

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues

This research memorandum seeks to address the following issues:¹

1. Whether the decisions of the International Criminal Tribunal for Rwanda/International Criminal Tribunal for the Former Yugoslavia (ICTR/ICTY) Appeals Chamber are legally binding or persuasive authority for the ICTR Trial Chambers.
2. Whether the decisions of the ICTR/ICTY Appeals Chamber are legally binding on the Appeals Chamber in subsequent cases.
3. Whether the decisions of the ICTR's Trial Chambers are legally binding in subsequent cases on the same Trial Chamber.
4. Whether the decisions of the ICTR's Trial Chambers are legally binding in subsequent cases on other ICTR Trial Chambers.

In addition, this memorandum examines the role of judicial precedent in the civil and common law traditions and in existing legal systems based on these traditions.²

¹ See United Nations International Criminal Tribunal for Rwanda, Office of the Prosecutor, Legal Research Topics, No. 8, Facsimile dated 27 August 2000. [Reproduced in the accompanying notebook at tab 29]

² See *id.* [Reproduced in the accompanying notebook at tab 29]

B. Summary of Conclusions

1. The Tribunal's Statute & Its Legislative History Do Not Explicitly Address The Use of Precedent; However, The Statute's Legislative History Implicitly Supports The Tribunal's Use of Precedent.

The Statute of the International Criminal Tribunal for Rwanda does not address the use of precedent by the Tribunal.³ In addition, precedent is not explicitly addressed in the Statute's legislative history. Although precedent is not mentioned in either source, the Statute's legislative history implicitly supports the use of precedent.⁴

The Statute's legislative history identifies four basic objectives of the Tribunal: (1) the consistent and uniform application of the law; (2) the balanced application of the law; (3) the efficient and effective application of the law; and (4) the enhancement of the rule of law in international public order. Although the legislative history imposes

³ See Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), reprinted in 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 3 - 12 (1998). [Reproduced in the accompanying notebook at tab 1]

⁴ See discussion *infra* pp. 13-19.

these goals upon the Tribunal, it does not identify or provide a mechanism for their achievement.

These objectives, however, are common to all legal systems. Moreover, virtually all civil and common law systems use precedent as one of the primary means to achieve these objectives.⁵ Thus, the use of precedent is implicitly supported by the Tribunal's legislative objectives.

2. The Tribunal's Rules Do Not Address The Use Of Tribunal Decisions As Precedent; However, They Support The Use Of Precedent.

The Tribunal's Rules of Procedure and Evidence (Rules) include one provision regarding precedent. That provision however is not pertinent to the issues at hand; it addresses the use of State court decisions, not the use of ICTR decisions.⁶

Although the Rules do not explicitly address the issues of precedent under consideration, they require parties to cite "case law" in their oral and written arguments to the Appeals Chamber.⁷ Thus, the Rules explicitly require the use of precedent. The Rules, however, do not define the decisions that may be cited, or the precedential value of

⁵ See discussion *infra* pp. 28-53.

⁶ Rule 12 states, "determinations of courts of any State are not binding on the Tribunal." *ICTR Rules of Procedure and Evidence* (visited Oct. 15, 2000) < <http://www.ictr.org/> >. [Reproduced in the accompanying notebook at tab 2] See discussion *infra* p. 17.

⁷ Rule 117(B)(ii) states, "[i]n every appeal ... the Appellant and Respondent shall each prepare and file a Book of Authorities ... including case law." *ICTR Rules of Procedure and Evidence* (visited Oct. 15, 2000) < <http://www.ictr.org/> >. [Reproduced in the accompanying notebook at tab 2]

such decisions. This lack of guidance may lead to inconsistencies, as well as inefficiency. A formal system of precedent would counter these tendencies by providing the Chambers, as well as the parties, with unifying guidelines.⁸

3. The Use of Precedent Is Required By The Common Law Tradition And Rejected By The Civil Law Tradition.

A fundamental difference between the common and civil law traditions is source of law.⁹ In the common law tradition, law is embodied in judicial opinions.¹⁰ As law, opinions must be followed. Precedent, therefore, is an essential component of the common law. In the civil law tradition, law is contained in statutory codes.¹¹ Courts

⁸ See discussion *infra* pp. 19-21.

⁹ A legal tradition "is a set of deeply rooted, historically conditioned attributes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught." John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 1 (1969). A legal system is "an operating set of legal institutions, procedures and rules." *Id.* [Reproduced in the accompanying notebook at tab 15] Thus, a legal tradition is a theoretical concept, whereas a legal system is the practical application of a theoretical concept.

¹⁰ See 3 *The Guide to American Law* 104 (1983) [Reproduced in the accompanying notebook at tab 8]; *Interpreting Precedents: A Comparative Study* 461 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

¹¹ See John Henry Merryman, *The Civil Law Tradition* 25 (1969). As Merryman notes, the generalization that law is

only interpret and apply the law; they do not make it.¹²

The concept of precedent, therefore, is theoretically irrelevant and inconsistent to the civil tradition.¹³

4. Civil and Common Law Legal Systems Use Precedents In A Similar Manner.

Although there is a dichotomy between the use of precedent in the civil and common law traditions, this theoretical distinction is not evident in practice. Both civil and common law systems rely heavily upon precedent. Moreover, they use precedent in much the same way.¹⁴

5. The Adoption Of A System of Precedent Would Promote Compliance With The Tribunal's Legislative Objectives And Ensure The

statutory in civil systems and case-based in common law systems is an "oversimplifi[cation] and misrepresent[ation]." *Id.* at 27. However, as he also acknowledges, "this [generalization] ... expresses an important set of basic differences between the two legal traditions." *Id.* [Reproduced in the accompanying notebook at tab 15] These "basic differences" are particularly relevant to the issues in this memorandum; therefore, this generalization has been used even though it may be somewhat misleading.

¹² See John Henry Merryman, *The Civil Law Tradition* 25 (1969). [Reproduced in the accompanying notebook at tab 15]

¹³ "Case law" and judicial precedent are inconsistent with the ideological basis of the civil law tradition. The civil tradition adheres to the principle that only the legislature can make law. See John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 23 (1969). As a result, judicial decisions must be based solely upon legislative acts. *Id.* at 25. The use of precedent, therefore, is not formally sanctioned. *Id.* at 23. [Reproduced in the accompanying notebook at tab 15] See discussion *infra* pp. 22-27.

¹⁴ See discussion *infra* pp. 22-27.

Consistent Application of The Tribunal's Rules.

The legislative history of the Tribunal's Statute advocates the consistent, uniform, balanced, efficient and effective application of the law. It also stresses the need to secure international support for the Tribunal's efforts. These objectives are not unique to the Tribunal; they are universally recognized as essential to the creation and maintenance of all rational legal orders. Moreover, both civil and common law legal systems use precedent as a primary means to achieve these objectives.¹⁵ Thus, the Tribunal's adoption of a system of precedent would enable it to fulfill its legislative mandate.

6. Proposed System Of Precedent for the ICTR

In light of the above considerations, the following provisions are recommended:¹⁶

1. Decisions of the ICTR/ICTY Appeals Chamber should serve as binding precedent for the Trial Chambers.
2. Decisions of the ICTR/ICTY Appeals Chambers should not serve as binding precedents for the Appeals Chambers in subsequent cases. However, they should serve as persuasive precedents. As such, they should be followed unless the injustice resulting from their application outweighs the value of

¹⁵ Although precedent is used to achieve similar objectives in common and civil law countries, common law jurisdictions officially recognize these objectives, whereas civil law systems generally do not. See discussion *infra* pp. 28-53.

¹⁶ It is suggested that Rule 12 be amended to include the provisions listed. Given that the only explicit rule regarding precedent is found in Rule 12, it is logical for all related rules to be consolidated with this provision. See discussion *infra* pp. 19-22.

certainty and stability secured by their adherence.

3. Decisions of a Trial Chamber, which have not been overruled by the Appeals Chamber, should not serve as binding precedents in subsequent cases in the same Trial Chamber. Such decisions however should serve as persuasive precedents, even when the judges making up the Chamber have changed.
4. Decisions of a Trial Chamber, which have not been overruled by the Appeals Chamber, should not serve as binding precedents for other Trial Chambers. Such decisions however should serve as persuasive precedent.

II. FACTUAL BACKGROUND

A. Definitions

The use of precedent is virtually universal in civil and common law systems.¹⁷ Precedents, however, play different roles within these two traditions.¹⁸ As a result, the terminology used by legal systems to describe precedent varies according to the legal tradition upon which that system is founded. As one author noted, "lawyers in the common law tradition have developed a much larger battery of terms and concepts for discussion and analysis of precedents

¹⁷ See *Interpreting Precedents: A Comparative Study* 454 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9] See also discussion *infra* pp. 28-41.

¹⁸ See discussion *infra* pp. 22-27.

than are in use among civilians, a fact that itself flows from the much more extensive tradition of precedent-based law in the relevant countries."¹⁹

Although the terminology used may vary, some standard definitions are essential to a discussion of precedent. A precedent is generally defined, by both common and civil law systems, as "a decided case that furnishes a basis for determining later cases involving similar facts or issues."²⁰ Thus, "[p]recedents are prior decisions that function as models for later decisions."²¹ *Stare decisis*, a

¹⁹ *Interpreting Precedents: A Comparative Study* 13 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

²⁰ *Black's Law Dictionary* 1195 (7th ed. 1999). [Reproduced in the accompanying notebook at tab 28]

This definition is generally accepted in common and civil law systems, even though precedent is not officially sanctioned by the civil law tradition. For example, the Federal Republic of Germany, with a legal system based on the civil law tradition, considers "prajudiz" (precedent) "to mean any prior decision possibly relevant to a present case to be decided." *Interpreting Precedents: A Comparative Study* 23 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10] The Finnish legal system, also based on the civil law tradition, defines precedent "as a decision which the deciding court expressly adopts or formulates to guide future decision making." *Id.* at 80. [Reproduced in the accompanying notebook at tab 11] In Italy, another civil law jurisdiction, precedent "mean[s] any prior decision possibly relevant to a case to be decided." *Id.* at 151. [Reproduced in the accompanying notebook at tab 13]

²¹ *Interpreting Precedents: A Comparative Study* 1 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

common law term, is "the legal principle that a court should abide by precedent in deciding future cases."²²

Under the doctrine of *stare decisis* a precedent is "binding" authority; it must be followed.²³ In addition to "binding" precedents, there are "persuasive" precedents. Persuasive precedents are decisions "a court may either follow or reject, but that [are] entitled to respect and careful consideration."²⁴

For a decision to have precedential value it usually must be published in a written opinion.²⁵ The content of opinions varies by jurisdiction and is a reflection of the role precedent plays within that legal system.²⁶ Generally, opinions can be divided into two elements, *ratio decidendi*

²² Gerry W. Beyer & Kenneth R. Redden, *Modern Dictionary for the Legal Profession* 730 (2nd ed. 1996). [Reproduced in the accompanying notebook at tab 28]

²³ *Interpreting Precedents: A Comparative Study* 13 (D. Neil MacCormick and Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

²⁴ *Id.* [Reproduced in the accompanying notebook at tab 9]

²⁵ *See Interpreting Precedents: A Comparative Study* 451 (D. Neil MacCormick and Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

²⁶ *See Interpreting Precedents: A Comparative Study* 448-457 (D. Neil MacCormick and Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

and *obiter dictum*.²⁷ The *ratio decidendi* is “[t]he principle or rule of law on which a court’s decision is founded.”²⁸ *Obiter dictum* is “a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision.”²⁹ Generally, only the *ratio decidendi* can have binding force. Thus the distinction between *obiter dicta* and *rationes decidendi* is important.³⁰

There are four types of opinions: majority, plurality, dissenting and concurring. A majority opinion is “[a]n opinion joined in by more than half of the judges considering a given case.”³¹ A plurality opinion is “[a]n

²⁷ See *Interpreting Precedents: A Comparative Study* 504-516 (D. Neil MacCormick and Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

²⁸ *Black’s Law Dictionary* 1269 (7th ed. 1999). [Reproduced in the accompanying notebook at tab 28]

²⁹ *Black’s Law Dictionary* 1100 (7th ed. 1999). [Reproduced in the accompanying notebook at tab 28]

³⁰ See Morris L. Cohen, et al., *How To Find the Law* 15 (9th ed. 1989). [Reproduced in the accompanying notebook at tab 23] See also *Oxford Dictionary of Law* 348 (4th ed. 1997) (“a lower court is not bound by all aspects of a previous decision but only by those parts of the judgment that constitute the principles of the decision (... *ratio decidendi*) and are not merely passing comments (... *obiter dicta*) of the judge”). [Reproduced in the accompanying notebook at tab 28]

³¹ *Black’s Law Dictionary* 1119 (7th ed. 1999). [Reproduced in the accompanying notebook at tab 28]

opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion."³² A dissenting opinion is "[a]n opinion by one or more judges who disagree with the decision reached by the majority."³³ A concurring opinion is an opinion that agrees with the judgment reached, but not with the legal rationale for that decision.³⁴ The type of opinion is a determining factor in the precedential weight of a decision. Generally, only majority opinions can have binding force. The persuasive force of all other types of opinions may vary considerably given factors such as the age of the decision, the strength of its reasoning, popular support, etc.

III. LEGAL DISCUSSION

³² *Id.* [Reproduced in the accompanying notebook at tab 28]

³³ *Id.* Dissenting opinions also are referred to as minority opinions. [Reproduced in the accompanying notebook at tab 28]

³⁴ *See id.* at 286. [Reproduced in the accompanying notebook at tab 28]

B. The Role of Judicial Precedent, as Indicated by the Statute of the International Criminal Tribunal for Rwanda and Its Legislative History

The Statute of the International Criminal Tribunal for Rwanda does not address the use of precedent by the Tribunal.³⁵ In addition, the issue of precedent is not explicitly addressed in the Statute's legislative history. Although precedent is not mentioned in the Statute or its legislative history, the latter implicitly supports the use of precedent.

The legislative history of the Rwanda Statute repeatedly stresses the need for consistency and uniformity. Members of the Security Council advocated a "unified approach ... to ... international crimes," the "consistent ... application of ... law," and an avoidance of "ad hoc

³⁵ See Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), reprinted in 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 3 - 12 (1998). [Reproduced in the accompanying notebook at tab 1]

initiatives."³⁶ Moreover, a primary goal in establishing the Tribunal was "to ensure a unity of legal approach."³⁷

Although steps were taken to ensure consistency and uniformity between the Tribunals for Rwanda and the Former Yugoslavia, no measures were taken to promote these values *within* the Rwanda Tribunal. According to the legislative record of the Rwanda Statute, three steps were taken to achieve inter-Tribunal consistency. These were (1) the establishment of a common Appeals Chamber; (2) the use of the same chief prosecutor who has authority over the prosecutorial staff of both Tribunals; and (3) the intention that the rules of the Rwanda Tribunal be modeled on those of the Tribunal for the Former Yugoslavia.³⁸

³⁶ Provisional Verbatim Record of the Security Council, Forty-ninth Year, 345rd Meeting, Tuesday, 8 November 1994, 3:35 p.m., New York, S/PV.3453 8 November 1994, *reprinted in* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 302-303 (1998) (quoting Mr. Kovanda, Czech Republic and Mr. Sardenberg, Brazil). [Reproduced in the accompanying notebook at tab 4]

³⁷ Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994) S/1995/134, 13 February 1995, *reprinted in* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 196 (1998). [Reproduced in the accompanying notebook at tab 6]

³⁸ See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994) S/1995/134, 13 February 1995, *reprinted in* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). [Reproduced in the accompanying notebook at tab 6] See also Report of the Secretary-General on the Activities of the Office of the Internal Oversight Services, General Assembly, Fifty-first Session, Agenda Items 139 and

The ICTR's judges also have expressed the need for a unity of approach. The judges have advocated for "harmonization" of the rules of the ICTR and ICTY to ensure "that the two International Criminal Tribunals, the only ones in the world, are enhancing the standards of international justice."³⁹ The judges also noted that "[d]ecisions of either Tribunal are cited by the other Tribunal ... therefore ... [there] is a need for more convergence of procedures than divergence."⁴⁰

A unity of approach between the two Tribunals is not feasible if the individual Tribunals are not themselves internally consistent. Thus, the legislative record and the Tribunal's judges clearly support intra-Tribunal, as well as inter-Tribunal, consistency and uniformity.

141, A/51/789, 6 February 1997 *reprinted in* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 231 (1998)(recommending that the Tribunals "facilitate and foster their mutual relationship"). [Reproduced in the accompanying notebook at tab 5]

³⁹ Press Briefing 22 February 2000 on Report of the Expert Review Group (visited Oct. 15, 2000) < <http://www.ictor.org/> >. [Reproduced in the accompanying notebook at tab 3]

⁴⁰ Press Briefing 22 February 2000 on Report of the Expert Review Group (visited Oct. 15, 2000) < <http://www.ictor.org/> >. [Reproduced in the accompanying notebook at tab 3]

The Statute's legislative history stresses the need to promote the "balanced and effective application of international humanitarian law."⁴¹ Moreover, historic sources indicate that a primary goal of the Tribunal was to "create an environment conducive to the enhancement of the rule of law in international public order."⁴² According to these materials, the "Tribunal's effectiveness ... will depend ... on the support, cooperation and encouragement given to it by States."⁴³

The objectives articulated in the Statute's legislative history are vital to all legal systems. Moreover, all legal systems, common and civil, use precedent as a means to

⁴¹ Provisional Verbatim Record of the Security Council, Forty-ninth Year, 345rd Meeting, Tuesday, 8 November 1994, 3:35 p.m., New York, S/PV.3453 8 November 1994, *reprinted in* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 304 (1998) (quoting Mr. Sardenberg, Brazil). [Reproduced in the accompanying notebook at tab 4]

⁴² Provisional Verbatim Record of the Security Council, Forty-ninth Year, 345rd Meeting, Tuesday, 8 November 1994, 3:35 p.m., New York, S/PV.3453 8 November 1994, *reprinted in* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 304 (1998) (quoting Mr. Ynez-Barnuevo, Spain). [Reproduced in the accompanying notebook at tab 4]

⁴³ Provisional Verbatim Record of the Security Council, Forty-ninth Year, 345rd Meeting, Tuesday, 8 November 1994, 3:35 p.m., New York, S/PV.3453 8 November 1994, *reprinted in* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 304 (1998). [Reproduced in the accompanying notebook at tab 4]

achieve these objectives.⁴⁴ Thus, the implementation of a precedential system would help the Tribunal achieve its legislative mandate, "the consistent, balanced and effective application of international humanitarian law...[and]... the enhancement of the rule of law in international public order."⁴⁵

1. Precedent Promotes The Consistent And Uniform Application Of The Law.

Precedent requires that a court consider prior similar cases when making decisions. Moreover, the doctrine of *stare decisis* requires courts to follow the law, as applied in prior decisions involving the same legal issue and facts. Precedent thus ensures that similarly situated individuals are treated similarly. Therefore, precedent promotes the consistent and uniform application of the law.

2. Precedent Promotes The Balanced Application Of The Law.

⁴⁴ See discussion *infra* pp. 28-53.

⁴⁵ Provisional Verbatim Record of the Security Council, Forty-ninth Year, 345rd Meeting, Tuesday, 8 November 1994, 3:35 p.m., New York, S/PV.3453 8 November 1994, *reprinted in* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 304 (1998). [Reproduced in the accompanying notebook at tab 4]

Precedent encourages courts to tailor the law to the instant case. The law, as established in prior cases, is applied only if the legal issue and facts are not distinguishable. If the issue or facts vary, the court may adjust the law in order to create a more appropriate response. Thus, precedent promotes the balanced application of the law.

3. Precedent Promotes the Efficient and Effective Application of the Law.

Precedent promotes judicial efficiency. Because precedent encourages judges to use prior decisions to formulate responses to current cases, the efficiency of the decision-making process is increased. Judges do not have to re-argue established principles, nor do they have to address novel issues with a blank slate. Prior decisions can be used to resolve a current issue, or they can provide a foundation from which a related decision can be extrapolated. Thus precedent facilitates the resolution of legal issues and thereby promotes the efficient application of the law.⁴⁶

In addition, precedent promotes the effective application of the law. Because precedent encourages extrapolation from prior decisions, extensions of the law are added in response to novel facts or issues. As a result, the law develops uniformly and in direct response to specific legal needs. Thus, precedent promotes the effective, as well as efficient, application and development of the law.

4. Precedent Promotes the Rule of Law.

By promoting the consistent, uniform, balanced, efficient and effective application of the law, precedent enhances the integrity of the legal system. This, in turn,

⁴⁶ The use of precedent can also reduce the learning curve for new judges, an important consideration given the judicial turnover within the Tribunal. See 2 Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 7 (1998). Article 12 §5 of the Statute of the International Criminal Tribunal for Rwanda provides that judges are to be elected for a term of four years and are eligible for re-election. [Reproduced in the accompanying notebook at tab 1]

fosters respect for the legal system and support for the legal order. Thus, precedent ultimately promotes the rule of law.

B. The Role Of Judicial Precedent, As Indicated By The Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda

The ICTR Rules of Procedure and Evidence include only one provision that explicitly addresses precedent. Rule 12 provides that "determinations of courts of any State are not binding on the Tribunal."⁴⁷ Thus, Rule 12 precludes the Trial and Appeals Chambers from using State court decisions as *binding* precedent. It does not, however, preclude the Chambers from using such decisions as *persuasive* authority. Neither Rule 12, nor any other provision in the ICTR Rules of Procedure and Evidence, addresses the precedential use of ICTR decisions by the Tribunal's Trial and Appeals Chambers. Thus, neither the ICTR's Statute, nor its Rules, addresses the issues at hand.

Although the Rules of Procedure and Evidence do not specifically address the Tribunal's use of its own decisions as precedent, they do include a provision that strongly suggests the use of precedent. Rule 117(B)(ii) provides, "[i]n every appeal before the Appeals Chamber, the Appellant and the Respondent shall each prepare and file a Book of Authorities [that is to include] ... a legible copy of the ... reference material, including case law ... to which the party refers in the party's briefs or intends to refer in the party's oral arguments."⁴⁸ The term, "case law," is synonymous with precedent; it is law established in court

⁴⁷ *ICTR Rules of Procedure and Evidence* (visited Oct. 15, 2000) < <http://www.ictor.org/> >. [Reproduced in the accompanying notebook at tab 2]

⁴⁸ *Id.*, (emphasis added). [Reproduced in the accompanying notebook at tab 2]

decisions.⁴⁹ Thus, Rule 117(B)(ii) promotes the use of precedent by the Tribunal.

According to Rule 117(B)(ii) and Rule 12, each party must "file a Book of Authorities... including case law," but "determinations of courts of any State are not binding on the Tribunal." Parties, therefore, are required to cite precedents, but the Tribunal is not bound by State Court decisions. Thus, although the Rules do not answer the specific issues at hand, they clearly support the use of precedent.

C. Precedent in the Civil and Common Law Traditions

A fundamental difference between the common and civil law traditions is source of law.⁵⁰ Whereas statutory codes

⁴⁹ See *Black's Law Dictionary* 207 (7th ed. 1999) (defining case law as "[t]he collection of reported cases that form the body of law within a given jurisdiction." [Reproduced in the accompanying notebook at tab 28]; *A Concise Dictionary of Law*, 56 (2nd ed. 1990) (defining case law as, "[t]he body of law set out in judicial decisions, as distinct from statute law. See ... precedent) [Reproduced in the accompanying notebook at tab 28]; *Real Life Dictionary of the Law*, 77 (1995) (defining case law as "reported decisions of appeals courts and other courts which make new interpretations of the law and, therefore, can be cited as precedents. These interpretations are distinguished from 'statutory law,' which is the statutes and codes enacted by legislative bodies ... The rulings in trials ... which are not appealed and not reported are not case law and, therefore, not precedent"). [Reproduced in the accompanying notebook at tab 28]

⁵⁰ A legal tradition "is a set of deeply rooted, historically conditioned attributes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught." John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 1 (1969). A legal system is "an operating set of legal institutions, procedures and rules." *Id.* [Reproduced in the accompanying notebook at tab 15]

are the primary source of law in the civil tradition, judicial decisions are the primary source of law within the common law tradition.⁵¹ This fundamental distinction has a significant impact upon the role of precedent within these traditions.

In the common law tradition, the law is embodied in judicial opinions.⁵² As law, opinions must be followed. Precedent, therefore, is an essential component of the common law. In the civil law tradition, the law is

contained in statutory codes.⁵³ Courts only interpret and

Thus, a legal tradition is a theoretical concept, whereas a legal system is the practical application of a theoretical concept.

⁵¹ Although a number of legal scholars object to this crude distinction, it is nonetheless particularly apt to the issues at hand. See John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 24-25 (1969). [Reproduced in the accompanying notebook at tab 15]

⁵² See 3 *The Guide to American Law* 104 (1983) [Reproduced in the accompanying notebook at tab 8]; *Interpreting Precedents: A Comparative Study* 461 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

⁵³ See John Henry Merryman, *The Civil Law Tradition* 25 (1969). As Merryman notes, the generalization that law is statutory in civil systems and case-based in common law systems is an "oversimplifi[cation] and misrepresent[ation]." *Id.* at 27. However, as he also acknowledges, "this [generalization] ... expresses an important set of basic differences between the two legal traditions." *Id.* [Reproduced in the accompanying notebook at tab 15] These "basic differences" are particularly relevant to the issues in this memorandum; therefore, this generalization has been used even though it may be somewhat

apply the law; they do not make it.⁵⁴ The concept of precedent, therefore, is theoretically irrelevant and inconsistent to the civil tradition.⁵⁵

Although judicial opinions serve fundamentally different purposes within the civil and common law traditions, they play similar roles in contemporary legal systems based on these traditions.⁵⁶ In fact, numerous legal scholars have noted a "convergence" between the civil and common systems.⁵⁷ The role of statutory law has

misleading.

⁵⁴ See John Henry Merryman, *The Civil Law Tradition* 25 (1969). [Reproduced in the accompanying notebook at tab 15]

⁵⁵ "Case law" and judicial precedent are inconsistent with the ideological basis of the civil law tradition. The civil tradition adheres to the principle that only the legislature can make law. See John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 23 (1969). As a result, judicial decisions must be based solely upon legislative acts. *Id.* at 25. The use of precedent, therefore, is not formally sanctioned. *Id.* at 23. [Reproduced in the accompanying notebook at tab 15]

⁵⁶ See discussion *infra* pp. 28-53.

⁵⁷ See *Interpreting Precedents: A Comparative Study* 2, 12 (D. Neil MacCormick & Robert S. Summers, eds. 1997) [Reproduced in the accompanying notebook at tab 9]; John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 25 (1969) [Reproduced in the accompanying notebook at tab 15]; Mary Ann Glendon, *The Sources of Law in a Changing Legal Order*, 17 Creighton L. Rev. 663, 665 (1984). [Reproduced in the accompanying notebook at tab 27]

Although a convergence has been noted, this convergence is in practice, not ideology. For example, although common

decreased in civil systems and increased in common law systems.⁵⁸ Similarly, the role of judicial precedent has increased in civil law systems and decreased in common law systems.⁵⁹

Although precedent is contrary to the civil law tradition, it plays a vital role in contemporary civil law systems.⁶⁰ This reliance on precedent is commonly

law countries increasingly rely upon statutory codes, these codes are usually codifications of existing case law. See *Interpreting Precedents: A Comparative Study* 4-5 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9] Similarly, judicial gap filling and clarification of the law in civil law systems is considered statutory interpretation, not law-making. See *id.* at 459. [Reproduced in the accompanying notebook at tab 9] This intellectual ingenuity enables both legal systems to remain true to their ideological tradition. See *id.* at 4-5. [Reproduced in the accompanying notebook at tab 9] Although these mental gymnastics may resolve the dissonance between ideology and existing practice, it may not be good for the legal order. See *id.* at 496. [Reproduced in the accompanying notebook at tab 9]

⁵⁸ See *Interpreting Precedents: A Comparative Study* 3 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

The convergence of common law systems with the civil law tradition is not discussed in this memorandum because it is not relevant to the issue of precedent.

⁵⁹ See *Interpreting Precedents: A Comparative Study* 458-459 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

⁶⁰ See *Interpreting Precedents: A Comparative Study* 531-533 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

attributed to the inherent nature of statutory codes.⁶¹ Codes cannot address every legal issue that is likely to arise. In addition, as a communication medium, codes are subject to interpretation. Omissions and ambiguities, therefore, are inevitable. In addition, codes are difficult to modify; the legislative process is cumbersome and time-consuming. As a result, codes cannot efficiently and effectively respond to societal changes.

Given the inherent limitations of codified law, it is impossible for a legislature to maintain a code that is clear, comprehensive and up-to-date.⁶² Codes are prone to omissions, ambiguities and obsolete provisions.⁶³ Such

⁶¹ See discussion *infra* pp. 25-27.

⁶² France's attempts to fashion a solution to this civil law conundrum are particularly noteworthy. The French recognized that if the legislature were responsible for addressing all statutory ambiguities, it would be inundated with interpretive requests. They did not want to saddle the legislature with this responsibility, however, they also believed that the judiciary was not the appropriate governmental entity to handle such legislative issues. The French addressed this problem by creating a legislative department, the Tribunal of Cassation. The Tribunal's role initially was limited to voiding judicial decisions based on incorrect interpretations of the law. It did not provide correct interpretations. Instead, it quashed the decision and ordered the case to be retried. Gradually, however, the Tribunal's role changed; it began to provide statutory interpretations. Later, the Tribunal's name was changed to Court of Cassation, and it was placed at the top of the court hierarchy. See John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 40-42 (1969). [Reproduced in the accompanying notebook at tab 15]

tendencies are lethal to a legal order; they undermine the utility, thus integrity, of the law. As a result, a code, which is designed to establish legal order, may ultimately threaten the stability of the system it is intended to sustain.

Because a legislative body cannot efficiently or effectively respond to these inherent failings, an alternate mechanism is needed. That mechanism is typically the judiciary. As an operational entity, the judiciary is better suited than the legislature to address omissions and clarify ambiguities for two reasons. First, the judiciary can respond more quickly than the legislature. Second, the judiciary can respond more accurately because it can tailor its response to the specific situation at hand.

Convergence is essential to the ongoing vitality, hence viability, of legal systems based upon the civil and common law traditions. As one legal scholar has stated, "[n]o contemporaneous legal order is conceivable that does not make large use of both [case and statutory law]."⁶⁴ Thus, although the official role of precedent in common and civil traditions is strikingly different, its actual usage is

⁶⁴ *Interpreting Precedents: A Comparative Study* 5 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

not.⁶⁵ Precedent today is a significant judicial tool in both civil and common law countries.⁶⁶

D. Precedent in Civil Law Countries

1. Federal Republic of Germany

The legal system of the Federal Republic of Germany is based upon the civil law tradition.⁶⁷ Officially, precedents play a very limited role. Unofficially, however, precedents are a significant force within the legal

⁶⁵ It should be noted that legal systems, including both civil and common law countries, usually do not explicitly define the force of precedent. See *Interpreting Precedents: A Comparative Study* 463 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

⁶⁶ *Interpreting Precedents: A Comparative Study* 5 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

⁶⁷ John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 1 (1969). [Reproduced in the accompanying notebook at tab 15]

The German judiciary is bound, by statute, to adhere to 'statute and law.' See Art. 20 (3) GG. Precedents do not fall within this category. Thus, precedents are *not de jure* binding. See *Interpreting Precedents: A Comparative Study* 29 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

system.⁶⁸ Judicial precedents, with one exception, are not legally binding authority.⁶⁹ Although court decisions are not *de jure* binding, practice indicates they are *de facto* binding.

Statistics indicate that virtually all cases refer to precedents.⁷⁰ The high use of precedent can be attributed to three factors: (1) statutory provisions that grant binding legal status to selected court decisions, (2) statutory provisions which promote the use of precedent, and (3) omissions and ambiguities in codified law.

A number of statutory provisions affect the use of precedent, either directly or indirectly. One statute provides that decisions of the Federal Constitutional Court

⁶⁸ "Prajudiz" (precedent) is generally defined as any prior decision that is relevant to the issue under consideration. See *Interpreting Precedents: A Comparative Study* 23 (D. Neil MacCormick & Robert S. Summers, eds. 1997). Although this definition implies controlling force, the German system does not quantify the strength of that force as binding or persuasive. *Id.* [Reproduced in the accompanying notebook at tab 10]

⁶⁹ The decisions of the Federal Constitutional Court decisions are the one exception. The decisions of this court are binding, by statute, upon lower courts. See *Interpreting Precedents: A Comparative Study* 25 (D. Neil MacCormick & Robert S. Summers, eds. 1997) (citing s.31(1) BVerfGG). [Reproduced in the accompanying notebook at tab 10]

⁷⁰ See *Interpreting Precedents: A Comparative Study* 23 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

are binding on all lower courts.⁷¹ This statute also grants certain decisions of the Federal Constitutional Court the status of law.⁷² Thus, the decisions of the Federal Constitutional Court are *de jure* binding precedents.

In addition to the *de jure* binding precedent of the Federal Constitutional Court, a number of statutory provisions foster *de facto* binding precedent. For example, one statute provides that a Supreme Federal Court may grant appellate review when a lower court fails to follow a precedent set by its Supreme Federal Court, the Common Panel of the Supreme Federal Courts, or the Federal Constitutional Court.⁷³ By implication, this statute makes the decisions of these courts binding precedent for lower courts.

Another statute provides that a Supreme Federal Court may grant appellate review when a "case is of fundamental importance in principle."⁷⁴ This test is satisfied when a

⁷¹ See *Interpreting Precedents: A Comparative Study* 25 (D. Neil MacCormick & Robert S. Summers, eds. 1997)(citing s.31(1) BVerfGG.) [Reproduced in the accompanying notebook at tab 10]

⁷² See *Interpreting Precedents: A Comparative Study* 25 (D. Neil MacCormick & Robert S. Summers, eds. 1997)(citing s.31(2) BVerfGG.) [Reproduced in the accompanying notebook at tab 10]

⁷³ See *Interpreting Precedents: A Comparative Study* 19 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

⁷⁴ See *Interpreting Precedents: A Comparative Study* 19 (D. Neil MacCormick & Robert S. Summers, eds. 1997). As a

case provides an opportunity for the court to establish a legal principle that further develops the law.⁷⁵ Thus, this statutory provision implies that the Supreme Federal Courts have law-making ability and their decisions have binding precedential value.

In addition to requiring courts to follow precedents, there is a statute that makes lawyers liable for damages for failing to cite relevant cases from superior courts.⁷⁶ Thus, this statute also promotes the use of precedent. In addition, it implies that courts must consider the decisions of all courts above it in the court hierarchy when making a decision.

Numerous other statutory provisions establish procedures for courts to follow when they intend to deviate from precedent.⁷⁷ Under these provisions, the deviating

general rule, precedents that support the court's decision are not discussed, whereas deviations from precedents are analyzed and justified. *Id.* at 24, 31. [Reproduced in the accompanying notebook at tab 10]

⁷⁵ See *Interpreting Precedents: A Comparative Study* 19-20 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

⁷⁶ See *Interpreting Precedents: A Comparative Study* 31 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

⁷⁷ See *Interpreting Precedents: A Comparative Study* 31-32 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

court is required to notify a superior court of its intention to break with precedent and its reasons for doing so.⁷⁸ In addition to promoting the binding force of precedent, this requirement implicitly sanctions the unofficial practice of binding precedent that permeates the German system.

Statutory codes, with one narrow exception, are the official source of law in the German legal system. Like all codifications, however, German codes suffer from ambiguities and omissions. Because the job of the courts is to apply and explain the law, these statutory infirmities are generally cured through judicial interpretation.⁷⁹ Although the law is embodied in the statutes, its meaning is found in court decisions.⁸⁰ As a result, court decisions have considerable legal force. Court decisions are not an official source of law, however, interpretive opinions must be followed in order to adhere to the law. As a result, court decisions become *de facto* binding precedents.

⁷⁸ See *Interpreting Precedents: A Comparative Study* 31-32 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

⁷⁹ See *Interpreting Precedents: A Comparative Study* 24 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

⁸⁰ See *Interpreting Precedents: A Comparative Study* 24-25 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

German law provides that only decisions of the Federal Constitutional are binding precedent. However, by implication, it establishes a system of *de facto* binding precedent wherein all courts are bound by the decisions of courts superior to them in the court hierarchy. According to the Federal Court of Justice, this *de facto* use of binding precedent is necessary because the "the legal values of certainty and protection of trust come to the fore and generally demand an adherence to the line of legal development that has been chosen."⁸¹

2. Finland

Finland's legal system is rooted in the civil law tradition. According to the Constitution, the courts make decisions, not law.⁸² In addition, the Code of Judicial Procedure requires that court decisions be based on statutory law.⁸³ Thus, the courts apply the law, whereas

⁸¹ See *Interpreting Precedents: A Comparative Study* 30 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 10]

⁸² See *Interpreting Precedents: A Comparative Study* 79 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁸³ See *Interpreting Precedents: A Comparative Study* 79 (D. Neil MacCormick & Robert S. Summers, eds. 1997)(citing Code of Judicial Procedure, s.24, Art. 3.) [Reproduced in the accompanying notebook at tab 11]

the legislature makes the law.⁸⁴ This clear-cut distinction, however, has recently begun to erode.⁸⁵

"Precedent" in the Finnish legal system is defined as "a decision which the deciding court expressly adopts or formulates to guide future decision making."⁸⁶ The role of precedent within the Finnish legal system is not addressed by statutory law or court decisions.⁸⁷ Court decisions, however, are not an official source of law. Therefore, they technically cannot be used as binding precedent. The legal system, however, allows some decisions to be used as persuasive authority.

A Supreme Court Working Order provides that its decisions, when decided by at least five judges, may have precedential weight.⁸⁸ Although Supreme Court decisions can

⁸⁴ See *Interpreting Precedents: A Comparative Study* 91 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁸⁵ See *Interpreting Precedents: A Comparative Study* 91 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁸⁶ See *Interpreting Precedents: A Comparative Study* 91 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁸⁷ See *Interpreting Precedents: A Comparative Study* 87 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁸⁸ See *Interpreting Precedents: A Comparative Study* 67 (D. Neil MacCormick & Robert S. Summers, eds. 1997). The Supreme Court, which consists of fifteen judges, sits in panels. *Id.* [Reproduced in the accompanying notebook at tab 11]

only serve as persuasive authority, they are usually followed.⁸⁹ Thus, Supreme Court decisions are *de facto* binding precedent.⁹⁰

The Code of Judicial Procedure provides that the Supreme Court may grant appellate review if a case presents an issue that would help unify legal practice.⁹¹ Although Supreme Court decisions only have persuasive authority, this provision underscores their *de facto* status as binding precedent.

The *de facto* binding authority of the Court's opinions is further supported by a Supreme Court Working Order. Under this Order, if a majority of judges in a section advocate a ruling that is inconsistent with prior Court decisions, that section must notify the Chief Justice.⁹²

⁸⁹ See *Interpreting Precedents: A Comparative Study* 80 (D. Neil MacCormick & Robert S. Summers, eds. 1997). The precedential value of a decision is based upon a number of considerations. *Id.* at 87. [Reproduced in the accompanying notebook at tab 11]

⁹⁰ See *Interpreting Precedents: A Comparative Study* 66 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁹¹ See *Interpreting Precedents: A Comparative Study* 70 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁹² See *Interpreting Precedents: A Comparative Study* 68 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

The Chief Justice may then order the case to be heard in a plenary session.⁹³ This Order promotes adherence to prior court decisions, and it evinces unofficial support for the use of binding precedent. In addition, it indicates that the Supreme Court is not bound by its prior decisions.

Although precedents are not *de jure* a source of law in the Finnish legal system, they play a significant role in actual practice. Generally, precedents play a greater role in areas of law that lack statutory development or are subject to changing social conditions.⁹⁴ In fact, if the legislature has not acted, the courts may develop the law.⁹⁵ (Courts, however, do not acknowledge that they are performing this function. Thus, the pretense that courts do not make law is maintained.⁹⁶)

Precedent within the Finnish system serves a number of important, albeit unofficial, functions. It guides courts

⁹³ See *Interpreting Precedents: A Comparative Study* 68 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁹⁴ See *Interpreting Precedents: A Comparative Study* 83 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁹⁵ See *Interpreting Precedents: A Comparative Study* 83-84, 87 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁹⁶ See *Interpreting Precedents: A Comparative Study* 83-84 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

in future cases, ensures the stability of legal relations by promoting predictability, fosters equality by harmonizing the law of different courts, and develops the legal order.⁹⁷

3. France

The French legal system is based upon the civil law tradition. Statutes are the only legitimate source of law.⁹⁸ Prior judicial opinions, therefore, are not an acknowledged source of law.⁹⁹ A precedent within the French legal system is considered to be "a decision taken in the past in similar circumstances or in a similar case."¹⁰⁰ Although the use of precedent is contrary to the ideological foundation of the French legal system, it is a fundamental, albeit generally unacknowledged, judicial tool.

⁹⁷ See *Interpreting Precedents: A Comparative Study* 91 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 11]

⁹⁸ See *Interpreting Precedents: A Comparative Study* 107, 117 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

⁹⁹ See *Interpreting Precedents: A Comparative Study* 112 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹⁰⁰ See *Interpreting Precedents: A Comparative Study* 111 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

The French legal system is composed of a judicial and an administrative branch.¹⁰¹ Although the official role of precedent is the same within both branches, there is one attribute of the Administrative branch worthy of note. The decisions of the Administrative branch serve to establish and develop the law.¹⁰² This peculiarity is attributed to the fact that administrative law is not fully codified.¹⁰³

Although numerous statutes exist, administrative law is not complete.¹⁰⁴ Judges, therefore, frequently make law as they decide cases.¹⁰⁵ As a result, administrative law reflects the common law tradition.¹⁰⁶ Although this feature

¹⁰¹ See *Interpreting Precedents: A Comparative Study* 103-104 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹⁰² See *Interpreting Precedents: A Comparative Study* 104 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹⁰³ See *Interpreting Precedents: A Comparative Study* 104 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹⁰⁴ See *Interpreting Precedents: A Comparative Study* 113 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹⁰⁵ See *Interpreting Precedents: A Comparative Study* 104 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹⁰⁶ See *Interpreting Precedents: A Comparative Study* 104 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

distinguishes the Administrative branch from the Judicial branch, the use of precedent in both branches is similar.

In the French legal system, precedents are never binding. However, they do have persuasive authority.¹⁰⁷ Moreover, the weight of this authority is considerable. In practice, courts consistently adhere to precedents.¹⁰⁸ Thus, although precedents are not *de jure* binding, they are *de facto* binding.

Judicial opinions are not law; however, they explain the law. Although the law is officially contained in the codes, its meaning is contained in court decisions.¹⁰⁹ Thus, adherence to the law requires that court decisions be followed.¹¹⁰ As a result, interpretive decisions are *de facto* binding precedent.¹¹¹

¹⁰⁷ See *Interpreting Precedents: A Comparative Study* 111 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹⁰⁸ See *Interpreting Precedents: A Comparative Study* 111 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹⁰⁹ See *Interpreting Precedents: A Comparative Study* 112-113 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹¹⁰ See *Interpreting Precedents: A Comparative Study* 112-113 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹¹¹ See *Interpreting Precedents: A Comparative Study* 112-113 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

Although the French legal system does not rationalize the use of precedent, legal scholars attribute reliance on precedent to two factors. The first factor is judicial efficiency; precedent "saves the court an extensive analysis of the facts and of the legal issue."¹¹² The second factor is "equality before the law."¹¹³

4. Italy

The Italian legal system is based upon the civil law tradition. Statutory codes, therefore, are the primary source of law.¹¹⁴ There is no law that regulates the use of precedent in the Italian legal system.¹¹⁵ Judicial precedents, however, play such a significant role within the Italian legal system that they are considered a *de facto*

¹¹² See *Interpreting Precedents: A Comparative Study* 111 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹¹³ See *Interpreting Precedents: A Comparative Study* 111 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 12]

¹¹⁴ See Mauro Cappelletti, et al., *The Italian Legal System: An Introduction* 270-274 (1967). [Reproduced in the accompanying notebook at tab 18]

¹¹⁵ This statement is contested by some scholars who contend that the decisions of the Corte di Cassazione are legally binding precedent because a statute gives this court responsibility for unifying the law. See *Interpreting Precedents: A Comparative Study* 157, 186 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

source of law.¹¹⁶ Precedents, however, are not legally binding.¹¹⁷ Officially, precedents are only persuasive authority.¹¹⁸ Precedents, however, are considered "the most important justificatory materials used in judicial opinions."¹¹⁹

The term "precedent" has three different meanings in the Italian legal system. A precedent is a decision that (1) influences subsequent decisions, (2) articulates a new or unique legal argument, or (3) may be relevant to a subsequent case.¹²⁰ Generally, only the decisions of the

¹¹⁶ See *Interpreting Precedents: A Comparative Study* 154, 186 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹¹⁷ This general rule is contested by some who argue that decisions of the Constitutional Court, which hold a statute to be unconstitutional, are formally binding because other courts must adhere to this ruling. Others, however, argue that this does not illustrate binding precedent because a statute that is held unconstitutional is void. As a result, subsequent courts decisions are due to the fact that the law no longer exists and are not the result of binding precedent. See *Interpreting Precedents: A Comparative Study* 154, 154 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹¹⁸ See *Interpreting Precedents: A Comparative Study* 154 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹¹⁹ See *Interpreting Precedents: A Comparative Study* 151 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹²⁰ See *Interpreting Precedents: A Comparative Study* 151 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

highest courts, the Constitutional Court and the *Sezioni Unite* of the supreme court, are considered precedents that *should* be followed. Court decisions, however, do not have precedential value until they are cited in subsequent Court decisions.¹²¹

Although precedents are never formally binding, there are a number of informal rules that support their *de facto* controlling authority. According to these informal expectations, lower courts must follow the precedent of higher courts.¹²² Higher courts can overrule their prior decisions, but this practice is discouraged.¹²³ Moreover, if a court deviates from a precedent, it is expected to provide a rationale for doing so.¹²⁴ In addition, lawyers are expected to cite precedents in their oral and written arguments.¹²⁵

¹²¹ See *Interpreting Precedents: A Comparative Study* 152 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹²² See *Interpreting Precedents: A Comparative Study* 162 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹²³ See *Interpreting Precedents: A Comparative Study* 155 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹²⁴ See *Interpreting Precedents: A Comparative Study* 162 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹²⁵ See *Interpreting Precedents: A Comparative Study* 152 (D. Neil MacCormick & Robert S. Summers, eds. 1997).

Generally, precedents are cited as supportive, not determinative, authority.¹²⁶ That is, courts use precedent as evidence their decision is correct, not as the reason for their decision. However, there are some areas of the law in which judicial precedents have been used to fill gaps.¹²⁷ Thus, for all practical purposes, such decisions create the law.¹²⁸

Because court decisions are not *de jure* binding precedent, the Italian legal system does not justify their use. However, numerous unofficial reasons are offered for using binding precedent. It is believed that precedents promote "equal treatment under the law," "certainty of legal standards in decision making," "predictability of judicial decisions," and "uniformity of the case law."¹²⁹

[Reproduced in the accompanying notebook at tab 13]

¹²⁶ See *Interpreting Precedents: A Comparative Study* 156 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹²⁷ The use of judicial precedent to create law occurs most frequently in constitutional law, tort law and administrative. See *Interpreting Precedents: A Comparative Study* 158 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹²⁸ See *Interpreting Precedents: A Comparative Study* 158 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹²⁹ See *Interpreting Precedents: A Comparative Study* 165 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

It also commonly believed that precedents can be effectively used to compensate for deficiencies, such as omissions and ambiguities, in codified law.¹³⁰ In addition, by fulfilling this purpose, precedents promote the gradual growth of the law in response to changing societal needs.¹³¹

E. Precedent in Common Law Countries

1. Australia

The Australian legal system is based on the common law tradition.¹³² Court decisions, therefore, are the primary source of law. Statutory law, however, plays an increasingly important role.¹³³ Although courts at all levels of the legal hierarchy expound the law, technically only the High Court can make law.¹³⁴

¹³⁰ See *Interpreting Precedents: A Comparative Study* 166-167 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹³¹ See *Interpreting Precedents: A Comparative Study* 166-167 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 13]

¹³² See *2 Modern Legal Systems Cyclopedia* 2.20.21 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

¹³³ See *2 Modern Legal Systems Cyclopedia* 2.20.21 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

¹³⁴ See *2 Modern Legal Systems Cyclopedia* 2.20.24 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

The doctrine of *stare decisis* is strictly applied in order to ensure stability and consistency in the legal system.¹³⁵ Under this doctrine, a court must adhere to prior decisions of those courts above it in the judicial hierarchy.¹³⁶ Thus, such decisions are legally binding precedent.¹³⁷

Stare decisis, however, does not require courts to adhere to their own previous decisions.¹³⁸ It also does not require courts to follow the decisions of other courts at the same level or below them in the judicial hierarchy.¹³⁹ In addition, courts are not required to follow decisions by courts in another branch of the legal system.¹⁴⁰ Although

¹³⁵ See *2 Modern Legal Systems Cyclopedia* 2.20.24 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

¹³⁶ See *2 Modern Legal Systems Cyclopedia* 2.20.24 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

¹³⁷ See *2 Modern Legal Systems Cyclopedia* 2.20.24 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

¹³⁸ See *2 Modern Legal Systems Cyclopedia* 2.20.24 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

¹³⁹ See *2 Modern Legal Systems Cyclopedia* 2.20.24 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

¹⁴⁰ See *2 Modern Legal Systems Cyclopedia* 2.20.24 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

such decisions are not binding precedent, they may serve as persuasive authority. As such, a court can use these decisions to guide its actions.

The Australian legal system has a number of judicial tools that are used to alter binding precedent or avoid its application.¹⁴¹ A court may overrule a prior decision and thus change the law.¹⁴² Or, a court may distinguish the case at hand from a prior decision. As a result, the law of the prior case is not applicable to the instant case.

¹⁴¹ See 2 *Modern Legal Systems Cyclopedia* 2.20.24 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

¹⁴² See 1 *Modern Legal Systems Cyclopedia* 1.20.13 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 19]

2. Canada

The Canadian legal system is based on both the common and civil law traditions.¹⁴³ All of Canada, except Quebec, is rooted in the common law tradition.¹⁴⁴ Because court decisions are a source of law, binding precedent is inherent in the legal system.

Under the doctrine of *stare decisis*, a court is bound by the decisions of those courts above it in the judicial hierarchy of that jurisdiction.¹⁴⁵ Technically, however, the court is only bound by the *ratio decidendi* in superior court opinions.¹⁴⁶ Decisions by lower courts or by courts in another jurisdiction are not binding precedent.¹⁴⁷ However, they may be used as persuasive authority.¹⁴⁸

¹⁴³ See 2 *Modern Legal Systems Cyclopedia* 1.20.13 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 22]

¹⁴⁴ See 2 *Modern Legal Systems Cyclopedia* 1.20.13 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 22]

¹⁴⁵ See Laurence M. Olivo, *Introduction to Law in Canada* 21 (1997). [Reproduced in the accompanying notebook at tab 17]

¹⁴⁶ Neil Boyd, *Canadian Law: An Introduction* 52 (1998). [Reproduced in the accompanying notebook at tab 24]

¹⁴⁷ See Laurence M. Olivo, *Introduction to Law in Canada* 21 (1997). [Reproduced in the accompanying notebook at tab 17]

¹⁴⁸ See Laurence M. Olivo, *Introduction to Law in Canada* 21 (1997). [Reproduced in the accompanying notebook at tab 17]

3. New Zealand

The legal system of New Zealand is founded on the common law tradition.¹⁴⁹ Although much of the common law has been codified, the courts have continued to develop the law through their decisions.¹⁵⁰

Precedent is defined as "reference to a prior decision as a basis for deciding a case today."¹⁵¹ Court decisions may serve as either binding or persuasive precedent. The New Zealand legal system adheres to the common law doctrine of *stare decisis*. Under this doctrine, "courts must follow decisions of higher courts in the judicial hierarchy."¹⁵² Although heavily disputed, courts are not required to adhere to their own prior decisions.¹⁵³ Thus, their prior

¹⁴⁹ See 2 *Modern Legal Systems Cyclopedia* 2.150.18 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 20]

¹⁵⁰ See 2 *Modern Legal Systems Cyclopedia* 2.150.19 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 20]

¹⁵¹ Daniel Laster, *Unreported Judgments and Principles of Precedent in New Zealand*, 6 Otago L. Rev. 563, 564 (1988). [Reproduced in the accompanying notebook at tab 26]

¹⁵² Daniel Laster, *Unreported Judgments and Principles of Precedent in New Zealand*, 6 Otago L. Rev. 563, 567 (1988). [Reproduced in the accompanying notebook at tab 26]

¹⁵³ See Daniel Laster, *Unreported Judgments and Principles of Precedent in New Zealand*, 6 Otago L. Rev. 563, 566, 568-570 (1988); *Stare Decisis in the Court of Appeal*, 1980 New Zealand L.J. 380-386; P.J. Downey, *Certainty and Stare*

decisions, as well as decisions of lower courts, serve only as persuasive authority.

4. United Kingdom

As a common law jurisdiction, precedent is inherent in the English legal system.¹⁵⁴ The law is contained in judicial opinions; therefore, adherence to the law automatically fosters binding precedent. Under the English doctrine of *stare decisis*, courts are bound by the decisions of those courts above them in the judicial hierarchy.¹⁵⁵

Decisis, 1986 New Zealand L.J. 137-139. [Reproduced in the accompanying notebook at tab 26]

New Zealand courts also are required to adhere to decisions of the Privy Council, the English House of Lords, and decisions of the English Court of Appeals that "represent the settled law of England." 2 *Modern Legal Systems Encyclopedia* 2.150.19 (Kenneth Robert Redden, ed. 1994). In addition, decisions from courts in Canada, Australia and the United States also may be used as precedent, however, they can only serve as persuasive authority. See 2 *Modern Legal Systems Encyclopedia* 2.150.19 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 20]

¹⁵⁴ This is a theoretical distinction not reflected in historical practice. In reality, the concept of binding precedent was not adopted until the early nineteenth century. See J.H. Baker, *An Introduction to English Legal History* 227-228 (1990). [Reproduced in the accompanying notebook at tab 14]

¹⁵⁵ See Rupert Cross, *Precedent in English Law* 6 (1977). [Reproduced in the accompanying notebook at tab 25]

A court, however, is not bound by its own decisions. Courts also are not bound by decisions of those courts on the same level or a lower level of the judicial hierarchy.¹⁵⁶ Courts, however, may use such opinions as persuasive authority.¹⁵⁷ The English doctrine of *stare decisis* does not make a distinction between *rationes decidendi* and *obiter dicta*.¹⁵⁸

5. United States

The American legal system is based upon the common law tradition.¹⁵⁹ Judicial opinions, therefore, are historically the foundation of the law. Although the law continues to grow through court decisions, reliance on statutory law has increased over time. The shift to law-making via statutes

¹⁵⁶ See J.H. Baker, *An Introduction to English Legal History* 229 (1990). [Reproduced in the accompanying notebook at tab 14]

¹⁵⁷ See Rupert Cross, *Precedent in English Law* 10 (1977). [Reproduced in the accompanying notebook at tab 25]

¹⁵⁸ See Rupert Cross, *Precedent in English Law* 8 (1977). [Reproduced in the accompanying notebook at tab 25]

¹⁵⁹ See *Fundamentals of American Law* 9 (Alan B. Morrison, ed. 1996). [Reproduced in the accompanying notebook at tab 7] Although this is the general rule, there is one exception. The law of Louisiana is based on the civil law tradition. See 1 *Modern Legal Systems Cyclopedia* 1.130.11 (Kenneth Robert Redden, ed. 1994) [Reproduced in the accompanying notebook at tab 21]

was necessitated by rapid changes in society. The common law method of creating the law could not produce law quickly enough to keep up with social, economic and technological changes.¹⁶⁰ Moreover, these changes required a more systematic approach to structuring the law.¹⁶¹ Although legislative law-making overshadows case law, precedent and the doctrine of *stare decisis* remain dominant forces within the legal system.¹⁶²

Under the doctrine of *stare decisis*, American courts are required to follow decisions of those courts above them in the judicial hierarchy that are within the same jurisdiction.¹⁶³ Courts are not required to follow their own decisions.¹⁶⁴ In addition, they are not obligated to adhere to decisions of other courts on the same level or

¹⁶⁰ See *Fundamentals of American Law* 14-15 (Alan B. Morrison, ed. 1996). [Reproduced in the accompanying notebook at tab 7]

¹⁶¹ See *Fundamentals of American Law* 14-15 (Alan B. Morrison, ed. 1996). [Reproduced in the accompanying notebook at tab 7]

¹⁶² See 1 *Modern Legal Systems Cyclopedia* 1.130.12 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 21]

¹⁶³ See 1 *Modern Legal Systems Cyclopedia* 1.130.12 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 21]

¹⁶⁴ See 1 *Modern Legal Systems Cyclopedia* 1.130.12 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 21]

below them in the hierarchy.¹⁶⁵ Opinions that a court is not required to follow, however, can be used as persuasive authority.

The force of judicial precedent is also determined by the nature of an opinion. Only majority opinions are binding.¹⁶⁶ Plurality and dissenting opinions are not binding precedent; they can only serve as persuasive authority.¹⁶⁷ In addition, only the *ratio decidendi*, the legal principle on which a judgment is based, has binding precedential value.¹⁶⁸ *Dictum* has merely persuasive authority.¹⁶⁹

¹⁶⁵ See 1 *Modern Legal Systems Cyclopedia* 1.130.12 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 21]

¹⁶⁶ See 1 *Modern Legal Systems Cyclopedia* 1.130.12 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 21]

¹⁶⁷ See 1 *Modern Legal Systems Cyclopedia* 1.130.12 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 21]

¹⁶⁸ See 1 *Modern Legal Systems Cyclopedia* 1.130.12 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 21]

¹⁶⁹ See 1 *Modern Legal Systems Cyclopedia* 1.130.12 (Kenneth Robert Redden, ed. 1994). [Reproduced in the accompanying notebook at tab 21]

F. Rationale For Proposed System of Precedent

1. Decisions Of The ICTR/ICTY Appeals Chamber Should Serve As Binding Precedent For The Trial Chambers

There are two basic rules that are applied in both civil and common law systems. The first is that appellate decisions "affirm and shape the law for future cases."¹⁷⁰ The second is "precedential hierarchy depends upon appellate hierarchy."¹⁷¹ Thus, a court's authority is based upon its location within the hierarchy. Courts at the highest level have the most authority, whereas courts on the lowest level have the least.¹⁷²

As a result of these two rules, courts are only bound by the decisions of those courts above them in the judicial hierarchy.¹⁷³ Both civil and common law system adhere to

¹⁷⁰ Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* 188 (1985). [Reproduced in the accompanying notebook at tab 16]

¹⁷¹ Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* 197 (1985). [Reproduced in the accompanying notebook at tab 16] See also *Interpreting Precedents: A Comparative Study* 437 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

¹⁷² See *Interpreting Precedents: A Comparative Study* 438 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

¹⁷³ See *Interpreting Precedents: A Comparative Study* 438 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

these rules in order to promote the consistent, uniform and efficient application of the law- the same goals mandated by the Tribunal's legislative history. Thus, the decisions of the ICTR/ICTY Appeals Chamber should serve as binding precedent for the Trial Chambers.

To ensure the effective application of the law, two conditions must be met for a precedent to be binding upon a subsequent case. First, Appeals Chamber decisions should be binding upon the ICTR Trial Chambers only when the facts and issues of law are substantially identical, a condition imposed by both civil and common law systems. Second, the Trial Chambers should be bound only by the *ratio decidendi* in majority opinions of the Appeals Chambers. Plurality and dissenting opinions, as well as dicta, should only be used as persuasive authority by the Trial Chambers.

In the absence of substantial similarity on the law and facts, the Trial Chambers should use prior Appeals Chamber decisions as persuasive authority. The use of Appeals Chamber decisions as persuasive authority will improve the efficiency of the Trial Chambers by enabling the Trial Chambers to build on existing arguments rather than

Although both civil and common law systems adhere to this rule, adherence is usually *de jure* in common law systems and *de facto* in civil law systems.

requiring them to construct original arguments. In addition, it will encourage the Trial Chambers to extrapolate from prior Appeals Chamber decisions thereby promoting the gradual and uniform growth of the law.

Thus, a rule that Appeals Chamber decisions are binding on the Trial Chambers will help the ICTR achieve three of its legislative objectives: the consistent, uniform and efficient application of the law. In addition, it will promote the uniform and gradual growth of the law. Moreover, the adoption of such a rule is consistent with current practice in both civil and common law systems.

2. Decisions Of The Appeals Chamber Should Serve As Persuasive Precedent For Subsequent Decisions Of The Appeals Chambers

In virtually all civil and common law countries, the highest courts are not required to adhere to their prior decisions. Therefore, such decisions technically do not serve as binding precedents. Although courts are not formally bound by their prior decisions, they generally do adhere to them.¹⁷⁴

¹⁷⁴ See *Interpreting Precedents: A Comparative Study* 439 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

Departures from precedents are generally discouraged because they threaten the consistency, uniformity and stability of the law. Courts, however, have developed a number of techniques that enable them to avoid or minimize the disruptive effects of departures from precedents.¹⁷⁵ A court can:

- (1) ignore the existence of a relevant precedent, thereby undermining the precedential force of that decision;
- (2) hold a precedent inapplicable due to "distinguishing" facts, thereby preserving the precedent but avoiding its application;
- (3) "clarify" a precedent in such a manner that its application is severely restricted, thereby negating future application of the precedent;
- (4) "overrule" a precedent, thereby overtly changing the law.¹⁷⁶

These practices enable a court to balance a legal system's need for consistency, uniformity and stability with its need for growth and change while minimizing the disruption caused by departures from precedents.

In both civil and common law systems, "overruling" is generally reserved for instances in which the injustice resulting from the application of a precedent outweighs the

¹⁷⁵ See *Interpreting Precedents: A Comparative Study* 519-530 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

¹⁷⁶ See *Interpreting Precedents: A Comparative Study* 519-530 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

value of certainty and stability achieved by adherence to the precedent."¹⁷⁷ Thus, a court should weigh a number of factors when it considers whether to overrule a prior decision. It should assess (1) the need for stability within the legal order; (2) existing reliance upon the precedent; (3) effect on the dignity and repute of the judiciary; (4) effect on the efficiency of the legal system and (5) effect on equality of treatment.¹⁷⁸

Based upon the above considerations, Appeals Chamber decisions should serve as persuasive precedent in subsequent cases in order to enable the law to grow to meet new circumstances, values and expectations. However, to safeguard the consistent and uniform application of the law, the Appeals Chamber should normally adhere to its prior decisions. To determine whether it should depart from a precedent, the Appeals Chamber should weigh the need for "certainty, stability and freedom from caprice" against the

¹⁷⁷ Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* 177 (1985). [Reproduced in the accompanying notebook at tab 16]

Although the term, "overrule," is used, this is a common law term generally not recognized in civil systems. Civil systems follow this practice, but they do not use this term.

¹⁷⁸ Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* 189 (1985). [Reproduced in the accompanying notebook at tab 16]

need for "flexibility, initiative and creativeness ... in [the] face of new social needs." ¹⁷⁹

2. Trial Chamber Decisions Should Serve Only As Persuasive Precedent In Subsequent Cases In The Same Trial Chamber.

In both civil and common law systems, trial court decisions are generally not considered precedents. Thus, they technically have neither binding, nor persuasive, force. In practice, however, trial courts tend to adhere to their prior decisions.¹⁸⁰ This unofficial practice is commonly attributed to the value placed on consistency and uniformity by legal systems, as well as human nature.¹⁸¹

¹⁷⁹ Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* 103 (1985). [Reproduced in the accompanying notebook at tab 16]

Stone has suggested that a court consider the following factors when assessing the injustice resulting from the application of a precedent: "(1) the width of the ratio attributed; (2) the frequency of incidence of cases caught by it; (3) the degree of advance reliance on it by the citizenry, or by lawyers in advance counseling of their clients ...; (4) the nature of the human interests put at risk by following the precedent." *Id.* at 184. [Reproduced in the accompanying notebook at tab 16]

¹⁸⁰ See *Interpreting Precedents: A Comparative Study* 439 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

¹⁸¹ See *Interpreting Precedents: A Comparative Study* 439 (D. Neil MacCormick & Robert S. Summers, eds. 1997). [Reproduced in the accompanying notebook at tab 9]

The ICTR's adherence to this general rule would ensure that the Tribunal's practices were consistent with both civil and common law systems. In addition, this rule would enable the Trial Chambers to balance the need for growth and change, with that for consistency and stability. By allowing the Chambers to diverge from past decisions, it would allow for the development of the law by encouraging new approaches to legal issues. However, by requiring the Chambers to consider prior decisions, it would improve the efficiency of these Chambers by enabling them to build on existing arguments rather than requiring them to construct original arguments. In addition, this rule would also encourage the Trial Chambers to extrapolate from prior decisions thereby promoting the consistent application and gradual growth of the law.

3. Trial Chamber Decisions Should Serve As Persuasive Precedent For Subsequent Cases In Other Trial Chambers.

In both civil and common law systems, the decisions of those courts located on the same or a lower level of the judicial hierarchy generally are considered persuasive

precedents. Therefore, they only can be used for support and illustration.¹⁸²

The adoption of this rule would ensure consistency between the Tribunal and external states. In addition, this rule would promote growth in the law because it would allow the articulation and development of opposing views among the Trial Chambers.

The allowance of divergent views among these Chambers would help improve the quality of the law. If the Trial Chambers develop opposing views, legal arguments are likely to be more complete and carefully crafted. Thus, when conflicts in the decisions of the Trial Chambers are brought to the Appeals Chambers, legal rationales are likely to be more fully developed.

¹⁸² See *Interpreting Precedents: A Comparative Study* 439 (D. Neil MacCormick & Robert S. Summers, eds. 1997).
[Reproduced in the accompanying notebook at tab 9]