IN THE COURT OF JUSTICE OF THE ECONOMIC COMMUNITY

OF THE WEST AFRICAN STATES

(ECOWAS)

In the Case

MR. CHERIF MADI v. REPUBLIC OF NIGER

SUIT No. ECW/CCJ/APP/30/20 - Judgment No. ECW/CCJ/JUD/24/2022

JUDGMENT

ACCRA

On 1st April 2022

SUIT No. ECW/CCJ/APP/30/20

JUDGMENT NO. ECW/CCJ/JUD/24/2022

BETWEEN:

MR. CHERIF MADI ....APPLICANT

AND

REPUBLIC OF NIGER...DEFENDANT

COMPOSITION OF THE COURT

Hon. Justice Dupe ATOKI .... Presiding

Hon. Justice KEIKURA BANGURA .... Member

Hon. Justice Januária T. S. M. COSTA............ Member/Rapporteur

ASSISTED BY:

Mr. Tony Anene MAIDOH……………………Chief Registrar

REPRESENTATION OF THE PARTIES:

Me Ould Salem Moustapha Said, ...Counsel for the Applicant

Le Directeur de l'Agence Judicaire de l'Etat..................Counsel for the Defendant

I. JUDGMENT

1. This is the Judgment of the Court read in virtual public hearing, in accordance with Article 8(1) of the 2020 Practice Directions on Electronic Case Management and Virtual Sessions of the Court.

II. DESCRIPTION OF THE PARTIES

2. The Applicant is Mr. Cherif Madi, born on 1st January 1956 in TADOK (Tahoua/Republic of Niger), trader, of Nigerien nationality and resident in Agadez (Niger) who has been in pre-trial detention since 13th June 2013 in Koutoukalé high security civil prison.

3. The Defendant is the State of the Republic of Niger, a Member State of the Economic Community of West African States (ECOWAS) and signatory to the African Charter on Human and Peoples' Rights, hereinafter the African Charter.

III. INTRODUCTION

4. In the instant case, the Applicant came to plead violation of his human rights, alleging that in 2013 armed men attacked the military barracks in Agadez (Niger Republic). That after the defence and security forces discovered that the attackers had spent the night before the attack in his house, he was notified that he was being prosecuted by the Public Prosecutor's Office before the Niamey High Court for complicity in murder and assassination, association with criminals linked to a terrorist enterprise, and that he was accused for the same crimes and arrested on 13 June 2013 by the investigating judge of the Niamey Special High Court anti-terrorism chamber. That after seven years of detention, the Applicant has not only not been tried, but remains in the pre-trial detention.

IV. PROCEEDINGS BEFORE THE COURT

5. The application initiating proceedings (Doc.1), gathered with six (6) documents, was registered at the Registry of this Court on July 13, 2020.
6. The Defendant State, the Republic of Niger, which was duly served on 16 July 2020, submitted its defence (Doc. 2) on 20 August 2020.
7. The objection was served on the Applicant on 28 August 2020 who did not make any comment on it.
8. The virtual hearing was scheduled for 21 October 2021, but only the Defendant's representative appeared and made his oral arguments on the merits of the case.
9. The trial of the case was adjourned to April 1, 2022.

V. APPLICANT'S CASE

a. Summary of facts

10. In 2013, armed men attacked the military barracks in Agadez (Niger Republic).

11. In following their footsteps, the defence and security forces discovered that the attackers had spent the night before the attack at the home of Mr. Cherif Madi.

12. The latter, who is originally from Algeria, usually hosts members of his family or tribe who pass through Agadez.

13. The individuals he hosted were found to be members of terrorist groups.

14. The day after the attack, the Applicant was arrested by the judicial police in Agadez.

15. He was later released.

16. He decided to stay voluntarily in Agadez so that, if necessary, he could make himself available to the judicial authorities and that the matter could be clarified.

17. At the request of the prosecutor of the Niamey Special High Court anti-terrorist chamber, he deliberately travelled from Agadez to Niamey, without any escort, in a public transport bus, to respond to the summon issued by the said prosecutor's office.

18. Once there, he was notified that he was being prosecuted by the Public Prosecutor's Office at the Niamey High Court for complicity in murder and assassination, and association with criminals linked to a terrorist group.

19. He was informed that he was charged for the same crimes and placed under arrest warrant on 13 June 2013 by the investigating judge of the Niamey Special High Court anti-terrorism chamber.

20. He is now in his seventh year of detention without trial, in violation of the rules of procedure that should have been followed at the specialised counter-terrorism chamber) which states that: "*the total duration of pre-trial detention cannot exceed four years in criminal matters and two years in non-contractual matters.*"

21. At the current stage of the proceedings, after seven years of detention, the Applicant has not only not been tried, but remains in the pre-trial detention because his case is pending before the Counter-Terrorism Control Chamber, which is only a court of second instance in pre-trial matters in Niger.

22. To this date, no judgment referring the case back to the Chamber for trial has been delivered, in violation of the procedural rules laid down by Niger's domestic positive law, but also by international law.

b. Pleas in law

23. In support of his claim, the Applicant relied on: article 605 (8) of the Niger Code of Criminal Procedure (Act No. 2016 21 of 16 June 2016) in force in Niger; Article 20 of the Constitution of the Republic of Niger; Articles 2, 3, 6, 7 and 11 of the African Charter on Human and Peoples' Rights; Articles 2, 3, 9 (3) and 14 of the International Covenant on Civil and Political Rights; Article 11 of the Universal Declaration of Human Rights and Article 6 (1) of the European Convention on Human Rights.

24. The Applicant further relied on international jurisprudence.

c. Reliefs sought

25. The Applicant seeks from the Court:

26. As to the form:

i. To declare itself competent;

ii. And declare the Applicant's claims admissible;

27. As to the merits

iii. To declare that the State of Niger has failed to fulfil its obligations:

- By violating the right to the presumption of innocence,
- By failing to respect the reasonable period of investigation
- By not respecting the right of access to justice.

iv. To declare that the long detention of Mr Cherif Madi causes enormous damages to his fundamental right to be tried within a reasonable time, and therefore to condemn the State of Niger for all the said violations;

v. To order the State of Niger to place Mr Cherif Madi in a position to claim fair compensation for the damage suffered;

vi. To order the State of Niger to pay Mr Cherif Madi the sum of five hundred million CFA francs (500,000,000 FCFA) as reparation.

VI - DEFENDANT'S CASE

a. Summary of facts

28. On 23 May 2013, the group Movement for Oneness and Jihad in West Africa (MUJAO) launched two simultaneous suicide attacks against the Niger Army and the SOMAIR uranium mine (AREVA).

29. The first terrorist attack was perpetrated in the city of Agadez.

30. At around 6am, a 4x4 pick-up vehicle packed with explosives driven by suicide bombers broke through the security barrier and exploded inside the military camp, killing several people.

31. A second vehicle entered the camp and the people on board opened fire on the soldiers.

32. The shooting lasted for several hours, then the terrorists took refuge in a dormitory killing some occupants; they claimed to hold some senior officers as hostages.

33. The attackers also placed improvised explosive devices everywhere, hiding some under the corpses of soldiers.

34. French special forces arrived at the Agadez camp as reinforcements and the next morning launched an assault on the dormitory, located near the barracks.

35. The two jihadists entrenched in the buildings were then neutralised.

36. The Agadez attack caused the death of 24 soldiers, including one Cameroonian, several wounded and significant material loss.

37. In the end, in Agadez, eight terrorists were killed, seven weapons recovered, three explosive belts made with defensive grenades and nail charges and a 60 mm calibre mortar were seized.

38. A crumpled phone belonging to one of the terrorists and containing an Orange number was found at the scene, as well as a letter.

39. About thirty minutes after the Agadez explosion, a second, almost simultaneous attack occurred near the town of Arlit, 240 km further north, against SOMAIR's uranium mine.

40. Car bombers detonated themselves with a car bomb in front of the uranium processing plant's power station. The result was one dead and about fifty injured, with significant property damage estimated at several billions.

41. The almost simultaneous attacks in Agadez and Arlit gave rise to the opening of a preliminary investigation at the level of the central counter-

terrorism service. Proceedings were initiated by the prosecutor of the terrorist unit, who requested the opening of an investigation. The office of the dean of investigating judges was designated for this purpose.

42. At the end of the investigations, charges were brought against CHERIF MADI, who was assisted at the time by the sole lawyer Maître NASSIROU LAWALY.

43. At the end of the investigation on 3rd December 2018, the case was referred to the General Attorney at the Niamey Court of Appeal, who in turn referred the case to the control chamber specialised in the fight against terrorism and transnational organised crime, to rule on a application for provisional release submitted by MAITRE NASSIROU LAWALY, lawyer of the accused CHERIF MADI, pursuant to the direct appeal procedure in accordance with Article 135 of the Niger Code of Criminal Procedure, but also to control the regularity of the entire proceedings before the trial stage.

44. The control chamber, while deliberating on the merits of the appeal, declared, by judgment No. 07/POLE/2019, dated 11 OCTOBER 2019, as follows:

"- Declares inadmissible the application of Maître NASSIROU LAWALY dated 29/06/2018

- Rejects the application to struck out Mr Maitre Niandou Karimou case file

- Orders that additional information be provided to execute the arrest warrants issued against the accused LAHBOUSS ABDOULKADER, alias CHERIF DOUNA, and HAMDANE TAOUDJI HAMDANE;

- Appoints the dean of the investigating judges of the special Niamey Court of Appeal, for this purpose;

- Adjourns the decision on the costs to the final decision" (Exhibit 1)

45. By declaration to the Registry of the Niamey Court of Appeal, dated 11 October 2019, Maître NASSIROU LAWALY, Counsel to Mr. CHERIF BILWAFI, Mr. MADI CHERIF and Mr. SIDI MOHAMED ZEIDANE, filed an appeal against the above judgment.

46. By judgment No. 2020/033/CC/CRIM, dated 27 May 2020, the Criminal Chamber of the Court of Cassation ruled on the merits of the appeal in the following terms: *"- is taken note of the withdrawal of the accused SIDI MOHAMED ZEIDANE, CHERIF MADI and CHERIF BILWAFI's appeal;*

- They are given notice of this;

- They are ordered to pay the costs." (Exhibit 2).

47. Following the decision of the Criminal Chamber of the Court of Cassation, dated 27 May 2020, the case was referred on 19 June 2020 to the General Attorney at the Niamey Court of Appeal, who referred it on 29 June 2020 to the investigating judge appointed to execute the additional information.

a) Preliminary objection

48. In its defence, the Defendant claimed the lack of jurisdiction of this Court, arguing that:

49. The case-law of this Court is that appeals against decisions of national courts do not fall within its jurisdiction.

50. That the Applicant is being held in detention by judicial decisions, namely by judgment No. 2020/033/CC/CRIM of 27 May 2020 of the Criminal Chamber of the Court of Cassation.

51. The said judgment in fact dismissed the appeal against the Control Chamber's judgment No. 07/POLE/2019 of 11 October 2019, which rejected the Applicant's application for provisional release and ordered additional information.

52. It was by virtue of a court decision, namely that of the Supreme Court of Niger and following the normal and due course of the investigation that the Applicant was kept in pre-trial detention.

53. This Court has repeated several times that it refrains from interfering in the internal jurisdiction of national courts.

54. That in the instant case, it is precisely a question of ruling on the legitimacy and legality of preventive detention, on which the national courts have already ruled.

55. This Court can no longer rule on this issue without setting itself up as the Supreme Court responsible for censuring domestic judicial decisions: That it is established that the Court does not have such competence.

56. Still in the sense of the delimitation of its competence, the Court also has affirmed its refusal to set itself up as a judge of internal law issues.

57. In the instant case, the determination of the maximum duration of the Applicant's pre-trial detention, as well as its legality, necessarily requires the reading and interpretation of national texts, in particular the provisions of the Code of Criminal Procedure.

58. That in fact as the Applicant points out pursuant Article 605(8): *"the total duration of pre-trial detention may not exceed four years in criminal matters and two years in non-contractual matters*".

59. However, the same Code of Criminal Procedure provides in Article 131 (1) that: *"Pre-trial detention may not exceed a reasonable period of time, taking into account the gravity of the facts alleged against the accused and the complexity of the investigations necessary to establish the truth*."

60. In order to be able to rule on the lawfulness of pre-trial detention, this Court would necessarily have to go through an interpretation of those provisions of the Code of Criminal Procedure to ensure that they are reconcilable: however, this Court does not consider itself competent to do so.

61. It is for this reason that the Court should declare itself incompetent to rule on the legality of the Applicant's detention.

b. Pleas in law

62. The Defendant relied its plea on Articles 131 (1), 132 (2) and 605 (8) of the Code of Criminal Procedure (Act No. 2016 21 of June 16, 2016) in force in Niger.

63. It also relied on the case-law of this Court.

b. Reliefs sought

64. The Defendant seeks from the Court:

65. As to form and main proceedings:

i. To declare itself incompetent to rule on the consequences of decisions taken by national courts and/or on the application of national law on pre-trial detention, in particular on the maximum length of such detention.

66. As to the merits and as an alternative order:

ii. To declare that there has been no violation of the Applicant's right to liberty and that his rights of defence and presumption of innocence were respected.

iii. To find that, taking into account the complexity of the case and the multiplicity of cases initiated by the Applicant, no delay has occurred and that the proceedings are being normally conducted within a reasonable period of time.

iv. To issue an order with regards to the amount of recoverable costs.

v. To order the Applicant to pay the costs.

VII - JURISDICTION:

The alleged lack of jurisdiction of the Court:

67. The Defendant raised the lack of jurisdiction of this Court, alleging, in summary, that from the jurisprudence of this Court, it is understood that appeals against decisions of national courts do not fall within its jurisdiction and that for the Court to rule on the legality of preventive detention, it would necessarily have to go through an interpretation of the aforementioned provisions of the Code of Criminal Procedure, to ensure its conciliation, which this Court does not consider itself competent to do.

68. The Applicant did not reply.

69. Based on the Defendant's submission, it is for the Court to ascertain its own jurisdiction.

70. To do so, it must first take into consideration both the legal texts governing its jurisdiction and the nature of the question put before it by the Applicant, based on the facts as alleged by the Applicant. See the case *CHUDE MBA v. REPUBLIC OF GHANA, Judgment No. ECW/CCJ/JUD/10/13,* in CCJRL (2013) p. 349§52.

71. Thus, it is from the analysis of the application lodged by the Applicant that the Court will verify whether the matter falls within its jurisdiction.

72. In this sense this Court pronounced in the case *BAKARY SARRE AND 28 ORS v. REPUBLIC OF MALI,* Judgment No. ECW/CCJ/JUD/03/1, in CCJRL (2011) p. 67, §25, that: "*The competence of the Court to adjudicate in a given case depends not only on its texts but also on the substance of the initiating application. The Court accords every attention to claims made by applicants, the pleas-in-law invoked, and in an instance where human rights violation is alleged, the Court equally carefully considers how the parties present such allegations. The Court therefore looks to find out whether the human rights violation as observed constitutes the main subject-matter of the*

application and whether the pleas in-law and evidence produced essentially go to establish such violation."

73. The jurisdiction of this Court is governed by Article 9 of Protocol A/P1/7/91 on the Court, as amended by Supplementary Protocol A/SP.1/01/05.

74. Paragraph 4 of the said Article 9 provides that:

"*The Court has jurisdiction to determine cases of human rights violations occurring in any member state*."

75. It is the case law of this Court that its jurisdiction cannot be called into question wherever the facts relied upon relate to human rights. (See the cases *HISSÈNE HABRÉ v. REPUBLIQUE DU SENEGAL*, Judgment No. ECW/CCJ/RUL/03/2010, CCJRL (2010) p. 43, § 53-61; *MAMADOU TANDJA v. REPUBLIQUE DU NIGER,* Judgment No. ECW/CCJ/JUD/05/10, CCJRL (2011) p. 105 ff.; *PRIVATE ALIMU AKEEM v. FEDERAL REPUBLIC OF NIGERIA*, Ruling No. ECW/CCJ/RUL/05/11, CCJRL (2011) p. 121 ff.)

76. This position of the Court has been permanently reaffirmed in a plethora of cases, making it indisputable that in a case, the mere allegation of a violation of human rights is sufficient to trigger the jurisdiction of this Court and it will assume jurisdiction without necessarily examining the veracity of the allegation. (See the case *DR. GEORGE S. BOLEY v. REPUBLIC OF LIBERIA & 4 ORS*, Judgment No. ECW/CCJ/JUD/24/19 §27).

77. Also, in relation to the said Article 9(4), this Court, in the case *SAWADOGO PAUL & 3 ORS v. REPUBLIC OF BURKINA FASO,* Judgment No. ECW/CCJ/JUD/07/20 §21 stated that: *"From the above provision, it is pertinent that two conditions must be met before the Court can exercise jurisdiction over an application brought before it for*

consideration- a) there must be an allegation of human rights violation and; b) such violation must have occurred within the territorial jurisdiction of the Member State against which the application was brought."

78. In the instant case, the Applicant relies his initial application on alleged violation of his human rights, namely, the right to presumption of innocence, the right to respect for reasonable time for pre-trial proceedings and the right of access to justice and prays the Court to find such violations.

79. Therefore, contrary to the Defendant's contention, this Court has not been called upon to analyse judgment No. 2020/033/CC/CRIM of 27 May 2020 rendered by the Criminal Chamber of the Court of Cassation nor to interpret national law, namely the provisions of the Code of Criminal Procedure in force in Niger.

80. Indeed, this Court has stated several times that it is not a court of appeal, nor of *cassation* or *reformatio* of decisions taken by national courts, as rightly submitted by the Defendant. See, inter alia, the case of *JERRY UGOKWE v. THE REPUBLIC OF NIGERIA)*, Judgment of 7 October 2005, Case No. ECW/CCJ/02/05, para. 32.

81. This means that it is outside the Court's mandate to review a judgment delivered by a court of a Member State to confirm or revoke it. (See also the case of *BAKARY SARRE & 28 ORS v. THE REPUBLIC OF MALI*, Judgment No. ECW/CCJ/JUD/03/11 of 17 March 2011, p. 22; The case *AJAMI YASMINE MARIE JEANNE v. STATE OF CÔTE D'IVOIRE*, Judgment No. ECW/CCJ/JUD/12/20 of 8 July 2020, paras.172 and 173)

82. Likewise, in the same vein, the Court emphasised, in the case *MESSRS ABDOULAYE BALDE & ORS v. REP OF SENEGAL*, Judgment No. ECW/CCJ/JUD/04/13 para. 72, that: "*(...) its consistently held case laws that it has no mandate to examine the national laws of Member States or to review decisions made by the domestic courts of member states.*"

83. This position has been affirmed several times by the jurisprudence of this Court, as mentioned by the Defendant State, namely, in the case of *MOUSSA LÉO KEITA v. REPUBLIC OF MALI,* Judgment No. ECW/CCJ/JUD/03/07 of 22 March 2007, IN (2004-2009) CCJ, LR, p. 73 & 30, where it was ruled that: *"Unlike other international courts of justice, such as the European Court of Human Rights, the Community Court of Justice, ECOWAS, does not possess, among others, the competence to revise decisions made by the domestic courts of Member States; it is neither a court of appeal nor a court cassation (cour de cassation) vis-a-vis the national courts, and as such, the action of the applicant cannot thrive"*.

84. However, mindful of its mandate, this Court has also been affirming that it is competent to examine the decisions of the courts of the Member States when it comes to ascertaining whether they have violated human rights.

85. In this regard see the case *FARIMATA MAHAMADOU & 3 ORS VS. REPUBLIC OF MALI*, Judgment No. ECW/CCJ/JUD/11/16 of 17 May 2016, Case No. ECW/CCJ/APP/39/15, pp. 11 and 12, para. 43 to 49, where it stated that : "*(...); Qu'en effet, lorsqu'une décision de justice est, en elle-même attentatoire aux droits de l'homme, il va de soi que le juge communautaire, qui a reçu mandat de protéger les droits des citoyens de la communauté, ne saurait avoir d'autre choix que d'intervenir et dénoncer cette violation*; *Qu'il ne saurait rester inerte face à une violation flagrante des droits de l'homme, peu importe l'acte qui est à l'origine de cette violation ; Qu'il ne s'agit pas pour lui ici de contrôler la légalité d'une décision rendue par une juridiction nationale mais de constater la violation manifeste des droits de l'homme contenue dans un acte judiciaire* ; ***Qu'il faut en effet distinguer le contrôle opéré sur la légalité d'une décision rendue par une juridiction nationale et la constatation d'une violation des***

droits de l'homme résultant d'une décision de justice ; Que si le juge communautaire ne peut apprécier la bonne application des textes de droit interne par les juges nationaux, il reste compétent pour relever les violations des droits de l'homme même lorsqu'elles ont pour origine une décision rendue par un juge d'un des Etats membres ; Que le juge des droits de l'homme qu'il est, ne remplirait pas son rôle de protecteur des droits de l'homme, s'il devait laisser échapper des violations flagrantes des droits de l'homme, contenues dans des décisions des juridictions nationales." (Emphasis added)

86. In the same vein, this Court has stated that it is competent to examine national legislation whenever necessary to ascertain whether its application results in a violation of the human rights invoked.

87. In the instant case, the Defendant State also appears to wish to question the competence of this Court to examine the national legislation of a Member State, in particular its own, to ascertain the legality or legitimacy of the pre-trial detention imposed on the Applicant.

88. In this regard, the Court in the case *FEDERATION OF AFRICAN JOURNALIST v. THE REPUBLIC OF THE GAMBIA*, relying on its own jurisprudence, reiterated that*: "it will not examine the laws of member states in abstracto since it is not a constitutional court but, once human rights violation are alleged, it invokes its jurisdiction to examine whether or not there has been violation." (page 31).*

89. The Court thus concludes that it is competent to examine both a national judicial decision of a Member State and the national legislation whenever they contain an allegation of a violation of human rights.

90. Thus, considering the facts alleged and the reliefs sought by the Applicant, the ground for the present action is the alleged violation of human rights, allegedly committed in the territory of the Defendant State,

guaranteed by legal instruments for the protection of human rights, namely, the African Charter on Human and Peoples' Rights, ratified by Member States of ECOWAS, such as the Defendant State, and which, therefore, bind them and impose on them the duty to respect and protect the rights proclaimed therein. (See the case *AMOUZOU HENRI et 5 AUTRES v. RÉPUBLIQUE DE COTE D'IVOIRE*, Judgment No. ECW/CCJ/JUD/04/09, of 17 December, Case No. ECW/CCJ/APP/01/09)

91. Consequently, since the requirements of Article 9(4) of Protocol A/P1/7/91 on the Court, as amended by Supplementary Protocol A/SP.1/01/05, are met, the Court understands that it entertains jurisdiction to rule on the instant case.

VIII - ADMISSIBILITY

92. The admissibility of the application is governed by the provisions of Article 10 (d), of Protocol A/P1/7/91 on the court as amended by Supplementary Protocol A/SP.1/01/05, as cited above, which provides that:

"*Access to the Court is open to the following: (...) d) Individuals on application for relief for violation of their human rights; the submission of application for which shall:*

i) Not be anonymous; nor

(ii) Be made whilst the same matter has been instituted before another International Court for adjudication; (...)"

93. Therefore, having the Applicant identified himself as a victim of a human rights violation, the Court finds that the claim is neither manifestly

unfounded under the aforementioned article nor inadmissible on any other grounds.

94. The instant case must therefore be declared admissible.

IX. MERITS

95. The Court now proceeds to examine each of the human rights allegedly violated by the Defendant State, taking into consideration the questions the Applicant puts to the Court's decision.

a) The alleged violation of Articles 2 and 6 of the African Charter on Human and Peoples' Rights (ACHPR) by the violation of the Applicant's personal freedom:

96. In the instant case, the Applicant alleged that in 2013, armed men attacked the military barracks in Agadez (Niger Republic). The defence and security forces discovered that the attackers spent the night before the attack in the Applicant's house, so he was notified that he was being prosecuted by the Public Prosecutor's Office before the Niamey High Court for complicity in murder and assassination and association with criminals linked to a terrorist group. That he was charged for these same crimes and arrested on June 13, 2013, by the investigating judge of the Anti-Terrorism chamber of the Niamey Special High Court. That after seven years of detention, the Applicant has not only not been tried, but remains in the pre-trial detention, in violation of Article 605(8) of the Niger Code of Criminal Procedure (Law No. 2016 21 of June 16, 2016), because his case is pending before the Counter-terrorism Control Chamber, which is only a court of second instance in pre-trial matters in Niger. To this date, no judgment referring the case back to the Chamber for trial has been delivered, in violation of the procedural rules laid down by Niger's domestic positive law, but also by international law.

97. That he first appealed to the investigating judge who rejected his application for provisional release.

98. He submitted an application for release to the Control Chamber for counterterrorism matters of the Niamey Court of Appeal on 5 November 2019 (Exhibit No. 2).

99. This application remained unanswered.

100. He wrote to the Minister of Justice by correspondence from his lawyer on 23 December 2019 and the latter never replied, despite the Applicant seeking only to be tried. (Exhibit 3)

101. On its turn, the Defendant claimed that:

102. The Applicant fails to point out the facts characterising the violation of the provisions of the Articles relied upon.

103. That the Applicant's pre-trial detention cannot in itself constitute a violation of his rights and freedoms, as it was carried out in accordance with and based on provisions of national law.

104. That in fact, under article 131 of the Niger Code of Criminal Procedure, pre-trial detention is an exceptional measure and can only be ordered or maintained under the terms and conditions defined therein.

105. The Applicant's pre-trial detention cannot be considered an illegal violation of his liberty because it was carried out in accordance with legal requirements.

106. That the Applicant is charged with complicity in terrorism, murder and criminal association and that his pre-trial detention and continued detention are therefore amply justified by law.

107. That the Applicant is charged with complicity in terrorism, murder and criminal association.

108. That there was no unlawful violation of his liberty and therefore no violation of his human rights.

✓

109. Article 2 of the Charter states that:

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." (See also Articles 1 and 2 of the Universal Declaration of Human Rights)

110. Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly prohibits any differential treatment between persons existing in similar contexts based on one or more of the prohibited grounds listed in Article 2 above. (See the case of *AJAMI YASMINE MARIE JEANNE V. STATE OF COTE D'IVOIRE*, Judgment No. ECW/CCJ/JUD/12/20 of 8 July 2020, p.41 & 253)

111. In the instant case, the Applicant merely asserts that the Defendant violated the aforementioned Article 2 of the Charter, without indicating what kind of discriminatory treatment he was subjected to in comparison with other persons who were in the same situation as him, nor does he specify the grounds prohibited by Article 2 of the Charter, the burden of which was upon him.

112. Based on the foregoing reasons, the Court considers that the Applicant is not victim of any discriminatory practice that violates the principle of the prohibition of discrimination guaranteed by Article 2 of the Charter.

113. In this sense, the Court concludes that the Applicant's claim in this regard must be dismissed.

✓

114. Article 6 of the Charter states that:

"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

115. The Universal Declaration of Human Rights (UDHR) in its Articles 3 and 9 and the International Covenant on Civil and Political Rights (ICCPR) in its Article 9(1) follow on the same vein.

116. Similarly, Article 7 of the American Convention on Human Rights and Article 5 of the European Convention on Human Rights guarantee the right to liberty and security of individuals, the latter being the only one that specifically lists in paragraphs (a) to (f) the grounds that can legally justify the deprivation of liberty.

117. All the above-mentioned human rights protection instruments guarantee individuals the right to liberty and security of person, establishing that the deprivation of liberty must, in all cases, occur for reasons and under conditions previously determined by law (meaning domestic or national law of the States Parties), in other words, respecting the principle of legality.

118. Similarly, the Human Rights Committee has observed that: "*no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law(...). Deprivation of liberty without such legal authorization is unlawful. Continued detention despite an operative (exécutoire) judicial order of release or a valid amnesty is also unlawful.*" (See General Comment No. 35 §22).

119. In this regard, the Court wrote in the case *BENSON OLUA OKOMBA v. REPUBLIQUE DU BENIN*, Judgment No. ECW/CCJ/JUD/05/15 that: *"The above-mentioned human rights treaties, provides that deprivation of liberty within a State must in all cases be carried out in accordance with the law.*" (pag. 16) (See also the case *CHIEF EBRIMAH MANNEH v. THE*

REPUBLIC OF GAMBIA, Judgment No. ECW/CCJ/JUD/03/08 in LR 2004-2009, (§15).

120. Also, the Court defined arbitrary detention, as: *"any form of curtailment of individual liberty that occurs without a legitimate or reasonable ground and is in violation of the conditions set out under the law.*" - See the case *BADINI SALFO v. RÉPUBLIQUE DU BURKINA FASO*, Judgment ECW/CCJ/JUD/13/12 - and referred in the case *DAME HADJITOU MANI KORAOU v. RÉPUBLIQUE DU NÍGER, Judgment ECW/CCJ/JUD/06/08* the Court ruled that: "*une détention est dite arbitraire lorqu'elle ne repose sur aucune base légale*." (§91)

121. The notion of arbitrariness also covers deprivation of liberty contrary to the standards of reasonableness, i.e. whether it is "*just, necessary, proportionate and equitable as opposed to unjust, absurd and arbitrary*". (See African Commission, Communication No. 458/1991, in the case MUKONG v. CAMEROON and the Human Rights Committee in General Comment No. 35 §12).

122. The African Court on Human and Peoples' Rights (AfCHPR), in its judgment in the case *ONYACHI AND NJOKA v. TANZANIA* (Application No. 003/2015 of 28 September 2017) highlighted the three criteria established by international human rights jurisprudence to determine whether or not a deprivation of liberty is arbitrary, as being the following: "*(...) the lawfulness of the deprivation, the existence of clear and reasonable grounds and the availability of procedural safeguards against arbitrariness.",* having concluded that: *"These are cumulative conditions and non-compliance with one makes the deprivation of liberty arbitrary*."

123. As set out in the "*Principles and Guidelines on the Right to a Fair trial and Legal Assistance in Africa"* adopted by the African Commission: "*States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried*

out strictly in accordance with the provisions of the law, and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause." (See Principle M. [1.(b)])

124. Detention or deprivation of liberty occurs as soon as an individual is forcibly held in a police station or prison or when an authority orders him/her to remain in a certain place.

125. And the indication of the beginning of the deprivation of liberty makes it possible to control the overall duration of the possible detention.

126. As the European Court of Human Rights held in the case of *GUZZARDI V. ITALY*, Application No. 737/76 (1980), to determine whether a person has been deprived of his liberty under Article 5: "*the starting point must be his concrete situation and account must be taken of a whole range of criteria such as type, duration, effects and manner of implementation of the measure in question*".

127. And, as the Human Rights Committee has pointed out: "*Review of the factual basis of the detention may, in appropriate circumstances, be limited to review of the reasonableness of a prior determination.*" (See General Comment No. 35 §39)

128. Detention or imprisonment is considered arbitrary when it is not in conformity with national or international law, and it happens whenever it lacks legitimacy or reasonable grounds. (See the judgment of this Court ECW/CCJ/JUD/05/17, rendered in the case of *BENSON OLUA OKOMBA v. REPUBLIQUE DU BENIN* (p.16).

129. As this Court stated in Judgment No. ECW/CCJ/JUD/04/09, rendered in the case *AMOUZO HENRI ET OUTRES v. REPUBLIQUE DU CÔTE D'IVOIRE, "...une detention peut être au départ exempte d'observations, c'est-à-dire être légale, et devenir postérieurement arbitraire, au delà d'un délai raisonnable dans lequel le détenu doit être jugê*." (§ 88)

130. This Court further reiterated in *MARTIN GEGENHEIMER & 4 ORS.v. The REPUBLIC OF NIGERIA & ANOR*, in its Judgment No. ECW/CCJ/JUD/03/21 of 04 March 2021, §104 that: "*The watch word for the validity of any arrest is lawfulness and reasonableness. It follows therefore that powers of arrest must not only be provided for under the law but the grounds upon which it is exercised must be reasonable, otherwise what might be initially lawful becomes arbitrary and illegal."* See the case of *MR. GODSWILL TOMMY UDOH v. FEDERAL REPUBLIC OF NIGERIA (2016) ECW/CCJ/JUD/26/16, page 17 (Unreported)".*

131. Reiterating the same position, see also the case of *KODJO ALAIN VICTOR CLAUDE v. LA RÉPUBLIQUE DE CÔTE D'IVOIRE*, Judgment N°. ECW/CCJ/JUD/09/21§53.

132. In the instant case, the Applicant was notified that he was being prosecuted by the Public Prosecutor's Office at the Niamey High Court for complicity in murder and assassination, and association with criminals, in connection with a terrorist enterprise; He was charged for the same crimes and arrested on 13 June 2013 by the investigating judge of the Anti-Terrorism Chamber of the Niamey Special High Court. And after seven years of detention, the Applicant has not only not been tried but remains in the pre-trial jail.

133. This means that the Applicant has been in pre-trial detention for more than 7 years.

134. The Niger Code of Criminal Procedure establishes that:

"Art. 131.1 bis: (Loi n° 2003-26 du 13 juin 2003). La détention provisoire ne peut excéder une durée raisonnable, au regard de la gravité des faits reprochés à l'inculpé et de la complexité des investigations nécessaires à la manifestation de la vérité.

Le juge d'instruction doit ordonner la mise en liberté immédiate de la personne placée en détention préventive, selon les modalités prévues par l'article 134, dès que les conditions prévues à l'article 131 et au présent article ne sont plus remplies.

Art. 132: (Loi n° 2003-26 du 13 juin 2003). En matière correctionnelle, lorsque le maximum de la peine prévue par la loi est inférieur ou égal à 3 ans d'emprisonnement, l'inculpé domicilié au Niger ne peut être détenu plus de six mois après sa première comparution devant le juge d'instruction s'il n'a pas été déjà déjà convamné soit pour crime, soit pour délit à un emprisonnement de plus de trois ans sans sursis.

Dans les cas autres que ceux prévus à l'alinéa précédent, l'inculpé ne peut être détenu plus de six mois renouvelables une seule fois par ordonnance motivée du juge d'instruction.

Art. 132-1: (Loi n° 2003-26 du 13 juin 2003). En matière criminelle, l'inculpé ne peut être maintenu en détention au-delà de 18 mois. Toutefois, le juge d'instruction peut, à l'expiration de ce délai décider de prolonger la détention pour une durée qui ne peut être supérieure à 12 mois par une ordonnance non renouvelable selon la même procédure.

(Loi n° 2007-04 du 22 février 2007). Toutefois, les dispositions ci-dessus ne s'appliquent pas aux cas de meurtre, assassinat, parricide, empoisonnement ainsi qu'aux vols criminels et aux détournements de deniers publics."

135. The same law also states in "CHAPITRE II: DE LA PROCEDURE DEVANT LE POLE JUDICIAIRE EN MATIERE DE LUTTE CONTRE LE TERRORISME." Provides for in its:

Art. 605.8 (nouveau) que *"(Loi n° 2016-21 du 16 juin 2016) La durée totale de la détention préventive ne peut excéder quatre (4) ans en matière criminelle et deux (2) ans en matière délictuelle."*

136. In the instant case, the Applicant is charged with complicity in terrorism, murder and criminal association and has been in detention since 13 June 2013, that is, he has been in pre-trial detention for more than 7 years without being tried by a final judgment.

137. Complicity presupposes a mere material or moral aid to the practice of the intentional act by another, in such a way that the accomplice lacks the domain of the typical act as an indispensable element of co-authorship.

138. Authorship and complicity are forms of criminal participation, distinguished by the manner in which they are carried out and by their objective gravity. The accomplice only favours or helps the execution, remaining outside the typical act. Only when he goes beyond mere assistance and thus plays a necessary part in the execution of the criminal plan does he become a co-author of the fact.

139. Complicity presupposes the existence of an act committed intentionally by another person and is subject to the principle of accessory nature since the accomplice does not take part in the functional domain of the acts constituting the crime, i.e., he is aware that he favours the commission of a crime but does not take part in it. He merely facilitates the main fact.

140. In the instant case the Defendant submits that the Applicant's pre-trial detention is justified under the law.

141. Now as stated above, it follows from Art. 132-1 of the Criminal Procedure Code in force in Niger, that the accused cannot be detained for more than 18 months; that the investigating judge may, at the end of that period, decide, for the extension of the detention for a period not exceeding

12 months by non-renewable order in accordance with the same procedure; and that the above provisions do not apply to cases of murder, assassination, parricide, poisoning, as well as, criminal theft and embezzlement of public funds.

142. The same law also states in "*CHAPTER II:* DE LA PROCEDURE DEVANT LE POLE JUDICIAIRE EN MATIERE DE LUTTE CONTRE LE TERRORISME..." in its Art. 605.8 that the total duration of pre-trial detention cannot exceed four (4) years in criminal matters and two (2) years in civil offences.

143. Therefore, the Court concludes that, in the instant case, by application of Article 132-1 *in fine* the Applicant would be subject to a maximum term of pre-trial detention of 18 months extendable, by non-renewable order, for a period not exceeding 12 months (which would total 30 months).

144. In the instant case, it has neither been alleged nor proven that the term of the Applicant's pre-trial detention has been extended by order of the investigating judge. And even if this had occurred, the maximum term of pre-trial detention (30 months) is far exceeded.

145. On the other hand, as admitted by the parties, the Applicant is accused of complicity in the practice of terrorism, murder, and criminal association, which leads to admit the applicability of the aforementioned Article 605.8 of the same law, which establishes a maximum preventive detention period of 4 years, which also is long overdue.

146. In this sense the Court concludes that the preventive detention of the Applicant, beyond the maximum limit of 4 years, violates Article 605.8 of the Criminal Procedure Code.

147. Consequently, in the absence of any legal basis, this Court considers that the continuation of the Applicant's pre-trial detention beyond 4 years is arbitrary and illegal, constituting a violation of his right to liberty and

security provided for in Articles 6 of the African Charter, 9 (1) of the ICCPR and 3 and 9 of the UDHR.

2 - Violation of Article 7 of the African Charter on Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 11 of the Universal Declaration of Human Rights by violating the Applicant's right to the presumption of innocence:

148. The element of the right to a fair trial, invoked in the instant case, is the right to the presumption of innocence.

149. In support of the violation of this right, the Applicant submits that the State of Niger has incorporated this right to presumption of innocence into its Constitution in Article 20; That all applications for the Applicant's provisional release have been dismissed; That no matter how serious the facts alleged against the Applicant may be, he is presumed innocent until he is convicted by means of a sentence in accordance with Article 20 of the Constitution of the Republic of Niger; that the Applicant first appealed to the investigating judge who dismissed his application for provisional release; he submitted an application for release on 5 November 2019 to the Control Chamber in matters of counter-terrorism of the Niamey Court of Appeal (Exhibit No. 2); that the said application remained unanswered; he wrote to the Minister of Justice by correspondence through his lawyer on 23 December 2019; the Minister never responded, despite the Applicant only seeking to be tried. (Exhibit 3)

150. On its turn, the Defendant submits that there is no violation of the presumption of innocence, since the ongoing investigation aims precisely at establishing his innocence or guilt in relation to the facts of which he is accused of; that in the first place, the almost simultaneous attacks in Agadez and Arlit gave rise to a complex and tedious procedure, given the number of dead and civilians wounded reaching into the hundreds; the investigations

were carried out at national and international level due to the foreign elements involved, notably with letters rogatory in Cameroon, Mali and Algeria, as a result of the magnitude of the tasks, the closure of the information, which occurred on 3 December 2018, is even a great achievement; that the said information eventually generated charges against the Applicant, in accordance with the rules of jurisdiction and procedure described above, that in addition, the presumption has essentially the following components: the right to be heard by a judge and the right to be assisted by a lawyer; that throughout the proceedings, these rights were guaranteed to the Applicant.

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151. The right to be presumed innocent until proven guilty is a fundamental human right and is another principle that conditions the treatment to which an accused person must be subject, during the criminal investigation and trial, until the final appeal.

152. Article 7 (1) (b) of the African Charter provides that:

"1. Every individual shall have the right to have his cause heard. This comprises: (b) "the right to be presumed innocent until proved guilty by a competent court or tribunal;"

153. Similarly, this right is enshrined in other international instruments, namely in Articles 14(2) of the ICCPR, 8(2) of the American Convention on Human Rights and 6(2) of the European Convention on Human Rights and 11(1) of the Universal Declaration of Human Rights.

154. The Commission on Human Rights noted in General Comment No. 13,§7, that: "*(...)By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to*

be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial."

155. Court stated in the case of *BATIONO IDA FLEUR PELAGIE v. BURKINA FASO*, Judgment No. ECW/CCJ/JUD/14/12 of 31 October 2012, LRCCJ (2012), p. 310 §32 that: "*The Court observes that the presumption of innocence implies that every person is supposed to be innocent as long as a competent court has not decided on his guilt and has not convicted of the offense that he is charged with; it prohibits all statements, all events, attitudes or behaviour likely to believe that a person is guilty before that person is declared as such by the competent court in the context of a judicial proceeding."*

156. The African Court further wrote in the case of *INGARBIRE HUMUHOZA VICTOIRE v. REPUBLIC OF RWANDA*, Application No. 03.14 of 24 November 2017 para 84 that: "*The essence of the right to presumption of innocence lies in its prescription that any suspect in a criminal trial is considered innocent throughout all the phases of the proceedings, from preliminary investigation to the delivery of judgment and until his guilt is legally established*."

157. And mentioned in the case *OSGAR JOSIAH v. UNITED REPUBLIC OF TANZANIA*, Application No. 053/2016, 28 March 2019, p. 51: "*The Court observes that the right to a fair trial and specifically, the right to presumption of innocence requires that a person's conviction on a criminal offence which results in a severe penalty and in particular to a heavy prison sentence, should be based on solid and credible evidence*."

158. On its turn, the European Court of Human Rights stated in the case of *BARBERÁ, MESSEGUÉ AND JABARDO v. SPAIN*, 6 December 1988, § 77 that: "*the principle of the presumption of innocence ... requires, inter alia, that, in the performance of their functions, the members of a Court must not begin with the preconceived idea that the accused has committed the crime*

he is being charged of; The burden of proof is on the prosecution and any doubt must benefit the accused."

159. It stressed that this right: "*does not necessarily prohibit presumptions of law or fact, but any rule shifting the burden of proof or applying a presumption operating against the accused must be confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence*." (see *SALABIAKU v. FRANCE*, 7 October 1988, § 28).

160. In the instant case, the Applicant's allegations are not to be accepted, as they lack any argumentation that follows the meaning of the right to presumption of innocence, as explained above.

161. The Applicant has neither alleged nor proved any facts to show that he was found guilty by the Defendant's agents before his guilt was proven according to law beyond a reasonable doubt. That is, that the public authorities prejudged the outcome of a trial.

162. The Court therefore rejects these allegations and concludes that the Defendant did not violate the Applicant's right to the presumption of innocence provided for in Article, 7 (1) (b) of the African Charter and Articles 14 (2) of the ICCPR, 11 (1) of the Universal Declaration of Human Rights.

4 - Violation of Article 9 (3) of the International Covenant on Civil and Political Rights by the failure to comply with the reasonable period of time for the investigation:

163. To substantiate the violation of the right in question, the Applicant submits that reasonable time is a fundamental guarantee of good justice; that it is unanimously accepted that everyone is entitled to good justice, without any distinction.

164. And that in the instant case, the remedies did not allow any reparation, on the contrary, they only confirmed the first decision.

165. He concluded that must be found a violation of the State of Niger's obligation to make the Applicant have access to justice within a reasonable time.

166. On its turn, the Defendant submits that, as regards preliminary enquiries, the concept of reasonable time is assessed in relation to the seriousness of the facts alleged against the accused, the complexity of the investigations required to establish the truth and the exercise of the rights of the defence.

167. That the provisions of Article 132(2) of the Niger Code of Criminal Procedure (Act No. 2016-21 of June 16, 2016) do not apply to the Applicant, who is the subject of charges and conviction for murder.

168. Indeed, Article 132(2)(1) of the Code of Criminal Procedure excludes from the scope of the provisions, which limit the maximum length of pre-trial detention, cases of voluntary manslaughter, murder, poisoning by parricide, as well as criminal theft and embezzlement of public funds.

169. The facts charged against the Applicant are extremely serious, involving murder, attacks with explosives, participation in the organisation and commission of terrorist acts, acts of support and the supply of arms.

170. The complexity of the investigations can be deduced from the circumstances of the two attacks, the foreign elements, the high number of victims, and the extent of the damage.

171. That in certain respects, the Applicant's dilatory behaviour has largely harmed his interests, through the multiplicity of appeals he has lodged with two different lawyers.

172. That in fact, on 5 November 2019, when one of his lawyers filed a new application for provisional release in favour of the Applicant, and less than a month after the judicial review had dismissed a similar appeal, point by

point, to the one filed earlier, concerning the same object, supported by the same arguments at the same stage of the proceedings; at the request of another lawyer, constituted for the same client, the Defendant was referred to the Court of Cassation to rule on the merits of the appeal.

173. That against all expectations, the same lawyer suddenly withdrew his appeal on February 26, 2020, that is, 4 months later (Judgment No. 2020/033/CC/CRIM of May 27, 2020).

174. This is concrete evidence of a dilatory **act** in the same case.

175. That in effect, due to this untimely appeal (withdrawal of counsel), the case remained pending before the Criminal Chamber of the Court of Cassation from 11 October 2019 to 27 May 2020

176. And this is clearly attributable to the accused, who expressly asked the Court of Cassation to record his withdrawal.

177. In its recent decision of 27 May 2020, the Court of Cassation welcomed the voluntary withdrawal of Maître NASSIROU LAWALY, MADI CHERIF's lawyer.

178. Following the decision of the Criminal Chamber of the Court of Cassation dated 27 May 2020, the case was transmitted on 19 June 2020 to the Prosecutor General at the Niamey Court of Appeal, who referred it on 29 June 2020 to the investigating judge appointed to execute the additional information.

179. It follows from these observations that the actions of the Applicant, through the multiplication of applications for provisional release and remedies against the orders, also had the inevitable consequence of delaying the course of the proceedings.

180. In fact, the courts to which these applications and appeals were submitted were required to rule on their merits before remitting the case to trial.

181. It was therefore the Applicant himself who delayed his trial, and he cannot be allowed to complain about his own *turpitude: nemo auditur propriam suam turpitudinem allegans*.

182. Therefore, in view of the complexity of the case and the multiplicity of applications initiated, no delay has occurred, and the proceedings are normally running within a reasonable time.

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183. Article 7 (1) (d) of the African Charter provides that:

"1. Every individual shall have the right to have his cause heard. This comprises:

(...)

(d) the right to be tried within a reason- able time by an impartial court or tribunal."

184. The right to be tried within a reasonable time by an impartial court or tribunal provided for in the said Article 7 (1) (d) must be read in conjunction with Articles 9 (3) and 14 (3) (c) of the ICCPR.

185. This Court, in relation to these articles, referred in the case of *ASSIMA KOKOU INNOCENT & 2 OTHERS v. REPUBLIC OF TOGO*, Judgment No. ECW/CCJ/JUD/08/11 of 3 July 2013, CCJRL (2013), p. 207§ 84 that: *"The combination of all these articles places an obligation on the Republic of Togo to respect the right of anyone accused of a criminal offence, and to try him in reasonable time without undue delay."*

186. The same right is provided for in Articles 8(1) of the American Convention and 6(1) of the European Convention, which state that everyone has the right to be heard "within a reasonable time".

187. The right to a fair hearing within a reasonable time is one of the cardinal elements of a fair trial.

188. Article 7 (l) (d) of the African Charter not only provides that a person accused of a criminal offence has the right to be tried without undue delay/within a reasonable time by an impartial tribunal or court, but that an individual who is accused and held in custody has the right to have his case promptly resolved. (See African Commission, *HAREGEWOIN GABRE-SALASSIE AND IHRDA (ON BEHALF OF FORMER DERGUE OFFICIALS) v. FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA*, Communication No. 301/2005, 5 November 2011, § 215)

189. In the same vein, the Human Rights Committee has noted that the right of the accused to be tried without undue delay provided for in article 14, paragraph 3 (c) is not only intended to avoid keeping persons for too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than is necessary in the circumstances of the particular case, but also to serve the interests of justice. (See General Comment No 32, Article 14: *Right to equality before courts and tribunals and to a fair trial*, para. 35; See also the Inter-American Court, in the case of *SAUREZ-ROSERO v. ECUADOR*, judgment of 12 November 1997 § 70)

190. In its "*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*", p.15§5, the African Commission, also noted that any person arrested on a criminal charge should be brought before a judicial officer authorised by law to exercise judicial power and should be entitled to trial within a reasonable time or to release.

191. The right to an impartial hearing within a reasonable time is further reinforced by the "*Commission's Resolution on Fair trial*", which provides that persons arrested or detained or facing criminal charges shall be brought promptly before a judge or other officer authorised by law to exercise the power of justice and shall be entitled to trial within a reasonable time or to

be released. (See paragraph 2 (c) *of ACHPR/Res. 4(XI) 92: Resolution on the Right to Appeal and Fair Trial* (1992)).

192. In order to give effect to the notion of "reasonable time", this Court in the case of *AMOUZOU HENRI ET 5 AUTRES v. REPUBLIC DE CÔTE D' IVOIRE*, Judgment no. ECW/CCJ/JUD/04/09, LRCCJ (2009) § 93 stressed that international courts competent in the application of international human rights instruments consider that the "reasonable time" for holding the trial of detainees should be determined according to: the merits of each case, the specificity of the procedure, the degree of complexity and nature of the offence, the difficulty in the investigation and the number of persons involved.

193. It further reiterated in the cited case *MR. IBRAHIM SORY TOURÉ AND MRISSIAGA BANGOURA v. THE REPUBLIC OF GUINEA*, §108, that what is reasonable must be assessed in the circumstances of each case, considering primarily the complexity of the case, the conduct of the accused and the manner in which the matter was handled by the administrative and judicial authorities.

194. In the same vein, see also Human Rights Committee, Communication No. 818/1998, *SEXTUS v. TRINIDAD AND TOBAGO*, §7.2,in relation to a 22-month delay between the indictment of the accused of a crime with death penalty and the commencement of the trial without specific circumstances justifying the delay; Communication No. 938/2000, *SIEWPERSAUD, SUKHRAM, AND PERSAUD v. TRINIDAD AND TOBAGO* § 6.2 in relation to the total length of criminal proceedings of almost five years, in the absence of any explanation from the State party justifying the delay.

195. On the question of the reasonableness of the length of proceedings, whether civil or criminal, the European Court, equally and consistently holds that: "*the particularities of the case must be taken into consideration, based on the criteria determined in the Court's precedents, in particular the*

complexity of the case, the conduct of the perpetrator and that of the competent authorities." (See the European Court of Human Rights, cases of *KEMMACHE v. FRANCE*, judgment of 27 November 1991, Series A, No. 218, p. 20, § 50 (criminal); *MARTINS MOREIRA v. PORTUGAL*, judgment of 26 October1988, Series A, No. 143, p. 17, § 45 (civil))

196. The African Commission follows in the same sense in the *"Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*", p.15 §5 - the African Court, in the case of *ALEX THOMAS v. UNITED REPUBLIC OF TANZANIA*, Application No. 005/2013 § 103 and 104 and the Inter-American Court in the cited case, *SAUREZ-ROSERO v. ECUADOR*, §72).

197. In terms of the complexity of the case, it should be taken into account that all aspects of the case are relevant to assess whether or not it is complex. Complexity may concern factual issues as well as legal issues. For example, consideration should be given to the nature of the facts to be established, the number of accused persons and witnesses, international elements, consolidation of cases and the intervention of other persons in the proceedings. (See Nuala Mole and Catharina Harby, *The right to a fair trial, A guide to the implementation of Article 6 of the European Convention on Human Rights,* p. 26)

198. With regard to the Applicant's conduct, it should be noted that if the Applicant caused a delay, this obviously weakens his claim. However, the Applicant cannot be penalised for having made use of the various procedures available to him to pursue his defence. An Applicant is not obliged to cooperate actively to expedite proceedings that may lead to his own conviction. However, if the Applicant has tried to speed up the process, this will be considered in his favour. (See European Court, in the case of *YAGCI AND SARGIN v. TURKEY* § 66)

199. With regard to the conduct of the competent authorities, only the delays attributable to the State are relevant, as only these can be taken into account in determining compliance with the reasonable period of guarantee. The State is, however, responsible for delays caused by all its administrative or judicial authorities. (See Nuala Mole and Catharina Harby, *The right to a fair trial, A guide to the implementation of Article 6 of the European Convention on Human Rights*, p. 27).

200. In assessing the length of the criminal proceedings, the European Court has held that, by Article 6(1) of the European Convention on Human Rights, the starting period to be taken into account is the day on which the person is charged, arrested or summoned to trial, for example. (See the cases of *KEMMACHE v. FRANCE*, judgment of 27 November 1991, Series A, No. 218, p. 27, para. 59 (date of indictment); *YAGCI AND SARGIN v. TURKEY*, judgment of 8 June 1995, Series A, No. 319-A, p. 20, para. 58 (date of arrest); *MANSUR V. TURKEY*, judgment of 8 June 1995, Series A, No. 319-B, p. 51, para. 60 (trial) and the end of the period is normally when the judgment, acquitting or convicting the person or persons, becomes final (See e.g. the case of YAGCI AND SARGIN v. TURKEY, judgment of 8 June 1995, Series A, No. 319-A, p. 20, para. 58)

201. With the same understanding this Court wrote, in the cited case *MR. IBRAHIM SORY TOURÉ AND MRISSIAGA BANGOURA v. THE REPUBLIC OF GUINEA*, § 10, that: "*Whereas for the determination of the length of time of a criminal procedure, the starting point is taken as the date of accusation (ECHR, Judgment on the Eckel Case, 15 July 1982, Series A, No. 51) and the end point, the date of the final decision*."

202. The guarantee of the right in question refers not only to the time between the formal accusation of the accused and the time when the trial must begin, but also the time until the final decision on the appeal. All steps, whether at first instance or on appeal, must take place "without undue delay".

(See Human Rights Committee, Communications No. 1089/2002, *ROUSE V. PHILIPPINES, §7.4; NO. 1085/2002, TARIGHT, TOUADI, REMLI AND YOUSFI v. ALGERIA*, §8.5.)

203. The Human Rights Committee noted that Article 14 (3) (c) and Article 14 (5) should be read conjointly so that the right to review of conviction and trial should be made available without undue delay. (See *EARL PRATT AND IVAN MORGAN v. JAMAICA*, Communication No.210/1986 & 225/1987; U.N. Doc. CCPR/C/35/D/225/1987, 20 March - 7 April 1989, § 13.3)

204. Coming back to the case at hand:

205. As stated above, the Applicant has been in preventive custody since 13 June 2013 by the Defendant on charges of complicity in the crimes of murder, and association with criminals in connection with a terrorist group.

206. At the date of the filing of this action (13 July 2020), the Applicant was waiting for more than seven years to be definitively tried, in order to be convicted or acquitted by a final judgment, because as stated above, the end of the period to be taken into consideration of the reasonable period of time is normally the rendering of the final judgment (not subject to further appeals), acquitting or convicting.

207. In order to justify this period of more than 7 years of pre-trial detention of the Applicant without trial, the Defendant claimed that the facts charged to the Applicant are extremely serious, involving murder, attacks with explosives, participation in the organisation and commission of terrorist acts, acts of support and supply of weapons, which as to the complexity of the investigations, can be deduced from the circumstances of the two attacks, the foreign elements, the high number of victims and the extent of the damage.

208. The Defendant has alleged such facts but has failed to prove them, the burden of proof which is upon it (see *FANTA CISSE v. STATE OF GUINEA*, Judgment No. ECW/CCJ/JUD/21/2021§166).

209. It further alleged that the Applicant's dilatory behaviour largely affected his interests through the multiple appeals he filed with two different lawyers.

210. As mentioned above, the Applicant cannot be penalised for having made use of the various procedures available to him to pursue his defence. An Applicant is not obliged to cooperate actively to expedite proceedings that may lead to his own conviction.

211. In this sense the Defendant's arguments cannot be accepted to justify the delay in the trial of the Applicant, which has long since exceeded the legal time limit for pre-trial detention provided for in the aforementioned legal provision.

212. Accordingly, this Court concludes that the conduct of the Defendant's agents constitutes a violation of Articles 7 (d) of the African Charter, 9 (3) and 14 (3) (c) and (5) of the ICCPR, and the Applicant's claim therefore stands in this point.

X- REPARATIONS

213. The Applicant seeks compensation of 500,000,000 FCFA for the damage suffered.

214. In the instant case, it has been demonstrated that the Defendant State, through its agents, has violated the Applicant's rights to liberty and security and to be tried within a reasonable time as set forth above, which confers upon him the right to reparation in accordance with the principle of international law which states that: "*everyone who has suffered a violation of his human rights is entitled to just and equitable reparation*", this taking into consideration that in matters of human rights violations, full reparation is, as a rule, impossible. (See Judgment No. *ECW/CCJ/JUD/01/06, rendered*

in the case, DJOT BAYI TALBIA & OTHERS v. FEDERAL REPUBLIC OF NIGERIA & OTHERS, in CCJ ELR (2004-2009).

215. Considering the gravity of the rights violated and their consequences for the Applicant, making an overall and equitable assessment, the Court awards the Applicant, by way of compensation, the sum of five million (5 000 000) FCFA.

XI. COSTS

216. The Applicant made no claim in relation to the payment of costs.

217. The Defendant, on its turn, seeks from the Court to order the Applicant to bear the costs of the proceedings.

218. Article 66(1) of the Rules of Court provides that "*A decision as to costs shall be given in the final judgment or in the order, which closes the proceedings.*"

219. Paragraph 2 of the same Article provides that "*The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.*"

220. Therefore, in the light of the above provisions, the Court considers that the Defendant, as the unsuccessful party, shall bear the costs of the proceedings, and the Chief Registrar shall determine it.

XII - OPERATIVE CLAUSE

221. For these reasons, the Court held a public hearing and having heard both parties:

As to jurisdiction:

i. Declares itself competent.

As to admissibility:

ii. Declares the application admissible.

As to merits of the cause:

iii. Finds the violation of the Applicant's right to liberty and security by the Defendant in accordance with Article 6 of the African Charter, Article 9 (1) of the ICCPR and Articles 3 and 9 of the Universal Declaration of Human Rights.

iv. Finds that the Defendant violated the Applicant's right to be tried within a reasonable time by an impartial tribunal, in accordance with Articles 7 (1) and 26 of the African Charter, Articles 9 and 14 (3) (c) of the ICCPR and Article 8 of the Universal Declaration of Human Rights.

v. Finds that the Defendant has not violated the Applicant's right to equality pursuant Article 3 of the African Charter.

vi. Finds that the Defendant has not violated the Applicant's right to the presumption of innocence provided for under Article 7 (1) (b) of the African Charter, Article 14 (2) of the ICCPR and Article 11 (1) of the UDHR.

As To Reparation

Regarding the release of the Applicant:

vii. Orders the Defendant to release the Applicant immediately.

As to reparation:

viii. Orders the Defendant to pay the Applicant the sum of five millions (5.000.000) FCFA, as compensation for the non-material damage suffered as a result of the violation of his rights.

Coast

x. Pursuant Rule 66(2) of the Rules of Court, the Defendant shall bear the costs of the proceedings, which shall be determined by the Chief Registrar.

XIII. AS TO COMPLIANCE AND REPORTING

ix. Orders the Defendant State to submit to the Court, within three (3) months from the date of notification of the present judgment, a report on the measures taken to implement the orders hereby ordered.

Signed by:

Hon. Justice Dupe ATOKI -Presiding________________________________

Hon. Justice KEIKURA BANGURA-Member________________________

Hon. Justice Januária T. S. M. COSTA- Member/Rapporteur ____________

Assisted by:

Mr. Tony Anene MAIDOH-Chief Registrar___________________________

222. Done in Accra on 1st April 2022, in Portuguese and translated into French and English.