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Working Group on Arbitrary Detention

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Opinions adopted by the Working Group on Arbitrary Detention at its sixty-second session

from 20 to 29 April 2015

No. 4/2015 (Senegal)

Communication to the Government, dated 25 June 2014

Regarding Mr. Karim Wade

The Government has not responded in the allotted time to the communication.

The state is party to the International Covenant on Civil and Political Rights since 13 February 1978.

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. Its mandate was clarified and extended by the Commission in its resolution 1997/50. The rights council assumed the mandate in decision 2006/102 and extended a period of three years by resolution 15/8 of the Council, dated 30 September 2012. The mandate was extended for a further three-year period by resolution 24/7 of the Council dated 26 September 2013. In accordance with its working methods (A / HRC / 16/47, annex), the Working Group transmitted: the aforementioned communication to the Government.
2. The Working Group considers impossible that the deprivation of liberty is arbitrary in the following cases:

- a) When it is clearly impossible to invoke any legal basis justifying it (such as continued detention of a person beyond the execution of the sentence or despite an amnesty law applicable to him) (category 1);
- b) When deprivation of liberty results from the exercise of rights or freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, in addition, in States parties concerned, in articles 12, 18, 19, 21, 22, 23, 26 and 27 of the International Pact on Civil and Political Rights (category II);
- c) Where the failure, total or partial, to comply with international standards on the right to a fair trial, established in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned is of such gravity that it confers on the deprivation of liberty an arbitrary character (category III);
- d) When asylum seekers, immigrants or refugees are subject to prolonged administrative custody without the possibility of review or administrative or judicial review (category IV);
- e) When the deprivation of liberty is a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic status, political or other opinion, gender, sexual orientation, disability or any other status, and which tends or can lead to ignore the principle of equality of human rights (category V).

Information received:

Communication from the source

- 3. Mr. Karim Wade, born on 1 September 1968 in Paris, is a Senegalese citizen, resident in Dakar, Senegal. From 2002 to 2012, he successively served as Special Advisor to the President of the Republic of Senegal, Chairman of the Supervisory Board of the National Agency of the Organization of the Islamic Conference and Minister of State.
- 4. According to the information received on 2 October 2012, the Special Prosecutor of the Court of repression of illicit enrichment (CREI), a Senegalese special court aspiring to know facts of illicit enrichment, opened a preliminary investigation

against Karim Wade on the basis of Article 5 of Law n° 81-54 of 10 July 1981. He is accused of holding assets unrelated to the legal income he would have received under his official duties.

5. After closing the preliminary hearing on 8 March 2013, the Special Prosecutor of the CREI had summoned Karim Wade on 15 March 2013 in order to give notice to show cause within a period of one month, of the lawful origin of his assets then estimated by the said Prosecutor and the police responsible for the preliminary investigation at 693,946,390,174 CFA francs, or about 1 billion Euros and allegedly including 15 companies.
6. According to the source, Karim Wade produced a memoire in response to that formal notice showing that he was not the owner, nor was he a direct or indirect beneficial owner or shareholder in these companies, as was confirmed by the real owners, statutory shareholders and executives. The source claims that no evidence would have been brought by the Prosecutor who nevertheless ordered the arrest and placement in custody of Karim Wade on 15 April 2013. The latter was then referred to the Committee of Enquiry of the CREI on the basis of an introductory submission for indictment taken the same day by the special prosecutor for illicit enrichment offenses committed in the exercise of his functions.
7. The source reports that the Committee of Enquiry proceeded to the initial appearance interrogation, placed him in custody on 17 April 2013 on the basis of Articles 10 and 11 of the aforementioned Act of 10 July 1981 and rejected the exception of incompetence raised by Karim Wade. Since 17 April 2013, Karim Wade is held at correctional house of arrest of Rebeuss in Dakar, and would be unable to receive visits, apart from his mother.
8. At the end of that first detention order for a maximum of 6 months in accordance with the aforementioned Law and Article 127 bis of Law n° 99-06, a second formal notice was given and a second warrant delivered against him for the same offense when, according to the source, international letters rogatory and the report of experts appointed by the Committee of Enquiry of the CREI proved that these companies did not belong to Karim Wade. For the source, it would be a misuse of procedure designed to circumvent the legal restriction of six months.
9. The Instruction Committee then has to 'the end of this second warrant, decided on 16 April 2014, Karim Wade to return before the trial court. According to the source, in accordance with Article 14 of the aforementioned Law of 10 July 1981 the judgment of the CREI must be made within two months. But the source

informs that the date of judgment is scheduled for 31 July 2014, that is to say, three and a half months after the order to refer to the trial court was issued.

10. According to the source, Karim Wade would be detained arbitrarily, since this detention would not meet any legal basis and therefore would fall in Category 1 of the categories applied by the Working Group.
11. The source states that the deprivation of liberty of Karim Wade is arbitrary also under category III of the categories applied by the Working Group. The source claims that it is particularly a question of the violation of the right to a fair trial that violates the following international standards: Articles 8, 9 and 11 of the Universal Declaration of Human Rights (UDHR), Articles 2, 9 (1), 9 (4), 14 (1), 14 (2), 14 (3) (g) of the International Covenant on Civil and Political Rights (ICCPR), the Principles 2, 9, 32 and 36 the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" and Articles 6 and 7 of the African Charter of Human and People's Rights. The source stressed that the African Assembly for the Defence of Human Rights, at the 55th Ordinary Session of the African Commission on Human and People's Rights, in its declaration of Luanda (April-May 2014) noted most violations of the right to a fair trial caused by the procedural rules of the CREI.
12. Thus, according to the source, the CREI was maintained despite its repeal. This special court established by Law n° 81-54 of 10 July 1981 to know the facts of illicit enrichment have been implicitly repealed by Law No. 84-19 of 12 February 1984 because it has not been mentioned in it. Such an interpretation is also retained by the lawyer and former Attorney Doudou Ndoye as can be read in an article in the 14 April 2014 published in the Walfadjiri Senegalese newspaper. The source also reports that according to article 67 of the Senegalese Constitution, only a law may reinstate such a jurisdiction, which would have been the case since a presidential decree of 12 May 2012 and after removal, another decree on 6 July 2012 would have reactivated it. In the opinion of the source, that court would therefore have no legal existence and the two detention orders are therefore null and void.
13. Alternatively, the source reports that the CREI is incompetent to judge Karim Wade as the facts in question took place while Karim Wade was performing official duties as Minister of the Republic so much so that he benefits from a privilege of jurisdiction, as provides in Article 101 paragraph 2 of the Constitution. On the other hand, the source points out that under Article 7 of Law n° 81-54 of 10 July 1981, when the facts of illicit enrichment point to a person enjoying immunity or jurisdiction privilege, the case must be transmitted to the competent

judicial authority at the prosecution stage. Karim Wade should have been tried by the High Court of Justice and not by CREI, as was emphasized by the Court of Justice of the Economic Community of West African States (ECOWAS) in its judgment of 22 February 2013.

14. Indeed, the source tells that at the stage of the preliminary inquiry, counsel for Karim Wade and other former Ministers of the Republic of Senegal referred to the same procedure applied to the ECOWAS which held, in a judgment dated 22 February 2013, that all proceedings which may be brought against Karim Wade incumbent on the High Court of Justice. The source reports that the State of Senegal was never executed, and this despite a formal notification of the judgment under Article 62 of the Rules of Court is binding upon its delivery, a letter March 25, 2013 of the Commission's Chairman of ECOWAS and a new judgment 19 July 2013 recalling that the execution of court decisions is not an option but an obligation according to Article 15 (4) of the Treaty of the ECOWAS Court of Justice.
15. Moreover, according to information received, Article 13 (1) of Law n° 81-54 of 10 July 1981 rules out any possibility of appeal except where non-suit judgment is delivered, as can be appealed before the CREI by the Special Prosecutor. The source informs that the request for appeal exerted by Karim Wade to the Committee of Enquiry has therefore been rejected and the referral to the Chief Registrar of the Supreme Court against the decision of 17 April 2013 of the Committee of Enquiry of the CREI was also refused by the minutes of 23 April 2013.
16. The source reports that Karim Wade had seized the President of the CREI with a request dated 19 April 2013 to instruct the Registrar to register the appeal, which was also rejected by rejection order issued on 23 April. Karim Wade then appealed to the Supreme Court of Senegal that declared admissible by judgment of 6 February 2014 the appeal against that decision and remitted the proceedings to the Constitutional Council for a ruling on the objection of unconstitutionality of this law. But it was then dismissed on 3 March 2014 at the exception of unconstitutionality, while the source recalls that the absence of dual jurisdiction goes against international conventions duly ratified by Senegal. The source informs that the prosecutor of the CREI has asked the Supreme Court on 6 June 2014 to cancel the last decision of the Supreme Court dated 6 February 2014.
17. Karim Wade had also informed the Indictment Division of Dakar of the cancellation proceedings brought by the CREI but it declined jurisdiction on 21

November 2013. According to the source, Karim Wade would be deprived of any opportunity of appeal, coupled with a breach of the equality of arms. The source informs that a draft law repealing the CREI and replacing it with the CRIEF would introduce the double degree of jurisdiction at the investigation and the conviction stages.

18. According to the source, it emerges from the Articles 3 bis (2) of Law n° 81-53 of 10 July 1981, Article 6 (4) and (6) of the Law n° 81-54 that the person is presumed guilty until they adequately justify the lawful origin of their asset within the time allotted by the Special Prosecutor. The source reports that Karim Wade repeatedly demonstrated that he was not at the head of these companies but it has been completely ignored by the Prosecutor since the Committee of Enquiry has nevertheless referred for trial on facts of illegal enrichment. It also appears from the information received that the said Prosecutor would in his press conference on 9 November 2012, even before the opening of the investigation, have violated the presumption of innocence.
19. On the other hand, the source denounces that this violation of the right to the presumption was confirmed by the Constitutional Council of the Republic of Senegal in a judgment of 3 March 2014, arguing that the applicant could defend themselves by proving otherwise. But the source informs that according to Article 3 of Law n° 81-53 of 10 July 1981, the only evidence of liberality is not enough to justify the legal origin of assets thereby precluding the principle of free assessment of evidence.
20. While the Government of Senegal had filed a complaint against Karim Wade in December 2012 for fraud before French courts, the source informs that the Financial Public Prosecutor decided on 19 May 2014 to dismiss the case.
21. On 5 June 2014, the International Federation of Human Rights (IFHR), the Senegalese Human Rights League (LSDH) and the African Encounter for the Defence of Human Rights (RADDHO) issued a joint press release describing the CREI as a special jurisdiction violating the defence rights of accused persons and does not guarantee the right to a fair trial in accordance with the African Charter on Human and Peoples' Rights (ACHPR) and ICCPR.

Government Response

22. The Working Group transmitted to the Government on 25 June 2014 all the information received from the source. The Government then had 60 days to

respond. That deadline expired on Sunday 24 August 2014. Logically, the Government's response should therefore be given on 25 August 2014; however that response was submitted to the secretariat of the Working Group on 26 August 2014, unless the Government had requested additional time or brought some explanation. Accordingly, the Government's response cannot be admitted into evidence and taken into account in assessing by the Working Group.

Comments from the source

23. Following the initial communication, the source reported constantly updated information as long as the Working Group had not ended their deliberations. Since this information did not add anything more to the substance of the initial application, it was not necessary to communicate to the Government for a response. But some of this information had clarified the initial request.
24. Thus, with regard to the visits received by Karim Wade, the source said, in response to the request of the Working Group, it was necessary to distinguish three periods:
- During the investigation phase, Karim Wade had received 50 visits per week. However, some of his relatives - including the person caring for his children in Paris - had reportedly been systematically refused a visitor's permit, despite repeated requests;
 - Between the dates of service of the order for reference and the beginning of the trial, the number of visitors would have been slightly reduced. Several permit requests had been denied;
 - Finally, since the beginning of the trial, only Karim Wade's mother could visit him, except for three people on 11 August.
25. In the opinion of the source, the significant reduction in the number of visits (apart from those of his mother and those of his lawyers), which would now be allowed only on Monday, would make less credible the statement from the Ministry of Justice of Senegal, on 12 June 2014, emphasizing that all permit applications requested by relatives of Karim Wade would have been granted by the Special Prosecutor of the CREI. The source adds that the CREI would allow visits only for specific dates unlike other jurisdictions that would grant permits valid throughout the procedure.

26. According to the source, international conventions applicable in Senegal in the fight against corruption and organized crime are: the African Union Convention on the Prevention and Fight against Corruption, adopted in Maputo on 11 July 2003 (Maputo Convention) and the UN Convention against Corruption, signed in Merida on 9 November 2003 (Merida Convention). These agreements provide for the criminalization of illicit enrichment, and demand respect for human rights, including the right to fair trial.
27. Furthermore, the source claims that the Special Prosecutor and the Committee of Enquiry of the CREI infringed the right for Karim Wade to the presumption of innocence by taking a double reversal of the burden of proof. Indeed, the Special Prosecutor and the Committee of Enquiry reportedly asked Karim Wade to prove the origin of assets without first proving that they were indeed his.
28. In addition, many elements prove that almost these entire assets do not belong to Karim Wade. First, the source noted that the Committee of Enquiry sent Karim Wade back to the bench based on assets almost eight times less than the Special Prosecutor had asked him to justify. Then the co-defendants have not ceased to claim ownership of the assets without the prosecution being able to bring any writing contradicting them. Furthermore, international letters rogatory requested to France, Monaco and Luxembourg have confirmed that Karim Wade did not own any of the bank accounts, buildings, or companies allocated to him. These investigations have further revealed the absence of any banking or financial flow movement between 2002 and 2012, between Karim Wade's accounts and those of his co-defendants. According to the source, the prosecution relies solely on testimonies yet not susceptible to contradict the certificates of records of corporate equity produced by Karim Wade's co-defendants and which according to the OHADA companies (Organization for the Harmonization of Business Law in Africa), provide evidence of ownership of shares.
29. The source reports that for the rest of the assets attributed to Karim Wade, and corresponding to the balance of an alleged bank account in ICBC bank in Singapore, that supposedly in the name of the AHSGB (African Guinea Bissau Handling Service) company, owned by Karim Wade, no evidence adduced that the latter directly or indirectly owns that bank account. During the preliminary investigation and the case instruction before the Committee of Enquiry of the CREI, Karim Wade was never charged nor given notice, nor even heard on this alleged account in Singapore. He would find out about this account and the sum it represents - a third of the assets which he is charged with - only on reading the order for reference. Indeed, although an international letter rogatory was sent to

the Singapore authorities about it on 10 April 2014, no questions about the account in dispute had been asked to Karim Wade during his interrogation on 9 April 2014. In addition, on 16 April 2014, the Committee of Enquiry of the CREI had decided to refer the case to the trial court without waiting for the results of the investigation.

30. The proceedings pending before the CREI would infringe the principle of the presumption of innocence and the rights of the defence, since Karim Wade is now on trial for having enriched himself, without being able to justify the lawful origin.
31. The source also came to report on the events that followed the opening of the trial on 31 July 2014. First, Karim Wade's lawyers raised an objection to the jurisdiction of the CREI. They feel that their client should benefit from a privilege of jurisdiction because the charges against him were committed when he was a Minister, during the exercise of his functions. This exception was rejected by the Court on 18 August 2014. The latter took the view that the offense alleged against Karim Wade had been established that on 15 April 2013, that is to say following his reply to the notice that was sent to him. He was no longer Minister for over a year. Such a decision would go against the Articles 101 paragraph 2 of the Constitution of the Republic of Senegal and Article 7 of Law n° 81-54 of 10 July 1981.
32. As soon as they received notifications of this decision, Karim Wade's lawyers then appealed on points of law and requested that the CREI shall stay the proceedings pending the decision of Supreme Court. On 20 August 2014, the Court dismissed the application.
33. Karim Wade's lawyers also raised twenty procedures of nullity. However, the source indicates that, while the Court took the matter under advisement in order to meet the exceptions of nullity and inadmissibility raised, it finally said, at the hearing on 1 September 2014, that it had joined all the pleas to the substance. Such a decision would infringe the right of Karim Wade to a fair trial.
34. Karim Wade's defence then formed a request for a referral of the case at a later date so that the debate can take place in the presence of Karim Wade's main co-accused, Ibrahim Aboukhalil, who was seriously ill and recognized as unable to appear by an expert appointed by the CREI. They had, however, refused his repatriation in France and had required him to appear before the court at the hearing on 1 September 2014. This decision was condemned by some organizations of civil society, based on the right to health and the right to life. By

decision of 2 September 2014, the CREI nevertheless rejected referral requests and decided that the trial would be held in the absence of Ibrahim Aboukhalil. Thus, according to the source, it would once again infringe the right of Karim Wade to a fair trial and contradictory, given that Ibrahim Aboukhalil has not ceased to claim 70% of the assets imputed to Karim Wade.

35. The source further alleges that on 12 September 2014, the Court would be made in secret at the bedside of Ibrahim Aboukhalil in order to hear him on the facts, without warning the parties, apart from the lawyers of the interested. This demonstrates once again the disinterest of the Court for the respect of the rights of the defence.
36. The source also informs that on 2 September 2014, Karim Wade's lawyers filed a challenge for cause of the President of the CREI. This request is justified by the fact that the President would not cease to share his bias, thus undermining the presumption of innocence of Karim Wade. He would have also held several times inappropriate comments against Karim Wade's lawyers. This request was however rejected by the First President of the Supreme Court by order of 17 September 2014.
37. In general, the source reports that the President of the CREI would increasingly hinder the defence from taking the floor during the debates. In addition, the Prosecutor would have repeatedly questioned the co-defendants on unclassified materials to the proceedings, not part of the file, without the Court excluding the said parts of the debate. Furthermore, the source mentions that in a letter dated 3 September 2014, the President of the Court required that the defence team communicates why they would call witnesses who have not been heard before the Committee of Enquiry. According to the source, no provision of the Senegalese Code of Criminal Procedure provides for such a restriction.
38. The source tells in addition that, by judgment of 19 August 2014, the joint chambers of the Supreme Court annulled the judgment of the Criminal Chamber of the Supreme Court dated 6 February 2014, thus granting the motion filed by the Attorney General on 6 June 2014 for this purpose.
39. Finally, a press release of RADDHO informs that on 29 December 2014, the CREI rejected the request for provisional release of Karim Wade. This would infringe the right to presumption of innocence; such a measure is not justified by the need to prevent the disturbance of public order, prevent the loss of evidence, the flight of the accused, prevent the subordination of witnesses or to protect the person being prosecuted against the revenge of those who suffered from the

offense. It would also infringe the right to be tried within a reasonable time, reasonable inquiry time and judgment in this case having been exceeded. Finally, it would infringe the right of all persons charged before the same court or the same tribunal to be treated equally and enjoy the same benefits. According to the source, in fact, such a tie would not last since, for some defendants it was considered that the provisional release would cause neither disturbance of public order, nor subordination of witnesses, nor even a flight risk, while for others, these risks were considered plausible.

40. More recently, the source has promptly informed the Working Group that on 23 March 2015, the CREI had delivered its judgment in the case against Karim Wade, concluding to the guilt of the accused with a six-year prison sentence.

Discussion

41. Article 9 of the UDHR prohibits therefore arbitrary arrest or detention by stating that "no one shall be subjected to arbitrary arrest, detention or exile". This ban is a fundamental rule of customary international law and is recognized as a peremptory norm general international law or *jus cogens*¹. It is also enshrined in Article 9 of the ICCPR and Article 6 of the ACHPR, international conventions to which Senegal is a party. Moreover, Principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly in its resolution 43/173 of 9 December 1988 states that "measures of arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law";
42. The Working Group notes, on the basis of credible and consistent evidence provided by the source, that the various periods for preventive detention and for the trial and the time of deliberation were not respected, so that the provisions even Senegalese law on deprivation of liberty measures have not been respected and leading to a violation of the relevant aforementioned provisions of the UDHR, ICCPR, the African Commission and the Body of Principles for the Protection of All Persons Under Any makeshift detention or imprisonment. Therefore, the deprivation of liberty of Karim Wade is arbitrary under category I.
43. The source said that the deprivation of liberty of Karim Wade also is arbitrary under category III as defined in the Working Methods. But, in the opinion of the

¹ See the established practice of the organization of the United Nations as set by the Human Rights Committee in its General Comment n° 29 (2001) on states of emergency, Para 11.

Working Group, among the many arguments emitted by the source, only those relating to the presumption of innocence, equality of treatment between the defendants and the time of the procedure would eventually prosper.

44. Indeed, the source contested the reversal of the burden of evidence resulting from a presumption of illegality from the moment the accused cannot prove the legal origin of their assets. For the source, there is a violation of the presumption of innocence because the aforementioned reversal entails that the inability of a person to prove his ownership can only lead to the conclusion of unlawful appropriation. However, in the opinion of the Working Group, this type of reversal is common in tax matters and the fight against money laundering and does not violate the African conventions and UN for both corruption adopted in 2003 and which Senegal is a party since 12 April 2007 and 16 November 2005 respectively². Although a reversal of the burden of proof would have violated the right to a fair trial and led to a conclusion on the category III, in this case the type of operated reversal is recognized in law and, in the opinion of the Working Group, there's no violation of the presumption of innocence.
45. Next, regarding the provisional release, the rule in legal matters remains freedom and custody pending the outcome of the trial should be the exception, so any preventive detention must be duly substantiated by specific circumstances by law and controlled by the judge. In this case, the Working Group is not satisfied that the circumstances required by law were objectively met for continued custody. Furthermore, the Senegalese law that regulates the procedure within strict deadlines have not been met in this case, so much so that preventive detention was even longer. Under these conditions, the difference in treatment between Karim Wade and the other defendants who were allowed provisional release is not warranted and exacerbates the violation of the right to a fair trial in this case against Karim Wade.
46. In conclusion, the Working Group emphasizes that the present case does not relate to the charge which is the subject of proceedings against Karim Wade, but the conditions of implementation of this procedure. But corruption in all its forms

² In the two conventions, such shifting of the burden of proof is operated in cases of illicit enrichment where the impossibility for the defendant to prove the legal origin of his assets leads to a presumption of illegality. See the section of the UN Convention and Article 8 of the African Convention.

is contrary to international public policy³ and everything must be done to combat and punish, without infringing the rights of the accused.

Opinions and recommendations

47. In light of the foregoing, the Working Group believes that the deprivation of liberty of Karim Wade is arbitrary, being in contravention of Articles 9 and 10 of the UDHR and in Articles 9 and 14 the ICCPR, and so fit in the categories I and III of the criteria applicable to the consideration of cases submitted to the Working Group.

48. Accordingly, the Working Group requests the Government of the Republic of Senegal to take the necessary steps to remedy the injury suffered, by providing full compensation in accordance with Article 9 (5) of the ICCPR.

49. The Working Group noted that the Commission on Human Rights called upon all States to cooperate with the Working Group to consider its opinions and to take appropriate measures to remedy the situation of persons deprived of their liberty and to inform the Working Group of the steps they have taken⁴. Accordingly, the Working Group requires the full cooperation of the Republic of Senegal in the implementation of such notice to remedy effectively a violation of international law.

(Adopted on 20 April 2015)

■: I, the undersigned, Fatoumata Diagne, Translator for Mathurin Services and certified by the Translation Bureau of the Ministry of Foreign Affairs of the Republic of Senegal, certify that this translation into English is true to the original French document submitted to me.

This certificate is provided to serve its legal purpose.

Dakar 13 June 2015

³ International Centre for Settlement of Investment Disputes. World Duty Free Company Limited and Republic of Kenya, ICSID Case n° ARB / 007, Award, August 2006, para 157.

⁴ Resolution 24/7 of the Council of Human Rights, paras 3, 6 and 9