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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-eighth session, 24–28 August 2020

#### Opinion No. 59/2020 concerning Carlos Ghosn (Japan)\*, \*\*, \*\*\*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 18 October 2019, the Working Group transmitted to the Government of Japan a communication concerning Carlos Ghosn. The Government replied to the communication on 17 December 2019. Japan is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
  - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
  - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
  - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
  - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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\* Seong-Phil Hong did not participate in the discussion of the present case.

\*\* An individual opinion of Sétondji Roland Adjovi (partially dissenting) is contained in the annex.

\*\*\* The annex to the present document is reproduced in the language of submission only.

## Submissions

### *Communication from the source*

4. Carlos Ghosn is a 66-year-old is a national of France, Lebanon and Brazil. He was born in Porto Velho, Brazil. For more than 20 years, he was the head of Renault-Nissan-Mitsubishi, the first global automobile group.

#### a. Background information

5. According to the source, Mr. Ghosn was arrested four times, each time after the expiry of the 23-day limit for keeping a person in police custody in Japan. In this way, the authorities were able to detain Mr. Ghosn continuously.

6. Each of the four arrests was followed by detention with the same characteristics. According to the source, the detention infringed the rights and dignity of Mr. Ghosn and was intended to force him to confess. The conditions of Mr. Ghosn's detention included solitary confinement, prohibition on Mr. Ghosn to leave his cell, the deprivation of exercise for several consecutive days, constant light to disturb sleep, and the absence of heating in the cell.

7. During each of his 23-day periods in police custody, Mr. Ghosn was not brought before a judicial authority and he was unable to challenge his detention within this time frame. According to the source, the prosecutor subjected Mr. Ghosn to daily interrogations in the absence of his lawyer. The interrogation sessions were held several times a day, lasting on average five hours, including on weekends and public holidays. The source alleges that the prosecutor attempted to have Mr. Ghosn sign documents in Japanese that he did not understand by threatening to continue his prolonged detention. Furthermore, Mr. Ghosn was refused any family visits while in police custody.

8. In addition, the source states that, during his remand in pretrial detention, which commenced on 11 January 2019, Mr. Ghosn could receive visits from his family members only if they remained behind a glass screen and in the presence of a guard. The guard took notes on the content of the conversations, thereby denying the possibility of confidential discussions during family meetings. According to the source, Mr. Ghosn lost a significant amount of weight while deprived of his liberty, as he was provided with food only occasionally and subjected to poor detention conditions.

#### b. Arrests of Mr. Ghosn

9. Mr. Ghosn was first arrested on 19 November 2018, when he was taken in for questioning upon his arrival at Tokyo airport. According to the source, the authorities had informed the press prior to the arrest. Following his arrest, Mr. Ghosn was detained at Kosuge Prison in Tokyo. On 21 November, Mr. Ghosn's police custody was extended for 10 days, and then again on 30 November for a second period of 10 days. On 10 December, at the end of the 23-day period of police custody, during which time Mr. Ghosn was questioned daily without a lawyer, and without being allowed to request his release, he was brought before a judge for the first time and charged. Mr. Ghosn was accused of "concealing hypothetical income (bonuses) from the tax authorities".

10. On 10 December 2018, after Mr. Ghosn had just been charged, the prosecution arrested him a second time, for the same crimes, but allegedly committed between 2015 and 2017. The source submits that this second arrest, which appears to have been based on dividing the same facts into several sequences, allowed prosecutors to open a new period of police custody during which Mr. Ghosn was interrogated without his lawyer in order to obtain a confession from him.

11. According to the source, the judicial authorities had allowed the prosecutors to detain Mr. Ghosn for an initial period of 10 days. However, on 20 December 2018, realizing the procedural manoeuvres being used by the prosecution, the Tokyo Court, and subsequently the Tokyo Supreme Court, refused a request to keep Mr. Ghosn in police custody for a further 10 days. The source argues that this extension of police custody was not necessary, as Mr. Ghosn had agreed to wear an ankle monitor and his passports had been confiscated. The

source emphasizes that it was at this point, while Mr. Ghosn was supposed to be released, that the prosecutor arrested him for a third time.

12. On 21 December 2018, while Mr. Ghosn was still in detention, he was arrested for the third time and taken into police custody for allegedly having Nissan cover “losses in personal investments” during the financial crisis of October 2008, which amounted to 1.85 billion yen (15 million euros). The source notes that these facts, dating back 10 years, had been brought to the attention of the prosecutors in the past in the context of an investigation conducted by the Japanese supervisory authority. However, at that time, the Prosecutor’s Office did not consider it necessary to initiate criminal proceedings.

13. On 23 December 2018, Mr. Ghosn’s third time in custody was extended for an initial period of 10 days, until 1 January 2019. His custody was again extended on 31 December 2018 for a second period of 10 days, until 11 January 2019. On 8 January 2019, Mr. Ghosn, in accordance with article 34 of the Constitution of Japan, briefly appeared before a judge to claim his innocence and to obtain clarification of the reasons for his prolonged detention. On 11 January, Mr. Ghosn was charged with crimes relating to the alleged facts of his second and third arrests. On the same day, he filed a bail application, which was rejected by the Tokyo Court on 15 January. On 18 January, Mr. Ghosn filed a new application for release, which the Tokyo Court rejected on 22 January. On 28 February, Mr. Ghosn filed a third application for release.

14. On 5 March 2019, Mr. Ghosn was released on bail after having spent 108 days in detention. The source notes that the two bail orders issued that same day stated that neither the risk of flight nor the risk of destruction of evidence adduced by the prosecution was present. However, the orders required Mr. Ghosn to fulfil 15 obligations, including having a surveillance camera that would operate for 24 hours a day installed at the entrance of his apartment, and that he would submit a monthly log of his telephone calls Internet search history and all appointments to the court. The source submits that Mr. Ghosn carefully observed the obligations imposed on him, which confirmed the absence of any risk justifying his placement in pretrial detention. Mr. Ghosn was at the full disposal of the courts to be questioned, confronted with witnesses and judged on the accusations made against him.

15. On 3 April 2019, Mr. Ghosn announced that a press conference would be held in Tokyo on 11 April. This was to be Mr. Ghosn’s first opportunity to present his arguments in his defence and to reply to the accusations made against him. According to the source, the next day, on 4 April, at 5.50 a.m., the prosecution decided to arrest Mr. Ghosn for a fourth time.

16. According to the source, the prosecutor was accompanied by 20 individuals, including journalists and photographers, which demonstrated the intention of the prosecution to dramatize the arrest by portraying Mr. Ghosn as guilty. The source alleges that, during this incident, the authorities attacked a member of Mr. Ghosn’s family who was by his side during the arrest. This family member was treated as a suspect in the case. Requests to contact her lawyers were denied until the lawyers arrived to provide assistance at about 9 a.m. The prosecutor attempted to interrogate her without her lawyers present and to make her sign documents written in Japanese, which she does not understand.

17. The source alleges that, following his fourth arrest, Mr. Ghosn was again interrogated for hours, despite his frail health and without the presence of his lawyer. He was presented documents in Japanese, a language he does not understand, and was not given an opportunity to prepare his defence properly.

18. On 25 April 2019, Mr. Ghosn was released on bail after having spent a further 21 days in detention. Having admitted that neither the risk of flight nor the risk of destruction of evidence adduced by the prosecutor were present, the courts subjected Mr. Ghosn to 15 obligations, which were in addition to the payment of a significant deposit (more than \$4 million) that Mr. Ghosn was required to make and to the \$9 million that had already been paid to secure his release. The additional obligations included being prohibited from leaving Japan or travelling within Japan without court authorization, the obligation to reside at an address approved by the court, prohibition of all direct contact with his spouse, the presence of a surveillance camera that would operate for 24 hours a day at his apartment, prohibition on the use of any mobile telephone or computer other than those devices provided by his

lawyers, and the obligation to submit every month a log of his telephone calls, Internet search history and all appointments to the court.

19. According to the source, the number and scale of the restrictions on Mr. Ghosn's freedom of movement and communication with the outside world were comparable to house arrest. As a result, Mr. Ghosn was deprived of his liberty from his first arrest on 19 November 2018 until the time of submission of the present communication to the Working Group.

20. Lastly, the source notes that appeals against the court decisions were filed by the defence on 10 and 21 May 2019, but were rejected without any reasons being given. The source claims that, given the repeated violations of Mr. Ghosn's right to a fair trial, his deprivation of liberty was arbitrary.

c. Analysis of violations

21. The source submits that Mr. Ghosn's rights under articles 9, 10 and 14 of the Covenant were violated, and that his detention was arbitrary under category III. In particular, the source alleges that Mr. Ghosn was subjected to unjustifiably prolonged detention in harsh conditions. His rights to be brought promptly before a judicial authority and to appeal against his detention were violated. Moreover, his right not to be compelled to testify against himself or to confess guilt was gravely compromised, he was not given the time and facilities necessary for the preparation of his defence and to communicate with a lawyer of his choice, and he was not afforded the right to the presumption of innocence.

d. Right to challenge the legality of detention

22. The source alleges that four periods of police custody were imposed on Mr. Ghosn in violation of the guarantee provided by article 9 (3) of the Covenant that any person arrested or detained on a criminal charge should be brought promptly before a judge or other authority authorized by law to exercise judicial power. According to the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person, individuals must appear before a judge or judicial authority within 48 hours from the time of arrest. Mr. Ghosn was initially detained for 23 days between 19 November and 10 December 2018, during which time he was not brought before a judge. It was only on 10 December 2018, 23 days after his arrest, that the case was brought before a judge.

23. This pattern was repeated three times. On 10 December 2018, Mr. Ghosn was again arrested for the same crimes, but for the period from 2015 to 2017, and detained in police custody until 20 December 2018. He was not brought before a judge during this period of detention. On 21 December, he was arrested for a third time, and once again detained for 23 days prior to being brought before a judge and charged on 11 January 2019. Mr. Ghosn was arrested for a fourth time on 4 April and kept in police custody for 21 days prior to being brought before a judge and charged on 25 April. According to the source, this use of police detention is part of the *daiyo kangoku* system, and constitutes a flagrant violation of article 9 (3) of the Covenant. The source concludes that Mr. Ghosn's right to be brought before a judicial authority without delay was violated on four occasions.

24. Furthermore, Mr. Ghosn was unable to appeal to a court to challenge his status and continued deprivation of liberty during several periods of his detention, namely (a) during the 23 days following his initial arrest and 10 days after his second arrest (as his detention could not be extended beyond 10 days); (b) during the 23-day period following his third arrest; and (c) 21 days after his fourth arrest. This amounts to a violation of article 32 of the Constitution of Japan and article 9 (4) of the Covenant, which enshrines the principle of habeas corpus. It was only after Mr. Ghosn was charged, following these four periods, that he was able to file release applications. In this case, applications were filed on 11 and 18 January 2019, both dismissed. This option should have been offered to Mr. Ghosn as soon as he was placed in detention – and not after 23 days – in order to fulfil the guarantee established in article 9 (4) of the Covenant.

e. Reasonableness, necessity and proportionality of detention

25. The source submits that Mr. Ghosn's detention was neither necessary nor reasonable, in violation of article 9 (3) of the Covenant. As the Human Rights Committee clarified in its

general comment No. 35, pretrial detention in a criminal case must be a reasonable and essential measure under all circumstances, and the courts should consider the possibility of applying alternative measures to it. In Mr. Ghosn's case, the initial 108 days of detention – that is, the first three successive periods in police custody followed by pretrial detention ending on 5 March 2019, and the 21 consecutive days of police custody during his fourth arrest – were neither necessary nor reasonable. Mr. Ghosn had presented to the judges guarantees that he would remain at the disposal of the court, demonstrating that there was no risk of escape, interference with witnesses or destruction of evidence. He had also provided assurances that he would wear an ankle monitor and contract, at his own expense, security officers to follow his movements while awaiting trial.

26. Alternative measures to pretrial detention should have been considered well before 5 March 2019, the date on which Mr. Ghosn was released on bail for the first time. The courts had acknowledged the absence of a risk of flight, collusion or destruction of evidence. However, the courts did not exercise any actual control over Mr. Ghosn's police custody, nor over his pretrial detention. The source alleges that the courts approved these measures without thorough examination, as part of a judicial system in which almost every request for detention or continued detention from the prosecutor is accepted by the judiciary, particularly when suspects do not admit the facts alleged against them.

27. In addition, the detention of Mr. Ghosn was not reasonable because it resulted from unfair methods used by the prosecution. The source claims that the prosecutor used the proceedings to circumvent the time limit of 23 days in police custody, by (a) artificially distributing the offence of income reduction across two periods of time (from 2010 to 2014 and from 2015 to 2017), giving rise to two arrests and allowing two periods of custody of 23 days each; (b) arresting Mr. Ghosn for a third time on 21 December 2018 for events dating back 10 years and of which the prosecutor had already been aware without deciding to proceed;<sup>1</sup> and (c) arresting Mr. Ghosn for a fourth time on 4 April 2019 for facts with which the prosecution had been long acquainted.

28. According to the source, the methods used by prosecutors were aimed at applying significant psychological pressure on suspects detained in harsh conditions in order to force them to confess. Confessions are presented as the only way for suspects to regain their freedom, in violation of the right to a fair trial.

29. Furthermore, 15 obligations were imposed on Mr. Ghosn at the time of his release on 25 April 2019 under conditions similar to a house arrest. These obligations were disproportionate considering the absence of a risk of flight and destruction of evidence, as acknowledged by the Tokyo Court itself when ordering the release of Mr. Ghosn on bail. The source emphasizes that the case in question involved white-collar crime, with no alleged violence. Moreover, Mr. Ghosn proved during his previous release on bail between 5 March and 4 April 2019 that he respected all the obligations imposed on him.

30. The new restrictions placed on Mr. Ghosn, including prohibition of any direct contact with his spouse without prior court authorization, were not justified by any reasoning from the courts or subjected to any time limit. Appeals against the order, made on the grounds of the right to privacy and family life, as guaranteed by article 17 of the Covenant and article 91 of the Constitution of Japan, were rejected by the Tokyo Court of Appeal and the Supreme Court of Japan, without reasoning. Following the Supreme Court's decision, on 23 May 2019 Mr. Ghosn filed a request to be allowed to meet his spouse for at least one hour a day in the presence of his lawyers. On 24 May, the Tokyo Court rejected his request. According to the source, the decision was at the discretion of the judge and was not subject to appeal.

31. Mr. Ghosn's spouse had always been at the disposal of the prosecutors, and she was questioned about the alleged facts before Mr. Ghosn was released. There was no risk of fraud or pressure being placed on her by Mr. Ghosn. The source argues that limiting Mr. Ghosn's contact with his spouse, even in the presence of his lawyers, was a form of judicial persecution.

<sup>1</sup> The source alleges that Mr. Ghosn was arrested in order to keep him in detention, despite the order for his release on 20 December 2018.

## f. Forced confession

32. According to the source, Mr. Ghosn was detained from 19 November 2018 to 5 March 2019, then from 4 to 25 April 2019, in conditions that contravened article 10 (1) of the Covenant, which complements article 9.<sup>2</sup> Since his arrest on 19 November 2018, Mr. Ghosn was held in solitary confinement in conditions that led, during his fourth period in police custody, to a request from his legal counsel that the prosecution stop “torturing” their client. The source alleges that the detention regime inflicted on Mr. Ghosn was aimed at punishing him for refusing to confess, and considerably weakened him and compromised his ability to defend himself effectively. The source argues that conditions of detention can be taken into account in determining the arbitrary nature of a detention, and that solitary confinement may constitute a violation of articles 7 and 10 of the Covenant. Mr. Ghosn’s conditions of detention were also contrary to principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provide for the right of the detainee to maintain communication with the outside world, in particular with family members and legal counsel.

33. The source alleges that Mr. Ghosn was exposed to a systemic pattern in which suspects are detained for long periods of time in difficult conditions that force them to confess. Mr. Ghosn was placed in a situation in which he was forced to confess to acts that he had not committed, at the risk of being held in detention for a prolonged period. In effect, Mr. Ghosn was coerced during his detention, under the pretext that it was the only way for him to be released. He was forced to sign documents in Japanese in the absence of his lawyer. These documents listed the facts relating to the allegations against him, and he was only provided with a simultaneous oral translation. This amounted to a violation of the right not to be forced to testify against oneself or to confess guilt, stipulated in article 14 (3) (g) of the Covenant.

## g. Time and facilities to prepare a defence

34. The source submits that the authorities violated Mr. Ghosn’s right to have the necessary time and facilities for the preparation of his defence and to communicate with a lawyer of his choice, as provided for in articles 14 (3) (b) and (d) of the Covenant.

35. In the context of his four extended periods of detention, which lasted two and a half months, Mr. Ghosn was subjected to daily interrogations by the prosecution, sometimes several times a day, lasting on average five hours, in the absence of his lawyer. This constituted a serious violation of the rights of defence and of equal standing. During the interrogations, the prosecutors presented Mr. Ghosn with documents that were written in Japanese, which Mr. Ghosn does not speak, and of which he had never been aware. As a result, he had not been able to discuss these documents with his lawyer. Mr. Ghosn signed documents in Japanese listing the facts relating to the allegations against him, of which he had only received a simultaneous oral translation. He took these actions on the understanding that this was the only way to be released.

36. The prosecutors were able to interview Mr. Ghosn at any time of the day, even during the evening, on Sundays and on public holidays, when the detention centre was not accessible to his lawyers. In addition, Mr. Ghosn’s right to communicate with his lawyer was seriously restricted from 19 November 2018 to 11 January 2019, and subsequently from 5 to 21 April 2019, since interviews with Mr. Ghosn were limited to two hours. The detention centre was not accessible to his lawyers on weekends.

37. During his detention in Kosuge Prison, Mr. Ghosn was not allowed to speak with his international lawyers for more than 30 minutes, and no confidentiality was possible since these interviews were conducted in the presence of guards, who took notes on the exchanges. The source contrasts these restrictions with the hours of interrogation that Mr. Ghosn endured.

38. Furthermore, Mr. Ghosn was denied access to the pleadings and had to reconstruct the prosecutors’ investigation on the basis of the questions he was asked during the interrogations. According to the source, the phase of disclosure of investigative material by the prosecutor

<sup>2</sup> Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 59.

to the defence lasts several months in Japan, without any obligation for the prosecutor to disclose exculpatory material. This constituted a violation of Mr. Ghosn's right to adequate time and facilities for the preparation of his defence.

h. Presumption of innocence

39. The source submits that the investigating authorities violated Mr. Ghosn's right to the presumption of innocence under article 14 (2) of the Covenant. Mr. Ghosn was presented as guilty when he was arrested on 19 November 2018, as journalists had been notified in advance of his arrest. The press regularly reported on the charges brought against Mr. Ghosn, providing information on the charges that only prosecutors had been able to present during the proceedings, with the purpose of presenting him as guilty. Furthermore, when Mr. Ghosn appeared before the Tokyo District Court on 8 January 2019, he was handcuffed and tied at the waist with a rope.

40. When Mr. Ghosn was arrested for a fourth time on 4 April 2019, the prosecutor arrived at 5.50 a.m. accompanied by journalists and photographers, who recorded images of the arrest, which were widely distributed. This contributed to the creation of a negative public image of Mr. Ghosn, presenting him as guilty of the charges.

*Response from the Government*

41. On 18 October 2019, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting the Government of Japan to provide detailed information by 17 December 2019 about Mr. Ghosn's situation. The Government was also requested to clarify the legal provisions justifying his detention, as well as its compatibility with the State's obligations under international human rights law.

42. In its response of 17 December 2019, the Government noted that it was difficult to provide specific information on Mr. Ghosn's case because it pertained to a situation in which a trial was scheduled to be held. However, the Government emphasized that Japan, as a State party to various human rights treaties, including the Covenant, had faithfully fulfilled its obligations set out in those treaties. Criminal proceedings are based on relevant laws and regulations, such as the Code of Criminal Procedure, and appropriate procedures are followed to reveal the facts of cases while guaranteeing fundamental human rights. Moreover, the treatment of detainees awaiting a judicial decision at penal institutions is consistent with respect for their human rights. The Government considers that there are no grounds for finding that the systems or their implementation violated the Covenant or was arbitrary.

43. More specifically, the Government refers to the source's allegation that the detention of Mr. Ghosn and the measures taken against him were intended to obtain a confession. Article 38 (3) of the Constitution of Japan and article 319 (2) of the Code of Criminal Procedure state that the accused "shall not be convicted when a confession is the only piece of incriminating evidence". As a result, public prosecutors never rely solely on confessions, even in cases in which the facts are not in dispute. Rather, prosecutors in Japan institute criminal proceedings only when they consider that there is a high probability of conviction based on legitimate evidence, after gathering sufficient objective information. In addition, according to article 38 (2) of the Constitution of Japan and article 319 (1) of the Code of Criminal Procedure, involuntary confessions may not be admitted as evidence. The Government refers to various procedures introduced under articles 301 and 302 of the Code of Criminal Procedure to ensure the validity and transparency of investigations.

44. Furthermore, the Government emphasizes that detention of a suspect is only permitted during the period stipulated by law following strict judicial review. This is a requirement of articles 60 and 208 of the Code of Criminal Procedure. The Government also refers to provisions that guarantee fair proceedings, including the prohibition of detention until the suspect has been informed of the case and a statement taken from him or her, the right of the suspect to request the court to disclose the grounds for detention in open court, and the right to request revocation of a detention order, or to appeal such an order (articles 61, 82–83, 87,

207 and 429 of the Code of Criminal Procedure).<sup>3</sup> According to article 39 (1) of the Code of Criminal Procedure, a suspect is entitled to appoint defence counsel immediately after arrest, and to meet with counsel without anyone else present.

45. The Government notes that the source alleges that Mr. Ghosn was not brought before a judge during the period of arrest and detention and was unable to appeal to a court to challenge his status and continued detention. The Government states that it is not clear why these allegations were made, as they are not consistent with the procedures under the Code of Criminal Procedure. Furthermore, the Government refers to the source's allegation that the authorities intentionally leaked information on the case to the media, but states that this is speculation and that no grounds or supporting evidence are provided for the allegation. The Government requests the Working Group to carefully consider the credibility of the information provided by the source.

46. In conclusion, the Government considers the domestic laws in Japan and their implementation to be appropriate in the light of international standards. The proceedings in Mr. Ghosn's case did not violate the human rights standards applicable to Japan.

*Further comments from the source*

47. According to the source, Mr. Ghosn decided to leave Japan for Lebanon on 30 December 2019, having arrived at the conclusion that he could not receive a fair trial guaranteeing his right to the presumption of innocence.

48. The source argues that the Japanese authorities have yet to respond to the criticisms made of the particular detention conditions experienced by Mr. Ghosn, referring to the Government's statement that it would be difficult to provide specific information concerning a case for which a hearing date has been fixed. The Government was not requested to comment on the merits of an ongoing case but to answer whether procedural guarantees under the Covenant were afforded to Mr. Ghosn in a system that the source refers to as "hostage justice". The source emphasizes that similar human rights violations to those in the present case were raised during the most recent universal periodic review of Japan<sup>4</sup> and in the consideration of its periodic reporting by the Human Rights Committee<sup>5</sup> and the Committee against Torture.<sup>6</sup>

*Additional communication from the Government*

49. In April 2020, the Government of Japan sent a further communication to the Working Group noting that Mr. Ghosn had fled Japan in violation of his bail conditions. His trial therefore cannot proceed. In order to protect the rights of suspects and of those who cooperate with investigations, Japanese law does not permit the publication of any documents regarding a trial before the commencement of proceedings. As a result, the Government is unable to provide additional information on the present case. The Government insists that the prosecution acted impartially throughout the proceedings against Mr. Ghosn.

**Discussion**

50. The Working Group thanks the source and the Government of Japan for their submissions.

51. Before considering the submissions, the Working Group wishes to address several preliminary issues. First, the Working Group takes note that, since the initial communication was filed under its regular procedure, Mr. Ghosn has not been in Japan because he fled the

<sup>3</sup> The Government provided excerpts of these provisions. It also provided excerpts of relevant provisions of the Act on Penal Detention Facilities and the Treatment of Inmates and Detainees relating to the treatment of unconvicted persons, physical exercise, restraints and visits. The Government clarified that the English text of these provisions was an unofficial translation and requested the Working Group to refer to the original Japanese version for accuracy.

<sup>4</sup> See A/HRC/37/15.

<sup>5</sup> CCPR/C/JPN/CO/6.

<sup>6</sup> CAT/C/JPN/CO/2.



country in December 2019. This does not prevent the Working Group from adopting an opinion, as there is no provision in its methods of work that precludes consideration of a case in such circumstances. Indeed, the Working Group considers it necessary to render an opinion given that the allegations relating to Mr. Ghosn's deprivation of liberty in Japan are serious and warrant further attention,<sup>7</sup> and that the case concerns important aspects of the Japanese criminal justice system. In addition, the Working Group wishes to consider elements of the case that it has not previously had an opportunity to analyse given that, despite its extensive engagement with the Government, the Working Group is yet to be invited to undertake a country visit to Japan.

52. Second, in rendering the present opinion, the Working Group emphasizes that it expresses no view on the circumstances in which Mr. Ghosn fled the jurisdiction of the Japanese authorities, and should not be construed as condoning or offering any justification for such a departure. By considering the submissions in the present case, which concern events that allegedly took place before Mr. Ghosn fled Japan, the Working Group is giving effect to its mandate, as described by the Commission on Human Rights in its resolution 1991/42, of investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards, which was most recently extended for a three-year period by the Human Rights Council in September 2019, in its resolution 42/22. The Working Group recognizes that all States have the obligation to investigate, prosecute and punish those responsible for having committed crimes, including serious allegations involving financial crime. In the present case, however, the Working Group's opinion does not relate to the charges that are the subject of the proceedings against Mr. Ghosn but rather to the conditions under which those proceedings were carried out,<sup>8</sup> in full conformity with its mandate.

53. Third, the Working Group takes note of the Government's position to which it alluded in its initial response to the regular communication and explained in its additional communication, namely that it is unable to provide information on Mr. Ghosn's case because Japanese law does not permit publication of information regarding a trial prior to the commencement of proceedings. As the Working Group has previously stated in its jurisprudence relating to Japan, however, it is not sufficient for the Government to argue that its national legislation prevents it from providing a detailed explanation of the actions of the national authorities.<sup>9</sup> The Working Group further explained in its opinion that it had been created to serve the needs of victims of arbitrary arrests and detention worldwide and for Member States to hold each other accountable; Member States must therefore have intended for the mechanism to resolve the disputes brought by victims. That was also the motivation of the Human Rights Council when it reminded States to cooperate fully with the Working Group in its resolution 33/30. The Working Group therefore normally expected a reply from the Government within 60 days, during which time appropriate inquiries may be carried out by the Government so as to provide the Working Group with the fullest possible information. The Government's contention that its national legislation prevented it from providing detailed information was incompatible with that requirement.<sup>10</sup>

54. Fourth, in determining whether the deprivation of liberty of Mr. Ghosn was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a *prima facie* case for breach of the international law constituting arbitrary detention, the burden of proof rests upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient.<sup>11</sup> In the present case, the Government has not responded substantively to many of the source's allegations, instead citing legislation that contains guarantees of procedural fairness.<sup>12</sup> Nevertheless, even when

<sup>7</sup> See opinions Nos. 55/2018, para. 59 and 50/2017, para. 53 (c).

<sup>8</sup> Opinion No. 1/2020, para. 74.

<sup>9</sup> Opinion No. 70/2018, para. 32.

<sup>10</sup> *Ibid.*, paras. 32–33. See also Human Rights Council resolution 42/22, paras. 7 and 9, and A/HRC/36/38, para. 15.

<sup>11</sup> A/HRC/19/57, para. 68.

<sup>12</sup> See opinion No. 9/2009, paras. 22–24 (in which the Working Group found that this approach did not rebut the source's allegations).

detention is carried out in conformity with domestic legislation, the Working Group must assess whether it was consistent with international human rights law.<sup>13</sup>

55. Lastly, prior to considering whether Mr. Ghosn's deprivation of liberty was arbitrary, there is a further preliminary question as to the period in which Mr. Ghosn was actually deprived of his liberty. According to the source, Mr. Ghosn was held in police custody and pretrial detention from his first arrest on 19 November 2018 until he was released on bail for the first time on 5 March 2019, and was detained in police custody from 4 to 25 April 2019, when he was released on bail for a second time. Together, these two periods amount to 128 days.<sup>14</sup>

56. The source further submits, however, that Mr. Ghosn was continuously deprived of his liberty for the entire period from his arrest on 19 November 2018, including during the periods in which he was purportedly released on bail between 5 March and 4 April 2019, and from 25 April 2019 onward. According to the source, Mr. Ghosn was subject to house arrest, particularly from 25 April 2019 onward, given the severity of the restrictions placed on his freedom of movement and communications. The Government did not address this issue.

57. The Working Group observes that the Government did not contest the claims that the bail conditions imposed on Mr. Ghosn included payment of large bonds, the surrender of his passports, a prohibition on leaving Japan and on travelling within Japan for more than three days without prior court authorization, the obligation to reside at an address approved by the court, the prohibition of all direct contact with his spouse, the presence of a surveillance camera operating 24 hours a day at his apartment, the prohibition on using any mobile telephone or computer other than those provided by his lawyers, and the obligation to submit to the court every month a log of his telephone calls, Internet search history and all appointments held with persons other than his lawyers.

58. In the present case, the bail conditions imposed on Mr. Ghosn appear to have been unusually strict, particularly the prohibition imposed during the second period of bail on all contact with his spouse, other than through his lawyers, without prior court authorization and for an indeterminate period.<sup>15</sup> The Working Group disagrees, however, with the submission of the source that these amounted to house arrest, but were rather police and judicial control.

59. The Working Group will now consider whether Mr. Ghosn's deprivation of liberty in police custody and pretrial detention for 128 days from 19 November 2018 to 5 March 2019, and from 4 to 25 April 2019, was arbitrary.

i. Category I

60. The source alleges that Mr. Ghosn was detained on four occasions, in violation of the requirement under article 9 (3) of the Covenant that any person arrested or detained on a criminal charge should be brought promptly before a judge. According to the source, Mr. Ghosn was initially detained on 19 November 2018 and was not brought before a judge until 10 December 2018, 23 days later.<sup>16</sup> He was detained a second time from 10 to 20 December 2018 without being brought before a judge, and again for a third time, for 23 days, from 21 December 2018 until 11 January 2019, when he was brought before a judge and charged.<sup>17</sup> Finally, Mr. Ghosn was detained for a fourth time on 4 April 2019, then brought before a judge and charged 21 days later, on 25 April. The Government did not address these

<sup>13</sup> Opinions Nos. 46/2019, para. 50, 4/2019, para. 46 and 10/2018, para. 39.

<sup>14</sup> Although the source states that detention lasted 129 days the initial period of custody from 19 November 2018 until 5 March 2019 was 107 days, not 108 as calculated by the source. According to the source, Mr. Ghosn was then detained for 21 days between 4 and 25 April 2019, resulting in a total of 128 days in police custody and pretrial detention.

<sup>15</sup> In its opinion No. 55/2018, the Working Group considered a similar restriction on contact with a spouse, noting that it was unusual.

<sup>16</sup> The period between 19 November and 10 December 2018 was 22 days.

<sup>17</sup> Mr. Ghosn appeared briefly before a court on 8 January 2019 to obtain clarification of the reasons for his detention. This appears to be the first point at which Mr. Ghosn's detention was reviewed following his third arrest, not 11 January 2019. The period without judicial review was therefore 19 days.

allegations other than to state that they were not consistent with the procedures established under the Japanese Code of Criminal Procedure.

61. As the Human Rights Committee has stated, 48 hours is ordinarily sufficient to satisfy the requirement in article 9 (3) of the Covenant of bringing a detainee “promptly” before a judge following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.<sup>18</sup> The purpose of such a requirement is to ensure that a judicial authority can review the legal basis for the detention and, if no such legal basis exists, order the release of the individual.<sup>19</sup>

62. The Working Group considers that the requirement under article 9 (3) of prompt presentation before a court applied to each of Mr. Ghosn’s four arrests. The first arrest was Mr. Ghosn’s first time in detention, and he should have been brought promptly before a court. His second and third arrests were made at the end of periods of police custody. According to the source, both of these arrests were intended to circumvent the 23-day time limit for police custody so that the authorities could continue to detain Mr. Ghosn. The third arrest was carried out despite an order for Mr. Ghosn’s release the previous day. For this reason, there was significant doubt as to the lawfulness of police custody following Mr. Ghosn’s second and third arrests, and he should have been brought promptly before a court for review of that detention.<sup>20</sup> Furthermore, Mr. Ghosn’s fourth arrest was made after a period of release on bail and was again subject to the requirements of article 9 (3) of the Covenant.

63. Accordingly, the Working Group considers that, following his arrests, Mr. Ghosn was held for periods of 22 days, 10 days, 19 days and 21 days respectively without being brought before a judge, in violation of article 9 (3) of the Covenant.

64. Similarly, the source alleges, and the Government does not contest, that Mr. Ghosn was unable to challenge his detention before a court during these four periods of detention. The source states that, under Japanese law, individuals may be detained for up to 23 days without charge, and are precluded from seeking release until they have been charged. As a result, Mr. Ghosn was not permitted recourse to the courts until after he was charged. He filed applications for release on 11 and 18 January 2019. As the Working Group has stated, the right to bring proceedings before a court to challenge the lawfulness of detention applies from the moment of apprehension as an essential guarantee in ensuring judicial review of the legal basis of detention from the outset.<sup>21</sup> The delay in affording this right to Mr. Ghosn constituted a violation of article 9 (4) of the Covenant.

65. The source further submits that when Mr. Ghosn’s case was brought before the courts, the judges did not exercise any actual control over his detention. According to the source, the courts approved Mr. Ghosn’s detention without thorough examination, as part of a criminal justice system in which the judiciary routinely accepts prosecution requests for detention. As part of the review of Mr. Ghosn’s detention, the courts should have considered alternative measures to pretrial detention well before 5 March 2019, when Mr. Ghosn was released on bail for the first time.

66. The Working Group recalls that it is a well-established norm of international law that pretrial detention should be the exception, not the rule, and that it should be ordered for as short a time as possible.<sup>22</sup> Article 9 (3) of the Covenant provides that “it shall not be the general rule that persons awaiting trial shall be detained, but release may be subject to

<sup>18</sup> Human Rights Committee, general comment No. 35, para. 33.

<sup>19</sup> Opinions Nos. 15/2020, para. 56 and 70/2019, para. 62. See United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37), para. 3.

<sup>20</sup> Human Rights Committee, general comment No. 35, para. 32. Mr. Ghosn’s situation may be contrasted with the case described by the Human Rights Committee in *Everton Morrison v. Jamaica*, communication No. 635/1995, in which the accused was already lawfully detained on a first charge and had no right to be released on a second charge.

<sup>21</sup> A/HRC/30/37, principle 8 and guideline 7.

<sup>22</sup> See opinions Nos. 8/2020, para. 54, 1/2020, para. 53, 57/2014, para. 26, 49/2014, para. 23, and 28/2014, para. 43. See also Human Rights Committee, general comment No. 35, para. 38, and A/HRC/19/57, paras. 48–58.

guarantees to appear for trial and at any other stage of the judicial proceedings". It follows that liberty is recognized as a principle and detention as an exception in the interests of justice.<sup>23</sup>

67. In order to give effect to this principle, pretrial detention must be based on an individualized determination that it is reasonable and necessary, and for such purposes as to prevent flight, interference with evidence or the recurrence of crime.<sup>24</sup> The courts must examine whether alternatives to detention, such as bail, would render custodial measures unnecessary.<sup>25</sup> According to the source, Mr. Ghosn's applications for bail were rejected by the courts on 15 and 22 January 2019, and his third application for bail, submitted on 28 February 2019, resulted in his release on 5 March 2019. The Government has not explained the reasons for the refusal of bail on these occasions. In the absence of such an explanation, the Working Group cannot accept the argument that Mr. Ghosn's pretrial detention was properly constituted in accordance with article 9 (3) of the Covenant. Moreover, since detainees are not permitted to request bail while in pre-indictment detention, it was impossible for the courts to comply with article 9 (3) by considering alternatives to detention prior to charges being brought against Mr. Ghosn. The Working Group joins the calls to either abolish the *daiyo kangoku* system or bring it into compliance with the Covenant by ensuring that alternatives to detention are duly considered during pre-indictment detention.<sup>26</sup>

68. Lastly, the Working Group takes note of the fact that Mr. Ghosn was placed by the authorities under a continuous series of arrests from November 2018 to April 2019. In the absence of any justification from the Government of the need for such repeated arrests, the Working Group considers that this revolving pattern of detention was an extrajudicial abuse of process (discussed further under category III) that can have no legal basis under international law.<sup>27</sup>

69. For these reasons, the Working Group finds that the authorities failed to establish the legal basis for Mr. Ghosn's detention. His deprivation of liberty was arbitrary under category I.

## ii. Category III

70. The source alleges that Mr. Ghosn's detention resulted from the use of unfair methods by the prosecution to circumvent the time limit of 23 days in police custody. According to the source, the prosecution artificially distributed the offence of income reduction across two periods (2010 to 2014 and 2015 to 2017), giving rise to the first and second arrests and allowing two periods of custody of 23 days each. In addition, the authorities arrested Mr. Ghosn for a third time, on 21 December 2018, for facts dating back 10 years and of which the prosecutor was already acquainted without having ever decided to proceed. The third arrest was made despite the order for Mr. Ghosn's release on 20 December 2018. Lastly, Mr. Ghosn was arrested for a fourth time on 4 April 2019 for facts with which the prosecution had been long acquainted.

71. In its response, the Government states that, according to articles 60 and 208 of the Code of Criminal Procedure, detention of a suspect is only permitted during the period stipulated by law following strict judicial review. The Government also refers to other guarantees under the Code of Criminal Procedure, including the prohibition of detention until the suspect has been informed of the case, the right to request the court to disclose the grounds for detention and the right to request the revocation of a detention order. While these guarantees are important, the Government's response did not directly address the source's allegations.

72. In the absence of an alternative explanation from the Government, the repeated arrest of Mr. Ghosn appears to be an abuse of process intended to ensure that he remained in custody.

<sup>23</sup> A/HRC/19/57, para. 54.

<sup>24</sup> Human Rights Committee, general comment No. 35, para. 38.

<sup>25</sup> Ibid. See opinion No. 83/2019, para. 68, and A/HRC/30/37, guideline 15.

<sup>26</sup> See A/HRC/37/15, para. 161, recommendations 135–137; CCPR/C/JPN/CO/6, para. 18;

CAT/C/JPN/CO/2, para. 10; and opinion No. 55/2018, para. 78.

<sup>27</sup> See also opinion No. 37/2018, para. 32.

According to the source, the judicial authorities reached a similar conclusion on 20 December 2018 by refusing a request to keep Mr. Ghosn in custody for a further 10 days. Despite that order, Mr. Ghosn was arrested for a third time the following day. The Working Group concludes that the process of arresting and detaining Mr. Ghosn four times was fundamentally unfair, as it prevented him from regaining his liberty and from enjoying other fair trial rights, including to freely communicate with legal counsel, as discussed below. Given the alleged unfair prosecutorial conduct, the Working Group will refer the present case to the Special Rapporteur on the independence of judges and lawyers.

73. Furthermore, the source alleges that Mr. Ghosn was detained under a systemic pattern of detention, referred to as “hostage justice”, in which suspects are detained for long periods in difficult conditions, thereby putting psychological pressure on them to confess. The source argues that the conditions in which Mr. Ghosn was detained were contrary to article 10 (1) of the Covenant – including solitary confinement, the deprivation of exercise, constant light, and the absence of heating, as well as limited contact with family and legal counsel<sup>28</sup> – and compromised his ability to effectively defend himself. As a result, Mr. Ghosn signed documents in Japanese that listed the facts relating to the allegations against him. According to the source, Mr. Ghosn was provided with only simultaneous oral translation of the documents, and his lawyers were not present when they were signed.

74. In its response, the Government refers to article 38 of the Constitution of Japan and article 319 of the Code of Criminal Procedure, which prohibit the admission of involuntary confessions into evidence, and prohibit conviction when a confession is the only piece of incriminating evidence. According to the Government, prosecutors never rely solely on confessions, and institute criminal proceedings only when they consider that there is a high probability of conviction based on legitimate evidence. The Government also cites a number of provisions in the Act on Penal Detention Facilities and the Treatment of Inmates and Detainees relating to the treatment of unconvicted persons, physical exercise, restraints and visits.

75. The Working Group considers that the source has presented a credible *prima facie* case that Mr. Ghosn was detained in circumstances in which he was effectively forced to provide statements relating to the allegations against him, which violated his right to the presumption of innocence under article 14 (2) of the Covenant, and his right not to be compelled to testify against himself or to confess guilt under article 14 (3) (g) of the Covenant. The burden is on the Government to prove that statements made by the accused have been given of their own free will, without any direct or indirect physical or undue psychological pressure from the investigating authorities,<sup>29</sup> but it has not done so.

76. In reaching this conclusion, the Working Group observes that other human rights mechanisms have recognized that interrogation and detention practices under the *daiyo kangoku* system, which relies heavily on confessions, may severely limit the right to a fair trial and expose detainees to torture, ill-treatment and coercion.<sup>30</sup> Indeed, the Working Group has previously expressed similar concerns, noting that too much prosecutorial discretion with insufficient judicial oversight may result in an environment conducive to the discriminatory application of law.<sup>31</sup> The Working Group will refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

77. The source further alleges that Mr. Ghosn was subjected to daily interrogations by the prosecution, sometimes several times a day, lasting on average five hours, in the absence of his lawyer. The prosecutors were able to interview Mr. Ghosn at any time, including when the detention centre was not accessible to his lawyers. Mr. Ghosn was not allowed to speak

<sup>28</sup> See the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rules 13, 22, 23, 43–45, 58 and 61, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 15 and 17–19.

<sup>29</sup> Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 41. See also opinions Nos. 15/2020, para. 76 and 5/2020, para. 83.

<sup>30</sup> See CCPR/C/JPN/CO/6, para. 18; and CAT/C/JPN/CO/2, paras. 10–11.

<sup>31</sup> See opinion No. 55/2018, para. 78, where the Working Group also cited opinion No. 42/2006, paras. 13–16.

with his international lawyers for more than 30 minutes, and no confidentiality was possible, since interviews were conducted in the presence of guards, who took notes on the exchanges. Mr. Ghosn was also denied access to the pleadings and had to reconstruct the prosecutors' investigation on the basis of questions he was asked during the interrogations. In its response, the Government referred to article 39 (1) of the Code of Criminal Procedure, which provides for the right of a suspect to appoint defence counsel immediately after arrest and to meet with counsel without anyone else present.<sup>32</sup> The Government did not comment on how that provision applied in the present case.

78. All persons deprived of their liberty have the right to legal assistance by the counsel of their choice at any time during their detention, including immediately after their apprehension, and such access must be provided without delay.<sup>33</sup> The Working Group considers that the failure to provide Mr. Ghosn with access to his lawyers from the outset, and the subsequent limitation of his meetings with local and international lawyers, violated his right to adequate time and facilities for the preparation of his defence and to communicate with a lawyer of his choice under article 14 (3) (b) of the Covenant. Legal consultations may be within sight but not within hearing of the authorities, and all communications with counsel must remain confidential.<sup>34</sup> The failure to provide equal access to the pleadings also violated the principle of the equality of arms.<sup>35</sup> The Working Group urges the Government to ensure that criminal defendants have access to counsel from the outset of detention and during interrogations.

79. Lastly, the source submits that Mr. Ghosn was presented as guilty when he was arrested on 19 November 2018, as journalists had been notified in advance of the arrest. According to the source, when Mr. Ghosn was arrested for the fourth time, on 4 April 2019, the prosecutor arrived accompanied by journalists and photographers, who recorded images of the arrest and disseminated them widely. These elements contributed to a negative public image of Mr. Ghosn. Moreover, when Mr. Ghosn appeared before the Tokyo District Court on 8 January 2019, he was handcuffed and tied at his waist with a rope.

80. In its response, the Government states that there are no grounds for the allegation that information on the case was intentionally leaked to the media. The Government also refers to article 78 of the Act on Penal Detention Facilities and the Treatment of Inmates and Detainees, which allows the use of restraints when prison officers are escorting detainees or when there is likely a risk of escape, self-harm, injury to others, or property damage.

81. The Working Group recalls that it is the duty of all public authorities to refrain from pre-judging the outcome of a trial, and that the media should avoid news coverage that undermines the presumption of innocence.<sup>36</sup> Given the wide dissemination of images of Mr. Ghosn's arrests, it is likely that the media had advance notice of them. The Working Group cannot exclude the possibility that such images, in such a high-profile case, contributed to the negative presentation of Mr. Ghosn to the public, in violation of his right to the presumption of innocence under article 14 (2) of the Covenant. Furthermore, in the absence of an explanation from the Government as to why restraints were needed during Mr. Ghosn's court appearance, the Working Group finds that handcuffing and the use of a waist rope represented a further violation of his right to the presumption of innocence. Criminal defendants should not be presented to the court in a manner indicating that they may be dangerous criminals, as this also undermines the presumption of innocence.<sup>37</sup>

82. The Working Group concludes that these violations of the right to a fair trial were of such gravity as to give Mr. Ghosn's detention an arbitrary character under category III.

<sup>32</sup> The Government cites article 198 (1) of the Code of Criminal Procedure, which notably does not provide for the presence of a suspect's lawyer during interrogations.

<sup>33</sup> A/HRC/30/37, principle 9 and guideline 8; Human Rights Committee, general comment No. 35, para. 35.

<sup>34</sup> Mandela Rules, rule 61 (1); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 18; A/HRC/30/37, guideline 8.

<sup>35</sup> Opinion No. 70/2019, para. 79; Human Rights Committee, general comment No. 32, para. 33.

<sup>36</sup> Human Rights Committee, general comment No. 32, para. 30.

<sup>37</sup> Ibid. See also opinions Nos. 83/2019, para. 73, 36/2018, para. 55, 79/2017, para. 62, 40/2016, para. 41 and 5/2010, para. 30.

83. The Working Group would welcome the opportunity to work constructively with the Government of Japan to address its serious concerns relating to the arbitrary deprivation of liberty. On 30 November 2016, the Working Group addressed a request to the Government to undertake a country visit, and welcomes the engagement of the Government during the meetings the Working Group has held with the Permanent Mission of Japan to the United Nations Office at Geneva to discuss the possibility of such a visit. On 2 February 2018, the Working Group addressed a further request to the Government to undertake a country visit, and hopes to receive a positive response from the Government as a sign of its willingness to enhance its cooperation with the special procedures of the Human Rights Council.

### **Disposition**

84. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Carlos Ghosn from 19 November 2018 to 5 March 2019 and from 4 to 25 April 2019, being in contravention of articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9, 10 (1) and 14 of the International Covenant on Civil and Political Rights, was arbitrary and fell within categories I and III.

85. The Working Group requests the Government of Japan to take the steps necessary to remedy the situation of Mr. Ghosn without delay and to bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

86. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Ghosn an enforceable right to compensation and other reparations, in accordance with international law.

87. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Ghosn, and to take appropriate measures against those responsible for the violation of his rights.

88. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

89. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

### **Follow-up procedure**

90. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether compensation or other reparations have been made to Mr. Ghosn;
- (b) Whether an investigation has been conducted into the violation of Mr. Ghosn's rights, and if so, the outcome of the investigation;
- (c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Japan with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

91. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

92. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the

opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

93. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>38</sup>

*[Adopted on 28 August 2020]*

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<sup>38</sup> Human Rights Council resolution 42/22, paras. 3 and 7.



## Annex

### Partially dissenting opinion of Sètondji Roland Adjovi

1. The mandate of the Working Group deals with arbitrary detention and sets a prerequisite: the situation submitted for its consideration must constitute one of detention. However, the Working Group seems to be regressing in this interpretation, which undermines the protection enshrined in international instruments.
2. Indeed, the source asserts that the period during which Mr. Ghosn was released on bail should also be taken into account, whereas the majority of the Working Group concludes otherwise.
3. In my view, detention within the meaning of the Working Group's mandate was never conceived in a strict sense but rather as a restriction of the freedom of movement that the individual naturally enjoys. Indeed, in the texts relating to the Working Group, both detention and deprivation of liberty, a broader concept, are referred to. In other words, and in principle, deprivation of liberty or detention is a *de facto* situation arising from restrictions on the enjoyment of the freedom of movement. This definition will be all the more important where the restrictions are part of a criminal law framework, as in the present case, in order to ensure judicial review of the deprivation of liberty as required in a State governed by the rule of law.
4. The Working Group, in its jurisprudence, had considered that house arrest could constitute detention under certain conditions. I am convinced that any restriction on freedom of movement of the individual constitutes a deprivation of liberty. However, the conditions for such a restriction to be arbitrary would necessarily be different from a situation of confinement in a place controlled by the State. It remains essential that such a restriction is provided for by law and therefore has a legal basis. The restriction must be justified in every respect. And the restriction must not be based on discrimination in violation of the principle of equality before the law.
5. In the present case, in my view, the Working Group should have recognized that the release on bail constituted a situation of restriction of liberty and thus a deprivation of liberty which was within its mandate. In its opinion, the Working Group clearly notes that the conditions of this situation are extraordinary, but it does not take them into account because of its position rejecting that it constitutes detention. And that is why I am issuing this partially dissenting opinion. In my view, the situation does indeed constitute a deprivation of liberty which falls within the mandate of the Working Group and the conditions imposed should have been assessed to determine whether they are such that the situation has become arbitrary.
6. The Working Group has missed another opportunity to consolidate the protection of the individual from the monopoly of legal violence that the State is trying to exercise over him. Today, with a State policy focused on security risks, particularly terrorism, the State is arrogating more and more rights to itself, by derogating from the principles that protect us, and it is the very role of human rights institutions to stay the course to frame these developments in order to ensure continued protection of the individual. The Working Group, by refraining from considering any restriction of liberty as a deprivation of liberty, misses its fundamental mission and runs the risk of allowing situations where the State is resourceful to slip through the cracks. I regret to have to disagree in these circumstances, even though my voice is still in a minority.