IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT NO: 32/18
High Court Case No: A431/15
Magistrates' Court Case No: 14/985/2013

In the matter between:

PHUMEZA MHLUNGWANA	First Applicant
XOLISWA MBADISA	Second Applicant
LUVO MANKQA	**Third Applicant**
NOMHLE MACI	**Fourth Applicant**
ZINGISA MRWEBI	**Fifth Applicant**
MLONDOLOZI SINUKU	**Sixth Applicant**
VUYOLWETHU SINUKU	**Seventh Applicant**
EZETHU SEBEZO	**Eighth Applicant**
NOLULAMA JARA	**Ninth Applicant**
ABDURRAZACK ACHMAT	**Tenth Applicant**

and

THE STATE	First Respondent
THE MINISTER OF POLICE	Second Respondent

and

EQUAL EDUCATION	First Amicus Curiae
RIGHT2KNOW CAMPAIGN	Second Amicus Curiae
UN SPECIAL RAPPORTEUR ON THE RIGHTS OF FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATIONS	Third Amicus Curiae

FILLING SHEET

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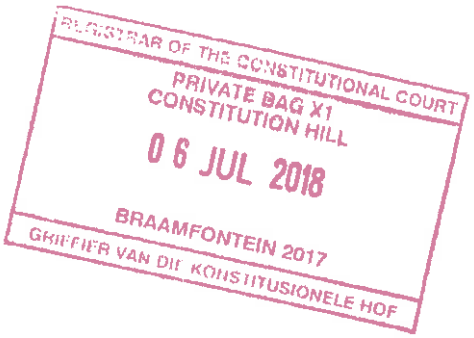

and

THE STATE	First Respondent
THE MINISTER OF POLICE	Second Respondent

and

EQUAL EDUCATION	First Amicus Curiae
RIGHT2KNOW CAMPAIGN	Second Amicus Curiae
UN SPECIAL RAPPORTEUR ON THE RIGHTS OF FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATIONS	Third Amicus Curiae

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THIRD AMICUS CURIAE'S PRACTICE NOTE

NATURE OF THE MATTER

1 The applicant seeks an order for confirmation of the High Court in *Mlungwana and Others v S and Another [2018] ZAWCHC 3; [2018] 2 All SA 183 (WCC); 2018 (1) SACR 538 (WCC)*. The second respondent appeals against the same judgment.

ISSUES FOR DETERMINATION

2 The issue for determination before this honourable court is whether section 12(1)(a) of the Regulation of Gatherings Act, 205 of 1993 ("the Gatherings Act") unjustifiably limits the rights to free assembly as provided in section 17 of the Constitution of South Africa.

3 This is because section 12(1)(a) of the Gatherings Act makes it a criminal offence to convene a gathering of more than 15 people unless the convener gives prior notice to the local municipality. This arose after the conviction of the applicants for contravening section 12(1)(a) of the Regulation of Gatherings Act.

4 SUMMARY OF THE UN SPECIAL REPORTEUR'S SUBMISSIONS

4.1 South Africa is a signatory to the International Convention on Civil and Political Rights ("the ICCPR") and the African Charter on Human and Peoples' Rights ("African Charter"). It has ratified both instruments and is therefore obliged to comply with the obligations imposed by both instruments. The import of these instruments is

that it is impermissible to criminalise convening a gathering solely because no notice was given.

4.2 Advance notification of public gatherings is a fairly common regulatory procedure around the world. However, the applicants' attack is not directed at the notice requirement but at the consequences of not giving notice.

4.3 The state's requirement for prior notification may conform to its positive obligations under international law, standards and principles. However, the imposition of criminal sanctions for failure to exactly conform to the notification requirements is a restriction of the right.

4.4 Using criminal law against individuals solely for having organized or participated in a peaceful assembly is, in principle, not a legitimate response available to States when the persons concerned have not themselves engaged in other criminal acts. When no other punishable behavior is involved, sanctioning the mere non-notification of a peaceful assembly means *de facto* that the exercise of the right to freedom of peaceful assembly is penalized.

4.5 The right to freedom of peaceful assembly is not absolute under international law. However, any restriction of the right to freedom of assembly can only be legitimate if it is in conformity with the

law, is intended for a legitimate aim and is necessary in a democratic society. South Africa's imposition of criminal sanctions for failure to provide notice or adequate notice in terms of the Gatherings Act constitutes an illegitimate restriction of the right to freedom of assembly at international law.

4.6 Although administrative penalties attract fewer consequences than criminal offences, however, they also amount to *de facto* penalizations and have therefore the same punitive and chilling effects on the exercise of the freedom of peaceful assembly.

5 ESTIMATED DURATION OF THE HEARING

None (the UN Special Rapporteur has not been admitted to make oral submissions)

6 PARTS OF THE RECORD THAT NEED TO BE READ

The parties have indicated that the entire record is necessary for purposes of the appeal

BD LEKOKOTLA

MUZI MBATHA

MICHAEL MATLAPENG

COUNSEL FOR THE THIRD AMICUS CURIAE

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6 JULY 2018

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FILLING SHEET

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1. Third Amicus Curiae's written submissions

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THIRD AMICUS CURIAE'S WRITTEN SUBMISSIONS

TABLE OF CONTENTS

A. INTRODUCTION

1 The applicants seek confirmation of the orders made by the Western Cape High Court ("the High Court") on 24 January 2018 in *Mhlungwana and Others v S and Another [2018] ZAWCHC 3; [2018] 2 All SA 183 (WCC); 2018 (1) SACR 538 (WCC)*. The respondents appeal against the same judgment and order. They also oppose the confirmation of the High Court declaration of constitutional invalidity of section 12(1)(a) of the Regulation of Gatherings Act[1] ("the Gatherings Act").

2 The issue for determination before this honourable court is whether s 12(1)(a) of the Gatherings Act unjustifiably limits the rights to free assembly as provided in section 17 of the Constitution of South Africa. This is because this provision makes it a criminal offence to convene a gathering of more than 15 people unless the convener gives prior notice to the local authority.

B FACTUAL BACKGROUND

3 The applicants were convicted by the magistrate for contravening s 12(1)(a) of the Gatherings Act due to their failure to give notice to the relevant local authority prior to their gathering, which at some point consisted of more than 15 people, even though it was initially intended to be limited to 15 people,

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[1] Regulation of Gatherings Act, 205 of 1993

4 Following their conviction, the applicants appealed their convictions[4] and challenged the constitutionality of s 12(1)(a), at the High Court. On 24 January 2018 the High Court upheld their appeal against the convictions and set the convictions aside. It also declared s 12(1)(a) unconstitutional and invalid.

5 The applicants brought this application for confirmation of unconstitutionality of s 12(1)(a) of the Gatherings Act. As stated above, the Minister appeals against the finding and order of the High Court.

6 The UN Special Rapporteur was admitted to this Court as the third *amicus curiae* in order to make written submissions. It had previously made written and oral submissions in the High Court.

C THE INTEREST OF THE SPECIAL RAPPARTEUR IN THIS APPLICATION

7 The Special Rapporteur is an independent expert appointed by the Human Rights Council to examine and report back on a specific human rights theme or country situation. The Special Rapporteurs are part of the Special Procedures of the Human Rights Council.

8 In October 2010, the Human Rights Council adopted resolution 15/21[2] establishing the mandate of the Special Rapporteur on the rights to

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[2] http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/15/21

freedom of peaceful assembly and of association for an initial period of[5] three years.

9 The Council extended the mandate of the Special Rapporteur for an additional period of three years in September 2013 (resolution 24/5)[3] and thereafter in June 2016 (resolution 32/32)[4]. The mandate-holder serves for an initial period of three years, renewable once.

10 The Special Rapporteur has an interest in this matter in light of his mandate to examine, monitor, and advise on the freedoms of assembly and association worldwide and his goal of promoting and protecting the rights to freedom of peaceful assembly and of association worldwide.

11 Section 39(1)(b) of the Constitution enjoins the courts to consider international law when interpreting the Bill of Rights. Section 39(1)(c) permits the courts to consider foreign law when interpreting the Bill of Rights. Furthermore, s 233 of the Constitution provides that when interpreting any legislation, the courts must prefer a reasonable interpretation that accords with international law over any alternative interpretation that is inconsistent with international law [5]

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[3] http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/24/5

[4] http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/32

[5] S 233 of the Constitution reads:
"*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*"

12 International law recognises the right to freedom of peaceful assembly[6] as the right to gather publicly or privately in order to collectively express, promote, pursue and defend common interests. This right includes the right to participate in peaceful assemblies, meetings, protests, strikes, sit-ins, demonstrations and other temporary gatherings for a specific purpose[6]. Therefore states not only have an obligation to protect peaceful assemblies, but should also take measures to facilitate them.

13 International law only protects assemblies that are peaceful, and the peaceful intentions of those assembling should be presumed. In SATAWU & Another v Garvas & Others[7] this Court confirmed the position to be the same in South Africa.

14 The South African courts have given due attention to international and regional law, standards and principles when interpreting the Constitution. In Glenister v President of the Republic of South Africa and Others[8] this Court explained the importance and relevance of international law to the South African constitutional framework[9].

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[6] Delaney S "The right to freedom of assembly, demonstration, picket, and petition within the parameters of South African law", p 2

[7] SATAWU & Another v Garvas & Others 2013 (1) SA 83 (CC) at paras [51] – [53]

[8] Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) at paras 95 – 95 and 192

[9] See also *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 at paras 26-27; and *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; 1995 (2) SACR 1 at paras 35 – 39.

D THE UN SPECIAL RAPPORTEUR'S SUBMISSIONS

15 The issue for determination before this honourable court is whether s 12(1)(a) of the Gatherings Act, unjustifiably limits the rights to free assembly as provided in section 17 of the Constitution of South Africa.

16 Having considered the submissions of the applicants and the second respondent, and while they each touch on international law, neither one of the submissions makes international law its primary focus. The Special Rapporteur's submissions will provide a more extensive overview of the relevant international legal principles.

17 In line with sections 39(1)(b), 231 and 233 of the Constitution, these submissions not only rely on the treaties ratified by South Africa, but they also place reliance on standards and principles that emanate from legal and institutional frameworks from international treaty bodies, international, regional courts (jurisprudence) or those that form part of an existing or emerging practice. These include the findings of the United Nations ("UN") treaty bodies or of experts under the special procedures, the African Commission on Human and Peoples' Rights ("African Commission"), the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights, and the European Court on Human Rights ("ECtHR"). Given the similar wording in the regional instruments, these bodies provide useful interpretative guidance to human rights stipulations.

Summary of the Special Rapporteur's submissions

18 The UN Special Rapporteur will make submissions in relation to the following issues:

18.1 The interpretation of s17 of the Constitution of the Republic of South Africa ("the Constitution") in light of international law;

18.2 The obligations of the Republic of South Africa under the International Covenant on Civil and Political Rights ("ICCPR");

18.3 The requirement that state authorities should be given prior notice of assemblies, demonstrations and gatherings; and

18.4 The appropriateness, from an international perspective, of criminally sanctioning failure to provide notice to state authorities prior to embarking on gatherings;

19 Below, we deal with each of these issues in turn.

Interpretation of section 17 of the Constitution

20 The right to freedom of peaceful assembly is among the most important human rights that people possess. Simply put, this right protects peoples' ability to come together and work for the common good. This right is a vehicle for the exercise of many other civil, cultural, economic, political and social rights, allowing people to express their political opinions, engage in artistic pursuits, engage in religious observances, form and join trade unions, elect leaders to represent their interests and

hold them accountable[10]. These rights are referred to as the core[9] rights and freedoms.

21 Today, the right to freedom of peaceful assembly is enshrined in international law as a fundamental freedom.

22 The core rights and freedoms are recognised in all the major international and regional human rights treaties[11]. Major international and regional human rights instruments include the following:

22.1 Article 5 of the UN Declaration on Human Rights Defenders;

22.2 Article 20 of Universal Declaration of Human Rights;

22.3 Article 21 of the International Covenant on Civil and Political Rights;

22.4 Article 11 of African Charter on Human and Peoples' Rights;

22.5 Article 15 of American Convention on Human Rights;

22.6 Article 11 of European Convention for the Protection of Human Rights;

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[10] Delaney S "The right to freedom of assembly, demonstration, picket and petition within the parameters of South African law" p 1; This was also confirmed by this Court in South African National Defence Union v Minister of Defence and Another, discussed below

[11] Major international and regional human rights treaties: these include Article 5 of the UN Declaration on Human Rights Defenders, Article 20 of Universal Declaration of Human Rights, Article 21 of the International Covenant on Civil and Political Rights; and regional standards: Article 11 of African Charter on Human and Peoples' Rights, Article 15 of American Convention on Human Rights, Article 11 of European Convention for the Protection of Human Rights, Article 28 of the Arab Charter on Human Rights (2004)

22.7 Article 28 of the Arab Charter on Human Rights (2004) 10

23 The content of the right is described as *`freedom of assembly'* or *`to assemble freely'*. In all instruments, except the African Charter, the guarantee only applies to *`peaceful'* assemblies. The American Convention adds the additional qualification *`without arms'*.

24 The bearers of the right to freedom of association are described as *"every individual"* in the African Charter and *"everyone"* in the Universal Declaration of Human Rights and the European Convention. The International Covenant on Civil and Political Rights and the American Convention on Human Rights do not describe the bearers of the right.

25 The right to freedom of assembly is a fundamental right, which is guaranteed in all national Bills of Rights. The following examples can be quoted:

25.1 Section 8 of the German Constitution states that: "(1) All Germans have the right to assemble peacefully and unarmed without notification or permission. (2) With regard to open-air meetings, this right may be restricted by or pursuant to a law."

25.2 Section 19(1) of the Indian Constitution provides that: "Everyone shall have the right to .... (d) assemble peacefully and without arms..."

25.3 The First Amendment Constitution of the United States of America provides that: "Congress shall make no law ...

abridging the ... the right of the people peaceably to assemble[11] ...", applied to the federal state as 'liberty" in the due process clause of the Fourteenth Amendment.

26 Foreign case law provides a useful comparative source for determining the conduct protected by the concept "to assemble peacefully and unarmed" and the application of limitation clauses to various situations in which the rights might be restricted.[12]

27 In the South African context, the right to assemble, demonstrate and picket is guaranteed in s 17 of the Constitution, which states as follows:

17 Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions.

28 This right was interpreted by the Constitutional Court in SATAWU & Another and Another v Garvas and Others[13]] to mean that s 17 of the Constitution protects only peaceful and unarmed demonstrations.

29 In South African National Defence Union v Minister of Defence and Another[14] O'Regan J, writing for the court, stated as follows:

'[Freedom of speech] is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the

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[12] Woolman and De Waal "Freedom of Assembly: voting with your Feet" in Van Wyk *et al Rights and Constitutionalism* (1994) 292- 327).

[13] **SATAWU and Another v Garvas and Others 2013 (1) SA 83 (CC) at para [52]**

[14] South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC)

right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of likeminded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial".[12]

30 In SATAWU & Another v Garvas & Others[15] this court found that the limitation on the right to assemble is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom

31 It is common cause that s 12(1)(a) of the Gatherings Act criminalises the convening of all gatherings without notice, including a peaceful and unarmed assembly like the one convened by the applicants.

32 We therefore submit that section 17 of the Constitution of the Republic of South Africa, is on par with most international human rights bodies and find application in many foreign jurisprudences.

South Africa's obligations under the ICCPR

33 South Africa's international obligations, as a full member of the UN system, deserve to be underscored and taken into account. The core rights and freedoms are recognised in all the major international and regional human rights treaties[16], including the International Covenant on

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[15] **At para [84]**

[16] Major international and regional human rights treaties: these include Article 5 of the UN Declaration

Civil and Political Rights (ICCPR), which South Africa has ratified[17].[13] As stated above, under South African law, courts are required to consider international law in the interpretation of the Bill of Rights.

34 South Africa is a signatory to and has ratified the International Convention on Civil and Political Rights ("the ICCPR")[18] As a state party, the South African Government has binding international legal obligations to respect, protect, promote and fulfil these rights. In addition, international law requires South African courts to interpret domestic law in line with the ICCPR.

35 The international obligations of States under the ICCPR are twofold. On the one hand, States have a positive obligation to create an enabling environment in which the right to freedom of peaceful assembly can be exercised; hence they have the obligation to facilitate and protect peaceful assemblies[19]

36 On the other hand, States have a negative obligation to refrain from interference with the rights guaranteed. The UN Human Rights

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on Human Rights Defenders, Article 20 of Universal Declaration of Human Rights, Article 21 of the International Covenant on Civil and Political Rights; and regional standards: Article 11 of African Charter on Human and Peoples' Rights, Article 15 of American Convention on Human Rights, Article 11 of European Convention for the Protection of Human Rights, Article 28 of the Arab Charter on Human Rights (2004)

[17] South Africa signed the ICCPR on 3 October 1994. It ratified in on 10 December 1998. It came into force in the Republic of South Africa on 10 March 1999

[18] South Africa signed the ICCPR on 3 October 1994. It ratified in on 10 December 1998. It came into force in the Republic of South Africa on 10 March 1999

[19] United Nations Human rights Council Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association, at para 27, U.N. Doc A/HRC/20/27(May 21, 2012) Hereinafter referred to as the UN Special Rapporteur's May 2012 Report

Committee ("Human Rights Committee"), the body charged with[14] authoritative interpretation and monitoring of implementation of the ICCPR in its [20]General Comment No. 27 on the freedom of movement, emphasised that:

> *"In adopting laws providing for restrictions ... States should always be guided by the principle that the restrictions must not impair the essence of the right... the relation between right and restriction, between norm and exception, must not be reversed"*

37 South Africa Is also a signatory to and has ratified the African Charter on Human and Peoples' Rights ("African Charter"). Furthermore, as recognised by the African Commission on Human and Peoples' Rights, South Africa, as an African Union (AU) member that has ratified the AU Charter, is bound to respect the rights protected under the African Charter of Human and Peoples Rights. Both the ICCPR and the African Charter protect the right to peaceful assembly in similar wording.

38 The right to freedom of peaceful assembly is not absolute under international law. Assemblies may be subject to certain restrictions, but such measures must be prescribed by law and are 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Any restrictions must meet a strict test of necessity and proportionality.

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[20] Human Rights Committee, *General Comment No. 27*, 1999, at para 13. The same point was made by the Human Rights Committee in relation to the rights to freedom of opinion and freedom of expression in *General Comment no. 34*, 2011, at para 21

39 We submit that as a signatory to ICCPR, the Republic of South Africa[15] ("South Africa") has binding international legal obligations to respect, protect, promote and fulfil these rights. In addition, international law requires South African courts to interpret domestic law in line with the ICCPR.

40 Part II, Article 2 (1) of the ICCPR provides that each state party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

41 Article 2(2) provides further that where not already provided for by existing legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the covenant.

42 Article 3(a) provides that each state party to the Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

43 Section 231(2) of the Constitution provides that an international agreement binds the Republic only after it has been approved by

resolution in both the National Assembly and the National Council of[16] Provinces, unless it is an agreement referred to in subsection (3)."

We submit that the Republic of South Africa has an obligation under the ICCPR to observe in particular the rights in Article 21.

44 Article 21 of the ICCPR provides as follows:

The right to peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national society or public safety; public order (order public), the protection of public health and morals or the protection of the rights and freedoms of others.

45 To this end, Article 5(1)(2) of the Covenant provides as follows:

(1) Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

(2) There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

46 The signatories including the Republic of South Africa are bound by the Covenant to respect the civil, and political rights of individuals in their territories.

47 Article 11 of the African Charter on Human and People's Rights ("the African Charter") provides as follows:

"Every individual shall have the right to assembly freely with others. The exercise of this right shall be subject only to the necessary restrictions

provided for by law in particular those enacted in the interests of national security, the safety, health, ethics, rights and freedoms of others"[17]

48 The import of these provisions is that it is impermissible to criminalise convening a gathering solely because no notice was given.

49 At international law, any restriction of the right to freedom of assembly can only be legitimate if it is in conformity with the law, is intended for a legitimate aim and is necessary in a democratic society[21].

50 We submit that the imposition of criminal sanctions for failure to provide notice or adequate notice in terms of the Gatherings Act constitutes an illegitimate restriction of the right to freedom of assembly at international law. We will deal with this issue in more detail below.

The notice requirement

51 In terms of s 2 of the Gatherings Act, an organisation intending to hold a gathering must appoint a 'convener', who is responsible for arranging the gathering and liaising with the State actors[22]. Notice of the intended gathering must be given to a 'responsible officer', who is delegated by the local authority to oversee arrangements for the gathering[23]. After the notice is given, the responsible officer must consult with an 'authorised member' of the SAPS regarding the necessity for negotiations on any

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[21] See article 21 of the ICCPR G.A. res 2200A (XXI) 21 UN GOAR Supp. (No. 16) at 52, UN Doc A/6316 (1966) 999 U.N.T.S 171; and Human Rights Committee, Turchenyak et al. v Belarus, Communication No. 1948/2010, at para 7.4, (July 24, 2013) ("Turchenyak et al. v Belarus")

[22] S 2(1)

[23] S 2(4)(a)

aspect of the conduct of, or any condition with regard to, the[18] proposed gathering[24]. If, after such consultation, the responsible officer is of the opinion that negotiations are not necessary and that the gathering may take place as specified in the notice or with such amendment of the contents of the notice as may have been agreed upon by him and the convener, he notifies the convener accordingly[25].

52 If a convener has been so notified or has not, within 24 hours after giving notice of the gathering, been called to a meeting, the gathering may take place in accordance with the contents of the notice[26]. If such negotiations are necessary, the responsible officer calls the convenor and authorised member to a meeting[27]. The responsible officer is required to ensure that such discussions take place in good faith[28]. The responsible officer pay impose conditions to the gathering. If the convener agrees to the imposed conditions, then the gathering will proceed accordingly. If the convener does not agree to the conditions or if the gathering is refused, the convenor may approach the local magistrate.

53 Even though the Gatherings Act deals with demonstrations and gatherings, it does not require that notice be given in the case of a

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[24] S 4(1)

[25] S 4(2)(a)

[26] S 4(3)

[27] Ss 4(2) and 4(3)

[28] S 2(d)

demonstration (which is limited to a group of 15 people or less).[19] Therefore, in the South African context, the notice requirement is limited to a gathering and the criminal sanction imposed by s 12(1)(a) applies only in relation to gatherings.

54 In international human rights law terminology, an 'assembly' is an intentional and temporary gathering in a private or public space for a specific purpose. It includes both 'gatherings' and 'demonstrations' as defined by the Gatherings Act. It also includes indoor meetings, strikes, processions, rallies or even sits-in. Assemblies can be static or moving[29]. The States' obligations, both negative and positive, to protect the right to freedom of peaceful assembly are thus applicable to both gatherings and demonstrations. We submit that this approach conforms with the language of s 17 of the Constitution. Therefore, in these submissions, we will use the notion of assembly in accordance with international law.

55 Section 12(1)(a) of the Gatherings Act provides that any person who convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3 shall be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding one year or both such fine and such imprisonment.

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[29] The UN Special Rapporteur's May 2012 Report at para 24

56 In terms of s 12(2) it shall be a defence to a charge of convening a gathering in contravention of s 12(1)(a) that the gathering concerned took place spontaneously.

57 The applicants' attack is not directed at the notice requirement but at the consequences of not giving notice[30]. The applicants have also demonstrated how giving notice is not as easy for certain people[31]

58 The second respondent ("the Minister") contends that s 12(1)(a) is not unconstitutional because: (a) the requirement to give notice serves a legitimate government objective of ensuring that proper planning may occur so as to ultimately facilitate the exercise of the right protected by s 17 of the Constitution; (b) the giving of notice imposes modest requirements on the person(s) convening a gathering; (c) the law provides as a defense to such a charge, that the gathering concerned took place spontaneously.[32]

59 Despite protections under international law for peaceful assemblies, in recent years an increasing number of countries around the world are restricting the right. The International Center for Not-for-Profit Law (ICNL) writes that these countries are suffering from a pandemic called "agoraphobia", which literally means the fear of an agora, or *"place of*

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[30] Applicants' heads of argument, para 105, p 34

[31] Applicants' heads of argument, para 107, p 34

[32] Respondent's practice note, p 3

assembly."[33] Since 2013, more than 20 countries from Australia to Egypt to Uganda have imposed legal measures that restrict people from exercising their right to freedom of assembly.[34] 21

60 One of the most common ways for countries to restrict assemblies is through enacting laws that require organizers and participants to receive permission from the government authorities in advance of holding the assembly. The former UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Mr. Maina Kiai, however did not consider the permission requirement a good practice and contends that the exercise of the right to freedom of peaceful assembly should be *"governed at most by a regime of prior notification regarding the holding of peaceful assemblies, in lieu of a regime of authorization."*[35] We accept that in the South African context, *"giving notice"* is not the same as making an application for permission.

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[33] Doug Rutzen and Brittany Grabel, "Fighting for the Public Square," Foreign Policy, April 9, 2014.

[34] Australia's Summary Offences Act, 2014, gives police in Victoria enhanced powers to disperse protesters who are blocking access to buildings, obstructing people or traffic, or who the police believe are "reasonably suspicious" of being violent. It also allows courts to issue an order preventing protestors who are repeatedly told to "move on" from entering a particular public space for up to 12 months, with a maximum penalty of two years imprisonment for violators. Egypt's Law on the Right to Public Meetings, Processions, and Peaceful Demonstrations requires assembly organizers to notify the Interior Ministry at least three days prior to assembling, allows the Ministry to ban and disperse peaceful demonstrations on vague grounds, and explicitly provides for the use of lethal force in dispersing assemblies. Uganda's Public Order Management Act, 2013, provides broad discretion to security forces to control and disband assemblies

[35] Report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/23/39 , April 24, 2013. https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf

61 Advance notification of public gatherings is a fairly common regulatory procedure around the world. It has been upheld by the UN Human Rights Committee and regional human rights bodies, even though it imposes an additional restriction and responsibility on organizers to notify the authorities of an upcoming assembly. In *Kivenmaa v. Finland*, the Committee held that *"as requirement to pre-notify a demonstration would normally be for reasons of national security, public order, the protection of public health or morals or the protection of the rights and freedoms of others."*[36]

62 We submit that the key difference between the notification procedure and the permission requirement, therefore, is that the former is based on the legal presumption that no permit is necessary to exercise the freedom of assembly. The goal of a notification procedure is to inform a competent authority about plans to hold a peaceful assembly in advance, in order to trigger the positive obligations of the state to facilitate the exercise of freedom of peaceful assembly. It is consistent with the 'principle of presumption' in favor of holding assemblies outlined in the Organization for Security and Co-operation in Europe

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[36] UN Human Rights Committee, Communication No. 412/1990, UN Doc. CCPR/ C/50/D/412/1990 (1994).

(OSCE) and Office for Democratic Institutions and Human Rights[23] (ODIHR) Guidelines on Assembly, which provides:[37]

"As a basic and fundamental right, freedom of assembly should be enjoyed without regulation insofar as is possible. Anything not expressly forbidden in law should, therefore, be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so."

63 We submit that, the underlying rationale for a permission requirement is much more tenuous because it places full power with the state. Where there is a "permission requirement," the authorities give approval for using public space for an assembly, which contravenes the essence of the nature of freedom for peaceful assembly. As noted above, in some jurisdictions, such as in Georgia but also countries like Zambia and Tanzania, the permission system has been declared unconstitutional because it undermines the value of the fundamental freedom to assemble peacefully.[38]

64 Countries like Bangladesh[39], Tajikistan[40], Peru[41] Ecuador[42], Cambodia[43], Colombia[44] require that permission be granted by the local authorities prior to a gathering taking place.

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[37] OSCE/ODIHR and the Venice Commission, Guidelines on Freedom of Peaceful Assembly, Second edition (Warsaw/Strasbourg, 2010).165.

[38] The Constitutional Court of Georgia has annulled part of a law (Article 8, para 5) that allowed a body of local government to reject a notification (thus, effectively creating a system of prior license rather than prior notification), Georgian Young Lawyers' Association Zaal Tkeshelashvili, Lela Gurashvili and Others v. Parliament of Georgia (5 November 2002) N2/2/180-183.

[39] In Dhaka, the capital of Bangladesh, "organizers of any assembly, meeting or public gathering in open public places, such as streets, must submit an application to the Police Commissioner seven days before an assembly; Refer to: http://www.forum-asia.org/?p=16237

65 In Georgia, the Constitutional Court annulled part of the Law on[24] Assemblies and Manifestations that allowed a body of local government to reject a notification.[45] The court's reasoning was that such a law effectively created a system of prior permission rather than prior notification.

66 In Turkey, all of the members of the organizing committee of an assembly must sign a declaration 48 hours prior to the assembly and submit it to the district governor's office during work hours;[46] In Malaysia, notice of an assembly must be given to the police within 10 days before the assembly date.

67 According to OSCE & Venice Commission Guidelines on Freedom of Peaceful Assembly[47] in Ireland there is no notice requirement for static gatherings. In England and Wales there is no requirement to give notice for open-air public meetings.

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[40] In Tajikistan, organizations must notify the authorities 15 days before a demonstration after which the authorities have three days to decide whether to permit or ban the assembly; refer Tajikistan (Article of Law on Assemblies, Meetings, Demonstrations and Marches of 1998).

[41] In Peru, "if public authorities do not respond specifically to the petition within a given period of time, then the petition must be deemed denied (negative administrative silence); See http://www.icnl.org/research/monitor/peru.html

[42] In Ecuador, "...there is no fixed period of time in which the regulatory authority must respond to the application; See http://www.icnl.org/research/monitor/ecuador.html

[43] In Cambodia "if the competent municipal or provincial territorial authorities fail to respond [to an application] within three days, then that implies that the competent municipal or provincial territorial authorities have approved the assembly; See http://www.icnl.org/research/monitor/cambodia.html

[44] In Colombia, if there is no response [to an application] by the authority within 24 hours, it is understood that the assembly may take place; See http://www.icnl.org/research/monitor/colombia.html

[45] Article 8, para 5

[46] Turkey (Article 10 of Law No. 2911 on Meetings and Demonstrations)
[47] OSCE & Venice Commission Guidelines on Freedom of Peaceful Assembly (2nd Ed, 2010) AT FN 175

68 The Report of the Special Rapporteur[48] states that "prior notifications[25] should ideally be required only for large meetings or meetings which may disrupt road traffic. This is echoed by the OSCE & Venice Commission Guidelines on Freedom of Peaceful Assembly[49].

Best Practices for Permission and Notification

69 The best practice for permission requirements and notification procedures is simple: it is best for a government to explicitly state that no permission is required to hold a peaceful assembly. For example, in Lebanon, the Public Assemblies Law does not require prior authorization before a public assembly takes place and explicitly provides that no permit is required (Lebanon does, however, require 48-hours prior notification to the authorities before an assembly).[50]

70 In cases where a state does not have a permission requirement but adopts a notification procedure, there are a number of measures that that state should take in order to ensure a notification procedure remains simply a notification, rather than permission and is as enabling as possible.

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[48] Report of the Special Rapporteur on the rights to Freedom of Peaceful Assembly and of Association Maina Kai 2012 A/HRC/20/27 at para 238 available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf

[49] At para 115

[50] Public Assemblies Law, Article 1

71 In Poland, there is no notice requirement for small assemblies but for assemblies of more than 15 people, the organizers are required to notify the authorities three days in advance.[51] 26

European Court of Human Rights

72 The European Court of Human Rights (ECHR) has produced a rich body of authorities on the right to peaceful assembly. With regard to notification requirements, the ECHR reiterated in the case of *Eva Molnar v. Hungary* that a prior notification requirement would not normally encroach upon the essence of that right. It is not contrary to the spirit of Article 11 [of the Convention] if, for reasons of public order and national security, *a priori*, a High Contracting Party requires that the holding of meetings be subject to authorization.[52]

73 The ECHR went on to say that the mere absence of prior notification can never serve as a legitimate basis for crowd dispersal; that prior notification serves the goal of reconciling the right to peaceful assembly with that of preventing disorder and crime; and that in order to balance these conflicting interests, the institution of preliminary administrative procedures is common practice in Member States when a public demonstration is to be organized. In the Court's view, such

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[51] Law on Assemblies of Poland, 2012, Chapter 1, Article 2

[52] Éva Molnár v. Hungary, App. No. 10346/05 Final, Eur. Ct. H.R. (Jan. 7, 2009), http://hudoc.echr.coe.int/ sites/eng/pages/search.aspx?i=001-88775 (citing Nurettin Aldemir and Others v. Turkey, App. Nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02 (joined), § 42, Eur. Ct. H.R. (Dec. 18, 2007)).

requirements do not, as such, run counter to the principles embodied 27
in Article 11 of the Convention, as long as they do not represent a hidden obstacle to the freedom of peaceful assembly protected by the Convention.[53]

74 In the case of *Bukta and Others v. Hungary*, the ECHR found that Hungary had violated article 11 of the European Convention because the police had dispersed a peaceful assembly on the basis that it was held without prior notification.[54] Although the police were acting on the basis of Hungary's Right of Assembly Act 1989, which requires that the police be informed of an assembly at least three days in advance and gives the police the authority to disband an assembly that takes place without prior notification, the ECHR held that a decision to dispel a peaceful assembly solely because of the failure of the organizers to comply with a notice requirement, without any illegal conduct by the participants, is a disproportionate restriction on peaceful assembly.[55]

75 We submit, therefore, that the state's requirement for prior notification may conform to its positive obligations under international law, standards and principles. However, the imposition of criminal sanctions

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[53] *Id.* at 37

[54] *Id.* para. 19

[55] *Id.* para. 36

for failure to exactly conform to the notification requirements is a[28] restriction of the right.

76 We further submit that, restrictions should not lead to effectively turning the right into a privilege and they must always be subjected to the proportionality rule.

The appropriateness of criminally sanctioning failure to provide notice

77 International law prohibits criminalising gatherings without notice and requires states to exempt spontaneous gathering. Paragraph 23 of the 2016 Joint Report of the Special Rapporteur[56] provides as follows:

> *23.Failure to notify authorities of an assembly does not render an assembly unlawful, and consequently should not be used as a basis for dispersing the assembly. Where there has been a failure to properly notify, organizers, community or political leaders should not be subject to criminal or administrative sanctions resulting in fines or imprisonment (see A/HRC/20/27, para. 29). This applies equally in the case of spontaneous assemblies, where prior notice is otherwise impracticable or where no identifiable organizer exists. Spontaneous assemblies should be exempt from notification requirements,[57] and law enforcement authorities should, as far as possible, protect and facilitate spontaneous assemblies as they would any other assembly.*

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[56] Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Associations and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies (2016) A/HCR/31/66 at para 23, accessible at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/.../A.HRC.31.66_E.docx

[57] European Court of Human Rights, *Bukta v. Hungary*, application No. 25691/04, 17 July 2007.

78 Although international law recognises the organisational advantage of providing notice, it does not justify criminalising the convening of otherwise peaceful, unarmed and non-harmful protests[58] 29

79 As stated above, since s 12(1)(a) of the Gatherings Act criminalises the convening of all gatherings without notice, including a peaceful and unarmed assembly like the one convened by the applicants, it is inconceivable to have a more serious limitation of the right than criminalising its exercise. The criminal sanction is the ultimate limitation of this right.

80 The applicants do not object to the requirement in s 3 that notice be given as that may be mere regulation. What they object to is the criminalisation of convening a gathering without giving notice in s 12(1)(a)[59]. The reason for their objection is that criminalisation of convening a gathering without giving notice in s 12(1)(a) will deter people from gathering or they will fear that they will face fines and imprisonment for exercising a constitutional right. The respondents contend that what is criminalised is not the conduct of the gathering but the convenor's failure to give notice to local authorities prior to doing so. With respect, that is still criminalisation that will deter people from convening gatherings in the future.

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[58] Applicants' heads of argument, para 144.3

[59] Applicants' heads of argument, para 61, p 21

81 The applicants contend that the law without s 12(1)(a) is more than sufficient to both incentivise notice, and to ensure that protests occur peacefully and without unjustifiable disruption[60].

82 The respondents admit that criminalisation due to failure to give notice is a serious consequence[61] but they contend that it must be emphasised that (a) it arises out of a conscious and deliberate choice not to comply with the notice requirements of the Gatherings Act; and (b) applies only in respect of the convenor[62]. They further contend that if there is likely going to be any chilling effect, it will be limited to convenors of un-notified gatherings[63] because s 12(1)(a) does not criminalise the gathering or the conduct of persons attending such a gathering, its effect does not extend to persons exercising their rights in terms of s 17 of the Constitution. We have dealt with these contentions.

THE INTERNATIONAL PERSPECTIVE

83 Holding organizers criminally liable for not providing notification or an inadequate notification is a restriction to the right to freedom of peaceful assembly, which then must conform to international law, standards and principles.

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[60] Applicants' heads of argument, para 55, p 20

[61] Respondents' heads of argument, para 77.3, p 45

[62] Respondents' heads of argument, para 77.3, p 45

[63] Respondents' heads of argument, para 77.4, p 45

84 More than twenty years ago, the UN Human Rights Committee in a[31] case dealing with 'prior notification' noted clearly *"that any restrictions upon the right to assemble must fall within the limitation provisions of article 21."*[64] In his reports, the Special Rapporteur has emphasized on several occasions that *"should the organizers fail to notify the authorities, the assembly should not be dissolved automatically and the organizers should not be subject to criminal sanctions, or administrative sanctions, resulting in fines or imprisonment"*.[65]

85 When an assembly is protected under article 21 of the ICCPR, as is the case for non-notified assemblies, the only legitimate and permissible restrictions are those that meet the three-pronged test at international law. The restrictions must be (1) in conformity with the law; (2) for a legitimate aim as mentioned in article 21 of the ICCPR; and (3) necessary in a democratic society. Any restriction must also comply with the strict test of necessity and proportionality.[66]

Conformity with the law

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[64] UN Human Rights Committee, Kivenmaa v. Finland, Communication No. 412/1990, U.N. Doc. CCPR/C/50/D/412/1990 (1994) at para 9.2.

[65] The Special Rapporteur's May 2012 Report above at para 29 and The Special Rapporteur's April 2013 Report above at para 51.

[66] Sergey Praded v Belarus above n 21 at para 7.5, with reference to Human Rights Committee, General Comment No. 34 at para 22.

86 Any restriction must be "in conformity with the law". Any law[32] regulating to the right to freedom of assembly must prevent arbitrary interferences with the right and meet the requirements of legality.[67]

87 In SATAWU & Another v Garvas and Others[68], this Court held that *"freedom of assembly is no doubt a very important right in any democratic society. Its exercise may not, therefore, be limited without good reason. The purpose sought to be achieved through the limitation must be sufficiently important to warrant the limitation"*.

88 The Human Rights Committee in its General Comment No. 34 clarifies that to meet the principle of legality, a law may not have unfettered discretion and it must provide sufficient guidance to those charged with its execution to enable right holders to ascertain or foresee the sort of behavior that is restricted and that which is not.[69] The European Court adopts the same understanding: the law itself must be sufficiently precise to enable an individual to assess whether or not his or her

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[67] On the need for legality see Manfred Nowak, CCPR Commentary, N.P. Engel, 2005, p. 489 – 490
[68] At para [66]

[69] U.N. Human Rights Committee, General Comment No. 34 at para 25. For a similar understanding in South African law, see Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) at para 47 where the Constitutional Court said:

"It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."

conduct would be in breach of the law, and also foresee the likely[33] consequences of any such breach.[70]

89 S 12(1)(a) of the Gatherings Act stipulates that more than 15 participants to an assembly triggers a criminal penalty in the case of non-notification. Such a clear cut-off figure may seem clear and objective *prima facie*. However, we submit that a closer analysis of the general nature of assemblies suggests the contrary: it does not necessarily provide organizers of assemblies with sufficient guidance to determine their behavior. It is hard to predict in advance how many people will participate in an assembly, all the more so because by-standers may decide to join as they see assemblies in public areas.

90 It is therefore doubtful that the number of 16 participants, as a threshold for notification, is sufficiently foreseeable to organisers who – like in the present case – did not intend to exceed that number. The exact number of participants in an assembly cannot be foreseen or controlled by the organisers and can only be truly determined after the assembly has taken place. It is thus challenging for organisers to ascertain and foresee whether they should or should not submit a notification[71]

Legitimate aim

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[70] Hashman and Harrup v. United Kingdom, ECtHR, Application no. 25594/94, (1999) at para 31; and Gillan and Quinton v. United Kingdom, ECtHR, Application no. 4158/05, (2010) at para 76.
[71] See The UN Special Rapporteur's April 2013 Report at para 54

91 Only the aims mentioned in article 21 of the ICCPR are considered[34] legitimate reasons for imposing restrictions on the right to freedom of peaceful assembly. They include (i) national security or public safety, (i) public order, (iii) the protection of public health or the protection of the rights and freedoms of others. It is the duty of the State to specify the aim which is sought to be protected, and to indicate the specific threat.[72]

92 It is noteworthy that the failure to submit a notification to authorities for a planned assembly of more than 15 people constitutes the sole element of the offence in question.[73] This offence should not to be conflated with other actions that may occur during an assembly, such as demolition of property by certain participants, which constitute separate offences that may entail civil or criminal liability for individuals committing those acts.[74]

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[72] Human Rights Committee, General Comment No. 31 CCPR/C/21/Rev.1/Add.13 (2004) at para 6. In U.N. Human Rights Committee, Mr. Jeong-Eun Lee v. Republic of Korea, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005) ("Lee v Korea") at para 7.3, the Human Rights Committee required a State, that invoked national security and protection of public order as a reason to restrict the right to association, to prove the precise nature of the threat. In Freedom and Democracy Party (ÖZDEP) v. Turkey, ECtHR, Application No. 23885/94, (1999), the European Court on Human Rights was dealing with a case on freedom of association where the State had raised national security concerns as a basis for restricting the right. The Court clarified, at para 44, that only convincing and compelling reasons can justify restrictions. Therefore, it is not enough for the State to refer generally to the security situation in the specific area. See Parti Nationaliste Basque-Organization Regionale D'Iparralde v. France, ECtHR, Application No. 71251/01 (2007) at para 47.

[73] As similarly in Novikoa v Russia above n 55 at para 144.

[74] The Special Rapporteur takes the view that organisers should not bear criminal nor civil liability for acts committed by others. In the Joint Report above n 43, the Special Rapporteur stated at para 26 that—

"While organisers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, organisers shall not be held responsible for the unlawful behaviour of others. To do so would violate the principle of individual liability, weaken trust

93 In a 2011 case, the Human Rights Committee found that a State[35] failed to demonstrate that a legitimate aim was served by prosecuting the mere non-notification of an assembly, and therefore found a violation of the right to freedom of peaceful assembly.[75]

94 In Malawi African Association and Others v Mauritania, the African Commission took the same approach. It found a violation of article 11 of the African Charter because the government had not shown that accusations of holding an '*unauthorized assembly*' *"had any foundation in the 'interest of national security, the safety, health, ethics and rights and freedoms of others'."*[76]

95 In Primov and Others v Russia, the European Court of Human Rights underscored that the enforcement of notification should not become an end in itself.[77] Even more, in the case of Novikova a.o. v Russia, the European Court of Human Rights said it could not see —

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and cooperation between assembly organisers, participants, and the authorities, and discourage potential assembly organisers from exercising their rights."

See also the Special Rapporteur's May 2012 Report above n 19 at para 31; and the The Special Rapporteur's April 2013 Report above n 26 at para 78. For the position in South Africa, see SATTAWU v Garvas above n 2 at paras 80 – 84.

[75] Sergey Praded v Belarus above n 21 at paras 7.8 and 8.

[76] African Commission on Human and Peoples' Rights, Malawi African Association and Others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000) at para. 111

[77] Primov v Russia above n 34 at para 118, the Court said:

"an unlawful situation does not justify an infringement of freedom of assembly. While rules governing public assemblies, such as the system of prior notification, are essential for the smooth conduct of

"What legitimate aim the authorities genuinely sought to achieve [...] for non-observance of the notification requirement, where they were merely standing in a peaceful and non-disruptive manner at distance of some fifty meters from each other. Indeed, no compelling consideration relating to public safety, prevention of disorder or protection of the rights of others was at stake. The only relevant consideration was the need to punish unlawful conduct."[78] 36

96 Generally, it is difficult to identify which legitimate aim may be served by the punishment of organizers for the mere fact of not notifying authorities of an assembly.[79] The Gatherings Act does not provide specific reasons for the application of s 2(1)(a), on the contrary, the section is generally applicable to all situations of lack of notification or flawed notification. Therefore, s 12(1)(a) allows for restrictions of the right to freedom of peaceful assembly for purposes beyond national security or public security, public order, public health or the protection of the rights and freedoms of others.

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public events ..., the Court emphasises that their enforcement cannot become an end in itself. In particular, where irregular demonstrators do not engage in acts of violence the Court has required that the public authorities show a certain degree of tolerance towards peaceful gatherings."

[78] Novikoa v Russia above n 55 at para 199. After having considered the facts at hand, the Court at para 147 also mentioned that: "nothing in the circumstances of the applicants' demonstrations discloses that their prosecution was aimed at protecting 'health or morals', national security or even public safety'."

[79] Measures aimed at avoiding disturbances, which are naturally to be expected with peaceful assemblies, clearly do not in themselves amount to the legitimate aims mentioned in article 21 of the ICCPR. In the Special Rapporteur's May 2012 Report at para 41, he cautioned that the free flow of traffic should not automatically take precedence over freedom of peaceful assembly.

His view is shared by the findings of the European Courts on Human Rights and the OAS Special Rapporteur on freedom of expression. See Ashughyan v Armenia above n 40 at para 90; Oya Ataman v Turkey 2007 above n 34 at paras 41 – 44; and IACHR, Annual Report of the Inter- American Commission on Human Rights, Volume II. Report of the Special Rapporteur for freedom of expression to the Inter-American Commission (2008) Chapter IV, para. 70; See also, Balcik v Turkey above n 40 at para 52 where the Court said:

"In the Court's view, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance."

Necessary in a democratic society

97 Any restriction has to pass the necessity and proportionality test to be deemed necessary in a democratic society. The Human Rights Committee explained that '*where ... restrictions are made, States must demonstrate their necessity and "only take such measures as are proportionate to the pursuance of legitimate aims."*[80] Moreover, the Human Rights Committee also said that "[the restrictions] must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."[81] Furthermore, the Human Rights Committee has clarified that the State must demonstrate that the restrictions placed on the right are in fact necessary to avert a real and not only a hypothetical danger.[82] In other words, the State measure must pursue a pressing need and it must be the least severe (in range, duration, and applicability) option available to the public authority in meeting that need.[83]

98 The Human Rights Committee – in a case concerning a participant to a peaceful assembly which did not obtain prior authorization as required

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[80] Human Rights Committee, General Comment No. 31 CCPR/C/21/Rev.1/Add.13 (2004) at para 6

[81] U.N. Human Rights Committee, General Comment No. 27, 1999 at para 14; See also, Arslan v. Turkey, ECtHR, Application No. 23462/94 (1999) at para 46

[82] U.N. Human Rights Committee, Aleksander Belyatsky et al v. Belarus, Communication No. 1296/2004, UN Doc. CCPR/C/90/D/1296/2004 (2007) at para 7.3.

[83] See Lee v Korea above n 70 at para 7.2

by national law – found that the administrative fine imposed upon the[38] right holder violated his right to freedom of peaceful assembly. The measure was found to be neither necessary nor proportionate in a democratic society. In relevant part, the Committee stated as follows:

> *"The Committee recalls that, while imposing the restrictions to the right of freedom of peaceful assembly, the State party should be guided by the objective to facilitate the right, rather than seeking unnecessary or disproportionate limitations to it.[84] In that regard, the Committee notes that, while the restrictions imposed in the author's case were in accordance with the law, the State party has not attempted to explain why such restrictions were necessary and whether they were proportionate for one of the legitimate purposes set out in the second sentence of article 21 of the Covenant. Nor did the State party explain how, in practice, in the present case, the author's participation in a peaceful demonstration in which only a few persons participated could have violated the rights and freedoms of others or posed a threat to the protection of public safety or public order, or of public health or morals. The Committee observes that, while ensuring the security and safety of the embassy of the foreign State may be regarded as a legitimate purpose for restricting the right to peaceful assembly, the State party must justify why the apprehension of the author and imposition on him of an administrative fine were necessary and proportionate to that purpose."*[85]

99 In 2014 the African Commission's study group on freedom of association and assembly recognised that *"[o]rganizers should not be subject to sanctions merely for failure to notify the authorities"*[86]. Indeed, in a democratic society, the enforcement of notifications should not become an end in itself.

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[84] See Turchenyak v Belarus above n 11 at para 7.4.

[85] Sergey Praded v Belarus above n 21 at para 7.8

[86] African Commission on Human and Peoples' Rights, *Report of the Study group on freedom of association and assembly in Africa*, African Union - ACHPR, 2014, p. 25 at para 23

100 It must be noted that section 12(1)(a) of the Gatherings Act also[39] penalises inadequate (or incomplete) notice as per section 3 of the Act. The notice procedure described in that section requires, amongst other things, the inclusion of the anticipated number of participants to the assembly (which, as already stated, may be a challenging undertaking), and imposes a timeline of seven days for submitting the notification. When a criminal penalty is proven to be a disproportionate measure for lack of notification, it self-evident that a similar penalty for 'inadequate notice' (for example, by filing a late notification or inaccurately anticipating the number of participants) is also disproportionate.

101 We submit that using criminal law against individuals solely for having organized or participated in a peaceful assembly is, in principle, not a legitimate response available to States when the persons concerned have not themselves engaged in other criminal acts.[87] When no other punishable behavior is involved, sanctioning the mere non-notification of a peaceful assembly means de facto that the exercise of the right to freedom of peaceful assembly is penalized.[88]

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[87] See also OSCE/ODIHR-Venice Commission, Guidelines on Freedom of Assembly, para. 111: "Individual participants in any assembly who themselves do not commit any violent act should not be prosecuted, even if others in the assembly become violent or disorderly."

[88] OSCE/ODIHR-Venice Commission, Guidelines on Freedom of Assembly, p.62 at para 110. The OSCE guidelines also clarify that non-compliance with the notification should not automatically lead to liability or sanctions.

102 We submit that the use of definitions of crimes or penalties, including[40] administrative fines, that essentially criminalize the exercise of the right to freedom of peaceful assembly or other activities otherwise protected under international human rights law, have no place in the State law of a democratic society.[89]

REMEDY: PROPOSED ALTERNATIVE TO CRIMINAL SANCTIONS

103 The applicants propose the imposition of administrative fines, instead of criminal penalties as this will be a less restrictive means because administrative fines are civil, not criminal. This is because a person cannot be detained for an administrative offence[90].

104 Administrative penalties attract fewer consequences than criminal offences. The benefits of administrative penalties in comparison to the criminal sanctions are numerous. This includes the fact that they will not affect future travel, employment and study. They also do not carry the social stigma as does the criminal offences.

105 The criminal sanctions that get imposed in the absence of giving notice for a gathering are not to punish morally reprehensible behaviour or to prevent harm to others but to make the job of planning for police officer

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[89] For a discussion on the criminalisation of the right to freedom of peaceful assembly, see U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association and Human Rights Centre of the University of Ghent, Third Party Intervention before the European Court of Human Rights in Mahammad Majidli v. Azerbaijan (no. 3) and three other applications, November 2015, http://freeassembly.net/wp-content/uploads/2015/11/ECtHR-brief-Azerbaijan.pdf.

[90] Applicants' heads of argument, para 132, p 42

resources much easier. We submit that the punishment (of[41] imprisonment and criminal sanctions) do not fit the *"offence"* of failure to give notice.

106 In Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission[91] it was held that the purpose of administrative penalties in the Competition Act is to *"reduce the incentive on the part of potential transgressors to engage in them"*. The CAC further held that the use of administrative penalties is premised on an incentive-based model not a criminal one.

THE SPECIAL RAPPORTEUR'S STANCE ON ADMINISTRATIVE FINES

107 The administrative fines also amount to *de facto* penalizations and have therefore the same punitive and chilling effects on the exercise of the freedom of peaceful assembly. The European Court of Human Rights recently found that 'administrative offenses' for participating in an unauthorized assembly effectively penalized participation in the assembly, and found this in violation of Article 11 of the European Convention on Human Rights.[92]

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[91] Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission 2005 (6) BCLR 613 (CAC) at para [86]

[92] Gafgaz Mammadov v. Azerbaijan, ECtHR, Application No. 60259/11 (2016) at para 62, the Court said:

108 The Inter-American Court of Human Rights similarly highlighted that[42] penalties have an inherent intimidating and inhibiting effect on the exercise of rights and could lead to self-censorship of the person concerned and of other members of society.[93] This, it reasoned, is because the penalties may result in would-be protestors having fears of being subjected to civil or criminal sanctions.[94]

109 We submit that criminalizing the mere failure to notify authorities of an assembly or the inadequate or incomplete notification does not meet the international standards of proportionality nor is it necessary in a democratic society. Even the imposition of administrative fines as an alternative do not cure s 12(1)(a)'s unconstitutionality.

110 Despite proposing, *inter alia*, administrative fines as an alternative to criminal sanctions, the applicants contend that they do not necessarily endorse any of the alternative options that they have proposed. They state that the administrative fine or the alternation of the definition of gathering may still result in unconstitutionality[95].

"Despite being formally charged with failure to comply with a lawful order of a police officer, the applicant in fact was arrested and convicted for his participation in an unauthorised peaceful demonstration."

See also paras 63 – 65

[93] Inter-American Court on Human Rights, Case of Norín Catrimán et al. (leaders, members and activist of the Mapuche Indigenous People) v Chile, Judgement of May 29, 2004, para. 376.

[94] Ibid at para 67

[95] Applicants' heads of argument, para 140

111 They also point out that the Special Rapporteur has also warned that[43] administrative fines are impermissible[96]. The applicants only argue for s 12(1)(a) to be declared unconstitutional and not for this Court to test each of the proposed restrictive means because that would amount to them intruding into the legislative terrain. We align ourselves with this submission made by the applicants.

E. CONCLUSION

112 Therefore criminalisation of convening without a notice is inconsistent with international law and best foreign practice. The Special Rapporteur therefore aligns himself with the submissions made by the applicants for confirmation of the declaration of invalidity of s 12(1)(a). It should therefore follow that the applicants' convictions be set aside.

113 The applicants contend that there is no basis for the suspension of the declaration of invalidity. They contend that the order of invalidity should have immediate effect. This is because, according to the applicants, the existing measures in the Gatherings Act provide more than sufficient protection to achieve the Minister's purpose[97]

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[96] Applicants' heads of argument, referring to (para 29 of the 2012 Special Rapporteur's report). It is referred on footnote 161 of the applicants' heads of argument

[97] Applicants' heads of argument, para 148

MUZI MBATHA[44]

MIKE MATLAPENG

CHAMBERS, SANDTON

6 JULY 2018

MUZI MBATHA[44]

MIKE MATLAPENG

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6 JULY 2018

LIST OF AUTHORITIES

International instruments and Rulings

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Dear Sir

Kindly find the third Amicus Curiae's written submissions

Regards

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