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Testi, corpora, confronti interlinguistici: approcci qualitativi e quantitativi

a cura di
Giuseppe Palumbo

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Sommario

5. Finding traces of transnational legal communication: cross-referencing in international case law

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Abstract

National and international judicial systems are today in constant interaction. This interaction has been mainly studied by legal scholars, who termed it "transjudicial communication". This communication manifests itself in case law and may also be of interest for linguists. The focus in this chapter is on one of the possible linguistic manifestations of transjudicial communication in the judgments delivered by the European Court of Human Rights (ECtHR). They consist in "external cross-references", i.e. references that point to sources of legislative or judicial law other than the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols or the ECtHR case law. The chapter presents a feasibility study conducted on a small corpus of three English judgments delivered by the Grand Chamber of the ECtHR. The aim of the study is first to develop a language-specific methodology for the semi-automatic extraction of cross-references and then to conduct a qualitative analysis of the extracted cross-references that fall within the category of "external cross-references". These cross-references are analysed to identify both the type of sources they point to and the function they perform. As regards the sources, they are both judicial (case law) and normative (legislation); therefore, an alternative term to refer to the communication that emerges is proposed, namely "transnational legal com-

munication". The three functions cross-references are seen to perform are: (i) description of the factual background and the legal history of the case, (ii) recall of relevant domestic law or other legal provisions, and (iii) provision of a backbone for the legal reasoning and argumentation of the ruling.

Keywords

Transnational legal communication, cross-references, intertextuality, ECtHR judgments, international case law.

1. Introduction

The second half of the 20th century witnessed the emergence of a universal process of globalisation that is today still shaping the economic, cultural, and social landscape. This process has resulted in continuous interaction and intensified co-operation across and above national legal systems and international organisations, with legislative and judicial law-making increasingly taking place on various levels, i.e. in globalized, regional, national or even private legal frameworks. The focus in this chapter is on the visible traces of the interaction between different legal systems in judicial law-making, with particular attention on the judgments delivered by the European Court of Human Rights (ECtHR). Such traces are to be found in what is here termed "external cross-references", i.e. cross-references to sources of law, either legislative or judicial, that do not belong to the supranational legal system stemming from either the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols or the case law developed by the ECtHR.

In order to investigate this form of "intertextuality of judgments" (Mattila 2011: 96), a case study on the English version of a corpus of three judgments passed by the Grand Chamber of the ECtHR is presented. The aim is two-fold: first, to propose a methodology for the semi-automatic extraction of cross-references from legal text corpora in English, and second, to analyse the cross-references thus extracted. A legal and a linguistic framework are first provided to situate cross-references within the broad phenomenon of transjudicial communication (Sections 2 and 3). The methodology is then illustrated in Section 4; the main idea behind its development is the possibility to replicate it on a larger scale for future studies. Note that since the methodology illustrated here is based on the analysis of the corpus described in Section 4.1, the list of lexical patterns used for the case study cannot be considered exhaustive and would need to be fine-tuned every time the methodology was applied to a new corpus. Section 5 contains a classification of the cross-references extracted from the corpus into intratextual and intertextual cross-references and further divides the latter type into internal and

external cross-references. Given the emphasis of the study on transjudicial communication, a more detailed discussion is devoted to external cross-references (Section 5.1), in an attempt to provide greater insight into the functions that they perform in Grand Chamber judgments.

2. Transjudicial communication: A legal perspective

Since the second half of the 20th century, the globalisation process has led to a situation in which national legal systems are encouraged, expected and even required to constantly interact and co-operate with international organisations and vice versa. This means that law-making, both legislative and judicial, is no longer confined within rigid national borders. The boundaries within which law-making takes place are increasingly fluid and permeable. In this scenario, the interaction and co-operation between national and supranational/international legal systems are made possible in different ways: directly, when hierarchical relations are established between, for instance, national and supranational legislation, such as in the European Union; or indirectly, as in the development of trade customs or the exchange of good practices. However, both direct and indirect interaction and co-operation call for communication that goes beyond national boundaries and jurisdictions. It follows that this form of legal communication may occur in legislative and judicial law-making. In the latter case, its natural setting is transnational litigation, i.e. litigation that "encompasses domestic and international tribunals" and "includes cases between states (with individuals typically in the wings), between individuals and states, and between individuals across borders" (Slaughter 2003: 192).

Interaction between courts, especially at national level, is not a new phenomenon, as is well recognized by Wagner (2011: 439):

> dialogue between domestic courts has been in practice for a considerable period of time. The shared heritage of common law countries has facilitated and necessitated communication between courts of this tradition since their inception. In the civil law world, domestic courts engaged in dialogue even before the period of codification, which started with the creation of the French Civil Code in the late 18th century and its promulgation in 1804.

Switching the focus on modern times, Wagner (2011: 439) recognizes that

> many of Europe's highest courts have been communicating with one another since the end of World War II. This communication sometimes takes place through hierarchical and somewhat predetermined mechanisms, such as the European Union's Court of Justice and its predecessors or the Council of Europe's European Court of Human Rights. On the other hand, courts also communicate directly with one another. This phenomenon is not confined to these spheres; rather, it has taken on global dimensions.

Several authors have approached the communication between courts – whether national, international or supranational – from different perspectives and named it differently. The first author to use the term "international judicial dialogue" was Andrew L. Strauss, who applied it to "the discussion that could take place between members of different courts and even different judiciaries" (Strauss 1995: 378). Other expressions used to refer to the interaction between different courts and justices include "transnational judicial dialogue" (Burley 1992: 1923; Waters 2005), "transjudicial communication" (Slaughter 1994), "transjudicial dialogue" (Wiener & Liste 2014: 267), "global judicial dialogue" (a term derived from L'Heureux Dube 1998), "transjudicialism" (Bahdi 2002) or "constitutional comparativism" (Alford 2005). These labels may refer to a variety of forms of interaction, ranging from the explicit invocation of either foreign or supranational/international case law to the comparative analysis of foreign legislation found in judicial deliberations and even to direct interactions among judges and networking events for the members of the judiciary.

The background for the present study is Slaughter's typology of "transjudicial communication", broadly defined as the "communication among courts – whether national or supranational – across borders" (Slaughter 1994: 101). This typology is based on a variety of factors. The first factor has to do with the participants in the communication. Slaughter distinguishes between horizontal communications between courts of the same status, vertical communication between national and international/supranational courts, and mixed vertical-horizontal communication, in which international or supranational judicial bodies work as the medium allowing communication among different jurisdictions. The second factor is the "degree of reciprocal engagement manifested by the courts involved" (Slaughter 1994: 112). Slaughter distinguishes between "direct dialogue", in which different courts are actively involved, "monologue", where there is no ongoing conversation but rather a one-sided borrowing of ideas and principles by foreign courts, and "intermediated dialogue", where international/supranational organisations broker communication between national courts. The third factor in Slaughter's classification concerns the functions of transjudicial communication. As regards the interaction between international and supranational law and domestic law, Slaughter (1994: 117) identifies two functions concerning "the role of transjudicial communication in strengthening international regimes", namely the enhancement of the effectiveness of supranational tribunals and the assurance and promotion of the acceptance of reciprocal international obligations. However, the function that has most attracted both interest and criticism from other scholars is "cross-fertilization", i.e. the process by which ideas are disseminated from one legal system to another. According to Slaughter (1994: 118) herself, the process "is likely to be very difficult to track", since it may occur without the recipient court needing to acknowledge the source. A fourth function attributed by Slaughter to transjudicial communication is the enhancement of the persuasiveness, authority or legitimacy of individual judicial deci-

sions, while the final function is what Slaughter (1994: 119) terms "collective deliberation", i.e. the process whereby different actors cooperate in the deliberation on common problems.

Slaughter's seminal work on transjudicial communication has been followed by further studies on cross-fertilization, the increasingly direct interactions between judges, and the active construction of a global judicial community (see Slaughter 2003). However, her standpoint, together with that of advocates of transnational judicial dialogue, has not been immune from criticism. Law and Chang (2001: 523), for instance, mounted a powerful attack on the use of the word "dialogue", considering it "conceptually and factually inaccurate to characterize the manner in which constitutional courts cite and analyze foreign jurisprudence", since "[a]s a conceptual matter, constitutional courts do not cite one another for the purpose of communicating with another, while as an empirical matter, there is little evidence to suggest that one-sided citation of a handful of highly prestigious courts has given way to genuine two-way dialogue". Wiener and Liste, in turn, question one of the functions identified by Slaughter in her typology, i.e. cross-fertilization. Although not denying the existence of "transjudicial dialogue", which they define as "direct interactions between involved legal practitioners including judges, lawyers, or prosecutors", they see cross-fertilization as "a process of legal systems mutually affecting one another", i.e. "an ongoing effect of inter-judicial practice such as cross-referencing" (Wiener and Liste 2014: 267). Based on the results of an empirical test carried out by means of semi-structured interviews with legal practitioners, the two authors argue that the cross-jurisdictional referencing of legal norms and decisions has not yet led to a "global community of courts", as envisaged by Slaughter (2003). Despite such objections, however, it can be confidently stated that "the [international judicial discourse] theory's advocates far outnumber its critics" (Krotoszynski 2006: 1329).

In an increasingly globalized world it is impossible to think of judicial systems working in complete isolation. The existence of some sort of interaction between judges and courts, be it in the form of a monologue or dialogue – to use Slaughter's own words – is undeniable (see, for instance, Waters 2005: 555 ff.). The perspective adopted in this study is, however, linguistic rather than legal. "Transjudicial communication" is here ascribed a narrower meaning than in some of the definitions provided above, since it is conceived as a form of intertextuality, i.e. the linguistic manifestation of the interaction between courts in judicial deliberations. All other forms of interaction, such as face-to-face meetings and networking among legal practitioners, are excluded from the study. Even so, the typology devised by Slaughter, is still judged to be a useful framework for the data to be analysed.

3. Transjudicial communication: A linguistic perspective

Transjudicial communication has so far been analysed exclusively through the lenses of legal studies. However, given the indissoluble connection between law and language, it would be naïve to assume that the language in which transjudicial communication as a legal phenomenon is carried out remains unaffected by the ongoing interaction between different courts. In this study transjudicial communication is intended as the actual linguistic manifestation of the interaction between different courts. Interestingly, Wiener and Liste exemplify interjudicial practice by mentioning a linguistic phenomenon, i.e. cross-referencing (Wiener and Liste 2014: 267), and it is precisely cross-referencing that is taken here as one possible linguistic manifestation of transjudicial communication. The involvement of courts in transjudicial communication may be more or less conscious or intentional, in the sense that there may be interaction between courts without them being aware of it or without them being compelled to give credit to the source. To put it simply, some courts may draw inspiration from other courts but refrain from quoting the source. The focus of this study, however, is on cross-references that signal some sort of interaction between different courts: for this reason, the covert type of transjudicial communication has been ignored in favour of an analysis of the overt type. In particular, the analysis of cross-references is conducted on a corpus of judgments issued by the ECtHR (described in Section 4.1).

In order to place this corpus in the framework of transjudicial communication from a legal perspective, ECtHR judgments have been considered against Slaughter's typology described above. Within this typology, the ECtHR is the natural forum for vertical communication, since it is in charge of resolving disputes originally brought before national courts. Taking the degree of reciprocal engagement into account, the ECtHR is used by Slaughter herself to exemplify "intermediated dialogue", since in her view the ECtHR "effectively brokers communication among national courts" (Slaughter 1994: 113). As for the function, Slaughter sees the ECtHR as an example of "collective deliberation", since it "surveys the common consitutional provisions and practices of the states under its jurisdiction and disseminates national norms from one country to another through the medium of national courts" and, by doing so, "it is effectively collaborating with these national courts on the development of a common European law of human rights" (Slaughter 1994: 120-121).

4. Methodology

As stated above, in this study cross-references are seen as a possible linguistic manifestation, or "trace", of transjudicial communication. Transjudicial communication is also assumed to occur in the international case law produced by

the ECtHR, which constitutes the subject of this case study. Such communication was further assumed to leave traces in ECtHR judgments in the form of cross-references. This assumption was confirmed by skimming a random sample of ECtHR judgments. Once evidence of the presence of cross-references in these judgments was found, the need for their systematic corpus-based analysis emerged. To this end, a small corpus of ECtHR judgments was compiled, which is illustrated in more detail in subsection 4.1, with a brief digression on the structure of ECtHR judgments. The first challenge for the investigation of cross-references was how to identify them in the corpus. The methodology described in subsection 4.2 was developed to semi-automatize their extraction. However, given the peculiarities of the structure of ECtHR judgments, the methodology was only applied to certain sections ("The facts" and "The law") of the texts included in the corpus.

4.1 ECtHR judgments and the corpus

The study presented in this paper was intended as a pilot study to verify the feasibility of a three-step method for the semi-automatic extraction of cross-references from international case law. In Table 1 the main features of the analysed corpus are summarised, attesting to the homogeneity of the corpus components in terms of text type and content.

	Corpus Total word types: 3613 Total word tokens: 50515		
Title	CASE OF HERMI v. ITALY (Application no. 18114/02)	CASE OF MARKOVIC AND OTHERS v. ITALY (Application no. 1398/03)	CASE OF SEJDOVIC v. ITALY (Application no. 56581/00)
Word types:	1822	2297	1794
Word tokens:	14434	21485	14596
Parties to the case:	a Tunisian national; the Italian Republic	ten nationals of Serbia and Montenegro; the Italian Republic	a national of the then Federal Republic of Yugoslavia; the Italian Republic
Year of delivery of Grand Chamber judgment:	2006	2006	2006
Article of the ECHR allegedly violated:	Article 6	Article 6	Article 6

Table 1. Details of the three ECtHR Grand Chamber judgments used for compiling the corpus.

The three judgments were delivered by the Grand Chamber in 2006. In all three cases the applicants were nationals of States that were not contracting States of the European Convention on Human Rights (ECHR); the respondent State was always Italy. Moreover, in all the three cases the Article of the ECHR that was allegedly violated by the Italian Government was Article 6 on the right to a fair trial. As for the language of the judgments, it should be borne in mind that, under Rule 34(1) of the Rules of Court, "[t]he official languages of the Court shall be English and French" and, under Rule 76(1), "[u]nless the Court decides that a judgment shall be given in both official languages, all judgments shall be given either in English or in French". Due to historical and legal reasons, when Italy is the respondent State, the language of proceedings and of the resulting judgment is usually French. However, "there is an assumption that only difficult and complicated cases are submitted to it [the Grand Chamber]" (Garlicki 2009: 394) and, due to their importance, the judgments of this Chamber are published in the official reports of the Court. For these reasons, they are required to be available in both official languages (see Rule 76(2)). For this study the English version of the three judgments was used and the data relating to the number of word tokens and types given in Table 1 refer to that version. The choice of English is also relevant for the method presented in subsection 4.2, since the extraction criteria that were used are language-specific.

The feasibility study presented here was only conducted on a part of the corpus. The reason for this has to do with the particular way the content of the analysed judgments is organized. In the words of Senden (2011: 21),

> [i]n the more than 50 years since its inception the ECHR has developed its own style of reasoning and its own style of judgment. While other international courts, like the CJEU [Court of Justice of the European Union], have had a clear inspirational model, the ECtHR and its judgments have not been modelled on a particular national legal tradition.

The ECtHR has thus developed an elaborate judicial style (see, for instance, Garlicki 2009: 391) which can be observed in both its decisions and judgments. Despite their peculiar style, however, ECtHR judgments can be compared to judgments rendered by any other court. Therefore, when considered from a general perspective, judgments can be seen either as a judicial activity or as documents (see Iacoviello 2001: 'motivazione'). If considered as an activity, they consist in legal reasoning and argumentation on the one hand, and decision-making on the other. When considered as documents, their complex structure comes to the fore: it includes an operative part, which contains the decision taken on the basis of a set of premises, and an argumentative part, which consists in the elicitation of such set of premises. ECtHR judgments are no exception, containing both an operative and an argumentative part. The analysis of the structure of the Grand Chamber judgments included in the corpus reveal a high degree of regularity, with their content being subdivided into the sections described in Table 2.

Activity	Section	Content
INTRODUCTON	Opening section	Information about the Chamber delivering the judgment (here, the Grand Chamber), the parties involved, the application number and year, the date of delivery, the composition of the judging body.
	"Procedure"	Information about the identity of the parties involved, as well as of their representatives and advisers.
ARGUMENTATION; LEGAL REASONING	"The facts"	Divided into two or three subsections identified by a heading: (i) "Circumstances of the case", giving background information on the applicants and reporting, diachronically, the circumstances of the case and the proceedings before domestic courts; (ii) "Relevant domestic law", providing an overview of the relevant national legislation; (iii) "Other relevant provisions", making references to other provisions (e.g. international conventions and recommendations of the Committee of Ministers).
	"The law"	Analysis of the circumstances of the case in the light of the ECHR, divided into subsections, all of which are not always present: (i) The Government's preliminary objection; (ii) Admissibility of the application; (iii) Alleged violation of Article no. of the Convention (iv) Application of Articles 46 and 41 of the Convention.
DECISION-MAKING	Operative part	Ruling of the Court (here, the Grand Chamber).
CLOSING	Closing section	Information about the language(s), mode, place and date of the delivery of the judgment. Signatures of the President and the Registrar.

Table 2. Content organisation in ECtHR Grand Chamber judgments.

Since the purpose of this paper is to shed light on cross-references as indicators of transjudicial communication in ECtHR judgments, only the sections mentioned in Table 2 in which explicit traces of interaction between legal systems can be found were selected and analysed. Therefore, of the three judgments in Table 1, only "The facts" and "The law" sections were subject to the semi-automatic extraction process described below and the subsequent analysis.

4.2 Three-step extraction procedure

In order to extract cross-references from the ECtHR judgments listed in Table 1, a semi-automatic corpus-analysis approach was adopted. For the codification of text segments in the relevant sections ("The facts" and "The law") in each judgment, a qualitative corpus-analysis software programme[1] was used. In particular, the corpus sections were analysed against a list of potential extraction criteria to identify segments containing cross-references as pointers to instances of transjudicial communication and, once those segments were found, they were coded as instances of transjudicial communication. Further possible lexical patterns or other extraction criteria pointing at such communication were recorded. The methodology adopted was thus conceived as a sequential process in which, once the first extraction of cross-references from the corpus was completed, the obtained results could either become keywords or provide suitable hints for a second round of extraction. The second round could then be followed by a further round and the methodology could be repeated until all the cross-references were extracted.

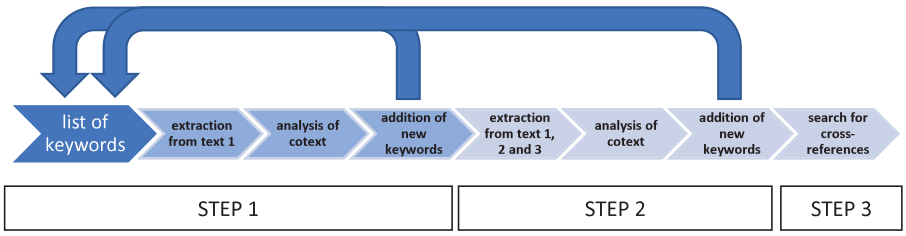

Figure 1. Representation of the three-step extraction procedure.

For the purposes of this feasibility study, the methodology was divided into three steps, each of them entailing a round of extraction of candidate cross-references. The individual steps are outlined below.

1 QDA Miner Lite, version 2.0.

Step 1

The first step in the methodology consisted in the extraction of candidate cross-references based on a list of keywords. The first extraction was performed from only one text in the corpus, i.e. *Markovic and others v. Italy*[2], rather than from the entire corpus. Taking into consideration that the judgments under analysis had been delivered against Italy, the expectation was that cross-references would mainly point to Italian legislation or case law. Based on prior knowledge on ECtHR judgments, such cross-references were supposed to co-occur with a series of words that constitute prototypical cross-referencing patterns in legal language and may thus collocate with possible cross-references. Therefore, an initial list of keywords (see Appendix 1) was compiled to be used for the extraction of cross-references. This list contained three types of keywords. First, verbs were included for which it seemed plausible to expect proximity to cross-references, such as "to provide" and "to state". Second, prepositions and prepositional phrases were added, such as "under" and "in accordance with". Finally, given the assumption that ECtHR judgments contain cross-references to other legislative and judicial sources and that the corpus to be analysed consists of judgments where the Italian Government is a party to the case, terms referring to legal instruments and case law or to their respective sections were included, such as "law", "decree", "judgment", "convention", "article" and "paragraph". In order to illustrate this step, the results of the use of two keywords, i.e. "provides" and "Convention", are discussed below.

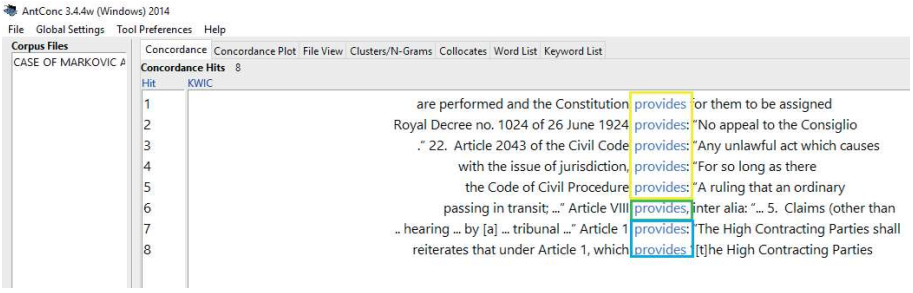

Figure 2. Concordances of "provides" in *Markovic and others v. Italy.*

In Figure 2, all the concordances of "provides" in *Markovic and others v. Italy* are reported. Since the co-text provided by the concordancer[3] is not enough to understand the full cross-citation, the following colour scheme is used in the Figure: yellow for references to Italian legislation, green for international legislation (in this case, the London Convention of 19 June 1951), and blue for the ECHR and its Protocols. The same colour scheme was applied in relation to the first twenty occurrences of "Convention" in the same text (Figure 2). However, since conven-

2 The case was selected due to its higher number of word tokens and types.

3 AntConc, version 3.4.4w.

tions are international rather than national legal instruments, in this case no reference to a national piece of legislation was found.

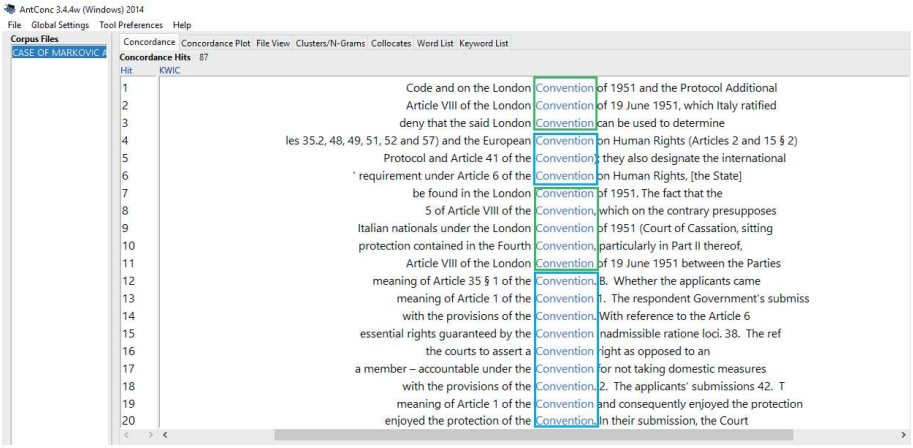

Figure 3. Concordances of "Convention" in *Markovic and others v. Italy.*

The analysis of the concordances obtained by using the keywords in the initial list, such as those in Figures 2 and 3, and of their broader co-text allowed for the identification of further keywords to be added to the initial list. Indeed, in Figure 2, possible keywords such as "Civil Code" and "Code of Civil Procedure" can be noticed, as well as the use of punctuation (inverted commas and semi-colons), which can indicate the presence of a cross-reference nearby in the text. Therefore, the existing list was enriched not only with keywords pertaining to the categories already present in the original list (i.e. verbs, in the active and passive form, prepositions and prepositional phrases, and terms referring to legal instruments and case law), but also with new categories of keywords. The categories added to the list of extraction criteria are nouns (e.g. "rule", "provision"), collocations of 'noun+preposition' (e.g. "scope of", "applicability of") and punctuation (e.g. inverted commas, brackets). The list of extraction criteria obtained at the end of step 1 is available in Appendix 2.

Step 2

In step 2, the list of extraction criteria obtained at the end of step 1 was applied to the entire corpus. After the second round of extraction, other keywords (mainly verbs and 'noun+preposition' collocations) and punctuation marks were added to the list of extraction criteria, which is available in Appendix 3.

Step 3

The final step of the methodology consisted in a third round of semi-automatic extraction of cross-references, carried out by applying the list of extraction cri-

teria from Step 2 to the corpus. The cross-references extracted from the corpus were then subjected to a qualitative analysis to provide a tentative classification based on the sources referred to, as discussed in Section 5.

5. Classification of cross-references extracted from the corpus

The first insight resulting from the analysis of the extracted cross-references is that they refer to a variety of sources. Cross-references in ECtHR judgments can first be distinguished into two broad categories, i.e. intratextual and intertextual references. The former are references that point at information that can be found within the same judgment, such as in the following two examples[4]:

(1) The applicant had been arrested *in flagrante delicto* (see paragraph 12 above) and had at no stage in the proceedings attempted to deny the factual basis of the charges against him. (*Hermi v. Italy*)

(2) The Court therefore considers it unnecessary to indicate any general measures at national level that could be called for in the execution of this judgment. (*Sejdovic v. Italy*)

Intratextual references will not be discussed further, as this study focuses on *trans*judicial communication. The main focus is here on intertextual references, which direct readers to texts other than the one they are reading, as illustrated in these examples:

(3) In view of the circumstances outlined above, and on the basis of the Court's case-law in *Kamasinski v. Austria* (19 December 1989, Series A no. 168) and, conversely, in *Kremzow v. Austria* (21 September 1993, Series A no. 268-B), the Government concluded that the presence of the defendant at the appeal hearing was not required under the Convention. (*Hermi v. Italy*)

(4) In so far as the Government have cited the first of these provisions, the Court reiterates that under Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *K. and T. v. Finland* [GC], no. 25702/94, § 145, ECHR 2001-VII, and *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). (*Sejdovic v. Italy*)

4 In all the examples, the emphasis (signalled by underlining) is added.

(5) The Court accordingly considers that, where, as in the instant case, an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see the principles set forth in Recommendation No. R (2000) 2 of the Committee of Ministers, as outlined in paragraph 28 above). (*Sejdovic v. Italy*)

(6) In its judgment of 25 November 2004 (no. 48738) in *Soldati*, the Court of Cassation (First Section) observed that leave to appeal out of time could be granted on two conditions: if the accused had not had any knowledge of the proceedings and if he or she had not deliberately avoided taking cognisance of the procedural steps. (*Sejdovic v. Italy*)

(7) They [the applicants] also relied in support of their claim on Article 174 of the Wartime Military Criminal Code and on the London Convention of 1951 and the Protocol Additional to the Geneva Conventions. (*Markovic and others v. Italy*)

While examples 1-7 above contain either intra- or intertextual references, the corpus also reveals the presence of intratextual and intertextual references within the same paragraph, such as in the following example:

(8) Article 599 § 2 of the CCP states that the proceedings are to be adjourned if "a defendant who has expressed a wish to appear has a legitimate reason for not attending" (see paragraph 31 above). (*Hermi v. Italy*)

Intertextual cross-references can be further divided into two subcategories or types, based on the source of the texts being referred to. The first type can be termed 'internal cross-references'. These references point at: (i) texts produced by the ECtHR (ECtHR judgments and decisions, as well as the Rules of Court) (see examples 3 and 4); (ii) texts produced by the Committee of Ministers of the Council of Europe (e.g. Recommendations and Resolutions) (see example 5); and (iii) the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (see example 5). The second type of intertextual cross-references, instances of which can be found in examples 6 and 7 above, can be termed 'external cross-references'. This subcategory includes a greater variety of sources, such as international legal provisions (e.g. the Geneva Conventions of 12 August 1949 and the London Convention of 19 June 1951), national legal provisions (e.g. the Italian Code of Civil Procedure, Code of Criminal Procedure, Laws, Legislative Decrees and Royal Decrees), national case law (i.e. judgments), and other sources (e.g. notes from public prosecutor's offices). Internal cross-references were not taken into consideration for the discussion of the results presented in Section 5.1 because they lack a transnational character.

5.1 External cross-references: from transjudicial to transnational legal communication

In Section 2.2, transjudicial communication has been described as the linguistic manifestation of the interaction between different courts, and cross-references have been suggested as indicators of transjudicial communication. However, once cross-references are classified using the source as a criterion, it becomes clear that not all cross-references mark the presence of such communication – only external cross-references do so. Focusing on this subtype only, a closer look at examples 4, 5 and 7 further reveals that cross-references in ECtHR judgments are not limited to judicial deliberations, but also concern other – mainly legislative – sources. This means that, when considering external cross-references against the background of ongoing legal interaction in ECtHR judgments, the communication that emerges assumes a variety of forms. When reference is made to judicial sources, the implied interaction is between different courts and the communication can indeed be 'transjudicial'. However, if the invoked source is of a different origin, it would not be fully appropriate to call the interaction 'transjudicial'. Therefore, since the cross-references described in the remaining part of the paper fall within both types, we propose the use of an alternative expression to refer to the underlying interaction, i.e. "transnational legal communication"[5]. This term seems broad enough to include transjudicial cross-references, but also references to other texts that share these common features: they go beyond national boundaries and are legal in their nature, but are not the result of judicial decision-making.

Having established that external cross-references can be considered as indicators of transnational legal communication, the next issue to be addressed is the possible functions such references perform in the argumentative part of ECtHR judgments. The qualitative analysis of the cross-references extracted following the methodology illustrated in Section 4.2 indicates that they are used for three different functions[6]. The first function, which can be identified in both the "The facts" and "The law" sections, is to provide a description of the factual background and legal history of the case, as can be seen in the examples below. Given that in the three cases under analysis the respondent State was Italy and that all the cases to be decided by the ECtHR were already discussed extensively in domestic courts, it should come as no surprise that the references performing this function point at Italian judicial and legislative sources.

5 The term "translational legal communication" is not new and has been used by Wagner (2011). In his view, "transjudicial communication" or "transnational judicial dialogue" refers to "modes of communication between judges that can be traced through the official pronouncements in the publications of the courts", while "transnational legal communication" has a broader meaning, including forms of "open dialogue between domestic judicial institutions" (Wagner 2011: 441). In this study, however, the alternative term is used to go beyond the boundaries of judicial bodies and "legal" is used to refer to both law enforcement and law-making institutions.

6 To illustrate these functions, all the examples provided below are from *Markovic and others v. Italy*.

(9) (from "The facts") On 31 May 2000 the first four applicants brought an action in damages in the Rome District Court under Article 2043 of the Italian Civil Code. The other six applicants applied to be joined to the proceedings on 3 November 2000.

(10) (from "The facts") In a ruling (no. 8157) of 8 February 2002, which was deposited with the registry on 5 June 2002 and conveyed to the applicants on 11 June 2002, the Court of Cassation, sitting as a full court (*Sezioni Unite*), found that the Italian courts had no jurisdiction. It reasoned as follows:

> "...
>
> 2. The claim seeks to impute liability to the Italian State on the basis of an act of war, in particular the conduct of hostilities through aerial warfare. The choice of the means that will be used to conduct hostilities is an act of government. These are acts through which political functions are performed and the Constitution provides for them to be assigned to a constitutional body. The nature of such functions precludes any claim to a protected interest in relation thereto, so that the acts by which they are carried out may or may not have a specific content – see the judgments of the full court of 12 July 1968 (no. 2452), 17 October 1980 (no. 5583) and 8 January 1993 (no. 124). With respect to acts of this type, no court has the power to review the manner in which the function was performed.
> [...]"

(11) (from "The law") The applicants pointed out that the question whether their claim was well-founded or ill-founded under the domestic legal system should have been determined by a court. However, the Court of Cassation's decision had prevented them from asserting in the Italian courts a right recognised by Article 2043 of the Civil Code. Moreover, it was at variance with that court's existing case-law and subsequent decisions. In the applicants' submission, the Court of Cassation's judgment no. 5044 of 11 March 2004 (see paragraph 28 above) showed, firstly, that immunity from jurisdiction could never extend to the criminal law so that civil liability for criminal acts could not, therefore, ever be excluded and, secondly, that rules of international origin protecting fundamental human rights were an integral part of the Italian system and could therefore be relied on in support of a claim in respect of damage caused by criminal acts or by negligence. It followed that anyone alleging a violation of a right guaranteed by such rules was always entitled to the protection of the courts.

The second function is that of recalling relevant domestic law or other legal provisions and was observed in the "The facts" section only. The reason for this may be related to the rigid structure of ECtHR judgments described in Section 4.1: in "The facts", two subsections are specifically devoted to this function, i.e. "Relevant domestic law" and "Other relevant provisions". The following examples

relate to Italian domestic law, but while in example 12 the cross-reference is judicial, in example 13 it is legislative (constitutional).

(12) In a judgment of 10 July 1992 (no. 124/1993), the Court of Cassation, sitting as a full court, established the rule that the courts had no jurisdiction to hear cases against the authorities relating to political acts.

(13) The relevant provisions of the Italian Constitution are as follows:

> **Article 10 § 1**
> "The Italian legal system shall comply with the generally recognised rules of international law.
> ..."
> [...]

As regards "Other relevant provisions", the example provided below may be useful to highlight the fact that the position of a cross-reference in a specific section of an ECtHR judgment does not necessarily determine its function. In fact, although the paragraph in Example 14 is found in "Other relevant provisions", a combination of the aforementioned functions can be observed: here, the Protocol Additional to the Geneva Conventions is used to refer to the international provisions invoked by the applicants (first function) and then a specific provision of the same Protocol is explicitly reported (second function).

(14) The applicants relied in the domestic courts on the Protocol Additional of 8 June 1977 to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I). The Protocol, which Italy ratified through Law no. 672 of 11 December 1985, contains, *inter alia*, the following provisions:

> **Article 35 – Basic rules**
>
> "1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
>
> 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
>
> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.
>
> ..."

The third function of external cross-references was identified in the "The law" section. Here, cross-references are used to provide either a backbone for the legal reasoning and argumentation of the ruling that is to be found in the operative part of the judgment or the object of such reasoning.

(15) Although it is not its role to express any view on the applicability of the Protocol Additional to the Geneva Conventions (Protocol I) or the London Convention, the Court notes that the Court of Cassation's comments on the international conventions do not appear to contain any errors of interpretation. There are two reasons for this: firstly, the statement that Protocol I regulates relations between States is true; secondly, the applicants relied on paragraph 5 of Article VIII of the London Convention, which concerns acts "... causing damage *in the territory of the receiving State* to third parties ..." (see paragraph 31 above), whereas the applicants' damage was sustained in Serbia, not Italy.

In example 15, the reference to the Court of Cassation's comments is used to refer to the object of discussion and the quotation of the London Convention is used to support the ECtHR's opinion on the correct interpretation by the Court of Cassation. However, at a closer examination, it can be said that in "the applicants relied on paragraph 5 of Article VIII of the London Convention" there is a slight overlap between the first and third function, since this segment is used both to reconstruct the legal history of the case and to support the ECtHR's standpoint.

6. Conclusion and future work

The feasibility study illustrated here represents the first step in a broader study on the interaction between different sources of law, both judicial and legislative, in ECtHR judgments. Drawing from the discussion on "transjudicial communication" as developed by legal scholars, it is argued here that this notion can also be examined from a linguistic perspective. Taking cross-references as possible linguistic indicators of interaction between different sources of law in case law in general and ECtHR judgments in particular, a corpus-driven study was conducted on the English version of three judgments delivered by the Grand Chamber of the ECtHR. To do so, a three-step language-specific methodology was developed for the semi-automatic extraction of cross-references and it was then applied to a small corpus so as to test its feasibility.

Based on the qualitative analysis of the extracted cross-references, a tentative classification was proposed in order to separate the cross-references that point to transjudicial communication from those that cannot say to perform this role. A first distinction was made between intratextual and intertextual cross-references, and the former category was excluded from further analysis because it lacks a

transnational character. Based on the invoked source, intertextual cross-references were subsequently divided into internal and external cross-references. The former were again excluded from the analysis, since they point at texts belonging to the same legal system as the analysed judgments or, in other words, texts produced by the organs of the Council of Europe, which should 'speak the same language' as the ECtHR. External cross-references, on the other hand, were further analysed with the aim of identifying the type of sources they link to. Given that these sources are not limited to judicial textual material, but also include legislative texts of various origins (e.g. national, international), it was concluded that what emerges from the analysis of external cross-references is probably not best described as "transjudicial communication". The term "transnational legal communication" was introduced to depict the interaction between different judicial and legislative sources of law in ECtHR judgments. The qualitative analysis was then extended to determine the functions performed by external cross-references. In the analysed judgments, three functions were identified: (i) description of the factual background and the legal history of the case, (ii) recall of relevant domestic law or other legal provisions, and (iii) provision of a backbone for the legal reasoning and argumentation of the ruling to be found in the operative part of the judgment or of the object of such reasoning.

The methodology developed for this case study was conceived so as to allow its future application to a larger corpus. The main idea for the near future is to build a larger corpus of ECtHR judgments in English and to continue investigating the field of transnational legal communication with the aim of shedding light on the dynamic relationship between different sources of law. Taking external cross-references as a starting point, it would be very interesting to observe the co-text of the cross-references rather than the cross-references only, so as to see what processes the invoked texts undergo when they are included in an ECtHR judgment. For instance, in some cases the text invoked is cited verbatim (as in example 15); in other cases it is quoted in inverted commas, but it is actually the result of a translation process (as in 10 and 13); and in other cases still the co-text is the result of reformulation of a text in another language (as in 12, where the legal principle established by the Italian Court of Cassation is summarised immediately after the reference to the relevant judgment).

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Appendix 1

Initial list of keywords for cross-reference extraction for step 1*

Verbs	Prepositions	Nouns referring to legislation or case law or parts thereof
to allow to provide to state	under in compliance with in accordance with	Article Constitution Convention Decree Judgment Law Paragraph Section Treaty

* The verbs are provided in the infinitive, but the extraction was carried out using inflected forms. For instance, for the verb "to provide", the forms "provides" and provided" were used as keywords.

Appendix 2

List of keywords and other criteria added to the initial list for step 2

Verbs	Phraseology	Nouns referring to legislation or case law or parts thereof	Nouns	Punctuation
to use (can be used) to find (can be found) to be laid down in to *** the rule laid down in to presuppose to be incompatible with (the provisions of) to be irreconcilable with to preclude to be established by to be recognised by/through to cover to preclude to rely on to be guaranteed by to be (not) applicable to find applicable to be set out in to afford to be required by to be defined in to justify to violate to be protected by to be compatible with to (not) apply to be provided in to be afforded by to be provided for in to entitle	within the meaning of with reference to as follows following in the light of for the purposes of in conjunction with on the basis of according to in accordance with as follows inter alia within	Code (Wartime Military Criminal Code, Criminal Code, Code of Civil Procedure, Civil Code) Constitutional Law Protocol	effect(s) of legislation rule provision (no) violation of explanation for scope of applicability of civil or criminal law international law case-law compliance with	“citation” : (…)”

Appendix 3
List of keywords and other criteria added to the initial list for step 3

Verbs	Phraseology	Nouns referring to legislation or case law or parts thereof	Nouns	Punctuation
to have regard to to hold to read (as follows) to be detailed in to be referred to to be indicated in to be contained in to be set forth in to be permitted by to require to be mentioned in to prevent to confer to be required by to be construed to be covered by to be irreconcilable with to be confirmed by to amend to disregard to introduce to enable to be infringed to afford (a right) to (not) specify to interpret to be derived from to be enshrined in to enunciate in to secure to be entitled to apply under to amend to be worded (as follows) to be in issue in	in breach of under the terms of pursuant to in connection with within the scope of by way of interpretation of	(relevant/integral) part(s) of	reference in/to requirement(s) of/ under application of spirit of the wording of a claim on the principle underlying right conferred by an analysis of	(Article XXX) [Article XXX] (see XXX)