



Republic of the Philippines  
**SUPREME COURT**  
Manila

EN BANC

**A.M. No. 10-7-17-SC**      **October 15, 2010**

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

DECISION

**PER CURIAM:**

This case is concerned with charges that, in preparing a decision for the Court, a designated member **plagiarized the works** of certain authors and twisted their meanings to support the decision.

The Background Facts

Petitioners **Isabelita C. Vinuya** and about 70 other elderly women, all members of the Malaya Lolos Organization, filed with the Court in G.R. No. 162230 a special civil action of *certiorari* with application for preliminary mandatory injunction against the Executive Secretary, the Secretary of Foreign Affairs, the Secretary of Justice, and the Office of the Solicitor General.

Petitioners claimed that in destroying villages in the Philippines during World War II, the Japanese army systematically raped them and a number of other women, seizing them and holding them in houses or cells where soldiers repeatedly ravished and abused them.

Petitioners alleged that they have since 1998 been approaching the Executive Department, represented by the respondent public officials, requesting assistance in filing claims against the Japanese military officers who established the comfort women stations. But that Department declined, saying that petitioners' individual claims had already been fully satisfied under the Peace Treaty between the Philippines and Japan.

Petitioners wanted the Court to render judgment, compelling the Executive Department to espouse their claims for official apology and other forms of reparations against Japan before the International Court of Justice and other international tribunals.

On April 28, 2010, the Court rendered judgment dismissing petitioners' action. **Justice Mariano C. del Castillo** wrote the decision for the Court. The Court essentially gave two reasons for its decision: it cannot grant the petition because, first, the Executive Department has the exclusive prerogative under the Constitution and the law to determine whether to espouse petitioners' claim against Japan; and, second, the Philippines is not under any obligation in international law to espouse their claims.

On June 9, 2010, petitioners filed a motion for reconsideration of the Court's decision. More than a month later on July 18, 2010, counsel for petitioners, Atty. Herminio Harry Roque, Jr., announced in his online blog that his clients would file a supplemental petition "detailing plagiarism committed by the court" under the second reason it gave for dismissing the petition and that "these stolen passages were also twisted to support the court's erroneous conclusions that the Filipino comfort women of World War Two have no further legal remedies." The media gave publicity to Atty. Roque's announcement.

On July 19, 2010, petitioners filed the supplemental motion for reconsideration that Atty. Roque announced. It accused **Justice Del Castillo** of "manifest intellectual theft and outright plagiarism"<sup>1</sup> when he wrote the decision for the Court and of "twisting the true intents of the plagiarized sources ... to suit the arguments of the assailed Judgment."<sup>2</sup> They charged Justice Del Castillo of copying without acknowledgement certain passages from three foreign articles:

- a. A Fiduciary Theory of Jus Cogens by Evan J. Criddle and Evan Fox-Decent, Yale Journal of International Law (2009);
- b. Breaking the Silence: Rape as an International Crime by Mark Ellis, Case Western Reserve Journal of International Law (2006); and
- c. Enforcing Erga Omnes Obligations by Christian J. Tams, Cambridge University Press (2005).

Petitioners claim that the integrity of the Court's deliberations in the case has been put into question by Justice Del Castillo's fraud. The Court should thus "address and disclose to the public the truth about the manifest intellectual theft and outright plagiarism"<sup>3</sup> that resulted in gross prejudice to the petitioners.

Because of the publicity that the supplemental motion for reconsideration generated, Justice Del Castillo circulated a letter to his colleagues, subsequently verified, stating that when he wrote the decision for the Court he had the intent to attribute all sources used in it. He said in the pertinent part:

It must be emphasized that there was every intention to attribute all sources, whenever due. At no point was there ever any malicious intent to appropriate another's work as our own. We recall that this ponencia was thrice included in the Agenda of the Court en banc. It was deliberated upon during the Baguio session on April 13, 2010, April 20, 2010 and in Manila on April 27, 2010. Each time, suggestions were made which necessitated major revisions in the draft. Sources were re-studied, discussions modified, passages added or deleted. The resulting decision comprises 34 pages with 78 footnotes.

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As regards the claim of the petitioners that the concepts as contained in the above foreign materials were "twisted," the same remains their opinion which we do not necessarily share.<sup>4</sup>

On July 27, 2010, the Court En Banc referred the charges against Justice Del Castillo to its Committee on Ethics and Ethical Standards, chaired by the Chief Justice, for investigation and recommendation. The Chief Justice designated retired Justice Jose C. Vitug to serve as consultant of the Committee. He graciously accepted.

On August 2, 2010, the Committee directed petitioners to comment on Justice Del Castillo's verified letter. When this was done, it set the matter for hearing.

In the meantime, on July 19, 2010, Evan Criddle wrote on his blog that he and his co-author Evan Fox-Descent (referred to jointly as Criddle-Descent) learned of alleged plagiarism involving their work but Criddle's concern, after reading the supplemental motion for reconsideration, was the Court's conclusion that prohibitions against sexual slavery are not jus cogens or internationally binding norms that treaties cannot diminish.

On July 23, 2010, Dr. Mark Ellis wrote the Court expressing concern that in mentioning his work, the Court "may have misread the argument [he] made in the article and employed them for cross purposes." Dr. Ellis said that he wrote the article precisely to argue for appropriate legal remedy for victims of war crimes.

On August 8, 2010, after the referral of the matter to the Committee for investigation, the Dean of the University of the Philippines (U.P.) College of Law publicized a Statement from his faculty, claiming that the *Vinuya* decision was "an extraordinary act of injustice" and a "singularly reprehensible act of dishonesty and misrepresentation by the Highest Court of the land." The statement said that Justice Del Castillo had a "deliberate intention to appropriate the original authors' work," and that the Court's decision amounted to "an act of intellectual fraud by copying works in order to mislead and deceive."<sup>5</sup>

On August 18, 2010 Mr. Christian J. Tams wrote Chief Justice Renato C. Corona that, although relevant sentences in the Court's decision were taken from his work, he was given generic reference only in the footnote and in connection with a citation from another author (Bruno Simma) rather than with respect to the passages taken from his work. He thought that the form of referencing was inappropriate. Mr. Tams was also concerned that the decision may have used his work to support an approach to erga omnes concept (obligations owed by individual States to the community of nations) that is not consistent with what he advocated.

On August 26, 2010, the Committee heard the parties' submissions in the summary manner of administrative investigations. Counsels from both sides were given ample time to address the Committee and submit their evidence. The Committee queried them on these.

Counsels for Justice Del Castillo later asked to be heard with the other parties not in attendance so they could make submissions that their client regarded as sensitive and confidential, involving the drafting process that went into the making of the Court's decision in the *Vinuya* case. Petitioners' counsels vigorously objected and the Committee sustained the objection. After consulting Justice Del Castillo, his counsels requested the Committee to hear the Justice's court researcher, whose name need not be mentioned here, explain the research work that went into the making of the decision in the *Vinuya* case. The Committee granted the request.

The researcher demonstrated by Power Point presentation how the attribution of the lifted passages to the writings of Criddle-Descent and Ellis, found in the beginning drafts of her report to Justice Del Castillo, were unintentionally deleted. She tearfully expressed remorse at her "grievous mistake" and grief for having "caused an enormous amount of suffering for Justice Del Castillo and his family."<sup>6</sup>

On the other hand, addressing the Committee in reaction to the researcher's explanation, counsel for petitioners insisted that lack of intent is not a defense in plagiarism since all that is required is for a writer to acknowledge that certain words or language in his work were taken from another's work. Counsel invoked the Court's ruling in *University of the Philippines Board of Regents v. Court of Appeals and Arokiaswamy William Margaret Celine*,<sup>7</sup> arguing that standards on plagiarism in the academe should apply with more force to the judiciary.

After the hearing, the Committee gave the parties ten days to file their respective memoranda. They filed their memoranda in due course. Subsequently after deliberation, the Committee submitted its unanimous findings and recommendations to the Court.

### The Issues

This case presents two issues:

1. Whether or not, in writing the opinion for the Court in the Vinuya case, Justice Del Castillo plagiarized the published works of authors Tams, Criddle-Descent, and Ellis.
2. Whether or not Justice Del Castillo twisted the works of these authors to make it appear that such works supported the Court's position in the Vinuya decision.

### The Court's Rulings

Because of the pending motion for reconsideration in the Vinuya case, the Court like its Committee on Ethics and Ethical Standards will purposely avoid touching the merits of the Court's decision in that case or the soundness or lack of soundness of the position it has so far taken in the same. The Court will deal, not with the essential merit or persuasiveness of the foreign author's works, but how the decision that Justice Del Castillo wrote for the Court appropriated parts of those works and for what purpose the decision employed the same.

At its most basic, plagiarism means the theft of another person's language, thoughts, or ideas. To plagiarize, as it is commonly understood according to Webster, is "to take (ideas, writings, etc.) from (another) and pass them off as one's own."<sup>8</sup> The passing off of the work of another as one's own is thus an indispensable element of plagiarism.

#### The Passages from Tams

Petitioners point out that the Vinuya decision lifted passages from Tams' book, *Enforcing Erga Omnes Obligations in International Law* (2006) and used them in Footnote 69 with what the author thought was a mere generic reference. But, although Tams himself may have believed that the footnoting in this case was not "an appropriate form of referencing,"<sup>9</sup> he and petitioners cannot deny that the decision did attribute the source or sources of such passages. Justice Del Castillo did not pass off Tams' work as his own. The Justice primarily attributed the ideas embodied in the passages to Bruno Simma, whom Tams himself credited for them. Still, Footnote 69 mentioned, apart from Simma, Tams' article as another source of those ideas.

The Court believes that whether or not the footnote is sufficiently detailed, so as to satisfy the footnoting standards of counsel for petitioners is not an ethical matter but one concerning clarity of writing. The statement "See Tams, *Enforcing Obligations Erga Omnes in International Law* (2005)" in the Vinuya decision is an attribution no matter if Tams thought that it gave him somewhat less credit than he deserved. Such attribution altogether negates the idea that Justice Del Castillo passed off the challenged passages as his own.

That it would have been better had Justice Del Castillo used the introductory phrase "cited in" rather than the phrase "See" would make a case of mere inadvertent slip in attribution rather than a case of "manifest intellectual theft and outright plagiarism." If the Justice's citations were imprecise, it would just be a case of bad footnoting rather than one of theft or deceit. If it were otherwise, many would be target of abuse for every editorial error, for every mistake in citing pagination, and for every technical detail of form.

#### The Passages from Ellis and Criddle-Descent

Petitioners also attack the Court's decision for lifting and using as footnotes, without attribution to the author, passages from the published work of Ellis. The Court made the following statement on page 27 of its decision, marked with Footnote 65 at the end:

We fully agree that rape, sexual slavery, torture, and sexual violence are morally reprehensible as well as legally prohibited under contemporary international law. 65 xxx

Footnote 65 appears down the bottom of the page. Since the lengthy passages in that footnote came almost verbatim from Ellis' article,<sup>10</sup> such passages ought to have been introduced by an acknowledgement that they are from that article. The footnote could very well have read:

65 In an article, *Breaking the Silence: Rape as an International Crime*, *Case Western Reserve Journal of International Law* (2006), Mark Ellis said: 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. But modern-day sensitivity to the crime of rape did not emerge until after World War II. 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. (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. The 1863 Lieber Instructions classified rape as a crime of "troop discipline." (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). It specified rape as a capital crime

punishable by the death penalty (*Id.* at 236). The 1907 Hague Convention protected women by requiring the protection of their "honour." ("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; 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. 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.

The Nuremberg Judgment did not make any reference to rape and rape was not prosecuted. (Judge Gabrielle Kirk McDonald, *The International Criminal Tribunals Crime and Punishment in the International Arena*, 7 ILSA J. Int'l. Comp. L. 667, 676.) However, International Military Tribunal for the Far East prosecuted rape crimes, even though its Statute did not explicitly criminalize rape. The Far East Tribunal held General Iwane Matsui, Commander Shunroku Hata and Foreign Minister Hirota criminally responsible for a series of crimes, including rape, committed by persons under their authority. (*The Tokyo Judgment: Judgment Of The International Military Tribunal For The Far East* 445-54 (1977).

The first mention of rape as a specific crime came in December 1945 when Control Council Law No. 10 included the term rape in the definition of crimes against humanity. Law No. 10, adopted by the four occupying powers in Germany, was devised to establish a uniform basis for prosecuting war criminals in German courts. (Control Council for Germany, Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50, 53 (1946))

The 1949 Geneva Convention Relative to the Treatment of Prisoners of War was the first modern-day international instrument to establish protections against rape for women. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3316, 75 U.N.T.S. 287 (entry into force Oct. 20, 1950) [hereinafter Fourth Geneva Convention]. Furthermore, the ICC, the ICTY, and the International Criminal Tribunal for Rwanda (ICTR) have significantly advanced the crime of rape by enabling it to be prosecuted as genocide, a war crime, and a crime against humanity.

But, as it happened, the acknowledgment above or a similar introduction was missing from Footnote 65.

Next, petitioners also point out that the following eight sentences and their accompanying footnotes appear in text on pages 30-32 of the Vinuya decision:

xxx In international law, the term "*jus cogens*" (literally, "compelling law") refers to norms that command peremptory authority, superseding conflicting treaties and custom. *Jus cogens* norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.<sup>71</sup>

Early strains of the *jus cogens* doctrine have existed since the 1700s,<sup>72</sup> 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*.<sup>73</sup> 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).<sup>74</sup> Though there was a consensus that certain international norms had attained the status of *jus cogens*,<sup>75</sup> the ILC was unable to reach a consensus on the proper criteria for identifying peremptory norms.

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*."<sup>76</sup> 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."<sup>77</sup> Thus, while the existence of *jus cogens* in international law is undisputed, no consensus exists on its substance,<sup>77</sup> beyond a tiny core of principles and rules.<sup>78</sup>

Admittedly, the Vinuya decision lifted the above, including their footnotes, from Criddle-Descent's article, *A Fiduciary Theory of Jus Cogens*.<sup>11</sup> Criddle-Descent's footnotes were carried into the Vinuya decision's own footnotes but no attributions were made to the two authors in those footnotes.

#### The Explanation

Unless amply explained, the above lifting from the works of Ellis and Criddle-Descent could be construed as plagiarism. But one of Justice Del Castillo's researchers, a court-employed attorney, explained how she accidentally deleted the attributions, originally planted in the beginning drafts of her report to him, which report eventually became the working draft of the decision. She said that, for most parts, she did her research electronically. For international materials, she sourced these mainly from Westlaw, an online research service for legal and law-related materials to which the Court subscribes.

In the old days, the common practice was that after a Justice would have assigned a case for study and report, the researcher would source his materials mostly from available law books and published articles on print. When he found a relevant item in a book, whether for one side of the issue or for the other, he would place a strip of paper marker on the appropriate page, pencil mark the item, and place the book on his desk where other relevant books would have piled up. He would later paraphrase or copy the marked out passages from some of these books as he typed his manuscript on a manual typewriter. This occasion would give him a clear opportunity to attribute the materials used to their authors or sources.

With the advent of computers, however, as Justice Del Castillo's researcher also explained, most legal references, including the collection of decisions of the Court, are found in electronic diskettes or in internet websites that offer virtual libraries of books and articles. Here, as the researcher found items that were relevant to her assignment, she downloaded or copied them into her "main manuscript," a smorgasbord plate of materials that she thought she might need. The researcher's technique in this case is not too far different from that employed by a carpenter. The carpenter first gets the pieces of lumber he would need, choosing the kinds and sizes suitable to the object he has in mind, say a table. When ready, he would measure out the portions he needs, cut them out of the pieces of lumber he had collected, and construct his table. He would get rid of the scraps.

Here, Justice Del Castillo's researcher did just that. She electronically "cut" relevant materials from books and journals in the Westlaw website and "pasted" these to a "main manuscript" in her computer that contained the issues for discussion in her proposed report to the Justice. She used the Microsoft Word program.<sup>12</sup> Later, after she decided on the general shape that her report would take, she began pruning from that manuscript those materials that did not fit, changing the positions in the general scheme of those that remained, and adding and deleting paragraphs, sentences, and words as her continuing discussions with Justice Del Castillo, her chief editor, demanded. Parenthetically, this is the standard scheme that computer-literate court researchers use everyday in their work.

Justice Del Castillo's researcher showed the Committee the early drafts of her report in the Vinuya case and these included the passages lifted from the separate articles of Criddle-Descent and of Ellis with proper attributions to these authors. But, as it happened, in the course of editing and cleaning up her draft, the researcher accidentally deleted the attributions.

#### First Finding

The Court adopts the Committee's finding that the researcher's explanation regarding the accidental removal of proper attributions to the three authors is credible. Given the operational properties of the Microsoft program in use by the Court, the accidental decapitation of attributions to sources of research materials is not remote.

For most senior lawyers and judges who are not computer literate, a familiar example similar to the circumstances of the present case would probably help illustrate the likelihood of such an accident happening. If researcher X, for example, happens to be interested in "the inalienable character of juridical personality" in connection with an assignment and if the book of the learned Civilist, Arturo M. Tolentino, happens to have been published in a website, researcher X would probably show interest in the following passage from that book:

xxx Both juridical capacity and capacity to act are not rights, but qualities of persons; hence, they cannot be alienated or renounced.<sup>15</sup>

xxx

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15 3 Von Tuhr 296; 1 Valverde 291.

Because the sentence has a footnote mark (#15) that attributes the idea to other sources, it is evident that Tolentino did not originate it. The idea is not a product of his intellect. He merely lifted it from Von Tuhr and Valverde, two reputable foreign authors.

When researcher X copies and pastes the above passage and its footnote into a manuscript-in-the-making in his computer, the footnote number would, given the computer program in use, automatically change and adjust to the footnoting sequence of researcher X's manuscript. Thus, if the preceding footnote in the manuscript when the passage from Tolentino was pasted on it is 23, Tolentino's footnote would automatically change from the original Footnote 15 to Footnote 24.

But then, to be of use in his materials-gathering scheme, researcher X would have to tag the Tolentino passage with a short description of its subject for easy reference. A suitable subject description would be: "The inalienable character of juridical personality.<sup>23</sup>" The footnote mark, 23 From Tolentino, which researcher X attaches to the subject tag, serves as reminder to him to attribute the passage in its final form to Tolentino. After the passage has been tagged, it would now appear like this:

The inalienable character of juridical personality.<sup>23</sup>

xxx Both juridical capacity and capacity to act are not rights, but qualities of persons; hence, they cannot be alienated or renounced.<sup>24</sup>

xxx

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23 From Tolentino.  
24 3 Von Tuhr 296; 1 Valverde 291.

The tag is of course temporary and would later have to go. It serves but a marker to help researcher X maneuver the passage into the right spot in his final manuscript.

The mistake of Justice Del Castillo's researcher is that, after the Justice had decided what texts, passages, and citations were to be retained including those from Criddle-Descent and Ellis, and when she was already cleaning up her work and deleting all subject tags, she unintentionally deleted the footnotes that went with such tags—with disastrous effect.

To understand this, in Tolentino's example, the equivalent would be researcher X's removal during cleanup of the tag, "The inalienable character of juridical personality.<sup>23</sup>" by a simple "delete" operation, and the unintended removal as well of the accompanying footnote (#23). The erasure of the footnote eliminates the link between the lifted passage and its source, Tolentino's book. Only the following would remain in the manuscript:

xxx Both juridical capacity and capacity to act are not rights, but qualities of persons; hence, they cannot be alienated or renounced.<sup>43</sup>

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43 3 Von Tuhr 296; 1 Valverde 291.

As it happened, the Microsoft word program does not have a function that raises an alarm when original materials are cut up or pruned. The portions that remain simply blend in with the rest of the manuscript, adjusting the footnote number and removing any clue that what should stick together had just been severed.

This was what happened in the attributions to Ellis and Criddle-Descent. The researcher deleted the subject tags and, accidentally, their accompanying footnotes that served as reminder of the sources of the lifted passages. With 119 sources cited in the decision, the loss of the 2 of them was not easily detectable.

Petitioners point out, however, that Justice Del Castillo's verified letter of July 22, 2010 is inconsistent with his researcher's claim that the omissions were mere errors in attribution. They cite the fact that the Justice did not disclose his researcher's error in that letter despite the latter's confession regarding her mistake even before the Justice sent his letter to the Chief Justice. By denying plagiarism in his letter, Justice Del Castillo allegedly perjured himself and sought to whitewash the case.<sup>13</sup>

But nothing in the July 22 letter supports the charge of false testimony. Justice Del Castillo merely explained "that there was every intention to attribute all sources whenever due" and that there was never "any malicious intent to appropriate another's work as our own," which as it turns out is a true statement. He recalled how the Court deliberated upon the case more than once, prompting major revisions in the draft of the decision. In the process, "(s)ources were re-studied, discussions modified, passages added or deleted." Nothing in the letter suggests a cover-up. Indeed, it did not preclude a researcher's inadvertent error.

And it is understandable that Justice Del Castillo did not initially disclose his researcher's error. He wrote the decision for the Court and was expected to take full responsibility for any lapse arising from its preparation. What is more, the process of drafting a particular decision for the Court is confidential, which explained his initial request to be heard on the matter without the attendance of the other parties.

Notably, neither Justice Del Castillo nor his researcher had a motive or reason for omitting attribution for the lifted passages to Criddle-Descent or to Ellis. The latter authors are highly respected professors of international law. The law journals that published their works have exceptional reputations. It did not make sense to intentionally omit attribution to these authors when the decision cites an abundance of other sources. Citing these authors as the sources of the lifted passages would enhance rather than diminish their informative value. Both Justice Del Castillo and his researcher gain nothing from the omission. Thus, the failure to mention the works of Criddle-Decent and Ellis was unquestionably due to inadvertence or pure oversight.

Petitioners of course insist that intent is not material in committing plagiarism since all that a writer has to do, to avoid the charge, is to enclose lifted portions with quotation marks and acknowledge the sources from which these were taken.<sup>14</sup> Petitioners point out that the Court should apply to this case the ruling in University of the Philippines Board of Regents v. Court of Appeals and Arokiaswamy William Margaret Celine.<sup>15</sup> They argue that standards on plagiarism in the academe should apply with more force to the judiciary.

But petitioners' theory ignores the fact that plagiarism is essentially a form of fraud where intent to deceive is inherent. Their theory provides no room for errors in research, an unrealistic position considering that there is hardly any substantial written work in any field of discipline that is free of any mistake. The theory places an automatic universal curse even on errors that, as in this case, have reasonable and logical explanations.

Indeed, the 8th edition of Black's Law Dictionary defines plagiarism as the "deliberate and knowing presentation of another person's original ideas or creative expressions as one's own."<sup>16</sup> Thus, plagiarism presupposes intent and a deliberate, conscious effort to steal another's work and pass it off as one's own.

Besides, the Court said nothing in U.P. Board of Regents that would indicate that an intent to pass off another's work as one's own is not required in plagiarism. The Court merely affirmed the academic freedom of a university to withdraw a master's degree that a student obtained based on evidence that she misappropriated the work of others, passing them off as her own. This is not the case here since, as already stated, Justice Del Castillo actually imputed the borrowed passages to others.

### Second Finding

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.

This is best illustrated in the familiar example above. After the deletion of the subject tag and, accidentally, its footnote which connects to the source, the lifted passage would appear like this:

xxx Both juridical capacity and capacity to act are not rights, but qualities of persons; hence, they cannot be alienated or renounced.<sup>43</sup>

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43 3 Von Tuhr 296; 1 Valverde 291.

Although the unintended deletion severed the passage's link to Tolentino, the passage remains to be attributed to Von Tuhr and Valverde, the original sources that Tolentino himself cites. The text and its footnote reference cancel out any impression that the passage is a creation of researcher X. It is the same with the passages from Criddle-Descent and Ellis. Because such passages remained attributed by the footnotes to the authors' original sources, the omission of attributions to Criddle-Descent and Ellis gave no impression that the passages were the creations of Justice Del Castillo. This wholly negates the idea that he was passing them off as his own thoughts.

True the subject passages in this case were reproduced in the *Vinuya* decision without placing them in quotation marks. But such passages are much unlike the creative line from Robert Frost,<sup>17</sup> "The woods are lovely, dark, and deep, but I have promises to keep, and miles to go before I sleep, and miles to go before I sleep." The passages here consisted of 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.

To paraphrase Bast and Samuels,<sup>18</sup> 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.

### Third Finding

Petitioners allege that the decision twisted the passages from Tams, Criddle-Descent, and Ellis. The Court adopts the Committee's finding that this is not so. Indeed, this allegation of twisting or misrepresentation remains a mystery to the Court. To twist means "to distort or pervert the meaning of."<sup>19</sup> For example, if one lifts the lyrics of the National Anthem, uses it in his work, and declares that Jose Palma who wrote it "did not love his country," then there is "twisting" or misrepresentation of what the anthem's lyrics said. Here, nothing in the *Vinuya* decision said or implied that, based on the lifted passages, authors Tams, Criddle-Descent, and Ellis supported the Court's conclusion that the Philippines is not under any obligation in international law to espouse *Vinuya et al.*'s claims.

The fact is that, **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*.

Considering how it was impossible for Justice Del Castillo to have twisted the meaning of the passages he lifted from the works of Tams, Criddle-Descent, and Ellis, the charge of "twisting" or misrepresentation against him is to say the least, unkind. To be more accurate, however, the charge is reckless and obtuse.

### No Misconduct

On occasions judges and justices have mistakenly cited the wrong sources, failed to use quotation marks, inadvertently omitted necessary information from footnotes or endnotes. But these do not, in every case, amount to misconduct. Only errors that are tainted with fraud, corruption, or malice are subject of disciplinary action.<sup>20</sup> This is not the case here. Justice Del Castillo's acts or omissions were not shown to have been impelled by any of such disreputable motives.<sup>21</sup> If the rule were otherwise, no judge or justice, however competent, honest, or dedicated he may be, can ever hope to retire from the judiciary with an unblemished record.<sup>22</sup>

## No Inexcusable Negligence

Finally, petitioners assert that, even if they were to concede that the omission was the result of plain error, Justice Del Castillo is nonetheless guilty of gross inexcusable negligence. They point out that he has full control and supervision over his researcher and should not have surrendered the writing of the decision to the latter.<sup>23</sup>

But this assumes that Justice Del Castillo abdicated the writing of the *Vinuya* decision to his researcher, which is contrary to the evidence adduced during the hearing. As his researcher testified, the Justice set the direction that the research and study were to take by discussing the issues with her, setting forth his position on those issues, and reviewing and commenting on the study that she was putting together until he was completely satisfied with it.<sup>24</sup> In every sense, Justice Del Castillo was in control of the writing of the report to the Court, which report eventually became the basis for the decision, and determined its final outcome.

Assigning cases for study and research to a court attorney, the equivalent of a "law clerk" in the United States Supreme Court, is standard practice in the high courts of all nations. This is dictated by necessity. With about 80 to 100 cases assigned to a Justice in our Court each month, it would be truly senseless for him to do all the studies and research, going to the library, searching the internet, checking footnotes, and watching the punctuations. If he does all these by himself, he would have to allocate at least one to two weeks of work for each case that has been submitted for decision. The wheels of justice in the Supreme Court will grind to a halt under such a proposition.

What is important is that, in this case, Justice Del Castillo retained control over the writing of the decision in the *Vinuya* case without, however, having to look over his researcher's shoulder as she cleaned up her draft report to ensure that she hit the right computer keys. The Justice's researcher was after all competent in the field of assignment given her. She finished law from a leading law school, graduated third in her class, served as Editor-in-Chief of her school's Law Journal, and placed fourth in the bar examinations when she took it. She earned a master's degree in International Law and Human Rights from a prestigious university in the United States under the Global-Hauser program, which counsel for petitioners concedes to be one of the top post graduate programs on International Law in the world. Justice Del Castillo did not exercise bad judgment in assigning the research work in the *Vinuya* case to her.

Can errors in preparing decisions be prevented? Not until computers cease to be operated by human beings who are vulnerable to human errors. They are hypocrites who believe that the courts should be as error-free as they themselves are.

Incidentally, in the course of the submission of petitioners' exhibits, the Committee noted that petitioners' Exhibit J, the accusing statement of the Faculty of the U.P. College of Law on the allegations of plagiarism and misinterpretation, was a mere dummy. The whole of the statement was reproduced but the signatures portion below merely listed the names of 38 faculty members, in solid rows, with the letters "Sgd" or "signed" printed beside the names without exception. These included the name of retired Supreme Court Justice Vicente V. Mendoza, a U.P. professor.

Because the Committee declined to admit a mere dummy of Exhibit J, it directed Atty. Roque to present the signed copy within three days of the August 26 hearing.<sup>25</sup> He complied. As it turned out, the original statement was signed by only a minority of the faculty members on the list. The set of signatories that appeared like solid teeth in the dummy turned out to be broken teeth in the original. Since only 37 out of the 81 on the list signed the document, it does not appear to be a statement of the Faculty but of just some of its members. And retired Justice V. V. Mendoza did not sign the statement, contrary to what the dummy represented. The Committee wondered why the Dean submitted a dummy of the signed document when U.P. has an abundance of copying machines.

Since the above circumstances appear to be related to separate *en banc* matter concerning the supposed Faculty statement, there is a need for the Committee to turn over the signed copy of the same to the *en banc* for its consideration in relation to that matter.

WHEREFORE, in view of all of the above, the Court:

1. DISMISSES for lack of merit petitioner *Vinuya*, *et al.*'s charges of plagiarism, twisting of cited materials, and gross neglect against Justice Mariano C. del Castillo;
2. DIRECTS the Public Information Office to send copies of this decision to Professors Evan J. Criddle and Evan Fox-Descent, Dr. Mark Ellis, and Professor Christian J. Tams at their known addresses;
3. DIRECTS the Clerk of Court to provide all court attorneys involved in legal research and reporting with copies of this decision and to enjoin them to avoid editing errors committed in the *Vinuya* case while using the existing computer program especially when the volume of citations and footnoting is substantial; and
4. Finally, DIRECTS the Clerk of Court to acquire the necessary software for use by the Court that can prevent future lapses in citations and attributions.

Further, the Court DIRECTS the Committee on Ethics and Ethical Standards to turn over to the *en banc* the dummy as well as the signed copy of petitioners' Exhibit J, entitled "Restoring Integrity," a statement by the Faculty of the University of the Philippines College of Law for the *en banc*'s consideration in relation to the separate pending matter concerning that supposed Faculty statement.

SO ORDERED.

**RENATO C. CORONA**  
Chief Justice

**ANTONIO T. CARPIO**  
Associate Justice

**CONCHITA CARPIO MORALES**  
Associate Justice

**PRESBITERO J. VELASCO, JR.**  
Associate Justice

**ANTONIO EDUARDO B. NACHURA**  
Associate Justice

**TERESITA J. LEONARDO-DE CASTRO**  
Associate Justice

**ARTURO D. BRION**  
Associate Justice

**DIOSDADO M. PERALTA**  
Associate Justice

**LUCAS P. BERSAMIN**  
Associate Justice

**MARIANO C. DEL CASTILLO**  
Associate Justice

**ROBERTO A. ABAD**  
Associate Justice

**MARTIN S. VILLARAMA, JR.**  
Associate Justice

**JOSE PORTUGAL PEREZ**  
Associate Justice

**JOSE CATRAL MENDOZA**  
Associate Justice

**MARIA LOURDES P. A. SERENO**  
Associate Justice

#### Footnotes

- <sup>1</sup> Supplemental Motion for Reconsideration, petitioner's Exhibit A, p. 5.
- <sup>2</sup> *Id.* at 3.
- <sup>3</sup> Supplemental Motion for Reconsideration, *supra* note 1, at 5.
- <sup>4</sup> Justice Del Castillo's Verified Letter, p. 3, Exhibit G of the petitioners.
- <sup>5</sup> Statement of the University of the Philippines College of Law Faculty dated July 27, 2010, Exhibit J of the petitioners.
- <sup>6</sup> Transcript of Stenographic Notes taken on August 26, 2010, p. 31.
- <sup>7</sup> G.R. No. 134625, August 31, 1999, 313 SCRA 404.
- <sup>8</sup> Webster's New World College Dictionary, Third Edition, Macmillan USA, p. 1031.
- <sup>9</sup> Exhibit I for the petitioners.
- <sup>10</sup> Breaking the Silence of Rape as an International Crime, 38 Case W. Res. J. Int'l. L. 225 (2006).
- <sup>11</sup> 34 Yale J. Int'l. L. 331 (2009).
- <sup>12</sup> Memorandum for Justice Del Castillo, paragraphs 25-35.
- <sup>13</sup> Petitioner's Memorandum, pp. 26-27.
- <sup>14</sup> *Supra* note 6, at 41.
- <sup>15</sup> *Supra* note 7.
- <sup>16</sup> Black's Law Dictionary (8th ed. 2004).
- <sup>17</sup> Stopping by the Woods on a Snowy Evening (1923).
- <sup>18</sup> Bast and Samuels, Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty, 57 CATH. U. L. REV 777, 800 (2008).
- <sup>19</sup> Webster's New World College Dictionary, 3rd Edition, p. 1445.

<sup>20</sup> Atty. Alberto P. Quinto v. Judge Gregorio S. Vios, Municipal Trial Court, Kapatagan, Lanao del Norte, A.M. No. MTJ-04-1551, May 21, 2004, 429 SCRA 1; *Tolentino v. Camano, Jr.*, A.M. No. RTJ 10-1522, January 20, 2000, 322 SCRA 559.

<sup>21</sup> *Daracan v. Natividad*, A.M. No. RTC-99-1447, September 27, 2000, 341 SCRA 161.

<sup>22</sup> *Guerrero v. Villamor*, A.M. No. RTJ-90-483, September 25, 1998, 296 SCRA 88; *Tan v. Adre*, A.M. No. RTJ-05-1898, January 31, 2005, 450 SCRA 145.

<sup>23</sup> *Supra* note 13, at 25.

<sup>24</sup> *Supra* note 6, at 27-30.

<sup>25</sup> Order dated August 26, 2010, Committee Records, pp. 382-383.

## DISSENTING OPINION

### SERENO, J.:

What is black can be called "white" but it cannot turn white by the mere calling. The unfortunate ruling of the majority Decision that no plagiarism was committed stems from its failure to distinguish between the determination of the objective, factual existence of plagiarism in the *Vinuya* decision<sup>1</sup> and the determination of the liability that results from a finding of plagiarism. Specifically, it made "malicious intent", which heretofore had not been relevant to a finding of plagiarism, an essential element.

The majority Decision will thus stand against the overwhelming conventions on what constitutes plagiarism. In doing so, the Decision has created 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. Under Section 184 of R.A. 8293 ("An Act Describing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes"), or the Intellectual Property Code of the Philippines, there is no infringement of copyright in the use of another's work in:

(b) the making of quotations from a published work if they are compatible with fair use and only to the extent justified for the purpose, including quotations from newspaper articles and periodicals in the form of press summaries: **Provided that the source and the name of the author, if appearing on the work, are mentioned.** (Emphasis supplied)

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 — and that therefore there was no plagiarism — 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.<sup>2</sup>

### TABLES OF COMPARISON

The tables of comparison below were first drawn based on the tables made by petitioners in their Supplemental Motion for Reconsideration. This was then compared with Annex "A" of Justice Mariano del Castillo's letter, which is his tabular explanation for some of the copied excerpts.<sup>3</sup> The alleged plagiarism of the cited excerpts were then independently verified and re-presented below, with the necessary revisions accurately reflecting the alleged plagiarized works and the pertinent portions of the decision. A few excerpts in the table of petitioners are not included, as they merely refer to in-text citations.

TABLE A: Comparison of Christian J. Tams's book, entitled *Enforcing Erga Omnes Obligations in International Law* (2005), hereinafter called "Tams's work" and the Supreme Court's 28 April 2010 Decision in *Vinuya, et. al. v. Executive Secretary*.

	Christian J. Tams, <i>Enforcing Erga Omnes Obligations in International Law</i> (2005).	<i>Vinuya, et. al. v. Executive Secretary, G.R. No. 162230, 28 April 2010.</i>
1.	xxx The Latin phrase 'erga omnes' thus has become one of the rallying cries of those sharing a belief in the emergence of a value-based international public order based on law. xxx	*The Latin phrase, 'erga omnes,' has since become one of the rallying cries of those sharing a belief in the emergence of a value-based international public order. However, as is so often the case, the reality is neither so clear nor so bright.

<p>As often, the reality is neither so clear nor so bright. One problem is readily admitted by commentators: whatever the relevance of obligations erga omnes as a legal concept, its full potential remains to be realised in practice. xxx Bruno Simma’s much-quoted observation encapsulates this feeling of disappointment: ‘Viewed realistically, the world of obligations erga omnes is still the world of the “ought” rather than of the “is”.</p> <p>(pp. 3-4 of the Christian Tams’s book)</p>	<p>Whatever the relevance of obligations erga omnes as a legal concept, its full potential remains to be realized in practice. <sup>[FN69]</sup> (p. 30, Body of the 28 April 2010 Decision)</p> <p><sup>[FN69]</sup> Bruno Simma’s much-quoted observation encapsulates this feeling of disappointment: ‘Viewed realistically, the world of obligations erga omnes is still the world of the “ought” rather than of the “is”’ The Charter of the United Nations: A Commentary 125 (Simma, ed. 1995). See Tams, Enforcing Obligations Erga omnes in International Law (2005).</p> <p>*The decision mentioned Christian Tams’s book in footnote 69.</p>
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TABLE B: 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), hereinafter called “Criddle’s & Fox-Decent’s work” and the Supreme Court’s 28 April 2010 Decision in Vinuya, et al. v. Executive Secretary.

	<p>Evan J. Criddle &amp; Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int’l L. 331 (2009).</p>	<p>Vinuya, et. al. v. Executive Secretary, G.R. No. 162230, 28 April 2010</p>
<p>1.</p>	<p>In international law, the term "jus cogens" (literally, "compelling law") refers to norms that command peremptory authority, superseding conflicting treaties and custom. xxx Jus cogens norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority. <sup>[FN2]</sup></p> <p><sup>[FN2]</sup> See Vienna Convention on the Law of Treaties art. 53, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].</p> <p>(pp. 331-332 of the Yale Law Journal of Int’l Law)</p>	<p>In international law, the term "jus cogens" (literally, "compelling law") refers to norms that command peremptory authority, superseding conflicting treaties and custom. Jus cogens norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority. <sup>[FN70]</sup> (pp. 30-31, Body of the 28 April 2010 Decision)</p> <p><sup>[FN70]</sup> See Vienna Convention on the Law of Treaties art. 53, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].</p>

2.	<p>Peremptory norms began to attract greater scholarly attention with the publication of Alfred von Verdross's influential 1937 article, <i>Forbidden Treaties in International Law</i>.<sup>[FN10]</sup></p> <p>[FN10] 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 <i>bonos mores</i>. Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (Schücking, J., dissenting).</p> <p>(p. 334 of the Yale Law Journal of Int'l Law)</p>	<p>xxx but peremptory norms began to attract greater scholarly attention with the publication of Alfred von Verdross's influential 1937 article, <i>Forbidden Treaties in International Law</i>.<sup>[FN72]</sup> (p. 31, Body of the 28 April 2010 Decision)</p> <p>[FN72] 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 <i>jus cogens</i> encountered skepticism within the legal academy. These voices of resistance soon found themselves in the minority, however, as the <i>jus cogens</i> concept gained enhanced recognition and credibility following the Second World War. (See Lauri Hannikainen, <i>Peremptory Norms (Jus cogens) in International Law: Historical Development, Criteria, Present Status</i> 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").</p>
3.	<p>Classical publicists such as Hugo Grotius, Emer de Vattel, and Christian Wolff drew upon the Roman law distinction between <i>jus dispositivum</i> (voluntary law) and <i>jus scriptum</i> (obligatory law) to differentiate consensual agreements between states from the "necessary" principles of international law that bind all states as a point of conscience regardless of consent.<sup>[FN6]</sup></p> <p>[FN6] See Hugonis Grotii, <i>De Jure Belli et Pacis</i> [On the Law of War and Peace] (William Whewell ed. &amp; trans., John W. Parker, London 2009) (1625); Emer de Vattel, <i>Le Droit des Gens ou Principes de la Loi Naturelle</i> [The Law of Nations or Principles of Natural Law] §§ 9, 27 (1758) (distinguishing "<i>le Droit des Gens Naturel, ou Nécessaire</i>" from "<i>le Droit Volontaire</i>"); Christian Wolff, <i>Jus Gentium Methodo Scientifica Pertractorum</i> [A Scientific Method for Understanding the Law of Nations] ¶ 5 (James Brown Scott ed., Joseph H. Drake trans., Clarendon Press 1934) (1764).</p> <p>(p. 334 of the Yale Law Journal of Int'l Law)</p>	<p>[FN71] Classical publicists such as Hugo Grotius, Emer de Vattel, and Christian Wolff drew upon the Roman law distinction between <i>jus dispositivum</i> (voluntary law) and <i>jus scriptum</i> (obligatory law) to differentiate consensual agreements between states from the "necessary" principles of international law that bind all states as a point of conscience regardless of consent.</p> <p>(p. 31, Footnote 71 of the 28 April 2010 Decision)</p>
4.	<p>Early twentieth-century publicists such as Lassa Oppenheim and William Hall asserted confidently that states could not abrogate certain "universally recognized principles" by mutual agreement.<sup>[FN9]</sup> Outside the academy, judges on the Permanent Court of International Justice affirmed the existence of peremptory norms in international law by referencing treaties <i>contra bonos mores</i> (contrary to public policy) in a series of individual concurring and dissenting opinions.<sup>[FN10]</sup> xxx</p>	<p>[FN71] xxx Early twentieth-century publicists such as Lassa Oppenheim and William Hall asserted that states could not abrogate certain "universally recognized principles" by mutual agreement. xxx Judges on the Permanent Court of International Justice affirmed the existence of peremptory norms in international law by referencing treaties <i>contra bonos mores</i> (contrary to public policy) in a series of individual concurring and dissenting opinions. xxx</p> <p>(p. 31, Footnote 71 of the 28 April 2010 Decision)</p>

	<p>[FN9] William Hall, A Treatise on International Law 382-83 (8th ed. 1924) (asserting that "fundamental principles of international law" may "invalidate [], or at least render voidable," conflicting international agreements); 1 Lassa Oppenheim, International Law 528 (1905).</p> <p>[FN10] 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 <i>bonos mores</i>. Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (Schücking, J., dissenting).</p> <p>(pp. 334-5 of the Yale Law Journal of Int'l Law)</p>	
5.	<p>[FN9] William Hall, A Treatise on International Law 382-83 (8th ed. 1924) (asserting that "fundamental principles of international law" may "invalidate [], or at least render voidable," conflicting international agreements) xxx</p> <p>(Footnote 9 of the Yale Law Journal of Int'l Law)</p>	<p>[FN71] xxx (William Hall, A Treatise on International Law 382-83 (8th ed. 1924) (asserting that "fundamental principles of international law" may "invalidate [], or at least render voidable," conflicting international agreements) xxx</p> <p>(p. 31, Footnote 71 of the 28 April 2010 Decision)</p>
6.	<p>[FN10] 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 <i>bonos mores</i>. Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (Schücking, J., dissenting).</p> <p>(Footnote 9 of the Yale Law Journal of Int'l Law)</p>	<p>[FN71] xxx (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 <i>bonos mores</i>. Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (Schücking, J., dissenting).</p> <p>(p. 31, Footnote 71 of the 28 April 2010 Decision)</p>
7.	<p>Verdross argued that certain discrete rules of international custom had come to be recognized as having a compulsory character notwithstanding contrary state agreements. [FN12]</p> <p>[FN12] [Von Verdross, supra note 5.]</p> <p>(pp. 335 of the Yale Law Journal of Int'l Law)</p>	<p>[FN72] Verdross argued that certain discrete rules of international custom had come to be recognized as having a compulsory character notwithstanding contrary state agreements. xxx</p> <p>(p. 31, Footnote 72 of the 28 April 2010 Decision)</p>
8.	<p>At first, Verdross's vision of international <i>jus cogens</i> encountered skepticism within the legal academy. xxx These voices of resistance soon found themselves in the minority, however, as the <i>jus cogens</i> concept gained enhanced recognition and credibility following the Second World War.</p> <p>(pp. 335-6 of the Yale Law Journal of Int'l Law)</p>	<p>[FN72] xxx At first, Verdross's vision of international <i>jus cogens</i> encountered skepticism within the legal academy. These voices of resistance soon found themselves in the minority, however, as the <i>jus cogens</i> concept gained enhanced recognition and credibility following the Second World War. xxx</p> <p>(p. 31, Footnote 72 of the 28 April 2010 Decision)</p>
9.	<p>[FN18] See Lauri Hannikainen, Peremptory Norms (<i>Jus Cogens</i>) 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</p>	<p>[FN72] xxx (See Lauri Hannikainen, Peremptory Norms (<i>Jus cogens</i>) 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</p>

	<p>peremptory norms existing in international law").</p> <p>(Footnote 18 of the Yale Law Journal of Int'l Law)</p>	<p>opinion that there are peremptory norms existing in international law").</p> <p>(p. 31, Footnote 72 of the 28 April 2010 Decision)</p>
10.	<p>xxx the 1950s and 1960s with the United Nations International Law Commission's (ILC) preparation of the Vienna Convention on the Law of Treaties (VCLT).<sup>[FN20]</sup></p> <p>[FN20] VCLT, supra note 2.</p> <p>(p. 336 of the Yale Law Journal of Int'l Law)</p>	<p>xxx the 1950s and 1960s with the ILC's preparation of the Vienna Convention on the Law of Treaties (VCLT).<sup>[FN73]</sup></p> <p>(p. 31, Body of the 28 April 2010 Decision)</p> <p>[FN73] In March 1953, the ILC's Special Rapporteur, Sir Hersch Lauterpacht, submitted for the ILC's consideration a partial draft convention on treaties which stated that "[a] treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice." Hersch Lauterpacht, Law of Treaties: Report by Special Rapporteur, [1953] 2 Y.B. Int'l L. Comm'n 90, 93, U.N. Doc. A/CN.4/63.</p>
11.	<p>In March 1953, Lauterpacht submitted for the ILC's consideration a partial draft convention on treaties which stated that "[a] treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice."<sup>[FN21]</sup></p> <p>[FN21] Hersch Lauterpacht, Law of Treaties: Report by Special Rapporteur, [1953] 2 Y.B. Int'l L. Comm'n 90, 93, U.N. Doc. A/CN.4/63.</p> <p>(p. 336 of the Yale Law Journal of Int'l Law)</p>	<p>[FN73] In March 1953, the ILC's Special Rapporteur, Sir Hersch Lauterpacht, submitted for the ILC's consideration a partial draft convention on treaties which stated that "[a] treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice." Hersch Lauterpacht, Law of Treaties: Report by Special Rapporteur, [1953] 2 Y.B. Int'l L. Comm'n 90, 93, U.N. Doc. A/CN.4/63.</p> <p>(p. 31, Footnote 73 of the 28 April 2010 Decision)</p>
12.	<p>Lauterpacht's colleagues on the ILC generally accepted his assessment that certain international norms had attained the status of jus cogens.<sup>[FN23]</sup> Yet despite general agreement over the existence of international jus cogens, the ILC was unable to reach a consensus regarding either the theoretical basis for peremptory norms' legal authority or the proper criteria for identifying peremptory norms.</p> <p>[FN23] See Hannikainen, supra note 18, at 160-61 (noting that none of the twenty five members of the ILC in 1963 denied the existence of jus cogens or contested the inclusion of an article on jus cogens in the VCLT); see, e.g., Summary Records of the 877th Meeting, [1966] 1 Y.B. Int'l L. Comm'n 227, 230-231, U.N. Doc. A/CN.4/188 (noting that the "emergence of a rule of jus cogens banning aggressive war as an international crime" was evidence that international law contains "minimum requirement[s] for safeguarding the existence of the international community").</p> <p>(p. 336 of the Yale Law Journal of Int'l Law)</p>	<p>Though there was a consensus that certain international norms had attained the status of jus cogens,<sup>[FN74]</sup> the ILC was unable to reach a consensus on the proper criteria for identifying peremptory norms.</p> <p>(p. 31, Body of the 28 April 2010 Decision)</p> <p>[FN74] See Summary Records of the 877th Meeting, [1966] 1 Y.B. Int'l L. Comm'n 227, 230-231, U.N. Doc. A/CN.4/188 (noting that the "emergence of a rule of jus cogens banning aggressive war as an international crime" was evidence that international law contains "minimum requirement[s] for safeguarding the existence of the international community").</p>

13.	<p>[FN23] xxx see, e.g., Summary Records of the 877th Meeting, [1966] 1 Y.B. Int'l L. Comm'n 227, 230-231, U.N. Doc. A/CN.4/188 (noting that the "emergence of a rule of <i>jus cogens</i> banning aggressive war as an international crime" was evidence that international law contains "minimum requirement[s] for safeguarding the existence of the international community").</p> <p>(Footnote 23 of the Yale Law Journal of Int'l Law)</p>	<p>[FN74] See Summary Records of the 877th Meeting, [1966] 1 Y.B. Int'l L. Comm'n 227, 230-231, U.N. Doc. A/CN.4/188 (noting that the "emergence of a rule of <i>jus cogens</i> banning aggressive war as an international crime" was evidence that international law contains "minimum requirement[s] for safeguarding the existence of the international community").</p> <p>(p. 31, Footnote 74 of the 28 April 2010 Decision)</p>
14.	<p>After an extended debate over these and other theories of <i>jus cogens</i>, 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 <i>jus cogens</i>." [FN27] xxx In commentary accompanying the draft convention, the ILC indicated that "the prudent course seems to be to . . . leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals." [FN29] xxx</p> <p>[FN27] Second Report on the Law of Treaties, [1963] 2 Y.B. Int'l L. Comm'n 1, 52, U.N. Doc. A/CN.4/156.</p> <p>[FN29] Second Report on the Law of Treaties, <i>supra</i> note 27, at 53.</p> <p>(p. 337-8 of the Yale Law Journal of Int'l Law)</p>	<p>After an extended debate over these and other theories of <i>jus cogens</i>, 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 <i>jus cogens</i>." [FN75] 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." [FN76] xxx</p> <p>(p. 32, Body of the 28 April 2010 Decision)</p> <p>[FN75] Second Report on the Law of Treaties, [1963] 2 Y.B. Int'l L. Comm'n 1, 52, U.N. Doc. A/CN.4/156.</p> <p>[76] <i>Id.</i> at 53.</p>
15.	<p>In some municipal cases, courts have declined to recognize international norms as peremptory while expressing doubt about the proper criteria for identifying <i>jus cogens</i>. [FN72]</p> <p>[FN72] See, e.g., <i>Sampson v. Federal Republic of Germany</i>, 250 F.3d 1145, 1149 (7th Cir. 2001) (expressing concern that <i>jus cogens</i> should be invoked "[o]nly as a last resort").</p> <p>(p. 346 of the Yale Law Journal of Int'l Law)</p>	<p>[FN77] xxx In some municipal cases, courts have declined to recognize international norms as peremptory while expressing doubt about the proper criteria for identifying <i>jus cogens</i>. (See, e.g., <i>Sampson v. Federal Republic of Germany</i>, 250 F.3d 1145, 1149 (7th Cir. 2001) (expressing concern that <i>jus cogens</i> should be invoked "[o]nly as a last resort")). xxx</p> <p>(p. 32, Footnote 77 of the 28 April 2010 Decision)</p>
16.	<p>In other cases, national courts have accepted international norms as peremptory, but have hesitated to enforce these norms for fear that they might thereby compromise state sovereignty. [FN73] xxx In <i>Congo v. Rwanda</i>, for example, Judge ad hoc John Dugard observed that the ICJ had refrained from invoking the <i>jus cogens</i> concept in several previous cases where peremptory norms manifestly clashed with other principles of general international law. [FN74] Similarly, the European Court of Human Rights has addressed <i>jus cogens</i> only once, in <i>Al-Adsani v. United Kingdom</i>, when it famously rejected the argument that <i>jus cogens</i> violations would deprive a state of sovereign immunity.</p>	<p>[FN77] xxx In other cases, national courts have accepted international norms as peremptory, but have hesitated to enforce these norms for fear that they might thereby compromise state sovereignty. (See, e.g., <i>Bouzari v. Iran</i>, [2004] 71 O.R.3d 675 (Can.) (holding that the prohibition against torture does not entail a right to a civil remedy enforceable in a foreign court)).</p> <p>In <i>Congo v. Rwanda</i>, for example, Judge ad hoc John Dugard observed that the ICJ had refrained from invoking the <i>jus cogens</i> concept in several previous cases where peremptory norms manifestly clashed with other principles of general international law. (See <i>Armed Activities on the Territory of the Congo (Dem. Rep. Congo v.</i></p>

<p>[FN73] See, e.g., Bouzari v. Iran, [2004] 71 O.R.3d 675 (Can.) (holding that the prohibition against torture does not entail a right to a civil remedy enforceable in a foreign court).</p> <p>[FN74] See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda) (Judgment of Feb. 3, 2006), at 2 (dissenting opinion of Judge Dugard) xxx.</p> <p>(pp. 346-7 of the Yale Law Journal of Int'l Law)</p>	<p>Rwanda) (Judgment of February 3, 2006), at 2 (Dissenting Opinion of Judge Dugard))</p> <p>Similarly, the European Court of Human Rights has addressed <i>jus cogens</i> only once, in <i>Al-Adsani v. United Kingdom</i>, when it famously rejected the argument that <i>jus cogens</i> violations would deprive a state of sovereign immunity. <i>Al-Adsani v. United Kingdom</i>, 2001-XI Eur. Ct. H.R. 79, 61).</p> <p>(p. 32, Footnote 77 of the 28 April 2010 Decision)</p>
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TABLE C: Comparison of Mark Ellis's article in the Case Western Reserve Journal of International Law, entitled Breaking the Silence: Rape as an International Crime (2006-7), hereafter called "Ellis's work" and the Supreme Court's 28 April 2010 Decision in Vinuya, et al. v. Executive Secretary.

	<p>Mark Ellis, Breaking the Silence: Rape as an International Crime, 38 Case W. Res. J. Int'l L. 225 (2006-2007).</p>	<p>1.</p> <p>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.[FN7] The 1863 Lieber Instructions, which codified customary inter-national law of land warfare, classified rape as a crime of "troop discipline." [FN8] It specified rape as a capital crime punishable by the death penalty.[FN9] The 1907 Hague Convention protected women by requiring the protection of their "honour." [FN10] But modern-day sensitivity to the crime of rape did not emerge until after World War II.</p> <p>[FN7] For example, the Treaty of Amity and Commerce 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 &amp; OTHER INT'L AGREEMENTS OF THE U.S. 78, 85, available at xxx.</p> <p>[FN8] David 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.</p> <p>[FN9] Id. at 236.</p> <p>[FN10] "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 &amp; Customs of War on Land, art. 46, Oct. 18, 1907, available at <a href="http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm#art46">http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm#art46</a>.</p> <p>(p. 227 of the Case Western Law Reserve Journal of Int'l Law)</p>	<p>Vinuya, et. al. v. Executive Secretary, G.R. No. 162230, 28 April 2010.</p> <p>[FN65] 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. But modern-day sensitivity to the crime of rape did not emerge until after World War II. xxx (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 &amp; Other Int'l Agreements Of The U.S. 78, 85[]]. The 1863 Lieber Instructions classified rape as a crime of "troop discipline." (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). It specified rape as a capital crime punishable by the death penalty (Id. at 236). The 1907 Hague Convention protected women by requiring the protection of their "honour." ("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 &amp; Customs of War on Land, art. 46, Oct. 18, 1907[]). xxx.</p> <p>(p. 27, Footnote 65 of the 28 April 2010 Decision)</p>
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2.	<p>After World War II, when the Allies established 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.<sup>[FN11]</sup></p> <p><sup>[FN11]</sup> See generally, Agreement for the Prosecution and Punishment of the Major War Criminals of the Euro-pean Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.</p> <p>(p. 227 of the Case Western Law Reserve Journal of Int'l Law)</p>	<p><sup>[FN65]</sup> xxx 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. xxx 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. xxx.</p> <p>(p. 27, Footnote 65 of the 28 April 2010 Decision)</p>
3.	<p>The Nuremberg Judgment did not make any reference to rape and rape was not prosecuted.<sup>[FN13]</sup> xxx.</p> <p>It was different for the Charter of the International Military Tribunal for the Far East.<sup>[FN15]</sup> xxx The Tribunal prosecuted rape crimes, even though its Statute did not explicitly criminalize rape.<sup>[FN17]</sup> The Far East Tribunal held General Iwane Matsui, Commander Shunroku Hata and Foreign Minister Hirota criminally responsible for a series of crimes, including rape, committed by persons under their authority.<sup>[FN18]</sup></p> <p><sup>[FN13]</sup> Judge Gabrielle Kirk McDonald, <i>The International Criminal Tribunals Crime and Punishment in the International Arena</i>, 7 ILSA J. INT'L COMP L. 667, at 676.</p> <p><sup>[FN15]</sup> See Charter of the International Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589.</p> <p><sup>[FN17]</sup> See McDonald, <i>supra</i> note 13, at 676.</p> <p><sup>[FN18]</sup> THE TOKYO JUDGMENT: JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 445-54 (B.V.A. Roling and C.F. Ruter eds., 1977).</p> <p>(p. 228 of the Case Western Law Reserve Journal of Int'l Law)</p>	<p><sup>[FN65]</sup> xxx The Nuremberg Judgment did not make any reference to rape and rape was not prosecuted. (Judge Gabrielle Kirk McDonald, <i>The International Criminal Tribunals Crime and Punishment in the International Arena</i>, 7 ILSA J. Int'l. Comp. L. 667, 676.) However, International Military Tribunal for the Far East prosecuted rape crimes, even though its Statute did not explicitly criminalize rape. The Far East Tribunal held General Iwane Matsui, Commander Shunroku Hata and Foreign Minister Hirota criminally responsible for a series of crimes, including rape, committed by persons under their authority. (The Tokyo Judgment: Judgment Of The International Military Tribunal For The Far East 445-54 (1977). xxx</p> <p>(p. 27, Footnote 65 of the 28 April 2010 Decision)</p>
4.	<p>The first mention of rape as a specific crime came in December 1945 when Control Council Law No. 10 included the term rape in the definition of crimes against humanity.<sup>[FN22]</sup> Law No. 10, adopted by the four occupying powers in Germany, was devised to establish a uniform basis for prosecuting war criminals in German courts.</p> <p><sup>[FN22]</sup> Control Council for Germany, Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50, 53 (1946), available at <a href="http://www1.umn.edu/humanrts/instree/ccno10.htm">http://www1.umn.edu/humanrts/instree/ccno10.htm</a> (last visited Nov. 20, 2003). This law set forth a uniform legal</p>	<p><sup>[FN65]</sup> xxx The first mention of rape as a specific crime came in December 1945 when Control Council Law No. 10 included the term rape in the definition of crimes against humanity. Law No. 10, adopted by the four occupying powers in Germany, was devised to establish a uniform basis for prosecuting war criminals in German courts. (Control Council for Germany, Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50, 53 (1946)) xxx</p> <p>(p. 27, Footnote 65 of the 28 April 2010 Decision)</p>

	<p>basis in Germany for the prosecution of war criminals and similar offenders, other than those dealt with under the International Military Tribunal. See <i>id.</i> at 50.</p> <p>(pp. 228-9 of the Case Western Law Reserve Journal of Int'l Law)</p>	
5.	<p>The 1949 Geneva Convention Relative to the Treatment of Prisoners of War was the first modern-day international instrument to establish protections against rape for women.<sup>[FN23]</sup> However, the most important development in breaking the silence of rape as an international crime has come through the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). Both of these Tribunals have significantly advanced the crime of rape by enabling it to be prosecuted as genocide, a war crime, and a crime against humanity. xxx.</p> <p><sup>[FN23]</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3316, 75 U.N.T.S. 287 (entry into force Oct. 20, 1950) [hereinafter Fourth Geneva Convention].</p> <p>(p. 229 of the Case Western Law Reserve Journal of Int'l Law)</p>	<p><sup>[FN65]</sup> xxx The 1949 Geneva Convention Relative to the Treatment of Prisoners of War was the first modern-day international instrument to establish protections against rape for women. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3316, 75 U.N.T.S. 287 (entry into force Oct. 20, 1950) [hereinafter Fourth Geneva Convention]. Furthermore, the ICC, the ICTY, and the International Criminal Tribunal for Rwanda (ICTR) have significantly advanced the crime of rape by enabling it to be prosecuted as genocide, a war crime, and a crime against humanity. xxx.</p> <p>(p. 27, Footnote 65 of the 28 April 2010 Decision)</p>

#### Forms of Plagiarism

There are many ways by which plagiarism can be committed.<sup>4</sup> For the purpose of this analysis, we used the standard reference book prescribed for Harvard University students, "Writing with Sources" by Gordon Harvey.

Harvey identifies four forms of plagiarism<sup>5</sup>: (a) uncited data or information;<sup>6</sup> (b) an uncited idea, whether a specific claim or general concept;<sup>7</sup> (c) an unquoted but verbatim phrase or passage;<sup>8</sup> and (d) an uncited structure or organizing strategy.<sup>9</sup> He then explains how each form or mode of plagiarism is committed. Plagiarism is committed in mode (a) by "plagiarizing information that is not common knowledge."<sup>10</sup> Mode (b) is committed when "distinctive ideas are plagiarized," "even though you present them in a different order and in different words, because they are uncited."<sup>11</sup>

Even if there has been a prior citation, succeeding appropriations of an idea to make it appear as your own is plagiarism, because the "[previous] citation in [an earlier] passage is a deception." Mode (c) is committed when "you ... borrowed several distinctive phrases verbatim, without quotation marks..." Mode (d) is committed when, though the words and details are original, "(y)ou have, however, taken the structural framework or outline directly from the source passage ... even though, again, your language differs from your source and your invented examples are original."<sup>12</sup>

These forms of plagiarism can exist simultaneously in one and the same passage. There may be a complete failure to use quotation marks in one part of the sentence or paragraph while combining that part with phrases employing an uncited structure or organizing strategy. There may be patchwork plagiarizing committed by collating different works or excerpts from the same work without proper attribution.<sup>13</sup>

These acts of plagiarism can also be committed in footnotes in the same way and at the same degree of unacceptability as plagiarized passages in the body. This is especially frowned upon in footnotes that are discursive or "content" footnotes or endnotes. Harvey explains that a discursive footnote or endnote is "a note that includes comments, not just publication information . . . when you want to tell your reader something extra to the strict development of your argument, or incorporate extra information about sources."<sup>14</sup>

#### Violations of Rules against Plagiarism in the Vinuya Decision

Below are violations of the existing rules against plagiarism that can be found in the Vinuya decision. The alphanumeric tags correspond to the table letter and row numbers in the tables provided above.

A.1 Failure to use quotation marks to indicate that the entire paragraph in the body of the decision on page 30 was not the ponente's original paragraph, but was lifted verbatim from Tams's work. The attribution to Tams is wholly insufficient because without the quotation marks, there is nothing to alert the reader that the paragraph was lifted verbatim from Tams. The footnote leaves the reader with the impression that the said paragraph is the author's own analysis of *erga omnes*.

The "See Tams, Enforcing Obligations Erga omnes in International Law (2005)" line in footnote 69 of the *Vinuya* decision does not clearly indicate that the statement on Simma's observation was lifted directly from Tams's work; it only directs the reader to Tams's work should the reader wish to read further discussions on the matter.

B.1 Failure to use quotation marks to indicate that the two sentences were not the ponente's, but were lifted verbatim from two non-adjointing sentences found on pages 331 and 332 of the Yale Law Journal of International Law article of Criddle & Fox-Decent and with absolutely no attribution to the latter.

B.2 Failure to use quotation marks to indicate that the sentence fragment on peremptory norms was not the ponente's original writing, but was lifted verbatim from page 334 of the Yale Law Journal of International Law article of Criddle & Fox-Decent with absolutely no attribution to the authors.

B.3 Failure to use quotation marks to indicate that the first sentence in discursive footnote number 71 was not the ponente's idea, but was lifted verbatim from Criddle & Fox-Decent's work at page 334.

B.4 Failure to use quotation marks to indicate that the third sentence in discursive footnote number 71 was not the ponente's idea, but was lifted from Criddle & Fox-Decent's work at 334-335.

B.5 Failure to indicate that one footnote source in discursive footnote 71 was lifted verbatim from discursive footnote 9 of Tams; thus, even the idea being propounded in this discursive part of footnote 71 was presented as the ponente's, instead of Criddle's & Fox-Decent's.

B.6 Failure to indicate that the last discursive sentence in footnote 71 and the citations thereof were not the ponente's, but were lifted verbatim from footnote 9 of Criddle & Fox-Decent's work.

B.7 Failure to indicate that the first discursive sentence of footnote 72 was not the ponente's, but was lifted verbatim from page 335 of Criddle & Fox-Decent's work.

B.8 Failure to indicate that the second discursive sentence of footnote 72 was not the ponente's, but was lifted verbatim from pages 335-336 of Criddle and Fox-Decent's work.

B.9 Failure to indicate that the citation and the discursive passage thereon in the last sentence of footnote 72 was not the ponente's, but was lifted verbatim from discursive footnote 18 of Criddle & Fox-Decent's work.

B.10 Failure to use quotation marks to indicate that a phrase in the body of the decision on page 31 was not the ponente's, but was lifted verbatim from page 336 of Criddle & Fox-Decent's work.

B.11 Failure to indicate that the entirety of discursive footnote 73 was not the ponente's, but was lifted verbatim from page 336 of Criddle & Fox-Decent's work.

B.12 Failure to indicate that the idea of lack of "consensus on whether certain international norms had attained the status of jus cogens" was a paraphrase of a sentence combined with a verbatim lifting of a phrase that appears on page 336 of Criddle & Fox-Decent's work and was not the ponente's own conclusion. This is an example of patchwork plagiarism.

B.13 Failure to indicate that the entirety of discursive footnote 74 on page 31 of the Decision was not the ponente's comment on the source cited, but was lifted verbatim from footnote 23 of Criddle & Fox-Decent's work.

B.14 Failure to indicate through quotation marks and with the proper attribution to Criddle that the first two sentences of page 32 were not the ponente's, but were lifted verbatim from two non-adjointing sentences on pages 337-338 of Criddle & Fox-Decent's work.

B.15 Failure to indicate through quotation marks and the right citation that the discursive sentence in the second paragraph of footnote 77, and the citation therein, were not the ponente's, but were lifted verbatim from page 346 of the body of Criddle & Fox-Decent's work in the instance of the discursive sentence, and from footnote 72 of Criddle & Fox-Decent's work in the instance of the case cited and the description thereof.

B.16 Failure to indicate that the choice of citation and the discursive thereon statement in the second sentence of the second paragraph of discursive footnote 77 was not the ponente's, but was lifted verbatim from footnote 72 of Criddle & Fox-Decent's work.

B.17 Failure to indicate through quotation marks and the right citations that the entirety of the discursive third to fifth paragraphs of footnote 77 were not the product of the ponente's own analysis and choice of sources, but were lifted verbatim from footnotes 73 and 77 on pages 346-347 of Criddle & Fox-Decent's work.

C.1 to C.6 Failure to use quotation marks and the right citations to indicate that half of the long discursive footnote 65, including the sources cited therein, was actually comprised of the rearrangement, and in some

parts, rephrasing of 18 sentences found on pages 227-228 of Mr. Ellis's work in *Case Western Law Reserve Journal of International Law*.

This painstaking part-by-part analysis of the *Vinuya* decision is prompted by the fact that so many, including international academicians, await the Court's action on this plagiarism charge — whether it will in all candor acknowledge that there is a set of conventions by which all intellectual work is to be judged and thus fulfill its role as an honest court; or blind itself to the unhappy work of its member.

The text of the Decision itself reveals the evidence of plagiarism. The tearful apology of the legal researcher to the family of the *ponente* and her acknowledgment of the gravity of the act of omitting attributions is an admission that something wrong was committed. Her admission that the correct attributions went missing in the process of her work is an admission of plagiarism. The evidence in the text of the *Vinuya* Decision and the acknowledgment by the legal researcher are sufficient for the determination of plagiarism.

#### The Place of the Plagiarized

##### Portions in the *Vinuya* Decision

The suspect portions of the majority decision start from the discursive footnotes of the first full paragraph of page 27. In that paragraph, the idea sought to be developed was that while rape and sexual slavery may be morally reprehensible and impermissible by international legal norms, petitioners have failed to make the logical leap to conclude that the Philippines is thus under international legal duty to prosecute Japan for the said crime. The plagiarized work found in discursive footnote 65 largely consists of the exposition by Mr. Ellis of the development of the concept of rape as an international crime. The impression obtained by any reader is that the *ponente* has much to say about how this crime evolved in international law, and that he is an expert on this matter.

There are two intervening paragraphs before the next suspect portion of the decision. The latter starts from the second paragraph on page 30 and continues all the way up to the first paragraph of page 32. The discussion on the *erga omnes* obligation of states almost cannot exist, or at the very least cannot be sustained, without the plagiarized works of Messrs. Tams, Criddle and Decent-Fox. There is basis to say that the plagiarism of this portion is significant.

#### How the Majority Decision Treated the Specific Allegations of Plagiarism

The majority Decision narrates and explains:

"The researcher demonstrated by Power Point presentation how the attribution of the lifted passages to the writings of Criddle-Descent and Ellis, found in the beginning drafts of her report to Justice Del Castillo, were unintentionally deleted. She tearfully expressed remorse at her "grievous mistake" and grief for having "caused an enormous amount of suffering for Justice Del Castillo and his family."

On the other hand, addressing the Committee in reaction to the researcher's explanation, counsel for petitioners insisted that lack of intent is not a defense in plagiarism since all that is required is for a writer to acknowledge that certain words or language in his work were taken from another's work. Counsel invoked the Court's ruling in *University of the Philippines Board of Regents v. Court of Appeals and Arokiaswamy William Margaret Celine*, arguing that standards on plagiarism in the academe should apply with more force to the judiciary.

x x x            x x x            x x x

"... although Tams himself may have believed that the footnoting in his case was not "an appropriate form of referencing," he and petitioners cannot deny that the decision did attribute the source or sources of such passages. Justice Del Castillo did not pass off Tam's work as his own. The Justice primarily attributed the ideas embodied in the passages to Bruno Simma, whom Tam himself credited for them. Still, Footnote 69 mentioned, apart from Simma, Tam's article as another source of those ideas.

The Court believes that whether or not the footnote is sufficiently detailed, so as to satisfy the footnoting standards of counsel for petitioners is not an ethical matter but one concerning clarity of writing. The statement "See Tams, *Enforcing Obligations Erga Omnes in International Law* (2005)" in the *Vinuya* decision is an attribution no matter if Tams thought that it gave him somewhat less credit than he deserved. Such attribution altogether negates the idea that Justice Del Castillo passed off the challenged passages as his own.

That it would have been better had Justice Del Castillo used the introductory phrase "cited in" rather than the phrase "See" would make a case of mere inadvertent slip in attribution rather than a case of "manifest intellectual theft and outright plagiarism." If the Justice's citations were imprecise, it would just be a case of bad footnoting rather than one of theft or deceit. If it were otherwise, many would be target of abuse for every editorial error, for every mistake in citing pagination, and for every technical detail of form."

x x x

"Footnote 65 appears down the bottom of the page. Since the lengthily passages in that footnote came almost verbatim from Ellis' article, such passages ought to have been introduced by an acknowledgement that they are from that article. The footnote could very well have read:

65 In an article, *Breaking the Silence: Rape as an International Crime*, Case Western Reserve Journal of International Law (2006), Mark Ellis said.) x x x

"But, as it happened, the acknowledgment above or a similar introduction was missing from Footnote 65.

x x x

"Admittedly, the *Vinuya* decision lifted the above, including their footnotes, from Criddle-Descent's article, *A Fiduciary Theory of Jus Cogens*. Criddle-Descent's footnotes were carried into the *Vinuya* decision's own footnotes but no attributions were made to the two authors in those footnotes.

"Unless amply explained, the above lifting from the works of Ellis and Criddle-Descent could be construed as plagiarism. But one of Justice Del Castillo's researchers, a court-employed attorney, explained how she accidentally deleted the attributions, originally planted in the beginning drafts of her report to him, which report eventually became the working draft of the decision. She said that, for most parts, she did her research electronically. For international materials, she sourced these mainly from Westlaw, an online research service for legal and law-related materials to which the Court subscribes.

x x x

"With the advent of computers, however as Justice Del Castillo's researcher also explained, most legal references, including the collection of decisions of the Court, are found in electronic diskettes or in internet websites that offer virtual libraries of books and articles. Here, as the researcher found items that were relevant to her assignment, she downloaded or copied them into her "main manuscript," a smorgasbord plate of materials that she thought she might need. The researcher's technique in this case is not too far different from that employed by a carpenter. The carpenter first gets the pieces of lumber he would need, choosing the kinds and sizes suitable to the object he has in mind, say a table. When ready, he would measure out the portions he needs, cut them out of the pieces of lumber he had collected, and construct his table. He would get rid of the scraps.

"Here, Justice Del Castillo's researcher did just that. She electronically "cut" relevant materials from books and journals in the Westlaw website and "pasted" these to a "main manuscript" in her computer that contained the Microsoft Word program. Later, after she decided on the general shape that her report would take, she began pruning from that manuscript those materials that did not fit, changing the positions in the general scheme of those that remained, and adding and deleting paragraphs, sentences, and words as her continuing discussions with Justice Del Castillo, her chief editor, demanded. Parenthetically, this is the standard scheme that computer-literate court researchers use everyday in their work.

"Justice Del Castillo's researcher showed the Committee the early drafts of her report in the *Vinuya* case and these included the passages lifted from the separate articles of Criddle-Descent and of Ellis with proper attributions to these authors. But, as it happened, in the course of editing and cleaning up her draft, the researcher accidentally deleted the attributions.

"The Court adopts the Committee's finding that the researcher's explanation regarding the accidental removal of proper attributions to the three authors is credible. Given the operational properties of the Microsoft program in use by the Court, the accidental decapitation of attributions to sources of research materials is not remote."

Contrary to the view of my esteemed colleagues, the above is not a fair presentation of what happens in electronically generated writings aided by electronic research.

First, for a decision to make full attribution for lifted passages, one starts with block quote formatting or the "keying-in" of quotation marks at the beginning and at the end of the lifted passages. These keyed-in computer commands are not easily accidentally deleted, but should be deliberately inputted where there is an intention to quote and attribute.

Second, a beginning acknowledgment or similar introduction to a lengthy passage copied verbatim should not be accidentally deleted; it must be deliberately placed.

Third, the above explanation regarding the lines quoted in A.1 in the majority Decision may touch upon what happened in incident A.1, but it does not relate to what happened in incidents B.1 to C.6 of the Tables of Comparison, which are wholesale lifting of excerpts from both the body and the footnotes of the referenced works, without any attribution, specifically to the works of Criddle & Fox-Decent and of Ellis. While mention was made of Tams's work, no mention was made at all of the works of Criddle & Fox-Decent and of Ellis even though the discussions and analyses in their discursive footnotes were used wholesale.

**Fourth**, the researcher's explanation regarding the accidental deletion of 2 footnotes out of 119 does not plausibly account for the extensive amount of text used with little to no modifications from the works of Criddle & Fox-Decent and Ellis. As was presented in Tables B and C, copied text occurs in 22 instances in pages 27, 31, and 32 of the *Vinuya* decision. All these instances of non-attribution cannot be remedied by the reinstatement of 2 footnotes.

Fifth, the mention of Tams in "See Tams, *Enforcing Obligations Erga omnes in International Law* (2005)" in footnote 69 of the *Vinuya* decision was not a mere insufficiency in "clarity of writing," but a case of plagiarism under the rule prohibiting the use of misleading citations.

Sixth, the analogy that was chosen — that of a carpenter who discards materials that do not fit into his carpentry work — is completely inappropriate. In the scheme of "cutting and pasting" that the researcher did during her work, it is standard practice for the original sources of the downloaded and copied materials to be regarded as integral parts of the excerpts, not extraneous or ill-fitting. A computer-generated document can accommodate as many quotation marks, explanatory notes, citations and attributions as the writer desires and in multiple places. The limits of most desktop computer drives, even those used in the Supreme Court, are in magnitudes of gigabytes and megabytes, capable of accommodating 200 to 400 books per gigabyte (with each book just consuming roughly 3 to 5 megabytes). The addition of a footnote to the amount of file space taken up by an electronic document is practically negligible. It is not as if the researcher lacked any electronic space; there was simply no attribution.

Seventh, contrary to what is implied in the statement on Microsoft Word's lack of an alarm and in paragraph 4 of the decretal portion of the majority Decision, no software exists that will automatically type in quotation marks at the beginning and end of a passage that was lifted verbatim; these attribution marks must be made with deliberate effort by the human researcher. Nor can a software program generate the necessary citations without input from the human researcher. Neither is there a built-in software alarm that sounds every time attribution marks or citations are deleted. The best guarantee for works of high intellectual integrity is consistent, ethical practice in the writing habits of court researchers and judges. All lawyers are supposed to be knowledgeable on the standard of ethical practice, if they took their legal research courses in law school and their undergraduate research courses seriously. This knowledge can be easily picked up and updated by browsing many free online sources on the subject of writing standards. In addition, available on the market are software programs that can detect some, but not all, similarities in the phraseology of a work-in-progress with those in selected published materials; however, these programs cannot supply the citations on their own. Technology can help diminish instances of plagiarism by allowing supervisors of researchers to make partial audits of their work, but it is still the human writer who must decide to give the proper attribution and act on this decision.

### Plagiarism and Judicial Plagiarism

Plagiarism is an act that does not depend merely on the nature of the object, i.e. what is plagiarized, but also hinges on the process, i.e. what has been done to the object. The elements of this process are the *act* of copying the plagiarized work and the subsequent *omission* in failing to attribute the work to its author.<sup>15</sup> 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.

If the question of plagiarism, then, turns on a failure of attribution, judicial plagiarism in the case at bar "arises when judges author opinions that employ materials from copyrighted sources such as law journals or books, but neglect to give credit to the author."<sup>16</sup> Doing so effectively implies the staking of a claim on the copied work as the judge's own.<sup>17</sup> Note that there is no requirement of extent of copying or a minimum number of instances of unattributed usage for an act to be considered a plagiarist act, nor is the intent to deceive or to copy without attribution a prerequisite of plagiarism. In Dursht's exhaustive analysis of judicial plagiarism she cites the case of *Newman v. Burgin*<sup>18</sup> wherein the court said that plagiarism may be done "through negligence or recklessness without intent to deceive."<sup>19</sup> Dursht in addition notes that intent may also be taken as the intent to claim authorship of the copied work, whether or not there was intent to deceive, citing *Napolitano v. Trustees of Princeton Univ.*<sup>20</sup>

George describes the following among the types of judicial plagiarism:

**Borrowed Text:** When quoting a legal periodical, law review, treatise or other such source, the judicial writer must surround the borrowed text with quotation marks or use a block quote. . . . Additionally, the source should be referenced in the text . . .

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

**Reference errors:** The judge may fail to put quotation marks around a clause, phrase or paragraph that is a direct quote from another's writing even though he cites the author correctly. This is plagiarism even though it may be inadvertent.<sup>21</sup>

While indeed the notion of having committed judicial plagiarism may be unsettling to contemplate, as it may raise in the mind of a judge the question of his or her own culpability<sup>22</sup>, it is a grievous mistake to overlook the possibility of the commission of judicial plagiarism or the fact that judicial plagiarism is categorized by its very definition as a subset of plagiarism. That a judge, in lifting words from a source and failing to attribute said words to said source in the writing of a decision, committed specifically *judicial* plagiarism does not derogate from the nature of the act as a plagiarist act. Nor does any claim of inadvertence or lack of intent in the commission of a plagiarist act change the characterization of the act as plagiarism.

### Penalties for Plagiarism and Judicial Plagiarism

In the academe, plagiarism is generally dealt with severely when found out; many universities have policies on plagiarism detailing the sanctions that may be imposed on students who are found to have plagiarized in their coursework and other academic requirements. These run the gamut from an automatic failing grade in the course for which the offending work was submitted, or in more egregious cases, outright expulsion from the university. Sanctions for plagiarism in the academe operate through "the denial of certification or recognition of achievement"<sup>23</sup> to the extent of rescinding or denying degrees. In the case of law students who do manage to obtain their degrees, their admission to the bar may be hindered due to questions about their "character or fitness to practice law."<sup>24</sup> Indeed, plagiarism, due to the severity of the penalties it may incur, is often identified with the punishment of "academic death."<sup>25</sup> The academe justifies the harshness of the sanctions it imposes with the seriousness of the offense: plagiarism is seen not only to undermine the credibility and importance of scholarship, but also to deprive the rightful author of what is often one of the most valuable currencies in the academe: credit for intellectual achievement — an act of debasing the coinage, as it were. Thus the rules of many academic institutions sanctioning plagiarism as a violation of academic ethics and a serious offense often classed under the broader heading of "academic dishonesty."

The imposition of sanctions for acts of judicial plagiarism, however, is not as clear-cut. While George recognizes the lack of attribution as the fundamental mark of judicial plagiarism, she notes in the same breath that the act is "without legal sanction."<sup>26</sup> Past instances of censure notwithstanding (as in examples of condemnation of plagiarism cited by Lebovits et al<sup>27</sup>, most particularly the censure of the actions of the judge who plagiarized a law-review article in *Brennan*<sup>28</sup>; the admonition issued by the Canadian Federal Court of Appeal in the case of *Apotex*<sup>29</sup>) there is still no strictly prevailing consensus regarding the need or obligation to impose sanctions on judges who have committed acts of judicial plagiarism. This may be due in a large part to the absence of expectations of originality in the decisions penned by judges, as courts are required to "consider and usually . . . follow precedent."<sup>30</sup> In so fulfilling her obligations, it may become imperative for the judge to use "the legal reasoning and language [of others e.g. a supervising court or a law review article] for resolution of the dispute."<sup>31</sup> 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"<sup>32</sup> or that it falls far short of the high ethical standards to which judges must adhere<sup>33</sup>. The lack of definitiveness in sanctions for judicial plagiarism may also be due to the reluctance of judges themselves to confront the issue of plagiarism in the context of judicial writing; the apprehension caused by "feelings of guilt" being due to "the possibility that plagiarism has unknowingly or intentionally been committed" and a "traditional" hesitance to consider plagiarism as "being applicable to judicial writings."<sup>34</sup>

Findings of judicial plagiarism do not necessarily carry with them the imposition of sanctions, nor do they present unequivocal demands for rehearing or the reversal of rulings. In *Liggett Group, Inc., et al v Harold M. Engle, M.D. et al*<sup>35</sup>, a U.S. tobacco class action suit, "[the] plaintiffs' counsel filed a motion for rehearing alleging that the appellate opinion copied large portions of the defendants' briefs. . . . without attribution." The result of this, the plaintiffs claimed, was the creation of the "appearance of impropriety," the abdication of judicative duties, the relinquishing of independence to defendants, the failure to maintain impartiality, and therefore, as an act of judicial plagiarism, was "a misrepresentation of the facts found by the trial court and denied plaintiffs due process of law."<sup>36</sup> The three-judge panel denied the motion. In addition, "courts generally have been reluctant to reverse for the verbatim adoption of prepared findings."<sup>37</sup> In *Anderson v. City of Bessemer City, North Carolina*<sup>38</sup> it was held that even though the trial judge's findings of fact may have been adopted verbatim from the prevailing party, the findings "may be reversed only if clearly erroneous."<sup>39</sup>

### On Guilt and Hypocrisy

It is not hypocrisy, contrary to what is implied in a statement in the majority Decision, to make a finding of plagiarism when plagiarism exists. To conclude thus is to condemn wholesale all the academic thesis committees, student disciplinary tribunals and editorial boards who have made it their business to ensure that no plagiarism is tolerated in their institutions and industry. In accepting those review and quality control responsibilities, they are not making themselves out to be error-free, but rather, they are exerting themselves to improve the level of honesty in the original works generated in their institution so that the coinage and currency of intellectual life — originality and the attribution of originality — is maintained. The incentive system of intellectual creation is made to work so that the whole society benefits from the encouraged output.

In the case of judicial plagiarism, it is entirely possible for judges to have violated the rules against plagiarism out of ignorance or from the sheer fact that in order to cope with their caseloads, they have to rely on researchers for part of the work. That would have been a very interesting argument to consider. But ignorance is not pleaded here, nor is the inability to supervise a legal researcher pleaded to escape liability on the part of the *ponente*. Rather, the defense was that no plagiarism existed. This conclusion however is unacceptable for the reasons stated above.

As noted above, writers have ventured to say that the reluctance to address judicial plagiarism may stem from fear, nay, guilt.<sup>40</sup> Fear that the judge who says plagiarism was committed by another is himself guilty of plagiarism. But that is neither here nor there. We must apply the conventions against judicial plagiarism because we must, having taken on that obligation when the Court took cognizance of the plagiarism complaint, not because any one of us is error-free. In fact, the statement on hypocrisy in the majority Decision betrays prejudice of the complainants as hypocrites, and a complaint against a sitting judge for plagiarism would appear impossible to win.

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.

As earlier said, a determination of the existence of plagiarism in decision-making is not conclusive on the disciplinary measure to be imposed. Different jurisdictions have different treatments. At the very least however, the process of rectification must start from an acknowledgment and apology for the offense. After such have been done, then consideration of the circumstances that mitigate the offense are weighed. But not before then.

#### The Unfortunate Result of the Majority Decision

Unless reconsidered, this Court would unfortunately be remembered as the Court that made "malicious intent" an indispensable element of plagiarism and that made computer-keying errors an exculpatory fact in charges of plagiarism, without clarifying whether its ruling applies only to situations of judicial decision-making or to other written intellectual activity. It will also weaken this Court's disciplinary authority — the essence of which proceeds from its moral authority — over the bench and bar. In a real sense, this Court has rendered tenuous its ability to positively educate and influence the future of intellectual and academic discourse.

#### The Way Forward

Assuming that the Court had found that judicial plagiarism had indeed been committed in the Vinuya decision, the Court could then have moved to the next logical question: what then is the legal responsibility of the ponente of the Vinuya decision for having passed on to the Court en banc a ponencia that contains plagiarized parts?

There would have been at that point two possible choices for the Court vis-à-vis the ponente — to subject him to disciplinary measures or to excuse him. In order to determine whether the acts committed would have warranted discipline, the Court should have laid down the standard of diligence and responsibility that a judge has over his actions, as well as the disciplinary measures that are available and appropriate.

The Court could also have chosen to attribute liability to the researcher who had admitted to have caused the plagiarism. In *In re Hinden*, disciplinary measures were imposed on an attorney who plagiarized law review articles.<sup>41</sup>

#### Response to the Decretal Portion of the Majority Decision

In view of the above, it is my opinion:

1. That Justice Mariano C. del Castillo and his unnamed researcher have committed plagiarism in the drafting and passing on of the ponencia in the Vinuya decision;
2. That this Court should request Justice del Castillo to acknowledge the plagiarism and apologize to the complaining authors for his mistake;
3. That this Court should cause the issuance of a corrected version of the Vinuya decision in the form of a "Corrigendum";
4. That court attorneys should be provided with the appropriate manuals on writing and legal citation, and should be informed that the excerpts complained of and described in Tables A, B, and C of this opinion are acts of plagiarism and not mere editing errors or computer-generated mistakes;
5. That the refusal of the majority to pronounce that plagiarism was committed by Justice del Castillo means that any judicial opinion on his liability or that of his researcher would be academic and speculative, a ruling which this Dissenting Opinion will not venture to make a pronouncement on; and
6. That a copy of this Dissenting Opinion should be circulated by the Public Information Office in the same manner as the Majority Decision to the complaining authors Christian J. Tams, Mark Ellis, Evan Criddle and Evan Fox-Decent.

**MARIA LOURDES P. A. SERENO**  
Associate Justice

#### Footnotes

- <sup>1</sup> Isabelita C. Vinuya, et al. v. The Honorable Executive Secretary, et al., G.R. No. 1622309, April 28, 2010.
- <sup>2</sup> Judges cannot be liable for copyright infringement in their judicial work (Section 184.1(k), R.A. 8293).

- <sup>3</sup> Justice Mariano del Castillo's letter addressed to Chief Justice Renato C. Corona and Colleagues, dated July 22, 2010.
- <sup>4</sup> Gordon Harvey, *Writing with Sources: A Guide for Harvard Students* (Hackett Publishing Company, 2nd ed. [c] 2008).
- <sup>5</sup> *Id.* at 32.
- <sup>6</sup> *Id.* at 33.
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.* at 34.
- <sup>9</sup> *Id.* at 32-35.
- <sup>10</sup> *Id.* at 32.
- <sup>11</sup> *Id.* at 33.
- <sup>12</sup> Harvey, *supra* at 32.
- <sup>13</sup> *Id.* at 32.
- <sup>14</sup> *Id.* at 26.
- <sup>15</sup> Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 *Hastings L. J.* 167, at 173.
- <sup>16</sup> Jaime S. Dursht, *Judicial Plagiarism: It May Be Fair Use but Is It Ethical?*, 18 *Cardozo L. Rev.* 1253, at 1.
- <sup>17</sup> Joyce C. George, *Judicial Plagiarism, Judicial Opinion Writing Handbook*, <<http://books.google.com.ph/books?id=7jBZ4yjmgXUC&pg=PR1&hl=en&lpg=PR1#v=onepage&q&f=false>> (accessed on 10/12/2010).
- <sup>18</sup> *Newman v Burgin*, 930 F.2d 955 (1st Cir.) as cited in Dursht, *supra* at 4 and note 60.
- <sup>19</sup> *Newman v. Burgin*, *id.* at 962 as cited in Dursht, *id.* at 4 and note 61.
- <sup>20</sup> 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982) as cited in Dursht, *supra* at 1 and note 6.
- <sup>21</sup> George, *supra* at 715.
- <sup>22</sup> *Id.* at 707-708.
- <sup>23</sup> Dursht, *supra* note 16 at 5.
- <sup>24</sup> *In re Widdison*, 539 N.W.2d 671 (S.D. 1995) at 865, as cited in Dursht, *id.* at 5 and note 92.
- <sup>25</sup> 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> (accessed on 02/05/2009, 17:56) 789.
- <sup>26</sup> George, *supra* note 17 at 715.
- <sup>27</sup> *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.
- <sup>28</sup> See *In re Brennan*, 447 N.W.2d 712, 713-14 (Mich. 1989) as cited in Lebovits, et al., *supra* at note 191.
- <sup>29</sup> *Apotex Inc. v. Janssen-Ortho Inc.*, 2009, as cited in *Emir Aly Crowne-Mohammed*, 22 *No. 4 Intell. Prop. & Tech. L.J.* 15, 1.
- <sup>30</sup> Richard A. Posner, *The Little Book of Plagiarism*, 22 (2007), and Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 *J. Legal Educ.*, 240 (1999), as cited in Carol M. Bast and Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 *Cath. U.L. Rev.* 777, note 85.

- <sup>31</sup> George, supra note 17 at 708.
- <sup>32</sup> Lebovits, supra at 265.
- <sup>33</sup> See generally Dursht; supra note 16; and Lebovits, supra.
- <sup>34</sup> George, supra note 17 at 707
- <sup>35</sup> Liggett Group, Inc. v. Engle, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), as cited in Bast and Samuels, supra at note 102.
- <sup>36</sup> Id.
- <sup>37</sup> Counihan v. Allstate Ins. Co., 194 F.3d at 363, as cited in Roger J. Miner, Judicial Ethics in the Twenty-First Century: Tracing the Trends, 32 Hofstra Law Rev. 1135, note 154.
- <sup>38</sup> Anderson v. City of Bessemer, 470 U.S. 564, 572 (1985) as cited in Miner, id.
- <sup>39</sup> United States v. El Paso Natural Gas Co., p. 656, and United States v. Marine Bancorporation, p. 615, as cited in George, supra note 17 at 719.
- <sup>40</sup> See Stuart P. Green, Plagiarism, Norms, and the Limits of Theft Law: Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights, 54 Hastings L. J. 167; and Peter Shaw, Plagiary, 51 Am. Scholar 325, 328 (1982); and Green, supra at 180 as cited in George, supra at note 1
- <sup>41</sup> In re Hinden, 654 A.2d 864 (1995) (U.S.A.).