UNITED NATIONS

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INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991

TRIBUNAL INTERNATIONAL CHARGÉ DE POURSUIVRE LES PERSONNES PRÉSUMÉES RESPONSABLES DE VIOLATIONS GRAVES DU DROIT INTERNATIONAL HUMANITAIRE COMMISES SUR LE TERRITOIRE DE L'EX-YOUGOSLAVIE DEPUIS 1991

TO: Peter G. McCabe, Secretary Committee on Rules of Practice and Procedure Administrative Office of the U.S. Courts	**FROM:** Igor V. Timofeyev Associate Legal Officer Office of the President
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ATTN.:	REF.: Proposed FRAP 32.1
DATE: February 16, 2004	PAGES: 6 (including cover page)

SUBJECT:

Dear Mr. McCabe:

Attached is my comment in response to the proposed Federal Rule of Appellate Procedure 32.1. The original follows by mail.

03-AP-411

Yours sincerely,

Igor V. Timofeyev

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pour l'ex-Yougoslavie

February 16, 2003

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I write in opposition to the proposed Federal Rule of Appellate Procedure 32.1. I clerked on the U.S. Court of Appeals for the Ninth Circuit in 2001-2002 and on the U.S. Supreme Court in the following year. I am currently an Associate Legal Officer in the Chambers of the President of the International Criminal Tribunal for the Former Yugoslavia. At the end of this year, I will be joining the Washington, D.C., office of Sidley Austin Brown & Wood as an associate specializing in general and appellate litigation. I believe the proposed Rule 32.1 will impose significant burdens on the federal courts and the lawyers who practice before them. The reasons advanced by the Committee in support of the Rule are deeply unpersuasive and fail to appreciate the serious adverse consequences of the Rule's adoption. I strongly urge the Committee to reconsider its proposal.

The Committee's main argument in support of Rule 32.1 is that the existing restrictions on citation of unpublished opinions deprive the courts of valuable research or analysis contained in those opinions. Committee Note, at 31. By eliminating these restrictions, the Committee argues, the proposed Rule will "expand[] the sources of insight and information that can be brought to the attention of judges." *Id.*, at 35. This argument rests on a misunderstanding of the role unpublished opinions play in the circuits which restrict their citation. In contrast to their published counterparts, which explain, clarify or alter the law, unpublished opinions merely apply well-settled circuit precedent to uncomplicated disputes between the parties. They are not intended to serve as guidance in future cases nor as clarification of the circuit law, but only as an essential explanation of the result to the parties in that case. These opinions therefore do not recite the facts of the case, which are assumed to be known to the parties, and keep to a minimum citation and discussion of the governing precedent. The nature of unpublished opinions, then, makes them useless as a source of research and analysis.

The Committee also fails to give serious consideration to the ease with which an unpublished opinion may be misinterpreted by litigants and courts not familiar with the underlying case. Because an unpublished opinion does not recite the facts of the case and provides only a brief discussion of the governing law, the import of its reasoning will be unclear to a third-party observer. An unpublished opinion is not drafted to apply to any cases other than the one it decides, and so the legal propositions it contains are not stated with the finesse and precision of an opinion which is meant to bind all courts of that circuit in future litigation. An unpublished opinion, then, can easily convey a misimpression of the relevant law to a lawyer or a judge unconnected with the case.

Currently, the ability of courts of appeals to restrict citation of unpublished opinions guards well against this danger while not precluding lawyers from access to whatever benefits they hope to derive from these opinions. Lawyers are not forbidden from relying on unpublished opinions in their research, and are free to use any sources referenced in these opinions, or any arguments gleaned from them, in their briefs and arguments. The current rules only force practitioners to focus their advocacy on published case-law — case-law which is endowed with precedential force and which reflects a reasoned view of the court of appeals. A lawyer remains free to argue how that case-law should be applied; he is not precluded from trying to persuade the court that a particular precedent is distinguishable because of different factual circumstances, legal distinctions or policy implications. But a lawyer may not, under the current non-citation rules, attempt to distinguish a published opinion by presenting a court with an unpublished disposition which appears to have reached a slightly different result or which stated the applicable rule of law in a somewhat different way.

The advantage of these restrictions is that they promote consistency in circuit case-law and facilitate the work of federal courts. The current non-citation rules maintain a clear distinction between the published opinions, which are endowed with authority and permanence of precedent, and unpublished dispositions, whose reach is intentionally limited to isolated cases. Under this system, courts are able to concentrate their efforts on opinions that advance the law and provide guidance in future cases, while quickly and efficiently disposing of the bulk of their caseload in unpublished dispositions. Far from excuses for self-imposed wilful ignorance, the existing non-citation rules are essential tools for circuit courts to manage their demanding caseloads efficiently.

Under the proposed Rule 32.1, federal courts will no longer be able to limit their analysis to the reasoned precedent contained in published opinions, but will be forced to consider how cited unpublished opinions affect the case. The courts would have to spend considerable effort explaining why a particular unpublished opinion is — or is not — relevant, and why it is distinguishable from the published precedent. The courts — particularly the federal district, bankruptcy and magistrate courts — will be undertaking a fundamentally impossible task: attempting to derive guidance from dispositions which were never meant for that exercise. In order to avoid having the lower courts misinterpret the body of the circuit precedent, the courts of appeals will be compelled to expand the reasoning contained in unpublished opinions, supply the necessary factual context, and qualify the statements of law referenced in these opinions. The courts of appeals may also have to address the unpublished dispositions cited back to them, explaining why a particular unpublished opinion does not fully reflect the circuit case-law, or why it lacks sufficient detail to be used safely as an explanatory guide in another case.

The Committee appears to believe that these drastic and deeply undesirable consequences would not result. The reasons the Committee advances do not support its optimism. In arguing that its proposal will not increase the workload of federal courts, the Committee relies mainly on the fact that Rule 32.1 does not seek to change the non-precedential character of unpublished opinions. Committee Note, at 33. This distinction displays a failure to think through the consequences of the Rule. As already explained, the usefulness of an unpublished opinion to a practitioner is not in the mythical painstaking research or profound analysis it is alleged to contain, but in the fact that the opinion bears the names of three circuit judges and can therefore be represented as an official pronouncement of a court of appeals. Nothing in the current restrictions on unpublished opinions prohibits a party from presenting to a court the reasoning or the research derived from an unpublished opinion, as long as the party does not cite the opinion itself. The aim of being able to supply the citation is the desire to cloak an argument based on the contents of an unpublished disposition with a veneer of judicial approval.

The Committee's own analogy between an unpublished opinion and a law review article, Committee Note, at 31, underscores the fallacy of its argument. A law review article is not cited solely, and often not even mainly, for the persuasiveness of its reasoning, but for the weight the commentator's name lends to that reasoning. In the same way, a party will seek to adduce an unpublished opinion not for the intrinsic value of its reasoning (which a party can bring to the court's attention anyway), but for authority to be derived from the fact that three federal appellate judges have signed on to that disposition.

For similar reasons, the Committee is mistaken in arguing that, because other non-precedential sources may be cited with no restriction, a prohibition on the citation of unpublished opinions is difficult to justify. There is a clear and principled difference between the unpublished opinions and the other non-binding authority: None of the sources the Committee identifies — "the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles" — run the risk of being viewed by judges or litigants as having the judicial imprimatur. Unpublished opinions, by contrast, can easily be perceived as representing a considered view of three court of appeals judges. For the analogy drawn by the Committee to be even remotely plausible, the treatise or article a party cites would have to be co-authored by three circuit court judges, and published and distributed by a court of appeals. In fact, an unpublished opinion presents an even greater appearance of judicial authority because it is not an extra-judicial publication, but an opinion produced by three judges in the exercise of their judicial function. Of course, circuit judges, familiar with the negligible explanatory power and the hidden pitfalls of an unpublished opinion, will not accord an unpublished opinion much weight. The reaction of the judges of lower courts is likely to be quite different. In due deference to the judicial hierarchy, they will treat an unpublished opinion as a source of authority.

A conscientious circuit judge would respond either by spending more time drafting unpublished dispositions (an unrealistic task, given the crushing workload of the court of appeals) or by removing the explanatory reasoning altogether and issuing one-word summary orders instead. The losers, in either event, will be the litigants. They will either have to wait longer to have their cases decided, or leave the court without an understanding of why they lost. Neither result would reflect well on the federal judicial system.

The Committee argues that these consequences will not ensue because the proposed Rule 32.1 "does not require a court of appeals to treat its 'unpublished' opinions as binding precedent" nor "to increase the length or formality of any 'unpublished' opinions that it issues." Committee Note, at 33. This argument would work only if the courts of appeals follow the Committee's example in steadfastly ignoring the consequences of the proposed Rule. While the Rule, on its face, does not endow unpublished opinions with precedential force, its effect would be to introduce that creeping process through the backdoor. This is, unsurprisingly, the reason why those who advocate endowing all unpublished opinions with precedential force are lining up behind Rule 32.1.

The Committee's remaining reasons for the proposed Rule 32.1 are equally unpersuasive. The Committee can find no rational explanation for a system where a circuit court would prohibit citations of its own unpublished opinions but allow citations of unpublished opinions issued by other circuits. Committee Note, at 32-33. The explanation for this seeming disparity is, however, quite obvious. Opinions issued by other circuits do not possess, nor will be viewed as having, the same kind of authority as opinions issued by the circuit to whose courts they are cited. Courts of appeals also have different approaches with respect to opinions they do not designate for publication. Some circuits may have the resources to issue carefully reasoned unpublished opinions, and therefore do not prohibit their citation. By allowing citation of out-of-circuit unpublished opinions where such citation is authorized by the rules of the originating circuit, the

courts of appeals display respect for the autonomy and the judgment of their sister circuits — the very courtesy the Committee refuses to extend to the circuits that restrict citation.

The Committee also seems to suggest that unpublished opinions frequently play an important role in the development of the Nation's jurisprudence, and so merit unrestricted citation. The Committee relies on two recent instances where the Supreme Court has reviewed, and reversed or vacated, unpublished decisions of the courts of appeals. Committee Note, at 33 (citing *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002), and *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002)). Far from supporting the Committee's argument, these two cases show why the proposed Rule 32.1 is unnecessary. In the first case, *Holmes Group, Inc.*, the sole issue reviewed was whether the Federal Circuit properly assumed jurisdiction. Federal Circuit Rule 47.6, which restricts the citation of unpublished opinions of that circuit, prohibits only their citation "as precedent"; it permits citation in other circumstances, such as to show that the circuit exercised jurisdiction. *See* Fed. Cir. R. 47.6(b). The second case, *Swierkiewicz*, is an instance where publication was deemed unnecessary because the issue was squarely governed by the settled law of the circuit. *See* 534 U.S., at 509 (stating that the Second Circuit relied on "its settled precedent"); *Swierkiewicz* v. *Sorema, N.A.*, 5 Fed. Appx. 63, 64 (2d Cir. 2001). No party was disadvantaged by being unable to cite the Second Circuit's unpublished disposition, because it could cite, discuss and seek review of the published precedent on which the disposition relied.

The proposed Rule 32.1 could perhaps be justified if there were evidence that courts of appeals prohibiting citation are issuing unpublished dispositions which address novel issues of law or provide helpful and otherwise unavailable clarification of the precedent. The Committee, however, cites no such evidence. Even if such support existed, the proper course would be to request the circuits to review their practice so as to ensure that opinions appropriate for publication are so designated. The solution is not, without any in-depth study of the issue, to override the considered decision of several courts of appeals as to how best to manage the exercise of their judicial function.

Many circuits, moreover, already have rules ensuring that dispositions appropriate for publication get into the Federal Reporter. The Ninth Circuit, for instance, provides that any member of the three-judge panel who writes a separate concurring or dissenting opinion may insist on publication. Ninth Circuit Rule 36-2(g). This rule ensures that any case where the circuit judges have a significant disagreement as to the result or the reasoning will be published. Nor is this corrective power limited only to judges. The Ninth Circuit Rules also provide that any person — whether a party to the case or an outside observer — may request publication of an unpublished disposition. Ninth Circuit Rule 36-4. (Similar rules are in force in other circuits. See, e.g., Seventh Circuit Rule 53(d)(3); Federal Circuit Rule 47.6(c).) In the year I spent on the Ninth Circuit, I saw this rule invoked, and the requests made pursuant to it granted, on a number of occasions.

The adoption of the proposed Rule will bring serious disadvantages not only to the federal courts of appeals, but also to the lawyers who practice in federal court. If unpublished dispositions could be cited, practitioners would have to treat them as potential sources of authority. Although these dispositions would remain nominally without precedential force, no responsible lawyer could afford to ignore them. Practitioners would have to take into account the considerable likelihood that federal judges (especially those on the lower courts) will be impressed by an unpublished disposition which seems in tension with the existing case-law. A practitioner would have to familiarize himself with the voluminous unpublished opinions of the relevant circuit (and, perhaps, of other circuits as well) in order to anticipate potential arguments that opposing counsel can derive from these opinions. If the opposing party has cited an unpublished disposition to the court, no diligent lawyer could simply ignore the citation on the grounds that the disposition lacks precedential value. As a matter of professional responsibility, the lawyer would need to explain

why the disposition is inapposite. If unpublished dispositions become citable, a lawyer would need to spend considerable amounts of time searching for supporting material in these dispositions in order to serve his client's interests. This increased burden would not only make the practice of law more difficult, but would drive up the already high cost of litigation.

The proposed Rule 32.1 would produce no benefits to offset these considerable disadvantages. As the unpublished dispositions contain no new statements of law, the information gleaned from them would not disclose to attorneys anything they cannot find in the published opinions. Instead, the lawyers will encounter a minefield of inadvertent, and ultimately insignificant, ambiguity, contradiction and misdirection. The fact that the unpublished opinions are easily accessible, Committee Note, at 34, does not alleviate this burden. An attorney would still need to spend time reading, analyzing and discussing this material.

The Committee argues that the proposed Rule 32.1 will relieve attorneys from the alleged hardship of having to "pick through the conflicting no-citation rules of the circuits in which they practice." Committee Note, at 35. If the Committee seriously believes that divergent local circuit rules present a hardship for practitioners, it is setting itself a tall task, for there are wide differences in circuit rules governing the length of briefs, the time to file motions, and a myriad of similar mundane matters. These matters have historically been left to the discretion of local courts, and there is no evidence to show that practitioners are unable to acquaint themselves with the rules of the circuits where they practice and conform to them. The non-citation rules, moreover, are easy to identify, because normally these restrictions are described, and the appropriate rule is referenced, in the unpublished disposition itself. In most cases, the only effort required is to click on the Westlaw link to the applicable rule and read it. Attorneys who perform this minimal task run no risk of incurring any disciplinary measures for inadvertent violations of the non-citation rules.

Nor does the Committee provide any evidence for its concern that the circuits restricting citation of unpublished opinions will become engulfed by extensive satellite litigation over the propriety of such citation. Committee Note, at 34-35. If this dire prediction will indeed materialize, the courts of appeals can surely be trusted to modify their rules if they become counterproductive. There is no reason for the Committee's pre-emptive paternalism.

The proposed Rule 32.1 will imperil the ability of federal courts of appeals to produce a considered body of precedent and ensure its consistent application by lower courts. The Rule will also make the practice of law more difficult for practitioners who appear in federal court and will increase both the duration and the cost of litigation. There is no demonstrated need for the Rule. The decision what restrictions to place on the citation of unpublished dispositions should be left to the informed discretion of the courts of appeals.

I urge the Committee to reconsider its proposal and not to recommend Rule 32.1 to the Judicial Conference.

Yours sincerely,

Igor V. Timofeyev