European Journal of International Security (2025), page 1 of 18
doi:10.1017/eis.2024.60

EJIS

Evidencing terrorism: Juridical truth-making in terrorism trials

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(Received 25 June 2024; revised 12 November 2024; accepted 9 December 2024)

Abstract

This article explores the construction of terrorism via evidentiary practices, through the examination of terrorism trials in Nigeria. By conceptualising legal evidence – or evidencing – as a juridical practice of truth-making, the article contributes to the growing stream of critical literature on terrorism trials, and pre-emptive security more broadly, by examining the production of terrorism knowledge in light of the dominant pre-crime rationality that typically underpins counte-terrorism practice. The article highlights the complex processes and practices involved in the *making* of juridical truth in court and criminal justice processes, and how this enables the production and contestation of terrorism.

The article utilises important works on truth-making, alongside the contemporary literature on terrorism trials, to develop its theoretical and methodological approach. The empirical data for this study include court documents of terrorism cases in Nigeria, including those from the so-called Kainji trials, which emerged from fieldwork conducted in Abuja, Nigeria in 2020. The article demonstrates the productivity of legal evidence in the context of terrorism trials, involving different truth-makers, narratives, techniques, temporalities, and rationalities. In doing so, the article therefore contributes to the problematisation of terrorism and related issues of pre-emption, as well as the discussion on truth-making, by illustrating how the production of legal truth is shaped by different narratives, material practices, and logics in terrorism trials.

Keywords: counterterrorism; critical security studies; juridical truth; terrorism trials; law; security knowledge

Introduction

Criminal prosecution has often been described as an effective way to stem the tide of precautionary security practices that usually shapes counterterrorism.[1] Importantly, the values embedded in the criminal justice system, such as the presumption of innocence, due process protections, the requirement of proof, and the right to fair (and public) trial, have been described as crucial for providing useful safeguards against, or constraints on, state coercion. Thus, countering terrorism through 'criminalisation and prosecution offer[s] a leeway to return to normalcy [i.e. a retreat from exception] and a reassertion of procedural protections for those accused'.[2] These standards – or norms – of criminal justice were reinforced, and indeed contested, in terrorism trials in Nigeria, notably in the so-called Kainji trials which commenced in 2017, notwithstanding the various procedural and substantive flaws that attended these trials (such as the lack of public access to the

[1]Dickson Brice, 'Terrorism law and legal accountability', in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Abingdon: Routledge, 2015), pp.116–30; Lucia Zedner, 'Terrorizing criminal law', *Criminal Law and Philosophy* 8 (2012), pp. 99–121.

[2]Zedner, 'Terrorizing criminal law', p. 118.

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https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

court hearings).[3] In the case of the Federal Republic of Nigeria (FRN) vs Aliyu, for example, the Senior State Counsel in response to the facts of the case and the intelligence report, retorts: 'there is no proof that the suspect is involved in any criminal act, one therefore wonders from whence the allegation of terrorism was manufactured against the suspect'.[4] Such spurious allegations which have no evidential support, he adds, are 'a flagrant violation of the fundamental human rights of the suspect and should be discouraged with the harshest words possible'.[5]

The above highlights certain concerns and expectations of criminal prosecution in the context of counterterrorism, especially with regard to pre-crime ideas and interventions, which have been given considerable attention by legal and security scholars.[6] Recent works have illustrated the entanglement of security and legal rationalities, notably, in relation to preventive security practices in the post-9/11 era.[7] More broadly, this literature highlights the various techniques – such as 'net-widening', 'coincidental evidence', 'alternative sentencing' – introduced to perpetuate the pre-crime security terrain and logic associated with counterterrorism, which is often designed to meet various policy ambitions and/or moral obligations ostensibly directed against the existential threat posed by (the crime of) terrorism.[8] As de Lint and Kassa note,[9] 'precaution has been joined up to crime control and the necessity of national security priorities' in criminal justice processes.

Furthermore, the performativity of terrorism trials and the use of different legal technicalities, including evidence, have been explored in the literature on terrorism trials.[10] The court has been conceptualised in this literature as *theatre* or a space that enables the production of juridical truths about terrorism, which is underpinned by complex processes and practices.[11] More recent analysis has highlighted the workings of different legal processes or practices such as evidence and sentencing,[12] and their various functions in the prosecution of terrorist suspects. As Suresh points out, the legal sphere, and terrorism trials in particular, remains a space for mundane practices and contestations involving various rules, people, institutions, materials, modes of speech, and procedures.[13] Indeed, despite the overwhelming state control of the prosecution of terrorist suspects in Nigeria and other weaknesses with regard to the lack of due process and related human rights violations (mass arrest and prolonged pre-trial detention of individuals, often based on suspicion and anecdotal evidence), terrorism trials in the Nigerian context involve a convoluted process (and practices) leading to different, and often complex, outcomes (e.g. the rejection of the evidence produced by security agencies by the state counsel and judges).

[3]Kodili Henry Chukwuma, 'Proscribing time? Proscription and temporality in terrorism trials', *International Political Sociology*, 18:1 (2024), pp. 1–21.

[4]FRN vs Aliyu Bunu Mustapha, DPP/ADV:CCG/717/14.

[5]Ibid.

[6]See Beatrice de Graaf and Alex Schmid, *Terrorists on Trial: A Performative Perspective* (Leiden: Leiden University Press, 2016); Willem de Lint and Wondwossen Demissie Kassa, 'Bent into security: Barrister contribution to a skewed order in two terrorism prosecutions in Australia', *Journal of Law and Society*, 44:2 (2017), pp.169–99; Louise Amoore, 'Risk before justice: When the law contests its own suspension', *Leiden Journal of International Law*, 21 (2008), pp. 847–61.

[7]Tasniem Anwar, 'Time will tell: Defining violence in terrorism court cases', *Security Dialogue*, 53:2 (2021), pp. 130–47.

[8]Charanjit Singh, 'Prosecuting terrorism: Secret courts, evidence and special advocates. The panoply of challenges facing criminal justice, the United Kingdom perspective', *Current Issues in Criminal Justice*, 33:3 (2021), pp. 382–408; Christopher Banks, 'Security and freedom after September 11: The institutional limits and ethical costs of terrorism prosecutions', *Public Integrity*, 3:1 (2010), pp. 5–24; Kelly R. Damphouse and Chris Shields, 'The morning after: Assessing the effect of major terrorism events on prosecution strategies and outcomes', *Journal of Contemporary Criminal Justice*, 23:2 (2007), pp. 174–94.

[9]De Lint and Kassa, 'Bent into security', p. 176.

[10]Martha Merrill Umphrey, 'Law in drag: Trials and legal performativity', *Columbia Journal of Gender and Law*, 21:2 (2012), pp. 114–29.

[11]See de Graaf and Schmid, *Terrorists on Trial*.

[12]Mayur Suresh, *Terror Trials: Life and Law in Delhi's Courts* (New York: Fordham University Press, 2023); Mareike de Goede and Beatrice de Graaf, 'Sentencing risk: Temporality and precaution in terrorism trials', *International Political Sociology*, 7:3 (2013), pp. 313–31.

[13]Suresh, *Terror Trials*.

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With the foregoing background in mind, this article specifically aims to demonstrate how terrorism is constructed through evidentiary practices, against the backdrop of the overwhelming pre-crime rationality that often shapes counterterrorism knowledge and practices. This objective is informed by a key research question examined in what follows: first, how is (the crime of) terrorism constructed through legal evidence produced in court settings and criminal justice processes? To put this differently, how does the production of juridical truth enable the reproduction, and contestation, of various assumptions about terrorism (and pre-emption)?

To explore the above question, I conceptualise legal evidence in this article as a juridical truth-making process by drawing upon insightful literature on truth-making, along with other contemporary work on terrorism trials. In doing so, the article aims to illustrate the legal twists involved in the production of terrorism knowledge through complex evidentiary processes and practices which are comprised of different truth-makers, materials, techniques, temporalities, and rationales. This truth-making process (and practices), the article argues, essentially enable the reproduction of different legal norms and principles ostensibly to construct terrorism, including as an objective phenomenon (though contested), transnational, ahistorical, and behavioural. In making this argument, this article aims to contribute to work on the construction – and problematisation – of terrorism in legal discourse, and pre-emptive security more broadly. It also speaks to the discussion on (juridical) truth-making specifically by showing how the production of legal truth is often shaped by various narratives, material practices, and rationalities in terrorism trials. The analysis developed below also helps us to think more broadly about the relationship between law and security, and the complexity of criminal justice processes in contrast to alternative approaches to counterterrorism.

Having sketched the scope, objectives, and contribution of this intervention, the rest of this article proceeds as follow: the first section uses the notion of 'proof paradoxes' to highlight the complexities that often characterise, and mediate, terrorism trials as discussed in the existing legal and security scholarship. Following on from this, the second section provide a theoretical framework to scaffold my analysis in the substantive parts of this article by drawing upon contemporary work on terrorism trials, truth-telling, and truth-making to theorise legal evidence as a fundamentally truth-making practice. The third section outlines the research method used in this article, then moves on to examine three ways in which terrorism knowledge is produced in court trials of terrorist suspects, in relation to evidentiary practices (and processes) – including through security intelligence; through the reproduction of legal principles; and through court decisions – in the fourth section of this article. The article concludes by outlining the contribution and implications of this study especially for the burgeoning body of critical work on (counter)terrorism and security politics, and for our understanding of the relationship between law and security in counterterrorism contexts.

Proof paradoxes in terrorism trials: Status, rules, procedures, and standards of legal evidence

The following section uses the notion of 'proof paradox' as developed by legal scholars to highlight the tensions, complexities, and contingencies linked to 'conventional ways of understanding the process involved in legal proof' in terrorism trials,[14] which are often underscored by the logic of pre-emption. Proof paradoxes, according to Pardo,[15] involve the various types of evidence used to prove a contested case or crime, the burden of proofing the – often discrete – elements of such crimes, and, most importantly, the tensions or inconsistencies that arises in this process. It is important to note, though, that evidence scholarship is increasingly interdisciplinary and draws upon insights from a diverse array of fields including arts and performance studies, statistics, economics, and forensics to examine different aspects of legal evidence, such as the status of proof itself, the

[14] Michael S. Pardo, 'The paradoxes of legal proof: Critical guide', *Boston University Law Review*, 99:1 (2019), pp. 233–90.
[15] Ibid.

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rules, standards, and procedures through which proof emerges – or is presented – in criminal justice adjudication. While 'the requirement of proof' has often been distinguished as a fundamental component for upholding legality (i.e. the norms, conventions, and principles that ensure conformity with the law) in the prosecution of terrorist suspects, especially given the challenges associated with counterterrorism (state coercion, secrecy, human rights violations), legal scholars and their security counterparts alike have expressed scepticism concerning the reputational value and reliability of legal evidence.

Singh, in light of the above, refers to 'coincidental forensics' in highlighting the new forms of evidence produced in terrorism trials which integrate fragments of evidence and intelligence to adduce credibility and weight.[16] This, he notes, moves evidence beyond its contemporary construction in law to a broader focus on the forces, actors, and processes that underpin crime control and pre-emption. In other words, the investigation and prosecution of criminal offences within the remit of counterterrorism frequently involve a performative practice of gathering, sorting, and presenting *political* information as evidence about specific threats. As de Geode and de Graaf point out, it is within the realm of terrorism trials that the 'precautionary turn' in criminal justice manifests itself (as risk and pre-emptive justice).[17] The link between law and security, in one sense, stretches and recomposes the presentism often associated with the laws of evidence (i.e. communicating the knowledge of past events to the court) whereby future risks are imagined, contested, and responded to in the present. These tensions facing legal proof in terrorism trials increasingly put pressure on the rules, procedures, and conditions under which evidence emerges, is accepted, or is contested in adjudicatory proceedings (with regard to the admissibility process, the sufficiency of legal evidence, and the inferences that may be drawn from such evidence).

As Banks explains further, in the post-9/11 context and the pre-crime reasoning introduced into criminal justice, prosecutorial discretion often entails less need to establish a direct link between proof and its referent.[18] Thus, evidence may be permissible or rejected due to different concerns including public interest, moral judgements, national security, and intervention by the defence and/or the accused. Moreover, the use of intelligence obtained for security purposes, which is often fragmentary, circumstantial, and involves the discernment of risk and assumptions about potential threats (which are usually gathered through covert practices) as significantly evidential resources also expands the ambit of criminal justice in multiple temporal directions (backward and forward) to criminalise certain activities remote from, or perceived to enable, terrorism.

Besides these concerns about the value and type of evidence admissible in criminal justice processes, another related issue is the procedure through which legal proofs are communicated in court settings. Who provides legal evidence in terrorism trials? How and when does this take place? As indicated above, the precautionary logic that shapes counterterrorism increasingly blurs the distinction between intelligence and evidence, as well as the relationship between law enforcement, security agencies, and the criminal justice system. As McCulloch and Pickering note, the collection of evidence often commences when a profile is associated to risky subjects, whether based on mere suspicion or on anecdotal information.[19] This not only stifles the principle of 'equality of arms' in the adjudication process – with regard to the defence – but also expands considerably the pool of 'truth-makers'. According to de Lint and Kassa, 'barristers engage in implicatory denial by attributing the skewedness of the legal order to other actors',[20] including suspects, intelligence and security agencies, judges, terrorism experts, and other state actors. Furthermore, shifts in the burden of proof especially from the prosecution to terrorist suspects have been identified as constitutive of contemporary criminal justice processes. This also encompasses the convoluted

[16] Singh, 'Prosecuting terrorism', p. 384.

[17] De Goede and de Graaf, 'Sentencing risk'.

[18] Banks, 'Security and freedom after September 11'.

[19] Jude McCulloch and Sharon Pickering, 'Pre-crime and counter terrorism: Imagining future crime in the "war on terror"', *British Journal of Criminology*, 49 (2009), pp. 628–45 (p. 628).

[20] De Lint and Kassa 'Bent into security', p. 199.

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relationship between 'proof and persuasion', and the generative effects of different forms of evidence including ocular, material, and documentary practices which diffuse the burden of producing – or contesting – legal proof.

A fourth, and final, paradox examined in this section is the lowering of evidential standards ostensibly to accommodate the pre-crime rationale and aims of counterterrorism (emergence and necessity), often according to certain political interests. Singh notes that 'the nature of the offence and the requirement for proof has led us to the search for the lowest point at which the standards of [evidence] are judged'.[21] Interestingly, and rather perplexingly, while (the crime of) terrorism is portrayed as exceptional and dire, it is, however, 'prove-able' by presenting a 'convincing' or 'compelling' argument (as opposed to, say, 'beyond reasonable doubt' for criminal cases, and 'preponderance of evidence' for civil cases). Nevertheless, there have been several efforts to reconcile the above-explored paradoxes in relation to contemporary precautionary approaches to security and legal practice. Roach's idea of 'blended order', for example, highlights the compromise between principles of legality and counterterrorism practices,[22] which involves the coexistence of secrecy and fairness, publicity, and efficiency. Furthermore, the notion of 'plausible legality' highlights 'the institutionalization of exceptional devices and the bending of legal rules and norms to accord with specific policy choices, with implicit references to urgency and necessity'.[23]

The foregoing discussion about legal proof in terrorism trials and the complexities that shape, mediate, and inhibit them highlights several challenges with respect to the status and practice of evidencing. This dilemma, I suggest, creates space for further inquiry into evidentiary practices and how they enable the production of (legal) truth about terrorism. As demonstrated below, evidentiary practices often rekindle, and reformulate, various ontological quandaries about terrorism – especially concerning its unstable, and essentially contested – existence which are discursively and theatrically re-enacted in these trials. This article now moves to sketch the theoretical framework and ideas about *evidencing* as a juridical practice of truth-making (about terrorism) to guide the substantive analysis in this article.

Juridical truth-making in terrorism trials

The literature on terrorism trials has highlighted the performative aspects of courtroom engagements, juridical processes, and mundane legal practices.[24] Notably, the 'court' has been defined as theatre, stage, or show in conceptualising such trials as 'political arenas where the struggle for justification and legitimisation' of (the) meaning (of terrorism) continues.[25] De Graaf and Schmid in their work use the concept of 'lawfare' to highlight the continuation of politics through other means, that is, by communicative, legal, and performative measures, involving different parties (terrorism experts, defendants, and security agencies).[26] More broadly, the link between law and performativity – or 'law as performance' as described by Peters[27] – has of course been greatly explored by Butler who, though in relation to legal speech acts, highlights the way in which law continually authorises itself through a 'sovereign conceit'.[28] As Umphrey points out, law and the

[21]Singh, 'Prosecuting terrorism', p. 404.

[22]Kent Roach, 'The eroding distinction between intelligence and evidence in terrorism investigation', in Nicola McGarrity, Andrew Lynch, and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Abingdon: Routledge, 2010), pp. 48–68.

[23]De Lint and Kassa 'Bent into security', p. 179.

[24]See Suresh, *Terror Trials*.

[25]De Graaf and Schmid, *Terrorists on Trial*, p. 12.

[26]Ibid.

[27]Julie Stones Peters, 'Mapping law and performance: Reflections on the dilemmas of an interdisciplinary conjunction', in Simon Stern, **Maksymilian Del Mar**, and **Bernadette Meyler**, *The Oxford Handbook of Law and Humanities* (Oxford: Oxford University Press, 2020), pp. 198–215.

[28]Butler as quoted in Umphrey, 'Law in drag', p. 114.

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legal subjects who come before it are fabricated and staged, drawing attention to questions of representation and power in juridical processes.[29] In short, terrorism trials, as conceptualised in this literature, essentially entail 'spaces [and involve practices] for the production of knowledge about terrorism',[30] as well as the realm of security exceptions,[31] and the provenance of (post-)colonial subjection and violence, as I show later in this article.[32]

Yet a handful of studies have, contrastingly, highlighted the normal, everyday-ness of terrorism trials, which seeks to reconstitute the court as an interactive space rather than a zone of exception.[33] Chiefly, these interventions highlight the importance of mundane legal procedures and processes, which are usually entangled with other substantive aspects of terrorism trials and co-constitute meanings and legal outcomes. According to Suresh, legal processes and technicalities, though seemingly ordinary, 'provide the means through which accused persons weave themselves into the fabric of life in the courtrooms'.[34] Thus, while terrorism trials involve a complex, theatrical practice in which criminal intent, risky individuals, and scenarios are imagined, invoked, or contested, focusing on the practice of legal proof(ing) – or truth-making – highlights more fully the complexities involved in such trials, especially with regard to the processes, materials, peoples, texts, and rationalities invoked in the construction of terrorism.

There is a substantial body of critical work on legal evidence highlighting the different forms and processes of legal proof and the effects they create.[35] Rayburn,[36] for one, refers to the 'burden of performance' in rape and sexual assault trials to illustrate the various roles performed by complainants which put their gender identity into question but are fundamental to the jury's decision-making process. Other important works have drawn upon concepts such as 'detailism' or 'certification',[37] 'folded objects',[38] and 'ocular evidence'[39] to examine the importance of files, materials, visuals, and documentary practices in the production of juridical truth or contesting certain 'facts', including those about terrorism. Thus, this article can be situated within the growing critical scholarship on terrorism trials including those inspired by Critical Legal Studies and Science and Technology Studies, as well as critical works on the construction of terrorism.[40] By conceptualising legal evidence as a juridical truth-making practice, however, this article demonstrates

[29]Ibid.

[30]Tasniem Anwar and Beste Isleyen, 'Guilty knowledge: A postcolonial inquiry into knowledge, suspicion, and responsibility in the fight against terrorism financing', *Review of International Studies*, 49:1 (2023), pp. 161–80 (p. 161).

[31]Tasniem Anwar and Marieke de Goede, 'From contestation to conviction: Terrorism expertise before the courts', *Journal of Law and Society*, 48 (2021), pp. 137–57.

[32]See also Renisa Mawani, 'Postcolonial legal studies', in in Simon Stern, **Maksymilian Del Mar**, and **Bernadette Meyler**, *The Oxford Handbook of Law and Humanities* (Oxford: Oxford University Press, 2020), pp. 104–23.

[33]See, for example, Suresh, *Terror Trials*.

[34]Ibid., p. 5.

[35]Jude McCulloch and Sharon Pickering, 'Counter-terrorism: The law and policing of pre-emption' in Nicola McGarrity, Andrew Lynch, and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Abingdon: Routledge, 2010), pp. 13–29; Jude McCulloch and Sharon Pickering, 'Pre-crime and counter terrorism'; Corey Rayburn, 'To catch a sex thief: The burden of performance in rape and sexual assault trials', *Columbia Journal of Gender and Law*, 15:2 (2006), pp. 437–84.

[36]Rayburn, 'To catch a sex thief'.

[37]Mayur Suresh, 'The "paper case": Evidence and narrative of a terrorism trial in Delhi', *Law and Society Review*, 53:1 (2018), pp. 173–201; Mayur Suresh, 'The file as hypertext: Documents, files and the many worlds of the paper state', in Stewart Motha and Honni van Rijswijk (eds), *Law, Memory, Violence: Uncovering the Counter-Archive* (London: Routledge, 2016), pp. 97–115.

[38]Tasniem Anwar, 'Unfolding the past, proving the present: Social media evidence in terrorism finance court cases', *International Political Sociology*, 14, (2020), pp. 382–98.

[39]See Piyel Haldar, 'The evidencer's eye: Representations of truth in the laws of evidence', *Law and Critique*, 2:2 (1991), pp. 171–89; Piyel Haldar, 'Law and the evidential image', *Law, Culture and the Humanities*, 4 (2008), pp. 139–55.

[40]For critical works on terrorism, see Lee Jarvis, 'Terrorism, counter-terrorism, and critique: Opportunities, examples, and implications,' *Critical Terrorism Studies*, 12:2 (2019), pp. 339–358; Emeka Thaddeus-Njoku, 'Queering terrorism,' *Studies in Conflict and Terrorism*, 47:8 (2024), pp. 463–87; Kodili Henry Chukwuma, 'Critical Terrorism Studies and postcolonialism: Constructing ungoverned spaces in counter-terrorism discourse in Nigeria', *Critical Studies on Terrorism*, 15:2 (2022), pp. 399–416.

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more explicitly the complexities involved in the construction to terrorism through legal evidence involving different truth-makers, materials, techniques, and rationalities. This highlights specific attempts to invent, verify, obfuscate, and contest (legal) 'truths' about terrorism. In other word, this entails an active process of truth-*making* or evidencing in relation to terrorism through different material and narrative techniques, albeit in a fundamentally theatrical way, rather than presenting or communicating seemingly objective accounts of the past in court.

Recognising the multiple ways in which legal truth is produced (and contested), including through narratives and material practices (documents, certification, forensics, and personal narratives), helps to undermine the discursive/material binary as well as the Eurocentric and civilisational discourse on documentary evidence as an essential component of (legal) truth and progress.[41] Moreover, post-colonial legality, as Baxi explains, provides a register of creativity through a mimetic framework which enables the (re)production of texts and practices of governance through diverse means.[42] Such a conceptual approach also helps to highlight how the production of juridical truth (about terrorism) is shaped by different, and often competing, rationalities in terrorism trials (and illustrates the complex relationship between law and security with respect to criminal justice approaches to counterterrorism).

Foucault's idea of truth-telling and modes of veridiction (avowal, signs, and representation, among other techniques) has been taken up by critical legal scholars (as well as in peace-building and conflict resolution literature) to highlight the legal apparatuses that demand certain ways of speaking the truth and the kind of subjects these recursively produce.[43] According to Jackson, the version of law's truth which authorises itself and the jural acts following the finding of facts, and the ostensibly certifying procedure of evidencing, frequently leads to difficulties when it is claimed that verdicts are based on real, past events.[44] Thus, he continues, the 'process of disputation common to adversary proceedings essentially allow lay perceptions, lay stories, and lay judgements to govern the way verdicts are reached'.[45] While these accounts provide useful insights into the processes involved in (the production of) legal proof, truth-telling in these instances often implies the expectation of the revelation of truth(s) or the involvement of a linear process of uncovering or relaying past events in the presence of the court.

However, as Smith notes in relation to the gendered dimensions of truth-telling, 'the pressures of ideologies, the unconscious, the opaque mechanisms of language and desire, the powers of discursive determinations, the destabilised temporalities of history and memory, among others, collides in contaminating truth'.[46] With regard to terrorism trials, the paradoxes of legal proof as discussed above essentially mediate, and recompose, the process/practice of evidencing. (This raises pertinent questions: who bears the burden of proof? What counts as proof? What kinds of relationship, legal subjects and logics are produced?) Moreover, terrorism is an essentially contested phenomenon; hence, there is no access to the 'real' object to be revealed in court. As such, the court is, essentially, a space for 'truth games'.[47] Given this limitation inherent within the truth-telling literature, I turn to contemporary work on truth-making to ground the iterative process and activity involved

[41]See Mayur Suresh, 'The file as hypertext', p. 101.

[42]Upendra Baxi, 'Postcolonial legality: A postscript from India', *Law and Politics in Africa, Asia and Latin America*, 45:2 (2012), pp. 178–94.

[43]See, for example, George Pavlich, 'Avowal and criminal accusation,' *Law Critique*, 27 (2016), pp. 229–45; A. C. (Tina) Besley, 'Heidegger and Foucault: Truth-telling and technologies of the self', *Access: Contemporary Issues in Education*, 22:1–2 (2003), pp. 88–98.

[44]John Dugald Jackson, 'Law's truth, lay truth and lawyers' truth: The representation of evidence in adversary trials', *Law and Critique*, 3:1 (1992), pp. 29–49.

[45]Ibid., p. 38.

[46]Sidonie Smith, 'Construing truths in lying mouths: Truthtelling in women's autobiography', *Studies in the Literary Imagination*, 23:2 (1990), pp. 145–64 (p. 147).

[47]Michel Foucault, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice* (Chicago: University of Chicago Press, 2014), p. 20.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

in the production of juridical truths through a web of truth-makers, institutions, techniques, and rationalities.

More generally, analysis of truth-making often highlights the link between 'truth-makers' and the making of truth(s).[48] The presentism and institutions of truth-making, as well as the connection between meaning and temporality, has been theorised.[49] Recent studies in global governance, such as Littoz-Monnet and Uribe, have illustrated the politics of evidence-making in global health through 'method regimes' and classificatory or hierarchical designs.[50] Schnieder summarises these related perspectives by highlighting the link between agency, representation, temporality, and contingency in truth-making.[51] In criminal justice contexts, legal evidence or evidencing, according to Halder, entails 'the ability to show those facts clearly, that is, to evince their existence to a court of law'.[52] Thus, Halder continues, some sort of data or information is required, which when *produced* before a court would prove (or disprove) a pre- or non-existing fact in issue. In other words, until evidence is articulated by certain truth-makers and/or institutions through material or linguistic techniques, it is empty. Articulation in this context involves the interaction between complex processes, agencies, temporalities, and often competing rationalities in making terrorism *present* instead of simply communicating past events or facts to the court.[53] Through examining the re-enactment of evidence in court and legal processes to produce truth(s) about terrorism, the analysis below highlights how such truth claims are accepted, interrogated or contested.

Method

In this article, I adopt a discursive approach to examine the construction of terrorism through legal evidence in terrorism trials in Nigeria. Therefore, the analysis below acknowledges the productivity of legal evidence and how it is articulated in court proceedings, including through legal objects, linguistic utterances, and arguments, to produce a specific legal discourse about terrorism. Such an approach to evidence sees terrorism trials as spaces where these articulatory practices and interactions take place,[54] where assumptions about terrorism and legal norms are reinforced and contested,[55] all of which are explored here through the textual analysis of court documents of terrorism cases in Nigeria. The research data used for answering this article's question about legal evidence and terrorism, and for demonstrating the theoretical claims outlined above, are based on archival research conducted in Abuja, Nigeria in 2020 at the Complex Case Working Group, which is a sub-department of the Ministry of Justice.[56] This data includes court judgements and case files of terrorism trials in Nigeria, including court documents from the Kainji trials, which were conducted between 2012 and 2017. It is worth noting, though, that due to various archival practices in Nigeria (the fragmentation of records, secrecy, and gatekeeping), and by not being present at the court hearings, important details related to the cases discussed in this article may be excluded or omitted. Interestingly, the case files from the Kainji trials were recently de-classified by the Nigerian

[48] Hugo Mercier and Pascal Boyer, 'Truth-making institutions: From divination, ordeals and oaths to judicial torture and rules of evidence', *Evolution and Human Behavior*, 42 (2021), pp. 259–67; Benjamin Schnieder, 'Truth-making without truth-makers', *Synthese*, 152 (2006), pp. 21–47.

[49] Jonathan Tallant, 'Presentism and truth-telling', *Erkenn*, 71 (2009), pp. 407–16.

[50] Annabelle Littoz-Monnet and Juanita Uribe, 'Methods regimes in global governance: The politics of evidence-making in global health', *International Political Sociology*, 17 (2023), pp. 1–22.

[51] Schnieder, 'Truth-making without truth-makers'.

[52] Haldar, 'The evidencer's eye', p. 171.

[53] Chukwuma, 'Proscribing time?'; Anwar, 'Time will tell'.

[54] Nicole Bögelein, Kerstin Eppert, and Anja Schmidt-Kleinert, 'Conference proceedings of the international symposium 'Terrorism in court – National courts as epistemic and empirical field in terrorism and violence research', *Criminology: The Online Journal*, 4 (2022), pp. 453–9.

[55] Beatrice de Graaf, *Evaluating Counterterrorism Performance@ A Comparative Study* (London: Routledge, 2011).

[56] Kodili Henry Chukwuma, 'Archiving as embodied research and security practice', *Security Dialogue* 53:5 (2022), pp. 438–55.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

Table 1. Court cases of terrorism

Legal text	Cases	Charge(s)
Case file	FRN vs Hassan Hamidu, DPP/ADV:CCG/163/14	Membership of terrorist organisation; association, i.e. harbouring terrorist group.
Case file	FRN vs Aliyu Bunu Mustapha, DPP/ADV:CCG/717/14	Acts of terrorism; and membership of a proscribed terrorist organisation.
Case file	FRN vs Adamu Mohammed Auta, ADV:CCG/906/14	Membership of terrorist group.
Court judgement	FRN vs Murktar Ibrahim, FHC/ABJ/CR/178/2012	Preparatory acts of terrorism; support for terrorism.

government at the time of the field research (from February to April 2020), which raised various challenges, especially with regard to access and data collection.

Having said that, this article is, part of a broader research project, on terrorism trials in Nigeria, and the four cases examined here (see Table 1 below) provide a rich empirical basis for making a worthwhile contribution in respect to the objectives and questions pursued in the article. The large corpus of court documents collected during fieldwork in Nigeria, which include 105 terrorism cases, allowed for an extensive study of the trials, which helps to mitigate the limitations created by the lack of access to courtroom proceedings. As explained below, the four selected cases (and other cases in this corpus) share certain similarities with regard to the nature of the alleged offences or crimes, notwithstanding the individual peculiarities of these cases. Importantly, they highlight the pre-crime conditions and anticipatory reasoning that shape criminal justice in the context of counterterrorism, such as offences of preparation and planning of terrorist acts, crimes of association, and the techniques used by intelligence. Through an in-depth analysis of the court documents and by observing references to evidence in the cases discussed below, I identified the interaction between different actors involved in the trials (including intelligence and security agencies, judges, prosecutors, defence lawyers, accused persons, and witnesses) as well as the different types of evidence, temporality, and justifications invoked in the adjudicatory process. Three key themes emerged from this process:

1. Legal evidence and norms were pertinently, and discursively, invoked by different actors involved at different stages of the trials in constructing terrorism.
2. References to evidence – or lack thereof – function as grounds for constructing, undermining, or (de)stabilising legality, terrorism, and the identity of individuals charged with terrorism.
3. The study highlights the reproduction of various assumptions about terrorism (objective, ahistorical, transnational), including through making it 'clear and convincing' to the court and in final court verdicts.

Thus, I draw upon the first three case files to illustrate the construction of terrorism through references to various legal principles and norms in light of the pressures from, and interests of, security intelligence. This also highlights the complexity involved in the prosecutorial process, that is, the different views and rationales expressed by the prosecution team and other parties involved in these trials (which shed light on the relationship between law and security). Furthermore, I examine the court judgement in the case of FRN vs Murktar more extensively to show the construction of terrorism (and terrorist identity) by way of legal evidence. The case of FRN vs Murktar involves an attempt to prove the (terrorist) identity of the accused person in court, following security intelligence which linked the accused to an online (extremist) personality. Thus, the discussion in the substantive part of this article highlights the interaction between different truth-makers (judges, security personnel, defence lawyers, and accused persons), truth-making institutions (intelligence

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agencies, the court), techniques (documents, material exhibits, and narratives), and rationalities (including security and legal).

In 2017, Nigeria commenced the trial of 1,699 terrorist suspects as part of its broader counterterrorism campaign against Boko Haram, in Kainji, Borno State. These trials have been variously described, including as 'secret trials' or the 'Kainji trials', due to several procedural issues or shortcomings, such as the lack of public access to the proceedings in court (including for the media and researchers), visible military presence and state control, and the hurried nature of the trials.[57] The mass arrest and pre-trial detention of Boko Haram suspects from 2009 to 2013 (and beyond) was part of the state's initial response to the uprisings and clashes between the members of Boko Haram and state security forces in 2009, which were – and continue to be – driven by a military-centred approach.[58] There is an enormous body of work on state-led counterterrorism interventions against Boko Haram and other affiliated groups in Nigeria.[59]

Terrorism trials in Nigeria indeed share certain parallels with those in different Western and non-Western contexts, such as issues related to risk and precautionary practices,[60] as well as the banality of criminal prosecution with respect to various procedural and substantive aspects.[61] Yet the specificity of terrorism trials in Nigeria is characterised by certain paradoxes, especially in relation to the evidentiary process. The production (and contestation) of legal evidence was described by the Ministry of Justice as the 'most pertinent obstacle faced in the prosecution of Boko Haram suspects'.[62] The over-reliance on confessions, the lack of forensic evidence, poorly investigated cases, and, most importantly, the difficulty of converting military intelligence into admissible evidence are constitutive of this process. The securitisation of the criminal justice system in Nigeria through the use of secret tribunals, mass incarceration of opposition forces or groups without sufficient evidence, and death squads of various military governments constitutes Nigeria's postcolonial penal trajectory.[63] All of this, I suggest, provides grounds for examining how terrorism (knowledge) is constructed, reinforced, or contested through evidentiary processes and practices.

The burden of production: Intelligence as legal evidence, evidence as intelligence

Criminal justice prosecution in the context of counterterrorism, though increasingly shaped by the interests of policy and security especially in the post-9/11 era, often reveals a rather more complex and nuanced image than is usually portrayed in the contemporary literature on terrorism trials. The processes and practices involved in the production of juridical truth provides a useful way to begin to 'peel back the layers of assumptions about terrorism, and security exception',[64] and indeed, concerning the relationship between law and security. As illustrated in this section, the 'burden of production' highlights the construction of legal evidence as a ground for reinforcing law's authorial significance, for conjuring risky identities and criminality, and, most importantly, for constructing terrorism as a specific type of violence. The evidentiary process in this context entails more than

[57] Chukwuma, 'Proscribing time?'.

[58] Allan Ngari and Akinola Olojo, 'Besieged but not relenting: Ensuring fair trials for Nigeria's terrorism suspects', *Institute for Security Studies* 29 (2020), pp. 1–24, available at: {https://issafrica.org/research/west-africa-report/besieged-but-not-relenting-ensuring-fair-trials-for-nigerias-terrorism-suspects}.

[59] See the following studies for analysis of Nigeria's counterterrorism strategy: Michael I. Ugwueze and Freedom C. Onuoha, 'Hard versus soft measures to security: Explaining the failure of counter-terrorism strategy in Nigeria', *Journal of Applied Security Research*, 15:4 (2020), pp. 547–67; Kodili Henry Chukwuma, '*A critical analysis of Nigerian counter-terrorism discourse: Constructions of threats, response, and identity*' PhD diss., University of East Anglia (2021), available at: {https://ueaeprints.uea.ac.uk/id/eprint/90226/}; Akinyemi Oyawale, 'The impact of (counter-)terrorism on public (in)security in Nigeria: A vernacular analysis', *Security Dialogue*, 53:5 (2022), pp. 420–37.

[60] De Goede and de Graaf, 'Sentencing risk'.

[61] Suresh, *Terror Trials*.

[62] Status of Terrorism Cases as at 11 September 2017, Federal Ministry of Justice.

[63] Saleh-Hanna Viviane, *Colonial Systems of Control: Criminal Justice in Nigeria* (Ottawa: University of Ottawa Press, 2008), p. 109.

[64] Suresh, *Terror Trials*, p.6.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

the aleatory shifts in the onus of proof in criminal prosecution, often from the prosecution to the defence or terrorist suspect. Instead, this involves different truth-makers involved in counterterrorism and criminal prosecution, whether directly or otherwise, drawing upon different sources of proof and rationales.

In the case of FRN vs Hassan, the accused was arrested in 2013 for harbouring three 'visitors' in his house, who were alleged to be members of Boko Haram.[65] This allegation (of association) also raises further suspicion and, by extension, the crime of membership of a proscribed terrorist group according to the intelligence report. Chiefly, this case illustrates how various pre-crime activities such as harbouring and associating with suspected members of a proscribed group are criminalised and contribute to the construction of terrorism in evidentiary processes. During the pre-trial interrogation in 2013, the accused denied being a member of Boko Haram, and while he admitted to accommodating three visitors in his house, they were, he claimed, 'brought by one of his friends when he was away at work'.[66] In order to prove the ingredients of the case and the alleged crimes, the prosecution would have to show (a) that the accused was aware of the 'identity of the three visitors', i.e.[67] that they were members of Boko Haram; and (b) that this knowledge, and act of harbouring terrorists, amounts to association and membership of the group.

According to the legal recommendations of the principal state counsel, however, the alleged offences against the suspect cannot be proved 'due to lack of evidence and [suggest] further investigation by the security agencies to guarantee the successful prosecution of the accused'. Importantly, this request for more detail, investigation, and substantial evidence not only highlights the patchy nature of intelligence (which is, however, often admitted in court as evidence in terrorism trials) but also points to the complexity inherent within the prosecutorial process in terrorism cases, which usually involve different state and non-state actors with, often, competing interests. Intelligence agencies may deal with fragmentary information (often used for national security purposes) differently and may be reluctant to draw conclusions or treat it as evidence of guilt. On the other hand, the police and other security agencies, who are less experienced in dealing with such kind of information, may read it as objective facts or proof of guilt. Furthermore, the request for more evidence by the prosecution to guarantee 'successful prosecution' may come up against certain interests, including those of the security agencies, who may need to keep their methods or sources discreet especially in the realm of counterterrorism, as I show in the case below.[68]

In the second case of FRN vs Adamu, the suspect was arrested in 2014 based on 'the suspicion that he was a member of Boko Haram',[69] which was denied by the accused in his statement. The legal opinion of the lead state counsel in this case further highlights the complexity of criminal prosecution in relation to the production of juridical truth about terrorism. Having denied the alleged crime, the Senior State Counsel noted that the suspect was, according to the facts of the case, arrested 'based on mere suspicion without credible or material evidence'.[70] Furthermore, the state counsel adds that, 'it is not enough for the prosecution to suspect a person of having committed a criminal offence, evidence must be produced',[71] as suspicion or intelligence, 'no matter how strong, can never take the place of credible evidence in proof of allegation'.[72] The legal recommendation here, as in FRN vs Hassan above, includes further investigation and proof; that is, 'more witnesses, and probably, [material] exhibits to produce a convincing case of criminality'.[73] Reiterating the distinction between suspicion and evidence, intelligence and law does not only reinforce certain assumptions about criminal justice, legality, and the law's authorial function as

[65]FRN vs Hassan Hamidu, DPP/ADV:CCG/163/14.
[66]Ibid.
[67]Ibid.
[68]See Roach, 'The eroding distinction'.
[69]Federal Republic of Nigeria vs Adamu Mohammed Auta, ADV:CCG/906/14.
[70]Ibid.
[71]Ibid.
[72]Ibid.
[73]Federal Republic of Nigeria vs Hassan Hamidu, DPP/ADV:CCG/163/14.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

an impartial arbiter in the production of truth (about terrorism) but also disperses the fact-finding role and highlights certain elements that constitute 'real' or 'objective' evidence for producing terrorism (i.e. witnesses, material objects, and other exhibits). Put otherwise, (the crime of) terrorism is portrayed as a tangible phenomenon which is brought into being by certain discernible features, including terrorist acts and the destruction left in their wake.

The generative functions of evidentiary practices were demonstrated more clearly in the court exchanges in FRN vs Murktar, which highlights the truth games involved in the construction – or contestation – of terrorism by different truth-makers. The accused person in FRN vs Murktar was arrested in 2011, and was later charged in 2013, for supporting and promoting terrorism in Nigeria based on intelligence which linked him to an online personality known as Abu Sabaya.[74] While this case shares certain similarities with the two cases discussed above (i.e. preparatory acts and support for terrorism), it is important to note that the exchanges in court centred on (proving) the identity of the accused, which helps to shed light on the various ways in which (legal) truth about terrorism is constructed or contested. After initial 'skirmishes between the defence and the prosecution about issues related to "proof of evidence"', as noted in the ruling, the trial commenced in April 2013. During the court proceedings, the prosecution called upon two witnesses from different security agencies (the National Intelligence Agency [NIA] and the Directorate of State Security Service [DSS]) to provide evidence to prove the alleged crime.

The first prosecution witness (PW1) from the National Intelligence Agency, however, claimed that the suspect was handed over to his team by the Security Operatives of Niger Republic, which is an external security agency, highlighting the transnational dimension of counterterrorism and how colonial borders shape the production of (legal) truth about terrorism. It is important to note that the construction of terrorism in the official discourse of counterterrorism in Nigeria typically portrays the Lake Chad region as an 'ungoverned space', as well as the designation of 'foreign terrorists' to make certain interventions possible, including those of hegemonic designs.[75] At that point, he (PW1) continued, the accused was 'handed over to the DSS for further interrogation', as his duty involve 'eliminating threats to national security' rather than interrogating criminal suspects. With this statement, he passes the buck – or burden – to the second witness, and obliquely, to security agencies in other countries in the Lake Chad Basin, especially the Republic of Niger. The second prosecution witness (PW2) noted in his testimony that he used certain 'tradecraft' to identify the 'real person behind the online personality' Abu Sabaya. Furthermore, he told the court that this person (Abu Sabaya) was also being monitored by the United States House of Representative Committee on Homeland Security as a potential threat to the USA. This of course portrays terrorism in Nigeria as a global phenomenon or threat, as well as the composite, risky identity of the accused person, which he seeks to pin down or prove in court. The construction of evidence here as a 'technical object',[76] that is, as indivisible or opaque, highlights the discursive strategies used in constructing the materiality of legal proof in terrorism trials, according to security rationality.

Among the material evidence presented in court by PW2 are included printouts of online activities he allegedly retrieved from the email address of the accused person, which were signed by the accused on the reverse side nearly five months after they were printed. The reluctance of the accused person to countersign the document, the relentless demands of investigation, and personal error were given as reasons for this variation in the dates by PW2. Nevertheless, the prosecution

[74]Federal Republic of Nigeria vs Murktar Ibrahim, FHC/ABJ/CR/178/2012.

[75]Discourses of 'ungoverned space' and 'foreign terrorists' are pertinently reproduced within Nigeria's counterterrorism discourse in which north-eastern Nigeria and the Lake Chad Basin are fundamentally rendered as ungoverned, threatening, problematic geographies and terrorist sanctuaries to permit or justify certain practices, such as the monitoring of the internal affairs of Nigeria's neighbours, bolstering border security and surveillance, and targeting and monitoring foreign nationals, especially those from countries in the Lake Chad Basin. Moreover, these discourses point to crucial post-colonial realities including around the arbitrariness of state borders, transnational identities, and post-colonial relationships.

[76]Jessie Hohmann, 'The lives of objects', in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford: Oxford University Press, 2018), pp. 30–46.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

argued that the ‘tradecraft’ or technique used by the intelligence agency, and other supporting material evidence provided by PW2, proves the ingredients of the case concerning the identity of the accused person beyond reasonable doubt. Following the prosecution’s decision and statement, the defence opened by calling upon two witnesses (DW1 and DW2), who provided evidence of good character. According to these witnesses, they have ‘known the accused person for a long time’, and ‘he is hardworking, and a good individual’. These testimonies clearly and, of course, linearly construct the behaviour of the accused person in opposition to the alleged crime of terrorism. The judge, however, pointed out that ‘the whole essence of a defence to a *criminal indictment* [such as terrorism] is to show that the defendant may not have committed the offence, or to create a doubt [or contradiction] about the facts of the case’.[77] Moreover, the judge noted that, ‘evidence of previous good character can never avail a defendant in light of the nature of the criminal offence’.[78] This assertion not only shifts the onus of proof from the prosecution to the defence but also distinguishes between different types of evidence and truth claims deemed to be relevant for constructing terrorism/terrorist. This produces a specific criminal identity, albeit anecdotally and, of course, temporally (i.e. the distinction between past and present behaviour) and an ahistorical definition of terrorism.

The third defence witness (DW3), an IT expert, explained in his testimony that the exhibits (online printouts) presented in court by PW2 were not ‘real evidence but edited to serve certain purposes’ and highlighted various errors such as the lack of webpage headers, and discrepancies in the download and printout dates which supposedly render them ‘null and void’. Finally, the accused in his testimony (DW4), explained that he indeed signed on the reverse side of the documents without reading the contents of these documents, after relentless torture and threats of harm (to him and members of his family) by the security agency. The accused (DW4) also denied the charges against him, including concerning the online (terrorist) personality Abu Sabaya, by describing himself as ‘hard-working’, and aiming to seek justice through the courts for the violation of his rights by the state security agencies. Following these testimonies, the defence asked the court to reject the exhibits linking the accused to Abu Sabaya in light of the ‘contradiction’ raised by DW3, and the testimony of the accused (DW4) about the alleged use of coercion and unfair treatment by security agencies. While this highlights different ways of ‘doing legal truths’[79] through narratives about family lives and intimate relations, which have been discussed extensively in post-colonial literature,[80] they are increasingly rendered susceptible to different kinds of interventions, interrogation, and even invalidation. Even though the court ruling, as discussed below, appealed for additional proof by the prosecution to determine the validity of the exhibits and narratives accompanying them ‘beyond reasonable doubt’, given the objections raised by the defence, the judge expressed doubt about the intimate relationships of the accused and whether they constitute ample grounds ‘for forming an opinion about his behaviour and criminal intent’.[81]

The foregoing court exchanges in the three cases discussed above illustrate the twists that characterise evidentiary processes in terrorism trials, which are often shaped by different truth claims produced through different techniques or material sources, temporalities, and rationality (including legal and security, as well as contradictions raised by defence lawyers and accused persons). The burden of production, as described in this section, positions evidence as the ground of enunciation for constructing terrorism (as objective, ahistorical, transnational, behavioural), while diffusing the production of legal truth. Indeed, the realm of evidence in criminal prosecution is not consistently overshadowed by security priorities, as is often assumed; neither does evidence always entail the

[77]Federal Republic of Nigeria vs Murktar Ibrahim, FHC/ABJ/CR/178/2012.

[78]Ibid.

[79]I am grateful to the reviewers for their generous engagement and suggestions, including using phrases such as these to highlight the varied ways of producing or contesting juridical truth.

[80]See, for example, Joe Turner, *Bordering Intimacy: Postcolonial Governance and the Policing of Family Life* (Manchester: Manchester University Press, 2020).

[81]Federal Republic of Nigeria vs Murktar Ibrahim, FHC/ABJ/CR/178/2012.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

revelation or communication of objective facts to the court. Rather, legal evidence must be constructed through various means (material exhibits, documents, and the use of different narrative techniques and testimony) to enable the production of terrorism vis-à-vis 'law's truth'.[82] That is to say, to prove terrorism ultimately involves the process of producing, dispersing, or (de)stabilising various truth claims in court settings and criminal justice processes.

Making terrorism 'clear and convincing'

The interaction between different truth-makers, logics, and types of evidence as described in the preceding section enables the invocation of various standards of proof and legal norms in terrorism trials to *make* terrorism real in court. In the fourth case examined in this article, FRN vs Aliyu, the accused was arrested in 2014 based on the allegation of acts of terrorism and membership of Boko Haram according to the intelligence report. The Senior State Counsel in this case explain, however:

> There is no proof that the suspect is involved in any criminal act, one therefore wonders from whence the allegation of terrorism was manufactured against the suspect. I am of the firm opinion that spurious allegations which have no evidential support such as in this case is a flagrant violation of the fundamental human rights of the suspect and should be discouraged with the harshest words possible.[83]

The Senior State Counsel, in light of the above statement, insists on 'proofing the alleged crime [of terrorism] beyond reasonable doubt', as required in criminal prosecution, but also highlights issues of human rights violations which frequently characterise counterterrorism intervention. The intelligence report, in contrast, points to the capacity, credibility, and veracity of security intelligence in Nigeria, which seemingly produces 'accurate information about threats to national security' through certain technical processes. It also notes that the suspect is indeed a member of Boko Haram and has participated in various terrorist attacks, including the Baga fish road market bombing and the killing of an ex-serviceman. Thus, the evidential standard is determined by the technical processes or 'tradecraft', narratives, and inferences drawn from investigation and security intelligence which are often underpinned by secrecy and fragmentation, as well as other pre-crime justifications. These different, and opposing, standards of proof and institutions of truth-making (i.e. legal and security) further illustrate the knottiness involved in terrorism trials with regard to the production of juridical truth, as well as the politics of designating threats to national security and related interests.

In the case of FRN vs Murktar, the judge referred to different evidential grounds for the different parties involved in the trial, in relation to the production and persuasiveness of their respective truth claims. On the one hand, the prosecution 'must demonstrate beyond reasonable doubt' to prove the ingredients of the case (i.e. the terrorist identity of the accused person as Abu Sabaya).[84] On the other hand, the essence of a defence, according to the ruling, is to 'show that the accused may not have committed the offence, and if indeed it seems that he has done so, to create a doubt as to the fact whether he was actually the one who has committed the offence'. Recent works on terrorism trials has identified the lowering of the standards of proof in prosecuting terrorist suspects to meet the expectations and interests of policymakers and the precautionary security regime enabled by counterterrorism. In essence, as Dickson points out, the court is prepared to accept the messiness of counterterrorism operations and the challenges associated with intelligence due to the moral obligation to prevent potentially deadly crimes – such as terrorist attacks – in the future.[85] What we see in FRN vs Murktar, though, are competing notions of proof standards and ways of producing (legal) truth through the production of technical objects, and the contradiction raised

[82] Jackson, 'Law's truth, lay truth and lawyers' truth'.

[83] FRN vs Aliyu Bunu Mustapha, DPP/ADV:CCG/717/14.

[84] Federal Republic of Nigeria vs Murktar Ibrahim, FHC/ABJ/CR/178/2012.

[85] Dickson, 'Terrorism law and legal accountability'.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

by the defence. This constructs terrorism as a contingent phenomenon (tangible/objective, but also flexible and open to interrogation), reproduced through various material and narrative devices.

The defence in FRN vs Murktar in his final address set down certain issues for determination, including 'whether from the evidence of the prosecution and the defence, the prosecution has proved the charges against the accused beyond reasonable doubt'. More specifically, the defence noted that the material exhibits (online printouts) produced by the prosecution were discredited by DW3 as 'edited materials and not original', and the prosecution had also failed to link the accused in a 'clear and convincing way' to the online (terrorist) personality. This highlights the fuzziness, contingency, and contestations of terrorism as noted above, as well as the link between (the production of) proof and persuasion in criminal justice processes. Thus, to evidence criminality – 'beyond any reasonable doubt' – fundamentally entails an attempt to construct, fix, or destabilise terrorism/terrorist within juridical contexts and legal discourse. Specifically, this involve making terrorism and a specific terrorist image (online extremist) compellingly real and juridically (in)visible, as the standards of proof and evidentiary practices ultimately dictate when a disputed fact has been 'proven' for legal (and security) purposes.

To conclude, while the burden of producing legal evidence in court settings and criminal justice processes as discussed in the previous section highlights the complexity of terrorism trials involving different truth-makers, criteria, and rationales, the evidentiary conventions examined in this section perform an integral, abetting function in constructing terrorism. Specifically, they serve as the grounds upon which certain truths about terrorism/terrorists are juridically processed, made real, interrogated or distorted in light of their rhetorical significance within legal discourse. This involves a kind of 'citation of legal norms' woven through evidentiary sources to make terrorism (in)visible and, at the same time, to reinforce law's authority even if in a fundamentally theatrical way.[86] Having examined these aspects of legal evidence in relation to the construction of terrorism, I finish below by exploring the role of evidence in sentencing terrorist suspects by focusing specifically on court judgements or rulings.

Judging terrorism

While judges are not objective fact-finders, they actively participate in the process of producing evidence and truth-making about terrorism,[87] including through the practice of excluding or permitting certain kinds of evidence or testimonies, through their reflections and summaries, and by delivering judgement. Importantly, judges have been described as playing a significant role in 'sentencing risks' and thus are involved in the production of terrorism knowledge.[88] The following section examines the complex position of judges and the practice of deciding terrorist cases specifically in relation to legal evidence to highlight the production of terrorism knowledge. What counts as evidence and how does this shape judicial decisions and verdicts? And how does the court as a truth-making institution contribute to the production of terrorism knowledge through its decisions or judgements?

The judge in FRN vs Murktar distinguishes between certain types of evidence and their juridical and temporal significance in proving – or disputing – criminal offences. With regard to the evidence given by the defence witness on the behaviour of the accused person, the judge noted that 'evidence of good character, and in particular, of previous good character can never avail a defendant as a defence to a criminal indictment'.[89] This is because, he continued, 'previous good character is an unknown concept in terms of a defence to an allegation of terrorism'. The temporal distinction between past and present behaviour essentially contributes to the production and legitimisation of certain kinds of evidence in, and through, court trials. This ahistorical interpretation

[86] Peters, 'Mapping law and performance'.
[87] Anwar and de Goede, 'From contestation to conviction'.
[88] De Goede and de Graaf, 'Sentencing risk'.
[89] FRN vs Murktar Ibrahim, FHC/ABJ/CR/178/2012.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

(of terrorism) renders invincible the past self to produce a specific, vulnerable legal subject. As the judge mused after the witness's testimony:

> When I read and reflected on the evidence of the defence witness (DW2), I asked myself, to what end is all of these? Doesn't this amount to a sheer waste of time and resources, for such witnesses to be called in the future?[90]

The above reflection of the judge as a truth-maker not only highlights the construction of certain kinds of evidence (i.e. previous good character) as unimportant but also points to their inadmissibility in court in future scenarios. This emphasises the governing of terrorism through legal temporality in relation to the production of evidence, which in turn produces atemporal, and potentially, risky individuals. Furthermore, the judge, in acting as an arbiter, contributes to the diffusion of the onus of proof, and, ultimately, in constructing terrorism. Following the testimony of the accused concerning the allegation of severe torture by security agencies, the judge asked the prosecution to provide 'more detail which, in any event, may not be used to produce fact or evidence but may give the court a plausible explanation without the court drawing inferences'.[91] This request for elucidation certainly creates the space for the struggle over meaning, interpretation, refutations, and, thus, the production of 'facts' about terrorism. The prosecution, in response to the request made by the judge, explained in the final address that the pre-trial statements and signature of the accused person 'were voluntarily provided to the security agencies by the accused'.[92] This arbiter function and shifts in the burden of proof may undermine the testimony or personal narratives of the accused, especially considering the relative distribution of power and immense state investment in terrorism trials.

The judge, in dispensing judgement by weighing, interpreting, and assessing the veracity of the evidence produced by the prosecution and the defence, inevitably (de)legitimises particular truths about an alleged crime. According to the judge in FRN vs Murktar, 'he intends to summarily deal with the issues raised in the proceedings because, in the course of reviewing the evidence (including material exhibits and testimonies of witnesses) several inconsistencies emerged'.[93] Importantly, the judge declared his dissatisfaction with the evidence (online printouts and pre-trial statements) provided by the prosecution, as the testimony of the defence witnesses (the IT expert and the accused person) 'has raised considerable doubt about their merit in proofing the alleged crime beyond any reasonable doubt'.[94] On the other hand, the judge noted the weakness of the evidence of 'previous good character' and its inability to disprove the allegation of terrorism. The accused was, however, acquitted in the final verdict, as the prosecution failed to prove the alleged offences in a compelling way. An acquittal ruling in this case, though, points to an alternative function of legal reasoning as opposed to the pre-emptive logic of security, raising pertinent questions and assumptions, including about terrorism, worth exploring below.

The court judgement also raises important procedural issues regarding the types of evidence and witness permitted or inadmissible in court. This not only forecloses the admission of good character or 'subjective evidence' in court but also seeks to prevent certain kind of witnesses, including family members, friends, and members of the community who may have useful knowledge of the accused person and the alleged offence. In doing so, terrorism is portrayed as an exceptional crime that must be proved or disputed in a certain way, and by certain people (i.e. those who possess material evidence or 'technical' knowledge), ignoring alternative sources of evidence and ways of articulating (legal) truth. Furthermore, the practice of arbitration and interpretation by the judge, which swings the burden of proof in different directions, and the ambiguities that emerge from

[90] FRN vs Murktar Ibrahim, Charge No: FHC/ABJ/CR/178/2012.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

the evidence produced by both parties, unfailingly illustrate the contingency associated with terrorism, particularly in relation to its contested ontological status.[95] These issues notwithstanding, the court judgement in FRN vs Murktar sheds light on the complex relationship between law and security, which is often overshadowed by assumptions of exception or pre-emption prominent in contemporary analysis of counterterrorism.

Conclusion

This article has examined the politics of evidence in relation to the construction of terrorism in criminal prosecution. As demonstrated above, legal evidence or evidencing as a truth-making practice goes beyond the communication or revelation of 'objective facts' in court to prove a particular crime, i.e. terrorism. Rather, evidentiary practices and processes reinforce various assumptions about terrorism (i.e. objective, contingent, transnational, ahistorical, behavioural). This involves the interaction of different truth-makers and truth claims, which are weighed, interrogated, and dismissed, raising crucial questions about security knowledge and practices. What narratives and material practices count in the articulation of (legal) truth about terrorism? How does the production of legal truth reinforce, undermine, or subvert terrorism knowledge and challenge pre-emptive counterterrorism practices?

Critical works on terrorism trials often overstretch the entanglement, or ignore the ruptures possible in the relationship, between legal processes and security governance through counterterrorism. This in turn skews such an analysis towards state sovereignty and the pre-eminence of security priorities at the expense of the nuances prevalent in legal practice and processes. Indeed, post-colonial legal studies highlight the versatility and ambivalence of the post-colonial legal order, which perpetuates, reinvents, and sometimes challenges repressive colonial laws and modes of sovereignty.[96] As illustrated in this article through analysing the case of Nigeria, evidentiary processes in terrorism trials are truth games involving different truth-makers, which provide considerable space for interrogating security logics through alternative modes of representing legal truth.

This article does not suggest that the analysis of state power or the securitisation of terrorism trials has run its course; neither should these be replaced with analyses focusing on the contestation of and resistance to state/security control (by lawyers, judges, and accused persons). Rather, the article place emphasis on important twists, in order to show the different turns possible in these trials to offer a potentially useful way for explaining the way in which terrorism is constructed or destabilised in legal discourse. Moreover, legal evidence sits between procedural and substantive issues in criminal justice and as such offers considerable leeway for examining mundane practices (such as pre-trial decisions, reflections, and musings of judges, among others) as well as court judgements or decisions. Furthermore, by exploring the construction of terrorism through evidentiary practices as discussed in this article, we gain useful insights into the 'lawfare' (i.e. the continuation of politics) around the meaning of, and contestations around, terrorism and related issues of pre-emption often associated with counterterrorism.

Finally, the article also highlights the flexibility of certain legal norms or law's truth, which undermine the objectivity of legal proof frequently linked to black letter laws and legal positivism. As explained above, legal evidence is contingently produced in relation to certain temporal, legal, or security justifications. In effect, this mean the status or validity of the law is open to contestations or scrutiny. Such a critical approach to legal evidence has been, somewhat, theorised in critical legal scholarship. However, the complexity and importance of temporality in relation to evidence has not been adequately explored. For example, the *presentism* often associated with legal evidence suggests the practice of revealing, communicating, or recounting past events in court (i.e. by making them present again before the court). This does not fully account for the varied

[95] Jarvis, 'Terrorism, counter-terrorism, and critique'.
[96] Baxi, 'Postcolonial legality'.

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press

temporalities or rationalities invoked or reinforced in the production of legal evidence in court settings or criminal justice processes, as demonstrated in the analysis in this article. Thus, to tell the truth, the whole truth, and nothing but the truth is to produce it vis-à-vis various techniques, temporal frameworks, and justifications. Interestingly, various approaches and analyses of the laws of evidence, such as theories of inference and relevance, as well as other economic and utilitarian approaches which ostensibly seek to minimise doubt in the search for 'truth', frequently ignore this reiterative aspect of legal evidence. As Halder notes, 'for the evidencer, to understand the nature of facts is to understand the way in which they are constituted in court; to understand the selecting and categorizing practices of the law of evidence'.[97] Building on this observation, legal evidence involves the methods and processes of representing juridical truth in light of their discursive and temporal effects. Put differently, legal evidence is as much about producing juridical truth as it is about the temporal significance of such truths.

Acknowledgements. My sincere thanks to the editors of the journal and the two anonymous reviewers for their generous engagement and useful comments which challenged me to clarify the contribution and argument developed in the article. Many thanks, too, to colleagues in the Durham Global Security Institute (DGSi) and those who attended the Conflict+ series on 6 July 2023 for their comments and feedback on an earlier version of this article. All errors, of course, remains solely mine.

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[97] Haldar, 'The evidencer's eye', p. 172.

Cite this article: Kodili Henry Chukwuma, 'Evidencing terrorism: Juridical truth-making in terrorism trials', *European Journal of International Security* (2025), pp. 1–18. https://doi.org/10.1017/eis.2024.60

https://doi.org/10.1017/eis.2024.60 Published online by Cambridge University Press