

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

Case no.: _____

In the matter between:

**TRUSTEES OF THE SOUTHERN AFRICAN
HUMAN RIGHTS LITIGATION CENTRE TRUST**

First Applicant

OPEN SECRETS NPC

Second Applicant

And

**CHAIRPERSON OF THE NATIONAL CONVENTIONAL
ARMS CONTROL COMMITTEE**

First Respondent

MINISTER OF DEFENCE

Second Respondent

EXPERT AFFIDAVIT


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I, the undersigned,

NAVANETHEM PILLAY

do hereby make oath and state:

- 1 I am an adult female residing at 16 Lavery Crescent, Overport Durban, South Africa.
- 2 From 2008 to 2014, I was the former United Nations High Commissioner for Human Rights. I was previously a judge of the International Criminal Court, and the Judge President of the International Criminal Tribunal for Rwanda. Prior to my appointment to these international bodies, I served as an acting judge of the High Court of South Africa, KZN.
- 3 I depose to this affidavit as an expert in international law and the United Nations system. In particular, I attest to the reliability of the information produced in general by bodies appointed by the United Nations, such as the United Nations Group of Eminent International and Regional Experts on Yemen ("**the Group of Experts**").
- 4 I should note that I have no personal knowledge of the members of the Group of Experts. Rather I demonstrate how these appointments are made in general, and the methodology such bodies employ when executing their mandates. The result is that UN expert bodies on the whole, in my experience, produce reports that

survive the most rigorous scrutiny and review. They are, therefore, reliable and authoritative.

5 The facts contained in this affidavit are to the best of my knowledge true. Unless otherwise stated or indicated by the context, they fall within my personal knowledge.

6 In this affidavit I discuss the following:

6.1 I first describe the UN system and the general approach employed by the UN in appointing expert groups, such as the Group of Experts.



6.2 I then discuss the appointment of the Group of Experts in particular; its mandate and its methodology, which information is publicly available.

6.3 Finally, I refer to case law in the United Kingdom where the reports of UN bodies and NGOs in general, and the Group of Experts in particular, have been accepted as authoritative and verifiable.

THE UN HUMAN RIGHTS SYSTEM

7 The United Nations comprises a myriad of bodies. Of particular importance to this matter are the Office of the High Commissioner for Human Rights ("**OHCHR**") and the UN Human Rights Council ("**HRC**"), which is a subsidiary body of the UN General Assembly.

8 The OHCHR is the entity responsible for human rights in the UN system. It represents the world's commitment to the promotion and protection of the full

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range of human rights and freedoms set out in the Universal Declaration of Human Rights.¹ The HRC is an inter-governmental body within the UN system made up of 47 states, including South Africa. It is responsible for the promotion and protection of all human rights around the globe.²

- 9 UN bodies such as the OHCHR and the HRC establish and mandate a variety of expert groups to investigate and report on alleged violations of human rights around the world.³ These include international commissions of inquiry, commissions on human rights, fact-finding missions and other investigatory entities, such as special rapporteurs or special procedures. These bodies are increasingly being used to respond to situations of serious violations of international humanitarian law and international human rights law, whether protracted or resulting from sudden events, and to promote accountability for such violations and counter impunity.
- 10 I focus in particular on the creation of expert bodies by the HRC. The process is as follows:
- 10.1 An expert body is created following a resolution by the HRC.
- 10.2 Once the resolution is passed and adopted by the member states, the process of appointing members to the expert group begins.
- 10.3 Candidates are nominated by states or identified by UN staff as experts.

¹ <https://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx>.

² <https://www.ohchr.org/EN/HRBodies/HRC/Pages/Home.aspx>.

³ <https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx>.

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10.4 Generally, candidates will be nominated based on their expert knowledge, standing in the international community and representation based on geography and gender. States may also endorse candidates.

10.5 Typically, members of expert groups are senior judges or senior academics from member states.

10.6 Candidates for appointment to an expert body are subject to an interview by representatives of specific states. Following the interview process, the interview panel proposes a candidate, who is then endorsed by the HRC or the OHCHR.

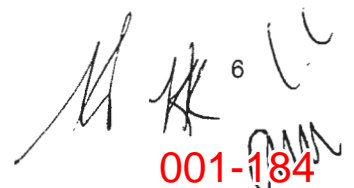
11 This brief description does not capture the myriad of checks and balances that are in place to ensure that only the most reputable experts are appointed to these bodies.

THE UN GROUP OF EXPERTS

1. Establishment

12 On 3 October 2017, the HRC adopted resolution 36/31 (A/HRC/RES/36/31) on “human rights, technical assistance and capacity-building in Yemen”.⁴ In paragraph 12 of the resolution, member states requested the then High Commissioner for Human Rights –

⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/289/51/PDF/G1728951.pdf?OpenElement>.



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“to establish a group of eminent international and regional experts with knowledge on human rights law and the context of Yemen for a period of at least one year, renewable as authorized...”⁵

- 13 On 4 December 2017, the High Commissioner established the Group of Eminent International and Regional Experts. As the name suggests, the members of the Group of Experts are experts on the issues relevant to the conflict in Yemen and the applicable legal principles.
- 14 The members of the Group of Experts are Kamel Jendoubi from Tunisia; Melissa Parke from Australia; and Ardi Imseis from Canada. While I do not know these candidates personally, they are experts of high standing:⁶
- 14.1 Kamel Jendoubi served as the President of the Independent Higher Electoral Commission, which organized the first free and democratic elections in Tunisia. He was also a member of the executive council of the World Organization Against Torture.
- 14.2 Melissa Parke was a federal member of the Australian parliament and was Minister for International Development.
- 14.3 Ardi Imseis is a professor of public international law in the Faculty of Law, Queen’s University, and a barrister and solicitor.

⁵ <https://www.ohchr.org/EN/HRBodies/HRC/YemenGEE/Pages/Members.aspx>.

⁶ <https://www.ohchr.org/EN/HRBodies/HRC/YemenGEE/Pages/Members.aspx>.



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- 15 The experts were chosen from a list of candidates prepared by the OHCHR. The candidates were selected based on subject matter expertise (international human rights law, international humanitarian law, international criminal law, military knowledge); geographical diversity; and gender representation.

2. Mandate

- 16 The Group of Experts was initially mandated to –

“carry out a comprehensive examination of all alleged violations and abuses of international human rights and other appropriate and applicable fields of international law committed by all parties to the conflict since September 2014, including the possible gender dimensions of such violations, and to establish the facts and circumstances surrounding the alleged violations and abuses and, where possible, to identify those responsible.”⁷

- 17 Since its establishment, the Group of Experts’ mandate has expanded to:

17.1 Monitor and report on the situation in Yemen;

17.2 Carry out a comprehensive examination of all alleged violations and abuses of international human rights and other appropriate and applicable fields of international law committed by all parties to the conflict since September 2014, including possible gender dimensions of such violations;

⁷ Group of Experts Expert Report to the UN Human Rights Council, 2018 (“2018 Expert Report”), para 1.

- 17.3 Establish the facts and circumstances surrounding the alleged violations and abuses;
- 17.4 Identify those responsible for the violations, where possible;
- 17.5 Make general recommendations on improving the respect for and protection and fulfilment of human rights;
- 17.6 Provide guidance on access to justice, accountability, reconciliation and healing, as appropriate;
- 17.7 Engage with Yemeni authorities and all stakeholders, in particular relevant United Nations agencies, the field presence of the Office of the High Commissioner in Yemen, authorities of the Gulf States, and the League of Arab States with a view to exchanging information and providing support for national, regional and international efforts to promote accountability for human rights violations and abuses in Yemen;
- 17.8 Submit a written report to the High Commissioner by the time of the forty-second session, to be followed by an interactive dialogue.

3. Methodology

- 18 Since its inception the Group of Experts has produced five reports and made extensive oral submissions to the HRC.

19 The Group of Experts has used a variety of methodologies in fulfilling its mandate.⁸ The methodologies include:

19.1 On-site visits to Yemen, Djibouti, Jordan, Saudi Arabia, Switzerland and the United States of America;

19.2 Submissions from parties involved in the conflict in response to questions posed by the UN Group of Experts;

19.3 Submissions from third parties;

19.4 Photographs, videos and satellite images;

19.5 Interviews with victims and witnesses; and

19.6 Invitations to "*interested individuals, groups and organisations to submit information and/or documentation relevant to its mandate, in particular on allegations of human rights violations and abuses and international humanitarian law violations committed in Yemen since September 2014.*"⁹

20 Consistent with established practices of UN fact-finding bodies, the Group of Experts used the standard of "*reasonable grounds to believe*'...as the standard of proof for its factual findings, which underpinned determinations of whether such incidents and patterns of conduct amounted to violations of international

⁸ <https://www.ohchr.org/EN/HRBodies/HRC/YemenGEE/Pages/Index.aspx>.

⁹ <https://www.ohchr.org/EN/HRBodies/HRC/YemenGEE/Pages/Index.aspx>.

human rights law, international humanitarian law, and, where relevant, to international crimes."¹⁰

21 In reaching factual findings, the Group of Experts followed the established methodology for this standard of proof of requiring at least one credible direct source of information, independently corroborated by at least one or more additional credible sources of information.¹¹



21.1 For direct sources of information, it relied on "*interviews with victims; interviews with direct eyewitnesses to an event; videos, photographs, satellite imagery and documents whose authenticity has been assured; decrees, regulations and directives issued by governments; publicly available statements from parties to the conflict, including statements made via State media outlets; statistics, surveys, reports, and other quantitative and qualitative information generated by United Nations organisations, bodies, agencies, funds and programmes.*"¹²

21.2 For the purposes of corroborating information from direct sources, and for providing a contextual understanding, it relied on "witness testimony, situational analysis, descriptions of patterns of conduct and other material from publications or submissions by the United Nations, governments, human rights and humanitarian organisations; affidavits or other authenticated witness statements provided to reputable human rights organisations where the Group of Experts was able to validate the

¹⁰ Group of Experts Expert Report to the UN Human Rights Council, 2019 ("**2019 Expert Report**"), para 14.

¹¹ 2019 Expert Report, para 14.

¹² 2019 Expert Report, para 17.



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methodology used to obtain the statement. Where the Group relied upon information contained in publications, it aimed to discuss the methodology, findings, and/or analysis with the author whenever possible.”¹³

- 22 In my experience as the former High Commissioner for Human Rights, the appointment process, the mandate and the methodology of the Group of Experts accords with the rigorous standards adopted by my office during my tenure.

ENGLAND AND WALES COURT OF APPEAL



- 23 In the 2019 case of *Campaign Against Arms Trade v Secretary of State for International Trade*,¹⁴ the England and Wales Court of Appeal had to address the veracity of reports by the Group of Experts and NGOs.

- 24 In that case, the Campaign Against Arms Trade (“**CAAT**”) challenged the failure by the UK government to consider Saudi Arabia’s violations of the laws of war in Yemen before licensing arms sales to Saudi Arabia. The UK Court found in favour of CAAT, holding that the decisions of the UK authorities to authorise the transfer of weapons to Saudi Arabia were unlawful.

- 25 The decision required the UK government to reconsider its decision on arms sales to Saudi Arabia.

¹³ 2019 Expert Report, para 18.

¹⁴ *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020 (*CAAT v Secretary of State*).

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26 In its judgment, the Court accepted, and based its judgment on, the evidence of “major NGOs” and “the UN Panel of Experts”.¹⁵ The Court held that *“the major NGOs, including the Interveners, and the UN Panel of Experts had a major contribution to make in recording and analysing events on the ground in the Yemen conflict. The NGOs did have the capacity to introduce representatives on the ground and to interview eye witnesses, which the Secretary of State could not do. It is the case, however, that the Secretary of State could access a great deal of information which the NGOs and the UN Panel could not see.... In the very crudest terms, the NGO and UN Panel evidence often establishes what happened, but the further information available to the Secretary of State could assist as to why events of concern had happened. Both may of course be highly relevant to whether a violation of IHL [international humanitarian law] had taken place and to the risk of future violations.”*¹⁶


27 The Court held further:

*‘The question whether there was an historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question which required to be faced. Even if it could not be answered with reasonable confidence in respect of every incident of concern (which CAAT accepts, and so do we) it is clear to us that it could properly be answered in respect of many such incidents...’*¹⁷

¹⁵ CAAT v Secretary of State at para 134.

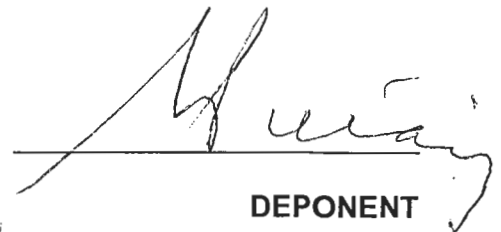
¹⁶ CAAT v Secretary of State at para 134.

¹⁷ CAAT v Secretary of State at para 138.


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CONCLUSION

- 28 As the former High Commissioner for Human Rights, I have intimate knowledge of the workings of the UN system. I confirm that the appointment processes are rigorous and the reporting of the expert bodies survives the most exacting scrutiny.
- 29 Given the political contestation involved in the matters on which expert groups work, the expert reports are confined to the most conservatively verifiable statements, conclusions and recommendations.
- 30 The Group of Experts on Yemen clearly meets these standards. As such, in my view, the reports are authoritative and reliable.



DEPONENT

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and ~~sworn to~~ or solemnly affirmed before me at JOHANNESBURG on this the 2nd day of June 2021, and that the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

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