

IN THE MATTER OF THE CHARGES OF PLAGIARISM, ETC., AGAINST ASSOCIATE JUSTICE MARIANO C. DEL CASTILLO.

A.M. No. 10-7-17-SC. February 08, 2011

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PER CURIAM:

Petitioners Isabelita C. Vinuya, et al., all members of the Malaya Lolas Organization, seek reconsideration of the decision of the Court dated October 12, 2010 that dismissed their charges of plagiarism, twisting of cited materials, and gross neglect against Justice Mariano Del Castillo in connection with the decision he wrote for the Court in G.R. No. 162230, entitled *Vinuya v. Romulo*.^[1]

Mainly, petitioners claim that the Court has by its decision legalized or approved of the commission of plagiarism in the Philippines. This claim is absurd. The Court, like everyone else, condemns plagiarism as the world in general understands and uses the term.

Plagiarism, a term not defined by statute, has a popular or common definition. To plagiarize, says Webster, is "to steal and pass off as one's own" the ideas or words of another. Stealing implies malicious taking. Black's Law Dictionary, the world's leading English law dictionary quoted by the Court in its decision, defines plagiarism as the "deliberate and knowing presentation of another person's original ideas or creative expressions as one's own."^[2] The presentation of another person's ideas as one's own must be deliberate or premeditated—a taking with ill intent.

There is no commonly-used dictionary in the world that embraces in the meaning of plagiarism errors in attribution by mere accident or in good faith.

Certain educational institutions of course assume different norms in its application. For instance, the Loyola Schools Code of Academic Integrity ordains that "plagiarism is identified not through intent but through the act itself. The objective act of falsely attributing to one's self what is not one's work, whether intentional or out of neglect, is sufficient to conclude that plagiarism has occurred. Students who plead ignorance or appeal to lack of malice are not excused."^[3]

But the Court's decision in the present case does not set aside such norm. The decision makes this clear, thus:

To paraphrase Bast and Samuels, while the academic publishing model is based on the originality of the writer's thesis, the judicial system is based on the doctrine of *stare decisis*, which encourages courts to cite historical legal data, precedents, and related studies in their decisions. The judge is not expected to produce original scholarship in every respect. The strength of a decision lies in the soundness and general acceptance of the precedents and long held legal opinions it draws from.^[4]

Original scholarship is highly valued in the academe and rightly so. A college thesis, for instance, should contain dissertations embodying results of original research, substantiating a specific view.^[5] This must be so since the writing is intended to earn for the student an academic degree, honor, or distinction. He earns no credit nor deserves it who takes the research of others, copies their dissertations, and proclaims these as his own. There

should be no question that a cheat deserves neither reward nor sympathy.

But the policy adopted by schools of disregarding the element of malicious intent found in dictionaries is evidently more in the nature of establishing what evidence is sufficient to prove the commission of such dishonest conduct than in rewriting the meaning of plagiarism. Since it would be easy enough for a student to plead ignorance or lack of malice even as he has copied the work of others, certain schools have adopted the policy of treating the mere presence of such copied work in his paper sufficient objective evidence of plagiarism. Surely, however, if on its face the student's work shows as a whole that he has but committed an obvious mistake or a clerical error in one of hundreds of citations in his thesis, the school will not be so unreasonable as to cancel his diploma.

In contrast, decisions of courts are not written to earn merit, accolade, or prize as an original piece of work or art. Deciding disputes is a service rendered by the government for the public good. Judges issue decisions to resolve everyday conflicts involving people of flesh and blood who ache for speedy justice or juridical beings which have rights and obligations in law that need to be protected. The interest of society in written decisions is not that they are originally crafted but that they are fair and correct in the context of the particular disputes involved. Justice, not originality, form, and style, is the object of every decision of a court of law.

There is a basic reason for individual judges of whatever level of courts, including the Supreme Court, not to use original or unique language when reinstating the laws involved in the cases they decide. Their duty is to apply the laws as these are written. But laws include, under the doctrine of stare decisis, judicial interpretations of such laws as are applied to specific situations. Under this doctrine, Courts are "to stand by precedent and not to disturb settled point." Once the Court has "laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties or property are the same." [6]

And because judicial precedents are not always clearly delineated, they are quite often entangled in apparent inconsistencies or even in contradictions, prompting experts in the law to build up regarding such matters a large body of commentaries or annotations that, in themselves, often become part of legal writings upon which lawyers and judges draw materials for their theories or solutions in particular cases. And, because of the need to be precise and correct, judges and practitioners alike, by practice and tradition, usually lift passages from such precedents and writings, at times omitting, without malicious intent, attributions to the originators.

Is this dishonest? No. Duncan Webb, writing for the International Bar Association puts it succinctly. When practicing lawyers (which include judges) write about the law, they effectively place their ideas, their language, and their work in the public domain, to be affirmed, adopted, criticized, or rejected. Being in the public domain, other lawyers can thus freely use these without fear of committing some wrong or incurring some liability. Thus:

The tendency to copy in law is readily explicable. In law accuracy of words is everything. Legal disputes often centre round the way in which obligations have been expressed in legal documents and how the facts of the real world fit the meaning of the words in which the obligation is contained. This, in conjunction with the risk-aversion of lawyers means that refuge will often be sought in articulations that have been tried and tested. In a sense therefore the community of lawyers have together contributed to this body of knowledge, language, and expression which is common property and may be utilized, developed and bettered by anyone. [7]

The implicit right of judges to use legal materials regarded as belonging to the public domain is not unique to the Philippines. As Joyce C. George, whom Justice Maria Lourdes Sereno cites in her dissenting opinion, observed in her Judicial Opinion Writing Handbook:

A judge writing to resolve a dispute, whether trial or appellate, is exempted from a charge of plagiarism even if

ideas, words or phrases from a law review article, novel thoughts published in a legal periodical or language from a party's brief are used without giving attribution. Thus judges are free to use whatever sources they deem appropriate to resolve the matter before them, without fear of reprisal. This exemption applies to judicial writings intended to decide cases for two reasons: the judge is not writing a literary work and, more importantly, the purpose of the writing is to resolve a dispute. As a result, judges adjudicating cases are not subject to a claim of legal plagiarism.[8]

If the Court were to inquire into the issue of plagiarism respecting its past decisions from the time of Chief Justice Cayetano S. Arellano to the present, it is likely to discover that it has not on occasion acknowledged the originators of passages and views found in its decisions. These omissions are true for many of the decisions that have been penned and are being penned daily by magistrates from the Court of Appeals, the Sandiganbayan, the Court of Tax Appeals, the Regional Trial Courts nationwide and with them, the municipal trial courts and other first level courts. Never in the judiciary's more than 100 years of history has the lack of attribution been regarded and demeaned as plagiarism.

This is not to say that the magistrates of our courts are mere copycats. They are not. Their decisions analyze the often conflicting facts of each case and sort out the relevant from the irrelevant. They identify and formulate the issue or issues that need to be resolved and evaluate each of the laws, rulings, principles, or authorities that the parties to the case invoke. The decisions then draw their apt conclusions regarding whether or not such laws, rulings, principles, or authorities apply to the particular cases before the Court. These efforts, reduced in writing, are the product of the judges' creativity. It is here--actually the substance of their decisions--that their genius, originality, and honest labor can be found, of which they should be proud.

In *Vinuya*, Justice Del Castillo examined and summarized the facts as seen by the opposing sides in a way that no one has ever done. He identified and formulated the core of the issues that the parties raised. And when he had done this, he discussed the state of the law relevant to their resolution. It was here that he drew materials from various sources, including the three foreign authors cited in the charges against him. He compared the divergent views these present as they developed in history. He then explained why the Court must reject some views in light of the peculiar facts of the case and applied those that suit such facts. Finally, he drew from his discussions of the facts and the law the right solution to the dispute in the case. On the whole, his work was original. He had but done an honest work.

The Court will not, therefore, consistent with established practice in the Philippines and elsewhere, dare permit the filing of actions to annul the decisions promulgated by its judges or expose them to charges of plagiarism for honest work done.

This rule should apply to practicing lawyers as well. Counsels for the petitioners, like all lawyers handling cases before courts and administrative tribunals, cannot object to this. Although as a rule they receive compensation for every pleading or paper they file in court or for every opinion they render to clients, lawyers also need to strive for technical accuracy in their writings. They should not be exposed to charges of plagiarism in what they write so long as they do not depart, as officers of the court, from the objective of assisting the Court in the administration of justice.

As Duncan Webb said:

In presenting legal argument most lawyers will have recourse to either previous decisions of the courts, frequently lifting whole sections of a judge's words to lend weight to a particular point either with or without attribution. The words of scholars are also sometimes given weight, depending on reputation. Some encyclopaedic works are given particular authority. In England this place is given to Halsbury's Laws of England which is widely considered authoritative. A lawyer can do little better than to frame an argument or

claim to fit with the articulation of the law in Halsbury's. While in many cases the very purpose of the citation is to claim the authority of the author, this is not always the case. Frequently commentary or dicta of lesser standing will be adopted by legal authors, largely without attribution.

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The converse point is that originality in the law is viewed with skepticism. It is only the arrogant fool or the truly gifted who will depart entirely from the established template and reformulate an existing idea in the belief that in doing so they will improve it. While over time incremental changes occur, the wholesale abandonment of established expression is generally considered foolhardy.[9]

The Court probably should not have entertained at all the charges of plagiarism against Justice Del Castillo, coming from the losing party. But it is a case of first impression and petitioners, joined by some faculty members of the University of the Philippines school of law, have unfairly maligned him with the charges of plagiarism, twisting of cited materials, and gross neglect for failing to attribute lifted passages from three foreign authors. These charges as already stated are false, applying the meaning of plagiarism as the world in general knows it.

True, Justice Del Castillo failed to attribute to the foreign authors materials that he lifted from their works and used in writing the decision for the Court in the Vinuya case. But, as the Court said, the evidence as found by its Ethics Committee shows that the attribution to these authors appeared in the beginning drafts of the decision. Unfortunately, as testified to by a highly qualified and experienced court-employed researcher, she accidentally deleted the same at the time she was cleaning up the final draft. The Court believed her since, among other reasons, she had no motive for omitting the attribution. The foreign authors concerned, like the dozens of other sources she cited in her research, had high reputations in international law.

Notably, those foreign authors expressly attributed the controversial passages found in their works to earlier writings by others. The authors concerned were not themselves the originators. As it happened, although the ponencia of Justice Del Castillo accidentally deleted the attribution to them, there remained in the final draft of the decision attributions of the same passages to the earlier writings from which those authors borrowed their ideas in the first place. In short, with the remaining attributions after the erroneous clean-up, the passages as it finally appeared in the Vinuya decision still showed on their face that the lifted ideas did not belong to Justice Del Castillo but to others. He did not pass them off as his own.

With our ruling, the Court need not dwell long on petitioners' allegations that Justice Del Castillo had also committed plagiarism in writing for the Court his decision in another case, *Ang Ladlad v. Commission on Elections*.^[10] Petitioners are nit-picking. Upon close examination and as Justice Del Castillo amply demonstrated in his comment to the motion for reconsideration, he in fact made attributions to passages in such decision that he borrowed from his sources although they at times suffered in formatting lapses.

Considering its above ruling, the Court sees no point in further passing upon the motion of the Integrated Bar of the Philippines for leave to file and admit motion for reconsideration-in-intervention dated January 5, 2011 and Dr. Peter Payoyo's claim of other instances of alleged plagiarism in the Vinuya decision.

ACCORDINGLY, the Court DENIES petitioners' motion for reconsideration for lack of merit.

SO ORDERED.

Corona, C.J., Velasco, Jr., Nachura, and Villarama, Jr., JJ., concur.

Carpio, J., see dissenting opinion.

Carpio Morales, J., please see separate opinion.

Leonardo-De Castro, J., I concur and also join the separate opinion of J. Brion and J. Abad.

Brion, J., see: separate opinion.

Peralta, J., I join the opinion of J. Brion.

Bersamin, J. I also join the Separate concurring opinion of J. Brion.

Del Castillo, J., no part.

Abad, J., with a separate concurring opinion.

Perez, J., I concur and join the separate opinion of J. Brion and J. Abad.

Mendoza, J., I also join the separate concurring opinion of J. Brion.

Sereno, J., please see dissenting opinion.

[1] April 28, 2010.

[2] Black's Law Dictionary (8th Edition, 2004).

[3] Available at <http://www.admu.edu.ph/index.php?p=120&type=2&sec=25&aid=9149>.

[4] In the Matter of the Charges of Plagiarism, etc., Against Associate Justice Mariano C. Del Castillo, A.M. No. 10-7-17-SC, October 12, 2010.

[5] Webster's Third New International Dictionary, p. 2374.

[6] Black's Law Dictionary (6th Edition, 1990), p. 1406.

[7] Duncan Webb, Plagiarism: A Threat to Lawyers' Integrity? Published by the International Bar Association, available [online at](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bc2ef7cd-3207-43d6-9e87-16c3bc2be595) <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bc2ef7cd-3207-43d6-9e87-16c3bc2be595>.

[8] Joyce C. George, Judicial Opinion Writing Handbook (2007), p. 725, cited by Justice Maria Lourdes Sereno in her dissenting opinion.

[9] Supra note 7.

[10] G.R. No. 190582, April 8, 2010.

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DISSENTING OPINION

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CARPIO, J.:

I dissent on two grounds. First, this Court has no jurisdiction to decide in an administrative case whether a sitting Justice of this Court has committed misconduct in office as this power belongs exclusively to Congress. Second, in writing judicial decisions a judge must comply with the Law on Copyright^[1] as the judge has no power to exempt himself from the mandatory requirements of the law.

I. Disciplining Authority of Impeachable Officers

Under the Constitution, the sole disciplining authority of all impeachable officers, including Justices of this Court, is Congress. Section 3(1), Article XI of the Constitution provides that, "The House of Representatives shall have

the exclusive power to initiate all cases of impeachment." Likewise, Section 3(6) of the same Article provides that, "The Senate shall have the sole power to try and decide cases of impeachment." These provisions constitute Congress as the exclusive authority to discipline all impeachable officers for any impeachable offense, including "betrayal of public trust," a "catchall phrase"[2] to cover any misconduct involving breach of public trust by an impeachable officer.

While impeachment is often described as a political process, it also functions as the equivalent of administrative disciplinary proceedings against impeachable officers. Impeachable officers are not subject to administrative disciplinary proceedings either by the Executive or Judicial branch, in the same manner that non-impeachable officers are subject. Thus, impeachment by Congress takes the place of administrative disciplinary proceedings against impeachable officers as there is no other authority that can administratively discipline impeachable officers.[3] Removal from office and disqualification to hold public office,[4] which is the penalty for an impeachable offense,[5] is also the most severe penalty that can be imposed in administrative disciplinary proceedings.

Impeachment is not a criminal proceeding because conviction in an impeachment complaint is not a bar to criminal prosecution for the same act.[6] An impeachable offense, like betrayal of public trust, may not even constitute a criminal act. Like in an administrative proceeding, proof beyond reasonable doubt is not required for conviction in impeachment. If an impeachable officer is charged of a crime, as distinguished from an administrative charge, the proper court has jurisdiction to try such impeachable officer because the proceeding is criminal, not administrative. However, neither the conviction nor acquittal of such impeachable officer in the criminal case constitutes a bar to his subsequent impeachment by Congress. There is no double jeopardy because impeachment is not a criminal proceeding.[7]

Only Congress, as the exclusive disciplining authority of all impeachable officers, can decide in a non-criminal, non-civil proceeding[8] whether a sitting Justice of this Court has committed plagiarism. Plagiarism is a betrayal of public trust because, as the majority puts it, to plagiarize is "'to steal and pass off as one's own' the ideas of another." [9] However, in writing judicial decisions a judge is liable for plagiarism only if the copying violates the moral rights of the author under the Law on Copyright.

This Court may conduct an investigation of an administrative complaint against a sitting Justice to determine if there is basis in recommending to the House of Representatives the initiation of an impeachment complaint against the sitting Justice. This Court may also conduct an investigation of an administrative complaint against a sitting Justice to determine if the complaint constitutes contempt of this Court. However, this Court has no power to decide on the guilt or innocence of a sitting Justice in the administrative complaint because such act is a usurpation of the exclusive disciplinary power of Congress over impeachable officers under the Constitution. Any decision by this Court in an administrative case clearing a sitting Justice of an impeachable offense is void for want of jurisdiction and for violation of an express provision of the Constitution.

Such a decision will put this Court on a collision course with Congress if subsequently an impeachment complaint for plagiarism is filed with Congress against the sitting Justice. Incidentally, an impeachment complaint has already been filed in the House of Representatives involving the same complaint subject of this administrative case. If the House of Representatives decides to take cognizance of the complaint and initiates an impeachment based on the same administrative complaint that this Court had already dismissed as baseless, then this Court would have created a constitutional crisis that could only weaken the public's faith in the primacy of the Constitution.

The Supreme Court cannot assume jurisdiction over an administrative complaint against a sitting Justice of this

Court by invoking Section 6, Article VIII of the Constitution. This provision states that the "Supreme Court shall have administrative supervision over all courts and the personnel thereof." This provision refers to the administrative supervision that the Department of Justice used to exercise over the courts and their personnel, as shown by the following exchange during the deliberations of the Constitutional Commission:

MR. GUINGONA: xxx.

The second question has reference to Section 9, about the administrative supervision over all courts to be retained in the Supreme Court. I was wondering if the Committee had taken into consideration the proposed resolution for the transfer of the administrative supervision from the Supreme Court to the Ministry of Justice. But as far as I know, none of the proponents had been invited to explain or defend the proposed resolution.

Also, I wonder if the Committee also took into consideration the fact that the UP Law Constitution Project in its Volume I, entitled: Annotated Provision had, in fact, made this an alternative proposal, the transfer of administrative supervision from the Supreme Court to the Ministry of Justice.

Thank you.

MR. CONCEPCION: May I refer the question to Commissioner Regalado?

THE PRESIDING OFFICER (Mr. Sarmiento): Commissioner Regalado is recognized.

MR. REGALADO: Thank you, Mr. Presiding Officer.

We did invite Minister Neptali Gonzales, who was the proponent for the transfer of supervision of the lower courts to the Ministry of Justice. I even personally called up and sent a letter or a short note inviting him, but the good Minister unfortunately was enmeshed in a lot of official commitments. We wanted to hear him because the Solicitor General of his office, Sedfrey Ordoñez, appeared before us, and asked for the maintenance of the present arrangement wherein the supervision over lower courts is with the Supreme Court. But aside from that, although there were no resource persons, we did further studies on the feasibility of transferring the supervision over the lower courts to the Ministry of Justice. All those things were taken into consideration *motu proprio*.^[10]

For sure, the disciplinary authority of the Supreme Court over judges is expressly governed by another provision, that is, Section 11, Article VIII of the Constitution. Section 11 provides:

Section 11. xxx The Supreme Court en banc shall have the power to discipline judges of lower courts, or order their dismissal by a vote of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon. (Emphasis supplied)

Clearly, the disciplinary authority of the Supreme Court over judges is found in Section 11 of Article VIII. However, this disciplinary authority is expressly limited to lower court judges, and does not include Supreme Court Justices, precisely because the Constitution expressly vests exclusively on Congress the power to discipline Supreme Court Justices. By excluding Supreme Court Justices, Section 11 withholds from the Supreme Court en banc the power to discipline its own members.

The Judicial Conduct and Disability Act of 1980 of the United States, which gives judicial councils composed of federal judges the power to discipline federal judges short of removal from office, does not apply to Justices of the United States Supreme Court who are subject to discipline only by the United States Congress. Moreover, a similar law cannot be enacted in the Philippines because all lower court judges are subject to discipline by the Supreme Court en banc under Section 11, Article VIII of the Constitution. Thus, reference to the Judicial Conduct and Disability Act of 1980 is inappropriate in this jurisdiction.

I submit that this Court recall the Resolution of 12 October 2010 subject of the present motion for reconsideration for lack of jurisdiction to decide the administrative complaint against Justice Mariano C. Del Castillo.

II. The Judge Must Follow the Law on Copyright

a. Copying from Works of the Government

In writing judicial decisions, a judge should make the proper attribution in copying passages from any judicial decision, statute, regulation, or other Works of the Government. The Manual of Judicial Writing adopted^[11] by this Court provides how such attribution should be made.

However, the failure to make such attribution does not violate the Law on Copyright.^[12] The law expressly provides that Works of the Government are not subject to copyright.^[13] This means that there is neither a legal right by anyone to demand attribution, nor any legal obligation from anyone to make an attribution, when Works of the Government are copied. The failure to make the proper attribution of a Work of the Government is not actionable but is merely a case of sloppy writing. Clearly, there is no legal obligation, by a judge or by any person, to make an attribution when copying Works of the Government.

However, misquoting or twisting, with or without attribution, any judicial decision, statute, regulation or other Works of the Government in judicial writing, if done to mislead the parties or the public, is actionable. Under Canon 3 of the Code of Judicial Conduct, a judge "should perform official duties honestly."^[14] Rule 3.01^[15] and Rule 3.02^[16] of the Code provide that a judge must be faithful to the law, maintain professional competence, and strive diligently to ascertain the facts and the applicable law.

The foregoing applies to any non-copyrightable work, and any work in the public domain, whether local or foreign.

b. Copying from Pleadings of Parties

In writing judicial decisions, the judge may copy passages from the pleadings of the parties with proper attribution to the author of the pleading. However, the failure to make the proper attribution is not actionable.

Pleadings are submitted to the court precisely so that the pleas, or the arguments written on the pleadings, are accepted by the judge. There is an implied offer by the pleader that the judge may make any use of the pleadings in resolving the case. If the judge accepts the pleader's arguments, he may copy such arguments to expedite the resolution of the case. In writing his decision, the judge does not claim as his own the arguments he adopts from the pleadings of the parties. Besides, the legal arguments in the pleadings are in most cases merely reiterations of judicial precedents, which are Works of the Government.

However, misquoting or twisting, with or without attribution, any passage from the pleadings of the parties, if done to mislead the parties or the public, is actionable. Under Canon 3 of the Code of Judicial Conduct, a judge "should perform official duties honestly." Rule 3.01 and Rule 3.02 of the Code provide that a judge must be faithful to the law, maintain professional competence, and strive diligently to ascertain the facts and the applicable law.

c. Copying from Textbooks, Journals and other Non-Government Works

In writing judicial decisions, the judge may copy passages from textbooks, journals and other non-government works with proper attribution. However, whether the failure to make the proper attribution is actionable or not depends on the nature of the passages copied.

If the work copied without proper attribution is copyrighted, the failure to make such attribution violates Section

193 of the Intellectual Property Code, which provides:

Section 193. Scope of Moral Rights. The author of a work shall, independently of the economic rights in Section 177 or the grant of an assignment or license with respect to such right, have the right:

193.1. To require that the authorship of the works be attributed to him, in particular, the right that his name, as far as practicable, be indicated in a prominent way on the copies, and in connection with the public use of his work;

x x x x

193.3 To object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work which would be prejudicial to his honor or reputation;

x x x x. (Emphasis supplied)

Section 184(k) of the Intellectual Property Code expressly allows, as a limitation on the copyright or economic rights of the author, "any use made of a work for the purpose of any judicial proceedings x x x." [17] Section 184(k) clearly authorizes a judge to copy copyrighted works for "any use" in judicial proceedings, which means the judge, in writing his decision, can copy passages beyond the quantitative limitations of "fair-use" under Section 184(b). This is the significance of Section 184(k), allowing the judge to copy lengthy passages of copyrighted work even beyond what is required by fair-use. Section 184(k) is silent on the obligation of the judge to make the proper attribution, unlike Section 184(b) on fair-use by the public which expressly requires a proper attribution.

However, Section 193 nevertheless requires anyone, including a judge writing a judicial decision, to make the proper attribution to show respect for the moral rights of the author. Thus, while the author has no right to demand economic compensation from the judge or the government for the unlimited and public use of his work in a judicial decision, the law requires that "the authorship of the works be attributed to him x x x in connection with the public use of his work." In short, the judge is legally obligated to make the proper attribution because Section 193 protects the moral rights of the author.

The moral rights under Section 193 of the Intellectual Property Code arise only if the work of an author is copyrighted. If the work is not copyrighted, then there are no moral rights to the work. If the passages in a textbook, journal article, or other non-work of the government are merely quotations from Works of the Government, like sentences or paragraphs taken from judicial decisions, then such passages if copied by a judge do not require attribution because such passages, by themselves, are Works of the Government. The same is true for works in the public domain.

However, the arrangement or presentation of passages copied from Works of the Government may be subject to copyright, [18] and a judge copying such arrangement or presentation, together with the passages, may have to make the proper attribution. If the passages are those of the author himself, and not copied from Works of the Government or from works in the public domain, then clearly there is a legal obligation on the part of the judge to make the proper attribution. Failure by the judge to make such attribution violates not only Section 193 of the Intellectual Property Code, but also Canon 3 of the Code of Judicial Conduct.

The moral rights of an author are independent of the author's economic rights to his work in the sense that even if the author assigns his work, the moral rights to the work remain with him, being inalienable. [19] Any violation of an author's moral rights entitles him to the same remedies as a violation of the economic rights to the work, [20] whether such economic rights are still with him or have been assigned to another party. Thus, while called "moral rights," these rights are legally enforceable.

Two essential elements of an author's moral rights are the right to attribution and the right to integrity. The right to attribution or paternity[21] is the right of the author to be recognized as the originator or father of his work, a right expressly recognized in Section 193.1 of the Intellectual Property Code. The right to integrity is the right of the author to prevent any distortion or misrepresentation of his work, a right expressly recognized in Section 193.3 of the Code. The Legislature incorporated the moral rights of an author in the Intellectual Property Code in compliance with the treaty obligations of the Philippines under the Berne Convention, which requires treaty states to enact legislation protecting the moral rights of authors.[22]

The rationale behind moral rights is explained in a local intellectual property textbook, citing American jurisprudence:

The term moral rights has its origins in the civil law and is a translation of the French *le droit moral*, which is meant to capture those rights of a spiritual, non-economic and personal nature. The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved. Because they are personal to the artist, moral rights exist independently of an artist's copyright in his or her work. While the rubric of moral rights encompasses many varieties of rights, two are protected in nearly every jurisdiction recognizing their existence: attribution and integrity. The right of attribution generally consists of the right of an artist to be recognized by name as the author of his work or to publish anonymously or pseudonymously, the right to prevent the author's work from being attributed to someone else, and to prevent the use of the author's name on works created by others, including distorted editions of the author's original work. The right of integrity allows the author to prevent any deforming or mutilating changes to his work, even after title of the work has been transferred. In some jurisdictions, the integrity right also protects artwork from destruction. Whether or not a work of art is protected from destruction represents a fundamentally different perception of the purpose of moral rights. If integrity is meant to stress the public interest in preserving a nation's culture, destruction is prohibited; if the right is meant to emphasize the author's personality, destruction is seen as less harmful than the continued display of deformed or mutilated work that misrepresents the artist and destruction may proceed.[23] (Emphasis supplied)

When a judge respects the right to attribution and integrity of an author, then the judge observes intellectual honesty in writing his decisions. Writing decisions is the most important official duty of a judge, more so of appellate court judges. Conversely, if a judge fails to respect an author's right to attribution and integrity, then the judge fails to observe intellectual honesty in the performance of his official duties, a violation of Canon 3 of the Code of Judicial Conduct.

The duty of a judge to respect the moral rights of an author is certainly not burdensome on the performance of his official duties. All the reference materials that a judge needs in writing judicial decisions are either Works of the Government or works in the public domain. A judge must base his decision on the facts and the law,[24] and the facts and the law are all in the public domain. There is no need for a judge to refer to copyrighted works. When a judge ventures to refer to copyrighted works by copying passages from such works, he immediately knows he is treading on protected works, and should readily respect the rights of the authors of those works. The judge, whose most important function is to write judicial decisions, must be the first to respect the rights of writers whose lives and passions are dedicated to writing for the education of humankind.

Besides, Section 184(k) of the Intellectual Property Code already generously allows the judge unlimited copying of copyrighted works in writing his judicial decisions. The Code, however, does not exempt the judge from recognizing the moral rights of the author. The basic rule of human relations, as embodied in Article 19 of the Civil Code, requires that the judge should give to the author of the copyrighted work what is due him. Thus, Article 19 states: "Every person must, in the exercise of his rights and in the performance of his duties, act with

justice, give everyone his due, and observe honesty and good faith."

d. Difference from the Academe

Academic writing, such as writing dissertations or articles in academic journals, is governed by standards different from judicial decision writing. The failure to make the proper attribution for passages copied from Works of the Government is not actionable against a judge when writing a judicial decision. However, the same failure by a student or a faculty member may be deemed plagiarism in the academe, meriting a severe administrative penalty. Nevertheless, the Judiciary and the academe should have the same rule when it comes to copyrighted works. In every case, there is a legal duty to make the proper attribution when copying passages from copyrighted works because the law expressly requires such attribution without exception.

The academe requires that passages copied from Works of the Government, works in the public domain, and non-copyrighted works should be properly attributed in the same way as copyrighted works. The rationale is to separate the original work of the writer from the works of other authors in order to determine the original contribution of the writer to the development of a particular art or science. This rationale does not apply to the Judiciary, where adherence to jurisprudential precedence is the rule. However, if a judge writes an article for a law journal, he is bound by the same rules governing academic writing.[25]

ACCORDINGLY, I vote to RECALL the Resolution of 12 October 2010 subject of the present motion for reconsideration as this Court's jurisdiction extends only to a determination whether the administrative complaint against Justice Mariano C. Del Castillo constitutes contempt of this Court.

[1] Part IV, Intellectual Property Decree (Republic Act No. 8293).

[2] Volume II, Records of the Constitutional Commission, p. 272. The following exchange took place during the deliberations of the Constitutional Commission:

MR. REGALADO: Thank you, Madam President.

xxx

First, this is with respect to Section 2, on the grounds for impeachment, and I quote:

. . . culpable violation of the Constitution, treason, bribery, other high crimes, graft and corruption or betrayal of public trust.

Just for the record, what would the Committee envision as a betrayal of the public trust which is not otherwise covered by the other terms antecedent thereto?

MR. ROMULO: I think, if I may speak for the Committee and subject to further comments of Commissioner de los Reyes, the concept is that this is a catchall phrase. Really, it refers to his oath of office, in the end that the idea of a public trust is connected with the oath of office of the officer, and if he violates that oath of office, then he has betrayed that trust.

MR. REGALADO: Thank you.

MR. MONSOD: Madam President, may I ask Commissioner de los Reyes to perhaps add to those remarks.

THE PRESIDENT: Commissioner de los Reyes is recognized.

MR. DE LOS REYES: The reason I proposed this amendment is that during the Regular Batasang Pambansa when there was a move to impeach then President Marcos, there were arguments to the effect that there is no

ground for impeachment because there is no proof that President Marcos committed criminal acts which are punishable, or considered penal offenses. And so the term "betrayal of public trust," as explained by Commissioner Romulo, is a catchall phrase to include all acts which are not punishable by statutes as penal offenses but, nonetheless, render the officer unfit to continue in office. It includes betrayal of public interest, inexcusable negligence of duty, tyrannical abuse of power, breach of official duty by malfeasance or misfeasance cronyism, favoritism, etc. to the prejudice of public interest and which tend to bring the office into disrepute. That is the purpose, Madam President. Thank you.

MR. ROMULO: If I may add another example, because Commissioner Regalado asked a very good question. This concept would include, I think, obstruction of justice since in his oath he swears to do justice to every man; so if he does anything that obstructs justice, it could be construed as a betrayal of the public trust. Thank you. (Emphasis supplied)

[3] The 1993 Report of the National Commission on Judicial Discipline & Removal of the United States (http://judicial-discipline-reform.org/judicial_complaints/1993_Report Removal.pdf, pp. 17-18) concluded that impeachment is the exclusive mode of removing federal judges from office, thus:

Nevertheless, the Commission concludes that Congress may not provide for removal as a criminal penalty. If removal may lawfully follow on conviction for a federal judge, then it may do so for the Vice President of the United States or perhaps even the President. But if the constitutional grant of a term of office to the Vice President and President prevails against any provision for removal in the criminal law, the same should be true of the tenure the Constitution grants to judges. The Constitution quite explicitly separates impeachment and removal from the ordinary criminal process. The Commission does not believe that Congress's power to punish crimes is an exception to judicial life tenure, or alternatively a way in which good behavior may be inquired into, in the way that the impeachment process clearly is.

x x x x

The Commission concludes that a statute providing for the removal from office of judges who serve on good behavior under Article III by means other than impeachment and conviction would be unconstitutional. (Emphasis supplied; citations omitted)

[4] Section 3(7), Article XI of the Constitution provides: "Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, but the party convicted shall nevertheless be liable and subject to prosecution, trial, and punishment according to law."

[5] There are those who, with good reason, believe that removal from office is the maximum penalty in impeachment and thus there can be lesser penalties like censure. See Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process, 18 Yale Law & Policy Review 53 (1999).

[6] See note 4.

[7] Professor Laurence H. Tribe writes: "The independence of the process of impeachment and criminal prosecution is highlighted by the case of Judge Alcee Hastings, who was acquitted of bribery by a federal jury in 1983, but was subsequently impeached by the House and convicted by the Senate for the same offense - and for testifying falsely about it under oath at his federal criminal trial. Similarly, Judge Walter Nixon was impeached by the House and convicted by the Senate in 1989 for falsely testifying under oath before a federal grand jury investigating Judge Nixon's improper discussions with a state prosecutor in a case involving a business acquaintance's son, despite an earlier acquittal in a federal prosecution for bribery arising out of those very events. And, although this precise sequence is not addressed by Article I, Section 3, clause 7, it should also be possible for an official to be acquitted by the Senate in an impeachment trial but subsequently convicted of the same

underlying acts in a federal court. The Senate's acquittal, after all, could well represent a determination merely that the charged offenses were not impeachable, or that the nation would be harmed more than protected by pronouncing the official guilty." American Constitutional Law, Volume 1 (3[rd] edition), pp. 159-160.

[8] An author whose moral rights under the Law on Copyright are infringed by a judge in his judicial decision may file a civil case in court against such judge. See discussion on The Judge Must Follow the Law on Copyright, *infra*.

[9] Quoting Black's Law Dictionary.

[10] Volume I, Records of the Constitutional Commission, pp. 456-457.

[11] Approved by the En Banc on 15 November 2005.

[12] Part IV of RA No. 8293, otherwise known as the "Intellectual Property Code of the Philippines."

[13] Section 176 of RA No. 8293 provides: "Works of the Government. No copyright shall subsist in any work of the Government of the Philippines. xxx."

[14] Canon 3 of the Code of Judicial Conduct provides: "A judge should perform official duties honestly, and with impartiality and diligence."

[15] Rule 3.01 of the Code of Judicial Conduct provides: "A judge shall be faithful to the law and maintain professional competence."

[16] Rule 3.02 of the Code of Judicial Conduct provides: "In every case, a judge shall endeavour diligently to ascertain the facts and the applicable law, unswayed by partisan interests, public opinion or fear of criticism."

[17] Section 184 (k) of RA No. 8293 provides: "Limitations on Copyright. 184.1. Notwithstanding the provisions of Chapter V [on copyright and economic rights], the following acts shall not constitute infringement of copyright:

(a) x x x x

x x x x

(k) Any use made of a work for the purpose of any judicial proceedings or for the giving of professional advice by a legal practitioner."

[18] Section 173.1 (b), Intellectual Property Code.

[19] Section 198.1 of the Intellectual Property Code provides that the "[moral] rights of an author x x x shall not be assignable or subject to license."

[20] Section 119, Intellectual Property Code.

[21] Roger E. Schechter and John R. Thomas, Intellectual Property (2003), p. 19.

[22] Vicente B. Amador, Copyright under the Intellectual Property Code (1998), p. 570.

[23] *Id.* p. 569, citing John Carter, John Swing and John Veronis v. Helmsley-Spear, Inc. and Associates, U.S. Court of Appeals for 2[nd] Circuit, 1 December 1995.

[24] Article 8 of the Civil Code provides: "Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines."

[25] In the Matter of Hon. Thomas E. Brennan, Jr., Judge, 55[th] District, Mason, Michigan, 433 Mich. 1204, 447 N.W.2d 712 (6 November 1989) . In this case, Judge Brennan, Jr. submitted an article to a law review for publication. The article failed to acknowledge several passages copied from law journal articles of two other authors. The Michigan Judicial Tenure Commission recommended to the Supreme Court of Michigan that Judge Brennan, Jr. be publicly censured for misconduct. Interestingly, Judge Brennan, Jr. (a state judge) admitted his misconduct and made the following manifestation:

Respondent Thomas E. Brennan, Jr., of the 55th District Court, Ingham County, Michigan, acknowledges notice and receipt of the Judicial Tenure Commission's Decision and Recommendation for Order of Discipline dated September 12, 1989, and stipulates to the Judicial Tenure Commission's findings as recited in paragraphs one (1) through six (6) thereof;

Respondent further affirmatively acknowledges the impropriety of his conduct as set forth in the Decision and Recommendation for Order of Discipline, and pursuant to MCR 9.221(C), consents to the Commission's recommendation that he be publicly censured.

Respondent further concurs in the request of the Judicial Tenure Commission that an order embodying the foregoing disciplinary action be entered immediately by the Michigan Supreme Court. (Emphasis supplied)

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SEPARATE

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DISSENTING OPINION

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CARPIO MORALES, J.:

I join Justice Antonio T. Carpio's thesis in his Dissenting Opinion on the commission of plagiarism or violation of intellectual property rights in the Vinuya decision. I join him too on his other thesis that this Court has no jurisdiction to decide an administrative case where a sitting Justice of this Court has committed misconduct in office, with qualification.

I submit that the Court may wield its administrative power against its incumbent members on grounds other than culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust, AND provided the offense or misbehavior does not carry with it a penalty, the service of which would amount to removal from office either on a permanent or temporary basis such as suspension.

The President, the Vice President, the members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment.[1] (underscoring supplied)

In 1988, the Court dismissed the complaint for disbarment against Justice Marcelo Fernan for lack of merit. Aside from finding the accusations totally baseless, the Court, by per curiam Resolution,[2] also stated that to grant a complaint for disbarment of a member of the Court during the member's incumbency would in effect be to circumvent and hence to run afoul of the constitutional mandate that members of the Court may be removed from office only by impeachment.

In the subsequent case of *In Re Raul M. Gonzales*,^[3] this principle of constitutional law was succinctly formulated in the following terms which lay down a bar to the institution of certain actions against an impeachable officer during his or her incumbency.

x x x A public officer who under the Constitution is required to be a Member of the Philippine Bar as a qualification for the office held by him and who may be removed from office only by impeachment, cannot be charged with disbarment during the incumbency of such public officer. Further, such public officer, during his incumbency, cannot be charged criminally before the Sandiganbayan or any other court with any offense which carries with it the penalty of removal from office, or any penalty service of which would amount to removal from office.^[4] (emphasis and underscoring supplied; italics in the original)

The Court clarified, however, that it is not saying that its members are entitled to immunity from liability for possible criminal acts or for alleged violations of the canons of judicial ethics or codes of judicial conduct. It stressed that there is a fundamental procedural requirement that must be observed before such liability may be determined and enforced.

x x x A Member of the Supreme Court must first be removed from office via the constitutional route of impeachment under Sections 2 and 3 of Article XI of the 1987 Constitution. Should the tenure of the Supreme Court Justice be thus terminated by impeachment, he may then be held to answer either criminally or administratively (by disbarment proceedings) for any wrong or misbehaviour that may be proven against him in appropriate proceedings.^[5] (underscoring supplied)

The Court declared the same principle in *Jarque v. Desierto*^[6] by Resolution of December 5, 1995.

The rule that an impeachable officer cannot be criminally prosecuted for the same offenses which constitute grounds for impeachment presupposes his continuance in office. Hence, the moment he is no longer in office because of his removal, resignation, or permanent disability, there can be no bar to his criminal prosecution in the courts.

Nor does retirement bar an administrative investigation from proceeding against the private respondent, given that, as pointed out by the petitioner, the former's retirement benefits have been placed on hold in view of the provisions of Sections 12 and 13 of the Anti-Graft and Corrupt Practices Act.^[7] (underscoring supplied)

The immediately-quoted pronouncement implies that the administrative investigation must be initiated during the incumbency of the respondent.

That the Supreme Court has overall administrative power over its members and over all members of the judiciary has been recognized.^[8] Moreover, the Internal Rules of the Supreme Court (2010)^[9] expressly included, for the first time, "cases involving the discipline of a Member of the Court"^[10] as among those en banc matters and cases. Elucidating on the procedure, Section 13, Rule 2 of the Court's Internal Rules provides:

SEC. 13. Ethics Committee. - In addition to the above, a permanent Committee on Ethics and Ethical Standards shall be established and chaired by the Chief Justice, with following membership:

- a) a working Vice-Chair appointed by the Chief Justice;
- b) three (3) members chosen among themselves by the en banc by secret vote; and
- c) a retired Supreme Court Justice chosen by the Chief Justice as a non-voting observer-consultant.

The Vice-Chair, the Members and the Retired Supreme Court Justice shall serve for a term of one (1) year, with the election in the case of elected Members to be held at the call of the Chief Justice.

The Committee shall have the task of preliminarily investigating all complaints involving graft and corruption and violations of ethical standards, including anonymous complaints, filed against Members of the Court, and of

submitting findings and recommendations to the en banc. All proceedings shall be completely confidential. The Committee shall also monitor and report to the Court the progress of the investigation of similar complaints against Supreme Court officials and employees, and handle the annual update of the Court's ethical rules and standards for submission to the en banc. (emphasis and underscoring supplied)

The Court acknowledged its power to take cognizance of complaints against its incumbent Members. It is circumscribed, however, by the abovementioned principle of constitutional law^[11] in terms of grounds and penalties.

In at least two recent instances, the Court had conducted administrative proceedings against its incumbent Members.

In the controversy surrounding the 1999 Bar Examinations, the Court, by Resolution of March 22, 2000 in Bar Matter No. 979, censured then incumbent Justice Fidel Purisima for his failure to disclose on time his relationship to an examinee and for breach of duty and confidence, and declared forfeited 50% of the fees due him as chairperson of the 1999 Bar Examinations Committee. The impositions did not, however, douse the clamor for stiffer penalties on Justice Purisima in case he were found liable after a full, thorough and formal investigation by an independent and impartial committee, which some quarters urged the Court to form.

Meanwhile, Justice Purisima retired from the Court on October 28, 2000. By Resolution of November 28, 2000, the Court ruled that "[h]is retirement makes it untenable for this Court to further impose administrative sanctions on him as he is no longer a member of the Court" and referred the bar matter to the Special Study Group on Bar Examination Reforms for report and recommendation.

The implication that the Court could have imposed further administrative sanctions on Justice Purisima had he not retired is a recognition that the Court may discipline one of its sitting members.

Further, the Court did not explain why the "further" imposition of administrative sanctions was untenable except for the fact that Justice Purisima was no longer a member of the Court. Could it be that the earlier imposed penalties (i.e., censure and partial forfeiture of fees) were already considered sufficient? Could it be that the proper administrative case (arising from the earlier bar matter) was not instituted before Justice Purisima retired? Or could it be that Justice Purisima's retirement benefits were already released to him, leaving the Court with nothing more to go after to or impose (except, perhaps, disqualification to hold any government office)?

I thus submit that the failure to initiate an administrative proceeding prior to Justice Purisima's retirement made it untenable for the Court to further impose administrative sanctions on him. What was confirmed by the Purisima case, nonetheless, for purposes of pertinent discussion, is that the Court has jurisdiction to take cognizance of a complaint against an incumbent Justice.

Then there was the case *In re: Undated Letter of Mr. Louis Biraogo*^[12] where Justice Ruben Reyes was, *inter alia*, "held liable for GRAVE MISCONDUCT for leaking a confidential internal document of the Court" for which he was "FINED P500,000.00, to be charged against his retirement benefits, and disqualified to hold any office or employment in any branch or instrumentality of the government including government-owned or controlled corporations."^[13] The question in *Biraogo* was not so much on the Court's jurisdiction over the case but on the effect of Justice Reyes' subsequent retirement during the pendency of the case.

Unlike the present case, however, impeachment proceedings against Justices Purisima and Reyes did not see the light of day as they eventually retired, which mandatory retirement either foreclosed the initiation of further administrative proceedings or directed the imposable sanctions to the retirement benefits.

In view of the impeachment complaint filed with the House of Representatives involving the same subject matter of the case, which denotes that a co-equal branch of government found the same act or omission grievous as to present a ground for impeachment and opted to exercise its constitutional function, I submit that the Court cannot proceed with the administrative complaint against Justice Del Castillo for it will either (i) take cognizance of an impeachable offense which it has no jurisdiction to determine, or (ii) downplay the questioned conduct and preempt the impeachment proceedings.

I thus join the call of Justice Carpio to recall the Court's October 15, 2010 Resolution, but only insofar as Justice Del Castillo is concerned. All related administrative concerns and issues involving non-impeachable officers therein should still be considered effectual.

In Biraogo, the unauthorized release of the unpromulgated ponencia of Justice Reyes in the consolidated Limkaichong cases spawned an investigation to determine who were responsible for the leakage of the confidential internal document of the Court. The investigation led to the disciplining of not just Justice Reyes but also two members of his staff, who were named without hesitation by the Court, viz., Atty. Rosendo B. Evangelista and Armando Del Rosario, and who were held liable for SIMPLE NEGLECT OF DUTY and ordered to pay FINE in the amount of P10,000.00 and P5,000.00, respectively.[14]

Why, in the present case, the legal researcher who is hiding behind her credentials appears to be held a sacred cow, I cannot fathom. Hers is a new (or better) specie of initialed personification (e.g., "xxx") under the likes of Cabalquinto[15] which should apply only to cases involving violence against women and children.[16]

The unjustified non-disclosure of her identity is unfair to Atty. Evangelista who, aside from having his own credentials to protect, had to be mentioned as a matter of course in the committee report adopted by the Court in In re: Undated Letter of Mr. Louis Biraogo, after similarly cooperating with and explaining his side before the investigating committee.

Atty. Evangelista was eventually found by the Court to be wanting in care and diligence in securing the integrity and confidentiality of a document. In the present case, the Court's October 15, 2010 per curiam Decision cleared the name of the unnamed legal researcher.

While what was at stake in Biraogo was the "physical integrity" of a ponencia, what is at stake in the present case is the "intellectual integrity" of a ponencia. The Court is committing a disservice to its judicial function if it values the physical form of a decision more than what a decision substantially contains.

Moreover, the liability of Justice Reyes did not save the day for Atty. Evangelista who, as the judicial staff head, was tasked to secure and protect the copies of the Limkaichong Decision. Similarly in the present case, independently of Justice Del Castillo's "shortcomings," the legal researcher, who was the lone drafter, proofreader and citechecker, was tasked like any other Court Attorney to secure and ensure the substance and legal reasoning of the Vinuya Decision. Like Justice Reyes, Justice Del Castillo can only do so much in claiming responsibility and full control of his office processes and shielding the staff under the mantle of his impeachable wings.

Notably, Rule 10.2 of Canon 10 of the Code of Professional Responsibility states that lawyers shall "not knowingly misquote or misrepresent the contents of a paper, the language or the argument of opposing counsel, or the text of a decision or authority, or knowingly cite as law a provision already rendered inoperative by repeal or amendment, or assert as a fact that which has not been proved." While the provision presupposes knowledge or willful intent, it does not mean that negligent acts or omissions of the same nature by lawyers serving the government go scot-free.

Simple neglect of duty is defined as the failure to give proper attention to a task expected of an employee resulting

from either carelessness or indifference.[17]

I submit that the legal researcher was remiss in her duties of re-studying the sources or authorities invoked in the Vinuya Decision and checking the therein citations or, at the very least, those whose authors' rights to attribution and integrity are protected under Intellectual Property Law. While it is incumbent upon her to devise ways and means of legal research, her admitted method or process as shown in the Vinuya case reflects a disregard of a duty resulting from carelessness or indifference. She failed to exercise the required degree of care to a task expected of a lawyer-employee of the Supreme Court.

While the Court recognizes that there were indeed lapses in the editorial work in the drafting of the Vinuya Decision, it easily attributed them to "accidental deletions." It conveniently assigned such human errors to the realm of accidents, without explaining whether it could not have been foreseen or avoided.

I, therefore, posit that the legal researcher, who must hitherto be named, is liable for Simple Neglect of Duty and must be ordered to pay a Fine in the amount of, following Biraogo, P10,000.00, with warning of more severe sanctions for future similar conduct.

Whether liability attaches to what the October 15, 2010 per curiam Decision finds to be deletion or omission of citation "unquestionably due to inadvertence or pure oversight," the fact remains, nonetheless, that there is a need for a textual correction of the Vinuya Decision. This Court should cause the issuance of a corrected version in the form of, what Justice Ma. Lourdes P. A. Sereno suggests as, a "corrigendum."

The matter of making corrections in judicial issuances is neither novel nor something beneath the Court. As early as February 22, 2000, the Court already accepted the reality of human error. In A.M. No. 00-2-05-SC, "In the Matter of Correction of Typographical Errors in Decisions and Signed Resolutions," the Court provided a simple procedure in making proper corrections:

Inadvertent typographical errors in decisions and signed resolutions of the Court may occur every now and then. As these decisions and signed resolutions are published and preserved for posterity in the Philippine Reports, the Supreme Court Reports Annotated, and other publications as well as in the Supreme Court website, the need for making them free of typographical errors cannot be overemphasized. Care should, therefore, be taken in proofreading them before they are submitted for promulgation and/or publication.

Nevertheless, should typographical errors be discovered after the promulgation and/or publication of decisions and resolutions, the following procedure should be observed to the end that unauthorized corrections, alterations, or intercalations in what are public and official documents are not made.

1. In case of decisions and signed resolutions with the author['s] names indicated, the Reporter and the Chief of the Management Information Systems Office of the Supreme Court should secure the authority of the author concerned to make the necessary correction of typographical errors. In case of per curiam decisions and unsigned resolutions, authority to make corrections should be secured from the Chief Justice.
2. The correction of typographical errors shall be made by crossing out the incorrect word and inserting by hand the appropriate correction immediately above the cancelled word. Such correction shall be authenticated by the author by signing his initials immediately below the correction. In per curiam decisions and unsigned resolutions, and in cases where the author is no longer a member of the Court, the authentication shall be made by the Chief Justice.
3. The Reporter and the Chief of the Management Information Systems Office shall submit to the Court, through the Clerk of Court, a quarterly report of decisions and resolutions in which corrections have been made. The Clerk of Court must thereafter include the report in the agenda of the Court en banc.

This resolution takes effect immediately.

Despite the avowals of "slip in attribution," "bad footnoting," and "editorial error" in the Court's October 15, 2010 per curiam Decision, to date no effort has been made to correct the Vinuya Decision in conformity with A.M. No. 00-2-05-SC, which only implies that the lapses are not typographical in nature. The corrections of the Vinuya Decision cannot simply be made by crossing out the incorrect word and inserting by hand the appropriate correction immediately above the cancelled word, with authentication by the ponente or writer.

[1] Constitution, Art. XI, Sec. 2.

[2] *Cuenco v. Fernan*, Adm. Case No. 3135, February 17, 1988, 158 SCRA 29; vide also the Resolution of April 15, 1988 (160 SCRA 778) where the complainant was severely reprimanded and warned.

[3] A.M. No. 88-4-5433, April 15, 1988, 160 SCRA 771.

[4] *Id.* at 774.

[5] *Id.* at 776-777.

[6] A.C. No. 4509, December 5, 1995, 250 SCRA xi.

[7] *Office of the Ombudsman v. Court of Appeals*, G.R. No. 146486, March 4, 2005, 452 SCRA 714, 734-735.

[8] In discussing the word "incapacitated," *Bernas* said that the power to determine incapacity is part of the overall administrative power which the Supreme Court has over its members and over all members of the judiciary [*Bernas*, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (2003), p. 988].

[9] A.M. No. 10-4-20-SC (May 4, 2010).

[10] *Id.*, Rule 2, Sec. 3, par. (h).

[11] This framework of constitutional law likewise explains why incumbent Justices of the Supreme Court, by virtue of their being impeachable officers, are not included from the operation of A.M. No. 02-9-02-SC on the "Automatic Conversion of Some Administrative Cases Against Justices of the Court of Appeals and the Sandiganbayan, Judges of Regular and Special Courts, and Court Officials Who Are Lawyers as Disciplinary Proceedings Against Them Both as Officials and as Members of the Philippine Bar" (September 17, 2002). The rule provides that when the said administrative case is based on grounds which are likewise grounds for a disciplinary action of members of the Bar, the administrative case shall also be considered a disciplinary action against the respondent justice, judge or court official concerned as a member of the Bar [as applied in *Avancena v. Liwanag*, A.M. No. MTJ-01-1383, March 5, 2003, 398 SCRA 541 and July 17, 2003, 406 SCRA 300 where the judge was dismissed from service and disbarred from the practice of law. See also *Juan de la Cruz (Concerned Citizen of Legazpi City) v. Carretas*, A.M. No. RTJ-07-2043, September 5, 2007, 532 SCRA 218; *Cañada v. Suerte*, A.M. No. RTJ-04-1884, February 22, 2008, 546 SCRA 414]. Its application to a particular administrative action is not dependent on the date of commission of the offense but on the date of filing of the case. There is no automatic conversion when the administrative case was filed before October 1, 2002 or prior to the date of effectivity of A.M. No. 02-9-02-SC (vide *Office of the Court Administrator v. Morante*, A.M. No. P-02-1555, April 16, 2004, 428 SCRA 1, 35-36; *J. King and Sons Company, Inc., v. Hontanosas, Jr.*, A.M. No. RTJ-03-1802, February 28, 2006 Resolution) and the respondent has already been required to comment on the complaint (*Heck v. Santos*, A.M. No. RTJ-01-1657, 23 February 2004, 423 SCRA 329, 341).

[12] A.M. No. 09-2-19-SC, February 24, 2009, 580 SCRA 106.

[13] *Id.* at 164.

[14] Id. The Court explained:

Liability of Atty. Rosendo B. Evangelista

The Committee finds that Atty. Evangelista, Justice Reyes' Judicial Staff Head, was remiss in his duties, which includes the supervision of the operations of the office, particularly with respect to the promulgation of decisions. While it is incumbent upon him to devise ways and means to secure the integrity of confidential documents, his actuations reflected above evinced "a disregard of a duty resulting from carelessness or indifference."

Atty. Evangelista was admittedly unmindful of the responsible safekeeping of draft ponencias in an unlocked drawer of a member of the staff. He failed to make sure that the unused portion of confidential documents like the second signatory page of the ponencia in Gilbert form had been properly disposed of or shredded. He was not on top of things that concerned the promulgation of ponencias, for he failed to ascertain the status and procedural implication of an "on hold" order after having been apprised thereof by his subordinate, Del Rosario, on July 17, 2008. Despite his awareness that the Limkaichong case would eventually be called again, he admitted that he was not privy to the preparation of the copy of the ponencia for the subsequent session on July 29, 2008.

With these findings, the Court finds him liable for SIMPLE NEGLECT OF DUTY.

Liability of Armando Del Rosario

The committee likewise finds Del Rosario administratively liable for failing to exercise the required degree of care in the custody of the Gilbert copy. Del Rosario admittedly kept the Gilbert copy in an unlocked drawer from July 16, 2008 to December 10, 2008 when he should have known that, by the nature of the document in his custody, he should have kept it more securely. His carelessness renders him administratively liable for SIMPLE NEGLECT OF DUTY, defined as the failure to give proper attention to a task expected of an employee resulting from either carelessness or indifference.

Time and again, the Court has emphasized the heavy burden and responsibility which court officials and employees are mandated to carry. They are constantly reminded that any impression of impropriety, misdeed or negligence in the performance of official functions must be avoided. The Court will never countenance any conduct, act or omission on the part of all those involved in the administration of justice which would violate the norm of public accountability and diminish the people's faith in the judiciary.

Under Section 23, Rule XIV of the Omnibus Civil Service Rules and Regulations, (simple) neglect of duty is punishable by suspension of one month and one day to six months for the first offense. Under Sec. 19, Rule XIV of the same Rules, the penalty of fine (instead of suspension) may also be imposed in the alternative. Following the Court's ruling in several cases involving (simple) neglect of duty, we find the penalty of fine on Atty. Evangelista and Del Rosario in the amount of P10,000 and P5,000, respectively, just and reasonable. (Id. at 161-163; emphasis, italics and underscoring in the original).

[15] *People v. Cabalquinto*, G.R. No. 167693, September 19, 2006, 502 SCRA 419.

[16] Vide Republic Act No. 7610 (Special Protection of Children against Child Abuse, Exploitation and Discrimination Act); Republic Act No. 9262 (Anti-Violence Against Women and Their Children Act of 2004); A.M. No. 04-10-11-SC of November 14, 2004 (Rule on Violence against Women and their Children); and A.M. No. 99-7-06-SC, *In Re Internet Web page of the Supreme Court*, Resolution of February 14, 2006.

[17] *In Re: Undated Letter of Mr. Louis Biraogo*, supra at 162, citing *Rivera v. Buena*, A.M. No. P-07-2394, February 19, 2008, 546 SCRA 222.

SEPARATE CONCURRING OPINION

BRION, J.:

Background Facts

The present administrative disciplinary case against Supreme Court Associate Justice Mariano C. del Castillo stemmed from the decision he penned for the Court in G.R. No. 162230, entitled *Isabelita C. Vinuya, et al. v. Executive Secretary*. The Vinuya Decision was promulgated on April 28, 2010 with 13 justices of this Court concurring with the ruling to dismiss the case.

On July 19, 2010, Attys. Harry Roque and Rommel Bagares, counsels for petitioners Vinuya, et al., filed a Supplemental Motion for Reconsideration raising, among others, the plagiarism allegedly committed by Justice del Castillo for using the works of three foreign legal authors in his ponencia. They alleged that the use was without proper attribution and that Justice del Castillo twisted the foreign authors' works to support the Decision. They considered it "highly improper for x x x the Court x x x to wholly lift, without proper attribution, from at least three sources - an article published in 2009 in the *Yale Law Journal of International Law*,^[1] a book published by the Cambridge University Press in 2005,^[2] and an article published in the *Case Western Reserve Journal of International Law*^[3] - and to make it appear that these sources support the assailed Judgment's arguments for dismissing [their] petition[,]" when in truth, the plagiarized sources even make a strong case for the Petition's claims[.]"^[4]

In reply to the accusation, Justice del Castillo wrote and circulated a letter dated July 22, 2010 to the members of this Court. On July 27, 2010, the Court decided to refer the letter to the Ethics and Ethical Standards Committee (the "Ethics Committee" or "committee") which docketed it as an administrative matter. The committee required Attys. Roque and Bagares to comment on Justice del Castillo's letter, after which it heard the parties. After the parties' memoranda, the committee submitted its findings and recommendations to the Court.

The Court's Decision on the Plagiarism

Charge against Justice del Castillo

In a Decision dated October 12, 2010, the Court resolved to dismiss the plagiarism charges against Justice del Castillo. It recognized that indeed certain passages of the foreign legal article were lifted and used in the Vinuya Decision and that "no attributions were made to the x x x authors in [its] footnotes."^[5] However, the Court concluded that the failure to attribute did not amount to plagiarism because no malicious intent attended the failure; the attributions (present in Justice del Castillo's original drafts) were simply accidentally deleted in the course of the drafting process. Malicious intent was deemed an essential element, as "plagiarism is essentially a form of fraud where intent to deceive is inherent." Citing *Black's Law Dictionary's* definition of plagiarism - the deliberate and knowing presentation of another person's original ideas or creative expressions as one's own - the Court declared that "plagiarism presupposes intent and a deliberate, conscious effort to steal another's work and pass it off as one's own." In fact, the Court found that by citing the foreign author's original sources, Justice del Castillo never created the impression that he was the original author of the passages claimed to have been lifted from the foreign law articles:

The Court also adopts the Committee's finding that the omission of attributions to Criddle-Descent and Ellis did not bring about an impression that Justice Del Castillo himself created the passages that he lifted from their published articles. That he merely got those passages from others remains self-evident, despite the accidental deletion. The fact is that he still imputed the passages to the sources from which Criddle-Descent and Ellis

borrowed them in the first place.

As to the charge that Justice del Castillo twisted the meaning of the works of the foreign authors, the Court ruled that it was impossible for him to have done so because:

first, since the attributions to Criddle-Descent and Ellis were accidentally deleted, it is impossible for any person reading the decision to connect the same to the works of those authors as to conclude that in writing the decision Justice Del Castillo "twisted" their intended messages. And, second, the lifted passages provided mere background facts that established the state of international law at various stages of its development. These are neutral data that could support conflicting theories regarding whether or not the judiciary has the power today to order the Executive Department to sue another country or whether the duty to prosecute violators of international crimes has attained the status of *jus cogens*.

The Court, thus, declared that "only errors [of judges] tainted with fraud, corruption, or malice are subject of disciplinary action" and these were not present in Justice del Castillo's case; the failure was not attended by any malicious intent not to attribute the lifted passages to the foreign authors.

Justice Maria Lourdes P. A. Sereno dissented from the Court's October 12, 2010 Decision based mainly on her disagreement with the majority's declaration that malicious intent is required for a charge of plagiarism to prosper.

On November 15, 2010, Attys. Roque and Bagares filed a motion for reconsideration of the Court's October 12, 2010 Decision. This motion was the subject of the Report/Resolution submitted to the Court for consideration. Incidentally, the same counsels filed an impeachment complaint for betrayal of public trust against Justice del Castillo with the House of Representatives on December 14, 2010.

The Court's Action on the Motion for Reconsideration

The Court referred the motion for reconsideration to the Ethics Committee and its Report recommended the dismissal of the motion for reconsideration. The Report differentiated academic writing from judicial writing, declaring that originality of ideas is not required of a judge writing decisions and resolving conflicts because he is bound by the doctrine of *stare decisis* - the legal principle of determining points in litigation according to precedents.

The Report likewise declared that the foreign authors, whose works were claimed to have been plagiarized, were not themselves the originators of the ideas cited in the Vinuya Decision. While the Vinuya Decision did not mention their names, it did attribute the passages to the original authors from whom these foreign authors borrowed the ideas. There was, thus, no intent on the part of Justice del Castillo to appropriate the ideas or to claim that these ideas originated from him; in short, he did not pass them off as his own.

Justice Antonio T. Carpio dissented from the Report, based on two grounds:

- the Court has no jurisdiction over the administrative case as it involves a sitting Supreme Court Justice, for alleged misconduct committed in office; and
- the judge, when writing judicial decisions, must comply with the law on copyright and respect the moral right of the author to have the work copied attributed to him.

My Position

I fully support the conclusions of the Ethics Committee. I likewise take exception to Justice Carpio's Dissenting Opinion, specifically on his position that the Court has no jurisdiction to discipline its Members as the only means to discipline them is through impeachment proceedings that the Congress has the sole prerogative to undertake.

Impeachment, he declares, functions as the equivalent of administrative disciplinary proceedings. Since the Congress is given the exclusive power to initiate,[6] try, and decide[7] all cases of impeachment, Justice Carpio posits that the Congress serves as the exclusive disciplining authority over all impeachable officers. He warns that for the Supreme Court to hear the present administrative disciplinary case would be to usurp this exclusive power of Congress.

Jurisdiction of the Supreme Court to Discipline its Members

A given in the discipline of Members of the Supreme Court is that they can only be "removed from office" through impeachment, as provided under Article XI of the Constitution, on the specified grounds of culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of the public trust. The purpose of impeachment and the constitutional interest sought is to protect the people and the State from official delinquencies and other malfeasances.[8] The Constitution, however, is not a single-purpose document that focuses on one interest alone to the exclusion of related interests; impeachment was never intended by the Constitution to be the totality of the administrative actions or remedies that the public or the Court may take against an erring Justice of the Court. Other related constitutional interests exist touching on other facets of the Judiciary and public accountability. They are, by themselves, equally compelling and demanding of recognition.

Among the compelling interests that the Constitution zealously guards is judicial independence because it is basic to the meaning and purposes of the Judiciary. This interest permeates the provisions of Article VIII of the Constitution.[9]

Another interest to consider is the need for judicial integrity - a term not expressly mentioned in the Article on the Judiciary (Article VIII), but is a basic concept found in Article XI (on Accountability of Public Officers) of the Constitution. It is important as this constitutional interest underlies the independent and responsible Judiciary that Article VIII establishes and protects. To be exact, it complements judicial independence as integrity and independence affect and support one another; only a Judiciary with integrity can be a truly independent Judiciary. Judicial integrity, too, directly relates to public trust and accountability that the Constitution seeks in the strongest terms. The same Article XI contains the impeachment provisions that provide for the removal of Justices of the Supreme Court. Notably, a common thread that runs through all the grounds for impeachment is the lack of integrity of the official impeached on these grounds.

Still another unavoidable consideration on impeachment and its limited grounds is that it cannot, by itself, suffice to protect the people and foster the public accountability that the Constitution speaks of. While it is a powerful weapon in the arsenal of public accountability and integrity, it is not a complete weapon that can address and fully achieve its protective purposes. As discussed more fully below, not all complaints and grievances can be subsumed under the defined constitutional grounds for impeachment. Members of the Court can commit other offenses not covered by the impeachable offenses, for which other offenses they should equally be held accountable. These other offenses must of course be administratively addressed elsewhere if they cannot be similarly addressed through impeachment; the people will not accept an interpretation that these are offenses that fell through the constitutional cracks and can no longer be administratively addressed.

These considerations, taken together, dictate against the position of Justice Carpio that the Congress alone, through impeachment and to the exclusion of this Court, can proceed against the Members of the Court.

Protection of Judicial Integrity

For the purpose of preserving judicial integrity, the Supreme Court has as much (and in fact, should have more) interest as the public or as any other branch of the government in overseeing the conduct of members of the Judiciary, including its own Members. This is precisely the reason for the Judiciary's Code of Judicial Conduct and the lawyers' Code of Professional Responsibility. Judicial integrity is not only a necessary element in the orderly and efficient administration of justice; it is almost literally the lifeblood of the Judiciary. A Judiciary, dissociated from integrity and the public trust that integrity brings, loses its rightful place in the constitutional democratic scheme that puts a premium on a reliable and respected third branch of government that would balance the powers of the other two branches.

To ensure the maintenance and enhancement of judicial integrity, the Constitution has given the Judiciary, mainly through the Supreme Court, a variety of powers. These powers necessarily begin with the power to admit and to discipline members of the bar^[10] who are officers of the courts and who have the broadest frontline interaction with the courts and with the public. Courts in general have the power to cite for contempt^[11] that proceeds, not only from the need to maintain orderly procedures, but also from the need to protect judicial integrity in the course of the courts' exercise of judicial power. The Supreme Court has the power to discipline and remove judges of lower courts.^[12] In this role, the Court hears administrative disciplinary cases against lower court judges for purposes of redress against erring judges and, more importantly, to "[preserve] the integrity of the judicial system and public confidence in the system and x x x [to safeguard] the bench and the public from those who are unfit."^[13]

As concrete legal basis, the Supreme Court is expressly granted the general power of administrative supervision over all courts and the personnel thereof.^[14] By its plain terms, the power extends not only to the authority to supervise and discipline lower court judges but to exercise the same powers over the Members of the Court itself. This is the unavoidable meaning of this grant of authority if its main rationale - i.e., to preserve judicial integrity - is to be given full effect. The Supreme Court must ensure that the integrity of the whole Judiciary, its own Members included, is maintained as any taint on any part of the Judiciary necessarily taints the whole. To state the obvious, a taint in or misconduct by any Member of the Supreme Court - even if only whispered about for lack of concrete evidence and patriotic whistleblowers - carries greater adverse impact than a similar event elsewhere in the Judiciary.

Independent of the grant of supervisory authority and at a more basic level, the Supreme Court cannot be expected to play its role in the constitutional democratic scheme solely on the basis of the Constitution's express grant of powers. Implied in these grants are the inherent powers that every entity endowed with life (even artificial life) and burdened with responsibilities can and must exercise if it is to survive. The Court cannot but have the right to defend itself to ensure that its integrity and that of the Judiciary it oversees are kept intact. This is particularly true when its integrity is attacked or placed at risk by its very own Members - a situation that is not unknown in the history of the Court. To be sure, judicial integrity cannot be achieved if the Court can police the ranks of the lower court judges but not its own ranks. From this perspective view, it is unthinkable that the Supreme Court can only watch helplessly - for the reason that the power to act is granted only to Congress under the terms of the Constitution - as its own Members prostitute its integrity as an institution.

Impeachment Grounds are
Limited

That an impeachment partakes of the nature of an administrative disciplinary proceeding confined to the defined and limited grounds of "culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, and betrayal of public trust"^[15] cannot be disputed. However, it cannot likewise be disputed that these grounds, as defined, refer only to those serious "offenses that strike at the very heart of the life of the nation."^[16]

Thus, for "betrayal of public trust" to be a ground for impeachment, the "manner of commission must be of the same severity as `treason' and `bribery.'"[17] With respect to members of the High Court, impeachment is considered "as a response to serious misuse of judicial power"[18] no less equivalent to treason or bribery.

Directly implied from these established impeachment principles is that "removal from office (the impossible penalty upon impeachment and conviction) is not the price exacted for every incident of judicial misconduct."[19] Otherwise stated, that impeachment administratively addresses only serious offenses committed by impeachable officers cannot imply that the Constitution condones misdemeanors and misconduct that are not of equal gravity.

For, side by side with the constitutional provision on impeachment is the constitutional policy that "public office is a public trust" and that "public officers and employees must, at all times, be accountable to the people."[20] Even impeachable officials, despite the nature and level of their positions, must be administratively accountable for misconduct and misdemeanors that are of lesser gravity than the defined impeachable offenses. Only this approach and reconciled reading with the provision on impeachment can give full effect to the constitutional policy of accountability. If this were not the case, then the public would be left with no effective administrative recourse against Supreme Court Justices committing less than grave misconduct. One American writer, Brent D. Ward, writes on this point that:

It would be a serious weakness in our system to place systematic judicial misconduct beyond the reach of any remedy save impeachment. There are limits beyond which no person - even a federal judge - should be allowed to go with impunity. The courts themselves have the power and the duty to curtail the effect of repeated contrary and erratic actions of a judge that occur too frequently to permit effective appellate supervision in the run of cases.

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[The] Constitution does x x x shield [judges] from corrective action by other judges designed to ensure that the law is effectively administered. The appellate courts have the power to prevent action so obviously improper as to place it beyond established rules of law.[21]

Adverse Effects of Expansive View of Impeachment Grounds

If impeachment were to be the only administrative proceeding to hold Justices of this Court accountable, then the grounds for impeachment may arguably carry a definition beyond the traditionally grave or serious character these offenses have always carried. An expanded definition, however, is no different from the remedy of burning a house to kill a rat. While such definition in the long run may kill more rats or assuredly do away with a particularly obnoxious rat, it will at the same time threaten and adversely affect a more valuable constitutional interest - the independence of the Judiciary that allows magistrates to conscientiously undertake their duties, guided only by the dictates of the Constitution and the rule of law.

It needs no elaborate demonstration to show that the threat of impeachment for every perceived misconduct or misdemeanor would open Justices of the Court to harassment. A naughty effect - if administrative redress can only be secured from Congress to the exclusion of this Court under an expanded definition of impeachment grounds - is to encourage every litigant with a perceived grievance against a Justice of this Court to run to his congressman for the filing of an impeachment complaint.

Undoubtedly, this kind of scenario will be a continuing threat to judges and justices, with consequential adverse effects on the Judiciary, on inter-branch relationship, and on the respect the public may give the Judiciary, the Legislature, and even of the government itself. Worse, this kind of scenario may ultimately trivialize the impeachment process and is thus best avoided.

An expansive interpretation of the grounds for impeachment must also affect Congress which acts on impeachment complaints but whose main task under our structure of government is to legislate, not to police the Supreme Court and other impeachable officers. To say the least, a deluge of impeachment complaints may prove to be impractical for Congress because impeachment is both an arduous and a time consuming process that will surely divert congressional time and other resources from the principal function of lawmaking.

The US Practice

In the United States (US) federal courts, "the impeachment process has not been the only check on federal judges [who are removable through impeachment] who may have abused their independence, or the only assurance of their accountability." [22] The US National Commission on Judicial Discipline and Removal has posited that there must be "a power in the judiciary to deal with certain kinds of misconduct [as this will further] both the smooth functioning of the judicial branch and the broad goal judicial independence."

Along this line, the US Congress created a system enforcing an internal judicial self-discipline through the judicial councils under their Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the US 1980 Act). The judicial council (composed of the federal judges within a specific judicial circuit) is considered as a "formal and credible supplement to the impeachment process for resolving complaint of misconduct or disability against federal judges." [23] The judicial council of a federal circuit, through the chief judge, is authorized to receive and to act on complaints about the conduct of judges who are removable only through impeachment. If there is merit to a complaint, the judicial council can "take appropriate action, which may include censure, reprimand, temporary suspension, and transfer of cases, but not removal from office. If the judicial council believes that it has uncovered grounds for impeachment, the council is empowered to report its findings to the Judicial Conference of the United States, which after an investigation, may report its findings to the House of Representatives." [24]

Arguably, the existence of a judicial council as an additional or supplemental check on US federal judges is statutory and no equivalent statute has been enacted in our jurisdiction specifically establishing in our Supreme Court a system of internal judicial self-discipline. This argument, however, loses sight of the constitutional authority of our Supreme Court to govern the conduct of its members under its power of general administrative supervision over all courts - a power that the Philippine Constitution expressly grants to our Supreme Court to the exclusion of remedies outside of the Judiciary except only for impeachment. Interestingly, even in the US, the view has been taken that the enactment of a statute conferring disciplinary power to the Court over its own members may be unnecessary as the Supreme Court itself may assume this power. This is implied from the following recommendation of the US National Commission on Judicial Discipline and Removal which states:

[I]t may be in the [US Supreme] Court's best interest, as contributing to the public's perception of accountability, to devise and adopt some type of formal procedure for the receipt and disposition of conduct and disability complaints.

The Commission recommends that the Supreme Court may wish to consider the adoption of policies and procedures for the filing and disposition of complaints alleging misconduct against Justices of the Supreme Court. [25]

Note should be taken in these regards that the Philippine Supreme Court has already put in place various Codes governing ethical rules for the bar and for the Judiciary. The Code of Judicial Conduct applies to all members of the Judiciary, including the Members of the Supreme Court. The Code of Professional Responsibility applies to all lawyers, thus, necessarily to Members of the Court for whom membership in the bar is an essential qualification. The Court as well has codified the Internal Rules of the Supreme Court. A Rule on Whistleblowing

is presently under consideration by the Court en banc.

What is crucial in the establishment of the judicial council system in the US is the implication that no inherent incompatibility exists between the existence of Congress' power to impeach and the Supreme Court's power to discipline its own members; the two powers can co-exist and, in fact, even supplement each other. The constitutionality of recognizing disciplinary power in the courts over their own impeachable members (as provided in the US 1980 Act), vis-à-vis the Congress' power to remove the same officials by impeachment, has been addressed before the US Court of Appeals in the case of *McBryde v. Commission to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the US*[26]:

Judge McBryde frames his separation of powers claim as whether the Constitution "allocates the power to discipline federal judges and, if so, to which branches of government." Finding that it allocates the power to Congress in the form of impeachment, he concludes that it excludes all other forms of discipline. But Judge McBryde's attempt to fudge the distinction between impeachment and discipline doesn't work. The Constitution limits judgments for impeachment to removal from office and disqualification to hold office. It makes no mention of discipline generally. The Supreme Court recently observed that it accepted the proposition that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." But application of the maxim depends on the "thing to be done." Here the thing to be done by impeachment is removal and disqualification, not "discipline" of any sort.

Thus, when the conduct of a member of the Supreme Court is improper but is not of such gravity to be considered as an impeachable offense, the Court - to protect its integrity - may address the misconduct through an administrative disciplinary case against the erring member.

Conclusion: Court can hear the case
against Justice del Castillo as an
Administrative Matter

What the impeachment provisions of the Constitution guarantee is simply the right to be removed from office only through the process of impeachment and not by any other means; it does not preclude the imposition of disciplinary sanctions short of removal on the impeachable official. Impeachment is the sole means of removal, but it is certainly not the sole means of disciplining Members of the Supreme Court or, for that matter, public officials removable by impeachment.

Accordingly, I believe that the Court has the authority to hear the present administrative disciplinary case against Associate Justice Mariano del Castillo; in case of a finding of misconduct, it can impose penalties that are not the functional equivalent of removal or dismissal from service. If, in the exercise of its prerogative as interpreter of the Constitution, it determines that an act complained of falls within the defined grounds for impeachment, then the Court should say so and forthwith forward its recommendations to Congress as the body constitutionally mandated to act in impeachment cases.

Court's Interpretation of Plagiarism -
limited to its Concept as an Ethical
violation of Members of the Judiciary.

The dissatisfaction with the Court's October 12, 2010 Decision (resolving the plagiarism charge against Justice del Castillo or the "plagiarism Decision") primarily lies with the Court's declaration that malicious intent is a necessary element in committing plagiarism. In the plagiarism Decision, the Court said:

[P]lagiarism presupposes intent and a deliberate, conscious effort to steal another's work and pass it off as one's own.

Why we deemed malicious intent as a necessary element for judicial plagiarism can be explained by our repeated pronouncement that:

not every error or mistake committed by judges in the performance of their official duties renders them administratively liable. In the absence of fraud, dishonesty or deliberate intent to do an injustice, acts done in their official capacity, even though erroneous, do not always constitute misconduct.

Only errors that are tainted with fraud, corruption or malice may be the subject of disciplinary action. For administrative liability to attach, respondent must be shown to have been moved by bad faith, dishonesty, hatred or some other motive. Indeed, judges may not be held administratively liable for any of their official acts, no matter how erroneous, as long as they acted in good faith.[27]

The term plagiarism does not have a precise statutory definition as it is not a matter covered by present Philippine statutes.[28] What the Intellectual Property Code (Republic Act 8283)[29] defines and punishes is "copyright infringement." However, these terms are not legally interchangeable. Laurie Stearns, copyright lawyer and author of the article "Copy Wrong: Plagiarism, Process, Property, and the Law" aptly observes the distinctions between the two in this wise:

Plagiarism is not necessarily copyright infringement, nor is copyright infringement necessarily plagiarism. The two concepts diverge with respect to three main aspects of the offense: copying, attribution and intent. In some ways the concept of plagiarism broader than infringement, in that it can include the copying of ideas or of expression not protected by copyright, that would not constitute infringement and it can include copying of small amounts of material that would be disregarded under copyright law. In other ways the concept of infringement is broader, in that it can include both properly attributed copying and unintentional copying that would be excused from being called plagiarism.

The divergence between plagiarism's popular definition and copyright's statutory framework suggests an essential contradiction between what is at stake in plagiarism - the creative process - and what is at stake in copyright infringement - the creative result.[30]

Separately from these distinctions, the matter before the Court is Justice del Castillo's alleged plagiarism or failure to make attributions as an ethical violation, not a copyright violation under the Intellectual Property Code. Given these distinctions, I see no reason to quibble over the definition of plagiarism - a term that, in the absence of any statutory limitation, the Court can define and interpret for purposes of its administrative authority over all courts and the personnel thereof.

From the point of view of ethical rules, what are important are the intent in undertaking an act and the concepts of integrity, propriety, honesty and impartiality for purposes of dispensing justice by an independent Judiciary. It is in this sense, and in light of the nature of the present case as an administrative disciplinary charge against a Member of this Court, that the pronouncement of this Court on plagiarism and on the merits of the ethical charge should be understood.

In this light, I find it misplaced for Justice Sereno to describe the Court's Decision as:

[creating] unimaginable problems for Philippine academia, which will from now on have to find a disciplinary response to plagiarism committed by students and researchers on the justification of the majority Decision.

It has also undermined the protection of copyrighted work by making available to plagiarists "lack of malicious intent" as a defense to a charge of violation of copy or economic rights of the copyright owner committed through lack of attribution.

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Because the majority Decision has excused the lack of attribution to the complaining authors in the Vinuya decision to editorial errors and lack of malicious intent to appropriate â€œ and that therefore there was no plagiarism â€œ lack of intent to infringe copyright in the case of lack of attribution may now also become a defense, rendering the above legal provision meaningless. [31]

When the Supreme Court acts on complaints against judges under its supervision and control, it acts as an administrator imposing discipline and not as a court passing upon justiciable controversies.[32] It is precisely for this reason that disciplinary cases are docketed as "Administrative Matters" or "A.M." [33] Hence, any interpretation by the Court of "plagiarism" is limited to this context and cannot be held to bind the academe in undertaking its educational functions, particularly its own power to define plagiarism in the educational context. It likewise cannot bind Congress in its role as the sole authority to determine what constitutes an impeachable offense, subject to what I stated above on the established scope of impeachable offenses and the power of the Court to act in grave abuse of discretion situations under the Constitution. Specifically, a finding by this Court that plagiarism was or was not committed cannot preclude Congress from determining whether the failure or omission to make an attribution, intentionally or unintentionally, amounts to a "betrayal of public trust."

For these reasons, I support the conclusion of the Ethics and Ethical Standards Committee that Justice Mariano C. del Castillo's attribution lapses did not involve any ethical violation. I vote for the approval of the Committee's Report and for the denial of the petitioners' Motion for Reconsideration.

[1] A Fiduciary Theory of Jus Cogens by Evan J. Criddle and Evan Fox-Decent.

[2] Enforcing Erga Omnes Obligations in International Law by Christian J. Tams.

[3] Breaking the Silence: On Rape as an International Crime by Mark Ellis.

[4] Petitioners Vinuya, et al.'s Supplemental Motion for Reconsideration dated July 18, 2010, p. 2.

[5] Specifically, the Court referred to the article A Fiduciary Theory of Jus Cogens written by Criddle-Decent and Fox.

[6] CONSTITUTION, Article XI, Section 3(1). The House of Representatives shall have the exclusive power to initiate all cases of impeachment.

[7] Id., Section 3(6). The Senate shall have the sole power to try and decide all cases of impeachment.

[8] See De Leon, Philippine Constitutional Law, Vol. II, 2004 Ed., p. 831.

[9] See, among others, security of tenure at Section 1; fiscal autonomy under Section 2; defined jurisdiction that Congress cannot touch without concurrence from the Supreme Court; administrative supervision over all courts under Section 6; a Judicial and Bar Council that renders recourse to the Commission on Appointments unnecessary; and the guarantee of strict focus on judicial duties under Section 12.

[10] CONSTITUTION, Article VIII, Section 5(5); RULES OF COURT, Rules 138 and 139-B.

[11] RULES OF COURT, Rule 71.

[12] CONSTITUTION, Article VIII, Section 11; RULES OF COURT, Rule 140.

[13] Cynthia Gray, A Study of State Judicial Discipline Sanctions, American Judicature Society (2002), at , last visited February 9, 2011. The article also cites other reasons: impressing upon the judge the severity and significance of the misconduct; deterring similar conduct by the judge and others; reassuring the public that

judicial misconduct is not tolerated or condoned; and fostering public confidence in the self-policing system.

[14] See Joaquin G. Bernas, S.J., *The 1987 Constitution of the Republic of the Philippines: A Commentary* (2009 ed.), p. 1012, and Hector S. De Leon, *Philippine Constitutional Law: Principles and Cases, Volume 2* (2004 ed.), p. 595.

[15] CONSTITUTION, Article XI, Section 2.

[16] See Bernas, *supra*, note 14, p. 1113.

[17] *Ibid.*

[18] Robert W. Kastenmeier, Report of the National Commission on Judicial Discipline and Removal (March 1994), 152 F.R.D. 265, at , last visited on February 9, 2011.

[19] Cynthia Gray, *supra* note 13, citing *In re Lowery*, 999 S.W.2d 639, 661 (Special Court of Review Appointed by Texas Supreme Court, 1998).

[20] CONSTITUTION, Article XI, Section 1.

[21] Brent D. Ward, Can the Federal Courts Keep Order in Their Own House? Appellate Supervision through Mandamus and Orders of Judicial Councils, 233 *Bringham Young University Law Review* 233, 237 and 253 (1980), at hein.journals/byulr1980&div=177ID=&page=>, last visited on February 9, 2011.

[22] Robert W. Kastenmeier, *supra* note 18.

[23] *Ibid.*

[24] Michael J. Gerhardt, The Constitutional Limits to Impeachment and Its Alternatives, 68 *Texas Law Review* 1, 73-74 (November 1989).

[25] Robert W. Kastenmeier, *supra* note 18.

[26] 264 F.3d 52 (2001).

[27] *Cruz v. Iturralde*, A.M. RTJ No. 03-1775, April 30, 2003, 402 SCRA 65.

[28] George, Joyce J. "Judicial Opinion Writing Handbook." 5[th] edition. William S. Hein & Co., Inc., 2007, page 715, defines plagiarism as "the intentional representation of another person's words, thoughts or ideas as one's own without giving attribution."

[29] AN ACT PRESCRIBING THE INTELLECTUAL PROPERTY CODE AND ESTABLISHING THE INTELLECTUAL PROPERTY OFFICE, PROVIDING FOR ITS POWERS AND FUNCTIONS, AND FOR OTHER PURPOSES

[30] Stearns, Laurie. "Copy Wrong: Plagiarism, Process, Property and the Law." *Perspectives on Plagiarism and Intellectual Property in a Postmodern World*. Ed. Lise Buranen and Alice M. Roy. Albany, New York State University of New York Press. 1999. 5-6.

[31] Dissenting Opinion of Justice Sereno in the Plagiarism decision.

[32] *Icasiano v. Sandiganbayan*, G.R. No. 95642, May 28, 1992, 209 SCRA 377.

[33] See: Rule 4, Internal Rules of the Supreme Court, in relation with Section 4, Rule 6 on Docket Number and Entry in Logbook. Administrative cases are not listed as G.R. (General Register) cases as they are not acted upon

in the exercise of the Court's judicial function.

SEPARATE CONCURRING OPINION

ABAD, J.:

I fully concur in the majority opinion and would like to react to the separate dissenting opinions of Justices Antonio T. Carpio and Maria Lourdes P.A. Sereno.

Justice Carpio has again graced the Court's rulings in this case with his typically incisive dissenting opinion. Still, I cannot agree with his views. He asserts that the sole disciplining authority of all impeachable officers, including the Justices of this Court, lies in Congress. This is quite true but only with respect to impeachable offenses that consist in "culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust,"[1] all offenses that warrant the removal of such officers and disqualification for holding any office in the government.[2] The Supreme Court has no intention of exercising the power of impeachment that belongs to Congress alone.

Certainly, however, the Supreme Court has the administrative authority to investigate and discipline its members for official infractions that do not constitute impeachable offenses. This is a consequence of the Court's Constitutional power of "administrative supervision over all courts and the personnel thereof." [3] When the Court decided earlier the plagiarism charge filed against Justice Mariano Del Castillo by the petitioners in *Vinuya*, it was under a belief that "plagiarism," which is not even a statutory offense, is an administrative infraction. The petitioners in that case did not themselves object to the proceedings conducted by the Court's Ethics Committee.

Subsequently, a complaint for impeachment was filed against Justice Del Castillo before the House of Representatives based on the same charge of plagiarism. The Court cannot do anything about that but it is not the Court, denying the motion for reconsideration filed in the present case, which will provoke a constitutional crisis; if ever, it is the House of Representatives that will do so, seeing that the Court has already acted on such a charge under an honest belief that plagiarism is an administrative rather than an impeachable offense.

Whether plagiarism is an administrative or an impeachable offense need not be decided by the Court in this case since no actual dispute has arisen between Congress and the Court regarding it.

As for the alleged violation of the copyright law in this case, it should be sufficient to point out that no such charge has been lodged against Justice Del Castillo. What is more, the Court has no original jurisdiction over copyright law violations. I reserve in the appropriate case my view on whether or not lifting from copyrighted articles, without attribution, solely for the purpose of rendering a decision, constitutes violation of the copyright law.

Justice Sereno castigates the majority in the Court for lowering the standards for judicial scholarship, negating the educative and moral directional value in the writing and publishing of decisions, bending over backwards to deny the objective existence of gross plagiarism, and condoning dishonesty in the exercise of a function central to the role of the courts.

But our courts are in the business, not of "judicial scholarship," but of deciding fairly and honestly the disputes before them, using precedents and legal literature that, according to American scholars, belong to the public domain. If this is not honest work for a judge, I do not know what is.

And Justice Sereno has no right to preach at the expense of the majority about "educative and moral directional

value" in writing published articles. For one thing, her standards are obviously for work done in the academe, not for the judge plodding at his desk to perform government work. For another, I note that on occasions she has breached those very standards, lifting from works of others without proper attribution.

Take Justice Sereno's article, *Toward the Formulation of a Philippine Position in Resolving Trade and Investment Disputes in APEC*.^[4] Under the section subtitled "The WTO Dispute Settlement Mechanism," she said in the footnote that "[t]his section is drawn from Article XX and XXIII of the GATT 1994, Understanding on Dispute Settlement, and Working Procedures." To me, this means that in writing the section, she drew ideas from these four GATT issuances.

I am reproducing below the beginning portions of Justice Sereno's work that are relevant to this discussion. I underline what she copied verbatim from Annex 2 of the General Agreement on Tariffs and Trade (GATT) 1994, entitled "Understanding on Rules and Procedures Governing the Settlement of Disputes," or "Understanding on Dispute Settlement" for short.

The WTO Dispute Settlement Mechanism

Dispute settlement under the WTO mechanism is the prompt settlement of situations in which a member considers that any benefit accruing to it directly or indirectly under the WTO Agreement is being impaired by measures taken by another member. A dispute settlement mechanism aims to secure a positive solution to a dispute. Thus, a solution mutually acceptable to the parties to a dispute is preferred. However, in the absence of a mutually agreed solution, the first objective is usually to secure the withdrawal of measures concerned. A measure is any internal act, whether a law, an administrative action, or a judicial decision of a member.

The DSB is the WTO organ that is mandated to administer the rules and procedures that govern the settlement of disputes. It is made up of the representatives of all the members of the WTO. Each member is entitled to one vote.

The DSB has the following powers and functions: (a) to establish panels, (b) to adopt or reject panel and Appellate Body reports, (c) to maintain surveillance of the implementation of rulings and recommendations, and (d) to authorize the suspension of concessions and other obligations. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be viewed as contentious acts. Members engage in this procedure to resolve disputes. [copied]

If a measure adopted by a country (A) within its territory impinges on, for example, the exports of another country (B), the first step in dispute settlement is the filing of a request for consultation by the complainant. In this case, B is the complainant.

If B requests consultation with A, then A must consider the complaint of B. A must reply to the request within 10 days after its receipt and enter into consultations with B in good faith within a period of 30 days from the date of the request, with a view to reaching a mutually satisfactory solution. If A does not respond within 10 days, does not enter into consultations within a period of 30 days from the filing of the request, and if the consultation fails to settle a dispute within 60 days after the request for consultation, then B may proceed to request the establishment of a panel.

Good offices, conciliation, and mediation may be requested at any time by any party to a dispute. They may begin and be terminated at any time. Once they are terminated, the complaining party can then request the establishment of a panel.

If the complaining party so requests, a panel may be established by the DSB. The function of the panel is to assist the DSB in discharging its responsibilities. Accordingly, a panel should make an objective assessment of the matter before it, including the facts of the case and the applicability and conformity of the measure with the relevant agreements. It should also make other findings that will assist the DSB in making the

recommendations or in giving the rulings provided for in the covered agreements, besides consulting regularly with the parties to the dispute and giving them adequate opportunity to develop a mutually satisfactory solution. [Copied]

The request for the establishment of a panel should be made in writing, indicate whether consultations were held, identify the specific measures at issue, and provide a brief summary of the legal basis of the complaint. [Copied]

x x x x

Notably, Justice Sereno began her above discussion with ideas presumably from her four sources, which she put together and fashioned into her own sentences and paragraphs. The ideas were from GATT but the presentation was original Sereno. Down the line, however, without introduction or preamble, she copied verbatim into her work portions from Understanding on Dispute Settlement, without citing this specific source. More, she did not use quotation marks to identify the copied portions. She thus made ordinary readers like me believe that she also crafted those portions. To borrow a word from the civil code, she "co-mingled" the work of others with hers, erasing the identity of the lifted work.

Justice Sereno's explanation is that, since she was drawing from the rules embodied in GATT's Understanding on Dispute Settlement, she did not have to make attributions to those rules at each turn of her writing. She may be correct if she in fact properly cited those rules the first time she copied from it and, further, indicated a clear intent to do further copying down the line. But she did not. Properly, she could have written:

x x x x

The DSB has the following powers and functions: (a) to establish panels, (b) to adopt or reject panel and Appellate Body reports, (c) to maintain surveillance of the implementation of rulings and recommendations, and (d) to authorize the suspension of concessions and other obligations. GATT's Understanding on Dispute Settlement has a lot to say about the subject and some are mentioned here. For one it says, "It is understood that requests for conciliation and the use of the dispute settlement procedures should not be ... as contentious acts. Members engage in ... procedure to resolve disputes."

x x x x

Further, she did not identify the portions she copied verbatim in order to set them apart from her own writing. Under the rule that she foists on Justice Del Castillo, quotation marks must be used whenever verbatim quotes are made.[5] This requirement is all the more important since, unlike domestic rules, the rules of GATT are unfamiliar terrain to most readers. Thus, at the next turn, she could have at least enclosed in quotation marks the other portions she copied verbatim from her source like this:

If the complaining party so requests, a panel may be established by the DSB. "The function of the panel is to assist the DSB in discharging its responsibilities. Accordingly, a panel should make an objective assessment of the matter before it, including the facts of the case and the applicability and conformity of the measure with the relevant agreements. It should also make other findings that will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements ... consul ... regularly with the parties to the dispute and giving them adequate opportunity to develop a mutually satisfactory solution."

"The request for the establishment of a panel should be made in writing, indicate whether consultations were held, identify the specific measures at issue, and provide a brief summary of the legal basis of the complaint."

What is more, learned lawyers would always set apart the laws or rules that they cite or invoke in their work since these are expressions of a higher grade than their comments or opinions. A lawyer's opinion can persuade but a

rule or a law is binding. I have yet to see a Supreme Court decision that copies verbatim a specific rule or law, which it invokes to support such decision, without distinctly calling it what it is or citing its source.

Below is the rest of the verbatim copying that she made from Understanding on Dispute Settlement in the section she wrote without attribution or quotation marks.

Sereno, J.

Original work - GATT Annex 2, Understanding on Dispute Settlement

After receipt of comments from the parties, the panel shall issue an interim report to them, including both the descriptive sections and the panel's findings and conclusions. The parties may submit written requests for the panel to review precise aspects of the interim report for which the panel shall meet with the parties. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the members. (page 7)

Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

[Article 15.2, GATT Annex 2]

When a panel or the AB concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or AB may suggest ways by which the member concerned could implement the recommendations. (page 8)

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

[Article 19.1, GATT Annex 2]

The DSB shall adopt the report within 60 days of the issuance of a panel report to the members, unless one of the parties to the dispute formally notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt the report. If the panel report is on appeal, the panel report shall not be considered for adoption by the DSB until the completion of the appeal. (page 7-8)

Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.

[Article 16.4, GATT Annex 2]

It may uphold, modify, or reverse the legal findings and conclusions of the panel. (page 8)

The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

[Article 17.13, GATT Annex 2]

Note that the AB reviews only issues of law covered in the panel report and legal interpretation developed by the panel. (page 8)

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

[Article 17.6, GATT Annex 2]

The DSB shall keep under surveillance the implementation of adopted recommendation or rulings. Any member may raise the issue of implementation of the recommendations or rulings at the DSB anytime following their adoption. (page 8)

The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption.

[Article 21.6, GATT Annex 2]

Going to another item in the same article, Justice Sereno copies significant lines from Oppenheim's Treatise without making an attribution to that work.

Sereno, J.

Original work - Oppenheim's Treatise

In mediation, the third party facilitates the negotiations between the parties concerned. It involves direct conduct of negotiations between the parties at issue on the basis of proposals made by the mediator.

On the other hand, good offices are a friendly offer by a third party, which tries to induce disputants to negotiate among themselves. Such efforts may consist of various kinds of actions tending to call negotiations between conflicting states into existence. (page 11)

The difference between [good offices and mediation] is that, whereas good offices consist in various kinds of action tending to call negotiations between the conflicting States into existence, mediation consists in a direct conduct of negotiations between the differing parties on the basis of proposals made by the mediator.

[Oppenheim, International Law, A Treatise volume 2 page 11 (1920)]

Justice Sereno explains that "trite, common, standard statement[s]" like the ones she copied from Oppenheim has "nothing original at all about [them]" and need no citation or quotation marks. This is true. Indeed, the Court acknowledged in its October 12, 2010 decision that no plagiarism could be committed respecting "common definitions and terms, abridged history of certain principles of law, and similar frequently repeated phrases that, in the world of legal literature, already belong to the public realm." But I cite the above because Justice Sereno would not grant to Justice Del Castillo the liberty to use common definitions and terms in his ponencia without the correct attribution.

In the original draft of this concurring opinion that I circulated among the members of the Court, I mentioned an article published in 2007 that Justice Sereno wrote with two others entitled Justice and the Cost of Doing Business.[6] I found that a portion of this article appeared to have been reproduced without attribution from a 2005 publication, the Asian Development Bank Country Governance Assessment (Philippines) 2005.[7] Justice Sereno has since explained to my satisfaction that such portion came from the three co-authors' earlier 2001 report submitted to the World Bank (WB). I am dropping it as a case of omission of attribution.

Parenthetically, however, in the academic model, "dual and overlapping submissions" is a thesis writer's sin. It

simply means that the same academic work is submitted to gain credit for more than one academic course.[8] In the publishing world, while not prohibited across the board, law journals and reviews frown upon authors who submit manuscripts which have been previously published elsewhere, since the purpose of publication is the circulation and distribution of original scholarship and the practice would permit the author to be credited twice for the same work.

Notably, from the papers she furnished the members of the Court, it would seem that the WB Danish Trust Fund commissioned and paid for the 2001 study that Justice Sereno and her co-authors undertook. Indeed, the cover page of the WB paper she also provided shows that it was part of the "Document of the World Bank." I would assume, however, that Justice Sereno obtained WB authorization for the subsequent publication of the report in 2007.

Next, in her memorandum for petitioners-intervenors Franklin M. Drilon and Adel A. Tamano in Province of North Cotabato, et al. v. Government of the Republic of the Philippines Peace and Panel on Ancestral Domain, et al.,[9] Justice Sereno lifted a famous phrase from the United States' case of *Baker v. Carr*, 169 U.S. 180, without making attribution to her source.

J. Sereno

Original Work - *Baker v. Carr*

Second, there is no lack of a judicially discoverable and manageable standard for resolving the question, nor impossibility of deciding the question without an initial policy determination of a kind clearly for non-judicial discretion.

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion x x x

[*Baker v. Carr*, 169 U.S. 186]

Justice Sereno explains that, since she earlier cited *Baker v. Carr* in her memorandum, it would be utterly pointless to require her to repeat her citation as often as excerpts from the case appear down the line. It is not quite pointless because one who copies from the work of another has an obligation, she insists in her dissent, to make an attribution to his source. Otherwise, a writer can simply say at the start of his article that he is copying from a list of named cases and it would be up to the reader to guess where the copied portions are located in that article. An explanation like this from an academician is disheartening.

In another article, *Uncertainties Beyond The Horizon: The Metamorphosis of the WTO Investment Framework In The Philippine Setting*,[10] Justice Sereno also copied from the World Trade Organization fact sheet on line (prepared by the United States Department of Agriculture) without using quotation marks, and made the material appear to be her own original analysis. Thus:

J. Sereno

Original Work - WTO Factsheet

The World Trade Organization (WTO) was established on January 1, 1995. It is a multilateral institution charged with administering rules for trade among member countries. The WTO functions as the principal international body concerned with multilateral negotiations on the reduction of trade barriers and other measures that distort competition. The WTO also serves as a platform for countries to raise their concerns regarding the trade policies of their trading partners. The basic aim of the WTO is to liberalize world trade and

place it on a secure basis, thereby contributing to economic growth and development.

The World Trade Organization (WTO), established on January 1, 1995, is a multilateral institution charged with administering rules for trade among member countries. x x x The WTO functions as the principal international body concerned with multilateral negotiations on the reduction of trade barriers and other measures that distort competition. The WTO also serves as a platform for countries to raise their concerns regarding the trade policies of their trading partners. The basic aim of the WTO is to liberalize world trade and place it on a secure basis, thereby contributing to economic growth and development.

[WTO FACTSHEET <http://www.fas.usda.gov/info/factsheets/wto.html> (last accessed February 13, 2008)]

Here again, Justice Sereno ignores her unbendable rule that one commits plagiarism by his "[f]ailure to use quotation marks to indicate that the entire paragraph in the body of the decision...was not the ponente's original paragraph, but was lifted verbatim from [another's] work."

In his book entitled *Economic Analysis of Law* (2nd edition, 1977), Judge Richard A. Posner wrote:

xxx Hence, settlement negotiations will fail, and litigation ensue, only if the minimum price that the plaintiff is willing to accept in compromise of his claim is greater than the maximum price the defendant is willing to pay in satisfaction of that claim. (At p. 435)

Justice Sereno copied the above verbatim in her article entitled *Lawyers' Behavior and Judicial Decision-Making*[11] published in the *Philippine Law Journal*, without quotation marks or attribution to Judge Posner. Thus, she wrote:

xxx [S]ettlement negotiations will fail and litigation will ensue if the minimum price that plaintiff is willing to accept in compromise of his claim is greater than the maximum price that the defendant is willing to pay in satisfaction of that claim. (At page 483)

In other sections of the same article that Justice Sereno wrote, she either copied verbatim from Judge Posner or mimicked his ideas without attributing these to him. Thus:

Judge Posner wrote --

A somewhat more plausible case can be made that judges might slant their decisions in favour of powerful interest groups in order to increase the prospects of promotion to higher office, judicial or otherwise. xxx (At p. 416)

Justice Sereno mimicked --

The third is that the judge maximizes the prospects of his promotion to a higher office by slanting his decisions in favor of powerful interest groups. (page 489)

Judge Posner wrote --

Presumably judges, like the rest of us, seek to maximize a utility function that includes both monetary and non-monetary elements xxx. (At p. 415)

Justice Sereno mimicked --

In understanding judicial behaviour we have to assume that judges like all economic actors maximize a utility

function. This function in all probability includes material as well as non-material factors. xxx (At page 489)

Judge Posner wrote --

[T]he rules of the judicial process have been carefully designed both to prevent the judge from receiving a monetary payoff from deciding a particular case one way or the other and to minimize the influence of politically effective interest groups in his decisions. [At p. 415]

Justice Sereno mimicked --

The first is that the American judicial system have rules designed to minimize the possibilities of a judge maximizing his financial interest by receiving a bribe from a litigant or from acceding to a politically powerful interest group by making the rules work in such a manner as to create disincentives for the judge ruling in such a manner (page 489)

Judge Posner wrote --

It is often argued, for example, that the judge who owns land will decide in favor of landowners, the judge who walks to work will be in favour of pedestrians. Posner, 415]

Justice Sereno mimicked --

The second proceeding from the first is that the judge maximizes the interest of the group to which he belongs. If he belongs to the landowning class he will generally favor landowners and if he walks to work, he will generally favor pedestrians. (page 489)

Judge Posner wrote --

[J]udges seek to impose their preferences, tastes, values, etc. on society. [Posner, 416]

Justice Sereno mimicked--

The last is that judges maximize their influence on society by imposing their values, tastes and preferences thereon. (page 489)

Using the severe standards she sets for Justice Del Castillo in Vinuya, i.e., "objective existence of plagiarism," I am afraid that any explanation of good faith or lack of malicious intent on Justice Sereno's part in copying without proper attribution from the work of Judge Posner would not be acceptable.

Still I can concede that Justice Sereno may not have intended to plagiarize the work of others even if she copied verbatim from them without proper attribution or quotation marks. Her above articles were, taken as whole, essentially hers. I regret, however, that since she wrote them as an academician bound by the high standards that she and the University of the Philippines where she taught espouse, she may have failed, borrowing her own phrase, to set the correct "educative and moral directional value" for the young.

Justice Del Castillo, who did not write as an academician but as a judge, is at least entitled to the liberties granted judges in writing decisions.

I vote to DENY the motion for reconsideration filed in this case.

[1] Section 2, Article XI, 1987 Constitution of the Philippines.

[2] Section 3 (7), id.

[3] Section 6, Article VIII, 1987 Constitution of the Philippines.

[4] Sereno, Toward the Formulation of a Philippine Position in Resolving Trade and Investment Disputes in APEC, Philippine APEC Study Center Network (PASCN) Discussion Paper No. 2001-15 (2001). [available online at <http://pascn.pids.gov.ph/DiscList/d01/s01-15.pdf>]

[5] Harvey writes that "[w]ords you use verbatim from a source must be put in quotation marks, even if you use only two or three words; it's not enough simply to cite." Harvey, Writing with Sources: A Guide for Harvard Students 10 (2008).

[6] Ma Lourdes A. Sereno, Emmanuel S. De Dios, and Joseph J. Capuno, Justice and the Cost of Doing Business: The Philippines (2007) published by the Philippine Institute for Development Studies.

online at <http://www.econ.upd.edu.ph/respub/dp/pdf/DP2007-11.pdf> or

<http://publications.pids.gov.ph/details.phtml?pid=4180>

[7] At p. 103.

[8] The Harvard Plagiarism Policy states:

It is the expectation of every course that all work submitted to it will have been done solely for that course. If the same or similar work is to be submitted to any other course, the prior written permission of the instructor must be obtained. If the same or similar work is to be submitted to more than one course during the same term, the prior written permission of all instructors involved must be obtained. A student submits the same or similar work to more than one course without such prior permission is subject to disciplinary action, and ordinarily will be required to withdraw from the College. (available online at <http://isites.harvard.edu/icb/icb.do?keyword=k70847&pageid=icb.page355322>)

[9] G.R. Nos. 183591, 183752, 183893, 183951, September 18, 2008.

[10] Sereno, Uncertainties Beyond The Horizon: The Metamorphosis Of The WTO Investment Framework In The Philippine Setting, 52 UST LAW REVIEW 259 (2007-2008). Available online at http://ustlawreview.com/pdf/vol.LII/Uncertainties_Beyond_the_Horizon.pdf

[11] Sereno, Lawyer's Behavior and Judicial Decision-Making, 70 Phil. L. J. 472-492 (vol 4, June 1996) [available online at <http://law.upd.edu.ph/plj/images/files/PLJ%20volume%2070/PLJ%20volume%2070%20number%204%2002-%20Ma.%20Lourdes%20A.%20Sereno%20-%20Lawyers%20Behavior.pdf>]

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DISSENTING OPINION

SERENO, J.:

Judges need not strain themselves to meet inapplicable standards of research and attribution of sources in their judicial opinions, nor seek to achieve the scholarly rigidity or thoroughness observed in academic work. They need to answer to only two standards - diligence and honesty. By honesty here is meant that good faith attempt to attribute to the author his original words and analysis.

Even if a judge has to rely in large part on the drafts of his legal researchers, the work of a diligent and honest

judge will never display the severe plagiarism evident in the Vinuya Decision published under the name of Justice Mariano C. del Castillo. A judge will only find himself in the same predicament as Justice del Castillo if two situations coincide: (1) the judge wittingly or unwittingly entrusts a legal researcher with the task of drafting his judicial opinion, and the legal researcher decides to commit severe plagiarism; and (2) the judge: (a) does not read and study the draft decision himself; (b) even if he does read and study the same, the "red flags" that are self-evident in the draft decision completely escape him; or (c) despite having seen the red flags, he ignores them.

We use the words "severe plagiarism" here deliberately because not only were three (3) works of the four (4) complaining authors^[1] plagiarized in Vinuya, text from the following copyrighted works was copied without attribution as well: essays contributed by Robert McCorquodale and Phoebe Okowa to the book *International Law*, edited by Malcolm Evans; an article written by Mariana Salazar Albornoz, entitled *Legal Nature and Legal Consequences of Diplomatic Protection: Contemporary Challenges*; an article written by Elizabeth Prochaska, entitled *Testing the Limits of Diplomatic Protection: Khadr v. The Prime Minister of Canada*; a report by Larry Niksch, entitled *Japanese Military's Comfort Women*; and an article by James Ladino, entitled *Ianfu: No Comfort Yet for Korean Comfort Women and the Impact of House Resolution 121*. In addition, incorporated into Vinuya were excerpts from a decision of an international tribunal without any signal given to the reader that the words were not those of Justice del Castillo of the Philippine Supreme Court but the words of another tribunal. While there are views that a judge cannot be guilty of plagiarism for failure to recognize foreign decisions as source materials in one's judicial writing - as when Justice Antonio C. Carpio opines that a judge cannot be guilty on this score alone - it is beyond debate that there is a duty of care to attribute to these foreign and international judicial decisions properly, and that one should never present these materials as if they are one's own.

An estimate of the extent of the plagiarism in the Vinuya Decision has been made by my office. The best approximation available to us, using the "word count" feature of Microsoft Word, reveals that 52.9% of the words used in the Vinuya Decision's discussion on international law, which begins in page 24 and continues to the end (2,869 out of 5,419 words), are copied without attribution from other works.

The Vinuya Decision, therefore, because of the severity of the plagiarism attending it, is the worst possible context for the Majority to draw, in its Decision dated 12 October 2010 and in its Resolution denying the Motion for Reconsideration, the following conclusions:

- that plagiarism requires the element of "malicious intent";
- that - calibrating its ruling in response to the outcry of the academic community after the Majority Decision was issued - the rules against plagiarism applicable to the academic community do not apply to judicial decisions;
- that the standard of attribution applicable to judicial decisions is effectively, no standard at all - a judge cannot be guilty of plagiarism as understood by the academic world, and neither is he liable for copying without attribution, even from copyrighted materials;
- that this lack of liability extends as well to benefit lawyers in the submission of their pleadings before courts; and
- that on the whole, the Vinuya Decision is the product of hard, honest, original work.

In the course of the resolution of the Motion for Reconsideration, I have found myself counter-accused of having copied the works of others without attribution. I have debunked each of these claims and lay them bare in this Dissent. I have even proven that it was one of my co-authored works that was copied without attribution being given to me and to my co-authors. The theory propounded against me is that I cannot conclude that the Vinuya Decision is partly a product of plagiarism unless I am willing to call myself a plagiarist as well. I emphasize,

however, my original thesis - that a diligent and honest judge or researcher will never find himself to have plagiarized, even unwittingly, to the same extent that plagiarism occurred in the Vinuya Decision. Herein lies the safety of a researcher - a habit of trying to give recognition where recognition is due. Should any of my works, wherein I failed to make proper attribution, surface, I will do what I have recommended that the author of the Vinuya Decision do: acknowledge the wrong, apologize to the wronged, and correct the work. See pages 58 to 75 herein for a discussion on the counter-accusations leveled against me.

Irrespective of the outcome of my analysis, let it be stated that this Dissent does not make any pronouncement regarding the jurisdiction of this Court over the complaint for plagiarism against Justice del Castillo. My esteemed colleague Justice Carpio is convinced that Congress is the sole disciplining authority of all impeachable officers, including Justices of the Supreme Court. He characterizes plagiarism as a betrayal of public trust, and thus, "impeachment by Congress takes the place of administrative disciplinary proceedings against impeachable officers as there is no other power that can administratively discipline impeachable officers." [2]

I. The Flow of the Analysis in This Dissent

A. Parameters

To allay any concern from members of the judiciary, I have been very careful to underscore the limitations of my analysis of the Vinuya Decision. My Dissent of 12 October 2010 is very clear:

In a certain sense, there should have been less incentive to plagiarize law review articles because the currency of judges is *stare decisis*. One wonders how the issue should have been treated had what was plagiarized been a court ruling, but that is not at issue here. The analysis in this opinion is therefore confined to the peculiar situation of a judge who issues a decision that plagiarizes law review articles, not to his copying of precedents or parts of the pleadings of the parties to a case. [3]

To be categorical, a judge or legal researcher cannot be guilty for using doctrines that have been incorporated into the mainstream and are standard terms of trade. Neither is a judge required to use quotation marks or blockquotes every time there is a reference to allegations in the pleadings of parties, or when he is discussing legal arguments using already accepted legal doctrines. It is when he ventures into using the original words of others, especially those of legal scholars, that he must be particularly careful. He cannot write to pass off the words of others, especially those of others' pioneering works, as his own. To do so is dishonest. It has also been suggested that Justice del Castillo cannot be guilty of plagiarism as he never read the work of Mariana Salazar Alborno. That argument is neither here nor there. At the very least, the words he copied were those of another in an important original analysis of the state of international law on rape.

B. Structure of the Technical Analysis in This Dissent

The structure and rigidity of the Technical Analysis in this Dissent is necessary to fulfill two purposes: (1) to enable the reader to examine whether I have scientific and objective basis to conclude that severe plagiarism characterizes the Vinuya Decision; and (2) to examine whether I am willing to subject my work to the same standards to which I have subjected the Vinuya Decision.

One interesting note. My professional record had been vetted by the Judicial and Bar Council prior to my appointment to this Court. My previous works - those of an academic and those of a pleader - are presently being, and, I expect will continue to be, thoroughly scrutinized. While those previous works form part of the basis of my appointment, inasmuch as they are proof of my competence and expertise, they cannot serve as a basis to determine whether I am now performing my duties as a judge satisfactorily. One can view the scrutiny as an unwarranted collateral attack on my record. This did not happen until my Dissent of 12 October 2010.

The first part of the Technical Analysis consists of new tables of comparison presenting more instances of plagiarism as they occur in the Vinuya Decision. Two of these tables deal with copied works that previously appeared in my earlier Dissent: *A Fiduciary Theory of Jus Cogens*, by Evan J. Criddle and Evan Fox-Decent, and *Breaking the Silence: Rape as an International Crime* by Mark Ellis; however, the entries for these tables present instances of plagiarism not discussed or presented in my Dissent of 12 October 2010. Following the tables are lists of violations of rules against plagiarism, each list item corresponding to one table entry.

Following the presentation of the tables, the process whereby plagiarism could have been committed in Vinuya is examined. The severe extent of plagiarism, which is already evident in the tables, is discussed further, followed by an analysis of the systematic commission of plagiarism in Vinuya. This analysis consists of the detailed dissection of specific parts of the Vinuya decision: the text of the body in pages 31-32, and the first paragraph of footnote 65. The research process purportedly used by the legal researcher of Vinuya is then broken down into separate steps that illustrate the decision points at which an honest and diligent researcher would have ensured that proper attribution to sources be given. This is then followed by a closer examination of the deletion of existing citations and the features of Microsoft Word relevant to the deletion of footnotes.

II. Technical Analysis of Plagiarism in Vinuya

A. More Plagiarism

Below are new tables of comparison - excluding materials in tables already discussed in my earlier Dissent to the majority Decision in AM 10-7-17-SC - of excerpts from the Decision in Vinuya vis-a-vis text from one (1) book on international law, five (5) foreign law journal articles, and a copyrighted report of the United States Congressional Research Service. While the degree of seriousness of the offense of unattributed copying varies with the kind of material copied, the extent of the copying conveys the level of honesty or dishonesty of the work done with respect to the Vinuya Decision. The extent of copying enumerated in these tables also renders incredible the claim of mechanical failure, as well as the alleged lack of intent on the part of the researcher to not give proper attribution.

The materials for comparison were first identified in the Motion for Reconsideration and in the letter of Dr. Peter B. Payoyo, a Filipino legal scholar residing in the Netherlands, addressed to the Chief Justice dated 28 October 2010. These excerpts were independently verified, and compared with the corresponding portions from the original works. In the course of independent verification, we came across three more unattributed copied works.

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TABLES OF COMPARISON

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To aid an objective analysis of the extent and manner of the plagiarism committed in the Vinuya Decision, below are tables of comparison that will compare three written works: (1) the plagiarized work; (2) the Vinuya Decision; and (3) the purported "original" source analyzed or cited by the concerned authors and by the Vinuya Decision. The left column pertains to the literary works allegedly plagiarized by the legal researcher in the Vinuya Decision. The middle column refers to the pertinent passage in the Vinuya Decision that makes unattributed use of the copied work. According to the Majority Resolution, these citations made to original sources (e.g. to the international law cases being referenced to support a certain point) in the Vinuya Decision are sufficient to refute the charges of non-attribution. To address this claim, I have chosen to add a third column to present the text of the source referred to in the nearest (location-wise and/or context-wise) citation or attribution made in the Vinuya

Decision. This will allow us to determine whether the analysis, reference and/or collation of original sources were those of the allegedly plagiarized authors or are Vinuya originals. In addition, this three-column presentation will also allow us to examine the claim being made by Justice del Castillo that at least two of the authors whose works are allegedly plagiarized in the Vinuya Decision themselves violated academic scholarship rules against plagiarism.

TABLE A: Comparison of Evan J. Criddle & Evan Fox-Decent's article in the Yale Journal of International Law, entitled A Fiduciary Theory of Jus Cogens (2009) and the Supreme Court's 28 April 2010 Decision in *Vinuya v. Executive Secretary*.

The Allegedly Plagiarized Work

The Decision

International Source Being Analyzed by Criddle and Fox-Decent

Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int'l L. 331 (2009).

Vinuya v. Executive Secretary, G.R. No. 162230, 28 April 2010.

1.

...judges on the Permanent Court of International Justice affirmed the existence of peremptory norms in international law by referencing treaties *contra bonos mores* (contrary to public policy) in a series of individual concurring and dissenting opinions.[10] [10] For example, in the 1934 Oscar Chinn Case, Judge Schücking's influential dissent stated that neither an international court nor an arbitral tribunal should apply a treaty provision in contradiction to *bonos mores*. Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (Schücking, J., dissenting). (p. 335 of Criddle and Fox-Decent)

...Judges on the Permanent Court of International Justice affirmed the existence of peremptory norms in international law by referencing treaties *contra bonos mores* (contrary to public policy) in a series of individual concurring and dissenting opinions. (For example, in the 1934 Oscar Chinn Case, Judge Schücking's influential dissent stated that neither an international court nor an arbitral tribunal should apply a treaty provision in contradiction to *bonos mores*. Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (Schücking, J., dissenting). (p. 31, footnote 71 of *Vinuya*)

...It is an essential principle of any court, whether national or international, that the judges may only recognize legal rules which they hold to be valid. There is nothing to show that it was intended to disregard that legal principle when this Court was instituted, or that it was to be obliged to found its decisions on the ideas of the parties-which may be entirely wrong-as to the law to be applied in a given case.... The Court would never, for instance, apply a convention the terms of which were contrary to public morality. But, in my view, a tribunal finds itself in the same position if a convention adduced by the parties is in reality null and void, owing to a flaw in its origin. The attitude of the tribunal should, in my opinion, be governed in such a case by considerations of international public policy, even when jurisdiction is conferred on the Court by virtue of a Special Agreement. Source: The Oscar Chinn Case (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (separate opinion of Judge Schücking).

2.

While the ICJ recently endorsed the *jus cogens* concept for the first time in its 2006 Judgment on Preliminary Objections in Armed Activities on the Territory of the Congo (*Congo v. Rwanda*), it declined to clarify *jus cogens*'s legal status or to specify any criteria for identifying peremptory norms.[67] [67] Armed Activities on

the Territory of the Congo, Jurisdiction of the Court and Admissibility of the Application (Dem. Rep. Congo v. Rwanda) (Judgment of Feb. 3, 2006), at 31-32, available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (last visited Mar. 31, 2009). (p. 346, footnote 67 of Criddle and Fox-Decent)

While the ICJ recently endorsed the jus cogens concept for the first time in its 2006 Judgment on Preliminary Objections in Armed Activities on the territory of the Congo (Congo v. Rwanda), it declined to clarify jus cogens's legal status or to specify any criteria for identifying peremptory norms. (Armed Activities on the Territory of the Congo, Jurisdiction of the Court and Admissibility of the Application (Dem. Rep. Congo v. Rwanda) (Judgment of February 3, 2006), at 31-32, available at <http://www.icj-cij.org/docket/files/126/10435.pdf>. (p. 32, footnote 77 of Vinuya)

64. ...The Court observes, however, as it has already had occasion to emphasize, that "the erga omnes character of a norm and the rule of consent to jurisdiction are two different things"..., and that the mere fact that rights and obligations erga omnes may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (jus cogens) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties. Source: Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, 31-32 (Feb. 3).

3.

Similarly, the European Court of Human Rights has addressed jus cogens only once, in *Al-Adsani v. United Kingdom*, when it famously rejected the argument that jus cogens violations would deprive a state of sovereign immunity.[75] [75] Shelton, *supra* note 3, at 309 (discussing *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, ¶ 61). (p. 347 of Criddle and Fox-Decent)

[77] Similarly, the European Court of Human Rights has addressed jus cogens only once, in *Al-Adsani v. United Kingdom*, when it famously rejected the argument that jus cogens violations would deprive a state of sovereign immunity. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, ¶ 61) (p. 32, footnote 77 of Vinuya)

61 While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns... the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.... Source: *Al-Adsani v United Kingdom*, App. No. 35763/97, 34 Eur. H.R. Rep. 11, par. 61 (2002)(21 Nov. 2001).

TABLE B: Comparison of Mark Ellis's article entitled *Breaking the Silence: Rape as an International Crime* (2006-2007) and the Supreme Court's 28 April 2010 Decision in *Vinuya v. Executive Secretary*.

The Allegedly Copied Work

The Decision

International Source Being Analyzed by Ellis

Mark Ellis's article entitled *Breaking the Silence: Rape as an International Crime* 38 Case W. Res. J. Int'l. L.

225(2006-2007).

Vinuya v. Executive Secretary, G.R. No. 162230, 28 April 2010.

1.

A major step in this legal development came in 1949, when rape and sexual assault were included in the Geneva Conventions.... Rape is included in the following acts committed against persons protected by the 1949 Geneva Conventions: "willful killing, torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health." [65] [65]Fourth Geneva Convention, supra note 23, art. 147. (p. 236 of Ellis)

[65] ...A major step in this legal development came in 1949, when rape and sexual assault were included in the Geneva Conventions. Rape is included in the following acts committed against persons protected by the 1949 Geneva Conventions: "willful killing, torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health."... (See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3(1)(c), 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3(1)(c), 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(1)(c), 75 U.N.T.S. 973; Fourth Geneva Convention, supra note 23, art. 3(1)(c). (p. 28, footnote 65 of Vinuya)

[Article 50/51/147] Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons... protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health.... Source: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 973; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287.

2.

Rape as a violation of the laws or customs of war generally consists of violations of Article 3 of the 1949 Geneva Conventions, which, in part, prohibits "violence to life and person, in particular mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment." [66] [66]See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3(1)(c), 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3(1)(c), 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(1)(c), 75 U.N.T.S. 973; Fourth Geneva Convention, supra note 23, art. 3(1)(c).... (p. 236 of Ellis)

[65] ...Rape as a violation of the laws or customs of war generally consists of violations of Article 3 of the 1949 Geneva Conventions, which, in part, prohibits "violence to life and person, in particular mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment." (See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3(1)(c), 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3(1)(c), 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(1)(c), 75 U.N.T.S. 973; Fourth Geneva Convention, supra note 23, art. 3(1)(c). (p. 28, footnote 65 of Vinuya)

Article 3 ... (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and

torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; ... Source: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 973; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287.

3.

Article 27 of the Fourth Geneva Convention, directed at protecting civilians during time of war, states that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." [67] [67] Fourth Geneva Convention, *supra* note 23, art. 27. (pp. 236 of Ellis)

[65] ...Article 27 of the Fourth Geneva Convention, directed at protecting civilians during time of war, states that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." (p. 28, footnote 65 of Vinuya)

Article 27 Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Source: Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287.

4.

Protocol I of the Geneva Conventions continues to expand the protected rights by providing that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault." [68] [68] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 76(1), 1125 U.N.T.S. 4. (pp. 236-237 of Ellis)

[65] ...Protocol I of the Geneva Conventions continues to expand the protected rights by providing that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault." (Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 76(1), 1125 U.N.T.S. 4). (p. 28, footnote 65 of Vinuya)

Article 76.-Protection of women 1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. Source: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3.

TABLE C: Comparison of Robert McCorquodale's work, entitled *The Individual and the International Legal System*,^[4] and Phoebe Okowa's work, entitled *Issues of Admissibility and the Law on International Responsibility*,^[5] both of which were published in Malcolm Evans's book (*International Law*), and the Supreme Court's Decision in *Vinuya v. Executive Secretary*, G.R. No. 162230, 28 April 2010.

The Allegedly Copied Work

The Decision

International Source Being Analyzed and Used by McCorquodale / Okowa

Essays published in Malcolm Evans, *International Law* (ed., 2006).

Vinuya v. Executive Secretary, G.R. No. 162230, 28 April 2010.

1.

Traditionally, the only means available for individuals to bring a claim within the international legal system has been when the individual is able to persuade a government to bring a claim on the individual's behalf. Even then, it is not the individual's international rights that are being asserted but the State's own rights.... (p. 315-16 of Evans's *International Law* book, essay written by McCorquodale)

...traditionally, the only means available for individuals to bring a claim within the international legal system has been when the individual is able to persuade a government to bring a claim on the individual's behalf.[55] Even then, it is not the individual's rights that are being asserted, but rather, the state's own rights. [55] ...Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal, Judgment, 1933, PCIJ, Ser. A/B No. 61, p. 208 at 231. (p. 24, Body of *Vinuya*)

Note: Page 231 of the Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal case - the citation nearest in location and in context to the passage - does not contain a discussion on "persuad[ing] a government to bring a claim on the individual's behalf." The reference to Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal case occurs in McCorquodale as footnote 14, four sentences before the passage copied by *Vinuya*, and is made following the quote, "it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself". In McCorquodale, the citation following the discussion on how "it is not the individual's international rights that are being asserted but the State's own rights" is written thus in footnote 16: [16] *Panevezys-Saldutiskis Railway*, Judgment, PCIJ, Ser A/B, No 76, p 4. Cf *LaGrand (Germany v United States of America)*, Merits, Judgment, ICJ Reports 2001, p 466, para 42.

2.

The conceptual understanding that individuals have rights and responsibilities in the international legal system does not automatically mean that they have the ability to bring international claims to assert their rights or are able to claim an immunity to prevent their responsibilities being enforced (Hohfeld, above). Thus the PCIJ declared that "it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself".[14]

[14] Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal, Judgment, 1933, PCIJ, Ser A/B, No 61, p 208 at p 231 (p. 315 of Evans's *International Law* book, essay written by McCorquodale)

[55] The conceptual understanding that individuals have rights and responsibilities in the international arena does not automatically mean that they have the ability to bring international claims to assert their rights. Thus, the Permanent Court of International Justice declared that "it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself." Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal, Judgment, 1933, PCIJ, Ser. A/B No. 61, p. 208 at 231. (p. 24, footnote 55 of *Vinuya*)

Again, it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself. No argument against the University's personality in law can therefore be deduced from the fact that it did not enjoy the free disposal of the property in question.... Source: Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (*Peter Pázmány University v. Czechoslovakia*), 1933 P.C.I.J. 208, (ser. A/B) No. 61, at 231 (Dec. 15).

3.

The decisions of national courts on these constitutional provisions nevertheless support the thesis that general international law as it stands does not mandate an enforceable legal duty of diplomatic protection.[17] [17] *Kaunda and others v President of the Republic of South Africa and others*, Case CCCT23/04. In the *Hess Decision BverfGE*, 55, 349, 90 ILR 386, the German Federal Constitutional Court upheld the existence of a federal constitutional right to diplomatic protection but denied that it was required by customary international law. See also *Abbasi v Sec of Foreign and Commonwealth Affairs and Sec of Home Office* [2002] EWCA Civ 1598, 6 November 2002. (p. 484 of Evans's International Law book, essay written by Okowa)

Even decisions of national courts support the thesis that general international law as it stands does not mandate an enforceable legal duty of diplomatic protection. (p. 26, footnote 63 of Vinuya)

Note: In Okowa's essay, this statement follows a paragraph in which she discusses Kaunda in the context of discretionary diplomatic protection. Thus, for the pertinent passages of Kaunda please see entry 5 of this table.

4.

This position was been challenged in the UK in a case arising from the clearly internationally unlawful detention by the US of prisoners in Guantanamo Bay from the time of the Afghanistan conflict in 2001. In *Abassi v Secretary of State for Foreign and Commonwealth Affairs*[19] the applicant (a British national) sought judicial review of the adequacy of the diplomatic actions of the British government with the US government.... (p. 316 of Evans's International Law book, essay written by McCorquodale)

[63] ...has been challenged in the UK in a case arising from the unlawful detention by the US of prisoners in Guantanamo Bay from the time of the Afghanistan conflict in 2001. In *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* ([2002] EWCA Civ 1316, 19 September 2002) the applicant (a British national) sought judicial review of the adequacy of the diplomatic actions of the British government with the US government.... (p. 26, footnote 63 of Vinuya)

1. Feroz Ali Abbasi, the first claimant, is a British national.... They seek, by judicial review, to compel the Foreign Office to make representations on his behalf to the United States Government or to take other appropriate action or at least to give an explanation as to why this has not been done. ... 107. ...On no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy.... Source: *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, 42 I.L.M. 358, 359-383 (2003)(Nov. 6)(U.K.).

5.

The South African Constitutional Court in *Kaunda and others v President of the Republic of South Africa and others*[16] recognized the constitutional basis of the right of diplomatic protection as enshrined in the South African constitution, but went on to hold that the nature and extent of his obligation was an aspect of foreign policy within the discretion of the executive.

[16] *Kaunda and others v. President of the Republic of South Africa and others*, Case CCCT23/04. (p. 484 of Evans's International Law book, essay written by Okowa)

[63] ...The South African Constitutional Court in *Kaunda and others v. President of the Republic of South Africa and others* (Case CCCT23/04) recognized the constitutional basis of the right of diplomatic protection as enshrined in the South African Constitution, but went on to hold that the nature and extent of this obligation was an aspect of foreign policy within the discretion of the executive. (p. 27, footnote 63 of Vinuya)

[65] The founding values of our Constitution include human dignity, equality and the advancement of human rights and freedoms.... [69] There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms.... [73] A court cannot tell the government how to make diplomatic interventions for the protection of its nationals.... [77] A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal.... Source: *Kaunda v. President of the Republic of South Africa*, 44 I.L.M. 173, pars. 65-77 (2005) (C. Ct. S. Afr.).

TABLE D: Comparison of Mariana Salazar Alborno's article, Legal Nature and Legal Consequences of Diplomatic Protection: Contemporary Challenges, and the Supreme Court's Decision in *Vinuya et. al. v. Executive Secretary*, G.R. No. 162230, 28 April 2010.

The Allegedly Copied Work

The Decision

The Purported "Original" Source Cited by the Concerned Authors and in the *Vinuya* Decision

Mariana Salazar Alborno, Legal Nature and Legal Consequences of Diplomatic Protection: Contemporary Challenges, 6 *Anuario Mexicano de Derecho Internacional* 377 (2006)

Vinuya v. Executive Secretary, G.R. No. 162230, 28 April 2010.

1.

Nowhere is this position more clearly reflected than in the dictum of the Permanent Court of International Justice (PCIJ) in the 1924 *Mavrommatis Palestine Concessions Case*: By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact, is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.[85] [85] *Mavrommatis Palestine Concessions case*, supra note 9, p. 12. The emphasis is ours. This traditional view was repeated by the PCIJ in the *Panevezys-Saldutiskis Railway Case*, the *Case Concerning the Payment of Various Serbian Loans issued in France*, Judgment of July 12, 1929, PCIJ Reports, Series A No. 20; and in the *Case Concerning the Factory at Chorzow*, Judgment of September 13, 1928, Merits, PCIJ Reports, Series A No. 17. The ICJ has adopted it in the *Reparation for injuries suffered in the service of the United Nations Advisory Opinion*: ICJ Reports 1949, p. 174; the *Nottebohm Case (second phase)* Judgment of April 6th, 1955: ICJ Reports 1955, p. 4 at p. 24; the *Interhandel Case* (Judgment of March 21[st], 1959: ICJ Reports 1959, p. 6 at p. 27) and the *Barcelona Traction Light and Power Company, Limited case*, supra note 6, at p. 32 par. 33. It has also been recognized by other international tribunals: see, for example, *Administrative Decision No. V of the US-German Claims Commission*. (p. 397 of Alborno)

Nowhere is this position more clearly reflected than in the dictum of the Permanent Court of International Justice (PCIJ) in the 1924 *Mavrommatis Palestine Concessions Case*: By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact, is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.[56] [56] PCIJ, Ser. A, No. 2, p. 11, at 16. This traditional view was repeated by the PCIJ in the

Panevezys-Saldutiskis Railway Case, the Case Concerning the Payment of Various Serbian Loans issued in France, Judgment of July 12, 1929, PCIJ Reports, Series A No. 20; and in the Case Concerning the Factory at Chorzow, Judgment of September 13, 1928, Merits, PCIJ Reports, Series A No. 17. The ICJ has adopted it in the Reparation for injuries suffered in the service of the United Nations Advisory Opinion: ICJ Reports 1949, p. 174; the Nottebohm Case (second phase) Judgment of April 6th, 1955: ICJ Reports 1955, p. 4 at p. 24; the Interhandel Case (Judgment of March 21[st], 1959: ICJ Reports 1959, p. 6 at p. 27) and the Barcelona Traction Light and Power Company, Limited case, (Belg. V. Spain), 1970 I.C.J. 3, 32 (Feb. 5). (p. 24 Body of Vinuya)

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact, is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant. The fact that Great Britain and Greece are the opposing Parties to the dispute arising out of the Mavrommatis concessions is sufficient to make it a dispute between two States within the meaning of Article 26 of the Palestine Mandate. Source: Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

2.

Under this view, the considerations underlying the decision to exercise or not diplomatic protection may vary depending on each case and may rely entirely on policy considerations regardless of the interests of the directly-injured individual, and the State is not required to provide justification for its decision.[90] [90] See in this sense, Borchard E., Diplomatic Protection of Citizens Abroad, New York, The Banks Law Publishing Co., 1915, at VI. Also: G. Berlia, op. cit. (note 86), pp. 63 y 64. (p. 398 of Alborno)

[57] See Borchard, E., Diplomatic Protection of Citizens Abroad at VI (1915). Under this view, the considerations underlying the decision to exercise or not diplomatic protection may vary depending on each case and may rely entirely on policy considerations regardless of the interests of the directly-injured individual, and the State is not required to provide justification for its decision. (p. 25, footnote 57 of Vinuya)

...The citizen abroad has no legal right to require the diplomatic protection of his national government. Resort to this remedy of diplomatic protection is solely a right of the government, the justification and expediency of its employment being a matter for the government's unrestricted discretion. This protection is subject in its grant to such rules of municipal administrative law as the state may adopt, and in its exercise internationally to certain rules which custom has recognized. Source: Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims, vi (1914).

3.

The ILC's First Reading Draft Articles on diplomatic protection have fully attached to the traditional view on the legal nature of such institution. In this sense, (i) they expressly state that "the right of diplomatic protection belongs to or vests in the State", a statement which "gives recognition to the Vattelian notion that an injury to a national is an indirect injury to the State";[96] (ii) they affirm its discretionary nature by clarifying that diplomatic protection is a "sovereign prerogative" of the State;[97] and stressing that the state "has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so." [98] [96] ILC First Reading Draft Articles on Diplomatic Protection, supra note 13, par. 60, Commentary to Draft Article 2, par. (1); see also, Commentary to Draft Article 1, par. (3), and text of Draft Article 2. [97] Report of the International Law Commission on the work of its 50th session, supra note 13, par. 77. [98] ILC First Reading Draft Articles on Diplomatic Protection, supra note 2, commentary to Draft Article 2, par. (2). (p. 400 of Alborno)

The International Law Commission's (ILC's) Draft Articles on Diplomatic Protection fully support this traditional view. They (i) state that "the right of diplomatic protection belongs to or vests in the State,"[59] (ii) affirm its discretionary nature by clarifying that diplomatic protection is a "sovereign prerogative" of the State,[60] and (iii) stress that the state "has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so." [61] [59] ILC First Reading Draft Articles on Diplomatic Protection, U.N. Doc. A/CN.4/484, ILC Report, A/53/10 (F), par. 60, Commentary to Draft Article 2, par. (1); see also, Commentary to Draft Article 1, par. (3), and text of Draft Article 2. [60] Report of the International Law Commission on the work of its 50th session, supra note 60, par. 77. [61] ILC First Reading Draft Articles on Diplomatic Protection, supra note 60, commentary to Draft Article 2, par. (2). (p. 25-26 Body of Vinuya)

60. The texts of the draft articles on diplomatic protection with commentaries thereto adopted on first reading by the Commission at its fifty-sixth session, are reproduced below. ... Article 2 stresses that the right of diplomatic protection belongs to or vests in the State. It gives recognition to the Vattelian notion that an injury to a national is an indirect injury to the State.[25]... ... A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national,[29] but international law imposes no such obligation.... Source: Text of the Draft Articles on Diplomatic Protection Adopted by the Commission on First Reading, Rep. of the Int'l. Law Comm'n, 56th Sess., 3 May-4 June and 5 July-6 August 2004, U.N. Doc. A/59/10 at 22-28, par. 60; GAOR, 59th Sess., Supp. 10 (2004).

4.

...Special Rapporteur Dugard proposed that the ILC adopt in its Draft Articles a provision under which States would be internationally obliged to exercise diplomatic protection in favour of their nationals injured abroad by grave breaches to their jus cogens norms, if the national so requested and if he/she was not afforded direct access to an international tribunal.[116] [116] The proposed article read as follows: "Article [4] 1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State. 2. The state of nationality is relieved of this obligation if: (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people ; (b) Another State exercises diplomatic protection on behalf of the injured person; (c) The injured person does not have the effective and dominant nationality of the State. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority." Dugard, J. First report on diplomatic protection, supra note 13, par. 74. (p. 404 of Alborno)

[62] ...Special Rapporteur Dugard proposed that the ILC adopt in its Draft Articles a provision under which States would be internationally obliged to exercise diplomatic protection in favor of their nationals injured abroad by grave breaches to jus cogens norms, if the national so requested and if he/she was not afforded direct access to an international tribunal. The proposed article reads as follows: Article [4] 1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State. 2. The state of nationality is relieved of this obligation if: (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people ; (b) Another State exercises diplomatic protection on behalf of the injured person; (c) The injured person does not have the effective and dominant nationality of the State. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority." Special Rapporteur John Dugard, appointed in 1999, First Report on Diplomatic Protection, par. 74 (UN Doc A/CN.4/506 (March 7, 2000) and Corr. 1 (June 7, 2000) and Add. 1 (April 20, 2000). (p. 26, footnote 62 of Vinuya)

74. The discretionary power of the State to intervene on behalf of its national is considered in the commentary

on article 4. Article 4 1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State. 2. The State of nationality is relieved of this obligation if: (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people; (b) Another State exercises diplomatic protection on behalf of the injured person; (c) The injured person does not have the effective and dominant nationality of the State. 3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority. Source: Special Rapporteur on Diplomatic Protection, First Rep. on Diplomatic Protection, Int'l. Law Comm'n, UN Doc. A/CN.4/506, at 27, par. 74 (7 March 2000) (by John R. Dugard).

5.

...the proposal was not accepted by the ILC, as "the question was still not ripe for treatment" because "the State practice and their opinio juris still hadn't evolved in such direction." [120] [120] Official Records of the General Assembly: 55[th] session, Supplement No. 10, Doc. A/55/10 (2000), Report of the ILC on the work of its 52[nd] session, p. 131. (p. 405 of Alborno)

[62] ...the proposal was not accepted by the ILC, as "the question was still not ripe for treatment" because "the State practice and their opinio juris still hadn't evolved in such direction." Official Records of the General Assembly: 55[th] session, Supplement No. 10, Doc. A/55/10 (2000), Report of the ILC on the work of its 52[nd] session, p. 131. (p.26, footnote 62 of Vinuya)

456. The Special Rapporteur recognized that he had introduced article 4 de lege ferenda. As already indicated, the proposal enjoyed the support of certain writers, as well as of some members of the Sixth Committee and of ILA; it even formed part of some constitutions. It was thus an exercise in the progressive development of international law. But the general view was that the issue was not yet ripe for the attention of the Commission and that there was a need for more State practice and, particularly, more opinio juris before it could be considered. Note: p. 131 of the Report does not refer to the topic of diplomatic protection. Rather, the heading of the page reads "Other Decisions and Conclusions of the Commission." Source: Rep. of the Int'l. Law Comm'n, 52nd Sess., 1 May - 9 June and 10 July - 18 August 2000, U.N. Doc. A/55/10 at 78-79, par. 456; GAOR, 55th Sess., Supp. 10 (2000).

6.

...some States have, indeed, incorporated in their municipal law a duty to exercise diplomatic protection in favor of their nationals.... Various other States have also included such a "duty to exercise diplomatic protection" under their domestic laws,[130]but their enforceability is also, to say the least, questionable (in many cases there are not even courts competent to review the decision). [130]Dugard identifies this "obligation to exist in the Constitutions of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Viet Nam and Yugoslavia, albeit with different reaches. J. Dugard, First Report on diplomatic protection, supra note 13, par. 80.

(p. 406 of Alborno)

[62] ...some States have, indeed, incorporated in their municipal law a duty to exercise diplomatic protection in favor of their nationals. (Dugard identifies this "obligation to exist in the Constitutions of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Viet Nam and Yugoslavia, albeit with different reaches. J. Dugard, First Report on diplomatic protection, supra note 13,

par. 80.) (p. 26, footnote 62 of Vinuya)

80. ...Constitutional provisions in a number of States... recognize the right of the individual to receive diplomatic protection for injuries suffered abroad. These include: Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Viet Nam and Yugoslavia.... Source: Special Rapporteur on Diplomatic Protection, First Rep. on Diplomatic Protection, Int'l. Law Comm'n, UN Doc. A/CN.4/506, at 30, par. 80 (7 March 2000) (by John R. Dugard).

7.

...but their enforceability is also, to say the least, questionable (in many cases there are not even courts competent to review the decision). Moreover, their existence in no way implies that international law imposes such an obligation,[131] simply suggesting "that certain States consider diplomatic protection for their nationals abroad to be desirable." [132] [131] ILC First Reading Draft Articles on Diplomatic Protection, supra note 2, Commentary to Draft Article 2, par (2). This was recognized expressly in the Barcelona Traction case, supra note 6. [132] Dugard, J. First report on diplomatic protection, supra note 13, par. 81.... (p. 406-407 of Alborno)

[62] ..., but their enforceability is also, to say the least, questionable (in many cases there are not even courts competent to review the decision). Moreover, their existence in no way implies that international law imposes such an obligation, simply suggesting "that certain States consider diplomatic protection for their nationals abroad to be desirable" (ILC First Reading Draft Articles on Diplomatic Protection, supra note 2, Commentary to Draft Article 2, par (2)). (p. 26, footnote 62 of Vinuya)

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national,[29] but international law imposes no such obligation. The position was clearly stated by the International Court of Justice in the Barcelona Traction case: ... A proposal that a limited duty of protection be imposed on the State of nationality was rejected by the Commission as going beyond the permissible limits of progressive development of the law.[31] Source: Commentary to the Text of the Draft Articles on Diplomatic Protection Adopted by the Commission on First Reading, Rep. of the Int'l. Law Comm'n, 56th Sess., 3 May-4 June and 5 July-6 August 2004, U.N. Doc. A/59/10 at 28, par. 60; GAOR, 59th Sess., Supp. 10 (2004).

TABLE E: Comparison of Elizabeth Prochaska's article, Testing the Limits of Diplomatic Protection: Khadr v. The Prime Minister of Canada,[6] and the Supreme Court's Decision in Vinuya v. Executive Secretary, G.R. No. 162230, 28 April 2010.

The Allegedly Copied Work

The Decision

International Source Being Analyzed By Prochaska

Elizabeth Prochaska, Testing the Limits of Diplomatic Protection: Khadr v. The Prime Minister of Canada (2009).

Vinuya v. Executive Secretary, G.R. No. 162230, 28 April 2010.

Instead, Draft Article 19, entitled 'Recommended Practice,' suggests that states should be encouraged to exercise diplomatic protection 'especially when significant injury occurred to the national. Drafted in soft language, the Article does not purport to create any binding obligations on the state. (p. 397 of Prochaska)

[62] ...Official Records of the General Assembly: 55[th] session, Supplement No. 10, Doc. A/55/10 (2000), Report of the ILC on the work of its 52[nd] session, p. 131. Instead, Draft Article 19, entitled 'Recommended Practice,' suggests that states should be encouraged to exercise diplomatic protection 'especially when significant injury occurred to the national. Drafted in soft language, the Article does not purport to create any binding obligations on the state. (Footnote 62 of Vinuya)

Note: The Report of the International Law Commission on the Work of its Fifty-Second Session, and the Special Rapporteur's First on Diplomatic Protection, which are the nearest in location and in context to the passage, does not contain a discussion on Draft Article 19. See pp. 72-85 and 27-34 respectively.

TABLE F: Comparison of Larry Niksch's Report, Japanese Military's Comfort Women, 10 April 2006,[7] and the Supreme Court's Decision in Vinuya et. al. v. Executive Secretary, G.R. No. 162230, 28 April 2010.

The Allegedly Copied Work

The Decision

Source Being Used By
Niksch

1.

Larry Niksch, Japanese Military's Comfort Women, 10 April 2006.

Vinuya v. Executive Secretary, G.R. No. 162230, 28 April 2010.

2.

The Asian Women's Fund announced three programs for former comfort women who applied for assistance: (1) an atonement fund that paid two million yen (approximately \$20,000) to each former comfort woman; (2) medical and welfare support programs for former comfort women, paying 2.5-3 million yen (\$25,000-\$30,000) for each former comfort woman; and (3) a letter of apology from the Japanese Prime Minister to each recipient woman.[8] [FN8]. From the Asian Women's Fund website, March 16, 2006. (paragraph 11 of Niksch)

The AWF announced three programs for former comfort women who applied for assistance: (1) an atonement fund paying ¥2 million (approximately \$20,000) to each woman; (2) medical and welfare support programs, paying ¥2.5-3 million (\$25,000-\$30,000) for each woman; and (3) a letter of apology from the Japanese Prime Minister to each woman. (p. 17, Body of Vinuya)

The projects of atonement involved providing former comfort women with 2 million yen per person as atonement money donated by Japanese citizens, delivering a letter of apology from the Japanese Prime Minister, and offering goods and services under medical and welfare support projects financed by the Japanese government.

Note:

The passage in Vinuya does not contain a footnote. The following source is the nearest citation that may reasonably be taken as within the context of the discussion in Vinuya.

http://web.archive.org/web/20060301213211/http://www.awf.or.jp/english/project_atonement.html

3.

...As of March 2006, the Asian Women's Fund provided 700 million yen (approximately \$7 million) for these programs in South Korea, Taiwan, and the Philippines; 380 million yen (approximately \$3.8 million) in Indonesia; and 242 million yen (approximately \$2.4 million) in the Netherlands. [9] (paragraph 12 of Niksch)

...As of March 2006, the AWF provided ¥700 million yen (approximately \$7 million) for these programs in South Korea, Taiwan, and the Philippines; ¥380 million yen (approximately \$3.8 million) in Indonesia; and ¥242 million yen (approximately \$2.4 million) in the Netherlands. (p. 17, Body of Vinuya)

In order to fulfill its moral responsibility in all sincerity, the Japanese government decided to disburse about 700 million yen over a five-year period for medical and welfare support projects aiding former comfort women in the Philippines, the Republic of Korea and Taiwan. ...

Note:

The passage in Vinuya does not contain a footnote. The following source is the nearest citation that may reasonably be taken as within the context of the discussion in Vinuya.

http://web.archive.org/web/20060301213211/http://www.awf.or.jp/english/project_atonement.html

On January 15, 1997 the Asian Women's Fund and the Philippine government signed a Memorandum of understanding for medical and welfare support programs for former comfort women. Over the next five years, these were implemented by the Philippine government's Department of Social Welfare and Development. (paragraph 19 of Niksch)

On January 15, 1997 the AWF and the Philippine government signed a Memorandum of Understanding for medical and welfare support programs for former comfort women. Over the next five years, these were implemented by the Department of Social Welfare and Development. (p. 17, Body of Vinuya)

The government of the Philippines and the Asian Women's Fund signed a Memorandum of Understanding on January 15, 1997.... The Philippine government's Department of Social Welfare and Development implemented the projects over a period of five years....

Note:

The passage in Vinuya does not contain a footnote. The following source is the nearest citation that may reasonably be taken as within the context of the discussion in Vinuya.
http://web.archive.org/web/20060301213211/http://www.awf.or.jp/english/project_atonement.html

TABLE G: Comparison of James Ladino's article, Ianfu: No Comfort Yet for Korean Comfort Women and the Impact of House Resolution 121 and the Supreme Court's Decision in Vinuya v. Executive Secretary, G.R. No. 162230, 28 April 2010.

The Allegedly Copied Work

The Decision

Source Being Analyzed
and/or Used by Ladino

James Ladino, Ianfu: No Comfort Yet for Korean Comfort Women and the Impact of House Resolution 121, 15 Cardozo J.L. & Gender 333 (2009).

Vinuya v. Executive Secretary, G.R. No. 162230, 28 April 2010.

1.

In 1992, the Korean Council for the Women Drafted for Military Sexual Slavery by Japan ("KCWS"), submitted a petition to the United Nations Human Rights Commission ("UNHRC"), asking for their assistance in investigating crimes committed by Japan against Korean women and pressuring Japan to pay reparations to the women who had filed lawsuits.[96] The UNHRC formally placed the issue on its agenda and appointed Radhika Coomaraswamy as the issue's special investigator.[97] Issued in 1996, the UNHRC's report reaffirmed Japan's guilt in forcing Korean women to act as sex slaves for the imperial army.[98]

[96] Soh, supra note 7 [Chunghhee Sarah Soh, The Korean "Comfort Women": Movement for Redress, 36 Asian Survey 1226,], at 1234-35.

[97] Id. at 1226.

[98] Id. (p. 344 of Ladino)

In 1992, the Korean Council for the Women Drafted for Military Sexual Slavery by Japan (KCWS), submitted a petition to the UN Human Rights Commission (UNHRC), asking for assistance in investigating crimes committed by Japan against Korean women and seeking reparations for former comfort women.[29] The UNHRC placed the issue on its agenda and appointed Radhika Coomaraswamy as the issue's special investigator. In 1996, Coomaraswamy issued a Report reaffirming Japan's responsibility in forcing Korean women to act as sex slaves for the imperial army, and made the following recommendations:

[29] Soh, The Comfort Women Project, San Francisco State University (1997-2001), <http://online.sfsu.edu/~soh/comfortwomen.html>, at 1234-35.

(p. 9-10, Body of Vinuya)

...In her report to the U.N. Human Rights Commission, Radhika Coomaraswamy, the U.N. special investigator into violence against women, concluded that Japan must admit its legal responsibility....

...

...Lee Hyo-chae, as a co-chair of the KCWS submitted a petition to the U.N. Human Rights Commission, dated March 4, 1992, requesting that the Commission investigate Japanese atrocities committed against Korean women during World War Two, and help pressure the Japanese government to pay reparations to individual

women who have filed suit. The UNHRC responded by placing the issue on the official agenda for its August 1992 meeting in Geneva....

Source:

Chunghee Sarah Soh, The Korean "Comfort Women": Movement for Redress, 36 Asian Survey 1226, 1234-35 (1996).

2.

The Women's International War Crimes Tribunal (WIWCT) was a "people's tribunal" established by a number of Asian women, human rights organizations, and supported by an international coalition of non-governmental organizations ("NGOs").^[101] First proposed in 1998, the WIWCT convened in Tokyo in 2000 to discuss the issue of comfort women.^[102] Specifically, the WIWCT aimed to "adjudicate Japan's military sexual violence, in particular the enslavement of comfort women, to bring those responsible for it to justice, and to end the ongoing cycle of impunity for wartime sexual violence against women."

[101] Christine M. Chinkin, Women's International Tribunal on Japanese Sexual Slavery, 95 Am. J. Int'l. L. 335 (2001)

[102] Violence Against Women in War-Network Japan, What is the Women's Tribunal? <http://www1.jca.apc.org/vaww-net-japan/English/womenstribunal2000/whatstribunal.html> (last visited Oct. 16, 2008).

(p. 345 of Ladino)

The Women's International War Crimes Tribunal (WIWCT) was a "people's tribunal" established by a number of Asian women and human rights organizations, supported by an international coalition of non-governmental organizations.^[31] First proposed in 1998, the WIWCT convened in Tokyo in 2000 in order to "adjudicate Japan's military sexual violence, in particular the enslavement of comfort women, to bring those responsible for it to justice, and to end the ongoing cycle of impunity for wartime sexual violence against women."

[31] Chinkin, Women's International Tribunal on Japanese Sexual Slavery, 95 Am. J. Int'l. L. 335 (2001).

(p. 12, Body of Vinuya)

From December 8 to 12, 2000, a peoples' tribunal, the Women's International War Crimes Tribunal 2000, sat in Tokyo, Japan. It was established to consider the criminal liability of leading high-ranking Japanese military and political officials and the separate responsibility of the state of Japan for rape and sexual slavery as crimes against humanity arising out of Japanese military activity in the Asia Pacific region in the 1930s and 1940s.

...

...The tribunal arose out of the work of various women's nongovernmental organizations (NGOs) across Asia....

Source:

Chinkin, Women's International Tribunal on Japanese Sexual Slavery, 95 Am. J. Int'l. L. 335 (2001).

3.

A large amount of evidence was presented to the tribunal for examination. Sixty-four former comfort women from Korea and other surrounding territories in the Asia-Pacific region testified before the court.[104] Testimony was also presented by historical scholars, international law scholars, and two former Japanese soldiers.[105] Additional evidence was submitted by the prosecution teams of ten different countries, including: North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands.[106]

[104] Id. [Violence Against Women in War-Network Japan, What is the Women's Tribunal?, <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/whatstribunal.html> (last visited Oct. 16, 2008).]

[105] Id.

[106] Chinkin, *supra* note 101, at 336.

(p. 345 of Ladino)

[32] A large amount of evidence was presented to the tribunal for examination. Sixty-four former comfort women from Korea and other surrounding territories in the Asia-Pacific region testified before the court. Testimony was also presented by historical scholars, international law scholars, and two former Japanese soldiers. Additional evidence was submitted by the prosecution teams of ten different countries, including: North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands. Id. [Chinkin] at 336.

(p. 12, footnote 32 of Vinuya)

...Prosecution teams from ten countries presented indictments.[6] North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands.... Two lead prosecutors (Patricia Viseur Sellers[7] and Ustina Dolgopol[8]) joined the separate-country prosecutors and presented a common indictment. Source: Chinkin, Women's International Tribunal on Japanese Sexual Slavery, 95 Am. J. Int'l. L. 335, 336 (2001).

After examining the evidence for more than a year, the tribunal issued its final verdict on December 4, 2001, finding the former Emperor Hirohito and the State of Japan guilty of crimes against humanity for the rape and sexual slavery of women.[107] ... Although the tribunal included prosecutors, witnesses, and judges, its judgment was not legally binding since the tribunal itself was organized by private citizens....

[107] Violence Against Women in War-Network Japan, supra note 102.

(p. 345 of Ladino)

After examining the evidence for more than a year, the "tribunal" issued its verdict on December 4, 2001, finding the former Emperor Hirohito and the State of Japan guilty of crimes against humanity for the rape and sexual slavery of women.[32] It bears stressing, however, that although the tribunal included prosecutors, witnesses, and judges, its judgment was not legally binding since the tribunal itself was organized by private citizens.

[32] ...Id. [Chinkin] at 336.

(p. 12, Body of Vinuya)

The preliminary judgment indicated that the judges had found Emperor Hirohito guilty of the charges on the basis of command responsibility, that he knew or should have known of the offenses.... The judges also indicated that they had determined Japan to be responsible under international law applicable at the time of the events for violation of its treaty obligations and principles of customary international law relating to slavery, trafficking, forced labor, and rape, amounting to crimes against humanity.... What was the value of this exercise? Lacking legal authority, was the tribunal no more than a mock trial of little concern to serious international lawyers?

Source:

Chinkin, Women's International Tribunal on Japanese Sexual Slavery, 95 Am. J. Int'l. L. 335 (2001).

4.

On January 31, 2007, United States Representative Michael Honda of California, along with six co-sponsor representatives, introduced House Resolution 121. The resolution called for Japanese action in light of the

ongoing struggle for closure by former comfort women. The House of Representatives formally passed the resolution on July 30, 2007.[110] The resolution also makes four distinct demands:

[110] Press Release, Congressman Mike Honda, Rep. Honda Calls on Japan to Apologize for World War II Exploitation of "Comfort Women" (Jan. 31, 2007), available at http://www.house.gov/list/press/ca15_honda/COMFORTWOMEN.html.

(p. 346 of Ladino)

On January 31, 2007, US Representative Michael Honda of California, along with six co-sponsor representatives, introduced House Resolution 121 which called for Japanese action in light of the ongoing struggle for closure by former comfort women. The Resolution was formally passed on July 30, 2007,[33] and made four distinct demands: [33] Press Release, Congressman Mike Honda, Rep. Honda Calls on Japan to Apologize for World War II Exploitation of "Comfort Women" (January 31, 2007).

(p. 12, Body of Vinuya)

Today, Representative Michael M. Honda (CA - 15) introduced a bipartisan resolution before the U.S. House of Representatives calling on the government of Japan to formally and unambiguously apologize for and acknowledge the tragedy that comfort women endured at the hands of its Imperial Army during World War II...

...

The resolution is cosponsored by: Representatives Edward R. Royce (CA - 40), Christopher H. Smith (NJ - 4), Diane E. Watson (CA - 33), David Wu (OR - 1), Phil Hare (IL - 17), and Delegate Madaleine Bordallo (GU).

Source:

Press Release of Congressman Mike Honda, Rep. Honda Calls on Japan to Apologize for World War II Exploitation of "Comfort Women," 31 Jan. 2007, available at http://www.house.gov/list/press/ca15_honda/COMFORTWOMEN.html

5.

...The resolution also makes four distinct demands: [I]t is the sense of the House of Representatives that the

Government of Japan (1) should formally acknowledge, apologize, and accept historical responsibility in a clear and unequivocal manner for its Imperial Armed Forces' coercion of young women into sexual slavery, known to the world as "comfort women", during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II; (2) would help to resolve recurring questions about the sincerity and status of prior statements if the Prime Minister of Japan were to make such an apology as a public statement in his official capacity; (3) should clearly and publicly refute any claims that the sexual enslavement and trafficking of the "comfort women" for the Japanese Imperial Army never occurred; and (4) should educate current and future generations about this horrible crime while following the recommendations of the international community with respect to the "comfort women." [111]

[111] H.R. Res. 121, 110th Cong. (2007) (enacted). (p. 346 of Ladino)

The Resolution was formally passed on July 30, 2007,[33] and made four distinct demands: [I]t is the sense of the House of Representatives that the Government of Japan

(1) should formally acknowledge, apologize, and accept historical responsibility in a clear and unequivocal manner for its Imperial Armed Forces' coercion of young women into sexual slavery, known to the world as "comfort women", during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II;

(2) would help to resolve recurring questions about the sincerity and status of prior statements if the Prime Minister of Japan were to make such an apology as a public statement in his official capacity;

(3) should clearly and publicly refute any claims that the sexual enslavement and trafficking of the "comfort women" for the Japanese Imperial Army never occurred; and

(4) should educate current and future generations about this horrible crime while following the recommendations of the international community with respect to the "comfort women." [34]

[34] H.R. Res. 121, 110th Cong. (2007) (enacted).

(p. 12, Body of Vinuya)

Resolved, That it is the sense of the House of Representatives that the Government of Japan--

(1) should formally acknowledge, apologize, and accept historical responsibility in a clear and unequivocal manner for its Imperial Armed Force's coercion of young women into sexual slavery, known to the world as "comfort women", during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s

through the duration of World War II;

(2) should have this official apology given as a public statement presented by the Prime Minister of Japan in his official capacity;

(3) should clearly and publicly refute any claims that the sexual enslavement and trafficking of the "comfort women" for the Japanese Imperial Armed Forces never occurred; and

(4) should educate current and future generations about this horrible crime while following the recommendations of the international community with respect to the "comfort women".

Source cited:

H.R. Res. 121, 110th Cong. (2007) (enacted), available at <http://www.gpo.gov/fdsys/pkg/BILLS-110hres121ih/pdf/BILLS-110hres121ih.pdf> (U.S.)

6.

In December 2007, the European Parliament, the governing body of the European Union, drafted a resolution similar to House Resolution 121.

[130]... Entitled, "Justice for Comfort Women," the resolution demanded: (1) a formal acknowledgment of responsibility by the Japanese government; (2) a removal of the legal obstacles preventing compensation; and (3) unabridged education of the past.

[132] The resolution also stresses the urgency with which Japan should act on these issues, stating: "the right of individuals to claim reparations against the government should be expressly recognized in national law, and cases for reparations for the survivors of sexual slavery, as a crime under international law, should be prioritized, taking into account the age of the survivors." [133]...

[130] European Parliament, Human rights: Chad, Women's Rights in Saudi Arabia, Japan's Wartime Sex Slaves, Dec. 17, 2007, <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20071210BRI14639&seconRef=ITEM-008-EN>.

[132] Id.

[133] Id.

(p. 360 of Ladino)

In December 2007, the European Parliament, the governing body of the European Union, drafted a resolution similar to House Resolution 121.[35] Entitled, "Justice for Comfort Women," the resolution demanded: (1) a formal acknowledgment of responsibility by the Japanese government; (2) a removal of the legal obstacles preventing compensation; and (3) unabridged education of the past. The resolution also stressed the urgency with which Japan should act on these issues, stating: "the right of individuals to claim reparations against the government should be expressly recognized in national law, and cases for reparations for the survivors of sexual slavery, as a crime under international law, should be prioritized, taking into account the age of the survivors." [35] European Parliament, Human rights: Chad, Women's Rights in Saudi Arabia, Japan's Wartime Sex Slaves, Dec. 17, 2007, <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20071210BRI14639&secondRef=ITEM-008-EN>.

(p. 13, Body of Vinuya)

A resolution on the 'comfort women' (sex slaves) used by Japan in World War II calls for a change of official attitudes in modern-day Japan, a right for survivors or families to apply for compensation and measures to educate people about these historical events.

...

Call for formal acknowledgment of responsibility by government

...

Legal obstacles to compensation must be removed

...

Education about the past

...

Source cited:

European Parliament, Human rights: Chad, Women's Rights in Saudi Arabia, Japan's Wartime Sex Slaves, (17 Dec. 2007) available at

<http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20071210BRI14639&secondRef=ITEM-008-EN>

7.

The Canadian and Dutch parliaments have each followed suit in drafting resolutions against Japan. Canada's resolution demands the Japanese government to issue a formal apology, to admit that its Imperial Military coerced or forced hundreds of thousands of women into sexual slavery, and to restore references in Japanese textbooks to its war crimes.[134] The Dutch parliament's resolution simply calls for the Japanese government to uphold the 1993 declaration of remorse made by Chief Cabinet Secretary Yohei Kono.[135]

[134] The Comfort Women--A History of Trauma, http://taiwan.yam.org.tw/womenweb/conf_women/index_e.html. (last visited Mar. 26, 2009).

[134] Id.

(p. 360 of Ladino)

The Canadian and Dutch parliaments have each followed suit in drafting resolutions against Japan. Canada's resolution demands the Japanese government to issue a formal apology, to admit that its Imperial Military coerced or forced hundreds of thousands of women into sexual slavery, and to restore references in Japanese textbooks to its war crimes.[36] The Dutch parliament's resolution calls for the Japanese government to uphold the 1993 declaration of remorse made by Chief Cabinet Secretary Yohei Kono.

[36] The Comfort Women--A History of Trauma, http://taiwan.yam.org.tw/womenweb/conf_women/index_e.html. (p. 13, Body of Vinuya)

Note: On the issue of comfort women, the website only refers to the attitude and reaction of the following governments: Taiwan, South Korea, North Korea, Philippines, China, Indonesia, Malaysia, and Japan.

Source cited: http://taiwan.yam.org.tw/womenweb/conf_women/index_e.html

Violations of Rules Against Plagiarism in the Vinuya Decision

Below are violations of existing rules against plagiarism as can be found in the Vinuya Decision, in addition to violations earlier enumerated in my Dissent:

A.1 A passage from the article of Criddle and Fox-Decent was copied verbatim, including the footnote. There are no quotation marks to indicate that this important conclusion from the article and the example to illustrate it, which were discussed in the corresponding footnote, are not the ponente's own. No attribution to Criddle and Fox-Decent was made.

A.2 Similar to A.1, Criddle and Fox-Decent's conclusion was copied word for word, including the corresponding footnote, which was enclosed by parentheses and placed immediately after the sentence to which it corresponds. No attribution to Criddle and Fox-Decent was made.

A.3 Similar to A.1 and A.2, this sentence from the article was copied verbatim, including its corresponding footnote. No attribution to Criddle and Fox-Decent was made.

B.1 Save for a few words which were intentionally rearranged, the entire paragraph was lifted verbatim from Ellis's discussion on rape as an international crime. Two citations of cases from Ellis were omitted. No attribution to Ellis was made.

B.2 Ellis's identification of Article 3 of the 1949 Geneva Conventions as a general authority on rape as a violation of the laws of war, and his summation thereof, was lifted word for word. His footnote was also copied, including the intratext reference "supra note 23," enclosed in parentheses and inserted after the corresponding text. No attribution to Ellis was made.

B.3 Ellis's summary and analysis of Article 27 of the Fourth Geneva Convention was lifted word for word. No attribution to Ellis was made.

B.4 Ellis's conclusion regarding Protocol I of the Geneva Convention was appropriated, without any attribution to Ellis. Ellis's footnote was again copied. No attribution to Ellis was made.

C.1 McCorquodale's analysis of individual claims within the international legal system was copied word for word and inserted after the introductory clause "In the international sphere" in Vinuya. The footnote McCorquodale appended to his analysis of individual claims (i.e. the sentences copied in C.1.) is not present. No attribution to McCorquodale was made.

C.2 This item refers to the footnote attached to the copied sentence in C.1. It is composed of two instances of copying stitched together: two sentences of McCorquodale, taken from the paragraph directly preceding his analysis of individual claims in the international legal system, and the footnote corresponding to the PCIJ Decision quoted in the second of the said two sentences. No attribution to McCorquodale was made.

C.3 The conclusion Okowa reached was copied in footnote 63 of Vinuya, but Okowa's reference to the cases she cited in her analysis was omitted and the context of her conclusion (on the current standing of general international law with regard an enforceable legal duty of diplomatic protection) was removed. No attribution to Okowa was made.

C.4 McCorquodale's discussion of the case *Abassi v. Secretary of State* was copied without any citation of his essay or the international law book in which it was published. No attribution to McCorquodale was made.

C.5 The order of sentences were reversed, but the conclusion in Okowa's essay was copied, and as well as her discussion of the case *Kaunda v. President of the Republic of South Africa*. No attribution to Okowa was made.

D.1 Alborno's summary and analysis was copied word for word in the body of the Decision on page 24. No indication was given that this was not the ponente's original analysis, and no attribution to Alborno was made.

D.2 The elucidation of Alborno regarding what she calls the traditional view on the discretion of states in the

exercise of diplomatic protection was copied into footnote 57 of the Vinuya Decision. Alborno's citation of Borchard was used as a reference in the same footnote, but Alborno was bypassed completely.

D.3 Alborno's summation of the ILC's First Reading Draft Articles on diplomatic protection was copied with some modifications: the second half of the first sentence from Alborno was removed and instead replaced with "fully support this traditional view" in an apparent effort to link this summary to the previous instance of copying (table entry D.2.). Minor edits were made to Alborno's summary to streamline the flow of the second copied sentence. No attribution to Alborno was made.

D.4 Alborno's summation of Dugard's proposal was lifted word for word and used in footnote 62 of Vinuya. The footnote Alborno attached to this summation, a quotation of Alborno's cited source, was inserted directly after the copied summation. No attribution to Alborno was made.

D.5 The conclusion reached by Alborno regarding the rejection of Dugard's proposal was copied exactly, even with regard to the portions of the Official Records of the General Assembly that Alborno quoted. No attribution to Alborno was made.

D.6 The major part of a sentence from Alborno was copied and attached to the transition phrase "In addition" to continue the pastiche of copied sentences in footnote 62 of Vinuya. The footnote of Alborno regarding Dugard was inserted immediately after and enclosed in parentheses. Note that the inline text citation, "supra note 13, par. 80" in Alborno's footnote 130 was copied as well. No attribution to Alborno was made.

D.7 Continuing from the instance of copying in D.6., the second half of a sentence in Alborno was used as what is apparently an incomplete sentence (beginning with: ", but their enforceability...") in footnote 62 of Vinuya. The next sentence was also copied, and its corresponding footnote enclosed in parentheses and inserted immediately after it. While the Decision cites one of the same sources Alborno cited (ILC First Reading Draft Articles on Diplomatic Protection), no attribution is made to Alborno for the excerpt, or to Dugard, whom Alborno cited for the quoted portion.

E.1 An excerpt from the third paragraph of Prochaska is reproduced verbatim in footnote 62 of page 26 of the Decision. There were no quotation marks or attribution to Prochaska to indicate that such was not the ponente's analysis, but Prochaska's.

F.1 A sentence from paragraph 11 of Niksch was reproduced verbatim without quotation marks in page 17 of the body of the Decision. No attribution to Niksch was made.

F.2 An excerpt from paragraph 12 of Niksch was reproduced verbatim without quotation marks in page 17 of the body of the Decision. No attribution to Niksch was made.

F.3 An excerpt from paragraph 19 of Niksch was reproduced verbatim without quotation marks in page 17 of the body of the Decision. No attribution to Niksch was made.

G.1 An excerpt from page 344 of Ladino was reproduced without quotation marks in pages 9 to 10 of the body of the Decision. The phrase "women who had filed" was changed to "comfort women."

G.2 An excerpt from page 345 of Ladino was reproduced without quotation marks in page 12 of the body of the Decision. The two sentences in the footnote from Ladino were combined, but the words were reproduced verbatim.

G.3 An excerpt from page 345 of Ladino is reproduced verbatim in page 12 of the body of the Decision. Part of Ladino's discussion was reproduced verbatim in footnote 32 of the Vinuya Decision, with no attribution to Ladino.

G.4 The first part of the paragraph in page 345 of Ladino was reproduced verbatim. However, the latter part of Ladino's explanation, (stating that while the judgment against Japan was not legally binding, it still "cast Japan in the shadow of moral reproach") was omitted. There was no attribution to Ladino.

G.5 An excerpt from page 346 of Ladino, along with two footnotes, was reproduced verbatim in page 12 of the Decision. No attribution to Ladino was made.

G.6 Ladino's discussion in page 350 and the corresponding footnotes were reproduced verbatim in page 13 of the Decision. No attribution to Ladino was made.

B. The Process of the Commission of Plagiarism in the Vinuya Decision

A careful reading of the Vinuya Decision reveals that it is unlike other decisions issued by this Court, except perhaps for the case of *Ang Ladlad LGBT Party v. Commission on Elections*, which Justice del Castillo likewise penned. The footnotes in Vinuya read like those found in theses of international law scholars, where one discursive footnote can be so extensive as to occupy three-fourths of a page (see footnotes 62, 63, and 65). An honest researcher for a Philippine judge, after painstakingly developing a perspective on an international legal issue by reading the works of scholars who have documented the debate, would deliberately refer to the works of such scholars, and not transform their works into his own.

Justice del Castillo's researcher not only contends that accidental deletion is the sole reason for the missing footnotes, but also that their office subsequently went over the Decision "sentence by sentence" and concluded that no plagiarism was committed at all. However, the rearrangement of the sentences lifted from the original work, the mimicking of the original work's use of footnotes, the subsequent back and forth copying and pasting of such footnotes - these acts belie mere negligence. The following analysis shows objective plagiarism viewed through three lenses: extent, deliberateness, and effect.

The massiveness and frequency with which instances of unattributed copying occur in Vinuya highlight the extent of the plagiarism. Clever transpositions of excerpts to make them flow according to the researcher's transition phrases are clearly devices of a practiced plagiarist, which betray the deliberateness of every single act. The plagiarism in Vinuya will also be scrutinized on the basis of its effect, especially in light of its commission in a judicial decision. The rationale for such a thematic presentation will then be discussed in a succeeding section, which deals with evaluating plagiarism.

1. The extent of unattributed copying belies inadvertence.

In the tables outlined above, as well as in the analysis in my Dissent dated 12 October 2010, it can be seen that the researcher of Justice del Castillo failed to make the necessary attribution twenty-three (23) times in the body of the Vinuya Decision; the works whose texts were used without attribution include several copyrighted journal articles, essays from a book on international law, and one congressional report of the United States. There were thirty-six (36) missing citations in the footnotes, including twelve (12) citations missing from footnote 65 alone. This adds up to a total of fifty-nine (59) missing citations. The sheer number of missing citations is related to the length and volume of the footnotes and discussions, some of which Justice del Castillo himself admitted to be unnecessary.

The quantity of text copied without attribution is most concentrated in pages 12 to 13, which deal with actions taken in the pursuit of justice for the comfort women, and in pages 24 to 32, which appear under the section heading *The Philippines is not under any international obligation to espouse petitioners' claims*. In the latter section, the discussion and analysis appearing on pages 24 (insofar as the section after the start of the international law discussion is concerned), 28 and 31 in particular would be significantly impaired were the unattributed

portions of texts to be removed: there would be no words left in the instance of page 24; the entirety of the discursive footnote on page 28 would be reduced to one sentence and its attendant citations; three sentence fragments, and no footnotes, would remain on page 31.

In pages 24 to 32, out of a total of thirteen (13) discursive footnotes, eleven (11) of these are comprised wholly of material copied without attribution, and yet another one - footnote 69 - contains text that was copied without attribution as well. The writer of the Vinuya Decision displayed meticulous attention to detail in reproducing the citations to international judicial decisions, publications, and other such references in these footnotes - citations that originally appeared in the copied works - but completely bypassed the copied works themselves, thereby appropriating the analysis, processing, and synthesizing of information, as well as the words, of the writers whose works were copied.

On its face, the sheer volume of portions copied, added to the frequency with which citations to the plagiarized works were omitted while care was taken to retain citations to the sources cited by the plagiarized works, reveal that the plagiarism committed cannot logically be anything other than deliberate.

2. Systematic commission of plagiarism demonstrates deliberateness.

In pages twelve (12) to thirteen (13) of Vinuya, sentences from the body of Ladino's article were interspersed with Ladino's footnotes, without a single attribution to Ladino (please refer to Table G). Sentences from Ladino's article were copied into footnote 32 of Vinuya, while the immediately succeeding sentence was again copied to form part of the body of Vinuya. The cutting of sentences from Ladino's work and the patching together of these pieces to form a mishmash of sentences negate the defense of inadvertence, and give the reader the impression that the freshly crafted argument was an original creation.

The work of Criddle and Fox-Decent was subjected to a similar process. This process is dissected in the following list of instances ordered according to how they appear in pages 31 to 32 of the body of the Decision:

a. Detailed analysis of 'patchwork plagiarism' in the body of Vinuya, pp. 31-32:

1. Page 31, par. 2: Early strains of the jus cogens doctrine have existed since the 1700s,[71] but peremptory norms began to attract greater scholarly attention with the publication of Alfred von Verdross's influential 1937 article, *Forbidden Treaties in International Law*.^[72]

[72] <heinonline.org hol="" landingpage?collection="journals&handle=

Verdross argued that certain discrete rules of international custom had come to be recognized as having a compulsory character notwithstanding contrary state agreements. At first, Verdross's vision of international jus cogens encountered skepticism within the legal academy. These voices of resistance soon found themselves in the minority, however, as the jus cogens concept gained enhanced recognition and credibility following the Second World War. (See Lauri Hannikainen, *Peremptory Norms (Jus cogens) in International Law: Historical Development, Criteria, Present Status* 150 (1988) (surveying legal scholarship during the period 1945-69 and reporting that "about eighty per cent [of scholars] held the opinion that there are peremptory norms existing in international law").

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This sentence, together with footnote 72 in Vinuya, is part of one continuous discussion by Criddle and Fox Decent, and copied verbatim. The two authors rightfully attributed the historical data to Lauri Hannikainen, but the conclusion on established jus cogens principles is wholly their own.

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2. Page 31, par. 2: The recognition of jus cogens gained even more force in the 1950s and 1960s with the ILC's preparation of the Vienna Convention on the Law of Treaties (VCLT).[73] Though there was a consensus that certain international norms had attained the status of jus cogens...[74]

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The first sentence and its subsequent clause are lifted verbatim from the article. Footnotes 73 and 74 are Criddle and Fox-Decent's analysis of how international "minimum requirements" form evidence of jus cogens. The paragraph was broken down, then rearranged in Vinuya.

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3. Page 31, par. 2: Though there was a consensus that certain international norms had attained the status of jus cogens,[74] the ILC was unable to reach a consensus on the proper criteria for identifying peremptory norms.

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Aside from copying the first clause in the sentence, which forms part of the premise, the conclusion of Criddle and Fox-Decent was likewise copied.

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4. Page 32, par. 1: After an extended debate over these and other theories of jus cogens, the ILC concluded ruefully in 1963 that "there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of jus cogens." [75]

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After copying the sentence and footnote in No. 4 above, three sentences were omitted from the article, then this sentence in No. 5 was also copied. In the body of the work, the two sentences immediately following this statement pertaining to the conclusion of the International Law Commission were again omitted.

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5. Page 32, par. 1: In a commentary accompanying the draft convention, the ILC indicated that "the prudent course seems to be to x x x leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals." [76]

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This sentence was conjoined with the sentence above; footnotes 75 and 76 were also copied. The net effect is that this paragraph was spliced together, sentence by sentence, from Criddle and Fox-Decent's work.

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A similar method of splicing was used extensively in the footnotes of the Decision as well. It is most evident in footnote 65, the longest discursive footnote in Vinuya. This portion copied heavily from the article of Dr. Mark Ellis entitled "Breaking the Silence: Rape as an International Crime." To illustrate, the first paragraph of footnote 65 is broken down and scrutinized by sentence, following the original sequence in the Decision.

b. Detailed analysis of 'patchwork plagiarism' in paragraph 1, footnote 65 of Vinuya:

1. Sentences 1 and 2: The concept of rape as an international crime is relatively new. This is not to say that rape has never been historically prohibited, particularly in war.

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These are the opening sentences from the second paragraph on page 227 of the journal article. Ellis cites the treaty between the United States and Prussia as his own example, in a footnote. In Vinuya, this particular citation is copied, enclosed in parentheses, and became the sixth and seventh sentences of footnote 65.

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2. Sentence 3: But modern-day sensitivity to the crime of rape did not emerge until after World War II.

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This is the sixth sentence in the same paragraph in Ellis' article as discussed above. It is transposed verbatim, and became the second sentence in Vinuya.

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3. Sentences 4 and 5: In the Nuremberg Charter, the word rape was not mentioned. The article on crimes against humanity explicitly set forth prohibited acts, but rape was not mentioned by name.

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The clauses "After World War II, when the Allies established the Nuremberg Charter..." was deleted. This particular sentence is Ellis' own conclusion regarding the "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis," but there was no attribution to Ellis, only a citation of the agreement, along with Ellis's other footnotes, at the end of the paragraph.

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4. Sentences 6 and 7: (For example, the Treaty of Amity and Commerce between Prussia and the United States provides that in time of war all women and children "shall not be molested in their persons." The Treaty of Amity and Commerce, Between his Majesty the King of Prussia and the United States of America, art. 23, Sept. 10, 1785, U.S.-Pruss., 8 Treaties & Other Int'l Agreements Of The U.S. 78, 85.

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This is the citation originally corresponding to the first and second sentences on page 227 of Ellis's article. This portion was copied in Vinuya, this time placed at the end of the paragraph and enclosed in parentheses.

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5. Sentence 8: The 1863 Lieber Instructions classified rape as a crime of "troop discipline."

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Originally the second sentence in Ellis's paragraph, this was transposed to the eighth. Its corresponding footnote in Ellis was lifted verbatim, enclosed in parentheses, then inserted into the paragraph in Vinuya, as the ninth sentence: "(Mitchell, The Prohibition of Rape in International Humanitarian Law as a Norm of Jus cogens: Clarifying the Doctrine, 15 Duke J. Comp. Int'l. L. 219, 224)."

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6. Sentence 10: It specified rape as a capital crime punishable by the death penalty.

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Originally the fourth sentence in Ellis' article, this was transposed, and its corresponding footnote was copied: "(Id. at 236)."

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7. Sentence 11: The 1907 Hague Convention protected women by requiring the protection of their "honour."

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The sentence was copied, and its corresponding footnote was lifted verbatim, enclosed in parentheses, and placed at the end of the paragraph. Ellis's attribution to the Yale Law website where the pertinent law may be found was omitted, leaving only the following: ("Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected." Convention (IV) Respecting the Laws & Customs of War on Land, art. 46, Oct. 18, 1907. General Assembly resolution 95 (I) of December 11, 1946 entitled, "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal"; General Assembly document A/64/Add.1 of 1946".

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8. Sentence 13: See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

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This is originally Ellis's citation, used to support his observation that there was no express mention of "rape" in the Nuremberg Charter. It was enclosed in parentheses and relegated to the end of the paragraph in Vinuya.

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9. Sentence 14: Article 6(c) of the Charter established crimes against humanity as the following:

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the Jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

This was lifted from page 227 of Ellis's work. Pages 227 to 228 of the said work, pertaining to the discussion on rape were substantially copied. Insertions were made for Ellis's own footnotes.

The conscious thought required for the act of cutting and pasting the original author's footnotes onto the precise spot where the copied sentences ended contradicts the account of inadvertence. There is consistent correspondence between the sentences copied to the footnote copied. In the example above, the act of encapsulating Ellis' footnotes in parentheses show further that in Vinuya there was a conscious appropriation of Ellis's sources in a usage that is substantially similar to what appears in his article. This allegedly inadvertent copying of Ellis's footnotes occurred no less than twelve (12) times in footnote 65 alone.

3. Research steps purportedly followed in the drafting of Vinuya cast doubt on inadvertence.

The following is a recreation of the step-by-step research procedure followed by many offices in the research and crafting of judicial decisions. It is based on the account given by the researcher of the Vinuya Decision of her own experiences while working on the case. This detailed breakdown is made in order to show the exact number of actions which must be made in order to input a citation, if indeed it was intentionally inputted. A recreation of the steps necessary to delete a citation is also made to show that the aggregate number of actions needed to erase each and every citation missing in Vinuya is so high that the underlying cause could not have been mere inadvertence.

Step 1:

- a. First, using an internet-based search engine, which could be a free search service like Google's, or a paid service like Westlaw's, the researcher would have typed in key phrases like "erga omnes," "sexual slavery," or other such terms relevant to the subject matter.
- b. For some researchers, this is just a preliminary step, as they would then pick and choose which articles to read and which to discard. The researcher in Vinuya, however, claimed that she purposely read all the materials available through this search.[8]

Step 2:

- a. The search engine would have generated a list of documents containing the search terms and topics relevant to the subject matter. The search engine would also have linked the items on this list to the corresponding online locations where these documents may be accessed.
- b. In Vinuya, the researcher used the Westlaw legal research service (which is made available to offices of all the Justices), and perused the generated list.[9] A possible item on this list would be the article entitled "Breaking the Silence: Rape as an International Crime," by one of the complaining authors, Dr. Mark Ellis.

Step 3:

The researcher would read articles from the generated list and identify the portions she planned to incorporate into the draft. For this example, she would have scrolled through the work of Mark Ellis and found the selection she wanted. The level of scrutiny invested into each of the chosen articles would vary; some researchers make cursory readings and incorporate as many portions from different works and authors as they can.

Step 4:

- a. The researcher can either save the articles in their entirety, or save the selections in one document. The researcher in Vinuya claimed that she did the latter and used the Microsoft Word program for this purpose.
- b. If the researcher chose to save only pertinent selections, then ideally the attributions would have to be made at his point.

Now, this step is critical. I know of no software in the world, especially not Microsoft Word, that will generate the citation to the work of Ellis on its own, without the appropriate action of the user. An honest researcher would immediately copy and paste the citation references of Ellis into the copied portions, or type a reference or label in, even if it were only a short form placeholder of the proper citation. If she did neither, she may be sloppy, incompetent or downright dishonest.

During the deliberations of the Ethics Committee, the researcher explained this crucial step: "So I would cut and paste relevant portions, at least portions which I find relevant into what turns out to be a large manuscript which I can then whittle and edit and edit further." [10] Adhering to this account, there would be an additional step in the process:

Step 5

If an existing draft or "manuscript" has already been created, the next step would be to incorporate the selections from the articles into the draft. This is a second opportunity to ensure that the proper attributions are made. If the researcher is diligent, she would already have tried to follow the correct form as prescribed by the Manual of Judicial Writing.[11]

If a "manuscript" or outline has already been formulated, then incorporating the selections would require her to be conscious that these ideas and arguments are not her own. The process ideally alerts any researcher that extraneous sources are being added. It allows her to make the following considerations: Does this portion sufficiently discuss the historical context of a particular conclusion? Do I need this literature as support for my arguments? Am I including it to support my arguments, or merely to mimic the author's? Corollarily, the researcher would initially assess if such argument made by the author is adequately supported as well. She would check the author's footnotes. In *Vinuya*, the copying of the footnotes was so extensive, such that it practically used the uncited works as blueprint for the Decision's footnotes.

4. The frequency of instances of missing citations and actions required for deletion betray deliberateness.

To purposefully input citations would require many key strokes and movements of the computer's "mouse." If the attributions had indeed been made already, then the deletions of such attributions would not simply happen without a specific sequence of key strokes and mouse movements. The researcher testified that the necessary attributions were made in the earlier drafts, but that in the process of cutting and pasting the various paragraphs, they were accidentally dropped. She makes it sound as if something like a long reference citation can just easily fall by the wayside. Not so.

The reference required under the Manual of Judicial Writing for the work of Ellis reads like this: "Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 Case W. Res. J. Int'l L. 225 (2006-2007)."

The researcher in *Vinuya* explained that footnotes were deleted along with headings of certain portions, and with the deletion of the note reference mark in the body of the text, the citations in the document's footers disappeared also. For this scenario to happen with the same frequency as the number of missing citations, the following steps must have been followed:

1. First movement: Using hand and eye coordination, consciously move cursor to the location of target footnote and/or heading, using either the mouse or arrow keys.
2. Second movement: Select the "note reference mark" by highlighting the target footnote number. Note that unlike in normal characters or texts wherein a single press of the "delete" or "backspace" button would suffice, a footnote number must be highlighted before it can be deleted. This means that either the particular footnote and/or heading must have been "double-clicked" or it must have been specifically highlighted by a precise horizontal motion of the cursor while pressing on a mouse button - both of which require two movements (either two "clicks", or a "click" and a "swipe").
3. Third movement: Press "delete" or "backspace" key.

Note that in the case wherein the note reference mark was not highlighted by a mouse movement, the "delete" or "backspace" key must have been pressed twice, as pressing it only once will merely highlight the note reference mark without deleting the same.

Hence, even accommodating the explanation given by the researcher, at least four movements must have been accomplished to delete one footnote or reference. Multiply this with the number of references that were "dropped"

or "missing," and you have a situation wherein the researcher accomplished no less than two hundred thirty-six (236) deliberate steps to be able to drop the fifty-nine (59) citations that are missing in Vinuya. If by some chance the cursor happened to be at the precise location of the citations, and the citations were subsequently deleted by an accidental click of the mouse, this would still have necessitated a total of one hundred seventy seven (177) clicks. It is understandable if a researcher accidentally deleted one, two or even five footnotes. That a total of 59 footnotes were erased by mere accident is inconceivable.

To make a conservative estimate, we can deduct the number of times that a footnote number in the body of the Decision could simply have been deleted inadvertently. Our analysis indicates that this could have happened a third of the time, or an estimate of twenty times, when short footnotes containing "supra" or "id." could have been easily forgotten or omitted. This would still have yielded sixty deliberate steps or movements, and would alert the researcher either that: 1) too much of the body comprises ideas which are not his own, or 2) too many of the sources in his "main manuscript" were getting lost. Subsequently, if more than half of the attributions in the International Law discussion went missing, the simple recourse would have been either to review his or her first draft, or simply delete his lengthy discursive footnotes precisely because he cannot remember which articles he might have lifted them from.

On Microsoft Word features that alert the user to discrepancies in footnote deletions

The researcher took pains to deliberately cut and paste the original sources of the author, thereby making it appear that she was the one who collated and processed this material. What she should have done was simply to cite the author from whom she took the analysis and summarization of the said sources in the first place. The latter would have been the simple, straightforward, not to mention honest path. Instead, the effect is that the Vinuya Decision also appropriated the author's analysis. Actually, it would have been easier to cite the author's copied work considering the availability of short citation forms commonly used as reference tools in legal articles such as "supra" or "id."

Microsoft Word may not have an automatic alarm each time a footnote or citation is deleted, but it does contain built-in features to help raise "red flags" to signal that a particular passage was copied, or is attached to a particular citation - if indeed such citation exists. For example, the researcher in Vinuya, in describing her own process of drafting the Decision, stated that portions containing footnotes from the first Vinuya draft were lifted and transformed into the contents of a separate footnote. In short, during revisions of the draft, substantial footnoted portions which used to be in the body were relegated to footnotes. This does not result, however, in the automatic erasure of the original footnotes within the new footnote. A simple recreation of this process reveals that this "footnote within a footnote" retains a number symbol in superscript, albeit one altered due to the redundancy in the functionality of "footnotes within footnotes." Any reasonably prudent researcher would thus be alerted to the fact that something was amiss with the citations in that particular selection because the footnote would have abnormal numeric superscripts. This glaring abnormality in itself is a warning.

Another notable feature is that when a cursor, as seen on the screen in an open document, is placed over a footnote reference mark, Microsoft Word automatically supplies that footnote's citation in a popup text box. The popup box hovers over the numerical superscript, unmistakably indicating the source.^[12] In addition, no single action can cause a footnote to be deleted; once the cursor is beside it, either the "delete" or "backspace" key must be pressed twice, or it must be deliberately highlighted and then erased with a stroke of either the "delete" or the "backspace" key. This functionality of footnote deletion in Microsoft Word thus decreases the likelihood of footnotes being deleted without the knowledge or intention of the researcher.

As to the claim of the researcher that the footnotes in the headings were accidentally deleted, there was a failure

on the part of the Ethics Committee to thoroughly investigate the matter when they relied on a presentation of what, according to the researcher, happened during her research for and drafting of the Vinuya Decision. Instead of asking her to re-create the various situations of "inadvertent dropping," the Ethics Committee satisfied itself with a "before" and "after" Microsoft PowerPoint presentation which could not, by any stretch of the imagination, have recreated the whole process of researching and drafting that happened in Vinuya unless every step were to be frozen through screenshots using the "Print Screen" command in tandem with a common image management program. To simply present the "before" and "after" scenario through PowerPoint has no bearing on the reality of what happened. Had the Ethics Committee required that the presentation made before them be through recreation of the drafting process using Microsoft Word alone, without "priming the audience" through a "before" and "after" PowerPoint presentation, they would have seen the footnotes themselves behaving strangely, alerting the researcher that something was seriously wrong. The Committee would then have found incredible the claim that the accidental deletion of a footnote mark attached to a heading - and the subsequent transposition of text under that heading to another footnote - could have occurred without the researcher being reminded that the text itself came from another source. Proof of deliberate action is found in the Vinuya Decision itself - the care with which the researcher included citations of the sources to which the authors of the copied works referred, while conveniently neglecting attribution to the copied works themselves.

It is therefore impossible to conclude that such gross plagiarism, consisting of failure to attribute to nine (9) copyrighted works, could have been the result of anything other than failure to observe the requirements of the standard of conduct demanded of a legal researcher. There is also no basis to conclude that there was no failure on the part of Justice del Castillo to meet the standard of supervision over his law clerk required of incumbent judges.

III. On Evaluating Plagiarism

A. Posner's Standards for Evaluating the Characterization of Incidents of Plagiarism

To be generous to my colleagues in this part of my analysis, I have referred to one of the scholars who hold the most liberal views on plagiarism, Judge Richard A. Posner. The three guideposts by which I structured my technical analysis of the instances of plagiarism in the Vinuya Decision come from his breakdown of certain key issues in his work, *The Little Book of Plagiarism*. In his "cook's tour" of the key issues surrounding plagiarism, wherein he is more liberal than most academics in speaking of the sanctions the act may merit - he is against the criminalization of plagiarism, for instance, and believes it an act more suited to informal sanctions[13] - Judge Posner characterizes plagiarism thus:

Plagiarism is a species of intellectual fraud. It consists of unauthorized copying that the copier claims (whether explicitly or implicitly, and whether deliberately or carelessly) is original with him and the claim causes the copier's audience to behave otherwise than it would if it knew the truth. This change in behavior, as when it takes the form of readers' buying the copier's book under the misapprehension that it is original, can harm both the person who is copied and the competitors of the copier. But there can be plagiarism without publication, as in the case of student plagiarism. The fraud is directed in the first instance at the teacher (assuming that the student bought rather than stole the paper that he copied). But its principal victims are the plagiarist's student competitors, who are analogous to authors who compete with a plagiarist.[14]

Posner then goes on to neatly sum up, in the form of three "keys," major considerations that need to be taken into account when evaluating an occurrence of plagiarism. His book's last paragraph reads:

In the course of my cook's tour of the principal issues that have to be addressed in order to form a thoughtful response to plagiarism in modern America, I have challenged its definition as "literary theft" and in its place emphasized reliance, detectability, and the extent of the market for expressive works as keys to defining

plagiarism and calibrating the different types of plagiarism by their gravity. I have emphasized the variety of plagiarisms, argued for the adequacy of the existing, informal sanctions, pointed out that the "fair use" doctrine of copyright law should not protect a plagiarist, noted the analogy between plagiarism and trademark infringement (a clue to the entwinement of the modern concept of plagiarism with market values)-and warned would-be plagiarists that the continuing advance of digitization may soon trip them up. (Emphasis supplied.)

It is in this spirit that the three questions - of extent, an analogue of reliance, as extensive plagiarism correlates to the reliance of the text on the copied work; deliberateness; and effect, an analogue of what Posner called "extent of the market for expressive works", used here in the context of the effect of plagiarism in the Vinuya Decision - were put to the text being scrutinized. The first two questions have been discussed in preceding sections. To examine the effect, one must first make the distinction between the effect of copying a copyrighted work without attribution, and between the effect of copying without attribution a work in the public domain. Using these three guideposts, we can then come to a conclusion whether the plagiarism is relatively harmless and light or something severe and harmful. In the case of the Vinuya Decision, we have come to conclude that the plagiarism is severe; and because judicial decisions are valuable to the Philippine legal system, that the plagiarism harms this institution as well.

1. The distinction between the effect of appropriating copyrighted works and works in the public domain

The infringement of copyright necessitates a framework for characterizing the expression of ideas as property. It thus turns on a question of whether there exists resultant harm in a form which is economically quantifiable. Plagiarism, on the other hand, covers a much wider range of acts. In defining copyright infringement, Laurie Stearns points out how it is an offense independent from plagiarism, so that an action for violation of copyright - which may take on either a criminal and a civil aspect, or even both - does not sufficiently remedy the broader injury inherent in plagiarism.

Plagiarism is not necessarily copyright infringement, nor is copyright infringement necessarily plagiarism...In some ways the concept of plagiarism is broader than infringement, in that it can include the copying of ideas, or of expression not protected by copyright, that would not constitute infringement, and it can include the copying of small amounts of material that copyright law would disregard.[15]

Plagiarism, with its lack of attribution, severs the connection between the original author's name and the work. A plagiarist, by falsely claiming authorship of someone else's material, directly assaults the author's interest in receiving credit. In contrast, attribution is largely irrelevant to a claim of copyright infringement...infringement can occur even when a work is properly attributed if the copying is not authorized-for example, a pirated edition of a book produced by someone who does not own the publication rights.[16]

The recognition of plagiarism as an offense that can stand independently of copyright infringement allows a recognition that acts of plagiarism are subject to reproof irrespective of whether the work is copyrighted or not. In any case, the scenario presented before the Court is an administrative matter and deals with plagiarism, not infringement of copyright.

2. On judicial plagiarism and the sanctions therefor

The majority Resolution quotes from the Judicial Opinion Writing Handbook written by Joyce George - which I cited in my earlier Dissent - thusly:

The implicit right of judges to use legal materials regarded as belonging to the public domain is not unique to the Philippines. As Joyce C. George, whom Justice Maria Lourdes Sereno cites in her dissenting opinion, observed in her Judicial Opinion Writing Handbook:

A judge writing to resolve a dispute, whether trial or appellate, is exempted from a charge of plagiarism even if ideas, words or phrases from a law review article, novel thoughts published in a legal periodical or language from a party's brief are used without giving attribution. Thus judges are free to use whatever sources they deem appropriate to resolve the matter before them, without fear or reprisal. This exemption applies to judicial writings intended to decide cases for two reasons: the judge is not writing a literary work and, more importantly, the purpose of the writing is to resolve a dispute. As a result, judges adjudicating cases are not subject to a claim of legal plagiarism.

The use of this excerpt to justify the wholesale lifting of others' words without attribution as an "implicit right" is a serious misinterpretation of the discussion from which the excerpt was taken. George wrote the above-quoted passage in the context of a nuanced analysis of possible sanctions for judicial plagiarism, not in the context of the existence of plagiarism in judicial opinions. (I had candidly disclosed the existence of this liberal view even in my 12 October 2010 Dissent.) The sections preceding the text from which this passage was taken are, in fact, discussions of the following: ethical issues involving plagiarism in judicial writing, with regard to both the act of copying the work of another and the implications of plagiarism on the act of adjudication; types of judicial plagiarism, the means by which they may be committed, and the venues in and through which they can occur; and recent cases of judicial plagiarism.

In no wise does George imply that the judicial function confers upon judges the implicit right to use the writing of others without attribution. Neither does George conflate the possible lack of sanctions for plagiarism with the issue of whether a determination of judicial plagiarism can be made. Rather, George is careful to make the distinction between the issue of whether judicial plagiarism was committed and the issue of whether a sanction can be imposed for an act of judicial plagiarism. In George's terminology, the latter issue may also be framed as a question of whether judicial plagiarism is "subject to a claim of legal [that is, actionable] plagiarism", and it has no bearing whatsoever on the former issue. Thus, George writes:

The intentional representation of another person's words, thoughts, or ideas as one's own without giving attribution is plagiarism. "Judicial plagiarism" is the copying of words or ideas first written down by another judge, advocate, legal writer or commentator without giving credit to the originator of that work. It can include such things as a judge's copying of another's judges opinion, the adoption verbatim of an advocate's findings of fact and conclusions of law, the wholesale adoption of an advocate's brief, or the copying of a portion of a law review article and representing it as the judge's own thoughts. The lack of attribution makes this activity "judicial plagiarism," but without legal sanctions.[17]

Indeed, my previous Dissent stated that inasmuch as sanctions for judicial plagiarism are concerned, "there is no strictly prevailing consensus regarding the need or obligation to impose sanctions on judges who have committed judicial plagiarism." Yet the absence of a definite answer to the question of liability does not grant judges carte blanche to use the work of others without attribution, willy-nilly, in their judicial opinions. As George puts it, "the judge is ethically bound to give proper credit to law review articles, novel thoughts published in legal periodicals, newly handed down decisions, or even a persuasive case from another jurisdiction." [18] Plainly, George is of the opinion that though a judge may not be held liable for an act of judicial plagiarism, he should still attribute.

A note about "intentional representation." A careful reading of George's writing on judicial plagiarism will make it clear that she does not consider "inadvertent" or "unintentional" plagiarism not plagiarism; indeed, she makes the distinction between "intentional" and "unintentional" plagiarism several times, treating both as types of plagiarism:

Using another's language verbatim without using quotation marks or a block quote is intentional, as opposed to unintentional, plagiarism.[19]

...

The lack of proper attribution may be unintentional and due to sloppy note taking, either by the law clerk or the judge.[20]

...

Judicial plagiarism may also arise from the use of law clerks performing research and writing of draft decisions and who may not accurately reflect the source. The plagiarized material may be included within the draft resulting from the law clerk's poor research skills.[21]

...

The commission of unintended judicial plagiarism is unethical, but it is not sanctionable.[22]

The intentional representation of which George speaks, then, may be considered as the intent to represent a work as one's own - already embodied in claiming a work by, for instance, affixing one's name or byline to it - in which case the inadvertence, or lack thereof, by which an act of plagiarism was committed is irrelevant to a finding of plagiarism.

While George is perhaps not as exacting in her valuation of the penalties for plagiarism as others may be, she still emphasizes that her view on the exemption of judicial plagiarism from sanctions - among which she evidently counts social stigma, censure, and ostracism - does not negate the judge's ethical obligation to attribute. She writes:

In conclusion, this author believes that a judicial writer cannot commit legal plagiarism because the purpose of his writing is not to create a literary work but to dispose of a dispute between parties. Even so, a judge is ethically bound to give proper credit to law review articles, novel thoughts published in legal periodicals, newly handed down decisions, or even a persuasive case from another jurisdiction. While the judge may unwittingly use the language of a source without attribution, it is not proper even though he may be relieved of the stigma of plagiarism.[23]

As I wrote in my previous Dissent:

In so fulfilling her obligations, it may become imperative for the judge to use "the legal reasoning and language [of otherse.g. a supervising court or a law review article] for resolution of the dispute." [31] Although these obligations of the judicial writer must be acknowledged, care should be taken to consider that said obligations do not negate the need for attribution so as to avoid the commission of judicial plagiarism. Nor do said obligations diminish the fact that judicial plagiarism "detracts directly from the legitimacy of the judge's ruling and indirectly from the judiciary's legitimacy" [32] or that it falls far short of the high ethical standards to which judges must adhere [33]. [24]

It must not be forgotten, however, that George's view tends toward the very liberal. There are other writings, and actual instances of the imposition of sanctions, that reveal a more exacting view of the penalties merited by judicial plagiarism. [25]

B. On the Countercharges Made by Justice Abad

In his Concurring Opinion in A.M. No. 10-7-17-SC, Justice Abad alleged that I myself have "lifted from works of others without proper attribution," having written "them as an academician bound by the high standards" that I espouse.

Regarding this allegation, let us recall my Dissent promulgated on 12 October 2010. I stated:

Plagiarism thus does not consist solely of using the work of others in one's own work, but of the former in

conjunction with the failure to attribute said work to its rightful owner and thereby, as in the case of written work, misrepresenting the work of another as one's own. As the work is another's and used without attribution, the plagiarist derives the benefit of use from the plagiarized work without expending the requisite effort for the same - at a cost (as in the concept of "opportunity cost") to its author who could otherwise have gained credit for the work and whatever compensation for its use is deemed appropriate and necessary.[26]

Allow me to analyze the allegations of Justice Robert C. Abad point by point using the same standard I propounded in my 12 October 2010 Dissent.

1. The alleged non-attribution to the Asian Development Bank's Country Governance Assessment Report for the Philippines (2005).

TABLE H: Comparison of Justice Abad's allegations, the 2001 and 2007 versions of the article co-authored with Drs. De Dios and Capuno, and the ADB Country Governance Assessment of 2005.

Reproduction of J. Abad's Allegations

Excerpt from the Article Co-Authored with Drs. De Dios and Capuno: Justice and the Cost of Doing Business: The Philippines, report submitted to the World Bank, 2001.

Excerpt from the ADB Country Governance Assessment: Philippines Asian Development Bank Country Governance Assessment: Philippines, 2005.

1.

Cost refers to both monetary and nonmonetary opportunities that a litigant has to forego in pursuing a case. Direct cost refers not only to fees paid to the courts but also to out-of-pocket costs arising from litigation itself (e.g., lawyers' fees and compensation, transcript fees for stenographic notes, etc.). Indirect costs refer to lost opportunities arising from delays in the resolution of cases and the time spent by a litigant attending and following up a case. [Asian Development Bank Country Governance Assessment (Philippines) 2005, page 103]

Costs, on the other hand, refer to both the monetary and nonmonetary opportunities that business people forego as a result of making use of the judicial system itself. Direct costs refer not only to the fees paid the courts but also to out-of-pocket costs arising from litigation itself (e.g., lawyers' fees and documentation). Indirect costs also inevitably arise, of which the most important are those arising from delays in the resolution of cases, and the failure to come up with timely decisions.

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Excerpt from the Article Co-Authored with Drs. De Dios and Capuno: Justice and the Cost of Doing Business: The Philippines, UP School of Economics Discussion Paper 0711, October 2007.

Costs, on the other hand, refer to both the monetary and nonmonetary opportunities that business people forego as a result of making use of the judicial system itself. Direct costs refer not only to the fees paid the courts but also to out-of-pocket costs arising from litigation itself (e.g., lawyers' fees and documentation). Indirect costs also inevitably arise, of which the most important are those arising from delays in the resolution of cases, and the failure to come up with timely decisions.

Justice Abad accuses Dr. Emmanuel S. De Dios, Dr. Joseph J. Capuno, and me of copying, without attribution, three sentences from the Asian Development Bank's 2005 Outlook Report for the Philippines, and incorporating them into our 2007 paper entitled "Justice and the Cost of Doing Business." [27]

I thank Justice Abad for alerting me to this particular ADB publication; otherwise I would not have noticed ADB's failure to attribute the same to my co-authored work produced in 2001. Were it not for his charges, I would not have learned of such inadvertent error from the ADB. I have thus called the attention of my co-authors, Drs. De Dios and Capuno, to this matter. Below is a reproduction of the contents of my letter to Drs. De Dios and Capuno:

Hon. Maria Lourdes P.A. Sereno
Associate Justice
Supreme Court of the Philippines

February 4, 2011

Dr. Emmanuel C. De Dios
Dr. Joseph D. Capuno
School of Economics
University of the Philippines
Dear Drs. De Dios and Capuno

Greetings!

I have been recently alerted to a possible plagiarism that we are suspected to have committed with respect to the 2005 Asian Development Bank Outlook Report, specifically three sentences in page 103 that reads:

... Cost refers to both monetary and nonmonetary opportunities that a litigant has to forego in pursuing a case. Direct cost refers not only to fees paid to the courts but also to out-of-pocket costs arising from litigation itself (e.g. lawyer's fees and compensation, transcript fees for stenographic notes, etc.) Indirect costs refer to lost opportunities arising from delays in the resolution of cases and the time spent by a litigant attending and following up a case.

On examination, I discovered that it is the ADB that failed to attribute those sentences to the report we submitted in August 2001 to the World Bank entitled "Justice and the Cost of Doing Business: The Philippines," specifically found in the third paragraph of our 2001 report. May I suggest that perhaps you could alert our friends at the ADB regarding the oversight. It would be nice if our small study, and the World Bank support that made it possible, were appropriately recognized in this ADB publication.

Warmest regards always.

Sincerely,

Maria Lourdes P.A. Sereno

A proper reading of the ADB publication will immediately convey the fact that the ADB considers one of my writings as a resource on the topic of Philippine judicial reform. My name is quoted four (4) times in the text. A reading of the references listed one of my 2001 papers, which I wrote singly as the source. Note the following references to my writing:

... It is incumbent upon the courts to harmonize these laws, and often they would find the absence of constitutional standards to guide them (Sereno 2001). at page 98

...

... Critics pointed out that the Supreme Court should not have made factual declarations on whether a property belongs to the national patrimony in the absence of an operative law by which a factual determination can be made (Serenio 2001). at page 99

... As Sereno pointed out, if this tension between the three branches is not resolved satisfactorily, it will create a climate of unpredictability as a result of the following: at page 99

...

(iii) a court that will continually have to defend the exercise of its own powers against the criticism of the principal stakeholders in the process of economic policy formulation: the executive and legislative branches and the constituencies consulted on the particular economic issues at hand (Serenio 2001).

Had Justice Abad or his researcher taken the time to go through the ADB material, it would have been immediately apparent to either of them that ADB was merely collating the thoughts of several authors on the subject of Philippine judicial reform, and that I was one of those considered as a resource person. He would not then have presumed that I copied those sentences; rather, it might have struck him that more likely than not, it was the ADB echoing the thoughts of one or some of the authors in the reference list when it used those quoted sentences, and that the pool of authors being echoed by ADB includes me. The reference list of the ADB report with the relevant reference is quoted herein:

REFERENCES

...

Serenio, Ma. Lourdes. 2001. The Power of Judicial Review and Economic Policies: Achieving Constitutional Objectives. PHILJA-AGILE-USAID Project on Law and Economics." at page 158.

What is more unfortunate is that I was immediately accused of having copied my sentences from ADB when a simple turn of the page after the cover page of our 2007 paper would reveal that the 2007 paper is but a re-posting of our 2001 work. The notice on page 2 of the paper that is found in the asterisked footnote of the title reads:

This paper was originally submitted in August 2001 as project report to the World Bank. During and since the time this report was written, the Supreme Court was engaged in various projects in judicial reform. The authors are grateful to J. Edgardo Campos and Robert Sherwood for stimulating ideas and encouragement but take responsibility for remaining errors and omissions. The Asian Institute of Journalism and Communication provided excellent support to the study in the actual administration of the survey questionnaire and conduct of focus group discussions.

This charge is made even more aggravating by the fact that the Supreme Court itself, through the Project Management Office, has a copy of my 2001 paper. In July 2003, a "Project Appraisal Document on a Proposed Loan in the Amount of US\$21.9 Million to the Republic of the Philippines for a Judicial Reform Support Project" was officially filed by the World Bank as Report No. 25504.[28] The applicant Supreme Court's representative is named as Chief Justice Hilario Davide. The project leader is named as Evelyn Dumdum. The Report lists the technical papers that form the basis for the reform program. Among the papers listed is our 2001 paper.

What is worse, from the point of view of research protocols, is that a simple internet search would have revealed that this 2001 co-authored paper of mine has been internationally referred to at least four (4) times - in three (3) English language publications and one (1) Japanese- or Chinese-language publication; two of these are prior to the year 2005 when the relevant ADB Outlook Report came out. The authors of the English-language works are all scholars on judicial reform, and they cite our work as one of the pioneering ones in terms of measuring the relationship between dysfunctions in the judicial system and the cost to doing

business of such dysfunctions. It would have then struck any researcher that in all probability, the alleged plagiarized sentences originated from my co-authors and me.

The references to my 2001 paper appear in the following international publications:

a) Sherwood, Robert. Judicial Performance: Its Economic Impact in Seven Countries; at page 20. (<http://www.molaah.com/Economic%20Realities/Judicial%20Performance.pdf>)

b) Messick, Richard. Judicial Reform and Economic Growth: What a Decade of Experience Teaches; at pages 2 and 16. (2004). <http://www.cato.org/events/russianconf2004/papers/messick2.pdf>

c) Herro, Alvaro and Henderson, Keith. Inter-American Development Bank. The Cost of Resolving Small-Business Conflicts in Sustainable Development Department Best Practices Series; at page 46. (2004) http://www.ifes.org/~media/Files/Publications/White%20PaperReport/2003/258/SME_Peru_Report_final_EN.pdf

d) World Development Report 2005 (Japanese language); at page 235 (2005) ("url" in Japanese characters)

2. The purported non-attribution of the "Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the General Agreement on Tariffs and Trade 1994." [29]

I will spare the reader the tedium of reading twenty pages of treaty rules and working procedures, and thus omit the three-column table I have used in other sections of this Dissent. The rules and procedures may be accessed online at the following locations:

1. Marrakesh Declaration of 15 April 1994 (Last accessed on 16 February 2011)

2. Understanding on Rules and Procedures Governing the Settlement of Disputes (Last accessed on 16 February 2011)

3. Working Procedures for Appellate Review (Last accessed on 16 February 2011)

Justice Abad himself provides evidence of the attribution I made when he says:

Justice Sereno said that `this section is drawn from Article XX and XXII of the GATT 1994, Understanding on Dispute Settlement and Working Procedures.

I think the problem lies in the fact that neither Justice Abad nor his researcher is aware that the phrase "Understanding on Dispute Settlement" is the short title for the "Understanding on the Rules and Procedures Governing the Settlement of Disputes", which is formally known also as Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization (short form of treaty name: WTO Treaty). A quick visit to the WTO website will show that the WTO itself uses any of the terms "DSU," "Dispute Settlement Understanding" or "Understanding on Dispute Settlement" (UDS) as short forms for the said Annex. The WTO webpage[30] shows that "Understanding on Dispute Settlement" is the first short way they call the long set of rules covered by Annex 2 of the WTO Treaty.

More importantly, the WTO documents that were cited here are public international documents and rules governing the relations of states. In page 6 of my article, "Toward the Formulation of a Philippine Position in Resolving Trade and Investment Dispute in APEC," I explain the modes of resolving trade and investment disputes by APEC countries, and one of these modes is the WTO dispute settlement mechanism governed by the WTO rules themselves.

This is therefore a meaningless charge.

Assuming that Justice Abad knows that the above treaty titles are interchangeable, then his charge is akin to complaining of my supposed failure for having simply written thus: "The following are the requirements for filing a complaint under the Rules of Court" and then for having immediately discussed the requirements under the Rules of Court without quotation marks in reference to each specific rule and section. If this is the case, then it appears that in Justice Abad's view I should have written: "the following are the requirements provided for under the 1997 Rules of Civil Procedure (Bar Matter No. 803) for filing a complaint" and then used quotation marks every time reference to the law is made. Nothing can be more awkward than requiring such a tedious way of explaining the Rules of Court requirements. I have made no such comparable charge of violation against Justice del Castillo in the Dissent to the main Decision and I am not making any such claim of violation in my Dissent to the Resolution denying the Motion for Reconsideration, because that would be a meaningless point.

Regarding the phrase allegedly coming from Professor Oppenheim on good offices and mediation, this is a trite, common, standard statement - with nothing original at all about it - that can be found in any international dispute settlement reference book, including those that discuss WTO dispute settlement systems. The phrase is a necessary, cut-and-dried statement on the use of good offices and mediation, which take place alongside the formal dispute settlement system in major international dispute settlement systems. The system is provided for expressly in Article 5.5 and 5.6 of the DSU. A quick view of the WTO website makes this point very apparent.[31]

3. The supposed non-attribution of a phrase from *Baker v. Carr*.

TABLE I: Comparison of Justice Abad's allegations, the legal memorandum in *Province of North Cotabato v. Peace Panel*, and the decision of the U.S. Supreme Court in *Baker v. Carr*, cited in the legal memorandum.

Reproduction of J. Abad's Allegations

Excerpt from the Legal Memorandum Prepared by J. Sereno: Petitioners-Intervenors' Memorandum, *Province of North Cotabato v. Peace Panel*

Excerpt from the Source Cited by J. Sereno: *Baker v. Carr*, 369 U.S. 186 (1962).

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion x x x [*Baker v. Carr*, 169 U.S. 186]

3.4 The power to determine whether or not a governmental act is a political question, is solely vested in this Court, and not with the Respondents. This Honorable Court had firmly ruled that Article VIII, Section 1 of the Constitution, as rejected the prudential approach taken by courts as described in *Baker v. Carr*. Indeed, it is a duty, not discretion, of the Supreme Court, to take cognizance of a case and exercise the power of judicial review whenever a grave abuse of discretion has been prima facie established, as in this instance. 3.5 In this case, Respondents cannot hide under the political question doctrine, for two compelling reasons. 3.6 First, there is no resolute textual commitment in the Constitution that accords the President the power to negotiate with the MILF.... 3.13 Second, there is no lack of a judicially discoverable and manageable standard for resolving the question, nor impossibility of deciding the question without an initial policy determination of a kind clearly for non-judicial discretion. On the contrary, the negotiating history with Muslim secessionist groups easily contradict any pretense that this Court cannot set down the standards for what the government cannot do in this case. (pp. 47-50 of the Memorandum)

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy

determination of a kind clearly for non-judicial discretion.... Source cited: Baker v. Carr

A simple upward glance nine paragraphs above the phrase that Justice Abad quoted from my post-hearing Memorandum in the GRP-MILF MOA-AD case would show that Baker v. Carr was aptly cited. For quick reference, I have reproduced the pertinent parts of my legal memorandum in the middle column of the above table.

Baker v. Carr was discussed in the context of my argument that Marcos v. Manglapus has adopted a more liberal approach to the political question jurisdictional defense, and has rejected the prudential approach taken in Baker v. Carr. The offending paragraph that Justice Abad quoted was meant to demonstrate to the Court then hearing the GRP-MILF MOA-AD case that even if we apply Baker v. Carr, the Petition has demonstrated satisfaction of its requirement: the presence of a judicially-discoverable standard for resolving the legal question before the Court. Justice Abad's charge bears no similarity to the violations of the rules against plagiarism that I enumerated in pages 16 to 19 of my Dissent dated 12 October 2010. I have made no similar complaint against the work in Vinuya.

4. The alleged plagiarism of the internet-based World Trade Organization factsheet.

TABLE J: Comparison of Justice Abad's allegations, the article, entitled Uncertainties Beyond the Horizon: The Metamorphosis of the WTO Investment Framework in the Philippine Setting, and the WTO Factsheet cited in the article.

Reproduction of J. Abad's Allegations

Excerpt from the Work of J. Sereno: Sereno, Uncertainties Beyond the Horizon: The Metamorphosis of the WTO Investment Framework in the Philippine Setting, 52 U.S.T. L. Rev. 259 (2007-2008)

Excerpt from the Source Cited by J. Sereno: <http://www.fas.usda.gov/info/factsheets/wto.html>

The World Trade Organization (WTO), established on January 1, 1995, is a multilateral institution charged with administering rules for trade among member countries. Currently, there are 145 official member countries. The United States and other countries participating in the Uruguay Round of Multilateral Trade Negotiations (1986-1994) called for the formation of the WTO to embody the new trade disciplines adopted during those negotiations. The WTO functions as the principal international body concerned with multilateral negotiations on the reduction of trade barriers and other measures that distort competition. The WTO also serves as a platform for countries to raise their concerns regarding the trade policies of their trading partners. The basic aim of the WTO is to liberalize world trade and place it on a secure basis, thereby contributing to economic growth and development. [WTO FACTSHEET <http://www.fas.usda.gov/info/factsheets/wto.html>, last accessed February 13, 2008.]

This reticence, to link investment regulation with the legal disciplines in the WTO, compared to the eagerness with which other issues are linked to trade rules, was evident even in the precursor to the Marakkesh Agreement.[2] [2] Marakkesh Agreement established the World Trade Organization and replaced GATT as an international organization. It was signed by ministers from most of the 123 participating governments at a meeting in Marrakesh, Morocco on April 15, 1994.... The World Trade Organization (WTO) was established on January 1, 1995. It is a multilateral institution charged with administering rules for trade among member countries. The WTO functions as the principal international body concerned with multilateral negotiations on the reduction of trade barriers and other measures that distort competition. The WTO also serves as a platform for countries to raise their concerns regarding the trade policies of their trading partners. The basic aim of the WTO is to liberalize world trade and place it on a secure basis, thereby contributing to economic growth and development. <http://www.fas.usda.gov/info/factsheets/wto.html> (last accessed February 13, 2008). (Emphasis supplied.) (p. 260-261, footnote 2 of J. Sereno's work)

Source cited: The World Trade Organization (WTO), established on January 1, 1995, is a multilateral institution charged with administering rules for trade among member countries. Currently, there are 145 official member countries. The United States and other countries participating in the Uruguay Round of Multilateral Trade Negotiations (1986-1994) called for the formation of the WTO to embody the new trade disciplines adopted during those negotiations. The WTO functions as the principal international body concerned with multilateral negotiations on the reduction of trade barriers and other measures that distort competition. The WTO also serves as a platform for countries to raise their concerns regarding the trade policies of their trading partners. The basic aim of the WTO is to liberalize world trade and place it on a secure basis, thereby contributing to economic growth and development. Source cited: <http://www.fas.usda.gov/info/factsheets/wto.html>

Justice Abad has likewise pointed out that I made it appear that the description of the WTO in my article entitled "Uncertainties Beyond the Horizon: The Metamorphosis of the WTO Investment Framework in the Philippine Setting" was my own original analysis. Again, a cursory reading of the article will show that the paragraph in question was actually the second footnote in page 2 of the article. The footnote was made as a background reference to the Marrakesh Agreement, which, as I explained earlier in the article, established the WTO. The footnote thus further provided background information on the WTO. Contrary, however, to Justice Abad's allegation, I clearly attributed the source of the information at the end of the footnote by providing the website source of this information and the date I accessed the information. Thus, should one decide to follow the website that I cited, one would immediately see the information contained in the article was lifted from this direct source.

5. The purported non-attribution to Judge Richard A. Posner's seminal work in his book *Economic Analysis of Law*.

TABLE K: Comparison of Justice Abad's allegations, the article entitled *Lawyers' Behavior and Judicial Decision-Making*, and Judge Richard A. Posner's book *Economic Analysis of Law*, cited in the article.

Reproduction of J. Abad's Allegations

Excerpt from the Work of J. Sereno: Sereno, *Lawyers' Behavior and Judicial Decision-Making*, 70(4) *Phil. L. J.* 476 (1996).

Excerpt from the Source Cited by J. Sereno: Richard A. Posner, *Economic Analysis of Law*, (2nd ed. 1977).

[S]ettlement negotiations will fail and litigation ensue, only if the minimum price that the plaintiff is willing to accept in compromise of his claim is greater than the maximum price the defendant is willing to pay in satisfaction of the claim. [Posner, p. 434]

...We could deal with this problem later. What I would propose to evaluate at this point is the preconditions that Judge Richard Posner theorizes as dictating the likelihood of litigating... ... Posner's model is but a simple mathematical illustration or validation of what we as laymen have always believed to be true, although how to prove it to be true has always remained a problem to us. We have always known that the decision on whether to settle or not is dictated by the size of the stakes in the eyes of the parties, the costs of litigation and the probability which each side gives to his winning or losing. But until now, we have only been intuitively dealing with a formula for arriving at an estimation of the "settlement range" or its existence in any given controversy. Simply, the settlement range is that range of prices in which both parties would be willing to settle because it would increase their welfare. Settlement negotiations will fail, and litigation will ensue, if the minimum price that plaintiff is willing to accept in compromise of his claim is greater than the maximum price that the defendant is willing to pay in satisfaction of that claim. (pp. 481-483 of *Lawyers' Behavior and Judicial Decision-Making*)

As with any contract, a necessary (and usually--why not always?--sufficient) conditions for negotiations to

succeed is that there be a price at which both parties would feel that agreement would increase their welfare. Hence settlement negotiations should fail, and litigation ensue, only if the minimum price that the plaintiff is willing to accept in compromise of his claim is greater than the maximum price that the defendant is willing to pay in satisfaction of that claim; Source cited: Richard A. Posner, *Economic Analysis of Law*, 435 (2nd ed. 1977).

Presumably judges, like the rest of us, seek to maximize a utility function that includes both monetary and nonmonetary elements. [Posner, p. 415] [T]he rules of the judicial process have been carefully designed both to prevent the judge from receiving a monetary payoff from deciding a particular case one way or the other and to minimize the influence of politically effective interest group in his decisions. [Posner, 415] It is often argued, for example, that the judge who owns land will decide in favor of landowners, the judge who walks to work will be in favour of pedestrians. [Posner, 415] A somewhat more plausible case can be made that judges might slant their decisions in favour of powerful interest groups in order to increase the prospects of promotion to higher office, judicial or otherwise. [Posner, p. 416] [J]udges seek to impose their preferences, tastes, values, etc. on society. [Posner, 416]

What the Judge Maximizes In understanding judicial behavior, we have to assume, that judges, like all economic actors maximize a utility function. This function in all probability includes material as well as non-material factors. In American literature, they have come up with several theories on what judges maximize. The first is that the American judicial system have rules designed to minimize the possibilities of a judge maximizing his financial interest by receiving a bribe from a litigant or from acceding to a politically powerful interest group by making the rules work in such a manner as to create disincentives for the judge ruling in such a manner. The second, proceeding from the first is that the judge maximizes the interest of the group to which he belongs. If he belongs to the landowning class, he will generally favor landowners, and if he walks to work, he will generally favor pedestrians. The third is that the judge maximizes the prospects of his promotion to a higher office by slanting his decisions in favor of powerful interest groups. The last is that judges maximize their influence on society by imposing their values, tastes and preferences thereon. Depending on one's impressions and experiences (since there is no empirical data on which a more scientific conclusion can be reached on which of the above four theories are correct), we can see the relation of this utility-maximizing behavior on both our probability estimate function and Posner's precondition inequality for litigation. Although more research is required in this area, if we believe Posner's function to be true.... (Emphasis supplied.) (pp. 489 of *Lawyers' Behavior and Judicial Decision-Making*)

§19.7 WHAT DO JUDGES MAXIMIZE? ...This section attempts to sketch a theory of judicial incentives that will reconcile these assumptions. Presumably judges, like the rest of us, seek to maximize a utility function that includes both monetary and nonmonetary elements (the latter including leisure, prestige, and power). As noted earlier, however, the rules of the judicial process have been carefully designed both to prevent the judge from receiving a monetary payoff from deciding a particular case one way or the other and to minimize the influence of politically effective interest groups on his decisions. To be sure, the effectiveness of these insulating rules is sometimes questioned. It is often argued, for example, that the judge who owns land will decide in favor of landowners, the judge who walks to work in favor of pedestrians, the judge who used to be a corporate lawyer in favor of corporations.... A somewhat more plausible case can be made that judges might slant their decisions in favor of powerful interest groups in order to increase the prospects of promotion to higher office, judicial or otherwise.... It would seem, therefore, that the explanation for judicial behavior must lie elsewhere than in pecuniary or political factors. That most judges are leisure maximizers is an assumption that will not survive even casual observation of judicial behavior. A more attractive possibility, yet still one thoroughly consistent with the ordinary assumptions of economic analysis, is that judges seek to impose their preferences, tastes, values etc. on society.... Source: Richard A. Posner, *Economic Analysis of Law*, 415-16 (2nd ed. 1977).

May I invite the reader to read my entire article entitled "Lawyers' Behavior and Judicial Decision-Making," accessible online at [\[link\]](#), so that the alleged copying of words can be taken in the proper context.

It must first be emphasized that the whole article was largely a presentation and discussion of Judge Posner's economic models of litigation and settlement, applying what he had written to the context of the Philippines. An examination of the article will show that Posner's work was referred to no less than fourteen (14) times throughout the article, excluding the use of pronouns that also refer to Posner, such as "he" and "him." A diligent reading of the full text of the article will reveal that I have intentionally and heavily used Posner's opinions, analyses, models, and conclusions while crediting him with the same.

Furthermore, the passages cited in the table of counter-charges use what one may call the "terms of the trade" in the field of law and economics, or indeed in the field of economics itself. The maximization of an individual's utility is one of the core principles on which the study of an individual's choices and actions are based. The condition for the success/failure of settlement bargaining is practically a definition, as it is also a fundamental principle in the study of bargaining and negotiation that the minimum price of one of the parties must not exceed the maximum price the other party is willing to pay; that particular passage, indeed, may be regarded as a re-statement, in words instead of numbers, of a fundamental mathematical condition as it appears in Posner's model and in many similar models.

To allow industry professionals to have their say on the matter, I have written a letter to Dr. Arsenio M. Balisacan, the Dean of the University of the Philippines School of Economics, requesting that my paper, Lawyers' Behavior and Judicial Decision-Making, be examined by experts in the field to determine whether the allegations of plagiarism leveled against me have basis. I am reproducing the contents of the letter below.

Hon. Maria Lourdes P.A. Sereno
Associate Justice
Supreme Court of the Philippines
February 11, 2011

Dr. Arsenio M. Balisacan
Dean
School of Economics
University of the Philippines

Dear Dr. Balisacan:

Greetings! I hope this letter finds you in the best of health.

I write because I have a request to make of your highly-respected institution. I have been recently accused of plagiarizing the work of Judge Richard Posner in one of the articles on law and economics that I have written and that was published in the Philippine Law Journal entitled "Lawyers' Behavior and Judicial Decision-Making", 70 Phil L. J. 475-492 (June 1996). The work of Posner that I am accused of having plagiarized is the second edition of the book entitled "Economic Analysis of Law", published in 1977 by Little, Brown and Company.

May I ask you for help in this respect - I wish to submit my work to the evaluation of your esteemed professors in the UP School of Economics. My work as an academic has been attacked and I would wish very much for a statement from a panel of your choosing to give its word on my work.

I am attaching a table showing which part of Posner's work I am alleged to have plagiarized in my Philippine Law Journal article.

Thank you very much. I will be much obliged for this kind favor.

Very truly yours,

Maria Lourdes P.A. Sereno

The problem with the majority approach is that it refuses to face the scale of the plagiarism in the Vinuya Decision. If only that were the starting point for the analysis of the majority, then some of my colleagues would not have formed the impression that I was castigating or moralizing the majority. No court can lightly regard a ponencia, as in Vinuya, where around 53% of the words used for an important section were plagiarized from sources of original scholarship. Judges and their legal researchers are not being asked to be academics; only to be diligent and honest.

IV. The Role of the Judiciary in Society

On more than one occasion, this Court has referred to one of its functions as the symbolic or educative function, the competence to formulate guiding principles that may enlighten the bench and the bar, and the public in general.[32] It cannot now backpedal from the high standards inherent in the judicial role, or from the standards it has set for itself.

The need to cement ethical standards for judges and justices is intertwined with the democratic process. As Lebovits explained:

The judiciary's power comes from its words alone-judges command no army and control no purse. In a democracy, judges have legitimacy only when their words deserve respect, and their words deserve respect only when those who utter them are ethical. Opinion writing is public writing of the highest order; people are affected not only by judicial opinions but also by how they are written. Therefore, judges and the opinions they write-opinions scrutinized by litigants, attorneys, other judges, and the public-are held, and must be held, to high ethical standards. Ethics must constrain every aspect of the judicial opinion. [33]

Justice George Rose Smith once pointed to the democratic process as a reason to write opinions: "Above all else to expose the court's decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent." Justice Smith recognized that judges are not untouchable beings. Judges serve their audience. With this service comes the need for judges to be trusted. Writing opinions makes obtaining trust easier; it allows an often opaque judicial institution to become transparent.[34]

Judges cannot evade the provisions in the Code of Judicial Conduct.[35]

A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The drafters of the Model Code were aware that to be effective, the judiciary must maintain legitimacy -and to maintain legitimacy, judges must live up to the Model Code's moral standards when writing opinions. If the public is able to witness or infer from judges' writing that judges resolve disputes morally, the public will likewise be confident of judges' ability to resolve disputes fairly and justly.[36] (Citations omitted)

Canon 1 of the Code of Judicial Conduct states that a judge should uphold the integrity and independence of the judiciary. Rule 1.01 in particular states that a judge should be the embodiment of competence, integrity, and independence.

Canon 3 then focuses on the duty of honesty in the performance of official duties, as well as on the supervision of court personnel:

Rule 3.09. A judge should organize and supervise the court personnel to ensure the prompt and efficient dispatch of business, and require at all times the observance of high standards of public service and fidelity.

Rule 3.10. A judge should take or initiate appropriate disciplinary measures against lawyers or court personnel for

unprofessional conduct of which the judge may have become aware.

Paragraph 17 of the Code of Judicial Ethics[37] focuses on the writing of judicial opinions:

In disposing of controversial cases, judges should indicate the reasons for their action in opinions showing that they have not disregarded or overlooked serious arguments of counsel. They should show their full understanding of the case, avoid the suspicion of arbitrary conclusion, promote confidence in their intellectual integrity and contribute useful precedents to the growth of the law. (Emphasis supplied)

Paragraph 31, "a summary of judicial obligations," contains a more general statement regarding the behavioral norms required of judges and justices alike, stating:

A judge's conduct should be above reproach and in the discharge of his judicial duties, he should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, and regardless of private influence should administer justice according to law and should deal with the patronage of the position as a public trust; and he should not allow outside matters or his private interests to interfere with the prompt and proper performance of his office.

That judges and justices alike are subject to higher standards by virtue of their office has been repeatedly pronounced by the Supreme Court:

Concerned with safeguarding the integrity of the judiciary, this Court has come down hard and wielded the rod of discipline against members of the judiciary who have fallen short of the exacting standards of judicial conduct. This is because a judge is the visible representation of the law and of justice. He must comport himself in a manner that his conduct must be free of a whiff of impropriety, not only with respect to the performance of his official duties but also as to his behavior outside his sala and as a private individual. His character must be able to withstand the most searching public scrutiny because the ethical principles and sense of propriety of a judge are essential to the preservation of the people's faith in the judicial system.[38]

Thus, being the subject of constant public scrutiny, a judge should freely and willingly accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen.[39] A judge should personify integrity and exemplify honest public service. The personal behavior of a judge, both in the performance of his official duties and in private life should be above suspicion.[40] Concerned with safeguarding the integrity of the judiciary, this Court has come down hard on erring judges and imposed the concomitant punishment.[41]

As held by the Court in *Teban Hardware and Auto Supply Co. v. Tapucar*:[42]

The personal and official actuations of every member of the Bench must be beyond reproach and above suspicion. The faith and confidence of the public in the administration of justice cannot be maintained if a Judge who dispenses it is not equipped with the cardinal judicial virtue of moral integrity, and if he obtusely continues to commit an affront to public decency. In fact, moral integrity is more than a virtue; it is a necessity in the Judiciary.

The inherent value of judicial decisions goes beyond the resolution of dispute between two parties. From the perspective of the judge, he has fulfilled his minimum burden when he has disposed of the case. Yet from the perspective of the public, it is only through publicized decisions that the public experiences the nearest approximation of a democratic experience from the third branch of Government.

Decisions and opinions of a court are of course matters of public concern or interest for these are the authorized expositions and interpretations of the laws, binding upon all citizens, of which every citizen is charged with knowledge. Justice thus requires that all should have free access to the opinions of judges and justices, and it would be against sound public policy to prevent, suppress or keep the earliest knowledge of these from the public.[43]

The clearest manifestation of adherence to these standards is through a Justice's written opinions. In the democratic framework, it is the only way by which the public can check the performance of such public officer's obligations. Plagiarism in judicial opinions detracts directly from the legitimacy of the judge's ruling and indirectly from the judiciary's legitimacy.[44] It is objectionable not only because of its inherent capacity to harm, but the overarching damage it wreaks on the dignity of the Court as a whole.

The Court's Educative Function

The Court's first Decision in this case hinged on the difference between the academic publishing model on the one hand, and the judicial system on the other. It proceeded to conclude that courts are encouraged to cite "historical legal data, precedents, and related studies" in their decisions, so that "the judge is not expected to produce original scholarship in every respect."

This argument presents a narrower view of the role of the courts than what this country's history consistently reveals: the judiciary plays a more creative role than just traditional scholarship. No matter how hesitantly it assumes this duty and burden, the courts have become moral guideposts in the eyes of the public.

Easily the most daunting task which confronts a newly appointed judge is how to write decisions. It is truly a formidable challenge considering the impact of a court's judgment reverberates throughout the community in which it is rendered, affecting issues of life, liberty, and property in ways that are more pervasive and penetrating than what usually appears on the surface - or under it.[45]

The impact of judicial decisions has even been codified in paragraph 2 of the Canon of Judicial Ethics: "Every judge should at all times be alert in his rulings and in the conduct of the business of his court, so far as he can, to make it useful to litigants and to the community."

The error in the contention of the majority that judicial writing does not put a premium on originality is evident. In the words of Daniel Farber, *stare decisis* has become an oft-repeated catchphrase to justify an unfounded predisposition to repeating maxims and doctrines devoid of renewed evaluation.

In reviewing the Court's work, we saw a fixation on verbal formulas; likewise, race scholarship frequently seems to suffer from a similar fixation on stylized rhetoric. Yet Holmes' adage defines the problem a bit too narrowly-suggesting that we mostly need less abstraction and more concreteness. This deficiency actually is part of the problem; we could surely benefit from more empirical research and sensitivity to concrete factual situations. Yet, the problem goes beyond that.[46]

The consistent resort to *stare decisis* fails to take into account that in the exercise of the Court's self-proclaimed symbolic function, its first accountability is to its audience: the public. Its duty of guiding the bench and the bar comes a close second.

Consider first the judge. A key weakness of current Supreme Court opinions seems to be that judges have sometimes lost track of whom they are addressing or what they are trying to accomplish. Of course, they have no literal clients, but they seek to advance a set of values and perspectives that might serve as the basis for identifying metaphorical clients...The purpose, then, is to help the system work as well as possible according to its own norms and goals...

Often, the purpose is to guide other courts to advance the client's interests in their own decisions. In this respect, the important part of the opinion is that portion speaking to future cases-though as we have seen, judges sometimes fail to focus their energies there. Additionally, the opinion, if it is to elicit more than the most grudging obedience, must appeal to the values and goals of those judges as well as to the author's.[47]

The Court seemingly views the issuance of opinions to be an end in itself, as if the text of the opinion had some autonomous value unrelated to its ability to communicate to an audience. At a deeper level, the

intellectual flaw in the statutory-interpretation opinions is similar. The Court often treats statutes as free-standing texts, with little attention to their historical and social contexts or what their drafters were trying to achieve.[48]

Thus, the value of ethical judicial writing vis-à-vis the role that courts are called upon to play cannot be underestimated.

Worrying about the ethical status of judicial opinions seems pointless at first. Complaints about decisions and the opinions that explain them have been around as long as judges have been judging. As technology has lowered the cost of research, and of cutting and pasting earlier work, opinions often seem to be formal exercises that do not suggest deep judicial engagement. Other opinions do show the hand of a deeply engaged judge, though these can be worse than the cut-and-pasted kind. What then is to be gained by trying to make an ethical issue of judicial writing? ... Professor Llewellyn said it is in part because the judicial office acts as "a subduer of self and self-will, as an engine to promote openness to listen and to understand, to quicken evenhandedness, patience, sustained effort to see and judge for All-of-Us." [49]

The lessons taught our country by its singular experience in history has given rise to a more defined place for our courts. With the constitutional mandate that the Supreme Court alone can exercise judicial review, or promulgate rules and guidelines for the bench and the bar, or act as the arbiter between the two branches of government, it is all the more evident that standards for judicial behavior must be formulated. After all, "the most significant aspect of the court's work may lie in just this method and process of decision: by avoiding absolutes, by testing general maxims against concrete particulars, by deciding only in the context of specific controversies, by finding accommodations between polar principles, by holding itself open to the reconsideration of dogma, the court at its best, provides a symbol of reconciliation." [50]

According to Paul Freund, the great fundamental guarantees of our Constitution are in fact, moral standards wrapped in legal commands. It is only fitting that the Court, in taking on the role of a public conscience, accept the fact that the people expect nothing less from it than the best of faith and effort in adhering to high ethical standards.

I affirm my response to the dispositive portion of the majority Decision in this case as stated in my Dissent of 12 October 2010, with the modification that more work of more authors must be appropriately acknowledged, apologies must be extended, and a more extensively corrected Corrigendum must be issued. Again, I make no pronouncement on liability, not only because the process was erroneously cut short by the majority when it refused to proceed to the next step of determining the duty of diligence that a judge has in supervising the work of his legal research, and whether, in this instance, Justice del Castillo discharged such duty, but also because of the view expressed by Justice Carpio that this Court had best leave the matter of clearing Justice del Castillo to Congress, the body designated by the Constitution for such matters. It seems now that the process of determining the degree of care required in this case may never be undertaken by this Court. One thing is certain, however: we cannot allow a heavily plagiarized Decision to remain in our casebooks - it must be corrected. The issues are very clear to the general public. A wrong must be righted, and this Court must move forward in the right direction.

[1] Mark Ellis, Breaking the Silence: Rape as an International Crime, 38 Case W. Res. J. Int'l L. 225 (2006-2007); Christian J. Tams, Enforcing Erga Omnes Obligations in International Law (2005); Evan J. Criddle and Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int'l L. 331 (2009)

[2] Justice Antonio T. Carpio, Dissenting Opinion, In the Matter of the Charges of Plagiarism, etc. against Associate Justice Mariano C. del Castillo, A.M. No. 10-7-17-SC.

[3] Justice Maria Lourdes P. A. Sereno, Dissenting Opinion, In the Matter of the Charges of Plagiarism, etc. against Associate Justice Mariano C. del Castillo, AM 10-7-17-SC, promulgated 12 October 2010, at 31.

[4] Robert McCorquodale, The Individual and the International Legal System, in International Law, 307-332 (Malcolm Evans ed., 2006).

[5] Phoebe Okowa, Issues of Admissibility and the Law on International Responsibility, in International Law (Malcolm Evans ed., 2006).

[6] Published in the blog of the European Journal of International Law, accessed at <http://www.ejiltalk.org/testing-the-limits-of-diplomatic-protection-khadr-versus-the-prime-minister-of-canada>. Last visited 24 January 2011, 1:47 p.m.

[7] From the Congressional Report Services Memorandum, by Larry Niksch, Specialist in Asian Affairs, Foreign Affairs, Defense and Trade Division, accessible at <http://www.awf.or.jp/pdf/h0076.pdf>. This document is covered by a copyright notice from the United States Congressional Research Service posted at the website of the Asian Women's Fund: <http://www.awf.or.jp/e4/un-05.html#etc>. Last accessed 24 January 2011, 2:35 p.m.

[8] "So in the process, my practice, which may not be shared by other researchers, my own practice as to doing research for decisions is to basically review all the material that is available insofar as I can. So I review everything, I take notes, I do my own research and then after one has reviewed as much as I am able to, then one starts writing." TSN at 28, Hearing of 26 August 2010, Deliberations of the Committee on Ethics and Ethical Standards.

[9] "So what happens, Your Honors, is basically, one does an initial review, sorry, I do an initial review on this...all of these goes for the most articles, Law Journal articles. So one does initial review on these articles and if there is an article that immediately strikes one as relevant or as important or as useful in the course of writing a decision, you can click on it, the blue portion, you can click on this and the article will actually appear. And then you can read the whole article, you can skim through the article, if again it seems relevant, it's possible to e-mail the article to yourself, which makes it easier because...so at least I have, for instance, all of the articles available like in my home." TSN at 28, Hearing of 26 August 2010, Deliberations of the Committee on Ethics and Ethical Standards.

[10] TSN at 29, Hearing of 26 August 2010, Deliberations of the Committee on Ethics and Ethical Standards.

[11] Approved by the court en banc on 15 November 2005.

[12] A case in which the popup text box would not appear is that in which a block of text containing the note reference mark is selected; the popup text box will only appear if the cursor is hovered near the note reference mark.

[13] RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM, 38 (2007).

[14] Id. at 106.

[15] Laurie Stearns, Copy Wrong: Plagiarism, Property, and the Law, 80 Cal. L. Rev. 513, 518 (1992).

[16] Id. at 522.

[17] JOYCE C. GEORGE, JUDICIAL PLAGIARISM, JUDICIAL OPINION WRITING HANDBOOK, accessed at on February 8, 2011, at 715.

[18] Id. at 726.

[19] Id. at 715.

[20] Id. at 718.

[21] Id.

[22] Id. at 726.

[23] Id.

[24] Supra note 3 at 29.

[25] See: In re Widdison, 539 N.W.2d 671 (S.D. 1995) at 865 (as cited in Jaime S. Dursht, Judicial Plagiarism: It May Be Fair Use but Is It Ethical?, 18 Cardozo L. Rev. 1253); Rebecca Moore Howard, Plagiarisms, Authorships, and the Academic Death Penalty, 57 College English 7 (Nov., 1995), at 788-806, as cited in the JSTOR, <http://www.jstor.org/stable/378403>; Klinge v. Ithaca College, 634 N.Y.S.2d 1000 (Sup. Ct. 1995), Napolitano v. Trustees of Princeton Univ., 453 A.2d 279, 284 (N.J. Super. Ct. Ch. Div. 1987), and In re Brennan, 447 N.W.2d 712, 713-14 (Mich. 1949), as cited in Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, Ethical Judicial Opinion Writing, 21 The Georgetown Journal of Legal Ethics 264, note 190; Apotex Inc. v. Janssen-Ortho Inc. 2009, as cited in Emir Aly Crowne-Mohammed, 22 No. 4 Intell. Prop. & Tech. L. J. 15, 1 - as cited in page 28 and footnotes 24, 25, 27 to 29 of my 12 October 2010 Dissent.

[26] Id. at 26.

[27] Discussion Paper No. 07011, October 2007, UP School of Economics.

[28] World Bank, Project Appraisal Document on a Proposed Loan in the Amount of US\$21.9 Million to the Republic of the Philippines for a Judicial Reform Support Project (Report No: 25504) (2003), available at http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2003/07/31/000012009_20030731101244/Rendered/PDF/255040PHOPAD.pdf (accessed on February 5, 2011).

[29] A minor correction is in order. The "Understanding on the Rules and Procedures Governing the Settlement of Disputes" is Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization. There is no Annex 2 to the General Agreement on Tariffs and Trade 1994. Please see paragraphs 1 to 4 of said GATT 1994 for a list of all its component parts.

[30] Understanding on Dispute Settlement, available at <http://www.inquit.com/iqebooks/WTODC/Webversion/prov/eigteen.htm> (accessed on February 5, 2011).

[31] World Trade Organization, Dispute Settlement System Training Module: Chapter 8 - Dispute Settlement Without Recourse to Panels and the Appellate Body, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c8s1p2_e.htm (accessed on February 5, 2011).

[32] Salonga v. Cruz Paño, G.R. No. 59525, 18 February 1985, 134 SCRA 438.

[33] Gerald Lebovits, Alifya V. Curtin, & Lisa Solomon, Ethical Judicial Opinion Writing, 21 Geo. J. Legal Ethics 264 (2008).

[34] Id. at 269.

[35] Promulgated 5 September 1989, took effect 20 October 1989.

[36] Supra note 33 at 240-241.

- [37] Administrative Order No. 162.
- [38] In Re Letter of Judge Augustus C. Diaz, A.M. No. 07-7-17-SC, 19 September 2007.
- [39] A.M. No. RTJ-90-447, 199 SCRA 75, 12 July 1991, 83-84.
- [40] Junio v. Rivera, A.M. No. MTJ-91-565. August 30, 1993.
- [41] Castillo v. Calanog, Jr., A.M. No. RTJ-90-447, 16 December 1994, 239 SCRA 268
- [42] Teban Hardware and Auto Supply Co. v. Tapucar, A.M. No. 1720, 31 January 1981, 102 SCRA 492, 504.
- [43] Ex Parte Brown, 166 Ind. 593, 78 N.E. 553 (1906).
- [44] Supra note 33 at 282.
- [45] Foreword of Justice Ameurfina A. Melencio Herrera, "FUNDAMENTALS OF DECISION WRITING FOR JUDGES," (2009).
- [46] Daniel Farber, Missing the Play of Intelligence, 6 Wm. & Mary L. Rev. 147, (1994).
- [47] Id. at 170.
- [48] Id. at footnote 40.
- [49] David McGowan, Judicial Writing and the Ethics of the Judicial Office, 14 Geo. J. LEGAL ETHICS 509, 509. (2001).
- [50] Paul A. Freund, "The Supreme Court" in TALKS ON AMERICAN LAW 81-94 (rev. ed., 1972).

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