree? Anybody else? Across the waters are we in agreement on that?

Mr. JEFFREY APPERSON- Yes, OK.

Justice SHIRANEE TILAKAWARDANE- Then we go to Paragraph (4). Any corrections to (4)?

Justice JOHN DOWD- I accept the transparency aspects of what we have dealt with thus far. Very often appointments are not made for reasons that are not brought out in evidence. I just successfully had a barrister admitted who had had thirty convictions for drug and related offenses. She had spent up to ten years in jail and several of us promoted her for admission to the Bar and she is now being admitted. It is a marvellous rehabilitation process and she is the first person ever admitted as such. It has been a long time since she committed an offence. She was a drug addict and she also committed offences there. But the Bar admitted her as a barrister and she is now practicing. I am using this example because people can change, but there is a limit to how far matters in the past can be raised, because sometimes people, except for child offences and terrorism, can recover. What you get in a hearing may or may not be a good thing, but the press will publish it and it will go out in this electronic age and I don’t see why people who have, in fact redeemed themselves and are serving the public, should necessarily have evidence come out that their family may not know about or even if they know about it, they would have to live with it.

Justice SHIRANEE TILAKAWARDANE- Justice Ahmet, do you have any comments?

Prof. Dr. NIHAL JAYAWICKRAMA- Justice Dowd talked about an admission to the Bar and that of course would be different from appointment to judicial office. It is unlikely that a person with a criminal record would seriously be considered for appointment to a judicial office.

Justice JOHN DOWD- I used it as an extreme example. It could be quite a minor matter. There are things such as mental instability and so on. I sit as a Deputy President at the Mental Health Review Tribunal and there are people sitting on that Tribunal who have had mental disorders and have been cured, enabling them to sit on the Tribunal. There are some people who have personality disorders. Some people have mental illnesses that can be treated, and they would be able to sit thereafter. I used an extreme example. I don't see why we should publish any of the proceedings of an interview.

Prof. Dr. NIHAL JAYAWICKRAMA- Under the Constitution of Kenya for instance, all interviews by the Judicial Service Commission are televised. In South Africa, and I saw this on YouTube, when a vacancy occurred in the Office of Chief Justice, Justice Pius Langa was an applicant and he was interviewed, and the entire interview process was televised. That is transparency.

Justice SHIRANEE TILAKAWARDANE- Also, in today's digital age, even if there isn't a formal television or media recording, somebody will put it on YouTube, some court officer or someone else. So, it is difficult. I think we all understand where Justice Dowd's experience comes from and it is a very inclusive approach, but do we think that the phrases should be changed, or we should leave them as they are? Shall we just leave it for the moment? I think the chairperson has noted the opposition laid out by Justice Dowd.

Justice JOHN DOWD- I just wanted it to be noted. I accept. I was elected democratically to a parliament and so I accept the majority vote. There is a rule in politics that a majority of one is a landslide.

Prof. Dr. NIHAL JAYAWICKRAMA- When we were drafting the Implementation Measures for the Bangalore Principles, there were objections from the Australian participant, who was also a senior Judge, who then requested that his opposition be formally recorded.

Justice SHIRANEE TILAKAWARDANE- I think it is important that we make a note of it. Since there are no more changes, we will move to Paragraph (5) "*Establish a merit-based recruitment and promotion process that reflects the diversity of the society*". I think we all agree on that. There is no dissension.

Justice JOHN DOWD- I think that it is very dangerous. In terms of appointing women, I have had terrible difficulties persuading women to take office because then there were so few of them. Now, all universities are producing a majority of women and two out of three university graduates and law graduates are women. So, there is no problem except for the tyranny of history. But I don't want a society in which I must appoint a certain number of Jews or a certain number of Muslims or a certain number of Catholics or a certain number of Protestants. It is already difficult enough to appoint people to judicial office without having to take into account their religious, social, geographic and all the other problems. Society is changing. But we shouldn't have these identity politics of having to appoint at least one Muslim and at least one Aborigine and so on. They get there eventually as society grows up.

Justice SHIRANEE TILAKAWARDANE- The problem I think here is the inclusion factor that we need the Judiciary to be acceptable and it must be inclusive, and it must reflect the diversity of the society. If the society has aboriginals or other ethnic groups, I think that this must be reflected on the bench. I don't know how everybody else feels about it.

Justice JOHN DOWD- We had two aboriginal judges. They weren't appointed on quota or any such thing. They were appointed in the normal way.

Mr. MICHAEL BUENGER- I don't read Paragraph (5) as mandating quotas. I read Paragraph (5) as aspirational in saying that the judiciary should reflect the society that it serves. I think I understand what Justice Dowd is saying, but I also reflect on my own experience of working in Kosovo where appointments were totally towards particular groups, and that had the effect of undercutting or eroding general confidence, because they needed a judiciary that was built for the society rather than the judiciary that was built for the few.

Justice KASHIM ZANNAH- I completely agree with him.

Justice JOHN DOWD- But would you be happy to take out the words "diversity of"? If it says, "reflects the society"?

Justice KASHIM ZANNAH- I think that diversity needs to be there. Otherwise the whole purpose is defeated. I think it is a reality of life that diversity should be reflected in all institutions, and especially in the judiciary.

Justice SHIRANEE TILAKAWARDANE- Because if not, at the other end, we end up with highly discriminatory practices.

Justice KASHIM ZANNAH- That is what we will end up with in most societies.

Prof. Dr. NIHAL JAYAWICKRAMA- I think this is of particular relevance for multi-cultural and multi-religious countries.

Justice SHIRANEE TILAKAWARDANE- Your objection has been noted. Paragraph (6): *“Promulgate procedures governing the transfers of judges for regular rotation and on an emergency basis”*. I don’t think we have any problem with that.

Prof. Dr. NIHAL JAYAWICKRAMA- I think, American colleagues have suggested a new Paragraph (7)

Justice SHIRANEE TILAKAWARDANE- I have already read Paragraph (7). I will read it again: *“Establish a system requiring judges at the time of initial appointment to identify to the court any conflicts or potential conflicts of interest in order to enable the court to assign the cases to judges not having a conflict and require all judges to update their conflict information at least annually”*. I think this is very important. Isn’t it, Justice Dowd?

Justice JOHN DOWD- We have already dealt with the provisions about recusing judges and people not being assigned for particular cases. Conflict of interest can take various forms. If you have, for instance, a child with a particular mental disorder or a physical disability or, as in our country, where judges were involved in civil society and charities and so on, the nature of conflict can be very substantial and quite infinite. Again, judges are entitled to some privacy and some security. We are, in Australia, adjusting to terrorism matters and adjusting to the fact that judges live in society as well. I once travelled in a lift with somebody that I had sentenced, and he said, “You are Justice Dowd”. He thought I had been fair and was quite happy about the exercise. But publishing interests that people have would deter some people from exposing that their child has a bipolar disorder, or their child is this or that or they have a sister who did this and so on. I think this is a dangerous provision to put in.

Mr. JEFFREY APPERSON- Can I make an observation your Honour? The reason I bring this up as well is not only to reduce the number of conflicts raised publicly in the courtroom, but to also protect the privacy of the judge. The way this procedure is administered is that the judge will submit a private list of contacts to the registrar. The registrar will design a system that will flag a case once the conflict is noticed and with the permission of the judge, will reassign it. That would avoid the issue coming out publicly. This may perhaps cause embarrassment not only for the judge but also for the courts. We are increasing the privacy of interest and we are reducing the problems that arise in the courtroom where these conflicts are debated in public view which has the result of reducing public trust. We would like

to have improved privacy, reduced conflicts in the courtroom, and increase the public trust. I have seen this system administered in many countries with those three results in effect. I just wanted to raise that. It works.

Justice JOHN DOWD- It is not just the registrar; all the courts would see it. For instance, on one day, a case was listed before me by the clerk of the court. The clerk assigned the case and the party said, “Can we have a few moments?” and it was settled. Four cases came before me that day and all of them were settled. I cleared the matters without anyone knowing whether I was a friend of a party or something else. I am saying that sometimes people other than the registrar will know about what is on the list.

Mr. JEFFREY APPERSON- This is about the process of internal control. You can establish protocols for protecting privacy. I have seen it done before and it is possible to do this and to protect your privacy. It is also important, and I understand this, to protect those you want to protect, but we also have to protect the system. I am saying that if you want to avoid a public debate on conflict, if you can intervene before it becomes a debate, you improve public trust. This is all that I am saying.

Justice SHIRANEE TILAKAWARDANE- Justice, would you like to say something? Thank you.

Dr. MUSTAFA SALDIRIM- Thank you. Now when I am listening to these discussions I cannot help but think we are stuck on the wrong subject. The title of Principle (13) is the appointment procedure for judges, but at the moment we are talking about case allocation. This matter falls under Principle (5). If I am not mistaken Principle (5) says “*The judiciary should ensure transparency in the assignment of cases*”. This falls under that principle. This Principle (13) is entirely about the appointment of judges. I think the discussion is getting carried away to irrelevant issues. That is all I wished to say.

Justice JOHN DOWD- I agree.

Mr. JEFFREY APPERSON- We brought it up at this point because I mentioned it in Principle (5), but it was not in written form and Michael and I thought it was important enough to bring back to the Committee’s attention and to reconsider Principle (5). That is why we brought it up at this juncture.

Prof. Dr. NIHAL JAYAWICKRAMA- I think this can be included in Principle (5). I think why it was brought up under Principle (13), was probably because this is something that requires to be done “at the time of initial appointment”, but I agree that it is more appropriate under Principle (5). So, it can go there.

Mr. JEFFREY APPERSON- Thank you.

Principle 14

Justice SHIRANEE TILAKAWARDANE- Now we move on to the Principle (14). *“The Judiciary should respond to complaints of unethical conduct of judges in a transparent manner.”* Any amendments to that?

Justice JOHN DOWD- In the introductory paragraph, “the government or the court should” should be added.

Prof. Dr. NIHAL JAYAWICKRAMA- It says “relevant authorities”.

Justice SHIRANEE TILAKAWARDANE- Do we take “relevant authorities” out as well?

Justice JOHN DOWD- Yes, take those words out and say “government or the court should” etc. It is thus consistent with the rest.

Justice SHIRANEE TILAKAWARDANE- We will move on with Paragraph (1): *“The judiciary should respond to complaints of unethical conduct of judges in a transparent manner. Judicial integrity, accountability, and ethical conduct being an essential component in promoting public confidence in the courts and the competence of the judiciary, relevant authorities by statute or rule should; (1) Develop and promulgate rules or standards of professional and ethical conduct for members of the judiciary, taking into consideration the Bangalore Principles of Judicial Conduct;*

Is there anything one wishes to add? It refers to the Bangalore Principles of Judicial Conduct. So, it has to be there.

(2) Mandate that each judge be educated on the code of judicial conduct and provided an up-to-date written copy of such code;

I don’t think that there is any objection because education is so very important for our judges. I think that needs to be there.

(3) Make available to the public through written publication or on the Internet the code of judicial conduct;

(4) Establish a mechanism or procedure by which individual judges can obtain ethical advice concerning particular conduct and, members of the judiciary can they apprised of the propriety of proposed conduct;

Paragraph (4) is about the mechanism. Can we go to Paragraph (5) if we are all in agreement about Paragraphs (1), (2), (3), and (4)?

Justice JOHN DOWD- About Paragraph (4), I think that is too vague. There should be something proposed. I am concerned about judges getting advice from someone else. I think it should not be included here.

Prof. Dr. NIHAL JAYAWICKRAMA- What it contemplates is something in the nature of an Ethics Advisory Committee.

Justice SHIRANEE TILAKAWARDANE- Where they can either privately or formally apply to or get advice from.

Justice JOHN DOWD- Anyone can privately get another view on a particular matter. I don't think that there should be a formal procedure because within the court, you go to your head of jurisdiction or the head of division of the court to say that you have such and such problem and ask them about their opinion. I don't think there should be a formal mechanism which requires you to go to a particular person.

Prof. Dr. NIHAL JAYAWICKRAMA- This arises from the Bangalore Principles of Judicial Conduct. The Implementation Measures require that the Judiciary should establish two bodies, one of which is an Ethics Advisory Committee from which judges can request advice on ethical issues that have arisen or might arise. The other Committee is to deal with complaints from the public in regard to violations of ethics. I think an Ethics Advisory Committee is available in many jurisdictions where there is a code of judicial conduct, usually consisting of judges or retired judges. It advises judges on a confidential basis.

Mr. JEFFREY APPERSON- In the state of Ohio, we have a dual process in which a judge can ask our boards of professional conduct for an informal opinion or for a formal ethics opinion. The formal ethics opinions are then published so that all judges understand what the landscape is of the potential ethical problem. This is a mechanism by which ethical advisory opinions are made available to judges. They are published, so that the Judiciary has an understanding of how a particular provision in the code of conduct may be interpreted in like circumstances. In some sense, it protects judges because if there is a consistent interpretation of a provision of the code of conduct then they can all rely upon that interpretation as opposed to what judge A thinks it might be or what judge B thinks it might be. It promotes some consistency in understanding how the code of conduct is interpreted and applied.

Justice SHIRANEE TILAKAWARDANE- Yes, Justice Zannah?

Justice KASHIM ZANNAH- Yes, I absolutely agree. The need for that is as stated, but I just want to say that we are not talking about just any other body here, but one established by the judiciary for such purposes. And I absolutely support the deletion of (5). Laymen have no business when it comes to ethics in the judiciary.

Justice SHIRANEE TILAKAWARDANE- Thank you, Justice Zannah. Justice Mustafa?

Dr. MUSTAFA SALDIRIM- In the Court of Cassation, while we were preparing our draft of ethical principles, we thought long and hard about this matter and attempted to establish an advisory body within the Court for this purpose and we succeeded. Our reason for establishing this advisory body had to do with two international standards. First, as Dr Jayawickrama stated, the Implementation Measures for the Bangalore Principles of Judicial Conduct requires it. Than again, the Committee of Ministers of the European Council made twelve recommendations in 2010 to member states on the Independence, Conduct and Responsibilities of Judges. One recommendation states: *“Judges should be able to ask for recommendations on codes of conduct from an advisory body within the judiciary”*. Now what does it say in the Bangalore Principles’ preamble? *“These standards of ethical conduct for judges “are also intended to assist members of the executive and the legislature, the lawyers and the public in general, to better understand and support the judiciary.* We need not only a code of conduct along with an advisory body, but also a way to publish and circulate these matters so that the public is able to equally access and understand these codes of conduct. With this understanding, we already foresee circulating this draft both to various law faculties and on our website in line with the Bangalore approach and the standards approved by the European Council. Hence, setting up this advisory body will be of great benefit. Moreover, this advisory body should not only be made up of members of the judiciary. So as to ensure transparency, we decided on having an academician with expertise in ethics in the advisory body. That is all I wanted to share, thank you.

Prof. Dr. NIHAL JAYAWICKRAMA- On the point that Justice Zannah raised, may I read out the Istanbul Declaration commentary? It says that a code of judicial conduct will do little to improve judicial performance and enhance public confidence if it is not enforceable. Therefore, a mechanism in the form of a credible, independent Judicial Ethics Review Committee should be established to receive, enquire to, resolve and, determine complaints of unethical conduct of members of the judiciary where no provision exists for the reference of such complaints to a court. The committee established should not be controlled by the judiciary but must be one in which there is sufficient lay representation to attract the confidence of the community. Associating persons, external to the judiciary, such as lawyers, academics, and representatives of the community in the monitoring of ethical principles will prevent a possible perception of self-interest and self-protection and provide the essential element of transparency.

Justice KASHIM ZANNAH- We are bound by the Declaration. I have my reservations.

Justice SHIRANEE TILAKAWARDANE- So we go on to (5) then.

Mr. JEFFREY APPERSON- If I might, I think the question here, which also comes in with the next Principle 15 - is that in Principle 12, there is this body that is created, that is the public complaints committee. This is partly charged with accepting complaints against judges and court stuff. Somehow or another, is that buddy handling what you might call administrative complaints or is it handling ethics complaints? It is unclear to me how these various parties and their jurisdictions intersect each other.

Justice SHIRANEETILAKAWARDANE- Paragraph(5): *An independent mechanism or procedure, with sufficient lay representation, should be established to receive and inquire into complaints of unethical conduct against members of the judiciary;*

Mr. JEFFREY APPERSON- Are the bodies created in Principle 14 and in Principle 15 concerned exclusively with judicial ethics?

Prof. Dr. NIHAL JAYAWICKRAMA- May I suggest that we discuss this when we come to Principle 15?

Mr. JEFFREY APPERSON- OK, sure.

Justice SHIRANEETILAKAWARDANE- Paragraph (6): *“Develop and disseminate courses or modules on judicial ethics and conduct which should be mandatory as a part of the initial training for judges”*. That is no problem, I think.

Paragraph (7): *Promulgate procedures that require members of the judiciary to make regular declarations of their assets and liabilities, including the assets of their spouses, children, and close family members. Such declarations should be available to the public, as well as for reference in the court registry by litigants and their legal representatives.”*

Justice JOHN DOWD- Yes, as I suggested earlier, to oblige my mother-in-law if she were still alive to disclose her assets, my brother, my son-in-law, and my grandchildren - it is almost an impossibility. And why should my wife's assets be disclosed publicly if she is good enough to acquire assets and so on? As I have said before, at a hundred meters from my place, I own a unit where my daughter and granddaughter live in. People can't find me. I'm not in phone books or electoral rolls. Why should my children or my grandchildren be put at risk by such a publication? I think we have got enough things here to cover inappropriate conduct and I don't think that this does anything except its potential (a) to cause tremendous domestic problems for a lot of judges, (b) to disclose their privacy; (c) to put them at risk.

Justice SHIRANEE TILAKAWARDANE- In many countries in South Asia, we have a law called *declaration of assets* of not only judges but also their entire family. We don't publish the declarations, but we have to submit them every year.

Justice KASHIM ZANNAH- I will come in on this one. My concern is not even about the practical application and implications of this. If my wife says, "What is my business with you being a judge? I'm not going to declare my assets." Or my adult child who is in business says, "what do you mean? I am in a business and if I disclose my assets and if they are made public, I'm ruined! So, Dad, go and resign or do whatever pleases you! I am an adult. I'm a human being. I am a citizen and I have my rights. Your choice to become a judge should not erode my rights!" What is the answer to that?

Prof. Dr. NIHAL JAYAWICKRAMA- I agree that this provision is not quite appropriate here when dealing with ethical conduct. In any event, the declaration of assets and liabilities is a controversial issue and I don't know what purpose it really serves. You mentioned that judges in Sri Lanka have to declare their assets. They submit the Declaration to the President. Thereafter, nobody sees them. So what purpose does it serve?

Justice SHIRANEE TILAKAWARDANE- There is a provision that if you do not declare your assets, you will be subject to punitive measures.

Prof. Dr. NIHAL JAYAWICKRAMA- But that is if you have not declared all your assets.

Justice SHIRANEE TILAKAWARDANE- What happens is, you have to explain how your wife has got a Lamborghini when she is not working. It is a way of dealing with corruption, which is really important.

Prof. Dr. NIHAL JAYAWICKRAMA- That should be a matter for the relevant authority dealing with corruption – the anti-corruption commission. I am not sure that it is a matter relating to ethical conduct.

Justice SHIRANEE TILAKAWARDANE- Do we take that off then?

Dr. MUSTAFA SALDIRIM- I think it is best not to take it off at the moment. Here is the reason why: we know of many politicians, I mean people who have attained high positions, whose children, spouses, all of a sudden become wealthy. We learn of such cases happening all around the world, from newspaper articles. Under our law, it is not only judges, but all public officials have to make declarations of their assets and liabilities, of their partners and younger-than-18-year-old children, if I am not mistaken. This is not made public, so it should not be risky to do so anyway.

Prof. Dr. NIHAL JAYAWICKRAMA- I quite agree to that.

FROM THE HALL- I too agree with Mr.Saldırım and earlier asked permission to say the same thing. Yes, there has to be a declaration of assets for children younger than 18 and yes, partners living with the judge also have to make such declarations, but none of this has to be made public. The phrase “publicly available” should be omitted. Even after omitting that phrase, the objective of the statement does not change. In case there is an investigation into judicial conduct, the documents in question could then be taken out in public and checked for an abnormal increase in assets. That is why there is no need for those documents to be public, Mr. Zannah is right to be concerned. Thank you.

Justice SHIRANEE TILAKAWARDANE- We have had examples where judges, on the day before the date of declaration of assets - let's say 31st of March - they withdraw all their money and declare a deficit and on the 2nd of April they put everything back. This is evidence of corruption and dishonesty.

Prof. Dr. NIHAL JAYAWICKRAMA- I quite agree that a declaration of assets is necessary from anybody who is public officer, judicial or otherwise. But in most countries, there is a law requiring the declaration of assets. There is an authority established by law who is responsible for perusing those declarations and taking appropriate action. It could be a commission against bribery which has the power to examine them and to take appropriate action. I don't know whether it is relevant in this document to require judges, who would already have been asked to declare their assets under another law, to make it fresh declaration.If, however, a complaint is made of unethical conduct, then the appropriate body can investigate that complaint and should be able for its inquiry to obtain from the relevant authority the necessary documentation.

Justice SHIRANEE TILAKAWARDANE- What if the law for public officers does not apply to judicial officers? In many countries, judicial officers are not considered to be “public officers”. Yes, Justice Dowd?

Justice JOHN DOWD- I don't think this is in the right place. This provision about corruption should not be dealt with under a heading concerning ethical behaviour. Secondly, for the reasons that I have said, I don't see why judges and their families should have this problem imposed on them. There is nothing transparent about a declaration that the public does not know about. Thirdly, we have established in New South Wales, and I helped establish it, an independent commission against corruption with wide-ranging powers dealing with corruption including the judges.It was based on the Hong Kong model, but we extended it further than that.It has

hearings in public and sometimes privately, and all corruption matters are dealt with by that body. Nothing in the law says that any judge who was corrupt cannot be the subject of a complaint or an investigation by that commission. It is better to deal with such matters through a separate body rather than have it involved in matters relating to ethical conduct. I think it shouldn't be here.

Justice KASHIM ZANNAH- I see the relevance of it. I have just pointed out the practical difficulty involved in requiring an adult to do that. As for the question whether judges are exempted, in my place we are not exempted. We have a code of conduct bureau and we have to declare our assets upon appointment and periodically as the forms have been served on us. It is relevant. It is an ethical matter. However, is it practical? I have my doubts.

Mr. JEFFREY APPERSON- This has been a point of contention in every country that I have studied. This is a disclosure issue. The balance between the privacy interests of the judge and their family versus the public interests of transparency. My question is this: - as I look at Paragraph (7) the question is, are we trying to improve public approval of our approaches to transparency and public trust? With that objective in mind, does the inclusion of Paragraph (7) improve transparency and public trust? This is how I would go about it. I agree with many of you that this requirement is a burden. I don't think that I should be considered as a voting member here, but I think it is a very important issue and that is why we are having the debates that we are having here.

Prof. Dr. NIHAL JAYAWICKRAMA- Can this requirement be confined to the judge? I can anticipate problems arising in respect of spouses, children, and close family members. Spouses who are professionals in different fields would object to this. If you confine it to the judge, then yes, but if you require the assets of the spouse etc., there could be a problem.

Justice KASHIM ZANNAH- That is exactly my point, and there is even a gender issue here. The female judge goes to her husband and says, "I am a judge and you should declare your assets". That is what would be required. I think it should be the judge. To impose this obligation on the spouse would lead to so many issues. She is a citizen. She has her rights. Just because her husband chose to be a judge, it shouldn't involve her being imposed other obligations.

Justice SHIRANEE TILAKAWARDANE- And vice versa!

Justice KASHIM ZANNAH- That is exactly the point I am making.

Justice JOHN DOWD- To be political about this, we are trying to sell these principles around the world, and this provision is the sort of thing that would stop some countries from accepting much of what we are doing here today. This is the sort of provision which our friend from the U.S. has indicated is being debated everywhere. So even though I object to it, if you are going to include it, make it applicable to the judge only, and let others find ways of dealing with the son-in-law.

Justice SHIRANEE TILAKAWARDANE- I think that is the via media between these polarized ideas. So, we just say that “members of the judiciary should make regular declarations of their assets and liabilities”.

Prof. Dr. NIHAL JAYAWICKRAMA- What about the rest of it? “Such declaration should be available to the public”?

Justice SHIRANEE TILAKAWARDANE- No, I don’t think we should include it. We move on to the next Principle, and that is the final one. So please bear with me.

Principle 15

Justice SHIRANEE TILAKAWARDANE- Principle 15: *“There should be transparency in the disciplinary process of judges. The preamble states: Closed or obscure judicial disciplinary processes being contrary to the rule of law, public confidence in the fair and effective administration of justice, and judicial accountability, relevant authorities should:”*

Justice JOHN DOWD- Please insert “governments and courts should”.

Justice SHIRANEE TILAKAWARDANE- Thank you. (1) *Clearly define in law or the code of conduct judicial behaviour that may give rise to disciplinary sanction.* Alright? Next one.

(2) *Publish to the judiciary and the public clear procedures governing the making a complaint against a judge in his or her professional capacity.* Correct?

(3) *Establish an independent investigative body to receive complaints against a judge in his or her professional capacity, and to investigate a complaint in accordance with the procedure guaranteeing full rights of defence and by reference to established standards of judicial conduct. Civil society should be represented in such body.*

I think the question was asked earlier how Paragraph (3) is different from Paragraph (5) of Principle 14. Is this provision repetitive?

Prof. Dr. NIHAL JAYAWICKRAMA- Perhaps this is the stage when we should examine the relationship between the three Paragraphs: 12(1), 14(5) and 15(3). Paragraph 12(1) refers to a committee to be established in every court to which court-users may take their complaints. Paragraph 14(5) is an independent body to receive and inquire into complaints of unethical conduct against members of the judiciary. 15(3) is an independent investigative mechanism to process serious complaints made against judges. It does not have the power to remove a judge from office. That power is exercised by the independent body established under paragraph (6) to which this investigatory body may refer a credible complaint. I think in Nigeria, there are public complaints committees in the courts.

Justice KASHIM ZANNAH- The public complaints committee assists the disciplinary body. That is where complaints are received. The administrative structure there is like that open-door policy where complaints are submitted to the chief judge. Then he may refer the case to the public complaints committee, or they can lodge direct complaints. What they do is to listen to the complaint and in many cases, explain court procedure simply. That is an internal measure. But sometimes, they find cases to be worthy of being considered for disciplinary action. These are referred to the disciplinary body to commence disciplinary proceedings.

Prof. Dr. NIHAL JAYAWICKRAMA- How would you suggest Paragraph (1) of Principle (12) be reformulated to limit its purpose?

Justice KASHIM ZANNAH- I would suggest “to receive, review, and where appropriate, refer the complaint to the disciplinary body”.

Mr. MICHAEL BUENGER- May I ask a question? What is the role of the committee when I walk in the door with a complaint against the way Judge Apperson has been acting? What happens next?

Justice KASHIM ZANNAH- This is a very good question. Let me give you the background of how these things work in Nigerian society. In many cases, the judge may not even get to hear of it. Somebody walks through the door and says, “This judge has treated me badly with respect to my case and this is what he did”. The committee listens to the person and in a majority of cases, that person who has walked in, being one well versed in Islamic procedure, is informed that the court that has jurisdiction over his case is a statutory court and it follows a different procedure. They explain to him: “He did this, and you think he should have done it another way, but it is done this way at that court,” and that is the end of it. The person is now

satisfied that injustice was not done to him, but that his perception of the procedure was incorrect. But, there are sometimes situations where there are ethical issues or issues of misconduct and where the committee considers it necessary to seek the explanation of the judge. The complaint is then copied to the judge: "This is the complaint we have received against you. What have you to say?" They will listen to the Judge. They will explain to the litigant who has made the complaint, and that may end the process. Or, if they think that disciplinary action is required, they will refer the complaint to the Judicial Service Committee which will commence the disciplinary procedure.

Justice JOHN DOWD- In New South Wales, I supported the setting up of a judicial commission to deal with complaints. The procedure is that the complaint is dealt with by the body and if it is a serious matter it goes before a Conduct Division. The Conduct Division then takes evidence about the identity of the judge and so on. Most judges, on the decision to go to the Conduct Division, resign. The removal of the judges is done by the Parliament. My concern about this provision is: if a complaint against a judge is dismissed, why does the public have any interest in that?

Prof. Dr. NIHAL JAYAWICKRAMA- About Paragraph (3) concerning the involvement of civil society, I am wondering if there could be another formulation.

Justice SHIRANEE TILAKAWARDANE- The public?

Justice JOHN DOWD- Or lay representation like we do.

Prof. Dr. NIHAL JAYAWICKRAMA- I can change that appropriately.

Justice SHIRANEE TILAKAWARDANE- We move on with paragraph (4): *Establish procedures that ensure a complainant is kept informed of the progress of the investigation.* I would like to see the words "expeditious conclusion of an inquiry" inserted into the relevant paragraph.

Mr. JEFFREY APPERSON- May I ask a question? What does disciplinary proceedings mean? In other words, we are saying that every decision has to be made public. Does that mean that every complaint filed, whether it is accepted or not, needs to be public with its decision made public?

Justice SHIRANEE TILAKAWARDANE- You are proceeding to the next one. That is Paragraph (5): *Establish procedures that ensure that the final decision in a disciplinary proceeding against a judge that results in a sanction is published or otherwise made public*".

Justice JOHN DOWD- The problem about a sanction is that even if the sanction is that the judge be counselled, that would have to be published. If there is an adverse finding against the judge, then that should be published.

Prof. Dr. NIHAL JAYAWICKRAMA- What is contemplated under this Principle is a serious complaint. It says that the inquiry must be conducted by reference to established standards of judicial conduct and by guaranteeing full rights of defence to the judge, with the judge being represented. That suggests the seriousness of the matter. If, in the end, it has resulted in a sanction against the judge, then it should be made public. I think this is about charges of misconduct or some such conduct warranting dismissal. This paragraph should really follow the next one.

Justice JOHN DOWD- I would rather have the word “finding” then, for instance “finding against a judge” that he did something wrong. I’m happy with that.

Prof. Dr. NIHAL JAYAWICKRAMA- Finding against a judge.

Justice SHIRANEE TILAKAWARDANE- The final one, Paragraph (6): *Establish an independent body vested with the power to remove judges from office following a fair and public proceeding in which the judge was afforded full rights of defence and legal representation. In the event of a decision to remove a judge, the judge is entitled to appeal to an appropriate tribunal.*” Do you agree with that?

Dr. MUSTAFA SALDIRIM- Of course this is a critical issue, but our time here is limited. Let me provide an example from the Court of Cassation. In the Court of Cassation, we have the High Disciplinary Board. The members are chosen by the Board of First Presidency. Any appeal against a decision is to the Board of Presidents. That Board is not a court of justice, but it is one of the soundest boards in the Court of Cassation. Because the Board of Presidents is elected by the Grand General Assembly, it has a strong legitimacy.

Mr. JEFFREY APPERSON- Paragraph(3) says “Establish an independent disciplinary board” and Paragraph (6) says “Establish an independent body”. It should be clear to the public what the distinction between those two entities is. My point is, if these principles are put before the public, the question that is not clear to me is the difference between these two bodies, because the term “independent body” is used twice in the same Principle and therefore can be confusing. I am advocating that this independent body that actually decides on what happens needs to be independent of the investigating body. This is more a question of how you describe that in a way that is clearly distinguishable from the body

that receives complaints and investigates complaints and ultimately may be required to prosecute complaints in front of an independent board, commission, or body.

Justice SHIRANEE TILAKAWARDANE- I think paragraph (3) says “an independent disciplinary body” and this one says “independent body”.

Justice JOHN DOWD- Because a large number of complaints have no substance at all, because judges are everyday disappointing one litigant or the other, the body that needs to investigate needs to have investigative and exploratory powers. To underline the difference between the two, you could say “to be heard by an independent judge” to distinguish it from the investigative body that deals with complaints. When there is a hearing, it should be done by an independently appointed judge.

Mr. JEFFREY APPERSON- Could we say in Paragraph (3) “establish an independent investigative body” and then in Paragraph (6) “an independent body vested with the power to remove a judge or to rule on the complaint”? It is just not clear to me. I have been doing this for 30 years and it is not clear to me how the jurisdictional lines are being drawn from the way that this is worded.

Justice JOHN DOWD- I haven’t been doing it for thirty years, I am sorry, and I have done my best. We can look at the second one as a court or a tribunal to deal with disciplinary issues.

Prof. Dr. NIHAL JAYAWICKRAMA- In paragraph (3), I think it may be appropriate to refer to it as an independent investigative body. It is dealing with a complaint at an intermediate stage. If the body vested with the power to discipline a judge is itself to receive complaints, there would be hundreds of them.

Justice SHIRANEE TILAKAWARDANE- How about the one in (6)? How do you word it? “*Establish an independent body vested with the power...*”

Justice JOHN DOWD- It could be a tribunal.

Prof. Dr. NIHAL JAYAWICKRAMA- The other one is not vested with the power to remove. It is investigative.

Justice SHIRANEE TILAKAWARDANE- Before you say remove shouldn’t you say, “rule on the matter”?

Prof. Dr. NIHAL JAYAWICKRAMA- We are discussing the procedures for the removal of judges.

Justice SHIRANEETILAKAWARDANE – What is the word we

should be using in paragraph (3)? Any suggestions around the room? What words should we use here?

Dr. MUSTAFA SALDIRIM- Under Paragraph (6) the authorized body decides to remove the judge from office. This assumes there is no authority for appeal. That body makes a decision and there is going to be no mechanism to challenge it.

Justice AHMET ER- Sorry, it says at the end of Paragraph (6) that there is the right to appeal to the court.

Dr. MUSTAFA SALDIRIM- Perhaps the word “tribunal” should be used. These are ad hoc, meaning they are temporarily established for a special need or purpose. For instance, the Court of Cassation assembles a disciplinary committee whenever there is an investigation. We do not have a permanent disciplinary committee. I think we can work out an arrangement there if we edit the last sentence so that it includes these committees. It is best we use the word “tribunal”.

Mr. JEFFREY APPERSON- Yes, it is.

Justice SHIRANEE TILAKAWARDANE- Is that alright? “Appeal to a tribunal”?

Mr. JEFFREY APPERSON- Yes.

Prof. Dr. NIHAL JAYAWICKRAMA- May I explain? This Principle contemplates three stages. The investigative body processes the complaints. The disciplinary body examines the complaints referred to it by the investigative body and, after inquiry, makes a determination. The disciplinary body is vested with the power of removal. If a decision is made to remove a judge from office, then the judge has the right to appeal to a court.

Justice SHIRANEE TILAKAWARDANE- But what Justice Ahmet is saying is, the entire process of determination is by the body mentioned in (3) and once they have determined on removal, then it goes to (6). Is that correct, Justice Ahmet?

Justice AHMET ER- That is indeed correct. Let us suppose the judge used profanity, for which a warning could be given. Let us suppose the judge took bribes, for which the penalty could be termination of duties. Hence, it is likely that the warning will be issued by the body stated in Paragraph (3), and the termination of duties will be decided by the body under Paragraph (6). There are already two different bodies in Paragraphs (3) and (6). The second is followed by an appeal. Because the penalty is so heavy, you are removing the judge from office, it can be counted as a court, and it is no longer a board.

Justice FAHRİ AKÇİN- I am also confused after reading this. Why would there be two boards? I mean, the same board should carry out the disciplinary investigation. If the penalty is light, then there is no need for an appeal mechanism foreseen in Paragraph (6), but if it is removal, then appeal measures foreseen in Paragraph (6) could apply.

Justice SERACETTİN GÖKTAŞ- I agree Mr. President.

Justice AHMET ER- Here is my suggestion: Let us take out the first sentence under Paragraph (6) and let it begin with “A judge subject to removal following a disciplinary proceeding”. A judge subject to removal following a disciplinary proceeding should be entitled to full rights of defence before such body and in the event of a decision to remove a judge, the judge is entitled to appeal to an appropriate court. That saves us from this duality.

Dr. MUSTAFA SALDIRIM- Please think about the Board of Judges and Prosecutors, Assembly of Civil Chamber, Assembly of Criminal Chamber... So, I suggest that naming the body in Paragraph (6) as the Board of Appeal is enough for it to be understood as having a higher status than the one in Paragraph (3).

Prof. Dr. NIHAL JAYAWICKRAMA- We are trying to describe procedures that will be generally available, or to recommend procedures to many countries outside Turkey, and Australia and the United States. We have taken note of what the Consultative Council of European Judges have recommended, what the Bangalore Principles have recommended, and it is basically as follows; litigants may complain on various matters, but there should be a body which can process those hundreds of complaints. So, you examine the complaints and find that some are frivolous without the need for any further steps to be taken. Some may require some form of sanction, and some may be so serious after inquiry that they would warrant removal from office. The body that processes hundreds of complaints refers those which in their view warrant some serious punishments such as removal to the body vested with the power to remove judges. Then, it provides full representation rights as it says here along with full defence rights and it is like a trial. At the end of it, if the body decides to remove the judge, then he is removed. The third stage is that the judge should be given the opportunity to appeal to a court. It may be that in some jurisdictions some of these steps may be combined. There may not be three stages, but two, if that is convenient and if that is how it works in that country. In principle, what is recommended is a three-stage process. You don't necessarily have to have it, but this is the recommendation. It could be sandwiched into two.

Justice SHIRANEE TILAKAWARDANE- Is that correct? Satisfied? Thank you.

Session 5

Mr. JEFFREY APPERSON- Thank you for the opportunity to join you. I have really found this quite valuable and educational and enlightening. I look forward to the final product as well as the continuing work.

Mr. MICHAEL BUENGER- I would just like to say that I wish we were there, but I wanted to tell that in front all of you, in Atatürk's Tomb, one of the most notable artefacts that I have seen is Atatürk's Library that includes Montesquieu's *Spirits of the Law* and he had, in the tomb, the book open to the section where he had underlined the area regarding the separation of powers. This is one of the reasons why this is very important. Those are my final words. On those closing remarks, I hand it over to the chairperson.

Dr. MUSTAFA SALDIRIM- Now as Mr. Jayawickrama was arranging the program he wrote co-chairman next to my name. I objected. I told him that I wanted to assist him, that it would be inappropriate, but he insisted. That is why I am going to stay put in my place. Of course, there is still the closing session to consider, with closing remarks. If I may be so bold, I would like to state that today's meeting was very beneficial, and that it produced fruitful discussions. In this regard we have reached a new milestone. During the meeting on 24-25 August in Vienna Dr. Stolpehad suggested adding more details to the İstanbul Declaration. We have done so while drawing on Prof. Dr. Nihal Jayawickrama's valuable guidelines for implementation. We are a step closer to a better judicial system, a step forward. I would like to leave the floor to Dr. Jayawickrama. Perhaps also to think about next year's Summit. The issue of how to design the Summit remains. In addition, how will the next stage be handled, how could it be handled? While we have so many esteemed participants here we cannot help but want to take advantage of their experiences. And with this I give the floor to esteemed Nihal Jayawickrama. Go ahead Sir.

Prof. Dr. NIHAL JAYAWICKRAMA- Thank you. I think, first of all, I must thank our colleagues from the United States who have succeeded in completely transforming the structure of the document which we have had for some time. I am grateful to you for that because it is certainly a much better document than the one placed on the table this morning. I am sorry that the colleague from Poland is not here. He communicated some comments in writing. They don't refer to any particular section of the draft. If they did then we would have been able to examine them. They are comments of a general nature which I think we can circulate. The next step will be to prepare a clear copy incorporating the amendments which we have made today and which reflect our extensive discussion of the action plan. I will try

to do that in the first instance and then send it here to Dr. Saldırım for any further action. I think as I mentioned, it is intended now to present these Draft Implementation Measures to the Summit of High Courts which is expected to be held next year in 2018. We do have a document which I think is good. We will have to present it to an International audience. Apart from that, I am not the one who should be thanking them, but thank you everyone for being here, distinguished Judges of the Court of Cassation, fellow participants, and everyone else in this room including our over-worked interpreters.

Justice JOHN DOWD- If I may say, although it has been a very worthwhile exercise particularly with the inclusion of our friends from the United States, you personally must acquire an immense gratitude, and you have seen through a process which I think we can all be proud of, but you personally should take immense pride in the work that you have done and the way this is brought about and I think we should carry our appreciation with acclamation.

Dr. MUSTAFA SALDIRIM- What we have discussed here today along with the valuable contribution of our American guests will all be published into a book in Turkish and English. Your contributions have all been recorded, and with your permission we would like to distribute the book during the Summit and even send it to you beforehand. In the future, today's discussions will become key in determining how to interpret the İstanbul Declaration much like the way we interpret the the Bangalore Principles of Judicial Conduct. Knowing why we wrote what we wrote and why we removed what we removed, will become quite beneficial in interpreting the document. I would like to thank our dear friends who have joined us from the United States. And of course, Dr. Jayawickrama's work has been an invaluable contribution all along. Justice Dowd shared with us his unique experiences, we are pleased to see Justice Zannah among us and in our team. We would also like to thank our Presidents. Of course, Justice Tilakawardane too, I could hardly see her with her in hiding over there, but she is one of our international consultants for our work on ethics and has sent us valuable documents for the preparation of our ethics guidebook. We translated them. Our ethics guidebook will also be very helpful. We are also glad that she will be sharing her unique training experiences with us. We will also be seeing the unique knowledge and experiences of our Presidents in the İstanbul Declaration. If you approve we also have plaques prepared for you to commemorate today's work. Our friends in the United States can also visit Turkey whenever they wish to take their plaques, but I imagine we will be sending them via cargo. Mrs. Gözde would like to say a few words so I am leaving the floor to her.

Mrs. GÖZDE ATA- On behalf of the United Nations Development Programme, I would also like to thank our esteemed experts Dr. Jayawickrama and Justice. Tilakawardane, our esteemed guests Justice Dowd and Justice Zannah for their valuable contributions today. I would also like to thank the experts from the United States Mr. Buenger and Mr.Apperson. I would like to extend our gratitude for their attendance. They were present for nearly the whole program. We had to extend our invitations to our participants on a short notice, but they responded despite the short notice and participated actively, I thank you for that sincerely. Lastly, I would like to thank our representatives from the Court of Cassation for always giving us tremendous support in and taking ownership of our project.

Dr. MUSTAFA SALDIRIM- Let us not forget about our interpreters of course. They too achieved a great feat, and thanks to the team that secured the cinevision connection. They had to work until late hours. They sacrificed their sleep for us, and of course we would like to thank our project team. This short meeting actually had a significant amount of details, and they pulled it off splendidly.

Mrs. GÖZDE ATA- I would also like to extend my sincere thanks to our Project Assistant Nazlı Ersoy and our Intern Eda Nazlı Genç from the United Nations Development Programme who undertook the bulk of the organizational work.