

Editorial



The Cross-fertilisation Rhetoric in Question: Use and Abuse of the European Court's Jurisprudence by International Criminal Tribunals

The various fields of international law have become increasingly intertwined, and this process has manifested itself in the 'gradual interpenetration and cross-fertilisation of previously somewhat compartmentalized areas of international law'.¹ This wider phenomenon is reflected in the field of international criminal law, which appears as a new open system based on a network of legal relations between international and domestic law. This is exemplified, in particular, by Article 21 of the Statute of the International Criminal Court, which articulates the international penal order as a complex, multi-level structure, and, thus, provides institutional recognition of the emerging interconnection between international criminal tribunals (ICTs) and regional human rights courts.

This interaction has been particularly apparent in the progressive emergence of a practice of cross-referencing between ICTs and the European Court of Human Rights (ECtHR). Whereas the ECtHR has (sporadically) made use of the jurisprudence of ICTs,² most of the references originate from the ICTs, which have frequently resorted to the European Court's *dicta* in order to elucidate the definition, scope and application of human rights. The areas of law where these human rights norms have been invoked, re-interpreted and applied include, *inter alia*, the right to freedom of expression, *nullum crimen sine lege*, the right not to be subject to inhumane or degrading treatment, fair

1 A. Cassese, *International Law*, 2nd edition (Oxford University Press, Oxford, 2004) p. 45.

2 See e.g., ECtHR *M.C. v. Bulgaria*, Application No. 39272/98, 4 December 2003, in which the ECtHR referred to ICTs case law with a view to interpreting specific provisions of international criminal law and international humanitarian law.

trial rights, the right to an effective remedy, sentencing and pre-trial detention, the right to remain silent, self-representation and *ne bis in idem*.

A significant part of scholarship has pointed out the positive effects produced by the cross-fertilisation between ICTs and the ECtHR. It is commonly believed that reliance of the ICTs on the interpretation of human rights principles articulated by regional human rights courts prevents fragmentation, and thus facilitates the advent of a common understanding of fundamental rights. Observance of the authoritative interpretations of human rights norms is considered to ensure that such rights are not curtailed in international criminal proceedings. The recognition of such norms by ICTs is also seen as fostering the rule of law and due process in post-conflict societies. Finally, given the cosmopolitan character of the ECHR system, the use of the principles developed therein is alleged to help fashion a fair procedural scheme without making any of the domestic models dominant in international criminal law.

Nonetheless, scholarly research has thus far fallen short of developing a systematic approach to the appraisal of the interactions between human rights bodies and international criminal tribunals. Indeed, a number of crucial questions concerning the use of human rights jurisprudence by ICTs remain mostly unaddressed by academic literature. For example, are there discrepancies in the interpretation of the same right by the ECtHR and ICTs? If so, can such discrepancies be justified by institutional differences or other legitimate circumstances? What methodologies can be used to enable a more accurate, and potentially justiciable, appraisal of the process of transplantation of external legal notions? What are the parameters that may legitimise a re-interpretation (or 'translation') of ECHR standards in relation to the 'unique' context of international(ised) courts adjudicating serious international crimes? Is there a 'common grammar' of inter-systemic referencing emerging in international criminal justice which could be used to assess practices of (non-)cross-referencing, (non-)engagement, dismissal or endorsement, with respect to human rights courts' jurisprudence?

Therefore, the effective import of this inter-systemic communication between the ECtHR and ICTs has been rarely put into question. This is in sharp contrast to other legal fields, where there has been extensive academic debate providing a critical reading of trans-judicial dialogues. As a consequence, methodologies and parameters to assess the reliance of ICTs on human rights courts' jurisprudence are still uncertain. Indeed, the very notion of 'fertilising' a different field, rather than a neutral designation, ascribes an immediately positive connotation to the process of transplantation. Still, this optimistic understanding seems to be grounded in *prima facie* sensible, though as yet unsupported and unverified, premises.

In order to fill the gap between aspirations and realities, the editors gathered together academics and practitioners to tackle from different perspectives the manner in which widely-recognised standards of human rights have been used or misused by international criminal tribunals. The event took place at the Edge Hill University (UK) on 13–14 June 2014. It was structured as a five-panel workshop, followed by a public conference in which the chair of each panel was to share the results of his or her thematic session with the audience and solicit further discussion. This special issue of the *Nordic Journal of International Law* includes a selection of the papers presented at the workshop, as revised upon comments by other participants and editors, and double-blind peer review. The papers focus on two primary research questions.

The first goal is to critically assess whether the widespread practice of judicial cross-referencing might indeed be sanctioned as a process of mutual ‘fertilisation’ between different legal branches. This analysis relies on an implicit reservation on the generalised attitude of sympathy for these dynamics, which tends to note with approval a ‘trans-judicial communication’ or ‘dialogue’ without, however, providing a yardstick to evaluate its supposed merits.

Most contributors to the present issue emphasise that the inherently positive idea of fertilisation is tricky, if not outright misleading. The use of external concepts and interpretations within the ‘borrowing’ system requires what has been called ‘thick translation’ or ‘adaptation’ (see e.g. Julia Geneuss’ article). This goes without saying for a process that has developed informally and is short of rules dictating adherence to human rights’ courts’ jurisprudence. However, as posited in Sergey Vasiliev’s article, international criminal courts and tribunals are under a firm expectation to refer and stick to the principles established by human rights bodies. But when criminal tribunals do so, they do not appear to be so much driven by genuine deference as by pragmatism and contingent expediency. The legal solutions they devise, accordingly, neither necessarily reflect the original norm nor are *per se* bound to secure allegiance to fundamental rights.

Even though cross-fertilisation as a term might well be inaccurate and as a practice might well be incapable of effectively bringing about respect of the accused’s rights, most contributors were reluctant to leave ICTs in a legal vacuum, that is, totally unbound by internationally-established human rights principles. Therefore, while cross-referencing does not necessarily entail an enhanced human rights protection, the use of external precedents as guidance is desirable, as far as it follows a proper ‘grammar’, which ensures that the process may be objectively assessed as sound or erroneous.

This leads us to the second goal of this academic endeavour. After having exposed the inconsistencies underlying the common understanding of

cross-fertilisation, this collection attempts to lay the foundations of a well-structured method orienting reference by ICTs to external jurisprudence. The contributors take issue with the current 'wild approach' followed by ICTs, and call for a generally-accepted methodological framework aimed at guiding interpreters in administering (and then assessing the correctness of) the complex process of circulation of legal notions.

This special issue contains six articles, each of which approaches the tortuous path of cross-fertilisation from a different angle. Setting the scene, Sergey Vasiliev's article focuses upon the methodological questions raised by such dynamics between ICTs and the European Court of Human Rights. The author adopts a critical realist view, in order to unveil the judicial politics behind the trans-judicial communication between the European Court and ICTs, as well as to 'deconstruct' the mainstream discourse on the consumption of human rights case law in international criminal justice. Indeed, according to Vasiliev, such normative discourse, which has placed international judges under a quasi-obligation to adhere to the Strasbourg jurisprudence, by providing the ECtHR with the role of human rights hegemon, appears in contrast with the terms on which judicial rationales migrate among international courts and also fails to avoid that ICTs stay clear from human rights violations.

The next article, by Julia Geneuss, 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' "Unique Context" and the Flexibility of the European Court of Human Rights' Case Law', offers another perspective on the theoretical framework of the interaction between the jurisprudence of the ECtHR and that of international criminal tribunals. The author argues that accurate cross-fertilisation can only result from judicial cross-referencing where the legal norms or concepts are 'translated', from the language of the original legal system into the language of the borrowing one, without being re-interpreted and losing their normative meaning. This operation is not easy to accomplish in the relationship under examination, due to the 'uniqueness' of ICTs and the flexibility of the European Court's case law. The author, however, expresses a feeling of 'uneasiness' when it comes to affirm the legal unbindingness that would ensue for ICTs. The proposed solution is to focus on the methodology – rather than the outcome – of trans-judicial communication. Notably, the author suggests that the ECtHR's precedents are to be reviewed by ICTs and, based on their persuasiveness, followed or distinguished on the basis of a compelling motivation. These precedents should be afforded what Geneuss terms 'directory' authority.

What is the meaning of 'cross-fertilisation'? And what are its conditions? Ulf Linderfalk's article 'Cross-fertilisation in International Law' addresses these questions, in an endeavour which aims to establish a 'common conceptual

framework', in which a meaningful debate among scholars could be premised. Like Vasiliev and Geneuss, the author emphasises the need to conceptualise a set of widely-accepted rules governing cross-referencing. In other words, assuming that the understanding of a legal utterance must be determined through its relationship with other legal utterances, Linderfalk argues for the necessity of providing a compelling justification of the selection of the terms of reference which are used to elucidate the meaning of the first utterance. In the international legal discourse, such explanation cannot but rest upon a series of well-established principles, rules and informal conventions, such as those on treaty interpretation and logical argumentation. The piece is enriched by a series of examples, illustrating the factors that may hinder cross-fertilisation, including the vague or ambiguous language of the rules of relationship among two or more utterances, the context-dependency of transplanted concepts and so forth. In this context, the author touches upon an issue that is examined by other articles in this Special Issue, that is, whether the International Criminal Tribunal for the former Yugoslavia correctly assumed that the particular concept of torture enshrined in its Statute corresponds with the general notion of torture adopted by the ECtHR.

In this regard, the European Court has produced an abundance of case law on the prohibition of torture and its differences with other types of ill-treatment, which are enshrined in the Article 3 of the European Convention of Human Rights. The use of this European jurisprudence in international criminal tribunals has played a crucial role in the definition of torture or inhumane or degrading treatment. Elena Maculan and Michelle Farrell critically analyse the use by ICTs of the Strasbourg case law defining the constituent elements of torture. As argued by Maculan, the reliance of ICTs on the ECtHR's jurisprudence on the concept of torture offers a perfect example of the aims, the merits and pitfalls of the phenomenon of cross-fertilisation. Indeed, Maculan examines how the European jurisprudence has significantly influenced the practice of ICTs with regard to the abandoning of the public official requirement, the development of distinctive criteria between torture and inhuman treatment, the determination of a severity threshold for an act to amount to torture, and the labelling of rape as an act of torture. According to the author, the effect of this reliance on the Strasbourg case law with regard to these interpretive issues of torture is twofold. On the one hand it has brought to the harmonisation of the definition of torture, whilst on the other it has broadened its scope, raising concerns from the perspective of basic safeguards enshrined in the principles of legality and non-retroactivity.

In the next article titled, 'Just How Ill-treated Were You: An Investigation of Cross-fertilisation in the Interpretative Approaches to Torture at the European

Court of Human Rights and in International Criminal Law', Farrell argues that in borrowing from the Strasbourg interpretations of torture, the (early) jurisprudence of *ad hoc* tribunals has generally ignored the structural and contextual differences between human rights courts, facing state liability, and criminal tribunals, dealing with individual criminal responsibility. According to the author, the definition of torture developed by the European Court is unsuitable for usage where individual criminal responsibility is sought. Indeed, the author emphasises how the European Court defines the conception of torture on the basis of 'subjective and victim-derived interpretations', whereas it only loosely assesses the act from the perspective of intent, purpose and perpetration, which constitute fundamental aspects of international criminal legal proceedings.

The *nullum crimen sine lege* principle constitutes a paradigm of the 'state of exception' in which fundamental rights are subject to derogations or significant erosions because of the seriousness of crimes committed. Moving to the last article of this special issue, Harmen van der Wilt addresses the uneasiness in balancing individual safeguards – protecting every person from arbitrary conviction and punishment – with the need to ensure substantive justice through the prosecution of acts regarded as abhorrent by all members of society, regardless of whether they were considered criminal at the time of commission. With a focus on the famous *Kononov* case,³ the author questions the foreseeability test as qualitative element of the legality principle in the ECtHR jurisprudence. In particular, the author argues that the strong divergent opinions among judges whether the *nullum crimen* principle had been violated in this case, demonstrate the lack of objective foreseeability, as a basis for the assessment of the subjective foreseeability and a – potentially exculpating – mistake of law of the perpetrator.

To conclude, this special issue reveals how uncertainty, selectivity and instrumentalisation still characterise the way in which international criminal tribunals transplant human rights standards into their context. Such ambiguity and arbitrariness calls for academic engagement. It calls for scholars and practitioners in international criminal justice to contribute to the development of a coherent set of principles, which may guide the transit of human rights standards into the practice of international criminal tribunals. A grammar of inter-systemic communication would not only reduce the unpredictability of the products of human rights' interpretations by ICTs, but also render academic critique on cross-fertilisation less erratic, shifting its focus away from the outcome – whose desirability is too often influenced by personal

3 ECtHR (GC) *Kononov v. Latvia* Application No. 39272/98, 4 December 2003.

views – onto the methods. As anticipated, although the articles included in this special issue venture into fairly uncharted waters and present cutting-edge perspectives, they also are intended to represent a first step in the erection of a common framework orienting the course of cross-referencing toward achieving true cross-fertilisation.

*Triestino Mariniello**

Senior Lecturer in Law, Department of Law and Criminology, Edge Hill University, Ormskirk, UK

*Paolo Lobba***

Legal Officer, United Nations Assistance to the Khmer Rouge Trials

* (Ph.D, LL.M.). E-mail: mariniet@edgehill.ac.uk.

** (Ph.D, University of Bologna and Humboldt University of Berlin). Research for this project was conducted as post-doctoral *Stipendiat* of the Deutscher Akademischer Austausch Dienst – DAAD (German Academic Exchange Service) and as post-doctoral Fellow of the Law Department of the University of Bologna. The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations. E-mail: lobba@un.org.