IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A431/15

In the matter between:

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

and

THE STATE	First Respondent
THE MINISTER OF POLICE	Second Respondent

and

THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION	Amicus Curiae

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WRITTEN SUBMISSIONS ON BEHALF OF THE SPECIAL RAPPORTEUR

A. INTRODUCTION

1. This case concerns the constitutionality of section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 ("Gatherings Act") which imposes criminal sanctions on any person who convenes a gathering without having provided the relevant authority with any notice, or who has provided inadequate notice. The Court must determine whether this provision unjustifiably limits the constitutionally entrenched right, "peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."[1] Closely intertwined with the right to assemble are the rights to freedoms of speech and of association.[2]

2. The case arises from a peaceful protest by the Appellants at the Cape Town Civic Centre on 11 September 2013. The protest was about poor sanitation for communities in Cape Town after engagements with the City of Cape Town Municipality.[3] The protesters, among other things, chained themselves to the railings outside the City's Civic Centre.[4]

3. Upon police intervention, 21 people were arrested[5] and charged under section 12(1)(a) of the Gatherings Act for convening a gathering without providing notice to the relevant municipal authority. In the alternative, they

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[1] Section 17 of the Constitution of South Africa, 1996 ("the Constitution").
[2] *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2012 (8) BCLR 840 (CC); 2013 (1) SA 83 (CC) at para 62 ("*SATTAWU v Garvas*"); and *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 8.
[3] Transcript p 191, lines 1 – 3.
[4] Transcript p 191, lines 6 – 8.
[5] Transcript p 193, lines 8 – 9.

were charged under section 12(1)(e) of the Gatherings Act for attending a gathering without notice and the required permission from the relevant authority.[6]

4. In the learned Magistrate's judgment, handed down on 11 February 2015, she found that there was photographic evidence of no more than 16, then 17, and then 18 people in the vicinity of the chain at any time in question.[7] The Magistrate accepted the Appellants' version that they intended for the number of protesters to not exceed 15 people.[8] In addition, the Magistrate accepted that the Appellants were, at all times, respectful and peaceful.[9]

5. Notwithstanding, the Appellants were convicted on the main charge of contravening section 12(1)(a) of the Gatherings Act by convening a gathering without providing the relevant municipal authority with notice.[10]

6. Therefore, the question of the role of notifications in the exercise of the right to peaceful assembly is of utmost relevance to the realisation of the right to freedom of assembly in South Africa. The right to freedom of assembly is also recognised at international law and the Special Rapporteur invites the above Honourable Court to have regard to international law, including comparative case law, and the obligations of

[6] Transcript p 188, lines 11 – 21.
[7] Transcript p 193, lines 17 – 19.
[8] Transcript p 194, lines 11 – 18 and Transcript p 207, lines 23 – 25.
[9] Transcript p 208, lines 12 – 14.
[10] Only those regarded as conveners of the protest were convicted of this charge. See Transcript p 195, lines 14 – 17 and Transcript p 196, lines 14 – 16.

South Africa under international law in view of guaranteeing effectively the right to freedom of peaceful assembly in South Africa.

7. These submissions will deal with the following issues:

7.1 First, the applicability of international human rights law in South Africa;

7.2 Second, whether requesting a notification to organise an assembly or *'gathering'* conforms to international law, standards and principles;

7.3 Third, whether the request to notify, in terms of section 12(1)(a) of the Gatherings Act, accords with the proportionality test under international law;

7.4 Fourth, whether section 12(1)(a) of the Gatherings Act conforms to international law, standards and principles to impose criminal sanctions for organising an assembly without a notification; and

7.5 Fifth, whether the defence under section 12(2) of the Gatherings Act has any effect on the legitimacy of the restrictions occasioned by section 12(1)(a).

8. 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.[11] We submit that the imposition of criminal sanctions for failure to provide notice or adequate

[11] See article 21 of the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. 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 v Belarus*").

notice in terms of the Gatherings Act constitutes an illegitimate restriction of the right to freedom of assembly at international law.

B. THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW IN SOUTH AFRICA

9. The Constitution recognises the important role of international law in the interpretation of the Bill of Rights.[12] Furthermore, the South African courts have given due attention to international and regional law, standards and principles when interpreting the Constitution.[13]

10. In terms of section 39(1)(b) of the Constitution, courts must consider international law when interpreting the rights in the Bill of Rights.[14] In addition, section 233 of the Constitution provides that when interpreting any legislation, courts must prefer a reasonable interpretation that accords with international law.[15]

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[12] Section 39(1)(b) provides:

> "*When interpreting the Bill of Rights, a court, tribunal or forum—*
> *…*
> *(b) must consider international law.*"

[13] See, for instance, *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 192; *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.

[14] See n 12 above.

[15] Section 233 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.*"

11. These submissions, on behalf of the Special Rapporteur, place international and regional law, standards and principles before the Court for its consideration when interpreting section 17 of the Constitution, which recognises the right of everyone, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

12. In line with sections 39(1)(b), 231[16] 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.

13. South Africa's international obligations, as a full member of the UN system, deserve to be underscored and taken into account. South Africa has ratified the International Covenant on Civil and Political Rights ("ICCPR")

[16] Section 231(2) provides:

> "*An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*"

and the African Charter on Human and Peoples' Rights ("African Charter"). Both protect the right to peaceful assembly in similar wording.

14. Article 21 of the ICCPR provides:

"The right of peaceful assembly shall be recognized. 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 security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."[17]

15. Article 11 of the African Charter reads:

"Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."[18]

16. 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

[17] See n 11 above.
[18] African Charter on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

exercised; hence they have the obligation to facilitate and protect peaceful assemblies.[19]

17. On the other hand, States have a negative obligation to refrain from interference with the rights guaranteed. The UN Human Rights Committee ("Human Rights Committee"), the body charged with authoritative interpretation and monitoring of implementation of the ICCPR, in its 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."[20]

18. The Human Rights Committee further recalls that the right to peaceful assembly is a fundamental human right that is essential for public expression of one's views and opinions and is indispensable in a democratic society.[21] The restriction of this right is only permissible when

[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 "*the UN Special Rapporteur's May 2012 Report*").
See also *Plattform Ärtze für das Leben v. Austria*, ECtHR, Application No. 10126/82 (1988) at para 32.

[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.

[21] *Turchenyak v Belarus* above n 11 at para 7.4; Reiterated in Human Rights Committee, *Sergey Praded v. Belarus*, Communication NO. 2029/2011, at para 7.4, CCPR/C/112/D/2029/2011, (October 10, 2014) ("*Sergey Praded v Belarus*").

it is: (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.[22] Any restriction must comply with the strict test of necessity and proportionality.[23]

C. DOES REQUESTING A NOTIFICATION TO ORGANISE AN ASSEMBLY OR 'GATHERING' CONFORM TO INTERNATIONAL LAW, STANDARDS AND PRINCIPLES?

19. 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,[24] *shall be guilty of an offence and on conviction liable to a fine not exceeding R20.000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."*

20. Section 1 of the Gatherings Act defines a 'demonstration' to include "*any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action".* In addition, it defines a 'gathering' as follows:

[22] *Turchenyak v Belarus* above n 11 at para 7.4.
[23] *Sergey Praded v Belarus* above n 21 at para 7.5, with reference to Human Rights Committee, *General Comment No. 34*, 2011, at para 22.
[24] Section 3 stipulates the modalities of the notification: it shall be in writing, 7 days before the date, if not reasonably possible then no less than 48 hours. If less, then the responsible officer may prohibit the gathering. The section also lists the information which the notification needs to contain such as, amongst others, the anticipated number of participants, the purpose of the gathering and in case of a procession, the exact route.

"*… any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air -*

(a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of applicable law, are discussed, attacked, criticized, promoted or propagated; or

(b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution."

21. It must be noted that 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.[25] 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

[25] *The UN Special Rapporteur's May 2012 Report* above n 19 at para 24.

comports with the language of section 17 of the Constitution. Therefore, in these submissions, we will use the notion of assembly in accordance with international law.

The notification procedure and the positive obligation of the State

22. With regards to prior notice for assemblies and its modalities, we submit that it is not necessary under international human rights law for domestic legislation to request advance notification of an assembly. However, to enable State authorities to fulfil their positive obligation, they may request a notification where a certain degree of disruption is anticipated.[26] The rationale for this is to enable State authorities to facilitate and safeguard the exercise of the right to freedom of peaceful assembly, to protect public safety and order and the rights and freedoms of others. This can be achieved by, for instance, rerouting traffic and deploying security when necessary.[27]

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[26] *The UN Special Rapporteur's May 2012 Report* above n 19 at para 90.
See also United Nations General Assembly, *Human Rights Council. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, at para 52, U.N. Doc, A/HRC/23/39 (Hereinafter "*the UN Special Rapporteur's April 2013 Report*").
The difference between a notification and an authorisation deserves to be made. The Inter-American Commission on Human Rights clearly indicates that the requirement of an advance permit is not compatible with the right to freedom of assembly, Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders* (2011) at para 137.
On several occasions the Special Rapporteur underscored that authorisation turns the right into a privilege and is incompatible with international human rights law. See United Nations 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.

[27] *The Special Rapporteur's May 2012 Report* above n 19 at paras 26 – 28.
See also *Sergey Praded v Belarus* above n 21 at para 7.8, where the Human Rights Committee said:

> *"The State party should be guided by the objective to facilitate the right, rather than seeking unnecessary or disproportionate limitations to it".*

See also Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders* (2011) at para 136.

23. As notification serves the interest of protecting and facilitating the right to peaceful assembly, we submit that organisers of assemblies, in well-functioning rights-respecting States, generally have an interest in notifying the authorities when a certain degree of disruption is foreseen.

24. The fact that it is permissible to ask for a notification does not imply that States fulfil their positive obligation of facilitating and protecting only those assemblies for which notice has been given, and not for others. International human rights law, standards and principles recognise that spontaneous peaceful assemblies form an integral part of the right to peaceful assembly. UN Special Rapporteurs have repeatedly underscored that spontaneous assemblies should be recognised in law, and be exempted from prior notification.[28]

25. The African Commission's study group on freedom of association and assembly clarifies the purpose of the notification framework in the same way:

[28] *The Special Rapporteur's May 2012 Report* above n 19 at para 91.
See also U.N. General Assembly, *Report of the Special Representative of the Secretary-General on Human Rights Defenders to the General Assembly*, A/61/312, at para 97, where the Special Representative of the Secretary-General on Human Rights Defenders also advanced that human rights defenders should have the possibility of responding immediately to an event by holding peaceful assemblies.

"*The right to freedom of assembly resides in the people. As such, a state's duty is to facilitate the conduct of peaceful assembly, and any legal framework implemented should be aimed at this purpose."*[29]

It further emphasises that assemblies cannot be subject to authorisation.[30]

26. In the matter of *Bukta and Others v Hungary*[31] the European Court of Human Rights held that:

"…*when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly*."[32]

The court confirmed in several cases that the mere fact that an assembly has not been authorised does not, in and of itself, justify interference with the freedom of peaceful assembly.[33]

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[29] 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 60 at para 5.
[30] Ibid, p 60 at para 5.
[31] *Bukta and Others v. Hungary*, ECtHR, Application No. 25691/04 (2007) ("*Bukta v Hungary*"). This case was brought in terms of articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 10 provides for the right to freedom of expression whilst article 11 provides for freedom of association, including freedom of assembly. The applicants alleged that their peaceful assembly was disbanded by the police, in contravention of the two articles.
[32] Ibid, at para 36.
See also *Molnar v Hungary*, ECtHR, Application No. 10346/05 (2009) ("*Molnar v Hungary* ") at para 38 for the understanding of special circumstances. 'Special circumstances' refers to cases in which an immediate response to a current event is warranted in the form of a demonstration.
[33] See *Primov and Others v. Russia*, Application No. 17391/06 (2014) at para 119 ("*Primov v Russia*"); *Samüt Karabulut v. Turkey*, ECtHR, Application No. 16999/04, (2009) at para 35; and

27. The Inter-American Commission on Human Rights in its 2011 report titled '*Second Report on the Situation of Human Rights Defenders in the Americas*', states that the notification requirement is compatible with the right to assembly to the extent that it informs the authorities and allows them to take measures to facilitate the exercise of the right.[34] In order to meet their obligations, States have the obligation not to obstruct the right and this obligation begins from the time the authorities are notified.[35]

28. We submit that notifications serve the positive obligation of the State to facilitate assemblies where a degree of disruption is anticipated. Although assemblies may cause disruption – including traffic congestion, blocked roads and noise – it must be noted that peaceful assemblies naturally come with disturbances, which, we submit, must be tolerated.

29. In its 2011 report, referred to above, the Inter-American Commission highlighted that in a democratic society "*the urban space is not only an area for circulation, but also a space for participation*".[36] Institutions at both the Inter-American[37] and European regional level have clearly held that tolerance, from the public and the authorities, towards those disruptions of life is required. Indeed, they are part of the mechanics of a pluralistic

Oya Ataman v Turkey, ECtHR, Application No. 74552/01 (2007) ("*Oya Ataman v Turkey 2007*") at para 39.

[34]Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas* (2011) at paras 133-137.

[35] Ibid, at para 133.

[36] Ibid, at para 136, citing a decision of the Constitutional Tribunal of Spain, Decision 66/1995, p 3.

[37] Organization of American States (OAS), IACHR, Report on Citizens Security and Human Rights, 2009, OEA/SerI/V/II at para 198.

society in which diverse and sometimes conflicting interests coexist and find the forums and channels in which to express themselves.[38]

30. In *Ashughyan v Armenia*, the European Court of Human Rights held that —

> "*any demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption of traffic and, 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 … is not to be deprived of all substance.*"[39]

31. Therefore, in our submission, a State's request for prior notification of a planned assembly may conform to the positive obligations of the State under international law, standards and principles. It would only so conform if it is intended for the preparation and facilitation of the exercise of the

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[38] *The UN Special Rapporteur's April 2013 Report* above n 26 at para 65.

[39] *Ashughyan v. Armenia*, ECtHR, Application No. 33268/03 (2008) ("*Ashughyan v Armenia*") at para 90.
See also, *Balcik and Others v Turkey*, ECtHR Application No. 25/02 (2008) ("*Balcik v Turkey*")at para 52:

> "*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.*"

Also, *Oya Ataman v Turkey 2007* above n 34 at paras 41 – 44.
On the use of road and preferred location to hold an assembly, see OSCE-ODIHR (Office for Democratic Institutions and Human Rights), *Guidelines on freedom of peaceful assembly*, Principle 2.2., Warsaw.

right to freedom of peaceful assembly and it is not exercised in a manner that unduly restricts or that prohibits the intended assembly.

32. In light of this, I will now turn to deal with the international law requirement of proportionality in relation to the request for prior notification of a planned assembly.

D. DOES THE REQUEST TO NOTIFY IN TERMS OF SECTION 12(1)(a) OF THE GATHERINGS ACT ACCORD WITH THE INTERNATIONAL LAW TEST OF PROPORTIONALITY?

33. At international law, notifications are subject to a proportionality assessment.[40] We submit that the core of the proportionality principle is that the procedure for the notification request serves the aim of allowing the State to prepare for an assembly with a view towards facilitating it and protecting rights and freedoms of others.

34. However, notification procedures should not function as a *de facto* request for authorisation[41] or as a basis for content-based regulation.[42] Nor should

[40] *The UN Special Rapporteur's May 2012 Report* above n 19 at para 28 and OSCE/ODIHR-Venice Commission, *Guidelines on Freedom of Assembly*. Note: notification is not always proportional, e.g. in cases of spontaneous assemblies or when the impact upon the public is very limited.
See also the Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas* (2011) at para 137.
In addition, the European Court on Human Rights also recognised that enforcement of notifications should not become an end in itself, see below and *Oya Ataman v Turkey 2007* above n 34 at para 36.
[41] On authorisation, see n 26 above.
[42] *Joint report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions on*

the notification process be overly bureaucratic.[43] The notice period should not be unreasonably long,[44] though it should allow sufficient time for relevant authorities to prepare appropriately for the assembly. The notification procedure should be free of charge[45] and easily accessible.

35. In line with the notion of proportionality, notifications should not be expected for assemblies which do not require prior preparation by State authorities, such as those where only a small number of participants is expected, or where the impact on the public is expected to be minimal.[46] The number of participants is one factor of potential disturbance, but even this depends on a variety of factors. For instance, some assemblies of 900 people may require little support from authorities while others with 100 people may require support and policing.

36. Although the number of participants may be one element that guides regulations on when to notify, we submit that numbers should not be the only element. In this case, for instance, the Magistrate found that the number of protesters exceeded 15 people.[47] Notwithstanding, the Magistrate also found that people were not obstructed from gaining entry

the proper management of assemblies, Maina Kiai and Christof Heyns, (2016), UN. Doc. A/HRC/31/66 ("*Joint Report*") at paras 21 – 22.

[43] Ibid. See also, *The UN Special Rapporteur's May 2012 Report* above n 19 at para 28 and the Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas* (2011) at para 137.

[44] *The UN Special Rapporteur's May 2012 Report* above n 19 at para 28. See also *The UN Special Rapporteur's April 2013 Report* above n 26 at para 52.

[45] *The UN Special Rapporteur's April 2013 Report* above n 26 at para 57.

[46] This is identified as a best practice in the *Joint Report* above n 43 at para 21.

[47] See n 7 above.

into the building[48] and that the protesters were at all times peaceful and respectful.[49]

37. The OSCE Guidelines on Freedom of Assembly highlight the good practice of requesting notification only when a substantial number of participants is expected or only for certain types of assemblies. Furthermore, the guidelines note that where a lone demonstrator is joined by another or others, the event should be treated as a spontaneous assembly[50] for which no notification is necessary.[51] In addition, when more people than anticipated by the organisers gather at an assembly for which notification has been given, the relevant law-enforcement agencies should facilitate the assembly so long as the participants remain peaceful.[52]

Proportionality under the Gatherings Act

38. Under the Gatherings Act, 16 participants to an assembly trigger the notification procedure. Where no notification was provided and there are more than 15 unarmed people participating in a protest, as in the case of the Appellants, those people immediately attract criminal sanctions. We

[48] Transcript p 193, lines 23 – 25.
[49] See n 9 above.
[50] OSCE/ODIHR-Venice Commission, *Guidelines on Freedom of Assembly* at paras 115, 126 – 131.
[51] As noted in the OSCE/ODIHR-Venice Commission, *Guidelines on Freedom of Assembly* at para 163, these gatherings include 'flash mobs' —

> *"the raison d'être of which demands an element of surprise that would be defeated by prior notification. Such assemblies should still be accommodated by law-enforcement authorities as far as possible."*

[52] OSCE/ODIHR-Venice Commission, *Guidelines on Freedom of Assembly* at para 121.

submit that the imposition of the number 16 is arbitrary, and thus not proportionate, for the following reasons:

38.1 First, the justification for this number is unclear in view of the States' obligation to ensure adequate protection and facilitation of an assembly. In addition, more than 15 participants to an assembly immediately attract criminal sanctions. Does this number mean that when 16 people assemble there is likelihood of substantial disturbance that would require support, facilitation and protection? Why 16 and not 14 or 20 or even 100?

38.2 Second, determining or predicting the exact number of participants is difficult for organisers.

38.2.1 Assemblies are necessarily open to the public, meaning that anyone can join-in if they identify with the cause, without prior registration, notice or announcement to the organisers.

38.2.2 In this particular case, the Appellants were protesting about sanitation, an issue with which many poor black people would have identified. Although the Appellants had planned to have 15 people protesting at any given

time, the number of protesters did at some points increase.[53]

38.2.3 In fact, by-standers, who have a protected right to freedom of assembly, could join-in when they see an assembly passing by. This characteristic of assemblies makes it almost impossible for organisers to know the numbers in advance: assemblies that are intended to be large scale may turn out small and assemblies intended to be small scale may turn out much bigger.[54]

38.2.4 In his Report to the UN Human Rights Council, the Special Rapporteur stated that "*…the exact number of participants … is difficult to predict …. In this connection, the authorities should not punish organizers if the number of participants does not match the anticipated number, as stipulated by domestic legislation*".[55]

[53] Transcript p 192, lines 13 – 20 and transcript p 194, lines 11 – 18.

[54] The European Court of Human Rights recently recognised this unique feature of demonstrations, even by a single person and thus *ipso facto* also for assemblies generally. In reviewing the case – in which the State argued that because of the number of people involved in the assembly, notification was required – the Court in *Novikova a.o. vs Russia*, ECtHR, Application Nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13 (2016) ("*Novikova v Russia*") noted at para 204, that this —

> "*form of expression … is by its nature capable of and is aimed at attracting some attention from passers-by."*

[55] *The UN Special Rapporteur's April 2013 Report* above n 26 at para 54.

39. We submit, therefore, that the State's request for a 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.

40. In our submission, restrictions should not lead to effectively turning the right into a privilege and they must always be subjected to the proportionality rule. We now turn to address the imposition of criminal sanctions for failure to provide prior or adequate notice of an assembly.

E. DOES SECTION 12(1)(a) OF THE GATHERINGS ACT, BY IMPOSING CRIMINAL SANCTIONS FOR ORGANISING AN ASSEMBLY WITHOUT A NOTIFICATION, CONFORM TO INTERNATIONAL LAW, STANDARDS AND PRINCIPLES?

41. Holding organisers 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.

42. More than twenty years ago, the UN Human Rights Committee in a case dealing with 'prior notification' noted clearly "*that any restrictions upon the right to assemble must fall within the limitation provisions of article 21*."[56]

[56] 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.

In his reports, the Special Rapporteur has emphasised 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*".[57]

43. Similarly, the European Commission of Human Rights has held that if an assembly is peaceful, the fact that it is 'illegal'[58] under national legislation will not remove it from protection under the relevant article on the right to freedom of assembly.[59] On several occasions, the European Court of Human Rights has held that the absence of prior authorisation and the ensuing domestic 'unlawfulness' of an assembly does not, in and of itself, justify interference with the right to freedom of peaceful assembly.[60] Specifically on notification, the Court has stated that 'a decision to disband' assemblies "*solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, may amount to a disproportionate restriction on freedom of peaceful assembly*".[61]

44. In *Oya Ataman v Turkey*, a case concerning an assembly for which no notification had been given (with 40-50 participants), the European Court

[57] *The Special Rapporteur's May 2012 Report* above n 19 at para 29 and the *The Special Rapporteur's April 2013 Report* above n 26 at para 51.
[58] In this case it was dealing with a demonstration that took place at a location where, by national legislation, no demonstrations were allowed.
[59] Former European Commission of Human Rights, *G v Germany*, 1989, as discussed in Interights, *Freedom of peaceful assembly and of association under the European convention on human rights*, 2010, p.9.
[60] *Primov v Russia* above n 34 at para 119; and *Kudrevičius and Others v. Lithuana*, ECtHR, Application No. 37553/05 (2015) at para 151.
[61] *Bukta v Hungary* above n 32 at para. 36; and *Molnar v Hungary* above n 32 at para 36.

of Human Rights found that there was a violation of the right to peaceful assembly when the participants refused to disperse and were subsequently *pepper-sprayed* by police.[62]

45. Furthermore, the European Court of Human Rights has stated that restrictions to an assembly must be interpreted to include punitive measures taken after the assembly has occurred.[63]

46. 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.[64]

(i) Conformity with the law

47. Any restriction must be "in conformity with the law". Any law regulating the right to freedom of assembly must prevent arbitrary interferences with the right and meet the requirements of legality.[65] The Human Rights

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[62] *Oya Ataman v Turkey 2007* above n 34 at paras 39 – 44.

[63] In *Novikova v Russia* above n 55 the court, at para 106, said:

> "*[r]estrictions … must be interpreted … as including measures taken before or during an assembly and those, such as punitive measures, taken afterwards*."

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

[65] On the need for legality see Manfred Nowak, *CCPR Commentary*, N.P. Engel, 2005, p. 489 – 490.

Committee in its General Comment No. 34 clarifies that to meet the principle of legality, a law may not confer 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 behaviour that is restricted and that which is not.[66] 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 conduct would be in breach of the law, and also foresee the likely consequences of any such breach.[67]

48. Section 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 organisers of assemblies with sufficient guidance to determine their behaviour. 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.

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[66] 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."*

[67] *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.

49. 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.[68] 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.[69]

(ii) Legitimate aim

50. Only the aims mentioned in article 21 of the ICCPR are considered legitimate reasons for imposing restrictions on the right to freedom of peaceful assembly. They include national security or public safety, public order, 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.[70]

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[68] Transcript p 194, lines 11 – 13.

[69] See *The UN Special Rapporteur's April 2013 Report* above n 26 at para 54.

[70] 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.
See also Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas*, (2011) at para 166.

51. It is worth noting 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.[71] 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.[72]

52. In a 2011 case, the Human Rights Committee found that a State 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.[73]

53. In *Malawi African Association and Others vs 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 'unauthorised assembly' "*had any foundation in*

[71] As similarly in *Novikova v Russia* above n 55 at para 144.
[72] 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 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.
[73] *Sergey Praded v Belarus* above n 21 at paras 7.8 and 8.

the 'interest of national security, the safety, health, ethics and rights and freedoms of others'."[74]

54. 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.[75] Even more, in the case of *Novikova a.o. v Russia*, the European Court of Human Rights said it could not see —

"*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*."[76]

55. Generally, it is difficult to identify which legitimate aim may be served by the punishment of organisers for the mere fact of not notifying authorities

[74]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.
[75] *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 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*."

[76] *Novikova 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'*."

of an assembly.[77] The Gatherings Act does not provide specific reasons for the application of section 12(1)(a), on the contrary, the section is generally applicable to all situations of lack of notification or flawed notification. Therefore, section 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.

(iii) Necessary in a democratic society

56. 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*."[78] 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;

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[77] 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."*

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

and they must be proportionate to the interest to be protected."[79] 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.[80] 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.[81]

57. The Human Rights Committee – in a case concerning a participant to a peaceful assembly which did not obtain prior authorisation as required by national law – found that the administrative fine imposed upon the 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 said:

"*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.*[82] *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*

[79] 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.
[80] 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.
[81] See *Lee v Korea* above n 70 at para 7.2.
[82] See *Turchenyak v Belarus* above n 11 at para 7.4.

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."[83]

58. 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*".[84] Indeed, in a democratic society, the enforcement of notifications should not become an end in itself.

59. The European Court, which emphasised that non-notified assemblies still deserve protection under the right to peaceful assembly,[85] also established that "*the freedom to take part in a peaceful assembly … is of such importance that it cannot be restricted in any way ... so long as the*

[83] *Sergey Praded v Belarus* above n 21 at para 7.8.
[84] 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.
[85] *Oya Ataman v Turkey 2007* above n 34 at para 39.

person concerned does not himself commit any reprehensible act on such an occasion"[86] The Court ruled that this was even true for a penalty at the lower end of the scale of disciplinary penalties.[87]

60. In *Kuznetsov v. Russia*, the same Court applied the same reasoning to the organisers of an assembly and held that "a *merely formal breach of the notification time-limit was neither relevant nor a sufficient reason for imposing administrative liability*".[88] We submit that criminalisation and the potentiality of prosecution have serious chilling effects upon the exercise of the right to freedom of peaceful assembly.[89]

61. It must be noted that section 12(1)(a) of the Gatherings Act also 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,

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[86] *Ezelin v. France*, ECtHR, Application no. 11800/526 (1991) at para. 53 ("*Ezelin v France*"). See also, *Taranenko v. Russia*, ECtHR, Application no. 19554/05 (2014) at para 88; and *Ashughyan v Armenia* above n 40 at para 98.

[87] *Ezelin v France* above n 86 at para 53. 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. Still at para 53, the Court said:

> "*In short, the sanction … however minimal, does not appear to have been 'necessary in a democratic society'."*

See, *Oya Ataman v Turkey 2007* above n 34 at para 42.

[88] *Kuznetsov v. Russia,* ECtHR, Application no. 10877/04 (2009) at para 43.

[89] On disproportionality of criminal sanctions and the effects on human rights, in the context of the right to freedom of expression, see Inter-American Court on Human Rights, *Norín Catrimán et al. (leaders, members and activist of the Mapuche Indigenous People) v Chile*, (2014) at para 374 – 378.

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.

62. We submit that using criminal law against individuals solely for having organised 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.[90] When no other punishable behaviour 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 penalised.[91]

63. We submit that the use of definitions of crimes or penalties, including administrative fines, that essentially criminalise 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.[92]

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[90] 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*."

[91] 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.

[92] 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.

64. Furthermore, administrative fines also amount to *de facto* penalisations 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 unauthorised assembly effectively penalised participation in the assembly, and found this in violation of Article 11 of the European Convention on Human Rights.[93]

65. The Inter-American Court of Human Rights similarly highlighted that 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.[94] This, it reasoned, is because the penalties may result in would-be protestors having fears of being subjected to civil or criminal sanctions.[95]

66. We submit that criminalising 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.

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

> *"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.

[94] 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.

[95] Ibid at para 67.

F. DOES THE SECTION 12(2) DEFENCE HAVE ANY EFFECT ON THE LEGITIMACY OF THE RESTRICTIONS OCCASSIONED BY SECTION 12(1)(a)?

67. As stated above, we submit that a spontaneous assembly includes an assembly where a particular number of protesters was initially expected but where the number of protesters ultimately exceed that number.[96] We note that the Appellants do not seek to rely on the defence of spontaneity.[97]

68. In any event, we submit that the defence provided under section 12(2)[98] of the Gatherings Act does not remove the illegitimate restrictions occasioned by section 12(1)(a) on the right to freedom of assembly. This is because section 12(1)(a) read with section 12(2) still criminalises a planned assembly where notice was not provided or where the notice was inadequate on the basis that the assembly was attended by more than 15 people.

69. In our submission, the imposition of criminal sanctions simply because of the lack of, or inadequate, notification – irrespective of the number of people that participated in an assembly – is inimical to the exercise of the right to freedom of assembly. The section 12(2) defence is therefore not

[96] See n 50 and 51 above.
[97] Paragraph 106 of the Appellants' Heads of Argument in this Court.
[98] Section 12(2) of the Gatherings Act provides:

> *"It shall be a defence to a charge of convening a gathering in contravention of subsection (1)(a) that the gathering concerned took place spontaneously."*

sufficient to legitimise the restriction, by section 12(1)(a), on the right to freedom of assembly.

G. CONCLUSION

70. In the Court's assessment of whether the requirement of prior notice for a gathering in terms of section 12(1)(a) imposes a limitation on the right to freedom of assembly, we submit that the Court ought to have regard to the proportionality test as set out above.

71. We submit that section 12(1)(a) of the Gatherings Act imposes illegitimate restrictions on the exercise of the right to peaceful assembly. Above all, imposing criminal sanctions for inadequate or complete lack of notification for assemblies only because more than 15 people participated does not serve a legitimate aim, nor is it necessary in a democratic society and it is disproportionate.

72. The defence under section 12(2) of the Gatherings Act does not otherwise render the restrictions occasioned by section 12(1)(a) legitimate.

73. Furthermore, the international law test for legitimate restrictions together with the principles enunciated by the various Courts, as set out above, complement the analysis under section 36 of the Constitution. We therefore submit that this Court ought to have regard to the three-prong

test for legitimate restrictions under international law when undertaking the inquiry in terms of section 36 of the Constitution.

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