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Giulia Melotti

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Université Paris Cité
Ecole Doctorale 624 « Sciences des sociétés »
Laboratoire CEPED (Centre Population et Développement)

FIGHTING THE EXCEPTIONAL ENEMY: COUNTERTERRORISM THROUGH JUSTICE IN NIGER

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Thèse de doctorat de sociologie

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ABSTRACT

FIGHTING THE EXCEPTIONAL ENEMY: COUNTERTERRORISM THROUGH JUSTICE IN NIGER

On 6 February 2015, early in the morning, coordinated attacks are launched on the cities of Diffa and Bosso, at the eastern periphery of Niger, taking both the population and security forces by surprise. They are the first extensive attacks conducted by Boko Haram on Nigerien soil and mark a turning point in the country's approaches to counterterrorism.

Over the following months, mass arrests are carried out in the Diffa region and the prisons fill with terrorist suspects. The intensification of the threat also sparks a comprehensive criminal justice reform in 2016, including the criminalisation of new offences and further specialisation of criminal justice institutions dealing with terrorism. From that moment, criminal justice responses have become a significant aspect of counterterrorism in Niger.

Against this backdrop, this study asks: did those responses contribute to strengthening the State's claims to sovereignty in Niger?

Guiding this research is the idea of a threat as an opportunity for recognition. First, the notion of terrorism as an exceptional phenomenon is explored as guiding and shaping the global process of its securitization. Then, the relationship between State and sovereignty is examined. Here, sovereignty is understood as a construct, a quality that States strive for and pursue, rather than possess. In this view, when a State engages in securitization of a threat, such as terrorism, reacting to the threat also becomes the opportunity to prove sovereign qualities. Accordingly, counterterrorism is a stage for the State perform its power and gain legitimacy.

To explore the relationship between counterterrorism and State sovereignty, this research looks into the State's role as a normative actor and in its capacity as a security provider to its citizens. It analyses the national counterterrorism legal framework and its practical application, as well as the outcomes of counterterrorism policies in terms of accountability of alleged terrorists and with regards to rehabilitation and reconciliation efforts in the most affected areas.

Keywords: counterterrorism, criminal justice, exceptionalism, sovereignty, securitization

RESUME

COMBATTRE L'ENNEMI EXCEPTIONNEL : LA LUTTE AU TERRORISME PAR LA JUSTICE AU NIGER

Le 6 février 2015, tôt le matin, des attaques coordonnées sont lancées sur les villes de Diffa et Bosso, à la périphérie orientale du Niger, prenant par surprise à la fois la population et les forces de sécurité. Ce sont les premières attaques de grande envergure menées par Boko Haram sur le sol nigérien et marquent un tournant dans les approches du pays en matière de lutte contre le terrorisme.

Au cours des mois suivants, des arrestations massives sont effectuées dans la région de Diffa et les prisons se remplissent de suspects terroristes. L'intensification de la menace déclenche également une vaste réforme de la justice pénale en 2016, qui comporte la criminalisation de nouvelles infractions et la spécialisation renforcée des institutions de justice pénale engagées dans la lutte au terrorisme. À partir de ce moment, les réponses de la justice pénale deviennent un aspect important de la lutte contre le terrorisme au Niger.

Dans ce contexte, cette étude pose la question suivante : ces réponses ont-elles contribué à renforcer les revendications de souveraineté de l'État du Niger ?

Cette recherche est guidée par l'idée de la menace comme une opportunité de reconnaissance. En premier lieu, la notion d'exceptionnalité associée au terrorisme est explorée comme un facteur déterminant dans le processus de sa sécurisation globale. Ensuite, la relation entre État et souveraineté est examinée. Ici, la souveraineté est appréhendée comme un concept social, une qualité que les États poursuivent, au lieu de la posséder. Dans cette optique, lorsqu'un État s'engage dans la sécurisation d'une menace, comme le terrorisme, réagir à la menace devient aussi l'occasion de prouver sa souveraineté. Par conséquent, la lutte au terrorisme est la scène sur laquelle l'État peut exercer son pouvoir et gagner en légitimité.

Afin d'explorer la relation entre la lutte contre le terrorisme et la souveraineté de l'État, cette recherche s'intéresse au rôle de l'État en tant qu'acteur normatif et pourvoyeur de sécurité pour ses citoyens. Elle analyse le cadre juridique national de lutte contre le terrorisme et sa mise en œuvre, ainsi que les résultats de la lutte contre le terrorisme en termes de poursuites des terroristes présumés et en ce qui concerne les efforts de réhabilitation et de réconciliation dans les zones les plus touchées.

Mots clés : lutte contre le terrorisme, justice pénale, exceptionnalisme, souveraineté, sécurisation

*A Elio, che il pensiero di te è nato in Niger
Ad Aris, compagno di viaggio
A noi quattro*

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ACRONYMS AND ABBREVIATIONS

ANAJJ	Agence Nationale de l'Assistance Juridique et Judiciaire
AQMI	Al-Qaida au Maghreb islamique
BH	Boko Haram
CDS-Rahama	Convention démocratique et sociale (political party)
CSRD	Conseil Suprême pour la Restauration de la Démocratie
ECOWAS	Economic Community of West African States
EU	European Union
EUCAP Sahel	European Union Capacity Building Mission in Niger
G5S	Group of 5 Sahel (Chad, Burkina Faso, Mali, Mauritania, Niger)
HACP	Haute Autorité à la Consolidation de la Paix
IS-GS	Islamic State in the Greater Sahara
ISWAP	Islamic State's West Africa Province
MNJTF	Multi-National Joint Task Force
MNSD-Nassara	Mouvement national pour la société du développement (political party)
OAU	Organisation of African Unity
PNDS - TARAYYA	Parti Nigérien pour la Démocratie et le Socialisme (political party)
Pôle	Pôle judiciaire spécialisé en matière de lutte contre le terrorisme et la criminalité transnationale organisée
RNR	Risks - Needs -Responsivity
SCLCT	Service central de lutte contre le terrorisme
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
WMD	Weapons of Mass Destruction

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RÉSUMÉ SUBSTANTIEL

COMBATTRE L'ENNEMI EXCEPTIONNEL : LA LUTTE AU TERRORISME PAR LA JUSTICE AU NIGER

“During war, a State is confronted with a test of will --testing whether it is still a sovereign unit-- in which the ability to fend off a challenge is the criterion for forcing the others to acknowledge its sovereignty and identity as a State.”¹

1. LA LUTTE CONTRE LE TERRORISME AU NIGER ET LE ROLE DE L'ÉTAT : UNE QUESTION DE RECHERCHE

Le 6 février 2015, tôt le matin, des attaques coordonnées sont lancées sur les villes de Diffa et Bosso, à la périphérie orientale du Niger², prenant par surprise à la fois la population et les forces de sécurité. Ce sont les premières attaques de grande envergure menées par Boko Haram sur le sol nigérien et marquent un tournant dans les approches du pays en matière de lutte contre le terrorisme.

À l'époque, le Niger connaissait deux transitions parallèles. En 2010, la transition à la VIII^e République avait ouvert une période d'intense évolution de l'agenda politique interne et externe, qui exprimait une nouvelle vision de l'État et promettait une trajectoire renouvelée vers la souveraineté.

D'une part, le nouveau gouvernement, sous la direction du président Issoufou, avait conçu un ambitieux programme de réformes, visant à soutenir le développement économique et social à travers le renforcement du cadre institutionnel³. La justice était au cœur de cette transition⁴, représentant la manifestation de la souveraineté à travers un État capable de faire respecter ses lois et en même temps de gagner en légitimité en garantissant le respect des droits individuels. À cet égard, le vaste processus de réforme du secteur de la justice est conçu comme la base pour remédier l'absence de pouvoir réglementaire de l'État et renverser la perception généralisée de l'attitude prédatrice de ses agents, qui est à l'origine de sa fragilisation⁵ et de son manque de légitimité.

¹ Wæver, O. “Securitization and Desecuritization” in Lipschutz, R. D. (Ed.). (1995). *On Security* Columbia University Press, p. 51.

² <https://www.reuters.com/article/nigeria-violence-niger-idUKL6N0VG33X20150206>

³ Niger : la Renaissance. Programme de Campagne pour les Elections Présidentielles 2011 ; République du Niger, Plan de Développement Economique et Social (PDES) 2012 – 2015.

⁴ République du Niger, Ministère de la Justice (2012). Etats Generaux de la Justice. Rapport general des travaux

⁵ Olivier de Sardan, Jean-Pierre. (2006). Des pouvoirs locaux dans l'attente de la décentralisation au Niger. In : Fay Claude (ed.), Koné Y.F. (ed.), Quiminal C. (ed.) Décentralisation et pouvoirs en Afrique : en contrepoint, modèles territoriaux français. Paris (FRA) ; Bamako : IRD ; ISH, 407-426, p. 416-417.

D'autre part, le pays assume un rôle de plus en plus important sur la scène régionale et internationale par son implication croissante dans la stabilisation de la région du Sahel, aux côtés des États voisins, des partenaires occidentaux et des instances intergouvernementales. Alors que la détérioration du contexte sécuritaire de la Libye voisine, à partir de 2011, et du Mali, depuis 2012, est devenue le centre des intérêts des donateurs externes⁶, le nouveau gouvernement du Niger est devenu un partenaire stratégique crucial. Un bataillon de 500 soldats nigériens a été envoyé pour appuyer le lancement de l'opération Serval en janvier 2012.⁷ La même année, plus de 4 % du budget national étaient destinés à des dépenses exceptionnelles pour le secteur de la défense.⁸ En octobre 2014, le gouvernement s'était engagé dans la Force multinationale mixte contre Boko Haram, aux côtés de Cameroun, du Tchad et du Nigéria. En janvier 2015, 1733 soldats nigériens étaient déployés dans les opérations de maintien de la paix de l'ONU.⁹ Cette deuxième transition, analysée par cette recherche comme la progression de la « sécurisation », a d'abord tourné autour de la position progressivement affirmée du Niger sur la lutte contre le terrorisme comme une priorité cruciale pour la stabilité du Sahel.

Mais avec les attentats de février 2015 au Niger, qui ont visé des sites gouvernementaux, y compris les bases des forces de sécurité, le terrorisme est redéfini comme une priorité nationale et la sécurisation se déplace à l'intérieur des frontières nationales. Cela conduit à un changement considérable dans l'agenda de la lutte contre le terrorisme : le gouvernement impose l'état d'urgence, autorise des pouvoirs d'enquête et saisie exceptionnels et impose un couvre-feu à la population. Les mesures prévoient également des interdictions économiques strictes, visant à étrangler les moyens de subsistance des membres du groupe : le commerce du poisson fumé, la culture des piments locaux, ainsi que les motos (le moyen de transport préféré des membres de Boko Haram) sont tous interdits.

A cette époque, des arrestations massives ont été effectuées pour combattre « l'ennemi terroriste ». Des centaines de personnes sont appréhendées sur la base de vagues accusations liées au terrorisme et transférées à Niamey, aux enquêteurs du *Service central spécialisé*, puis aux procureurs spécialisés antiterroristes et aux juges d'instruction (*le Pôle*), chargés de mener une enquête à 1700 kilomètres de distance. Alors que la surpopulation carcérale s'aggrave, le législateur adopte en 2016 une nouvelle réforme antiterroriste¹⁰, qui accroît considérablement le rôle du système judiciaire dans la stratégie nationale plus large de lutte contre le terrorisme.

À travers l'analyse de l'adoption de la législation antiterroriste et de son application dans les années qui ont suivi 2015, ce travail étudie leur influence sur l'État. En particulier, il se demande si le programme de lutte contre le terrorisme a contribué à renforcer la capacité de l'État à

⁶ Göpfert, M. (2016), *Surveillance in Niger: Gendarmes and the Problem of "Seeing Things"*, *African Studies Review* ; 59, 2. - pp. 39-57, p. 44.

⁷ https://www.lemonde.fr/afrique/article/2013/01/29/qui-participe-a-l-operation-serval-au-mali_1824111_3212.html

⁸ Deltenre, Damien. *Niger : cap sur 2016 ! Situation politique et sécuritaire à la veille des élections*. (2015), p. 5

⁹ Deltenre, Damien. *Niger : cap sur 2016 ! Situation politique et sécuritaire à la veille des élections*. (2015), p. 6

¹⁰ Loi n° 2016-19 du 16 juin 2016, modifiant la loi organique n°2004-50 du 22 juillet 2004 fixant l'organisation et la compétence des juridictions en République du Niger ; loi n° 2016 – 21, modifiant et complétant la loi n°61-33 du 14 août 1961 portant institution du Code de procédure pénale ; loi n° 2016 – 22 modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal.

revendiquer sa souveraineté, dans un contexte où la souveraineté est continuellement entravée par les limitations des pouvoirs et de l'autorité de l'État.

La relation entre les réponses au terrorisme et l'État est donc au centre de cette analyse. Mais plutôt qu'explorer comment l'État détermine et met en œuvre le contre-terrorisme, cette étude opère un changement de paradigme et pose la question : comment le contre-terrorisme façonne-t-il l'État ?

2. TERRORISME, SOUVERAINETE, SECURITISATION : UN ETAT DE L'ART

Explorant les approches judiciaires de la lutte contre le terrorisme au Niger et leur contribution à la consolidation de l'État, cette étude s'appuie sur des idées complexes et parfois ambiguës, telles que « terrorisme », « souveraineté » et « État » et enquête sur des pratiques controversées et fortement politisées. Pour ce faire, elle mobilise de multiples théories, empruntant à un éventail de disciplines : la sociologie, dont la criminologie, les études juridiques et les sciences politiques, notamment les approches constructivistes et critiques des relations internationales, dont la théorie de la sécurisation, le terrorisme et les études critiques sur le terrorisme.

En particulier, cette recherche s'appuie sur trois idées clés.

Premièrement, elle analyse les facteurs qui ont contribué à l'exceptionnalisation du terrorisme. Empruntant à la conceptualisation de Schmitt de l'exception comme une menace existentielle contre l'État¹¹ « qui ne peut être subsumée ; elle défie toute codification générale »¹², l'étude se penche sur les approches dominantes et critiques des études sur le terrorisme pour identifier les processus par lesquels ces qualités ont été progressivement attribuées au terrorisme. À l'origine, les définitions minimalistes¹³ et juridiques du terrorisme¹⁴, ainsi que celles proposées par les principaux spécialistes du terrorisme, mettent en avant sa compréhension comme une tactique, qui implique une sélection symbolique des victimes et un choix stratégique visant à générer un effet psychologique¹⁵. Cependant, à mesure que le terrorisme devenait une menace plus imminente pour les superpuissances, il a également commencé à être de plus en plus traité comme un phénomène distinct : un phénomène intrinsèquement exceptionnel¹⁶. Les partisans du « nouveau terrorisme » le qualifient de menace sans précédent : plus meurtrière et plus irrationnelle, car motivée par des motivations idéologiques et religieuses (plutôt que politiques)¹⁷. Alors que les allégations de « nouveau terrorisme », qui ont culminé après le 11

¹¹ Schmitt, C. (2010). *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, p. 6.

¹² Schmitt, C. (2010). *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, p.12

¹³ Schmid, A. (2004). Terrorism—The Definitional Problem. *Case Western Reserve Journal of International Law*, 36, 47, p. 380-381.

¹⁴ Cassese, A. (2006). *The Multifaceted Criminal Notion of Terrorism in International Law* (SSRN Scholarly Paper ID 1147484). Social Science Research Network, 933-958, p.936.

¹⁵ Crenshaw, M. (2011). *Explaining Terrorism: Causes, Processes, and Consequences*. Routledge.

¹⁶ Stampnitzky (2013) *Disciplining Terror*. How experts invented terrorism, chapter 5

¹⁷ Laqueur, W. (2000). *The New Terrorism: Fanaticism and the Arms of Mass Destruction*. Oxford University Press; Lesser, I. O. (1999). Changing terrorism in a changing world. In B. Hoffman, J. Arquilla, D. Ronfeldt, M. Zanini, & B. M. Jenkins, *Countering the New Terrorism*. RAND Corporation; Crenshaw, M. (2008). The Debate over “New” vs. “Old” Terrorism. In I. A. Karawan, W. McCormack, & S. E. Reynolds (Eds.), *Values and Violence: Intangible Aspects of Terrorism* (pp. 117–136). Springer Netherlands

septembre, ont depuis été vivement critiquées par les historiens et les spécialistes du terrorisme¹⁸, les allégations d'exceptionnalité ont constamment façonné le discours sur le terrorisme, facilitées par des efforts de recherche peut-être trop proches de l'agenda politique¹⁹. Cela identifie un processus de sécurisation du terrorisme au niveau mondial, dans lequel les acteurs étatiques jouent un rôle notable en tant qu'agents de sécurisation²⁰.

Deuxièmement, la recherche interroge la relation entre l'État et la souveraineté. Cette étude rejette la notion supposée « traditionnelle » de la souveraineté westphalienne, conçue comme innée, indivisible et fondée sur le non-interventionnisme²¹. Un défi spécifique à la conceptualisation classique de la souveraineté est l'identification de son « locus » fondamental et sa localisation dans l'État²². Choissant de se concentrer sur la souveraineté intérieure, définie par Krasner comme « l'organisation et l'efficacité de l'autorité publique »²³, cette recherche adopte une approche constructiviste pour guider son analyse. Dans cette optique, les États prouvent constamment qu'ils détiennent des qualités souveraines en tentant d'accomplir les tâches associées aux pouvoirs souverains. En d'autres termes, comme le disent Biersteker et Weber, *les États négocient la souveraineté*²⁴. Ensuite, la souveraineté est entendue comme « la production d'une conception normative qui lie l'autorité, le territoire, la population (la société, la nation) et la reconnaissance de manière unique et en un lieu particulier (l'État) »²⁵. Cette perspective permet aussi de dépasser les limites d'une conception strictement eurocentrée d'un « État consolidé »²⁶. En effet, en séparant État et souveraineté, il est possible d'éviter le piège consistant à pathologiser l'étude des institutions étatiques en Afrique,²⁷ en interprétant les lacunes dans les capacités empiriques de l'État à produire des biens publics comme le signe d'un effondrement inéluctable.²⁸ Au lieu de cela, l'accent mis sur le processus de négociation de la souveraineté permet d'enquêter sur les acteurs, les pratiques et les interactions à travers lesquels l'État vise à prouver sa souveraineté, y compris dans des États à statut limité.²⁹

¹⁸ Pérouse de Montclos, M.-A. (2016). *Jihad in sub-Saharan Africa: Challenging the narratives of the war on terror*. World Policy Paper; Duyvesteyn, I. (2004). How New Is the New Terrorism? *Studies in Conflict & Terrorism*, 27(5), 439–454.

¹⁹ Silke, A. (2001). *The Devil You Know: Continuing Problems with Research on Terrorism*. *Terrorism and Political Violence*, 13(4), 1–14.

²⁰ Buzan, B. (2006). Will the 'Global War on Terrorism' Be the New Cold War? *International Affairs (Royal Institute of International Affairs 1944-)*, 82(6), 1101–1118.

²¹ Glanville, L. (2013). The Myth of 'Traditional' Sovereignty. *International Studies Quarterly*, 57(1), 79–90;

Lake, D. A. (2003). The New Sovereignty in International Relations I. *International Studies Review*, 5(3), 303–323.

²² Walker, N. (2003). *Sovereignty in Transition*. Hart Publishing.

²³ Krasner, S. (1999). *Sovereignty: Organized Hypocrisy*. Princeton University Press, p. 12

²⁴ Biersteker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press.

²⁵ Biersteker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press, p.3.

²⁶ Börzel, T. A., & Risse, T. (2018). *Conceptual Framework: Fostering Resilience in Areas of Limited Statehood and Contested Orders*. Freie Universität Berlin.

²⁷ Hagmann, T., & Péclard, D. (2010). Negotiating Statehood: Dynamics of Power and Domination in Africa. *Development and Change*, 41(4), 539–562, p. 541.

²⁸ Risse, T. (Ed.). (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*.

Columbia University Press; Jackson, R. H., & Rosberg, C. G. (1982). Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood. *World Politics*, 35(1), 1–24.

²⁹ Risse, T. (Ed.). (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*. Columbia University Press.

Enfin, l'étude se place dans la perspective d'un État impliqué à la fois dans un processus de sécurisation et dans la négociation de la souveraineté et fait valoir que le succès de la sécurisation doit être compris dans son rapport avec la souveraineté. Pour l'École de Copenhague, la sécurisation est le processus par lequel les problèmes sont présentés comme des menaces exceptionnelles et existentielles, nécessitant ainsi, et en même temps justifiant, des réponses qui sortent de l'ordinaire³⁰. Mais qu'est-ce qui détermine leur succès ? Buzan et Waever soutiennent que le succès de la sécurisation en tant que forme distinctive de politisation réside dans l'adoption de mesures exceptionnelles³¹. Cette recherche soutient que cette perspective est réductrice car elle ne prend pas en compte la dimension de la souveraineté. En effet, la sécurisation doit en définitive servir les intérêts de l'agent sécurisant, ici l'État³². Dans cette optique, son objectif ultime, le soutien des revendications de souveraineté de l'État, est encore plus important que son objectif direct : maîtriser la menace. En d'autres termes, la menace exceptionnelle est l'occasion pour l'État de tester sa capacité à revendiquer sa souveraineté.

3. MÉTHODOLOGIE

La conception et la conduite de cette recherche ont été guidées par un double dynamique, intégrant des approches déductives et inductives.

L'intérêt pour la question de recherche a été suscité par une expérience de travail. Alors que j'étais à Niamey en tant que consultante en 2016, je me suis familiarisé avec la nouvelle législation antiterroriste du Niger. Adoptée en juin de la même année, la réforme était extrêmement récente et représentait une évolution considérable de l'approche judiciaire du terrorisme. Avec le rôle élargi des organes spécialisés chargés d'enquêter et de juger les affaires liées au terrorisme, le Niger est devenu le pays doté de la plus grande spécialisation judiciaire en matière de lutte contre le terrorisme dans la région du Sahel. Pourtant, pour la première fois et par la voix de praticiens nigériens, j'ai également été exposée aux véritables défis de la conduite d'enquêtes et de procès antiterroristes : les obstacles continuaient d'émerger malgré les progrès continus de l'arsenal juridique. Cela a soulevé une question cruciale : la spécialisation croissante des procédures judiciaires était-elle une approche efficace dans la poursuite des efforts de lutte contre le terrorisme de l'État ? Ou plutôt était-ce un facteur contributif à l'impuissance de l'État ? Plus précisément, j'ai voulu examiner comment les manières spécifiques dont le terrorisme était compris et défini à travers les lois et les pratiques judiciaires, en se concentrant sur son caractère exceptionnel, influençaient l'action de l'État dans la pratique.

Cette observation a conduit à l'élaboration d'un cadre conceptuel global. Pour explorer la relation entre le terrorisme « exceptionnel » et le souverain, je me suis appuyé sur une

³⁰ Buzan, B., Waever, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers.

³¹ Buzan, B., Waever, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers, p. 26

³² Waever, O. "Securitization and Desecuritization" in Lipschutz, R. D. (Ed.). (1995). *On Security* Columbia University Press, p.46.

perspective constructiviste, qui met l'accent sur l'attribution de sens, et son institutionnalisation par l'interaction³³ et qui interprète cette relation comme mutuellement constructive.

Dans cette optique, l'État met sa souveraineté à l'épreuve par sa réponse à la menace exceptionnelle. En construisant l'ennemi, l'autre, l'État se met en situation de devoir l'emporter sur lui. En conséquence, l'étude s'articule autour de deux axes principaux, qui reflètent les principaux attributs de la souveraineté utilisés pour évaluer la performance du système de justice pénale mettant en œuvre la lutte contre le terrorisme au Niger. La première considère l'influence du contre-terrorisme sur la négociation d'autorité de l'État, à travers sa capacité à produire des normes contraignantes. La seconde considère la performance de l'État en tant que pourvoyeur d'un bien public crucial : la sécurité, qui implique la capacité d'exercer un contrôle effectif.

L'étude qualitative de cas unique a été jugée l'approche la plus appropriée aux fins de cette analyse, car elle se prête à l'analyse approfondie de phénomènes complexes³⁴, tels que les politiques de sécurisation, la souveraineté négociée et leur interaction. En outre, la forme de l'étude de cas est particulièrement adaptée pour interroger les significations construites et les valeurs attribuées à des notions telles que « menace exceptionnelle », « violence », « justice » et « État » : car elles sont intrinsèquement influencées par des facteurs historiques, culturels et sociaux, donc dynamique.

Pour rassembler les données pertinentes pour cette étude, je me suis appuyée sur de multiples ressources, en me concentrant notamment sur la documentation et les archives et sur les entretiens.

Documents et archives sont les principales sources pour analyser les changements institutionnels et procéduraux introduits par les réformes antiterroristes et pour explorer leurs principaux objectifs politiques et opérationnels. Ils comprennent des documents juridiques et politiques au niveau international et national, des documents programmatiques pour la fourniture d'aide extérieure, des documents programmatiques nationaux et des partis, des déclarations politiques, des rapports de réunions, du matériel de communication.

Les entretiens constituent la colonne vertébrale de la présente recherche. Ils fournissent des preuves des résultats des réformes et des politiques et ils offrent un aperçu des perceptions et des compréhensions des acteurs cruciaux sur les conséquences de ces politiques : comment ils donnent un sens au terrorisme et au contre-terrorisme dans leur travail.

Les participants aux entrevues peuvent être classifiés comme appartenant à trois groupes différents, représentant des relations spécifiques avec le système judiciaire au Niger. Un premier groupe est celui des « agents », c'est-à-dire des acteurs qui appartiennent eux-mêmes à la justice, bien qu'à des titres différents, comme les policiers, les avocats, les juges. Un deuxième groupe est composé des « agents externes », c'est-à-dire ceux qui contribuent à la conceptualisation et/ou à la mise en œuvre des politiques de lutte contre le terrorisme mais

³³ Berger, P. L., & Luckmann, T. (1967). *The social construction of reality: A treatise in the sociology of knowledge*.

³⁴ Yin, R. K. (1994). *Case study research: Design and methods* (2nd ed.). Thousand Oaks, CA: Sage ; Bent Flyvbjerg, "Five Misunderstandings About Case-Study Research," *Qualitative Inquiry*, vol. 12, no. 2, April 2006, pp. 219-245.

n'appartiennent pas au système judiciaire lui-même. Il s'agit d'un groupe composite, comprenant des représentants d'organisations internationales, ainsi que des organisations de la société civile. Enfin, le groupe des « cibles » est constitué de ceux qui sont concernés par les approches pénales de la lutte contre le terrorisme, et notamment les personnes accusées d'infractions liées au terrorisme, que j'ai eu la chance d'interviewer dans deux établissements pénitentiaires différents : Kollo et Koutoukalé. Ce groupe comprend en outre certains représentants des communautés qui ont été affectées à la fois par les arrestations et par les dispositions relatives à l'état d'urgence dans la région de Diffa. Globalement et pour chaque groupe, il m'a également semblé intéressant d'examiner les perspectives à Niamey et à Diffa, pour éviter de me fier uniquement aux avis des professionnels exerçant dans la capitale.

Des *informations quantitatives limitées* étaient également pertinentes pour compléter l'analyse qualitative. Les données quantitatives présentées dans cette étude peuvent être regroupées en trois catégories :

- Les données concernant l'état du système judiciaire au Niger, qui appuient la compréhension des défis structurels auxquels est confronté le système judiciaire au Niger, qui précèdent et influencent la mise en œuvre de la lutte contre le terrorisme.
- Les données sur les poursuites pénales contre les auteurs présumés d'infractions liées au terrorisme : y compris l'évolution des taux de déperdition entre 2011 et 2019 ; les taux de condamnation pour les procès entre 2017 et 2019 ; des données concernant la répartition des infractions de terrorisme, illustrant l'importance des accusations d'« association ».
- Des données sur la population carcérale et sa variation depuis la crise de Boko Haram, donnant un aperçu de l'ampleur de l'arriéré judiciaire et des conséquences de la surpopulation carcérale.

Enfin, j'ai pu effectuer une observation non participante lors d'une des audiences publiques pour les affaires liées au terrorisme, tenue au pôle spécialisé de Niamey. Bien que peu étendue, cette expérience s'est avérée utile pour comprendre certaines implications pratiques des formulations juridiques des lois antiterroristes et certaines des pratiques des magistrats, des procureurs et des avocats.

4. RESULTATS DU PREMIER AXE DE RECHERCHE : SOUVERAINETE PAR LA PRODUCTION NORMATIVE

La négociation de la souveraineté par l'État est une entreprise à plusieurs facettes et évolutive. Le premier axe de l'analyse interroge la valeur de la production normative pour les revendications de l'État à la souveraineté. En effet, le fait de légiférer est la première manifestation de l'autorité de l'État sur la société organisée et sur un territoire. En conséquence, cette étude a demandé : *comment la réglementation du terrorisme peut-elle contribuer à la légitimité de l'État en fixant les limites de ce qu'est le terrorisme et comment l'État devrait y répondre ?*

Afin de traiter cette question, une analyse approfondie de l'architecture juridique et institutionnelle développée pour répondre au terrorisme au Niger est proposée, interrogeant ses

origines, sa valeur constitutionnelle et le respect global des paramètres de légalité. L'étude s'intéresse également à l'interaction entre la législation « ordinaire » et l'état d'urgence, qui introduit une forte composante d'exceptionnalité dans la réponse de l'État, compatible avec les paradigmes de la sécurisation³⁵. L'argument développé ici est que les exigences formelles des lois fournissent la base de la certitude et de la prévisibilité de l'action de l'État, contribuant ainsi à sa légitimité et à sa reconnaissance³⁶.

En même temps, dans des contextes d'État à statut limité, où l'État peut être confronté à des « problèmes de gouvernance »³⁷ considérables, la dimension empirique de l'autorité législative est ce qui est particulièrement important pour la négociation de la souveraineté. En effet, si l'État peut ne pas être confronté à des problèmes particuliers lorsqu'il légifère, il peut plus facilement rencontrer des obstacles pour agir conformément à la loi, qu'il s'agisse du respect de dispositions et de procédures spécifiques ou de la fourniture de services. Par conséquent, l'analyse passe à la dimension empirique des lois antiterroristes, en se concentrant sur la mesure dans laquelle les agents de l'État et notamment les fonctionnaires de la justice se sont sentis liés par la loi et ont agi en conséquence. Pour ce faire, la recherche approfondit les interactions mutuelles entre les différents agents de l'État (militaires, policiers, magistrats), leurs démarches et incitations, les contraintes auxquelles ils sont confrontés et leurs réactions face aux obstacles rencontrés. L'application des lois de l'État par les agents de l'État est une mesure cruciale de sa capacité à transmettre l'autorité et, à son tour, à construire sa légitimité en tant qu'acteur souverain.

On constate d'abord que deux défis principaux ont entravé la production d'un cadre juridique cohérent et faisant autorité pour lutter contre le terrorisme au Niger. L'examen de la législation révèle comment les réformes antiterroristes sont déclenchées principalement par des questions de souveraineté externe plutôt que nationale. Par exemple, la transposition de dispositions internationales directement empruntées à la tradition du crime organisé, telles que les moyens spéciaux d'enquête, s'est révélée impossible à appliquer au Niger. Le deuxième problème apparaît dans la pratique, avec les perturbations importantes causées par l'application des dispositions relatives à l'état d'urgence au lendemain de la crise de 2015.

*« Et il nous est arrivé d'avoir 200 personnes arrêtées d'un seul coup. 200 en une seule vague de transfert. Quand vous venez ici pendant cette période, la cellule puait tellement, avec des mouches et tout. Nos enquêteurs ne dormaient pas. Bon, les locaux étaient dépassés et donc ceux qui présentent une plus grande dangerosité, on les garde dans les cellules classiques. Ceux qui sont un peu faibles, les vieux ou les tout petits ou ceux qui sont un peu malade dans la salle de réunion. Les femmes à l'extérieur sous les arbres. »*³⁸

Dans le même temps, la réaction aux contestations a été cohérente et claire : l'intervention du

³⁵ Buzan, B., Waeber, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers; Floyd, R. (2016). Extraordinary or ordinary emergency measures: What, and who, defines the 'success' of securitization? *Cambridge Review of International Affairs*, 29(2), 677–694.

³⁶ Bedner (2010) "An Elementary Approach to the Rule of Law."

³⁷ Risse, T. (Ed.). (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*. Columbia University Press, p. 9-10.

³⁸ Author's interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

législateur et des fonctionnaires de la justice pénale a été guidée par le ferme engagement de faire respecter la légalité. La volonté d'innover à travers une chaîne de justice pénale entièrement spécialisée, le plaidoyer pour une nouvelle réforme³⁹, plus adaptée aux circonstances nationales dans le contexte de l'escalade du terrorisme, et l'intégration progressive des garanties des droits fondamentaux dans les procédures antiterroristes témoignent d'une aspiration incessante à la légalité. Les pratiques de décentralisation progressive, de dialogue et d'interactions croissantes avec les forces de sécurité, ainsi que l'adoption d'outils d'amélioration des procédures, témoignent du même intérêt clé : veiller à ce que les efforts de lutte contre le terrorisme restent strictement dans les limites du droit. Cet engagement primordial envers l'état de droit apporte une contribution significative à l'autorité de l'État et donc à la souveraineté. En effet, étant donné l'association entre le terrorisme et les tactiques sans loi, l'adhésion des représentants de l'État aux principes de légalité est particulièrement importante pour creuser le fossé entre le pouvoir légitime de l'État et ses ennemis.

*« Je pense que en 5 ans on peut mesurer les choses. Beaucoup de défis ont été relevés au cours de ce quinquennat et je pense que nous avons pu nous adapter ou réajuster par rapport même à nos textes (...) Maintenant, le Niger est cité en exemple. À la création du pôle, nous avons un seul front, c'est le front de Diffa, et ce front est dépassé par le front de Nord Tillabéri (...) Je pense que vraiment beaucoup de choses ont été faites. Mais le défi est toujours là. Les arrestations qui continuent. Le problème se complexifie. On doit développer des réflexes pour être efficaces dans la lutte contre ce phénomène. »*⁴⁰

Deuxièmement, cette analyse souligne à quel point la spécialisation a été le facteur déterminant dans l'orientation des efforts de réforme, ainsi que dans la mise en œuvre des lois antiterroristes au Niger. Ses lacunes ont profondément impacté les pratiques antiterroristes, notamment à travers les défis engendrés par la centralisation des procédures. Dans le même temps, la spécialisation s'est avérée un facteur clé pour favoriser l'apprentissage institutionnel et permettre un système rapidement adaptatif, capable d'adopter l'innovation à plusieurs niveaux pour revenir à la légalité après la crise de 2015. Comprendre l'impact de la spécialisation des revendications de souveraineté s'avère complexe : une équipe hautement spécialisée d'enquêteurs et de magistrats pourrait contribuer à l'autorité de l'État dans la lutte contre le terrorisme. Cependant, cela dépendra en fin de compte de son impact sur la capacité de la chaîne judiciaire à garantir que les auteurs soient tenus responsables.

Enfin, si la pertinence de la légalité est réitérée tout au long de l'analyse des réformes antiterroristes et de leur mise en œuvre, sa limite la plus nette apparaît aussi clairement : la poursuite de la sécurité. En définitive, qu'il fournisse la justification de l'instauration et de la pérennisation de l'état d'urgence ou des atteintes graves aux droits des personnes arrêtées en relation avec le terrorisme, l'objectif de sécurité semble l'emporter, parfois, sur les principes de légalité. Cela apparaît particulièrement évident dans l'utilisation des arrestations massives comme un moyen d'incapacité temporaire, plutôt que comme une étape dans la poursuite des

³⁹ Loi n° 2016-19 du 16 juin 2016, modifiant la loi organique n°2004-50 du 22 juillet 2004 fixant l'organisation et la compétence des juridictions en République du Niger ; loi n° 2016 – 21, modifiant et complétant la loi n°61-33 du 14 août 1961 portant institution du Code de procédure pénale ; loi n° 2016 – 22 modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal.

⁴⁰ Author's interview with a judge of the specialised pôle, Niamey (23 January 2020).

terroristes, sur la base d'enquêtes solides. Si cette prédominance s'explique aisément par la perception d'urgence liée à la montée de l'insécurité, les témoignages des premiers mois après les attentats de février 2015 révèlent l'impact considérable d'une telle violence sur les objectifs et le fonctionnement de la chaîne pénale et apparaissent comme une limite claire à la légitimité de l'État dans l'application de la loi.

5. RESULTATS DU DEUXIEME AXE DE RECHERCHE : LA SOUVERAINETE PAR LA SECURITE (RESPONSABILITE JURIDIQUE)

Le deuxième axe de recherche s'intéresse à la poursuite et à la négociation de la souveraineté à travers la capacité de l'État à exercer un contrôle effectif⁴¹, ou, dans une perspective différente, à agir en tant que pourvoyeur d'un bien public crucial : la sécurité⁴². Reconnaisant que l'État n'est pas le seul acteur à s'engager dans les efforts de sécurité, notamment dans la lutte contre le terrorisme, cette recherche soutient également qu'il reste le principal agent ayant la capacité de rendre la justice. En se concentrant sur le travail de la chaîne pénale, l'analyse explore la métrique la plus appropriée pour comprendre sa contribution à l'objectif de sécurité. *Comment le système judiciaire peut-il assurer la sécurité ? Et a-t-il été efficace de le faire par le biais de procédures antiterroristes ?*

Enquêtant sur la perception des acteurs de la justice au Niger de leur rôle institutionnel dans la poursuite des objectifs de sécurité, cette étude identifie la "accountability" ou « responsabilité juridique » comme un objectif clé. Poursuivre la responsabilité juridique des individus accusé de terrorisme implique une recherche d'équité, ainsi que la nécessité de produire des résultats concrets de l'enquête et processus de poursuites. Dans cette optique, l'objectif du processus de justice se trouve dans la capacité d'opérer la distinction entre les innocents et les coupables, réalisée dans le cadre d'un procès équitable et sur la base de la preuve. Bien que ces points de vue proviennent toujours d'une perspective punitive⁴³, ils rejettent résolument l'accent mis sur la punition en tant qu'objectif en soi, mais mettent plutôt l'accent sur l'importance de la distribution et la proportionnalité de la peine.

« La justice joue un rôle important dans la lutte contre le terrorisme, parce que de toutes les façons c'est elle qui permet de filtrer, avec tout ce qu'elle a dans les dossiers, qui est terroriste et qui ne l'est pas (...) La justice nigérienne elle travaille beaucoup dans le cadre de la lutte contre le terrorisme et je vais ajouter qu'elle travaille avec discernement et c'est pour ça d'ailleurs quand j'étais au Pôle, on avait l'impression qu'ils étaient confiants les prévenus BH (Boko Haram). Parce que souvent, parmi eux il y a ceux qui pensent que déjà c'est la décision de condamnation, ils sont surpris avec certaines décisions que nous prenons, certaines décisions de relaxes que nous prenons. Parce que les gens pensent que dès qu'on dit BH, c'est systématiquement la

⁴¹ Krasner, S. D. (1999). *Sovereignty: Organized Hypocrisy*. Princeton University Press, p. 10-12.

⁴² Hagmann, T., & Péclard, D. (2010). Negotiating Statehood: Dynamics of Power and Domination in Africa. *Development and Change*, 41(4), 539–562, p. 552-553.

⁴³ Hart, H. L. A. (1968). *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford University Press.

condamnation alors que comme j'ai dit, il y a souvent des dénonciations basées sur du faux, et la justice permet de filtrer tout ça. »⁴⁴

Pour tester la performance du système judiciaire dans la poursuite et la réalisation de la responsabilité juridique, l'analyse englobe plusieurs dimensions. Premièrement, les taux d'implication et les taux de condamnation sont utilisés pour une analyse « quantifiable » des procédures judiciaires. Ici la question directrice est : *combien d'individus coupables de terrorisme la justice nigérienne a-t-elle pu identifier et condamner, parmi les suspects ?*

Deuxièmement, une dimension « qualitative » des procédures liées au terrorisme est explorée, en explorant les critères de détermination de la culpabilité et de l'innocence dans les tribunaux antiterroristes nigériens. Les principes d'équité, d'impartialité, d'universalité et de répartition, que les acteurs nationaux ont identifiés comme cruciaux, sont-ils respectés dans le déroulement de la procédure ? À cette fin, la responsabilité des forces de sécurité pour les violations commises dans le cadre des efforts de lutte contre le terrorisme a été remise en question.

Enfin, pour que les résultats de la justice impactent la crédibilité de l'État en tant qu'agent souverain, il faut aussi qu'ils soient appréciés et légitimés à travers les yeux du public⁴⁵. Par conséquent, cette étude a examiné si le système judiciaire était perçu comme étant capable de tenir les terroristes responsables, par la population.

L'étude constate que, tout en ratisant extrêmement large, interrogeant des milliers de personnes sur des infractions liées au terrorisme, la justice nigérienne n'a pu en tenir pour responsables que très peu d'entre elles. Une majorité écrasante de personnes arrêtées pour des infractions liées au terrorisme ont été libérées. Dans le même temps, les données relatives à l'évolution des taux de condamnation, couplées aux déclarations des participants aux entrevues, mettent en évidence une amélioration considérable des performances dans le temps, en termes de capacité accrue à condamner pour les affaires portées après 2017. Mais le programme de lutte contre le terrorisme, qui met l'accent sur la sécurité, limite la capacité de la chaîne judiciaire à tenir les terroristes responsables. En effet, le grand nombre d'arrestations effectuées pendant l'état d'urgence, avec les violations des règles procédurales les plus élémentaires qu'elles ont entraînées, a déterminé l'incapacité des enquêtes et des procédures judiciaires à établir la responsabilité des infractions liées au terrorisme. Si les arrestations massives peuvent être utiles dans la perspective de la sécurité à court terme, car elles permettent une incapacité temporaire des menaces potentielles, elles ont également empêché la collecte significative de preuves, entraînant ainsi la perte de cas. Cette dynamique rend compte de la tension inévitable entre l'orientation préventive du programme de sécurité et le rôle réactif du processus judiciaire, montrant comment l'accent mis sur le premier s'est fait au détriment du second.

« Je dis que souvent on acquitte des gens qui ne sont pas coupables, c'est normal ; mais on acquitte aussi des gens qui sont coupables parce que... voilà on n'a pas de preuves. Mais sur le terrain il y a des gens qui sont capable de dire « cette personne je sais qu'elle est impliquée dans le terrorisme ». Mais tant qu'on n'a pas les preuves

⁴⁴ Author's interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁴⁵ Stritzel, H. (2007). Towards a Theory of Securitization: Copenhagen and Beyond. *European Journal of International Relations - EUR J INT RELAT*, 13, 357–83.

formelles, on ne peut pas aller vers une justice digne de ce nom pouvant justifier de la condamnation de la personne. »⁴⁶

L'analyse révèle également que la qualité des preuves disponibles dans les affaires liées au terrorisme est extrêmement médiocre. De nombreuses raisons y ont contribué : collecte et transmission insuffisantes, voire carrément ignorées, des preuves matérielles lors des enquêtes préliminaires ; une dépendance excessive à l'égard des preuves testimoniales résultant de politiques de l'État qui ont encouragé les dénonciations de terroristes par les populations locales ; l'incapacité des avocats de la défense d'interroger et de tester les preuves. Une telle incapacité signifie en pratique que l'appareil judiciaire peut avoir directement contribué à accroître l'insécurité, en libérant des coupables et en détenant des innocents en prison, nourrissant leurs frustrations, plutôt qu'en freinant le terrorisme. Il est également révélé que 86 % des affaires liées au terrorisme concernaient des accusations de simple association⁴⁷. Ceci est particulièrement préoccupant compte tenu de la manière dont le délit d'"association" a été mal défini dans le code pénal, ce qui a conduit à son utilisation comme un outil "fourre-tout"⁴⁸ entre les mains des militaires, des forces de l'ordre, des procureurs et des juges, et permettant d'arrêter et parfois même de condamner des terroristes présumés sur des bases très fragiles.

L'utilisation aveugle de l'accusation «d'association» a conduit à la perception largement répandue que le système judiciaire ne pouvait s'en prendre qu'aux personnes qui se trouvaient au mauvais endroit au mauvais moment⁴⁹, plutôt que de poursuivre de dangereux terroristes. En outre, il met en évidence le fossé entre la responsabilité des citoyens et celle des forces de sécurité. Alors que les premiers pouvaient facilement être arrêtés pour de petites infractions et se voir accusés d'« association », les seconds échappaient régulièrement à toute responsabilité, même pour de graves épisodes de violence perpétrés dans le cadre d'opérations antiterroristes. Au lieu de cela, ces épisodes ont souvent été minimisés car perçus comme quelque peu moralement justifiables dans le contexte de la guerre asymétrique contre le terrorisme.

En termes de légitimation de l'exécution de la justice par la reconnaissance du public, les conséquences de la centralisation apparaissent particulièrement graves. En pratique, la centralisation signifiait que les procédures se déroulaient trop loin de la région la plus touchée, devenant ainsi invisibles pour la population locale. Cela a contribué à la perception d'une piètre performance de la « justice de Niamey », accusée d'arrêter les innocents et de libérer les coupables : une notion qui entrave profondément la possibilité pour l'État de revendiquer sa souveraineté à travers sa capacité à tenir les terroristes responsables.

6. RESULTATS DU DEUXIEME AXE DE RECHERCHE : LA SOUVERAINETE PAR LA SECURITE (REHABILITATION ET RECONCILIATION)

Si la performance de la justice dans la poursuite de la responsabilité des «terroristes» présumés est une contribution essentielle à la sécurité publique, elle n'est pas non plus suffisante, en

⁴⁶ Author's interview with a lawyer charged with providing legal defense to individuals accused of terrorism, Niamey (30 April 2018).

⁴⁷ Art. 399.1.19 du Code Pénal ((Loi n° 2016-22 du 16 juin 2016).

⁴⁸ Author's interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁴⁹ Author's interview with anonymous national human rights defender, Niamey (27 January 2020).

particulier pour les zones les plus touchées par la violence. En conclusion de l'analyse, cette recherche s'intéresse également à l'efficacité de la chaîne judiciaire dans la promotion de la réhabilitation.

La réhabilitation apporte une contribution essentielle aux objectifs de sécurité. Entendue comme une intervention visant à promouvoir des comportements pro-sociaux, la réhabilitation dans le cadre de la justice pénale traditionnelle est une voie de réduction de la récidive⁵⁰. De plus, dans le contexte de la campagne antiterroriste du Niger, l'accent mis sur la réhabilitation est en effet associé aux approches de justice restauratrice et transitionnelle comme réponses à la violence collective. De ce point de vue, la réhabilitation peut remplacer la rétribution, en tant que processus qui implique la réparation d'actes répréhensibles, plutôt que l'expiation par la punition⁵¹. Dans les zones les plus touchées par la violence, la réhabilitation consiste à gérer les risques posés par les populations particulièrement vulnérables, et à ce titre est un élément important dans le processus de stabilisation de la région de Diffa, qui reste affectée par l'instabilité à ce jour. De ce point de vue, les processus de réhabilitation deviennent particulièrement pertinents pour la promotion de la réconciliation et de la paix au lendemain de la violence⁵².

Dans le cadre de l'intervention de réhabilitation des « terroristes » présumés ou assurés, les politiques publiques au Niger ont opéré une bifurcation intéressante. D'une part, les milliers de personnes qui ont été arrêtées et détenues sur la base d'accusations liées au terrorisme ont droit à une aide à la réadaptation. Cela est particulièrement vrai après de longues périodes passées en détention, car la réinsertion dans la vie sociale peut devenir très difficile. D'autre part, en décembre 2016, le gouvernement national a inauguré une « politique de la main tendue » régionale, visant à encourager les défections de Boko Haram en promettant le pardon et la réhabilitation aux anciens membres qui ont accepté de se rendre⁵³. Ce faisant, un nouveau groupe cible d'intervention de réhabilitation a été créé, celui des soi-disant « repentis ».

L'analyse simultanée de la façon dont la réhabilitation est poursuivie pour les deux groupes est particulièrement intéressante ici. Les circonstances et le raisonnement politique derrière les choix différents pour les deux groupes ouvrent de nouvelles questions sur le traitement à réserver à « l'ennemi » créé par les mesures antiterroristes. En effet, ils révèlent des compréhensions différentes de ce qu'implique la réhabilitation, de sa relation avec la sécurité et, finalement, avec la souveraineté. La réhabilitation des anciens détenus est conçue comme un corollaire de la responsabilisation et, à ce titre, est inévitablement associée à la prééminence de la légalité. La réhabilitation par le pardon des « repentis » suggère plutôt une vision où la pacification prime sur l'état de droit.

⁵⁰ Hart, H. L. A. (n.d.). Punishment and Responsibility: Essays in the Philosophy of Law. In *Punishment and Responsibility*. Oxford University Press.

⁵¹ Barnett, R. E. (1977). Restitution: A New Paradigm for Criminal Justice. *Ethics*, 87, 279–301; Zehr, H. (1985). *Retributive Justice, Restorative Justice*. US Office of Criminal Justice.

⁵² Clamp, K., & Doak, J. (2012). More than Words: Restorative Justice Concepts in Transitional Justice Settings. *International Criminal Law Review*, 12, 339–360.

⁵³ Ministère de l'Intérieur, de la Sécurité Publique, de la Décentralisation, des Affaires Coutumières et Religieuses (December 2016), *Document Cadre de prise en charge de la reddition des éléments de Boko Haram*.

Les données révèlent clairement que, malgré la reconnaissance de la réhabilitation comme une priorité, pratiquement aucune tentative n'a été faite pour fournir un soutien à la réhabilitation des personnes détenues sur la base d'infractions liées au terrorisme, tout au long du processus judiciaire. La gravité de cette occasion manquée ne doit pas être sous-estimée. Ne pas fournir de soutien aux personnes placées dans des circonstances particulièrement difficiles par l'État renforcera les griefs, surtout s'il s'accompagne d'un sentiment d'injustice à l'égard de son arrestation. En sacrifiant la réhabilitation, la justice a potentiellement contribué directement à créer les conditions de nouveaux recrutements, de troubles, d'insécurité.

« J'avais 18 ans quand j'ai été arrêté et cela fait 4 ans que je suis ici. Donc j'ai 22 ans maintenant. Je ne suis pas un Boko Haram, mais on m'accuse de ça quand même. Ce qu'on appelle justice ici, c'est une mascarade. »⁵⁴

A l'inverse, l'expérience de réhabilitation des repentis a représenté une approche novatrice pour répondre au terrorisme au Niger. En raison de leur association directe avec une menace exceptionnelle, les détenus «terroristes» et les repentis de Boko Haram peuvent poser des problèmes de sécurité accrus. Paradoxalement, entre les deux groupes, c'est peut-être encore plus vrai pour les repentis, dont l'appartenance au groupe a été constatée, alors que de nombreux détenus clament leur innocence. Et pourtant, pour des raisons stratégiques et de stabilisation, les repentis ont été accueillis par l'État à travers une approche entièrement centrée sur le pardon, la réhabilitation et la réconciliation.

« Si l'État arrive à pardonner, la population aussi doit pardonner. C'est à dire, c'est des fils de Diffa, c'est des fils du terroir, ils sont partis, ils ont dit que là-bas ça ne va pas. Ils se sont rendus eux-mêmes. Là vraiment l'initiative est bonne. On a créé un camp pour eux à Goudoumaria. On les a formés. (...) Et l'État en faisant ça a pardonné ces repentis. Et la population aussi est obligée d'accepter. Parce que eux même ils se sont dit : 'Ah on ne veut plus maintenant cette affaire. Nous voulons venir rester avec vous dans la paix, dans la cohésion sociale.' Mais on est obligé de les accepter. Et c'était comme ça. »⁵⁵

Agissant sans être gêné par les limites strictes de la loi et de ses procédures, l'État a pu ici faire preuve de souplesse et répondre aux besoins perçus de la population locale. La politique de la main tendue emprunte clairement aux processus de DDR et aux scénarios de conflit, plutôt que de s'en tenir à la conceptualisation du terrorisme comme une forme spécifique de crime organisé. Ce faisant, cette initiative a pu contribuer au besoin de stabilisation en affaiblissant directement l'organisation terroriste et en même temps en initiant des efforts de réconciliation. De plus, cela s'est fait non seulement en fournissant directement des services à cette population, mais aussi en impliquant les communautés locales. Les chefs traditionnels étaient officiellement impliqués dans le processus de démobilisation, agissant en accord avec les autorités administratives, et les résidents locaux bénéficiaient également de services sélectionnés, augmentant les incitations populaires à accueillir les processus de réintégration.

⁵⁴ Author's interview with "Abba", detained in Koutoukalé, sentenced for a terrorism-related offence (7 May 2018).

⁵⁵ Author's interview with anonymous member of the 'Peace and Security Committee' in Diffa, Diffa (4 February 2020).

Cette recherche soutient que l'exceptionnalité inhérente au contre-terrorisme a influencé son orientation vers des approches plus punitives et a limité son ouverture à l'égard de solutions alternatives, qui peuvent s'avérer plus adaptées aux contextes locaux de conflit en cours. En ce sens, les approches pénales de la lutte contre le terrorisme ont peu contribué à la négociation par l'État de son rôle de fournisseur de sécurité. En se concentrant sur l'élimination de la menace, ils n'ont pas réussi à intégrer dans l'administration de la justice un élément prospectif, capable de répondre au besoin de réconciliation. Ce faisant, ils ont perdu l'occasion d'apporter des réponses aux victimes et de prendre la tête des processus de paix et de stabilisation, minant en fin de compte les revendications de souveraineté des États.

INTRODUCTION

When States select an “enemy”, raising its profile and contributing to its exceptionalisation in the process, they are also creating the conditions to test the extent of their powers. There is little doubt that, over the past twenty years, terrorism has been that prominent enemy for many States. And as this phenomenon has changed, the stakes for States that have chosen to address it have become higher. This study calls attention to those stakes, interrogating counterterrorism practices and their consequences on State sovereignty.

Over the past decades, counterterrorism has become *the* security priority. Contrary to popular perception, there are reasons to question whether terrorism as a phenomenon has risen drastically after the 9/11 attacks on the United States, as data proves that the number of terrorism related attacks may actually have diminished⁵⁶. What is certain, however, is that the prominence of terrorism, in both policy and academia, has dramatically increased.⁵⁷ In other words, 2001 had a potentially greater effect on counterterrorism than on terrorism, shifting its foundational discourse as well as its policy development. Two elements appear as especially relevant in determining this change: the globalisation of security approaches and the exceptionalisation of terrorism.

Indeed, the two dynamics are mutually reinforcing. Terrorism is increasingly understood as an unprecedented, exceptional threat of global dimension. It is directed against the State and, even more significantly, against a way of life that exceeds the State: the western understanding of freedom and democracy⁵⁸. Furthermore, tactics and alliances of terrorist groups are often analysed in the context of their global reach. The discussion of similarities between terrorist groups and transnational organised criminal groups points to notable overlaps in terms of resources and operations, hinting at the dangers of “violent hybrid organisations” that can use

⁵⁶ Smith, M., & Zeigler, S. M. (2017). Terrorism before and after 9/11 – a more dangerous world? *Research & Politics*, 4(4), p.4.

⁵⁷ See for instance Phillips, B. J. (2021). How Did 9/11 Affect Terrorism Research? Examining Articles and Authors, 1970–2019. *Terrorism and Political Violence*, 1–24; Pape, R. A. (2009). Introduction: What is New About Research on Terrorism. *Security Studies*, 18(4), 643–650.

⁵⁸ See “*The road to pre-emption*”, in Stampnitzky, L. (2013). *Disciplining Terror: How Experts Invented “Terrorism.”* Cambridge University Press.

economic resources gained from criminal endeavours to serve the political goals of terrorism⁵⁹. In addition, from the perspective of the groups, a transnational network increases tactical opportunities due to the shortcoming of cross-country coordination⁶⁰. All of these arguments, that justify the exceptionalisation of terrorism, are also used to call for harmonisation of security norms and policies beyond State borders, at regional and global levels.⁶¹

Against this backdrop, the contemporary rise of Boko Haram and the Islamic State has been interpreted as a further potential shift in terrorist violence, one that further confirms the exceptional dimension of the phenomenon. In terrorism studies, proponents of the terrorist waves theory posit the emergence of a fifth wave, characterised by the break away from existing terrorist networks, extreme pervasiveness of violence, authoritarian nature and charismatic/messianic leadership and, notably, a localized quest for power.⁶² The emphasis on indiscriminate violence and irrationality as characterising elements of these groups reinforces their perceived exceptionality. At the same time, both Boko Haram and the Islamic State are active across State borders and their transnational influence is indeed evident when looking at the policies and military alliances enacted against them.

The evolution of these groups' practices has come to blur the distinction between terrorism and armed conflict. Indeed, their progressive localization often entails effective control over strands of territory. In parallel and because of their claims over part of national territories, their confrontations with national military and security forces have intensified. The intensity of the conflict with national armies and the ability to exercise effective control over a territory are two key criteria to determine whether instances of collective violence amount to armed conflict.⁶³ Indeed, while both Boko Haram and the Islamic State are listed by the United Nations Security

⁵⁹ Schmid, P. em A. P. (2018). *Revisiting the Relationship between International Terrorism and Transnational Organised Crime 22 Years Later*.

⁶⁰ Sandler, T., & Enders, W. (2004). An economic perspective on transnational terrorism. *European Journal of Political Economy*, 20(2), 301–316.

⁶¹ Bigo, D. (2008). Globalized (in)security: The field and the ban-opticon. In *Terror, Insecurity and Liberty*. Routledge.

⁶² Celso, A. N. (2015). The Islamic State and Boko Haram: Fifth Wave Jihadist Terror Groups. *Orbis*, 59(2), 249–268; Kaplan, J. (2010). *Terrorist Groups and the New Tribalism: Terrorism's Fifth Wave*. Routledge.

⁶³ According to Article 1 of the Additional protocol II to the Geneva Conventions, internal armed conflict is to be understood as a conflict “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations”, see: International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: <https://www.refworld.org/docid/3ae6b37f40.html>

Council as terrorist organizations,⁶⁴ multiple international bodies have recognised that, in both instances, the level of hostilities qualified them as situations of armed conflict.⁶⁵

And when the threat is perceived as intensifying, so does its response. Now, it should be noted that this study does not investigate whether the intensification of the terrorist threat has actually happened.⁶⁶ By analysing counterterrorism, it assumes that whether or not terrorism is actually an exceptional phenomenon is immaterial: it is its perception as an exceptional phenomenon that is sufficient to shape normative and policy responses.

The relationship between terrorism responses and the State is thus at the center of this analysis. Rather than exploring how the State determines and enacts counterterrorism, this study operates a paradigm shift and asks: how does counterterrorism shape the State?

To do so, it relies on three key ideas.

First, it analyses the factors that have contributed to the *exceptionalisation* of terrorism. Borrowing from Schmitt's conceptualisation of the exception⁶⁷, it looks into mainstream and critical approaches to terrorism studies to identify the processes through which the defining elements of an exceptional threat have been progressively attributed to terrorism. In particular, it looks into the contribution of "new terrorism" approaches to the conceptualisation of terrorism as increasingly lethal, irrational and fundamentally different from any other form of collective violence. This, it is argued, shifts the focus from terrorism as a tactic to "terrorists" as a specific class of actors, who become "the enemy". It identifies here a securitization process, at global level, in which State actors play a notable role as securitizing agents.

Second, it adopts a constructivist approach to understand the relationship between the State and sovereignty. Rejecting the notion of sovereignty as inherent in the State, it rather embraces the understanding of *States as negotiating sovereignty*, as proposed by Biersteker and Weber⁶⁸. In

⁶⁴ Security Council ISIL (Da'esh) And Al-Qaida Sanctions Committee, ISIL (Da'esh) & Al-Qaida Sanctions List

⁶⁵ International Criminal Court, Office of the Prosecutor Report on Preliminary Examination Activities 2013 (November 2013), para.214 -218 ; Office of the High Commissioner for Human Rights (OHCHR), (2014) United Nations Assistance Mission for Iraq (UNAMI), Report on the Protection of Civilians in the Armed Conflict in Iraq:5 June to 5 July 2014.

⁶⁶ However, an overview of empirical and theoretical studies that question this assumption and that more broadly call into question the attribution of exceptionality to terrorism is presented in "*How terrorism became exceptional*", Chapter I.

⁶⁷ Schmitt, C. (2010). *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, p. 5 – 12.

⁶⁸ Biersteker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press.

this view, States are constantly proving they hold sovereign qualities by attempting to perform the tasks that are associated with sovereign powers.

Finally, it assumes the perspective of a State being concomitantly involved in a securitization process and in the negotiation of sovereignty. As understood by the Copenhagen School, this study argues that the ultimate objectives of the securitization process is not its direct objective, subduing the threat, but rather *servicing the interests of the securitizing agent*, here the State⁶⁹. Indeed, Buzan also put forth the idea that the global war on terror served the United States' interests insofar as they were facing a "threat deficit" in the aftermath of the iron curtain falling.⁷⁰ This points to the connection between the threat, here the exceptional terrorist enemy, and the process of legitimation of the State. In other words, as securitization aims to support the State's claims to sovereignty, so should counterterrorism in practice.

Building on this premise, this research is dedicated to interrogating the success of securitization processes through counterterrorism, in terms of their contribution to State sovereignty. The question of securitization's success is one that is dramatically under-researched. Existing contributions, in the Copenhagen School tradition, generally analyse securitization as succeeding when different from "ordinary" politicization⁷¹. In doing so, they contend that the adoption of exceptional measures, per se, represents the accomplishment of securitization. This research argues that by focusing on the "breaking free of rules", academic production fails to appreciate the real objective of such exceptional responses: enhancing the power of the State.

To test this perspective, this study examines the case of Niger in the years between 2010 and early 2020. This time period starts with the transition to the Seventh Republic, with the new Constitution adopted in 2010, and ends with the Chinégodar attacks in January 2020, claimed by the Islamic State and costing a record number of casualties to the Nigerien army⁷². The selected timeframe captures an especially relevant moment for sovereignty negotiation, anchored in the democratic reboot and promises of stronger institutions, as well as for securitization. While previously spared from terrorism-related violence, this decade sees a

⁶⁹ Wæver, O. "Securitization and Desecuritization" in Lipschutz, R. D. (Ed.). (1995). *On Security* Columbia University Press, p.46.

⁷⁰ Buzan, B. (2006). Will the "Global War on Terrorism" Be the New Cold War? *International Affairs (Royal Institute of International Affairs 1944-)*, 82(6), 1101–1118.

⁷¹ Buzan, B., Wæver, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers.

⁷² Le Monde (13 January 2020) Au Niger, l'armée subit ses plus lourdes pertes à Chinégodar avec 89 soldats tués https://www.lemonde.fr/afrique/article/2020/01/13/au-niger-l-armee-subit-ses-plus-lourdes-pertes-a-chinegodar-avec-89-soldats-tues_6025664_3212.html

notable escalation of the phenomenon in Niger, starting with targeted kidnappings and ending with the army heavily engaged on two fronts: facing Boko Haram in the Lake Chad Area and against the Islamic State in the Greater Sahara (IS-GS) along the borders with Mali and Burkina Faso. Over time, the epicenter of the terrorism-related crisis has moved from Diffa and the Boko Haram insurgency to the “Three Borders” area in the western part of the country. While this study focuses primarily on judicial responses and rehabilitation intervention related to the Boko Haram crisis, the question of State action through counterterrorism and its ability to raise the profile of national sovereignty continues to be relevant in the context of the evolving crisis.

Despite its raising profile as a key ally to the United States, the European Union and France in counterterrorism efforts in the Sahel, as well as its growing importance as a regional partner, both in the context of the G5 Sahel and within the Multi-National Joint Task-Force against Boko Haram, Niger’s implication in counterterrorism has been noticeably overlooked by researchers so far. While of course part of the reason for this is the relatively recent time span of the evolution of these phenomena, this also fits into a trend of underrepresentation of French colonies in academia.⁷³

Through an in-depth case-study, this work aims to address this notable gap through an analysis that is anchored in the national perspective, as expressed by State officials, community leaders and civil society organizations. The approach chosen for this study determines that the validity of its findings is contextual to Niger. How did securitization and growing investment in counterterrorism influence Niger’s ability to negotiate sovereignty? At the same time, the underlying question on the State’s claims to sovereignty in a securitized context are likely to be relevant to the understanding of counterterrorism trajectories beyond the national context.

To answer this question, the research examines two specific dimensions of sovereign powers that are especially relevant to the counterterrorism context. First, the ability of the State to act as a normative power. Second, the capacity of the State to produce security for its citizens. Both research axes are explored by analysing criminal justice approaches to counterterrorism.

Security-related research often focuses on military efforts and political statements. When the normative and judicial dimension is addressed, it is generally with reference to the counterterrorism legislation’s impact on human rights violations and constitutional norms. It is argued here that the contribution of normative and judicial efforts the negotiation of

⁷³ Elischer, S., & Mueller, L. (2019). Niger falls back off track. *African Affairs*, 118(471), 392–406, p.2.

sovereignty, in the context of counterterrorism, is generally disregarded. On the one hand, justice processes can strengthen the State by proving that the fight against terrorism is conducted within the boundaries of legality and does not come at the expense of the rule of law. Indeed, by anchoring counterterrorism in the legitimacy of the law, States are also reinforcing the distinction between them and their terrorist enemies. On the other hand, investigations and trials can directly contribute to security. They do so by holding perpetrators of terrorism accountable, imposing on them sentences and thus separating them from the population. They can also pursue this goal by promoting rehabilitation and reintegration of alleged terrorists, lowering recidivism risks and enhancing acceptance by the population.

First, this study presents the underlying theoretical framework that informs and has shaped the research findings. Chapter I provides an analysis of the key concepts and a review of relevant literature, highlighting the relevance of a multi-disciplinary approach in the investigation of controversial and value-oriented notions such as terrorism, sovereignty and State performance in a securitized space. In doing so, it takes into account that “speaking and writing about security is never innocent”⁷⁴, and proposes research strategies that open alternative opportunities to securitization paradigms.

A second chapter outlines the processes that drove the selection of the case study, illustrating methods and sources mobilised for the analysis and discussing its limitations. Here a reflective examination of the complexities associated with this research is presented, looking into issues of access, security and ethical questions, particularly as they relate to the conduct of interviews in prisons. In addition, the impact of the dual positioning of the researcher as also an “expert” consultant is put into question, including by contextualising it in the relationship between academia and policy-making.

Chapter III assumes a more historical perspective, with the intent to clarify the context in which the research takes place. With this view, it faces a dual challenge. On the one hand, it needs to uncover the reasons for the significance of the 2010 – 2011 regime transition in Niger and specifically the significant role of justice institutions in the process of negotiating sovereignty. To do so, it examines the perceived shortcomings and advances of justice in Niger prior to the rise of counterterrorism. On the other hand, it needs address the progressive expansion of the

⁷⁴ Huysmans, J. (2002). Defining Social Constructivism in Security Studies: The Normative Dilemma of Writing Security. *Alternatives*, 27(1_suppl), 41–62, p. 43.

security agenda over the past decade and the influence of global and regional geopolitical interests in shaping national policy-making.

The following three chapters present the analysis and the findings of the study. Chapter IV tackles the normative production related to terrorism in Niger between 2011 and 2017, as well as the application of this body of norms. In this process, it examines international influences, national originalities, challenges and efforts to adapt to a rapidly evolving security context, as well as the interaction between the exceptional measures of the state of emergency and ‘ordinary’ but specialised counterterrorism laws. This chapter is especially helpful to understand the considerable efforts that went into the reform of counterterrorism legislation of 2016 and how that shaped criminal justice approaches to terrorism in the following years.

Chapter V analyses investigations and trials of alleged terrorists, to appraise the State’s ability to produce security by convicting terrorist offenders. The study goes beyond a quantifiable assessment of attrition and conviction rates and explores the quality of proceedings as well as the popular perception of the terrorism-related trials. It also questions the very notion of fairness and its limitations in a securitized context, by looking into the impunity of the military for violations committed during counterterrorism operations.

To conclude the study, chapter VI looks into a different dimension of security, closer to the most affected population. Here, it considers that the achievement of peace through rehabilitation and reconciliation assumes priority in the contexts most affected by prolonged violence. Hence, it analyses the support to the rehabilitation of former detainees, comparing it with that of the group of *repentants*, thus focusing on two potentially vulnerable and volatile groups, easily linked with insecurity potential. By highlighting the situation of the Diffa region, the chapter also provides an interesting setting to question centre-periphery relationships in counterterrorism. But most importantly, it provides an account of the connection between punitive approaches and the potential for reconciliation, in practice, weighing their impact on the process of stabilisation after insecurity.

CHAPTER I

**COUNTERTERRORISM: EXCEPTIONAL THREATS,
THE SOVEREIGN, AND THE “SUCCESS” OF
SECURITIZATION**

A STATE OF THE ART

INTRODUCTION

Over the coming chapters, this study will undertake a challenging endeavour: looking into the justice approach to counterterrorism in Niger to understand if, and to what extent, they have consolidated the State. To do so, it will be necessary to rely on complex and at times ambiguous ideas and to investigate controversial practices. This first chapter is dedicated to laying the grounds for this work, by clarifying the research question and the relationships between the different axes of the research, defining the key concepts that underpin the study, and reviewing the main theories that informed and shaped this analysis.

“Terrorism” and “counterterrorism” are controversial and heavily politicized phenomena, whose academic treatment has been plagued by persisting challenges to the emergence of a universally shared definition and by the considerable blur between theoretical and policy-oriented approaches. Investigating “sovereignty” and “statehood”, on the other hand, is also not free from ambiguity, especially considering the persisting Eurocentric bias in the definition of these terms and in the proposed understandings of their relationship. In addition, a research that addresses, to some extent, questions of policy “success”, such as this one, needs to be particularly cautious in taking into account the value-oriented connotations of such efforts.

In view of these complexities, a multi-disciplinary approach was adopted and the literature review will borrow from a broad range of disciplines: sociology, including criminology, legal studies, and political science, with a focus on constructivist and critical approaches to international relations, including securitization theory, terrorism and critical terrorism studies.

The chapter begins by presenting the conceptual framework, which clarifies the use of crucial terminology in the research and outlines the relation between these key concepts and the research questions. Then, it provides a review of relevant literature that has informed the understanding of such concepts for the present research. This section addresses: i) terrorism; ii) sovereignty and statehood; iii) securitization and its success in relation to State performance. It concludes with a brief overview of the value and limitations of the present thesis.

7. CONCEPTUAL FRAMEWORK AND KEY CONCEPTS

Through the study of Niger’s reaction to Boko Haram’s large-scale attacks since 2015, this work investigates the relationship between normative and policy approaches dealing with

exceptional threats, and the State's claims to sovereignty. In particular, the underlying question is whether counterterrorism policies serve to strengthen sovereignty, in a context where statehood is contested or transitioning, rather than affirmed.

Terrorism is generally presented as an existential threat to the democratic state: an exceptional form of political violence. The exceptional threat requires (and thus justifies) exceptional responses, namely counterterrorism policies, in the name of security as a crucial public interest. This study investigates the connection between the state's delivery of citizens' security, identified as a vital public good especially in contexts of limited statehood, and its recognition as the legitimate authority in domestic affairs. In order to do so, this research questions the relationship between *statehood* and *sovereignty*, and that between the *State* and the *exceptional threat*, as mutually constructive. It is argued here that:

- The State determines the exception, and in doing so it also creates a public enemy, thus defining the boundaries of its own polity, and affirming its supreme and legitimate authority to decide when and how to act outside of the constituted legal order.
- The exceptional threat, in turn, provides a testing ground for the State's fundamental attributes, namely the capacity to produce binding norms, and the capacity to deliver public goods. These are attributes of sovereignty that are not automatically inherent to statehood, but they have to be negotiated, as they prove to be crucial basis for claims to recognition and legitimacy. In this sense, then, the exception can strengthen the sovereign. This will depend, however, on the "success" of State responses (counterterrorism). Here I question whether this was case in Niger, under which conditions, and how.

Two key dimensions of sovereignty are especially relevant to the State's recognition: the authoritative production of binding norms, and the ultimate capacity to ensure (increase, or restore) public safety. This research focuses on the contribution of counterterrorism criminal justice approaches to both dimensions. First, criminal justice counterterrorism norms and policies are crucial to determine the stability of rules and institutions. Second, justice institutions have a notable role in producing security. Accordingly, in the following chapters I will carry out a dual analysis of counterterrorism justice practices in Niger. In the first research axis, counterterrorism norms are analysed as testing the State's claims to sovereignty through certainty of laws; lawful procedures, well-functioning institutions and judicial process. The role of public officials within justice institutions is a central one in negotiating sovereignty in this

sense, and the research will focus not only on the outcome of their works, but also on their perspectives, as well as the repertoires they recur to when interpreting, applying and questioning counterterrorism norms. In its second axis, the research assesses whether counterterrorism is conducive to increasing the State's ability to provide security, by prevailing over the exceptional threat identified with terrorism, thus contributing to its recognition as a sovereign entity.

The central thesis of this work is that counterterrorism policies have failed to strengthen sovereignty in Niger, because the exceptionalism that has become inbuilt in counterterrorism is often incompatible with the national context, and has led to the adoption of inappropriate strategies.

In testing this thesis, the research claims that neither the exceptional threat, nor the sovereign State should be assumed as natural features of the international order. On the contrary, it is in the process of their construction and negotiation that meaning is conferred, and that a mutually constitutive relationship takes form. The analysis builds on three key arguments, whose theoretical foundations are further discussed in the present chapter:

- i) The notion of the existential and exceptional threat has become inextricable from terrorism: terrorism, in spite or because of its fragile definitional basis, has increasingly been characterised as an exceptional form of political violence, in direct antagonism to the State, of which it threatens not only the public interests but also the fundamental values. In other words, terrorism has undergone a process of securitization.
- ii) Sovereignty is not an essential, nor an existential quality of the State, but is negotiated: in the process of claiming sovereignty within their boundaries, demonstrating the key attributes of sovereignty becomes especially important for those States that face limited statehood within their national borders. It is instrumental for the State's recognition and legitimacy to prove its internal supremacy, especially as a security agent. Hence, it is not only the creation of the existential threat, but also the State's response to it (here, counterterrorism) that is significant to claim sovereign qualities.
- iii) Counterterrorism laws and policies reify the exceptionalism of terrorism by integrating exceptionality in its response. To examine whether the securitization

process that distinguishes current framings of terrorism and counterterrorism has been successful, it is necessary to investigate whether it has contributed to the State's negotiation of sovereignty, through facilitation of sovereign attributes: the production of binding norms and the production of security.

It is necessary here to clarify the meaning of the fundamental terms that serve as basis to this research and to the review of the significant literature, in particular *the exception* and *sovereignty*.

In his *Political Theology*, Schmitt famously held that the "Sovereign is he who decides on the exception"⁷⁵. While Schmitt does not provide a clear-cut definition of the exception, which indeed is created each time, he does clarify its basic characteristics. First, not every emergency or unusual set of circumstance rise to the level of the exception. To be considered such, the exception must pose a threat to the very existence of the State.⁷⁶ Second, the exception is a condition "which cannot be subsumed; it defies general codification".⁷⁷

Here, the concept of the exception as theorized by Schmitt is approached through constructivist lenses, notably through securitization theory: the exception, then, converges with what the Copenhagen School identifies as a "*security problem*".⁷⁸ In Wæver's words "*a security problem is something that can undercut the political order within a state and thereby "alter the premises for all other questions."* (...) *Those issues with this undercutting potential must therefore be addressed prior to all others because, if they are not, the state will cease to exist as a sovereign unit and all other questions will become irrelevant.*"⁷⁹ It becomes apparent, then, that what really qualifies the exception, or the existential threat, is its relation to the sovereignty of the State. And in the name of this potential destructive effect, the preeminence of the exception on other legitimate interests is justified.

⁷⁵ Schmitt, C. (2010). *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, p.5

⁷⁶ Schmitt, C. (2010). *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, p.6

⁷⁷ Schmitt, C. (2010). *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, p.12

⁷⁸ Wæver, O. "Securitization and Desecuritization" in Lipschutz, R. D. (Ed.). (1995). *On Security* Columbia University Press.

⁷⁹ Wæver, O. "Securitization and Desecuritization" in Lipschutz, R. D. (Ed.). (1995). *On Security* Columbia University Press, p. 49.

When dealing with sovereignty, this work adheres to the conceptualisation provided by Biersteker and Weber⁸⁰, arguing that sovereignty is an inherently social concept, whose precise meaning, therefore, is constructed through interaction and practices. Importantly, a meaningful analysis of sovereignty must separate it from the State, to recognise that the sovereign State does not exist per se, but the two concepts enjoy a mutually constitutive relationship. As they put it, “*the modern state system is not based on some timeless principles of sovereignty, but on the production of a normative conception that links authority, territory, population (society, nation), and recognition in a unique way and in a particular place (the state).*”⁸¹ In this normative conception, authority, territory and population are the constitutive attributes of the State. It follows that the fourth element, recognition, which entails the legitimisation of the State’s authority to exercise power is the crucial component of sovereign claims.

In addition, this research pays special attention to the internal dimension of sovereignty. Adapting Krasner’s definition of domestic sovereignty as “*the organization and effectiveness of public authority*”⁸², this research will rather focus on the process of recognition or legitimation of the organization and effectiveness of public authority.

8. HOW TERRORISM BECAME EXCEPTIONAL

This research primarily tackles responses to terrorism, in particular criminal justice approaches, rather than terrorism itself. Nonetheless, it will be argued that counterterrorism policies are determined to a great extent by the characterisation of terrorism as an exceptional threat. In this light, it is necessary to question, through a review of the significant literature, through which processes and attributes exceptionality has become embedded with terrorism.

First, this requires an analysis of the constitutive elements of terrorism, and accordingly, a brief overview of the key features of the definitional debate which has continuously permeated academic production on this subject. Then, an overview of key themes in the study of terrorism will be undertaken. This will concern in particular the progressive characterisation of terrorist violence as an especially new, serious and unjustifiable threat directed against the State. These attributes, it is argued here, make terrorism an exception, a notion that has become entrenched

⁸⁰ Biersteker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press.

⁸¹ Biersteker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press, p. 3.

⁸² Krasner, S. (1999). *Sovereignty: Organized Hypocrisy*. Princeton University Press, p. 12

in policy approaches to the phenomenon, regardless of being partially debunked, or at the very least nuanced, by scholars.

DEFINITIONAL ISSUE

The definitional debate has plagued the study of terrorism since its origin in the 60ies and 70ies,⁸³ due to persisting difficulties in reaching a consensus on the key constitutive components and/or distinctive features of this phenomenon. So much so, that the debate on whether the definitional question deserves to be addressed or should rather be abandoned by scholars has become a focus of academic production in its own right.⁸⁴ In addition, the lack of a solid definitional basis has proved problematic beyond the scholarly field, proving challenging for policy-making at international level (the United Nations famously having not managed, so far, to produce an internationally agreed upon definition of terrorism) as well as on the national level.⁸⁵

Here it is argued that the analysis of meaningful definitions, those that possess explanatory powers, can help determine the constitutive elements of terrorism, and assess whether exceptionality is inherent in them, or rather attributed to them. Among the numerous examples of existing definitions of terrorism, two will be explored. The first is especially significant as it represents the closest possible product of an academic consensus on a highly contested phenomenon. It is a definition that comprises the minimum common denominator of 73 definitions put forward by leading publications in the field, identified by Weinberg, Pedahzur and Hirsh-Hoefler and reprised by Schmid:⁸⁶

“Terrorism is a politically motivated tactic involving the threat or use of force or violence in which the pursuit of publicity plays a significant role”.

A second definition, proposed by Cassese, has the merit to present the key elements of (international or transnational) terrorism as characterises in international law:

“Terrorism consists of acts normally criminalised under any national penal system, or assistance in the commission of such acts whenever they are performed in time of peace;

⁸³ Weinberg, L., Pedahzur, A., & Hirsch-Hoefler, S. (2004). The Challenges of Conceptualizing Terrorism. *Terrorism and Political Violence*, 16(4), 777–794, p.777.

⁸⁴ See for instance: Richards, A. (2014). Conceptualizing Terrorism. *Studies in Conflict & Terrorism*, 37(3), 213–236, p. 213-218 and Ramsay, G. (2015). Why terrorism can, but should not be defined. *Critical Studies on Terrorism*, 8(2), 211–228.

⁸⁵ According to Alex Schmid, United States government agencies used at least four different definitions of terrorism, see: Schmid, A. (2004). Terrorism—The Definitional Problem. *Case Western Reserve Journal of International Law*, 36, 47, p. 377.

⁸⁶ Schmid, A. P. (2004). Terrorism—The Definitional Problem. *Case Western Reserve Journal of International Law*, 36, 47, p. 380-381.

those acts must be intended to provoke a state of terror in the population or to coerce a state or an international organization to take some sort of action, and finally are politically or ideologically motivated, i.e. are not based on the pursuit of private ends.”⁸⁷

Such minimalist definitions consent to extrapolate three essential constitutive elements of terrorism:

- **The objective element:** which can be identified with the threat or use of force or violence, under Schmid, and with a normally criminalised act, under Cassese;
- **The subjective element:** generally identified in criminal law with intent (or *mens rea*), the subjective element is specific in terrorism as it involves a political objective;
- **The tactical element:** the political goal is pursued through spreading terror, which in turn entails pursuing visibility.

Due to their limited approach, these definitions leave multiple questions about the nature of terrorism unanswered, and precisely those that have proved more controversial. They do not provide sufficient clarity on who is the perpetrator of terrorism, specifically whether the “terrorism” label only applies to non-State actors, or whether it can be ascribed to the same extent to governments and State agencies.⁸⁸ They do not qualify the victim, differing for instance from the approach of international humanitarian law, which associates terrorism with attacks on civilians, aiming to produce a state of terror.⁸⁹ Finally, they do specify whether terrorism shall be considered as such only in times of peace or also during armed conflict.

At the same time, however, the reductive definitions point to the essence of terrorism, which lies in the connection between the political goals and the specific method employed to achieve

⁸⁷ Cassese, A. (2006). *The Multifaceted Criminal Notion of Terrorism in International Law* (SSRN Scholarly Paper ID 1147484). Social Science Research Network, 933-958, p.936.

⁸⁸ For a brief overview of this debate, consider the position of Anthony Richards: “*The utility of viewing terrorism as a method (or a tactic) is that it allows us to implicitly acknowledge that terrorism is not particular to any type of actor for it has been used by a wide variety of actors, not just terrorist organisations.*”, in Richards, A. (2014). Conceptualizing Terrorism. *Studies in Conflict & Terrorism*, 37(3), 213–236, p.230. On the other hand, Gibbs contends that “because various aspects of government may be public violence, to label all of those aspects “terrorism” is to deny that terrorism has any secretive, furtive, or clandestine feature” and for this reason argues to address State terrorism as a separate issue from terrorism used by non-State entities, in: Gibbs, J. P. (1989). Conceptualization of Terrorism. *American Sociological Review*, 54(3), 329–340, p. 333.

⁸⁹ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, Art. 51; International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, art.13.

them, meaning spreading fear.⁹⁰ In this relationship, between tactics and purpose, it is the tactics that are truly unique to terrorism. Therefore, it is correct to state, as in the first proposed definition, that terrorism is a distinctive phenomenon insofar as it is conceived primarily as a tactic.

Accordingly, despite the lack of definitional clarity, it could be argued that there is general consensus about the fundamental features of terrorism. Crenshaw also focuses on defining terrorism as a method, one which involves a symbolic selection of victims, and a strategic choice aimed at generating a psychological effect.⁹¹ This approach to the analysis of the phenomenon, she argues, is not only coherent and appropriate, it is also useful for research perspectives. Indeed, it entails the recognition of the rationality of terrorist actors, presumes that the tactic of terrorism can be employed equally by State and non-State actors, and leads to further investigating the motivations and causes of terrorism, as well as the circumstances under which terrorist tactics prove effective.

Now the question is: are the key features of terrorism, according to the selected definitions, enough to qualify terrorism as an exceptional threat? So far, the analysis of these constitutive elements shows that terrorism is a distinctive tactic. Certainly, its configuration as collective violence with political goals can be sufficient to qualify terrorism as a threat, and its special tactics characterise it as a specific threat. This may be considered as fulfilling the second requirement of the exception: terrorism is different from other threats, although, as will be argued later, it is doubtful whether this excludes terrorism from the realm of other violence, whether classified as crime or as war. At the same time, the key features of terrorism do not appear sufficient, per se, to elevate the threat to an existential one against the State.

Then, it is concluded here: terrorism is not qualified as an exception because it is necessarily exceptional in nature. Rather, it emerges that the common understanding of terrorism extends beyond its definitions, or is affirmed somewhat independently from it. In other words, exceptionality of terrorism does not stem directly from its constitutive elements, as conveyed by its definition, but rather from a broader construct of the terrorism concept, to which the lack of a consensual definition may have contributed. As Hoffman put it “*most people have a vague idea or impression of what terrorism is, but lack a more precise, concrete and truly explanatory*

⁹⁰ See for instance Schmid, A. P. (2005). Terrorism as Psychological Warfare. *Democracy and Security*, 1(2), 137–146; Richards, A. (2014). Conceptualizing Terrorism. *Studies in Conflict & Terrorism*, 37(3), 213–236; Primoratz, I. (2004). *Terrorism: The Philosophical Issues*. Palgrave-Macmillan.

⁹¹ Crenshaw, M. (2011). *Explaining Terrorism: Causes, Processes, and Consequences*. Routledge.

definition”.⁹² This generalised and imprecise understanding of terrorism has evolved in parallel with the political discourse and, it is argued here, is centered on exceptionality.

EXCEPTIONALITY EMBEDDED

Academic production focusing on terrorism, both in the area of terrorism studies and legal theory, has focused on the analysis of this phenomenon’s fundamental elements: actors, methods and motives. It is argued here that conceptualisations of terrorism have contributed to associating it with three specific connotations: terrorism is serious, unjustifiable, not codifiable.

First, the attribute of seriousness is connected both to the notion that terrorism is aimed directly at the State, and that it is becoming increasingly lethal. One of the key reproaches to traditional terrorism research, which lies at the core of critical terrorism studies, is that of being too closely associated with political discussion and policy-making on the subject, and therefore becoming extremely State-centric.⁹³ Then, it is not especially surprising that terrorism has been qualified as a crucial threat to the State, and from the perspective of the State. Indeed, securitization theorists such as Buzan have extensively explained how the securitization of terrorism presents direct political advantages for major super-powers.⁹⁴ In her study of how terrorism-related knowledge production has evolved, Stampnitzky convincingly presents different turning points.⁹⁵ In particular, she contends that terrorism started being addressed as a distinctive phenomenon, rather than merely a tactic, in the 70ies, when it “*seemed to be more of an imminent threat to the domestic US population. This was both because it targeted Americans and, especially, because it targeted sites of international connection identified with a peaceful civilian realm, such as airline travel, diplomacy, and the Olympic Games.*”⁹⁶ By the end of the decade, with the growing influence of cold war rhetoric, political discourses on terrorism was not merely a threat to State symbols, but a much more politicized threat to the values of the democratic state, as defended by the West, in other words, an attack on civilization.⁹⁷ This way

⁹² Schmid, A. P. (2004). Terrorism—The Definitional Problem. *Case Western Reserve Journal of International Law*, 36, 47.

⁹³ Jackson, R. (2007). The core commitments of critical terrorism studies. *European Political Science*, 6(3), 244–251, p.245.

⁹⁴ Buzan, B. (2006). Will the ‘Global War on Terrorism’ Be the New Cold War? *International Affairs (Royal Institute of International Affairs 1944-)*, 82(6), 1101–1118.

⁹⁵ Stampnitzky, L. (2013). *Disciplining terror: How experts invented ‘terrorism’*. Cambridge University Press.

⁹⁶ Stampnitzky, L. (2013). *Disciplining terror: How experts invented ‘terrorism’*. Cambridge University Press, p.67.

⁹⁷ See “Terrorism fever”: the first war on terror and the politicization of expertise, in: Stampnitzky, L. (2013) *Disciplining Terror. How experts invented terrorism*.

terrorist violence becomes especially serious as not only politically connotated, but also as directed against the very foundations of the democratic State.

A second pivotal moment in terrorism research, and possibly the most relevant, can be identified with the end of the 90ies and the aftermath of 9/11. Analysing the differences between first and second wave of terrorism studies, Pape highlights the coincidence of the turning point with the moment when American interests are most directly menaced.⁹⁸ From that moment, the threat is not only serious because of its value-oriented target, but also in light of its scale:

“This event not only increased interest in the study of terrorism, but also changed the nature of that interest, particularly for the United States. Whereas terrorism had often previously been viewed as a persistent, but modest menace comparable to individual acts of violence associated with domestic criminals, 9/11 increased the fear of another large- scale, direct attack usually connected with acts of war.”⁹⁹

And while the securitization of terrorism has happened mainly through political rhetoric, academic production has also contributed to it, especially at certain times. Indeed, through the 90ies, the academic debate centers around the proponents of “new terrorism”. It is interesting to note that claims of the rise of “new” type of terrorism, begin as early as the early 80ies.¹⁰⁰ But it is between the late 90ies and the early 2000s that a real theory emerges, founded on the idea that terrorism has dramatically changed into a new phenomenon.¹⁰¹ This position gains progressive political and academic relevance following the 1993 World Trade Center bombing, the 1995 Tokyo subway sarin attack, the Oklahoma city bombing of the same year, the 1998 attacks to the US embassies in Kenya and Tanzania. After 2001, policy-makers and scholars are blamed for failing to recognise how terrorism has become an unprecedented threat.¹⁰²

Proponents of the “new terrorism” argument, such as Lesser, Hoffman, Laqueur, Simon and Benjamin, who are generally especially close to State agencies, set out to explain the increased lethality of terrorism, which qualifies it an unprecedented threat:

“Even the bloodiest terrorist incidents in the past, such as those just recounted, affected only a relatively few people. This is no longer true today, and may be even less in the

⁹⁸ Pape, R. A. (2009). Introduction: What is New About Research on Terrorism. *Security Studies*, 18(4), 643–650.

⁹⁹ Pape, R. A. (2009). Introduction: What is New About Research on Terrorism. *Security Studies*, 18(4), 643–650, p. 646.

¹⁰⁰ Duyvesteyn, I. (2004). How New Is the New Terrorism? *Studies in Conflict & Terrorism*, 27(5), 439–454, p. 439.

¹⁰¹ Crenshaw, M. (2008). The Debate over “New” vs. “Old” Terrorism. In I. A. Karawan, W. McCormack, & S. E. Reynolds (Eds.), *Values and Violence: Intangible Aspects of Terrorism* (pp. 117–136). Springer Netherlands.

¹⁰² Crenshaw, M. (2008). The Debate over “New” vs. “Old” Terrorism. In I. A. Karawan, W. McCormack, & S. E. Reynolds (Eds.), *Values and Violence: Intangible Aspects of Terrorism* (pp. 117–136). Springer Netherlands.

future. Yesterday's nuisance has become one of the greatest dangers facing mankind".¹⁰³

Such growing destructive impact, they argue, derives from a qualitative change in the phenomenon. In parallel, this disqualifies previous research on terrorism, which is regarded as obsolete and as an ineffective basis for policy-making,¹⁰⁴ as it is unable to account for the new features of terrorism. Tactics and available instruments are also deemed to have changed. Hoffman's analysis highlights how new terrorist groups have both the intention and the means to produce more casualties. This is explained through a number of factors, most notably "new terrorists" increased access to weapons, the availability of weapons of mass destruction, and their belief that public opinion has become desensitized to violence, thus more violence is necessary to gain attention.¹⁰⁵

Undoubtedly, however, the most significant change is related to motives and goals of the new terrorists. Compared with the traditional terrorism that pursued secular nationalist and separatist objectives, new terrorism is ideologically and religiously motivated. This makes its goals unlimited and non-negotiable, dissolves the need for further legitimisation, making violence an end in itself, and ultimately makes the new terrorists more dangerous and lethal.¹⁰⁶

Not only does the "new terrorism" current highlight many underlying themes in terrorism knowledge production, it also opens a window on the mechanisms of exceptionality as a construction, by tying it directly to a specific historical and cultural context, through the claim of it being unprecedented.

The second attribute, identified here with the inherent immorality of terrorism has also been object of extensive theorisation. Indeed, moral considerations of terrorism have always characterised the discourse around it. The reason for it can be traced to its methods, broadly considered unacceptable. First, the trademark of terrorism, which is spreading fear as a strategy to pursue political objective,¹⁰⁷ is problematic per se. While fear is a byproduct of political

¹⁰³ Laqueur, W. (2000). *The New Terrorism: Fanaticism and the Arms of Mass Destruction*. Oxford University Press, p. 4.

¹⁰⁴ Lesser, I. O. (1999). Changing terrorism in a changing world. In B. Hoffman, J. Arquilla, D. Ronfeldt, M. Zanini, & B. M. Jenkins, *Countering the New Terrorism*. RAND Corporation, p. 1 – 2.

¹⁰⁵ Lesser, I. O., Hoffman, B., Arquilla, J., Ronfeldt, D., Zanini, M., & Jenkins, B. M. (1998). *Countering the New Terrorism*. https://www.rand.org/pubs/monograph_reports/MR989.html , p 13; 29 – 31.

¹⁰⁶ Benjamin, D., & Simon, S. (2002a). *The Age of Sacred Terror*. Random House Publishing Group; Laqueur, W. (2000). *The New Terrorism: Fanaticism and the Arms of Mass Destruction*. Oxford University Press; Hoffman, B. (2002). Rethinking Terrorism and Counterterrorism Since 9/11. *Studies in Conflict & Terrorism*, 25(5), 303–316.

¹⁰⁷ Gibbs, J. P. (1989). Conceptualization of Terrorism. *American Sociological Review*, 54(3), 329–340, p.

violence in general, in the framework of terrorism it is the direct objective¹⁰⁸. Second, and most important, in order to generate such wide-spread fear, the terrorist strategy entails at the very least the potential targeting of “innocents”, meaning individuals not taking part in a conflict, nor directly representing the State.

Primoratz highlights that what is relevant is the basic structure of terrorism, and the fact that it foresees two targets: “the immediate, direct target, which is of secondary importance, and the indirect target, which is really important.”¹⁰⁹ The indirect target, meaning the political entity that the terrorist act aims to influence, represent the real purpose, which does not coincide with killing innocent people, but somewhat requires it.¹¹⁰ The willingness to kill civilians is generally not included in definitions of terrorism, as it lacks a consensual basis as being common to all acts of terror. However, it is often used as distinctive of terrorism, by making it “*different, both conceptually and morally, from violence employed in self-defense, from war in general and guerrilla war in particular, and from political assassination*”.¹¹¹ In a similar vein, Schmid argues that, while terrorism is certainly criminal, the nature of the terrorist act is so wrong that it would be considered a violation regardless of its criminalisation.¹¹² In other words, terrorism is unjustifiable.

Finally, terrorism is generally addressed as inherently different from other forms of collective violence, notably crime and war. This last element is also constitutive of exceptionality as it qualifies terrorism not only as vital threat to the State, but also as an unparalleled threat.

It is widely recognised that terrorism can take place during war, yet the phenomenon is also clearly differentiated from it. This distinction has been traditionally built around two prevailing arguments. First, terrorism does not raise to the intensity threshold of an armed conflict. Merari’s classification of political violence, classified as conventional war, guerrilla, and terrorism, outlined size of unit in battle and territorial control as crucial criteria separating

¹⁰⁸ Richards, A. (2014). Conceptualizing Terrorism. *Studies in Conflict & Terrorism*, 37(3), 213–236, p.234

¹⁰⁹ Primoratz, I. (2004). *Terrorism: The Philosophical Issues*. Palgrave-Macmillan, p. 17.

¹¹⁰ Richards, A. (2014). Conceptualizing Terrorism. *Studies in Conflict & Terrorism*, 37(3), 213–236, p. 223.

¹¹¹ Primoratz, I. (2004). *Terrorism: The Philosophical Issues*. Palgrave-Macmillan, p. 21.

¹¹² Schmid, A. P. (2004). Frameworks for Conceptualising Terrorism. *Terrorism and Political Violence*, 16(2), 197–221, p. 198.

terrorism from conflict¹¹³. Second, terrorism is not war because it refuses to abide by the law of war, most notably by targeting civilians.¹¹⁴

At the same time, terrorism is also separated from criminality. While nobody disputes that terrorism is criminal,¹¹⁵ the literature tends to separate terrorism from “common” crime, marking it as a distinctive phenomenon. Primarily, it is because of its motive and purpose, and their political connotation.¹¹⁶ Legal scholars stress that a shared political motive separates terrorism from individual crime, and anchors it in the realm of collective criminality.¹¹⁷ Gravity of the political objectives of terrorism also differentiates it from “common” criminality. In addition, tactical considerations also differentiate terrorism from other forms of crime. As terrorism pursues coercion through intimidation, it requires the publicisation of the terrorist activity, a strategy that is contrary to most forms of criminality, which require secrecy. Schmid dedicates special emphasis to the analysis of the connection between terrorist tactics and communication, reprising Jenkins’ argument of terrorism as performance, and suggesting: “*Violence aims at behaviour modification by coercion. Propaganda aims at the same by persuasion. Terrorism can be seen as a combination of the two.*”¹¹⁸ In such analysis, broad visibility of terrorist action is not only direct significant as a means to disseminate intimidation, but also acquires symbolical meaning by manifesting a challenge to the State’s monopoly of violence.¹¹⁹

EXCEPTIONALITY’S PERSISTENCE AND CONSEQUENCES

There is no doubt that the numerous contributions to the study of terrorism have produced a lively academic debate, in which the different claims to terrorism’s exceptionality have been broadly contested. First, doubts have been raised on the seriousness and lethality of terrorism. Pérouse de Montclos raises the question of comparing the impact of terrorism with

¹¹³ Schmid, A. P. (2004). Frameworks for Conceptualising Terrorism. *Terrorism and Political Violence*, 16(2), 197–221, p. 205.

¹¹⁴ Rapoport, D. (1977). The politics of atrocity. In *Terrorism: Interdisciplinary perspectives*. Alexander, Y. & Finger, S. (Eds.). New York: John Jay.

¹¹⁵ Gibbs, J. P. (1989). Conceptualization of Terrorism. *American Sociological Review*, 54(3), 329–340, p. 331.

¹¹⁶ Sandler and Enders, for instance, define terrorism as: “the premeditated use, or threat of use, of extranormal violence to obtain a political objective through intimidation or fear directed at a large audience” and clarify that part of this extremity is the political motive that separates terrorism from other crime: “Incidents that have no specific political demand are criminal rather than terrorist acts”, in: Sandler, T., & Enders, W. (2004). An economic perspective on transnational terrorism. *European Journal of Political Economy*, 20(2), 301–316.

¹¹⁷ Cassese, A. (2006). *The Multifaceted Criminal Notion of Terrorism in International Law* (SSRN Scholarly Paper ID 1147484). Social Science Research Network.

¹¹⁸ Schmid, A. P. (2004). Frameworks for Conceptualising Terrorism. *Terrorism and Political Violence*, 16(2), 197–221, p. 206.

¹¹⁹ Ibidem.

counterterrorism in terms of lethality, while also calling for a broader perspective on other phenomena which constitute a higher danger for human security, such as health issues, especially in sub-Saharan Africa.¹²⁰

Similarly, the notion of “new terrorism” has been thoroughly criticised by historians and terrorism scholars alike. Notably, Duyvensteyn historical overview highlights continuity in terrorist networks’ structure, as well as in reliance on traditional weaponry. Perhaps more significantly, she stresses how emphasis on religious motives (that are far from new) has served to conceal the political motives of so-called new terrorists.¹²¹ Similarly, Crenshaw argues that the fundamental flaw of the “new terrorism” wave is to separate it from a more historical perspective. This way, changes are interpreted as constitutive of a new kind of terrorism, instead of different degrees and evolutions of the same phenomenon.¹²²

It is also doubtful whether a moral analysis of terrorism can be sufficient to qualify it as an exceptional phenomenon. There is first of all a question about the absolute significance of the notion of “civilian” and of his or her innocence. In this vein, Kinsella provides an especially interesting analysis of the contested construction of the category of “civilian”, questioning whether, rather than existing in nature, this category is actually the byproduct of having defined the combatant (or the enemy).¹²³ But even without going as far, recognising that terrorist tactics generally imply the violation of the crucial law of war, one should at least acknowledge that terrorists are far from the only ones perpetrating such violations.

In addition, currently, groups such Daesh and Boko Haram, internationally categorised as terrorist organizations, have acquired territorial control and internal hierarchical structure. They have also engaged in sufficiently intense hostilities with national armed forces for the threshold of internal armed conflict as defined by international humanitarian law to be met.¹²⁴ The distinction between terrorism and war could thus be easily questioned.

¹²⁰ Pérouse de Montclos, M.-A. (2016). *Jihad in sub-Saharan Africa: Challenging the narratives of the war on terror*. World Policy Paper.

¹²¹ Duyvesteyn, I. (2004). How New Is the New Terrorism? *Studies in Conflict & Terrorism*, 27(5), 439–454.

¹²² Crenshaw, M. (2011). *Explaining Terrorism: Causes, Processes, and Consequences*. Routledge, p.53.

¹²³ Kinsella, H. (2011). *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian*. Cornell University Press.

¹²⁴ Article 1, International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: <https://www.refworld.org/docid/3ae6b37f40.html>

And yet, despite their contested nature, claims of exceptionality have consistently shaped the discourse on terrorism, especially at international level, and have arguable become embedded in international law.

« *Reaffirming (...) that such acts, like any act of international terrorism, constitute a threat to international peace and security,*

(...)

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”¹²⁵

According to Tilly, terrorism has thus become a term that serves political and normative ends much better than it manages to describe a coherent reality or consistent phenomenon.¹²⁶ In other words, the process of securitizing terrorism, by turning it into a homogenous phenomenon whose core is identified as an existential threat to the State, has been completed.

The present research focuses on counterterrorism practices by the justice system in Niger, it is thus beyond its scope to investigate the organizational structure, history and practices of any of the terrorist entities operating within Niger’s border. Nonetheless, since the quick rise of the counterterrorism agenda is linked to the growing intensity of the threat posed by Boko Haram specifically (further explored in chapter III), it is worth mentioning how securitization of terrorism has also shaped reactions to Boko Haram. On the one hand, scholars have provided rich accounts of the complex history of Boko Haram insurgency, with academic production blossoming with the rising global visibility of the group after Chibok attacks. Various authors have highlighted the specificity of Boko Haram, providing accounts of its historical and doctrinal ties to the Sokoto caliphate, its fragmented structure,¹²⁷ its root causes in the interaction of political, socio-economic and religious factors anchored to the Nigerian reality,¹²⁸ as well as the effects of the Nigerian counterterrorism tactics in growing “radicalisation” within the group.¹²⁹ At the same time, however, the transnational implications of Boko Haram actions

¹²⁵ UN Security Council (28 September 2001), *Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]*, S/RES/1373 (2001), available at: <https://www.refworld.org/docid/3c4e94552a.html>

¹²⁶ Tilly, C. (2004). Terror, Terrorism, Terrorists. *Sociological Theory*, 22(1), 5–13.

¹²⁷ Pérouse de Montclos, M.-A. (2015). Boko Haram, une exception dans la mouvance djihadiste ? *Politique étrangère*, 2, 147–158.

¹²⁸ Akinola, O. (2015). Boko Haram Insurgency in Nigeria: Between Islamic Fundamentalism, Politics, and Poverty. *African Security*, 8(1), 1–29.

¹²⁹ Weeraratne, S. (2017). Theorizing the Expansion of the Boko Haram Insurgency in Nigeria. *Terrorism and Political Violence*, 29(4), 610–634.

are increasingly explored¹³⁰, highlighting the group's place in a terrorist wave of Islamic fundamentalism. This element, in and of itself, enhances the perception of a coherent terrorist phenomenon at global level. Furthermore, and perhaps even more significantly in terms of securitization process, the Boko Haram threat is increasingly analysed as an existential one to the State¹³¹, initially mainly addressed to Nigeria and progressively expanding to the entire Lake Chad basin. While the direct opposition between the group and the State is undeniable, it is worth asking to what extent the securitization of terrorism contributed to outshine other structural threats to the State's stability. The following chapters will argue that this perception was significant in shaping the nature of counterterrorism responses in Niger.

Finally, it is also argued here that one of the most concerning consequences of the *exceptionalization* of terrorism is the creation of the terrorist as a “*distinct, coherent class of actors (terrorists) who specialise in a unitary form of political action (terror)*”.¹³² The creation of the terrorist, often characterised as evil, pathological, and irrational¹³³ introduces thus a common enemy, and serves as a powerful delegitimising tool, with important consequences of the elaboration of counterterrorism strategies.

9. THE STATE, SOVEREIGNTY, AND ITS LIMITS

Having looked into the construct of terrorism as an exceptional threat, it is now crucial to understand what is at stake for the State when opposing it. If Schmitt theorises that the sovereign creates the exception, it is mostly the reverse process which is questioned here: how can the creation of an exception influence the State's claims to sovereignty? Yet, before addressing this question, it is necessary to focus on what are the interests of the State in terms of affirming its sovereignty.

First, the concept of sovereignty itself is analysed as a social construct, and identified as separate, although connected to statehood. Then, in light of the focus on Niger, an overview of

¹³⁰ See for instance Solomon, H. (2015). *Terrorism and Counter-Terrorism in Africa: Fighting Insurgency from Al Shabaab, Ansar Dine and Boko Haram* (2015th edition). Palgrave Macmillan; Onapajo, H., & Uzodike, U. O. (2012). Boko Haram terrorism in Nigeria. *African Security Review*, 21(3), 24–39.

¹³¹ Agbibo, D. (2013). The Ongoing Campaign of Terror in Nigeria: Boko Haram versus the State. *Stability: International Journal of Security and Development*, 2(3), Art. 52; Onapajo, H. (2017). Has Nigeria Defeated Boko Haram? An Appraisal of the Counter-Terrorism Approach under the Buhari Administration. *Strategic Analysis*, 41(1), 61–73.

¹³² Tilly, C. (2004). Terror, Terrorism, Terrorists. *Sociological Theory*, 22(1), 5–13, p.5.

¹³³ Stampnitzky, L. (2013). *Disciplining terror: How experts invented 'terrorism'*. Cambridge University Press, p.50.

the literature concerning “weak” States, their limited statehood, and the processes through which they negotiate sovereignty is proposed.

A CONCEPTUALISATION OF STATE SOVEREIGNTY AND ITS KEY ATTRIBUTES

State sovereignty is an elusive and historically contested idea, which has animated scholarly debates of international relations and legal theory for centuries. Classical conceptualisations have addressed the nature of sovereignty as absolute and/or supreme power, a unitary basis for statehood.¹³⁴ More recently, and especially following the end of the cold war, scholars have analysed the growing challenges to a supposed ‘traditional’ notion of Westphalian sovereignty, conceived as innate, indivisible and based on non-interventionism¹³⁵. One of such challenges concerns the fundamental ‘locus’ of sovereignty and whether it is located in the State or in the people and the relationship between constitutive and constituted power.¹³⁶ Others have examined its changing nature as new actors at international and subnational level gain power and challenge the supremacy of the State, characterising such processes either as erosion or diffusion of sovereignty.¹³⁷ Finally, the temporal validity of sovereignty has been questioned, opposing the notion of sovereignty as a perennial feature of international relations, with the idea that sovereignty is merely the name of a contingent political unity.¹³⁸

Without going into detail into the multiple theoretical conceptions of sovereignty, it is necessary here to provide a brief analysis of the lenses through which sovereignty is conceptualised in this research, before delving into its relationship with terrorism and counterterrorism. This work embraces the notion of sovereignty as a social construct, as expounded by Biersteker and Weber. In addition, it considers useful to clarify both external and internal dimensions of sovereignty.

In *Sovereignty as a social construct*, Biersteker and Weber oppose the prevailing schools of thought concerned with sovereignty to argue for a focus on its construction. In their view, realist and neorealist schools replicate and assume sovereignty, and manage to explain its durability,

¹³⁴ See Bodin’s theorization of indivisible sovereignty as “the absolute and perpetual power of a commonwealth” or Hobbes’ necessity for the social contract originating the Leviathan and end the state of nature in : Shinoda, H. (2000). *Re-examining Sovereignty: From Classical Theory to the Global Age*. Springer.

¹³⁵ Glanville, L. (2013). The Myth of ‘Traditional’ Sovereignty. *International Studies Quarterly*, 57(1), 79–90; Lake, D. A. (2003). The New Sovereignty in International Relations1. *International Studies Review*, 5(3), 303–323.

¹³⁶ Walker, N. (2003). *Sovereignty in Transition*. Hart Publishing.

¹³⁷ Ilgen, T. L. (2003). *Reconfigured Sovereignty: Multi-Layered Governance in the Global Age*. Ashgate Publishing Limited.

¹³⁸ Beaulac, S. (2004). *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia*. Brill Nijhoff.

but fail to account for its emergence, while interdependence and dependence studies are more useful in terms of analysis of emerging challenges to the State as a locus of authority and power, than to tackle conceptually sovereignty. In Biersterker and Weber's view, instead, sovereignty is understood as "*the production of a normative conception that links authority, territory, population (society, nation) and recognition in a unique way and in a particular place (the state).*"¹³⁹ Their contribution highlights three aspects that are crucial to my analysis.

First, they argue for a separate investigation of State and sovereignty. While the State is understood as a geographically located *agent* (whose components are to be found in territory, population and authority), sovereignty is conceived as the recognition of the State's authority to exercise power within or outside its borders. As such, it becomes, a discourse, or an institution, the *structure* of the State agent. Separating the two concepts allows for an analysis of their relationship as a mutually constitutive and ever changing one. In this view, "*states are constantly negotiating their sovereignty*".¹⁴⁰

Second, they bring the issue of recognition to the centre of the stage. They go beyond acknowledging the socially constructed nature of recognition and make it a constitutive component of sovereignty. Accordingly, the State's authority to exercise power is not merely anchored to an essential and natural notion of sovereignty but has to be built through its legitimisation and it changes with it: "*we suggest that as the prescriptions for sovereign recognition changes, so does the meaning of sovereignty*".¹⁴¹ Through the emphasis on recognition, Biersterker and Weber account for the changing nature of the meaning of sovereignty.

Finally, because of the relevance of recognition in the construction of the sovereign State, they direct their interest to the practices through which the State can access recognition and therefore sovereignty. In doing so, they open the space for the fundamental question behind the present research: what shall States do to be recognised as sovereign?

At the same time, in order to answer such question, it is important to recognise that two different dimensions are inherent in the notion of sovereignty: an external one, which characterises the

¹³⁹ Biersterker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press, p.3.

¹⁴⁰ Biersterker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press, p.11.

¹⁴¹ Biersterker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press, p. 13.

State's relationships to other States and the legitimation of its authority in the international realm, and an internal one, related to the State's legitimate authority within its own borders. The two dimensions inevitably coexist to constitute sovereignty. As Jackson put it "*Sovereign States are Janus-faced: they simultaneously face inward at the population of the country, and outward at other countries. Sovereign governments, by their very organization and orientation, are obliged to face in both directions, to frame foreign policies as well as domestic policies in order to carry out their responsibilities. That is because supremacy and independence are not two separate characteristics: they are two facets of one overall characteristic: sovereignty.*"¹⁴²

As pointed out by Jackson, the recognition of sovereign quality is constructed and manifested differently in the two dimensions: through independence in international relations, and through supremacy at domestic level.¹⁴³ The notion of independence entails the autonomy of the State from other States, and at the same time its equality to them. Conversely, supremacy requires political authority over a specific territory and people. According to Bodin's view, the sovereign's ultimate prerogative is that of being the primary and ultimate authority to decide what the law is. Krasner, in his conceptualisation of the four uses of the term "sovereignty", brings the notion of domestic a bit further, by including in it not only the element of authority but also that of effective control.¹⁴⁴ In other words, the State exercising domestic sovereignty is recognised as having both the capacity to set rules and that of enforcing them in a legitimised manner. Both these dimensions are crucial in the operationalization of this research: they represent the key attributes of sovereignty that the State of Niger has put to the test in the design and implementation of its criminal justice counterterrorism agenda.

LIMITED STATEHOOD: EURO-CENTRIC AND NORMATIVE BIAS IN THE CONCEPTUALISATION OF THE STATE

While Biersterker and Weber call for the separation of State and sovereignty as objects of analysis, the traditional debates tend to conflate the two. In doing so, a specific configuration of the State is assumed which is anchored to a strictly euro-centric conception of "consolidated statehood"¹⁴⁵. In this view, States have the inherent capacity to enact rules to which they can expect obedience, and exercise control through the monopoly of legitimate force, in a Weberian

¹⁴² Jackson, R. (2007b). *Sovereignty: The Evolution of an Idea*. Polity, p.11.

¹⁴³ Fowler, M. R. (1995). *Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*. Pennsylvania State University Press.

¹⁴⁴ Krasner, S. D. (1999). *Sovereignty: Organized Hypocrisy*. Princeton University Press, p. 10-12.

¹⁴⁵ Börzel, T. A., & Risse, T. (2018). *Conceptual Framework: Fostering Resilience in Areas of Limited Statehood and Contested Orders*. Freie Universität Berlin.

institutional conceptualisation. Alternatively, statehood is measured on the basis of the functions performed by the State, and ultimately the capacity for the provision of public goods.

These approaches have powerful repercussions on the analysis of States beyond the western nation-state model, as clearly shown by the literature concerning statehood in Africa. The first issue with academic production over capacities of States in Africa, as pointed out by Risse, is that they confuse definitional and empirical questions of statehood. Indeed, they fail to distinguish between the constitutive components of the State (clearly defined territory, population, and power to produce rules and enforce them), which define it as a State, and the question of its ability to produce public goods, such as the security of its citizens, which is an empirical question.¹⁴⁶ The second concern lies in their “*pathological approach to State institutions in Africa*”¹⁴⁷, which results in the abundant academic production on failing, fragile, weak, or quasi- States. One crucial fallacy of such approaches is the assumption that States that fail to measure to the ideal-type notion of consolidated statehood are destined to collapse, which simply does not seem to be the case in most scenarios.

Conversely, Jackson and Rosberg provide an interesting analysis of the persistence of weak states in Africa despite their lack of empirical capacity to exercise effective control over a defined population and territory.¹⁴⁸ Although according to the measurement of their institutions and functions these States would simply not qualify as States at all times, they have not disappeared, nor have they ceased to enter into relations with other States. In other words, the authors argue, they have retained their juridical attributes.

In order to overcome this inherent bias, Risse suggests a focus on governance in areas of limited statehood.¹⁴⁹ He proposes to define limited statehood as “*those parts of a country in which central authorities (governments) lack the ability to implement and enforce rules and decisions or in which the legitimate monopoly over the means of violence is lacking, at least temporarily*”¹⁵⁰, although they remain within the national boundaries of an internationally recognised State. Such definition is helpful insofar as it accepts and provides a descriptive

¹⁴⁶ Risse, T. (Ed.). (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*. Columbia University Press, p. 4.

¹⁴⁷ Hagmann, T., & Péclard, D. (2010). Negotiating Statehood: Dynamics of Power and Domination in Africa. *Development and Change*, 41(4), 539–562, p. 541.

¹⁴⁸ Jackson, R. H., & Rosberg, C. G. (1982). Why Africa’s Weak States Persist: The Empirical and the Juridical in Statehood. *World Politics*, 35(1), 1–24.

¹⁴⁹ Risse, T. (Ed.). (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*. Columbia University Press.

¹⁵⁰ Risse, T. (Ed.). (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*. Columbia University Press, p.4.

explanation of the constitutive components of the State as existing according to different degrees. At the same time, this notion refuses to associate either statehood or limited statehood with a necessary temporal condition: limited statehood in particular is not bound to disappear nor to lead to dissolution of the State, and that is because it does not necessarily lead to the disappearance of norms nor public goods, which can be provided by other agents. He then proposes to focus on governance as “*the various institutionalized modes of social coordination to produce and implement collectively binding rules, or to provide collective goods*”.¹⁵¹ In this view, the State is only one of the institutionalized modes of social coordination that can produce rules or provide public goods. The choice of governance as an object of analysis promotes the consideration of other non-State actors, and of other, non-hierarchical, modes of social coordination in constructing the empirical attributes of the State. Risse’s approach, while useful to overcome an essentialist view of the State, does not, however, provide clarity over the relationship between statehood and sovereignty, as it seems to merely assume that, on the internal dimension, limited statehood goes hand in hand with limited sovereignty.

More useful in this sense is the heuristic approach proposed by Hagmann and Péclard, who recall the attention on the negotiation and mutually constructive processes between State and sovereign qualities.¹⁵² They promote a dynamic analysis of how statehood is negotiated, based on the understanding of such processes as undetermined, and on the attention to empirical attributes, rather than juridical qualities of States. This brings back the focus on the investigation and analysis of practices, already emphasized by Biersterker and Weber, and that also lies at the core of *real governance*. Borrowed from Olivier de Sardan, the concept of real governance stands in direct opposition to the Western fixation on good governance, calling attention to the real mechanisms through which public goods are delivered.¹⁵³ On this basis, Hagmann and Péclard bring forward three especially relevant areas of interest for the study of the processes to negotiate statehood: actors (together with their resources and symbolic repertoires); negotiation arenas; objects of negotiation. Citizens’ security is recognised as one the key objects of negotiation of statehood in Africa.¹⁵⁴

¹⁵¹ Risse, T. (Ed.). (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*. Columbia University Press, p. 9.

¹⁵² Hagmann, T., & Péclard, D. (2010). Negotiating Statehood: Dynamics of Power and Domination in Africa. *Development and Change*, 41(4), 539–562.

¹⁵³ Olivier De Sardan, J.-P. (2008). *Researching the practical norms of real governance in Africa*. APPP Discussion paper No. 5.

¹⁵⁴ Hagmann, T., & Péclard, D. (2010). Negotiating Statehood: Dynamics of Power and Domination in Africa. *Development and Change*, 41(4), 539–562, p. 552-553.

Statehood and sovereignty in Niger have faced multiple limitations since independence, as political control and provision of public goods have traditionally been shared (and competed for) by local powers and multiple coups have undermined governmental continuity and peaceful transfer of powers, especially following the introduction of multi-party system in 1990.¹⁵⁵ Chapter III discusses how the inception of the Seventh Republic inaugurates a period of statehood in transition, stressing the importance of the negotiation of sovereign attributes. My research suggests that with the *exceptionalisation* of terrorism, counterterrorism practices have become a central object of sovereignty negotiation, including in Niger.

WHAT IS AT STAKE: THE RELATIONSHIP BETWEEN EXCEPTIONAL THREAT AND SOVEREIGNTY

Internal or domestic sovereignty is the *structure* of State powers, meaning the recognition of State's authority to exercise power. The exception, on the other hand, is characterised as an existential threat to the State, which is unlike any other, and therefore defies codification. This research aims to answer the underlying question of the relationship between the two, and it does so by reversing Schmitt's position. Rather than focusing on how the sovereign creates the exception, it investigates how the exception plays a part in constructing claims of sovereignty.

One way of looking at this relationship would be the purely nominal approach that Schmitt himself uses. According to his *Political Theology*, the sovereign creates the exception by exercising pure decision-making power.¹⁵⁶ In the same way, then, it is the exception coming into existence that proves that sovereign quality by demonstrating that the sovereign can "exceed ordinary legal prescriptions" and not only act outside legal boundaries, but does so legitimately. In this light, conferring exceptionality to terrorism through political discourse and action already proves sovereignty insofar as it shows the ability of the State to create the exception. In an optic of negotiation of identities and sense of belonging, it also shows the ability of the sovereign to draw the boundaries of its polity, by creating the enemy. It is worth noting that, despite the growing skepticism towards sovereignty as a purely State-centric attribute, the ability to create and define terrorism and has been so far steadily held by States only. According to this approach, terrorism-related norms and policies, by themselves, prove the sovereign claim of the State.

¹⁵⁵ Olivier De Sardan, J.-P., & Alou, T. M. (2009). *Les pouvoirs locaux au Niger*. KARTHALA Editions; Grégoire, E., & Olivier de Sardan, J.-P. (1996). *Niger: Le pire a été évité, mais demain ?*; Grégoire, E. (1994). *Démocratie, état et milieux d'affaires au Niger*. *Politique Africaine* 56, 93 – 107.

¹⁵⁶ Schmitt, C. (2010). *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press.

However, it is contended here that the creation of the exception is not sufficient to provide a thorough account of the mutually constitutive relationship between sovereignty and exceptional threats. Rather, this construction necessarily goes through the negotiation of the key attributes of sovereignty: the ability to produce and enforce binding norms and that of providing public goods. This is not proven by defining terrorism, but rather in reacting to it. With the growing conditionality of sovereignty, this research aims to address the practices through which States negotiate their sovereignty, in the context of counterterrorism. To do so, it will rely on securitization theory and its contribution to the understanding of the State's interests as a securitizing actor.

10. SECURITIZATION AND THE QUESTION OF SUCCESS: A FRAMEWORK TO ANALYSE COUNTERTERRORISM IN NIGER

In its final part, this chapter moves to analyse the core of this research: the counterterrorism agenda in action, becoming security practices, adopted, questioned and transformed by State agents. And how these practices contribute to the negotiation of the constitutive attributes of sovereignty: normative power and public safety. This is, in a way, a question of “success” of justice approaches to counterterrorism.

To explore it, I will first consider securitization approaches, looking into how the Copenhagen School dissected the concept of “security” and what it contributed to the analysis not only of the existential threat, but also of the State as a securitizing agent. Then, I will focus on different approaches to securitizations' success, providing the framework for its theoretical application to the following chapters.

FROM THE EXCEPTIONAL THREAT TO EXCEPTIONAL RESPONSES: SECURITIZATION

A discussion of terrorism and counterterrorism would be incomplete without exploring the concept of securitization. Emerging in the constructivist approach to international relations of the Copenhagen School, securitization theory originates in a certain uneasiness to traditional understanding of security as “*a reality prior to language*”.¹⁵⁷ Addressing securitization, instead, as a distinctive mode of politicization, Buzan and Wæver propose to focus on the *construction*

¹⁵⁷ Wæver, O. “Securitization and Desecuritization” in Lipschutz, R. D. (Ed.). (1995). *On Security* Columbia University Press, p. 46

of security or the modality through which issues are securitized.¹⁵⁸ In their view, then, securitization is the process through which issues are presented as exceptional and existential threats, thus requiring, and at the same time justifying, responses that are out of the ordinary.¹⁵⁹

But how does securitization come to be? In its most essentialist propositions, the Copenhagen School argues that the act of qualifying a security threat as existential and thus exceptional, is enough for the completion of the securitization process¹⁶⁰. The role of facilitating conditions is also explored: the authority of securitizing actor and the qualities of the threat are recognised as factors that can contribute to securitization.¹⁶¹ Nonetheless, this approach focuses prominently on the intrinsic power within the speech act, whereby speaking the threat can be equated with making the threat. It is also a perspective of Schmittian reminiscence, whereby the sovereign (the most prominent securitizing agent) is, alone, the creator of the exception because he masters its definition.

In a more constructivist approach, instead, the role of the audience becomes crucial to the outcome of securitization¹⁶². In this view, the audience has to accept the elevation of the threat to exceptionality for securitization to be successful. By this standard, then, securitization stops being an *act* to become a *process*, characterised by intersubjectivity as it is negotiated among multiple actors.¹⁶³

Regardless of the theoretical variations in qualifying and analysing securitization in action, its constitutive qualities remain unchallenged and identify the foundations of the present research: i) exceptionality is embedded in the threat; ii) the exceptionality of the threat is reflected in the exceptionality of the response, which is thus justified; iii) securitization rests on the fundamental dichotomy between the enemy and the State. Indeed, it is in this core opposition that the process of legitimisation that characterises securitization takes place. As Wæver notes: “*At the heart of the concept (of security) we still find something to do with defense and the State. As a result, addressing an issue in security terms still evokes an image of threat-defense,*

¹⁵⁸ Buzan, B., Waever, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers.

¹⁵⁹ Buzan, B., Waever, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers.

¹⁶⁰ Stritzel, H. (2007). Towards a Theory of Securitization: Copenhagen and Beyond. *European Journal of International Relations - EUR J INT RELAT*, 13, 357–38; 359-360.

¹⁶¹ Buzan, B., Waever, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers, p.32 – 33;

¹⁶² Stritzel, H. (2007). Towards a Theory of Securitization: Copenhagen and Beyond. *European Journal of International Relations - EUR J INT RELAT*, 13, 357–83.

¹⁶³ Stritzel, H. (2007). Towards a Theory of Securitization: Copenhagen and Beyond. *European Journal of International Relations - EUR J INT RELAT*, 13, 357–83; p. 363.

allocating to the state an important role in addressing it."¹⁶⁴ In a way then, the legitimisation of the State as the main securitizing actor is inherent in the securitization process. Or is it?

This chapter argues that the relationship between securitization and the State is not necessarily advantageous. To understand why, it is necessary to look into securitization's success.

SECURITIZATION WITHOUT SOVEREIGNTY?

The question of success of securitization approaches is underexplored in recent literature.¹⁶⁵ When it has been addressed, academic focus has been placed on what determines securitization's 'success' as a distinct form of politicization, rather than in relation to its presumed goals, i.e. containing the exceptional threat. This debate is particularly interesting as it questions the place of exceptionality in defining securitization and reveals inconsistencies in the Copenhagen School's treatment of the issue.

According to the Copenhagen School, success of securitization is to be found in the adoption of exceptional measures. Buzan and Waever argue that "*a successful securitization has three components (or steps): existential threat, emergency action, and effects on interunit relations by breaking free of rules*"¹⁶⁶, and go on to stress that "*the distinguishing feature of securitization is a specific rhetorical structure*"¹⁶⁷ (emphasis added) which associates the emergency measures to the primal need to survive the existential threat. Here, the characterisation of such emergency measures as exceptional is still *constitutive* of securitization's success. In other words, when exceptional measures are not adopted, securitization is not taking place, mere politicization is.

A number of authors have put forward relevant criticisms of such prominence of exceptional responses. Saltner, for instance, posits that the focus on exceptional measures leads to the inability to capture, conceptualise and study instances where securitization moves have failed and demands more attention for the audience's discretionary power to reject security arguments.¹⁶⁸ Floyd, instead, argues that the Copenhagen School's insistence on exceptional measures prevents securitization theory from capturing a variety of circumstances in which

¹⁶⁴ Wæver, O. "Securitization and Desecuritization" in Lipschutz, R. D. (Ed.). (1995). *On Security* Columbia University Press, p.46.

¹⁶⁵ Floyd, R. (2016). Extraordinary or ordinary emergency measures: What, and who, defines the 'success' of securitization? *Cambridge Review of International Affairs*, 29(2), 677–694, p. 678.

¹⁶⁶ Buzan, B., Waever, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers, p. 26

¹⁶⁷ Ibidem.

¹⁶⁸ Salter, M. B. (2011), 'When Securitization Fails: The Hard Case of Counter-terrorism Programs', in T. Balzacq (ed.), *Securitization Theory: How Security Problems Emerge and Dissolve*, London: Routledge, 116–32.

threats that have been securitized are addressed through ordinary politics, which are increasingly common.¹⁶⁹ To overcome this crucial shortcoming, she proposes a revision of the theory whereby the focus is moved to the “*the causal connection between the securitizing move (the speech act) and the action taken*”, regardless of its exceptional nature.¹⁷⁰ The tension between exceptional and ordinary counterterrorism measures is integral to the analysis of security practices in Niger, where considerable normative intervention in counterterrorism practices has often taken place through ordinary legislative production, only to be considerably impacted by the adoption and perennialization of the State of emergency.

However, it is argued here that by stressing the importance of exceptional responses to the threat, the Copenhagen School has identified a crucial aspect of securitization: its direct objective, containing or defeating the threat, is less important than the indirect objective, which is to serve the interests of the securitizing actor. Ultimately, then, this research contends that the success of securitization should not be divorced from the success of the securitized practices that it generates. However, they should be assessed in light of the securitizing actor’s quest for sovereignty, rather than merely their capacity to defeat the securitized threat.

Indeed, by adopting a constructivist approach, securitization theory recognises that the existential threat does not pre-exist its definition as such by the securitizing actor. Then, constructing the threat must serve the securitizing actor’s interests. In particular, securitization will facilitate the State’s pursuit of sovereign powers by removing some of the obstacles of traditional democratic law- and policy-making through the legitimation of exceptional responses. Wæver identified and clarified this process by showing how securitization turns the threat into a test of the sovereign capacities:

“During war, a State is confronted with a test of will --testing whether it is still a sovereign unit--in which the ability to fend off a challenge is the criterion for forcing the others to acknowledge its sovereignty and identity as a state.”¹⁷¹

By employing the rhetoric of securitization, then, the State applies this war-like conditions beyond the strict boundaries of conflict, freeing itself from the limitations of traditional politicization nonetheless. This tactic entails especially high stakes in contexts of limited

¹⁶⁹ Floyd, R. (2016). Extraordinary or ordinary emergency measures: What, and who, defines the ‘success’ of securitization? *Cambridge Review of International Affairs*, 29(2), 677–694.

¹⁷⁰ Floyd, R. (2016). Extraordinary or ordinary emergency measures: What, and who, defines the ‘success’ of securitization? *Cambridge Review of International Affairs*, 29(2), 677–694, p. 683.

¹⁷¹ Wæver, O. “Securitization and Desecuritization” in Lipschutz, R. D. (Ed.). (1995). *On Security* Columbia University Press, p. 51.

statehood. Here, on the one hand, the State has especially high interests in proving its sovereign qualities, as they are consistently challenged. On the other hand, adhering to the democratic tradition of ordinary politics is also a key factor in legitimisation processes¹⁷². Accordingly, the focus of my analysis will be placed on the success of counterterrorism practices', whether exceptional or not, in contributing to the State's interests to claim sovereignty.

PRODUCING NORMS AND SECURITY: STATE PERFORMANCE TO THE TEST IN SECURITIZED SPACES

The present research sets out to explore how the State is put to the test in designing and enacting counterterrorism justice policies, by analysing two key sovereign attributes: normative capacity and preservation (or restoration) of public safety. In other words, the question of counterterrorism's success in promoting sovereignty hinges on the State's *performance* in enacting such policies.

I would argue that the notion of performance allows this research to capture an intrinsic duality that characterises State action in a securitized space.

In its most pragmatic meaning, an analysis of State performance is concerned with evaluating the ability to fulfil crucial tasks, here the capacity to design and enforce rules and that of producing security. These tasks are not mere *functions*, but rather they necessarily involve precise objectives, that speak to the State's negotiation of sovereignty. They represent what Jackson identified as the empirical aspects of statehood¹⁷³ in the ability to achieve a specific goal that serves the polity. In this context, the notion of performance, that recalls measurements of economic effectiveness in the private sector, is transposed to the public sphere to question governance practices and their ability to meet key objectives of State action. In doing so, it provides an immediate measure of success. Through these lenses, investigating State performance offers a direct operationalisation of that *effective control* that constitutes a direct claim to sovereignty¹⁷⁴.

Yet the concept of *performance* also evokes the idea of a role enacted on a stage. This view is ingrained in this research, reminding us that the success or failure of the State in claiming sovereignty cannot be measured through objective metrics only, but ultimately depends on its

¹⁷² See "Niger's VII Republic: Justice and Democratic Reboot", Chapter III.

¹⁷³ Jackson, R. H., & Rosberg, C. G. (1982). Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood. *World Politics*, 35(1), 1–24.

¹⁷⁴ Krasner, S. D. (1999). *Sovereignty: Organized Hypocrisy*. Princeton University Press, p. 10-12.

audience's *perception*. Indeed, the final result of the State's performance in fighting terrorism would be found in its growing *legitimation* and *recognition* in a specific role: the provider of law and order, the defender of public safety.

Throughout the forthcoming analysis, the dual nature of State performance is taken into account. The specific objectives that are inherent in the normative action of the State and in its interventions to produce security are rendered explicit and examined. At the same time, they are addressed as key attributes to the role of the State as a sovereign actor, crucial to its internal supremacy, and they are questioned through the perspective of relevant audiences.

First, the capacity to produce binding norms is inherent in the State's capacity to rule, including over the exception. Chapter IV establishes the criteria to determine when normative production related to terrorism can be deemed successful in strengthening sovereignty. The examination of counterterrorism norms in Niger is essential to understanding how the terrorist threat is constructed in its exceptionality: how its exceptional character is signaled, defined and outlawed. Yet, more importantly, normative production is also where exceptional norms are adopted and justified, or rejected in favour of ordinary legislation.

In simple terms, chapter IV will ask: are counterterrorism norms produced in Niger binding in practice? Are they regarded as unbreakable by public authorities? If so, securitizing terrorism will have contributed to the State's quest for sovereign power by contributing to its capacity to rule.

To answer the question, this research borrows from the tradition of legal studies and rule of law theory to investigate to what extent these norms adhere to the formal requirements of "lawfulness".¹⁷⁵ Then, it investigates the practice of counterterrorism norms' implementation, by focusing on the constructive role of State agents. Through what codes and repertoires is the exception characterised as illegitimate? How do State officials (here justice officials) adhere to, negotiate, and legitimise the State's authority to rule over the exception? To what extent do they espouse counterterrorism's tenants and to what extent do they question them or transform them in their application? And are exceptional responses an advantage or an obstacle in the pursuit of sovereignty through normative power? It is argued here that State's claims to sovereignty will be constructed through institutional conduct, certainty of the law, and

¹⁷⁵ Bedner, A. (2010) An Elementary Approach to the Rule of Law. *Hague Journal on the Rule of Law* 2,1: 48–74.

compliance with key constitutional principles, including due process guarantees, which will be analysed through the practices and resistances of public officials.

Interestingly, such analysis unearths the distinction between “ordinary” counterterrorism legislation and the exceptional measures, unveiling a persistent tension between two different modes of addressing the threat and perhaps different embodiments of exceptional security practices.

Then, domestic sovereignty is inevitably negotiated through the ability to provide the ultimate public good: citizens’ security, albeit in partnership supra- and sub-national actors. The Niger State’s pursuit of order and stabilisation through counterterrorism will be investigated through the intervention of its justice sector, rather than military intervention, and will be explored through two key concepts.

In chapter V, I chose to focus on “accountability” among the possible objectives of the criminal justice chain, as it was the most responsive to Nigerien justice officials’ understanding and conceptualisation of their goals when pursuing terrorists. By focusing on procedural fairness and on a direct connection between responsibility and sanction, the success of accountability processes is significant to the process of constructing sovereignty insofar as it demonstrates the State’s ability to implement the laws and to produce security by punishing terrorists.

In chapter VI, I examined the relevance of rehabilitative intervention in their potential to support stabilisation. Borrowing from the criminological tradition, this chapter proposes an operationalization of “rehabilitation” that is instrumental to assessing its success in the Nigerien context. This operationalization comprises three levels: individual, social and systemic.¹⁷⁶

Both chapters pursue a composite understanding of what determines “success” in a constructivist approach. For this reason, they strive to give voice to two groups that are essential to the acceptance of securitization’s exceptionality as well as to the recognition and legitimisation of sovereign power: the agents of the State, here identified with the justice actors, and the audience: identified respectively with the audience of terrorist trials, and with populations that are the objects of stabilisation efforts: those most affected by terrorist violence

¹⁷⁶ Wright, K. A., & Cesar, G. T. (2013). Toward a More Complete Model of Offender Reintegration: Linking the Individual-, Community-, and System-Level Components of Recidivism. *Victims & Offenders*, 8(4), 373–398.
Shinkfield, A. J., & Graffam, J. (2009). Community Reintegration of Ex-Prisoners: Type and Degree of Change in Variables Influencing Successful Reintegration. *International Journal of Offender Therapy and Comparative Criminology*, 53(1), 29–42.

and counterterrorism policies. In addition, this research pays specific attention to the voice of the securitized agents, meaning those individuals that are directly affected by the label of “terrorist” and the otherness produced by the securitization process. The experiences of those persons accused, imprisoned and tried for terrorism-related crimes, as well as those of persons who have defected Boko Haram have been reflected, both directly and indirectly, throughout the analysis.

Here, the research reveals how opportunities for restoring public safety are deeply impacted by the securitized context, which in Niger also entails the deployment of military power against terrorist groups. On the one hand, ongoing insecurity is, in and of itself, a notable challenge to the regaining order and stability. This is especially true in the Nigerien counterterrorism situation, that, differently from a traditional conflict, has seen waves of increasing and decreasing violence but never a complete cessation of hostilities. On the other hand, the exceptional measures that stemmed from securitized approaches also affect both State agents and population’s abilities to attain stabilisation and security. Chapter V will examine how the justice system’s capacity to achieve alleged terrorists’ accountability has been undercut by the arrest and investigation practices of the State of emergency, while chapter VI will explore the aftermath of exceptional counterterrorism measures on the socio-economic situation of the most affected regions.

Undoubtedly, both the dimension of normative production and that of public safety’s pursuit require a thorough analysis of counterterrorism policies: the State’s responses to the exceptional threat. Will their exceptionality have contributed to or detracted from the process of negotiating sovereignty?

NORMATIVE DILEMMA AND RESPONSIBILITY OF THE SECURITY ANALYST

In almost four decades of academic relevance, securitization theory has not been exempted from criticism. Of particular interest for this research is the normative dilemma that characterises security studies, as presented by Huysmans. He argues that “*speaking and writing about security is never innocent*”¹⁷⁷, as the security analyst inevitably engages with the assumptions and attributes of the securitizing process when discussing issues that are securitized. Indeed, the normative dilemma emerges from the very understanding of the security

¹⁷⁷ Huysmans, J. (2002). Defining Social Constructivism in Security Studies: The Normative Dilemma of Writing Security. *Alternatives*, 27(1_suppl), 41–62, p. 43.

speech act as an intersubjective phenomenon, a social reality that is constituted through discourse. By discussing exceptionality as a defining feature of terrorism, this study mobilises the same repertoires of securitizing actors, even while questioning them.

While this chapter has attempted at containing this normative trap by overtly discussing how connotations of exceptionality have been associated with terrorism regardless of their accuracy, this strategy is only partially effective, as it does not provide an alternative conceptualisation of terrorism, except for suggesting parallels with other forms of collective violence such as crime and war.

This study has also chosen to interrogate not only the perspective of the securitizing actor, the State, and its agents, but also to capture the view of the “audience” to counterterrorism efforts: the most affected population. While limited by issues of access, the perspective of audience is explored both in chapter V, discussing the population reactions to the trials, and in chapter VI, where the communities’ views on rehabilitation and reintegration of alleged terrorists and of the defectors are examined.

Most importantly, a conscious choice was made to reflect the voices of those who have been made object of securitizing practices in Niger: the alleged terrorists. By making space for these experiences, this research aims to question the consequences of the power structures that are inherent in security and strives to provide a more inclusive perspective to securitization theory.¹⁷⁸

11. RESEARCH VALUE AND LIMITATIONS

The originality of my research lies in the key relationship it explores, in its focus on the criminal justice chain and in its choice of the Niger case-study.

First, while the Copenhagen School explains how securitization involves freedom from rules for the State¹⁷⁹, which entails sovereignty gains through exceptionality of counterterrorism measures, empirical tests of whether those gains have held true in practice are quite rare.¹⁸⁰ In

¹⁷⁸ Charrett, C. (2009). *A Critical Application of Securitization Theory: Overcoming the Normative Dilemma of Writing Security*. Working Paper No. 2009/7. International Catalan Institute for Peace.

¹⁷⁹ Buzan, B., Waever, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers.

¹⁸⁰ Floyd, R. (2016). Extraordinary or ordinary emergency measures: What, and who, defines the ‘success’ of securitization? *Cambridge Review of International Affairs*, 29(2), 677–694, p.679.

truth, positive outcomes for the State through securitization are generally presumed, rather than proven.

Second, when it comes to the relationship between justice and terrorism, two aspects appear prevalent in past and current research trends. One is interrogating the moral and ethical basis for the criminalisation of terrorism as a form of political violence.¹⁸¹ The questions evoked by scholars in this area are extremely interesting and intimately related with terrorism's definition and its construct, as questioned above. The other explores how counterterrorism impacts justice systems, by examining the controversial relations between the security agenda and constitutional values and human rights.¹⁸² This is especially true for the impact on due process guarantees, and for counterterrorism agendas that rely heavily on exceptional measures. It is quite rare, however, to find contributions that address how counterterrorism shapes that way justice operates, both in terms of normative production and in the practice of conducting investigations, arrests and trials. This is the quest undertaken by the following chapters.

Finally, it is undeniable that research on terrorism and counterterrorism practices in the Sahel and around the Lake Chad Basin has flourished in the course of the past decade.¹⁸³ Yet, there are currently but a handful of studies that address the relevance of justice responses in countering terrorism, especially in Niger, the country that has arguably developed the most specialised justice arsenal in this area.¹⁸⁴ Such shortage can be easily explained by multiple factors: first, military efforts are often seen as taking precedence over criminal justice ones, especially as the contours of counterterrorism in the region appear to resemble conflict situations more and more. Second, the development of specialised justice approaches in this region and in Niger specifically is quite recent, and the times of justice proceedings are, in contrast, quite long. And yet, currently no study has attempted to capture the connection between counterterrorism justice practices and the sovereignty negotiation in areas of

¹⁸¹ Frey, R. G. (1991). *Violence, Terrorism, and Justice*. Cambridge University Press.

¹⁸² Addressed, for instance, by: Crenshaw, M. (2010). *The Consequences of Counterterrorism*. Russell Sage Foundation; Fenwick, H., & Phillipson, G. (2011). Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond. *McGill Law Journal / Revue de Droit de McGill*, 56(4), 863–918; Wolfendale, J. (2007). Terrorism, Security, and the Threat of Counterterrorism. *Studies in Conflict & Terrorism*, 30(1), 75–92.

¹⁸³ Baldaro, E., & Dially, Y. S. (2020). The End of the Sahelian Exception: Al-Qaeda and Islamic State Clash in Central Mali. *The International Spectator*, 55(4), 69–83; Raineri, L. (2020). Explaining the Rise of Jihadism in Africa: The Crucial Case of the Islamic State of the Greater Sahara. *Terrorism and Political Violence*, 0(0), 1–15; Charbonneau, B. (2017). De Serval à Barkhane: Les problèmes de la guerre contre le terrorisme au Sahel. *Les Temps Modernes*, 693694(2), 322–340; Dowd, C., & Raleigh, C. (2013). The myth of global Islamic terrorism and local conflict in Mali and the Sahel. *African Affairs*, 112(448), 498–509.

¹⁸⁴ Assane, Z. A. (2020). *La lutte contre le terrorisme au Niger. Les approches juridiques*. Québec et Niamey : Éditions science et bien commun ; Sigsworth, R. (2019). *Lutte contre le terrorisme, droits de l'homme et état de droit en Afrique de l'Ouest*. Institut d'Études de Sécurité.

transitioning statehood. A connection that, I would argue, may prove significant well beyond the borders of Niger.

In order to focus on this specific relationship, this research does not delve into issues related to root causes of terrorism, including in specific to the Sahel region and the Lake Chad basin, nor has it explored the history and characterisation of Boko Haram or other organizations that are designated as terrorists that operate within, or at the borders of Niger. In-depth contributions exist on these issues¹⁸⁵, but they extend beyond the scope of the present study, which will only describe the initial escalation of terrorist attacks in Niger as part of the government's securitization process¹⁸⁶.

A conscious choice was also made to focus on internal politics in Niger, emphasizing the relevance of State agents and national contexts in the construct of counterterrorism, its application by the justice system, and its reception by national audiences. This choice does not negate, however, nor does it wish to ignore, the crucial implications of international politics in defining, securitizing and enforcing counterterrorism. To some extent, themes of North – South power relations, former colonial linkages with France and current interests in the alliance with the United States emerge at various points of this study. Chapter III provide an overview of how the security agenda in Niger emerged as a regional and global effort first, arguably before it was a key internal concern. Chapter III and IV will reveal how the Nigerien normative framework has been crucially influenced by international law and the French codification of terrorism. Chapter VI will address the extent of humanitarian support in the regions affected by the Boko Haram crisis. While these power dynamics have been the object of considerable research, notably by both proponents and critics of the security-development nexus¹⁸⁷, a more coherent and homogenous analysis of the influence of the global counterterrorism agenda on Niger's internal politics would fill numerous gaps and should be further investigated. The guiding question may focus on the external dimension of sovereignty, and analyse to what

¹⁸⁵ See for instance: Agbiboa, D. E. (2013). Why Boko Haram Exists: The Relative Deprivation Perspective. *African Conflict and Peacebuilding Review*, 3(1), 144–157; Akinola, O. (2015). Boko Haram Insurgency in Nigeria: Between Islamic Fundamentalism, Politics, and Poverty. *African Security*, 8(1), 1–29; Pérouse de Montclos, M.-A. (2015). Boko Haram, une exception dans la mouvance djihadiste ? *Politique étrangère*, 2, 147–158; Filiu, J.-P. (2009). *Al-Qaida in the Islamic Maghrib: Algerian Challenge or Global Threat?*; Guidère, M. (2014). The Timbuktu Letters: New Insights about AQIM. *Res Militaris*, 25; Baldaro, E., & Diall, Y. S. (2020). The End of the Sahelian Exception: Al-Qaeda and Islamic State Clash in Central Mali. *The International Spectator*, 55(4), 69–83; Raineri, L. (2020). Explaining the Rise of Jihadism in Africa: The Crucial Case of the Islamic State of the Greater Sahara. *Terrorism and Political Violence*, 0(0), 1–15.

¹⁸⁶ In “*Securitization in Niger: A separate trajectory*”, Chapter III.

¹⁸⁷ Buur, L., Jensen, S., & Stepputat, F. (Eds.). (2007). *The Security-Development Nexus: Expressions of Sovereignty and Securitization in Southern Africa*. Nordic Africa Institute. Fisher, J., & Anderson, D. M. (2015). Authoritarianism and the securitization of development in Africa. *International Affairs*, 91(1), 131–151.

extent adopting global mechanisms of securitization of terrorism has been instrumental to Niger's recognition in the community of States.

Additionally, while attempting to reflect the voices of securitized subjects, here the individuals accused of terrorist offences, this research does not investigate how gender and ethnic origin have played a role in the definition and understanding of "who is a terrorist", nor how the counterterrorism agenda has proven a tool in the hands of the State to pursue specific communities in the most affected regions.

CHAPTER II

RESEARCH DESIGN, METHODS AND ETHICAL QUESTIONS

INTRODUCTION:

I first visited Niger in 2016, in the context of a work-related project focusing on terrorism. In that instance, I was introduced to the efforts undertaken through the recent reforms of counterterrorism legislation and the evolution of criminal justice specialisation to address the terrorism phenomenon. In parallel, a notable issue emerged: a backlog of cases was paralysing the courts. Was the increased criminalisation and judicial treatment of terrorism cases working against the State performance? This question, triggered by observation on the ground, sparked the interest underlying the present research and constituted its preliminary motivation.

Afterwards, extensive digging into theoretical approaches to the question of sovereignty, limited statehood and a critical understanding of terrorism-related policy-making led to the refinement and clarification of the research question, through an hypothetico-deductive method. Schmitt's theory of the exception and the constructivist lenses of securitization theory further shaped the research framework.

This chapter narrates how the research design and its conduct was informed by this dual dynamic, integrating deductive and inductive approaches.

To do so, this chapter presents two sections. First, it provides an overview of the research framework, by clarifying the conceptual relationship between the key concepts at work, and by outlining the two main sub-components of the analysis conducted. This section is concluded by discussing the reasons to focus on Niger through a case-study approach. Second, it explains the methods adopted for the research, justifying their appropriateness in terms of both the research project itself (whether the methods are suited to answering the research question), and the field procedures¹⁸⁸ (whether the methods are suited to collecting the necessary and relevant information in the context of the analysis).

Then, a third and final section of the chapter is dedicated to the analysis of the specific constraints and challenges that I faced throughout the research process and their potential impact on research outcomes. In particular, I explore the duality and ambiguity of my positioning as researcher and expert at the same time, and I delve into the ethical questions associated with conducting research in a prison setting, with vulnerable subjects.

¹⁸⁸ Tellis, W. M. (1997). Introduction to Case Study. *The Qualitative Report*, 3(2), 1-14, p.6.

1. RESEARCH FRAMEWORK

In September 2016, I was working as a consultant on issues related to justice for children for the United Nations Office on Drugs and Crime (UNODC), when I was invited to conduct a training workshop on the treatment of children associated with terrorist groups, in Niamey. The activity was organized by the Directorate for the Juvenile Judicial Protection of the Ministry of Justice, and involved professionals from the justice system with different backgrounds and roles.

During this workshop, I became familiar with the new counterterrorism legislation of Niger. Adopted only in June of the same year, the three laws amending the code of criminal procedure, the penal code and the law on the organization of the judicial system,¹⁸⁹ respectively, were extremely recent and represented a considerable evolution of the judicial approach to terrorism. With the extended role of the *Service Central* (SCLCT), the *Pôle spécialisé* (Pôle) and the counterterrorism Trial Chambers, the specialised bodies to investigate and adjudicate terrorism-related cases, Niger had become the country with the most extensive judicial specialisation in counterterrorism matters in the Sahel region.

Yet, for the first time and through the voices of Nigerien practitioners, I was also exposed to the real challenges in conducting counterterrorism investigation and trials; the obstacles continued to emerge despite the continued progress of the legal arsenal. Undoubtedly, the significant number of arrests conducted in the short time-span of a few months contributed to hindering the progress of justice proceedings. It was this observation that sparked a crucial question: was the growing specialisation of justice proceedings an effective approach in the State's pursuit of counterterrorism efforts? Or rather was it a contributing factor in the State's impotency? More specifically, this experience, for me, raised questions around the effects of the specific ways in which terrorism was understood and defined through laws and judicial practices that focused around its exceptionality and that, in turn, were transformed into exceptional and specialised approaches. These questions led me to the elaboration of this research project and to the development of a comprehensive conceptual framework aiming to

¹⁸⁹ Loi n° 2016-19 du 16 juin 2016, modifiant la loi organique n°2004-50 du 22 juillet 2004 fixant l'organisation et la compétence des juridictions en République du Niger ; loi n° 2016 – 21, modifiant et complétant la loi n°61-33 du 14 août 1961 portant institution du Code de procédure pénale ; loi n° 2016 – 22 modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal.

guide the examination of the relationship between the construction of sovereign power and the process of securitization of the terrorist threat.

CONCEPTUAL FRAMEWORK

This study aims to answer the overarching research question: *Does the counterterrorism agenda strengthen the State's claims to sovereignty in Niger?*

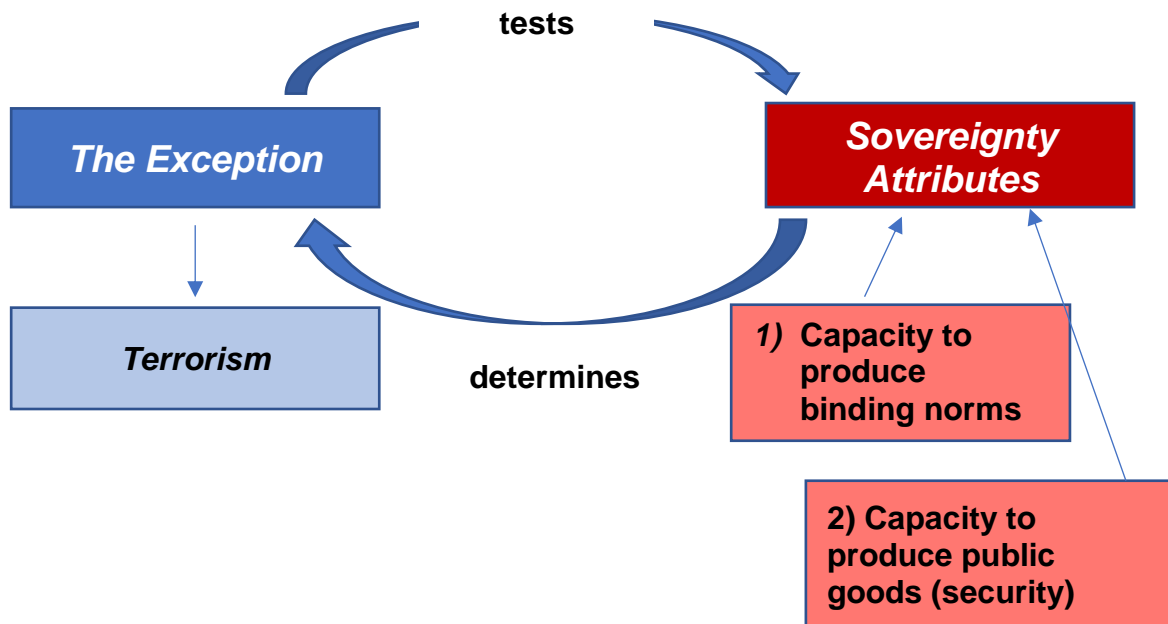
The underlying approach, anchored to a constructivist view, places emphasis on the attribution of meaning, and its institutionalisation through interaction.¹⁹⁰ Accordingly, the research question relies on a conceptual framework that interrogates the mutually constructive relationship between “the exception”, here identified with terrorism, and the sovereign¹⁹¹. Briefly, it considers that:

- it is the State (as a securitizing actor) who, through its legitimate authority, determines who, or what constitute the exception;
- at the same time, as sovereignty is considered as a social construct, rather than a constitutive attribute of statehood, it is to be negotiated. This is especially true for contexts of limited statehood, where there are limitations to the capacities of the State to exercise authority. In this research, the pursuit of two fundamental attributes of sovereignty is analysed as a testing ground for this negotiation process: i) the capacity to produce binding norms and ii) the capacity to produce security as a public good;
- It is through the response to the exception, which may or may not be characterised by exceptionality itself, that the State puts its sovereignty to the test. By constructing the enemy, the *other*, the State puts itself in the position of having to prevail over it. Here, it is through the counterterrorism agenda, and specifically through criminal justice approaches to counterterrorism, that the State tests its capacities to pursue the fundamental attributes of sovereignty. In other words, the State's counterterrorism performance can contribute to strengthening or undermining its claims to sovereignty (see below fig.1).

¹⁹⁰ Berger, P. L., & Luckmann, T. (1967). *The social construction of reality: A treatise in the sociology of knowledge*.

¹⁹¹ See “*A Conceptualization of State Sovereignty and its Key Attributes*”, Chapter I.

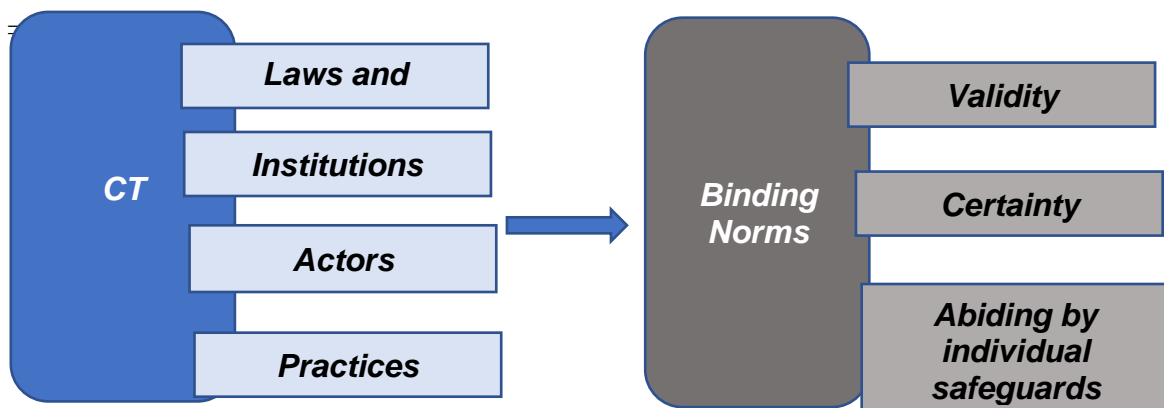
FIGURE 1: CONCEPTUAL FRAMEWORK



FRAMEWORK OF ANALYSIS

The study is articulated around two sub-questions, which reflect the key attributes of sovereignty used to assess the performance of the criminal justice system in Niger. The first one, addressed in chapter IV, is dedicated to the influence of counterterrorism on the State’s capacity to produce binding norms.

FIGURE 2: FRAMEWORK OF ANALYSIS, SUB-QUESTION 1



Sub-question 1: *Does the counterterrorism agenda support or hinder the stability of rules and institutions?*

To observe the influence of counterterrorism on normative production, I adopt a multi-dimensional notion of what constitutes counterterrorism. Emphasis is placed on the analysis of the two waves of legal reform of 2011 and 2016, the following reform of 2018 and, in parallel,

State of emergency prescriptions and the associated policy developments (law and policies). Yet, it is also necessary to move beyond the prescriptive elements to understand the effects of counterterrorism in practice. This requires exploring the interaction between norms, institutional structures, actors within those institutions, their discourse and their practices.

At the same time, I propose a threefold conceptualisation of the constitutive components of “binding norms”, inspired by Summers’ account of the rule of law as including 18 principles.¹⁹² I argue here that the effectiveness of counterterrorism in producing binding norms can be analysed according to three key criteria.

- Do the norms produced in the context of counterterrorism satisfy the minimum standards for validity? These include clarity, predictability, uniformity, universal applicability, public and prospective character. Are these norms lawful in terms of adherence to constitutional provisions?
- Do they promote legal certainty? Legal certainty is a composite principle, which includes clarity of interpretation of the norms, and also specific, clear, and reliable procedures. In doing so, certainty of norms is related primarily to their application and efficiency and puts emphasis on the roles of actors and institutions.
- Do they institute (and provide for compliance with) individual safeguards of the accused? The guaranteed protection to suspects and accused is a crucial component of norms that are to be considered binding, and thus legitimate, particularly in the course of a democratic transition.

Sub-question2: *Does counterterrorism strengthen or weaken the State’s capacity to ensure security as a public good?*

I assume here that the public good that represents the objective of counterterrorism is security (or public safety). There are different possibilities to assess the performance of the justice system in producing security. A first and immediate measurement of counterterrorism’s success in improving security is the comparison between number of attacks (or number of deaths resulting from terrorist attacks) prior to, and following the reforms. However, this measurement is deemed problematic here for a variety of reasons, the most crucial of which is connected to the primary role of the criminal justice system, which is arguably reactive, rather than preventive. In addition, it is expected that the intelligence and military component of the

¹⁹² Summers, R. S. (1999) *The Principles of the Rule of Law*, pp.1693-1694

counterterrorism agenda would have significant impact on prevention and repression of terrorism-related attacks, and thus these data would not be representative of the impact of the justice component.

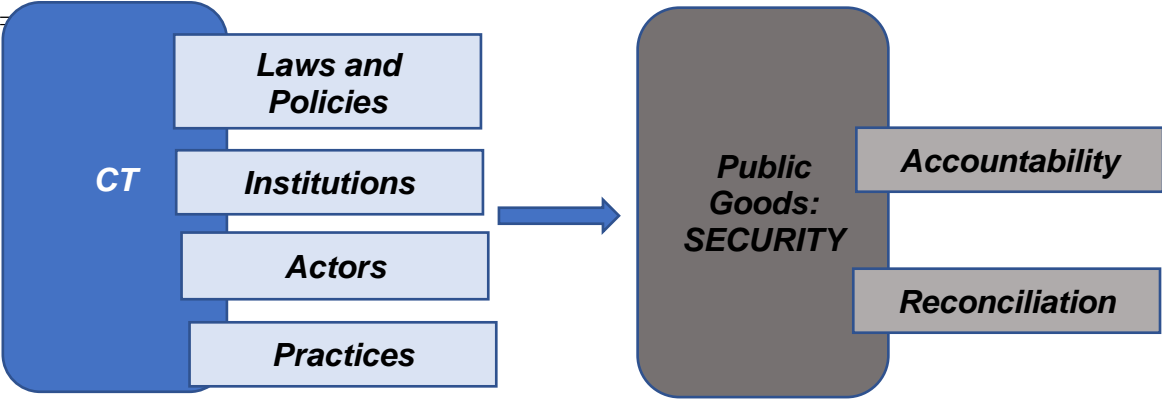
Instead, I propose a dual analysis of justice’s contribution to public safety in the context of counterterrorism. First, I argue that criminal justice responses to terrorism should be effective in “bringing perpetrators to justice”, pursuing accountability for violations of the law and thus “filtering those who are terrorists from those who are not”¹⁹³. In other words, it is the task and responsibility of the justice system to uphold accountability for terrorism-related acts. Success in terms of accountability can be examined through the credibility and the outcome of arrests, investigations, and criminal proceedings.

Second, because of the extent of terrorism-related activity in certain areas of the country, I argue that a repressive approach cannot be sufficient to ensuring public safety, but that necessarily broader reconciliation efforts will be inevitable, which entails a focus on rehabilitation of the group’s former members.

“It is the real challenge, if we decided to make prisoners, it is because they should not die. So this situation needs to serve to recover those who were capable of engaging with terrorists, even those who became convinced, to become again normal citizens, like you and I.”¹⁹⁴

Evaluating the outcomes of reconciliation approaches can prove extremely complex, especially in the context of a limited time-frame and recent events. However, preliminary results can be investigated by studying rehabilitative and reintegrative governmental services and through the perceptions of their recipients.

FIGURE 3: FRAMEWORK OF ANALYSIS, SUB-QUESTION 2



¹⁹³ Author’s interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

¹⁹⁴ Author’s interview with a lawyer, Niamey (30 April 2018).

A CASE-STUDY APPROACH FOR HOLISTIC ANALYSIS: THE SELECTION OF NIGER

In order to undertake the investigation of this conceptual and operational framework, I deemed the holistic single- case design as the most appropriate, as it lends itself to the in-depth analysis of complex phenomena¹⁹⁵, such as securitization policies, negotiated sovereignty, and their interaction. Furthermore, while the importance of transnational and global dimensions of terrorism is well-reflected in the literature,¹⁹⁶ the case-study design is especially suited to interrogate the constructed meanings and attributed values of notions such as “exceptional threat”, “violence”, “justice” and “statehood”: as they are inherently influenced by historical, cultural and social dynamics.

An additional level of specification of the case-study stems from its focus on criminal justice approaches to counterterrorism, rather than on its military aspects. This choice was motivated by the significance of judicial institutions and practices in terms of claims to sovereignty. With their role as implementers and protectors of the law, justice actors play a crucial part in the legitimation of the State (or lack thereof). In my research, I adopted a broad understanding of which institutions and actors are part of the criminal justice system. That is to say that the analysis is not limited to the work of magistrates (judges and prosecutors), but extends to law enforcement and investigation officials. Indeed, to the extent that military personnel was also involved in arrests and preliminary investigations, their actions and practices have also been questioned through this research. I would contend that such openness allows for not only a more comprehensive understanding of the justice chain’s performance, but also a more operational one, reflective of the challenges and opportunities that arise during justice proceedings understood as extensive processes, rather than limited to trials.

As mentioned, the present research was born out of personal and professional experiences in Niger. The reason for it is that the contrast between the level of specialisation of the criminal justice chain to counter terrorism and the limitations of sovereign powers appear especially stark. Indeed, the context in Niger represents an extreme case of variation on both dimensions

¹⁹⁵ Yin, R. K. (1994). *Case study research: Design and methods* (2nd ed.). Thousand Oaks, CA: Sage ; Bent Flyvbjerg, "Five Misunderstandings About Case-Study Research," *Qualitative Inquiry*, vol. 12, no. 2, April 2006, pp. 219-245.

¹⁹⁶ See for instance Buzan, B. (2006). Will the “Global War on Terrorism” Be the New Cold War? *International Affairs (Royal Institute of International Affairs 1944-)*, 82(6), 1101–1118; Bigo, D. (2008). Globalized (in)security: The field and the ban-opticon. In *Terror, Insecurity and Liberty*. Routledge; Schmid, P. em A. P. (2018). *Revisiting the Relationship between International Terrorism and Transnational Organised Crime 22 Years Later*.

analysed in this study: counterterrorism reform as a response to an exceptional threat, on the one hand, and negotiated sovereignty, on the other.

In the past sixty years since its independence, Niger has experienced ten regime changes, seven different Republics, and introduced multipartitism only in the 90ies. Between 2011 and 2022, Niger has ranked between the 18th and 21st places on the Fragile States Index, on a total of 178.¹⁹⁷ Relevant indicators for such ranking include State legitimacy, public service provision, as well as rule of law respect. Against this background, it can be argued that the transition of 2011, anchored in democratic relaunch and in a vast developmental programme, represents a moment of particular significance for the negotiation of sovereignty and State legitimacy.

At the same time, the criminal justice approaches to counterterrorism have been both extremely rapid and extremely intense in the country. The sudden escalation of the security threat in 2015 marks a clear turning point for the development of a national counterterrorism agenda, and leads to focused and swift legal and political initiative in 2016, which continued through the following years. In addition, when compared with other countries in the region (including those considerably affected by terrorism, like Cameroon, Mali, Nigeria, and Chad), Niger is the case that presents the broadest specialisation of criminal justice procedures and institutions to deal with counterterrorism, embracing the entire criminal justice chain, from arrest, to adjudication. In this view, the criminal justice aspect of counterterrorism appears especially developed in Niger. Accordingly, Niger is to be considered as an extreme example, in the Sahel region, of the analysed relationship, and thus the ideal testing ground for the investigation of the research question.

Another reason for selecting Niger as the case-study was the gap in literature concerning securitization in the country. The security context in Niger has changed quite recently, particularly as far as terrorism is concerned, which means that the subject of this research is relatively uncharted territory. While earlier studies explore security risks from the perspective of the touareg crisis¹⁹⁸, the evolution of the terrorism phenomenon and related securitization policies has been addressed only limitedly, and mainly with an eye to the regional context of

¹⁹⁷ <https://fragilestatesindex.org/country-data/>

¹⁹⁸ Krings, T. (1995). Marginalisation and revolt among the Tuareg in Mali and Niger. *GeoJournal* 36: 57 ; Guichaoua Y. (2012) Circumstantial Alliances and Loose Loyalties in Rebellion Making: The Case of Tuareg Insurgency in Northern Niger (2007–2009). In: Guichaoua Y. (eds) *Understanding Collective Political Violence. Conflict, Inequality and Ethnicity*. Palgrave Macmillan, London. ; Lecocq B., Klute G. (2019) Tuareg Separatism in Mali and Niger. In: de Vries L., Englebert P., Schomerus M. (eds) *Secessionism in African Politics*. Palgrave Series in African Borderlands Studies. Palgrave Macmillan, Cham.

the Sahel.¹⁹⁹ This often leads to a focus on cross-border dynamics, which build on military alliances to fight terrorism, much more than on the criminal justice component, which remains a national prerogative. At the same time, academic production on the functioning of the justice system in Niger, although valuable to trace the historical grievances and structural weaknesses, is scarce and does not reflect the latest reforms, nor a focus on security-related issues.²⁰⁰ .

If these circumstances create the opportunity for this research to produce original contributions, it is also true that they reduce the opportunity for triangulation of information and verification of the analysis conducted.

Finally, pragmatic considerations had to be taken into account when selecting the present case. Terrorism and security policies are often associated with enhanced rules of confidentiality around information that is qualified as sensitive. This entails a strong potential for denied or limited access to institutions, agents, and those individuals who have been targeted by criminal justice proceedings, and as such becomes relevant for the purposes of a selection process.²⁰¹

As further illustrated below, my previous knowledge of the context and of the relevant actors in Niger allowed to me preliminarily assess openness to discussion around the effects of counterterrorism reform. This has been confirmed by the authorisation to access detention centres, including high-security facilities.

2. OBJECTS, METHODS AND LIMITATIONS

DATA COLLECTION AND ANALYSIS

I relied on multiple resources to gather the relevant data for this study, focusing in particular on documentation, archival records and interviews.

Documentation and archival records have proved essential for the purposes of investigating the legal and policy framework in which the counterterrorism reforms took place in Niger. These are the primary sources for analysing the institutional and procedural changes introduced through counterterrorism reforms and to explore their key political and operational objectives. They have proved especially relevant to illuminate the influence of the international and regional context on the evolution of counterterrorism in Niger, an element that is explored in

¹⁹⁹Pérouse de Montclos, M.-A., Magrin, G., Seignobos, C., & Gluski, P. (2018). *Crise et développement : la région du lac Tchad à l'épreuve de Boko Haram*. Agence française de développement.

²⁰⁰ Alou, M. T. (2012). La justice au plus offrant, Justice for the Highest Bidder. *Politique africaine*, (83), 59–78.

²⁰¹ Poulis K., Poulis E. & Plakoyannaki, E.(2013). The role of context in case study selection: *An international business perspective*, *International Business Review*, 22(1): 304-314.

chapter III “*Justice in Niger: serving the State through democratization and securitization*”, which analyses the context in which the counterterrorism policies develop in Niger, as well as in chapter IV “*Sovereignty through lawfulness: State’s legitimation through “legal” counterterrorism*”, where I examine the Nigerien anti-terrorism laws and policies. At the same time, they also clarified in what ways the counterterrorism framework fits into the broader justice reform process of the transition to the Seventh Republic and in what ways it departs or negates it.

These sources include:

- International and regional legal and policy documents, including international treaties and conventions, United Nations Security Council (UNSC) resolutions, policy statements and guidelines by the United Nations and other international and regional bodies, programmatic documents for technical assistance provision and/or financial aid provision.
- National legal, policy, and programmatic documents, including Niger’s Constitutions (past and present) national laws and amendments to the criminal code and code of criminal procedure, national and party programmatic documents, political statements, reports of meetings, communication material.

Interviews constitute the backbone of the present research, not only insofar as they provide evidence as to the results of the reforms and policies, but mainly as they offer insight in the perceptions and understandings of crucial actors on the consequences of such policies and how they make meaning of terrorism and counterterrorism in their work. Such perceptions are necessary to determine the effects of policy change on the attributes sovereignty, as it is constructed through interaction and practices.²⁰² I used semi-structured interviews throughout my fieldwork: they included open questions on key themes explored through the research question, such as the perception of terrorism; the role of the State and of the justice chain; the structural challenges faced by justice institutions in Niger; counterterrorism reform, State of emergency, and the advances in the terrorism-related judicial proceedings. I also always prepared lists of potential probes, which I integrated as the data collection unfolded and new elements were added. This was especially true for questions concerning the situation of the

²⁰² Biersteker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press.

“repentis”, which evolved dramatically between 2017 and 2020, as well as for those related to the special hearings that were organized and held in Diffa.

When it came to selecting interviewees, I was especially interested in three aspects. First and foremost, I intended to capture the experience of the different agents involved in the justice process at each stage. Second, I wanted to also reflect the experience and views of those who were external to the delivery of justice, but still professionally involved with other relevant aspects of counterterrorism. This diversification served to validate information and reduce bias (triangulation), as well as to ensure more thorough understanding of comprehensive explanations of the phenomena (complementarity).²⁰³ Third, I was decided to ensure that this research also included the voices of those agents who have been directly targeted by justice approaches to counterterrorism.

Overall and for each group, I was also interested in examining the perspectives in Niamey and in Diffa, to avoid excessive reliance only on the views of professionals working in the capital.

Accordingly, the interviewees can be described as belonging to three different groups, representing different relationships to the justice system in Niger. One group is that of the “justice agents”, meaning actors who belong to the justice system themselves, albeit in different capacities, such as police officers, lawyers, judges. A second group is composed of “external agents” meaning those that contribute to conceptualising and/or implementing counterterrorism policies but do not belong to the justice system itself. This is a composite group, including representatives of international organizations, as well as civil society organizations. Finally, the group of “targeted agents” is constituted of those who are affected by criminal justice approaches to counterterrorism, and notably individuals accused of terrorism-related offences, who I was fortunate to interview in two different prison facilities: Kollo and Koutoukalé. This group further includes some representatives of the communities that were affected both by the arrests and by the State of emergency provisions in the Diffa area.

The three groups are represented both through interviews held in Niamey and interviews held in Diffa. While I was not always sure that I would be able to travel to Diffa and conduct fieldwork there, due to the everchanging security situation and the related challenges to reach the city, the opportunity finally presented in January 2020. This trip was extremely helpful in gathering more information on a number of key elements for this study, including the effects

²⁰³Yauch, C. A., & Steudel, H. J. (2003). Complementary Use of Qualitative and Quantitative Cultural Assessment Methods. *Organizational Research Methods*, 6(4), 465–481.

of prolonged insecurity and the consequences of the longstanding State of emergency, the perception of the State and the justice system in the most affected region, the evolution of the situation of the “repentis”, including their reintegration, as well as the reintegration of former detainees for terrorism-related offences, the perception of the special hearings.

The qualitative analysis that I present in the following chapters is also at times complemented by *limited quantitative information*. Quantitative data presented in this study can be grouped into three categories:

- Data concerning the status of the justice system in Niger: this information, provided in chapter III, supports the understanding of structural challenges faced by the justice system in Niger, that pre-date and influence the delivery of counterterrorism investigations and trials.²⁰⁴
- Data on criminal proceedings against alleged offenders accused of terrorism-related crimes: chapter V includes the overview of the evolution of attrition rates for terrorism-related offences in the period between 2011 and 2019, as well as the evolution of conviction rates for the trials that followed the 2015 attacks, in the period between 2017 and 2019.²⁰⁵ These figures were obtained thanks to the open cooperation of the Office of the Prosecutor and prove extremely valuable in painting a picture of some of the obstacles faced by the criminal justice process in prosecuting terrorism and at the same time in illustrating the effects of procedural changes introduced by the Nigerien criminal justice system over time. In addition, the graph concerning the distribution of terrorism offences²⁰⁶ illustrates the prominence of the charges for “association” over any other terrorism-related charge.
- Data on prison population and its variation since the Boko Haram crisis: presented first in chapter IV and later explored in chapter VI²⁰⁷, the data shows the exponential growth of prison population as a result of terrorism-related arrests in the years following the 2015 attacks. This allows an analysis of the extent of the backlog of cases faced around 2017 by the Nigerien judges in the context of chapter IV. Later on, this data is further explored to

²⁰⁴ For an overview of the evolution of the budget of the Ministry of Justice between 2012 and 2015 see “*Les Etats Généraux: justice in transition*”, Chapter III; for data on human resources available and situations in the prisons, see “*The limits of justice, challenging sovereignty*”, Chapter III.

²⁰⁵ See “*How many were brought to justice?*”, Chapter V.

²⁰⁶ See “*Curtailed accountability: the impact of systemic weaknesses on adjudication*”, Chapter V.

²⁰⁷ The impact of mass arrests on overcrowding rates is first outlined in “*Specialisation in Action*”, Chapter IV and then further analysed in the box “*A look at the impact of counterterrorism on overcrowding in prisons*”, Chapter VI.

analyse the impact of counterterrorism policies on the lives of the detainees, their perception of the justice process and of the State.

Finally, I was able to carry out *nonparticipant observation* during one of the public hearings for terrorism-related cases, held in the Pôle in Niamey. While my experience of observation was not extensive, it proved helpful in understanding some practical implications of the legal formulations of the counterterrorism laws and some of the practices of magistrates, prosecutors and lawyers. In particular, the day I spent in the Court raised additional questions over the role of the lawyers and its limitations, the relevance of the interpretation service, the participation of the accused in their own defence. Even more crucially, it allowed me to hear the motivation for sentencing, illuminating the relevance of the discretionary space left to the judges in defining offence of association. Building on this experience, I was able to further investigate these points during the following interviews.

CODING: BETWEEN THEORY AND DATA

My coding process, similarly to the process of conceptualising the research question, was both grounded in the fieldwork and deduced from the theoretical background and the main hypothesis. It began with the first period of interviews in Niger and continued well into the elaboration of the thesis, through multiple iterations. Mainly, I used coding at two different levels of analysis.

The first level of coding was dedicated to the definition of the relationship that is tested by my research: that between the securitized policies of counterterrorism and the State in its quest of sovereignty. In the face of highly contested concepts, it was crucially important to attribute meaning not only on the basis of the theoretical backbone of the study, but also in a way that reflected the values and key interests of the subjects participating in the research. Accordingly, this first level of coding aimed at translating the inductive approach used to identify the core elements of the research in core *themes* as expressed and conceptualised by Nigerian participants in the justice process, with a focus on criminal justice agents. In other words, the objective of this first level of coding was to clarify how Nigerian justice officials understood their role and defined their objectives, as well as those of the State.

I carried out this thematic coding in multiple stages. In the first stage, following my first fieldwork, I analysed certain portions of data using *initial codes*²⁰⁸, to identify the themes that emerged as most relevant to the interviewees. While no codes were defined a priori, and all emerge from the data analysis, they were certainly influenced by the research design. I focused on the answers to open questions that had been designed to capture processes of attribution of meaning, for instance: what is the role of justice institutions in the context of counterterrorism?; or what is the role of the State in the context of insecurity?, as well as on parts of interviews that described intentions, objectives and priorities. I repeated this process after my latest fieldwork, unearthing a number of key themes.

In a second stage, I focused on theoretical coding,²⁰⁹ identifying and clarifying the relationship between these key themes and the core concept explored by the research question. This was done through detailed memo writing on the different codes, with a view to capturing specific nuances of meaning. At this point I wanted to clarify what was the perception of the key agents at national level when putting counterterrorism policies and laws into practice: what objectives appeared as priorities?

This also entailed multiple iterations of the same process. At the end, I had identified five core themes: justice, terrorism, legality, accountability, reintegration. Three of the themes (*legality; accountability; reintegration*) explicit the connection between the theoretical basis of the research and the data, anchoring the process of evaluating the performance of the State, and specifically of the justice system, in the context of Niger. They represent the specific goals that the justice system pursued or could have pursued (*reintegration*), in the process of aiming at “producing binding norms” and “producing security”, and they also reflect a distinction in the priorities as perceived as centralised level, in Niamey, and in the most affected region, Diffa. The two other codes (*justice and terrorism*) allowed me to provide sufficient relevance to definitional and underlying issues that appeared to strongly influence the perception and priorities of Nigerien agents. Under the theme *terrorism*, the analysis through different codes allowed me to explore the challenges posed by this phenomenon and the insecurity context as felt by the respondents. This highlighted the definitional ambiguity of the phenomenon, as well as the perspective of the different agents over the evolution of the terrorism-related threat.

²⁰⁸ Saldana, J. (2015). *The Coding Manual for Qualitative Researchers* (3e édition). SAGE Publications Ltd., p.100.

²⁰⁹ Saldana, J. (2015). *The Coding Manual for Qualitative Researchers* (3e édition). SAGE Publications Ltd., p.223.

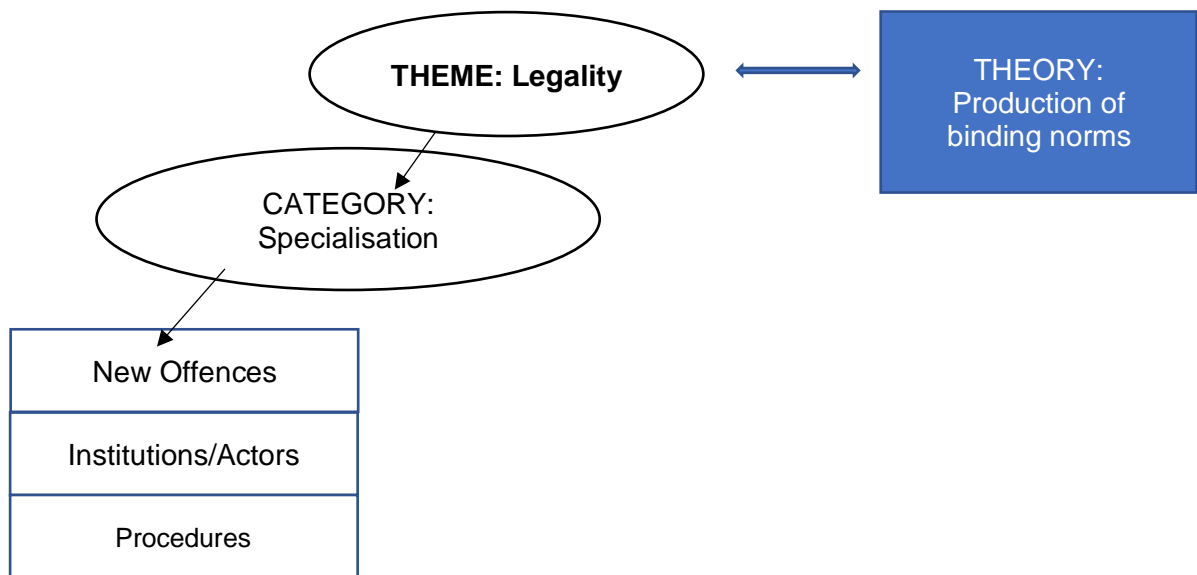
During the second level of the coding process, having made the link between the research question and the data I had collected, I moved to identifying the key elements of the justice system's performance in counterterrorism, as emerged from the different interviews. Again, I went through multiple stages: at first, I thoroughly coded interview transcripts using mostly initial, descriptive and process codes to identify the key aspects that the interviewees highlighted. For example, justice agents repeatedly brought up different elements that constituted challenges in the implementation of counterterrorism laws, to which I attributed the codes: "*new offences*"; "*institutions/ actors*"; "*procedures*". Then, I realized that in many cases codes presented two dimensions: a negative perspective, which stressed the numerous difficulties perceived by the agents, and a positive outlook, which expressed a sense of accomplishment, improvement and progress achieved. This duality is consistent with the evaluation of performance, so I included two-level sub-codes where pertinent, and the analysis of both dimensions was crucial to allow me to reflect the nuances of the efforts undertaken by the justice system in Niger. In particular, I believe that this element was essential to highlight the critical approach that justice agents applied to their own work, the high-level of awareness of specific challenges and the concrete efforts they employed to adapt and improve the implementation of the counterterrorism agenda.

At the same time, this analysis emphasized that the perception of the main challenges of the justice actors was not always coherent with two other groups: State and non-State agents working more directly on the situation in Diffa; and the subjects of the terrorism-related legal proceedings: the men detained in the Kollo and Koutoukalé prisons. For these groups, the main concerns focused on future perspective of stabilisation of the region (the former), the violations they experienced and their future perspectives in society (the latter). Different codes emerged here.

In a second stage, I moved to focused coding²¹⁰ to identify the most salient common ground among multiple codes and group them into relevant categories. The categories allowed me to create the linkages between the codes, mostly emerging from the data, and the theoretical background that was reflected and specified by the key themes (see figure below).

²¹⁰ Saldana, J. (2015). *The Coding Manual for Qualitative Researchers* (3e édition). SAGE Publications Ltd., p.213.

FIGURE 4:EXAMPLE OF CODING STRUCTURE



Throughout the coding process, I gave preference to extremely simple codes, preferably one-word codes and repeatedly went back to writing detailed analytical memos. In her exploration of grounded theory, Charmaz describes the significance of memo writing to advance research: “Memo writing is about capturing ideas in process and in progress. Successive memos on the same category trace its development as the researcher gathers more data to illuminate the category and probes deeper into its analysis”.²¹¹ While this research is consistently based on a clear and detailed theoretical framework and cannot be qualified as grounded, I found that some methods of grounded theory could be mobilised to ensure that the theory was framed according to the perceptions of the key agents in Niger. In this light, memo writing was important to highlight causal relationships as described by the interviewees, or to identify conference of meaning and/or value in specific contexts. It was also in the course of memo writing that I used “in-vivo” labels that appear to capture certain attitudes or opinions especially well. One key example being the definition of the charge of association as a “*fourre-tout*” offence, a concept that I translated as “*catch-all*” and that I incorporated into chapter V to examine the advantage and limitations of its use in practice.

Overall, the process of coding the interview transcripts was essential not only to clarifying the concrete application of theoretical knowledge to the research, but also to the reverse. Through coding and memo writing I was able to ensure that the data itself framed, informed, and shaped

²¹¹ Charmaz, K. (2008). Grounded theory as an emergent method. In S. N. Hesse-Biber & P. Leavy (Eds.), *Handbook of emergent methods* (pp. 155–170). The Guilford Press, p.166.

by the values and notions that were to be emphasized by the theory, in a mutually constructive relationship.

SCOPE AND LIMITATIONS

To conclude the overview of the data collection and analysis process, the boundaries of the present research should be clearly laid out. This study focuses on the time period comprised between the initial counterterrorism reform of 2011, and the end of the year 2019, which coincides with the finalization of the data-collection process. This time-span covers three pivotal moments which are of specific interest to the research:

- The transition to the VII Republic, and in particular the announced democratic reboot of President Issoufou. In the context of justice policies, the “États généraux de la justice”, held in 2012, are analysed as representative of the transition and its objectives.
- The 2015 Boko Haram attacks to Diffa and Bosso, which was the first large scale attack on the national soil and triggered a notable change in the national counterterrorism agenda, particularly from the perspective of criminal justice.
- Three waves of counterterrorism reforms, and notably the one that follows the 2015 attacks and inaugurates the renewed emphasis on the security agenda.

Despite growing interest in the role of women in terrorism and security policies²¹², a gendered approach is not included in the present study, mainly due to the lack of representation of women among terrorism suspects in Niger. It may be argued that this is connected primarily to the tactics of Boko Haram, which features forced and brutal recruitment methods used against women, such as abductions, tactical use of gender-based violence, and forced instrumentalization of women and girls to perpetrate attacks, particularly suicide bombings.²¹³ This can lead to a generalized perception of women as victims, rather than perpetrators, in the context of Niger, which would explain their exclusion from policy responses focused on accountability and punishment, such as those of the criminal justice system. It is telling, in this

²¹² Bloom, M. (2011). *Bombshell: The Many Faces of Women Terrorists*. London: Hurst Publishers; Davis, J., West, L., & Amarasingam, A. (2021). Measuring Impact, Uncovering Bias? Citation Analysis of Literature on Women in Terrorism. *Perspectives on Terrorism*, 15(2), 58–76.

²¹³ Zenn, J., & Pearson, E. (2014). Women, Gender and the evolving tactics of Boko Haram. *Contemporary Voices: St Andrews Journal of International Relations*, 5(1); Maiangwa, B., & Amao, O. B. (2015). ‘Daughters, brides, and supporters of the Jihad’: Revisiting the gender-based atrocities of Boko Haram in Nigeria. *African Renaissance*, 12(2), 117–144.

sense, that women (and children) are instead included among the repentis, and thus become beneficiaries of rehabilitation and reintegration assistance under that framework, and questions of gender roles as connected to perception of insecurity would be worth further exploration in future research.

A second group of “agents targeted by counterterrorism” that is not addressed here is that of children, intended as individuals below eighteen years of age²¹⁴. Differently from the case of women, in Niger numerous children (boys) have been accused of terrorism-related offences. Indeed, their treatment by the criminal justice system proves especially interesting because of the interaction between two specialised normative frameworks: counterterrorism on the one hand, and juvenile justice on the other hand. To address conflicting provisions and procedures, Niger adopted innovative reforms²¹⁵, whose conception and application could be of interest to study the compatibility between broader justice reforms and in particular emphasis on human rights safeguards, and the exceptionalism of counterterrorism. However, this group has been excluded from the analysis for two sets of reasons:

- Ethical reasons: children are entitled to enhanced safeguards and protection, when compared with adults, by reason of their developmental process. The children suspected of terrorism-related offences in Niger face an additional layer of vulnerability due to the circumstances of their recruitment and use within the groups, which generally entails being subjected to repeated and extreme violence. In addition, their legal status as alleged offenders (albeit temporary)²¹⁶ grants them additional safeguards. In light of these considerations, and due to the potential stigma of being associated with terrorism, I considered that interviewing children was not in line with their best interests, beyond posing notable issues related to informed consent, and entailed considerable risks of secondary victimisation to the children themselves.
- Positioning of the researcher: as explained below, while conducting research in Niger, I was also holding a position as expert consultant for UNODC, and conducted multiple activities in the country, in partnership with the Ministry of Justice. As the project I was working on focused on children affected by counterterrorism provision, I decided for a

²¹⁴ In line with Article 1, UN General Assembly (20 November 1989) *Convention on the Rights of the Child*, United Nations.

²¹⁵ Loi n° 2016-19 du 16 juin 2016, modifiant la loi organique n°2004-50 du 22 juillet 2004 fixant l'organisation et la compétence des juridictions en République du Niger.

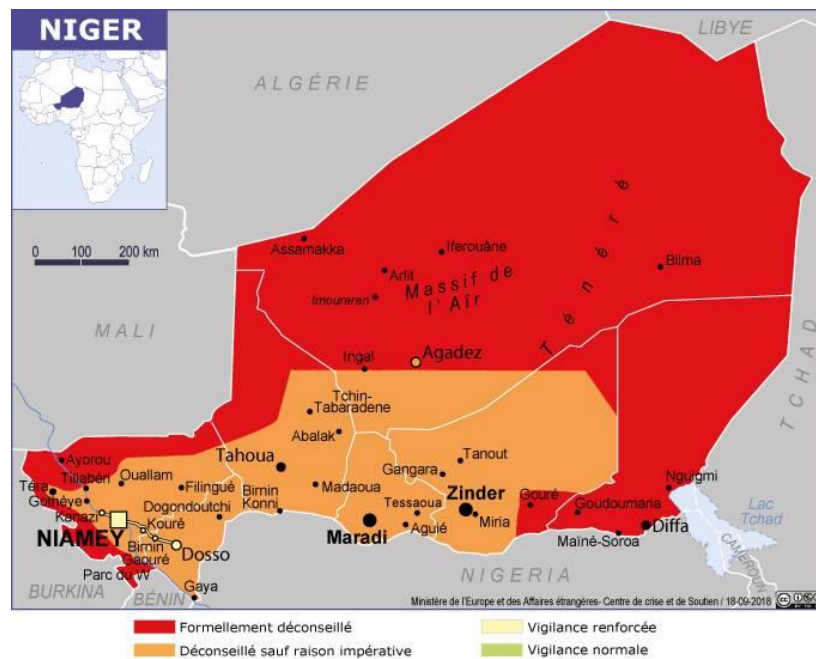
²¹⁶ In February 2017, the Government of Niger signed a Protocol with the United Nations System which recognised these children as being primarily victims and led to their release from detention facilities and access to reintegration support.

strict separation between the focus of my work and that of the research, in terms of target group.

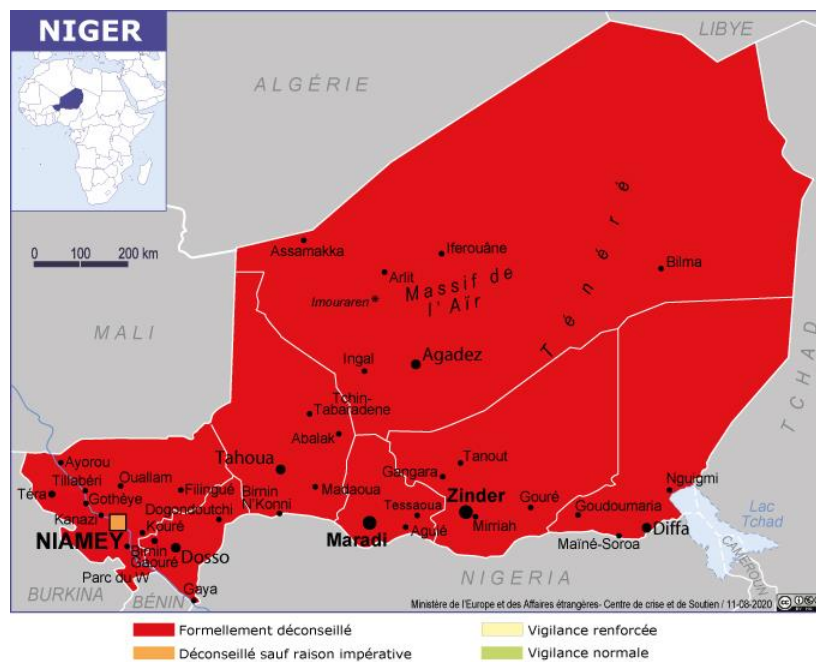
3. DOING RESEARCH: A “SENSITIVE” SUBJECT IN A “CHALLENGING” ROLE

As soon as I began working on this research, some of the challenges that I would need to face became apparent to me. First and foremost, I was planning to conduct research on terrorism in Niger, a country that was at the time mostly classified as a “zone rouge” by the French government, with the exception of the capital Niamey. Indeed, the security reasons that drove such classification were (and still are) mainly connected to the phenomenon that I wished to explore. Would I be able to access the field, and, most importantly, to do so in a meaningful way? This question was especially pressing as, from the start, my research plans included access to the prison facilities and to the Diffa region.

FIGURE 5: EVOLUTION OF NIGER’S SECURITY CLASSIFICATION BY THE FRENCH GOVERNMENT BETWEEN 2018 AND 2020



²¹⁷ The security assessment of the situation in Niger has evolved throughout the research period, in large part depending on the frequency and nature of terrorist attacks conducted on the country. The Diffa region has remained a “red zone” throughout the period of the research, due to the activity of Boko Haram, which has varied in intensity and frequency but never completely ceased. After the Kouré attack of 9 August 2020, the country was entirely classified red, with the exception of the capital Niamey, which became orange, meaning “highly unrecommended”. The attack was conducted in an animal park frequented by international tourists and eight people were killed, including six foreign humanitarian workers. The choice of the French Government at the time was highly criticized



I also had to question the ethical choices that I was going to make in the interactions that would originate in the prison setting, where I would be addressing vulnerable subjects.

Finally, at the time this project started, I found myself holding a dual role: while I was still working as a consultant for UNODC, I had also become a researcher, working on matters related to justice approaches to the terrorism phenomenon. To what extent, and in what ways, would this duality affect the people I interacted with in the course of my research? But also, how would my dual experience shape and influence my positioning as a researcher and the understanding of the research object?

These issues became clear to me early on in the research effort and they inevitably directed my choices, questioning and thus contributing to both the processes I employed and the results I obtained.

CONFIDENTIALITY, CONTACTS, ACCESS

One of the first concerns I had to address was related to the compatibility between the work I was already conducting as a consultant and the research project. It was clear since its inception that this would not be a case of action research, where the professional and research activity

by Nigerien opinion: <https://nigerinter.com/2020/08/14/classement-du-niger-en-zone-rouge-par-la-france-indignation-et-desapprobation-des-nigériens/>

would fully integrate and overlap.²¹⁸ Then, I decided early on to entirely exclude the situation of children who may become arrested for terrorism-related offences from the scope of this research. This allowed a certain degree of separation between the UNODC project and the research focus. It also meant I could ensure complete confidentiality over any specific information acquired in the course of the UNODC project, especially as it concerned children.

Of course, while the separation may have been clear-cut in theory, it was not in practice, especially in terms of the relationships that I had established with key counterparts in the context of the UNODC work and who became key contacts for the conduct of the research fieldwork. With these key contacts, I had honest conversations when approaching them for the first time for the purposes of the research. During these talks I focused on clarifying that no information shared in the context of activities conducted under the project would be published in the research and also that, conversely, the information disclosed during the interviews would not be integrated in the design or implementation of project activities. I also focused on creating separate circumstances for research-related activities, I would not broach the research activity during work meeting and I was especially careful in setting interview times that were separate from any UNODC-related event. Then, during the introductory phase of interviews, I spent time explaining my different role as a researcher and I would emphasize the importance of consent and the question of anonymisation.

Such dissociation of my activities was useful to ensure the application of fundamental ethical standards. Yet, I had also emphasised it in the initial stages of the research in order to facilitate trust with the Nigerien officials who were initially work contacts and then made themselves available to become participants in the research. As time went on, the activities under the UNODC project that were conducted in Niger declined and I undertook fieldwork missions that were exclusively dedicated to the research. Then, I was also introduced to new contacts, who knew me solely as a researcher and the potential conflict inherent in my dual role attenuated. Nonetheless, to the subjects who cooperated with me and who knew me in both roles, the separation between the two may have felt to some extent artificial. Yet I found, during my stays in Niger, that my engagement as a consultant on work that was related to terrorism entailed a number of advantages, which contributed to the research outcomes in considerable ways.

²¹⁸ Altrichter, H., Kemmis, S., McTaggart, R., & Zuber-Skerritt, O. (2002). The concept of action research. *The Learning Organization*, 9(3), 125–131.

First and foremost, this role created the initial opportunities to reach the most relevant contacts among the magistrates of the pôle and the officials of the Ministry of Justice, who also became crucial intermediaries for the introduction to new contacts, creating the very possibility for this research to exist. Then, it was instrumental to obtaining access to the prisons, including the maximum-security facility of Koutoukalé. Through this, it allowed this study to include and call attention to the voices of those that have been more directly and severely impacted by the judicial counterterrorism approaches in Niger.

Most importantly, I had the clear perception that the knowledge acquired through my professional activities, together with the “status” that was endowed by my professional position contributed to my credibility and compensated for the unspoken limitations of age, gender and my situation as a foreigner investigating issues connected with national security. This was especially true as I often found myself facing imposing subjects, whose social standing was determined by their professional career (magistrates, lawyers, public officials).²¹⁹ This entails a number of open and hidden challenges to the position of a beginner researcher, including difficulties in approaching sensitive questions or the risk of seeing interviews becoming confrontational. I was especially aware of these risks as I asked questions related to “shortcomings” of “disfunctions” in the criminal justice chain and in counterterrorism approaches and I found on numerous occasions that having specific knowledge of the national legal landscape and of the national counterterrorism agenda allowed me to redress, to some extent, the imbalance inherent in the dynamic of the interview and open spaces of trust and disclosure.

At the same time, throughout my experience in Niger I found that the greatest ally in collecting relevant data has been the willingness of national actors, whether in government or in other roles, to contribute to research advances, in spite of sensitivities associated with the subjects. This was confirmed in multiple occasions: when discussing critically the effects of State of emergency measures; when disclosing the reasons that caused the backlog of judicial cases; at the time of supporting me in gathering data on the prison facilities and on the advances of the judicial proceedings, even when that meant disclosing that the majority of cases were being dismissed for insufficient evidence; opening up about the fears that characterised the Diffa hearings. Even when I carried out interviews in Diffa, where the security threat is more pressing

²¹⁹ Chamboredon, H., Pavis, F., Surdez, M., & Willemez, L. (1994). S'imposer aux imposants: A propos de quelques obstacles rencontrés par des sociologues débutants dans la pratique et l'usage de l'entretien. *Genèses*, 16, 114–132.

and clearly felt, especially by State officials, both governmental and non-governmental actors, as well as community representatives were willing to discuss their personal experiences and views of the security context, the justice process and the needs and expectations in terms of stabilisation. There is no doubt that, without such level of cooperation, this study would not have been possible.

ENTERING THE PRISONS: PRACTICAL AND ETHICAL QUESTIONS

When heading to the prisons of Kollo and Koutoukalé to interview detainees for terrorism-related offences, however, I had to leave behind the mechanisms of cooperation that I experienced with the other participants in the research. Entering this space added a layer of sensitivity to the subjects at hand, that came with the very real implications of addressing “vulnerable subjects”²²⁰. Doing research in the prisons has entailed practical issues of access; ethical questions around voluntariness and concern to avoid harm; as well as personal questions on my position and role as a researcher.

Questions of access to prison are generally lengthy and complex procedures, object of extensive negotiation and limitations.²²¹ In the present case, however, the initial and formal process proved to be relatively free of obstacles: the engagement of other officials from the Ministry of Justice facilitated obtaining a permit by the Director of the Penitentiary Administration, which allowed me to enter both the prison of Kollo and the maximum-security prison of Koutoukalé. Gaining access in practice was, however, less straightforward. In the Kollo penitentiary, I was able to hold brief discussions with the Regisseur adjoint and one of the guards, and could conduct a brief round of the facility. However, the unspoken limitations of the interviews were made clear as the guard refused to leave the (separate) room in which the interviews took place. To access the Koutoukalé prison, which is located in a rather deserted area, I had to be accompanied by the driver, who could not wait anywhere else. Here there was no room allocated to the interviews, which took place outside of the internal prison fence, but no guards remained within ear-shot. In both instances, the individuals to be interviewed were selected by the prison guards, apparently at random, among the list of “BH prisoners”, meaning persons

²²⁰ For an overview of unethical research programmes particularly in the medical field, conducted in US prisons, see Dalen, K., & Jones, L. Ø. (2010). Ethical Monitoring: Conducting Research in a Prison Setting. *Research Ethics*, 6(1), 10–16. and for a discussion of issues of potential coercion when conducting research with prisoner see Moser, D. J., Arndt, S., Kanz, J. E., Benjamin, M. L., Bayless, J. D., Reese, R. L., Paulsen, J. S., & Flaum, M. A. (2004). Coercion and informed consent in research involving prisoners. *Comprehensive Psychiatry*, 45(1), 1–9.

²²¹ Martos-Garcia, D., Devís-Devís, J., & Sparkes, A. C. (2022). Volunteering for Research in Prison: Issues of Access, Rapport and Ethics and Emotions During Ethnography. *International Journal of Qualitative Methods*, 21.

accused of crimes in relation with Boko Haram activities. Similarly, the permit only allowed me to enter the facility alone, thus the guards selected another detainee to serve as an interpreter in both instances. These circumstances entailed numerous practical and ethical considerations on the extent, significance and appropriateness of conducting interviews in this context. Rather than pushing back on those limits, I attempted to design strategies to mitigate their effects, first on the lives of the detainees who were becoming participants in the interview process and, second, on the research validity. Right away, I accepted that the prison environment would remain mostly “opaque to enquiry”²²²: living conditions and treatment of the inmates would be described and analysed through interviews of other participants who had regular professional access, rather than through my visits. I chose instead to prioritise the experiences of the interviewees in terms of the justice process.

The primary concern I was faced with was the imperative of avoiding harm to the participants through the interviews themselves. I had collected information on the prison facilities prior to the visits, concerning their functioning, the situation of the detainees and expectations of confidentiality. As the lack of any confidentiality was confirmed, I was especially aware of the risks that the interviews could engender. On the one hand, I had no way of controlling for any consequence that may arise from participants’ complaints over their situation and treatment within the prison. On the other hand, I had to take into account potential judicial implications: most of the interviewees were being held prior to their trial, meaning that their guilt had not been ascertained yet. For these reasons, I had strictly limited the scope of the questions in advance, avoiding any issue related to their potential role with terrorist groups or their permanence within the prisons. Instead, the questions focused on their arrest, their experience with the different justice actors, their opinions over the treatment received by the group of “repentis” and their expectations regarding the trial, their potential release and life after prison.

Questions related to the potential risks caused by the interviews are also intimately linked with issues of voluntariness in participating to the research process. Doubts over the willingness of the detainees to take part in the interviews were compounded by the fact that they had been selected by the guards. The role of guards as subjects of unquestionable authority over their daily lives and the progressive interiorisation of the need for compliance with the order and

²²² Martos-Garcia, D., Devís-Devís, J., & Sparkes, A. C. (2022). Volunteering for Research in Prison: Issues of Access, Rapport and Ethics and Emotions During Ethnography. *International Journal of Qualitative Methods*, 21, p.3.

norms of the institutionalized space of the prison, sometimes referred to “*prisonization*”²²³ made it especially necessary to clearly separate the research process from their obligations in the prison space. In addition to issues of compliance with “orders”, I was also aware of the expectations that my presence in the prison as a foreign woman could inadvertently raise: the detainees may expect me to be a humanitarian worker or a journalist. I decided to address both these elements right at the beginning of the interview: I introduced myself clearly as a researcher and clarified that participation in the research would not entail any benefit, the information would not be published in a short timeframe, nor would it lead to any direct assistance to the prisoners. I also clarified that answering my questions was entirely voluntary, that the guards did not expect them to and that they could decide to leave at any point. I considered the fact that three detainees refused to continue as a positive sign that the interview did not appear as mandatory.

As the interviews progressed, I listened to accounts of unexpected arrests, of torture, of isolation and loss of hope during the time spent in the prison, often with no contact with official authorities. At the time, my focus was on ensuring clarity and brevity of the questions, leaving the space for the interviewee to tell his story and maintaining attention high. However, while these stories were disclosed and then later during the analysis of the data collected, I was also called to confront the emotions they triggered in me as a researcher, including the frustration over the imbalance between the contribution they were making to this research and the lack of significant benefit that the research could render to them. This raised questions over the appropriateness of including these testimonies among the data. Ultimately, I believe that an account of the performance of the State in fighting terrorism and the consequences of securitizing the justice system would have been sorely incomplete without the voices of the subjects who have directly experienced the otherness and seclusion of securitizing practices. In this process, acknowledging and interrogating the space of the researcher’s emotions, has been essential “*to overcome, rather than to solve, the question of the “appropriate distance” in the research relationship*”.²²⁴ Engaging in reflexivity over the position of the researcher and interrogating the emotions involved in this process has proven instrumental to the account of the position of the different interviewees, rather than a hindrance to neutrality. Indeed,

²²³ Schlosser, J. A. (2008). Issues in Interviewing Inmates: Navigating the Methodological Landmines of Prison Research. *Qualitative Inquiry*, 14(8), 1500–1525, p.1511.

²²⁴ Villani, M., Pogliani Miletto, F., Mellini, L., Sulstarova, B., & Singy, P. (2014). Les émotions au travail (scientifique): Enjeux éthiques et stratégies méthodologiques d’une enquête en terrain intime. *Genre, Sexualité et Société*, 12, p.4.

recognising the space of personal reactions to the stories of the detainees, as well as to the accounts shared by the judges or the prosecutors, has supported the relevance of rendering their integrity through the present analysis and prevented the feeling of finding myself in a “contentious middle ground”²²⁵ between two opposed groups. For these reasons, it can also be relevant to provide an account of these processes here, shining a light on the methodological and ethical questions that often remain invisible in the research process.

A “SENSITIVE” ISSUE AND ITS POLICY IMPLICATIONS

Finally, it is worth investigating how my professional position supporting United Nations-related work may have impacted my posture as a researcher. This is especially relevant in view of this study’s focus on terrorism, a sensitive and controversial issue, plagued by its proximity with policy-making. In advocating for critical approaches to terrorism studies, Jackson contends that the taboo nature of the topic, compounded with the growing political interest in it, have led to the emergence of weak literature, hindered by the lack of definitional basis, morally oriented towards condemnation and insufficiently empirical.²²⁶ Silke has highlighted how terrorism research tends to be too close to policy agendas and serve governmental interests²²⁷, while Stampnitzky clearly describes the United States government’s direct efforts to promote terrorism-related expertise.²²⁸

It is inevitable that the experience as a consultant working on terrorism issues has fostered my interest in this area and has also shaped the focus of this research, directing it towards questions of State performance. However, it is this same experience that allowed to witness directly some mechanisms of reproduction of internationally produced categories at national level, especially in relation to terrorism, and triggered the questioning that informed this research.

Throughout this experience, both theoretical and empirical means were applied to ensure this study would avoid playing into the mechanisms of naturalisation of politically produced categories, such as, arguably, terrorism and terrorists. On the one hand, the theoretical approaches that were mobilised, such as constructivism, critical terrorism studies and

²²⁵ Martos-Garcia, D., Devís-Devís, J., & Sparkes, A. C. (2022). Volunteering for Research in Prison: Issues of Access, Rapport and Ethics and Emotions During Ethnography. *International Journal of Qualitative Methods*, 21,p.4.

²²⁶ Jackson, R. (2007a). The core commitments of critical terrorism studies. *European Political Science*, 6(3), 244–251, p. 252

²²⁷ Silke, A. (2001). The Devil You Know: Continuing Problems with Research on Terrorism. *Terrorism and Political Violence*, 13(4), 1–14.

²²⁸ Stampnitzky, L. (2013). *Disciplining terror: How experts invented ‘terrorism’*. Cambridge University Press, p.26.

securitization theories, are ones that bring to light the subjectivity and negotiation of meaning that are inherent in the construction of terrorism, sovereignty and the very notion of an exceptional threat. On the other hand, the entire analysis of counterterrorism approaches has been anchored in empirical findings and primary sources. In addition, the categories selected to analyse the performance of the State and measure “success” have been extrapolated from the priorities and understandings of actors in the field, rather than merely deduced from the theoretical framework. Furthermore, the analysis that is presented in the coming chapters has shied away from clear-cut findings in terms of “positive” and “negative” outcomes of counterterrorism justice approaches, aiming to provide a nuanced, even when at times contradictory account of the complexities of the reality on the ground.

Nonetheless, it is true that this project was animated by the belief that research can, and arguably should, inform policy, especially when the sensitivity of the issues at hand increases the chances for poorly informed, assumption-driven decision-making in the political arena.

CHAPTER III

JUSTICE IN NIGER:

SERVING THE STATE THROUGH DEMOCRATIZATION AND SECURITIZATION

INTRODUCTION

The 2010 transition to the Seventh Republic in Niger opens a period of intense evolution of the internal and external political agenda, which also expresses a new vision of the State and promises a renewed trajectory to sovereignty.

On the one hand, the new government, under the leadership of President Issoufou, designs an ambitious programme of reform, aiming to support economic and social development through the reinforcement of the institutional framework. Justice lies at the core of such transition, as it represents the manifestation of sovereignty through a State that is capable to enforce its laws and at the same time gain in legitimacy by safeguarding the respect of individual rights. In this sense, the vast reform process of the justice sector is conceived as the basis to overcome the lack of regulatory power of the State, and overturn the generalised perception of the predatory attitude of its officials, which lie at the roots of its fragilisation²²⁹ and lack of legitimacy.

On the other hand, the country assumes an increasingly relevant role on the regional and international scene through the growing involvement in the stabilisation of the Sahel region, alongside neighboring States, western partners and intergovernmental bodies. This second transition, henceforth described as “securitization”, revolves around Niger’s progressively assertive stance on countering terrorism as a crucial priority for the stability not only of the Sahel, but also of the country. In the context of progressive insecurity, aggravated by the Libyan crisis, the conflict in Mali, and the escalation of violence between Boko Haram and the countries on the Lake Chad basin, the spread of terrorist violence is quickly identified as the dominant threat in the region, and the strategic significance of a stable and strong Niger becomes more and more apparent to its partners.

This chapter will set the background for the research by introducing how the criminal justice approach to counterterrorism in Niger was born and flourished. To do so, it looks into the renewed focus on democratization and institutional credibility proposed by Issoufou’s government and in the progressive securitization of the political agenda in Niger. It shows how

²²⁹ Olivier de Sardan, J.-P. (2006). Des pouvoirs locaux dans l’attente de la décentralisation au Niger. In C. Fay, Y. F. Koné, C. Quiminal, & Pouvoirs et Décentralisations en Afrique et en Europe : Colloque International, Bamako (MLI), 2002/11/11-13 (Eds.), *Décentralisation et pouvoirs en Afrique: En contrepoint, modèles territoriaux français* (Centre IRD de Bondy; pp. 407–426). IRD.

the trajectories of these processes, their separate inception, their growing convergence and their final split under the mounting pressure of growing insecurity in the country.

Specifically, the analysis investigates how these two transitions overlapped in their influence on the criminal justice system. It has been highlighted how justice institutions constitute a systematically overlooked area of research, in the otherwise rich literature concerning *statehood* and *democratization* in Africa.²³⁰ And not only are such studies limited in number, but they are limited in scope, often focusing on the questions that are considered as indicators of a “democratic” justice, such as independence of the judiciary and access to justice, rather than on the day-to-day functioning of the judicial system, or justice “for real”²³¹. This chapter sets the scene to interrogate the role of justice in promoting sovereignty, both as an instrument of legality (through the production of norm and the provision of services) and as a tool to exercise effective control (an instrument of security policies).

Three chronological landmarks have been selected to explore the significance and role of the justice sector in the context of the two parallel processes of transition:

- The États généraux de la justice of 2012, a national participative congress on the state of justice in Niger, have been examined to contextualize the relevance of justice institutions in the broader process of institutions strengthening promoted by president Issoufou, and to provide an outline of systemic and legitimacy challenges plaguing the administration of justice in Niger.
- The first counterterrorism reform of 2011 has been selected as the starting point of the affirmation of the first phase of the war on terror in Niger, one that sees the incipit of the specialisation and separation of a criminal justice approach to terrorism, but during which the engagement of the country against terrorist has a primarily regional dimension.
- The February 2015 attacks of Boko Haram on Bosso and Diffa represent the turning point for counterterrorism in Niger, as terrorist violence goes from a regional to an

²³⁰ Alou, M. T. (2001) La justice au plus offrant. Les Infortunes du Système Judiciaire en Afrique de l’Ouest (autour du cas du Niger). *Politique Africaine*

²³¹ Jaffré, Y. (1999). Les services de santé "pour de vrai". Politiques sanitaires et interactions quotidiennes dans quelques centres de santé (Bamako, Dakar, Niamey). *Bulletin de l’APAD* 17, Blundo, G. (2006). Dealing with the Local State: The Informal Privatization of Street-Level Bureaucracies in Senegal. *Development and Change* (37) 4, 977-819, P.803

internal threat. They also trigger a new wave of counterterrorism reform, in 2016, whose implementation constitute the main subject of this research.

1. NIGER'S VII REPUBLIC: JUSTICE AND DEMOCRATIC REBOOT

Issoufou's election as President of the Seventh Republic of Niger, in 2011, follows a peculiar and seemingly painless transition. On 18 February 2010, the military junta removes then president Tandja, following a brief confrontation with the presidential guard, and takes power.

Tandja's election, in 1999, had inaugurated a period of stability and relative economic growth. He was the first president to be peacefully re-elected, in 2004, since the transition to the multi-party system of 1990. During his presidency debt relief measures had allowed for growing investment in health and education.²³² But a few months before the conclusion of his second mandate, the government announced a referendum for a Constitutional amendment that would remove the two-term limit for the President. This move came on the shoulders of mounting internal contestation, due to the government's denial of the food crisis which had risked a famine in 2005, and culminated in a constitutional crisis:

*"The Constitutional Court declared the referendum illegal and all opposition parties, even the president's nominal allies in the CDS, decried it as anti-democratic."*²³³

Accordingly, when the army takes power ousting Tandja, this is perceived as a legitimate move in defense of democratic values. The Junta takes the name of *Supreme Council for the Restoration of Democracy* (Conseil Suprême pour la Restauration de la Démocratie - CSRD) and quickly adopts multiple actions aimed at reassuring the national population, as well the international partners, that it does not intend to constitute a repressive military government, but rather it aims to favour a quick democratic transition, ending the Sixth Republic which had become illegal and unlawful.²³⁴ A transition government is swiftly formed by March, and in October the new Constitution is adopted through a popular referendum.²³⁵ However, this transition process is not presented as a complete innovation, but rather as a "*democratic reboot*",²³⁶ the reprisal of a long-standing process following the temporary illiberal disruption caused by president Tandja's claim to a third mandate.

²³² Elischer, S., & Mueller, L. (2019). Niger falls back off track. *African Affairs*, 118(471), 392–406, p. 395.

²³³ Elischer, S., & Mueller, L. (2019). Niger falls back off track. *African Affairs*, 118(471), 392–406, p. 396.

²³⁴ Baudais, V., & Chauzal, G. (2011). Briefing: the 2010 Coup d'Etat in Niger: a praetorian regulation of politics? *African Affairs*, 110(439), 295–304, p. 301.

²³⁵ Deltenre, D. (2015). *Niger: Cap sur 2016 ! Situation politique et sécuritaire à la veille des élections.*, p. 5-6.

²³⁶ Deltenre, D. (2015). *Niger: Cap sur 2016 ! Situation politique et sécuritaire à la veille des élections.*, p. 2.

The beginning of this broader democratization process in Niger can be traced back to 15 November 1990, when General Saibou officially recognised a multi-party system.²³⁷ Prior to that, the country had been ruled by a one-party system since its independence in 1960: first under President Hamani Diori, and then under the military regime led by General Koutché. Following Koutché's death in 1987, General Saibou, Chief Staff of the army, became his interim successor. He then set in motion a period of “*décrispation*”, which ultimately led to the National Conference in 1991,²³⁸ a new Constitution and the inauguration of the Third Republic in 1992, and which culminated in the first competitive elections of 1993.²³⁹

In 2011, this historical background still constitutes a relevant political inheritance : the roots on which to build the legitimacy of the Seventh Republic. Indeed, the new Constitution clearly recalls the achievement of the National Conference, which lay the basis for the new Republic's pursuit of:

*“A State based on the rule of law ensuring, on the one hand, the exercise of collective and individual rights, of freedom, justice, dignity, equality, security, and well-being as fundamental values of our society and, on the other hand, democratic alternation and good governance”*²⁴⁰

The new President follows to a large extent the same script : his electoral programme, significantly titled *the Renaissance*, firmly inscribes the future governmental action in an established democratization process and highlights the heritage of the free elections of 1993 and 1999.²⁴¹ But at the same time, it recognises that the track-record of democratization in Niger so far is mixed at best. From a political perspective, the country has hardly achieved more stability: since 1993, Niger has undergone three military coups (respectively in 1996; 1999; 2010) and as many political transitions. From a developmental point of view, the situation is also critical, especially following a renewed food crisis in 2010, with an estimated 46% of the total national population in a situation of food insecurity.²⁴²

In this context, the strategy of the new government focuses on a renewed commitment to functioning, reliable, and accountable institutions as the crucial instrument to achieve good

²³⁷ Gregoire, E. (1994). Démocratie, état et milieux d'affaires au Niger. *Politique Africaine* 56, 93 – 107, p. 96.

²³⁸ Gregoire, E. (1994). Démocratie, état et milieux d'affaires au Niger. *Politique Africaine* 56, 93 – 107.

²³⁹ Gazibo, M. (2003). La vertu des procédures démocratiques, The virtue of democratic procedures. *Politique africaine*, 92, 145–156

²⁴⁰ Journal officiel de la République du Niger, (29 novembre 2010), Constitution de la VIIe République, préambule.

²⁴¹ Issoufou, M. (2011) Niger : la Renaissance. Programme de Campagne pour les Elections Présidentielles 2011, p.7.

²⁴² Olivier de Sardan, J. P. (7 Janvier 2011) Au Niger, le cycle de crises alimentaires, Le monde Diplomatique : <https://blog.mondediplo.net/2011-01-07-Au-Niger-le-cycle-des-crisis-alimentaires>

governance and socio-economic development. Such focus on institutions, and specifically on rule of law and judicial institutions is confirmed by the *Economic and Social Development Plan 2012-2015*. If the primary objective of the *Plan* is strengthening the economic growth and social development of the country, the government takes the view that such objectives will only be achieved through a systemic approach, one that is based on the credibility, efficiency and stability of public institutions.²⁴³ In this view, the institutions are representative of the State's capacity to rule and to provide services to its citizens. In other words, they are the main vehicle through which the State can successfully negotiate its sovereign qualities.

This first section of the chapter is dedicated to an overview of the justice system in Niger, its perceived flaws and the structural challenges that threaten its efficiency, and the promise for reform undertaken by the government since 2012.

1.1 LES ETATS GENERAUX: JUSTICE IN TRANSITION

The ability of the State to uphold and enforce its laws takes center-stage since the inception of the new government, and this capacity is dependent on the role of justice institutions. The *Renaissance electoral programme* states:

*“Our people’ aspirations to justice has been so far reduced to promises. In the course of the forthcoming mandate, the PNDP-TARAYYA (Nigerien Party for Democracy and Socialism) will be firmly committed to respond positively to these expectations implementing appropriate measures. Impunity will be banned; the State, in partnership with civil society, will undertake dissemination campaigns of laws and rule of law principles, especially in rural areas and among the least privileged urban population; the independence of Justice from other powers will be preserved; all social relations will be regulated by law so that no one will be denied their rights; justice will be brought closer to the citizens and detention conditions will be improved through considerable investment in infrastructure, equipment, and human resources”.*²⁴⁴

The *Economic and Social Development Plan 2012- 2015* highlights the outcomes of a first phase of reform undertaken under the Tandja presidency, which include: a revision of the penal code and the code of criminal procedure, integrating a stronger focus on human rights, new legislation regulating the judicial structure, as well as the profession of justice actors (judges, lawyers, notaries, judicial officers), the creation of a national agency for legal assistance (the

²⁴³ République du Niger (2012) Plan de Développement Économique et Social (PDES) 2012 – 2015, Ministère du Plan de l'Aménagement du Territoire et du Développement Communautaire, p. 106.

²⁴⁴ Issoufou, M. (2011) Niger : la Renaissance. Programme de Campagne pour les Elections Présidentielles 2011, p.10.

Agence Nationale de l'Assistance Juridique et Judiciaire -ANAJJ), the creation of a section providing initial training to judges.²⁴⁵

Despite these notable advances, however, the administration of justice is still plagued by systemic failures. With the launch of the new governmental strategy, the emphasis on the reform of justice materializes in a vast national conference. On 26 November 2012, the conference room of the Congress Centre in Niamey hosts the opening of the *états généraux de la justice*. For five days, 500 participants from all regions in the country are called to address and discuss around four broad themes: i) justice and institutions; ii) justice and society; iii) justice and the economic environment; iv) justice and the citizens.²⁴⁶

The objective of this broad consultation is twofold: first, taking stock of the challenges and shortcomings faced by justice institutions and in the delivery of related services, and, second, accordingly define priorities and recommendations to improve the implementation of undertaken reforms.

Presented as an historic opportunity, the conference becomes a key component of the broader rule of law reform undertaken by a State in transition, a situation where proving sovereign qualities becomes especially critical to ensure governmental legitimacy. In the words of President Issoufou at the opening ceremony:

*“Rule of law and justice are two fundamental values of the Republic. The Renaissance programme envisages to promote them in view of the moral rearmament of our society, and of its economic and social progress through the improvement and consolidation of governance.”*²⁴⁷

According to Teitel,²⁴⁸ the rule of law at a time of regime transition embodies a foundational quality, based on a dual nature: on the one it has to uphold continuity with established principles and norms, and on the other hand it is required to promote the shift to the normative basis of the new regime. No one single trait can prevail, for continuity allows not only for the certainty of the law, but for the continued and legitimate existence of the State itself, while the paradigm shift is necessary to justify that justice under the new regime will be effective, thus signaling the distance from past regimes. It is in this duality that justice holds foundational value for State sovereignty during a transition. Teitel argues that the tension between “*backward looking*” and

²⁴⁵ République du Niger (2012) Plan de Développement Économique et Social (PDES) 2012 – 2015. Ministère du Plan de l'Aménagement du Territoire et du Développement Communautaire, p. 60.

²⁴⁶ République du Niger, Ministère de la Justice (2012). États Généraux de la Justice. Rapport général des travaux

²⁴⁷ *ibidem*

²⁴⁸ Teitel, R.G. (2000) *Transitional Justice*. Oxford University Press.

a “*forward looking*” element provides justice with a transformative quality that is necessary for the transition to happen. In this sense, the *états généraux de la justice* become the opportunity to concretely define this transformative role of justice institutions for Niger: which principles will be upheld, and ensure continuity with the identity of the State? What new features will transform the current system in effective justice?

Once again, the element of continuity is found in the connection with the process of democratization that the country embarked on since the nineties. First, the participative process of the *états généraux* mirrors that of the 1991 National Conference. Civil society is involved, with a view to favour its engagement in reform process, which is deemed necessary improve the image and perception of national justice by the citizens.²⁴⁹ Second, the programme of reform is not in its preliminary stages, but it is underway. As already claimed by the *Economic and Social Development Plan*, further support to the justice sector is to be inscribed in the ongoing reform process initiated under the previous presidency.

Therefore, the Congress tackles the complex task of assessing the concrete obstacles to the translation of the comprehensive reform programmes into practice. The conclusions drawn by the four thematic commissions call attention to a dual challenge. On the one hand, the *structural flaws* of the judicial institutions de facto prevent the provision of effective services to the citizens. The same systemic deficiencies widely affect the law enforcement sector, thus threatening the sovereign capacity to maintain law and order on multiple levels. On the other hand, the distrust of the population towards the representatives of justice, be it policemen, gendarmes, or magistrates, erodes the foundations of the legitimising power of justice. In this sense, the mistrust expressed by the citizens towards justice officials and institutions²⁵⁰ demonstrates the distance, both actual and metaphorical, of the State from its people.

Reports of the consultations taking place during the congress show enhanced awareness not only of both these dimensions as representing crucial priorities for public action, but also of their necessary interconnection:

“The President of the Bar Association of Niamey, who took the stage on behalf of the Bar Association, explained that the états généraux reveal the importance that national authorities place on justice for the establishment of a rule of law system. He then

²⁴⁹ République du Niger, Ministère de la Justice (2012). *Etats Généraux de la Justice. Rapport général des travaux*, p.5.

²⁵⁰ République du Niger, Ministère de la Justice (2012). *Etats Généraux de la Justice. Rapport général des travaux*, see annex *Rapport des travaux de la Commission N°4 « Justice et Justiciables »*, p. 88.

insisted on the fracture between justice and the citizens, a fracture which originates in the wrongs affecting our justice system."²⁵¹

Then, the forward-looking commitment of the new regime is to be identified in the decisive commitment to end the crisis of national institutions. And such commitment materializes in considerable investments: for the first time in 2012, the budget dedicated to the ministry of justice reaches 1,5% of the national budget, while previously it had rarely surpassed 0,80%,²⁵² the workforce of magistrates and clerks grows²⁵³, new equipment is provided to detention facilities²⁵⁴, in partnership with international donors. The spike in national investment on justice, however, will be short-lived: in 2013 the ratio will be down to 0,70 % and in 2015, when the fight against terrorism becomes an absolute priority on the national agenda and defense expenditure continues to rise, the budget of the Ministry of Justice will plummet to 0,56% : the lowest percentage in a decade.²⁵⁵

In 2012, however, security concerns and terrorism in particular are rarely mentioned in the context of institutional reform of the judiciary. The counterterrorism agenda, which is already determinant in the reform of security and law enforcement sector, as we will see later on, does not yet appear to be a priority in this context, despite the fact that new legislation on terrorism has already been introduced the year before, during the military government.

1.2 THE LIMITS OF JUSTICE, CHALLENGING SOVEREIGNTY

The reform program examined so far is representative of the political relevance and emphasis on the role of justice institutions during the political transition. However, it is the way that justice institutions work in reality that determines whether the administration of justice will be conducive to a State that can claim sovereignty.

But how do justice institutions contribute to the negotiation of sovereignty, in practice? In a nutshell, domestic sovereignty is understood to involve two fundamental components: *“Domestic sovereignty involves both authority and control, both the specification of legitimate authority within a polity and the extent to which that authority can be effectively exercised”*.²⁵⁶ The attribute of authority can be identified with the State’s capacity to ultimately decide what

²⁵¹ République du Niger, Ministère de la Justice (2012). Etats Généraux de la Justice. Rapport général des travaux, p.9.

²⁵² République du Niger (2016) Annuaire Statistique 2011-2015, Institut National de la Statistique, p. 12.

²⁵³ République du Niger (2016) Annuaire Statistique 2011-2015, Institut National de la Statistique, p. 15.

²⁵⁴ République du Niger (2016) Annuaire Statistique 2011-2015, Institut National de la Statistique, p. 31.

²⁵⁵ République du Niger (2016) Annuaire Statistique 2011-2015, Institut National de la Statistique, p. 12.

²⁵⁶ Krasner, S. D. (1999). *Sovereignty: Organized Hypocrisy*. Princeton University Press, p.4.

rules govern the polity: its normative capacity. In a rule of law perspective, this entails not only that the State will legislate, but that it will do so:

- according to standards of validity of the law, and notably the requirements of clear, predictable, prospective (as opposed to retroactive), and public laws;
- in a way that promotes legal certainty and limitations to the volatility of norm's content;
- through norms that grant access to justice to individual citizens, respect of fundamental as well as procedural rights²⁵⁷

and that ultimately State agents will recognise the authority of the law and act accordingly.

Effective control, on the other hand, refers to the capacity of the State to enforce its norms across its territory, including with a view to provide essential public goods.

This study adopts the view of the State as an agent and sovereignty as a discourse that the State is interested in claiming to enhance its legitimation²⁵⁸. In this perspective, the justice system and its officials are proxies of the State and have an interest in working to facilitate sovereignty claims by contributing, through their practices, to its ability to exercise authority and effective control.

As a consequence, the structural weaknesses that undermine the ability of justice institutions to contribute to law validity and law enforcement represent a threat to sovereignty. While these challenges should not be interpreted as pathological and as leading to the dissolution of the State²⁵⁹, they are however an important obstacle to effective claims to sovereignty. In a period of regime transition, overcoming these challenges is especially relevant to increase legitimation. The following section provides an overview of the weaknesses which characterise the provision of justice in Niger, as that were identified by the consultative process of the états généraux in 2012. In doing so, it argues that the State's commitment to addressing these challenges represents the forward-looking element of justice during the transition to the VII Republic.

²⁵⁷ Summers, R. S. (1999) *The Principles of the Rule of Law*, pp.1693-1694.

²⁵⁸ Biersteker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press, p. 11.

²⁵⁹ Hagmann, T., & Péclard, D. (2010). Negotiating Statehood: Dynamics of Power and Domination in Africa. *Development and Change*, 41(4), 539–562.

Another crucial element for the negotiation of sovereignty is the value of recognition. While the relevance of recognition is often emphasized in the international arena, where mutual recognition among States is often a condition of their existence, its importance for domestic sovereignty should not be underestimated. Indeed, recognition *is* the link between authority, territory and population that provides cohesion to the notion of sovereignty. Internal recognition identifies the population's view of the State's authority and contributes to cementing or undermining claims to sovereignty.

Accordingly, this chapter will also look into the relationship between justice institutions and the citizens. Emphasized as one of the most crucial challenges for justice in Niger during the états généraux it also represents a crucial limitation to the State's ability to claim sovereignty. Analysing both structural weaknesses and citizens' disaffection to justice institutions underlines the interconnectedness of these two dimensions in their impact on State authority. In the wording of the Report on the états généraux, to overcome these challenges would mean to:

“Ensure the respect of the law as a constitutional principle, the right to an efficient justice system and to an effective judicial protection, the equality of all citizens before the law and the end of impunity and of corruption.”²⁶⁰

STRUCTURAL WEAKNESSES OF JUSTICE IN NIGER

The structural flaws in the criminal justice system of Niger are to be understood, according to Tidjiani Alou, as “*constraints weighing on the standard performance of the public service of justice*”.²⁶¹ In this sense, structural weaknesses manifest the limitations to both State authority and State's capacity to exercise affective control, understood as comprising law and order as well as the provision of appropriate services.

The administration of justice in Niger is first and foremost conditioned by a dense and opaque legal framework, which creates a distance between formal norms and the social understanding of justice²⁶². Considerable portion of the law, including in the Criminal Code and Code of Criminal Procedure, are still today directly inherited from French colonial law. Furthermore, the limited financial means affect the dissemination of the reforms that have been undertaken

²⁶⁰ République du Niger, Ministère de la Justice (2012). Etats Généraux de la Justice. Rapport général des travaux, p.5.

²⁶¹ Alou, M. T.(2012) La justice au plus offrant. Les Infortunes du Système Judiciaire en Afrique de l'Ouest (autour du cas du Niger). *Politique Africaine*, p. 62.

²⁶² Göpfert, M. (2016), Repairing the law: The search for justice in the Nigerien gendarmerie, *Theoretical Criminology*, Vol 20, Issue 4, pp. 446 – 461, p. 451.

since. Therefore, on the one hand the national legislative arsenal is weighed down by antiquated provisions, often incoherent with the national context, on the other hand the proliferation of amended legislation makes it even more heavy and cumbersome. At the same time, professionals, including not only policemen, gendarmes, judicial police, but also judges and prosecutors are often misinformed on innovations introduced through reform.

A second aspect adding to the opaque quality of the overall legal framework is the duality between positive and customary law. Niger has nonetheless adopted an innovative approach in the attempt at combining customary norms with positive law, which consists in leaving the option to the citizens on the preferred regime to be applied to their disputes.²⁶³ Such duality of course is limited to matters of family law, succession law, and property law²⁶⁴, and can never extend to criminal law which remains the undiscussed domain of positive law. Yet, it represents a conscious and notable effort to create a continuum of mutually recognised norms, rather than two opposing systems. Indeed, the legislator has gone even further in the attempt to overcome a binary system and promote an integrated normative framework, by associating two appointed assessors to aid the judges and provide counsel on the customary norms of the parties in civil matters.²⁶⁵ These assessors are regularly retributed by Ministry of Justice, which stresses their undertaking of an official, and recognised role within justice's institutional structure. Nonetheless, the gap between positive and customary law remains, and adds to the magistrates' lack of knowledge of customary norms. In addition, local variations to customs further cloud the panorama of applicable provisions and build on the judges' alienation from the context in which they operate.

Another considerable issue is the systematic shortage of human resources. The number of active magistrates on national territory provides a useful indication of Niger's challenges in this area, with only 381 magistrates active on the entire national territory in 2015.²⁶⁶ While this number has been constantly growing in the past decade, a trend that is also valid for clerks and law enforcement agents (whether under the Ministry of Defense, as the gendarmerie, or under the

²⁶³ Art. 63 - 67 Loi organique n° 2004-50 du 22 juillet 2004, fixant l'organisation et la compétence des juridictions en République du Niger

²⁶⁴ *ibidem*

²⁶⁵ « En matière coutumière, des assesseurs avec voix consultative complètent la Cour de cassation, le tribunal de grande instance, le tribunal d'instance et le tribunal du foncier rural », in Art. 5, Loi organique n° 2004-50 du 22 juillet 2004, fixant l'organisation et la compétence des juridictions en République du Niger.

²⁶⁶ République du Niger (2016) Annuaire Statistique 2011-2015, Institut National de la Statistique, p.250.

Ministry of Interior, as the police and national guard) the ratio of judges and population²⁶⁷ remains very low.

Poor human resources have multiple consequences: from lack of territorial coverage, to difficult access to justice, to slower procedures and backlog of judicial process. Furthermore, the shortage of available professionals in specific roles threatens the basic notion of justice. A key example in this sense is the situation of lawyers practicing on national territory, which is of 111 practitioners registered with the Bar Association in 2015, according to official national sources²⁶⁸. Not only, contrary to public officials, this number has not increased in the past years, and professional lawyers are registered and active only in the capital Niamey, where profitable cases are concentrated. This has led to the commodification of the right to a legal defense,²⁶⁹ and to its de facto non-existence in certain regions of the country.

In addition, inadequate training, and especially the insufficient specialisation of magistrates, coupled with the lack of specialised jurisdictions, undermine effective access to justice, as well as the overall quality of judicial proceedings.

Poor working conditions are experienced by the actors of the criminal justice chain at all stages. Working environments ultimately results suffer greatly from the limitations of the available budget. For instance: law enforcement often cannot intervene rapidly due to insufficient vehicles and lack of resources for fuel.²⁷⁰ Administrative weakness also directly affects the professionals' ability to communicate, appropriately collect, store, and access data and information, and make the justice system a weak bureaucratic machine. From a legal point of view, this also entails an extremely poor circulation of relevant doctrine and jurisprudence.²⁷¹ The low salaries of judges have also constituted, historically, motive of complaint, especially when compared to liberal legal professions such as lawyers and notaries²⁷² and have contributed

²⁶⁷ According to the national data, the ratio was 1 magistrate to 48 560 citizens in 2015, see République du Niger (2016) *Annuaire Statistique 2011-2015*, Institut National de la Statistique, p.250.

²⁶⁸ République du Niger (2016) *Annuaire Statistique 2011-2015*, Institut National de la Statistique, p.250.

²⁶⁹ Alou, M. T. (2007). 4. La corruption dans le système judiciaire. Dans *État et corruption en Afrique: Une anthropologie comparative des relations entre fonctionnaires et usagers (Benin, Niger, Sénégal)* (pp. 141-177), page 175.

²⁷⁰ Olivier de Sardan, J.-P. (2006). Des pouvoirs locaux dans l'attente de la décentralisation au Niger. In C. Fay, Y. F. Koné, C. Quiminal, & Pouvoirs et Décentralisations en Afrique et en Europe : Colloque International, Bamako (MLI), 2002/11/11-13 (Eds.), *Décentralisation et pouvoirs en Afrique: En contrepoint, modèles territoriaux français* (Centre IRD de Bondy; pp. 407-426). IRD, p. 417.

²⁷¹ Alou, M. T. (2001) La justice au plus offrant. Les Infortunes du Système Judiciaire en Afrique de l'Ouest (autour du cas du Niger). *Politique Africaine*, p.63.

²⁷² Alou, M. T. (2001) La justice au plus offrant. Les Infortunes du Système Judiciaire en Afrique de l'Ouest (autour du cas du Niger). *Politique Africaine*, p. 63.

to rampant corruption. At the same time, the very high turn-over rates, which are imposed by the State and designed in part as a mechanism to discourage excessive familiarisation with the local communities, have a considerable effect on the quality of life of these professionals, in particular magistrates and gendarmes who are especially affected. This also contributes to their alienation from the local context, including the customary laws prevailing in any given area.

The narrow budget also impacts infrastructure available, both in quantity and in quality. This becomes especially apparent in facilities where individuals are detained, whether they are police stations or prisons. Law enforcement officials routinely complain about the conditions of police cells, which are unsuitable to hold suspects: the limited space and the inadequate aeration system are notably aggravated by the local climate. In addition, the premises generally do not allow for separated spaces for women or minors in custody, as the law provides.

The situation of prisons in and of itself represents one of the most considerable threats to the stability and efficiency of the justice process. Overcrowding is a pervasive reality, with a prison system increasingly compressed by a growing prison population: 6 562 detainees in 2007²⁷³ had become 8 771 in 2013²⁷⁴.²⁷⁵ In the meantime, however, the 38 prison facilities available on the national territory had undergone no improvement nor enlargement, with the facilities closer to the capital often experiencing the highest overcrowding rates (In 2013, the civil prison of Niamey was holding 1089 detainees, despite its capacity of 350 persons).²⁷⁶ This phenomenon is largely a direct result of slow and inefficient judicial proceedings, as confirmed by another persistent feature of the prison population: most detainees are awaiting trial, rather than serving sentences (According to national statistics, 60% of detainees in 2011; 59% in 2012; 56% in 2013 were held in pre-trial detention)²⁷⁷. The infrastructure often dating back to the colonial time, limited budgets, inefficient records and often extreme overcrowding contribute to untenable conditions for detainees. Extremely poor health and medical care conditions, insufficient supplies, including food, medicine, and even vehicles to ensure that emergencies can be quickly transferred to a local hospital are a constant threat to the lives of the detainees.

²⁷³ According to World Prison Brief, available here: <https://www.prisonstudies.org/country/niger>

²⁷⁴ République du Niger (2016) *Annuaire Statistique 2011-2015*, Institut National de la Statistique, p. 252.

²⁷⁵ It is worth noting that the global prison population rate at national level does not show such a clear pattern of growth: due to the one of the fastest growing populations in the world, the annual rate fluctuates around 3.8%. The extent and impact of overcrowding only becomes visible when transitioning from nationally aggregated data to data specific to the specific facilities. For a more detailed analysis of overcrowding in counterterrorism context, see the box “*A look at the impact of counterterrorism on overcrowding in prisons*”, Chapter VI.

²⁷⁶ United States (2013) “Niger 2013 Human Rights Report”, Country Reports on Human Rights Practices, p.3.

²⁷⁷ République du Niger (2016) *Annuaire Statistique 2011-2015*, Institut National de la Statistique, p. 252

This critical situation is exacerbated by the lack of appropriately selected and trained prison staff. While awaiting an appropriate reform to allow for the selection of custodial personnel that would fall under the supervision of the Ministry of Justice, the task falls on the garde nationale, an autonomous military body under the responsibility of the Ministry of Interior, who lack specialised training, sufficient resources, and any oversight. Yet the analysis of power relationships within the prison reveals a multifaceted reality. On the one hand, any available mechanism of monitoring and accountability for the behavior of prison guards is deprived of any credibility, as confirmed by cases of violations of prisoners' rights, including acts of torture or gross negligence, whose reporting by national human rights bodies yielded no official consequence.²⁷⁸ At the same time, prisoners who can afford it will have no trouble ensuring special treatment, including access to mobile phones and other means of communication.²⁷⁹

The ultimate representation of the State's sovereign power to exercise control, the prison also provides the clearest indicator of failure of its authority. However, this overview of structural weaknesses provides more than an instant argument for bad governance in the administration of justice. Going beyond the formalist analysis inherent in the conceptualisation of the rational-goal model of justice system, and focusing on a perspective of "law in action", systemic flaws also reveal an intricate patchwork of competing pressures weighing on the agents of justice throughout the process.²⁸⁰ In this sense, the different constraints of an inefficient system trigger and legitimise a continuous process of mediation between the rationalist expectation and the reality on the ground, between personal and institutional incentives, resulting in adaptation and at times complete overlook of formal procedures.

JUSTICE OFFICIALS AND CITIZENS: MUTUAL DISTRUST?

The day-to-day functioning of the justice system is often a mystery to the eyes of the citizens. The interconnection of multiple bodies and officials, the intricacies of procedures and norms, the lack of appropriate information and assistance, the pervasive corruption, nepotism, and political influence, all contribute to generating a substantial divide, which soon becomes filled with distrust and fear.

²⁷⁸ Collectif des Organisations de défense des droits de l'homme et de la démocratie (Décembre 2014), Rapport sur la situation des droits de l'homme en milieu carcéral au Niger, p.18.

²⁷⁹ Collectif des Organisations de défense des droits de l'homme et de la démocratie (Décembre 2014), Rapport sur la situation des droits de l'homme en milieu carcéral au Niger, p. 27.

²⁸⁰ Feeley, M. M. (1973). Two Models of the Criminal Justice System: An Organizational Perspective. *Law & Society Review*, 7(3), 407–425.

Quite often, the suspicion originates in ignorance of justice officials, their role, and the services provided by the institutions. This is due, among other factors, to the physical distance separating most of Niger's citizens from the sites of justice. The importance of distance is also revealed in routine exchanges with institutional agents, who are especially aware of how it affects the citizens' capacities to access justice services. A recent national study provides a good picture:

“The population travel long distances to access justice services. For instance, the persons interviewed for the present survey travel 44,15 km to lodge a complaint before the court, 41,95 km for a request for criminal records, 41,75 km for the issuing of convocations, 41,63 km to see a notary and 41,43 km to lodge a legal assistance request to a lawyer.”²⁸¹

It is also worth highlighting that the figures are averages, which can hardly account for the notable differences between urban and rural areas, where distances from justice institutions can reach hundreds of kilometers. How can formal proceedings then constitute a valid option for, say, reparation of grievances suffered by a victim?²⁸²

But the cultural dimension of distance from justice proceedings constitutes an even higher barrier. Assisting to trial hearings in Niamey shows to which extent the language and rituals of justice present an intentionally archaic and inaccessible performance. The black robes, the wigs, the technical juridical French, the ceremonial formality of proceedings conjure up an image of justice as:

“ (...) almost theatrical representations which intimidates the individual, fostering fear and diffidence. All these elements contribute to covering the court in mystery, and to generating a further lack of understanding and distance between those who judge and those who are judged”.²⁸³

The recent national survey of popular perception of the justice institutions provides further context to the cultural divide, showing that only 14% of the participants in the survey can explain the concept of “judicial system”. If general notions such as nationality (explained by 40% of participants in the survey), divorce and repudiation (known by 38% of respondents), or even rape and sexual harassment (described by 30% of respondents) appear to be more widely understood, the technical terminology of judicial proceedings is generally recognised by less than 10% of the population (For instance, only 7% and 6,5% of the respondents were able to

²⁸¹ République du Niger (2018) Enquête nationale sur la corruption en milieux judiciaire et les autres phénomènes sociaux. Rapport Final. *Institut National de la Statistique*, p. 58

²⁸² Göpfert, M. (2016), Repairing the law: The search for justice in the Nigerien gendarmerie, *Theoretical Criminology*, Vol 20, Issue 4, pp. 446 – 461, p. 447.

²⁸³ Alou, M. T. (2001) La justice au plus offrant. Les Infortunes du Système Judiciaire en Afrique de l'Ouest (autour du cas du Niger). *Politique Africaine*, p 70.

explain, respectively, the expressions “initiation of an appeal” and “remedy for abuse of power”).²⁸⁴

This mistrust is further reinforced by the perception of an unfair system, crippled by political interference and by pervasive corruption.²⁸⁵ The meddling power of political interests, especially in high-profile cases, is widely recognised. Rendering a sentence contrary to prominent interests can even result in punishment through judges’ transfer to lower positions.²⁸⁶ In parallel, it is well known that the proverbial lethargy of judicial institutions can easily be sped up through the appropriate channels, which advances claims of a two-tier justice system, efficient for the wealthy and well-connected, painfully slow for anyone else. From a formal perspective, these malfunctioning mechanisms undermine not only the lawfulness of justice proceedings, but also undercut the certainty of the law.

In parallel, Tidjiani Alou in his in-depth analysis of the justice system in Niger illustrated the complexity and reciprocity of the dynamics between the officials tasked with providing justice services and the “*usagers*”, the citizens who are the recipients of such services. If the population laments the widespread corruption, judges, in parallel, describe the stress of constant societal pressure on multiple levels, from families, friends, party members and so on.²⁸⁷

It is in this network of informal connections and negotiations that the “broker” acquires increased relevance as an intermediary between the institution and the citizen. As introduced by Blundo, the notion of brokerage presents inherent ambivalence: brokers both facilitate and contribute to further obscuring the relationship between the citizen and the institution.²⁸⁸ While providing support to the individual confronted by the overbearing process of justice, the broker also confirms the suspicion that with no external support and informal channels there would be no hope for a positive outcome. Göpfert, in his study of Niger’s gendarmes, further elaborates on the notion of brokerage, proposing the distinction between the “administrative broker”, as described by Blundo and de Sardan, and the “knowledge broker”. The distinction lies in the direction of the vectors: if the administrative broker supports the citizen in accessing the

²⁸⁴ République du Niger (2018) Enquête nationale sur la corruption en milieu judiciaire et les autres phénomènes sociaux. Rapport Final. *Institut National de la Statistique*, p. 20-21.

²⁸⁵ Alou, M. T. (2007). 4. La corruption dans le système judiciaire. Dans *État et corruption en Afrique: Une anthropologie comparative des relations entre fonctionnaires et usagers (Benin, Niger, Sénégal)* (pp. 141-177).

²⁸⁶ United States (2013) “Niger 2013 Human Rights Report”, Country Reports on Human Rights Practices, p.6.

²⁸⁷ Alou, M. T. (2001) La justice au plus offrant. Les Infortunes du Système Judiciaire en Afrique de l’Ouest (autour du cas du Niger). *Politique Africaine*, p69

²⁸⁸ Blundo, G. (2001) Dealing with the Local State: The Informal Privatization of Street-Level Bureaucracies in Senegal, P. 803

institution, the knowledge broker supports the public official to overcome his alienation, understand the codes and learn vital information on the population. Both roles are extremely relevant to fully understanding the functioning of justice in Niger. What they have in common, beyond their different role, is how through their intermediary action they have come to influence the overall procedural set-up, reinforcing its informal components and contributing to their proliferation.

To conclude the overview of the justice in action in Niger it is worth addressing not only the perception of the institutions by the citizen, but also the societal consequences of being in contact with the justice system. This is especially true for criminal justice. Being identified as participating in a judicial process has a high social cost, for the alleged perpetrator as well as for the victim. And it is the price of this stigma that shines a new light on consequences of the prison. First, chances are high that suspects and convicts are sent to prison far away from their families, often for months or years. This not only severs the family connections (often divorce follows the imprisonment), but also favours the spreading of rumors and speculations on the individual. After release, ex detainees find it especially hard to reintegrate their communities of origin, as they are labelled as dangerous or having lost all social value.²⁸⁹

In this light, Issoufou's government commitments to strengthening the role and the functioning of justice institutions reveals all of its importance as a crucial aspect of the negotiation of sovereignty in the democratization transition. In this programme, addressing and repairing the distance between citizens and justice, including by improving the conditions of specific groups of justice recipients that are the detainees, assumes vital importance.

2. SECURITIZATION IN NIGER: A SEPARATE TRAJECTORY

If the presidency of Issoufou is characterised by the “democratic reboot”, and a renewed effort for institutional reform, a second and parallel process begins to take form at the inception of his government: the securitization of the political agenda.

At its core, the notion of securitization entails the construct of a problem into a security priority, meaning a potentially existential threat.²⁹⁰ When put into action in context of limited statehood, however, securitization entails specific consequences. Notably, it can be argued that it triggers

²⁸⁹ Göpfert, M. (2016), Repairing the law: The search for justice in the Nigerien gendarmerie, *Theoretical Criminology*, Vol 20, Issue 4, pp. 446 – 461, p. 451

²⁹⁰ Stritzel, H. (2007). Towards a Theory of Securitization: Copenhagen and Beyond. *European Journal of International Relations - EUR J INT RELAT*, 13, 357–83.

a dual process. On the one hand, the introduction and progressive prioritisation of security over developmental goals. On the other hand, and in the context of the domination of Western powers over the developing world, securitization also implies the emergence of new norms and policies devised by the north and imposed on the south.²⁹¹

But how did securitization come to be at the forefront of Nigerien policy-making? There is little doubt that the securitization of the terrorism-related agenda driven by Western powers was underway well before its manifestation in Niger. Indeed, at the time of the transition to the VII Republic, terrorism and national security do not appear to be among the key concerns internally.

It is true that the 2012 *Strategy for Security and Development of the Sahelo-Saharan area* already highlighted the connection between socio-economic development and the security concerns. However, its approach echoes rather an attempt at promoting the concept of human security, stressing the need to facilitate access to essential services and economic opportunities and strengthening investment on purely development -oriented intervention.

In Niger, the first counterterrorism reform has already been adopted at that point, through three decrees passed by the supreme council of the military transition government on 27 January 2011. The reform has introduced the specialisation of institutions and bodies responsible for dealing with terrorism, at investigative as well as judicial level. Yet, the dispositions concerning the specialised tribunal appear unclear, and its set-up is not prioritised. Addressing terrorism does not seem to be so pressing. The governmental programme, exemplified by the *Economic and Social Development Plan 2012-2015* remains primarily focused on strengthening economic growth and good governance through trustworthy institutions.²⁹² Issues of security and terrorism are mentioned, but mostly in relation to the geopolitical evolutions in contiguous countries.

In fact, it is the regional context, not an internal threat, that initially sets the stage for Niger's securitization process. The deterioration of the situation of neighboring countries, in particular Libya, starting in 2011, and Mali, since 2012, coincide with the initial steps of the new government. At that point, stabilisation of region is at the heart of external donors' interests.

²⁹¹ Larzillière, P. (2012), "Production of Norms and Securitization in Development Policies: from 'Human Security' to 'Security Sector Reform'", in *Working Paper Series 13*, American University of Beirut, Issam Fares Institute, December 2012, p. 8 – 9.

²⁹² République du Niger. (2012.). *Plan de Développement Economique et Social (PDES) 2012 – 2015*. Ministère du Plan de l'Aménagement du Territoire et du Développement Communautaire, p. 68.

And on the regional stage, Niger is quickly assuming a leading role. External partners, France and the US in particular, strengthen their investment in securitizing the Sahel, increasing intelligence operations as well as the overall security apparatus,²⁹³ and Niamey becomes a crucial strategic partner. When Serval is launched in January 2012, a battalion of 500 Nigerien soldiers is sent in support of the operation and stationed in Northern Mali.²⁹⁴ In the same year, over 4% of the national budget is destined to exceptional expenditure for the defense sector.²⁹⁵ Following an extraordinary summit held in Niamey in October 2014, the government also commits to the Multi National Joint Task Force (MNJTF) against Boko Haram, side by side with Cameroon, Chad, and Nigeria. By January 2015, 1733 Nigeriens soldiers are deployed in UN peacekeeping operations.²⁹⁶

Here, this chapter looks into the dynamics that led to the progressive rise of terrorism on the political agenda of Niger. Specifically, it highlights how the national government initially utilizes security themes to foster the internal development priorities and how this strategy dramatically changes with growing insecurity in the country. In the process, the increasing importance of counterterrorism begins to affect not only the functioning of the justice system, but also the way that justice institutions can contribute to State's authority and effective control. To do so, the analysis will focus on 2015, identified as the turning point of terrorist violence in Niger, analysing how terrorism was addressed before and what changed with the attacks on Bosso and Diffa.

2.1 2011 - 2015: FIGHTING TERRORISM AS A REGIONAL PHENOMENON

At the time of the transition to the VII Republic and in its immediate aftermath, Niger did not appear to be a primary target of terrorist violence. Certain armed groups associated with terrorism were already carrying out some attacks in Niger. Most notably, in 2008, Canadian diplomat and then UN special envoy to Niger Robert Fowler, was kidnapped with a colleague by Al-Qaeda in the Islamic Maghreb (AQMI), to be released after four months.²⁹⁷ In 2010, the Areva abductions involved seven foreign workers of the French nuclear group, and only four

²⁹³ Göpfert, M. (2016), Surveillance in Niger: Gendarmes and the Problem of "Seeing Things", African Studies Review ; 59, 2. - pp. 39-57, p. 44.

²⁹⁴ https://www.lemonde.fr/afrique/article/2013/01/29/qui-participe-a-l-operation-serval-au-mali_1824111_3212.html

²⁹⁵ Deltenre, D. (2015). *Niger: Cap sur 2016 ! Situation politique et sécuritaire à la veille des élections*, p. 5.

²⁹⁶ Deltenre, D. (2015). *Niger: Cap sur 2016 ! Situation politique et sécuritaire à la veille des élections*, p. 6.

²⁹⁷ NY Times (12/12/2012), Millions in Ransoms Fuel Militants' Clout in West Africa, Adam Nossiter: <https://www.nytimes.com/2012/12/13/world/africa/kidnappings-fuel-extremists-in-western-africa.html>

of them were released three years later.²⁹⁸ In 2011, a similar attack was conducted in Niamey, when two French nationals were kidnapped in a bar, to be killed two days later during a failed rescue operation.²⁹⁹ Indeed, this latter incident raised higher concerns because of the assailants' ability to reach the capital and contributed to the hasty introduction of the first national counterterrorism legislation. And yet, all of these attacks shared common traits: they targeted foreigners and, as kidnappings for ransom, were motivated by financial gains. For these reasons, the threat was understood as not directly aimed at the national government nor especially worrisome to Nigeriens.

In parallel, another internal source of insecurity, identified with the potential spill-over effect of the Malian crisis through a reprisal of the Tuareg rebellion, was swiftly addressed and contained by the new government. President Issoufou organized multiple peace forums in the north of the country throughout 2012 and integrated prominent Tuareg figures in his government, first and foremost Brigi Rafini, native of the Agadez region, promptly appointed prime minister in 2011.³⁰⁰

As insecurity emerges in the national and regional discourse, Niger adopts the *Strategy for Security and Development of the Sahelo-Saharan area*, which is articulated around a specific representation of the threat on two levels:

First, the roots of terrorist violence are primarily external, but incumbent upon Niger:

“the petrol exploitation, the proximity with the Chadian border and the situation in Libya threaten the tranquility of the populations. The Nigerian sect Boko Haram, active in the Maiduguri State, could influence the communities along the border in the Diffa region.

The Saharan and Sahel-Saharan regions, at the heart of the great Sahel, constitute a priority and urgent security issue, for Niger and for all Saharan's riparian countries. (...) It is important to note the cross-border character of insecurity raging across the northern border of Niger.”³⁰¹

²⁹⁸ Reuters (29 October 2013) Four French hostages kidnapped in Niger freed: <https://www.reuters.com/article/us-france-niger-hostages-idUSBRE99S16T20131029>

²⁹⁹ The Telegraph (9/01/2011) Two French hostages killed by al-Qaeda kidnappers during failed rescue attempt <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/niger/8248977/Two-French-hostages-killed-by-al-Qaeda-kidnappers-during-failed-rescue-attempt.html>

³⁰⁰ Grégoire, E. (2013). Islamistes et rebelles touaregs maliens: Alliances, rivalités et ruptures. *EchoGéo*, p. 11.

³⁰¹ République du Niger, Cabinet du premier Ministre (2012) *Stratégie pour le développement et la sécurité dans les zones sahélo-sahariennes du Niger*, p. 28.

Second, the internal potential for instability is to be traced in the frailty of the national socio-economic context, aggravated by intra and inter-community conflicts primarily related to access to resources.³⁰²

Such characterisation of security issues has two crucial effects: on the one hand, it aligns the strategic interests of the national government with those of the main powers engaged for the stabilisation of the region, mainly France, the United States, as well as the EU and the UN. Notably, this alliance is confirmed not only through Niger's growing military engagement in various hot-spots in the Sahel, but also through growing foreign military presence within the national territory.³⁰³

On the other hand, however, the strategy of the national government firmly anchors, or, it could be argued, conditions, the pursuit of security interests to keeping the focus on developmental efforts. Indeed, this choice succeeds in granting the support of external donors to the broader reform and development programme launched by president Issoufou. During a round-table of international donors organized in 2012 with the support of UNDP, Niger collects 4.8 billion dollars in external aid to support its multi-annual Economic and Social Development Plan, corresponding to 44% of the total budget necessary for the implementation.³⁰⁴

In practice, while Niger is increasingly engaged in fighting terrorism in the region, the internal counterterrorism agenda focuses on improving governmental control over the vast national territory and addressing borders' permeability. Following a period of "*retreat of the police state*" after the democratic transition of 1991,³⁰⁵ this new phase brings renewed attention and investment in the resources and capabilities of all branches of national security forces around three crucial axes: increase in personnel, raise in salaries, and redeployments to cover strategic territory. In this light, 80 additional units of the police force (3180 new agents) and 6 more mobile units of border surveillance are created, while the numerous national guards' units are reallocated in previously deserted areas.³⁰⁶ International partners confirm their support through

³⁰² République du Niger, Cabinet du premier Ministre (2012) *Stratégie pour le développement et la sécurité dans les zones sahélo-sahariennes du Niger*, p. 24 – 27.

³⁰³ Karlsrud, J. (2019). From Liberal Peacebuilding to Stabilization and Counterterrorism. *International Peacekeeping*, 26(1), 1–21.

³⁰⁴ Deltenre, D. (2013). *Niger: Du coup d'État à l'engagement international. Retour sur trois années de transition politique sur fond d'insécurité régionale grandissante*. UCL-Université Catholique de Louvain, p. 8.

³⁰⁵ Göpfert, M. (2012) *Security in Niamey: An Anthropological Perspective on Policing and an Act of Terrorism in Niger*. Article in *The Journal of Modern African Studies* 50(01), p. 51

³⁰⁶ Deltenre, D. (2013). *Niger: Du coup d'État à l'engagement international. Retour sur trois années de transition politiquesur fond d'insécurité régionale grandissante*. UCL-Université Catholique de Louvain, p. 8 – 10.

the provision of specialised training and equipment,³⁰⁷ focused on the development of the security and intelligence apparatus. They also establish specialised presence dedicated to technical partnership in these areas, such as the EUCAP Sahel mission, whose mandate focuses on the linkage between terrorism and organized crime in the context of weak borders and territorial control.³⁰⁸

In other words, internal counterterrorism privileges the purely military and security sector, including the intelligence apparatus. This focus represents a different facet of the governmental strategy to pursuing sovereignty claims. The *états généraux de la justice* emphasized the role of the State as a provider of services to the citizens, this is understood as an essential aspect of “effective justice” and effective authority. Here, instead, the exercise of authority is pursued through effective control over the territory.

In parallel, the judicial approach to counterterrorism in Niger has remained quite limited. It is true that a terrorism-related reform was already in place. In January 2011, three decrees concerning terrorism had been expeditiously adopted by the military junta that was in power during the transition, the Supreme Council for the Restoration of Democracy. The reform modified the statute of national jurisdictions, amended the penal code and the code of criminal procedures, to:

- Define terrorism and criminalise a series of terrorism-related acts³⁰⁹;
- Establish exceptional procedures for dealing with terrorism-related offences³¹⁰;
- Create specialised, separate, institutions dealing with terrorism related offences³¹¹.

However, an analysis of the measures adopted through the three decrees shows that the reform borrowed to a considerable extent from regional and international law. Terrorism is defined through the definition first adopted by the 1999 Convention on the Prevention and Combating

³⁰⁷ Göpfert, M. (2016a). Surveillance in Niger: Gendarmes and the Problem of “Seeing Things.” *African Studies Review*, 59(2), 39–57, p. 43–44.

³⁰⁸ Common Security and Defence Policy, the EUCAP Sahel Niger civilian mission: http://eeas.europa.eu/archives/docs/csdp/missions-and-operations/eucap-sahel-niger/pdf/factsheet_eucap_sahel_niger_en.pdf

³⁰⁹ Ordonnance n° 2011-12 du 27 janvier 2011, modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal

³¹⁰ Ordonnance n° 2011-13 du 27 janvier 2011, modifiant et complétant la loi n°61-33 du 14 août 1961 portant institution du Code de procédure pénale

³¹¹ Ordonnance n° 2011-11 du 27 janvier 2011, modifiant la loi organique n°2004-50 du 22 juillet 2004 fixant l’organisation et la compétence des juridictions en République du Niger

of Terrorism, signed by the member countries of the Organisation of African Unity³¹². The other provisions criminalising terrorism-related offences follow a similar path of integrating, almost word-by-word, the international legal framework on counterterrorism, including the instruments on the taking of hostages, terrorist bombings, financing of terrorism and nuclear terrorism.

Even when the national framework diverges from international conventions, its external inspiration is quite clear. It is the case for the criminalisation of the “*association de malfaiteurs en vue de perpétrer des actes terroristes*”. The criminalisation of “association”, often referred to as “membership” is not recommended by terrorism-related international instruments, but is also not uncommon. The Nigerien formulation present striking similarity with the one introduced in the French penal code in 1992.

Nigerien Penal code, art. 399.1.19 : « *Le fait de participer à un groupement formé ou à une entente établie en vue de la préparation d'un des actes terroristes, caractérisée par un ou plusieurs faits matériels sera puni d'un emprisonnement de dix (10) à trente (30) ans*³¹³. »

French Penal code, art. 421-2-1 : “*Constitue également un acte de terrorisme le fait de participer à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un des actes de terrorisme mentionnés aux articles précédents.* »

Such adherence to international law reinforces the positioning of Niger as a strategic ally in the international war against terror. It also shows the pervasiveness of global approaches to, and understanding of, terrorism and transfers the conceptualisation of terrorism as an exceptional form of organized crime, which is prevalent in international instruments, to the Nigerien context.

The most innovative aspect of the 2011 reform is the design of a dedicated institutional judicial framework for counterterrorism. The decrees introduce the *judicial counterterrorism units* (pôles judiciaire en matière de lutte contre le terrorisme) as well as two *specialised*

³¹² For a more detailed analysis of the 2011 reform see “*Terrorism-related reform in Niger: external influences on the first wave of reform*”, Chapter IV. For the definition, see Article premier, *Ordonnance n° 2011-12 du 27 janvier 2011, modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal* and Organization of African Unity (OAU), *OAU Convention on the Prevention and Combating of Terrorism*, 14 June 1999, article 1.

³¹³ This is the formulation of 399.1.19 in the first counterterrorism laws of 2011 (*Ordonnance n° 2011-12 du 27 janvier 2011, modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal*), with the 2016 reform, the wording of the offence remained the same, but the sanction was lowered to 5 years imprisonment.

counterterrorism trial chambers in the appellate Court: a *control chamber* and a *trial chamber* (chambre de contrôle et chambre de jugement en matière de lutte contre le terrorisme). These bodies complement the law enforcement counterterrorism body. Initially established as a small unit within the police force, in 2011 the *SCLCT* becomes an independent and multidisciplinary force, which includes selected policemen, gendarmes and national guards, and is charged with carrying out the police investigation phase.

Such institutional framework lays the ground for one of the defining features of the criminal justice approach to counterterrorism in Niger: its specialisation and separation from the ordinary justice system. However, most of the reform finds very little application during the first years of its implementation. The unit has been created on the premises of the High Court of Niamey, yet the magistrates are not exclusively appointed to the judicial units, as the number of terrorism-related cases is not sufficient to occupy them full-time. It is only after the 2015 attacks and the 2016 reform that the transition to a specialised judicial system to fight terrorism will be completed.³¹⁴

2.2 THE 2015 TURNING-POINT: TERRORISM AS AN INTERNAL THREAT

In the course of 2013, the security situation within Niger begins to shift. In May, two parallel suicide attacks target a military academy in Agadez and the Areva mine in Arlit, killing twenty-five people in addition to the ten attackers.³¹⁵ In June, a small contingent of Boko Haram members attacks the civil prison of Niamey, and succeeds in allowing for the escape of some prisoners associated with the group.³¹⁶ For the first times, the targets of the terrorist violence are government sites. The modalities of the attacks also point to an evolution. Some observers call the attention on the security dilemma of exposure – intensification faced by the government, which highlights how it is exactly the strong national posture against terrorism assumed in the international arena which is expanding the internal dangers:

“(the country’s) external engagement exposes it to retaliations, which in turn toughen the governmental offensive stance, exposing it to new threats (...). Niger has embarked on a process whereby its security commitments are to be constantly reinforced, which increases the external threat on the country, and forces (the government) to dedicate more and more resources to national defense. Niger’s international role, focused on

³¹⁴ For this analysis, see “*Evolving normative framework: between exceptional and ordinary measures*”, Chapter IV.

³¹⁵ United States (2013) “Niger 2013 Human Rights Report”, Country Reports on Human Rights Practices, p. 2.

³¹⁶ <http://www.rfi.fr/afrique/20130601-niger-prison-niamey-attaquee-groupe-arme-boko-haram>

*security diplomacy, appears as one of the primary causes of the lack of process in internal matters.*³¹⁷

Indeed, the process of rapid escalation of the terrorist threat from an external to an internal phenomenon in Niger begins to demonstrate the unintended consequences of securitization processes. Having prioritised the fight against terrorism, the government will now have to test its sovereign attributes by proving its capabilities through counterterrorism response.

Prior to this period, the group had used the Diffa region as a withdrawal area, counting on a sort of tacit accord of non-aggression with local authorities.³¹⁸ However, in the course of 2014, Boko Haram's activities move to the forefront of the international arena, and as such become more difficult to ignore for neighbouring countries. First, because after having focused on Nigeria only, the theatre of the attacks extends to Cameroun, and second because the abduction of the Chibok girls generates extensive media coverage, transforming Boko Haram in a phenomenon of global relevance.³¹⁹ In a political climate which increasingly emphasises transnational violence in the Sahel as exceptional, and an unequivocal sign of the globalisation of the terrorist threat, Boko Haram is deemed to constitute an unprecedented threat.³²⁰

In October 2014, the Heads of State of the countries of the Lake Chad basin meet in summit in Niamey, and resolve to commit renewed efforts to the fight against Boko Haram, primarily through the coordinated intervention under the auspices of the MNJTF. Then, president Issoufou reiterates its commitment to fighting global terrorism and takes part in the French national march to commemorate the victims of the attack to Charlie Hebdo, organized on 11 January 2015 in Paris. But the publication of a new satirical vignette depicting the prophet the following week triggers violent riots in Niamey, where Christian buildings are targeted, together with the headquarters of the ruling party. As the protesters are enraged against the President, observers note with concern the manifestation, for the first time, of what is perceived as an affiliation to "islamic extremism", in the heart of the capital.³²¹

In parallel, and once again, as the engagement in counterterrorism intensifies, so does the level of violence. An escalation occurs at the beginning of 2015: on 5 January, Boko Haram attacks

³¹⁷ Deltenre, D. (2015). *Niger: Cap sur 2016 ! Situation politique et sécuritaire à la veille des élections*, p. 6.

³¹⁸ Pérouse de Montclos, M.-A., Magrin, G., Seignobos, C., & Gluski, P. (2018). *Crise et développement: La région du lac Tchad à l'épreuve de Boko Haram*. Agence française de développement, p. 132.

³¹⁹ Ibidem.

³²⁰ Pérouse de Montclos, M. A. (2016), "Jihad in Sub-Saharan Africa: *Challenging the Narratives of the War on Terror*." New York: World Policy Institute, p.15

³²¹ Gregoire, E. (2015), *Dangers extérieurs, dangers intérieurs : le Niger face au radicalisme islamique*, p. 6-7

the MNJTF headquarters in Baga³²², on 10 and 11 January the group carries out attacks in the Borno State and Yobe State using children as suicide attackers,³²³ on 20 January, Abubakar Shekau disseminates a video in which he addresses open threats to the Presidents of Cameroun, Chad, and Niger, calling into question precisely Issoufou's participation in the Parisian march.³²⁴

In this climate and possibly for the first time, it becomes clear that Boko Haram constitutes the primary and most immediate threat to Niger.³²⁵ In the beginning of February, the group launches coordinated attacks on the cities of Bosso and Diffa, in what became the turning point for Niger's perception of the terrorist threat. Already weakened by the flux of refugees and displaced persons, for the most part escaping Boko Haram, the situation in the Diffa area is irretrievably jeopardized, as the region continues to experience repeated attacks in the following months.

Discovering its new qualification of a primary target of terrorist violence, and its vulnerability to the infiltrations of the group on national territory, the government of Niger reacts with strong measures. The state of emergency is declared following the attacks, authorising exceptional search powers and imposing a curfew on the population. In addition, strict economic prohibitions are enforced to strangle the livelihood of group members: the trade of smoked fish, the culture of local peppers, as well as the motorbikes (the preferred means of transportation of Boko Haram members) are all banned.

And it is at this time that the flaws and vulnerabilities of the first phase of reform of the specialised judicial unit on counterterrorism are revealed. In this first period following the attacks, mass arrests are carried out. Hundreds of people are apprehended on the basis of vague terrorism-related charges and transferred to Niamey, to the investigators of *Central Specialised Service*, and then to the prosecutors and the investigative judges, tasked with carrying out an investigation at 1700 kilometers of distance. As the overcrowding in the prisons worsens, the necessity for a new reform, and for increased funding becomes urgent. In June 2016, three new

³²² Pérouse de Montclos, M.-A. (2015) Boko Haram : les enjeux régionaux de l'insurrection, *Fondation Jean Jaurès*, Note n° 246, p. 5-6.

³²³ African Union, Peace and Security Council 484th meeting at the level of heads of State and Government (29 January 2015), Report of the Chairperson of the Commission on Regional and International Efforts to Combat the Boko Haram terrorist Group and the Way Forward, p.1.

³²⁴ <http://www.jeuneafrique.com/34657/politique/boko-haram-shekau-menace-d-by-biya-et-issoufou/>

³²⁵ Gregoire, E. (2015), Dangers extérieurs, dangers intérieurs : le Niger face au radicalisme islamique, p. 1

laws are adopted,³²⁶ launching a second wave of reform and dramatically increasing the relevance of judicial approaches to terrorism in the broader national counterterrorism strategy.

3. ON THE COMPLEMENTARITY OF THE “DEMOCRATIC REBOOT” AND SECURITIZATION

Democratization and securitization have been portrayed as complementary and mutually reinforcing processes, in line with the security-governance-development nexus, which has guided the investment of international donors during the past decades. According to the European Security Strategy “*security is a precondition of development*”.³²⁷ Similarly, Niger’s security strategy opens recalling that: “*the issue of security is, in general terms, a major challenge for the socio-economic development of all of Niger and will concern the entire country*”.³²⁸ Indeed, this chapter showed how the strategy of aligning security interests and development priorities was initially successful in Niger, managing to attract international support and investment for social and economic policies.

However, over a few years, broad security interests quickly became synonymous with the specific objectives and modalities of counterterrorism in the Sahel.³²⁹ And as the threat increased in volume and urgency, the focus shifted from the socio-economic goals that may have prevented further dissemination of terrorism, to the need for immediate and repressive responses.

In this context, the priority role of the justice system also appears to shift: from leading a democratic transition through improving services for the population, justice institutions become key players in ensuring security through the repression of the terrorist threat. This, it is argued, has not only potentially diverted the founding from the previously established objectives, but it has also strongly influenced the reform process in itself. Indeed, the prioritisation of security concerns changes the way that the justice system is called to serve the State’s claims to sovereignty. In terms of testing the State’s normative authority, the focus is shifted on enacting

³²⁶ Loi n° 2016-19 du 16 juin 2016, modifiant la loi organique n°2004-50 du 22 juillet 2004 fixant l’organisation et la compétence des juridictions en République du Niger ; loi n° 2016 – 21, modifiant et complétant la loi n°61-33 du 14 août 1961 portant institution du Code de procédure pénale ; loi n° 2016 – 22 modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal.

³²⁷ European Union (2003), « A Secure Europe in a Better World. European Security Strategy », p. 2

³²⁸ République du Niger, Cabinet du premier Ministre (2012.). *Stratégie pour le développement et la sécurité dans les zones sahélo-sahariennes du Niger*, p. 4.

³²⁹ Serre, J. (2012). Aide au développement et lutte contre le terrorisme. *Politique étrangère*, hiver,(4), 891-904.

and implementing counterterrorism legislation. In terms of ensuring effective control, the State prioritises law and order to obtain security as the overarching public good.

Accordingly, the reform process of justice institutions outlined through the national congress of the *états généraux de la justice* and the one that is carried out to respond to terrorist violence should not be read as part of a coherent approach, but rather as serving separate objectives. If the former aimed to lead the transition from undemocratic to a democratic regime, the meaning of the transition has now shifted. Justice institutions have assumed a key role in the transition from insecurity to peace.

Through the following chapter, this study analyses in what ways and to what extent the justice system in Niger was able to strengthen the State's claim to sovereignty in a context redefined by securitization.

CHAPTER IV

SOVEREIGNTY THROUGH LAWFULNESS

STATE'S LEGITIMATION THROUGH "LEGAL"

COUNTERTERRORISM

*"The mere presumption that they are involved in terrorism continues to play a part throughout the investigation phase. Because there is no witness who'll come and say: here, I saw this person doing this and that...it is surely the army or the gendarmerie who got them on the basis of denunciation and information gathered here and there and with that opened proceedings. As it is terrorism, priority is given to incarceration. That is to say, there is no presumption of innocence, there's a presumption of guilt."*³³⁰

A lawyer charged with the legal defence in terrorism cases discusses investigation and arrest practices in 2018.

*"I think that after five years, we can evaluate things. Many challenges have been met during this period. I think we were able to adapt, including with respect to our laws (...). Nowadays, Niger is cited as an example. At the time of creation of the pôle we were facing a unique front, in Diffa, while now this front has been overtaken by the situation in North Tillabéri (...) I think really, a lot of things have been done. But the challenge is always there. Arrests continue. The problem becomes increasingly complex. We have to develop the right reflexes to be effective in the fight against this phenomenon."*³³¹

A judge of the specialised pôle, thinking back on the work of five years since the beginning of the crisis in 2015.

³³⁰ Author's interview with a lawyer, Niamey (30 April 2018).

³³¹ Author's interview with a judge of the specialised pôle, Niamey (23 January 2020).

INTRODUCTION

The negotiation of sovereign quality by the State is a multi-faceted and evolving endeavour. If sovereignty is the “organisation and effectiveness of public authority”³³² in a way that leads to *recognition*³³³, this chapter asks whether counterterrorism contributes to sovereign claims through the production of a normative framework.

Indeed, Niger’s approach to counterterrorism relies heavily on legislation, with multiple comprehensive reforms reshaping national jurisdictions, criminal offences, and criminal procedures. In this context, this chapter investigates the value of normative production for claims to State authority: how can regulating terrorism contribute to the legitimacy of the State by setting the boundaries of what terrorism is and how the State should respond to it?

To answer this question, the first necessary step is determining the necessary conditions for normative production to strengthen State authority. This study argues that to claim sovereignty more effectively, the State will need to enact legislation that is perceived as lawful and will need to prove that its agents, specifically law enforcement and judicial actors, act according to State law. Hence, the analysis is structured along two main axes.

First, this chapter proposes an extensive examination of the legal and institutional architecture developed to respond to terrorism in Niger, interrogating its origins, its constitutional value and overall adherence to lawfulness parameters. To do so, it will also look into the interaction between “ordinary” legislation and the *state of emergency*³³⁴, which introduces a notable component of exceptionality in the State response.

³³² Krasner, S. D. (1999) *Sovereignty: Organized Hypocrisy*.

³³³ Biersteker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press.

³³⁴ On 10 February 2015, in an extraordinary meeting of the Council of Ministers, the government decided to declare the state of emergency in the region of Diffa. According to law, the state of emergency provisions can be renewed by governmental decree only once for 15 days; afterwards, the decision must be voted by the Parliament, through a law that foresees the extension of the state of emergency for three months, renewable (see art. 2, loi N° 2015-07 du 10 avril 2015, modifiant et complétant la loi n° 98-24 du 11 août 1998, portant réglementation de l’état d’urgence au Niger). The measures foreseen by the state of emergency in 2015 in Diffa concerned: freedom of movement by car or motorbike, freedom of movement at certain times (curfew), certain agricultural and commercial activities, thus impacting considerably the local economy. (see also “*A wider look: security and socio-economic context for rehabilitation*”, Chapter VI.) In March 2017, state of emergency provisions were extended to the regions of Tahoua and Tillabery while persisting in Diffa, where certain prohibitions were removed as time passed. For a comprehensive analysis of state of emergency provisions related to terrorism in Niger, see Centre National d’Etudes Stratégiques et de Sécurité (CNESS). (2018). *Evaluation des impacts sécuritaires et socioéconomiques de l’état d’urgence dans les zones touchées par l’extrémisme violent au Niger_Rapport Final*.

Then, it examines to what extent State agents involved in counterterrorism efforts act according to law, thus proving that the norms issued by the State are perceived as valid. To this end, this study interrogates the dynamics of interaction between actors, resources and repertoires to understand how motivation and reality constraints have influenced their adherence to the law.

Finally, the issues of respect of human rights in the context of counterterrorism laws are addressed separately. Taking the view that adherence to fundamental rights holds direct value for the legitimation of State action in a securitized space, this chapter looks into compliance with the right to due process and the rights of victims and witnesses during counterterrorism judicial proceedings.

1. SOVEREIGNTY THROUGH NORMATIVE PRODUCTION: A FRAMEWORK FOR ANALYSIS

The capacity of law-making is central even to the most essentialist definitions of domestic sovereignty. Normative production is the first manifestation of the State's authority over the polity and a given territory.

In contexts of limited statehood, where the State may face considerable "governance problems",³³⁵ the empirical dimension of authoritative law-making is what is especially important to the negotiation of sovereignty. Indeed, while the State may not face particular issues when legislating, it can more easily encounter obstacles in acting according to law, whether that entails adherence to specific provisions and procedures or provision of services.

To begin this study, then, the analysis of norms produced in Niger to fight terrorism is crucial to the investigation of the State's trajectory of sovereignty negotiation: when legislating, the State determines its authority not only by defining the security threat, but also by reinforcing its authority.

In a securitized space, law-making can be even more meaningful. First, through normative action, the State has the opportunity to reify the exceptionality of the threat. Legislating in the context of securitization does not merely entail regulating an issue, it means determining who the enemy is and why. Second, it is through the law that the State defines the objectives and boundaries through which it articulates its response. In doing so, it lays the foundation for its

³³⁵ Risse, T. (Ed.). (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*. Columbia University Press, p. 9-10.

citizens to later weigh its performance, as will be addressed in coming chapters (was the State capable of holding perpetrators of terrorist crimes accountable?).

In this context, the proponents of securitization theory have engaged in a debate, over the years, on the relevance of “exceptional measures” in State responses. According to Buzan, a key feature of securitization is that, relying on the rhetoric of the exceptional threat, the State is legitimated to “break free of rules”³³⁶, in the sense of adopting exceptional measures in the attempt to restore security. Others, such as Floyd, have criticized such focus on “exceptional measures”, arguing that securitization can be accomplished also through ordinary laws and policies³³⁷. The analysis of terrorism-related norms in Niger allows an appreciation of both ordinary laws and extraordinary measures, adopted through the state of emergency. It looks into the way the two approaches can converge or collide and to what extent they support the overarching authority of the State.

With a view to capturing the different ways in which normative production can strengthen or undermine State’s claims to sovereignty, this chapter proposes to investigate the issue according to two key dimensions.

First, it looks into the formal aspects of counterterrorism laws in Niger, assessing to what extent they abide by the criteria of legality. Considering their origins, their key provisions and the contingencies that led to their evolution, this chapter analyses terrorism-related laws to appreciate their clarity, consistency and accessibility. Indeed, it is argued here that formal legal requirements of the laws provide the basis for certainty and predictability of State action, thus contributing to legitimacy and recognition³³⁸.

Then, it moves to the empirical dimension of counterterrorism laws, focusing on the extent to which State agents and notably justice officials felt bound by the law and acted accordingly. To do so, it delves into the mutual interactions between different State officials (military, police, magistrates), their approaches and incentives, the constraints they faced and their reactions to the obstacles they encountered. The application of State laws by State agents is a crucial measurement of its ability to convey authority and, in turn, build legitimacy.

³³⁶ Buzan, B., Waever, O., & Wilde, J. de. (1998a). *Security: A New Framework for Analysis*. Lynne Rienner Publishers, p. 26.

³³⁷ Floyd, R. (2016). Extraordinary or ordinary emergency measures: What, and who, defines the ‘success’ of securitization? *Cambridge Review of International Affairs*, 29(2), 677–694.

³³⁸ Bedner, A. (2010). An Elementary Approach to the Rule of Law. *Hague Journal on the Rule of Law*, 2(1), 48–74.

Throughout both dimensions of the analysis, this chapter explores the tension between ordinary and exceptional approaches to counterterrorism norms, appreciating the notable consequences of the discrepancies between them.

2. COUNTERTERRORISM IN NIGER: A NORMATIVE AND INSTITUTIONAL FRAMEWORK

The production of binding norms related to terrorism in Niger takes place for the most part³³⁹ in three waves. First, in January 2011, following the kidnapping of two Frenchmen in the capital Niamey, and the failure of the rescue operation that led to their deaths³⁴⁰, the military junta that is in power during the transition adopts the first comprehensive counterterrorism legislation in less than two weeks³⁴¹. This first reform reflects a period when terrorism, while present on the national soil, is not considered a direct threat against the State of Niger or its citizens.³⁴²

The 2015 attacks and the transformation of terrorism into an existential threat also bring the justice system on the forefront of counterterrorism. As a consequence, a major reform is undertaken in 2016, extending, modifying and clarifying the initial laws³⁴³. This second wave of reform is consolidated through the introduction, in 2017, of additional measures for the protection of victims and witnesses in the context of terrorism related proceedings.³⁴⁴

The third wave of reform can be understood as an amnesty law for those who have willingly abandoned Boko Haram and handed themselves over to national authorities. Introduced in December 2018, the law modifies the provisions concerning the “repentant” or “collaborator of justice”, foreseen by the 2011 decrees, to introduce the opportunity for rehabilitation rather than prosecution.³⁴⁵ This reform, which constitutes an attempt at bringing together the criminal justice approaches to counterterrorism in Niger and the initiative of the “extended hand”,

³³⁹ With the exception of the « loi n° 2010-05 du 21 janvier 2010 relative à la lutte contre le financement du terrorisme au Niger ».

³⁴⁰ The Telegraph (9/01/2011) Two French hostages killed by al-Qaeda kidnappers during failed rescue attempt <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/niger/8248977/Two-French-hostages-killed-by-al-Qaeda-kidnappers-during-failed-rescue-attempt.html>

³⁴¹ Ordonnance n° 2011-11 du 27 janvier 2011; Ordonnance n° 2011-12 du 27 janvier 2011 ; Ordonnance n° 2011-13 du 27 janvier 2011.

³⁴² See “2011 – 2015: Fighting Terrorism as a Regional Phenomenon”, Chapter III.

³⁴³ Loi n° 2016-19 du 16 juin 2016, modifiant la loi organique n°2004-50 du 22 juillet 2004 fixant l’organisation et la compétence des juridictions en République du Niger ; loi n° 2016 – 21, modifiant et complétant la loi n°61-33 du 14 août 1961 portant institution du Code de procédure pénale ; loi n° 2016 – 22 modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal.

³⁴⁴ Loi N° 2017-7 du 31 mars 2017, modifiant et complétant la loi n°61-33 du 14 août 1961 portant institution du Code de procédure pénale.

³⁴⁵ Loi N° 2018 – 86 du 19 décembre 2018, modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal.

launched by the Ministry of Interior in Diffa in December 2016, will be the object of analysis in the context of chapter VI, rather than here.

This chapter chooses to focus, instead, on the analysis of the first two waves of reform, which have set the stage for the efforts of the criminal justice system in identifying, investigating and prosecuting alleged terrorists in Niger.

The identification of terrorism with an exceptional threat makes specialisation the defining feature of such normative production. Both reforms include three laws, amending, respectively, the penal code, the code of criminal procedure, and the law on the organization of the judiciary. This corresponds to the introduction of three levels of innovation and specialisation:

- A definition of terrorism and a category of new (or renewed) offences are introduced, qualifying terrorism as a criminal phenomenon;
- New and specialised bodies and institutions are created and tasked with carrying out terrorism-related proceedings;
- Procedures of arrest, investigation, prosecution and adjudication are modified to respond to the specificity of terrorism.

Such three-tiered system materializes a wide derogation from the ‘ordinary justice system’, to respond to the exceptionality of terrorism. This process takes place in the framework of a wide specialisation of the international and regional legal framework dealing with terrorism.

2.1: TERRORISM-RELATED REFORM IN NIGER: EXTERNAL INFLUENCES ON THE FIRST WAVE OF REFORM

To understand how terrorism is initially regulated in Niger, it is important to examine the first national reform in the broader legal context that defines terrorism and determines appropriate responses, that is to say: international and regional law.

This provides an account of the influence of global conceptualisations of terrorism on the Nigerien approach. At the same time, though, adherence to international and regional law also affords a measurement of legality of national counterterrorism laws. Indeed, international and regional Conventions create obligations for State Parties. By abiding to those obligations, then, national law is automatically invested with validity and legitimacy.

TERRORISM: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

For the past sixty years, international legal instruments codifying the fight against terrorism have grown in number and scope. This body of laws comprises 19 conventions and protocols, relevant United Nations Security Council (UNSC) resolutions and, to a lesser extent United Nations General Assembly (UNGA) resolutions. The extent and nature of these instruments justify their qualification as a unified legislation, which also interacts with other specific international legal regimes, most notably international human rights law, international refugee law, and international humanitarian law.³⁴⁶

Such extensive production of norms at international level is motivated by the interest in pursuing a coordinated, cross-national approach to counterterrorism. While the fight against terrorism is historically controversial, the agreement over the need for a global approach has grown throughout the past decades. First, the end of the USSR reduced the incentive of major powers at the time to use the accusation of terrorism against each other³⁴⁷. Then, with the 9/11 attacks, terrorism increasingly becomes synonymous with non-State groups, and with transnational attacks. Accordingly, solutions cannot be found at national level, but rather have to be developed internationally.

With this goal in mind, the objective pursued by these international instruments is twofold. On the one hand, they provide a common framework for a shared understanding terrorism. In light of the repeated failures to complete a universal Convention that would define terrorism³⁴⁸, the numerous Conventions take a ‘sectoral’ and somewhat pragmatic approach³⁴⁹ as they define different terrorist acts, according to the evolution of the threat at the time, and create the obligation of their criminalisation nationally: unlawful seizure of aircrafts, crimes against internationally protected persons, suppression of terrorist bombings, etc.

³⁴⁶ When adopting counterterrorism measures States still have to abide by international law, as clarified, for instance, by S/RES/1624 (2005): “States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law”.

³⁴⁷ Crenshaw, M. (2019). *Terrorism and International Cooperation*. Routledge, Introduction.

³⁴⁸ Since 2000, a *Draft Comprehensive Convention on International Terrorism* exists, however, the text has never been approved, in part due to the frictions over a shared definition. Despite this, legal scholars, including Cassese, have emphasized that general consensus over the key elements of international terrorism exists, and is reflected in the *International Convention for the Suppression of the Financing of Terrorism (9 December 1999)*, see: Cassese, A. (2006). *The Multifaceted Criminal Notion of Terrorism in International Law* (SSRN Scholarly Paper ID 1147484). Social Science Research Network.

³⁴⁹ Nesi, G. (2016). *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*. Routledge, p. 5-6.

On the other hand, they create the basis for increased transnational cooperation, by extending States' obligations and opportunities to "bring perpetrators of terrorism to justice"³⁵⁰. This is achieved through two different avenues. The first is the extension of the national jurisdiction beyond territoriality, by relying on either active or passive nationality principles. In other words, the possibility to adjudicate crimes committed outside of the national territory by the State's nationals (active nationality), or severely affecting State's nationals (passive nationality).³⁵¹ The second is the extension of the *aut dedere aut judicare* obligation, meaning the requirement to either extradite or prosecute. This is illustrated by Art.8 of the Convention on Terrorist Bombings: "*The State Party in the territory of which the alleged offender is present shall (...), if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State*". This extension is justified on the basis of terrorism being considered a threat to the international community as a whole.³⁵²

In addition to treaty-based law, following 2001, there has been increased activity from the Security Council, which has adopted resolutions acting under chapter VII of the UN Charter, creating the obligation for UN member States to adopt internal laws and administrative acts. The most striking example of this trend can be identified in:

- UNSC resolution 1373(2001), which includes provision concerning freezing of funds that could be used to finance terrorism;
- UNSC resolution 1540 (2004), dealing with criminalisation of non-state actors' involvement in weapons of mass destruction (WMD);
- UNSC resolution 2178 (2014), addressing so-called foreign terrorist fighters and calling on States to take all feasible measures to prevent their recruitment, travel and training.

³⁵⁰ See for instance OP 2 of S/RES/1373 (2001): "*Decides also that States shall (...) ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts*".

³⁵¹ McCarthy, J. G. (1989). The Passive Personality Principle and Its Use in Combatting International Terrorism. *Fordham International Law Journal*, 13, 298.

³⁵² Newton, M. A. (2013). *Terrorist Crimes and the Aut Dedere Aut Judicare Obligation* (SSRN Scholarly Paper ID 2307877). Social Science Research Network.

Many have observed this “quasi-legislative” role of the Security Council with concern, debating its impact on States’ consent as the exclusive source of international law.³⁵³ At the same time, the progressive expansion of counterterrorism provisions to embrace preparatory acts, including incitement, uncovers what can be described as a “preventative shift”. This means that even criminal justice responses are expanded to allow for intervention prior to an attack. This trend, which is also reflected in Nigerien legislation, has considerable impact on the day-to-day operations of the justice system.

Within the regional fora, concerns for a coordinated approach to terrorism are also addressed. Following the 1994 Declaration on the Code of Conduct for Inter-African Relations, that condemned terrorism and extremism, the Organization of African Unity (OAU) adopted in 1999 the Convention on the Prevention and Combating Terrorism. In 2004, an additional Protocol to the Convention is adopted, which recognises the interplay between terrorism and transnational crime. Niger is also part of the Economic Community of West African States (ECOWAS), which has taken steps to both develop a counterterrorism legal framework, and a policy framework. The ECOWAS Convention on Small Arms and Light Weapons (formerly a moratorium), has now legally binding force in all member States³⁵⁴. Furthermore, the 1999 Protocol on Conflict Prevention Resolution, Management and Security deals with prevention of wide-spread violence, including terrorism, and counts on four observatory zones in the region.³⁵⁵

Finally, the growing engagement in regionally-led efforts against terrorism and translational crime is also guided by relevant Conventions. Notably, in December 2014, Niger signs the Convention Portant Creation du G5 Sahel. The Group of 5 (G5) includes Burkina Faso, Chad, Mali, Mauritania and Niger and is constituted as an intergovernmental organization which aims to foster development by combating insecurity in the region, with a focus on terrorism. This will lead to Niger’s participation in the G5 Sahel Joint Force, which entails military involvement of Niger to secure the border area of Mali, Niger and Burkina Faso, while its role in the MNJTF against Boko Harm provides the framework for military involvement around the Lake Chad Basin.

³⁵³ Martínez, L. M. H. (2008). The Legislative Role of the Security Council in Its Fight against Terrorism: Legal, Political and Practical Limits. *The International and Comparative Law Quarterly*, 57(2), 333–359.

³⁵⁴ Botha, A. (2008). *Understanding Terrorism in Africa Building Bridges and Overcoming the Gaps* Edited by Wafula Okumu and Anneli Botha.

³⁵⁵ Botha, A. (2008). *Understanding Terrorism in Africa Building Bridges and Overcoming the Gaps* Edited by Wafula Okumu and Anneli Botha.

TERRORISM: THE LEGAL AND INSTITUTIONAL ARSENAL IN NIGER

The national laws in Niger are certainly inspired by the international and regional frameworks. The analysis of the first wave of reform in 2011 confirms this while showing a certain degree of innovation in the creation of a specialised institutional framework.

To begin, in 2011 Niger adopts the definition of terrorist act of the 1999 OAU Convention on Combating Terrorism.

‘ “*Terrorist act*” means:

- a) *Any act or threat which is a violation of the dispositions of title VI of the Penal code which may endanger the life, physical integrity or freedom of any person or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage, and is calculated or intended to:*
 - *Intimidate, cause a situation of terror, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles;*
 - *Disrupt any public service, the delivery of any essential service to the public or to create a public emergency;*
 - *Create general insurrection in a State.*
- b) *any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) of the present article.*³⁵⁶

While this definition is in line with other international instruments³⁵⁷, it is also an especially broad one. It includes damages to inanimate objects rather than only to persons and, more significantly, it clearly extends to preparatory act, somewhat anticipating the “preventative turn” in counterterrorism legislation. This definition also effectively associates terrorism with a threat against the State, creating the conditions for a securitized approach to the phenomenon.

As explained, in addition to defining terrorism, the reform does three things: it criminalises terrorism-related acts; it creates an institutional framework for dealing with terrorism specifically; it provides for special procedures for the conduct of terrorism proceedings.

³⁵⁶ See chapitre préliminaire ; definitions, Ordonnance n° 2011-12 du 27 janvier 2011, modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal and art 3, Organization of African Unity (OAU), *OAU Convention on the Prevention and Combating of Terrorism*, 14 June 1999. This overarching definition will be split into a series of terrorism-related offences with the 2016 reforms.

³⁵⁷ UN General Assembly (15 December 1997), *International Convention for the Suppression of Terrorist Bombings*, No. 37517, UN General Assembly (9 December 1999), *International Convention for the Suppression of the Financing of Terrorism*, No. 38349.

When it comes to creating new terrorist offences, the 2011 reform does so mostly by integrating the key provisions for criminalisation of the main international conventions: hostage taking; acts against internationally protected persons; terrorist bombings³⁵⁸. Adhering to the requirements of Security Council resolutions, national legislation also criminalises a series of preparatory and support acts, including: financing of terrorism; recruitment; support and incitement to terrorism³⁵⁹. All of these offences are introduced in the penal code as “crimes”, meaning that they foresee a sanction of over 10 years of imprisonment, except recruitment, which provides a punishment between 5 and 10 years and is thus qualified of “délit”. This two-level distinction is relevant not only because it signals different degrees of gravity among offences, but also because it brings specific consequences in terms of the courts’ jurisdiction and the procedures applicable. Accordingly, in 2011, all terrorism-related offences, with one exception, are deemed especially serious, another element that highlights the integration of the “exceptionality” of terrorism in the national legal framework since the outset.

The Nigerien legislator also introduces two provisions that go beyond the requirements of international law. First, article 399.1.19 of the penal code criminalises the “association de malfaiteurs en vue de perpétrer des actes terroristes”. As emerged in chapter III, the criminalisation of association draws, almost word for word, from the 1992 provision of the French penal code. It is this offence that will allow for most terrorism-related arrests in the wake of the 2015 attacks and for the following years. Second, article 399.1.20 regulates the status of the “collaborator of justice”, meaning the individual who, being a member of the terrorist group, informs competent authorities on the offences committed. In the wording of the 2011 decree, becoming a “collaborator of justice”, in French a “repentant” can lead to the exemption from prosecution, in cases where the collaboration allows to prevent the act, or to mitigating circumstances, when collaboration follows the commission of offences³⁶⁰.

The criminalisation of these two specific offences will have deep repercussions on the work of the justice system in addressing terrorism. From the outset, it can be argued that it achieves two goals: first, it promotes the understanding of terrorism as a group identity. Indeed, the

³⁵⁸ Ordonnance n° 2011-12 du 27 janvier 2011, modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal.

³⁵⁹ See, respectively, art. 399.1.21 ; 399.1.22 ; 399.1.17 du Code pénal (Ordonnance n° 2011-12 du 27 janvier 2011), République du Niger.

³⁶⁰ Also criminalised in French penal code in relation to terrorism, see article 422-1 du code de procedure penale: « Toute personne qui a tenté de commettre un acte de terrorisme est exempte de peine si, ayant averti l'autorité administrative ou judiciaire, elle a permis d'éviter la réalisation de l'infraction et d'identifier, le cas échéant, les autres coupables. »

criminalisation of “association” reflects the notion that certain groups are inherently terrorist, and that all its members are necessarily “terrorists”, thus identifying terrorism with an identity, rather than a tactic. This is in line with the progressive focus on terrorism as perpetrated solely by non-State groups, as understood by international law and, in turn, can undermine the understanding of terrorism as a tactic that can be employed by different agents, including States. Overall, this understanding of terrorism contributes to the construct of the terrorist group as a coherent entity, the enemy of the State.³⁶¹ Second, both the criminalisation of “association” and the figure of the “collaborator of justice” are increasingly relevant features of criminal justice approaches to organized crime. In a nutshell then, the way that the 2011 integrates criminal offences related to terrorism introduces in national law the understanding of this phenomenon as an exceptional form of organized crime.

When it comes to the institutional framework, the reforms in Niger are especially notable for the extent of the specialisation they introduce. Indeed, the jurisdiction of special counterterrorism bodies is established from the earliest stages of arrests and investigation, up to adjudication.

The very first anti-terrorism specialised unit was created within the police. In 2011, this small unit is transformed into a specialised inter-agency body.³⁶² The Service Central (SCLCT) is in fact composed of personnel from the three law-enforcement forces of Niger: police, gendarmerie and national guard. The SCLCT has jurisdiction over the entire national territory of Niger, regardless of the nationality of the alleged perpetrator. They are charged to conduct the investigation, under the control of the Prosecutor of the Niamey’s Court, who is also the Prosecutor in charge for terrorism-related matters. In this sense, the competency over terrorism-related investigation becomes centralised in the capital, although local officers of the judicial police, within each district Court, are also able to carry out the preliminary phases of the enquiry. This is done to facilitate the collection of preliminary evidence and the reception of information and complaints from locals. In this view, the police officers are meant to work under the direction of local prosecutors who, in turn, shall refer to the Niamey counterterrorism prosecutor. Yet, centralisation remains key in the procedures, as all relevant elements have to be transferred to the capital as soon as possible:

« Ils mettent, dans les plus brefs délais, à la disposition du parquet du pôle judiciaire spécialisé en matière de lutte contre le terrorisme et la criminalité transnationale

³⁶¹ Tilly, C. (2004). Terror, Terrorism, Terrorists. *Sociological Theory*, 22(1), 5–13.

³⁶² Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

organisée, la ou les personnes mise (s) en cause, les rapports, procès-verbaux et pièces à conviction.»³⁶³

Remarkable innovations are also introduced in terms of means and procedures available to the investigators. First, communications' interceptions and infiltrations can now be authorised by the Niamey prosecutor during preliminary investigations, and evidence thereby collected will be admissible in front of the courts.³⁶⁴ Additionally, police custody delays are extended, from 48 hours, once renewable, to 120 hours, also renewable once.³⁶⁵ Finally, searches and seizures during the preliminary investigation do not require any consent and can take place at any time and place.³⁶⁶ With these exceptional measures, “means formerly confined to surveillance services are extended to the investigation”³⁶⁷, in the interest of promoting a proactive and preventative role of the justice process during the inquiry.

The prosecutor in charge of terrorism-related offences can decide to either drop a case with no further action (*classement sans suite*) or to open the judicial investigation, which is handled by the investigative judge. The counterterrorism investigative judges work within a new specialised unit: the Specialised Pôle. Instituted by the District Court in Niamey, the Pôle only counts two offices of investigative judges in 2011. These judges proceed to verify whether sufficient evidence to bring the case to trial exists.

The seriousness of the terrorist offences entails derogations to ordinary procedures also during the pre-trial phase. There is no option to consider either mitigating circumstances nor suspension, except in the case of the collaborator of justice (*repenti*). Furthermore, maximum delays for pre-trial detention are considerably extended: from the 18 months of the ordinary procedure, renewable one time for 12 months, to 4 years.³⁶⁸

³⁶³ Article 605.3 du Code de Procédure Pénale Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

³⁶⁴ Article 605.4 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

³⁶⁵ Art. 605.5 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger. This delay will be further extended by the 2016 reform to 15 days, once renewable.

³⁶⁶ Article 605.6 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger., while normally they can only take place during daytime, with the express consent of the affected person (see Art. 70 du Code de Procédure Pénale, République du Niger).

³⁶⁷ Barry, M. (2017) *La répression du terrorisme au Sahel : Cas du Mali et du Niger*. Université D'Abomey-Calavi, p.29.

³⁶⁸ Art.605.8 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger, establishes the four-years delay of pre-trial detention for « crimes » and two-year maximum delay for « délits » in terrorism-related cases, while art132 -1 du Code de Procédure Pénale (Loi n° 2003-26 du 13 juin 2003), République du Niger, provides for a eighteen-months maximum delay in ordinary criminal proceedings, renewable only once for twelve months.

The judicial investigation is concluded by an order of the investigative judge, who can either decide for a discharge (non-lieu), or the referral to the Court. Because the institutional specialisation in Niger has been comprehensive, the 2011 reform already introduced two specialised chambers to deal with terrorism cases. The control chamber reviews appeals against the decision of the investigative judge, while the trial chamber undertakes adjudications. At the time of adjudication, and despite the complexities inherent in terrorism-related trials, procedures remain very similar to those of ordinary cases, including for their public nature.

In a nutshell, the first terrorism-related reform in Niger combines strict adherence to the international and regional legal framework, when it comes to defining the offences, with some innovation in terms of a completely specialised institutional framework. Both interventions integrate the exceptionalism of terrorism. However, the capacities and functions of those new bodies will not truly be tested until 2015.

2.2 EVOLVING NORMATIVE FRAMEWORK: BETWEEN EXCEPTIONAL AND ORDINARY MEASURES

The sudden escalation of the terrorist threat with the 2015 attacks by Boko Haram will inevitably shape the work of the justice system in the following years. This section looks into the immediate State reaction to the attacks, the introduction of the state of emergency and its consequences on the evolution of the national legal framework through the 2016 reform. In doing so, it begins to uncover the tension inherent in the interaction between exceptional and ordinary legislation to counter terrorism.

DISRUPTION AND EXCEPTIONAL REACTION

The analysis clearly reveals that, in the eyes of the Nigerien population, the large-scale attacks by Boko Haram on Diffa and Bosso were a shock. Although the security situation in the region was quickly deteriorating by 2014³⁶⁹, a false sense of security persisted around Diffa, where signs of growing instability were misinterpreted or underestimated.

“Before the 2015’s attacks, there were already indications of insecurity. There was the assassination of a prominent economic operator, while he was in Nigeria, that has been attributed to Boko Haram. There were many signs of insecurity. You could not circulate freely between Niger and Nigeria, including between villages. For instance, I have family on the other side, in Nigeria, and I did not venture there anymore, there was a bad atmosphere.”

³⁶⁹ For an overview of the evolving security situation, see “*The 2015 turning-point: terrorism as an internal threat*”, Chapter III; “*Disruption and exceptional reaction*”, Chapter IV as well as “*A wider security look: security and socio-economic context for rehabilitation*”, Chapter VI.

And what was the State's response at the time?

I do not know exactly, but there was no concrete response, except on the military's side. New military positions were created to protect the city of Diffa, but from the social perspective, no measures were taken to stop this plague. I think that at the time, one did not realise the scale...the gravity of the turn that this conflict was going to take.”³⁷⁰

“In the beginning the situation was taken a bit lightly. By the government and by the population, because when it started, it was more on the side of Nigeria. Until 2015, in February, when they arrived in the Bosso department, and even in the city, and then...before then, people were not really taking interest in those terrorist acts. But it was the first time there was a war like that. So, the public authority was also a bit, if one can say so, weak in the intervention. It was only after that they knew it was more serious, it was dangerous for the population.”³⁷¹

These testimonies are coherent with the views expressed by judicial actors, and even within law enforcement³⁷². An official of the SCLCT confirmed that despite the terrorist attacks that were taking place in the country at the time, there was no sense of an imminent threat, even less so coming from the East of the country. While the police was aware of the presence of Boko Haram members in the region, and their connections to the population, wide-spread violence had not been foreseen by the Government.

“At the time, one can say that the threat was not perceived as directed against Niger. Because it was still something affecting Westerners, we were not the main target. But now, the picture had changed. Before, no Nigerien citizen has been touched. But with the Diffa events, this time, the front had moved.”³⁷³

The scale and nature of the attacks, which targeted governmental actors as well as security forces and managed to penetrate the two main cities in the region, represent the culmination of a threat that has now become vital to the State of Niger. This new sense of urgency is mirrored by dramatic strategy and policy changes. The state of emergency was declared five days after the attacks, introducing numerous provisions that strictly regulate and limit public life and commercial habits in the region. While this strategy mainly aimed at debilitating Boko Haram by depriving it of economic resources, its impact on the population still shapes current challenges in the region.³⁷⁴ In addition to the socioeconomic measures, the state of emergency

³⁷⁰ Author's interview with local administrative authority, Diffa (3 February 2020).

³⁷¹ Author's interview with anonymous N'Guigmi community leader, Diffa (4 February 2020).

³⁷² Author's interview with the high ranking official of the SCLCT, Niamey, (21 November 2017); Koundy, M. A. A. (2018). *Les obligations des Etats en matière de respect des droits de l'homme dans la lutte contre le terrorisme au Sahel*. Université Abdou Moumouni de Niamey.

³⁷³ Author's interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

³⁷⁴ For a broader contextual overview of the impact of the state of emergency provisions, see “A wider security look: security and socio-economic context for rehabilitation”, Chapter VI.

attributes to the regional governor the power to order exceptional searches day and night, and security and defense forces are tasked to carry them out and to conduct arrests³⁷⁵.

Initially declared for 15 days, the state of emergency has been prolonged to a three-month period, and has been regularly extended in the Diffa region to the present day, albeit with notable changes. In 2017, the state of emergency is also declared in multiple districts within the Tahoua and Tillabéri regions, in the west of the country, threatened by rising insecurity on the Mali and Burkina Faso's borders. Much has been written on the perennialisation of the state of emergency, and to its diffusion in contexts of counterterrorism.³⁷⁶ However, these analyses generally question the impact of such exceptional measures on citizens' rights and enjoyments of their fundamental freedoms. In this case, instead, it is interesting to consider the impact of the state of emergency on the institutional framework and specifically on the functioning of the justice system.

It is worth noting that the state of emergency, in its various iterations in Niger, has always been adopted according to constitutional norms.³⁷⁷ However, the provisions of the state of emergency are only partially in line with the careful legal and institutional framework built by the 2011 counterterrorism reform. Indeed, they integrate the potential for disruption, by altering the equilibrium between the pursuit of security and the protection of legal safeguards that had been included in the reforms.

The exceptional powers of security forces result in an unprecedented amount of arrests. Estimates and official sources indicate that about 1200 terrorist suspects were apprehended between February and December. According to the prosecutor, the pôle was dealing with 1750 terrorist suspects in pre-trial detention by March 2017, the large majority of them allegedly involved with Boko Haram³⁷⁸. These arrests were, for the most part, carried out in a haste, often on the basis of violations to the state of emergency limitations (such as curfew, ban on motorcycles) or vague suspicions, and despite lack of relevant evidence. Interviews also

³⁷⁵ Centre National d'Etudes Stratégiques et de Sécurité (CNESS). (2018). *Evaluation des impacts sécuritaires et socioéconomiques de l'état d'urgence dans les zones touchées par l'extrémisme violent au Niger_Rapport Final*.

³⁷⁶ Sire-Marín, É. (2006). L'état d'urgence, rupture de l'État de droit ou continuité des procédures d'exception ? *Mouvements*, no 44(2), 78–82; Rousseau, D. (2006). L'état d'urgence, un état vide de droit(s). *Revue Projet*, n° 291(2), 19–26.

³⁷⁷ Journal officiel de la République du Niger, (29 novembre 2010), Constitution de la VIIe République, articles 67-68.

³⁷⁸ Ibidem.

highlight how arrests waves generally followed important attacks, hinting at the security forces' motivations connected with vengeance.

“With the military patrols, you can find yourself in the wrong place at the wrong times. You may have just gone to look for wood, and they would round you up, take you to Diffa, without any screening, round everyone up and send you to Niamey (to the SCLCT)”.³⁷⁹

This wave of arrests had cumbersome, almost immediate consequences, affecting the functioning of the entire justice chain in matters of terrorism. The interviews reveal how, during the following years, the justice system attempted to address this disruption and its controversial relation with the pre-established legal and institutional framework in counterterrorism.

2016: COURAGEOUS REFORM

Following the mass arrests and the backlog of judicial institutions, in a prolonged context of insecurity, justice officials realise the constraints imposed by the procedural and institutional framework introduced in 2011 and strongly advocate for reform.

In 2016, the second wave of counterterrorism legislation mirrors the first in structure, introducing changes to: terrorist offences; institutions; procedures.

The criminalisation of incitement is now associated with that of “apologie du terrorisme”, and the harbouring of terrorists is newly criminalised³⁸⁰. But the most relevant shift in the configuration of terrorism-related offences does not involve criminalisation of new acts, but rather, in a move decidedly supported by judicial actors, the lowering of a number of offences from “crime” status to “délit”. This notably includes incitement and apologie, association, and harbouring of terrorists.³⁸¹ Such modifications testify to the need for adaption to the new configuration of the threat following 2015, while also signalling the consistent political will that made such changes possible in a short time.

The impact of this new, lower status of some terrorism-related offences was very notable in how it affected the competency of the different counterterrorism bodies and related procedures. On the one hand, the reform introduces crucial innovations to the jurisdictions of specialised

³⁷⁹ Author's interview with anonymous national human rights defender, Niamey (27 January 2020).

³⁸⁰ Loi n° 2016 – 22 du 16 juin 2016, modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal.

³⁸¹ Article 399.1.17, Code Pénal, (*Loi n° 2016-22 du 16 juin 2016*.; Article 399.1.19, Code Pénal, (*Loi n° 2016-22 du 16 juin 2016*), République du Niger; Article 399.1.19 (bis), Code Pénal, (*Loi n° 2016-22 du 16 juin 2016*), République du Niger.

bodies. Both the Centralised Service and the Pôle see their jurisdiction *ratione materiae* extended to transnational organised crime, which includes arms and drugs trafficking, trafficking in human beings and smuggling of migrants. On the other hand, the fact that association and other terrorist offences are now “délits”, means that they fall within the jurisdiction of the Pôle not only for judicial investigation, but also during adjudication. Indeed, offences that are “délits” are not tried in front of the trial chamber, but by the Pôle. As mentioned, at that time and for the following years, this concerns an overwhelming majority of terrorism-related cases, as most of the alleged perpetrators are accused of such “lower” offences, particularly association.³⁸²

The shift in nature of these offences also means that procedural changes take place. While there is a generalised increased in police custody delay to 15 days once renewable³⁸³, the delay of admissible pre-trial detention, which remains of four years in case of “criminal” offences, is reduced to two years in case of délits.³⁸⁴ As a result, the Pôle is now not only responsible for the overall proceedings for the largest number of terrorism suspect, but it also has only half the time to conduct them. In these circumstances, it is worth noting that the new laws also introduce collegiality in adjudication of terrorism-related offences at the level of “délit”, which is not foreseen in ordinary proceedings³⁸⁵. To respond to the expanding workload, the human resources of the Pôle are also reinforced, in a move that consolidates its specialistic nature. The Pôle is now composed of seven magistrates of the Court and four offices of investigating judges, including one that has the exclusive competence over cases involving minors.³⁸⁶ The Department of the Prosecutor is also strengthened, as three magistrates are now seconded to deal with terrorism-related files.³⁸⁷

Then, in 2017, an additional, albeit more modest, reform introduces protection measures for the judicial actors charged with terrorism-related offences, as well as for the witnesses, victims and informants that contribute to these proceedings.³⁸⁸ The SCLCT acquires the responsibility over

³⁸² For the analysis of prevailing charges, see “*Curtailed accountability: the impact of systemic weaknesses on adjudication*”, Chapter V.

³⁸³ Art. 605.5 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

³⁸⁴ Art. 605.8 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

³⁸⁵ Art. 605.11 (ter), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

³⁸⁶ Art 62.2 (nouveau), Loi n° 2016-19 du 16 juin 2016, modifiant la loi organique n°2004-50 du 22 juillet 2004 fixant l’organisation et la compétence des juridictions en République du Niger.

³⁸⁷ Art 10 (nouveau), Loi n° 2016-19 du 16 juin 2016, modifiant la loi organique n°2004-50 du 22 juillet 2004 fixant l’organisation et la compétence des juridictions en République du Niger.

³⁸⁸ Loi N° 2017-7 du 31 mars 2017, modifiant et complétant la loi n°61-33 du 14 août 1961 portant institution du Code de procédure pénale, République du Niger.

such protection.³⁸⁹ Against the background of a fast-evolving threat, 2016 and 2017 reforms are significant in their attempts not only to address the concrete challenges faced on the ground by investigators and trial judges, but also in their firm intention to balance the security interests with the rights of the accused, victims and witnesses. If it is true that, by strengthening the human resources available to the Pôle and the Prosecutor's Office, the 2016 reform creates better working conditions to address the backlog of cases, it is also notable that it does so in conjunction with measures that might make the work more complicated. Indeed, lowering the status of certain offences and dividing by half the available time for the procedure will present notable obstacles to the investigative judges. The motivations for this change are then especially relevant, and they point to an effort to speed up the process and enhance the legality of proceedings, avoiding excessive delays. At the same time, this new status of certain offences introduces the notion that not all terrorist crimes are necessarily exceptionally serious.

2.3 LAWS, LAWFULNESS, LEGITIMACY

An assessment of counterterrorism provisions in Niger confirms that exceptionalism is embedded within the legal and institutional framework since the outset. Although, in a departure from Schmitt's approach that qualified exception of inherently defiant of regulation³⁹⁰, counterterrorism laws do codify terrorism in Niger, they do so in a way that perpetuates its distinction from any other phenomenon. Both exceptional measures, such as the state of emergency, and ordinary legislation contribute to this process, albeit through different means. The use of the state of emergency directly evokes the notion of "*a grave and immediate threat to the institutions of the Republic, the independence of the nation or the integrity of the national territory*", as foreseen by the Constitution.³⁹¹ Yet, by establishing a complete separation of the specialised institutional frameworks, and integrating the recourse to procedures that derogate from ordinary administration of justice, the 2011 and 2016 reforms also clearly establish terrorism as a form of criminality *sui generis*. Additionally, the definition that is provided integrates the notion of terrorism not only as politically motivated, but also as

³⁸⁹ "Le service central de lutte contre le terrorisme et la criminalité transnationale organisée est chargé de la mise en œuvre des mesures de protection », in Art. 605.16, (Loi n° 2017-07 du 31 mars 2017) du Code de Procédure Pénale, République du Niger.

³⁹⁰ Schmitt, C. (2010). *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, p. 12.

³⁹¹ Journal officiel de la République du Niger, (29 novembre 2010), Constitution de la VIIe République, article 67.

posing direct challenges to the State. In other words, through its normative power, the State consolidates the exceptionality of terrorism.

However, the focus of this analysis is on the contribution of this new legal framework to the sovereign attributes of the State. In particular, it is argued that compliance with formal requirements of legality serves State authority and builds its legitimacy. Such formal requirements include some basic principles, such as laws' non-retroactive quality, publicity and accessibility, and consistency³⁹².

This analysis confirms that terrorism laws do not entail retroactive quality. Indeed, nothing indicates that counterterrorism provisions would be applied retroactively, with the exception of the “lowering” of the status of certain offences to délits. However, this does entail the potential for increased punishment of citizens, but rather lowers their burden in certain circumstances. Accordingly, the limited retroactivity of procedural modifications introduced by the second wave of reform does not violate the requirement of formal legality, at least according to its conception in the Nigerien Constitution³⁹³.

Consistency of these laws can be assessed on multiple levels and, in the growing globalisation of counterterrorism responses, this study has looked into both external and internal coherence.

There is no discrepancy between the international and national approaches when it comes to the definition of terrorism, albeit the Nigerien legislator favours a broad characterisation of this phenomenon. This is especially true of the first wave of reform, which appears to be essentially inspired by international and regional law. Accordingly, national legislation initially foresees all terrorist offences as especially serious and proceeds to the progressive criminalisation of preparatory acts. When Niger goes further than what is prescribed by international instruments, it does so by adopting instruments derived from the framework of organised crime. This reflects the conception of terrorism as a phenomenon that is essentially criminal in nature³⁹⁴ and also

³⁹² Bedner, A. (2010) An Elementary Approach to the Rule of Law. *Hague Journal on the Rule of Law* 2,1: 48–74.

³⁹³ « Les lois et règlements n'ont d'effet rétroactif qu'en ce qui concerne les droits et avantages qu'ils peuvent conférer au citoyen », in Art. 19, Constitution de la VIIe République, *Journal officiel de la République du Niger*, (29 novembre 2010).

³⁹⁴ In the coming chapters it will be argued that this notion is challenged by the reality of the 2015 attacks and the conflict situation in the most affected regions. In fact, the application of the “association » charges and the use of the “repenti” will prove amongst the most problematic aspects of the justice approach to counterterrorism in Niger.

signals a clear intention to inscribe national counterterrorism efforts in broader, global, objectives.

Internal consistency is also meaningful. And indeed, the normative framework that is proposed in Niger, while composite, is clear and internally coherent. It can also be easily argued coherence is maintained through the different waves of reform, as no conflicting provisions are introduced. Some issues within consistency emerge in the consideration of the tensions between the state of emergency provisions and the ordinary reforms. Yet the disruptive potential of these discrepancies will emerge mostly in the application of the laws. It is also worth noting that terrorism-related provisions in Niger abide by Constitutional norms. This remains true even during the application of the state of emergency. Despite its extensive iterations in Niger, its use remains within the boundaries established by Constitutional norms³⁹⁵.

From a strictly formal perspective, counterterrorism laws not only fulfil the minimum requirements of lawfulness, but they also demonstrate the decisiveness of the State in addressing this threat. In doing so, they create strong basis for the legitimization of State action through law-making.

Yet, it is ultimately only the analysis of practices that can reveal whether these laws provided predictable limits to arbitrariness of State action, thus strengthening sovereignty by demonstrating the State's commitment to lawfulness.

3. SPECIALISATION IN ACTION

While the previous section is concerned with assessing a formal approach to lawfulness in the counterterrorism normative and institutional framework, this second segment addresses the practices that defines the implementation of those laws. Instead of questioning whether terrorism-related reforms possess the formal attributes of legality, it examines to what extent the reforms have been applied by the State's agents directly concerned, hence proving that the authority of the State is perceived as binding.

In doing so, it argues that the normative setting is not sufficient to determine the effective capacity of the State to claim sovereignty. Rather, this negotiation largely plays out in the practices that are enacted, modified and adjusted by those actors that embody the State in these

³⁹⁵ Journal officiel de la République du Niger, (29 novembre 2010), Constitution de la VIIe République, articles 67- 68.

circumstances³⁹⁶. The present analysis takes into account not only the behaviours of the justice system officials, but puts particular emphasis on their beliefs and attitudes, as well as on their interactions, in the interest of proposing a layered interpretation of the complexity that characterises such negotiation processes.

AFTERMATH OF THE 2016 REFORM AND THE STRUGGLE TO OVERCOME PARALYSIS

The application of the state of emergency measures quickly overwhelmed the careful counterterrorism institutional and procedural set-up. As large groups of suspects periodically arrived to the SCLCT and the Pôle, material and human capacities showed their limitations.

“It would happen to have 200 people arrested at the same time and then transferred. When you arrived here during that time, the premises would stink terribly, there were flies everywhere. Our investigators could not sleep. Space was not enough, so we would place individuals who looked more dangerous in the traditional cells, those who looked more weak, older people or youngsters, in the meeting room, and the women, we had placed them outside, under the trees.”³⁹⁷

At this point, the key obstacle to compliance with norms and procedures is the impossibility to conduct proper investigation and the subsequent judicial backlog.

In the meantime, with the validation of the arrests, the presumed terrorists were transferred to the custodial facility of Kollo and the maximum-security prison of Koutoukalé, an approximate 38- and 47-kilometers distance from the capital Niamey, respectively, causing notable overcrowding issues. Overcrowding is not a new phenomenon in Niger’s prison, especially in those surrounding the capital. Nonetheless, the impact of mass arrests following February 2015 cannot be overstated: data from that year shows a 32.5% increase in national prison population compared with 2014, at least half of which can be directly credited to terrorism-related arrests. By the end of 2015, the overwhelming majority of detainees in the Kollo and Koutoukalé prisons were accused of terrorism, and in both facilities overcrowding rates exceeded 150%³⁹⁸.

The analysis of the justice actors reveals their understanding of the crucial challenges at that time. An immediate consideration concerns the personnel: the Pôle is simply too small for its case-load. But in addition to the material resources, the magistrates identify in the rigidity and

³⁹⁶ See “A conceptualization of State Sovereignty and its key attributes”, Chapter I.

³⁹⁷ Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

³⁹⁸ Laboratoire Religions et Sociétés (LARSO), (2017). Rapport : Étude sur la prévention à la radicalisation au Niger, Rapport final, Niamey, Université Abdou Moumouni–IRSH.

punitive nature of the legislation at the time the primary obstacle to the advancement of cases³⁹⁹. In fact, due to the criminalisation of all terrorism-related offences as “serious” with the 2011 laws, and punishable by more ten years of imprisonment, the delays of pre-trial detention are extended to 4 years for all arrested individuals. In a challenging context to access evidence and conduct enquiries, the extensive delays reduce incentives to move cases forward, as explained by this judge:

“When a case enters your office (as an investigative judge), you have four years to deal with it. There is no pressure, because you think you have all the time. There a risk that this favours a passive attitude in your role as investigative judge. In comparison, for a case of breach of trust in an ordinary justice process, you would have six months that you can only renew once (...) This challenge really had to be met and we insisted a lot on it. For this reason, starting in February 2015, when we started seeing plenty of cases coming, we raised our voice to obtain this reform, and luckily it was obtained in 2016.”⁴⁰⁰

The new 2016 law allows therefore the specialised Chambers at the appeal Court to decline jurisdiction over the majority of terrorism-related cases, whose competence now lies with the Pôle. The timing of the proceedings then undergoes considerable acceleration, which points to the efficacy of the reform. In the interval between February 2015 and July 2016, date of the new reform, only a handful of cases are adjudicated. But by January 2017, the first transfers of the investigative judges to Diffa are organized, opening a new phase in the judicial investigations and leading to the first notable advances. By March, the Pôle has organized the first special sessions, where consolidated hearings concerning exclusively terrorism cases are carried out over multiple days.

Yet, the outcomes of the new laws are not only relevant in and of itself, but also in the advocacy that was carried out by the judiciary for its adoption, which speaks to their beliefs. First, even when advocating for modifications, they are reaffirming their adherence to the binding norms established by State: their priority is to remain within the boundaries of the law. This emerges clearly on the issue of police custody delays, initially foreseen at 120 hours. The complexities of the transfer from Diffa had made the respect for such delays highly problematic, which explains the extension to 15 days afforded by the 2016 reform⁴⁰¹. When advocating for these modifications, then, justice officials are calling for procedures that would allow them to act legally, rather than tolerating violations. Similarly, they insist on lowering the status of certain

³⁹⁹ For a more comprehensive analysis of overcrowding rates and prison conditions, see the box “A look at the impact of counterterrorism on overcrowding in prisons”, Chapter VI.

⁴⁰⁰ Author’s interview with an investigative judge of the specialised pôle, Niamey (24 November 2017).

⁴⁰¹ Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

offences in order not only to speed up the process, but also to create an obligation for such cases to be tackled in shorter times. Such manifest concern with the legal legitimacy of their practices is even more noteworthy in the context of widespread insecurity.

A second consideration can be made when confronting the provisions of the older laws with the situation of 2016: the configuration of certain offences appeared very different from what may have been foreseen. Given the broader powers for preliminary investigations, including the use of interceptions and infiltrations, it can be expected that when criminalising “association”, the legislator had in mind carefully constructed cases with material evidence collected during pervasive investigations. In this sense, the new conditions in which arrests took place as well as the limited and controversial nature of the evidence may have contributed to recognising a less serious connotation to “association”, thus justifying its new lower status.

CLASH OF PROCEDURES AND CONTEXT

Beyond the obstacles inherent in the legal framework, it is undoubtedly the context of prolonged insecurity that affects the work of justice officials and their ability to act lawfully the most. Certain shortcomings are the direct result of the friction between the state of emergency procedures and the counterterrorism institutional set-up, based on specialisation. In particular, interviews across different sectors agree in identifying the time of arrests and preliminary investigations as the most prone to procedural violations.

According to the 2011 and the 2016 laws, it is the SCLCT, together with the judicial police, that is mandated to carry out the preliminary phase of the investigations⁴⁰². Yet, in reality, and with the state of emergency, this task was transferred to the military. Interviewees note how this led not only to arbitrary proceedings, but also a serious gap in the crucial first steps of the investigations:

“There is no evidence, there was only people who were arrested by the military. Sometimes, it can be that the militaries are in possession of certain elements against them, sometimes they may have taken them during combat. But none of this was transferred to the criminal justice chain, the evidence is not transferred and the judiciary did not have focal points in the military to know how such evidence could be relayed.”⁴⁰³

⁴⁰² Art. 605.2 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

⁴⁰³ Author’s interview with judge at the specialised pôle, Niamey (29 January 2020).

These testimonies⁴⁰⁴ identify a number of issues during the preliminary phase. First, in many cases arrests appear to have been carried out on very flimsy basis. Numerous anecdotes point to the fact that normal activities could be interpreted as “suspect movements”, and mere violations of the administrative restrictions imposed with the state of emergency could justify arrests for terrorism. The large number of arrested persons at the same time also confirm an indiscriminate approach, where entire families or even villages could be taken at the same time. Others indicated that not being recognised in a village could also easily lead to arrest, which may have resulted in the growing refugee and internally displaced population being especially exposed. The second concern refers to the quality of that initial phase. Interviewees refer of burned and missing evidence, lack of preliminary interrogations of the suspect, nor of potential witnesses, disregard of any search process⁴⁰⁵.

Evidently, the flaws of the opening steps of the proceedings will affect the entirety of the justice process. They are also further aggravated by the distance between the areas where the events take place and the capital, where the investigators, both from the SCLCT and from the Pôle, are located. The limited presence of justice on the territory of Niger, especially in the more remote regions, is a longstanding problem and creates a physical, psychological, and economic barrier to access to justice.⁴⁰⁶ This is a well-recognised issue, as confirmed by the focus on “bringing justice to the citizens” that characterised the *États généraux de la justice*.⁴⁰⁷ This is because limited institutional presence also means limited sovereignty: physical absence is also lack of effective control. Yet, in counterterrorism, the distance is considerably enhanced by the institutional specialisation, which initially resulted in the complete centralisation of terrorism-related proceedings in Niamey.

There are practical reasons why a centralised process would provide material advantages: the most important one being that it favours security, in light of the pervasive instability in Diffa. Safety-related considerations continue to currently apply with respect to the more recent

⁴⁰⁴ This information was corroborated by a number of interviewees, including: Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017); Author’s interview with a local magistrate, Diffa (04 February 2020); Author’s interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (6 February 2020).

⁴⁰⁵ Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017); Author’s interview with a judge of the specialised pôle, Niamey (23 January 2020); Author’s interview with general prosecutor Chaibou Samna, Niamey (6 February 2020); Author’s interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (30 January 2020).

⁴⁰⁶ Alou, M. T. (2001) La justice au plus offrant, Les Infortunes du Système Judiciaire en Afrique de l’Ouest (autour du cas du Niger). *Politique Africaine*.

⁴⁰⁷ See République du Niger, Ministère de la Justice (2012) *États généraux de la justice. Rapport General Des Travaux*.

hotspots at the borders with Mali and Burkina Faso. However, when coupled with the tight financial means, centralisation de facto prevented access to the areas where the investigation was supposed to take place and to the relevant evidence, for a considerable time. This means that in most cases, the interrogations, searches, testing and other forms of evidence collection that had been neglected initially, became non-viable for investigators in Niamey. An additional element that contributed to the limitations of the investigative process also stems from the centralisation of powers of investigation in the SCLCT and the Pôle. While the laws provide for local officials of judicial police and local prosecutors to contribute to the preliminary stages, where they could have provided much needed support and monitoring of the military's conduct, multiple interviews highlight that this did not happen during the first years after the 2015 attacks⁴⁰⁸. This is attributed to a generalised feeling that only the specialised bodies were competent in counterterrorism.

In sum, issues of arbitrariness and superficiality of the preliminary phases, distance from the affected areas and centralisation led to repeated violations to the procedural provisions, notably through exceeding of the time-limits provided for police custody and pre-trial detention. Furthermore, they undermined the quality of the proceedings, ultimately leading to an overwhelming rate of release over convictions⁴⁰⁹. The issue of limited quality of the evidence further exacerbated the questionable nature of the proceedings. In a context where the operational areas for the groups are often inaccessible, and the security forces in charge of arrests and investigations are not familiar with judicial proceedings, the local population became the main source of evidence. This was encouraged by local authorities, as the Quran was used to incite denunciations. At times, judges and investigators have argued that this was a positive strategy, as it led to a rising number of locals collaborating with justice.⁴¹⁰

“Another element that was really helpful was the Quran with its regional dimensions. The Quran was waved in the entire region, and because the Islamic tradition is strongly rooted there, often people would come voluntarily to denounce. Because they felt that they were really obligated to do it, because the Quran was waved. So this generates a religious and moral obligation for people to cooperate. And this helped us considerably.”⁴¹¹

⁴⁰⁸ Author's interview with a local magistrate, Diffa (04 February 2020); Author's interview with general prosecutor Chaibou Samna, Niamey (6 February 2020).

⁴⁰⁹ Further discussed in *“Beyond the surface: the quality of accountability”*, Chapter V.

⁴¹⁰ Author's interview with an investigative judge of the specialised pôle, Niamey (24 November 2017); Author's interview with a judge of the specialised pôle, Niamey (23 January 2020).

⁴¹¹ Author's interview with an investigative judge of the specialised pôle, Niamey (24 November 2017.)

However, it is complex to assess the unintended consequences of this strategy. On the one hand, may this have led to overlooking the dangers that witnesses were putting themselves in, in the context of ongoing insecurity?⁴¹² On the other hand, these accusations often went unconfirmed. Inside villages, and across ethnical divides, the situation transformed into an opportunity to settle private accounts.

Another layer of complications is a direct result of the cross-national nature of terrorism, although this terminology is often used to indicated different things.⁴¹³ In the case of Niger, cross-nationality manifests itself in the recurrence of criminal and terrorist groups that operate at the borders of different States, benefitting both from the advantage of multi-national coordination challenges, and from the marginal presence of the State in peripheral regions.⁴¹⁴ For the purposes of criminal justice, this resulted in a considerable number of suspects who are Nigerian nationals. This opened questions with respect to extraditions to Nigeria for their adjudication.

As the norms for trans-national cooperation in criminal matters are especially cogent in relation to terrorism, particularly with regards to extradition⁴¹⁵, interviews confirm that an extradition request was introduced by the Government of Nigeria. However, the transfer of the suspects was never organised, because the Nigerien authorities were not satisfied that due process guarantees would be respected in Nigeria⁴¹⁶. This shows adherence to the principle of non-refoulment, which provides that a State shall not remove an individual from its territory (including for the purposes of extradition) when this individual would be exposed to persecution, serious human rights violations, and irreparable harm in the country of destination.⁴¹⁷ In Nigerien law, the legislator included broad provisions to ensure respect of

⁴¹² For an analysis of challenges related to the use of witness testimony in terrorism-related proceedings, see below “*Adherence to fundamental rights*”, Chapter IV.

⁴¹³ In recent years, the cross-national dimension of terrorism has been increasingly associated with the foreign terrorist fighters (FTFs) phenomenon, as addressed by S/RES/2178 (2014). The UN Security Council resolution defines FTFs as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.” However, the applicability of the notion of FTFs to the context of the Lake Chad basin and, some would argue, more broadly to the African continent, is questionable, in light of the “flexibility” of the notion of foreignness that characterises certain borders: see “How ‘foreign’ are foreign terrorist fighters in Africa? <https://issafrica.org/iss-today/how-foreign-are-foreign-terrorist-fighters-in-africa>”

⁴¹⁴ Pérouse de Montclos, M. (2015) *Boko Haram et la souveraineté du Nigeria : une histoire de frontières*. *Herodote* n° 159, 4: 58–75.

⁴¹⁵ Extensions to the provisions concerning extradition have been introduced in Niger through the counterterrorism reform, by Law n° 2016-21 of 16 June 2016.

⁴¹⁶ Author’s interview with an investigative judge of the specialised pôle, Niamey (24 November 2017).

⁴¹⁷ Art. 3 of the UN General Assembly (10 December 1984), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and arts. 6 and 7 of the International Covenant on Civil and

non-refoulement principle in counterterrorism⁴¹⁸: article 649.17 of the code of criminal procedure include gaps in due process guarantees as sufficient grounds to deny extradition.

Accordingly, the treatment of the Nigerian suspects, who have been adjudicated, detained or released in Niger, reflects the pre-eminence of lawfulness over political interests and opportunities. This is especially noteworthy as the transfer of Nigerian cases would have not only favoured political relationships with neighbours, but also considerably alleviated the backlog of cases in front of the Nigerien magistrates, as well as immediately reduced overcrowding conditions.

The interviews reveal how the loopholes in the conduct of the proceedings were rapidly acknowledged, and that numerous initiatives were undertaken to address them between 2015 and 2020. The SCLCT opened multiple branches in the regions, starting with Diffa, by the end of 2015. As mentioned above, regular missions of the Pôle to Diffa were organised starting in January 2017, with a view to conducting more in-depth judicial investigations. Alternatively, rogatory commissions composed of judicial police officials were mandated to conduct such investigations, which also allowed reductions in the budget, compared with the Pôle's trips to the region. Training, dialogues, and coordination mechanisms were also put in place to facilitate communication among gate-keepers of different sectors, and notably between judicial bodies and the security forces.

These actions aimed at reducing the arbitrariness and at improving coherence in the functioning of the criminal justice chain. A notable innovation in this sense was the introduction of the "fiche de mise à disposition": a simplified sheet to collect the preliminary information concerning a terrorism suspect who has been arrested, the person responsible for the arrest, date and circumstances leading to the arrest. Once filled, the fiche is transmitted from the security officer to the judicial police, the prosecutor, and the investigators, and has proved quite effective in terms of improving the quality of the initial reception of the suspects. Overall, justice actors attest a notable improvement in the quality of cases they received after the first waves of arrests.

Magistrate in Diffa: *"Of course, now the procedures have evolved. It is not the same procedures you see now, notable changes have been introduced, there has been a real improvement. The investigation is done, there are people who are based here during*

Political Rights (ICCPR). In Nigerien law, the legislator included broad provisions to ensure respect of non-refoulement principle in counterterrorism, which include gaps in due process guarantees as sufficient grounds to deny extradition.

⁴¹⁸ For a complete overview of the criteria to refuse extradition, see Art. 649.15 - 649.20 du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

*the investigation and they have a certain experience (in the SCLCT branch), and there are also agents who come for missions of two, three months at least.”*⁴¹⁹

Judge formerly with the specialised Pôle: *“It is true that in the beginning it was complicated, we ourselves were not satisfied with the procedure because, as trial judges, we faced challenges as the basis of the proceeding was not clarified. It would come to the hearing and we often did not have sufficient elements to establish guilt. Because when in a case you have nothing but the declarations of the accused, no other elements to deny or confirm such declarations, then often we would release because of the benefit of the doubt. In doing so, it can be that we are releasing a guilty person. But with time, thanks to the investigative judges’ missions to Diffa (...) now we have more testimonies of different parties, and with expert appraisals we can request, for instance the analysis of the phones, we managed to really improve the proceedings.”*⁴²⁰

Judge with specialised trial chamber: *“It is changing, because in the beginning the investigation was done solely at your desk. It was enough to take the person and interrogate them in the office. (...) But now it goes well beyond, and efforts are made to conduct investigations on the ground (...). The establishment of the SCLCT’s branch in Diffa, who takes care of the preliminary investigations, was very important. And since the investigative judges have started travelling to collect evidence it has become a lot faster.”*⁴²¹

This extensive process of identifying the gaps and adapting the procedures to find available responses reveals a dual interest on the side of the justice system. On the one hand, there was a necessity to control and end the procedural violations that are introduced with the crisis of 2015 and are magnified by the State of emergency provisions. On the other hand, there is also an acknowledgment that the institutional and procedural framework does not always reflect appropriately the reality on the ground. In the evolving attempts to conciliate these two concerns, the interest of respecting the law provided a stabilising and legitimising force, guiding the activities of counterterrorism bodies in uncharted territory.

NEGOTIATING THE NOTION OF LEGALITY

Counterterrorism is an area that requires cooperation across different institutions and actors. The analysis reveals how the interactions between different agents is significant to the understanding of legality as a binding force, and the questions of its limits and supremacy in times of insecurity.

⁴¹⁹ Author’s interview with a local magistrate, Diffa (04 February 2020).

⁴²⁰ Author’s interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁴²¹ Author’s interview with a judge of the specialised trial chamber, Niamey (22 November 2017).

Law enforcement, judiciary, and security forces have different professional relationships to the legal framework. The army's scarce knowledge of judicial proceedings repeatedly emerges as the motivation for the numerous procedural violations during arrest and preliminary investigation⁴²². However, reports indicate that abuses by security forces have far exceeded the mere lack of legal comprehension. Accusation of physical violence against the suspects have been raised by some detainees, and confirmed by police officials.

*“We noted that there were cases, for instance when a military is fighting with someone, to control him, the others take pictures. And if they are beating him, when he's already a prisoner, than it is not normal.”*⁴²³

The moment of transfer from Diffa to Niamey appears to be especially vulnerable for the prisoners, especially during the months following the 2015 attacks, when it was carried out in inhumane conditions. Incidents of abuses and beatings appear to have been especially frequent at that time.⁴²⁴ These incidents are often ascribed to a sentiment of revenge, due to the fact that security forces have been amongst the favoured target by terrorist groups in Niger, both on the Boko Haram front, and in the region of Tillabéri. There are reports that, indeed, following each attack, there would be increased waves of arrests⁴²⁵. Referring more specifically to incidents of violence against the suspects, a high ranking official of the SCLCT explained:

*“We are the ones in charge of the transfer from Diffa to Niamey, it is our agents who are in the vehicles with the prisoners. There's only our agents, who are trained. But we do not have enough personnel for the escort, which is provided by the military or the gendarmerie. When we get to the stops, if during the attacks some gendarmes have died, so their comrades, they want to beat the detainees. And then it is our agents who gets in the middle and get hit... Well, it is normal. We understand that they do not understand. But we understand also, that it is human. They tell me someone who kill my comrade is there, I see him just like that...not everyone can contain themselves. It is hard.”*⁴²⁶

This feeling of revenge later came to influence also the decisions of the judiciary. Following the first waves of arrests, when the prosecutor and judges started releasing suspects whose cases did not present enough evidence (or any at all), the security forces expressed their dismay.

⁴²² Author's interview with the high ranking official of the SCLCT, Niamey, (21 November 2017); Author's interview with anonymous official of Diffa SCLCT branch, Diffa (5 February 2020); Author's interview with anonymous prosecutor of the specialised pôle, Niamey (6 February 2020); Author's interview with judge at the specialised pôle, Niamey (29 January 2020).

⁴²³ Author's interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

⁴²⁴ Author's interview with “Ousmane”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018); Author's interview with “Mohamed”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018); Author's interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

⁴²⁵ Author's interview with anonymous prosecutor of the specialised pôle, Niamey (6 February 2020).

⁴²⁶ Author's interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

“On the other side you had the army, who complained about judges freeing people. ‘I do not understand. I am a soldier, I exposed myself to go and get them. You, as a human right defender, tell me that extrajudicial executions are not allowed, so we hand them over to the justice system. But then why do judges release them?’”⁴²⁷

The frustration of security forces was also met with discontent by investigators, including police and prosecutors, and judges. In the following years, efforts and funding were devoted to fostering a dialogue between the different actors involved in counterterrorism, with a focus on communication chains between the security sector and the justice system. This was pursued both through institutional multi-disciplinary and coordination bodies, notably the Interministerial Committee dealing with terrorism, and through more informal exchange initiatives at the working level⁴²⁸. These opportunities for dialogue, often conducted under the direction of the Haute Autorité à la Consolidation de la Paix, a State body linked to the Presidency, unveil the multiple obstacles to a coherent intervention between security forces and judiciary.

On the military’s side, there is a fundamental gap in understanding of legal constraints, enhanced by reluctance or difficulty in involving the judicial police or the gendarmerie prévôtale who could provide qualified support. At the same time, judicial actors initially lacked the knowledge of the territory of operations, and its implications in terms of criminal responsibility of the accused. This is especially relevant because certain areas are under the territorial control of Boko Haram, and performing activities in those areas is deemed a serious indication of culpability.

According to the interviews, these collaboration efforts were considered useful and fruitful by participants, and were successful in building more coherent approaches over time.⁴²⁹ It is notable how judicial actors stress the importance of sensitisation of security forces over the necessity to respect the laws. According to their assessments, repeated interaction has served the dissemination of principles of legality, particularly with respect to rule of law principles and respect of human rights. In this sense, multidisciplinary practices contributed to the construction of a shared approach to counterterrorism, framed within the boundaries of the law.

⁴²⁷ Author’s interview with anonymous national human rights defender, Niamey (27 January 2020).

⁴²⁸ Author’s interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020).

⁴²⁹ Author’s interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020); Author’s interview with a judge of the specialised pôle, Niamey (23 January 2020); Author’s interview with a judge of the specialised pôle, Niamey (27 January 2020);

At the same time, however, and despite the emphasis on legitimacy through law by justice agents, the primacy of security as legitimising force emerges from the different accounts. The most relevant example concerns the use of imprisonment beyond its lawful restrictions: in the context of an unprecedented threat, it is not only that violations to the norms are understandable, they were perceived as the only viable options.

“The issue is: it was something we did not expect⁴³⁰. It shocked everybody. And really in that context, you as a public servant, when having to take a decision, there was this fear, because State’s security was at risk...So, often you thought you needed to take precautions: even if we have got nothing on this person, I’d rather arrest him. Security forces did so, and in many cases when it got to us (the judges) we also kept the people, waiting to get a clear idea. Later, in hindsight, we realised we made mistakes. But at the time, one has to recognise, we faced with this phenomenon that was exploding.⁴³¹

It should be noted that violations are recognised as such, and indeed practical corrective efforts were undertaken to address them. At the same time, when faced with a security threat, the circumstances provide justification that transcends normative legitimacy.

In terms of the action by the justice system, this also means that the focus is moved from the identification of the individual offender, to the targeting of potentially disruptive groups threatening the safety of the entire nation. As a result, emphasis is no longer placed on long-term efficacy of justice, meaning conducting arrests in a way that will lead to convictions, but rather on short-term results, or rapid neutralisation of (potential) risk.

Overall, the analysis of interactions between justice and security actors embodies an ambiguity in the State’s approach to terrorism: while legality is presented as the non-negotiable quality to build legitimate sovereignty, the pursuit of security ultimately justifies its breach.

SPECIALISATION AS AN ASSET FOR LEGITIMACY

In concluding the study of how practices influenced legal certainty in counterterrorism, it is worth stressing that justice actors highlighted the specialised institutional design as advantageous to their work under many respects:

“I think that the organisation as it is now, centralised, is much more credible. Why? Because if we created a specialised (terrorism-related) competency in each district of the country, many of these jurisdictions would never work on it, as certain areas are not affected by this phenomenon. The second factor is that the centralisation of a jurisdiction allows the State to concentrate specialisation efforts. If we had a (counterterrorism) Pôle in each court, we would need to train all those people, and

⁴³⁰ With reference to the 2015 attacks on Bosso and Diffa and escalating violence in the region.

⁴³¹ Author’s interview with an investigative judge of the specialised pôle, Niamey (24 November 2017).

there are no means to do that. The third thing is that the creation of a specialised Pôle meant all proceedings were in the hands of a few magistrates, a few prosecutors, who knew the cases well were able to see the connections between them, (...) and that is essential in terrorism. (...) But when you have centralisation, you have a group of magistrates who speak, exchange, know the procedures, and this also created harmony, because the approach tends to be the same, sanctions will be quite the same, and I think this creates people who are really specialised, who have special qualifications.”⁴³²

The analysis of the interviews reveals how specialisation and centralisation provided a number of technical advantages despite the logistical impediments due to the distance from the most affected areas. By creating a sort of close-knit community, the institutional design contributed to cooperative practice by iterated exchanges, as mentioned. Additionally, these prolonged working relationships and progressive confidence with the subject matter are interpreted by the judges as having favoured the reactive ability of the counterterrorism bodies, thus their capacity to actively adjust to the reality of the challenges on the ground. In other words, the specialisation is conceived as inherently connected with the learning process of institutions. This opinion is shared across the different sectors involved in counterterrorism, as the “exceptional” institutional setting is vastly credited with procedural improvements over the years.

Secondly, the establishment of the specialised institutional framework provides the connection between the understanding of the phenomenon and legal certainty. Through interaction, policemen, judges and prosecutors defined a shared conception of criminality in the area of terrorism, and via this signification process they harmonised the outcomes of the judicial processes⁴³³. The substantive consequences of this process, in terms of quality of judicial debate and sentencing process, will be further discussed in chapter V. Nonetheless, centralisation has shown positive effects on predictability and legal certainty.

This was further fostered through the opportunity to subvert usual dynamics of the justice institutions in Niger, within the counterterrorism bodies. One notable example being the considerably lower turn-over rate of judges and prosecutor:

“Honestly, at the time of the latest posting assignments were announced, for instance, I thought to myself I was going to leave, because I had been there since 2012. But I think that the nomination authority understood it was necessary to leave a core group. (...) And truly, this produced results.”⁴³⁴

⁴³² Author’s interview with a judge of the specialised pôle, Niamey (22 November 2017).

⁴³³ Giddens, A. (1984). *The Constitution of Society: Outline of the Theory of Structuration*. University of California Press.

⁴³⁴ Author’s interview with a judge of the specialised pôle, Niamey (23 January 2020).

The connection between turnover and institutional practice is debated: for instance, while high rates of turnover are considered beneficial to judicial independence, it can also be associated with negative performance indicators, such as cumulative delays.⁴³⁵ In Niger, turnover frequency can contribute to the social distance between judges and their constituency. However, the specialisation of counterterrorism bodies has favoured cumulation and transmission of competences, thus contributing to the credibility of the justice process. This holds true, however, exclusively for the officials based in the capital. In Diffa, and possibly in other areas facing pressing instability, turnover has increased with the crisis, aggravated by the fact that posting in such dangerous areas is often perceived as punishment.⁴³⁶

Ultimately, this is a testament to the relevance of the institutional structure over the agents' practices. In this case, by contributing to both competency and predictability of counterterrorism actors, specialisation is credited as efficient to increase the legitimacy of State action in fighting terror.

4. ADHERENCE TO FUNDAMENTAL RIGHTS

The relationship between human rights and sovereignty is a constantly debated one. A static understanding of sovereignty as the inherent quality of the State would tend to identify human rights with limitations to the State's action. Instead, by conceiving sovereignty as a negotiated quality, this work takes the view that human rights prove an irreplaceable ally to the State's claims to sovereignty. They do so by providing legitimation in a way that transcends national boundaries⁴³⁷. In other words, human rights contribute to the recognition of the State as the legitimate authority to regulate public life, in a considerable part because, and as long as, it can claim adherence to a universal understanding of human rights and democratic principles. Such approach to the legitimating power of human rights is arguably especially relevant in Niger, where the government led by Issoufou also inaugurates the VII Republic, whose legitimacy is anchored in the rhetoric of the democratization process⁴³⁸.

⁴³⁵ Author's interview with representative of the Diffa governorate, Diffa (3 February 2020); Author's interview with anonymous official of Diffa SCLCT branch, Diffa (5 February 2020).

⁴³⁶ Author's interview with a local magistrate, Diffa (04 February 2020).

⁴³⁷ Levy, D., & Sznaider, N. (2006). Sovereignty transformed: A sociology of human rights1. *The British Journal of Sociology*, 57(4), 657–676.

⁴³⁸ See "Niger's VII Republic: Justice and Democratic Reboot", Chapter III.

Hence, this final section of the chapter deals with justice actors' praxis with regards to fundamental rights and procedural safeguards of the individuals involved in the proceedings, namely the alleged perpetrator, potential victims and witnesses. Due process guarantees are an especially important limit to State's autocracy, and thus hold enhanced legitimising power against claims of arbitrariness⁴³⁹. As such, their application in the context of counterterrorism in Niger are central to this analysis.

Additionally, because terrorism is a form of collective violence⁴⁴⁰, which not only causes direct damages to large numbers of people, but also uses victimization for strategic purposes, State's responses to victims are significant to the analysis of counterterrorism efforts. Indeed, assistance to victims is an essential feature of reconciliation programmes following armed violence. Lately it has been increasingly argued that promoting a more active involvement of victims should become a strategic priority when responding to terrorism⁴⁴¹. This thesis considers that initiatives that aim to provide direct support to victims, and indeed also to suspects and convicts, are part of State's efforts to reaffirm control and sovereignty by promoting stabilisation and security. Accordingly, they are included in the second dimension of the analysis, addressed in chapter VI.

However, victims also have the right to access justice: the specific treatment of victims and witnesses during investigations and judicial proceedings is tackled here. In fact, when it comes to terrorism, victims and witnesses are often the beneficiaries of similar safeguards and protection level, due to the enhanced risks of intimidation and retaliation that are an integral part of organized crime's methods.⁴⁴² In this light, the level of protection afforded to victims is one important element of assessing to what extent justice institutions adhered to the laws during counterterrorism proceedings.

In the course of the research, the author was able to interview some of the alleged perpetrators of terrorism, who are held respectively in the Kollo and Koutoukalé prisons. While the nature and scope of the interviews was limited by the circumstances they were facing in deprivation of liberty, these interviews provided significant information on their experiences within the

⁴³⁹ Levinson, R. B. (2008). Reining in Abuses of Executive Power through Substantive Due Process. *Florida Law Review*, 60, 519.

⁴⁴⁰ Tilly, C. (2004). Terror, Terrorism, Terrorists. *Sociological Theory*, 22(1), 5–13.

⁴⁴¹ Schmid, A. (2012) Strengthening the Role of Victims and Incorporating Victims in Efforts to Counter Violent Extremism and Terrorism. *Terrorism and Counter-terrorism studies*.

⁴⁴² Leong, A. V. M. (2016). *The Disruption of International Organised Crime: An Analysis of Legal and Non-Legal Strategies*. Routledge.

justice system. Conversely, it for reasons of access and of safety, the author did not come into direct contact with witnesses or victims who collaborated with justice. Their personal experiences are therefore not included in the present analysis.

RIGHTS OF THE ACCUSED

The right to a fair trial is a cornerstone of national legal traditions and of international human rights law⁴⁴³. At the same time, situations of instability, and in particular state of emergency, raise questions over the possibility and scope of derogations to these legal safeguards. Counterterrorism measures have been associated with violations to due process both at international level, notably through the ‘listing’ activities of the UN Security Council⁴⁴⁴, and in national practice⁴⁴⁵

Due process includes, but is not limited to: presumption of innocence; procedural guarantees, including the right to be informed, to access and exercise legal defence, and avoidance of undue delays; right to legal review and to legal remedies. The primacy of these safeguards is also recognised by the Nigerien system, where they hold constitutional value⁴⁴⁶. When it comes to counterterrorism reforms, limited but significant limitations are introduced to the right to a legal defence. While in ordinary proceedings authorities are obligated to notify the accused of their right to legal counsel by the 24th hour of police custody, as failure to do so constitutes ground for annulment of the proceeding, this time limit is extended to 48 hours in terrorism-related cases⁴⁴⁷. And yet, it would not be difficult to argue that the major obstacles to the certainty of fair trial rights emerge from the practice, rather than from the law.

Of course, the arbitrariness of arrests, the instances of maltreatment and outright violence against the suspects that emerge from the conduct of the security forces are serious violations of fundamental rights, that not only question State agents’ capacities to act within the boundaries of law, but are also likely to create grievance and harbour the potential of future

⁴⁴³ Article 14, UN General Assembly (16 December 1966), *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999.

⁴⁴⁴ Wessel, R. A. (2006) The UN, the EU and Jus Cogens.” *International Organizations Law Review* 3: 1; Hudson, A. (2007) Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights. *Berkeley Journal of International Law* 25: 203.

⁴⁴⁵ Wolfendale, J. (2007) Terrorism, Security, and the Threat of Counterterrorism. *Studies in Conflict & Terrorism* 30, 1: 75–92.

⁴⁴⁶ Journal officiel de la République du Niger, (29 novembre 2010), Constitution de la VIIe République, article 20.

⁴⁴⁷ Delays in ordinary proceedings are established by Art. 71 du Code de Procédure Pénale (Loi n° 2003-26 du 13 juin 2003), République du Niger, while the delays in terrorism-related proceedings are established in Art. 605.5 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

insecurity⁴⁴⁸. Interviews with the detainee also confirm cases where the delays of police custody were exceeded.⁴⁴⁹

Furthermore, adherence to procedural safeguards appears very poorly enforced, particularly with regards to the right to information. Among the ten detainees for terrorism that were interviewed for the research, two declared never having spoken to a judge; six claimed they had only seen the judge once. The only ones who had spoken to a judge more than once were the only two who had been convicted, among the interviewees. This lack of interaction with investigators and judicial authorities is especially notable when considering that all of these individuals had already spent at least 14 months in prison at the time of the interviews: seven of them had been detained for over three years. Extremely limited communication with the accused considerably impacts their right to information. Strikingly, none of the interviewed prisoners were aware of the charges being brought against them at the time of the arrest, and until their arrival at the SCLCT.

“I have not been questioned in Diffa, nor at the SCLCT. It is only when I got in front of the judge, to confirm my detention order, that I found out I was accused of Boko Haram. I thought that because I am a foreigner, it was a question of documents’ control.”⁴⁵⁰

In addition, none of them was informed of the progress of their files, nor the status of proceedings, or the schedule of upcoming hearings in which they would be involved.

The assessment of compliance with the right to a legal defence in counterterrorism is complicated by the underlying circumstances of the administration of justice. In Niger, lawyers are only available in the capital, with maybe a couple of exceptions in big cities such as Maradi and Zinder. In this context, it is not rare to see cases being discussed and decided in the absence of legal assistance for the accused. This situation is especially concerning in criminal matters, where the alleged offenders are often in situation of indigence, unable to afford a lawyer. In this light, it is worth noting that efforts were made to extend legal aid to all individuals accused of terrorism-related offences, despite the fact that this is normally only provided for infractions of “criminal” level, and with no requirement to prove eligibility to legal aid⁴⁵¹.

⁴⁴⁸ For a discussion of the treatment of “terrorist suspects” in detention see “*Rehabilitation of ‘terrorist’ offenders*”, Chapter VI.

⁴⁴⁹ Author’s interview with “Mohamed”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018); Author’s interview with “Adamou”, detained in Kollo on the basis of terrorism charges (4 May 2018).

⁴⁵⁰ Author’s interview with “Ousmane”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018).

⁴⁵¹ Although the first trials of “lower” offences took place in the absence of any legal assistance, this changed in the course of 2017 and 2018. Currently, all terrorism hearings see the presence of lawyers.

At the same time, the actual exercise of the legal defence remains extremely limited in time and scope. None among the interviewed detainees had seen a lawyer, from the time of their arrest. The relationship between the lawyer and the accused is limited to the time of the hearing, which de facto undermines any opportunity for the preparation of a defence strategy. Additionally, it is extremely complex for lawyers to obtain access to the case files prior to the hearings.

“We, as defenders, would have wanted to assist these persons from the opening of the preliminary investigation, to arrive prepared to the judgement. Unfortunately, it is not yet possible to access the preliminary investigation files, because the investigation is opened in Diffa. (...) It is only when the hearings are programmed that the lawyers sometimes get access to the case files. At one point, there were also lawyers who were reluctant to go, because they would only obtain the documentation the day before the hearing or during the hearing. And until now it goes on like that actually.”⁴⁵²

Finally, the law in Niger provides for the right to indemnisation in case a person has been subjected to deprivation of liberty and the case is concluded by a dismissal of the proceeding by the investigative judge or by an acquittal⁴⁵³. While a large number of persons accused of terrorist offences would clearly qualify for such indemnisation, especially in light of the prolonged period they spent in pre-trial detention, it is unclear to what extent they have been informed of this available remedy. According to one of the bodies providing support to former detainees, there was no history of successful complaints so far.

“They’d have to file a demand by the Cour de Cassation, requesting an indemnisation by the State for the time spent in pre-trial detention. But even those who presented a demand have not gotten anything.”⁴⁵⁴

In conclusion, there have been attempts to ensure that fair trial guarantees apply to terrorism-related cases, including through notable efforts such as the extension of legal aid provisions beyond its ordinary limitations. Nonetheless, the effective access to due process is consistently undermined at each step of the justice process. At the same time, it is relevant to know that counterterrorism cases do not represent an exception in this sense, but are rather in line with ordinary challenges faced by justice in Niger.

SAFEGUARDS OF VICTIMS AND WITNESSES

Historically, rights of victims have not held the same status as those of the alleged perpetrators in criminal law. This can be explained by the understanding of the criminal justice process as

⁴⁵² Author’s interview with a lawyer charged with providing legal defense to individuals accused of terrorism, Niamey (30 April 2018).

⁴⁵³ Art. 143-1 du Code de Procédure Pénale (Loi n° 2003-26 du 13 juin 2003), République du Niger.

⁴⁵⁴ Author’s interview with anonymous national human rights defender, Niamey (27 January 2020).

opposing primarily the State, representing the interests of society as a whole, and the individual who is accused of a violation of the law⁴⁵⁵. In this dual relationship, the imbalance of powers between this individual and the organs of the State justifies and mandates extensive guarantees to ensure that the rights of the accused are safeguarded at all times. The position of victims is often overlooked in this paradigm.

The past decades, however, have seen a considerable resurgence of the place of the victims in the judicial process, as testified by a growing body of international standards in this area, starting with the 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*⁴⁵⁶. Taking into account risks of “secondary victimization” produced by the justice system itself⁴⁵⁷, legal safeguards concerning victims attempt to strike a balance between victims’ right to participation and their appropriate protection.

In recent years, the specificity of victims of terrorism has been increasingly debated⁴⁵⁸. The 2018 review of the *Global Counter-Terrorism Strategy* calls on States to provide appropriate support to victims of terrorism, including through access to justice, when appropriate;⁴⁵⁹ the United Nations proclaimed the 21 of August the “*International Day of Remembrance of and Tribute to the Victims of Terrorism*”⁴⁶⁰, and the Global Counterterrorism Forum issued the “*Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings*.”⁴⁶¹

It is interesting to note that in Niger’s national legal framework, the rights of victims and witnesses have seen a somewhat limited and sectoral development. In all criminal proceedings, victims have the right to bring a complaint as “*partie civile*”, which allows them, as in most

⁴⁵⁵ Bellivier, F., & Duvert, C. (2006). Regards pluridisciplinaires sur les victimes. *Archives de politique criminelle*, n° 28(1), 3–10.

⁴⁵⁶ UN General Assembly (29 November 1985) *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : resolution / adopted by the General Assembly*, A/RES/40/34.

⁴⁵⁷ Orth, U. (2002). Secondary Victimization of Crime Victims by Criminal Proceedings. *Social Justice Research*, 15(4), 313–325.

⁴⁵⁸ Letschert, R., & Ammerlaan, K. (2009). Compensation and Reparation for Victims of Terrorism. In R. Letschert, A. Pemberton, & I. Staiger (Eds.), *Assisting Victims of Terrorism* (pp. 215–266). Springer Netherlands.

⁴⁵⁹ See operative paragraphs 13 – 14 in UN General Assembly (2 July 2018) *The United Nations Global Counter-Terrorism Strategy Review : resolution / adopted by the General Assembly*, A/RES/72/284.

⁴⁶⁰ UN General Assembly (19 December 2017) *International Day of Remembrance of and Tribute to the Victims of Terrorism : resolution / adopted by the General Assembly*, A/RES/72/165.

⁴⁶¹ Global Counterterrorism Forum (2019), *Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings*, available at: https://www.thegctf.org/documents/10162/72352/13Sep19_Madrid+Memorandum.pdf

civil law systems, to take part in the proceedings.⁴⁶² Protective safeguards, are however, considerably enhanced when it comes to counterterrorism and trans-national organized crime. In short, the Nigerien laws establishes that⁴⁶³:

- special protection can be applicable to: judicial officers involved in the cases, victims and witnesses and, in certain cases, their family members;
- the SCLCT is in charge of providing such protection;
- the identity of victims and witnesses can be protected by anonymity when their testimony exposes them to risks, except in cases where knowing the person's identity would be essential to the rights of the defense;
- no conviction can be issued solely on the basis of an anonymous testimony.

These provisions have been introduced by a 2017 reform, and testify to the notable concerns for the risks that both victims and witnesses can face when collaborating with justice. An additional law, introduced in 2018, introduced the rights of victims of terrorism to compensation⁴⁶⁴. At the same time, there is a notable disparity between the rights conferred to victims in the context of counterterrorism, and those provided in the context of trafficking of human beings. Provisions concerning victims of trafficking, that entered into force years prior to the counterterrorism reforms⁴⁶⁵, are more extensive, including broader provisions on confidentiality, as well as sanctions for their violations, and right to legal counsel. This inconsistency points to one possible shortcoming connected with the specialisation of different areas of justice action: a lack of harmonisation of the norms and practices of justice overall.

Nonetheless, it is in the practice that the justice system shows notable limitations when it comes to protecting victims and witnesses who collaborate during the proceedings. The magistrates openly recognise intimidation of victims and witnesses and their fear of reprisal influence their willingness to participate in the justice process to a considerable extent.

*“Often, they have the elements, but they were afraid of denouncing and providing justice with consistent evidence because the youngsters can turn against you. We saw cases where people denounced, and then, during the night, they got killed”.*⁴⁶⁶

⁴⁶² Art. 80 du Code de Procédure Pénale (Loi n°61-33 du 14 août 1961 portant institution du Code de procédure pénale), République du Niger.

⁴⁶³ See art. 605.16 – 605.21 du Code de Procédure Pénale (Loi n° 2017-07 du 31 mars 2017), République du Niger.

⁴⁶⁴ Loi N° 2018 – 86 du 19 décembre 2018, modifiant et complétant la loi n°61-27 du 15 juillet 1961 portant institution du Code pénal.

⁴⁶⁵ Ordonnance n° 2010-86 du 16 décembre 2010, relative à la lutte contre la traite des personnes.

⁴⁶⁶ Author's interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

A number of elements play into reluctance to testify. Most importantly, it is the fact that the only available protection measure is anonymity. However, anonymity is not enough to prevent knowledge dissemination in small villages, where the mere fact of going to the police post, or even more so, travelling a few days to Niamey to testify in a hearing, will be blatantly noticeable. Distance from the hearings and financial limitations further complicate witnesses and victims' participation to the trials.

With a view to overcoming these challenges, investigators have shown flexibility and willingness to adapt to the needs of witnesses. They join the witnesses where it is more feasible for them, and take appointments in undisclosed locations⁴⁶⁷. However, these limited precautions may be sufficient for the investigative phase, but prove of more difficult applicability during trials. There have been attempts at adapting the procedures to the physical presence of victims and witnesses.

“In one of the hearings that took place here in Niamey, we tried to have some witnesses come. They are for the most part community leaders and we tried to protect them in our way, arranging it so that they were not in Court at the same time of the suspects. Since it is a public hearing, where the suspects are assisted by their lawyers, we asked the suspect to leave the court room and we would let their lawyers represent their rights.”⁴⁶⁸

Indeed, anonymity of the witnesses also opens questions of compatibility with due process guarantees. It is largely in consideration of this aspect, that the law excludes the possibility of conviction solely on the grounds of anonymous testimonies, although the extent to which this provision is fully respected could be argued⁴⁶⁹.

Overall, adequate protection of witnesses appears especially problematic. It is certainly a financial problem, reinforced by its long-term implications, as noted by bilateral partners of the Pôle and SCLCT.

“In Niger’s code, the SCLCT is responsible for the protection of witnesses, they have never, ever done anything to do that. There’s no money. There’s no money in the budget for SCLCT to protect witnesses. (...) Because the problem is not necessarily limited to the trial, it’s one week, one month, one year after, then they go back to their village and someone says “this person cooperated” and I don’t really have a good answer for what

⁴⁶⁷ Author’s interview with judge at the specialised pôle, Niamey (29 January 2020); Author’s interview with a local magistrate, Diffa (04 February 2020).

⁴⁶⁸ Author’s interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁴⁶⁹ See “*Curtailed accountability: the impact of systemic weaknesses on adjudication*”, Chapter V.

*we do out in there region of Niger to protect witnesses, villages chiefs, anyone who is accused of cooperating.*⁴⁷⁰

The insufficiency of the response in this area is further aggravated by the fact that State's counterterrorism strategies have notably invested in the collaboration of the population to denounce terrorists and bring them to justice. Communications campaigns have insisted that providing information on the identity and actions of supposed terrorists was demanded by the Quran. And this strategy proved extremely effective, with many arrests being carried out as a result of denunciations by the local population. In this sense, the consequences of the limited protection of witnesses and victims do not only undermine certainty of legal safeguards, they potentially expose those who have collaborated to retaliation by former terrorist suspects after their release. And yet, despite the seriousness of these concerns, and the partial progress made by the 2017 legislation, in practice the question of affording better protection to victims and witnesses is a question that often goes unanswered.

5. CONCLUSIONS

The State regulates the life of the polity through the law. The value of norms in affirming State authority cannot be underestimated: as they define the rules citizens should abide by, they also set the boundaries of arbitrariness for the rulers.

When it came to regulating terrorism in Niger, the legislator faced a complex task. On the one hand, it was necessary to find a balance between the international instruments related to terrorism and the obligations they entailed and the need to respond to a rapidly evolving security challenge on the ground. How to provide coherent responses in such contexts? How to set-up an institutional apparatus with the capacities and means to go after such exceptional threat in an effective way?

This study has carried out a comprehensive exploration of various counterterrorism justice reforms, as well as the provisions instated by the state of emergency. It has examined how the laws define and address terrorism through the criminalisation of specific acts, the derogations to ordinary procedures and, most notably, the specialisation of the entire criminal justice chain. Here, the findings are quite straightforward: the Nigerien legislator considered that the most effective way to empower the justice system to investigate and prosecute terrorism would be to frame the phenomenon as an exceptional form of organized crime. From a legal perspective,

⁴⁷⁰Author's interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (30 January 2020).

this approach has indeed ensured overall coherence of the different provisions and demonstrated the State's commitment to addressing the enemy through legal means.

However, the parallel analysis of the practices that have shaped the implementation of the counterterrorism laws, especially after February 2015, revealed the obstacles generated by the pervasive insecurity context and the growing role of the security forces under the state of emergency. What surfaces is a story of law violations and efforts to repair them. Whether or not these endeavours have contributed to ultimately strengthening the State as a normative actor in the process of negotiating sovereignty, they doubtlessly attest to the significance of lawfulness as a guiding principle for State officials in Niger.

GUIDED BY LEGALITY

This chapter has revealed two main challenges to a coherent and authoritative legal framework to address terrorism in Niger. The first issue concerns the formal analysis of the laws, which highlights how counterterrorism reforms are ignited primarily by issues of external, rather than domestic sovereignty. The impracticality of the transposition of the international and regional framing of terrorism at domestic level is revealed in the impossibility to make use of the provisions that are more directly borrowed by organized crime tradition, such as special investigation means introduced through the 2011 decrees. The second problem emerges in practice, with the extensive disruption caused by the application of state of emergency provisions in the aftermath of the 2015.

In both instances, what is most notable is the coherence and clarity that characterise the intervention of the legislator and of criminal justice officials. On both fronts, the reaction to the challenges is guided by the need to uphold legality. The willingness to innovate through a fully specialised criminal justice chain, the advocacy for a new reform, more responsive to the national circumstances in the wake of the escalation of terrorism, and the progressive integration of fundamental rights safeguards speak of an unrelenting aspiration to legality. The practices of progressive de-centralisation, growing dialogue and interactions with security forces and adoption of tools for improved procedures attest to the same key interest: ensuring that counterterrorism efforts strictly remain within the boundaries of legality.

This overarching commitment to the rule of law provides a meaningful contribution to State authority. Indeed, given the association between terrorism and lawless tactics, the adherence of

State officials to the principles of legality is especially significant in widening the gap between the legitimate power of the State and its enemies.

SPECIALISATION AS A DOUBLE-EDGED SWORD

Specialisation has been the defining factor in guiding reform efforts, as well as the implementation of counterterrorism laws in Niger. Its shortcomings have deeply impacted counterterrorism practices, most notably through the challenges engendered by the centralisation of the proceedings, especially extreme in the first period of the analysis.

At the same time, specialisation has proven a key factor in favouring institutional learning and in allowing for a rapidly adaptive system, able to adopt innovation at multiple levels to return to legality following the 2015 crisis. While a highly specialised team of investigators and magistrates could contribute to the authority of the State in the fight against terrorism, this will ultimately depend on its impact on the capacity of the justice chain to ensure that perpetrators are held accountable.

OVERPOWERING SECURITY INTERESTS

If the relevance of legality is reiterated throughout the analysis of counterterrorism reforms and their implementation, its sharpest limitation also emerges clearly: the pursuit of security. Ultimately, whether it provides the justification for the introduction and the perpetuation of the state of emergency or for the grave violations to the rights of the individuals arrested in relation to terrorism, the security objective appears to take prevail, at times, over legality principles. This appears especially evident in the use of mass arrest as a means for temporary incapacitation, rather than as a step in the prosecution of terrorists, on the basis of solid investigations. While this prominence can easily be explained by the perception of urgency that is connected to mounting insecurity, the accounts of the first few months after the February 2015 attacks begin to reveal the extensive impact of such extensive violence on the objectives and the functioning of the criminal justice chain.

CHAPTER V

PERFORMING SOVEREIGNTY: BRINGING “TERRORISTS” TO JUSTICE

“Now I think that even the terrorists have understood that justice does not aim to punish them, but rather to find the innocents and sentence the guilty, to distinguish these situations and to allow those who are innocents to go back to being normal citizens and be able to say: “I trust justice in my country!””⁴⁷¹

A lawyer charged with the legal defence in terrorism cases on the objectives of the judicial process.

“It is a problem that we are already facing for the people who were released by the justice system. Local populations feel that those people belong to Boko Haram. Sure, we, the institutions may not have enough information, but them, the populations, they know these people are no good. When we ask people to swear on the Quran, we had a lot of denunciations, and sometimes they were motivated by personal reasons. But now, what is this person is released and when I am the one who exposed him, how am I going to live now?”⁴⁷²

An official of the SCLCT assessing some of the issues emerging from the large numbers of releases of terrorist suspects.

⁴⁷¹ Author’s interview with a lawyer charged with providing legal defense to individuals accused of terrorism, Niamey (30 April 2018).

⁴⁷² Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

INTRODUCTION:

Following the examination of the State's capacity to produce binding norms that define terrorism and regulate public responses to it, this chapter moves on to investigate the outcomes of judicial approaches to counterterrorism. If counterterrorism is a significant arena for the negotiation of sovereignty, questioning the results of counterterrorism policies is essential to determine to what extent the State has been successful.

In other words, this chapter is asking: *Has the criminal justice system been effective in identifying and prosecuting terrorists? Has its action contributed to guaranteeing security?*

This question reveals the assumption that State's performance is meaningful for sovereignty. Now, criticism of the literature surrounding States' failure and weakness points to the fallacy of overestimating the significance of State effectiveness.⁴⁷³ However, this critique focuses mostly on two aspects. On the one hand, it highlights the inaccuracy of associating the State's incapacity to exercise effective control with the necessary demise, or "failure" of sovereignty and statehood. "Ineffective" States, it is argued, generally continue to hold their juridical attributes and persist.⁴⁷⁴ On the other hand, it invites to study sovereignty as not necessarily the attribute of the State, but as negotiated among multiple actors.⁴⁷⁵

Nonetheless, it is in such negotiation, where the State is only one of the contenders to the attributes of sovereignty, that the ability to claim effective control finds renewed meaning. And, this study argues, exercising effective control in counterterrorism includes the State's capacity to produce security by bringing terrorists to justice. And while the State is not the only actor to engage in security efforts, particularly in counterterrorism, where resources and powers are increasingly attributed to regional and international bodies, it is instead the only one able to deliver justice. This makes the performance in this area quite significant in terms of claiming sovereignty.

⁴⁷³ See for instance Hagmann, T., & Péclard, D. (2010). Negotiating Statehood: Dynamics of Power and Domination in Africa. *Development and Change*, 41(4), 539–562, p. 547; Krasner, S. D. (1999). Sovereignty. In *Sovereignty*. Princeton University Press. Risse, T. (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*. Columbia University Press.

⁴⁷⁴ Jackson, R. H., & Rosberg, C. G. (1982). Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood. *World Politics*, 35(1), 1–24.

⁴⁷⁵ Risse, T. (Ed.). (2011). *Governance Without a State?: Policies and Politics in Areas of Limited Statehood*. Columbia University Press.

This analysis begins with the discussion of which metric is suitable to evaluate the performance of the State when applying the law, and it identifies the concept of accountability. Then, the proposed examination of the justice system's performance evolves around three key elements. First, by proposing a quantifiable measure of effectiveness, through the study of attrition rates and conviction rates. Second, by interrogating the qualitative dimension of judicial outcomes: do the sentences pronounced by the antiterrorism courts reflect the essential features of accountability? And to conclude, by questioning the public perception of justice's results in counterterrorism, with a view to shed light on the aspect of State performance that is more directly linked with its legitimation.

1. MEASURING PERFORMANCE OF THE CRIMINAL JUSTICE SYSTEM THROUGH ACCOUNTABILITY

The adoption of counterterrorism policies, especially the state of emergency, led to mass arrests of terrorist suspects. But what followed these immediate results? Has the action of the justice system been effective in contributing to the objectives of counterterrorism?

In order to answer these questions, it is first necessary to clarify against what objectives the performance of the justice system can be evaluated. Accordingly, prior to diving into the analysis, this study sets out to examine the potential objectives of the criminal justice chain, aiming to select those that are: relevant to the work of justice institutions in Niger, significant in the context of counterterrorism, and meaningful to elucidate the relationship between the work of the justice system and State sovereignty.

CRIME CONTROL, PUNISHMENT, REHABILITATION: WHAT OBJECTIVE FOR THE JUSTICE SYSTEM?

As confirmed by the scarce literature production in this area,⁴⁷⁶ evaluating the performance of the criminal justice system is an extremely complex endeavour. This is partly due to the fact that the notion of "criminal justice system" comprises different actors and institutions, notably law enforcement, courts, and correctional system. And while these different elements are all essential to the criminal justice chain, they are not completely interdependent, nor do they necessarily recognise a unitary objective. On the contrary, the criminal justice system is, by

⁴⁷⁶ Maguire, E. R., Howard, G. J., & Newman, G. (1998). Measuring the performance of national criminal justice systems. *International Journal of Comparative and Applied Criminal Justice*, 22(1), 31–59.

nature, called to fulfil diverse and potentially conflicting interests.⁴⁷⁷ Accordingly, adopting a systemic approach to evaluating the effectiveness of justice institutions can easily become controversial. For instance, the present study has already revealed how, in practice, magistrates' respect for procedural rules and legal safeguards of alleged terrorists, in the interest of a fair rendition of justice, can clash with law enforcement's action aiming to "secure" a region affected by terrorism through massive arrests. What objective is to be considered as prevalent in this case?

It is also worth noting that the inherent struggle among competing objectives within the justice chain has also been linked with traditionally lower public confidence rates when compared with other institutions.⁴⁷⁸ Therefore, the balancing between these multiple interests can have a direct impact on popular perception and legitimation of justice's work and, in turn, on the attribution of sovereign qualities to the State.

One possible solution to the dilemma is to adopt a very broad understanding of the ultimate objective of justice, and identify it with crime control⁴⁷⁹. Indeed, the notion that the final purpose of the criminal justice chain is producing more security would also be in line with the underlying principles of counterterrorism. If this view were to be adopted, then the performance of the overall system could be evaluated by assessing changes in crime rates.

However, this research considers that crime rates or, more specifically, statistics concerning terrorism-related offences, would not capture the performance of the justice chain appropriately in this context. This is partially related to concerns over the accessibility of such data: it would be extremely difficult, if not outright impossible, to acquire comprehensive statistics over the commission (and report to military and law enforcement) of such crimes. Yet, even if the data were available, such analysis could be misleading. The activities of the specialised justice institutions dealing with terrorism in Niger began at the same time as the exponential progression of terrorism-related activities in the country. Given the nature of the phenomenon

⁴⁷⁷ Indermaur, D., & Roberts, L. (2009). Confidence in the criminal justice system. *Trends & Issues in Crime and Criminal Justice*, N°387, 6.

⁴⁷⁸ Indermaur, D., & Roberts, L. (2009). Confidence in the criminal justice system. *Trends & Issues in Crime and Criminal Justice*, N°387, 6.

⁴⁷⁹ According to Maguire, Howard and Newman: "Criminal justice systems were created and are maintained for the sole purpose of controlling crime. Although many scholars express doubt about the effect of criminal justice on crime, it is not unreasonable to hold criminal justice systems accountable for their effectiveness in achieving their prime mandate", see Maguire, E. R., Howard, G. J., & Newman, G. (1998). Measuring the performance of national criminal justice systems. *International Journal of Comparative and Applied Criminal Justice*, 22(1), 31–59. For the distinction between the Crime Control Model and the Due Process Model of Criminal Justice, see Packer, H. (1968). *The Limits of the Criminal Sanction*. Stanford University Press.

and its progression, particularly in view of the escalation in gravity starting in 2015 in Diffa and continuing later in the North Tillabery region, evaluating the effectiveness of the criminal justice in counterterrorism through variations in crime rates would be a disproportionate approach to the effectiveness of the justice system. First, because while criminal justice approaches contribute to counterterrorism, ultimately they cannot be solely responsible for the results in terms of public safety, as military intervention remains the prevalent response, especially in the Sahel. Second, because of the regional dimension of the terrorism, which excludes that Niger could reach control over terrorism exclusively through national intervention. Third, the essentially reactive nature of the judicial process entails a necessary delay between the emergence of a criminal phenomenon, and the controlling effect that criminal justice initiatives could exercise on it.

In addition, and maybe more importantly, crime rates do not provide any relevant information on *how* the criminal justice system aims to contribute to controlling terrorism. In fact, the approach chosen to pursue public safety can be even more significant than the objective in itself to determine the relationship between justice and sovereignty. Then, a different option to assess performance of the justice chain would be focusing on its specific approach to the goal of controlling crime (here terrorism). In this regard, two prominent views are often proposed to describe the criminal justice system's as pursuing either "punishment" or "rehabilitation/reintegration". These two options reveal different attitudes towards the role of justice system in handling crime, and in its relation to the State.

According to Hart, the notion of criminal punishment entails a number of key elements, notably: that it involves pain or unpleasant consequences, that it is a response to a criminal infraction, that it is intentionally administered to an offender by an authority established by the legal system (and not self-inflicted).⁴⁸⁰ Defining rehabilitation and reintegration proves a more complex endeavour, as it is generally referred to as a composite concept.⁴⁸¹ For the purpose of this study, it is worth highlighting that rehabilitation generally involves two parallel objectives. Simply put, rehabilitation aims to provoke a change in the offender, making him/her more prone to abide by law, and to modify his or her relationship to the surrounding community.⁴⁸²

⁴⁸⁰ Hart, H. L. A. (1968). *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford University Press.

⁴⁸¹ Raynor, P., & Robinson, G. (2005). *Rehabilitation, Crime and Justice*. Palgrave Macmillan UK.

⁴⁸² For a description of two competing models of rehabilitation, the risk-needs-responsivity (RNR) model and the good lives model (GLM), and how they address the individual and social components of rehabilitation see Ward, T., & Maruna, S. (2007). *Rehabilitation*. Routledge, p. 20 – 25. For a perspective focusing on the social

Legal theory has traditionally opposed these two approaches for numerous reasons. Hart emphasizes, for instance, how the goal of rehabilitation practically denies the applicability of two basic principles of “just” punishment, namely that similar crimes should receive similar sentences, and that punishment should be determined in a way that is proportional to the severity of the offense. Accordingly, he adds, the two approaches propose very different routes to crime reduction. Punishment aims to deterrence by proposing suffering of the offender. In doing so, it mainly aims to reduce the incentives of the overall population to offend, and thus reduces crime rates through an essentially preventive perspective. Rehabilitation’s influence on crime rates is, instead, necessarily more restricted, as its goal is more focused on the single offender than on society as a whole. Rehabilitation’s only impact on security is through the prevention of recidivism⁴⁸³. Therefore, reintegration is either conceived as following punishment, thus as secondary to it, or presumes an inherently alternative conception of justice system.

In the context of terrorism, international law has recognised both approaches as significant. Traditionally, it has stressed the role of “serious sentences”⁴⁸⁴ to reflect “seriousness of the offence” and in light of their assumed deterrent quality. Accordingly, the criminal justice approach to terrorism has generally been anchored in repressive action. In recent times, however, and with the increased attention to terrorism settings that increasingly resemble conflict theatres, rehabilitation is frequently cited as necessary objective of governmental action. In particular, in 2017 Security Council Resolution 2349 “*Encourages Governments in the region (...) to develop and implement a regional and coordinated strategy that encompasses transparent, inclusive, human rights-compliant disarmament, demobilisation, de-radicalisation, rehabilitation and reintegration initiatives, in line with strategies for prosecution, where appropriate, for persons associated with Boko Haram and ISIL, drawing upon regional and international best practice and lessons learned*”.⁴⁸⁵

environment’s impact on reintegration processes, see: Wright, K. A., & Cesar, G. T. (2013). Toward a More Complete Model of Offender Reintegration: Linking the Individual-, Community-, and System-Level Components of Recidivism. *Victims & Offenders*, 8(4), 373–398.

⁴⁸³ Hart, H. L. A. (1968). *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford University Press.

⁴⁸⁴ See for instance United Nations Security Council Resolution 1373 (2001): “*ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.*”

⁴⁸⁵ UN Security Council (31 March 2017), *Security Council resolution 2349 (2017) [on the situation in the Lake Chad Basin region]*, S/RES/2349 available at: <https://www.refworld.org/docid/592ef6944.html>

Far from considering that punishment and rehabilitation are mutually exclusive, the present study analyses both dimensions as necessary to fully appreciate the effectiveness of criminal justice approaches to counterterrorism in Niger. At the same time, this research bears in mind that they diverge in significant ways, and thus their application as coherent and equal goals could meet notable obstacles, and one or the other may prevail in practice.

“ACCOUNTABILITY” AS FAIRNESS: THE NIGERIEN APPROACH

In light of this ambivalence, this study considers that the most appropriate criterion to identify the ultimate objective of the criminal justice system in countering terrorism is the opinion of the Nigerien agents of justice themselves. Assessing their personal views of the matter is essential, first of all, to prevent ethnocentric analysis. Critical criminology has investigated how socio-economic, political and cultural factors bear heavily upon issues related to justice, starting by the definition and understanding of “crime”⁴⁸⁶ and, it can be easily argued, terrorism. With this in mind, relying on the actors’ own understanding of their professional role was deemed appropriate to prevent a biased assessment of their performance.

For some respondents, the role of justice institutions in the context of counterterrorism is directly connected with the State and its sovereignty.

*“I think that the role of justice is that of a custodian. It is necessary for us to be able to address terrorism at the judicial level. Because we should not forget that these people aim to create an Islamic State, which is opposed to the modern State, to the Republican State that we are. Our State founded on clearly established rules. The Republican State wanted such rules, that account for a modern society. Now those who are facing us are against such modern society. (...) And we have to avoid going in the same direction as them. Because when they find someone who has cooperated with the militaries, they will cut his throat. But we cannot head in the same direction.”*⁴⁸⁷

Here, the judicial treatment of terrorism appears to be implicitly opposed to extra-judicial executions or alternative forms of illegal and violent treatment of *terrorists*. The rules established by law, and the action of the justice system in both defending them and applying them, provide justification to the power of the State as legitimate, and necessarily oppose it to other forms of illegitimate violence. In anchoring sovereignty directly into the rule of law, this approach is reminiscent of the analysis carried out in chapter IV: acting within the boundaries

⁴⁸⁶ Farmer, L. (1996). The Obsession With Definition: The Nature of Crime and Critical Legal Theory. *Social & Legal Studies*, 5(1), 57–73. Hulsman, L. H. C. (1986). Critical criminology and the concept of crime. *Contemporary Crises*, 10(1), 63–80.

⁴⁸⁷ Author’s interview with general prosecutor Chaibou Samna, Niamey (6 February 2020).

of the law is, by itself, objective and measure of the justice system's service to the sovereign State.

The most recurrent view expressed by the Nigerien justice actors, however, is one that relates the role of the justice system to both its results and to the application of underlying principles of fairness.

*“The fundamental role of justice is to restore an equilibrium. Justice must be found in between. No impunity for those against whom we have critical elements. But also, no excessive severity, severity which is not necessary for those who entered Boko Haram just to have fun. Because someone who did not commit any extraordinary criminal act, who got there just because of adventure or maybe for the love of someone, we need to make the due distinctions and to introduce a final objective of reintegration to make sure they become useful to society.”*⁴⁸⁸

*“Justice plays an important role in the fight against terrorism, as she allows to filter, according to the evidence, who is a terrorist and who is not. (...) Justice in Niger has worked considerably in the area of counterterrorism, and I will add that she does so with discernment, and that is why, when I was at the Pôle, I had the feeling that even those who were alleged Boko Haram, they became confident in justice. Because amongst them there were some who may have thought that it would automatically be a guilty verdict, and we surprised them with some releases. Because people originally thought that because it was Boko Haram, we would systematically condemn, but as I said there can be false accusations, and justice allows to filter all of this”.*⁴⁸⁹

Such opinions consider the objective of the justice process to be in operating the distinction between the innocents and the guilty, achieved through a fair process and on the basis of the evidence. A number of elements emerge as significant to determine exactly what objective is being pursued by these professionals. First, while these views still originate from a retributive perspective, they decidedly reject the focus on punishment as an objective per se, but rather emphasize the significance of the distribution, and the proportionality of sentencing. In other words, it is not important that terrorists should suffer for their action, but rather that sanction is assigned to the guilty only, in proportion to their offence. For this reason, a more appropriate definition of the goal that is pursued would be found in the notion of “*accountability*”. This term introduces a clear connection between responsibility and sanction, thus shifting the focus from the suffering of the guilty, to the proven distinction between guilty and innocents, which is anchored in the notion of fairness. This way, *accountability* has dual significance in the negotiation of sovereignty: on the one hand, it proves the State's capacity to defend and apply

⁴⁸⁸ Author's interview with judge at the specialised pôle, Niamey (29 January 2020).

⁴⁸⁹ Author's interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

its own laws, on the other hand, by freeing the innocents and sentencing the guilty, it contributes to producing stabilisation and security.

At the same time, while not cited as the dominant objective, rehabilitation appears to be an inherent by-product of accountability. By recognising and releasing the innocents, their process of reintegration is not delayed and thus, favoured. There is also value, however, in reintegration of less serious offenders, a view that stresses the significance of proportionality in punishment.

Finally, a new connection to the legitimation of the State is provided. As long as the justice system is effective in pursuing accountability and distinguish innocents and guilty, trust in State institutions will rise. According to this analysis, the notion of accountability appears appropriate to express the objective that is perceived as primary by the agents of Nigerien justice, and one that is broadly shared among them.

That is not to say that the notion of reintegration is dismissed. However, it appears more controversial at times whether it is to be attributed to the justice system itself. In other circumstances, a clear hierarchy is introduced between the two, when not in importance, at least in time.

“Justice should be at the beginning and at the end. Is there is reason to repress, repress. But where repression is not deserved, then we should know what to do. There needs to be rehabilitation and deradicalisation, so a post-judicial follow-up. Because one who is sentenced to five years, it goes by fast. And afterwards, what will he do? This is a huge issue. He gets out, and he has no perspectives? And in the meantime, he has grown, matured, and was in contact with other detainees. This is really a crucial issue.” ⁴⁹⁰

“Justice can only judge, and you can only judge on the basis of the available evidence. (...) Sure, justice includes a bit of a pedagogical element, but when you are in front of the court, it is to be punished if necessary. This is the role of justice at first. No other interpretations can be offered.” ⁴⁹¹

According to the results of this preliminary analysis, the present study has selected to address accountability first, as the dominant objective of criminal justice’s activities in counterterrorism in Niger, and its main contribution to the goal of public safety. Later on, in the following and final chapter, the research will address instead the contribution of the justice system to the

⁴⁹⁰ Author’s interview with a judge of the specialised pôle, Niamey (27 January 2020).

⁴⁹¹ Author’s interview with a lawyer charged of terrorism-related defenses, Niamey (24 January 2020).

pursuit of reintegration, including its impact on reintegration initiatives that take place outside of the system itself.

THREE DIMENSIONS OF ACCOUNTABILITY: A FRAMEWORK FOR ANALYSIS

In order to test the justice system's effectiveness in pursuing and achieving accountability, it is considered here that multiple dimensions should be analysed to provide a meaningful account of this essential concept.

First, attrition rates and conviction rates will be used to carry out a "quantifiable" analysis of outcomes of the justice proceedings. Here the guiding question is: how many individuals guilty of terrorism was Nigerien justice able to identify and to sentence, among the suspects? This research considers the analysis of attrition rates will be significant to a preliminary evaluation of performance.

However, information focused on quantitative outcomes of judicial process does not clarify whether, in rendering those judgements, justice was served according to the principles of fairness, impartiality, universality and distribution that national actors have identified as crucial. Thus, a "qualitative" dimension of terrorism-related proceedings will be conducted. This section of the analysis aims to assess on the basis of what criteria guilt and innocence were demonstrated in the Nigerien antiterrorism courts. In addition, it asks whether justice action was universally guided by the pursuit of accountability, including when the perpetrators were the security forces.

Finally, for the results of justice to impact the credibility of the State as a sovereign agent, they also need to be appreciated and legitimised through the eyes of the audience. Then, for the connection between justice's effectiveness and sovereignty to be actualized, it will also be necessary for the population to hold a positive opinion of the trials. This third dimension of analysis investigates whether the justice system was perceived as being able to hold terrorists accountable by the population.

2. HOW MANY WERE BROUGHT TO JUSTICE?

It is useful to begin by contextualising the justice system's performance on counterterrorism in Niger. The implementation of counterterrorism legislation began in 2011, with the adoption of the first reform. However, it is only following the 2015 Boko Haram attacks in the Diffa region that mass arrests were carried out, and thousands of individuals have been questioned for

terrorism-related offences since. After two years of relative judicial paralysis, the first trials of alleged terrorists took place in July 2017. From that moment on, regular hearings have been conducted in Niger, including through the mechanism of the “special anti-terrorism hearings”, which see the Pôle hearing and adjudicating cases over a continued period that generally extends between one and two weeks.

Through the five years of intensive activity that extend from February 2015 to the end of 2019, the SCLCT, the Pôle and the Specialised Chambers of the Appellate Court processed a considerable number of cases, addressing the backlog caused by the initial arrests, partially reducing the pressure on the prisons that hold terrorist suspects, and managing to keep up with the continuous influx of new arrests. After eight year of activity, five of which especially intensive, and two years and half of trials, it is legitimate to ask: *how many terrorists has the system been able to identify and convict?*

In order to examine the performance of the justice system through a quantifiable measure, the notion of “*attrition*” becomes especially relevant. Attrition can be defined as “the ‘loss’ of cases, or, more technically, the filtering out of cases during the criminal justice process.”⁴⁹² The analysis of attrition rates has been especially relevant in the context of sexual offences, including rape, to assess whether the justice system has been effective in responding to these specific types of crime.⁴⁹³ The emphasis on attrition for these types of offences derives from the assumption that attitudes across the criminal justice chain can contribute to undermining the effectiveness of proceedings. In other words, they are triggered by a concern that sexual offences are not “taken seriously”. However, given the prevailing understanding of terrorism as an especially serious crime and a potential threat to the State, the same explanations would not apply in the present context, and reasons for ineffectiveness would have to be found elsewhere.

OVERVIEW OF ATTRITION RATES

Attrition can take place at different stages of the justice process, during contact with the police, the prosecution, or during adjudication. For a comprehensive analysis of the attrition process

⁴⁹² Aebi, M. et al. (2014). *European Sourcebook of Crime and Criminal Justice Statistics—2014*, p.154

⁴⁹³ See for instance Jehle, J.-M. (2012). Attrition and Conviction Rates of Sexual Offences in Europe: Definitions and Criminal Justice Responses. *European Journal on Criminal Policy and Research*, 18(1), 145–161; Gregory, J., & Lees, S. (1996). Attrition in Rape and Sexual Assault Cases. *The British Journal of Criminology*, 36(1), 1–17.

in the context of counterterrorism in Niger, it is worth noting that terrorism cases can exit the criminal justice process at three different stages.

- First, during the police-led phase of investigation (*enquête*). At this point of the proceedings, terrorism suspects can be placed in police custody for a 15-day period, once renewable.⁴⁹⁴ At the end of this period, the general prosecutor can either refer the case, or dismiss the case (*classement sans suite*), when it is considered that the infraction did not take place or that there is not enough evidence linking the suspect to the offence. When the case is dismissed, it has effectively left the justice process.
- Second, during the judicially-led phase of investigation (*instruction*). In most terrorism-related cases, the suspect will be placed in pre-trial detention, whose limit is fixed at 2 years for lower-level offences (*délits*), and 4 years for higher-level offences (*crimes*).⁴⁹⁵ The case has to be concluded prior to the expiry of this legal delay. That can happen in cases where the investigative judge decrees the closure of the proceeding (*ordonnance de non-lieu*).
- Third, during the adjudication. Adjudication of terrorism cases in Niger can take place either in the specialised Pôle for the lower-level offences, or in the specialised chambers, for the higher-level offences, and it is considered that cases leave the system when the judges rule to acquit the accused (*relaxe* or *acquiescement*), as opposed to when they pronounce a conviction.

The analysis of the attrition process in terrorism-related cases in Niger was made possible by the precious cooperation of multiple specialised terrorism judges and the Chief Prosecutor of the Specialised Pôle, Chaibou Samna. The data represented in the below graphs (see Figures 6 and 7) refer to the period between 2011, the time when the SCLCT and the Specialised Pôle became functional, and end of 2019.

⁴⁹⁴ Art. 605.5 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

⁴⁹⁵ Art. 605.8 (nouveau), du Code de Procédure Pénale (Loi n° 2016-21 du 16 juin 2016), République du Niger.

FIGURE 6: ATTRITION PROCESS IN TERRORISM-RELATED PROCEEDINGS

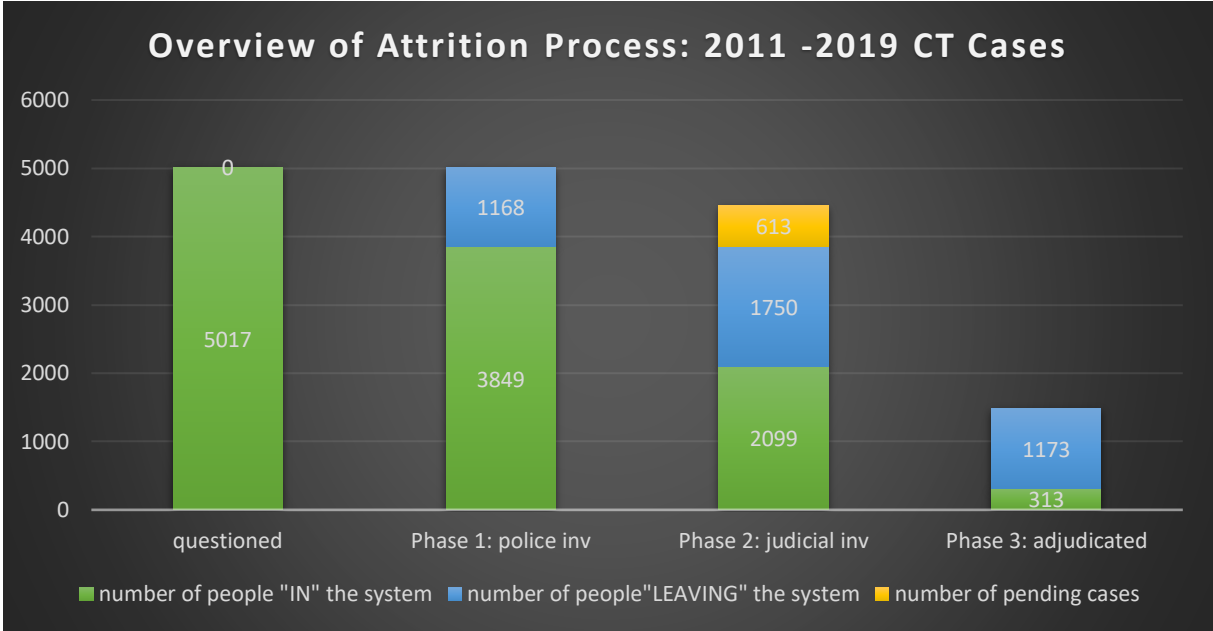
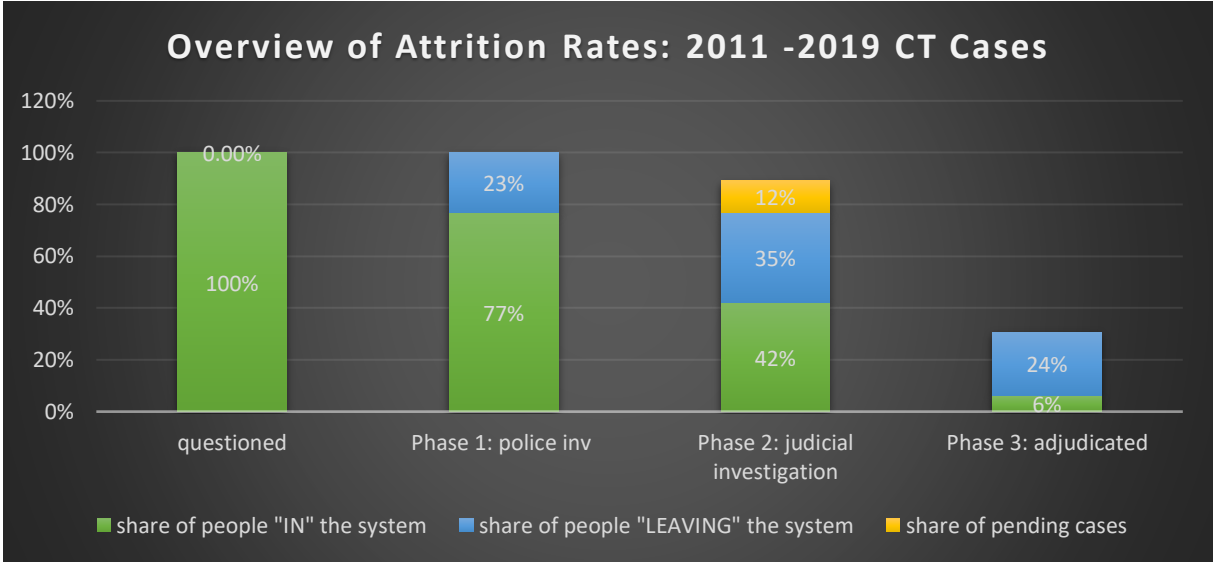


FIGURE 7: ATTRITION RATES IN TERRORISM-RELATED PROCEEDINGS



The attrition process “in the form of an offence-related loss of cases, can only be observed by comparing the quantities of offences/respective offenders on police level with

convictions/respective convicted persons on court level”.⁴⁹⁶ Accordingly, **Figure 6** is helpful to illustrate how this process has manifested through the different stages of the criminal justice chain for terrorism cases in Niger. **Figure 7** allows an appreciation of what that means in terms of the overall attrition rate. When compounding the loss of cases at each stage, the total attrition rate amounts to 82%, and is likely to grow further depending on the outcome of the 613 cases that were pending judicial treatment at the time (representing the 12% of the total). At the time of the data collection, only 6% of terrorism cases had resulted in conviction.

Before looking into how the loss of cases has taken place through the different stages of the process, it is necessary to provide some context to the data that is presented here and its limitations. First, these numbers correspond to the total of cases that have been processed by the SCLCT and Pôle in the course of eight-years. However, since the data was not classified by year, it is not possible to infer information about how attrition has evolved during this period of time. The lack of precision over the specific time at which the cases have been processed is the main shortcoming concerning this data, and entails numerous limitations to the conclusions that can be drawn from their analysis. Nonetheless, taking into consideration the issues related to data collection in this context, the data presented here remains quite comprehensive.

Numerous interviews highlighted that the lack of comprehensive and detailed statistics is a pervasive problem, and that obtaining a comprehensive overview of the treatment of terrorism cases had not yet been possible.⁴⁹⁷ While this is not the most pressing issue facing judicial counterterrorism approaches, it is undoubtedly symptomatic of a system that has been overwhelmed and where transparency remains complicated. This also emerges when comparing the availability of data related to terrorism, with that related to “ordinary” criminal justice. General information concerning criminal justice cases heard in the different regional jurisdictions of Niger is regularly published in the Niger Statistical Yearbook, but terrorism-related cases are systematically excluded from such reports.⁴⁹⁸ Nonetheless, the collection and

⁴⁹⁶ Jehle, J.-M. (2012). Attrition and Conviction Rates of Sexual Offences in Europe: Definitions and Criminal Justice Responses. *European Journal on Criminal Policy and Research*, 18(1), 145–161, p.147.

⁴⁹⁷ Author’s interview with anonymous United Nations official in Niger, Niamey (23 November 2017); Author’s interview with a lawyer charged with providing legal defense to individuals accused of terrorism, Niamey (30 April 2018); Author’s interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (30 January 2020); Author’s interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (6 February 2020).

⁴⁹⁸ See for instance: République du Niger (2016) *Annuaire Statistique 2011-2015*, Institut National de la Statistique; République du Niger (2019) *Annuaire Statistique 2013-2017*, Institut National de la Statistique

analysis of data has been a priority for the office of the prosecutor, and has led to some important advances over the years.⁴⁹⁹

Second, it should be noted that these numbers reflect the total of cases referred to the SCLCT and Specialised Pôle. In line with the jurisdiction of these bodies, this is not limited to terrorism-related cases, but also includes transnational cases of human trafficking. Nonetheless, complementary data to that presented here shows that trafficking cases represent an almost negligible minority with respect to terrorism cases addressed by the Pôle.⁵⁰⁰

Despite these gaps, these numbers allow to clarify how terrorism files have moved through the criminal justice chain in the past years. It appears that, since 2011 and over the following eight years, 5017 individuals have been questioned by the military and the judicial police in relation to terrorism cases. As for the period between 2011 and 2014, only a handful of cases were referred to the SCLCT and the Pôle⁵⁰¹, it can be concluded that most of these individuals were in contact with the justice chain following the 2015 attacks, the declaration of the state of emergency, and the extensive powers granted to the military to proceed to arrests.

Of these 5017 people, 3849, corresponding to the 76,72% of the total, were deferred to the investigative judge, remaining within the criminal justice chain through the preliminary investigation conducted by the police. Instead, 1868 individuals were released while in custody at the SCLCT, meaning following their initial transfer to Niamey. Accordingly, the attrition rate during this first phase is of 23,28%. It should be noted that cases exiting the system at this early stage would be motivated by the impossibility to link the suspect with the offence that has been committed, meaning that the initial investigation did not uncover sufficient evidence. As discussed in chapter IV, the State reacted to the 2015 with state of emergency provisions that led to large-scale arrests, often lacking satisfactory basis in material evidence.⁵⁰² Then, one could expect that the largest “loss of cases” would be identifiable during this phase, which is not in line with the data included in the above graphs.

The interviews of criminal justice practitioners provide additional elements to characterise the loss of cases during preliminary investigations, by identifying two conflicting trends. On the

⁴⁹⁹ Author’s interview with Chaibou Samna, chief prosecutor of the specialised pôle, Niamey (6 February 2020).

⁵⁰⁰ In 2019, for instance, of 674 individuals investigated by the Specialised Pôle, only 6 were allegedly involved in trafficking cases (see Figure 5 below).

⁵⁰¹ According to complementary data provided by the Office of the Prosecutor associated with the Specialised Pôle to the author, only 55 people were accused of terrorism-related offences between 2011 and the end of 2013.

⁵⁰² See “*Clash of Procedures and Context*”, in Chapter IV.

one hand, they indicate that the intervention of specialised investigators of the SCLCT contributed to early releases, as they had to correct the mistakes made during the large sweep operations carried out by the military.

“We had to save numerous situations. I’m going to give you one example. The army saw about a hundred women and children leaving the city of Diffa. There are no men in the group. So they thought: these must be the families of the terrorists, this is why they have no men with them. We had to explain to them that it was the time of year when the peppers are harvested in that region, and it is generally the women who harvest. When they have small kids, they are not going to leave them at home, and they’ll take them. That explains why there was no men in this group.”⁵⁰³

Situations like these clarify how there were considerable numbers of individuals freed as soon as the specialised anti-terrorism bodies gained control over the investigations. During the first years, when the SCLCT had no branch in the region, this would only happen after the transfer of the suspects to the capital. At the same time, however, the interviewees also attest to a preference for keeping the suspects within the justice system, including without sufficient evidence.

“We (the judges) called their attention on the need to improve the preliminary investigations. And they (the officials of the SCLCT) argued that in the beginning it was not the SCLCT who carried out the investigations. And it was very difficult for them to take a decision to release the person, when generally it is the army who brought them in. So, to avoid creating tensions between the sectors, they decided to move people forward in the justice process like that. But since the establishment of their branch, they gained more involvement during arrests (...) And that is how things could get better.”⁵⁰⁴

Therefore, the lack of material evidence did not automatically result in cases exiting the criminal justice chain. Instead, due to the circumstances of the military-led arrests, lack of evidence was not necessarily attributed to lack of involvement of the accused, but rather to a faulty or non-existent investigation. In times of enhanced insecurity, uncertainty over individual suspects’ involvement justified the continuation of the case, preventing higher rates of attrition during the first phase.

The following phase is the judicial investigation, handled in partnership by the investigative judges and the prosecutors. It should be noted that this is normally the lengthiest step, as it can extend to two or four years depending on the nature of the offence. By its conclusion, 2099 terrorist suspects were still “within” the system, 1750 suspects have been cleared as their cases have been closed, and 613 people were still being processed at the time of data collection.

⁵⁰³ Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

⁵⁰⁴ Author’s interview with an investigative judge of the specialised pôle, Niamey (24 November 2017).

Attrition rate in this second phase corresponds to 35% of the total, or 45% of cases that continued after the preliminary investigation. Overall, the highest loss of cases, in absolute terms, appears to take place during judicial investigation.

This can be partially explained by the fact that arrests carried out at the peak of the Boko Haram crisis in Niger (roughly with the two years following February 2015) were processed with notable delays. As the preliminary investigations, led by the military, had been extremely inconclusive, actual search and collection of evidence only took place at the later stage of judicial investigation. However, this started only in January 2017, when the Pôle began to organise missions to Diffa, and thus the involvement of the investigative judges became effective and they gathered the first significant evidence.⁵⁰⁵ Notably, as more evidence finally enters the proceedings, loss of cases increases considerably.

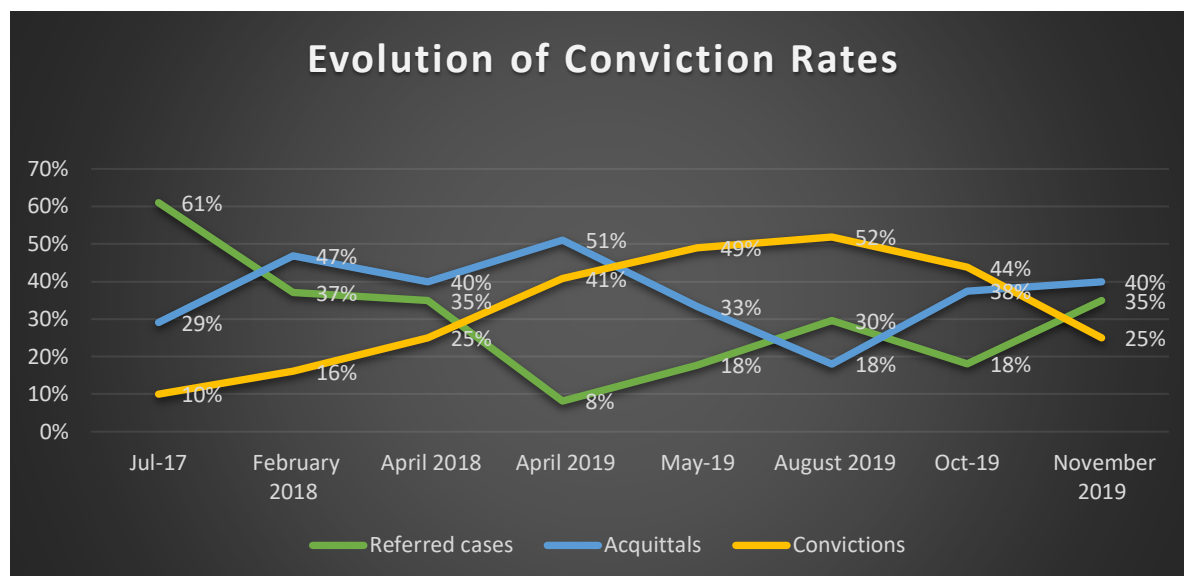
Finally, the last section of the data concerns the adjudication phase, showing that the criminal justice chain in Niger was able to convict only 313 cases over the 5017 individuals who initially entered the process, corresponding to a mere 6% of the total. As mentioned above, this number speaks for itself, pointing to a gap in the system's ability to hold perpetrators of terrorism accountable. Nonetheless, it fails to provide any indication over a crucial element that, according to justice actors in Niger, deeply influenced the "quantitative" effectiveness of terrorism-related proceedings: the progress in the investigations and related changes in attrition rate over time.

EVOLUTION OF CONVICTION RATES

Figure 8 below is instrumental to analysing how attrition changes over time during court proceedings.

⁵⁰⁵ Author's interview with an investigative judge of the specialised pôle, Niamey (24 November 2017).

FIGURE 8: CONVICTION RATES OF COUNTERTERRORISM TRIALS 2017 – 2019



The data presented in *Figure 8* reflects solely the phase of adjudication, and more specifically it concerns only the special hearing sessions dedicated to terrorism. Indeed, while the hearings of low-level terrorist offences normally take place during regular sessions of the Specialised Pôle, held on Thursdays, a number of specialised sessions have been organized since the trials began in 2017. During these special hearings, terrorism cases are tried for one or two consecutive weeks, allowing to accelerate the resolution of judicial backlog. Accordingly, these numbers offer no information on whether time has affected attrition rates during the investigative stages of the justice process, nor is it a complete overview of all adjudications.

Furthermore, while one can assume that individuals who are arrested first will also appear first at trial, that is not always necessarily the case. Indeed, the data collected by the candidate shows cases who entered the justice process in 2015 and that were still to be adjudicated in 2019, when some cases of 2018 had already been tried.⁵⁰⁶ Accordingly, the lack of direct correlation between the time of arrest and the time of adjudication should be considered, especially if the objective is analysing the impact of improved investigations over the outcomes of the adjudication phase.

⁵⁰⁶ Data shared by the office of the prosecutor associated with the Specialised Pôle with the author showed that by November 2019, the cases of 179 individuals arrested in 2019 were still pending.

These inherent limitations prevent the present data from indicating very clear trends. However, a notable evolution in conviction rates, while not persistent, emerges. In the two years period when terrorism-related trials took place, convictions have gone from 10% or 16% to 49% or 52% of total people adjudicated during the session. The numbers, alone, cannot provide any insight on the reasons for this change. For instance, the rising conviction rates could be motivated by a change in the judges' attitudes, such as more punitive approaches following recrudescence of terrorism, or could be a result of political pressure to increase perceived effectiveness of terrorism trials. Instead, there is broad consensus among the interviewees that what changed was the availability of more evidence for the judges to rely on⁵⁰⁷.

“More and more, the office of the prosecutor is putting emphasis on the “judicialisation” of intelligence. Because often proceedings now begin with intelligence information. And there are elements of the evidence that it can be really difficult to admit in trials unless they are made available to the criminal justice chain. And this aspect is now being improved.”⁵⁰⁸

“We analysed the statistics and initially we barely had 10% of convictions. But then the rates have improved, we managed to reach even 52%. Because with the army, the investigators, the judges and the prosecutor, all together we had numerous meetings to increase dialogue. In order to understand what was not working, and this is what allowed us to evolve. Because the military understood that when you arrest people, you cannot simply collect all the phones and put them in the same bag. That when you question people, you also have to conduct searches in their homes, and when you find evidence, such as motorbike and phones, those cannot be burned. They used to do this because they did not know the procedures. So we explained how things should get done. And this improved the proceedings.”⁵⁰⁹

“The conviction rate was about 35% which is worryingly low, from the middle of 2018, and instead by the end of 2019 it looked to be up to closer to 50%, about half the time. Which is still low, but better. And I think the main reason for that very low percentage is that the “dossiers” consisted of two pieces of paper and nothing else. Because there was no early involvement with prosecutors and SCLCT in the first 30 days, because there was nothing done at a preliminary stage in terms of interviewing family members, interviewing witnesses that might have been there. Now it looks like it has gotten better. And the judges confirm that it has gotten better. People who have been arrested in 2017 were tried in 2019, and looking at the cases filed by then, they showed improvement.”⁵¹⁰

⁵⁰⁷ Also confirmed by: Author's interview with a local magistrate, Diffa (04 February 2020); Author's interview with a judge formerly with the specialised pôle, Niamey (27 January 2020). Author's interview with a judge of the specialised trial chamber, Niamey (22 November 2017) as reported under “Clash of Procedures”, in Chapter IV.

⁵⁰⁸ Author's interview with an investigative judge of the specialised pôle, Niamey (24 November 2017).

⁵⁰⁹ Author's interview with anonymous prosecutor of the specialised pôle, Niamey (6 February 2020).

⁵¹⁰ Author's interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (30 January 2020).

The interviews are relevant to provide clarity on two aspects. First, as mentioned, they attribute the rise in conviction rates to improved procedures, particularly during the initial phases of investigations. Second, they show how this process developed overtime, as the justice chain started addressing the first identified challenges already by 2017 and then noticing some results by the trials of 2019.

Accordingly, the analysis of loss of cases at the different stages of the justice process, and in more detail during the phase of adjudication, allows to draw some preliminary conclusions on the system's performance in terms of accountability. On the one hand, the exploration of attrition rates together with the actors of the specialised antiterrorism chain confirms that they view the capacity of proceedings to reach a positive conclusion as an essential component of justice being served. When too many cases exit the justice process due to insufficient grounds, this is perceived and framed as a gap in effectiveness, and an obstacle to the proper administration of justice. At the same time, the strategies that have been employed to address the gaps also corroborate the actors' views of their role as not focusing on punishment, but on distributive and proportionate sentencing. Instead of adopting more strict interpretations of the laws to increase the number of convictions, the system focused on addressing procedural gaps, aiming to redress justice's effectiveness by strengthening the compliance with the rule of law.

While these results confirm the finding of the previous chapter in terms of the adaptability of the system and its pursuit of legality above all, when looking merely at the numbers, the outcomes of criminal justice approaches to counterterrorism appear unsatisfactory, with a system able to identify only 6% of guilty individuals among the thousands questioned and arrested over the past years. This is highly problematic in two obvious ways. First, among the 82% of cases that have been progressively "lost" through the justice chain, it is hard to quantify how many individuals were in fact responsible of terrorist offences and yet walked free. In this case, the system's shortcoming could have a direct impact in further insecurity in the long-term.

In parallel, however, it is difficult to gauge how many of the thousands of individuals questioned, arrested and detained for terrorism were in fact innocent. Their treatment is further aggravated by the fact that the majority of cases carried on during the judicial investigation and adjudication, despite being based in insufficient evidence, as substantiated by the distribution of attrition rates through the process. In reality this means years spent in detention for the majority of these people and opens the question on the impact of this experience on their future

attitudes towards the State and justice. These questions will be further explored in the following chapter, dedicated to reconciliation and reintegration processes.

3. BEYOND THE SURFACE: THE QUALITY OF ACCOUNTABILITY

“I am saying we are frequently releasing innocent people, which is normal, but we are also releasing guilty individuals, because the truth is, we have no evidence. But in the field, there are some people who can say “I know for a fact that this person is involved in terrorism”. However, as long as we do not have formal evidence, we cannot go towards conviction and call it justice.”⁵¹¹

Knowing how many “terrorists” the justice system was able to detect and sentence is an important measure of success or failure for the State. However, these numbers remain meaningless if the nature of those sentences is not reflective of the concept of accountability.

As was clearly defined by the interviewees, accountability through justice entails fair distribution of the sentence, meaning that there is connection between guilt and punishment, that is to be proven through independent and fair proceedings. By investigating the “quality” of accountability, this second part of the analysis first aims to assess to what extent was such connection demonstrated in terrorism criminal cases. In other words, it is asking whether the justice system in Niger was effective in sentencing the guilty and freeing the innocents.

Afterwards, the analysis contemplates whether accountability in Niger also reflected the principle of universality of the law. To do so, it proposes an examination of the violations perpetrated by security forces in the context of counterterrorism operations, and their judicial consequences.

3.1 CURTAILED ACCOUNTABILITY: THE IMPACT OF SYSTEMIC WEAKNESSES ON ADJUDICATION

Evaluating the quality of the justice process is a complex endeavour, which lends itself to a diverse array of interpretations.⁵¹² Many different elements characterising “good” justice are regulated by norms and procedures, and as such have already been the subject of the analysis conducted in the previous chapter. These include: coherence with legality principles, delays, access to remedies, respect of legal safeguards.

⁵¹¹ Author’s interview with a lawyer charged with providing legal defense to individuals accused of terrorism, Niamey (30 April 2018).

⁵¹² Colombet, H., & Gouttefangeas, A. (2013). La qualité des décisions de justice. Quels critères ? *Droit et société*, n° 83(1), 155–176.

To avoid duplicating the observations of chapter IV, this section focuses on two inter-connected elements that influence quality of terrorism-related proceedings in terms of their outcomes, rather than on the overall process. These elements were selected because of their impact on the results of the justice process, according to the observations of the interviewees and of the author. They include:

- The type and quality of evidence available for adjudication;
- The type of charges brought against individuals accused of terrorism.

THE UNSURMOUNTABLE WEAKNESS: THE QUALITY OF THE EVIDENCE

So far, the findings of the research have emphasized a consensus on the grave failures during the conduct of arrests and preliminary investigations, especially for the initial years of the Boko Haram crisis. The notable shortcomings that have characterised the initial steps of criminal proceedings continue to affect the justice process throughout adjudication, and manifest most clearly in the evidence that is made available to court.

*“Because at the time, it was the military who carried out the arrests and they were not trained to do it. They collected mobile phones, altogether: mine, yours, someone else’s... all in the same bag and that’s what they took (to the investigators). How would you know which phone belongs to who? And how can the magistrate carry out the investigation? How can he decide on inculpatory and exculpatory elements?”*⁵¹³

*“As I told you, at that point you know the evidence collected by the military was systematically burned. Often they may have done it because of ignorance, not realizing that what they got on a suspect would be an element of interest to the justice process.”*⁵¹⁴

The relationship between evidence and quality of accountability is quite self-explanatory.

*“When you say trial, you say evidence. Can we establish guilt or not? That depends entirely on evidence. But what if you do not have evidence? Then you can only apply the penal code as it stands.”*⁵¹⁵

Meaning, with no reliable evidence, risks of releasing guilty people increase. According to justice practitioners in Niger, the problem with evidence has been twofold. First, as clarified above, the lack of sufficient and reliable evidence.

⁵¹³ Author’s interview with anonymous national human rights defender, Niamey (27 January 2020).

⁵¹⁴ Author’s interview with a judge of the specialised pôle, Niamey (23 January 2020).

⁵¹⁵ Author’s interview with a local magistrate, Diffa (04 February 2020).

Second, which is also a direct result of the challenges in collecting and transmitting material evidence, is that judges indicated that in terrorism-related cases they mostly have to rely on testimonial evidence.

“The problems we still face are, for the most part, issues related to the quality of evidence, because what we generally have is only “human elements”, such as testimonies. It is necessary to move on to more scientific proof, like phone data, fingerprints, elements that can be proven scientifically, and therefore is much harder to refute. A testimony can easily be rebutted.”⁵¹⁶

However, while the judges have reported some improvements in the availability of material evidence, including the exploitation of elements collected in portable phones⁵¹⁷, the testimonies are still the prevailing elements for the constitution of the files.

“It would be necessary for denunciations to be reinforced by serious and corroborating evidence, especially since we have understood that for unrelated and hidden issues, for instance by reason of jealousy, people brought forward false allegations.”⁵¹⁸

“Generally, when you have testimonies defending the accused, he will be questioned about those, instead I do not think there have been cases where judges relied exclusively on testimonial evidence for a guilty sentence. Because it is a disposition of the law, which clearly states that conviction cannot be based solely on anonymous testimonies.”⁵¹⁹

According to the magistrates, overreliance on testimonial evidence presents various downsides. The most notable is that testimonial evidence is generally regarded as holding limited reliability, aggravated in the judges’ opinion by their noticing that in certain cases false accusations were made for reasons completely unrelated to potential suspicions of terrorist activity, such as land and family disputes. It could also be argued that the government’s persistent campaigns asking local populations to cooperate and bring terrorists to justice can largely explain the prevalence of testimonial evidence.

In addition, the security concerns faced by the witnesses allow for the recourse to anonymity for protection reasons. This, coupled with the challenges of travelling between Diffa and Niamey, generally means that the witnesses are only heard during the judicial investigation, but do not appear in court. However, the law clearly prevents the judge from relying exclusively

⁵¹⁶ Author’s interview with the vice-president of the Specialised Pôle (29 January 2020).

⁵¹⁷ Author’s interview with a judge of the specialised pôle, Niamey (23 January 2020); Author’s interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁵¹⁸ Author’s interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁵¹⁹ Author’s interview with a judge of the specialised pôle, Niamey (23 January 2020).

on anonymous testimony to justify a conviction.⁵²⁰ This is clearly a provision that intends to preserve the quality of proceedings, by preventing unfounded verdicts.

Finally, the quality of the defence is also significant in determining the quality of the evidence that is relied upon during adjudication. The application of the principles of equality of arms between the prosecution and the defence is designed to allow for a healthy adversarial debate among the parties, which leads to questioning and testing the credibility of the evidence. In this light, the notable limitations to the legal defence that is available to the individuals accused of terrorism in Niger is problematic not only from the perspective of fair trials guarantees, but also due to its negative impact on the treatment of the evidence.

“Honestly, the defence is still to be improved. Because in the 90% of cases they get the legal aid counsel, which means the lawyers are very badly paid for their work on these cases. Often, they come to the hearing only for 15 or 30 minutes, and they may have read the file just before. Generally, they have not seen the accused before the trial. They just get the file and they come, and they don’t want it to last too long, they want to leave early. Because honestly these people don’t have the means to afford a lawyer. And even when they do, it is possible that the families have cut them out because of the stigma of being accused of terrorism. It is very rare that someone will pay for their lawyer...So the lawyers, they do not help us, if you see what I mean. Because we would need the lawyers to improve the quality of proceedings, to support us in looking for credible proof. But we cannot rely on them.”⁵²¹

As was mentioned in the previous chapter, the State in Niger has undertaken notable efforts to ensure legal defence to all individuals accused of terrorism, regardless of their means.⁵²² However, when the exercise of legal defence is reduced to the mere pretence of assistance, void of any real contribution to the trial, the consequences are heavy not only for the accused, but for the credibility of the justice process as a whole.

PROSECUTING ASSOCIATION: PROS AND CONS OF A CATCH-ALL SHORTCUT

The analysis of terrorism-related cases in Niger over the past eight years leads to a striking realisation in terms of what type of charges are brought against terrorist suspects: an overwhelming majority of cases concern charges of “criminal association in view of terrorist undertakings”⁵²³, henceforth simply “association”.

⁵²⁰ See Art. 605.21 du Code de Procédure Pénale (*Loi n° 2017-07 du 31 mars 2017*): « *Aucune condamnation ne peut être prononcée sur le seul fondement de déclarations recueillies sous anonymat.* »

⁵²¹ Author’s interview with the vice-president of the Specialised Pôle (29 January 2020).

⁵²² See “*Adherence to fundamental rights*”, Chapter IV

⁵²³ Art. 399.1.19 du Code Pénal (*Loi n° 2016-22 du 16 juin 2016*).

FIGURE 9: DISTRIBUTION OF TERRORIST OFFENCES IN 2019

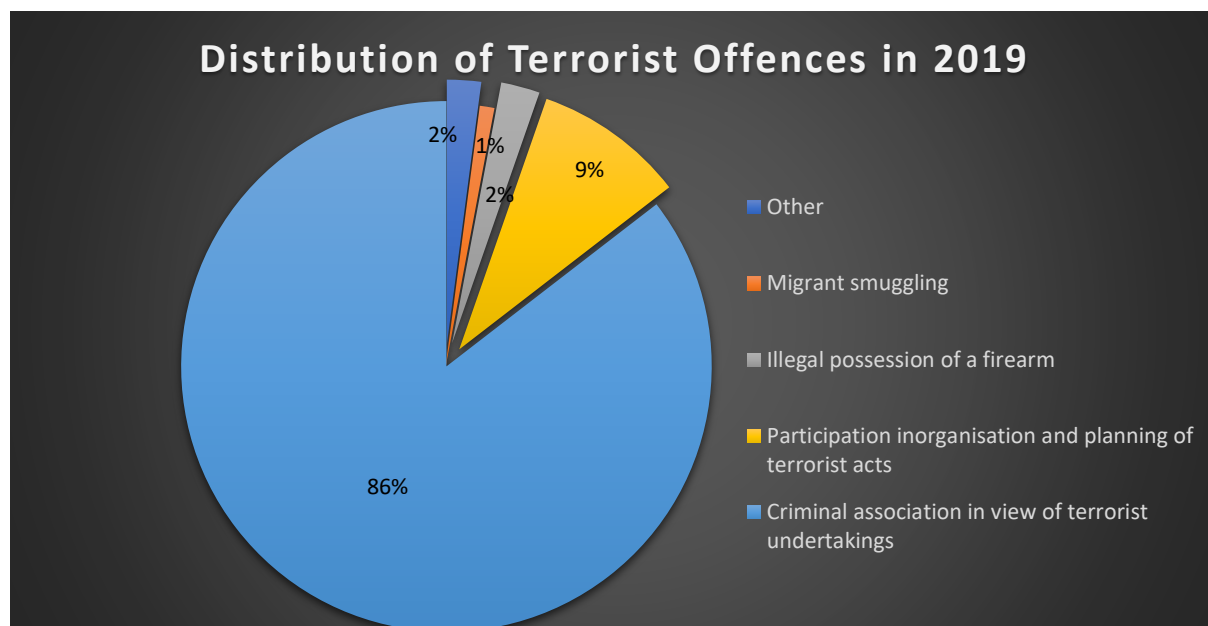


Figure 9 above helps providing a visualisation of the prevalence of “association” charges. This graph is based on the data provided by the office of the prosecutor assigned to the Pôle and is related to the 674 cases filed under the jurisdiction of the Pôle between January and November 2019. Of these, 576 were cases of “association”, which corresponds to 86% of the total. The interviews confirm that this trend has characterised justice proceedings related to terrorism since the beginning, and is not limited to 2019.⁵²⁴

Different reasons explain the primacy of this type of charge, according to the actors of the justice system. One reasoning connects the prevalence of charges of “association” with the nature of terrorism in Niger, which is mainly connected with instances of armed violence. As a result, the individuals involved in terrorist attacks have often lost their lives by the time they could be apprehended and charged with more serious offences.⁵²⁵ More often, however, justice professionals have explained the overwhelming use of “association” with the challenges in producing evidence for more serious offences.

“It can be said that it is the offence that allows for...well the other offences, they are very difficult to prove. Very difficult. How are you going to prove, for instance, that someone took part in a terrorist attack, unless they are apprehended on the theatre of

⁵²⁴ Author’s interview with an investigative judge of the specialised pôle, Niamey (24 November 2017); Author’s interview with a judge of the specialised pôle, Niamey (27 January 2020); Author’s interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (30 January 2020).

⁵²⁵ Author’s interview with Chaibou Samna, chief prosecutor of the specialised pôle, Niamey (6 February 2020).

the operation? But more often, they are caught afterwards, or during sweeping operations."⁵²⁶

*"The majority of terrorist suspects are prosecuted for "association", which is a catch-all really. It allows to cast the net far and wide."*⁵²⁷

In other words, as the quality of, and resources for, investigation are quite limited, and proving involvement in other terrorism-related offences can be complex, charging suspects simply with "association" became somewhat of an easy fix, allowing to still carry out the arrest, even on flimsy basis. From a strictly security perspective, there can be obvious advantages in the opportunity to cast a wide net when launching investigations and prosecutions of terrorism-related offences. That is especially true in a context of armed violence that can be assimilated to conflict, where the imperative of reducing the enemy's capacities is the first priority.

However, when evaluating the performance of the State in relation to judicial proceedings, the overreliance on "association" charges raises some questions. First, it could be argued that mere "association" is probably the least serious among terrorism-related offences foreseen by the criminal code, together perhaps with *apologie* and incitement⁵²⁸. In terms of counterterrorism objectives, it may be more strategic to focus the limited resources of the criminal justice system on the identification, investigation and prosecution of fewer individuals who play more considerable roles in the terrorist organizations, and whose cooperation in the justice process could provide relevant information on group members that are higher up in the hierarchy.

Furthermore, the vague formulation of the "association" offence in the penal code, coupled with the challenges faced by investigators and judges to obtain significant evidence, has led to some inconsistencies in the interpretation of the appropriate threshold to verify association. According to the penal code, the offence of association foresees: "*Le fait de participer à un groupement formé ou à une entente établie en vue de la préparation d'un des actes terroristes caractérisés par un ou plusieurs faits matériels*".⁵²⁹ Despite the mention of "material elements" in the law, the interpretation of this provisions often appear to be so broad as to necessitate solely the proof of having spent some time in an area that is considered to be under the control of the terrorist organization.

⁵²⁶ Author's interview with a judge of the specialised pôle, Niamey (27 January 2020).

⁵²⁷ Author's interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁵²⁸ Art. 399.1.17 (bis) du Code Pénal, (Loi n° 2016-22 du 16 juin 2016).

⁵²⁹ Art. 399.1.19 du Code Pénal (Loi n° 2016-22 du 16 juin 2016).

“From the moment you recognise you were present, it means you belong to that group, it is more than enough. Why? Because you know that that’s not a group organised for charity actions”⁵³⁰.

“Q: Would you say that mere presence with the group constitutes association?”

A: Why would you be present with them if you were not associated with them? At the very least you share their ideas. In my opinion, yes ! You know we have had people that told us they were forced, in order to evade their criminal responsibility. But then it is up to them to demonstrate that they have been forced. It is up to them to convince the judge!”⁵³¹

“Whether or not the presence in certain areas would constitute association will depend on the circumstances of the case. Did the person join by force or was it their choice? From the moment you are physically with the group, then you are a member, because we are talking about a terrorist group. Unless there has been use of force.”⁵³²

“In my view, having been present in an area under the control of the group is not enough to convict for association. It would be necessary to also prove material acts that have been committed, beyond the mere presence. However, it is a matter of interpretation”.⁵³³

As these testimonies show, while there is no absolute consensus over the correct interpretation of the “association” offence, there appears to be a strong tendency to qualify the presence in certain areas as sufficient basis for a conviction. It should be noted that the sentence foreseen for “association” is five to ten years of detention. But who are the individuals who can be qualified as associated with Boko Haram? Are they actual members of the organisation, people entertaining economic relations with the group, or anyone in the vicinity of the group? And, most importantly, can the judicial process really establish these distinctions, when deprived of reliable and detailed evidence?

There are two reasons that are put forward when clarifying such emphasis on mere presence. The first is related to the fact that certain areas around the Lake Chad are known to be occupied by Boko Haram. Accordingly, the assumption is that, unless one is a member of the group, they would not dare spend time in those zones. However, the areas occupied by Boko Haram are also among the most fertile, which explains why people could attempt to gain access for fishing and for farming there. A second reason is connected with the identification of Boko Haram with

⁵³⁰ Author’s interview with a lawyer charged with providing legal defense to individuals accused of terrorism, Niamey (25 January 2020).

⁵³¹ Author’s interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁵³² Author’s interview with a judge of the specialised pôle, Niamey (27 January 2020).

⁵³³ Author’s interview with the vice-president of the Specialised Pôle (29 January 2020).

its ideology, which would exclude that anyone not fully supportive of the group's messages would accept to be in their presence.

In terms of quality of judicial proceedings, however, such extensive reliance on a vague and far-reaching offence raises strong concerns. First, it can be argued that the frequent use of this offence is what has allowed numerous innocents to be arrested in the first place. Then, when examining the adjudication phase, the diverse and open interpretations attributed to "association" put into question the capacity of the justice system to ensure certainty and coherence of sentences, and, ultimately, to identify and punish real terrorists.

CONVICTION FOR "ASSOCIATION": AN EXAMPLE⁵³⁴

There was a case that came before the court in 2019, following an arrest in 2015 of a man who's from a certain village around Diffa. He had left Diffa and went to one of the islands in the Lake Chad that are known to be overrun and controlled by Boko-Haram. He was there for say, three or six months.

After, he returned back to the original village. The village chief immediately contacted the military or local authorities and denounced and said 'this person has spent six months on this particular island and everyone knows that's Boko-Haram, so come, arrest him', and they did.

No physical evidence whatsoever. Nothing, on his person, nothing that they can find to connect him to Boko-Haram. No other witnesses other than the village chief's denouncement. To the best of my knowledge, they didn't interview family members or anything like that. No one else could say 'I physically saw him doing something wrong'. That piece of paper, where the village chief gave his statements and then a second paper where the interview the detainee, and he admitted, 'Yes, I was there but I've been desperate to try to find a good place to fish or farm and that's just how I ended up there, Boko-Haram left me alone and I was able to do that for a while and then the season has changed and I came back. I didn't do anything, I didn't commit any crimes'.

So, he did not confess. That person was found guilty. Solely because they admitted to be physically present on an island in Lake Chad, that was controlled by Boko Haram.

⁵³⁴ Author's interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (30 January 2020).

3.2 RIGGING THE GAME: HOW IMPUNITY IS BUILT INTO COUNTERTERRORISM

If accountability is to be fair, it also has to be universal. Indeed, the most minimalist definition of the rule of law is the no one can be above it: “*the core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.*”⁵³⁵ So far, this chapter has dealt with the Nigerien justice system’s capacity to hold terrorism perpetrators accountable. Yet, this angle would ignore the violations committed by the State, here represented by the military, in the course of counterterrorism operations. In doing so, it would offer only a partial account of the quality of justice in addressing terrorism.

MILITARY ABUSES: ISOLATED INCIDENTS OR GROWING TENDENCY?

In the course of data collection, the author was able to assemble various testimonies, both direct and indirect, reporting instances of violence perpetrated by security forces against terrorist suspects.

*“I am a refugee from Nigeria, I was running from Boko Haram. Then one day, I was by the door with my wife, and the security forces took me. I don’t know exactly who they were, but from the uniform I could tell they were Nigerien soldiers. Then they took me to the police station, but the police would not take me because I had been badly hurt. You can see it here..-he says indicating a long scar on his head- so they left me at the Gendarmerie instead. And then they moved us to Niamey.”*⁵³⁶

*“I was taken by the gendarmes, and they accused me of being a Boko Haram. They took me to the gendarmerie, I remained there for 11 days, and then for two weeks in the prisons in Diffa. There I was not beaten. But during the transfer from Diffa to Niamey the militaries beat me. They accused me of killing their colleagues. They were many”.*⁵³⁷

“Yes there are people (in the prison) who have been tortured by the militaries when they caught them. There is one prisoner who has the scars of the acid on his back and on his stomach. Another one, they put his hand in burning coals. You can see the bone. Others have been beaten. One has serious mental issues, and he also told me he was

⁵³⁵ Bingham, Lord. (2007). The Rule of Law. *The Cambridge Law Journal*, 66(1), 67–85, p.69.

⁵³⁶ Author’s interview with “Ousmane”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018).

⁵³⁷ Author’s interview with “Mohamed”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018).

*tortured (...). Because the military are in the frontlines, they see people being blown up, their brothers, their colleagues, they are afraid and they hate them.”*⁵³⁸

Law enforcement, justice officials, national human rights defenders, as well as international officials reported similar episodes of violence, including a few extrajudicial killings.⁵³⁹ The different episodes often present a common thread: following Boko Haram’s attacks to military posts, a favourite target of the group, security forces would apprehend, beat, torture and at times kill suspects in retaliation. It is worth adding that these suspects were often identified on the basis of simple violations to the State of emergency restrictions, rather than thorough investigations.

Pursuing the accountability of the officers involved in these cases did not appear as a crucial priority within the justice system. Indeed, while in a few cases complaints have been brought forward by civil society organizations and by the national human rights commission⁵⁴⁰, the information collected indicated that in no circumstances they advanced enough to reach a conviction, or even prosecution. A number of reasons were brought forward during the interviews to explain and justify this lack of intervention to sanction inappropriate and outright criminal conduct by security forces.

A first argument identifies violations committed by the army as a marginal phenomenon, particularly when compared with other forces in the region.

*“Well, there have been no real cases where violations were confirmed. I have no knowledge of any officer being prosecuted because truly, the Nigerien militaries conduct themselves correctly in the field”*⁵⁴¹

*“All these detainees, where do you think they come from? I can tell you: it’s because Nigerien soldiers avoid arbitrary executions. Yes, there have been some isolated cases, we should not bury our heads in the sand. But when compared with what happens in Chad, or in Nigeria, or in Mali, here you are not going to find the same thing.”*⁵⁴²

⁵³⁸ Author’s interview with anonymous United Nations volunteer providing legal assistance to individuals detained for terrorism-related offences in the prisons of Kollo and Koutoukalé, Niamey (11 November 2017).

⁵³⁹ Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017); Author’s interview with anonymous United Nations official in Niger, Niamey (23 November 2017); Author’s interview with anonymous national human rights defender, Niamey (27 January 2020); Author’s interview with anonymous prosecutor of the specialised pôle, Niamey (6 February 2020).

⁵⁴⁰ Author’s interview with anonymous United Nations official in Niger, Niamey (23 November 2017); Author’s interview with anonymous national human rights defender, Niamey (27 January 2020).

⁵⁴¹ Author’s interview with a judge of the specialised pôle, Niamey (27 January 2020).

⁵⁴² Author’s interview with anonymous national human rights defender, Niamey (27 January 2020)

There is truth in this perspective. That the Nigerien army has been involved in abuses and torture far less systematically than its counterparts in the neighbouring countries is widely recognised.⁵⁴³ However, the national security forces' propensity for violent reprisals appears to have increased as tensions escalated in the North- West, in the border region with Burkina Faso and Mali. Following the recrudescence of terrorism-related violence, which manifested in the unprecedented attacks of Inates and Chinegodar, perpetrated by the Islamic State in the Greater Sahara between December 2019 and January 2020, Amnesty International and MINUSMA reported over one hundred forcible disappearances by the Nigerien army.⁵⁴⁴ These episodes took place following the latest field-work conducted for the present research, and thus were not captured by the present analysis. Yet they provide the basis for the conduct of further research in this area: it is worth asking if abuses from the security forces are more than incidental and will continue growing with the rising intensity of terrorism on the national territory.

EXCEPTIONALITY OF TERRORISM AS JUSTIFICATION OF STATE VIOLENCE

However, the other arguments that emerge from the interviews to explain the extremely limited attempts at pursuing accountability of armed forces in the context of counterterrorism operations are connected with the nature of terrorism itself, and its qualification as an exceptional threat.

The first way in which the characterisation of terrorism undermines accountability of State actors is through its legal and institutional architecture. Indeed, the investigation and prosecution of military officials in the Nigerien system would not fall under the jurisdiction of the specialised counterterrorism justice institutions, because, quite simply, acts of security forces would not be considered terrorism. It is worth noting that the approach that excludes State actors from the scope of terrorist acts, widely popular in recent counterterrorism laws, is anchored in a perspective of what terrorism is in times of peace, meaning a criminal phenomenon. Yet, this has not always been the understanding of terrorism.

The Geneva Conventions and related Additional Protocols, which focus on situations of armed conflict, include 'acts of terror' among the prohibited tactics. Specifically, they identify

⁵⁴³ International Crisis Group. (2017). *Niger and Boko Haram Beyond Counter-insurgency* (Africa Report N°245; p. 38), p 20; Felbab-Brown, V. (2019, August 15). *Nigeria's Troubling Counterinsurgency Strategy Against Boko Haram*. <https://www.foreignaffairs.com/articles/nigeria/2018-03-30/nigerias-troubling-counterinsurgency-strategy-against-boko-haram>

⁵⁴⁴ Amnesty International. (2020). *They executed some and brought the rest with them. Human Rights violations by security forces in the Sahel*. <https://www.amnesty.org/en/documents/document/?indexNumber=afr37%2f2318%2f2020&language=en>

terrorism with attacks perpetrated against the civilian population: “*The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited*”.⁵⁴⁵ In doing so, they identify terrorism as a strategy that entails inappropriate means of warfare, and ascribe it primarily to the conduct of armed forces. Indeed, historically terror has been primarily associated with governmental repression⁵⁴⁶. However, in the past decades, the qualification of terrorist has been increasingly limited to acts perpetrated by non-State groups.

The Nigerien legislator, in fact, firmly inscribes the terrorist phenomenon in the context of criminality, albeit as an especially serious form of crime. In particular, through the criminalisation of “association” or “membership”⁵⁴⁷, the current laws foster the attribution of “terrorists” solely to specific groups, automatically excluding any other perpetrator, and notably any State official, from the commission of these crimes. It can be argued, once more, that the recent interpretations of terrorism, and its progressive “personification” through the increasing focus on groups that are designated as terrorists, restrict the pursuit of accountability solely to those who are perceived as the enemy of the State. This same process almost automatically excludes liability for State actors in the conduct of counterterrorism operations.

The second way in which this process takes place is by undermining the perception of military abuses as unjust and immoral, when conducted in the context of counterterrorism. Indeed, terrorism is increasingly understood as an existential threat, and as such it is the soft approaches that would incur more reprobation, as clearly explained by the Nigerien antiterrorism judge Koundy in his doctoral thesis: “*The striking feature of the response to terrorism in the area (the Sahel) is to be conducted in a context of declared State of emergency, in a climate where fear and suspicion reign. Indeed, confronted with an existential challenge, due to a violent and growing terrorist threat which tends to fester in the social fabric, States believed it was their duty to respond vigorously by constantly curtailing human rights. A specialised*

⁵⁴⁵ Art.51.2, International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*

⁵⁴⁶ Charles Tilly provides a helpful overview of how historically terrorism has been mainly associated with governmental tactics, since the French revolution, see: Tilly, C. (2004). *Terror, Terrorism, Terrorists. Sociological Theory*, 22(1), 5–13, p.9.

⁵⁴⁷ See Art. 399.1.19 du Code Pénal (*Loi n° 2016-22 du 16 juin 2016*): « *Le fait de participer à un groupement formé ou à une entente établie en vue de la préparation d'un des actes terroristes caractérisés par un ou plusieurs faits matériels est puni d'un emprisonnement de cinq (5) ans à moins de dix (10) ans. Le fait de diriger ou d'organiser le groupement ou l'entente est puni d'un emprisonnement de dix (10) ans à trente (30) ans.* »

counterterrorism legislation, moulded by the notion of a formidable enemy, has progressively separated from ordinary law and provides justification to repeated human rights violations.⁵⁴⁸ Thus once more the perceived menace shapes the understanding of the State's response, creating the basis for tolerance of abuses. In particular, as stressed by multiple interviewees, since terrorist violence often targets the military specifically, their reaction, even when disproportionate, is somewhat justified, or at the very least understood.⁵⁴⁹ Therefore, one of the outcomes of a narrative which emphasizes the risks posed by terrorism is to lower the blame for disproportionate responses, which, in turn, reduces the perceived necessity of accountability.

4. THE COURT AND ITS AUDIENCE: AN ANALYSIS OF JUSTICE'S LEGITIMACY IN PURSUING ACCOUNTABILITY

To conclude the analysis of the justice system's ability to pursue and secure accountability of terrorists, this chapter proposes to focus on the element of legitimacy. According to Suchman, "Legitimacy is a *perception* or *assumption* in that it represents a reaction of observers to the organization as they see it."⁵⁵⁰ In other words, the investigation of legitimacy demands that one separates from the perception and understanding of the institutional actors, to focus on that of their audience.

TRIALS, AUDIENCES AND THE NEGOTIATION OF SOVEREIGNTY

Securitization theory, especially in its more constructivist declination, emphasizes the importance of the audience in determining the success of securitization attempts. The audience decides whether claims made in relation to a specific threat are credible. In this sense, when elevating terrorism to the degree of exceptional threat, States will be successful if and when audiences accept and reinforce that claim, contributing to the process of securitization. Accordingly, the audience plays a key role in the "negotiation of securitization"⁵⁵¹ and thus in its accomplishment.

⁵⁴⁸ Koundy, M. A. A. (2018). *Les obligations des Etats en matière de respect des droits de l'homme dans la lutte contre le terrorisme au Sahel*. Université Abdou Moumouni de Niamey, p. 179.

⁵⁴⁹ Author's interview with anonymous United Nations volunteer providing legal assistance to individuals detained for terrorism-related offences in the prisons of Kollo and Koutoukalé, Niamey (11 November 2017); Author's interview with the high ranking official of the SCLCT, Niamey, (21 November 2017); Author's interview with anonymous prosecutor of the specialised pôle, Niamey (6 February 2020).

⁵⁵⁰ Suchman, M. C. (1995). Managing Legitimacy: Strategic and Institutional Approaches. *The Academy of Management Review*, 20(3), 571–610, p. 574.

⁵⁵¹ Stritzel, H. (2007). Towards a Theory of Securitization: Copenhagen and Beyond. *European Journal of International Relations*, 13(3), 357–383, p. 363.

However, the present study is more interested in the State's responses to terrorism, than in its constitution as an exceptional threat. Then, analysing the role of the audience becomes meaningful to the process of negotiating sovereignty: it is the audience's perception of the State's capacity to bring terrorist to justice that will ultimately determine whether its performance is successful and its claims to sovereignty are credible.

In the context of the anti-terrorism trials in Niger, the analysis of legitimation processes corresponds to the public's interest in, and reaction to, the public hearings and the sentences pronounced by the courts. In exploring this dimension, this research aims to highlight how public perceptions of the trials against alleged terrorists can contribute or hinder the affirmation of the State as the main securitizing actor, as they define the narrative of its success.

Indeed, the judicial context, with its high performative value, makes the role of the audience especially relevant. This is particularly true of the court, which represents the culmination of judicial proceedings and its most public aspect. The analysis of trials through the lenses of performance theory is not new⁵⁵². Indeed, trial hearings are intrinsically dramatic, a quality reflected in the courtroom settings, serving as a stage, in the specificity of the roles attributed to the different actors, judges, prosecution, accused and lawyer, as well as in the rituals that govern the proceedings. Thus, the presence of the audience, which is inherently participatory, is necessary to fully realise the trials' social potential. Such social potential can be expressed in a twofold manner.

On the one hand, trials serve a social function by contributing to a shared understanding of what constitutes deviant behavior, meaning the "crime", and in turn allowing for the justified punishment of the criminal. And in parallel, by identifying and separating what is an unacceptable violation to the norm, the polity defines and reinforces itself in comparison. "*As crime creates and excludes 'them' it also creates and strengthens 'us' "*".⁵⁵³ In doing so, the performance would reinforce the notion of citizenship, the sense of belonging to a community, bounded by the collective rejection of crime. It can be argued that this process would hold increased power in the context of terrorism, as terrorist tactics are more likely than ordinary crimes to trigger visceral reprobation. In this light, public trials of terrorist suspects could

⁵⁵² Cole, C. M. (2007). Performance, Transitional Justice, and the Law: South Africa's Truth and Reconciliation Commission. *Theatre Journal*, 59(2), 167–187, p.167.

⁵⁵³ Nunn, K. B. (1994). The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process - A Critique of the Role of the Public Defender and a Proposal for Reform. *American Criminal Law Review*, 32, 743, p. 760.

showcase the atrocities committed by the terrorist organizations, reinforcing popular support of antiterrorism intervention, and, in turn, support to the State's counterterrorism campaigns.

On the other hand, however, trials are supposed to display more than mere public acts of punishment. Indeed, they are required to mobilise repertoires and symbols pertaining to higher values, those of justice, fairness and impartiality. The rituals of judicial procedures “*make visible abstract principles and inchoate concepts-such as Justice*”.⁵⁵⁴ It is these values that are embedded in the concept of accountability as described by the justice actors in Niger, which goes beyond repression, to espouse proportionality and legality. Such principles hold identity value for States, especially States that are negotiating their sovereignty in the framework of democratization efforts, such as Niger. Then, the recourse to such symbolic repertoires is instrumental to justice actors to “*mobilise public support and to give meaning to their actions. (...) These repertoires are brought into play both to defend and to challenge existing types of statehood and power relations*”.⁵⁵⁵ Accordingly, if trials' outcomes are to prove meaningful to support State action, audiences should see that counterterrorism courts are capable to hold terrorists accountable fairly, meaning to separate the guilty from the innocents and to sentence accordingly.

*“The return of the State involves security and justice. So, if the population sees that the State delivers justice, then the State is present. One of the objectives of stabilisation is ensuring that the State can be present. To this end, it is necessary to provide guarantees of justice to all the communities, to avoid the perception that it is only their children that get arrested, and not those of the neighbouring community, and that they are arrested for no reason, and then kept in prison for years...”*⁵⁵⁶

DIFFA – NIAMEY: DISCONNECTING JUSTICE FROM ITS AUDIENCE

The Nigerian specialised antiterrorism justice system indirectly attributes value to the role of the audience in terrorism hearings, as they are maintained public. That is not always the case when it comes to matters of national security, where the nature of certain evidence is considered too sensitive to be openly shared. Indeed, the past twenty years have witnessed a growing tendency to limit public and media access to terrorism trials and to specific evidence, limits that at times extend even to the defence. These trends have manifested in Western countries, as well as in countries in West Africa and specifically in the course of trials of Boko Haram members,

⁵⁵⁴ Winner, L. (2005). Democratic Acts: Theatre of Public Trials. *Theatre Topics*, 15(2), 149–169, p.151.

⁵⁵⁵ Hagmann, T., & Péclard, D. (2010). Negotiating Statehood: Dynamics of Power and Domination in Africa. *Development and Change*, 41(4), 539–562, p. 547.

⁵⁵⁶ Author's interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (6 February 2020).

attracting notable criticism because of their impact on the quality of fair trial guarantees for the accused and on the overall legitimacy of the proceedings.⁵⁵⁷ Yet, the Nigerien legislator does not foresee specific limitations to the openness of the hearings of the Specialised Pôle. The rules that apply here are the same as in any other first instance court: if exceptions to the regular public proceedings are foreseen (while the verdict will always be pronounced publicly)⁵⁵⁸, they do not seem to have been applied specifically to terrorism trials.

It could be argued that this choice corresponds to the attention that the Nigerien State has dedicated to the process of “bringing justice to the citizens”, a pillar of judicial reforms since the 2012 conference of the *États généraux de la justice*.⁵⁵⁹ However, as specialisation of antiterrorism institutions goes hand in hand with the centralisation of procedures in the capital, the perspectives of “*rapprochement*” are denied *a priori*. Terrorism trials take place in Niamey, inevitably separating the proceedings from their most significant audience: the communities that have been directly affected by Boko Haram’s attacks in the Diffa region. This led to immediate issues with how the verdicts were received by the concerned population, especially when the first hearings of 2017 and 2018 settled with overwhelming release rates, and former terrorist suspects returned to their communities of origin.

The interviews of State officials, within and beyond the justice system, confirm that there was considerable awareness of the limitations inherent in holding the trials in Niamey and the consequences that this would entail for the credibility of the judicial process for the population in the Diffa region.

“Because often there are releases that are made here, in Niamey, the people there do not understand it. There were concerns about certain people, who had been denounced (by the population) and then released due to insufficient evidence, and so they were released either during the judicial investigations or even at the trial. And the trend has been that we have released more people than we could convict. So, in the Diffa area people were starting to ask questions about what the justice system was doing.”⁵⁶⁰

In this light, it appears that the considerable loss of cases through the justice process, which continued at the hearings, especially during the first years of trials, produced the perception of

⁵⁵⁷ See for instance: Lekogmo, H. N. (2019). Crise du droit et terrorisme. Retour sur le droit à un procès équitable des présumés terroristes. *ADILAAKU - Droit, politique et société en Afrique*; Chesney, R., & Goldsmith, J. (2007). Terrorism and the Convergence of Criminal and Military Detention Models. *Stanford Law Review*, 60, 1079; Silver, D. (2011). Media Censorship and Access to Terrorism Trials: A Social Architecture Analysis. *Notre Dame Journal of Law, Ethics & Public Policy*, 25, 143.

⁵⁵⁸ Art. 386 du Code de Procédure Pénale, République du Niger.

⁵⁵⁹ See “*Les états généraux : justice in transition*”, Chapter III.

⁵⁶⁰ Author’s interview with an investigative judge of the specialised pôle, Niamey (24 November 2017).

lack of effectiveness and poor performance by the justice system. This, in itself, is enough to justify further distance and weariness of State action by the concerned communities.

In addition, it is worth recalling that the justice intervention by the State had been built on popular participation, as local officials and communication campaigns invited, requested and demanded that anyone who had information about alleged terrorist activities and/or individuals would share them with military and police. Such policy, which relied on the Quran to encourage denunciations, had proven effective, as large numbers of arrests were carried out on the basis of intel shared by local informants. But, when such information proved insufficient to convict, local population did not only have cause for distrust in the performance of justice, but also growing concerns over personal safety. This outcome can be especially detrimental to the legitimation of the State as holding effective power: here counterterrorism intervention has not merely failed to produce more security by identifying and punishing terrorists, it has actively contributed to producing increased insecurity by breaking an implicit promise to its citizens while relying on their contribution.

The dangers connected with the spread of these perceptions were clearly identified by State representatives in Niamey, and potential solutions were discussed, leading to the decision to organize some of the hearings in Diffa. This delocalization of the trials was discussed since the end of 2017, but logistical and security concerns delayed its realization until 2018.

*“It has not been done yet, but we are going to hold some hearings there, to show the populations, and especially the victims, what is being done. Because for them it is difficult to reach Niamey and so they get the impression that everything is taking place without them. Then, organizing this in their region, where all of this happened, this shows that the State is there for them, and it is going to bring justice closer to the citizens”.*⁵⁶¹

“The communities demanded: ‘Now you want us to welcome these people, who have slit the throats of our people and even killed their own parents, how are you going to convince us that this is justice?’

*So, as the High Authority for the Consolidation of Peace, we proposed to the government to delocalize the trials in Diffa, which is 1300 km from here.”*⁵⁶²

⁵⁶¹ Author’s interview with high-level official of the Ministry of Justice, Niamey (8 May 2018).

⁵⁶² Author’s interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020).

2018 DIFFA HEARINGS: AN ATTEMPT AT RESTORING CONFIDENCE

The first hearings of the specialised antiterrorism Pôle in Diffa took place in July 2018. Differently from what had happened in Niamey, the courtroom was soon full⁵⁶³, testifying to the public's investment in the trials. Indeed, interviews and media reports alike highlight that the presence of the public was considered essential for the Diffa hearings to fulfil their objectives, and had been consistently encouraged.

*“We decided to go to Diffa and show the people how the information is collected. And since the hearings are public, we invited everyone to come and assist. To show them that we will bring out all of the evidence, as little as may be. So that people could come to understand the challenges that the judges faced to carry out their investigations.”*⁵⁶⁴

*“Standing in front of local leaders, parents of Boko Haram victims and the witnesses, the head of the Pôle judiciaire antiterroriste could not have been clearer. Social cohesion must be reinforced. ‘It is a purely educational trial – underlines Boukari Sally – it should be a lesson to show how people are freed, and why some are convicted.’”*⁵⁶⁵

If the goal cannot be showing to the local population that the trials have become effective in sentencing those responsible for the atrocities of the previous years in large numbers, then its performative value will focus on the adherence to justice principles, which are held as indispensable to the State's credibility. In doing so, the audience regains its central role in the performance of the trial. But did it work? Did the choice of delocalization restore the perception of judicial effectiveness?

Here, the outcomes of the analysis are nuanced. If the perception of the State's inability to identify and convict terrorists persisted, the Diffa hearings appear to have been significant in showing to the citizens that the limitations derived from the conduct of the procedures and that in many instances people were being freed because they had been wrongfully arrested.

*“When that hearing took place, people understood that there were many innocents who had been captured as Boko Haram, and so the people recognised that these people had been incriminated for nothing.”*⁵⁶⁶

“As I told you there were many innocents among those people, people who knew nothing about that (Boko Haram) but they were arrested. Now the population was present. The parents of those accused, the detainees, are there. And I think that is transparency.”

⁵⁶³ RFI (4 Juillet 2018) Niger : des membres présumés de Boko Haram jugés à Diffa : <https://www.rfi.fr/fr/afrique/20180704-niger-proces-public-diffa-membres-boko-haram>

⁵⁶⁴ Author's interview with a judge of the specialised pôle, Niamey (23 January 2020).

⁵⁶⁵ RFI (4 Juillet 2018) Niger : des membres présumés de Boko Haram jugés à Diffa : <https://www.rfi.fr/fr/afrique/20180704-niger-proces-public-diffa-membres-boko-haram>

⁵⁶⁶ Author's interview with anonymous N'Guigmi community leader, Diffa (4 February 2020).

Transparency played its part and so people were quite happy that the hearing took place here in Diffa."⁵⁶⁷

Then, if the justice process has not performed well in holding the guilty accountable, it has at least exercised fairness and restraint, and freed the innocents. The adherence to the legality principles and the rule of law manifests success, albeit partial, in the construct of a positive narrative of statehood. Nonetheless, the question remains of whether such perception is enough to offset the substantial failure in bringing terrorist perpetrators to justice, thus restoring order through justice.

Furthermore, while an overall positive experience for the local population, the delocalized trials proved extremely difficult for the judges, who felt exposed and unsafe. The security apparatus was mobilised to protect the tribunal and the organization of the hearings, including through a considerable presence of security forces and systematic searches of anyone accessing the Court. Yet, numerous reports describe how, despite these precautions, the officials of the specialised Pôle, and in particular the magistrates had strong concerns for their own safety.⁵⁶⁸ The public nature of the hearing, the mobilisation of the local population, and the strong mediatization of the trials contributed to fostering these fears, as the judges could not be sure that those in attendance were not Boko Haram members.⁵⁶⁹

TESTIMONY OF A JUDGE WHO TOOK PART IN THE DIFFA HEARING

That is what affected us, seeing so many people that were interested, the courtroom filled up every day until the last. And so we wondered: is this really just the innocent population or is this Boko Haram?

(...)

I was quite scared, and to tell you the whole story, we wanted to leave the town during the night at one point. We did not do it in the end, but we almost did, because we were scared that this hearing had been so publicised. And internationally, the entire world was interested in the hearing and in Boko Haram, in terrorism.

⁵⁶⁷ Author's interview with anonymous member of the 'Peace and Security Committee' in Diffa, Diffa (4 February 2020).

⁵⁶⁸ Author's interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (6 February 2020); Author's interview with a judge of the specialised pôle, Niamey (23 January 2020); Author's interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁵⁶⁹ See box below for more details on the experience of the judges in Diffa.

Because, on our side we had gone (to Diffa) not only to answer the doubts of the population, as they were saying that they did not understand why they were denouncing and we were releasing, but also to facilitate the proceeding. Because, as the majority of the accused come from Diffa, we go there, we hold the hearing, and once we pronounce the verdict and if it is a release, since we are already there, we can simply take care of formalities and let the person go. The person does not need to go from Niamey to Diffa, their family is already there to welcome them, and it would make it easier. But they (Boko Haram) saw this as an affront: how do we dare go into their area? Because the Diffa region is their area.

So one week before our departure for Diffa, they attacked, there was an attack around N'Guinguimi, and we came to know that it was done to discourage us. And when we were there, we learned that they were getting organized with the objective of attacking us, because they could not accept that we would go to their area to hold a judgment. And we learned...well we cannot be sure that this information was verified, but we heard that they had slit the throats of three people in the city. And it scared us because we thought 'this is getting serious'. We got really scared so we met up, and we decided (to leave). We felt we were thrown in the lion's den, and we are here, while the others in Niamey will be able to claim the success of holding a hearing here, but they are safe. And despite the mobilisation in terms of security, we felt in danger, and we started thinking of coming up with our own strategy. And that's what we planned to do, after the first three days, we planned of leaving the town during the night, without anyone knowing, but then we came back with a better disposition. The authorities there, the Governor and his team, came to reassure us. And even the different Ministers who were interested in the trials called us to offer their support.

The following day, even before we got the courtroom, the Governor was already there. So we started each hearing with him and finished with him, he really supported us throughout, and that's how we were able to complete all of the files. And I am glad we held on, because it went well and it was really interesting.

Ultimately, there was broad consensus over the success of the Diffa hearing in bringing justice to citizens, displaying a good example of fair proceedings, and in turn contributing to the credibility of the justice process and the State. However, despite talks of replicating the experience, including in areas that are closer to the capital and increasingly affected by

terrorism, such as Tillabery, no other delocalised audiences were organized in the following two years of activity of the Specialised Pôle, due to the prevailing security concerns.

5. CONCLUSIONS

This chapter looked into the performance of the justice system in ensuring accountability of terrorists in Niger, as an essential component of State's efforts to produce security and negotiate sovereignty through counterterrorism. Indeed, the judicial process is not only meant to prove that the State can identify and punish terrorists, thus creating a deterrent from associating with terrorism-related activities, but is also meant to do so by adhering to the values of justice and fairness. These values attribute legitimacy to State action, justifying claims to sovereignty and, what is even more relevant, doing so in a way that directly contrasts the methods of State agents with those of terrorist organisations.

In order to study the capacity of the Nigerien justice chain to produce accountability, the present research has analysed three dimensions, looking first into attrition rates and conviction rates, to assess a quantifiable measure of accountability, then looking into quality of the proceedings, to conclude with an appreciation of the legitimacy of justice action. The outcomes of this analysis are nuanced and, at times, contradictory. It is argued here that this is a result not only of the challenges posed by the terrorism phenomenon, but also of the construct and approach of counterterrorism itself.

QUANTIFIABLE ACCOUNTABILITY: IMPROVING PERFORMANCE AND ADHERENCE TO LEGALITY

The chapter examined attrition rates for terrorism-related cases at the different stages of the justice process, between 2011 and 2019, corresponding to the period that the specialised counterterrorism laws and institutions have been operational in Niger. Emphasis was on the years that followed the 2015 attacks, those of most intense judicial activity. The analysis found that only 6% of overall cases have, so far, resulted in convictions, with a corresponding overall attrition rate between 82% and 94%, depending on the outcome of the 613 cases that were still pending at the time of data collection (see Figure 3). It also further broke down the data to find that 23% of cases were 'lost' during the preliminary investigation, 35% were dismissed during the judicial investigation and 24 % of cases 'exited' the justice process in court. Finally, the conviction rates of the special hearing sessions for terrorism have grown, albeit with notable fluctuations, overtime, between July 2017 and November 2019 (see Figure 5).

Although the data presents limitations, most notably due to the lack of clarity over the element of time and how it affected attrition rates, it is also able to shine some light on the performance of the justice system in the prosecution and adjudication of alleged terrorists. When compounded with the content of the interviews, these statistics allow to draw the following preliminary conclusions.

First, while it cast an extremely wide net, questioning thousands of people in relation to terrorism-related offences, the Nigerien justice system was only able to hold only very few of them accountable. This leads to conflicting considerations about performance. On the one hand the “quantifiable” results are disappointing, especially when considering the importance that was attributed to creation and the specialisation of a counterterrorism justice apparatus. This failure is even more serious when taking into account that hundreds of accused spent years in prison prior to their cases being dismissed. On the other hand, it appears that magistrates refused the temptation of mass conviction, and their performance shows adherence to the principles of legality despite the pressures of the security agenda.

Second, the data related to the evolution of conviction rates, coupled with the declarations of the interviewees, highlights a considerable improvement of the performance over time, in terms of the increased ability to convict for cases brought after 2017. This confirms the findings of the previous chapter, which details numerous advances in the investigation process, to which the more effective proceedings have been attributed, and testifies to the strong willingness of the justice chain to address shortcomings and enhance its own capacities.

Finally, this study is interested in the reasons behind the observed gaps in performance. It is argued here that the counterterrorism agenda, with its emphasis on security, limited the ability of the justice chain to hold terrorist accountable. This is most visible when observing how the large number of arrests carried out during the state of emergency, with the violations to the most basic procedural rules that they entailed, determined the inability of subsequent investigations and court proceedings to achieve accountability for terrorism-related offences. In fact, mass arrests may be useful in the perspective of short-term security, as they allow for temporary incapacitation of potential threats, but they also prevented meaningful collection of evidence, thus resulting in case loss. This dynamic captures the inevitable tension between the preventative focus of the security agenda, and the reactive role of the justice process, showing how emphasis on the former came at the expense of the latter.

QUALITY OF ACCOUNTABILITY: THE SHORTCOMINGS INBUILT IN COUNTERTERRORISM

When examining the ‘quality’ of justice proceedings pursuing terrorists’ accountability, this research refers to the basic capacity to conduct investigation and adjudication in a way that is conducive to separating the innocents from the guilty.

In accordance with the outcomes of chapter IV, the analysis found the quality of the evidence available in terrorism-related cases to be extremely poor. Numerous reasons contributed to this: insufficient if not downright disregarded collection and transmission of material evidence during preliminary investigations; overreliance on testimonial evidence resulting from public policies that encouraged denunciations of terrorists by local populations; the inability of the defense lawyers to question and test the evidence. Poor quality of evidence, especially during the preliminary investigations carried out by security forces, is a key hindrance to the ability to appropriately ascertain guilt through the judicial process. Here, the serious faults in the justice process inevitably open the question of how many individuals actually responsible for terrorist crimes evaded the law despite having been arrested, simply because evidence of their offenses was handled improperly. While some issues, such as material evidence collection, have been improved over time according to the interviewees, such widespread limitations to reliable evidence means that the justice chain was often unable to separate the guilty from the innocent.

Such inability means in practice that the justice apparatus may have directly contributed to further insecurity, by freeing the guilty and holding the innocents in prison, fostering their grievances, rather than curbing terrorism. It is therefore a considerable gap in performance, with a direct impact on the State’s ability to claim effective sovereignty through counterterrorism. It is also worth noting that such failure was exacerbated by the State’s responsibilities in pushing local populations to denounce, which means that numerous people felt exposed and unsafe when the alleged terrorists were finally released.

Additionally, if the issues with evidence were especially emphasized by justice officials during the interviews, this study contends that other elements, that were often downplayed, obstructed the justice process’ contribution to counterterrorism. First of all, the research revealed that 86% of terrorism-related cases concerned charges of mere association. This is especially concerning in view of how the offense of ‘association’ has been poorly defined in the penal code, leading to its use it as a ‘catch-all’ tool in the hands of military, law enforcement, prosecution and judges, and allowing to arrest and at times even convict alleged terrorists on very flimsy basis. The interviews further revealed how such indiscriminate use of the ‘association’ charge has

been responsible for the widespread perception that the justice system ultimately was only able to go after people who were in the wrong place at the wrong time, rather than pursuing dangerous terrorists.

While normal citizens could be easily charged with ‘association’, it appears that the security forces regularly escaped accountability even for serious episodes of violence perpetrated in the course of counterterrorism operations. Instead, these episodes were often downplayed because perceived as somewhat morally justifiable in the context of the asymmetrical war against terror.

When examining the quality of justice proceedings, it should not be ignored that the underlying systemic weaknesses of justice in Niger were bound to also impact the counterterrorism framework. However, the elements highlighted by the present research are either specific to terrorism (overreliance on association charge), or considerably enhanced by the security agenda (the involvement of security forces in preliminary investigation arguably led to both poor evidence and increased violence). In fact, it can be argued that the specific approach to terrorism and, in particular, its widely accepted exceptionalism is at the roots of such failures in the quality of the proceedings. Obviously, the insecurity circumstances that led to the military taking over during initial arrests are a direct result of the exceptional measures adopted during the state of emergency to address what was perceived as an existential threat to the State. But even more significantly, framing terrorism as an exceptional threat leads to the automatic creation of ‘enemies’ and heroes, which is here actualized through the criminalisation and widespread use of ‘association’, on the one hand, and the impunity of security forces, on the other. However, and as revealed by the Nigerien experience, the transposition of these categories to the criminal model leads to an overly punitive, but also ultimately ineffective approach with respect to accountability.

LEGITIMACY THROUGH ACCOUNTABILITY: AN OPEN BATTLE

Finally, to conclude the analysis of the justice chain’s performance, this chapter addressed the legitimacy of legal proceedings through the perception of the audience. Indeed, it is argued that the State’s claims to sovereignty will be credible only when its delivery of justice is visible to the population.

In these regards, the research found that the Nigerien legislator made an uncommon choice in the context of high security proceedings, such as those related to terrorism, by keeping the hearings public. However, in practice, the centralisation of anti-terrorism institutions meant that

the proceedings took place too far from the most affected region, thus becoming invisible to the local population. This has contributed to the perception of poor performance by ‘Niamey’s justice’, accused of arresting the innocent and freeing the guilty.

To address these concerns, special hearings were organized and held in Diffa in 2018. The findings show that this initiative was highly appreciated by the local population, that filled the courtroom. Interestingly, the interviewees related positive recollections of the hearings, regardless of the limited number of convictions, because the process was perceived as fair. This is a notable result, as it shows that even a poor ‘quantifiable’ performance by the justice apparatus was welcomed by the most affected citizens, and interpreted as a positive sign of the State’s presence. Ultimately, the perception of fairness may be more relevant to the negotiation of sovereignty than the achievement of punishment.

The Diffa hearings confirmed, once more, State officials’ serious intention to ‘bring justice closer to the citizens’, and their willingness to adapt and evolve to reach this objective. Nonetheless, the security context contributed to hinder the performance of justice also in this case, as the pervasive insecurity in the regions where terrorist groups operate has so far prevented the organization of other delocalized hearings, making the Diffa experience an isolated success: anti-terrorism judicial proceedings continue to be conducted in Niamey.

Overall, this composite analysis of Niger’s effort to bring terrorists to justice led to mixed results in terms of performance, as some positive interventions and the notable progress of the anti-terrorism bodies overtime were clouded by inconsistencies in the approach to the cases and plagued by the overwhelming weakness of initial investigations.

But behind this assessment, the findings of this chapter appear to highlight how the objectives of counterterrorism, characterised as security efforts against an exceptional threat, not only do not align with the goals of the justice process but, when forced onto it, end up curtailing its performance and, ultimately, its credibility.

CHAPTER VI

REHABILITATION AND RECONCILIATION IN DIFFA: ALTERNATIVE RESPONSES TO THE ‘EXCEPTIONAL’ ENEMY

“There was a man I have met, and his testimony shocked me. He told me: ‘I have been arrested. I have done nothing. They sent me to prison for two years and a half, almost three. In this time, my wife got pregnant from someone else. When I got back, we divorced. I wanted to get married again, but no one would have me, for they say I am a terrorist.’ This situation poses a lot of issues.”⁵⁷⁰

An agent working for a human rights defense body in Niger remembers the experience of former detainees accused of terrorism.

“I can tell you clearly that there are two completely different processes, but there are some distinctions to be made. The cases treated by justice are people who have been arrested, while on the other side (that of the so-called “repentants”) there are people who have voluntarily accepted to leave their weapons and come learn a trade to change their life. It is as it is usually done in case of rebellions and other conflicts. People leave their weapons, an amnesty is done, and then that’s it. Honestly, any measure that is conducive to peace, I have no problem with.”⁵⁷¹

A local magistrate considers the advantages of the “extended hand” policy, which promoted the rehabilitation of former Boko Haram members having “repented”.

⁵⁷⁰ Author’s interview with anonymous national human rights defender, Niamey (27 January 2020).

⁵⁷¹ Author’s interview with a local magistrate, Diffa (04 February 2020).

INTRODUCTION

It is inevitable that efforts to negotiate sovereignty through the provision of security will be most significant in the areas most affected by violence. For the State of Niger, then, regaining control over the Diffa region, following the 2015 surprise attacks by Boko Haram, has been a crucial priority to consolidate basic legitimacy in a traditionally peripheral region.

In the past years, Diffa and the neighbouring villages have experienced not only the atrocities perpetrated by Boko Haram in its different factions, but also the restrictions imposed by the state of emergency and the harassment of security forces. If justice's performance in pursuing accountability of alleged 'terrorists' is a key contribution to public safety, as examined by the previous chapter, it is also not enough to face the complexity of this context. Accordingly, this research now focuses on the justice chain's effectiveness in promoting rehabilitation. While often relegated to second place among the objectives of the justice process, rehabilitation remains nonetheless significant in the effort of curtailing recidivism, and thus ultimately curbing insecurity. Beyond that, in the context of Niger's counterterrorism campaign, rehabilitating means managing the risks posed by especially vulnerable populations, and as such is a significant element in the process of stabilising the Diffa area, which remains affected by instability to this day.

In the framework of rehabilitative intervention for presumed or assured 'terrorists', public policy in Niger has undertaken an interesting bifurcation. On the one hand, the thousands of individuals who have been arrested and detained on the basis of terrorism-related charges are entitled to rehabilitation support. That is especially true after long periods spent in detention, as re-entry into social life can become particularly challenging. On the other hand, in December 2016, the national government has inaugurated a regional 'policy of the extended hand', aiming to encourage defections from Boko Haram by promising forgiveness and rehabilitation to former members who accepted to surrender. In doing so, a new target group of rehabilitative intervention has been created, that of so-called 'repentants'.

The concurrent analysis of how rehabilitation is pursued for the two groups presents a dual interest here. In practical terms, rehabilitative measures conceived for the 'repentants' have been since partially extended to the population of former detainees. Accordingly, the study of one without the other would have been incomplete. Even more interestingly, however, the

circumstances and the political reasoning behind the different choices for the two groups open new questions over the treatment to be reserved to the “enemy” that is created through counterterrorism measures. Indeed, they reveal different understandings of what rehabilitation entails, its relationship with security and, ultimately, with sovereignty. Rehabilitation of former-detainees is conceived as a corollary to accountability, and is as such inevitably associated with the preeminence of legality. Rehabilitation through forgiveness of ‘repentants’, instead, suggests a vision where pacification takes precedence over the rule of law. Yet their discrepancy can, by itself, undermine credibility of the State’s approaches to the crisis faced by local populations. The present chapter wishes to evaluate the State’s performances in the two contexts, as well as the potential for convergence between accountability and rehabilitative approaches. But more importantly, it wishes to uncover divergent responses to the exceptionality of terrorism and question how they shape of the role of the Sovereign in contrasting it.

In order to examine State’s performance in securitizing through rehabilitation, this chapter begins by discussing this key concept and offers an operational framework for a coherent analysis of performance in this area. This discussion is then anchored in a contextual overview of the situation in the Diffa region, to clarify the background against which rehabilitative efforts take place. The core of the chapter is dedicated the examination of rehabilitation of current and former ‘terrorist’ detainees, juxtaposed to those of the so-called ‘repentants’. In concluding, the preliminary outcomes of rehabilitative processes are investigated by focusing on the perspective of the “audience”, here identified with local populations and their perception of the action of State as a security provider.

1. PURSUING SECURITY THROUGH REHABILITATION

Prior to launching in the discussion of rehabilitation-oriented initiatives in Niger and their contribution to stabilisation of the Diffa region, this chapter sets out to lay down the literary and empirical basis that define its arguments. First, it considers the meaning of “rehabilitation” and proposes an operational understanding of its key components to guide the following analysis. Then, it paints the context of insecurity and socio-economic hardship faced by the local population, which is essential to define the key objectives of the State in promoting stabilisation, and the place of rehabilitation amongst them.

1.1 EXAMINING REHABILITATION AS A GOAL AND AS A PROCESS

The importance of rehabilitation in criminology has been subjected to alternate fortune, at times extensively endorsed, and at other times thoroughly rejected⁵⁷². Its relationship with the promotion of public safety is a direct one: by addressing and “correcting” the offender’s tendency and/or opportunity to infringe the law, rehabilitative intervention aims to promote pro-social behavior, thus ultimately reducing crime.⁵⁷³

But what does “rehabilitation” entail as a public policy goal? Is it compatible with the pursuit of accountability that is perceived by the Nigerian justice actors as the key objective of their work in the context of counterterrorism? What model of analysis allows to capture State’s performance in securitizing through rehabilitation? To answer these questions, this study explores the criminology contributions to the rehabilitation debate, in order to illuminate new aspects of securitization theory.

ANOTHER CONTESTED TERM

Rehabilitation is widely recognised as a primary object of public policy in the area of criminal justice, and specifically of correctional and post-release interventions. And yet this complex concept is far from being homogeneously defined and plainly understood. In academia, the term rehabilitation is often regarded with suspect for different reasons: it is accused of inherent ambiguity⁵⁷⁴, considered inefficient and ultimately unhelpful⁵⁷⁵, associated with a medical understanding of correction or, on the other end of the spectrum, with an evangelical and moralist view of justice.⁵⁷⁶ The present study embraces the conceptualisation of rehabilitation as multi-dimensional, at the same time rejecting its classification as a murky and unproductive term. For it is in its complexity, this research argues, that the idea of rehabilitation clarifies the relationship between its multiple components and thus provides a useful direction to public action.

It is useful here to look into the traditional criminal justice understanding of the notion of rehabilitation, to understand this complexity. Hudson, for instance, offers a brief but layered definition: “*taking away the desire to offend, is the aim of reformist or rehabilitative*

⁵⁷² Shichor, D. (1992). *Following the Penological Pendulum: The Survival of Rehabilitation*.

⁵⁷³ Hart, H. L. A. (n.d.). *Punishment and Responsibility: Essays in the Philosophy of Law*. In *Punishment and Responsibility*. Oxford University Press.

⁵⁷⁴ Raynor, P., & Robinson, G. (2005). *Rehabilitation, Crime and Justice*. Palgrave Macmillan UK.

⁵⁷⁵ Shichor, D. (1992). *Following the Penological Pendulum: The Survival of Rehabilitation*.

⁵⁷⁶ Ward, T., & Maruna, S. (2007). *Rehabilitation*. Taylor & Francis.

punishment. The objective of reform or rehabilitation is to reintegrate the offender into society after a period of punishment, and to design the content of the punishment so as to achieve this. (Hudson, 2003, p. 26) »⁵⁷⁷.

Some key elements emerge from this definition that provide a meaningful basis for further operationalization of the concept of rehabilitation:

- Rehabilitation is not only an objective of public policy, a final destination, **it is also to be intended as a process**. In this view, the event of re-entry, generally identified with the release from prison, is but one moment in the long-term endeavor towards (re)acquiring a constructive social role. And while the transition that takes place with release is a significant point for rehabilitation, it is neither its beginning (since the process should start during the application of punishment), nor its culmination (for rehabilitation continues after punishment), rather representing a crucial passage. In the Nigerian context, this would mean that rehabilitation intervention should embrace both the time spent in detention, the release process, and continue during re-entry into society. This prolonged approach would be especially relevant when the release from prison also entails a relocation in an especially remote area of the country.
- The notion of **rehabilitation entails a necessary interaction between personal and social dimension**, and conceives them both as necessary. At times this duality is reflected in the distinction between a “reformatory model” of rehabilitation, which traces the causes for criminal behavior to the individual and there situates the necessary change, opposed to a “reintegration model”, focusing instead on achieving social inclusion to prevent recidivism. However, in reality the two components are often accepted as mutually reinforcing.⁵⁷⁸ When applied to individuals who have joined terrorist organizations, this would entail that rehabilitative measures would target both personal and social drivers of recruitment.
- The proposed definition of rehabilitation entails a **relationship of this process to punishment**. The terms of this relationship are, however, unclear. On the one hand, it appears that rehabilitation is separated from punishment: it follows punishment, thus representing a different stage in the experience of the individual who has been found

⁵⁷⁷ McNeill, Fergus (2014) *Punishment as rehabilitation*, in: Bruinsma, G., & Weisburd, D. (Eds.). (2014). *Encyclopedia of criminology and criminal justice*. Springer, New York, pp. 4195-4206.

⁵⁷⁸ Raynor, P., & Robinson, G. (2005). *Rehabilitation, Crime and Justice*. Palgrave Macmillan UK. p.8.

guilty. On the other hand, it is stated that punishment should be oriented to favouring rehabilitation, thus they appear connected. Can this paradox be solved?

This debate is far from new and has directly shaped the transposition of rehabilitation into public policy.

In his *Punishment and Responsibility*, Hart argued that rehabilitation, by its nature, excludes the suffering that is distinctive of punishment, and contradicts some of its basic tenants, such as proportionality to the seriousness of the offense.⁵⁷⁹ In this view, punishment and rehabilitation not only necessarily diverge, they are inherently incompatible. This contrast also animated the rise of “restorative justice”, which builds on the idea of restitution to achieve rehabilitation, and emerges in opposition to “retributive justice”, focused on punishment.⁵⁸⁰ Adopting criminological lenses here is especially helpful to understand the potential for innovation in conceiving rehabilitation as a priority over retribution. Indeed, the proponents of restorative justice as a “new paradigm” understand crime not as a violation of the individual against the State, but primarily as a wrong against the victim.⁵⁸¹ The rehabilitation of the offender, then, passes through repairing the harm caused to the victim, to regain a place in society, rather than entailing atonement through punishment.

In this approach, the criminal sentence loses its deterrent value and the State ceases to utilize it to defend law and order by preventing crime. But at the same time, it opens up to the opportunity for reconciliation. Indeed, the openness to dialogue, reparation and reconciliation has also driven the transposition of multiple restorative justice concepts to transitional justice approaches and post-conflict situations. While different authors have cautioned against uncritical transfer of these notions from a context of ordinary domestic justice to the aftermath of civil conflict, they have also identified their appeal in this possibility to work for a peaceful future while legitimising State institutions.⁵⁸² This forward-looking element of rehabilitation becomes especially relevant in the aftermath of collective violence.⁵⁸³

⁵⁷⁹ Hart, H. L. A. (n.d.). *Punishment and Responsibility: Essays in the Philosophy of Law*. In *Punishment and Responsibility*. Oxford University Press.

⁵⁸⁰ Barnett, R. E. (1977). Restitution: A New Paradigm for Criminal Justice. *Ethics*, 87, 279–301; Zehr, H. (1985). *Retributive Justice, Restorative Justice*. US Office of Criminal Justice.

⁵⁸¹ Daly, K. (2013). The punishment debate in restorative justice. In J. Simon & R. Sparks (Eds.), *The sage handbook of punishment and society* (pp. 356-374). London, UK: SAGE Publications.

⁵⁸² Daly, K., & Proietti-Scifoni, G. (2011). *Reparation and Restoration*. Oxford University Press; Clamp, K., & Doak, J. (2012). More than Words: Restorative Justice Concepts in Transitional Justice Settings. *International Criminal Law Review*, 12, 339–360.

⁵⁸³ Clamp, K., & Doak, J. (2012). More than Words: Restorative Justice Concepts in Transitional Justice Settings. *International Criminal Law Review*, 12, 339–360.

But can the tension between punishment and rehabilitation only be solved with a strictly dichotomic choice? It is argued here that there are opportunities for convergence between the objectives of traditional criminal justice and rehabilitation goals. This view is indeed reflective of most contemporary approaches to criminology⁵⁸⁴ and is also the one that was proposed by Nigerien magistrates. Such convergence can happen when the notion of punishment is abandoned, in favour of accountability. In the words of Nigerien judges, accountability is achieved when justice is capable of “*restoring an equilibrium*”⁵⁸⁵ that has been broken through the crime, but punishment is not the end goal. Rather, the objective is to attribute the sanction with “*discernment*”⁵⁸⁶, by connecting it to individual responsibility, ascertained through a fair process. If the objective of the sanction is to restore the social balance, there is no reason why it should exclude rehabilitation. Rather, rehabilitation seems a necessary aspect of it. This capacity to both pursue accountability and work for rehabilitation would bring together the backward-looking element of justice (the need for an appropriate response to the wrong that was perpetrated), with its forward-looking component (the opportunity for social reconciliation), a combination that is extremely relevant in post-conflict situations and in transitional justice.⁵⁸⁷ In this perspective, the State would be able to respond to terrorism as a crime against the State and at the same time to address its devastating effects on its direct victims among the population.

When it comes to the practices that should support rehabilitation of offenders, the way that the tension between retributive justice and rehabilitation is addressed has direct consequences on policy choices. Are accountability and rehabilitation pursued as two necessary routes to public safety and thus implemented as complementary? Or is their potential convergence denied in practice? The analysis of the rehabilitative efforts of the government of Niger toward “terrorist” detainees and the group of Boko Haram repentants shines an important light on the practical application of these concepts.

⁵⁸⁴ Daly, K. (2013). The punishment debate in restorative justice. In J. Simon & R. Sparks (Eds.), *The sage handbook of punishment and society* (pp. 356-374). London, UK: SAGE Publications.

⁵⁸⁵ Author’s interview with judge at the specialised pôle, Niamey (29 January 2020).

⁵⁸⁶ Author’s interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

⁵⁸⁷ Clamp, K., & Doak, J. (2012). More than Words: Restorative Justice Concepts in Transitional Justice Settings. *International Criminal Law Review*, 12, 339–360.

REHABILITATION AS A NIGERIEN PRIORITY

In order to understand its relevance within the context of counterterrorism in Niger, the issue of rehabilitation was discussed with a range of diverse actors. This included representatives of the justice system both at policy level (in the Ministry of Justice) and those directly involved in the adjudication of terrorism cases; representatives of the Haute Autorité à la Consolidation de la Paix (HACP), who hold a presidential mandate on reconciliation, but also civil society members and community leaders whose action focuses on the most affected areas in the Diffa region. Such diversity allows to investigate variation in degree of importance attributed to rehabilitation as an objective, as well as different views concerning the reasons why rehabilitation should be pursued.

The analysis shows that the understanding of rehabilitation as a goal of public policy is nuanced. Actors working within the justice system often perceive rehabilitation as a somewhat secondary concern with respect to their primary role of pursuing accountability, as per the analysis in chapter V⁵⁸⁸. Yet, this distinction regards their own role, and should not be misconstrued as an attribution of limited importance to the rehabilitation process in itself. Instead, on this point broad agreement emerges across professional specialties, on the relevance of rehabilitative objective, particularly in the context of counterterrorism.

There are a number of reasons why terrorism makes rehabilitation more urgent. Justice actors, as well as other institutions and civil society organizations working more directly on rehabilitative interventions, consider that the terrorism label will deeply influence social attitudes towards those returning from prison.⁵⁸⁹ They stated that resistances to the re-entry of these individuals were to be expected, both due to the exceptional and dishonourable nature of terrorism, and to the diffused practice of false accusations, which would cause frictions once those who had been wrongly arrested would return to their communities.⁵⁹⁰ A second element adding to the urgency is that the distance of justice proceedings from the affected region could raise further tensions upon return:

⁵⁸⁸ See “*Measuring performance of the criminal justice system through accountability*”, Chapter V.

⁵⁸⁹ Author’s interview with a lawyer, Niamey (30 April 2018); Author’s interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020); Author’s interview with anonymous national human rights defender, Niamey (27 January 2020); Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020); Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020).

⁵⁹⁰ Author’s interview with anonymous United Nations volunteer providing legal assistance to individuals detained for terrorism-related offences in the prisons of Kollo and Koutoukalé, Niamey (11 November 2017); Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020).

*“Most of these people (terrorist suspects) come from the interior of the country or the extreme east, around Diffa. When they get back, populations refuse to accept them, they are stigmatised and face hostility to their reintegration, because in the view of those who have not assisted to their trials... they think there was too much indulgence and cannot explain it since we are talking of terrorism cases. This is the other challenge for these proceedings. And this is the exclusive competency of the State: it has to be in charge of the treatment and reintegration of those who have been involved in terrorism cases.”*⁵⁹¹

This testimony not only points out a clear connection between the necessity to focus on rehabilitative intervention and the potential for social unrest, but in doing so it clearly anchors reintegration in the prerogative of the sovereign State, as the prime provider of security, particularly in relation to terrorism.

In other cases, interviewees focused more on the potential danger deriving from the former detainees, rather than the reaction of local populations. In this light, concerns were repeatedly expressed over the deteriorating living conditions in the prisons, the delays in the judicial proceeding and the likely frustration deriving from this treatment, coupled with the potential for further “radicalisation” in the closed prison setting.⁵⁹²

It is therefore possible to begin this analysis with a clear-cut recognition of rehabilitation of individuals formerly accused or condemned for terrorism as a collective objective of public policy in the area of counterterrorism. Its role is directly linked to ensuring security. This, in turn, associates the State’s performance in pursuing rehabilitation with its legitimacy as the custodian of public safety. Some doubts remained, however, with regards to the role of the justice system specifically in the pursuit of rehabilitation.

At a first glance, it appears that magistrates are concerned with reintegration, and they attribute competency over it to their own Ministry, but do not see themselves as directly involved in it:

*“As far as rehabilitation and reintegration go, well there is a department in the Ministry of Justice, it may be under the department of corrections actually. But I think some activities are taking place in that area. This makes sense, as it is justice that is responsible for handling the accused, therefore the same institution also has an important role to play in their rehabilitative process. I am not sure exactly what is being done, but justice has a role to play since it is its competency to handle the detainees.”*⁵⁹³

⁵⁹¹ Author’s interview with a lawyer, Niamey (30 April 2018).

⁵⁹² Author’s interview with high-level official of the Ministry of Justice, Niamey (8 May 2018); Author’s interview with a judge of the specialised pôle, Niamey (27 January 2020); Author’s interview with anonymous national human rights defender, Niamey (27 January 2020); Author’s interview with anonymous United Nations official in Niger, Niamey (24 January 2020).

⁵⁹³ Author’s interview with a judge formerly with the specialised pôle, Niamey (27 January 2020).

This confirms and further clarifies the results of chapter V: rehabilitative intervention is understood as a prerogative of the justice system, but it is also clearly limited to what happens after adjudication. In other words, it is mostly a concern of policy-makers in the Ministry, and of the correctional system, but it is not perceived as directly concerning the work of the magistrates during investigation and adjudication. In this view, rehabilitation is conceived as the conclusion of the justice process, relevant from the time of the application of the sanction.

Other interviews pointed out that there had been discussions between the Ministry of Justice and the Ministry of Interior to determine the primary responsibility over the rehabilitation and reintegration phase.

“The Ministry of Justice is responsible for sending people to prison, and it follows that it should be the one to ensure support after release. This would allow us to make the connection between those who have been reintegrated, cases where there is risk of recidivism, and to ensure follow-up. The same Ministry charged with adjudication should handle reintegration, to allow for evaluation: recidivism would provide the opportunity to study the impact of decisions taken in courts. (...) in cases of terrorism, however, this competency has gone to the Ministry of Interior.”⁵⁹⁴

According to these testimonies, there is a fundamental lack of clarity over the attribution of competences concerning rehabilitative intervention within the justice system, and, furthermore, there is a potential overlap between the role of the Ministry of Justice and that of the Ministry of Interior. It will be a task of the forthcoming analysis to assess to what extent this impacted the effectiveness of rehabilitative intervention for individuals arrested and detained in relation to “terrorism” charges, for the Boko Haram repentants, and for victims of terrorism.

THREE DIMENSIONS OF REHABILITATION: A FRAMEWORK FOR ANALYSIS

As was done for *accountability* in the previous chapter, it is necessary here to provide an operational framework for the analysis of *rehabilitation* in terms of effectiveness.

First, the target group of *accountability* in the context of justice proceedings is self-evident: it coincides with the targets of counterterrorism judicial action, meaning all individuals accused of terrorism offences in Niger. This target group is now broadened in the context of *rehabilitation*, and extended to: individuals accused of “terrorist” offences⁵⁹⁵ as well as former

⁵⁹⁴ Author’s interview with anonymous prosecutor of the specialised pôle, Niamey (6 February 2020).

⁵⁹⁵ More precisely those having spent some time in detention. Generally, rehabilitation in the justice system is mainly addressed to individuals who are found guilty (whose change is thus necessary to return to society). Given the context of counterterrorism judicial proceedings in Niger, and the long period spent in pre-trial detention, it is considered here that participation in the justice system as an accused who has been subjected to prolonged

Boko Haram members having joined the ‘policy of the extended hand’. The ratio for this choice is that both groups could have been object of judicial proceedings, on the basis of their real or presumed association with the group. Given their similar circumstances, the diversity in their treatment can be relevant to investigate meanings attributed to rehabilitation in a securitized context. To a limited extent, the study also considers rehabilitation support afforded to victims, as this would also likely require action from the justice system.

Having clarified the target, it is now necessary to provide a framework to assess effectiveness of rehabilitative policies. Once again, one potential solution would be examining crime rates as the final outcome of rehabilitative practices, and, more precisely, recidivism rates. However, it is estimated here that evaluating recidivism rates would constitute an inappropriate approach to measuring effectiveness, for the simple reason that rehabilitation is a long-term objective. In the case of Niger, the first waves of terrorism-related arrests took place in 2015, to continue throughout the following years. Even among these first individuals arrested, releases began to take place only by mid-2017. In these circumstances, considering reoffending rates of only a minority of individuals arrested for terrorism-related offences, and over a time-span that would extend, for the most fortunate cases only, solely on a period of three years, could hardly count as a measure of recidivism.

Additionally, even in different circumstances, focusing on recidivism rates would tell us very little of the performance of the State in conceiving and applying rehabilitation as complementary to accountability.

Accordingly, this study prefers to rely on the analysis of the different dimensions that appear relevant in affecting the success of the rehabilitative process. Academic literature on reintegration of former prisoners has pointed out how effective rehabilitation practices should address three interconnected levels⁵⁹⁶:

- **Individual level:** refers to the personal characteristics and circumstances that influence the likelihood of reoffending. They include non-modifiable traits (age, gender), but also physical and psychological health, addictions, behaviour and attitudes.

deprivation of liberty is a sufficient condition to be needing support following release, regardless of whether the person was found guilty.

⁵⁹⁶Shinkfield, A. J., & Graffam, J. (2009). Community Reintegration of Ex-Prisoners: Type and Degree of Change in Variables Influencing Successful Reintegration. *International Journal of Offender Therapy and Comparative Criminology*, 53(1), 29–42.

- **Subsistence or social level:** addresses the environmental circumstances that affect re-entry and, in turn, recidivism rates, such as employment, financial circumstances, living conditions and family relations.
- **Support or systemic level:** recognises that offenders are a group whose circumstances are considerably influenced by the organized bureaucracies. Justice systems and other actors who participate in the rehabilitative process can affect its success rate to a considerable extent, through the circumstances they themselves face, for instance overcrowding conditions, and through the objectives that they are incentivised to pursue.

Importantly, reintegration analysis models focusing on social support allow to identify and focus on the interconnectedness of these individual, community, and systemic levels of analysis⁵⁹⁷.

Adopting this framework for analysis, this final chapter will look into the results of rehabilitation policies addressed to the aforementioned target groups through the three key dimensions and their interaction. This will be instrumental to assessing the role of rehabilitation, its successes and failures, in promoting the recognition and credibility of the State as the ultimate authority to restore security in areas affected by the exceptional threat of terrorism.

1.2 A WIDER LOOK: SECURITY AND SOCIO-ECONOMIC CONTEXT FOR REHABILITATION

When evaluating the performance of the criminal justice system in achieving accountability of terrorist offenders, the analysis was limited to the confined environments and processes of judicial proceedings. While those contexts are varied (arrest proceedings, investigations, court hearings, prisons), they are nonetheless distinctive and to certain extent separated from day-to-day life. Rehabilitation, however, cannot be pursued solely within institutions. As was stressed, the concept in itself entails the inclusion of a social dimension, necessary to its completion. Accordingly, assessing the performance of the State in pursuing rehabilitation requires the appreciation of the context in which the process is deemed to take place.

⁵⁹⁷ Wright, K. A., & Cesar, G. T. (2013). Toward a More Complete Model of Offender Reintegration: Linking the Individual-, Community-, and System-Level Components of Recidivism. *Victims & Offenders*, 8(4), 373–398.

This study already includes a description of the evolving security circumstances in the Diffa region around 2015.⁵⁹⁸ Nonetheless, it is here necessary to propose a more punctual account of the relationship between contextual factors, on the one hand, and priorities and expectations towards rehabilitation, on the other, taking into account the security situation, socio-economic circumstances, as well as issues related to the presence of the State.

UNDERLYING CIRCUMSTANCES: THE DIFFA REGION BEFORE 2015

If the 2015 Boko Haram attacks on Bosso and Diffa have been generally regarded as unexpected, in both timing and exerted violence, their destructive effect on the entire region was facilitated by multiple pre-existing circumstances.

In 2017, the Nigerien government prepared the “*Plan for crisis resolution*”, a strategic document aiming to plan and guide stabilising intervention in the region.⁵⁹⁹ The plan identifies different root causes facilitating the spread of the security crisis.

First, historical and cultural linkages among the population of the Lake Chad Basin facilitated the infiltration of Boko Haram in the beginning, as well as the ripple effects of the crisis later on. While the group rhetoric claims to be inspired rather by the ancient Sokoto Caliphate⁶⁰⁰, their physical presence across Nigeria, Chad, Cameroon and Niger came to occupy an area around the lake that was formerly part of the Kanem-Bornu empire, whose rule extended, albeit in different forms, until the end of the nineteenth century⁶⁰¹. Until today, the population there continues to share not only cultural and family ties, including main language, but also economic interests. So much so, that in the region the naira, the Nigerian currency, is more common than the CFA franc. In addition, national borders are especially permeable in the region: “you can go from Diffa to the near Nigeria without even realizing”⁶⁰².

⁵⁹⁸ See “*The 2015 turning-point: terrorism as an internal threat*”, Chapter III and “*Disruption and exceptional reaction*”, Chapter IV.

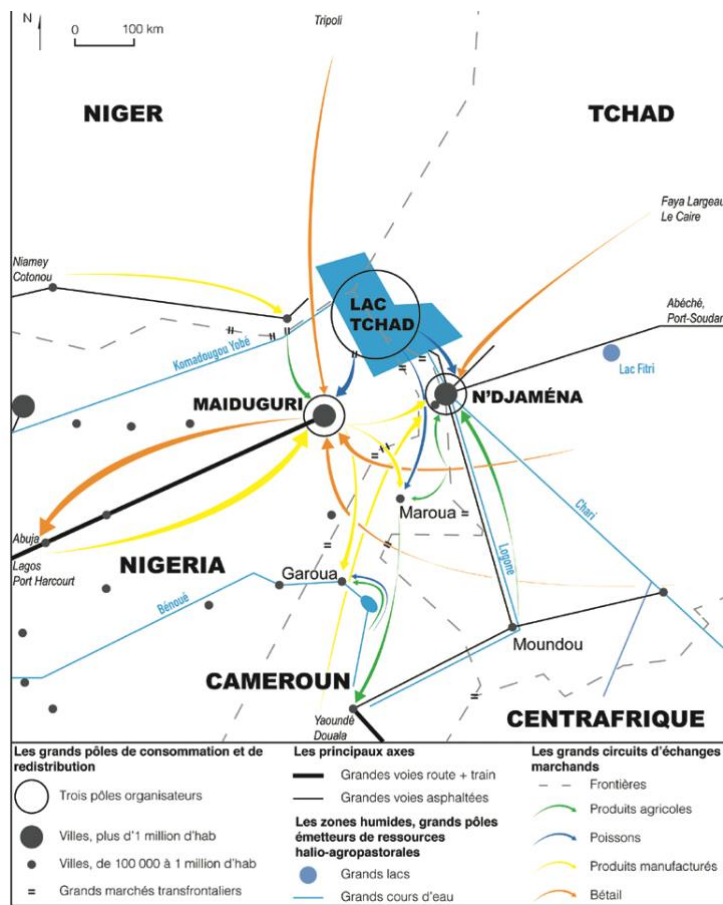
⁵⁹⁹ République du Niger (2017), Programme de Reconstruction Post Conflit de la Région de Diffa, Document de Sortie de Crise (interim version, non finalised).

⁶⁰⁰ Harnischfeger, J. (2014). Boko Haram and its Muslim critics: Observations from Yobe State. In *Boko Haram: Islamism, politics, security and the state in Nigeria*. African Studies Centre.

⁶⁰¹ Pieri, Z. P., & Zenn, J. (2016). The Boko Haram Paradox: Ethnicity, Religion, and Historical Memory in Pursuit of a Caliphate. *African Security*, 9(1), 66–88.

⁶⁰² République du Niger (2017), Programme de Reconstruction Post Conflit de la Région de Diffa, Document de Sortie de Crise (interim version, non finalised).

FIGURE 10: THE LAKE CHAD BASIN



The degradation of the economic conditions also increased vulnerability in the region. Across 2012 and 2013, the area was affected by multiple flooding of the Komadougou river, the natural frontier between Niger and Nigeria.⁶⁰³ This aggravated food insecurity, already threatened by the recurring droughts, despite the abundance of agricultural and pastoral resources and highly adaptive economic practices in the lake basin⁶⁰⁴. The mounting pressure of Boko Haram on Nigeria added to the economic crisis, as movement between the two

countries became increasingly difficult during 2014, impacting trade. In parallel, the first waves of refugees, fleeing the group's violence, arrived on Niger's soil⁶⁰⁵. As a result, employment opportunities became scarce, leaving the growing youth population to be especially affected.

The strategy of the group exploited these vulnerabilities to its advantage in a variety of ways. On the one hand, Boko Haram was able to progressively impose its own control on the most relevant economic activities of the region, most notably the cultivation of pepper and the fishing and commercialization of smoked fish, enforcing the payment of a "tax" on locals⁶⁰⁶. On the other hand, by progressively extending their preaches on the Niger's territory, group leaders

⁶⁰³ CICR (Janvier-Septembre 2014) Les activités du CICR dans la région de Diffa, available at : <https://reliefweb.int/sites/reliefweb.int/files/resources/faits-et-chiffres-diffa2.pdf>

⁶⁰⁴ Pérouse de Montclos, M.-A., Magrin, G., Seignobos, C., & Gluski, P. (2018). *Crise et développement : la région du lac Tchad à l'épreuve de Boko Haram*. Agence française de développement, p.55-56; Daouda, Y. H. (2020). Poverty and living conditions with Boko Haram in the Lake Chad Basin: The case of southeastern Niger. *Review of African Political Economy*, 47(163), 126–134.

⁶⁰⁵ Gouvernorat de Diffa; Système de Nations Unies, ONGs, (Avril 2014), Rapport de la mission conjointe de suivi de la situation humanitaire de la région de Diffa : <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/Rapport%20Mission%20Inter%20agences%20d%27%27C3%A9valuation%20C3%A0%20Diffa%20VFF.pdf>

⁶⁰⁶ Pérouse de Montclos, M.-A., Magrin, G., Seignobos, C., & Gluski, P. (2018). *Crise et développement : la région du lac Tchad à l'épreuve de Boko Haram*. Agence française de développement, p. 174-175.

operating in the Diffa region were able to exploit to their advantage the growing frustration of young people with respect to economic opportunities, effectively increasing their recruitment capabilities. Indeed, the result of the interviews confirms the findings of local studies: motivation for joining Boko Haram, at the time, was mainly connected to material incentives, rather than ideological conviction⁶⁰⁷.

“In order to talk of stabilisation of the Diffa region, it would be necessary, at first, to draw a connection between cause and effect. Looking at causes, we have to ask: what pushed people to approach Boko Haram? There is a crucial element here: the economic situation in the region. At first many young people left to join the group, and the overwhelming majority was moved by economic reasons. Many of them left and then came back with bikes, money, married... Later on, others joined thinking they would find the same advantages and sadly, they got caught there and could not come back. Because people were reduced into poverty, the difficult economic situation motivated the first group to go.”⁶⁰⁸

The very reason why the strategy enacted by Boko Haram was effective, both in its economic objectives and in its recruitment practices, was the absence of the State, that was at the time unable to provide the economic opportunities and to exercise the necessary territorial control to prevent the process of propagation and empowerment operated by the group⁶⁰⁹. And it is precisely this shortfall of authority in the period preceding the crisis, and the State’s inability to prevent its escalation, that make effectiveness in achieving stabilisation in the aftermath of 2015 so decisive in the negotiation of sovereignty.

REACTING TO AN EXCEPTIONAL CRISIS: STATE’S RESPONSES TO BOKO HARAM

The eruption of the crisis on Niger’s soil in early 2015 also represent the culmination of Boko Haram’s stranglehold on the Lake Chad Basin. While attacks on the Diffa region continued in the following years, albeit at varying intensity, 2016 already saw a notable decline in the group’s territorial control and in the power of its strikes. The interviews cite the wide-spread perception that governmental forces had gained the upper hand against the terrorist group as the reason for the launch of the “*politique de la main tendue*”, or “*policy of the extended hand*” which aimed at promoting the demobilisation of as many members of the groups as possible⁶¹⁰.

⁶⁰⁷ Centre National d’Etudes Strategiques et de Sécurité (CNESS). (2018). *Etude approfondie sur les facteurs de radicalisation en milieux rural, urbain, universitaire et carcéral dans cinq régions du Niger_Rapport Final*, p. 24

⁶⁰⁸ Author’s interview with anonymous N’Guigmi community leader, Diffa (4 February 2020).

⁶⁰⁹ Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (5 February 2020).

⁶⁰⁹ Author’s interview with local administrative authority, Diffa (3 February 2020).; Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

⁶¹⁰ Author’s interview with anonymous prosecutor of the specialised pôle, Niamey (6 February 2020).

Indeed, by 2017 the region was secured enough to organize the transfer of the judges and hold the first real enquiries into terrorism-related cases.

A number of reasons can explain this progressive erosion of Boko Haram's strength, and most notably the internal power struggle between the different factions, particularly among those led by Shekau and those who recognised the leadership of al-Barnawi. At the same time, the group was also quickly losing support from the local population and even within its ranks, due to increased indiscriminate violence against local communities.

Nonetheless, the progressive containment of insecurity should not lead to underestimating the consequences of pervasive and long-term instability on the daily lives on the population. Over recent years, the strategy of the different factions of Boko Haram has changed, and the area has become the theatre of targeted kidnappings for ransom, which serve to provide financial support to Boko Haram cells and local criminal groups, as well as feeding inter-community conflicts.⁶¹¹ Testimonies of local authorities attest to the fact that persisting danger affects not only the communities, but also the physical presence as well as the functioning of institutions, with public agents perceiving appointment to posts in Diffa as punishment, and, as a consequence, high rates of turn-over in significant posts.

Q: "How do you explain such frequent changes? We are talking of four different governors over four years?"

A: *"In less than three years actually, because I arrived here in 2017, and I have worked with four of them. Well, it is because many people tend to look for better opportunities. Because people here in Diffa, especially public authorities, face many risks. A kamikaze can attack you no matter where, blow himself up, the main goal is to die to go to paradise, as they say. So public officials would rather work in the Ministries or be close to the President than being here."*⁶¹²

Yet, when attempting to provide an account of the main challenges currently faced by the population in the most affected areas, it becomes clear that it is difficult to separate the damage caused by terrorist activities from the aftermath of counterterrorism policies. Faced with the exceptional threat of terrorism, in 2015 the government hastily resorts to the exceptional measures par excellence: the state of emergency.

⁶¹¹ United Nations High Commissioner for Refugees, Danish Refugee Council, International Rescue Committee, protection Cluster. (2018). Rapport d'analyse mensuelle des données du monitoring de protection, Diffa, Niger – Niger :

https://reliefweb.int/sites/reliefweb.int/files/resources/final_rapport_protection_monitoring_diffa_septembre_2018.pdf .

⁶¹² Author's interview with representative of the Diffa governorate, Diffa (3 February 2020).

have been wide-ranging: the following testimony provides a thorough account of their interconnected and long-lasting effects.

“It was the first time that there was a war like that. So, the State was also unprepared and initially quite weak in the intervention. It was only once they realized that it was really serious, and dangerous for the communities, then the State called local populations to leave the islands in the Lak Chad. At the time, people thought the State was going to intervene quickly, and that it would be a matter of two or three months. That there was going to be a military intervention and that it would be soon possible to return. And then, you know here in the Diffa region, and more precisely around Nguigmi, they main economic activities are agriculture, breeding and fishery. And the three were stopped at the same time with the state of emergency.

There was also the prohibition of using bikes to move. Here, many young people do some motorcycle-taxi as an income-generating activity. When this was forbidden, they started to really feel abandoned. And in parallel there was on the other side growing propaganda from the terrorists, hoping to attract young people. ‘When you come with us you will have a moto, and you can use it in the bush as you wish. No-one can tell you no on our territory, while on Nigerien soil the State will impose prohibitions on you!’ Even on the same day, prohibition to circulate on motorcycle caused many youths to join the terrorists.

In fact, it is after the state of emergency that recruitment intensified! Because prior to that, people were afraid to go. There are some who joined because they thought it was their chance to get a weapon, for others it was the hotheadedness of youth. (...) People did not realise they were going to die as well, they did not know the risks.”⁶¹⁶

Appreciating fully the consequences of Niger’s counterterrorism policies in Diffa, and the state of emergency in particular, proves a complex endeavour. The same interviewees have stressed also the warm welcome of the population to the increasing number of troops stationed in the region since 2015, and the firm belief that, together with the state of emergency measures, they signified strong presence by the State, at least in the initial stages.⁶¹⁷ These results also coincide with the outcomes of a 2018 study by the Centre National d’Etudes Strategiques et de Sécurité (CNESS)⁶¹⁸, which confirms the ambiguities in the evaluation of State’s action in this area. Nonetheless, it can easily be argued that the state of emergency contributed to long-term insecurity, both directly and indirectly. Its provisions increased frustrations and provided credibility to the terrorist group’s propaganda, ultimately facilitating recruitment. In addition, by favouring the displacement of the populations living in the islands of the lake, they not only

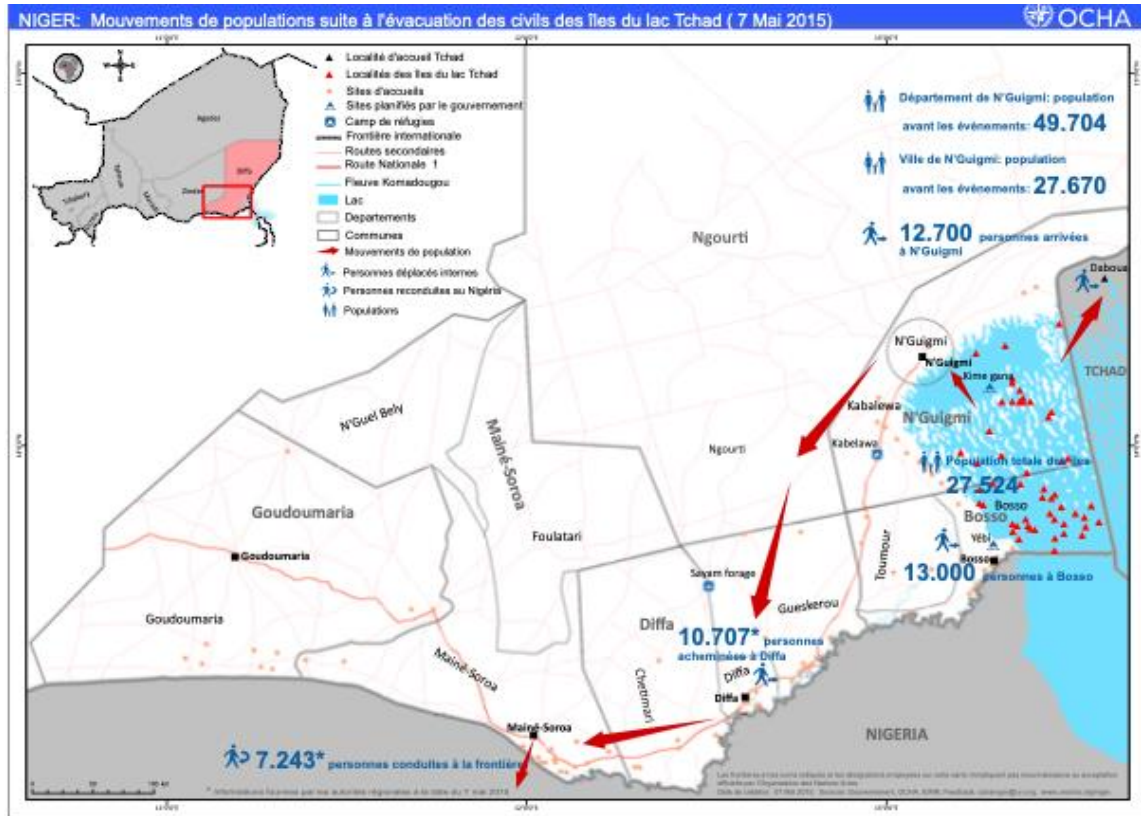
⁶¹⁶ Author’s interview with anonymous N’Guigmi community leader, Diffa (4 February 2020).

⁶¹⁷ Author’s interview with anonymous N’Guigmi community leader, Diffa (4 February 2020); ⁶¹⁷ Author’s interview with local administrative authority, Diffa (3 February 2020).

⁶¹⁸ Centre National d’Etudes Strategiques et de Sécurité (CNESS). (2018). *Evaluation des impacts sécuritaires et socioéconomiques de l’état d’urgence dans les zones touchées par l’extrémisme violent au Niger_Rapport Final*.

aggravated the numbers of internally displaced populations, but also ended providing a safe haven to Boko Haram members, in one of the most fertile areas of the region.

FIGURE 12: DISPLACEMENT RESULTING FROM THE EVACUATION OF LAKE CHAD ISLANDS



STATE OF AFFAIRS AND PRIORITIES FOR SECURITY

The latest fieldwork for the purposes of this study was conducted between January and February 2020, five years after the attacks that triggered such vigorous policy responses. Over the three-year period of data collection, the North Tillabery terrorism front has evolved, and worsened considerably. However, not much has changed in terms of forecasts over security conditions in Diffa. Since 2017, respondents have indicated that there has been a notable improvement in the overall circumstances, and yet that a real conclusion of the ‘terrorism phenomenon’ in the region should not be expected.⁶²⁰ This situation, that could be defined as one of prolonged

⁶¹⁹ https://reliefweb.int/sites/reliefweb.int/files/resources/ner_diffa_carte_de_mouvements_de_populations_0.pdf

⁶²⁰ Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017); Author’s interview with anonymous national human rights defender, Niamey (27 January 2020); Author’s interview with anonymous United Nations official in Niger, Niamey (24 January 2020).

precarious containment, is a considerable challenge in and of itself to comprehensive rehabilitation plans and coherent public investment in this area.

Against this backdrop, institutional and non-institutional actors in Diffa stressed a number of prominent concerns to reach overall stabilisation of the region. In many cases, the return of refugees and internally displaced people was indicated as the necessary pre-condition of any efficient programming. In this view, the situation of these people, which entails deprivation of subsistence means, creates the conditions for their long-term dependency from State or external financial partners' support and fosters tensions with local population, creating competition over limited resources.⁶²¹

In other instances, the necessity to address the needs of more vulnerable groups was stressed as vital to prevent further frustrations and thus future instability. But these vulnerable groups are qualified in multiple ways. If the situation of ex-detainees and Boko Haram repentants was identified as deserving of consistent and specialised support to facilitate the process of reintegrating into the communities on multiple occasions⁶²², most respondents stressed the urgency of supporting victims of terrorism in the region.⁶²³

Numerous respondents put emphasis on the fact that the leading expectation from the population is be reassured of security conditions in order to develop new economic opportunities.

*“The priority is always the socio-economic dimension! You have seen it by simply entering in the city of Diffa, that more than half of the population, nowadays, it is composed of young people. And these youths, what are they doing? They are doing nothing, they have nothing to do. This is an area of agriculture and animal husbandry and fishery. And now, there is none of that”.*⁶²⁴

⁶²¹ Author's interview with representative of the Diffa governorate, Diffa (3 February 2020); ⁶²¹ Author's interview with local administrative authority, Diffa (3 February 2020)..

⁶²² Author's interview with anonymous national human rights defender, Niamey (27 January 2020) ; ⁶²² Author's interview with local administrative authority, Diffa (3 February 2020); Author's interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020).

⁶²³ Author's interview with a judge formerly with the specialised pôle, Niamey (27 January 2020); Author's interview with a judge of the specialised pôle, Niamey (27 January 2020); Author's interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020); Author's interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

⁶²⁴ Author's interview with anonymous N'Guigmi community leader, Diffa (4 February 2020).

This confirms the finding of a study conducted under the aegis of UNDP in 2019, according to whom the priority is: “*the State has to secure fishing ports, agricultural lands and pastures, in order to allow population to go back to their villages and resume their activities*”⁶²⁵.

In conclusion, the contextual aspects of the current situation in the area that is the theatre of Boko Haram violence point to the urgent need for rehabilitation programmes directed not only towards ex-detainees but also to former members of Boko Haram more broadly, such as the returnees: ‘repentants’ who demobilised to answer the government’s call. However, they strongly emphasize that these efforts could be meaningless, if not counter-productive, unless they are conducted in parallel with support to the population, especially victims and young people, who have felt victimized both by the crisis and by the governmental response. Accordingly, the effectiveness of the State in handling the crisis will not only be judged in terms of success rates of single interventions, but rather in terms of the ability to respond to and balance these multiple interests, ultimately creating conditions for increased security and, in turn, economic resurgence.

2. REHABILITATION OF “TERRORIST” OFFENDERS

Coherently with the opinions expressed by justice actors⁶²⁶, the role attributed to the justice system in terms of supporting rehabilitation is narrowly defined as a function of the correctional system:

“Prison Administration: public service ensuring on the one hand the custody of people deprived of their liberty by reason of a detention order or a placement measure, and on the other hand the keeping of prison security, under the authority of the Ministry of Justice;

*It also participates in the social reintegration of detainees and the prevention of recidivism.”*⁶²⁷

While the scope for rehabilitation is limited, it is nonetheless clearly linked to the ultimate goal of preventing recidivism and, thus, fostering public safety. When it comes to terrorism cases in Niger, the mere number of people accused and detained justifies concerns over their rehabilitation. Statistics provided by the prosecutor’s office indicate that, even taking into

⁶²⁵ UNDP. (2019). *Enquête de perception au niveau des communautés d’origine sur la réintégration des ex-associés de Boko Haram dans la région de Diffa_Rapport Final*, p.22.

⁶²⁶ See analysis of Nigerien magistrates’ perception of their role in “*Measuring performance of the criminal justice system through accountability*”, Chapter V.

⁶²⁷ Article premier, Loi n° 2017-08 du 31 mars 2017, déterminant les principes fondamentaux du Régime pénitentiaire au Niger.

account only releases at trial over the past three years, over 1150 people have been freed after prolonged periods of detention.⁶²⁸ The majority of them were arrested in the Diffa region.

Additionally, the relative failures of the criminal justice process in determining their responsibility⁶²⁹ increase concerns over the potential security risks associated with their re-entry into society. On the one hand, there is reason to believe that some former Boko Haram member have been arrested but escaped sentencing due to lack of evidence. On the other hand, there is even more compelling information related to people wrongfully arrested and imprisoned, whose experiences are likely to have increased frustration.

This analysis will look into the State efforts to promote the rehabilitation of this vulnerable groups on different dimensions, looking into whether it was actually pursued as a complementary goal to accountability.

2.1 THE INDIVIDUAL LEVEL OF REHABILITATION

Traditional views of “correctional rehabilitation” focused on changing the offender in order to reduce potential for recidivism. There is abundant research on what individual characteristics, as well as individual circumstances have an impact on re-offending, and, as a result, there is ample literature concerning effectiveness of rehabilitation strategies in this area. Over the past thirty years, such literature has focused, for the most part, on the RNR model, short for Risk-Needs-Responsivity Model. While the RNR model has not escaped criticism and different approaches exist to the justification of its theoretical basis,⁶³⁰ its basic tenant is that, in order to be effective, rehabilitative intervention should address the connection between risk factors; needs; and responsivity of individual offenders⁶³¹.

In this view, risks and needs hang on the one side of the balance, as elements that should be identified, for appropriate intervention. However, they are not all the same. Evaluation of risks includes both static and dynamic elements, basically meaning that some can be modified (such as substance abuse), while others are fixed (previous criminal history). On the other hand, the model considers that not all needs are criminogenic, but that analysis of the individual profile of the offender should be able to identifying those needs that, if left unfulfilled, are conducive

⁶²⁸ Data provided by the Office of the Prosecutor associated with the Specialised Pôle to the author.

⁶²⁹ See the results of analysis in “*How many were brought to justice?*”, Chapter V.

⁶³⁰ Ward, T., & Maruna, S. (2007). *Rehabilitation*. Taylor & Francis.

⁶³¹ Ward, T., & Maruna, S. (2007). *Rehabilitation*. Taylor & Francis.

to criminality. On the other side of the balance, there are responsivity factors, meaning that elements such as personal motivation will also influence the success of rehabilitative action.

Reduced to its simplest terms, the RNR Model focuses on the individualisation of rehabilitative treatment as the variable that will most influence its effectiveness. To be applied, individualisation requires two steps: assessment and classification of offenders, instrumental to evaluating risks and needs, and the opportunity of matching intervention to the personal characteristics of each individual.

Carrying out an analysis of the individual dimension for “terrorist” offenders in Niger is quite straightforward, as at no point in the process is any individualised form of treatment applied. At no point after arrest or upon entry in custodial facilities there are any reports of assessment processes, classification of offenders according to risk levels, nor provision of specific treatment. In fact, the only distinction in treatment is the fact that anyone accused of terrorism-related offences is held in two main prisons: that of Kollo and the maximum-security prison of Koutoukalé, an approximate 38- and 47-kilometres distance from the capital Niamey, respectively. This is, however, motivated by the centralisation of all counterterrorism judicial proceedings in the capital and the security risks related to holding them closer to their regions.⁶³² In other words, the only specificity in their treatment is not connected with a rehabilitative objective, nor is it afforded on an individual basis, but rather to all those involved in terrorism as a group. The complete absence of individualised treatment also extends to any form of support that could be conducive to easier rehabilitation. There is simply very little to no intervention at all, throughout custodial care.⁶³³

It would be inappropriate, however, to attribute the lack of individualisation of treatment in Niger, to the context of counterterrorism. The non-existence of standardised assessments and specific prison regimes is mostly connected to insufficient material resources, which prevent the implementation of ad-hoc initiatives. Intervention within prisons, including to provide basic assistance, is a notable issue in Niger, well beyond terrorism.

Two aspects, however, are worthy of further examination in light of counterterrorism specifically. The first is connected with the notion of exceptionality associated with terrorism crimes: the concept that indeed justifies the specialisation of the entire criminal chain in Niger

⁶³² Prisons holding alleged “terrorist” offenders have been targets of multiple attacks, including a first instance in Diffa, in February 2015, and then in Koutoukalé in October 2016.

⁶³³ The situation was only slightly improved after the extension of the “repentis” support programme to the detainees, see below “*Former detainees and repentants: a comparison*”, Chapter VI.

to deal with this issue. As such exceptionality is associated with the serious risks posed by “terrorists” to the State as a whole, it is notable that this perception of risk barely affected life in prison. In particular, no actions were taken to exercise more stringent control over these prisoners, or to impose on them any specific regime, compared with the other detainees. No physical barrier separated them from the other prisoners, who constitute a marginal minority in both Kollo and Koutoukalé, and no programme was enacted to support a disengagement process from violent extremism. In a context where so-called deradicalization initiatives have become a focus of counterterrorism intervention, both regionally and internationally, such absence is still noticeable, even considering the context of correctional facilities in Niger.

In addition, during the first years, terrorist suspects reported extremely rare or non-existent relations with investigators during their detention⁶³⁴. While the interviews also pointed to considerable changes in this process after 2017, no significant effort was addressed, prior to that point, to extracting further intelligence from the suspects, either on themselves or on the activities of terrorist groups.

The second aspect is related to the fact that terrorism-related arrests considerably raised overcrowding rates in the prisons concerned, which, in turn, worsened living conditions. By the end of 2015, the overwhelming majority of detainees in the Kollo and Koutoukalé prisons were accused of terrorism, and in both facilities overcrowding rates exceeded 150%⁶³⁵. In Kollo, the overcrowding quickly became so extreme that prisoners could not be left to sleep in their cells, because of the excessive heat and insufficient space, and thus were moved to sleep in the prison courtyard. In Koutoukalé, only 8 toilets with showers are available, while the prison population exceeded 700 prisoners at the end of 2017.⁶³⁶ The poor health and hygienic conditions were

⁶³⁴ During the author’s interview with “Adamou” and “Yayé”, detained in Kollo on the basis of terrorism charges (4 May 2018), they both reported never having seen a judge in the period of their detention, while the other detainees interviewed in Kollo reported having seen the judge only once. They all had been detained over one year at the time, one of them for over three years. During the author’s interview with “Yacine”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018) he also reported never having seen the judge in the three years he had been detained up to that point. Other detainees, “Moustapha” and “Boubacar”, also detained in Koutoukalé for over three years, reported having seen the judge only once.

⁶³⁵ Université Abdou Moumouni de Niamey, (2017). *Étude Sur La Prévention à La Radicalisation Au Niger*.

⁶³⁶ No official data on the prison population in Koutoukalé is available since 2015, nor on the prison of Kollo starting from 2016. The proposed data are estimates collected during interviews of detainees, actors intervening in the prisons, and judges. It is also worth noting that these numbers have considerably changed following the releases of prisoners since late 2017.

coupled with insufficient medical assistance. Multiple cases of HIV/AIDS as well as tuberculosis have been reported in both prisons.⁶³⁷

Overall, the circumstances of imprisonment and treatment of the suspects during incarceration open concerns over rising frustrations. Prisoners' testimonies reveal pervasive feelings of abandonment and indifference from the system, which give rise to the wide-spread perception of having been victimized by an arbitrary system.

*« I was eighteen when I was arrested, I have been here almost four years. So I am 22 years old now. I am not a Boko Haram, but they accuse me of it nonetheless. What they call justice here, is a travesty. »*⁶³⁸

It is reasonable to suppose that, to these individuals, their experience with law enforcement and justice institutions is meaningful in terms of their perception of the government and the State, and it has generated profound grievances. The danger of this turning into motivation for further recruitment was repeatedly evoked within the prisons, but also by institutional actors.

*“Of course releases became a regular occurrence, there's nothing in the files. It is terrible. These people who are here did not use to be on the side of Boko Haram, but they will get there. It is here (inside the prison) that they started studying the Quran in a fundamentalist way.”*⁶³⁹

*“The challenge that worries me the most is deradicalisation. Because there are many people in prison today, many of them are young, and if we cannot get them on our side, it is possible that they will get out with a lot of frustration. And terrorism is a long-term fight. It does not end today. (...) Because so far I do not think there is any intervention in the prisons. (...) When they get out they may join the groups. And more, having been in prison they now know many things...”*⁶⁴⁰

⁶³⁷ Author's interview with anonymous United Nations volunteer providing legal assistance to individuals detained for terrorism-related offences in the prisons of Kollo and Koutoukalé, Niamey (11 November 2017).

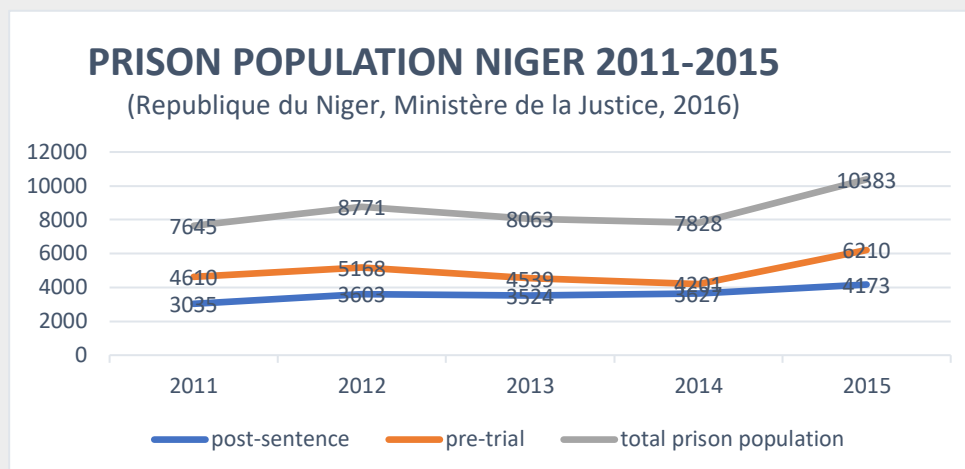
⁶³⁸ Author's interview with “Abba”, detained in Koutoukalé, sentenced for a terrorism-related offence, Koutoukalé (7 May 2018).

⁶³⁹ Author's interviews with “Mamadou”, detained for ordinary offence, Koutoukalé (7 May 2018).

⁶⁴⁰ Author's interview with a judge of the specialised pôle, Niamey (27 January 2020).

A LOOK AT THE IMPACT OF COUNTERTERRORISM ON OVERCROWDING IN PRISONS

FIGURE 13: PRISON POPULATION IN NIGER



Data related to overcrowding rates in Niger's correctional system as a result of counterterrorism policies can be easily misinterpreted and underestimated.

According to the official data of the Ministry of Justice, the thirty-eight penitentiary facilities in the country provide a theoretical capacity of 9700 places. Therefore, even following the arrests of 2015, global overcrowding rates remained around 107%, which can be considered as relatively low.⁶⁴¹

Correct interpretation of this data requires instead to take into account local differences. The prison population is traditionally unevenly distributed, with certain facilities not exceeding 20% occupational rate, while others surpass 200%. Neither this imbalance, nor overcrowding are new problems in Niger, nor exclusively consequences of counterterrorism: already in 2013, the civil prison of Niamey was holding 1089 detainees, despite its capacity of 350 persons⁶⁴². Instead, they are largely a direct result of slow and inefficient judicial proceedings. In fact, most detainees are awaiting trial, rather than serving sentences⁶⁴³. Inadequate infrastructure, limited budgets, and inefficient records further contribute to difficult life conditions for detainees.

⁶⁴¹ For comparison, according to World Prison Brief, the occupancy level of prison institutions exceeds 118% in both France and Italy in 2018.

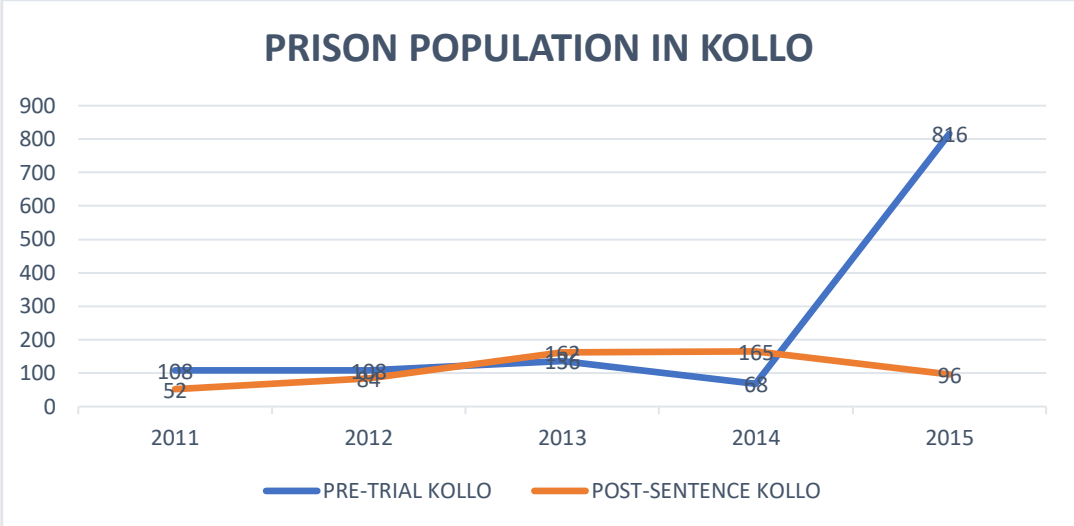
⁶⁴² United States (2013) "Niger 2013 Human Rights Report", Country Reports on Human Rights Practices.

⁶⁴³ According to the République du Niger (2016) *Annuaire Statistique 2011-2015*, Institut National de la Statistique, 60% of detainees in 2011; 59% in 2012; 56% in 2013 were held in pre-trial detention.

And yet, and even more so in light of longstanding shortcomings faced by the prison system, the impact of the arrest wave in the wake of 2015 attacks cannot be underestimated. Data from 2015 show a 32.5% increase in national prison population compared with the previous year, at least half of which can be directly credited to terrorism-related arrests. Overall data on prison population is not available for the following years, but terrorism-related incarcerations continued, although at a considerably slower pace. The growing proportion of pre-trial detainees in 2015, compared with previous years, is also significant.

Finally, the following graph is more helpful in terms understanding how terrorism-related arrests determined the living conditions in the facilities where terrorist suspects were regrouped. Because they are only held in two prisons, the impact of terrorism arrest flows caused considerable spikes in overcrowding rates.

FIGURE 14: IMPACT OF 2015 ON PRISON POPULATION IN KOLLO



2.2 SOCIAL DIMENSION OF REHABILITATION

Rehabilitation model also take into account the extent to which social relations, both at family and community level, can influence the success of reintegration process in terms, for instance, of regaining employment, housing, thus financial independence and a constructive role as a

citizen.⁶⁴⁴ Former detainees are expected to meet challenges in fulfilling these objectives, as the transition to freedom and active citizenship is an especially complex endeavour.⁶⁴⁵ Accordingly, rehabilitative intervention in this area should begin prior to release and continue after it, to facilitate what is expected to be a long-term process.

A number of factors make community reintegration especially difficult for former detainees arrested on terrorism charges. First, the insecurity context in their region of return, with its heavy consequences in terms of displacement and economic circumstances, makes both housing and employment challenging regardless of personal circumstances. The fact that many of these ex-detainees are originally from Nigeria, but their families are currently in Diffa as refugees, adds another layer of complication and precariousness to their circumstances. Second, the nature of terrorism accusations can lead to enhanced stigma. This is compounded by the living conditions in Diffa and surrounding villages, where people generally know each other and therefore the background of someone who has been detained for months or years is likely to be common knowledge.

A first result of the analysis shows that there is extremely limited intervention within the prison to facilitate training or any activity that could support economic reintegration after release, and the little that has been provided has been a consequence of the extension of the ‘repentis’ project to detainees and former detainees.⁶⁴⁶ This means that it has been very limited in time, and not triggered nor provided by justice institutions. Justice actors are, however, aware of these circumstances, and consider them a grave issue, and a missed opportunity in terms of reducing insecurity in the future.

In terms of reintegration, I am of those who considers that there should be activities within the prison, prior to release. Because you cannot leave people to just figure it out by themselves. Where are the organisations that are going to support them? Furthermore, once they are free, they can refuse to take part in any reintegration support. Once I have been released, I have no further obligations, I can do as I please. But within the prisons...Also because these people could be rejected by society. Because many have been freed because of doubts and lack of sufficient elements. But that does not mean that they are innocent. (...) We cannot have trust.”⁶⁴⁷

⁶⁴⁴ Shinkfield, A. J., & Graffam, J. (2009). Community Reintegration of Ex-Prisoners: Type and Degree of Change in Variables Influencing Successful Reintegration. *International Journal of Offender Therapy and Comparative Criminology*, 53(1), 29–42.

⁶⁴⁵ Visher, C. A., & Travis, J. (2003). Transitions from Prison to Community: Understanding Individual Pathways. *Annual Review of Sociology*, 29(1), 89–113.

⁶⁴⁶ See below “*Former detainees and repentants: a viable comparison?*”, Chapter VI.

⁶⁴⁷ Author’s interview with high-level official of the Ministry of Justice, Niamey (8 May 2018).

In addition, prison always entails severance from family bonds and community life. To counter the negative effects of this separation, regular contacts, visit, and, depending on the circumstances, opportunities for exits are supposed to be integrated in detention periods.⁶⁴⁸ The situation of alleged and convicted “terrorists” in Niger is further aggravated by centralisation of the proceedings and of their imprisonment. As mentioned, this is both a result of the specialisation of criminal justice in counterterrorism, and a security precaution, given the multiple attacks of Boko Haram against prison facilities holding its members. Nonetheless, for the detainees this means that visits from family members are almost impossible, as is the regular exchange of information. Interviews conducted in the prisons showed that the International Committee of the Red Cross (ICRC) carries out efforts to trace family members and facilitate contact. At the same time, because of the distance, these exchanges are always mediated and actual visits are a very rare occurrence.⁶⁴⁹

Beyond the obvious impact of this situation in terms of distress and well-being of the prisoners, it is worth asking whether this could also facilitate misconceptions about what awaits them after release. When the interviews in the prisons were carried out, the releases had already begun and it was obvious to the detainees that the overwhelming majority of cases found what was in their perspective a “positive” conclusion. In those circumstances, many of them declared that they were confident they would be released. When asked of their expectations for their return, and whether they feared that they could be ostracised as former terrorists, they generally shared no concerns in that sense, but rather confidence that everyone knew of their innocence and that they would be able to reprise a normal life.

Interviews of actors intervening in the prisons also show that there is no specific preparation of the release process. While some interviewees reported of the organisation of transportation to

⁶⁴⁸ See Rules 58 to 60: United Nations General Assembly. (2016). *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): Resolution / adopted by the General Assembly, A/RES/70/175*.

⁶⁴⁹ Author’s interview with anonymous United Nations volunteer providing legal assistance to individuals detained for terrorism-related offences in the prisons of Kollo and Koutoukalé, Niamey (11 November 2017); in Kollo, “Adamou” and “Yayé” confirmed that they were able to exchange messages with their family thanks to the intervention of the ICRC; Author’s interview with “Adamou”, detained in Kollo on the basis of terrorism charges (4 May 2018). Author’s interview with “Yayé”, detained in Kollo on the basis of terrorism charges (4 May 2018). Similarly, in Koutoukalé, “Boubacar” confirmed that he was able to exchange messages with his family through ICRC. However, both “Yacine” and “Ousmane” were not able to reach their families and none of them had received family visits during the years they had spent in detention, see: Author’s interview with “Boubacar”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018); Author’s interview with “Yacine”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018); Author’s interview with “Ousmane”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018).

the regions of origin for those who need it⁶⁵⁰, it appears that no process is put into place to ensure follow-up of the former prisoners at centralised level⁶⁵¹.

*“When there are group releases no partner intervenes. They cannot intervene because they are not aware when it happens, they are not informed. It is the DST (direction de surveillance du territoire) who is in charge of the release process, and they do not bother informing. They basically just leave them to themselves.”*⁶⁵²

Finally, after-care, meaning support provided after release from the prisons, appears to be the most notable gap in the process. Admittedly, since the first release processes took place only starting in 2017, it is relatively early to truly appreciate to what extent former detainees have been able to reintegrate successfully as members of the community and as economic agents. The information collected through interviews indicates that this process has not been consistent nor homogeneous. On the side of the population, in particular, reports account for the complexity of feelings and experiences towards the former detainees. On the one hand, part of the population, in many cases families and immediate communities, believe that most of these individuals were wrongly arrested. Their release and return was thus welcomed as a positive outcome, even with eagerness.⁶⁵³ On the other hand, however, strong resistances have also been reported, and have been attributed two different scenarios. There may be fears of former collaborators who provided false denunciations and now fear retaliations, and there may be people who have reliable information that in some cases there was an actual affiliation with Boko Haram, but the justice process found no proof.⁶⁵⁴

On the side of the ex-detainees, hostilities within the communities resulted, in certain cases, in discrimination and obstruction of economic and social possibilities. As explained by an international partner after having organized a seminar with former detainees to collect their experiences:

*“For some there were challenges. Some complained of having faced discrimination. For instance, they are still seen as former detainees so for the normal villager someone who has been to prison is automatically regarded as someone who is guilty. Some reported for instance having asked for a girl in marriage and being refused on account of being ex-detainees”*⁶⁵⁵.

⁶⁵⁰ Author’s interview with high-level official of the Ministry of Justice, Niamey (8 May 2018).

⁶⁵¹ Author’s interview with anonymous prosecutor of the specialised pôle, Niamey (6 February 2020).

⁶⁵² Author’s interview with anonymous United Nations volunteer providing legal assistance to individuals detained for terrorism-related offences in the prisons of Kollo and Koutoukalé, Niamey (19 November 2017).

⁶⁵³ Author’s interview with anonymous N’Guigmi community leader, Diffa (4 February 2020); Author’s interview with anonymous Diffa community leader, Diffa (5 February 2020).

⁶⁵⁴ Author’s interview with anonymous United Nations official in Niger, Niamey (24 January 2020).

⁶⁵⁵ Author’s interview with anonymous United Nations official in Niger, Niamey (24 January 2020).

Accordingly, while perceptions of the populations are mixed, those of former detainees are less so. The frustrations over the feeling of an unfair arrest and treatment by the justice system are compounded by a difficult journey of return to their communities, after the loss of what often amounts to entire years of their lives. Some reports spoke of cases where ex-detainees have become recruiters for Boko Haram, as a reaction to the injustice they have experienced.⁶⁵⁶ While these appear to be isolated instances, they certainly indicate the potential repercussion of a failing rehabilitative intervention on the security context of the region.

2.3 SYSTEMIC DIMENSION OF REHABILITATION: CHALLENGES AND RESISTANCES IN PROVIDING SUPPORT

The systemic dimension of rehabilitative support aims to investigate the direct influences of the institutional and organizational elements on the trajectory of reintegration undertaken by the former detainees⁶⁵⁷. The absence of direct rehabilitative intervention in both the individual and social dimensions already determines to a certain extent the ineffectiveness of justice as a system in fostering rehabilitative objectives. It is nonetheless interesting to evaluate which attitudes, mechanisms, and constraints have determined such failure.

It should be recognised at the outset that there is a strong incongruity between the attitudes of the justice actors, who recognise rehabilitation as vital in view of ensuring stabilisation and security, and the actual level of investment and intervention in this area. The analysis of interviews allows for the identification of a number of elements that contribute to this level of inconsistency between perceived goals and policy. The most relevant is certainly the limited budget available, and the subsequent challenge in finding financing to support this type of programmes. This is widely confirmed by the fact that the absence of real reintegration strategies within the justice system extends far beyond terrorism.

“And this is what I am saying to all of our partners: reintegration support should be available to all detainees. The “regular” detainees as well as the “terrorist” detainees. We have noticed that currently all eyes are fixed on the situation of terrorists, but other detainees...there are no reintegration programmes in our prisons, but now we want to emphasize the terrorists, who have committed heinous acts, when regular detainees, who are more likely to reintegrate, also benefit from no support.”⁶⁵⁸

⁶⁵⁶ Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (5 February 2020).

⁶⁵⁷ Shinkfield, A. J., & Gaffam, J. (2009). Community Reintegration of Ex-Prisoners: Type and Degree of Change in Variables Influencing Successful Reintegration. *International Journal of Offender Therapy and Comparative Criminology*, 53(1), 29–42.

⁶⁵⁸ Author’s interview with high-level official of the Ministry of Justice, Niamey (8 May 2018).

There is also a second reason, however, that emerges as dominant, which concerns the clear attribution of roles. It is challenging, even for the agents within the system, to understand what role exactly justice can play to favour rehabilitation of accused, first, and detainees, later. As mentioned, judges often consider that rehabilitation should be the final step of the process, limited to intervention within the prisons. Prison management, however, appears rather limited to managing the day-to-day functioning of the facilities and ensuring their control and security. There is also a fracture between the Ministry of Justice, who is supposed to hold control over the correctional facilities, and to direct rehabilitative programming through the related Direction Generale, and the actual prison management. In the absence of real prison staff, custodial facilities are run by the *garde nationale*, a law enforcement body whose competency falls under the Ministry of Interior, rather than justice.⁶⁵⁹ It is reasonable to infer that such multi-level fragmentation contributes to rehabilitative programming falling in the cracks.

Additionally, when it comes to counterterrorism, the Ministry of Interior has evidently fought to gain the lion-share of the control over stabilisation of the Diffa region, including activities of rehabilitation and reintegration of former detainees. Some progress has been achieved in this context in the past years: some former detainees have been included in the rehabilitation programmes for the ‘repentants’, a few training activities were conducted in Kollo, and a partnership between non-governmental organizations and administrative authorities has developed a mapping system to follow the return of ex-detainees in the different villages⁶⁶⁰. These are not small efforts, yet they hardly match the extent of needs of the population concerned. In addition, none of these actions were taken under the direction or supervision of the Ministry of Justice, further increasing the crack between justice and rehabilitation.

A third element concerns the failure of certain justice mechanisms, that would be inherently conducive to supporting the rehabilitation process, namely the remedies available to victims of wrongful accusations. Interviews have highlighted that, while such mechanisms exist, they have so far not been applied to former “terrorist” detainees.

“Now, in the code of criminal procedure, there is an article which concerns the commission for compensation, which is supposed to be located within the Cour de Cassation. This body is responsible for the compensation of those who have spent time in pre-trial trial detention, or where the terms have been exceeded, and in the end have been released by the investigative judge, or acquitted in trial. Recognising this poses a

⁶⁵⁹ Author’s interview with Etienne Jean Ibrahim, Deputy Secretary General, Ministry of Justice, Niamey (21 November 2017).

⁶⁶⁰ Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020).

*problem of damages, because they may have lost employment, property, image. But they got nothing.*⁶⁶¹

Indeed, according to section VII bis of the code of criminal procedure, such compensation is foreseen in those exact terms. However, should favorable decisions be taken for all persons accused of terrorism and then released after a period of detention in the past years in Niger, the cost to the State would be considerable.

Finally, the present analysis has shown that the justice system in Niger has not merely been ineffective in pursuing rehabilitation, but rather that its action has been counterproductive. There are two elements to this further degree of failure. One is the direct result of the disfunctions during the first phase of justice: wrongful arrests with almost non-existent investigation, the subsequent prolonged detention while waiting for the opportunity to collect evidence, and ensuing overcrowding rates. Each of these steps is cause for frustration by itself, and contributed to the next. Overall, they undoubtedly generated resentment in the persons who have been subjected to such treatment.

*“Evidently someone who has gone through three years of pre-trial detention, who gets to the end and then is told “we have nothing against you”, well this person cannot understand why. They were not at all generous towards justice, they consider they are innocents, and have been in prison for nothing. And then got out with no compensation.*⁶⁶²

The other, more complex, issue is that, if rehabilitation is associated with accountability but also perceived as subordinate to it, rather than a goal in itself, then once accountability fails so does inevitably rehabilitation. Indeed, rehabilitative programmes in prisons are generally reserved to convicted offenders, as they aim at promoting a change of offending behaviour. When the majority of the prison population is found innocent, how is rehabilitation to be justified? When deprived of a functioning criminal proceeding to ascertain responsibility, the prison is reduced to an instrument of short-term security through temporary incapacitation⁶⁶³, rather than aiming to control or reform the terrorist suspects to support their return to social life. And this can be costly in terms of long-term security.

This disconnect shines further attention on the deviation from justice in the context of security. While many of the challenges encountered by Niger’s justice are contextual to the country and

⁶⁶¹ Author’s interview with anonymous national human rights defender, Niamey (27 January 2020).

⁶⁶² Author’s interview with anonymous United Nations official in Niger, Niamey (24 January 2020).

⁶⁶³ Zimring, F. E., & Hawkins, G. (1995). *Incapacitation: penal confinement and the restraint of crime*. Oxford University Press.

the region, the alteration of judicial proceedings in counterterrorism opens the door to a broader, global, debate. In light of the increased reliance of exceptional counterterrorism measures, justice is increasingly (ab-)used to pursue security, rather than accountability and rule of law. It is worth asking whether such shifting objectives have a cost not only in terms of effectiveness of the judicial process, but also in terms of its legitimacy.

3. THE “REPENTANTS”: REPLACING ACCOUNTABILITY WITH RECONCILIATION

On Wednesday 28 December 2016, with a surprise announcement, Mohamed Bazoum, then Minister of Interior, inaugurates the ‘policy of the extended hand’ for former Boko Haram members willing to surrender to the national government⁶⁶⁴. Following the spontaneous demobilisation of about 30 young people in the Diffa region, the government takes the opportunity to launch a campaign aiming to reach disappointed members, especially among the youths, and providing them with a chance to re-join society and benefit from rehabilitation intervention.

According to the “framework document of the surrender policy”⁶⁶⁵, the combination of the growing dissent among the different factions within Boko Haram, and the successes of the Multi-national Joint Task Force, created the necessary conditions for this policy to be attractive to the group’s members. At that point, in fact, Boko Haram started facing the descent from its point of maximum expansion, which means that many combatants were purely attempting to survive.⁶⁶⁶ From the governmental perspective, the ‘policy of the extended hand’ is coherent with the overall objective of weakening the group by eroding its membership basis, fostering a conclusion of the Boko Haram crisis, and the progressive stabilisation and recovery of the region.

The specific objective of the policy is “*to take responsibility over the surrender of Boko Haram members through training, re-education, deradicalisation, and socio-economic reintegration*”.⁶⁶⁷ While the official documents clarify that the inauguration of the policy has been somewhat hastened by the first spontaneous demobilisations, they nonetheless set a number

⁶⁶⁴ RFI (29 Décembre 2016) Le Niger lance un programme d'amnistie pour les déserteurs de Boko Haram : <https://www.rfi.fr/fr/afrique/20161229-niger-amnistie-combattant-boko-haram-programme>

⁶⁶⁵ Ministère de l’Intérieur, de la Sécurité Publique, de la Décentralisation, des Affaires Coutumières et Religieuses (December 2016), *Document Cadre de prise en charge de la reddition des éléments de Boko Haram*.

⁶⁶⁶ Ministère de l’Intérieur, de la Sécurité Publique, de la Décentralisation, des Affaires Coutumières et Religieuses (December 2016), *Document Cadre de prise en charge de la reddition des éléments de Boko Haram*.

⁶⁶⁷ Ministère de l’Intérieur, de la Sécurité Publique, de la Décentralisation, des Affaires Coutumières et Religieuses (December 2016), *Document Cadre de prise en charge de la reddition des éléments de Boko Haram*, p. 5.

of key principles and directions to define the boundaries of this initiative and to guide its development. More precisely, it is clearly stated that: first, the policy will be developed in full compliance with constitutional law, international law, and particularly international humanitarian law. Second, in the absence of any ceasefire or peace agreement between the State of Niger and Boko Haram, the management of the policy will be developed progressively, including in relation to its judicial dimension. Third, because of its circumstances, the policy announcement is not preceded by an amnesty law, but the government would consider the adoption of such in case it proved necessary.

This brief overview of the origin story of the initiative of rehabilitating so-called “repentants” of Boko Haram reveals from the outset a substantial overturning of the perceived means to achieve security. The reasoning is not focused anymore on accountability nor punishment, but rather on reconciliation as the only real opportunity for peace.

“We said: we cannot end the war with war. We realized that war by itself was not going to be enough to surmount the situation, we now needed an alternative. What is to be done? Maybe we have to appeal to them directly, to incite them to come back. So, how can we do that? It is necessary to extend our hand. »

In this view, the sovereign’s authority and legitimation is negotiated through its direct ability to reach peace. The question, at this point, is whether this comes at the price of accountability. And, if it were so, is there a gain in legitimacy considerable enough to compensate such cost?

‘REPENTANTS’: THE CONTROVERSY OVER THEIR LEGAL STATUS

Interviews highlight conflicting reactions to the ‘policy of the extended hand’. If many perceived it as a positive and necessary innovation in the State’s counterterrorism strategy, numerous critics also emerged, and many of them were to be found within the justice sector. The reasons for opposition were varied, but can be reduced to three main issues. In a few cases, concerns were expressed over the dangers connected to the initiative. Because these former members surrendered in a challenging period for the group, it was considered that there was more opportunistic reasoning behind their decision than real repentance, and some fears emerged in relation to the future of the policy.

“The people of Al-Barnawi are fighting those of Shekaou. Those who are in danger of dying, run away. They know that if they stay they are going to die. And they come here because they know that here, differently from Nigeria, they are not going to get killed. So, that’s the people we are talking about. Are they really ‘repentants’? Has this evil plan left their mind? What I can say is that these people want to save their heads, that’s

all. And on this point, I brought up my concerns, I think that this formula that was found, the extended hand, can have a negative effect, if we do not pay attention”⁶⁶⁸.

Others were displeased with the ‘rushed’ development and launch of the policy, blamed on the wish to obtain a political result through a momentous announcement. This hurry caused very limited if not non-existent coordination and inter-ministerial consultations prior to the policy inauguration, which was at times resented and considered to be at the original of important legal inconsistencies.

However, it was the legal shortcomings of the policy that caused the strongest reactions, especially among justice officials. Indeed, this issue was brought up far more frequently than any other opposition, even by those who agreed in principle with the pardon. Legal issues related to the initiatives were multiple: first and foremost, “repentants” were left with no clear legal status under the new policy, as no amnesty law nor other official formula existed to clarify their position. Second, when the Ministry of Justice became involved in the elaboration of a draft amnesty law, at a later stage, contradictions between the policy framework and international law were highlighted. Most notably, amnesties can never be generalized to all former combatants, and international humanitarian law requires the distinction of those who have committed crimes against humanity and war crimes, and calls on States to prosecute them. Indeed for legality to be respected, even when justice emphasizes the forward-looking element of reconciliation over accountability, impunity for serious crimes cannot be justified. The policy, however, foresaw no such distinction, and all “repentants” by that point had surrendered based on the promise of being reintegrated with no prosecution or prison time. Finally, terminology became an issue in itself, as the use of term *repenti* was harshly opposed because already existing in the criminal code, specifically in relation with terrorism, with a completely different meaning.

“From a legal point of view, that is not a “repenti”. A repenti is someone who comes to bring to the attention of the authority that an act will be committed, and, having participated in its preparation, allows to prevent it; or it is someone who denounces the act after its commission and creates the opportunity of arresting other accomplices. This is a ‘repenti’. The approach they adopted towards people who have come back from Boko Haram is that they are considered as ‘repentis’. But they have not collaborated with justice, so they are people who have returned, for sure, but should not be considered ‘repentis’”⁶⁶⁹.

⁶⁶⁸ Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017).

⁶⁶⁹ Author’s interview with judge at the specialised pôle, Niamey (22 November 2017).

According to the penal code of Niger at the time, in fact, the term ‘repenti’ designated the role of the “collaborator of justice”,⁶⁷⁰ meaning someone who is afforded mitigation on his or her prosecution or sentence, in exchange for relevant information provided on criminal activity. This terminological problem reflects the issues in the conception of “terrorism” as an exceptional phenomenon, at times interpreted as organized crime, where the strategy of the ‘collaborator of justice’ originates, and at times assimilated to war, a context in which it is more frequent to adopt amnesties and promote rehabilitation of demobilised combatants.

It took years before a solution was found to the issue of the legal status of the repentants, in the form of an amendment of the penal code. According to the testimony of a high-level official of the Ministry of Justice, debates over an acceptable form for the amnesty lasted for a long time, as the Ministry of Interior did not wish to abandon the term ‘repentants’.⁶⁷¹ After months of negotiations, on 19 December 2018, the solution that was finally found through an amendment that accommodates both uses of the term, including collaboration with justice authorities, as well as “acts of voluntary surrender” as causes for exemption of prosecution.

Additionally, an exception to the exemption is created: those who have committed crimes against humanity, war crimes and/or ‘serious crimes’ will not avoid prosecution. While the amended article strives to ensure compliance with international law with this precision, it will also create some challenges to those charged with operating this distinction in practice, years after the first acts of surrender.

Interestingly, it is also through this amendment that the promise of compensation to victims of terrorism is introduced in the counterterrorism legal arsenal in Niger. According to interviews, this move was strongly advocated by international actors, aiming to reduce the potential for discontent of the local populations, faced with the State providing support to former Boko Haram members.⁶⁷²

With the approval of the new law, the initiatives directed to the rehabilitation of the ‘repentants’ could finally begin. In January 2020, three years after the first declarations by Minister Bazoum, the first phase of the project reached its conclusion. By then, the 237 people who had joined the programme, including women and children, has all been released from the Goudoumaria

⁶⁷⁰ Art. 399.1.20, Code Pénal, (Ord. n° 2011-12 du 27 janvier 2011), République du Niger.

⁶⁷¹ Author’s interview with high-level official of the Ministry of Justice, Niamey (8 May 2018).

⁶⁷² Author’s interview with anonymous United Nations official in Niger, Niamey (24 January 2020).

internment camp. During the previous years, they had received counselling, deradicalisation support, and training, and following a ceremony that involved governmental authorities, as well as local administrative and customary authorities.

The “repentants” initiative, launched by the government of Niger in partnership with multiple international actors, mostly non-governmental, and pursued with obstinacy by the Ministry of Interior despite legal challenges, with the preponderant support of international donors, incarnates a clear-cut alternative to the approach of criminal justice in conceiving counterterrorism. Focusing on reconciliation and forgiveness, rather than on accountability, the ‘repentants’ policy reveals a conception of the crisis that is much closer to dealing with terrorism as a war-like phenomenon rather than as an exceptional criminal phenomenon.

The following analysis aims to discuss the ultimate effectiveness of such alternative approach in pursuing the goal of ensuring public safety, and at the same time investigates its compatibility with the criminal justice model of counterterrorism.

OVERVIEW OF PROGRAMME STRUCTURE

As the ‘policy of the extended hand’ was launched, it was necessary not only to address the legal challenges related to the classification of the ‘repentants’, but also to devise an operational framework that would guarantee their treatment and pursue the objectives of rehabilitation and return announced by the Ministry of Interior.

This structure was created through the “framework document of the surrender policy”, and then operationalized through the establishment of the Goudoumaria Camp and the launch of PRAJURD, a project financed by the European Union and implemented under the coordination of the Haute Autorité à la Consolidation de la Paix (HACP).⁶⁷³ This project, which was initially conceived to support the ‘repentants’, was later partially extended to former detainees, as their return was identified as a priority for the stabilisation of the region. Four intervention axes are foreseen:

- Dialogue and mediation within local populations to prepare the re-entry of former Boko Haram members and ex-detainees, fostered through the work of the comité communaux de paix et sécurité (local peace and security committees).

⁶⁷³ Fiche de projet du « Programme d’appui au traitement Judiciaire et au processus de Réintégration des ex-combattants de Boko Haram, ainsi qu’au dialogue communautaire dans les régions périphériques au Nord du Niger » PRAJURD .

- Direct services for the ‘repentants’, including personal support and vocational training for (also later extended to former detainees, albeit to a more limited extent);
- Restoration and refurbishment of infrastructure and key services in the most affected areas;
- Inter-community dialogue in trans-border areas, meaning focusing on communities that live across national borders.

The different components are entrusted to international and local non-governmental organisations, whose staff is mainly composed of professionals who come from the region. The structure and coordination mechanisms within the project show that a comprehensive view of the rehabilitation process is adopted and that social support is considered to be an especially relevant variable in the potential for effectiveness of the overall intervention.

In order to gauge the effectiveness of intervention directed towards the ‘repentants’, the present analysis will focus on the interviews of both service providers, and recipients of rehabilitation intervention. In this case service providers are mainly external to the justice system, and include: officials of the HACP, representatives of three out of the four non-governmental organizations involved in the implementation of the project, as well as a limited number of justice actors who later contributed to the project. As far as recipients are concerned, it was unfortunately impossible to interview ‘repentants’. At the time of the fieldwork conducted in the Diffa, the Goudoumaria camp had just been emptied, following the reintegration ceremonies, and ‘repentants’ had returned to villages that could not be reached due to security restrictions. However, it was possible to conduct interviews of local administrative authorities and community leaders, to collect their views of the project’s result. As was done for the detainees, the analysis embraces all three key dimensions of rehabilitative intervention.

3.1 INDIVIDUAL REHABILITATION: INCENTIVES AND ADAPTION

As clarified, the individual dimension of rehabilitation is concerned with the personal circumstances that can foster or hinder reintegration. In this light, it is worth highlighting how the inception of the rehabilitation process for ‘repentants’ is quite different from the situation of people arrested for terrorism-related offences. For these individuals, engaging in the rehabilitation process is a choice. While there may be reasons to motivate return that do not stem from remorse, but rather opportunity, it is certain that a decision needs to be made, and one that entails risks, as in defecting the group they may expose themselves to retaliations and violence.

*“There are some who spend three or four nights in the bush before getting here, and when they arrive, they have been wounded and tortured. Because at times their first attempts fail, and when they are caught and they got whipped and tied and they are threatened with slaughter.”*⁶⁷⁴

The consent to being involved in rehabilitative intervention can be considered as a positive condition for the ultimate effectiveness of the process, making it more akin to therapeutic intervention.⁶⁷⁵ It is thus worth beginning the analysis by considering the circumstances and incentives that are provided to Boko Haram members, in order to make adherence to the ‘policy of the extended hand’ an attractive opportunity.

The intervention by the government and its partners has focused on three elements that are likely to facilitate a decision to surrender. First, it ensured that the information over the availability of a safe demobilisation option was disseminated, through the emphatic policy announcements and follow-up awareness-raising campaigns. Second, and most important, it created an incentive for return, by promising rehabilitation and excluding prosecution and detention. While this is perhaps the most controversial aspect of this policy,⁶⁷⁶ its effectiveness in terms of fostering surrenders has been unanimously recognised by interviewees, including those who oppose it.⁶⁷⁷ Third, a mechanism for safe demobilisation was created.⁶⁷⁸ In the absence of a peace agreement and of the necessary conditions for a ‘safe corridor’, the policy relies mostly on self-demobilisation. However, a procedure has been devised to support the process, which relies heavily on the involvement and cooperation of traditional leaders and administrative authorities. In practice: whenever a member escapes Boko Haram, they can refer to the village chief, or a religious leader, who, in turn, informs the administrative authority at the level of the mayor, the prefect, and the governorate. At this point, they are transferred to the SCLCT branch in Diffa, where they are questioned to see whether they can provide relevant information on the activities of the group, whether they may pose particular risks, and the personal information sheet is filled and collected. Afterwards, they are safely moved to the Goudoumaria camp.

⁶⁷⁴ Author’s interview with representative of the Diffa governorate, Diffa (3 February 2020).

⁶⁷⁵ See the influence of “therapeutic” approaches on conceptualization of rehabilitation services in: Raynor, P., & Robinson, G. (2005). *Rehabilitation, Crime and Justice*. Palgrave Macmillan UK, p.58-59.

⁶⁷⁶ See below “*Former detainees and repentants: a viable comparison?*”, Chapter VI.

⁶⁷⁷ Author’s interview with a member of the Supreme Judicial Council, Niamey (31 January 2020); Author’s interview with general prosecutor Chaibou Samna, Niamey (6 February 2020).

⁶⁷⁸ Author’s interview with representative of the Diffa governorate, Diffa (3 February 2020); Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020); Author’s interview with anonymous official of Diffa SCLCT branch, Diffa (5 February 2020).

After this preliminary assessment, further information is collected at the camp. The intervention provided during their stay in Goudoumaria is thus not only addressed to personal characteristics, as they are supported through counseling, and some cultural and leisure initiatives, but is also individualized on the basis of personal assessments. Furthermore, specific activities are directed at addressing recidivism risks connected with the ideological dimension.

“We have activities dedicated to personal transformation, but also therapeutic services, meaning there are psychologists working directly with these people. There are also other activities, for instance we promote dialogue with those who been deradicalized. That is to say that we rely on some young people who have been involved in this sort of situation, and nowadays have become peace ambassadors. We get them, we take them there and they have a talk, so we can show them that change is possible: if one tries, one can really change.”⁶⁷⁹

As was the case for detainees, living conditions can also contribute to the effectiveness or obstacles to the reintegration process. The Goudoumaria centre is not a prison, has not experienced overcrowding as a result of mass arrests, and, in light of the broad support of international partners to the initiatives, it is fair to assume that sufficient funding for its management was available. It is also worth noting that, while ‘repentants’ were separated from community life during their stay in the centre (and previously, while associated with Boko Haram), their situation is dissimilar from that of detainees, insofar as, in many cases, the centre hosted entire families together. Since it was not possible to have access to the repentis, it is difficult to provide an account of their own perceptions towards their treatment and living conditions. However, it is worth noting that they likely entered the process expecting a swift return to social life. Instead, the challenges related to their legal status notably delayed the provision of support, and ultimately their release. Many of them spent years in a situation of deprivation of liberty that, the facto, qualifies as arbitrary detention.⁶⁸⁰ In these circumstances, some level of frustration related to the delays in the process may be expected.

The analysis of effectiveness of the individual dimension of rehabilitation of ‘repentants’ is necessarily curtailed by the lack of direct access to this population, which makes the results of

⁶⁷⁹ Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020).

⁶⁸⁰ The lack of legal basis justifying deprivation of liberty is part of the definition of ‘arbitrary detention’ according to International law, see *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, in United Nations Human Rights Council (December 2012), Report of the Working Group on Arbitrary Detention, A/HRC/22/44. This view was also brought up during interviews, especially by international partners: Author’s interview with an anonymous representative of the ICRC, Niamey (22 November 2017); Author’s interview with anonymous United Nations official in Niger, Niamey (24 January 2020).

the present discussion inherently limited. Yet the examination of the framework and structure of rehabilitative intervention reveal, at the very least, closer adherence to the risks-needs-responsiveness model, through some extent of individualization of support, as well as the provision of a broad range of initiatives to foster involvement in the programme.

3.2 SOCIAL DIMENSION: ECONOMY AND COHESION

Under the social dimension of rehabilitative intervention, the analysis takes into account all facets of the programme that addressed potential social obstacles, and particularly economic reintegration and stigma, an element that is especially relevant when it comes to the population of ‘repentants’ who, by their own admission, have participated, albeit to different extents, in Boko Haram’s activities.

In what concerns support to economic reintegration, training spaces were included within the centre, aiming to prepare the ‘repentants’ to undertake different jobs, including mechanics, carpentry, sewing. Reports indicate that the choice of what activity to be trained in was left to the individual, in a clear attempt to increase individualization of the process, sense of ownership and thus personal commitment to its results. Additionally, the training cycle was concluded with a diploma and with the provision of what were defined as “reintegration kits”, which include some material to exercise such jobs after return to their communities⁶⁸¹. Accordingly, the project planned tried to both foster a sense of accomplishment, through formal recognition of the skills these individuals acquired through training, and to facilitate the continuation of the process after the return to the communities.

Some interviews brought up criticisms of the initiatives, indicating that provision of these services was more limited than planned, and that following release some ‘repentants’ had sold their ‘kits’ to gain means of subsistence.⁶⁸² Again, it is difficult for the time being to examine to what extent these interventions had positive results in terms of future employment. Not only was it impossible to consult with the beneficiaries of the action, but it is also quite early in the process to assess final results of reintegration, since most liberations only took place at the end of 2019.

⁶⁸¹ Author’s interview with representative of the Diffa governorate, Diffa (3 February 2020); Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (5 February 2020); Author’s interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020).

⁶⁸² Author’s interview with anonymous national human rights defender, Niamey (27 January 2020).

When it comes to the social dimension, particular attention was devoted to the need to address stigma as a priority, an objective that was pursued through multiple strategy. One element that interviewees indicated as particularly successful in preventing hostile reactions of the population is careful preparation of the ‘release’.

“What has been especially effective is that, when it was time to leave the centre, we asked them to identify families, or close relations that would welcome them, anywhere in Niger, not only in Diffa. So, some of them identified foster families in Agadez or Maradi..So the programme that was put in place allowed them to get accompanied to foster families, where they can live for some time, like a couple of years, the time that things can be forgotten, and try to reintegrate society.”⁶⁸³

By preparing both the ‘repentants’ and the families that would welcome them back in advance, the project minimized risks of rejection. Furthermore, monitoring mechanisms were put in place to supervise the reintegration process after actual return, and continue to provide support, albeit to a more limited extent.⁶⁸⁴ This progressive approach recognises reintegration as being a long process, and is likely to reduce dangers related to the otherwise abrupt transition to normal life. It should be noted that the same level of support was extended to those of Nigerian origin, among the ‘repentants’ population, and that diplomatic exchanges have taken place in December 2019 to favour their return to Nigeria, should they wish to.⁶⁸⁵

Such direct support was coupled with mediation and sensibilisation policies involving directly community members, and to the extension to community members of economic incentives. In order to avoid the feeling that ‘repentants’ were receiving more economic support than the local populations, which is proven to undermine overall effectiveness of rehabilitative programmes, especially in post-conflict situations, activities under PRAJURD project were extended to local communities. In particular, selected youths within the villages were granted access to the same trainings, and, in addition, parallel projects targeting primarily local youth through economic opportunities were implemented.⁶⁸⁶

Finally, support to the ‘repentants’ also embraced a symbolic and official dimension, with the organization of public ceremonies to celebrate their return to the communities. The ceremony

⁶⁸³ Author’s interview with anonymous prosecutor of the specialised pôle, Niamey (27 January 2020).

⁶⁸⁴ Author’s interview with local administrative authority, Diffa (3 February 2020).

⁶⁸⁵ Author’s interview with representative of the Diffa governorate, Diffa (3 February 2020).

⁶⁸⁶ Author’s interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020).

was organized on 7 December 2019, as the first group of ‘repentants’ finally left the Goudoumaria Centre, after three years since the announcement of the policy.

*“The Minister of Interior attended, with all his staff, the HACP, The US Embassy, the EU representative. There was also a Nigerian delegation, because we have some Nigerians there. And then the governor, the different mayors, canton chiefs, community leaders, and there were many, many people present. (...) To me, the peaceful reintegration of Boko Haram ‘repentants’ truly depends on this ceremony. We have done all we have done within the centre (...) and now they have to get back to the communities. So it is a very important step, as it marks the beginning of a new phase. (...) During the ceremony, the ‘repentants’ took an oath on the Quran that they will never belong to the sect again, they will not reoffend, and they will never participate again in any act that would trigger a crisis within the community. It was the high point of the ceremony”.*⁶⁸⁷

The ceremony carries multilayered significance. On the one hand, it proposes an acknowledgement of wrongdoing, and a rejection of hurtful conduct in front of the community. This way, the community not only sees their suffering recognised, but also becomes party to the reintegration process, witnessing the promise of a better future. On the other hand, the presence of high-level public authorities, administrative authorities and traditional leaders testifies of the State’s engagement in the process as a unite entity.

3.3 SYSTEMIC DIMENSION: STRATEGIC INTEREST, POLITICAL WILL, AND LOCAL ANCHORING

Finally, the systemic dimension looks at the impact of organizational elements on the rehabilitation process.

First, when analysing the attitudes of those actors that are charged with the rehabilitation of ‘repentants’, one notices that there is a particular significance associated with this intervention. The need to support young people who were unaware of the consequences of joining a terrorist organization is often cited as a reason for this policy, as is the necessity of a structured intervention to prevent negative reaction within the population. In other words, rehabilitation of this population is both regarded as positive for the beneficiaries, and as a means to prevent further insecurity in the region. But in addition to this, the ‘policy of the extended hand’ is conceived as strategically apt to directly weaken the group by encouraging defections⁶⁸⁸. This means that this intervention provides a non-violent alternative to the military option for tackling the group directly, which constitutes a compelling reason to engage in it as a priority. It is also

⁶⁸⁷ Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020).

⁶⁸⁸ Ministère de l’Intérieur, de la Sécurité Publique, de la Décentralisation, des Affaires Coutumières et Religieuses (December 2016), *Document Cadre de prise en charge de la reddition des éléments de Boko Haram*.

interesting to note that alternatives to the purely military option are also favoured by the local communities.⁶⁸⁹

*“We continue to work on it to encourage others to come back. Because that is the main objective”.*⁶⁹⁰

Furthermore, decisive political will was at the origin of the ‘repentants’ initiative, which began with the critical intervention of the Ministry of Interior, in partnership with the governorate of the region. This determined outlook over the necessity of this initiative was further proven throughout the challenges connected with the determination of the legal status of this group, and the persistence employed to finally amend the penal code in line with the provisions of the policy. Besides, internal political commitment was coupled with the powerful support of a variety of international partners, all interested in tackling what was perceived as the newest and most urgent challenge.⁶⁹¹ This, in turn, has allowed for considerable financial investment in this area, further made possible by the direct access to crisis funding mechanism.

Finally, it is worth considering the impact of implementation mechanisms in the overall design and content of the ‘repentants’ rehabilitation programme. The project design reveals a clear attention to both overall coordination and local anchoring of the initiative. Importantly, activities were designed to foster social intervention in parallel with personal rehabilitation of repentants, and to involve local leadership at each step. And at the same time, it is significant that to a large extent the actors involved in designing and implementing those activities have been entrenched in the realities of the region, in contact with the population and aware of their frustration and expectations.

While it is too early to propose a comprehensive evaluation of the outcomes of the policy of the extended hand, the combination of these systemic factors indicates a holistic approach to the rehabilitation process, and its coherent and express pursuit across each key dimension.

⁶⁸⁹ UNDP. (2019). *Enquête de perception au niveau des communautés d’origine sur la réintégration des ex-associés de Boko Haram dans la région de Diffa_Rapport Final*, p.23.

⁶⁹⁰ Author’s interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020).

⁶⁹¹ Author’s interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (6 February 2020); Author’s interview with anonymous United Nations official in Niger, Niamey (24 January 2020).

4. FORMER DETAINEES AND REPENTANTS: A COMPARISON

The programmes for the rehabilitation of ‘repentants’ appears to differ considerably from reintegration support available to the detainees and former detainees who are accused of being involved in terrorism-related activities. But does comparing public approaches to the two groups make sense? And can the different interventions be considered as part of unitary strategy to ultimately promote public safety in Niger, and specifically the stabilisation of the areas more affected by terrorism?

A VIABLE COMPARISON?

To answer these questions, it is first necessary to note that these groups differ in number, profile and composition. According to the available data, about 5000 people have been stopped and questioned in relation to terrorism-related proceedings in Niger in the course of the past years⁶⁹². For the purposes of rehabilitation, it is worth focusing only on those who spent some time in detention, and as such are more likely to be negatively affected, if not by a conviction, by prolonged exclusion from social life. Data shows that over 2000 people have gotten as far in the process as being in front of the investigative judge, and about 1150 have already been released⁶⁹³. In terrorism-cases, this entails having spent some time in detention. While not much information is available on the specific profiles of these individuals, interviews and partial data show that women and children⁶⁹⁴ represent an overwhelming minority of these cases. It is more difficult, on the other hand, to convey precise information over their origin. Terrorism-related arrests have been exponentially growing around the North-Tillabery area, as the crisis evolved at the borders with Mali and Burkina Faso. It is thus difficult to estimate the percentage of detainees and former detainees originally from Diffa, although interviews indicate they have been the majority of cases well within the crisis⁶⁹⁵. Furthermore, interviewees estimated that about half of people arrested around Diffa in relation with terrorism are of Nigerian nationality⁶⁹⁶.

More precise information exists over the group of ‘repentants’. By the conclusion of the first phase of the project, 243 ‘repentants’ had spent some time in the Goudoumaria camp. They

⁶⁹² Data provided by the Office of the prosecutor of the pôle spécialisé.

⁶⁹³ Data provided by the Office of the prosecutor of the pôle spécialisé.

⁶⁹⁴ Child according to art. 1 of the Convention on the Rights of the Child: below 18 years of age.

⁶⁹⁵ Author’s interview with Chaïbou Samna, chief prosecutor of the specialised pôle, Niamey (6 February 2020); Author’s interview with a judge of the specialised pôle, Niamey (24 November 2017); Author’s interview with a judge of the specialised pôle, Niamey (27 January 2020).

⁶⁹⁶ Author’s interview with a judge of the specialised pôle, Niamey (24 November 2017);

represent a more varied population, composed of 99 men, 29 women, and a majority of children. Of the 115 children in the camp, 79 are there with family members, while 36 are unaccompanied⁶⁹⁷.

Another crucial difference between the two groups is their level of implication within the groups. For the ‘repentants’, some level of association to Boko Haram is ascertained, although many of them stated that, while they had joined the group, they had not taken up an active role in fighting.⁶⁹⁸ Those who were arrested, however, generally deny vehemently their association with Boko Haram⁶⁹⁹.

*“There a huge difference (between the two groups), it is very simple: the detainees who are in Kollo and Koutoukalé, more than 90% of them got there through false denunciations (...) Mostly, we know, they never had links with Boko Haram. The ‘repentants’, we know it, have fought. For some you can see gun wounds, just yesterday one came here, he still has a bullet in his foot. So, they have fought, that’s the difference (...) It is those in Goudoumaria who are ideologically aligned with the Boko Haram group, even though they left. It is now a matter of repentance.”*⁷⁰⁰

Despite these notable differences, and their potential impact on rehabilitative processes, what these two groups have in common is that they were in a position to be associated with terrorism, and face criminal liability. Arguably, if considering the personal implication, the ‘repentants’ much more so than most of those who were actually arrested and imprisoned. As a result, they are also both particularly vulnerable groups, or groups that may pose enhanced risks of recidivism. In other words, although their different circumstances should be taken into account, comparing provisions for their rehabilitation makes sense because, by reason of their real or presumed connection with terrorism, they faced and/or posed heightened risks in terms of security.

⁶⁹⁷ Author’s interview with anonymous prosecutor of the specialised pôle, Niamey (27 January 2020).

⁶⁹⁸ According to a confidential document, shared with the author by an anonymous NGO representative working on the situation of the repentants, an initial screening in 2017 revealed that only 32% of repentants declared having had an active role in fighting with Boko Haram.

⁶⁹⁹ During the interviews conducted in the Kollo and Koutoukalé prisons, no specific question was asked to the detainees about their alleged involvement with Boko Haram, in order to avoid risks of retaliation for the detainees, since the interviewees were not taking place in optimal conditions of confidentiality. Nevertheless, nine out of the ten individuals interviewed, accused or sentenced for terrorism-related offences denied any involvement with Boko Haram of their own volition. Furthermore, all of them stated that they did not fear community rejection, as people knew they had nothing to do with it.

⁷⁰⁰ Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (5 February 2020).

UNAVOIDABLE GAP IN TREATMENT

While their circumstances may have been similar in terms of rehabilitation needs, the previous analysis shows that treatment of these two groups could not have been more different. In a nutshell, intervention directed at ‘repentants’ has been far more comprehensive, undertaken in better living conditions, carefully planned and monitored, adapted to individual needs to the extent that it was possible, and remarkably non-punitive in nature.

It should be stressed that the contrast between the two situations has been taken into account by the actors on the ground, and the project for the reintegration of ‘repentants’ gradually evolved to also address a target group of detainees.⁷⁰¹ While this is an important move in the attempt of redressing the balance, its effects may have been undercut by the limitations inherent in the project. Indeed, while the project was supposed to provide support to detainees, including during the release phase, by the time implementation began, it is estimated that at least 600 former detainees from Diffa had been released and had returned to the region, and then it was only possible to provide support to 150 of them.⁷⁰² In conclusion, among hundreds (and potentially thousands) former ‘terrorism’ detainees, only a small minority received actual reintegration support, and of them, most only gained access to such service at a very late stage, following release.

In addition, while efforts were made to include former detainees in rehabilitative services, attempts at extending accountability to the group of ‘repentants’ were met with sharp and persisting opposition. As described, the amendment to the penal code that provided a legal status to the ‘repentants’, excluded those responsible for war crimes, crimes against humanity, and a vaguely defined notion of ‘serious crimes’. This is essential for amnesty to be in line with the requirements of international law.⁷⁰³ A screening of the ‘repentants’ group was also carried out, by the SCLCT in close partnership with the specialised terrorism prosecutor and 21 people were identified as having committed acts that would fall within the aforementioned qualifications of “serious crimes”. And yet, no prosecution ever took place, mainly because it

⁷⁰¹ Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020).

⁷⁰² Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (5 February 2020): in addition to the support provided to former detainees, the programme was able to include support to around 100 people still imprisoned.

⁷⁰³ First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146, Additional Protocol II to the Geneva Conventions of 1949, Article 6

was considered that this choice would curtail any future continuation of the surrender process, which is considered a vital resource in the fight against Boko Haram⁷⁰⁴.

Finally, it should be noted that while numerous cases of abuses against alleged offenders connected to terrorism have been reported on multiple occasions, including directly by detainees,⁷⁰⁵ multiple sources confirmed that it was never the case for the ‘repentants’, protected by the planning of the surrender process.⁷⁰⁶

This imbalance is even more striking when considering that it does not appear to be proportional to the seriousness of actual involvement within the groups. There is little doubt, then, that frustrations appear to be notably higher among former detainees.

“The group that creates more problem is that of former detainees, and it is easy to understand. Two of them have joined Boko Haram as recruiters, but why? Because these people felt their honour has been ruined, and they have been wrongly accused, and now they want revenge.”⁷⁰⁷

“Some have come back to their villages, but others, coming back, found that their villages had been displaced. Three of four years have gone by since their arrest. And then they do not find their village. Some have lost their wives, but these are rare cases, and they were informed through the ICRC. Some wives had to tell their husbands ‘I am really sorry but there is nobody in the family who can take care of the children, so I have to leave.’”⁷⁰⁸

EXPRESSION OF DIFFERENT VISIONS?

It would be inappropriate to conclude that the incongruity of the treatment between the two groups is the result of a rational evaluation of risks and needs, or purely a political determination that the policy of the extended hand was supposed to take precedence over reintegration of former detainees. Attempts at bridging the gap prove the contrary. Instead, the evolution of the

⁷⁰⁴ Author’s interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020); Author’s interview with a judge of the specialised pôle, Niamey (27 January 2020); Author’s interview with a legal advisor for a bilateral partner of Niger in counterterrorism, Niamey (30 January 2020); Author’s interview with local administrative authority, Diffa (3 February 2020).

⁷⁰⁵ Author’s interview with the high ranking official of the SCLCT, Niamey, (21 November 2017); Author’s interview with “Ousmane”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018); Author’s interview with “Mohamed”, detained in Koutoukalé on the basis of terrorism charges (7 May 2018).

⁷⁰⁶ Author’s interview with representative of the Diffa governorate, Diffa (3 February 2020); Author’s interview with anonymous official of Diffa SCLCT branch, Diffa (5 February 2020).

⁷⁰⁷ Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (5 February 2020).

⁷⁰⁸ Author’s interview with anonymous Diffa community leader, Diffa (5 February 2020).

security context on the ground can explain much of the difference in treatment. The first arrest waves were led by the desire to overwhelm the enemy, bring perpetrator to justice and punish them as they deserved. In the course of two years, with the balance of power more securely in the hands of the government, and the socio-economic conditions in the region worsening, the strategic advantages of forgiveness and rehabilitation are likely to have appeared more appealing.

But if the context can explain to a large extent the origin of this bifurcation, it is less able to account for its persistence over three years later. This leads to asking whether these two treatments are the expression of two fundamentally irreconcilable approaches: one pursuing accountability as the priority, while the other estimates that pacification is to be pursued even at the cost of accountability. These two positions are inevitably connected with the perception and framing of terrorism as a phenomenon. In fact, as long as terrorism is addressed as a criminal phenomenon first and foremost, accountability of perpetrators of such a serious crime will necessarily take precedence as an objective of public action. In doing so, the State reassert continuity in a time of exception, by reaffirming authority to the legitimacy of the legal system. In these circumstances, adopting alternative models to traditional criminal justice, becomes inappropriate.

“You know, I have an issue with talking of transitional justice in this context. Because when we talk of transitional justice, it means that the fundamentals of the rule of law have been overturned, and it is now necessary to rebuild them. In reality, this is not the case here. The system is taking charge of the issue, and of course there are quality issues, but then in my opinion, rather than going towards transitional justice, it would be worth focusing on the system, to reinforce it, to allow it to continue and improve.”⁷⁰⁹

It is no surprise then that the necessity to invest in innovative justice approaches is felt stronger in the regions most affected, those where it is easier to perceive the effect of terrorism as an armed conflict, rather than just criminality. Then, it is not its political nature, nor the ideological connotation that justify its “exceptionalism”, which rather derives from its scope. In this second view, then, the approach to State authority inevitably shifts. As the status quo has already been subverted, it is in the ability to bring peace and foster stabilisation that the State will be able to prove its sovereign qualities.

⁷⁰⁹ Author’s interview with judge at the specialised pôle, Niamey (22 November 2017).

5. RECONCILIATION THROUGH REHABILITATION: AN EFFECTIVE ROUTE TO POPULAR LEGITIMATION?

It is now time to shift the focus from the performance of the State and justice institutions in pursuing rehabilitation, to its reception by the local population. Ultimately, rehabilitation intervention cannot contribute to the State negotiation of sovereign quality if it fails to result in public trust. As Biersteker and Weber explain, the normative production of sovereignty is constructed through practices and interactions⁷¹⁰. Securitization theories emphasized specifically the role of the audience in determining securitization: the elevation of the threat to exceptionality has to be believed to be actualized.⁷¹¹ It is argued here, as was the case for accountability earlier, that the role of the audience continues to hold value when securitization has happened. In a securitized context, it is for citizens to determine whether the State has effectively responded to the threat and, in doing so, recognising legitimate sovereignty. Indeed, citizens of the regions affected by violence exercise a direct demand for security from the State. Then it is essential to ask whether the population in Diffa and the surrounding villages perceived rehabilitation as a realistic and effective contribution to the stabilisation of the region.

Because the present research is focused on justice responses, the rehabilitative interventions considered here are those that are related to vulnerable groups who are, or could have been, involved in a judicial action. That essentially concerns three target groups: individuals arrested and detained on the basis of terrorism-related charges; so-called “repentants”; and victims of terrorism. However, it is worth acknowledging that “stabilisation” intervention in an area particularly affected by violence such as the Diffa region will extend much further than that, and include broader initiatives related to rebuilding infrastructure, supporting the re-installment of displaced populations and refugees, fostering economic reprisal through public investment. There are indications that a variety of activities aiming at those objectives have been taking place in the Diffa region,⁷¹² and while they are certainly vital to final objective of promoting

⁷¹⁰ Biersteker, T. J., Weber, C., & Weber, P. of I. R. C. (1996). *State Sovereignty as Social Construct*. Cambridge University Press.

⁷¹¹ Salter, M. B. (2011), ‘When Securitization Fails: The Hard Case of Counter-terrorism Programs’, in T. Balzacq (ed.), *Securitization Theory: How Security Problems Emerge and Dissolve*, London: Routledge, 116–32.

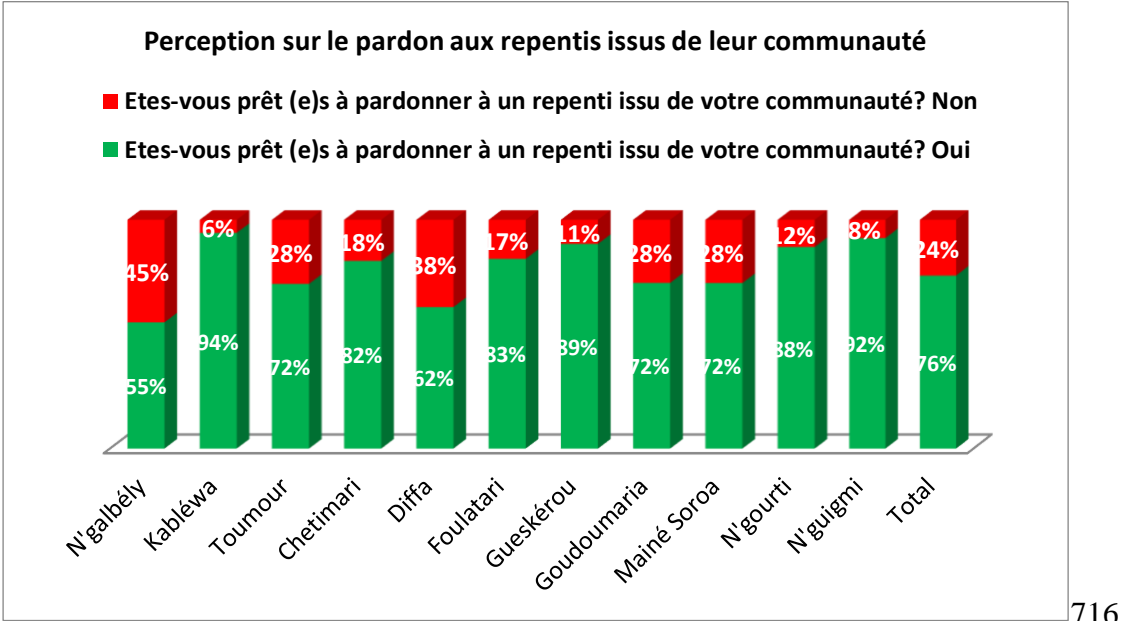
⁷¹² A Recent Report by the Centre National D’Etudes Strategiques et de Sécurité (CNESS) in Niger, published in October 2019, indicates that around 31% of projects related to terrorism and violent extremism implemented in Niger over the past five years have been related to creation of economic opportunities, improvement of service provision, climate change and agricultural production (p. 31-32 CNESS_Revue des initiatives de prevention et de lute contre l’extremisme violent au Niger).

security in the region, and they will necessarily impact popular perceptions of the action conducted by the State in this area, their analysis is beyond the scope of this study.

POPULAR VIEWS OF REHABILITATION PROCESSES

As far as the rehabilitation of groups that pose a potential security risk, namely former “terrorist” detainees and “repentants”, interviews clearly indicate that local populations are mostly open to their return.⁷¹³ These results are in line with those of a national study, carried out by UNDP, that collected results from 1030 interviews conducted in 11 out of the 12 municipalities in the region⁷¹⁴. According to this study, 76% of local populations would be ready to forgive a ‘repentant’ from their own community and 72% would be ready to forgive someone originally from a different community.⁷¹⁵

FIGURE 15: LOCAL POPULATIONS’ PERCEPTIONS OF/ FORGIVENESS FOR ‘REPENTANTS’



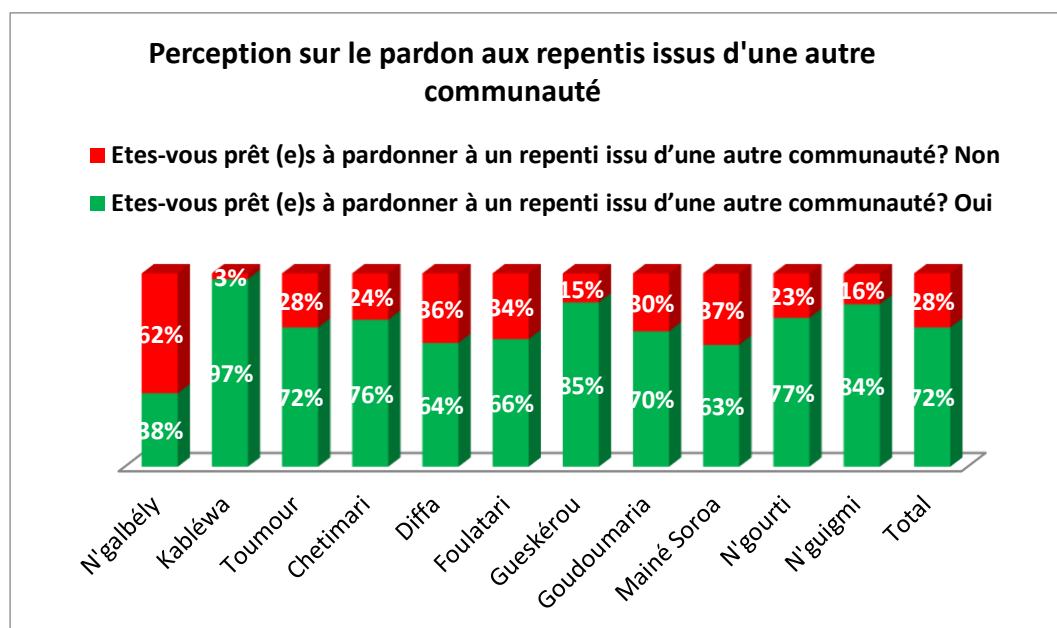
⁷¹³ Author’s interview with representative of the Diffa governorate, Diffa (3 February 2020); Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (5 February 2020); Author’s interview with a local magistrate, Diffa (04 February 2020); Author’s interview with anonymous member of the ‘Peace and Security Committee’ in Diffa, Diffa (4 February 2020).

⁷¹⁴ UNDP. (2019). *Enquête de perception au niveau des communautés d’origine sur la réintégration des ex-associés de Boko Haram dans la région de Diffa_Rapport Final*.

⁷¹⁵ Ibidem, page 6

⁷¹⁶ Source: UNDP. (2019). *Enquête de perception au niveau des communautés d’origine sur la réintégration des ex-associés de Boko Haram dans la région de Diffa_Rapport Final*.

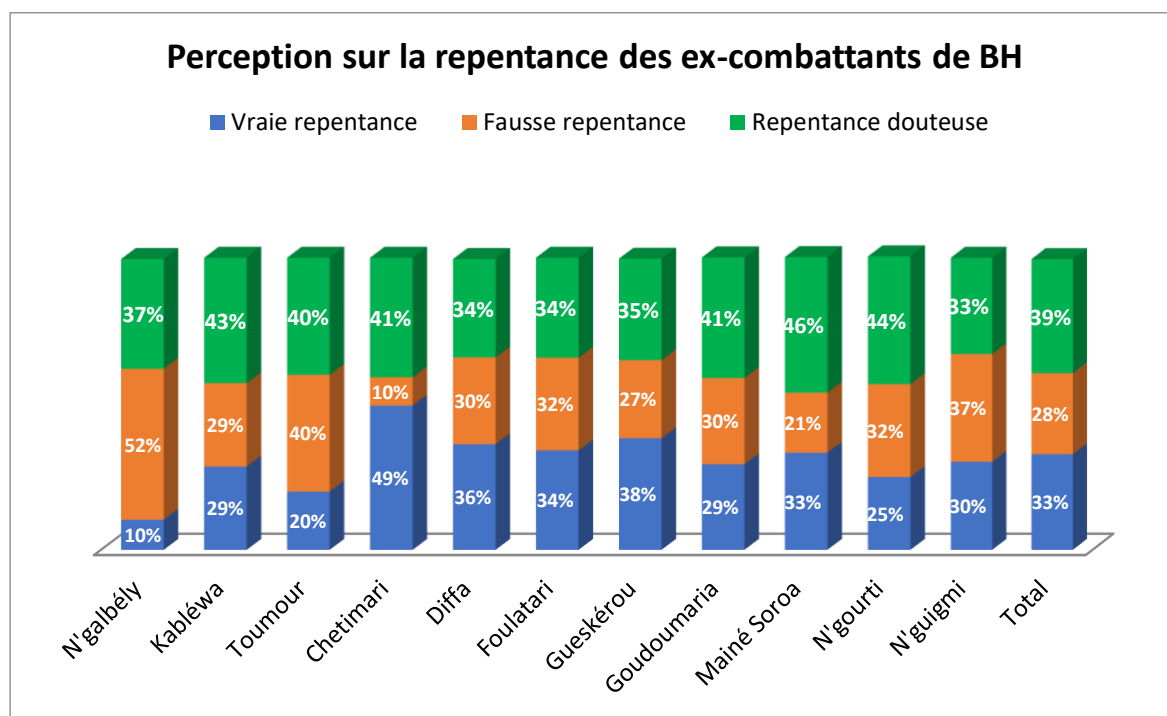
FIGURE 16: LOCAL POPULATIONS' PERCEPTIONS OF/ FORGIVENESS FOR 'REPENTANTS'



The results of the UNDP study present two elements of particular interest to the present research. First, there appears to be no correlation between the communities' openness to the 'repentants' return, and their belief in their actual remorse. According to the cited study, in all analysed municipalities, the majority of respondents considered that the act of repentance by former Boko Haram members was either false or, at the very least, doubtful. This may be taken to indicate that the interest of achieving stabilisation is valued above actual remorse of former Boko Haram members. At the same time, data shows that the majority of respondents (77%)⁷¹⁷ also believe that young people joined the terrorist group mainly for material gains, rather than for ideological reasons (only 4%). Albeit causal links cannot be inferred from the UNDP report, it may be argued that the openness to 'repentants' return may also be connected to lower perceptions of risks posed by future coexistence with former members of the group.

⁷¹⁷ Ibidem, page 6.

FIGURE 17: LOCAL POPULATIONS' PERCEPTIONS OF 'REPENTANTS' MOTIVES



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The second point of interest is related to the discrepancy between the result of the UNDP report, and those of a previous study conducted by an NGO operating in the region, focused on three of the affected municipalities, which showed barely 30 % of respondents were open to the return of former members of the groups. The interviews conducted in the context of the present research seem to indicate that how both governmental officials and civil society representatives share the perception of a progressive change in popular perception of the reintegration process as acceptable and desirable⁷¹⁹.

“If the State manages to forgive, then the population also has to forgive. That is to say, there are children of Diffa, children of this territory, they joined, and then they realised it was not a good situation. They surrendered by themselves. And this initiative was really good. We created a camp for them in Goudoumaria, we trained them. (...) And in doing so the State forgave these ‘repentants’. And the population also is now forced to accept it. They said to themselves: “we do not want anymore of this. We want to come

⁷¹⁸ Source: UNDP. (2019). *Enquête de perception au niveau des communautés d’origine sur la réintégration des ex-associés de Boko Haram dans la région de Diffa_Rapport Final*

⁷¹⁹ Author’s interview with representative of the Diffa governorate, Diffa (3 February 2020), Author’s interview with anonymous member of the ‘Peace and Security Committee’ in Diffa, Diffa (4 February 2020) ; Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020).

and stay with you in peace, in social cohesion.” So of course, we have to accept them. And that’s how it was.”⁷²⁰

“There was also a sensibilisation campaign, targeting the Nigerien populations to foster tolerance and forgiveness. Sure, there are some who say: “No, you cannot expect that after my wife has been killed in front of me or raped in front of me, after my child has been killed because he refused to join, that I will tolerate it.” But truthfully, they are a negligible minority, the majority tolerates because there are also measures to make funds available to them, meaning to help them for the future. (...) Because there is no question that we could help a ‘repentant’, a former Boko Haram member, and then forget the population, especially those who did not take up arms.”⁷²¹

“There was an evolution in the perception of the population. In what concerns the arrests, even before, the population always claimed the innocence of those people(...)For those who were considered guilty, for the most part they did not come back, they just left. For them, there would have been problems. For those who people thought innocent, reintegration was not a problem. (...) But towards the ‘repentants’, the perceptions evolved.”⁷²²

It is interesting to note this distinction between the reaction of the communities towards former detainees and ‘repentants’. While accounts of the perceived dangers associated with the release of former detainees are mixed, it appears that there is widely shared recognition that most of them were not truly involved with terrorism-related offences. These results are also in line with the outcomes of the analysis carried out in chapter V.

ROLE OF THE STATE THROUGH THE TERRORISM CRISIS

Despite progress in the security context and overall positive results of rehabilitation efforts, analysis of the interviews reveals divided views over the State’s intervention in the crisis.

Those who expressed positive considerations over the State’s ability to handle the terrorism crisis in Diffa, thought that the main success of the State was related to a strong willingness to address the terrorism phenomenon, refusing to leave the populations alone.⁷²³ These observations were often brought up by State officials, and referred to the eruption of the crisis in 2015, and the following muscular reaction of the State. This presence and commitment to addressing the issue was also at times compared with attitudes of *laissez faire* that had

⁷²⁰ Author’s interview with anonymous member of the ‘Peace and Security Committee’ in Diffa, Diffa (4 February 2020).

⁷²¹ Author’s interview with representative of the Diffa governorate, Diffa (3 February 2020).

⁷²² Author’s interview with anonymous representative of NGO working on the ‘repentants’ project, Diffa (3 February 2020).

⁷²³ Author’s interview with Chaibou Samna, chief prosecutor of the specialised pôle, Niamey (6 February 2020); Author’s interview with anonymous official of Diffa SCLCT branch, Diffa (5 February 2020).

characterised previous governments in relation to the progressive infiltration of the Diffa region by Boko Haram.

At the same time, however, many respondents, especially among local leaders, indicated that, as a result of the crisis, local populations were more likely to feel forgotten by the State than before⁷²⁴. A number of reasons were identified to justify this sense of abandonment.

The issue that emerged more insistently was certainly the controversial relationship of the local population with the security forces. Beyond mutual suspicions, interviewees have repeatedly expressed the feeling that security forces were not able nor really willing to protect the local population.

*“I can really tell you that this crisis has increased the distance between the State and the population, much more than it has addressed it. My opinion is that there are reasons connected to our behaviour as security forces...in any case there are some shared responsibilities, but the major responsibility is to be ascribed to the security forces.”*⁷²⁵

*“How many kidnappings have there been? Security forces have never intervened. When you ask them to, they say it is not prudent, that when you follow those people you risk the life of the person they have taken hostage, they may kill him on the way. They could, they may. That’s how it always is. (...) Nobody can guarantee your security.”*⁷²⁶

Behaviour of security forces also added to perceptions of injustice faced by those populations who live closer to the lake Chad islands, and who have been continuously suspected of harbouring and supporting Boko Haram members.⁷²⁷ In addition, the lack of securitized areas leads to inaccessible services, which translates to a gap in overall authority, but also opens a space for confrontation between State leadership, and traditional authorities, who remained present and closer to the people.

“In the entire area impacted by Boko Haram, there is an absence of the State. Currently, in the Diffa region, teachers of schools that are in insecure zones, they have all been delocalized to Diffa, in the centre of the town (from the nearby villages). To go to school, the teacher has to fend for himself and hitchhike to be at school by 8 or 9. By 1 p.m., he has to leave the school to get back to Diffa. By 3h30 p.m., for all health districts of the area, an ambulance has to bring back all health officials. If you get sick after 3h30 pm, you have no idea who to turn to. (...) By 4p.m., all projects operating in the villages

⁷²⁴ Author’s interview with anonymous N’Guigmi community leader, Diffa (4 February 2020); Author’s interview with anonymous Diffa community leader, Diffa (5 February 2020); Author’s interview with anonymous official of Diffa SCLCT branch, Diffa (5 February 2020).

⁷²⁵ Author’s interview with anonymous official of Diffa SCLCT branch, Diffa (5 February 2020).

⁷²⁶ Author’s interview with anonymous N’Guigmi community leader, Diffa (4 February 2020).

⁷²⁷ Author’s interview with anonymous Diffa community leader, Diffa (5 February 2020); Author’s interview with a judge of the specialised pôle, Niamey (23 January 2020).

have to get back to Diffa centre, and at 5p.m., security forces who are along the national route and whose mission is to secure the villages, they actually move further up north, where it is much safer. The only representative of the State after 5 p.m., is the village chief. (...) There is an authority crisis. The most dangerous consequence we see today is the authority crisis.”⁷²⁸

Finally, there is a notable gap in rehabilitative intervention, that so far has not been adequately addressed by the State. Victims of terrorism have lost loved ones, homes, and have incurred considerable financial losses over the past years, and they share the feeling that not enough has been to respond to their needs, especially when compared with the type of support that is provided to the ‘repentants’ and, to a certain extent, to former detainees⁷²⁹. One of the motivations provided by public officials is that there are simply too many victims to provide financial compensation to all of them.

« Question: are there specific forms of support for people who qualify as victims of terrorism-related violence?

Answer (Official 1): No, nothing really specific.

*Answer (Official 2): It is rather a global approach. There was a reflection on potential ways to compensate victims that was conducted in the framework of the interministerial committee, and potential forms of reparation. But it is a very complex axis of intervention. Because nowadays victims are not only in the Diffa region. Furthermore, relatives of victims are also victims. A lot of people can be considered victims, which makes it difficult to provide for them financially. We rather favoured actions within the communities, so that everyone in the communities will benefit from them »*⁷³⁰.

As already mentioned in chapter IV, the recent amendment of the penal code foresees a mechanism of compensation for victims, and yet nothing has evolved on that side in the past years. Certainly, financial constraints and the complexity of designing effective attribution mechanisms can explain the hindrances to the implementation of those measures. Nonetheless, the testimonies collected highlight that, while investment in rehabilitation efforts, whether towards former detainees or Boko Haram “repentants” have been mostly met with favourable reactions, the demands of the population for security extend way beyond that, and many have been left unanswered.

⁷²⁸ Author’s interview with anonymous Diffa community leader, Diffa (5 February 2020).

⁷²⁹ Author’s interview with anonymous national human rights defender, Niamey (27 January 2020); Author’s interview with a judge formerly with the specialised pôle, Niamey (27 January 2020); Author’s interview with anonymous United Nations official in Niger, Niamey (24 January 2020); Author’s interview with anonymous N’Guigmi community leader, Diffa (4 February 2020).

⁷³⁰ Author’s interview with the Secretariat of the Haute Autorité à la Consolidation de la paix, Niamey (22 January 2020).

6. CONCLUSIONS

This study examined the State of Niger's performance in promoting rehabilitation as a route to security, focusing on the Diffa region. The focus on rehabilitation has dual significance in this context: on the hand, from the perspective of justice institutions, it is a complementary objective to accountability of offenders. In this view the value of rehabilitation is to be understood as an integral part of the State performance in ensuring law and order. On the other hand, the importance of rehabilitation is further enhanced by the instability of the region. If the Boko Haram threat appears to be contained, the situation in Diffa and for the surrounding villages has remained precarious for years, deeply impacting living situations, social relations and livelihoods. Here, then, rehabilitating vulnerable groups, such as former detainees and Boko Haram repentants can directly reduce security risks.

After presenting the contextual circumstances that direct and influence rehabilitation attempts in Diffa, this chapter focused on two elements. First, it delved into the analysis of rehabilitation intervention within the ordinary criminal justice chain, directed at the individuals arrested and detained for terrorism-related offences, and outside traditional justice, in the context of the "policy of the extended hand" for the Boko Haram repentants. Then, it looked into the population's perceptions of rehabilitative programmes in the context of their demands to the State as security provider. In a way, the findings may appear straightforward, while revealing a deep contradiction in the State's approach: rehabilitation was only pursued outside of traditional justice, creating a clear dichotomy between accountability and reconciliation efforts and defeating attempts at convergence. It is also apparent that, despite the challenges posed by the context and by the somewhat impromptu launch of the "policy of the extended hand", the population welcomed efforts towards reconciliation, and it did increasingly so over the years. However, whether rehabilitative efforts were truly conducive to bolstering the State's claims to sovereignty remains in question. Ultimately though, the ways that rehabilitative intervention was born and implemented and the instances where it was forgotten put into question not only the performance of the State, but also the indirect and undesired consequences of counterterrorism.

REHABILITATION: THE FORGOTTEN OBJECTIVE OF JUSTICE

There is little doubt that rehabilitation of vulnerable groups, and particularly those detained for terrorism-related offences, is understood as a priority both by justice officials in Niger and by the local population in Diffa. And yet, despite the consensus, it is clear that throughout the

justice process, including the prolonged detention periods and after release, virtually no attempts were made at providing rehabilitative support to this group of people.

The gravity of this lost opportunity should not be underestimated. Failing to provide support to individuals placed in especially dire circumstances by the State will reinforce grievances, especially if coupled with feelings of injustice over one's arrest. By sacrificing rehabilitation, the justice system has potentially contributed directly to creating the conditions of further recruitment, disturbances, insecurity.

The exceptionality of terrorism-related proceedings may provide an explanation for this failure, if it had led to overemphasizing punitive approaches for this category of crimes. Yet, as was clearly shown in the previous chapters, that was not the case in Niger over the past years. Instead, the inability to effectively engage in rehabilitation appears to be a symptom of the broader weaknesses that affect justice delivery in Niger. The lack of funding and the uncertain attribution of responsibilities at ministerial level obliterate rehabilitation intervention for all detainees of the country, not only for those accused of terrorism.

It is rather surprising, instead, that the prioritisation of the judicial response to terrorism did not provide enough momentum to change the status quo and finally prioritize rehabilitation, at least for this group of prisoners. When contrasted with the notable reforms, advances and improvements of the arrest and investigation proceedings, all the way to the trial, over the same period of time, it is quite striking that no changes were observed in the State's capacity to support the rehabilitation of prisoners. This immobility highlights the effects of the superposition of the security agenda on the justice process. In a securitized space, justice risks serving only the short-term goals of threat control and is deprived of the capacity to be forward looking in producing long-term security.

FLEXIBILITY AND LOCALIZED POLICY-MAKING FOR THE OPPORTUNITY OF RECONCILIATION

The experience of rehabilitation of the repentants represented an innovative approach to respond to terrorism in Niger. Because of their direct association with an exceptional threat, both the "terrorist" detainees and Boko Haram defectors can be identified with heightened security concerns. Paradoxically, amongst the two groups, this may even be more relevant for the repentants, whose membership in the group was ascertained, while many detainees claim their innocence. And yet, for strategic and stabilisation related reasons, the repentants were

welcomed back by the State through an approach entirely centred on forgiveness, rehabilitation and reconciliation.

It is too soon for this study to provide an analysis of the outcomes of this initiative. Nonetheless, it appears obvious that the “policy of the extended hand” constitutes a clear-cut bifurcation with respect to the approach of the specialised criminal justice response to terrorism-related crimes.

Acting unencumbered by the strict boundaries of the law and its procedures, the State was able here to exercise flexibility and respond to the perceived needs of local population. The policy of the extended hand clearly borrows from DDR processes and conflict scenarios, rather than sticking with the conceptualisation of terrorism as a specific form of organized crime. In doing so, this initiative was able to contribute to the need for stabilisation by directly weakening the terrorist organization and at the same time initiating efforts of reconciliation. Furthermore, it hints at a different interpretation of the exceptionality of terrorism, where exceptionality is measured in the magnitude of the consequences of violence, rather than focusing on an exceptional enemy.

The involvement of local population, both through the direct engagement of traditional leaders and their authority in the surrender process and by providing services and assistance to local youth, is an especially notable feature of this policy. It anchors its inception as well as its benefits in the reality on the ground. This serves as a visible contrast to the centralisation of the judicial process, which had led to instrumentalizing local populations to denounce the terrorists and then failed to provide support when releasing those that had been arrested.

At the same time, the prolonged instability of the region also impacted the coherence of this policy, as the process is conducted outside of legality. While the amnesty law of 2018 clarifies the legal status of the repentans and legalizes their position, the terms of the law are never fully applied: as the priority is to foster further surrenders, accountability for serious offences is voluntarily overlooked. Whether within criminal justice or in the context of alternative approaches, such as those pursued with the amnesty law, the justice apparatus in Niger has yet to reach a coherent combination of its backward-looking element, anchored in accountability and forward-looking opportunity, centred on reconciliation.

THE STATE AND ITS CITIZENS: A MIXED PERFORMANCE REVIEW

Finally, this study has revealed how neither accountability of terrorism perpetrators, nor attempts at promoting rehabilitation of vulnerable groups are enough to respond to the security needs expressed by the local populations.

The persistence of instability is coupled with the aftermath of the state of emergency measures and continues to gravely hinder livelihoods and opportunities in Diffa and the neighbouring villages. Against this backdrop, the perception of the State's performance is fraught with ambiguity. On the hand, the "presence" and the intensity of the State reaction is met with appreciation. On the other hand, the bond of trust between the population and the first security provider, the army, appears broken.

In this context, rehabilitation and reconciliation cannot suffice because they cannot progress: they lack a secure basis to flourish and thus become a source of legitimacy for the State.

CONCLUSION

In 2021, Niger completed its first democratic transfer of power since its independence from the French colonial rule in 1960. On February 21st, Mohamed Bazoum won the second round of presidential elections with 55.75% of the favourable votes, peacefully succeeding to the two mandates of Mahamadou Issoufou's presidency.⁷³¹ This historic event concludes an especially tumultuous decade of transitions for the Sahelian country.

On the one hand, the 2010 military coup that ended the Tandja presidency relaunched hopes for the democratization process. Sparked by the introduction of a multi-party system in 1990, those hopes had been repeatedly dashed by two military coups and, later, by president Tandja's attempts at revising the Constitution to remove the two-term limit of presidential mandate and remain in power. In 2011, Issoufou's programme revived democratic aspirations. His administration pledged to focus on economic and social development and on food security, while firmly anchoring those objectives in the promise of a democratic reboot, to enhance institutional credibility and effectiveness.⁷³² Over the years, the democratic record of the government has faced considerable criticism, with journalists and civil society representatives raising serious concerns over governmental oppression and popular protests rising in the country.⁷³³ And yet, the latest presidential elections undoubtedly represent a turning point for democracy in Niger, sending a signal about the growing stability of institutions.

On the other hand, Niger has faced mounting insecurity under growing international scrutiny. The securitization of the political agenda began with growing investment in regional and global partnerships, particularly through the mobilisation of Nigerien soldiers in the Serval mission to Mali and in the Multi-National Joint Task-Force against Boko Haram⁷³⁴. But the terrorist threat quickly escalated also at home, exploding with the February 2015 attacks on Bosso and Diffa that sparked a muscular and unprecedented governmental response. As attacks rose, so did

⁷³¹BBC News (23 February 2021) Niger election: Mohamed Bazoum wins landmark vote amid protests. <https://www.bbc.com/news/world-africa-56175439>

⁷³² Republique du Niger, Plan de Développement Economique et Social (PDES) 2012 – 2015 ; Niger : la Renaissance. Programme de Campagne pour les Elections Présidentielles 2011.

⁷³³ Elischer, S., & Mueller, L. (2019). Niger falls back off track. *African Affairs*, 118(471), 392–406.

⁷³⁴ See “*Securitization in Niger: a separate trajectory*”, Chapter III.

international interest in Niger. While neighbouring Mali and Lybia had crumbled, Niger had already rose to the role of a “favoured ally” for many international partners, including France, the United States and the European Union. With the new global reach of Boko Haram violence, the relevance of Niger as a crucial counterterrorism force in the Sahel continued to grow. Then, in 2017, an ambush near the village of Tongo Tongo, close to the Malian border, led to the death of four Nigerien and four American soldiers. This sparked new and unrivaled interest in Niger’s role in the war on terror in the Sahara.⁷³⁵ A few years later, the Inates attack of December 2019, with 71 Nigerien casualties and the Chinégodar attack in January 2020, causing the death of 89 Nigerien soldiers, were the deadliest yet in the country, confirming that terrorist violence is far from being subdued.⁷³⁶

It is against this background, that this study set out to investigate the relationship between counterterrorism and the State in the dramatically understudied context of Niger⁷³⁷. As democratization and securitization efforts intertwined, the State faced unprecedented pressure to prove its sovereign capacities. But to what extent were counterterrorism efforts strengthening the State?

Building on the constructivist tradition, I posited that States do not automatically possess sovereignty, but rather constantly negotiate it⁷³⁸. Then, engaging in counterterrorism as a priority, thus securitizing the issue and elevating it to an existential threat, sets the perfect grounds for testing sovereign attributes.

To answer this question, this study conducted a thorough examination of the normative and policy framework regulating counterterrorism in Niger, mobilised original statistics to evaluate the performance of the justice system in terrorism-related investigations and trials, compared the judicial and extra-judicial approaches to accountability and rehabilitation and, most importantly, relied on in-depth interviews of State officials, magistrates and law enforcement, civil society professionals, community leaders and individuals imprisoned for terrorism-related crimes to analyse outcomes, motivations and perceived legitimacy of judicial counterterrorism

⁷³⁵ Vox (26 October 217) Why were US soldiers even in Niger? America’s shadow wars in Africa, explained. <https://www.vox.com/world/2017/10/26/16547528/us-soldiers-niger-johnson-widow-africa-trump>

⁷³⁶ Le Monde (13 January 2020) Au Niger, l’armée subit ses plus lourdes pertes à Chinégodar avec 89 soldats tués https://www.lemonde.fr/afrique/article/2020/01/13/au-niger-l-armee-subit-ses-plus-lourdes-pertes-a-chinegodar-avec-89-soldats-tues_6025664_3212.html

⁷³⁷ Elischer, S., & Mueller, L. (2019). Niger falls back off track. *African Affairs*, 118(471), 392–406, p.2.

⁷³⁸ Biersteker, T. J., & Weber, C. (Eds.). (1996). *State Sovereignty as Social Construct*. Cambridge University Press.

efforts. The result of this analysis focus on two axes of sovereignty negotiation: the State's capacity to act as a normative agent and the State's capacity to produce public safety.

Ultimately, the findings are far from clear-cut. They highlight the Nigerien efforts to continuously adapt counterterrorism responses to the realities of the ground, guided by the ambition of legality and fairness and performed in the name of the State. And yet they also reveal the striking inability of investigations and trials to achieve satisfactory accountability or to contribute to stabilisation after terrorist violence in other meaningful ways. The nuances and contradictions brought to light by this analysis illuminate the problematic implications of the "exceptionality" that is attributed to the terrorism phenomenon and reveal inconsistencies and limitations that derive from imposing security-oriented objectives upon justice institutions.

THE STATE AS A NORMATIVE ACTOR: LAWFULNESS IN COUNTERTERRORISM

Despite the scarcity of studies concerning Niger, the existing analyses of its counterterrorism agenda have concentrated on the influence of western powers on the country's trajectory of securitization⁷³⁹.

There is little doubt that post-colonial ties, global convergence of counterterrorism approaches, direct dependency on development aid and quests for legitimation in the international arena played a key role in shaping security approaches in Niger. This study has found this perspective especially compelling in two separate instances. First, when reviewing the progression of terrorist attacks on Niger's soil and specifically the escalation of Boko Haram's violence in early 2015. The exposure-intensification paradigm appears especially apt to explaining how, as Issoufou strengthened his alliance with European, American and regional powers to fight terrorist groups, he also increasingly exposed Niger to becoming a target of direct attacks.

Second, when dissecting the counterterrorism laws adopted during the 2011 and 2016 reforms. International conventions and Security Council resolutions impose to a certain extent a "coercive" harmonisation of national terrorism-related laws at national level. And yet the

⁷³⁹ See for instance : Deltenre, D. (2013). *Niger: Du coup d'État à l'engagement international. Retour sur trois années de transition politique sur fond d'insécurité régionale grandissante*. UCL-Université Catholique de Louvain ; Deltenre, D. (2015). *Niger: Cap sur 2016 ! Situation politique et sécuritaire à la veille des élections* ; Elischer, S., & Mueller, L. (2019). Niger falls back off track. *African Affairs*, 118(471), 392–406.

Nigerien legislator went even further, repositing almost literal transposition of foreign provisions. This is especially evident in the wording of the offence of “association”⁷⁴⁰.

The dynamics of policy transfers in the area of terrorism, and specifically the analysis of the role played by international and regional organisations such as the United Nations and the European Union, contributes greatly to the understanding of securitization processes. There is indeed a need for further empirical studies addressing the specific consequences of the rise of the Security Council’s prescriptive powers in this area, especially with the growing criminalisation of preparatory acts and travel since 2014.

Nonetheless, this research has deliberately chosen to focus on the Nigerien perspective, to shine a light on the active role of national agents in shaping, adapting and transposing the counterterrorism agenda into action. These “internal” lenses have allowed for a more in-depth examination of Nigerien actors’ motivations, practices and perceptions.

When it comes to contextualising securitization processes, concentrating on the Nigerien perspective highlights how involvement in counterterrorism was designed to serve *other* national priorities. This is especially true for the initial phase, when counterterrorism consisted mostly of regional military efforts. Looking into the electoral and policy programmes by Issoufou’s party at the time reveals how security issues were framed in terms of human security and terrorism risks were associated with developmental issues. These plans rely on the security-development-governance nexus to justify how socio-economic investment was the priority and would lead to reducing the spread of terrorism. In parallel then, the engagement in counterterrorism missions in the region allowed a gain in legitimacy that resulted in higher investments at home, transforming international capital in national capital⁷⁴¹.

Adopting national lenses has also been instrumental to reaching novel findings on the State’s normative powers in a security context. Indeed, this study demonstrated that Niger acted with decisiveness and initiative when it came to legislating terrorism, revealing the role of justice officials in advocating for reform. If the counterterrorism laws before the 2015 attacks are mainly the result of almost literal transposition from regional and international treaties, the 2016 reform introduces considerable changes. At the time when the country was most struck by mounting insecurity, it is notable that prosecutors and magistrates advocated for new laws that

⁷⁴⁰ For a comparison between the wording of article 399.1.19 of the Nigerien Penal Code and article 421-2-1 of the French Penal Code see “2011 – 2015: Fighting Terrorism as a Regional Phenomenon”, Chapter III.

⁷⁴¹ Delpuech, T. (2009). Comprendre la circulation internationale des solutions d’action publique: Panorama des policy transfer studies. *Critique internationale*, 43(2), 153–165.

better reflected national realities, even when those complicated the task of the justice system, as was the case for the “lowered” status of certain offences from *crimes* to *délits*. It is equally notable that justice officials strived to identify the shortcomings in the arrest and investigation processes and actively engaged to correct them, including when that required confronting the army, perceived as the first line of defense against Boko Haram and similar groups.

Furthermore, the State accelerated and reinforced the specialisation of key investigative and judicial bodies, signaling that the application of the counterterrorism laws through the courts was a strong priority. Efforts for the decentralisation of the SCLCT also point to the determination to adapt this system to the needs on the ground in the most affected region, correcting the initial institutional set-up. At the same time, the nature of specialisation has allowed this branch of the justice system to overcome some of the structural weaknesses associated with justice in Niger. Lower turn-over of magistrates has contributed to increased competency and credibility of the judicial process.

Most importantly, this study found that efforts to influence the counterterrorism reform process and to improve its operationalization were directly motivated by the aspiration of legality and the need to improve justice’s results. Through the years, justice officials in Niger have clearly identified their performance as reflective not only of the State’s abilities, but also of its legitimacy as a normative actor, and have strived to act within the bounds of the law as a result.

At the same time, this analysis clearly showed how the “exceptionality” of the terrorism phenomenon was integrated and promoted by the Nigerien legal framework even beyond what is entailed by the transposition of international legal provisions. Indeed, “*it is not the issue in itself, but rather the representation of the issue that develops among a group of actors, most frequently social and political élites, that can set a transfer in motion*”⁷⁴². And terrorism is indeed perceived as inherently different from other crimes or conflicts. This is demonstrated not only by the emphasis on institutional specialisation, but also by the distinctiveness of procedures when compared with ordinary crime. In this sense then, these findings are relevant to show how the “exceptionality” of responses goes beyond the adoption of exceptional measures, such as the State of emergency, and is easily incorporated and reinforced by ordinary laws.

⁷⁴² Sabine Sauruger, Yves Surel, « L’européanisation comme processus de transfert de politique publique », *Revue internationale de politique comparée*, vol.13, n°2, 2006, p. 190.

THE STATE AS A SECURITY PROVIDER

When it comes to the growing attention to armed violence and terrorism in Niger over the past decade, scholars have cautioned against overestimating the phenomenon⁷⁴³. In particular, they have highlighted how terrorist groups have shown a preference for State targets over attacks on the population, in Niger. However, this should not lead to underestimating the extent to which local populations have been affected by terrorism, both directly and through the broader circumstances of insecurity, including State-led counterterrorism. In this context, restoring peace and security has been a crucial priority for the State.

Yet no research has attempted to investigate the national responses to terrorist attacks beyond the military reaction. This study wished to address that gap by looking at the State's capacity to bring alleged terrorists to justice as well as alternative means of rehabilitation of former Boko Haram members in the context of the "extended hand" policy.

It has found that the criminal justice chain has, so far, proven a very poor record in terms of contributing to the State's role as a security provider. Indeed, it has been unable to efficiently identify and convict terrorists. It is certainly necessary to take into account that the data examined here referred to the years that immediately follow the 2016 reform and the escalation of terrorism in Niger. It would be interesting to repeat this analysis over a more extended time-frame to verify if the evolution in the justice performance that has emerged over the most recent years will continue. However, at present, it appears that the potential of the criminal justice approach to terrorism, based on its understanding as an exceptional form or organized crime, failed to realize.

This was due primarily to the impossibility to use credible evidence, resulting from the inappropriate conduct of arrests and investigation, particularly in the preliminary phases. In addition, this study contends that the overreliance on the offence of "association", instrumentalized to carry out as many arrests as were felt necessary in the aftermath of large-scale attacks, ultimately diluted the State's capacity to "go after" terrorists. By attempting to prosecute all potential low-level members of the groups, the justice system failed to focus time and resources in the investigation of leaders. In parallel, it was also considered responsible for jailing and maltreating hundreds of people who appeared to only have had flimsy connection with the terrorist groups, if they had connections at all. This study reports their accounts,

⁷⁴³ Elischer, S., & Mueller, L. (2019). Niger falls back off track. *African Affairs*, 118(471), 392–406.

unveiling instances of violence and torture and illustrating their grievances over the role of the State in their treatment. Despite the efforts of justice officials to act according to law, the testimonies of these individuals represent a serious indictment to the legitimacy of national justice.

Furthermore, the justice campaign against terrorism failed to increase the State's legitimacy as it was ultimately hardly visible. A direct result of the "exceptionalisation" of terrorism, the centralisation of the Pôle meant that alleged terrorists were tried far away from the affected communities. While this was recognised by national officials and gave rise to the experiment of the Diffa hearing, the long-term problem persists. Furthermore, the perception of a disconnect from the population in the justice approach to terrorism was compounded by the lack of significant measures to address and support victims. The lack of connection between the justice process and its legitimate audience is an especially serious concern, as it plays into a longstanding fracture that has historically been perceived as the main weakness of justice institutions in Niger⁷⁴⁴. In the context of counterterrorism, this notion is compounded by the State's choice to actively rely on the population for the identification of "the enemy", calling on locals to denounce presumed terrorists to local authorities. Hence, the State's commitment to remaining within the bounds of legality, rejecting the temptation of mass trials and unjustified harsh punishment is likely to have escaped the awareness of those populations that most sought justice. Instead, they only saw Niamey's courts as releasing those individuals that the State had formerly asked to expose. In addition, the failure to hold members of security forces accountable for the violations committed while carrying out their functions further curtails claims of legitimacy.

Lastly, this study drew a comparison between the treatment of individuals charged with terrorist offences and the 'repentants', who left Boko Haram when the Diffa governor promised to welcome them back. By focusing on efforts to promote their reintegration into society, another layer is added to the performance of the State as a security provider. As persons associated with terrorism, both groups were deemed especially vulnerable to stigma, rejection and potentially recidivism. Thus, supporting their return to society became directly connected with the State's capacity to act as a force of stabilisation in the Diffa region.

⁷⁴⁴ See République du Niger, Ministère de la Justice (2012). *Etats généraux de la justice. Rapport general des travaux*, see annex « Rapport des travaux de la Commission N°4 « Justice et Justiciables », p. 88 ; Alou, M. T. (2001) *La justice au plus offrant. Les Infortunes du Système Judiciaire en Afrique de l'Ouest (autour du cas du Niger)*. *Politique Africaine*,

This comparison revealed a sharp difference between the two scenarios. It is only in the context of the ‘repentants’ that public intervention showed concrete interest and action in terms of supporting rehabilitation. Notably, this was done not only by directly providing services to this population, but also by involving local communities. Traditional leaders were officially implicated in the demobilisation process, acting in accord with administrative authorities, and local residents were equally benefitting from selected services, increasing popular incentives to welcome reintegrative processes.

These findings indicate that alternative solutions proved far more capable of adapting to local realities than criminal justice approaches. It was anchored in the understanding that, in an area where the armed group has occupied large portions of territory, imprisoning every possible ‘associate’ is not a viable objective nor necessarily a desirable one. More importantly, it also provided a clear option for directly reducing the capacity of the enemy and move towards the conditions of stabilisation, thus contributing to the legitimisation of the State as an agent of peace. The strict parameters of the law became a considerable obstacle to the need to identify innovative responses to the crisis, as exemplified by the debate over the amnesty law. Conversely, by borrowing from post-conflict reconciliation traditions, including transitional justice,⁷⁴⁵ the policy of the ‘repentants’ proved more flexible and potentially strategically advantageous.

This research argues that the exceptionality inbuilt in counterterrorism has influenced its orientation towards more retributive approaches and limited the reliance on alternative solutions, that may have proven more responsive to local contexts of ongoing conflict. In this sense, criminal justice approaches to counterterrorism have provided little contribution to the State’s negotiation of its role as a security provider. By focusing on eliminating the threat, they failed to integrate a forward-looking element in the administration of justice, one that was capable to address the need for reconciliation and peace. However, more research into the continuation of the ‘repentis’ approach and its potential application to other counterterrorism context, within and outside of Niger, is necessary to fully assess its stabilisation potential.

⁷⁴⁵ Clamp, K., & Doak, J. (2012). More than Words: Restorative Justice Concepts in Transitional Justice Settings. *International Criminal Law Review*, 12, 339–360; Cole, C. M. (2007). Performance, Transitional Justice, and the Law: South Africa’s Truth and Reconciliation Commission. *Theatre Journal*, 59(2), 167–187.

A FINAL NOTE

The analysis presented here is an in-depth case study of Niger's justice approaches to counterterrorism during the last decade. Its findings are extremely specific to this location and time period.

At the same time, the question underlying this analysis remains relevant well beyond the borders of Niger. The use of securitized issues to justify the expansion of State powers is a recurrent aspect of contemporary politicization and it applies to contexts of limited statehood as well as to western countries. Then, further empirical research could better illustrate the relationship between these dynamics and sovereignty negotiation. In particular, it could shine a light on the extent to which securitization actually contributes to strengthening States' capacities as well as their legitimacy. The role of justice institutions in driving these processes is also significant and often understudied.

When it comes to terrorism specifically, it is important to recognise that the circumstances that characterise this phenomenon in Niger are increasingly diffused globally. On the one hand, criminalisation of terrorism-related offences, including pure membership or "association" has spread, driven by growing international normative production. On the other hand, terrorist groups are acting as armed groups in many contexts, often blurring the distinction between terrorism and war.

Then, the outcomes of criminal justice approaches to counterterrorism are worth exploring further. Can justice in a counterterrorism context provide a peaceful conclusion to acts of violence? Or is it rather contributing to the construct of an exceptional enemy and, in doing so, creating the conditions of its persistence?

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