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ARTICLE

# From contestation to conviction: terrorism expertise before the courts

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**Abstract**

This article asks how terrorism expertise has been mobilized in recent trials on terrorism financing. How is expert knowledge concerning ongoing and complex political situations involving alleged terrorism translated into factual evidence before a court of law? What kind of sources do courts use in terrorism cases, and what kind of expert knowledge is acknowledged or ignored? Through analysis of concrete cases under the United Kingdom (UK) Terrorism Act (2000) and the Dutch penal law Article 421Sr, we show how contested terrorism expertise becomes ‘certified knowledge’ that holds together as grounds for conviction before a court of law. This article contributes to socio-legal debates on legal knowledge in two ways. First, we analyse the every-day, material practices of gathering, presenting, and contesting expertise in relation to security. Second, the article analyses new case material and a particular kind of knowledge – namely, security knowledge and terrorism expertise – to identify patterns in what is deemed relevant for the court.

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## 1 | INTRODUCTION: ISLAMIC STATE MONEY AND TERRORISM EXPERTISE

In 2017, a Dutch bus driver was sentenced to 24 months' imprisonment for the financing of terrorism under Article 421Sr of Dutch penal law. The bus driver had sent money to his brother, who was at the time in territory held by Islamic State (IS).<sup>1</sup> The sentencing relied on factual descriptions of the situation in Syria at the time of the incriminating money transfers, in order to show that the defendant willingly took a risk that the money *might be* used for terrorism. In its judgment, the court posited a number of 'facts of general knowledge' about the conflict in Syria and the situation in IS-held territories, based on unnamed 'easily accessible public sources'.<sup>2</sup> Among other things, the court asserted a clear distinction between the anti-Assad uprisings, which it acknowledged as the beginning of the conflict in Syria, and the crimes of 'jihadist groups'. The court wrote: 'Many of the crimes of jihadist groups had no relation at all to the battle against Assad's army, but arose from a religiously-motivated desire to violently impose a radical version of sharia on the population.'<sup>3</sup> The court presented its understanding of the Syrian conflict as apparent to 'anyone who follows the news even just little a bit'.<sup>4</sup> The 47-page judgment includes only a few source references<sup>5</sup> and does not engage in cross-checking of facts. Nevertheless, this supposedly common knowledge of the Syrian conflict was accepted as truth by the court and helped to prove that the bus driver *should have known* that the money could or would be used for terrorism.<sup>6</sup>

This article asks how knowledge concerning ongoing, fluid, and complex political situations involving terrorist activities is rendered into factual evidence that holds together before a court of law. For example, in the case of the bus driver's conviction, it is possible to ask how the court was able to arrive at this factual assessment of a conflict that is complex, involving many armed groups and fluid frontlines, when the nature and characterization of the conflict are still fiercely debated by academics and experts.<sup>7</sup> In this article, we ask what kind of sources courts use in terrorism cases, and we focus on what kind of expert knowledge is acknowledged, referenced, excluded, or ignored in terrorism cases. These questions are important because, as Jasanoff argues, conventional legal scholarship 'offers relatively few resources for understanding what makes,

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<sup>1</sup> He was sentenced on 10 March 2017 to 24 months' imprisonment, of which 14 months were suspended with a probation time of three years. *Gerechtshof Den Haag*, ECLI:NL:GHDHA:2017:642. In the Netherlands, the standard way to refer to court cases is by their European Case Law Identifier (ECLI) and the location of the court. For the readability of the article, we have chosen to cite the ECLI in the footnotes and refer in-text to the location of the court.

<sup>2</sup> *Id.* All translations from the Dutch are our own.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> The sources cited in the footnotes of the judgment includes non-governmental organization (NGO) reports, newspaper articles, and a 2013 report of the UN Independent International Commission of Inquiry on the Syrian Arab Republic.

<sup>6</sup> An extended discussion of the definition of the offence in statute is presented later in this article.

<sup>7</sup> See, for example, the recent debate in the Dutch parliament that involved several experts discussing the status of different armed groups fighting in Syria: see *Commissie Buitenlandse Zaken*, 'Nederlandse Steun aan Gewapende Syrische Oppositie' *Tweede Kamer der Staten-Generaal*, 27 September 2018, at <[https://www.tweedekamer.nl/debat\\_en\\_vergadering/commissievergaderingen/details?id=2018A03897](https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2018A03897)>. See also I. Rothkopf, 'International Humanitarian Law and Non-State Practice in Armed Conflict: Combatant's Privilege and Kurdish Fighters in Syria' (2019) 24 *J. of Conflict and Security Law* 271; N. Ryder, 'Out with the Old and ... In with the Old? A Critical Review of the Financial War on Terrorism on the Islamic State of Iraq and Levant' (2018) 41 *Studies in Conflict & Terrorism* 79.

or unmakes, the credibility of scientific evidence in the courtroom'.<sup>8</sup> Through her work on scientific knowledge – including environmental and medical expertise – Jasanoff shows that the acceptance or rejection of the testimony of particular experts is often one of the most contentious aspects of a trial, and that it takes hard work to make materials and experts appear before a court.<sup>9</sup> Security expertise, and terrorism expertise more specifically, is perhaps even more contested than the scientific, medical, or environmental expertise that has previously been researched in socio-legal scholarship. This is not because the issues at stake are necessarily more contentious, but because the tradition of knowledge production in the security realm is less established.<sup>10</sup> As in the case of the convicted bus driver, the question is how courts evaluate and incorporate knowledge on terrorist threats and situations in their verdicts.

This article analyses how contested terrorism expertise becomes 'certified knowledge'<sup>11</sup> that holds together as grounds for conviction in criminal trials. We ask how expert knowledge is mobilized in criminal cases on terrorism support and facilitation, and what role it plays in bringing a case from contestation to conviction. Following Lynch,<sup>12</sup> we deploy the notion of 'conviction' in a dual sense. On the one hand, we understand conviction as the practice of sentencing, concluding a legal procedure and producing a legal fact concerning culpability. For this reason, we examine cases that have resulted in a guilty conviction for the defendants. On the other hand, we understand conviction as a strong belief or faith in the truthfulness of certain knowledge. (Scientific) knowledge needs to be 'juridified' to function as expert knowledge in a trial: it needs to be admitted as relevant, and recognized as credible, by the court.<sup>13</sup> It is through the process of juridification that expert knowledge acquires the capacity to *convince* actors that it is trustworthy and veracious in the context of a trial, and to become evidence. This dual approach to conviction allows us to analyse how expertise acquires credibility and becomes or is made *convincing* as grounds for criminal sentencing.

The article focuses on crimes of terrorism financing and facilitation, which are (in most jurisdictions) relatively new standalone criminal offences. These cases involve broad criminalizations of ancillary acts to terrorism, which make it possible to prosecute defendants who are not directly involved in terrorist violence or even accused of holding terrorist sympathies.<sup>14</sup> These cases are situated (far) in advance of actual terrorist violence, yet they have become increasingly important in the context of counter-terrorism.<sup>15</sup> The empirical focus of this article is on cases in the UK and the Netherlands. Criminal provisions on terrorism financing in these two countries are comparable as they are at least partly shaped through the guidance of the Financial Action Task Force (FATF),

<sup>8</sup> S. Jasanoff, *Science and Public Reason* (2012) 219.

<sup>9</sup> Id.

<sup>10</sup> T. V. Berling and C. Bueger, 'Security Expertise: An Introduction' in *Security Expertise: Practice, Power, Responsibility*, eds T. V. Berling and C. Bueger (2015) 1, at 13.

<sup>11</sup> Jasanoff, op. cit., n. 8.

<sup>12</sup> M. Lynch, 'Science, Truth, and Forensic Cultures: The Exceptional Legal Status of DNA Evidence' (2013) 44 *Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences* 60.

<sup>13</sup> K. McGee, *Latour and the Passage of Law* (2015) ch. 3.

<sup>14</sup> K. Cooper, 'Counter Terrorism Finance, Precautionary Logic and the Regulation of Risk: The Regulation of Informal Value Transfer Systems within the UK' in *The Palgrave Handbook of Criminal and Terrorism Financing Law*, eds C. King et al. (2018) 1029.

<sup>15</sup> J. McCulloch and S. Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror"' (2009) 49 *Brit. J. of Criminology* 628; M. de Goede and G. Sullivan, 'The Politics of Security Lists' (2016) 34 *Environment and Planning D: Society & Space* 67.

as is explained in this article. Key questions before the court in such cases concern the complex issue of defendants' *intent* when they sent monies to family, friends, or acquaintances. Terrorism financing is not a strict liability offence, and for intent to be proved the jury should be convinced that the defendants had 'reasonable cause to suspect' that monies might end up in the wrong hands. The discussion of these complex legal questions in court requires expert knowledge concerning, for example, the modus operandi of terrorist groups and the situation in territories where monies were remitted.

In particular, we show that in these cases, terrorism expertise functioned to produce and confirm a sanitized and stylized narrative of the war in Syria and the situation in IS-held territory. This narrative eradicates complexity on the ground and rests on a narrow definition of terrorism as *only* emerging from IS-held territory and as perpetrated by *all* individuals inside IS-held territory. Broader questions concerning the contested definition of terrorism, the complexity of the war, and Western state funding to anti-Assad groups were kept out of the courtroom so as not to complicate this stylized narrative. Taken together, these practices of expertise functioned to produce grounds for a criminal conviction (in the dual sense), even when evidence concerning the actual destination and use of the suspect monies was lacking before the court.

By unpacking terrorism expertise, we contribute to the socio-legal debates on expertise and legal knowledge in two ways. First, through focusing on the double meaning of conviction, we pay attention to the everyday, material practices of gathering, presenting, and contesting terrorism expertise. Within socio-legal studies, there is growing attention paid to the material and discursive practices that make up legal practices and produce legal knowledge.<sup>16</sup> In this article, we move beyond the question of acceptance or rejection of expert testimony and focus more broadly on the specific ways in which expert materials and witnesses were brought before the courts in selected terrorism cases. Second, the article focuses on a particular kind of knowledge that deserves more attention in socio-legal studies – namely, terrorism expertise.<sup>17</sup> We examine the ways in which terrorism expertise is brought before courts and referred to in courts' sentencing. We identify patterns in the cases that we observed, understood as particular ways of defining, conceptualizing, and operationalizing the contested notion of terrorism.<sup>18</sup> Much socio-legal literature on legal expertise to date focuses on forensic, medical, and environmental expertise, and its translation into legal evidence.<sup>19</sup> By instead analysing security expertise, we examine a different set of practices and materials that are mobilized as expert evidence in court cases, thereby broadening existing debates.

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<sup>16</sup> E. Cloatre and M. Pickersgill, 'Introduction' in *Knowledge, Technology and Law*, eds E. Cloatre and M. Pickersgill (2014) 1; E. Grabham, *Brewing Legal Times: Things, Form and the Enactment of Law* (2016); I. van Oorschot and W. Schinkel, 'The Legal Case File as Border Object: On Self-Reference and Other-Reference in Criminal Law' (2015) 42 *J. of Law and Society* 499; B. Latour, *The Making of Law: An Ethnography of the Conseil d'État* (2009); A. Pottage, 'The Materiality of What?' (2012) 39 *J. of Law and Society* 167; A. Faulkner et al., 'Introduction: Material Worlds: Intersections of Law, Science, Technology, and Society' (2012) 39 *J. of Law and Society* 1.

<sup>17</sup> There has been attention paid to terrorism trials in socio-legal studies; see for example L. Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *J. of Law and Society* 507. See also A. Leander and T. Aalberts, 'Introduction: The Co-Constitution of Legal Expertise and International Security' (2013) 26 *Leiden J. of International Law* 783, on legal expertise and international security more broadly. The literature, however, does not explicitly address terrorism expertise.

<sup>18</sup> L. Stampnitzky, *Disciplining Terror: How Experts Invented 'Terrorism'* (2013) 83–84.

<sup>19</sup> Lynch, *op. cit.*, n. 12; V. Toom, 'Bodies of Science and Law: Forensic DNA Profiling, Biological Bodies, and Biopower' (2012) 39 *J. of Law and Society* 150; M. Lynch and S. Cole, 'Science and Technology Studies on Trial: Dilemmas of Expertise' (2005) 35 *Social Studies of Science* 269; A. M'charek et al., 'Equal before the Law: On the Machinery of Sameness in Forensic DNA Practice' (2013) 38 *Science, Technology, & Human Values* 542.

The article is structured as follows. First, we place this contribution in the context of the current debates in socio-legal studies and critical security studies on expertise. Second, we explain the terrorism financing offence and how it has been coded in law. Third, we discuss our methodological approach, which understands court cases as important sites of practice where law is given meaning. In our empirical sections, we discuss two instances of terrorism expertise before the courts. In the first example, we follow an expert report written by Dutch academics through different court cases to trace how this report resulted in several convictions. In the second example, we focus on a specific court case in the UK and unpack how expertise was included and excluded from the courtroom. The conclusion reflects on the broader legal and political questions that security expertise – and particularly terrorism expertise – raises.

## 2 | CUTTING AND CONVINCING: THE MAKING OF CREDIBLE EVIDENCE

Existing work in socio-legal studies has shown that it is a complex process for materials or statements to become accepted as relevant expertise before a court of law, with the power to inscribe the factual matters of a case. Jasanoff argues that expert knowledge is not delivered to the court fully formed (to be accepted or rejected), but that it is best viewed

as the end product of a complex game – equipped with its own distinctive moves, countermoves, and practices – which can be simultaneously played by multiple players (such as judges, juries, lawyers, scientists, witnesses, and professional communities) at varied locations, inside and outside the courtroom.<sup>20</sup>

Jasanoff's work inspires a processual approach that unpacks the multiple ways in which legal actors construct or contest the credibility of expert knowledge before and during trial.

Lynch and Cole discuss the different standards developed by (US) courts over the years to 'assess the reliability of expert evidence' (these differ from scientific standards and processes for assessing reliability).<sup>21</sup> The traditional assessment of credibility of scientific expertise through a standard of 'general acceptance' has been partly displaced by the present 'gold standard' of DNA testing.<sup>22</sup> Yet, as science and technology studies (STS) scholars have shown, scientific facts remain contingent and contested,<sup>23</sup> and what counts as expert knowledge in one context may not be considered so in other situations.<sup>24</sup> As experts transmit or share their knowledge between different communities, such as between the laboratory and the court, this knowledge needs to be performed in both spaces as credible.

An important part of understanding expertise is therefore the production of 'credibility' or the continuous process of demonstrating 'objectivity and accredited professional experience' to

<sup>20</sup> Jasanoff, *op. cit.*, n. 8, p. 197.

<sup>21</sup> Lynch and Cole, *op. cit.*, n. 19, p. 271.

<sup>22</sup> *Id.*, pp. 273–274.

<sup>23</sup> S. Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (2009); S. Jasanoff et al., *Handbook of Science and Technology Studies* (2001); Lynch and Cole, *op. cit.*, n. 19.

<sup>24</sup> R. Evans and H. Collins, 'Expertise: From Attribute to Attribution and Back Again?' in *The Handbook of Science and Technology Studies*, eds E. Hackett et al. (2008) 609.

become credible in the eyes of the jury and/or judge.<sup>25</sup> The common description of juries and judges as ‘fact finders’ suggests a practice of ‘objective distance from the facts’, where scientific facts are like ‘pictures of the real world that the law should merely seek to recover’.<sup>26</sup> By contrast, building on Jasanoff, we understand court proceedings as important sites where knowledge is presented, doubt is raised, and ‘credible facts’ are constructed. Judges and juries are not objective fact finders, but actively participate in the process of knowledge making and credibility construction through their practice of excluding or allowing expert testimonies and reports, asking questions, summarizing testimonies, and rendering judgments.<sup>27</sup> To become convinced of the validity of expert knowledge is therefore not a passive process but an active engagement with the materials and their constructed meaning during legal proceedings.<sup>28</sup> Consequently, we approach expertise as a process of negotiation before and during the legal process.<sup>29</sup>

Moreover, the question of who or what is excluded from the credible expertise is not just a matter of courtroom evaluation, but importantly also takes place *in advance* of trial. Bringing materials and people before the court is a complex process. Expertise in a legal sense is inscribed with situated historical-political judgments on what or who counts as credible. For example, Schuppli discusses how in expertise on global warming, ‘indigenous observations and their oral transmissions’ were systematically excluded from legal and institutional processes<sup>30</sup> and that even when they were included, as at the Copenhagen Climate Change Conference in 2009, Inuit experience and ‘deep ancestral knowledge’ of the environment was not inscribed with the same legitimacy as prevailing scientific claims.<sup>31</sup> When examining the making and unmaking of expertise in the courtroom, then, it is important to be attentive to the types of knowledge and expertise that are *not* inscribed with sufficient credibility or relevance to appear before court. As we will see, one of the most striking developments is how certain expert analysis is excluded from the courtroom in terrorism financing trials.

Many of the studies researching the making or unmaking of legal expertise focus on forensic expertise such as DNA fingerprinting<sup>32</sup> or medical knowledge.<sup>33</sup> We contribute to these debates by introducing terrorism expertise as a specific form of knowledge that is highly contested and practically different from scientific knowledge. Those differences are at least threefold. First, terrorism research as a field of knowledge does not have the centuries-long tradition of ‘regulating objectivity’ that other scientific domains have.<sup>34</sup> ‘The rise of the terrorism expert,’ according to

<sup>25</sup> Jasanoff, *op. cit.*, n. 8, p. 201.

<sup>26</sup> *Id.*, pp. 192–193.

<sup>27</sup> J. Taipale, ‘Judges’ Socio-Technical Review of Contested Expertise’ (2019) 49 *Social Studies of Science* 310.

<sup>28</sup> Faulkner et al., *op. cit.*, n. 16; Pottage, *op. cit.*, n. 16.

<sup>29</sup> Evans and Collins, *op. cit.*, n. 24.

<sup>30</sup> S. Schuppli, ‘Can the Sun Lie?’ in *Forensis: The Architecture of Public Truth*, ed. Forensic Architecture (2014) 59. See also M. Lindroth, ‘Indigenous Rights as Tactics of Neoliberal Governance: Practices of Expertise in the United Nations’ (2014) 23 *Social & Legal Studies* 341.

<sup>31</sup> Schuppli, *id.*, p. 63.

<sup>32</sup> Lynch and Cole, *op. cit.*, n. 19; S. Halfon, ‘Collecting, Testing and Convincing: Forensic DNA Experts in the Courts’ (1998) 28 *Social Studies of Science* 801; B. Prainsack, ‘Unchaining Research: Processes of Dis/Empowerment and the Social Study of Criminal Law and Investigation’ in *Knowledge, Technology and Law*, eds E. Cloatre and M. Pickersgill (2014) 83.

<sup>33</sup> C. Rooke et al., ‘The Regulation of Nicotine in the United Kingdom: How Nicotine Gum Came to Be a Medicine, but Not a Drug’ (2012) 39 *J. of Law and Society* 39.

<sup>34</sup> S. Opitz and U. Tellmann, ‘Future Emergencies: Temporal Politics in Law and Economy’ (2015) 32 *Theory, Culture & Society* 107; Zedner, *op. cit.*, n. 17.

Stampnitzky, ‘stems from the early 1970s, when major incidents such as the Munich Olympic attack generated an interest in terrorism as an abstract, global phenomenon, independent from its situated geographical and local struggles.’<sup>35</sup> Second, the very definition of what terrorism is (and is not) remains contested, and even now the United Nations (UN) does not have a jointly agreed definition. For example, questions as to whether Assad’s actions against his own people constitute (a form of state-sponsored) terrorism, and whether Western state support for rebel groups like Ahrar al-Sham constitute terrorism facilitation, remain unresolved.<sup>36</sup> Since 9/11, the notion of ‘new terrorism’ has been popularized, understood as a ‘form of terrorism that [is] more irrational and more dangerous than those who [have] come beforehand’ and that is particularly difficult to know or explain.<sup>37</sup> Stampnitzky argues that ‘terrorism as an object of knowledge resists certain forms of expertise’<sup>38</sup> – for example, the expertise of those who are considered too sympathetic.<sup>39</sup> Third, security expertise is heavily influenced by the secretive nature of intelligence or police materials, which may not always be shared in open court. As a consequence, terrorism expertise is crucial to the interpretation and mediation of materials in a criminal procedure.<sup>40</sup> Characterized by issues of secrecy, urgency, and resistance against certain forms of knowledge, terrorism expertise is a fluid field that is even less settled than scientific expertise generally. This underscores the urgency to examine how this type of expertise functions and fares in the courtroom.

### 3 | THE INVESTIGATION AND PROSECUTION OF TERRORISM FINANCING

The terrorism financing offence is particularly complex because it is situated in advance of violence. According to one legal expert, this offence ‘throws up all the fundamental questions of law in one place’.<sup>41</sup> After 9/11, international legal measures were taken to criminalize and prevent money flows to terrorist organizations, particularly al-Qaeda. The international legislation finds its origins in UN Security Council Resolutions,<sup>42</sup> which have been adopted by the European Union, resulting in an obligation for all member states to draft national legislation on this matter. In recent years, the FATF – the main global standard-setting body in anti-money laundering (AML) and counter-terrorism financing (CFT) – has advised member states on correct and coherent drafting of the law, and emphasized the importance of successful convictions for terrorism financing offences in their evaluative approach.<sup>43</sup> Based on these international regulatory developments,

<sup>35</sup> Stampnitzky, op. cit., n. 18, p. 27.

<sup>36</sup> See, for example, the debate in the Dutch parliament on non-lethal assistance to rebel groups in Syria: *Kamerstukken II 2017/2018*, 32 62, 226 (Actuele situatie in Noord-Afrika en het Midden-Oosten).

<sup>37</sup> Stampnitzky, op. cit., n. 18, p. 184.

<sup>38</sup> Id., p. 158.

<sup>39</sup> Id., p. 168.

<sup>40</sup> K. Roach, ‘The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations’ in *Counterterrorism and Beyond: The Culture of Law and Justice after 9/11*, eds A. Lynch et al. (2010) 48; Berling and Bueger, op. cit., n. 10.

<sup>41</sup> Interview with members of the FATF secretariat, Paris, February 2019.

<sup>42</sup> UN convention on the Suppression of Terrorist Finance, 1999; UNSC Resolution 1267; UNSC Resolution 1333; UNSC Resolution 1373; and more recently on IS UNSC Resolutions 2178 and 2253.

<sup>43</sup> FATF, *Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (2019), at <<http://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html>>.



CFT regulations have been incorporated into domestic law across Europe.<sup>44</sup> Despite diversity in legal traditions, the formulation of the offence, the judicial practices, and even the legal challenges are comparable across jurisdictions.<sup>45</sup> This section offers an overview of the terrorism financing offence and its relevant elements in our case study countries, the UK and the Netherlands.

In the UK, the CFT legislation takes the form of special offences of the Terrorism Act 2000, Sections 15–18. The offences include direct involvement such as fund raising, donations, and extortion, as well as indirect involvement. Indirect involvement is prohibited by Section 17, which reads:

A person commits an offence if –

- a. he enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and
- b. he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

The formulation of Section 17 raises some fundamental legal questions, as well as particular challenges for prosecuting and proving the offence, as we analyse in the empirical section below. Even though the UK Terrorism Act predates 9/11, the current interpretation and application of Section 17 takes place in the broader context of the global regulatory drive.

In the Netherlands, by comparison, terrorism financing is a more recent standalone offence, written into the Dutch Criminal Code in 2013 at the insistence of the FATF.<sup>46</sup> Article 421Sr of the Dutch penal code prohibits financial support for terrorism or terrorist preparations, including the gathering of means, information, or objects that entail such support. This is a broad criminalization that allows the prosecution of indirect financing and cases where it is not known how the money was actually used or spent.<sup>47</sup> In addition, terrorism financing prosecutions in the Netherlands are sometimes based on other criminal law clauses – namely, Article 140a of the criminal code, which penalizes membership of a terrorist organization, and the 1977 Sanctions Law (renewed in 2007).<sup>48</sup>

Two elements of the terrorism financing offence are particularly complex and regularly require the need for expertise in the courtroom. First, a legal question arises around the relation between violence and the actual terrorist act on the one hand, and the offence of financing on the other. Here, FATF expert guidance takes the position that, for successful prosecution, the relation to (planning) a specific terrorist act need not be proven. FATF guidance says that the offence of financing is committed ‘regardless of whether the terrorist act is ultimately carried out or

<sup>44</sup> For overviews of the international regulatory developments, see C. King et al., *The Palgrave Handbook of Criminal and Terrorism Financing Law* (2018); M. de Goede, *Speculative Security: The Politics of Pursuing Terrorist Monies* (2012) ch. 2.

<sup>45</sup> N. Hafezi et al., ‘Criminal Prosecutions for Terrorism Financing in the UK’ in *The Palgrave Handbook of Criminal and Terrorism Financing Law*, eds C. King et al. (2018) 967. See also FATF, *FATF President’s Paper: Anti-Money Laundering and Counter Terrorist Financing for Judges & Prosecutors* (2018), at <<https://www.fatf-gafi.org/publications/methodandtrends/documents/AML-CFT-judges-prosecutors.html>>.

<sup>46</sup> The role of the FATF in the adoption of this Dutch law is confirmed in its official announcement: Tweede Kamer der Staten-Generaal, ‘Wijziging van het Wetboek van Strafrecht, het Wetboek van Strafrecht BES, en Enkele Andere Wetten in Verband met de Strafbaarstelling van het Financieren van Terrorisme (Strafbaarstelling Financieren van Terrorisme)’ *Tweede Kamer der Staten-Generaal*, 22 November 2012, at <<https://zoek.officielebekendmakingen.nl/kst-33478-3.html>>.

<sup>47</sup> Id.

<sup>48</sup> M. Wesseling and M. de Goede, *Beleid Bestrijding Terrorismedinanciering: Effectiviteit en Effecten (2013–2016)* (2018) 141–143, at <<https://repository.wodc.nl/handle/20.500.12832/2261>>.

not.<sup>49</sup> The offence of terrorist financing, in FATF guidance, is thus quite independent of the offence of terrorism and can be said to have taken place even if a direct relation to a terrorist event or group is not proven. It can also be said to have taken place if a terrorist event did not materialize, and even if the monies never reached their intended destination. Specific types of expertise are therefore required for successful prosecutions of terrorism financing, being a mix of terrorism expertise on the one hand and financial knowledge on the other. The FATF emphasizes that the process ‘requires huge skills and expertise which are shortcoming. You need judges with enough expertise.’<sup>50</sup>

Second, the element of *intent* is a crucial question in prosecutions of offences that are situated in advance and in anticipation of a terrorist act.<sup>51</sup> In this context, the FATF President’s Paper of 2018 considers it ‘good practice’ to draft the terrorism finance offence ‘to be as broad as possible ... [and] in such a way that the suspect’s intent to finance specific terrorist acts does not need to be proved’.<sup>52</sup> The 2016 FATF *Guidance on Criminalising Terrorist Financing* also addresses the criminalization of the ‘provision of funds ... to an individual terrorist for a purpose entirely unrelated to terrorism’, such as for food or housing.<sup>53</sup> These international best-practice guides result in broad formulations of legal standards to prosecute suspicious transactions in many jurisdictions, with lower thresholds of proof for ‘pre-punishments’. Because of the formulation of *mens rea* in this offence as ‘knowledge or having reasonable cause to suspect’, it is not the transaction itself that is robustly contested, as it would be if the offence was formulated in terms of recklessness or as a strict liability offence. Yet the legislation’s formulation of ‘knowledge or having reasonable cause to suspect’ demands an objective test about what a reasonable person would have known. Therefore, the intention and the destination of the monies become important points of discussion during legal proceedings. Expertise becomes crucial in clarifying or identifying for the judge or jury the meaning of destinations and intentions of the transactions. The next section argues why it is important to analyse actual terrorism financing trials as crucial sites where these complex legal questions play out.

#### 4 | METHODS: CASES AS SITES OF PRACTICE

In the UK, there were at least 21 prosecutions under Articles 15–18 of the Terrorism Act (2000) between January 2014 and February 2020, with tens of additional prosecutions relating to terrorism financing taking place under other law or other sections of the Terrorism Act.<sup>54</sup> In the Netherlands, there were 22 prosecutions under Article 421Sr between its incorporation into law

<sup>49</sup> Id., p. 4.

<sup>50</sup> Interview with members of the FATF secretariat, op. cit., n. 41.

<sup>51</sup> McCulloch and Pickering, op. cit., n. 15; C. Safferling and T. Ide, ‘Prosecuting Terrorism Financing in Germany: Bundesgerichtshof (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08’ (2010) 11 *German Law J.* 1292.

<sup>52</sup> FATF, op. cit., n. 45, p. 36.

<sup>53</sup> FATF, *Guidance on Criminalising Terrorist Financing: Recommendation 5* (2016) at <<https://www.fatf-gafi.org/publications/fatfrecommendations/documents/criminalising-terrorist-financing.html>>.

<sup>54</sup> The number of UK prosecutions is an estimate, compiled from FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United Kingdom: Fourth Round Mutual Evaluation Report* (2018) 89, at <<https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf>>; Crown Prosecution Service, ‘The Counter-Terrorism Division of the Crown Prosecution Service (CPS): Successful Prosecutions since 2016’ *Crown*

in 2013 until 2020. Several other prosecutions relating to terrorism financing were based on other provisions, such as the Sanctions Law.<sup>55</sup> Despite the jurisdictional differences, actual cases in recent years in the two countries are comparable. We can broadly distinguish two types of situations that result in terrorism funding criminal cases. The first type entails defendants who actively support terrorist ideologies and wire money to fighters in Syria or Iraq. The second type includes defendants who do not support terrorist ideologies but send money to relatives or spouses who have travelled to IS-held territory. This second type of cases is more challenging juridically, especially if *mens rea* cannot be proven. It is in these cases that expert knowledge becomes crucial to provide legal interpretation of the meaning of the transaction.

We argue that these court cases are important sites where terrorism financing laws are given meaning – where the scope of the law is determined and where the legal puzzles concerning the relation to violence and *mens rea* are grappled with. On the one hand, terrorism financing laws are relatively new and jurisprudence is still being developed. On the other hand, the laws are very broadly formulated and do not require a violent terrorist act, or even proven terrorist intent, to render a guilty verdict. Consequently, we consider the trial to be a performative space, where the scope, validity, and force of the new terrorism financing laws are contested and enacted.<sup>56</sup> Due to the novel and precautionary character of terrorism laws, the courtroom functions as an important ‘site of knowledge making’: trials are spaces where the boundaries of the law are discussed and where jurisprudence is developed for future cases.<sup>57</sup> Building on Jasanoff’s argument on juries as participants in evaluating evidence, we take seriously the authoritative positions of jury and judge.

This article develops thick descriptions of selected cases and legal proceedings, building on the recent attention paid to ethnographic methods in socio-legal studies.<sup>58</sup> We ask how a case is done in practice, focusing on the material and discursive practices that shape conviction and contestation. More precisely, this article is based on fieldwork in the UK and the Netherlands. The empirical sections focus on two instances of terrorism expertise *before* the court in a dual sense, meaning both as presented *in court* and as debated *in advance* of courtroom proceedings. In the first instance, we focus on an influential expert report written by three Dutch academics for the Court of Rotterdam on the daily lives of foreign fighters in Syria. This section follows the use of the report through multiple court cases, showing the breadth of the different cases in the two main Dutch courts. Data were collected through researching the court verdicts that referenced this report, complemented by interviews with legal professionals, including lawyers and expert witnesses. We mainly draw upon the court documents of the proceedings of two specific court cases in which the report was presented and contested as expert knowledge. The second instance focuses on a recent trial in the UK, where experts on radicalization appeared as witnesses. For

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*Prosecution Service*, at <<https://www.cps.gov.uk/crime-info/terrorism/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016>>.

<sup>55</sup> The number of Dutch prosecutions was obtained through a search on [www.rechtspraak.nl](http://www.rechtspraak.nl). We would like to point out that the exact numbers of prosecutions are difficult to obtain as terrorism financing cases are sometimes tried under alternative offences, including other financial crimes (such as money laundering) or terrorist offences (such as preparation for a terrorist act). In this article, we have therefore limited our figures to the actual cases tried under Sections 15–18 of the Terrorism Act and Article 421Sr.

<sup>56</sup> M. de Goede and B. de Graaf, ‘Sentencing Risk: Temporality and Precaution in Terrorism Trials’ (2013) 7 *International Political Sociology* 313.

<sup>57</sup> B. Shapiro, quoted in Lynch, *op. cit.*, n. 12, p. 61; K. L. Scheppele, ‘Judges as Architects’ (2012) 24 *Yale J. of Law & the Humanities* 345.

<sup>58</sup> E. Cloatre, ‘Law and ANT (and Its Kin): Possibilities, Challenges, and Ways Forward’ (2018) 45 *J. of Law and Society* 646.

this case, we conducted repeated observations of the case of *R v. Sally Lane and John Letts*, which was heard before the Central Criminal Court in London in the period from January 2017 until June 2019. We observed 14 trial days<sup>59</sup> and supplemented these observations with one interview. This particular trial is considered a landmark case in the prosecution of terrorism funding; it will most probably serve as important jurisprudence in future court cases. Our empirical instances of (1) the Dutch report and its use in court and (2) the UK trial provide a basis for identifying first patterns in the practices and materials of terrorism expertise in criminal (terrorism financing) trials, which are outlined in our conclusion.

## 5 | THE TURBULENT LIFE OF AN EXPERT REPORT: *DESTINATION SYRIA*

During a terrorism court case in the Netherlands in 2015, trying three individuals for terrorism financing under Article 421Sr and preparation of terrorist acts under Article 96Sr and Article 140aSr, the Court of Rotterdam ordered an inquiry into the daily lives of Dutch nationals who had travelled to areas in Syria that had not been controlled by the Assad regime since 2014. As terrorism financing cases linked to IS and foreign fighters in Syria increasingly found their way to trial, the court realized its limited knowledge on the details of the terrorist organizations and dynamics of the conflict in Syria. Three experts were asked to conduct research on these so-called ‘Syria travellers’ and to map the conflict in Syria and the principal partners involved. These experts were selected by the prosecution and the defence of the terrorism case and approved by the Court of Rotterdam. All experts were affiliated to Dutch universities and had prior expertise on security, terrorism, and Islam.

This resulted in a report, *Destination Syria*, that became the main source of expert knowledge in a series of terrorism cases before Dutch courts. The court records show 16 cases between 2016 and 2018 in which the report was part of the judgment, and it was presented as expertise in even more cases.<sup>60</sup> *Destination Syria* exemplifies the turbulent and contested status of expert knowledge on terrorism in courts. Following the document through the cases, we trace how the findings of the study became the subject of (legal) discussions during court sessions. By carefully outlining the disputes around the content of the study, we illustrate the contested and fluid nature of security knowledge and the challenges of presenting this in front of a judge.

The report consists of two parts. The first part provides an introduction by the authors, a short overview of the conflict in Syria, and a discussion of the methodological approach of the research. The second part of the report mainly focuses on the organization of IS but includes a chapter on other organizations such as Jabhat al-Nusra. The report also discusses social life in IS-controlled areas, the different roles of men and women, and economic life. The findings in the study are based on interviews with 26 individuals, ranging from security professionals to Syria travellers and Syrian nationals. Based on these data, the report concludes that from 2014 onwards, presence in IS territory was impossible without joining the terrorist organization, especially in the case of young men. To join IS does not immediately mean to be involved in armed conflict, although all male members are listed as reservists and are in some way employed to serve the organization. The report further concludes that very little information is available about daily life in areas of Syria

<sup>59</sup> We both attended trial days, as did the research assistant on the project, Marie Irmer.

<sup>60</sup> This was established through research via [www.rechtspraak.nl](http://www.rechtspraak.nl). Not all of these were terrorism financing cases.

not under IS control, and that these regions form a 'grey area'.<sup>61</sup> It also emphasizes that the roles of men and women in these areas might differ and that the research is an exploratory study. The authors clearly stress the limitations of the report and use language that indicates the exploratory nature of the study.

Despite the nuances in the report, the interpretation of the Court of Rotterdam that travelling to, or residing in, specific parts of Syria always entails contributing to terrorist activities became an important legal fact in the court cases in which the report was subsequently used. During the 2015 court case in which the report was commissioned, the defendant claimed that he had personal reasons to travel to Syria in 2013 and that his plans to return to the country in 2014 were to set up a transport company.<sup>62</sup> The conclusion of the *Destination Syria* report, however, became the cornerstone of the prosecution's argument that Dutch men who travel to Syria cannot refrain from joining terrorist organizations. During the trial, one of the authors of the report acted as an expert witness and confirmed these findings, though he emphasized that these conclusions apply only to IS-controlled areas and that a detailed account of Jabhat al-Nusra-controlled territory is very hard to verify.<sup>63</sup> The distinction is relevant because the defendant was accused of travelling to an area that was identified during the case as Jabhat al-Nusra-controlled territory. Even though this is described in the report as a 'grey area', the court nevertheless foregrounded the report as a main source of expertise to convict the defendant of terrorism financing and membership of a terrorist organization. The court's conclusion – that being present in an area under the control of a terrorist organization automatically entails involvement (direct or indirect) with that organization – became a precedent for further cases.

The court's interpretation of *Destination Syria* not only supported this particular conviction but also contributed to a broader legal development in which travelling and transferring money to Syria became immediately linked to terrorist activities. This line of sentencing by the court caused frustrations among the defence lawyers involved in terrorism cases, as they felt that there was no attention paid to the particularities of each case, as long as the prosecution could prove that the defendant had crossed into IS-controlled territory. In a number of different court cases,<sup>64</sup> lawyers argued that the interpretation of the report is a superficial sketch of the situation in Syria and that it should not be automatically applied to all terrorism cases. As one lawyer put it,

[i]t is already an expansion of what is common in criminal proceedings. In normal cases, you need to know on an individual level what the defendant did. In terrorism cases, this is very difficult when it comes to Syria and Iraq, because we don't know exactly what happened. We know that very horrible things happened. The solution to this was, instead of acquitting everyone, to lower the threshold for convictions, for example by using this report.<sup>65</sup>

This quote illustrates the specific use of terrorism expertise in the court, which is to generate a generic assessment of the geographical situation, by which culpability can be proven without having to assess the activities of the individual suspect or the individual money transfer. It

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<sup>61</sup> D. Weggemans et al., *Destination Syria: An Exploratory Study into the Daily Lives of Dutch 'Syria Travellers'* (2016).

<sup>62</sup> Court Judgment, ECLI:NL:RBROT:2016:1264.

<sup>63</sup> Gerechtshof Den Haag, ECLI:NL:GHDHA:2017:2854.

<sup>64</sup> Court observations during fieldwork conducted between December 2018 and June 2019 at the Court of Rotterdam.

<sup>65</sup> Interview with a Dutch defence lawyer, Rotterdam, May 2019.

is very difficult to conduct detailed and thorough research on what happens with a transaction once it travels from the official banking system to the informal banking system. After several convictions in terrorism financing cases at the same court, a lawyer during a 2019 court case started her defence as follows: ‘By now, we know that this court always classifies money transferred to Syria as terrorism financing. I could argue against this, but I am aware of this precedent of this court.’<sup>66</sup> What is striking is that she did not even attempt to discuss the particularities of the financial transaction because the precedent of the court was so strong that this individual case had little chance of being judged differently than previous cases, even though the story of this case was quite unique.

The expert report had a profound effect on the practices of prosecuting terrorism financing, yet its credibility was seriously contested in a number of different court cases. We highlight two controversies to show how the credibility of the report was called into question. The first relates to the multiple material forms of the report. The authors argued that they wanted their work to be published openly online. In this published version, certain passages were anonymized, making it a different document to the version circulated earlier among legal professionals. Several defence lawyers complained that in the public report, which was the version that was used for court proceedings, certain phrases were deleted. According to the authors, this did not change anything about the content of the report. Yet some defence lawyers felt that ‘the context was missing, and [it] had a really different note to it. The original report was much more favourable to the defence.’<sup>67</sup> Whether the public report was indeed very different from the first version remains disputed, but nevertheless the multiplicity of the material had a profound impact on the credibility of the report in the eyes of the lawyers. This controversy illustrates the difficulty of capturing fluid and changing security expertise in material evidence.

The second controversy occurred in 2017, when the life of the report took an interesting turn as the appeal court in Amsterdam (Gerechtshof Amsterdam) excluded the document as admissible evidence.<sup>68</sup> In this case, the defendant was accused of preparing to commit terrorist offences and attempting to join a terrorist organization. The question of whether the report could serve as evidence that the attempts of the defendant to travel to Syria could be understood as aspirations to join the armed fight of IS became a fierce point of discussion. This controversy draws our attention to the tensions between legal and scientific ‘fact finding’ concerning expert knowledge.

During this appeal case, two of the authors of *Destination Syria* were asked to give expert testimonies. The defence claimed that the report could not serve as expert evidence as the number of respondents interviewed for this study is not very high ( $n = 26$ ). Furthermore, these respondents could not be questioned or assessed for reliability because the study is anonymous. It was of great concern to the lawyers that they could not check the reliability and trustworthiness of (the statements of) the respondents. As one lawyer explained, ‘It doesn’t matter if [the report] is considered reliable, or made by experts. If you don’t disclose your sources, we cannot double-check this and we will not know whether it is true or not.’<sup>69</sup> A different lawyer argued: ‘Because of this

<sup>66</sup> Court observations, 18 June 2019, Court of Rotterdam.

<sup>67</sup> Interview with a Dutch defence lawyer, op. cit., n. 65, but this view was echoed in interviews with other Dutch defence lawyers.

<sup>68</sup> See Gerechtshof Amsterdam, ECLI:NL:GHAMS:2017:3041. Appeal cases in the Netherlands are adjudicated on points of fact as well as points of law.

<sup>69</sup> Interview with a Dutch defence lawyer, Rotterdam, December 2018.

conclusion, based on statements of people we don't know, and we cannot cross-examine, a lot of people are found guilty.<sup>70</sup>

For the authors, and social scientists in general, anonymity and other ethical guidelines are important scientific standards to uphold the integrity of the research and the safety of the respondents. Yet this makes it difficult to subject the report to a process of legal 'fact finding'. As one of the authors later explained, the defence seemed determined to reveal the identity of one particular respondent as a secret intelligence officer to prove that this respondent was an untrustworthy source, which greatly frustrated the report's authors.<sup>71</sup>

In the report, the authors themselves emphasize its exploratory nature, the limited time frame of the study, and the dynamic nature of the conflict. Therefore, the discussion on disclosing the identity of the respondents to criticize the general use of the report seemed to the author to be 'asking the wrong questions'. Even though he was himself at points critical of how the report is used by the court, he explained:

Then there is this lawyer, and he crucifies you on the wrong points really. And I think, maybe legal professionals should learn how to read these reports. ... [M]aybe we should include social science methods courses in our law education.<sup>72</sup>

This dispute over what constitutes admissible or reliable expertise confirms what Jasanoff has described as a process in which 'procedures for truth seeking in science and the law are profoundly antithetical to one another'.<sup>73</sup> While scientific discussions on 'facts' include nuancing conclusions and examining methodological choices, legal 'fact finding' has the opposite motivation. Courts might acknowledge that science is messy, but ultimately they are interested in whether it offers grounds for conviction in the dual sense.<sup>74</sup> As we have seen in this case, the court is not a passive receiver of the knowledge; on the contrary, it actively participates in shaping what counts as terrorism expertise.

In sum, following the life (and perhaps partial death) of the *Destination Syria* report allows us to analyse the contestation, acceptance, and rejection of terrorism expertise before the court. The discussions in court illustrate two important tensions. The first illustrates the friction between a nuanced and balanced conclusion in an expert report and the legal need to come to a final judgment. Translating the complexity of the concluding remarks of *Destination Syria* and the complicated and fluid conflict situation on the ground into a general line of sentencing fits Jasanoff's observation that 'legal fact-finding reproduces at best a still frame out of the continually unfurling motion picture of science'.<sup>75</sup> This is important as this interpretation, or conviction, in turn has implications for what ultimately is defined as terrorist violence and what counts as financial support. A second tension is between a legal methodology of 'fact finding', based on the possibility of cross-examining knowledge and coming to a general conclusion on 'what really happened',

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<sup>70</sup> Interview with a Dutch defence lawyer, op. cit., n. 65.

<sup>71</sup> Interview with one of the authors of *Destination Syria*, The Hague, October 2018.

<sup>72</sup> Id.

<sup>73</sup> Jasanoff, op. cit., n. 8, p. 194.

<sup>74</sup> Lynch and Cole, op. cit., n. 19, p. 269; M. de Goede, 'Speculative Values and Courtroom Contestations' (2015) 114 *South Atlantic Q.* 356.

<sup>75</sup> Jasanoff, op. cit., n. 8, p. 193.

and a social science methodology that acknowledges the limits of its findings and operates on the basis of the anonymity of its respondents. These tensions illustrate the contingent process of interpreting, and challenging, expert knowledge. The important societal impacts of the judgments underscore the need for more detailed reflections on how security knowledge is captured in legal proceedings.

## 6 | EXPERTISE BEFORE THE COURT

In June 2019, the Central Criminal Court in London (also known as the Old Bailey) sentenced two defendants to a suspended prison sentence of 12 months for financing of terrorism, because they had attempted to send money (about £1,700) to their son, who was at the time believed to be in IS-held territory.<sup>76</sup> Sally Lane and John Letts were charged with three counts of ‘entering into a funding arrangement for the purposes of terrorism’ under Article 17 of the UK Terrorism Act (2000). Their case was heard between 2017 and 2019, with lawyers seeking juridical clarification before the UK Supreme Court on one of the elements of the offence in 2017. There was no dispute over whether the monies were actually sent (video evidence of the mother sending the money from a Western Union office was shown at the trial), and the parents’ claim that they sent the money out of love and care for their son was also largely undisputed by the court. Neither did the prosecution allege that the monies were in fact used for terrorism, and two out of three money transfers were intercepted by police. Nevertheless, this case played an important role in interpreting, clarifying, and performing the law in relation to the terrorism financing offence. In particular, the Supreme Court judgment concerning what exactly needed to be proven in a charge of terrorism financing helped to further define the offence in the UK context. The sentencing in June 2019 was the conclusion of one of the longest and most costly terrorism trials in the UK to date, estimated to have cost £7 million.<sup>77</sup>

This section examines the contested legal trajectory of the case *R v. Sally Lane and John Letts* with a focus on the role of terrorism expertise in the trial and deliberations. First, we discuss how the specific definition of the offence as delivered by the UK Supreme Court in this case had consequences for the ways in which expertise was rendered (in)audible and (in)admissible before the court. Second, based on trial observations, we analyse the arguments of the terrorism/radicalization experts who were heard in court and the ways in which their evidence was (not) weighted in the sentencing.

First, *R v. Sally Lane and John Letts* sought juridical clarification before the UK Supreme Court concerning what exactly needed to be proven in order for a charge of terrorism financing to be upheld in a court of law (an appeal not afforded to the many Muslim parents previously charged with terrorism financing). Does a criminal court need to prove that the defendants *actually suspected* that the money might or would be used for terrorism (a ‘subjective’ knowledge test)? Or is it merely necessary to prove that the defendants accepted a risk that the monies *might be* used to support terrorism, on the basis of available knowledge at the time (an ‘objective’ knowledge test)? In 2018, the UK Supreme Court ruled that, in order for the charges of terrorism financing

<sup>76</sup> This section is based on trial observations by ourselves and a research assistant (Marie Irmer) between January 2017 and June 2019 during the court procedures of *R v. Sally Lane and John Letts [2019] Central Criminal Court*.

<sup>77</sup> T. Adams, ‘Our Son the Terror Suspect: Jack Letts’s Parents on the Fight to Save Their Child’ *Observer*, 7 July 2019, at <<https://www.theguardian.com/world/2019/jul/07/jack-letts-our-son-the-terror-suspect-john-letts-sally-lane-interview>>.



to be proven, it is not necessary to prove that defendants had *actual suspicion* that the money might or would be used for terrorism, but merely that, ‘objectively assessed’ and on the basis of their knowledge at the time, they had ‘reasonable cause to suspect that the money *might be* put to terrorist use’.<sup>78</sup>

The Supreme Court interpretation of the law had a bearing on the way in which experts were able to appear before court. When the trial resumed in 2019, the relevant test before the court became whether ‘a reasonable person would (or might or could) suspect that the money would be used for terrorism’, based on the totality of their available knowledge at the time.<sup>79</sup> Adjudicating this question required the court to deliberate over what information was available to the parents about the activities and location of their son at the time of sending the money. To enable the jury to make an objective knowledge test, expert witnesses testified about the knowledge and understanding of the parents at the time of making the money transfer. The trial’s focus on the parents’ knowledge had the effect of excluding wider evidence and expertise concerning the situation in Syria and the different armed groups.

The thrust of the prosecution’s case was to establish that the defendants knew very well where their son was, what beliefs their son held, and what groups he was associating with. The prosecution also set out to show that the defendants knew that sending money was forbidden under the law, despite conflicting advice that they had been given by police, Prevent officers,<sup>80</sup> and one counter-radicalization expert. According to the prosecution, they had wilfully ignored expert advice not to send the money, meaning that ‘the approach of the defendants was not the approach of a reasonable person’.<sup>81</sup> Testimony was brought into the courtroom in a limited and specific way – namely, to corroborate the timeline as presented by the prosecutor and to help to assess and contextualize the knowledge available to the defendants at the time. In this sense, testimony was restricted to witnesses of fact (rather than expert witnesses).<sup>82</sup>

Expertise was brought into the courtroom in the form of three witnesses of fact with backgrounds in counter-radicalization research and practice. These witnesses became involved in the case at an earlier stage, when the parents turned to them to seek advice and information after learning that their son was in Syria. On 29 May 2019, two witnesses who study radicalization at King’s College London (KCL) testified about their meeting with the defendants that had taken place in 2015.<sup>83</sup> At that time, the defendants were desperate to learn more about the situation of their son and had turned to the KCL researchers for information. The KCL experts were keeping a list of foreign fighters travelling to Syria and Iraq in order to look for ‘patterns’ of radicalization.<sup>84</sup> KCL Witness 1 testified about the information that he gave the parents concerning the likely location and situation of their son. He had told them that it was not possible to be in IS-held territory without taking an oath and without being involved in combatant situations, so that even a cook or a translator (roles to which the parents ascribed their son) would not be able to escape being

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<sup>78</sup> *R v. Sally Lane and John Letts* (AB and CD) (Appellant) [2018] UKSC, 36, §19, p. 9, emphasis added.

<sup>79</sup> *Id.*, §24, p. 11.

<sup>80</sup> Prevent is the UK counter-terrorism strategy.

<sup>81</sup> Prosecution statements, *R v. Sally Lane and John Letts* [2019] Central Criminal Court 12 June 2019, after 14:13 hrs.

<sup>82</sup> Interview with a UK lawyer, The Hague, December 2019.

<sup>83</sup> Although their names are publicly available, we here call these witnesses ‘KCL Witness 1’ and ‘KCL Witness 2’. This testimony took place despite the experts having explicitly agreed to full confidentiality when the parents approached them in 2015.

<sup>84</sup> KCL Witness 1, *R v. Sally Lane and John Letts* [2019] Central Criminal Court 29 May 2019, after 11:24 hrs.

involved in the fighting:

Crown Prosecution: Did you offer a view on what sorts of activities [the son] was engaged in?

KCL Witness 1: Yes, two things. Everyone was expected to contribute. What you can with [your] specialism. But they all fought alongside this.

Crown Prosecution: Did you explain that everyone fights?

KCL Witness 1: Yes. People performed dual roles. Fighting and [their] specialism.<sup>85</sup>

KCL Witness 2 corroborated this assessment and said that ‘[in IS] you had to fulfil certain duties even if you had humanitarian motives’.<sup>86</sup> KCL Witness 1 testified that he strongly advised the parents not to send money. He also opined about the emotional state of the defendants at the time of the 2015 meeting: ‘I had a sense that they were both in denial.’<sup>87</sup>

The defence, for their part, raised questions concerning the accuracy of the recollection of this meeting, of which no notes were taken and about which the KCL researchers were only questioned by police one year later. In addition, questions were raised about the reliability of these witnesses, especially because they had mistakenly claimed to have found the son’s Twitter account. The KCL witnesses did not find any information about the son in their database of fighters, which the parents had at the time taken to mean that they ‘did not think that [the son] was a fighter’.<sup>88</sup> According to the defence, the defendants ‘had good reasons to be sceptical about the advice that [KCL Witness 1] gave them’.<sup>89</sup>

Despite these concerns, the reports from the KCL witnesses were accepted by the jury. As the judge wrote in his sentencing remarks, KCL Witness 1 ‘told you both, a matter of days before the 2 September [money] transfer, that everybody [in IS territory] fights and that you should not send money to [your son]’.<sup>90</sup> Consequently, the KCL testimony fulfilled an important function similar to that of the Dutch report discussed in the previous section – namely, to solidify the notion that *everyone* in IS-held territory was engaged in combat, so that *all* monies sent to these territories could be regarded as supporting combat, obviating the need to examine the particularities of each case.

Another witness to appear before the court was from the Active Change Foundation (ACF), a charity that functioned as a centre of expertise in counter-radicalization, with close contacts with police and counter-terrorism units (until 2016, when its funding was cut by the government).<sup>91</sup> Police had advised the defendants to contact the ACF, and they met several times with the ACF’s director in 2015. At that time, the ACF director used the father’s Facebook account to try to reach and reason with the son, and to ‘figure out how deeply [the son] was involved’ and ‘to let him see things differently’.<sup>92</sup> On the assessment of the ACF witness, ‘not everyone in Raqqa was a

<sup>85</sup> *R v. Sally Lane and John Letts [2019] Central Criminal Court* 29 May 2019, after 11:24 hrs.

<sup>86</sup> KCL Witness 2, *R v. Sally Lane and John Letts [2019] Central Criminal Court* 29 May 2019, after 11:24 hrs.

<sup>87</sup> KCL Witness 1, *op. cit.*, n. 84.

<sup>88</sup> Defence closing statement, *R v. Sally Lane and John Letts [2019] Central Criminal Court* 12 June 2019, after 15:43 hrs.

<sup>89</sup> *Id.*

<sup>90</sup> Judge Hilliard QC, sentencing notes, *R v. Sally Lane and John Letts [2019] Central Criminal Court* 21 June 2019, p. 3.

<sup>91</sup> Although the name of this witness is publicly available, we here call him ‘ACF Witness’.

<sup>92</sup> ACF Witness, *R v. Sally Lane and John Letts [2019] Central Criminal Court* 30 May 2019.

fighter' and one could well be involved in, for example, translating.<sup>93</sup> For this witness, it was not unequivocally clear whether the son was with IS or another organization, though he did confirm that the son was 'very deep into the ideology'. This witness had been 'surprised but pleased' to learn that one police officer had advised the parents that they could send money, saying that he 'would agree with that permission'.<sup>94</sup> It was acknowledged that the parents' actions were influenced by this witness' assessment of the situation of the son, which they took to be authoritative, as at the time he was a 'senior and credible advisor to the Home Office'.<sup>95</sup> Ultimately, the judge's sentencing remarks did not refer to the statements by this witness.

The evidence of the KCL and ACF witnesses shows how expert knowledge became part of the trial without being treated as expert testimony. These counter-radicalization witnesses appeared as witnesses of fact, which meant that their credibility could not be questioned or cross-examined in the courtroom. The way in which their credibility was ultimately established or rejected by the court can be (partially) assessed through the judge's references to these testimonies in his sentencing remarks. Furthermore, the repeated argument of the prosecution that the parents sought expert advice on the situation in Syria, implying that they had the accurate knowledge of the activities and details of their son, became an important legal fact that could not be questioned. While these witnesses had to be considered witnesses of fact, the jury knew about their (academic) backgrounds, their experience with radicalization research, and their knowledge of terrorist organizations in the Middle East. The 'reasonable knowledge' test, in this case, meant that the question of whether the defendants found these radicalization experts credible or not at the time was displaced by the question of whether the jury found the narratives of the experts credible at trial.<sup>96</sup> We propose to understand this as a 'disguised' form of expertise.

Perhaps even more important than analysing the production and rejection of expertise during this trial is noting the kinds of testimony *left out* of trial and the kind of (expert) knowledge *not* mobilized before the court. The objective knowledge test was fully focused on establishing what the parents knew at the time of sending the money, and therefore excluded broader expert testimony and rendered it inadmissible. First, there was no independent expert testimony concerning the situation in Raqqa at the time that the son was there, and no testimony on the *modi operandi* of IS, its rituals of membership, or its territorial autonomy. There was no discussion more broadly on the complex and fluid frontlines during the considerable time that the son spent in Syria. No questions could be raised concerning the legitimacy of anti-Assad forces and the financial support of some of these groups by Western governments. In his instructions to the jury, the judge stated as a matter of fact that

there is no dispute that IS was a terrorist organization. . . . Anyone taking part in their activities is supporting terrorism. Not only by engaging directly in violence but also by supporting the group in other ways, like . . . building camps, interpreting, or religious instruction.<sup>97</sup>

<sup>93</sup> Id.

<sup>94</sup> Defence counsel, *R v. Sally Lane and John Letts* [2019] Central Criminal Court 30 May 2019.

<sup>95</sup> ACF Witness, op. cit., n. 92.

<sup>96</sup> Interview with a UK lawyer, op. cit., n. 82.

<sup>97</sup> Judge's instruction to the jury, *R v. Sally Lane and John Letts* [2019] Central Criminal Court 12 June 2019, after 10:25.

Second, the court did not hear from psychologists who could testify to the mental state of the parents, even though the distress and desperation of the parents was an explicit and repeatedly addressed aspect of the trial, and even though the test before the court was whether the parents acted as ‘reasonable persons’. The parents were said to be ‘completely in pieces’ when they found out that their son, 19 at the time, was in Syria.<sup>98</sup> One of the experts testified that the defendants were concerned and worried, and that ‘both of them broke down before me’.<sup>99</sup> The mental distress of the mother in particular was repeatedly mentioned before the court, both in her own testimony and that of others. This may have raised challenges concerning the required ‘reasonable person’ test. Indeed, the judge included an assessment of the parents’ distress in his sentencing remarks, though he ultimately judged the parents to be misguided and said:

It is one thing for parents to be optimistic for and about their children and I do acknowledge that this was your son, who you love very much, and that it is in the nature of both of you to hope for and to look for the best in others, but, in this context, you did lose sight of the realities.<sup>100</sup>

In conclusion, in *R v. Sally Lane and John Letts*, terrorism expertise had an important but limited function. First, witnesses testified concerning their meetings with the parents around the time of the money transfers, to corroborate what was known to the parents at the time of the activities of the son, and to explain their advice on whether sending money was or was not allowed. Second, but in a rather limited way, witnesses discussed the ideology of IS and the question of whether it was possible to be in Raqqa without supporting IS as a terrorist organization. We have argued that witnesses of fact functioned as ‘disguised’ expertise in this context. The factual situation of the Syrian war and the conditions in Raqqa were presumed to be known and were not contested before the court, nor was it considered necessary to hear from experts concerning the psychological or pedagogical implications of the situation in which the parents found themselves.

## 7 | CONCLUSION: TERRORISM EXPERTISE BEFORE THE COURTS

This article has raised the question of how terrorism expertise comes before the court – how it is invited, debated, accepted, or rejected in legal practice in terrorism financing cases. This question is important, not just because we have little understanding of the processes that ‘juridify’ scientific expertise in general, but also because terrorism expertise is a particularly contested type of knowledge that is increasingly demanded by the courts. The relatively new crime of terrorism financing is committed far in advance of the violent act and requires courts to assess evidence concerning potential support for terrorist parties during ongoing and fluid conflict. As the judge phrased it in the pre-trial hearing of *R v. Sally Lane and John Letts*, experts on radicalization and terrorism are required to assess such cases much like ‘a radiologist looking at a scan’.<sup>101</sup>

We have critically examined the expert assessments of the situation in areas controlled by terrorist groups, which can act as powerful grounds for conviction in the dual sense. Our approach

<sup>98</sup> Defence closing statement, op. cit., n. 88.

<sup>99</sup> ACF Witness, op. cit., n. 84.

<sup>100</sup> Judge Hilliard QC, op. cit., n. 90, p. 2.

<sup>101</sup> Judge, *R v. Sally Lane and John Letts* [2017] Central Criminal Court 20 January 2017.

offers a detailed examination of everyday practices and materials that become entangled in presenting and negotiating expert knowledge, and also allows for broader questions on credibility and controversies. Our examination of a limited set of cases in the UK and the Netherlands (under Section 17 of the UK Terrorism Act and Article 421Sr of Dutch criminal law) is insufficient to draw generalized conclusions; further work is needed to ask what patterns of expertise<sup>102</sup> appear in terrorism trials. Nevertheless, we can tentatively identify patterns concerning terrorism expertise before the court and pose questions that can serve as the basis for further research.

First, we found that the ways in which expert materials and testimonies were incorporated in the trials of terrorism financing that we examined (which focused on the financial support of so-called ‘foreign fighters’) elicited few questions about the dividing line between terrorism, civil war, and uprising, and avoided academic debates on the nature of terrorism, its contested definitions, and the constellation of warring parties. The judges did not allow debate on the fluid frontlines of the complex conflict in Syria, or invite region experts to corroborate local events and situations at the time of the alleged crimes. Instead, they decided on narrow and rather stylized accounts of the situation on the ground, which allowed limited definitions of what terrorism is (and is not).

Second, in the instances that form the empirical heart of this article, we found that limited and specific types of expertise were invited before the court. The cases that we examined heard experts in the realm of radicalization or terrorism, but not in the broader realms of regional or international politics, nor (relevant to the UK case) psychology, pedagogy, or adjacent fields. It appears that there are specialized networks of credibility at work: in all cases, the type of expertise most clearly heard before the court had prior relations with police or security authorities. Sometimes, witnesses are actually part of police research teams; sometimes, experts work closely with police and counter-terrorism authorities (as in the case of the ACF expert in the UK case); sometimes, they work within academia but with a track record of security-oriented policy advice. Furthermore, specifically in the Dutch case, we observed that legal professionals worked with very different standards of credibility than the security experts who conducted the research. This narrow focus on what counts as expertise ignores the fact that knowledge production is ‘transversal to social sites’ and inherently contested.<sup>103</sup> Our hypothesis is that, with the emergence of specialized terrorism law and terrorism courts, there has also been the emergence of a specialized network of radicalization/terrorism expertise that has acquired a privileged voice in courtrooms, to the exclusion of other types of voices.

Third, we proposed that different materials enter the courtroom with the introduction of security knowledge as a new type of expertise. Legal materials, such as expert reports, help to compress complicated and fluid security situations into neat legal categories of facts before the court. As shown in the case of the Dutch expert report, these seemingly stable materials remain socially and politically contested even after they have been accepted by one court as legal fact. Nevertheless, these legal facts have major impacts on the lives of those who are convicted of a terrorist offence, even if their jail sentence is suspended: a terrorist charge or conviction will stigmatize a defendant for life and is likely to have effects on their future, including job opportunities and access to the financial system/financial institutions.<sup>104</sup> Tracing the debates about which materials can be admitted or excluded as credible expertise before the court can help understanding of the broader political and social debates on terrorism underlying these new convictions.

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<sup>102</sup> Stampnitzky, *op. cit.*, n. 18, pp. 83–84.

<sup>103</sup> C. Aradau and J. Huysmans, ‘Assembling Credibility: Knowledge, Method and Critique in Times of “Post-Truth”’ (2019) 50 *Security Dialogue* 40, at 42.

<sup>104</sup> McCulloch and Pickering, *op. cit.*, n. 15; de Goede and Sullivan, *op. cit.*, n. 15.

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