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The *International Journal of Law, Language & Discourse* (IJLLD) is an interdisciplinary and cross-cultural peer-reviewed scholarly journal, integrating academic areas of law, linguistics, discourse analysis, psychology and sociology, presenting articles related to legal issues, review of cases, comments and opinions on legal cases and serving as a practical resource for lawyers, judges, legislators, applied linguists, discourse analysts and those academics who teach the future legal generations.

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Ethical Publication at the Nexus of Law, Language and Discourse

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Abstract

The research area for law, language and discourse, an academic field with few dedicated scholarly journals (each interpreting the field differently) is overviewed. Ethical practices in research article publication, and the manuscript management and editorial process within the newly re-activated *International Journal of Law, Language & Discourse* are discussed and compared to various historic and contemporary practices in scholarly publication, including editorial and peer review, publisher duties, commercial journals, and publication strategies. "Predatory" journals are distinguished from reader-driven editorial practices.

Keywords: ethics, editorial review, peer review, manuscript management, desk rejection, predatory journals

Introducing the *International Journal of Law, Language & Discourse*

After a two-year hiatus, this journal is returning to semi-annual publication (twice yearly: summer and winter). The reasons for recent non-publication are related to the scope of this introductory article, hence its inclusion in the re-launch issue. *The International Journal of Law, Language & Discourse* will ethically publish articles relevant to its topic area, which could be described as the nexus of law, language, and discourse. To understand the Journal's scope more properly, we must explore these terms more closely. First, however, we should point out that we treat these terms loosely, that our definitions are less prescriptive, more descriptive and inclusive: road signs rather than fences. Additionally, this article discusses the much-critiqued process of peer-review and publishing ethics in scholarly journals, and summarizes the practices in the relaunched journal. The Journal's manuscript management process is outlined, as the prevalent "desk rejection" has become an ethical concern for many researchers.

Surveying the Territory

Defining "Law" (for the purposes of this journal)

Law may be define rather broadly or narrowly, and as explained above, this journal will interpret the term expansively. "All the rules of conduct established and enforced by the authority, legislation, or custom of a given community, state or other group" is the first definition offered by World Publishing Co (1978). However, the ninth offering within the World Publishing entry is perhaps more appropriate for this journal: "any rule or principle expected to be observed." In fact, the effect of this ninth definition is not so different the first offering from *Black's Law Dictionary* (West Publishing Co, 1968), "That which is laid down, ordained, or established." These definitions encompass issues such as contract terms and safety notices, for example, and allow for inclusion of scholarly and social norms, such as citation and ethical practices which may not appear in enforceable written rules across academia. We also include practices which have become norms, and which could conceivably be enforced by the courts as community standards even where no written law exists. In this Covid-era, "social distancing" could be considered a social norm which rarely has any specific legal basis.

Defining "Language & Discourse" (for the purposes of this journal)

"Language" in this journal is inclusive of all human and machine forms of communication. While the articles in this journal are written in the English language, the content under investigation may be drawn from other languages. While "discourse" may be defined differently across various fields of (social) science, under a Piercean model it might be broadly construed as "representation" (Boholm, 2016), i.e., a sign or symbol which conveys meaning, and is interpreted (e.g., smoke in the forest interpreted by a ranger as a fire). More generally, however, "discourse normally refers to larger units of language such as paragraphs, conversations, and interviews... also the meanings and values embedded in talk" (Richards & Schmidt, 2002, pp. 160-161). For our purposes, we understand "language and discourse" as "language in use" in its application to law, legal issues, and the teaching of law and legal interpretation, among other fields.

Topics of Interest to the Journal

The intersection of law, language and discourse offers a wide and fertile field for investigation. Analysis of "legal language" (e.g., Chovanec, 2013; Gozdz-Roszkowski, 2013; Goźdź-Roszkowski & Pontrandolfo, 2013) is just a start. Legal semiotics, forensic law, legal translation and interpretation, and the language of the courts (particularly in plurilingual communities) are prominent areas of interest for the *Journal*. Linguistic analysis of language commonly used to address legal requirements (e.g., caution notices in consumer goods) is also

understood to be within our focus area. The teaching of Legal English and development of materials for such courses is included. On the other hand, the "nexus" of law, language and discourse should be not construed as the "union" of these disparate fields. The *Journal* is not open to "law review" type articles that do not address concerns of language or discourse, nor will it publish articles on language teaching, linguistics, translation, semiotics, discourse analysis, et cetera without reference to law or legal matters (as outlined above), legal education, or legal systems. This re-launch issue provides some examples of the diversity of topics in our field.

Scholarly Review and Publication – Standards in Scholarship

Ethics in scholarly publication

Ethics can be included under the definition of law stated above – "any rule or principle expected to be observed." As a broad principle, we can agree that research and publication should be ethical. A key concern in ethics is fairness (equity) and its antithesis, bias, though we may face challenges defining specifics (Dickey, 2006). Bias in the publication process can take many forms, including bias in authorship and bias in standards. Benos et al (2007), Jukola (2017) and Souder (2011) overview various forms of manuscript review bias, including gender bias and bias against unconventional ideas. Furthermore, standards for publication with some publishers may be lax: they may be motivated to publish as many submissions as possible under an "author pays" revenue model. These pseudo-journals, so-called "predatory journals," are typically decried as being unethical "pay-to-play" publications, a sort of "vanity-press" where authors claim scholarly credit for articles that have not undergone critical peer-review. However, payment of publication fees should not be a primary indicator of scholarly ethics.

Publisher's Duty

While much has written across the past 40 years about the responsibilities of researchers in conducting and publishing their studies, far less has been said of publishers' duties–and here we should include the full scholarly review process under publishers' duties, along with other concerns more often mentioned in the current century (e.g., predatory publications). Who defines these duties of publishers? Most widely adopted (in whole or part) are the guidelines proposed by the Committee on Publication Ethics; their Core Practices have replaced their previous Code of Conduct (COPE, n.d.). Those guidelines are foundational principles for the *International Journal of Law, Language & Discourse* (see the journal's "Ethics" page on the website – https://www.ijlld.com/publication-ethics-and-malpractice-statement/).

Of immediate concern to scholars is the review of manuscripts. A formal reviews process for scholarly publication, the hallmark of scholarly literature (Allen et al., 2019) is a relatively recent phenomenon (Horbach & Halffman, 2019), although it has existed in less formalized forms for several centuries (Benos et al., 2007; Jefferson et al, 2002; Johnson & Hermanowicz, 2017; Rowland, 2002). It would seem the process has been as severely critiqued from the onset as it is today (Csiszar, 2016) and it's not clear that the peer review process works as well as hoped, or even if we can agree on its aims (Jefferson, Wager, & Davidoff, 2002; Johnson & Hermanowicz, 2017; Manske, 1997). Anonymous peer-review was designed to eliminate the "old-boys network" of support for colleagues' papers (Ferreira et al., 2016). Yet still today, in many research communities leading scholars know most of the others, thus it can be difficult to maintain anonymity even under double-blind review systems. The review process is simply overloaded (Riisgård et al., 2003).

Some of the choices made in design of an editorial review process may have been based on administrative issues as well as scholarly concerns, and one concern by many researchers is that managerial convenience or efficiency might outweigh good scholarship or the rights of the scholars who submit to review. Scholars sometimes ask whether (or "how often") the dreaded "desk rejection" is simply a means of thinning the pile of submissions without due consideration of the scholarly merits within. And with desk rejections as high as 50%, 70%, or even 90% (Astruc et al., 2016; Byrnes, 2010; Clark, Floyd, & Wright, 2006), this is a fair concern. From time to time one reads on the internet or hears at conferences about desk-editors who are arbitrary, capricious, or unknowledgeable. Clearly such malfeasance is unacceptable: allegations of bias (favoritism or corruption) should be promptly investigated; formalized channels for submission and tracking of submissions are critical as one means of addressing these concerns. On the other hand, if all communications go through corrupted channels there seems little recourse for manuscript authors. Who polices the police?

Journal editors have offered a number of conditions that lead to desk rejection (Ashkanasy, 2020; Billsberry, 2014; Craig, 2010; Hourneaux Jr, 2020; Jiang & Tsai, 2019; Klerkx, 2020; Ogbuabor & Eigbiremolen, 2016). In general, "outside the journal scope," "no new knowledge is presented," and "poorly presented" are perhaps the most frequent causes of desk rejections. Some journals dive deeper into the text on the initial (desk) review, and may include multiple editors and consider issues such as "timing" (Teixeira da Silva et al., 2018) before sending on to referees (or rejecting). Editors have a duty to inform the manuscript author why a paper has been rejected, and to do so in a timely manner.

Turn-around time for initial desk review at IJLLD should be approximately seven calendar days. On the other hand, peer-review may take a number of months.

Other factors in publication ethics

Not only is the review process under scrutiny, but the very purpose of scholarly publication faces economic pressures (Ferreira et al., 2016). Governments and educational administrators have increased demands for publication (Beall, 2015; Ching, 2012; Li, 2012; Ziman, 2000), including "publish or perish" conditions for those who traditionally were not expected to publish (e.g., Koolsriroj & Prapinwong, 2017); as well as through designation of preferred and non-recognized avenues for publication, and rewards or penalties based on these designations (Lee, 2014). The governments of China (Leydesdorff & Bihui, 2005), Colombia (Cárdenas, 2016), India (Gautam & Mishra, 2015), Indonesia (Muriyatmoko & Setyaningrum, 2018), Italy (Bonaccorsi, Cicero, Ferrara, & Malgarini, 2015; Lanzillo, 2015), Russia (Gorin, Koroleva, & Ovcharenko, 2016), and South Korea (Ko & Park, 2013), for example, have created their own citations index systems to complement the better-known global Scopus and ISI (Web of Science) systems and to provide space for journals not publishing in English. "Approved" publication streams are therefore receiving vastly more submissions than even three years ago, resulting in more demand on editors and reviewers (who are generally not compensated for their labors)and longer queues for publication once accepted. The number of journals in circulation has increased exponentially in the past four decades in an attempt to meet the demand. Here we can use Ferreira et al.'s (2016) schematic for journals in ecology and evolutionary biology as an example of the general trend in scholarly publication (see Figure 1).

Along with the time required from submission to publication, measures such as "acceptance rate" (also known as "rejection rate") along with anticipated publication timelines may weigh heavily in terms of where papers are submitted. Acceptance rates for credible scholarly journals vary widely, partly based on field of study, but are often loosely correlated with relative ranking – more prestigious journals are, in general, more competitive. Aarssen et al. (2008) pointed out the risk/reward consideration in measuring a journal's impact factor versus risk of rejection, where rejection means delay in ultimate publication (repeating the review process when subsequently submitting to a lower-ranked journal). Björk's (2018) survey of journal acceptance rates suggest that between 10-65% of journal submissions are accepted in the typical scholarly journal, though a median of 20-40% was more common in the social sciences, whereas Egbert (2007) indicated that ultimate acceptances might fall as low as 10% or 20% in the field of applied linguistics and language teaching. *Journal of Writing Research* (n.d.) claims "a high rejection rate (above 90% in 2018)." It is certainly unclear

whether announcing rejection rates promote good scholarship (defining the acceptance rate would at least put a kinder spin on things). In some respects, then, a prompt desk-rejection is preferable to a multi-month delay prior to a review-rejection.

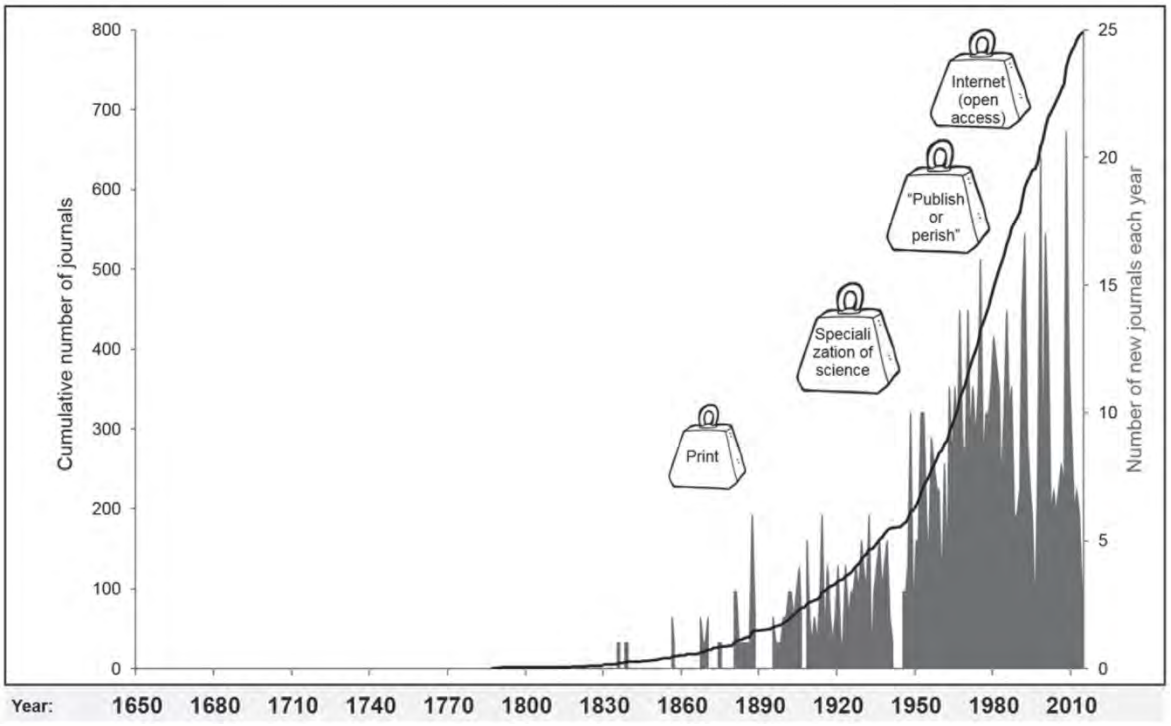

FIGURE 1. Growth in the number of journals publishing in ecology and evolutionary biology from 1650 to 2014. (from Ferreira et al., 2016)

One technique used by many researchers to improve their odds of acceptance is to include references from high-impact articles (Paine & Fox 2018). Similarly, most journals hope that manuscripts include plentiful citations of the journal's own previously published articles. Such calculations by the manuscript authors are not directed primarily towards research quality, but publishability. The ethical considerations of customizing citations for the journal is an ethical consideration not generally discussed.

Finance and Commercialization in Scholarly Publication

Commercialization of scholarly publications has long been lamented. Where should we draw the line? Journals published by scholarly societies often include advertising. Journals founded by such societies may be sold or licensed to commercial publishers, with the editorial process perhaps remaining under the authority of the society. Other scholarly journals were started by for-profit publishers. A cursory survey revealed that 90% of the 50 top-ranked journals in the current Scimago Language and Linguistics SJR table are published by for-profit

entities (see Table 1 in Appendix). Furthermore, the ratio of for-profit publishers may vary as journals not included in this "top 50" Scimago list are added to calculations. In contrast, only 42% of the listings in the Scimago Law SJR top 50 journals table are nonprofit, if we construe law school management of the journal as not-for-profit (see Table 2 in Appendix). In a nutshell, scholarly publication is dominated by for-profit publishers, and editorial independence is unclear in these.

Whether owned/operated by commercial interests or nonprofit scholarly societies, the traditional subscription model is based on individual or organizational subscriptions (library, personal) and electronic journals collection subscription, either/both print and electronic media. Jeffrey Beall (2015, 2016) contrasted traditional subscription-model journals, where the publisher's aim is to satisfy the reader-customer, with his "author-pays" "gold model" of open-access publishing which identifies the author as the customer, rather than the reader/subscriber. This does not equate the open-access (OA) model of publication with predatory journals! There are many open-access journals with minimal or no author fees, journals supported by scholarly societies, school, or other resources, such as IJLLD, which we may identify as reader-driven models of publishing.

While an increasing number of traditional-model journals do offer options for author-pay open-access publication, the primary sources of revenues, and the chief concern of the scholarly review process in the traditional model is maintaining reader satisfaction (hence, subscriptions) through quality content. Nevertheless, publication fees are increasingly common, particularly for open-access article release. Open-access publication can be very costly for authors, yet not always optional – both the U.K. and Australia require open access for most government-funded research (Tate, 2015; and Kennan, 2007; respectively, see also Fitzgerald et al., 2009, for a broader review of other countries, including the E.U., the United States, and Canada). In this environment, defining "predatory" must consider more than merely charging fees, instead we must distinguish between modest submission fees (also known as "reviewer fees," generally less than US$100 per article) and, page surcharges (color printing in a hardcopy journal, or exceeding the length standards) from mysterious article processing charges (APCs). APC fees are not unique to open-access journals, many top-ranked and well-established print journals have included such charges for numerous years (AOASG, 2014). The various types of fees defined by various journals may include

- submission fees
- review fees

- copy-editing charges (internal or select external services)
- publication fees
- excess-pages charges or color image fees
- open-access surcharges

This is not to suggest that all charges are unreasonable, or that costs beyond some certain amount are inappropriate, only that costs should be considered alongside various other factors. Predatory journals prey upon those who need a quick acceptance and prompt publication while offering minimal or no peer review or copy-editing. On the other hand, some highly regarded traditional subscription-based journals may have quite high fees: Oxford University Press charges $4,400 plus any additional color or page charges in their journals (https://academic.oup.com/eltj/pages/General_Instructions), and MIT Press charges $1,350 for an article in *Linguistic Inquiry* to cover "the costs associated with preparing an article for open publication" (https://www.mitpressjournals.org/journals/ling/oa).

The *International Journal of Law, Language & Discourse* is an open-access journal for scholars and thoughtful professionals that charges no fees to authors for submission, review, editing or publishing.

The Review Process

Mechanisms – Theory and Practice

Electronic Journal Management Systems are now prevalent. These may range from simple "upload your file here" where all the remaining activity takes place offline and through email to complex online manuscript management systems that determine the reviewer through keywords, review activity takes place entirely online, and all revisions and ultimately, the publisher's copy-editing, page-layout, proofing, and final publication take place: Initial article submission may require use of a particular formatting or file system (MSWord and LaTeX are popular choices), may require use of a specific template, or may allow any readable format (including PDF), and might require that the journal publishing style (e.g., APA 7th) be observed. The *International Journal of Law, Language & Discourse* has no strict requirements for initial submission, but does expect the initial submission through the website submission portal (https://www.ijlld.com/submissions/). All submissions are recorded upon receipt and tracked through the reviews process in a spreadsheet so that the publisher can track the editorial process.

Despite variations in the peer review process between journals and disciplines (Manske, 1997), manuscript flow through the editorial process has become rather standardized for peer-

reviewed journals; Estrada, Kalet, Smith and Chin (2006) offer a comprehensive schematic. IJLLD uses a somewhat simplified yet complete process, which is described below. The addition of specialty editors (e.g., book reviews, special issues) is envisioned for the future. In any case, the three major components of the manuscript review process could be construed as (1) initial (editorial) review; (2) peer review; and (3) revision and acceptance. The final step in publication follows acceptance: copy-editing, page-layout, and compilation into "book" form (hardcopy or electronic), and is beyond the scope of this discussion.

Manuscript Review Process in IJLLD

The process of manuscript review in the *International Journal of Law, Language & Discourse* includes several "decision trees" which are depicted in Figure 2 through a diamond shape. Administrative processes are shown with rectangles, submission and outcomes with ovals. The remainder are clearly labeled.

1. Initial manuscript submission is received and assigned a tracking number. This work includes a quick review to confirm it meets and scope of the journal and ensuring anonymity of the submission. Some editorial "coaching" may take place here. Three possible outcomes from this step: (a) send to the editorial team; (b) return to author for significant changes before proceeding (coaching process); or (c) reject the submission (also known as "desk rejection"). This step may be handled by a managing editor, the Editor-in-Chief, or a designate.
2. An editor is assigned. This could be the Editor-in-Chief, an Associate Editor, or a Guest Editor. This editor will manage the paper throughout the process. The assigned editor may also provide coaching to improve a submission prior to being sent to referees (the "blind peer review" process).
3. In the peer-review process, two scholars are asked to evaluate the anonymized submission based on the journal's review rubric. Extensive comments are requested. One or both of the reviewers may be members of the editorial team. Where there are significant differences in evaluation, a third reviewer may be added. The final rating from each reviewer will be (a) accept with no changes; (b) accept with minor revision; (c) major changes required, return to peer review process recommended; or (d) reject the submission. Reviewers are generally asked to complete a review in less than three weeks, and that, as Kundzewicz and Koutsoyiannis (2005) have observed, "reviewing journal papers is probably the least (directly) profitable scientific activity" (578). Lajtha and Baveye's (2010)

slightly whimsical “carrots and sticks” for reviewers won’t get it done. Let’s pay respect to the unpaid reviewers!

4. The assigned editor, faces a decision, based on reviewer comments: (a) accept the submission (end of review process, forward the submission to the copy-editing, layout, and book-compilation team); (b) reject the submission (and inform the author); or (c) inform the author that additional work is required, under the framework of [i] Conditional Acceptance (very minor changes required in presentation); [ii] Minor Revision (non-significant changes required in the scholarship of the paper; or [iii] Major Revisions required. This response to the author (email letter) returns to a “coaching” environment where every effort is made to encourage the author and facilitate an upgrade in the manuscript in order to complete the publication process with the journal, or to advise how future studies should be conducted.
5. In the case where revision is expected, the author then may choose to revise the manuscript and return it to the assigned editor, or withdraw the submission.
6. Upon receipt of the revision, the assigned editor then either (a) accepts the paper for publication with no further changes; (b) rejects the submission (and informs the author); (c) returns the manuscript to peer review; or (d) informs the author that additional work is required.

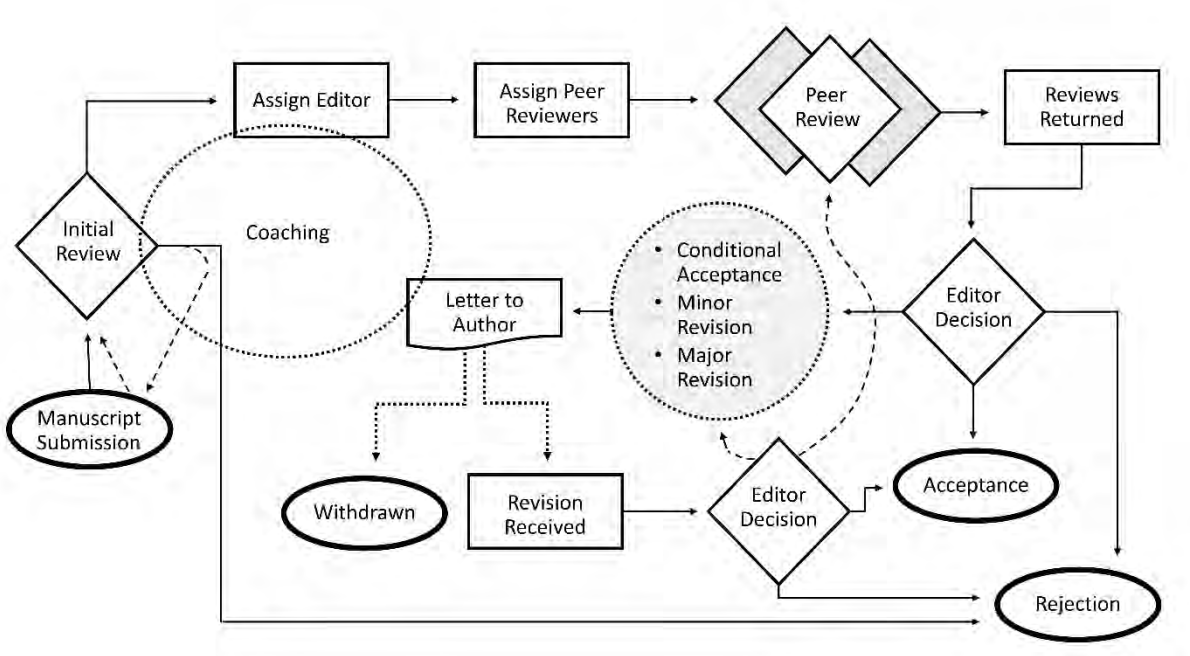

FIGURE 2. IJLLD’s article acceptance flow chart.

Unlike those journals that trumpet their high rejection rates, the aim of the *International Journal of Law, Language & Discourse* is not to claim "quality" through a low acceptance rate. Neither is IJLLD a predatory journal that accepts nearly every submission ready to pay fees. The aim of the journal's editorial process is to foster quality scholarship that benefits the broader academic and professional community at the nexus of law and language. The standard IJLLD peer-review rubric is available upon request (Email: editor@ijlld.com).

Conclusion

With increasing demand for publication in academia, an increasing number of journals have become available, yet many of those persons now required to publish lack awareness of the process and expectations of ethical scholarly publication. After a two-year hiatus, the *International Journal of Law, Language & Discourse* has returned to meet the demand for more scholarship opportunities for those working at the nexus of law and language.

It is important, as Paine and Fox (2018) observe, for authors to recognize the relative strengths and weaknesses of their research and the resulting manuscript, and thereby "reduce publication delays by choosing journals appropriate to the significance of their research" (9566). There are many valuable studies conducted that may not find room in the most highly ranked journals, yet there is still demand for ethical journals that publish new knowledge for the scholarly community at the nexus of law and language.

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Appendix

TABLE 1.

Ownership of Top 50 Scimago Journal Rank for Language and Linguistics

Journal Title	(For-profit) management	
Annual Review of Applied Linguistics	F	Cambridge University Press
Journal of Memory and Language	F	Elsevier Inc.
Applied Linguistics	F	Oxford University Press
Communication Theory	F	Wiley-Blackwell
Modern Language Journal	F	Wiley-Blackwell
Cognition	F	Elsevier BV
Journal of Communication	F	Wiley-Blackwell
Journal of Second Language Writing	F	Elsevier Ltd.
Journal of Experimental Psychology: Learning Memory and Cognition		American Psychological Ass'n
TESOL Quarterly	F	Wiley-Blackwell *Language*
Teaching Research	F	SAGE Publications
Studies in Second Language Acquisition	F	Cambridge University Press
Language, Culture and Curriculum	F	Taylor & Francis
Communication Research	F	SAGE Publications
Research in the Teaching of English		National Council of Teachers of English
Language Learning	F	Blackwell Publishing Inc.
Brain and Language	F	Elsevier Inc.
Annual Review of Linguistics	F	Annual Reviews Inc.
Language, Cognition and Neuroscience	F	Taylor & Francis
Language Policy	F	Kluwer Academic Publishers
Attention, Perception & Psychophysics	F	Springer New York LLC
Bilingualism	F	Cambridge University Press
Computer Assisted Language Learning	F	Taylor & Francis
Journal of Literacy Research	F	SAGE Publications
Syntax	F	Blackwell Publishing Inc.
Journal of Phonetics	F	Elsevier Inc.
System	F	Elsevier Inc.
European Journal of Communication	F	SAGE Publications
Language Learning and Technology		University of Hawaii Press [(1)]
Communication Monographs	F	Routledge
International Journal of Bilingual Education and Bilingualism	F	Taylor & Francis
Journal of Child Language	F	Cambridge University Press
International Multilingual Research Journal	F	Routledge

Discourse Studies	F	SAGE Publications
ReCALL	F	Cambridge University Press
Language Learning and Development	F	Taylor & Francis
Poetics	F	Elsevier BV
Linguistic Inquiry		MIT Press (2)
Interpreting	F	John Benjamins Publishing Co.
Cognitive Linguistics	F	De Gruyter Mouton
International Journal of the Sociology of Language	F	De Gruyter Mouton
Artificial Intelligence Review	F	Kluwer Academic Publishers
Journal of English for Academic Purposes	F	Elsevier Ltd.
Language Learning Journal	F	Taylor & Francis
Journal of Sociolinguistics	F	Blackwell Publishing Inc.
Journal of Writing Research		University of Antwerp (3)
ELT Journal	F	Oxford University Press
English for Specific Purposes	F	Elsevier Ltd.
Artificial Intelligence	F	Elsevier Ltd.
Language Testing	F	SAGE Publications

Notes:
1. Nonprofit University Press? According to each university's press website,
   (1) University of Hawaii Press… "a self-supporting, nonprofit operation "
   (2) "MIT Press is a mission-driven, not-for-profit scholarly publisher "
   (3) University of Antwerp - no info provided
2. Data from the Sciamgo website April 3, 2020:
https://www.scimagojr.com/journalrank.php?category=1203

TABLE 2.

Ownership of Top 50 Scimago Journal Rank for Law

Journal Title	**(For-profit) management**	
International Organization	F	Cambridge University Press
International Security		MIT Press (1)
Criminology	F	Wiley-Blackwell
Stanford Law Review		Stanford Law Review (2)
Journal of Quantitative Criminology	F	Kluwer Academic Publishers
Yale Law Journal		Yale Journal Co., Inc. (3)
Journal of Criminal Justice	F	Elsevier Ltd.
Justice Quarterly	F	Taylor & Francis

Journal of Experimental Criminology	F	Springer Verlag
Police Quarterly	F	SAGE Publications
University of Pennsylvania Law Review		Univ. of Pennsylvania Law Review [4]
Columbia Law Review		Columbia Law Review Ass'n [5]
University of Chicago Law Review		Univ. of Chicago Press [6]
Virginia Law Review		Virginia Law Review Ass'n [7]
Georgetown Law Journal		Georgetown Univ. Law Center [8]
Journal of Law, Economics, and Organization	F	Oxford University Press
Law and Human Behavior		American Psychological Ass'n
Journal of Business Ethics	F	Kluwer Academic Publishers
Journal of Law and Economics		Univ. of Chicago Press [6]
Crime and Delinquency	F	SAGE Publications
European Law Journal	F	Blackwell Publishing Inc.
Regulation and Governance	F	Blackwell Publishing Inc.
New York University Law Review		New York Univ. School of Law [9]
Journal of Legal Studies		Univ. of Chicago Press [6]
California Law Review		Univ. of California Press [10]
Michigan Law Review		Michigan Law Review Ass'n [11]
Higher Education	F	Kluwer Academic Publishers
Criminal Justice and Behavior	F	SAGE Publications
Youth Violence and Juvenile Justice	F	SAGE Publications
Common Market Law Review	F	Kluwer Academic Publishers
Texas Law Review		Univ. of Texas at Austin [12]
Transport Policy	F	Elsevier Ltd.
Antitrust Law Journal		American Bar Ass'n
Accident Analysis and Prevention	F	Elsevier Ltd.
Critical Military Studies	F	Taylor & Francis Ltd.
British Journal of Criminology	F	Oxford University Press
Social Science Computer Review	F	SAGE Publications
Government Information Quarterly	F	Elsevier Ltd.
Duke Law Journal		Duke Univ. Press
Parliamentary Affairs	F	Oxford University Press
European Competition Journal	F	Taylor & Francis Ltd.
Crime Science	F	Springer Open
Journal of Intervention and Statebuilding	F	Routledge
Journal of Contemporary Criminal Justice	F	SAGE Publications
Harvard International Law Journal		Harvard University [13]
Harvard Law Review		Harvard Law Review Ass'n [14]
Marine Policy	F	Elsevier Ltd.
Psychology, Public Policy, and Law		American Psychological Ass'n
UCLA Law Review		Univ. of California at Los Angeles [15]
International Theory: A Journal of International Politics, Law and Philosophy	F	Cambridge University Press

Notes:

1. Nonprofit University Press? According to each university's press website,
   (1) "MIT Press is a mission-driven, not-for-profit scholarly publisher"
   (2) "SLR operated entirely by Stanford Law School students and is fully independent of faculty and administration review or supervision."
   (3) unclear, appears to be incorporated yet owned by school, all archives available free online
   (4) unclear, appears to be owned by the school
   (5) "the Review is an independent nonprofit corporation"
   (6) "a non-profit publisher"
   (7) "Virginia Law Review Association, an independent publishing institution staffed and directed solely by law students at the University of Virginia School of Law"
   (8) unclear, appears to be owned by the school
   (9) unclear, appears to be owned by the school
   (10) unclear, appears to be owned by the school
   (11) unclear, appears to be owned by the school
   (12) "edited and published entirely by students at the University of Texas School of Law" (although there appears to be a "corporation" in its founding, with shareholders who appoint directors)
   (13) unclear, appears to be owned by the school
   (14) student-run organization
   (15) unclear, appears to be owned by the school

2. Data from the Sciamgo website April 3, 2020: https://www.scimagojr.com/journalrank.php?category=3308

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Informal Instant Translation in the Tanzanian Courts: Law Professionals' Perceptions on the Efficacy of English versus Kiswahili in Adjudication of Justice

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Abstract

It is widely known that language plays a fundamental role in the administration of justice. Court languages in Tanzania are Kiswahili and English. The English language is used predominantly for recording and writing of judgments in the Subordinate and High Courts of Tanzania. Kiswahili is used for hearing and recording all proceedings in Primary Courts. The magistrates in Subordinate Courts listen to testimonies in Kiswahili and then translate instantly into English when writing court records. This process of translating court hearings on spot has been considered to be problematic among scholars. This study will examine the challenges of informal instant translation of testimonies from Kiswahili to English in the Subordinate Courts of Tanzania. Specifically, it will focus on the perceptions of law professionals towards the efficacy of the English versus Kiswahili in the adjudication of justice. The study was conducted in the cities of Tanga and Dodoma. Data were collected through observations and interviews. It was found that there were a number of challenges faced by magistrates while instantly translating Kiswahili hearings into English for records. There were also contradicting perceptions of law professionals on the efficacy of English versus Kiswahili.

Keywords: Kiswahili, informal instant translation, court language, legal system, adjudication of justice, efficacy of English versus Kiswahili, Tanzanian Court Model

1. Introduction

The Judiciary of Tanzania refers to an independent organ whose primary role is to administer justice to the public of Tanzania. The justice system of Tanzania includes courts, laws, principles, and the language relevant to the administration of rights (The Constitution of the United Republic of Tanzania of 1977). The Judiciary is generally composed of several courts of varying jurisdictions. According to Nyanduga and Manning (2006), the judiciary of Tanzania consists of four tiers. The first tier is the Court of Appeal of the United Republic of

Tanzania which is the highest court in the hierarchy of the Judiciary. This court is established under Article 108 of the Constitution of Tanzania (1977). The second tier is the High Courts for Tanzania Mainland and Tanzania Zanzibar. These courts are established under Article 107 with unlimited original jurisdiction to deal with all types of cases. The third level of the court system is Subordinate or Magistrate Courts which include the Resident Magistrate Courts and the District Courts. These are established under the Magistrate Courts Act of 1984. Although both courts enjoy concurrent jurisdiction, District courts receive appeals from primary courts. The Resident Magistrate Courts, in particular, are located in major towns, or cities, as the regional (provincial) headquarters. District Courts are found in all districts (the local government units) of Tanzania. Finally, the lowest tier of the courts is the primary courts. These are also established under the Magistrate Courts Act of 1984 with jurisdiction in both criminal and civil suits (Nyanduga & Manning, 2006). Magistrates preside over all adjudicative and administrative duties in the Primary and Subordinate Courts. Judges preside over all adjudicative and administrative duties in the High Courts of Tanzania together with the Court of Appeal of Tanzania. Figure 1 shows the hierarchy of courts in Tanzania.

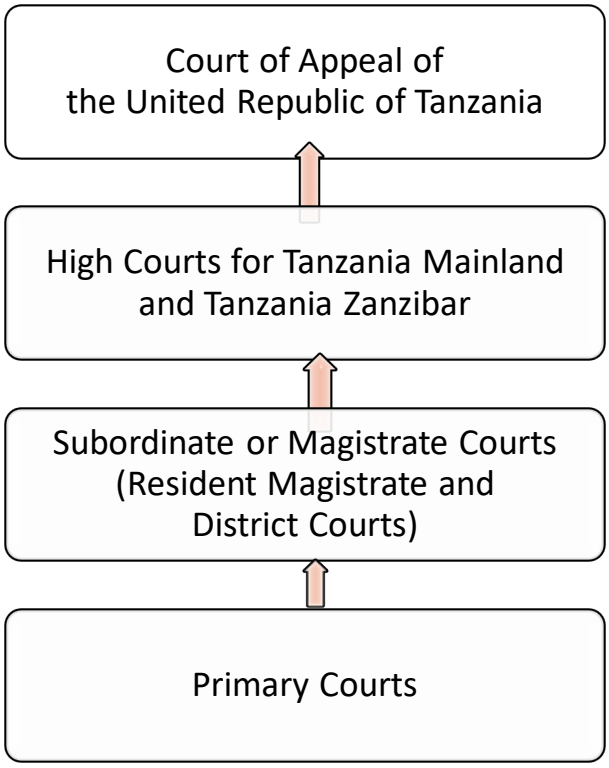

FIGURE 1. Hierarchy of Courts of Tanzania.

The administration of justice is carried out through the use of language, as language plays a significant role in the entire process of adjudicating proceedings in the courts of law (Khalfan, 2018; Rwezaura, 1993). Language is the tool that brings together all parties of the court by facilitating communication among them. According to Khalfan (2018), "language is the oxygen of law and it is a core foundation for justice" (p.viii). In other words, language is used in courts of law as a medium to access justice. In the Tanzanian context, Kiswahili and English are official languages used in the courts of law. Kiswahili is used for adjudicating all proceedings in primary courts but for hearings only in Subordinate Courts, the High Courts and the Court of Appeal of Tanzania. English is used for the recording all court proceedings and writing of judgments in Magistrate Courts and High Courts of Tanzania (The Magistrate Courts Act Cap. 11 s.13). This study will focus on only the Subordinate Courts such as the Resident Magistrate and the District Courts.

Law professionals, who include among others, magistrates, judges, and licensed advocates are the key players in the administration of justice. They are responsible for both adjudicative and administrative duties. According to the Code of Conduct for Judicial Officers of Tanzania (1993), law professionals especially magistrates and judges actively participate in establishing, maintaining, and enforcing a high standard of conduct to fulfill all duties prescribed by law. These duties include hearing cases, giving court orders, ruling, and finally pronouncing judgment.

In fulfilling their adjudicative and administrative duties, the magistrates of District and Resident Magistrate Courts and judges of the High Court translate oral testimonies of witnesses from Kiswahili into English. Together with these multitasking activities of the magistrates, they usually write court records in English with a translation of the Kiswahili oral testimonies. Magistrates also translate into the record arguments given in Kiswahili by the licensed advocates into English during the cross-examination and examination-in-chief sessions. The literature is silent about this kind of translation which involves the transfer of oral text of the source language into the written target text. This is a reversal of the well-known "sight translation." According to American Bar Association (2012), sight translation as a hybrid of interpretation and translation involves interpreters reading a document written in one language while translating it orally in another language without any advance notice.

Several challenges are facing the magistrates in the Subordinate Courts and the High Courts in Tanzania where the languages used in court proceedings change from Kiswahili to English. In these courts (District Courts, Resident Magistrate Courts, High Courts and the Court of Appeal), the languages used are either English or Kiswahili. As stated earlier, the

English language is used for taking and keeping court records during a trial and for issuing judgments, while, Kiswahili is used for hearing of cases only (The Magistrates Courts Act Cap. 11 s. 13 (1) and (2)). The legal language used in the judiciary is expected to facilitate effective communication between parties involved. It is supposed to allow court processes and proceedings to be conducted effectively (Rwezaura, 1993; Wanitzek & Twaib, 1996).

The challenge is caused by the fact that when adjudicating the court's proceedings, magistrates usually listen to testimonies in Kiswahili and then translate them instantly in English as they listen. It is reported that magistrates, interpreters, and translators experienced difficulty in translating testimonies. This has impacted the parties involved (Kasonde, 2017). This study will examine the challenges of informal instant translation done by magistrates in courts when dealing with court proceedings.

2. Literature Review

Magistrates' translation of witnesses' oral testimonies and lawyers' arguments into English records is referred to in this study as Informal Instant Translation (IIT). It is another novel hybrid of interpretation and translation service in courts. IIT is *informal* translation because it does not adhere to the professional standards of the translation procedure. The professional standard of courts' translation as stated by the American Bar Association (2012) should involve competent language access providers, including court interpreters and translators. These standards include using translators who are fluent in the working languages with professional interpreting and translating skills, familiarity with technical terms and courts' culture as well as adherence to codes of professional conduct for court interpreters and translators (American Bar Association, 2012). According to Wang (2013), translation is a language skill which integrates factors such as the style of the source text and the untranslatable cultural information in the source text. It is *instant* because it is carried out on spot by magistrates during the actual testimonies as witnesses continue to testify. Licensed advocates during the cross-examination and examination session usually argue in the Kiswahili language while magistrates translate such arguments into the English language as a way of keeping court records. Usually, these arguments and witnesses' oral testimonies are not recorded in audiotapes or other audio-recording tools but are translated instantly during testimonies.

According to Bassnett (2002), translation procedure involved four stages: reading of the source text, analyzing the source text (ST), restructuring the target text (TT) and finally translating to the TT. Just like writing, translation involves a language skill which combines knowledge of vocabulary, grammar, pragmatics, paragraph writing and organization of the

larger discourse (Wang, 2013). In formal translation, the translators are supposed to be recording the oral text, transcribing the oral text into written text, then analyzing the source text (ST), restructuring in the target text (TT), and finally translating it in the written target text with all revision, editing, and proofreading. However, since the translation of hearings is not done by professional translators but with magistrates with limited translation skills, these instant translations do not adhere to translation standards. Instead, the magistrates in these subordinate courts and judges in the High Courts and the Court of Appeal are the ones who perform such Informal Instant Translations (IIT) in the courtrooms. This is labeled as the "Tanzanian Court Model" in this study, whereby, magistrates and judges have been tasked to hear testimonies in Kiswahili and record them with the English translation (Magistrates Court Act of 1984 Cap 11, section 13(b)).

The choice of court languages is highly debated among scholars and it is reported to cause ineffective communication in courts of law. Several scholars from different fields have discussed various causes of communication barriers in courtroom settings. Scholars' opinions diverge based on the fields and nature of the causes (Khalfan, 2018).

The first group of scholars has argued that the use of Kiswahili both in education and in courtrooms would solve communication barriers (Mazrui, n.d; Rwezaura, 1993). This group of scholars argues that English is the main source of a barrier to communication and the use of Kiswahili will eliminate the barrier and would allow access to justice since the majority of Tanzanians are conversant in Kiswahili (Khalfan, 2018; Rwezaura, 1993).

The second group of scholars has not associated these challenges with the use of a certain language but rather with the legal system itself. They argue that law, as a specialized field or profession, is the main hindrance to effective communication in courtrooms. These scholars argue further that the language barrier would continue to exist regardless of the languages used in courts (Khalfan, 2018; Mukoyogo, 1991). There is a growing debate that calls for using Kiswahili not only in courts of law but also across the education system (Kavugha & Bobb, 1980; Mukoyogo, 1991; Rwezaura, 1993).

Other scholars have pointed out the challenges of using English and Kiswahili in Tanzania and translation problems are not necessarily associated with them. They indicated that the language problem is associated with the nature of the justice system (Blommaert, 2005; DuBow, 1976; Karton, 2008; Namakula, 2014). Thus, these scholars looked at the language challenges from an international criminal justice point of view (Karton, 2008; Namakula, 2014).

Since Kiswahili is used for both the hearing and recording of proceedings in Primary Courts (Khalfan, 2018; Rwezaura, 1993), there are a few problems associated with this level

such as failure to understand testimonies when a witness or a litigant does not understand Kiswahili. This occurs because these courts have less formal proceedings; they exclude the presence of lawyers and Kiswahili is understood by the majority of Tanzanians (Blommaert, 2005; DuBow, 1976). This situation helps lay people participate in decision processes (Wanitzek & Twaib, 1996). However, not all court clients understand Kiswahili as aforementioned. Some clients, especially those in rural areas, understand only ethnic community languages. It was reported that there are few problems in rural Primary Courts (Rwezaura, 1993). This is because the language barrier in the Primary Courts has been overcome by the courts' assessors who interpret from witnesses' vernacular language to Kiswahili (Mukoyogo, 1991).

Most of the scholars recommended various solutions to overcome communication barriers in the courtrooms based on their professional points of view (Karton, 2008; Kasonde, 2017). This study starts from the presumption that participants' perceptions and attitudes play a significant role in understanding the phenomena under-study, and will investigate perceptions of law professionals on the efficacy of English versus Kiswahili in adjudicating court proceedings. The study will also examine the challenges faced by magistrates when listening to testimonies in Kiswahili and translating them instantly into English.

3. Theoretical Framework

This study is guided by the Communicative Functional Approach of Translation which was introduced by Zinaida Lvovskaya in the 1980s (Sdobnikov, 2011). According to this theory, the translation process is not a mere replacement of SL words or structures by the TL words or structures, but rather it presents the act of communication between the three participants (trio); the author of the ST, the translator, and the receivers of the TT (Sdobnikov, 2011). According to the Communicative Functional Approach, translation scholars investigate a translation event in the framework of one specific communication situation within which the translation is done, taking into consideration both linguistic and extra-linguistic factors (Sdobnikov, 2017). These include the communicative intention of the source text sender, the character of the communicative effect produced on the TT recipients (Sdobnikov, 2017).

This means that the approach establishes communication between representatives of different cultures, contexts and that a translator is a mediator in the communication whereby the author of the SL message is communicated to the receivers of the TL message (Sdobnikov, 2011). This theory is used to guide this study in investigating communicative challenges in the

courtrooms by viewing context of communication environments such as speakers (witnesses or litigants), the recipients of the hearing such as parties of the courts and the magistrates, the translators (magistrates in this case who translate oral testimonies into English records translated from Kiswahili) and parties of the case who are the receivers of TT.

4. Methods

This study was carried out in two regions: Dodoma and Tanga. It involved 20 law professionals, including 8 court magistrates, 10 licensed advocates, and 2 lecturers of law. Magistrates and licensed and practicing advocates were sampled purposively. According to Taherdoost (2016), a purposive or judgmental sampling involves selecting settings, persons or events deliberately in order to provide important information that cannot be obtained from other choices. In this study, sampling of these law professionals was determined based on those who had great legal knowledge and, for those involved in court proceedings, only those who had legal experience of more than four (4) years. The sampling of participants also considered language competence, where all participants were those who had basic interpersonal communication skills in both Kiswahili and English. Convenience sampling was adopted to sample lecturers of law: under this selection process, two lecturers were selected because they were available during the holiday season for the period of the data collection. Some scholars emphasize that convenience sampling can be used when they were easily available and ready to participate in the study (Alvi, 2016; Taherdoost, 2016).

Data of this study were collected through observation, in-depth interviews with these law professionals, note-taking, and focus group discussion. The researcher observed the practice of courts' trial processes and interviewed law professionals. Data were collected from August 2019 up to November 2019. They were collected in courtrooms, law chambers and at the Institute of Judicial Administration Lushoto. Data were collected in Lushoto, Korogwe, and Dodoma involving both District and Resident Magistrate Courts. The collected data involved those which were about challenges and effects of informal instant translation in magistrates' adjudication of justice. In addition, the collected data involved those that concerned perceptions of these law professionals on the efficacy of English or Kiswahili in the administration of justice.

Data were analyzed by using Thematic Coding Approach with the help of the NVivo 10 software. Thematic analysis has been considered to be one of the best approaches to analyze qualitative data, particularly when it involves analyzing themes (patterns) found in the study or that relate to the data collected (Alhojailan, 2012; Nowell, Norris, & White, 2017; Rahimi,

2014). Several scholars in different fields have indicated the importance of using thematic analysis and they have used this approach to analyze their data (Alhojailan, 2012; Nowell, Norris, & White, 2017; Rahimi, 2014). Alhojailan, (2012:40) contended "thematic analysis is considered the most appropriate for any study that seeks to discover using interpretation." NVivo software also has become a very useful tool to analyze qualitative data. A number of scholars have adopted the NVivo programme when they analyzed their findings across different fields (Nowell, Norris, & White, 2017; Wei, 2014; Zamawe, 2015).

5. Findings and Discussion

The findings presented and discussed in this section are based on the analysis of interviews and focus group discussion (FGD) with magistrates, lawyers, and lecturers of law from the two regions. Since this study used a phenomenological research design, lawyers' points of view and their lived-experiences were the major focus of this study. The findings of this study are based on twenty (20) law professionals from Tanga and Dodoma. The findings of this study are analyzed into four themes including the role of court languages in promoting economic development of the country, challenges facing the magistrates when they translate testimonies instantly, effects of such instant translations, and perceptions of lawyers on the efficacy of English versus Kiswahili.

5.1 The Role of Court Languages

The role of the court language was explained by all lawyers who were interviewed during data collection. Almost all participants agreed that languages of the court play a significant role not only in running the court business but also in promoting the economic development of the country. In discussing the reasons behind the selection of these court languages, some participants illustrated the reasons for selecting English to be the legal language in Tanzania. Participant J contended,

> English is chosen because it is the legal language. And this is arising from the fact that our legal system is English based; the legal term in the Common law. It is Common legal system which has its root from England. And because of this, England colonized Tanzania by then was called Tanganyika and many East African countries or we can call it Common East African countries. So, the legal language is from Common Western countries.

English was made the legal language in Tanzania because it originated from Common law (Nyanduga & Manning, 2006). In addition, lawyers revealed reasons behind selecting Kiswahili to be used in the courtrooms. They argued that Kiswahili is the medium of instruction

and it is understood by the majority of Tanzanians. Thus, it is used as a way of honouring the national language and facilitating communication among court clients. Participant G illustrated,

> But, in order to honour and respect our national language which is commonly spoken by the majority of Tanzanians, we are using Swahili. So, the legal languages are English and Kiswahili. But according to law, although the legal language is English, someone can speak in Kiswahili. However, the records of the courts must be in English. The primary courts have to use Kiswahili which is the official language for primary courts. It is not English.

In summary, the above quotation reveals that English is used because the legal system is English-based and many kinds of literature and the education system use English. Kiswahili is adopted in order to simplify the communication in the courts of law because it is the lingua franca, hence; it is understood by the majority of Tanzanians.

Coming to the role of the court languages, all lawyers who were interviewed revealed that court languages play a very imperative role. The appropriate use of certain languages can help in the timely administration of justice. These lawyers' propositions concur with the American Bar Association, (2012) which emphasized the importance of maintaining standards access to language in courts. Again, according to the American Bar Association, these standards aimed at facilitating courts in implementing, designing and enforcing a comprehensive system of language access services. This means that courts are supposed to make sure that access to justice among people with limited English proficiency is guaranteed (American Bar Association, 2012). Thus, most participants of this study highlighted the importance of court languages in accessing justice.

Court languages are reported by the lawyers to promote economic development including industrial development. This is true because when the right language is used in the courts of law, people will access their rights on time and they will go to participate in the various economic activities. In addition, the right choice of language will enable other countries to see what is going on in the legal system of the country. If the country is governed by the rule of law, it will be easy for the developed countries to invest in different sectors including the industrial sector. To easily access justice in courts, different countries and international organizations such as the European Union since the 1950s have insisted on the importance of providing language assistance in different cases including criminal proceedings. According to Brannan (2016), the European Union (EU) in the 2010s incorporated the right of language assistance in the European Court of Human Rights to address and guarantee quality language assistance. In this case, every person who is arrested or charged with criminal offenses was

supposed to be informed in the language he/she understands and to freely access the interpreter (Brannan, 2016).

Following quality language assistance in courts, justice is administered on time and people can engage in different economic activities. Participants of this study emphasized the importance of court languages in bringing development. Participant L, a lecturer of law, stated "I think no development can be established without communication. So, lack of development indeed must be resolved and this must be through court law where the language is again important."

It should therefore be emphasized that language of whatever setting plays a significant role in promoting economic development, including industrial development in the country. In summary, the above section demonstrated that a good selection of court languages plays a significant role in the administration of justice and for economic development.

5.2. Challenges facing the Magistrates in Performing Informal Instant Translation

Translation is a professional occupation that requires professional skills (Bassnett, 2002). Translation in the courtrooms can be done in two ways. Firstly, it can be done in the form of interpretation whereby the parties can be speaking in the language which is not known by the courts. In this regard, court interpreters can be used to interpret to facilitate communication during the interview sessions, proceedings and witness testimonies (American Bar Association, 2012). In the Tanzanian Primary Courts, assessors sometimes are used for interpreting testimonies presented in the vernacular languages. Translation on the other side can be done during the hearing process of parties of the courts whereby some documents can be translated orally (sight translation) or in written form as part of the evidence (American Bar Association, 2012; Brannan, 2016).

In the Tanzanian context, the magistrate who runs courts' proceedings listens to the testimonies in Kiswahili and at the same time translates them in English on spot (Informal Instant Translation). This process was reported by various lawyers participating in this study to create various challenges. Participant C remarked,

> I think the practice of taking or listening [to] proceedings in Kiswahili and making records or recording in English is a big challenge to most of the magistrates and most judges. This is because; it is very hard to listen and write at the same time. But it is quite too hard to listen in one language and to write it in another language. So, this is a very big challenge

Most participants of this study highlighted the difficulties experienced by magistrates as they struggle listening to testimonies in Kiswahili then writing them into English. They

revealed that some magistrates concentrate more either in listening to cases leaving out writing translation or they focus more on translating testimonies leaving out intensive listening to the cases. Participant C continued, "Some magistrates fail to listen at the same time to write in another language. They either pay more attention on hearing or writing translation".

Participant (D) supported the above assertion by revealing that the challenges are obvious because the magistrates are not very conversant in spoken English. So, in most cases, they failed to render the equivalent terminologies to the court's legal language. He commented,

> The problems are obvious; the challenges are obvious. We don't have a good mastery of the English language. Or to be specific we are poor in English. But still, we are applying English. And in many cases, witnesses may give their evidence in Kiswahili. Magistrates translate testimonies in English from Kiswahili with the poor command of English. Therefore, the challenges are obvious. The record-keeping sometimes may need some important facts because of ignorance of the magistrate to what the witness might have said and what the magistrate might have recorded. I can give you some examples. For example, a certain witness said: "alikuwa amevaa nguo yenye viraka viraka" ["he was wearing clothes with patches"]. Now how can that magistrate translate [this] in[to] English?

This participant went further by indicating how most of courts in Tanzania lack appropriate recording tools such as audio-recorders and how such incident affects their adjudication of justice. He (participant D) argued, "Most of courts in Tanzania lack recording tools. This makes them fail to record all the important information which could assist the litigant."

The above quotations confirmed the presence of difficulties encountered by magistrates when they instantly translate testimonies from Kiswahili to English. These challenges are exacerbated by the lack of enough linguistic competence and translation skills among the magistrates.

5.3. The Effects of Informal Instant Translation in the Courtrooms

Poor language competences and translation skills of the magistrates are said to generate a number of negative impacts, including the misinterpretation of testimonies, delay of cases, and even miscarriage of justice. Various scholars have reported the need for court interpreters to aid in the smooth running of everyday court proceedings (Aliverti & Seoighe, 2017; Kasonde, 2017; Northcott, 1997). Specifically, Alverti and Seoighe (2017) highlighted that the presence of court interpreters significantly shapes the court's proceedings and impacts interactions inside and beyond courtrooms. The reverse is also true. Failure for courts to use court interpreters or

translators is likely to cause numerous challenges (Aliverti & Seoighe, 2017). Different challenges have been described by various participants of this study. Participant I asserted,

> There is a delay in cases. This is because the magistrate will not be fast in record taking. There will be a miscarriage of justice because the magistrate may have failed to put in record some important facts which would be relevant in the determination and resolution of the case. Again, the magistrate may misinterpret some words which can bring the wrong meaning which misleads the reader.

The above quote indicates that there are many effects of the instant translations performed by the magistrates in the Subordinate Courts of Tanzania. These effects include a miscarriage of justice, misinterpretation and sometimes a delay of cases.

Miscarriage of justice happens when the magistrate records something different from what the witness has said. Kasonde, (2017) remarked that, "lack of standard interpretation – translation services in Zambia and other multilingual African countries in the judiciary remains a daunting challenge" (p.23). And if the distorted evidence was important in supporting the case, then the magistrate may not adjudicate the case rightly.

Misinterpretation of evidence happens when the magistrates fail to translate the source speech faithfully because of lack of professionalism in translation, or lack of equivalent terminologies in the target language or due to the pressure of time of rendition (Kasonde, 2017). This occurs when the witness keeps on speaking while the magistrate struggles to capture the message correctly in another language.

Delay of cases happens when the witness does not speak the court's languages or the magistrate has failed to find equivalent words for use in the records. According to Kasonde (2017), these deficits are characterized by a lack of professionalization in the judiciary sector. Consequently, the magistrate may adjourn the case until he/she can write a good record or to find the interpreter in case the witness uses a different language.

In addition, some participants have reported that the effects of this poor recording system caused by Informal Instant Translation can go on even to the Court of Appeal. Participant I, a lecturer from Tanga, revealed,

> Remember, the Higher Courts, when they entertain the appeal, they don't call witnesses. These High Courts just rely on the records which were taken by the lower courts. So, they don't have witnesses. They just rely on the records which were taken by the prior magistrates. So, they decide that appeal based on the records taken by prior magistrates.

This becomes a very serious matter as by relying solely on the records which were taken by the magistrates from the lower courts could bring another challenge in the case where the records were wrongly taken. Participant I continued,

> Suppose the magistrate misinterpreted or missed some parts. That error is incurable. So, the challenges are obvious. The next court in dealing with the appeal will not have the opportunity to hear the witness. We will not have an opportunity to get the facts. So, it will rely on the facts which were wrongly taken or wrongly interpreted or some facts which maybe was not recorded. So, the miscarriage of justice may be obvious.

Thus, mistranslations that were done by the presiding lower courts do not affect only witness testimonies in the said courts but also will affect in appeals to the High Courts. The results of their appeal may be constrained by the same mistranslations that were done by the prior magistrates.

In short, this section discussed the effects of informal instant translation in the administration of justice. It concludes that magistrates encounter translation problems in courtrooms due to insufficient language and interpretation skills. There are delays of cases, misinterpretation of testimonies as well as the miscarriage of justice. The miscarriage can also be extended to the Court of Appeal since they rely on the same information which was wrongly recorded.

5.4. Perceptions of Lawyers on the Efficacy of English versus Kiswahili

Lawyers also were given time to present their perceptions on the efficacy of English versus Kiswahili in running court proceedings. Their perceptions can be divided into three groups, namely those who proposed making Kiswahili as solely court language, those who proposed English and Kiswahili to remain as languages of courts, and those who propose Kiswahili to be used also in the recording. Figure 1 indicates the frequency distribution of the perceptions of the lawyers who were interviewed in this study.

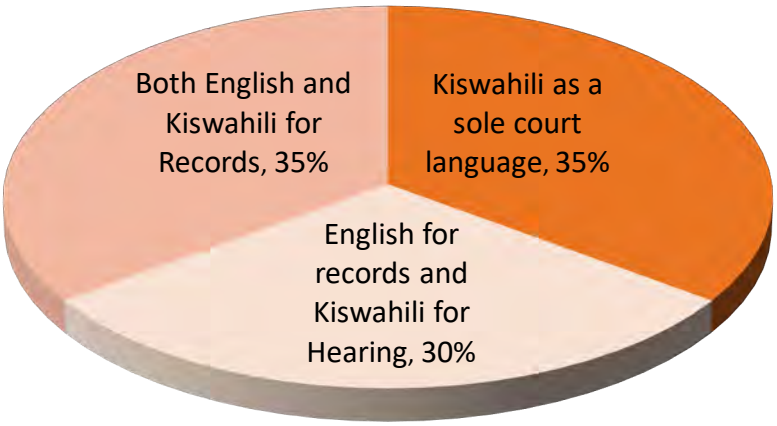

FIGURE 2. Law Professionals' Perceptions Frequency Distribution.

The first group of lawyers proposed Kiswahili to be the sole court language at all levels of the courts. 35% of all participants proposed that the court language should be solely Kiswahili for both hearing and recording. They said that Kiswahili is understood by the majority of people and it is the national language of Tanzania. Specifically, participant G held,

> The problem with us Tanzanians is that we don't understand English. So, many Tanzanians know Kiswahili. It is the media of communication. And Kiswahili is the unifying language known by the majority of Tanzanians. So, Kiswahili is preferable.

This group of lawyers concurred with the scholars who proposed the change of court languages from English to Kiswahili language (Mazrui, n.d; Rwezaura, 1993). Those scholars suggested that Kiswahili should be made the sole court language because it is understood by the majority of Tanzanians. It can also help all parties of the court to freely participate in the entire court proceedings. Although these participants proposed the shift, they recognized the difficulty of changing language. They declared that the legal system of Tanzania has its roots from Common law. It has literature written in English. There is a lack of sufficient professional translators as well as legal training to be done. Changing the court language from English brings a new challenge, as revealed by participant L ,

> The problem arises as I said; English is the legal language that traditionally is rooted in England. So, our laws and principles are imported. Most of them are not only in the English language but also the literature is in English as well. So, many books we use them as references are written in English. So for now, we are lacking material resources and experts to have those materials translated.

This group of participants identified several factors that drew back initiatives to change English to Kiswahili. They alleged that the whole process was constrained by the root of the English legal system in Tanzania and the education system of the country where the medium of instruction and the teaching materials are all written in the English language. As a strategy to overcome the stated challenges, these participants proposed that the government should start the movement of translating different material resources such as books, statutes, papers, judgments, law reports into Kiswahili. The government should start training law students in Kiswahili and finally should start using Kiswahili for both hearing and recording in the Subordinate Courts of Tanzania. Participant G contended,

> The English language as I said is a foreign culture. If at all we need to have our own culture, we must have some mechanisms. We must be in a process or a place. We should have sound mechanisms, and full determination to have Kiswahili promoted. So, we must do so much. We must invest in Kiswahili; we must be serious to change.

The proposition was also agreed to by scholars who are supporters of this school of thought (Mazrui, n.d; Rwezaura, 1993). These scholars suggested that the training of legal students should be done in the Kiswahili language. There should also be some initiatives of translating different legal documents such as statutes, law reports, and reference books into the Kiswahili language (DuBow, 1976; Mazrui, n.d; Rwezaura, 1993).

Coming to the second group of participants, they proposed English and Kiswahili to remain as they are used now in the courtrooms. They have affirmed that English should remain as the legal language for recording and Kiswahili for hearing. They said that the Tanzanian legal system originated from England and any attempt to translate them in Kiswahili would lose their meanings and bring confusion. Participant C expressed his thoughts as

> Kwangu mimi lugha fanisi ni lugha ya Kingereza itabaki palepale sababu mfumo wa kisheria tunaotumia sasa ni mfumo ambao chimbuko lake ni Uingereza. Kwa hiyo kuna kanuni nyingi ambazo zimeainishwa kwa lugha ya Kingereza ambazo ukijaribu kuzitafsiri zinapoteza maana. Kwa hiyo lugha ambayo italeta ufanisi kwa majaji na mahakimu ni kutumia Kingereza ili iwe rahisi kwa watu ambao hawajui kusoma kwa Kiswahili waweze kusoma maamuzi yetu na kuweza kuyakosoa. [To my side, the efficient language is English. It has to remain the same as the court language since our legal system is rooted from England. Therefore, there are many rules and principles which are English-based and trying to translate them would lose

> their original meanings. So, the English language will bring efficiency to the judges and the magistrates. This will also enable other people who do not understand Kiswahili to access our judgments.]

This group of participants made up 30% of the interviewed participants. They agreed that although Kiswahili is understood by the majority of the people it has its challenges to be adopted as the court language. They provided several challenges that face Kiswahili as sole court language including legal training to not be done in Kiswahili, Kiswahili has limited technical terminologies and many kinds of literature are written in the English language. Therefore, they proposed the English language to remain the language of records and Kiswahili would be used by witnesses when they are giving their testimonies.

The last group of lawyers proposed both Kiswahili and English to be languages of records. This group made 35% of all sampled populations. The group observed that the magistrates and judges are confronted with the problem of translation. As a result, they ended up mistranslating the testimonies or sometimes they failed to record equivalent terminologies of Kiswahili testimonies into English records. As a strategy to overcome such a challenge, these lawyers proposed Kiswahili to be used for recording in the same manner as English. By so doing, all Kishwahili testimonies will be recorded in Kiswahili and judgments can be written in both Kiswahili and English. Participant K argued,

> Mimi ninaamini lugha zote tu ni fanisi kwa sababu ukija kwa Kiswahili, mahakama hizi za kitanzania maana hata zile hukumu zinazotolewa kwa lugha zote mbili yaani zinapaswa kila mtanzania akitaka kujua kesi fulani aijue" [I believe both languages are efficient in court proceedings. This is because when judgments are written in both languages, it will be very easy for any Tanzanian to access and understand the judgment written in Kiswahili.]

So, these lawyers proposed both Kiswahili and English should be used as the court languages. They proposed that Kiswahili also should be used to record the proceedings as well to write judgments. That is to say both Kiswahili and English should be languages used for hearing, taking records and writing of judgments. The magistrates with the aid of court translators can prepare two judgments; one in Kiswahili and another version in the English language. Participant B emphasized, "Nasema zote zitumike lakini zaidi Kiswahili nacho kiruhusiwe kuingia katika records." ["I say that both languages should be used as the court languages. Kiswahili should also be used for recording court proceedings."]

In short, this group of participants calls for the government to allow Kiswahili to also be the language of the records and judgments. This will solve the problem of mistranslation. It will also simplify the communication process among various court parties. The normal citizens will have access to understand and participate in the whole adjudication process because they will understand everything said during and after the judgments.

6. Recommendations and Conclusion

This study examined the challenges and effects of the informal instant translation of Kiswahili oral testimonies to English records which are performed by magistrates in the Subordinate or Magistrate Courts of Tanzania. The study also considered the perceptions of law professionals towards the efficacy of English versus Kiswahili as court languages. It was observed that practices of courts in Tanzania raise a concern. Magistrates in courts become so busy when they translate testimonies at the same time fulfilling adjudicative duties. This means that they either pay more attention to listening to cases than writing a translation, or they do not pay attention to the broader testimony while being immersed in the writing of a translation for court records. Furthermore, there is no audio recording during the hearing of testimonies. In addition, if a judgment is in an error and includes the fact that the translation record is either incomplete or erroneous, there is nothing that can be viewed by an appellate court except the magistrate's record. This situation calls for the immediate use of professional court interpreters and translators. This also necessitates the use of modern tools such as audio recorders and other information technologies to be used in the courtrooms. If these two options are not adopted by the judiciary, magistrates will continue to be confronted with the challenge of mistranslation during the court proceedings. This will also mean that the identified effects, including the delay of cases, miscarriage of justice as well as misinterpretation of witnesses' testimonies, will continue to persist.

Coming to the efficacy between English and Kiswahili as court languages, this researcher is in favour of using Kiswahili for recording and writing judgments. This means that both Kiswahili and English can be used for both hearing and keeping of records. The shift will be advantageous to all parties of the courts. This change will help magistrates to do away with the translation challenges because all Kiswahili testimonies will be recorded in Kiswahili. Judgments can also be written in both Kiswahili and English. Professional court translators and interpreters will be used for translating and interpreting texts, including judgments, from Kiswahili to English. This will help also the majority of Tanzanians to easily access judgments.

Although this study used only the reduced number of twenty (20) participants, and does not discuss concrete practical examples of the challenges and effects from the courtrooms, this paper acts as the starting point for further studies, particularly those involving larger groups of informants and including both qualitative and quantitative approaches. Further research can be developed in the practical challenges of informal instant translations in courtrooms. Informal instant translation is still a novel hybrid of interpretation-translation service in courtrooms; hence it requires further studies incorporating different approaches, designs and theories other than the Communicative Functional Approach.

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The Sexism of Transitive Verbs in Legal Process

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Abstract

The use of grammatical transitivity by the criminal law is considered. This question is discussed: is it appropriate for courts to use a discourse in which unthinking men do actions that cause harm to the feelings of women? Is the mental state of an actor depicted by the language used to describe the actions of that actor? The choice of verbs such as “abuse”, “treat” and “ply with” and military metaphors such as “bombard” and “harass” in relations between men and women are particularly problematic. The data analysed are child protection, relationship break-up, and intimate partner violence. Frieze’s evidence on habitual one-sided violence and the more frequent “common couple violence” is reproduced. Transitive verbs are analysed in the cases of *R v. Love* and *R v Balakrishnan*. Some reformulations using intransitive verbs with multiple agents are offered.

Keywords: transitivity, sexism, abuse, harassment, coercion

Introduction

Law depends heavily on accurate use of language, yet the way we speak remains preconscious and needs bringing into the light. The rationale for the present research is to examine the use of transitive verbs in legal processes to see whether bias is created. The question to be answered is whether rephrasing with intransitive verbs changes the presumption of wrongdoing. The methods for the analysis are linguistic, particularly those used for elucidating hidden syntax.

The traditional grammar of English derives heavily from the grammar used to teach Latin, dating from the centuries when Latin was the high language of England, reconstructed from historic sources. Verbs are our interest here, so does English have the tenses, moods and voices that are essential for learning Latin? Moods show the speaker's attitude to what they are saying. Most utterances are in the indicative mood, but other possibilities are interrogative, imperative or subjunctive. Questions and orders are fairly self-explanatory, whereas subjunctive in English is now a rarely-used mood for hypothetical events. It was historically taught in English but is now hardly marked in morphology and most educated people cannot reliably distinguish it. A

hypothetical judge might say about an agitated accused, “I order that the prisoner *is* removed and *sees* a doctor”. These might slip by as a good English sentence, but a nagging doubt might prompt him or her later to change it to “…*be* removed” and “that he *see* a doctor”. The judge might also say “if the accused drank less, he might remember who he gave the stolen items to”. On reflection the judge might notice this type two conditional is using an unreal past and also recall that “who” displays inflectional morphology. The transcript might then read, “…if he *were* to drink less …” and “to *whom* he gave the stolen items”.

The judge who chose these corrections would be reinstating the subjunctive mood, the ‘who’ morphology and an older verb form for the conditional, which are each slipping into disuse. Omission of the subjunctive and unreal past in a conditional are now generally acceptable for educated English. This obsolescent English would probably increase the perceived gravitas of the court, at the expense of distancing it from the accused. This obsolescence is of interest here in possible distortions introduced by a court that chooses to use transitive verbs for the actions of a man attributed the status of perpetrator and intransitive verbs for the feelings of a woman attributed the status of victim.

Voice usually means active or passive, and a middle voice is described occasionally. There is a small literature on the passive voice in legal use. Riggle (1998) analysed 185 legal texts used in the US Air Force. This author notes that many current technical writing handbooks still advise writers to avoid the passive voice, but finds several situations where there is a choice between active and passive voice. I am choosing to use the first person in the rest of this paragraph after reading Nunn et al's (2018) analysis of 10 papers in the journal Nature, which encourages the use of the first person in conjunction with the active voice. They found that authors used the passive voice more in the method section but first-person transitive verbs in the main body. In clinical practice I found that probation officers may advise their clients not to say, “he looked at me in a funny way so I hit him before he could hit me”. An alternative such as “I was under severe threat and was obliged to defend myself” is likely to induce a more favourable attitude in the judge.

Transitivity is a relatively robust way of describing verbs. This construct refers to whether or not the verb takes a direct object. Some verbs such as “give” can take an additional indirect object and are said to be ditransitive. The hypothesis to be investigated here is this: speakers trained in law frequently choose a verb that has a female, or the mental state of a female, as direct object of a transitive verb.

In modern linguistic theory there are many competing grammars. Chomsky’s approach has had several iterations, of which the third was Minimalism. I used Adger’s (2003) textbook and

managed to analyse syntactic trees in an examination and achieve a good pass, but still find Minimalism challenging! Another approach is Corpus Linguistics (Sinclair, 1992), which is particularly appropriate for large amounts of text on computers. Algorithms may be used to predict the next word without assuming a sentence syntax. This is good for mobile phones, but not for law.

Systemic Functional Linguistics (SFL) is another competing grammar theory, which offers a different account of transitivity. SFL was proposed by Halliday and widely used for research on legal proceedings. Halliday rephrases transitivity in terms of three constituents: Participant, Process and Circumstance. For example, one study of English-Persian legal translations (Aghagolzadeh & Farazandeh-pour (2012) used SFL in a typology of students' errors. They classify a "Mistranslation" only when all three transitivity constituents in a sentence, namely Participant, Process and Circumstance, are wrong.

De Carvalho Figueiredo (1998) analysed transitivity choices in five appellate decisions in rape cases, using Halliday's understanding of transitivity. She says, "To analyse relations of agency and causality in the reported decisions I will investigate not only what kinds of processes appear in it, but also the passive and the nominalizations used when referring to the three main participants of an appeal: the judges (or the Court), the appellant (the man convicted of rape, who is now appealing the previous judgment) and the complainant (the woman who was raped)." Note that she does not say "the woman who alleges she was raped". The author's use of critical discourse analysis makes transitivity hard to separate.

Bartley (2017) also analysed transitivity in a courtroom discourse where a man was convicted of raping a minor. He uses the Appraisal feature of Systemic Functional Linguistics to examine the closing arguments of lawyers for both sides, which apparently led to wrongful conviction. Bartley later expands this PhD thesis in a comparison of the Sydney and Cardiff approaches to SFL (Bartley, 2018). Unfortunately, there is no phrasebook, as it were, to compare several competing grammars with traditional grammar, so the reader will be greatly slowed down if they have to follow this side route. For the present research traditional grammatical terms such as "adverb" (see e. g., Vocatic, no date) will be used in preference to "circumstance" of SFL.

"Consent to sexual intercourse" is particularly problematic linguistically. It implies an active male agent and a female passive object. It makes the comparison with consent to a surgical procedure. The consent form is in principle the moment where the doctor yields agency to the patient, though I have heard junior surgeons say they "have consented the patient". Consent in law requires a permanent record - in text with a signature, or by audio-visual recording. This

hardly ever happens and indeed I would be interested to hear of a historical record of consent to intercourse. Kaitlin Priest is a woman journalist who discloses her own sensitive experiences, including an episode where she went to bed with a long-term male friend and subsequently regretted doing so. She had left her recording equipment running and later listened to her own conversation. In this rather unusual evidence, she reappraises her utterances as excitement. Radiolab (Oct 12, 2018) included this in a series of four podcasts using the punning title "in the no". Radiolab tentatively suggests that "they reached a consensus" (and, presumably, "they disagreed") is a better phrase than "she consented". In legal practice consensus or dissensus may have to be decided behaviourally. "Coming in for a nightcap" implies a strong commitment and putting on a condom is almost unambiguous. "Consensus" derives from Latin "consentire" - "to feel together" via French. The derivative "consent" meaning "giving permission" apparently occurred in French before it was borrowed into English. It was mainly used for legal contracts until about 1977 when it was extended to rape (Online Etymology Dictionary, n.d.).

Methodology

The materials below are compared on one feature only – transitivity. The utterances have been presented under a numbering system which can be used for later analysis. While, in principle the official record of a court procedure can be found at the judiciary.uk website, strictly speaking, the utterances in the sections beginning with "2" or "5" are taken from newspaper reports, thus, these two groups are sentences provided by the newspaper editor rather than the court's transcription.

Analysis

The following seven sentences 1.1 to 1.7 are constructed by the author for purposes of discussion or have been drawn from external sources (where noted). They use verbs that are relatively appropriate for describing conception. Consider the agency of the following statements.

1.1 Adam begat Seth; and Seth, Enos [1 Chronicles 1, *Wycliffe Bible*]

1.2 Mary was found to be pregnant through the Holy Spirit [1 Matthew 18, *New International Version Bible*]

1.3 John and Jane decided to have full intercourse on her 16th birthday, but he got her pregnant straight away

1.4 John and Jane feel they are mature and financially secure enough to be parents

1.5 John and Jane have started a family

1.6 Jane feels it's a woman's choice and is not taking precautions

1.7 Jane longed to be a mother and the baby was conceived by anonymous donor insemination

The sentences above describe a biological event in which conception occurs by two parents. The differences are mainly in agency – who did what to whom. In 1.1 the main concern is the paternity of the child, which determines inheritance of livestock and land and the mother's view is not heard. One male agent with a transitive active verb takes a child as its direct object. In 1.2 the mother is passive and the object of two transitive verbs. In 1.3 two agents agree on intercourse, but his lack of (family) planning is held to transitively cause her conception. A more modern pattern appears in 1.4 and 1.5. In the first a man and woman share feelings but there is no direct object. In the second their actions have caused a conception - two agents, transitive verb, family as direct object. One aphorism concerning traditional sex differences is "men do, woman feel", but in these sentences both feel, and both do. In 1.6 the single subject leaves conception to chance and rejects agency. The parents of John and Jane in both 1.3 and 1.6 might feel that the young people are being feckless and ask who will provide the money and childcare. In 1.7 one female agent discloses only her feeling and the baby is the passive object without a clear causal connection by a male. If the child later takes legal action to discover their paternity, it will appear that Jane had chosen to conceal it. The corpora of utterances that follow will be examined to see whether the even-handedness of 1.4/1.5 actually prevails in law, or whether 1.1 to 1.3 still prevail.

Modern English verbs are extremely difficult to categorise and rarely correspond to a grammar based on Latin. What are the Latin conjugations corresponding to the following? “I am going to London tomorrow”; “boys will be boys”; “we would take a picnic in summer”. Most grammatical forms for describing the act of conception still favour a male subject and a female object, though a female agent with a transitive verb and the baby as grammatical object is now just possible, as in 1.7. The issue to be explored in the following sentences is this: can the behaviour of a male partner be connected by grammatical transitivity with the mental state of a female partner?

The principal legal domain in which transitivity is used is child abuse. UK Government guidance (National Society for the Prevention of Cruelty to Children [NSPCC], no date) defines four types of child abuse, as follows: 1. Physical abuse, 2. Emotional abuse, 3. Sexual abuse 4. Neglect. A minor is presumed not to have mental capacity and to be substantially weaker than an adult. Therefore, transitive verbs are natural for the first category, with verbs

such as hitting or punishing. The legal principle that a minor can never consent makes transitive verbs fairly appropriate for the third category, irrespective of whether "seduction" and "buying favours with sex" by the minor are sometimes involved. Transitive verbs for the second and fourth types, emotional abuse and neglect are more problematic. "Emotional abuse" in 2. 1 and 2. 2 below involves the mental state of the object. It is highly doubtful whether one person's thoughts are wholly determined by another's actions. "Neglect" in 2. 3 below is a failure to act, rather than harmful action. (These sentences are taken from NSPCC, no date.)

2.1 conveying to children that they are worthless or unloved, inadequate, or valued only insofar as they meet the needs of another person

2.2 'making fun of' what they say

2.3 neglect is the persistent failure to meet a child's basic … psychological needs

These statements imply a causal chain between the adult's actions and the child's mental state. "Conveying" takes [a mental state of being] "worthless or unloved" as direct object and "children" as indirect object. "Making fun of" is a phrasal verb equivalent to "mocking", which is a transitive verb with the child's utterances as its grammatical object and mental state as its implied object. It may be doubted whether a mental state can ever be a direct object. Although the actions of an adult are a major influence on a child's thinking, the child always has at least some chance of thinking differently. The child may be angry, cynical, or think he or she deserves what is being said. Consider the following sentence: "Hitler terrified the Jews". There is no doubt about perpetrator and victim in this sentence, but were the victims "terrified"? Terrified people behave in a disorganised way and are highly physiologically aroused, so they become exhausted quickly. "Fearful compliance" was a more usual response. Occasionally, as with the Bielski partisans, the desire for active defence and even retaliation was the dominant mental process.

Forms of syntax that speak of "adverse influences on thinking" rather than causes would be preferable, not least because it gives a good therapeutic direction. A more satisfactory revised syntax of the NSPCC propositions would include mental states of both parties, as follows, where 'A' enumerations show an intransitive version of the utterances above:

2.1A parents who have experienced coldness in their own childhood may not nurture their children towards feeling worthwhile, loved, adequate, or valued

2.2A a parent who has status insecurity may make derogatory remarks about a child so that the child may also feel lower self-worth

2.3A a parent may be unaware of or unable to give nurturance to a child

We turn now to the problematic area that arises when the concept of abuse is extended to interactions between adults. “Abuse” has its etymology in the prefix ab- and the verb use, and the original meaning “to use up”. Until recent decades it usually meant to make derogatory statements to someone. The use of the verb “abuse” between female and male adults is highly asymmetrical. Consider the statements:

3.1 John abused his wife Jane

3.2 Jane abused her husband John

The simple transitive syntax in 3.1 is the same as in 1.1 above. The mental state of the object is presumed to be of having been emotionally harmed or neglected, but the mental state of the agent is unknown. 3.2 has the same syntax as 3.1, but its use is as rare as 1.7.

The verb “to treat” is also used asymmetrically between the sexes. English uses the passive voice to focus on the person affected, rather than the person affecting. Consider the plausibility of an active female and passive male in the following sentences (sentences 3. 3 are novel and created for this discussion):

3.3 John was badly treated by Jane after she married him

3.4 Jane was badly treated by John after he married her

Social influence is best considered in terms of attributions. It would be more psychologically accurate to rephrase either of the above in terms such as

• “A experienced B as unsupportive / critical/ loud etc.”

The verb “to ply with” also discriminates between the sexes, as may be heard in the following sentences.

3.5 John plied Jane with drink in order to have sex with her

3.6 Jane plied John with drink in order to steal his wallet

The first has been widely used in several recent criminal trials in the UK. Its use immediately implies wrongdoing and prejudices the jury member or onlooker. If the phrase was used before trial, it might even be considered contempt of court. The idea of a woman plying a man with drink for wrongful purposes is now improbable, though historically prostitutes often robbed sailors this way.

Power attributions about electronic communication are particularly enhanced by battlefield metaphors. The term was coined by Sandra Bem (1974), to describe how academic seminars use military metaphors: positions are advanced, attacked or defended. Bem saw this as a deterrent to female students, who might prefer a more collaborative academic atmosphere. Text messages, e-mails and tweets are intrinsically rather weak communications: only characters are sent, without paralinguistic and non-verbal communication; the presumed reader is absent and

can always block the message. Various verbs associated with female harming might be chosen, such as "she gave him a poisonous look" or "her coldness pierced him through the heart". However, the preferred metaphors in several recent court case have come from artillery and cavalry warfare. "Bombard" and "launch a campaign" are very frequent.

The verb "harass" has become a specific legal offence to describe attempts to communicate or be in proximity with another that are rejected. The verb retains its earlier associations of repeated small-scale attacks before or after a major battle. Harassing was the task of hussars or skirmishers and other light cavalry. Barratt (2008) says "British light dragoons were first raised in the 18th century. Initially they formed part of a cavalry regiment performing scouting, reconnaissance and the like, but due to their successes in this role (and also in charging and harassing the enemy), they soon acquired a reputation for courage and skill."

The language used by the Crown Prosecution Service in a "harassment" case (*R. v Adam Love*) was reported by the *Daily Mail* (Gye, 2013). Mr Love is described as having made 200 phone calls, 400 text messages and 74 e-mails, apparently in a continuous 14-hour period. The intended reader/ listener for each of these was only the other partner. There is no mention of Facebook or Instagram, which would have allowed other people to listen in: both parties had such sites, images from which were reproduced by the *Daily Mail* (Gye, 2013). The linguistic context is close to a perfect dyadic communication. The semiotics (Saeed, 1997) of the communication are violated by this dissemination. The mechanics and propriety of this disclosure were not discussed in the published evidence. The *Daily Mail* (Gye, 2013) reports (emphasis added):

> 4.1 Adam Love <u>bombarded</u> aspiring doctor Gabrielle Onions with 200 phone calls…
>
> Recorder Pye sentenced him to eight months and said
>
> 4.2 "you <u>dominated</u> her life and when she ended your relationship …
>
> 4.3 "you started the <u>campaign of harassment</u> in which …
>
> 4.4 "you threatened her life".

Unfortunately, this conviction for "harassment" thus combines a negative mental state, which was not explored, and metaphors supplied by the court for either attack with a sword from horseback or artillery rounds.

In *R v Aravindan Balakrishnan*, (B) of Enfield, north London, was convicted of six counts of indecent assault, four counts of rape and two counts of actual bodily harm at Southwark court. He was also found guilty of cruelty to a child under 16. Six women complainants, B, B's daughter and another woman communard sympathetic to B, had shared a commune in Brixton,

South London for decades. The following utterances 5.1 to 5.7 are taken from The Daily Telegraph (Ward, Nov 14 2015; Ward, Dec 4 2015):

Ms Rosina Cottage Cottage for the prosecution used these phrases

5.1 B told the woman she should never dream about anyone else

5.2 B treated female followers as sex slaves

5.3 B brain-washed them into believing they would die if they did not worship him as a god

5.4 B is accused of raping two women

5.5 B founded the Communist collective

5.6 B used violence and sexual degradation to bend them to his will [multiple transitive verbs]

5.7 B told her she would be killed by the fictional, dangerous character 'Jackie' he had created in order to threaten his followers and control their minds

The BBC web-site (2015) reported that chief crown prosecutor for London, Baljit Ubhey, said:

5.8 "Balakrishnan has robbed these women including his own daughter of a huge part of their lives"

and that the Det Supt Caroline Barker said:

5.9 "The victims were so conditioned that they truly believed he was all-powerful and all-seeing. Tragically one of them was born into his control".

Propositions 5.1 to 5.9 above are rephrased with 'A' enumerations, using intransitive verbs as far as possible.

5.1A The woman felt that disclosing her dreams to B was unwelcome

5.2A Female members did not feel they could refuse B sex

5.3A B's communications were compared by some women with the political re-education programmes for American PoWs in the Korean war.

5.4A Two women made love with B at various times; the extent to which these achieved consensus is now disputed

5.5A Several women and B founded the communist collective

5.6A Some women felt their social status was reduced after sex

5.7A She thought she might be killed by Jackie after discussion with B

5.8A Several women including Miss B felt their lives had been futile and attributed this to B

5.9A Some women's attributions of divinity to B had arisen by Pavlovian Conditioning

After the verdict one of the defendant's former followers shouted: "You are sending an innocent man to prison. Shame on you". The full force of English law therefore says this: "six or more women living in a terrace house in Brixton were so powerless that they were unable to leave the house, refuse sex or listen to media over a 45 year period, while the accused was such a powerful personality that he needed no weapons or restraints to enforce his command". Is this plausible?

Intimate partner violence is a third area where choice of verb is critical in legal process. Professor Irene Frieze (2008) has summarised the data as follows. The earlier research generally drew on battered women, but general population surveys gave a rather different picture. Straus (1979) used the Conflict Tactics Scale (CTS) and found that 16% of US married couples had had some partner violence in the last 12 months, and that 27% of the men and 24% of the women reporting using violence against their partner. Archer (2000) published a meta-analysis of 82 published and unpublished studies of partner violence and concluded that overall women are more likely to use aggression as measured by the CTS than men. In spite of women initiating more violent acts, it was also found that 65% of those reporting injuries from partner violence were women, and 71% of those receiving medical treatment were women. Frieze distinguishes two patterns: one involving very one-sided and repeated violence, typically from a man to a woman; a second pattern is "common couple violence", which tends to be relatively low-level violence that rarely results in injury and is done by both men and women, about equally. The default language for common couple violence would therefore be an intransitive dual-subject verb such as "they fought". This could be qualified if the one partner used unreasonable force and escalated to use of a weapon or battering.

Discussion

The data above may show that arraignments and judicial verdicts using intransitive verbs are less prejudicial to male defendants. Unfortunately, UK law continues to extend the linguistic framework in which one person is nominated as a "perpetrator" who transitively causes a mental state in a second person, dubbed a "victim". We may consider Section 76 in the United Kingdom's Serious Crime Act 2015 as an example.

"Controlling or coercive behaviour in an intimate or family relationship" was a new crime defined by Section 76 Subsection 1in the UK's Serious Crime Act 2015, in which:

> 6. 1 "a person (A) commits an offence if — A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive … and the behaviour has a serious effect on B…".

The "serious effect" is defined in Subsection 4 of the Act as

> it causes B to fear, on at least two occasions, that violence will be used against B or (b) it causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities ….

The law was championed by Gillian Guy of the Citizens' Advice Bureau. All the examples she gave in motivating the new law were of a man trying to restrict the spending of his woman partner. No woman has apparently yet been angry enough to seek imprisonment of her ex-partner about her spending habits. The Surrey police used the "Coercion" law to achieve imprisonment of Steven Saunders, a homeless man, so that he could be separated from his partner who was pregnant. She did not want to appear, so Surrey police have declared with some pride that the conviction is "the first to be made only on hearsay evidence" (Smith, 2018).

At the same time as the law extends into intimate relationships, controlling behaviour in intimacy is being greeted enthusiastically in romantic fiction. The 50 Shades trilogy novels by E. L. James have sold 125 million copies. These were written by a woman and 80% of readers are women, spread fairly evenly across the age spectrum. The inference is that the women who identify with Anastasia wish to cede control of their sexuality to a man who is wealthy, attentive and monogamous. Perhaps the last quality is the most unlikely feature of the imaginary Christian Grey.

The "Rescue Triangle" of Perpetrator, Victim and Rescuer is well-known in couple therapy as a "game" in Transactional Analysis theory. Zimberoff (1989) offers some therapeutic applications of the triangle. The three positions are unstable: a would-be rescuer who identifies only with the "victim" and rejects the viewpoint of the "perpetrator" can then become the perpetrator. Section 76 of The Serious Crime Act (2015) in invites courts to take just such a one-sided identification. The above discourse can readily be rewritten in this way using the Rescue Triangle:

> 6. 2 "the legal person A (judge) takes the viewpoint only of V (victim) and continuously engages in behaviour towards B (the defendant) that is controlling or coercive, causing B to fear violence and causes B serious alarm or distress …"

If this were applied to R v Adam Love above, it would become:

> 6. 3 "Judge Pye took the viewpoint of Onions and engaged in behaviour towards Love that was coercive by confining him in jail, causing Love to fear violence or sexual molestation – a frequent consequence of imprisonment."

This discussion has argued that the use of transitive verbs in legal contexts to describe relationships between adult male and females is biased. The use of shared-agency verbs,

passive voice and intransitivity would be less sexually discriminatory. Whereas sentences 1.1 to 1.7 provide a range of syntaxes for the act of conception, an active male subject acting transitively on a passive female object is still the default assumption. The differences between males “doing” and females “being” probably originates in the domain of biology rather than syntax.

Conclusion

The utterances above argue that courts' choices to use transitive verbs in the area of conflict between men and women is prejudicial to men. The interests of justice may be better served by rephrasing arraignments and judgments with intransitive verb forms. The above sample of criminal cases is small so further research is indicated. Courts seem to be able to slip into a discourse in which active males do wrongful things to passive females. The unwitting ease with which this discourse is adopted hints at a biological process. Perhaps there is a preconscious drive to protect babies and their mothers. This is an important area for research which is beyond the scope of this journal article.

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Lawyers' Perceptions of Forensic Linguistic Evidence in Arab Countries: A Call for Collaboration

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Abstract

Although forensic linguists (FLs) are being increasingly used in various Western countries, the concept of lawyers in the Arab world hiring a FL has not found its way to the legal system yet. This exploratory study examines Arab lawyers' awareness of the work of FLs and gauges their perceptions towards the use of forensic linguistic evidence and its admissibility in courts in Arab countries. A survey, comprising 18 questions and designed via the Google Forms website, was used for data collection. Analysis of lawyers' responses shows that lawyers in Arab countries, albeit their readiness to use medical and other expert witnesses in courts to support their cases, are reluctant to use the services of language specialists, i.e. FLs; for they view this as an indication of a lawyer's incompetence in native language interpretation and professional weakness. It seems that lawyers, by refusing to seek support from FLs in what they believe to be 100 percent their playground, are reinforcing their peculiar understanding of their professional competence. Nevertheless, the findings of the investigation underscore a significant shift in lawyers' perceptions of the role of FLs after they have learned of how their counterparts in Western countries utilize the services of FLs and forensic speech analysts in support of their defense in courts. The research concludes with limitations of the study, suggestions for future research and some recommendations for spreading awareness and knowledge of the forensic linguistics field in the Arab world. [*]

Keywords: forensic, evidence, lawyers, admissibility, perceptions, Arab courts

Introduction

The past three decades have witnessed an exponential increase in the number of forensic linguists (FLs) being hired by lawyers in Western countries and a rapid expansion in the

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forensic linguistics field as more lawyers are becoming aware of the potential use of forensic linguistic analysis and the expertise of linguists in courts (Coulthard, Johnson and Wright, 2017). According to Coulthard (2005), FLs are most frequently called in to help a court answer one or both of two questions: what does a given text say, and who is its author? In answering these questions, linguists draw on knowledge and techniques derived from one or more of the sub-areas of descriptive linguistics: phonetics and phonology, lexis, syntax, semantics, pragmatics, discourse and text analysis (p.1). Coulthard, Johnson and Wright (2017) add that the FL has available to him/her a toolkit comprising "phonetic and phonological, morphological, syntactic, lexical, discoursal, textual and pragmatic" aspects of the language (p. 105). Along the same lines, Olsson (2004) defines forensic linguistics as an application of linguistics in the context of crime, court proceeding, or arguments in law. Therefore, the FL may be called upon to analyze a wide variety of documents, e.g. agreements relating to ancient territorial disputes, the quality of court interpreting, an allegation of verballing (claims by defendants that their statements were altered by police officers), a disputed will, a suicide note, a ransom demand, etc. Consequently, the work of a FL spans everything from plagiarism, insurance contracts, trademarks and patents to court procedures, confessions, hate crimes and murder. Thus, forensic linguistics augments legal analysis by applying rigorous, scientifically accepted principles of linguistic analysis to legal evidence. In other words, "forensic linguistic analysis can be of value in virtually any case in which language can be considered evidence" (Leonard, Ford & Christensen, 2017, p. 897).

It is worth noting here that FLs "offer specialized testimony at trial concerning aspects of evidence that may be beyond the knowledge of the ordinary juror or judge" (Butters, 2009, p. 238). Related to this is Shuy's (2001) observation that the interpretation and application of the law are overwhelmingly about language. Hence, there are many situations in which the expertise of a linguist – someone trained in the precise description and analysis of language (but not necessarily a person who knows many languages) – can make substantial contributions to a case, providing evidence one way or the other or simply clarifying the linguistic principles, problems, and processes that the case involves. This view is corroborated in the sayings of law specialists that "Whatever problems in legal interpretation exist must have something to do with our inability to succeed completely in governing ourselves under a rule of law driven so heavily by language" (Solan & Dahmen, 2018, pp. 298-299). Thus, there are calls for increased collaboration between FLs, lawyers and other legal professionals (Chaski, 2013; Coulthard, Johnson and Wright, 2017; Ariani, Sajedi & Sajedi, 2014; Leonard, Ford & Christensen, 2017).

At the time a great number of Western countries are striving to enhance the quality and use of forensic linguistic evidence in courts and strengthen the qualification requirements of FLs (Butters, 2009; Clarke, 2016; Clarke & Kredens, 2018; Coulthard, Johnson & Wright, 2017; Tiersma & Solan, 2002; etc.), the concept of lawyers in the Arab world hiring a FL has not found its way to the legal system yet. Although forensic linguistic courses, academic degrees in forensic linguistics (Clarke & Kredens, 2018) and forensic speech and acoustics labs (i.e. https://www.jpfrench.com/) are well recognized in the United Kingdom, the United States of America, Australia, and several other European countries, they are unknown and unheard of in the Arab world. Just as lawyers cannot diagnose and treat themselves when they fall ill and because persons are only experts in their fields, lawyers need the services of language specialists to help in the interpretation of legal texts and write expert reports for litigation purposes (McMenamin, Mistry, Morton & Yasuda, 2002; Udina, 2016) in the language(s) they are specialized in and draw on a host of other branches of language study to interpret texts. Furthermore, lawyers may not be knowledgeable of some academic practices, therefore; they need FLs to decide cases of academic plagiarism (Silva, 2013), the accuracy of the interpreters' renditions of non-native speakers' statements in foreign courts (Giordano, 2012), "the different strategies" used "to encapsulate defamatory meaning" (Nieto, 2020, p. 20), interpreters' preferences for renditions of voice and their consciousness of power asymmetry relations between lay-participants and legal professionals in courtrooms (Ng, 2011) and several other cases when language is the concern.

Therefore, it is the purpose of this exploratory study to report on the state-of-the-art of the field of forensic linguistics in the Arab world, to examine lawyers' awareness of the work of FLs and gauge their perceptions towards the use of forensic linguistic evidence and its admissibility in courts in Arab countries. More specifically, this exploratory research aims to find answers the following questions:

1. How aware are lawyers of the existence of the forensic linguistics field and the work of FLs?
2. Will they seek the services of FLs? If not, why not?
3. Do they think FLs' testimony will be accepted in courts?

Theoretical Bases

The lawyers' responses to the survey questions (see below) are analyzed within the theoretical framework of Bucholtz and Hall's (2005) concept of identity and Foucault's (1980) concept of "knowledge is power". For Bucholtz and Hall (2005), "identity is the social

positioning of self and other" (p. 586). The authors adopt a constructionist approach for the analysis of identity which hinges on the following principles: emergence, positionality, idexicality, relationality and partialness. The indexicality principle suggests that there are several means through which identity can be made manifest (Clarke & Kredens, 2018). In this regard, Li and Ran (2016) note that one's professional self-image, which could be individual or collective, consists of such attributes as professional role, professional competence and professional ethics" (p. 48). In addition to these, Watson (2006) lists 'professional knowledge' as another component of professional identity. It entails a demonstration of superior knowledge (Sullivan, 2000). Along the same lines, Morris, Patel and Wearne (2000) argue that professions require a body of knowledge and competencies. Such attributes enable lawyers perform their work in the best manner possible. That is why Marra and Angouri (2011) see identity as something that people do and perform.

Methodology

This section describes the participants, the data collection tool and the data analysis procedures.

Participants

The target population for this study was all male and female lawyers in the Arab world, a nation of a total population of about 422 million inhabitants (https://en.wikipedia.org/wiki/Arab_world). Although the survey was open from February 2017 until October 2019, only 49 lawyers cooperated; a rather meager response which must be borne in mind when interpreting the findings of this study. Table 1 displays the respondents' demographic details.

Survey

To pilot the survey, it was disseminated face-to-face to four volunteer lawyers residing and working in the United Arab Emirates. This was meant to determine and test the lawyers' understanding of the survey items. Based on the lawyers' responses and feedback on the piloted version of the questionnaire, some questions were revised and fine-tuned. The survey was also verified by an expert educationalist for accuracy. To get reliable and accurate feedback, the lawyers who participated in piloting the survey were excluded from the study. The survey*[endnote] (see appendix) was originally written in English, but was presented to the respondents in Arabic to ensure that they understood each item on it. The Arabic version was compared with the original by two certified English-Arabic-Arabic–English translators to determine the equivalence between the two versions. The Google Forms site was used for

designing and posting the survey to prospective participants. It provides a fast way to create an online survey, with responses collected in an online spreadsheet.

TABLE 1.

Participants' Demographics

Place of work	**Gender**		**Age in years**				**Work experience in years**		
	Females	Males	20-29	30-39	40-49	50 +	4-8	9-15	16 +
Africa	1	34	3	11	16	5	17	8	12
Asia	0	14	4	7	2	1	7	2	3
Total	49		49				49		

The survey comprised an introduction and 18 questions. The introduction clearly stated that participating in this study was voluntary, and all participants had the right to withdraw from it at any point of time they wanted to. Also, it included a brief description of the study and the significance to the field. Furthermore, it guaranteed the participants that any collected data would only be used for scientific research and anonymous references would be used at all times (Cohen et al., 2017; Creswell, 2013). The first 7 questions requested simple demographic details about the participants' gender, nationality, place of work, years of experience and their first language, the language used in courts. Question 8 asked the participants to rate their competence of the language they use in courts. Then, questions from 9 to 11 asked them about what they would do if they faced language interpretation difficulties and whether they would have recourse to a qualified language expert or not. Question 12 introduced six authentic forensic linguistic cases that have been carefully selected from previous studies to represent a wide spectrum of the kind of work FLs carry out. This particular question fell half way through the survey and its inclusion marked a significant shift in the respondents' answers before and after it. The rest of the questions, 14 through 17 asked the respondents whether they would use language evidence the same way it was used in the sample cases presented to them. Question 18 presented a hypothetical case of a suicide note and asked the lawyers whether they would interpret it themselves or seek help from a FL.

Procedures

Lawyers Associations in the twenty-two Arab countries were contacted in February 2017 through their online websites and briefed on the context and contents of the study. It was agreed that the researcher would send them a Google survey link and, they, in turn, would share the

link with all member lawyers, inviting them to participate in the study. However, fourteen Lawyers Associations either did not respond to the various email messages sent to them, or declined to help with this research on the pretext that they had no control over their community members. Since there was no guarantee that all Lawyers Associations would help forward the survey link to all their members, the researcher, in an attempt to collect as many responses to the survey questions as possible, had to join various lawyers' closed Facebook groups, in which case, the researcher posted the link to the survey on these sites for the members to click on it and fill in the survey, if they wished. The survey could be accessed from any web browser - including mobile smartphones and tablet browsers.

Ethical Considerations

All survey responses were compiled anonymously from the responses provided by the Google Forms and decimals were rounded up to the nearest whole. Before proceeding with the study, permission to conduct this research was obtained from the American University of Sharjah's Institutional Review Board (IRB) Committee.

Analysis

The participants' choices regarding their own perceptions of their native language competence indicate that 61 % of the lawyers consider their command of the Arabic language as excellent, 33% as very good, and 6 % as good. When asked if they had ever consulted a language expert regarding some linguistic issue(s), answers show that only 31% responded with 'yes', whereas the rest (69%) chose 'no. Yet, they all failed to give examples of such consultations when asked to do so. When asked if they had encountered any language interpretation problems in their legal career, the responses were 'yes' (68%) and 'no' (32%). Although 68% reported facing language interpretation problems, they all, with the exception of one, failed to provide examples of such cases. The only example given was of a phrase in an employment contract that says: "*At the end of the contract, the second party (worker) is paid three months' salary*". The problem was in the interpretation of the phrase "three months' salary'. Does this mean the basic salary or the salary with all the other benefits included in it? Yet, those lawyers who admitted coming across interpretation problems indicated that they would personally try to interpret them. When asked about the reason(s) for not seeking expert opinion on linguistic issues, 40% of the respondents considered this as "a lawyer not doing his/her work", whereas 33% viewed this as "a weakness in the lawyer". The total percentages for lawyers not doing their work and lawyers' weakness, amounted to 73%. In spite of this and

regardless of the lawyers' perception that the use of forensic evidence in court depends on judges' conviction (Q17), the lawyers still viewed the use of FLs' services as helpful, as displayed in Figure 1 below.

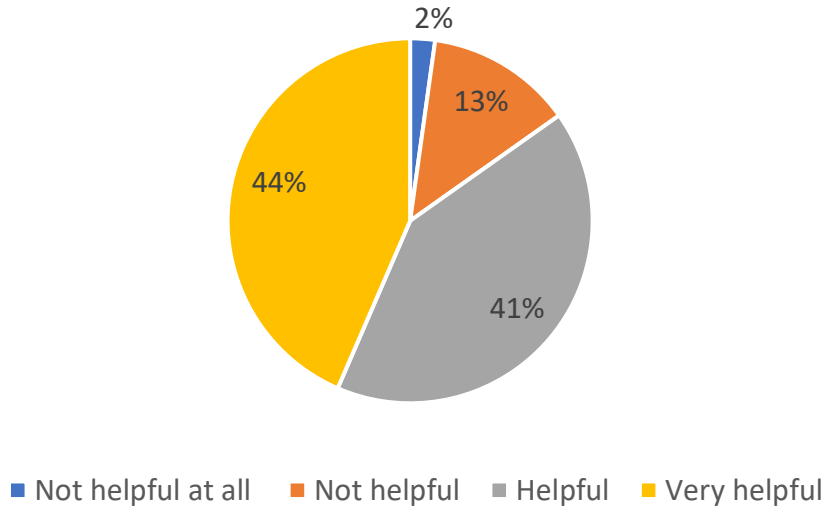

FIGURE 1. Lawyers' views on the usefulness of using the services of FLs.

Combining the two options, 'very helpful' and 'helpful', together; gives a total of 85%. This high percentage represents a positive change in the lawyers' perceptions of the services of FLs. These responses correlate with the responses (see Fig. 2) given to the hypothetical suicide case question posed in Q.18.

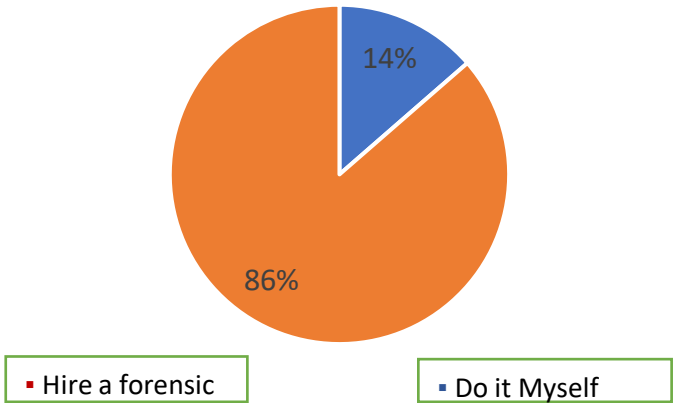

FIGURE. 2. Responses to the hypothetical suicide case question.

Here, in spite of the small percentages for the other option, we notice a clear shift towards the use of FLs' services, which may have been brought about by presenting the sample forensic linguistic cases given in question 12 and the hypothetical suicide case presented in question 18.

It seems that this last question (18) has put the lawyers in a difficult situation because the whole case is based on linguistic evidence. Thus, 86% opted for the use of a FL's services.

Discussion

Although FLs' services are being increasingly used in various Western countries (Ainsworth, 2006, 2009; Clarke, 2016; Clarke & Kredens, 2018; Coulthard & Johnson, 2010; Coulthard, Johnson & Wright, 2017; Grant, 2010, 2013; Jordan, 2002; Olsson, 2004, 2013; Rajamanickam & Abdul Rahim, 2013; Shuy, 2002, 2006, 2007), preliminary evidence from the current study shows that lawyers in Arab countries, albeit their readiness to use medical and other types of evidence in courts (Jordan, 2002) to support their cases, are reluctant to use the services of language specialists, i.e. FLs; for they view this as an indication of a lawyer's incompetence in native language interpretation. The lawyers' reluctance to use the services of FLs may also be viewed as demonstrations of one's identity. That is to say, lawyers view bringing into the scene the professional knowledge and expertise of others as damaging to the concept of their "professional role, professional competence and professional ethics" (Li and Ran, 2016, p.48).

This interpretation may also be corroborated by the fact that the survey was posted on several Lawyers Associations' websites as well as various legal Facebook websites run and managed by lawyers for lawyers for over two and a half years, and only attracted 49 lawyers' responses. In other words, the survey may have not appealed to lawyers and attracted a big number of them because of their being unaware of the existence of the forensic linguistics field, or because of being unconvinced about the proposition of having recourse to the services of qualified language experts. Another support for this reluctance is Tiersma's (2009, p. 19) observation that although "linguistic knowledge can also be helpful in understanding the substance or content of the law", "the legal profession seems slow to recognize the point" (p.19).

Also, worth noting here are the concerns that some lawyers raised regarding the admissibility of forensic linguistic evidence in courts and the restrictions the law enforces on lawyers and judges concerning what type of evidence to use and exhibit in courts. Perhaps, their reluctance is also due to their knowledge of what judges may accept as evidence. In this context, Coulthard, Johnson and Wright (2017) cite the following incident:

> indeed one judge in the US explicitly refused to admit the linguist Ellen Prince as an expert on the grounds that it is the function of the court to decide on meaning. Certainly, it is more difficult when the texts involved

> are legal texts, because lawyers and judges usually see themselves as the guardians of and adjudicators on such meaning (p. 108).

Furthermore, it is sometimes argued that everybody who speaks a language knows pretty much how to interpret this language. That is why some lawyers, judges and members of the jury may view recruiting an expert on language as simply unnecessary (Butters, 2009. p. 239).

From the aforementioned, it seems that lawyers showcase their identity by refusing to accept any interference from others in what they believe to be 100 percent their playground on the pretext that accepting the work of a FL confirms their professional weakness and acknowledges that a FL, because of having the linguistic knowledge, is more powerful than the hiring lawyer. which may be a display of Foucault's (1980) concept 'knowledge is power". That being said, the 86% responses to question 18 (Fig. 2) show a clear and positive shift in the respondents' perceptions and attitudes towards the use of the FLs' services, which may have been brought about by presenting the sample forensic linguistic cases given in question 12. This significant change may be increased through educating lawyers and all the legal profession personnel on the role FLs can play in legal proceedings (Ariani, Sajedi & Sajedi, 2014); Chaski, 2013). Yet, lawyers are still doubtful about the admissibility of such kind of evidence in courts in Arab countries, which calls for collaboration between proponents of forensic linguistic evidence and legislators. More specifically, the legal system in Arab countries needs to show how responsive and flexible it is by including language evidence in the list of evidences they accept and endorse. This, nowadays, becomes a must as a result of technological advancements that have produced evidence types that were not there before, such as emails, WhatsApp messages, fraud, identity theft, defamation messages, etc. This hinges on the proper understanding of Bucholtz and Hall's (2005, p. 598) principles of "relationality" and "partialness", in whose lights humans should have complementary relations to reach informed configurations of self and other, to overcome the partialness of knowledge. In the end, lawyers need to be told that FL are not forced on them, but are called upon by the lawyers (Rajamanickam & Abdul Rahim, 2013) who know what the language evidence might be, but they require the professional competence and academic credentials of the specialist language expert to gain this evidence more weight in court.

Conclusion and Recommendations

Based on the above, forensic linguistics refers to the process of applying knowledge and theories of linguistics to legal documents and crimes including ransom notes, threatening and defamatory messages, extortion letters or other crime-related communications. Regardless of

whether the communication is typed, handwritten, electronic, or verbal, forensic linguists use the style, tone, and other linguistic elements as criminal profiling tools to see inside the mind of the document's creator. Even the briefest of texting and Twitter threats can be analyzed using forensic linguistic methods (Grant, 2013). Henceforth, it is undeniable that forensic linguistics plays a significant role in selecting the most relevant evidence and in making the information much more comprehensible to lawyers, judges and the courts. This research represents a modest attempt from the author to spread knowledge on the meaning and uses of forensic linguistic evidence, the exponentially expanding forensic linguistics field and the services FLs and forensic speech analysts could offer lawyers in the Arab world in an attempt to enhance justice and human rights. Although this study demonstrates positive shifts in the lawyers' perceptions of the employment of forensic linguistic evidence, the results should be cautiously interpreted because of the very low number of respondents. Thus, future researchers may personally approach lawyers, judges, law enforcement personnel and, most importantly, legislators to check and verify their viewpoints regarding the subject. That said, the researcher proposes the following to spread more awareness and knowledge of the forensic linguistics field in Arab countries and others with similar contexts:

- Educating legal professionals on the nature of forensic linguistics and the role of FLs in language interpretation.
- Hosting and offering seminars/conferences for all interested parties and hosting renowned FLs and forensic speech analysts in the field (Gold & French, 2011).
- Lawyers, judges, and all legal professionals need to be assured that a forensic linguist is only a language expert witness, or in Selinker's (1979) words, "a specialist informant", whose work should be perceived as assisting the court in reaching a decision and achieving justice (Ainsworth, 2009; Ariani, Sajedi & Sajedi, 2014; Coulthard, 2010; Clarke, 2018; Clarke & Kredens,2018; Grant 2013).
- Setting up forensic linguistics centres and university degrees for those interested in the field (Anjum, 2017).
- Planning and offering professional development programmes on forensic linguistics for police officers, lawyers, judges, the legal profession staff, and the interested public.
- Campaigning for the inclusion of forensic linguistic evidence in courts through the various media outlets and promoting that if the evidence is relevant, then it is admissible to court (Rajamanickam & Abdul Rahim, 2013).

- Importing and building on forensic linguistic rules Western countries have developed.
- Continuing the hard work on enhancing and improving the quality of forensic linguistic evidence.
- Considering the formation and appointment in courts of what Edmond and Roberts (2011, p. 292) have termed "an independent multidisciplinary advisory panel" to examine expert opinion evidence and advise judges on their accuracy and admissibility.
- Translating seminal books and academic articles in the field into Arabic to make the knowledge and information they contain available to speakers of the Arabic language.

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Appendix

Lawyers' Perceptions of Forensic Linguistic Evidence and its Admissibility in Courts

This questionnaire aims to collect information about lawyers' attitudes towards and perceptions of the work of forensic linguists (i.e. specialized and qualified language experts), and the admissibility of language evidence in courts. I would appreciate your help by answering the following questions. Your honest and sincere responses are highly valued. The questionnaire is anonymous and you do not need to provide your name. It is designed on a voluntary basis. It will take you around ten minutes to fill it in. All collected responses will be used for the purposes of this study only. Thank you very much for your help.

I. Kindly complete the following:

1. Gender:

   a) Male b) Female

2. Age

   a) 21-29 b) 30-39 c) 40- 49 d)50+

3. Nationality:

   ----

4. How long have you been working as a lawyer?

   a. 0- 4 b) 5-8 c) 9-15 d) 16+

5. Name of country where you work: ----------

6. What is your first language? ----------

7. Is it the same language you use in court(s)?

   Yes No

8. How good do you think is your command of this language?

   Perfect Reasonable

9. Did you ever experience any cases in which the interpretation of language (i.e. articles, clauses, contracts, wills etc.) was the main concern?

   Yes No

10. What do you normally do in such cases?

    -I interpret the intended meaning myself

    -I use a language specialist to correctly interpret the intended meaning, and write a report that I can use in court as evidence

11. Would you please provide examples of any cases where language ambiguity was an issue? Please write in the space provided below.

12. Examples of litigation cases where forensic linguists'/phoneticians' opinions have been used.

Case One

In 1998 the UK Court of Appeal pardoned Derek Bently for his role in the murder of a police officer. Linguistic evidence contributed to the successful appeal as an English Forensic Linguist Prof. Malcolm Coulthard was able to show that the written confession was more likely to be in the language of the police officers than the language of Derek Bently.

-Do you know of any cases in your jurisdiction that have used linguistic evidence in this way?

Yes No

If yes, please provide examples.

-Do you think this sort of linguistic evidence could ever be admitted in your jurisdiction?

Yes No

If no, kindly say why? ----------

Case Two

Another occasion where dialectic variation gave information about the suspect's identity was the case of a ransom note analyzed by Professor Roger Shuy in the States in 2001. Although the suspect included misspellings of words such as dautter for daughter or kops for cops, his correct spelling of more difficult words such as precious, diaper or watching led Prof. Shuy to believe that the author of the note was trying to appear less educated than he was. However, what really helped determine the writer of the note was the uncommon use of devil strip, a term denoting the strip of grass between the sidewalk and the curb that is only used in the area surrounding Akron, Ohio. As there was only one educated man from Akron in the suspect list, the police did not take long to find other clues that also incriminated him.

-Do you know of any cases in your jurisdiction that have used linguistic evidence in this way?

Yes No

If yes, please provide examples. ----------

-Do you think this sort of linguistic evidence could ever be admitted in your jurisdiction?

Yes No

If no, kindly say why? ----------

Case Three

Telephone text messages (SMSs) are another type of linguistic evidence that has increasingly been used in courts. For example, in 2008 a UK Criminal Court heard

evidence from a forensic linguist Prof. Tim Grant in a case of murder. Prof. Grant was able to show that the text messages that provided an alibi for the main suspect were written by the suspect and not his wife, even though they were sent from the wife's phone.

-Do you know of any cases in your jurisdiction that have used linguistic evidence in this way?

Yes No

If yes, please provide examples.

-Do you think this sort of linguistic evidence could ever be admitted in your jurisdiction?

Yes No

If no, kindly say why? ----------

Case Four

One famous example of forensic speaker identification is the Prinzivalli case in the States in 1994. Prinzivalli was an employee of Pan American Airlines suspected of making telephone bomb threats to his employer in Los Angeles because: a) he was known to be an unhappy employee, and b) he was a New Yorker (the caller making the threat was believed to have a New York accent). Prof. Labov was given a tape with the original threat and another one with samples produced by the suspect. Based on the distribution of certain vowels, he determined that the person who issued the threat was actually from Eastern New England and not from New York City (Prinzivalli was acquitted).

-Do you know of any cases in your jurisdiction that have used linguistic evidence in this way?

Yes No

If yes, please provide examples. ----------

-Do you think this sort of linguistic evidence could ever be admitted in your jurisdiction?

Yes No

If no, kindly say why? ----------

Case Five

In November 2014 a hoax call was made to West Midlands Police about a car containing a firearm. The call was made from the mobile phone of the suspect, Mr Sadiq. Prof. Rhodes was instructed by Birmingham Magistrates Court to compare the voice of Mr Sadiq with the hoax caller. By making a reference recording of Mr. Sadiq's voice over the telephone, he was able to show very significant differences between the two voices, to the extent that the possibility of Mr. Sadiq being the caller could effectively be ruled out. The Judge Magistrate in the case acknowledged that

without the voice evidence, Mr. Sadiq would have been wrongly convicted of the offence.

-Do you know of any cases in your jurisdiction that have used linguistic evidence in this way?

Yes No

If yes, please provide examples. ----------

-Do you think this sort of linguistic evidence could ever be admitted in your jurisdiction?

Yes No

If no, kindly say why? ----------

Case Six

In 2006 in the States Prof. Ronald R. Butters, in a trademark litigation case, was hired by the defence to give his expert opinion concerning the possible confusion between Aventis and Advancis,. The presiding Judge was persuaded by the forensic linguist's arguments that the two marks were confusingly similar. And this view in turn formed a fundamental basis for the Judge's decision in favor of the plaintiff.

-Do you know of any cases in your jurisdiction that have used linguistic evidence in this way?

Yes No

If yes, please provide examples. ----------

-Do you think this sort of linguistic evidence could ever be admitted in your jurisdiction?

Yes No

If no, kindly say why? ----------

13. Regardless of your responses to the above questions, what will make you resort to a forensic linguist?

-To have an objective opinion that may support my defense in court

-Because my knowledge of the grammar and structure of the language is not that perfect

14. Did you ever use/consult with a forensic linguist regarding any linguistic issues?

Yes No

15. Do you consider using the services of a forensic linguist to help in the interpretation of any linguistic issues as a sign of a lawyer's confidence in him/herself?

Yes No

If no, why? Please tick one or all that apply.

-The lawyer is not doing his/her work

- This is a weakness in the lawyer

16. In your opinion, how helpful is it for lawyers to use forensic linguists in the cases of language related issues?

a) not helpful at all b) not helpful c) helpful d) very helpful

17. Do you think that such a practice enhances a lawyer's chances of winning legal cases?

Yes No Not sure

18. If you get a case for someone who committed suicide, and left behind a typed suicide note in which he tells the family why he did this, but the family strongly believes that he was killed by a friend; and that this friend is the one who wrote the suicide note.

-Will you consider using the services of a forensic linguist to determine

the author of this suicide note, or try to do this yourself?

-Hire a forensic linguist

-Do it myself

If you decide to do it yourself, what will you do? ----------

Thank you for your time and cooperation!

* The researcher expresses his gratitude to Prof. Dr. Tim Grant, Director of the Centre for Forensic Linguistics at Aston University in the UK, for giving feedback on an earlier version of this survey and for suggesting the addition of some forensic linguistic cases to it.

Special Essay Contribution from the past Chief Editor

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The Language of Cyberattacks

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Abstract

This essay is a post-structuralist analysis of legal systems and terminology used in government-based high technology activities. In the pandemic contact tracing post 9-11 era of high technology global security, there is no single determinate structure for the application of basic international law principles. The legal terms in practice do not point at things, persons, structures, nor even at other words with reliable predictability. The novelty of the technologies used results in referent persons, locales, situations and governing laws being subject to the broadest interpretive license. Meanwhile, the originating spirit found in international legal rules protecting civilians, such as the Geneva Conventions, has been applied to electronic attacks during times of armed conflict. This essay discusses the semantic importance of "threat, crime, attack, security" language and the referent persons conducting the activities. A linguistic deconstruction of the techniques of intelligence gathering is discussed, such as packet sniffing, FBI cybercrimes investigations, data collection, remote sensing, storage and retrieval of records. This includes an analysis of the places involved in cyberattacks and digital trespass which redefine the meaning of borders through electronic security-surveillance during border entry such as airports. These surveillance, security and cybercrime concepts are grounded in a history and culture whose new laws are based on state-of-the-art applications and re-interpretations of traditionally accepted legal principles. Post-structuralism as applied to cyberlaw argues that to understand these legal referents, it is necessary to understand both the object itself and the historical technological lineage that produced the cybersecurity laws

Keywords: post-structuralist linguistics, surveillance, security, cybercrimes, international humanitarian law, international law, technology, computers, civilians during armed conflict, cyberattacks, cyberwarfare, state borders

An overview of cybersecurity under international law

Cybercrime and cyberwarfare have significant real life effects outside of the virtual world.[1]

The most basic rules of cyberlaw are probably familiar and intuitive to most people:

- Certain activities are crimes regardless of whether the actions are based on virtual computer technology or tangible real world actions. “If it is illegal offline, it is illegal online” (Ugo 2005).
- Offensive cyberattacks and defensive cybersecurity rules are in place for use during armed conflict, and also for the preparation and prevention of armed conflict.
- During war, the military has a legal obligation to minimize harm to civilians. When possible, civilians must be protected during armed conflict. Harm to civilians during cyberwarfare is prohibited by international law.

In fact, it is the simplicity of these concepts that leads to great ambiguity and diverse application in practice. One remarkable characteristic of cyberattacks is that the bad guy has a high likelihood of remaining anonymous. Cybercriminals are said to “spoof” systems and as a class are referred to as a “spook” or a “ghost” denoting their incorporeal and “non-existent” presence. Hackers are talented to spoof their IP and email addresses to secretly infiltrate networks, do their dirty work, and clear the logs of their digital activities. This animosity is compounded by the fact that there is a marked lack of reporting of cybercrimes. Even though required by law to report cybercrimes that happen against their business, organization or government, most do not want to report the crime because they don’t want to lose credibility, confidence nor have their bad data and secrets become a newsworthy headline. This victim’s shame, thereby perpetuates the ethereal nature of the crime and the criminal. (The term “bad guy” is actually professional jargon in cryptology.)

Animosity makes prosecution and enforcement difficult. Spoofs traverse multiple computer systems enroute to their cybervictim. Typically, these are the computers of innocent people and businesses whose machines are being controlled by the bad guy. Entry and control are gained through introduction of malicious spyware and malware (i.e., bad guy software) embedded in websites, emails and attachments that appear as something other than what they really are, termed as a “Trojan horse.” This software, also known as “bot,” then waits in a dormant state for commands from the spoof. These controlled computer systems are referred to as robots or zombies, and a chain of them forms a “botnet.” Just as attackers have found ways to distance themselves from the crime, the number of penetrations and the level of data access and remote network control have greatly increased. The range of cyber bad guy identities spans foreign and domestic governments, military, commercial, private and criminal enterprises. A cyber bad guy could be freelance or employed by anyone.

The ambiguity of the actors continues once their identity is known. Independent cyber perpetrators may be called hackers, but there are security weakness detectives that are trained to find and correct network vulnerabilities who are certified as an "ethical hacker."[2] The exposure of data found business trade secrets, confidential personal logs, or top secret sources that implicate government crimes can be made public by the protected "whistleblower" or the wicked "traitor" to the state. Exposed bribery by public officials to induce behavior of other public officials might be seen as diplomacy, but the same bribery by private citizens would make them criminals and those government officials receiving the bribe "corrupt." The moral content of the action, it seems, depends on the identity of the actor, as much as the context of the cyberattack.

The USA Director of National Intelligence, James Clapper, at the Senate's Intelligence Committee hearing in February 2012 said that non-state actors are increasingly gaining in prominence, and in fact already have "easy access to potentially disruptive and even lethal technology." Clapper said that hacker groups like Anonymous and LulzSec have been carrying out a consistent campaign of distributed denial of service attacks and website defacements, and that intrusions into NASDAQ and the International Monetary Fund "underscore the vulnerability of key sectors of the economy" (Hoover 2012).

The International Information Systems Security Certification Consortium, Inc., $(ISC)^2$ describes many industry standards for computer security and offers the Certified Information Systems Security Professionals (CISSP) credential. The CISSP Guide distinguishes three categories of computer crime:

1. ***computer assisted crime*** – a computer is used as a tool to help carry out a crime
2. ***computer-targeted crime*** – a computer is specifically the intended victim of an attack crafted to harm the computer, network, data and its owners
3. ***computer is incidental crime*** – a computer is not necessarily the attacker nor victim, but just happened to be involved when a crime is carried out

Of note is that each of these crimes are being conducted by bad guys from every type of organization: government, military, commercial, private and criminal enterprises. When the acts are political or state-based cybercrimes, or as a part of cyberwarfare, we can note that there are international laws that seek to protect civilians during times of war. Specifically, the *Geneva Conventions*[3] apply to this situation to protect non-combatants during international armed conflict between states. Now let's look at each part of this grand protection scheme as it relates to computer and technology law to determine the 21st century evolved nature of:

- Who is a non-combatant?
- What is a conflict?
- When does a cyber-espionage and cyber-sabotage become an act of war?
- Where does a cyberattack occur?
- Why are civilian actors engaging in traditional state conflict activities?
- How can cyberattacks be considered a part of international law?

Cyberwarfare has been recognized as a significant part of armed conflict since at least the 2008 Russian conflict in Georgia (Swanson 2010). Cyberattacks on infrastructure can lead to blocked military communications, which have become of supreme necessity in managing the high technology of databases, real-time satellite remote controlled video monitored missiles, machine guns, and ballistic attacks. Control of the network of communication systems has become a necessary first step to monitoring and controlling the population, at a level whose surface was only scratched during the era of radio, newspaper and then television station control during warfare. Automated ground traffic control, air traffic and flight processes, internet commerce, and telecommunications for land-based telephone and fax are among the more mundane archaic infrastructure access and control methods.

The two prizes of cyberattacks are network control and data. The target is cyberproperty. Data is the information on the network. The tangible computer network is the hardware architecture infrastructure of satellites, telephone and cable lines, airwaves, electrical stations, communication towers, beacons, signal relays and more. Then there is software that manages, protects, and communicates data to users. Security and threats exist in both the physical and the digital aspects of the computer network. The prize sought may be access to the data, alteration of data, or access and control of the computer network. Often those legitimate and criminal parties in control of data, as intangible assets, have a great deal of power over the military and the civilian population. It is understandable how control of the civilian and municipal computer networks can greatly impair movement of the civilian population, and in a similar way control financial, social, governmental and military activity.

Network control – espionage and sabotage

Computer networks are the pipes and systems through which data flows. The “net” part is created based on an analogy to fishing nets with each cord connected to another cord to form a mesh grid of rope. Then networks evolved to mean to social groupings of people in the real world – each connected to one another directly or through links to other people and their groups

– that meet to play bridge, work on a job, study a particular subject or other social purpose. *Inter*net means a network "between" computers, linked together across various tangible and digital technologies. Then with Facebook, LinkedIn, Renren, Plaxo, Orkut, Vkontakte and others we return to the original concept as "social media networks" such that the computers linked together over the internet, telephone channels, and other means can socially interact based on interests in careers, shared hobbies, life events, and daily routines. This has at the same time established the growth of intelligence gathering jobs that monitor these social media networks and rely on GPS, cell phone tower triangulation, email and text data searches, relationship building, purchases and habits of life to predict future behavior. New jobs can be found for government contractors with titles such as "Social Media Cyber Identities Intelligence Analyst" whose quoted job description functions include:

> Analyze social networking, virtual world, and online identity issues... Manage online and virtual identity profiles… Utilize sophisticated, customized applications that collect, manage, and process online identity data… Perform appropriate methods of social network analysis to meet specific project needs. Methods may include classification, pattern analysis, trend/geo-temporal studies, and link analysis based on analysis of transaction data, message (phone, e-mail, blog) traffic, and other data sources in collaboration with other project analysts... be flexible in adapting analysis methods and different data sources to meet project needs, including willingness to learn and explore new methods/approaches.

The "explore new methods" phrase in the above job description leads me to believe that the analyst is expected to adopt "pseudo-identities" to spy on others' online behavior. This is the use of social media and intelligence gathering experts to monitor Facebook, LinkedIn, and other social networks. This monitoring is part of open source data gathering but being carried out for secret military and corporate marketing purposes by civilians. The roles played in cyber actions may originate with the same referents but are defined differently based on the particular legal, political or emotive situation. There is a clear matter of interpretation for data mining robots that crawl the web, for example, to gather, compare, and aggregate airline price fares, as this activity is termed by some as "screen scraping" but others as aggregation, depending on the legal system in place and the person conducting the activity. What has been challenged as illegal copyright infringement in the past, quickly became the search engine aggregation of the present, and this continues on to every other type of data, and then to organization, manipulation and representation of that data as it spans the network of information.

The “net” analogy has touched sciences, humanity, and crime. Transportation networks of railway, sea, and aerospace, and ground motor vehicles are intertwined via their superstructures and also their communications technologies. In recent science, the brain is described as a neuronet. Twentieth century epistemology is based on networking support for beliefs. A web, likewise, is a similar pattern of connections found by spiders in nature. Early users of the internet were called webslingers, and later, crawlers became computer programs that read websites and store data, and spiders and spyders in cyberspeak, came to mean persons or programs doing the crawling. Crimes based on criminal networks use terms such as:

- Social Engineering – Gathering information through deception of people
- Masquerading – Altering the identity’s origin to appear as valid
- Emanations Capture – Intercepting electrical signals from devices; the TEMPEST standard is a defense to this threat
- Wire Tapping – Eavesdropping an electrical signal

Not far from the net, when describing a 2011 series of computer-based espionage by an undisclosed assailant, McAfee's chief European technology officer, Raj Samani, said:

> This was what we call a spear-phish attack, as opposed to a trawl, where they were targeting specific individuals within an organisation. An email would be sent to an individual with the right level of access within the system; attached to the message was a piece of malware which would then execute and open a channel to a remote website giving them access.
>
> (Emery 2011)

Criminal organizations and cybergangs are increasing using the Internet to dupe victims through false and deceitful appeals to emotion, charity and good offices along with some financial need or transaction. The net-based term used for these tricks are called “phishing attacks” and also “419 scams” and “Nigerian Letter scams.” Note that analysts, contractors, criminals and bad guys use the same techniques to obtain information, but for very different ends.

Data – espionage and sabotage

The real treasure is in the data – information – secret confidential records for operating businesses, governments, and the countless details of individual lives. In accordance with the legal regime of many countries, the definition of property has been expanded to include data as property right. Courts have held that to unlawfully enter that property is a trespass. Data

crimes include the unauthorized access, modification, destruction, or discloser of sensitive information. Data mining efforts can lead to information useful for the conduct of military activities, but also espionage against academic, commercial and government institutions for socioeconomic advantage and financial benefits.

Protecting intangible assets which include intellectual property, trade secrets, data, services, client lists, negotiation bids, operating expenses, air fares, and reputation can be the most difficult and the most important property for a company to protect. Consider the intellectual property, trade secrets, technology transfers, and data retrieval gold mine that can be found through your partner's computer network in a joint venture because she negligently left open their computer systems to enemies of your business.

At strategic times, data can be intercepted, altered and retransmitted sending false information and misinformation on any possible range of subject from bank accounts, to telephone transmissions, or to military targets for missile attacks. A regular series of cyberattacks was publicly reported by the famed Internet security company McAfee in August 2011, known as operation Shady RAT (Remote Access Tool) (Alperovitch 2011). The cyberattacks succeeded against 72 organizations, including defense contractors, global businesses, United Nations organizations, international organizations, government, military, university, contractor and civilian enterprises. The data retrieved, intercepted, recorded, and in some cases, altered and destroyed, has had a great effect on private civilians as well as governments. Data accessed included "U.S. military systems, the McAfee report says, as well as material from satellite communications, electronics, natural gas companies and even bid data from a Florida real estate company" (Alperovitch 2011). As operation Shady RAT demonstrated,

> A high level of access could reveal the satellite's capabilities or information, such as imagery, gained through its sensors. Opportunities may also exist to reconnoiter or compromise other terrestrial or space-based networks used by the satellite.
>
> *(Nakashima 2011)*

As described in documents of the U.S.-China Economic and Security Review Commission[4]on concerning the opportunity to control the flow of data: "The attacker could also deny or degrade as well as forge or otherwise manipulate the satellite's transmission." Satellite networks saturate the skies of the Earth.[5] Due to their secretive functions and relative states of decay, the exact number has become a matter of interpretation with high estimates that include many types of orbiters at around 13,000 objects. Because the data that is gathered and

transmitted can only be received via specially laid out connections to other data ports in the network, satellites serve to connect data and people across the globe. In order to cover the spherical Earth at once, data relay satellites are launched into geostationary orbit, which is a location whose distance and speed enable constant communication with the Earth below to then relay information to and from other non-geostationary satellites, spacecraft, vehicles, fixed Earth stations, and personal communicator equipment. Satellites have become the pipe carrying a wealth of data through networks. Access to data via its transmitters and command-and-control infiltration is a process designed to damage and overload electrical systems, imaging equipment and data. As the 2011 USCC report describes:

> If executed successfully, such interference has the potential to pose numerous threats, particularly if achieved against satellites with more sensitive functions. For example, access to a satellite's controls could allow an attacker to damage or destroy the satellite.

One means of destroying the conduits for information flows is through strategic and conventional attacks against earth-based communication lines and systems as well as using missiles or orbiters to physically assault enemy infrastructure and satellites, this is known as the "hard attack." These hard attacks can control, interrupt or destroy energy supply systems causing power distribution outages, grid communications interruptions, and also interrupt natural energy resources for water, steam, gas and others. The "soft attack" uses digital techniques and planted misinformation to bring down the communications array and interfere with true data transmission. For infrastructure purposes, we intuitively recognize there is a need to ensure nuclear power facilities are highly protected from soft cyberattacks.

Data sharing in satellite usage becomes even more interesting when understood in light of the *Outer Space Treaties*[6] signed by all space-faring states back in 1967. They hold in relevant part that, states are prohibited from engaging in military activities in outer space and that everything that is done in outer space is the common heritage of mankind, further clarifying since the inception of the space era, that data collected in outer space is required to be shared with all of mankind. The concept is that outer space is the "Common Heritage of Humanity," also includes the principle that activities of people in outer space affect us all. From its inception, the development of space, and all of the benefits that derive from space, has been founded on the principles of equality, openness, and cooperation of all of humanity. The *Moon Treaty* (1974)[6] elaborates this, and it is held that everything discovered, invented, created, destroyed, explored, defined, developed, and so on, in outer space will gradually trickle down and reach all people everywhere. As such, the activities carried out in outer space, the right to

conduct such activities, and the benefits from those activities belong to our "World Heritage." Travelers (astronauts and tourists) to outer space are not merely state government passengers but treaty designated "envoys of mankind" and according to the agreements of all the states that signed the treaties, we all have a right to access of the data acquired by these envoys (*The Outer Space Treaty of 1967*, Article 5). The issues of satellite and mobile phone data is precisely the technology intended to be guided by the outer space principles as these satellite-based technologies have clearly affected all of mankind. Therefore, the use of secretive government and military applications for cell phone data may be seen as contrary to treaty obliged openness and non-militaristic uses for outer space, and the international legal regime that enabled the peaceful development of outer space that we presently enjoy.

A relevant example is found in the use of remote imaging satellites to gather data about the Earth via satellite imagery. According to the law of the *Outer Space Treaties*, remote sensing data can be used to benefit all of humanity. Remote sensing imaging machines and applications measure, map, image, track and observe all manner of phenomenon on Earth and in outer space. Sustainable development resources can be allocated and business plans can be made based on data about vegetation rates, erosion, pollution, forestry, weather, and land use. City planning, archaeological investigations, military observation and geomorphological surveying also are enhanced based on remote sensing data. Remote sensing data is more than just nice pictures or nuclear missile detection spy satellites, as the data tells us about how to prospect for minerals, detect or monitor land usage, understand deforestation, and examine the health of indigenous plants and crops, and how to farm entire regions or forests. Landsat-7 is designed to take up to 582 high-resolution images of the Earth's terrain each day, and in accordance with the *Outer Space Treaties*, these images are publicly distributed, such that private companies like Google Maps, may color-balance and enhanced them for commercial services. So it is telling that the cyberattacks of 2012 against officially non-military satellites, in this case the U.S. Geological Survey satellite Landsat-7, are described as contrary to space law's peaceful cooperation principles, and even international humanitarian law's protection of civilian structures from military targeting. As the satellite was used for peaceful purposes, with data benefits that are shared for the common heritage of all mankind, the attack on this network harmed us all. As a matter of international space law, regardless of the individual, criminal organization, government or military affiliation of the bad guy, her activities directed toward outer space fall under the liability of the state of origin of those activities, i.e., the launching state (*The Outer Space Treaty of 1967*, Article 7).

State and non-state Actors migrate from the war on terror to cyberwar

There is a long tradition of government contractors to support military services. Outsourcing is much cheaper for the government in terms of retirement, pension, healthcare and other benefits, and for their works, they receive higher salaries as a private contractor than as a government employee. But is the job being done for state purposes or military purposes – when the duties have traditionally been part of a military job, or a government job, now being contracted out to a civilian? Does the data gathering, retention, security, or theft of this data fall into the realm of the government public international law or private company liability? The basic rule applicable from International Humanitarian Law (IHL)[7] is to protect civilians during armed conflict.

State actors traditionally include government officials, the, police and the military. Non-state actors are civilians, independent contractors, cybergangs and terrorists. Whatever the parties' affiliation, international law remains the law between states. The basic rule of distinction is that parties to conflict are required to at all times distinguish between civilians and combatants, and then their attacks are required to be directed solely against military objectives. This principle requires combatants to only attack military objectives and not the civilian population, nor individual civilians, nor civilian property including hospitals, schools, religious buildings, historical and cultural structures, nor industrial infrastructure used for civilian purposes.[8]

Let's consider the status of civilian contractors performing highly specialized work that has traditionally been carried out by the governments to develop, monitor, and implement data gathering programs. In every country, especially the USA, Russia, China, and throughout the EU, following the post 9-11 changes that have led to highly developed security regimes, there has also developed a remarkable increase in private entities that own infrastructures that are critical to national security interests. Use of private company equipment, vehicles and personnel for support of military activities confuses the civilian/military distinction. Here we recognize the traditional construction workers, war machine factory employees, food preparation and delivery enterprises that are contractors for the military, and for Law of War purposes, are considered civilians that accompany the military. But recent developments also include having private civilian security services to guard buildings, install technology wiring, computers, networks, and video and communications equipment. Also now, we have delivery of space satellites on privately launched vehicles, and development of surveillance equipment for audio, video, purchases, movement, lifestyle and choice of life data. Is this military data or civilian data? Is this data used to observe threats to national security or for military uses or for

corporate marketing campaigns? In a legal sense, does the military enter into the domestic civilian police force during the conduct of surveillance cyberattacks, data theft, and network control?

The civilians' role has evolved in part as a reaction to decreased government spending for traditional military types of work. Defining civilians and their role in the relationships between government-military-university-private contractors has become complex. The traditional rule is that civilians are not part of the military.[9] Furthermore, the traditional rule holds, civilians are non-combatants and are not engaged in conducting acts of aggression. Increasingly, civilian government contractors are in control of more technology for remote surveillance, data capture, and increasingly employ more techniques to disrupt and control the electronic equipment of other enemies.

At other times these remote attacks take the form of drone strikes carried out against non-military persons, civilians and terrorists, and these attacks are based on data produced, gathered analyzed and reported by non-government employees, i.e., contractors. The "civilian" status becomes particularly relevant when the information gathering "unmanned aerial vehicle" mounts a weapon and becomes a remote controlled attack drone; or even as an autonomous robotic weapon system that fully automates in a self-contained and independent manner once deployed to a kill zone. When the machine is designed and deployed by civilians, and persons killed are civilians, it becomes difficult to determine who are the combatants in this state sponsored act, in zone that may or may not be declared a war zone.

Suppose a state party decides to destroy a government contractor surveillance institution operating remotely because the attacking government believes the civilian contractors are conducting cyber espionage, sabotage, as well as, property taking of confidential records for socioeconomic advantage, or destruction of civilian tangible assets and intangible assets from that site. From IHL,[7] three rules apply to military actors, and it remains to be determined at what point the remote cyber surveillance civilian actor becomes a combatant:

1. An indiscriminate attack occurs when the military fails to make this civilian, combatant and non-combatant distinction in its activities. This is the essence of a war crime.
2. Combatants must always take precautions to minimize causing harm to non-combatants.
3. Excessive attacks are ones that are likely to cause death or injury to civilians or are attacks that are likely to damage non-military civilian objects. Proportionality is

> required in military decision making to minimize harm to civilians while carrying out military objectives.

The linguistic evolution of "war" to "armed conflict" to the "war on terror" and now to "cyberwar" has coincided with the evolution of the meaning of attack, criminal, and belligerent. As noted by FBI Director Robert Mueller who testified that cyber threats will surpass terrorism as the top threat facing the United States. "Stopping terrorists is the number one priority," stated Mueller, "But down the road, the cyber threat will be the number one threat to the country. I do not think today it is necessarily [the] number one threat, but it will be tomorrow" (Hoover 2012).

Cyberwar and cyberattacks come from all types of bad guys. The laws of armed conflict are ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians, so for our purposes cybergang status is likewise ambiguous but is merely another type of bad guy conducting attacks to control communications networks, data, and financial and military weapons. So the cyberwar is against all manner of bad guys – states, cybergangs, enemy military, and hackers.

So let's now briefly consider the meaning of this "state of war." Traditionally, a declaration of war is an announced position for acts of hostility by one state party against another state party. The legality of who in the government is competent to declare war varies based on the country, but in the USA, it is the Congress that has the Constitutional authority to declare that the USA is in a war with another country. This declaration power has not been used by the USA since it last declared itself to be in a war in 1942. "Armed conflict" is a concept that has evolved as a counter to the need for a declaration of war and is based on the fact that the nature of military actions has changed away from states' declarations. In many modern states today, this warlike aggression is now titled "authorization to use military force." Rather than be concerned with the politics and rhetoric of states regarding whether a particular conflict is a war or not, international law applies for armed conflict as defined as "any use of armed force by one State against the territory of another," so that it triggers the applicability of the Geneva Conventions between the two states (Gasser 1993). According to this scheme, measures taken to prevent cyberwarfare and the carrying out of attacks during cyberwarfare would be governed by the same legal regimes that other types of "armed conflict."

Surveillance and border security

The meaning of a technology crime or attack depends largely upon the definition of the parties involved. Police use of magnetic GPS radio transmitters secretly attached to a car,

without obtaining a warrant from a judge, might be seen as legal. But if instead of the police the same activity is conducted by a jealous ex-husband, or a business competitor, or an advertising company seeking to learn market strategies for its goods, or to monitor an employee's private vehicle that she drives in part for performance of work related duties – then the culpability of the act becomes more certain. Cyberlaw, and international cyberwarfare, must consider the limits of government and corporate penetration into private civil life.

The meaning of borders has changed. We once lived in a world with less immigration, passport and border security controls. As globalization and ease of mass transportation has greatly increased, the nature of border security has evolved such that it becomes more and more difficult for legal entry into another country. Illegal entry immigration remains a fact of everyday life in every country. The distinction between resident and migrant becomes linguistically and legally blurred. The meaning connected to this legal glossary has changed greatly in the past two decades, resulting in the marginalization of certain groups, in effect defining their legal status out of existence, and simultaneously empowering other groups with new authoritative meaning, identity, power, representation, and jurisdiction.

Some argue that this is a situation that many governments seek to maintain, because so much of their domestic economy depends on the labor of "undocumented" workers. Terms such as "without status" "migrant," and "illegal immigrant" have become legally fashionable. In the USA, contract managers can hire these laborers from "south of the border" by scouting them out from groups of men waiting for drive-by pickup trucks to hire them to do the most menial and physically demanding of jobs. Of note here is the convenient legal linguistic situation of the "contractor." The owner of the construction project or factory or business is not the employer of the laborers. In practice, the project is run by a principal who hires contractors for specific parts of the job: the laborers are hired by the "independent contractor" so that any legalities or illegalities in work performance or standards are buffered to the liability of this very independent contractor, thereby immunizing the ultimate owner of the business or construction project. This independent contractor situation protects the principal from all sorts of immigration, healthcare, housing, food, working hours, environmental standards, machinery and equipment safety requirements. Another byproduct of this undocumented labor is the denial of taxes and community contributions greatly needed by the governments during the worst of economic times, yet unpaid by "workers without status." In Northern California it has been reported that the average life expectancy of illegal migrant farm worker is "still 49 years -- compared to 73 years for the average American."[10] There are parallel situations in every country.

So while airport security does full nude image body scans, diary readings and on-sight translations, along with total computer, cell phone and digital camera harddrive data copying and weeklong computer seizures – workers without status in well-known districts remain in every major world city, out in public to be hired as servants to work without rights. Similar criminal networks develop for the sex industry, as much of its labor comes from mass and secretive movement and abduction of women, girls, and boys trapped in this undocumented underground economy. Many live and die secretly in the same country for 80 years or are even born in that country, but never attain citizenship rights or even residency permission, despite massive amounts of electronic data collected about them. The government is concerned with who is the tourist, businessman, and resident, as well as, who is the potential terrorist. The result is that the level of publicly-displayed high technology surveillance and adherence to the immigration tracking rules is at a worldwide all-time high, yet it is difficult to reconcile this level of scrutiny with the number of unprotected and undocumented travelers and laborers.

Conclusion

The technology to record, monitor and influence human movement and activities is highly sophisticated. There are many parties leading the social and legal movement to involve computers in all aspects of government affairs, financial endeavors, political activism, travel, migration, and criminal behavior. But there are common security threads legally found throughout international law, computer law, and the law of armed conflict that prove to have application to the cybercrimes and cyberwars of the newest era.

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Registration Convention 1974 https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introregistration-convention.html

Moon Agreement 1974 https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/travaux-preparatoires/moon-agreement.html

End Notes

1. Separate papers written by the author regarding cybersecurity describe legal aspects of intellectual property, trade secrets, technology, transfers, satellite, data retrieval, travel law, and international humanitarian law.
2. This training is offered by many organizations including, e.g., the EC-Council which "provides a comprehensive ethical hacking and network security-training program to meet the standards of highly skilled security professionals." An archived copy of the CE Council page may be found at https://web.archive.org/web/20120325073617/www.eccouncil.org/courses/certified_ethical_hacker.aspx
3. *The Geneva Conventions* comprise four treaties, and three additional protocols, that establish the standards of international law for the humanitarian treatment of the

victims of war. The treaties text and International Committee of the Red Cross (ICRC) commentary can be found at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/

4. The U.S.-China Economic and Security Review Commission (USCC) https://www.uscc.gov/ *2011 Annual Report*, and described by Mick, Jason DailyTech, *Gov't Report Warns of Chinese Plans to Cripple U.S. Space Defenses*, November 17, 2011. Archive copy at https://archive.li/xTKEj
5. The real time locations of 13,000 of these satellites can be seen on via the official KML file https://www.gearthblog.com/satellites or via the Google Earth Plug-in.
6. *Treaty Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies* Moscow, London & Washington, January 27, 1967. Et seq. Five Outer Space Treaties – *Outer Space Treaty* 1967, *Rescue Agreement* 1968, *Liability Convention* 1972, *Registration Convention* 1974, *Moon Agreement* 1974.
7. International Humanitarian Law (IHL) to also include Geneva Conventions, the Hague Conventions, Law of War and Armed Conflict (LOW and LOAC), human rights law, war crimes, and proceedings of International Criminal Court (ICC).
8. A useful collection of customary rules of IHL are summarized and organized on the International Committee of the Red Cross (ICRC) website at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul
9. The Geneva Conventions define civilian status and the civilian population. The definition of civilians is as persons who are not members of the armed forces. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) Chapter II: "Civilians and Civilian Population", Article 50 to which no reservations have been made, and virtually all states agree. This custom and standard is also restated in numerous military manuals and military practice. The International Criminal Tribunal for the Former Yugoslavia adjudicated the Blaškić case in 2000, defining civilians as "persons who are not, or no longer, members of the armed forces."
10. The Cesar E. Chavez Foundation and the United Farmworkers of America. https://ufw.org/