



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its ninety-ninth session, 18–27 March 2024****Opinion No. 1/2024 concerning Peter Shane Huxham and Frederik Johannes Potgieter (Equatorial Guinea)***

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 51/8.
2. In accordance with its methods of work,¹ on 2 November 2023 the Working Group transmitted to the Government of the Equatorial Guinea a communication concerning Peter Shane Huxham and Frederik Johannes Potgieter. The Government has not replied to the communication. The State 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,

* Miriam Estrada-Castillo did not participate in the discussion of the case.

¹ [A/HRC/36/38](#).



or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

1. Submissions

(a) Communication from the source

4. Peter Shane Huxham, born on 8 May 1968 in South Africa, is an employee of SBM Production Contractors, a subsidiary of SBM Offshore. He usually resides in Langebaan, South Africa.

5. Frederik Johannes Potgieter, born on 10 January 1970 in South Africa, is also an employee of SBM Production Contractors. He usually resides in Western Cape, South Africa.

6. Although they both work for the same company, the source states that Mr. Huxham and Mr. Potgieter did not know each other before being arrested, with Mr. Huxham working on the Serpentina floating production, storage and offloading unit, and Mr. Potgieter on the Aseng unit.

(i) Arrest and detention

7. According to the information received, Mr. Huxham and Mr. Potgieter were arrested by the police at their hotel on 9 February 2023.

8. According to the source, the police took Mr. Huxham and Mr. Potgieter to the police station for questioning. The questioning and answers were filmed and broadcast on television on 10 February 2023, even though no charges had been laid. The source states that, in the television report, Mr. Huxham and Mr. Potgieter are shown in front of bags of white and grey powder. Moreover, the report showed their faces, which left them feeling humiliated.

9. A lawyer for SBM Offshore reportedly went to the police station on the morning of 10 February 2023 and acted as interpreter during the initial questioning by the police.

10. The source states that, between the first court hearing on 13 February 2023 and the trial in June 2023, about six packets of white powder were presented to the court as drugs found in the luggage of Mr. Huxham and Mr. Potgieter. The source attests that these packages were different from those shown during their questioning.

11. The source explains that the court documents contain contradictory information. The court first stated that the national police, in its mission to maintain public order, had been investigating certain South African nationals for some time after receiving information about drug trafficking and use in their workplaces. It then stated that, after several months of investigation, the criminal police had concluded that the defendants were keeping the drugs in a hotel with a view to selling them later.

12. The source states that, according to court documents, on the morning of the arrest of Mr. Huxham and Mr. Potgieter, the police, having ascertained that they were staying at the hotel, detained them with bags of drugs.

13. In addition, the source reports that the documents refer to a search of Mr. Huxham's and Mr. Potgieter's rooms and state that, at the end of this search, small packets of powder wrapped in white plastic were found. The documents also state that packets of powder were found in their backpacks and seized by the police.

14. The source explains that witnesses present at the hotel dispute that the search took place on 9 February 2023 and deny that the police entered Mr. Huxham's and Mr. Potgieter's rooms or collected any evidence. According to the information received, Mr. Huxham's and Mr. Potgieter's belongings were not opened by the police that day, but their luggage was examined by the police a few days later and then taken to the office of SBM Offshore.

15. According to the source, the police apparently never requested the hotel's closed-circuit television (CCTV) footage, which is automatically deleted after 10 days.

16. The source explains that several newspapers have reported accusations different from those reported on Equatorial Guinean television regarding the crimes allegedly committed by Mr. Huxham and Mr. Potgieter. On 24 February 2023, a South African news site reported

that police had arrested them on drug charges. On 10 February 2023, an Equatorial Guinean television station reported that the police had found narcotic drugs in their hotel rooms and that they had used narcotic drugs at their place of work. On 11 February 2023, a local news site reported that Mr. Huxham and Mr. Potgieter were also accused of importing narcotic drugs into the country. Similarly, a newspaper article dated 2 March 2023 reported that police had found narcotic drugs in a plane on which Mr. Huxham and Mr. Potgieter had travelled to the country on 4 January 2023.

17. The source reports that, in a newspaper article dated 15 May 2023, a former president of the Supreme Court of Equatorial Guinea stated that the authorities of Equatorial Guinea had not provided any evidence to justify the arrest of Mr. Huxham and Mr. Potgieter.

18. On 13 February 2023, a hearing was reportedly held before the investigating judge in Malabo during which no evidence was presented, with the exception of about six plastic bags. During the hearing, Mr. Huxham and Mr. Potgieter claimed that they had never seen these bags before.

19. At the end of the hearing, on 13 February 2023, Mr. Huxham and Mr. Potgieter were transferred from Black Beach prison in Malabo to Oveng-Azem prison. This prison, located in the heart of the forest, is said to be used to detain media and political figures.

20. According to the source, a second hearing was held in Mongomo during the last week of February 2023 in the presence of Mr. Huxham, Mr. Potgieter and an interpreter. However, the source states that Mr. Huxham's and Mr. Potgieter's lawyers were not present, although they had already filed their powers of attorney with the Malabo court designating them as the official lawyers for the case.

21. On 23 February 2023, the court issued an order of indictment, stating that Mr. Huxham and Mr. Potgieter had been arrested with small bags containing white powder in their luggage found at the hotel and charging them with possession of narcotic drugs intended for use, consumption and sale in Equatorial Guinea.

22. On 6 March 2023, Mr. Huxham's and Mr. Potgieter's lawyers were reportedly informed that they could not visit their clients, but that they could use a document issued by the principal public prosecutor to deliver medicines to the Mongomo prison authorities for Mr. Huxham and Mr. Potgieter. According to the source, it was decided that one of the lawyers would accompany the doctor.

23. The visit took place in a military hangar at Mongomeyen airport on 15 March 2023. The source reports that a local doctor and a prison doctor were present, as were one of Mr. Huxham's lawyers and Mr. Potgieter, the local human resources manager of SBM Offshore, who acted as interpreter, the prison governor and three soldiers. The discussions took place under the constant scrutiny of prison and military personnel. The source states that, while in custody, Mr. Huxham and Mr. Potgieter were allowed to exercise and go out for two hours a day.

24. The source submits that, although the cases concerning Mr. Huxham and Mr. Potgieter are different, they were treated as a single case. The source explains that the principal public prosecutor prepared only one report on the criminal charges filed and that each document issued by the courts treated the two cases as a single case.

25. In his report, the principal public prosecutor asked the provincial court to render a sentencing decision at the end of the trial. The principal public prosecutor's report stated: (a) that the procedure to be followed for the prosecution and trial was governed by article 793 of the Code of Criminal Procedure and articles 14.1, 15.1, 243.4 and 243.5 of the Criminal Code, criminalizing the trafficking in and illegal possession of drugs, with the aggravating circumstance of premeditation; (b) that a fine should be imposed in accordance with articles 19 and 21 of the Criminal Code; and (c) that the public prosecutor's office wished to have a hearing of Mr. Huxham and Mr. Potgieter.

26. Mr. Huxham's and Mr. Potgieter's lawyers went to the provincial court on the morning of 31 March 2023 and were served with the investigation file. According to the source, the charge reports of the provincial court and the court of first instance were identical.

27. The source points out that, while article 652 of the Code of Criminal Procedure provides for five working days for a lawyer to submit his or her written defence and bring the case before the court, Mr. Huxham's and Mr. Potgieter's lawyers had only three working days to do so according to the opinion issued by the provincial court.

28. Although the burden of proof lies with the public prosecutor, Mr. Huxham's and Mr. Potgieter's lawyers contested the charge, requested an interpreter for the hearing and proposed, among other things, a reading of the police report, the hearing of Mr. Huxham and Mr. Potgieter, the hearing of the hotel staff and the hearing of the expert or experts who produced the forensic report confirming the nature of the product allegedly found as evidence.

29. According to the source, the complexity of the factors in this case, including the suspicion that the case was politically motivated, led the defence to provide more information than usual, including a list of witnesses, and to request that all witnesses be interviewed.

30. The source states that, following a follow-up visit on 20 April 2023, Mr. Huxham and Mr. Potgieter were able to see a doctor. Initial contact with their families was also authorized. According to the source, Mr. Huxham and Mr. Potgieter were in good physical health, although anxious, and were receiving rudimentary care in prison.

31. During the visit on 20 April 2023, Mr. Huxham and Mr. Potgieter reportedly asked to see their lawyers, but the doctor informed them that their lawyers were not allowed during the visit.

32. The trial scheduled for 4 May 2023 was cancelled two days before that date due to logistical problems in arranging for Mr. Huxham's and Mr. Potgieter's travel.

33. According to the source, Mr. Huxham's and Mr. Potgieter's lawyers filed a petition on 12 May 2023 requesting that the procedure be expedited and a date set.

34. A further consultation with the doctor was authorized on 17 June 2023, after the prison authorities expressed concern about Mr. Potgieter's health. However, the source claims that it was in fact Mr. Huxham who had injured his head and was taken to the clinic on 16 June 2023. Mr. Huxham and Mr. Potgieter are said to have been supplied with an eight-month supply of medicines.

35. According to the source, Mr. Huxham was allowed to call his partner, which was the only direct communication Mr. Huxham and Mr. Potgieter had had since their arrest. Prison staff reportedly told them they were considered political prisoners.

36. The above-mentioned visits on 15 March, 20 April and 17 June 2023 were the only visits to which Mr. Huxham and Mr. Potgieter were entitled before they were sentenced, apart from informal visits by staff of the South African Embassy and that of a third State. According to the source, no one had access to Mr. Huxham and Mr. Potgieter alone, including during the visit by the consular staff of the third State, as prison guards were always present.

37. According to the source, the case was transferred from Malabo to the criminal division of the Wele-Nzás provincial court by letters rogatory No. 354 of 22 June 2023. In accordance with article 658 of the Criminal Procedure Act, the criminal division referred the case to the appointed reporting judge to give a decision on the evidence submitted by the parties. The judge asked the court to declare the evidence relevant. The trial started on 26 June 2023 at the Wele-Nzás provincial court in Mongomo.

38. Mr. Huxham's and Mr. Potgieter's lawyers were not informed of the hearing until 24 June 2023. As a result, it was not possible for them to arrange for witnesses to attend the trial in time. The source states that the lawyers, who were in Malabo, had to travel to Mongomo by helicopter, and that SBM Offshore had made considerable efforts to ensure that they arrived at the trial on time. However, the hearing started several hours late.

39. The source claims that several heavily armed soldiers were in the courtroom and that few civilians were present, the latter having been invited to take part in the trial in order to make it appear more ordinary.

40. During the trial, the principal public prosecutor expressly requested a sentence of 12 years' imprisonment and a fine of 30 million CFA francs (CFAF) in damages. The source

states that this request was made under an old law that has not been in force since the approval of the new Criminal Code on 17 August 2022. The new Code expressly limits drug trafficking sentences to 3 years.

41. According to the source, Mr. Huxham's and Mr. Potgieter's lawyers told the judge that the applicable law was not the one advocated by the principal public prosecutor. In addition, the source notes that the court referred to the provisions of the new Criminal Code concerning the pretrial detention of Mr. Huxham and Mr. Potgieter.

42. The source claims that the principal public prosecutor is the only person to have set the amount of damages.

43. The source states that Mr. Huxham's and Mr. Potgieter's lawyers were able to openly present their arguments, but deplors the fact that no witnesses were presented or questioned. Moreover, no expert was interviewed to provide an analysis of the white powder, whose nature was never determined, nor was the link with Mr. Huxham and Mr. Potgieter established.

44. According to its decision, the court accepted the evidence presented by the defendants, namely that Mr. Huxham and Mr. Potgieter were living in Equatorial Guinea for the sole purpose of working on maritime platforms in the drilling sector and often spent their free time in hotels, and that they had been arrested by the police while leaving their rooms to meet other people. While they were waiting at the police station, some people allegedly arrived with plastic bags and accused Mr. Huxham and Mr. Potgieter of possessing these bags. The decision also stated that the above-mentioned facts, which were considered to be proven, were expressly and voluntarily acknowledged by Mr. Huxham and Mr. Potgieter.

45. The source states that Mr. Huxham and Mr. Potgieter were found guilty of crimes against public health for trafficking in and illegal possession of drugs, which they have vigorously denied.

46. According to the source, the court considered that it had been proved that the narcotic drugs seized were intended for sale. However, the source claims that no evidence was provided during the trial to confirm the substances were of a narcotic nature. According to the judgment, Mr. Huxham and Mr. Potgieter admitted the charges against them. The source maintains, on the contrary, that they have firmly denied each and every one of the accusations.

47. The court sentenced Mr. Huxham and Mr. Potgieter to 12 years' imprisonment on the basis of articles 341, 344 and 61.2 of the former Criminal Code.² Article 341 states that anyone who, without being authorized to do so, develops substances harmful to health or chemical products likely to have devastating effects, or sells or exchanges them, will be punished by imprisonment and a fine. Article 344 states that, in the case of toxic or narcotic drugs, the penalties for those found guilty will be more severe. Article 61.2 provides for the aggravating circumstance of premeditation.

48. According to the source, Mr. Huxham and Mr. Potgieter were also fined US\$ 5 million under article 19 of the Criminal Code, to compensate the Government, and an additional US\$ 2,500 without any legal explanation. They were also ordered to pay the costs of the proceedings.

49. The source explains that, according to article 43 of the Criminal Code, the amount of the fine varies between CFAF 25,000 and CFAF 100,000 per month. Moreover, article 45 states that the amount of the fine must take into account the harm caused and the advantage potentially gained by the defendant, and the defendant's financial capacity. The formula for calculating the fine payable is unrelated to prison sentences, as the 12 years' imprisonment imposed on Mr. Huxham and Mr. Potgieter could not be converted into a fine. The source goes on to explain how the fines were set, stating that the maximum fine that could be ordered was CFAF 50 million, or some US\$ 82,700. The source claims, therefore, that the prison sentences and fines imposed on Mr. Huxham and Mr. Potgieter have no legal basis.

² Equatorial Guinea, Decree-Law No. 691/1963 of 28 March 1963.

50. The source adds that, although the decision refers to damages in dollars, these were payable in CFA francs. The source deplors the use of the dollar when the court could have opted for a foreign currency more closely linked to the CFA franc, such as the euro.

51. In addition, the source explains that a summary of the hearing was broadcast, again showing the faces of Mr. Huxham and Mr. Potgieter and presenting the statements of the principal public prosecutor, in particular when he requested sentences of 12 years' imprisonment and damages of CFAF 30 million.

52. Following these convictions, two appeals were lodged with the second chamber of the Mongomo provincial court. An appeal was filed on 18 August 2023 under article 161 of the Code of Criminal Procedure and article 146 of Organic Act No. 5/2009 on the judiciary, requesting that the decision be clarified to allow Mr. Huxham's and Mr. Potgieter's lawyers to exercise their constitutional rights of the defence. The source claims that Mr. Huxham and Mr. Potgieter have never admitted the charges against them, nor pleaded guilty to the crimes they were accused of. The only incriminating evidence which could undermine the presumption of innocence of Mr. Huxham and Mr. Potgieter was based on their statements made during questioning, during which they pleaded not guilty and denied any involvement in the alleged activities. A notice of appeal was also filed and accepted in the proceedings on 26 July 2023.

53. The source states that Mr. Huxham's and Mr. Potgieter's lawyers did not have access to their clients, apart from their presence at the hearing and the brief meeting on 15 March 2023. In addition, the source reports that Mr. Huxham and Mr. Potgieter were not allowed to communicate by telephone or email with their lawyers or families.

54. The source believes that the basis for the detention, charge and conviction of Mr. Huxham and Mr. Potgieter remains unclear. It is alleged that this case is politically motivated and aimed at the recovery of money by the authorities of Equatorial Guinea, following the order of the High Court of South Africa to seize Equatorial Guinean assets located on South African territory. According to the source, the proceedings against Mr. Huxham and Mr. Potgieter are linked to a case involving high-level South African and Equatorial Guinean authorities.

55. The source states that politically motivated detentions are commonplace in Equatorial Guinea and that the Government has previously used such detentions to exert pressure in disputes with other countries, including South Africa, by applying legal sanctions against commercial entities in those countries.

56. According to the source, the incarceration of Mr. Huxham and Mr. Potgieter, which occurred just two days after the seizure of the assets located on South African territory, immediately gave rise to allegations suggesting that, as South African citizens, they had been used as bargaining chips in exchange for the return of the assets. An article dated 17 February 2023, published in an Equatorial Guinean investigative newspaper, reported that the authorities had wished to negotiate their release in return for the assets.

57. It is claimed that Equatorial Guinea has an interest in keeping Mr. Huxham and Mr. Potgieter in detention to maintain the leverage necessary to recover its assets.

58. The source reports that the families of Mr. Huxham and Mr. Potgieter have sent letters to the President of Equatorial Guinea asking for clemency. No official reply was received and no proof of receipt of these letters was provided.

59. A special envoy from a high-level South African authority is said to have visited Equatorial Guinea in October 2023 with the aim of persuading the President of Equatorial Guinea to pardon Mr. Huxham and Mr. Potgieter. The envoy reportedly met with the authorities and it was agreed that any release would be linked to the return of two seized properties. According to the source, this confirms that the imprisonment constitutes a State hostage situation as defined by the International Convention against the Taking of Hostages.

60. Mr. Huxham and Mr. Potgieter are being held in Oveng-Azem prison in Equatorial Guinea.

(ii) *Legal analysis*

61. The source alleges that Mr. Huxham's and Mr. Potgieter's detention is arbitrary under categories III and V.

a. Category III

62. The source submits that the detention of Mr. Huxham and Mr. Potgieter is arbitrary since their right to a fair trial has been violated.

63. The source recalls that articles 7, 10 and 11 of the Universal Declaration of Human Rights govern the right to a fair trial. The source considers that Mr. Huxham's and Mr. Potgieter's right to a fair trial has been violated as they were not treated in a fair manner and without discrimination before the law.

64. The source adds that Mr. Huxham and Mr. Potgieter did not get a trial before an independent and impartial court. In this respect, the source claims that the trial date was set at short notice, leaving the defence lawyers no opportunity to present witnesses at the trial. In addition, the prosecution's expert was not brought in for questioning about the nature of the substance supposedly found.

65. The source also claims that the court sentenced Mr. Huxham and Mr. Potgieter to prison terms and fines higher than the maximum permitted for the offenses charged. Moreover, the source claims that the meeting between the prosecutor, the President of the Supreme Court and high-ranking authorities of Equatorial Guinea to discuss the case against Mr. Huxham and Mr. Potgieter before the trial took place demonstrates that the court was not independent and impartial.

66. The source also claims that Mr. Huxham and Mr. Potgieter did not have all the guarantees necessary for their defence, since they had only limited access to their lawyers for the purposes of preparing for the trial, their witnesses were not able to testify at the trial, and their lawyers were not able to cross-examine the expert about the substance supposedly found.

67. The source further claims that article 11 of the Universal Declaration of Human Rights and article 15 of the Covenant were violated in that Mr. Huxham and Mr. Potgieter were given harsher sentences in terms of both the length of imprisonment and the amount of the fine than those applicable at the time of the commission of the offence. The source considers that the imprisonment of Mr. Huxham and Mr. Potgieter was not ordered in strict conformity with the provisions of the law, in disregard of principles 2 and 9 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The source therefore concludes that Mr. Huxham and Mr. Potgieter did not receive a fair trial.

68. Moreover, the source submits that Mr. Huxham and Mr. Potgieter were not given the opportunity to communicate with their lawyers beyond a brief interview, in disregard of principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The source adds that Mr. Huxham and Mr. Potgieter did not receive a public trial during which they were afforded all the guarantees necessary for their defence, which is contrary to principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

69. Furthermore, the source claims that Mr. Huxham and Mr. Potgieter were not treated without distinction and in a fair manner before the court, which is contrary to articles 2 and 14 of the Covenant. In this respect, the source states that, before their trial, Mr. Huxham and Mr. Potgieter received a brief visit from one of their lawyers. However, the consultation took place in full view of the prison staff, and communication difficulties were encountered since the lawyer did not speak English and only Mr. Huxham spoke Spanish, albeit to a very limited extent. The prison administration did not provide access to interpretation.

70. In addition, the source reports that Mr. Huxham and Mr. Potgieter were denied the opportunity to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf.

71. The source also submits that Mr. Huxham and Mr. Potgieter were denied the opportunity, time and facilities to communicate without delay and in full confidentiality with

their lawyers, contrary to rule 61 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Nor were they informed of their right to request and receive writing material for the preparation of documents relating to their defence, including confidential instructions for their lawyers, in disregard of rule 120 of the Nelson Mandela Rules. The source concludes that Mr. Huxham and Mr. Potgieter were denied the opportunity to prepare their defence.

72. The source also claims that the authorities have violated the provisions of the African Charter on Human and Peoples' Rights, which guarantee without distinction (art. 2) the right to equal treatment before the law (art. 3), the right to defence (art. 7), the right to receive information (art. 9) and the duty to guarantee the independence of the courts (art. 26).

b. Category V

73. The source claims that Mr. Huxham and Mr. Potgieter were discriminated against, in violation of article 2 of the Covenant, article 7 of the Universal Declaration of Human Rights and principle 5 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The source believes that Mr. Huxham and Mr. Potgieter are being targeted because of their national origin. In particular, the source believes that the fact that a discussion took place between the high-level authorities proves their willingness to treat Mr. Huxham and Mr. Potgieter differently.

74. Moreover, the source considers that the evidence in the case file demonstrates that Mr. Huxham and Mr. Potgieter were discriminated against on the basis of their South African nationality, in violation of article 26 of the Covenant. The source explains that they were arrested and tried while Equatorial Guinea was involved in litigation and facing legal sanction in South Africa. The source concludes that the two matters are linked and that, as a result, Mr. Huxham and Mr. Potgieter did not receive a fair trial.

75. The source adds that articles 2 and 3 of the African Charter on Human and Peoples' Rights have been violated since Mr. Huxham and Mr. Potgieter have been denied their rights and freedoms, in particular their rights not to be discriminated against and to be treated in a fair manner before the law.

76. The source concludes that the deprivation of liberty of Mr. Huxham and Mr. Potgieter constitutes a violation of international law since they were targeted because of their nationality.

(b) Response from the Government

77. On 2 November 2023, the Working Group transmitted a communication concerning Mr. Huxham and Mr. Potgieter to the Government, requesting it to provide detailed information about them by 2 January 2024 and to guarantee their physical and mental integrity.

78. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

2. Discussion

79. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

80. In determining whether the detention of Mr. Huxham and Mr. Potgieter was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international human rights law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.³ In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

³ [A/HRC/19/57](#), para. 68.

(a) Category I

81. The source submits that Mr. Huxham's and Mr. Potgieter's detention is arbitrary in several respects. The source claims that there is no convincing evidence to show that Mr. Huxham and Mr. Potgieter were involved in drug offences, that they were denied the opportunity to challenge their detention immediately and that alternatives to detention, such as parole, should have been considered. The Working Group considers that these allegations are best dealt with under category I, and will therefore examine them under this category.

82. With regard to the allegations that there is no convincing evidence to justify the detention of Mr. Huxham and Mr. Potgieter, the Working Group recalls that it is not for it to reassess the sufficiency of the evidence used in national criminal proceedings.⁴ Consequently, it is unable to determine whether there was sufficient evidence to justify the detention of Mr. Huxham and Mr. Potgieter. However, it falls within the mandate of the Working Group to examine whether the procedures that accompanied the detention were carried out in accordance with applicable international human rights standards.

83. With regard to the source's allegations that Mr. Huxham and Mr. Potgieter were deprived of their right to challenge their detention immediately and that the authorities did not consider alternatives to detention, the Working Group notes that article 9 (3) of the Covenant guarantees the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or other officer authorized by law to exercise judicial power. As the Human Rights Committee has stated, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detained person "promptly" before a judge, and any longer delay must remain absolutely exceptional and be justified under the circumstances.⁵ Furthermore, the Working Group recalls the view of the Human Rights Committee and its own recurrent findings that pretrial detention should be the exception and not the rule, should be ordered for the shortest possible time and must be based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.⁶ Courts must examine whether alternatives to pretrial detention, such as bail, or other conditions, would render detention unnecessary in the particular case.⁷ These protections also fall within the scope of article 9 of the Universal Declaration of Human Rights.

84. The source reports that Mr. Huxham and Mr. Potgieter were arrested on 9 February 2023 and appeared before the investigating judge for the first time on 13 February 2023. Noting the absence of a response from the Government, the Working Group considers that the Government has not justified the length of time that elapsed between the arrest of Mr. Huxham and Mr. Potgieter and their appearance before a judge. The Working Group therefore finds violations of article 9 of the Universal Declaration of Human Rights and article 9 (3) of the Covenant. Furthermore, as the Government has not demonstrated that alternatives to detention had been considered, the Working Group concludes that there has been a further violation of article 9 of the Universal Declaration of Human Rights and article 9 (3) of the Covenant.

85. According to the source, the detention of Mr. Huxham and Mr. Potgieter is tantamount to hostage-taking and therefore raises the prospect of a violation of the International Convention against the Taking of Hostages. As a preliminary matter, the Working Group notes that, in accordance with paragraph 7 of its methods of work, it is possible for it to take account of the Convention as a potentially relevant instrument accepted by the State in question, as Equatorial Guinea acceded to the Convention on 7 February 2003. In the present case, the Working Group notes the source's arguments concerning the coincidence of dates between the detention of Mr. Huxham and Mr. Potgieter and a dispute involving a senior official of the Government of Equatorial Guinea. However, the Working Group considers that there is a lack of information as to whether Mr. Huxham's and Mr. Potgieter's continued

⁴ Opinion No. 63/2023, para. 79.

⁵ Human Rights Committee, general comment No. 35 (2014), para. 33.

⁶ *Ibid.*, para. 38.

⁷ Opinion No. 75/2021, para. 49; and Human Rights Committee, general comment No. 35 (2014), para. 38.

detention is conditional on a third party doing, or abstaining from doing, an act.⁸ It therefore does not consider itself in a position to determine whether the detention of Mr. Huxham and Mr. Potgieter meets the definition of hostage-taking.

86. Nevertheless, and on the basis of the foregoing, the Working Group concludes that the detention of Mr. Huxham and Mr. Potgieter violates articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant and is therefore arbitrary under category I.

(b) Category III

87. The source claims that Mr. Huxham and Mr. Potgieter were denied a public trial before an independent and impartial tribunal in several respects, in violation, *inter alia*, of articles 10 and 11 of the Universal Declaration of Human Rights and article 14 of the Covenant. The source concludes that Mr. Huxham's and Mr. Potgieter's detention is arbitrary under categories III.

88. The source first notes that, the day after their arrest, Mr. Huxham and Mr. Potgieter appeared on the national television of Equatorial Guinea with black basket liners containing powder and another smaller white plastic bag. The images showed their faces as they answered questions. In the light of the source's allegations, which are uncontested by the Government, it appears that the programme was broadcast on a national channel. The Working Group notes that article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant recognize the right of everyone charged with a criminal offence to be presumed innocent and require all State institutions to treat the accused person as if he or she were innocent until proved guilty. In this respect, the Working Group and the Human Rights Committee have established that the authorities must refrain from prejudging the outcome of a trial and that the media must refrain from publishing information that undermines the presumption of innocence.⁹ Noting the absence of a response from the Government to refute the source's allegations, the Working Group considers that the images broadcast on national television were liable to violate Mr. Huxham's and Mr. Potgieter's right to a fair trial, in particular their right to be presumed innocent protected by article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

89. With regard to the source's allegations that the defence lawyers were not given the five working days provided for in article 652 of the Code of Criminal Procedure to present their defence, the Working Group recalls that it has always refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the application of domestic law by the judiciary.¹⁰ In the present case, the Working Group considers that it does not have sufficient information to be able to make conclusions regarding these allegations.

90. Furthermore, the source claims that the trial date for Mr. Huxham and Mr. Potgieter was set at short notice and that, as a result, their lawyers were unable to bring witnesses to the trial on their behalf. The Government has chosen not to contest these allegations, although it had the opportunity to do so.

91. Under article 14 (3) (e) of the Covenant, persons charged with an offence have the right to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. Noting the absence of a response from the Government to refute the allegations of the source, the Working Group considers that the source has sufficiently demonstrated the

⁸ The International Convention against the Taking of Hostages, article 1, states: "Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention."

⁹ See, for example, opinions No. 78/2021, para. 101; and No. 16/2022, para. 72. See also Human Rights Committee, general comment No. 32 (2007), para. 30.

¹⁰ See opinion No. 40/2005.

violation by the authorities of the right of Mr. Huxham and Mr. Potgieter to obtain the attendance of witnesses on their behalf. While a period of three months is generally sufficient to make contact with witnesses and arrange for them to testify, the Working Group notes the source's uncontested allegations that the defence was not notified of the new trial date until two days before the trial and that the courthouse is difficult to reach and requires air travel and a three-hour drive from Malabo. The Working Group concludes that the late notification to the defence lawyers of the new trial date by the authorities affected the right of Mr. Huxham and Mr. Potgieter to obtain the attendance of witnesses on their behalf and therefore constitutes a violation of article 14 (3) (e) of the Covenant and article 11 of the Universal Declaration of Human Rights.

92. In addition, the source submits that the prosecution's expert witness was not called and that the defence was not allowed to request an independent assessment of the substances presented as narcotic drugs. The Working Group notes that the right of persons to examine, or have examined, witnesses against them under article 14 (3) of the Covenant includes expert witnesses.¹¹ In the present case, the prosecution's expert claimed that the substances allegedly found on the defendants were of a narcotic nature. Given the centrality of this issue, it seems natural that the defence should seek to challenge this evidence. Noting the absence of a response from the Government to refute the allegations of the source, the Working Group considers that, by not allowing the defence to question the prosecution's expert witness, the authorities violated the rights of Mr. Huxham and Mr. Potgieter guaranteed by article 14 (3) (e) of the Covenant and article 11 of the Universal Declaration of Human Rights.

93. The source submits that the court's lack of impartiality is demonstrated by the fact that it imposed longer sentences and a much higher fine on Mr. Huxham and Mr. Potgieter than is legally permissible for the offences with which they were charged. Under article 14 (1) of the Covenant and article 10 of the Universal Declaration of Human Rights, everyone is entitled to a fair and public hearing by an independent and impartial tribunal. In addition, articles 14 and 15 of the Covenant and article 11 (2) of the Universal Declaration of Human Rights provide that no one may be liable to a heavier penalty than that prescribed by law for the criminal offence with which the person is charged. The Working Group notes the source's allegations, which are uncontested by the Government, that Mr. Huxham and Mr. Potgieter were sentenced to 12 years' imprisonment and a fine of approximately US\$ 5 million, even though the maximum penalty under national law for the offence with which they were charged is 3 years' imprisonment and a fine equivalent to some US\$ 82,700. Therefore, the Working Group considers that the sentences imposed, exceeding the legally prescribed limits for these offences, tend to demonstrate a violation of articles 14 and 15 of the Covenant and article 11 (2) of the Universal Declaration of Human Rights, and thus of Mr. Huxham's and Mr. Potgieter's right to a fair trial.

94. The source also claims that Mr. Huxham and Mr. Potgieter were not allowed to communicate with their lawyers, beyond a brief consultation with one of them, or to have the time and facilities necessary for their defence. The Government has chosen not to contest these allegations, although it had the opportunity to do so.

95. The right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing, and the right to legal aid, are guaranteed under article 14 (3) (b) and (d) of the Covenant and article 11 of the Universal Declaration of Human Rights. The Human Rights Committee, in its general comment No. 32 (2007), states that the right of an accused person to communicate with counsel requires that he or she have access to counsel as soon as possible and throughout the legal proceedings.¹² In addition, the right to prompt access to legal representation includes the right for counsel to communicate with the accused person in private, in conditions that fully respect the confidentiality of their communications, and to attend criminal investigations without being subject to interference or restrictions.¹³ Principle 9 and guideline 8 of the United Nations

¹¹ Opinion No. 32/2019, para. 45. See also Human Rights Committee, general comment No. 32 (2007), para. 39.

¹² Human Rights Committee, general comment No. 32 (2007), para. 34.

¹³ *Ibid.*

Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court provide that persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after apprehension, that they must be promptly informed of this right and that access to legal counsel should not be unlawfully or unreasonably restricted.¹⁴

96. According to information provided by the source, which is uncontested by the Government, Mr. Huxham and Mr. Potgieter had difficulty communicating with their lawyer, who did not speak English. The source explains that only Mr. Huxham speaks Spanish, albeit at a very rudimentary level. Furthermore, Mr. Huxham, Mr. Potgieter and their lawyers were unable to meet in conditions that fully respected the confidential nature of their communications. Although the information provided attests to the presence of defence lawyers at the trial and to the possibility for a lawyer to meet briefly with Mr. Huxham and Mr. Potgieter three months earlier, the Working Group considers that communications between Mr. Huxham, Mr. Potgieter and their lawyers were subject to numerous restrictions, both in terms of frequency and duration. The Working Group therefore concludes that there has been a violation of article 14 (3) (b) and (d) of the Covenant and article 11 of the Universal Declaration of Human Rights.

97. In addition, the source claims that the prosecutor, the President of the Supreme Court and high-level authorities of Equatorial Guinea met to discuss the case involving Mr. Huxham and Mr. Potgieter prior to the trial. According to the source, this meeting demonstrates the court's lack of independence and impartiality. Notwithstanding the source's observations, the Working Group considers that it does not have sufficient information on the content of this meeting and, consequently, is not in a position to determine whether it involves a violation of their right to a trial by a competent, independent and impartial tribunal under article 14 (1) of the Covenant and article 10 of the Universal Declaration of Human Rights.

98. In the light of the foregoing, the Working Group concludes that the deprivation of liberty of Mr. Huxham and Mr. Potgieter is marked by numerous violations of international standards relating to the right to a fair trial, established by articles 10 and 11 of the Universal Declaration of Human Rights and articles 14 and 15 of the Covenant. Such violations are of such gravity as to give their deprivation of liberty an arbitrary character under category III.

(c) Category V

99. The source claims that the detention of Mr. Huxham and Mr. Potgieter falls under category V because it is the result of discrimination based on their nationality. In support of this claim, the source points out that the two individuals are South African citizens and were arrested while a senior government official of Equatorial Guinea was the subject of legal proceedings and sanctions in South Africa. Mr. Huxham and Mr. Potgieter were tried while the senior official in question was still subject to legal sanctions in South Africa. The source highlights the meeting between this senior official, the principal public prosecutor and the President of the Supreme Court to discuss the case concerning Mr. Huxham and Mr. Potgieter prior to the trial.

100. As previously stated, the Working Group does not have sufficient information to conclude that Mr. Huxham and Mr. Potgieter were detained as a result of the proceedings in South Africa against the above-mentioned senior official of the Government of Equatorial Guinea. Furthermore, although the meeting between the official, the principal public prosecutor and the President of the Supreme Court in the case against Mr. Huxham and Mr. Potgieter raises concerns about the involvement of the executive in the proceedings against them, this is not in itself sufficient to conclude that Mr. Huxham and Mr. Potgieter were deprived of their liberty on a discriminatory basis and that their detention is arbitrary under category V.

¹⁴ See also the Nelson Mandela Rules, rule 61 (1).

3. Disposition

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

The deprivation of liberty of Mr. Huxham and Mr. Potgieter, being in contravention of articles 3, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

102. The Working Group requests the Government of Equatorial Guinea to take the steps necessary to remedy the situation of Mr. Huxham and Mr. Potgieter without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the Covenant.

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

104. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Huxham and Mr. Potgieter and to take appropriate measures against those responsible for the violation of their rights.

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

4. Follow-up procedure

106. 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 Mr. Huxham and Mr. Potgieter have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Huxham and Mr. Potgieter;

(c) Whether an investigation has been conducted into the violation of Mr. Huxham's and Mr. Potgieter's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Equatorial Guinea with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

107. 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.

108. 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 of any failure to take action.

109. 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.¹⁵

¹⁵ Human Rights Council resolution 51/8, paras. 6 and 9.

[Adopted on 18 March 2024]
