**To:** *The United Nations Human Rights Committee,* ccpr@ohchr.org

**From:** *Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa*

**Subject**: Written contribution to the Half-Day General Discussion on Article 21, in view of the *Human Rights Committee’s Preparation of General Comment 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights.*

**Date:** 11 March 2019

**Introduction**

1. The Centre for Human Rights (the Centre) is an institution located in the Faculty of Law of the University of Pretoria, South Africa and dedicated to the protection of human rights in Africa.
2. The Centre welcomes the opportunity to provide the following comments to the Human Rights Committee (the Committee) in view of the Committee’s planned General Comment on Article 21 of the International Covenant on Civil and Political Rights.
3. This submission draws on the jurisprudence of the African Commission on Human and Peoples’ Rights (ACHPR) and the case law of South Africa in particular with respect to the following two key questions:
	1. The question of organizer liability; and
	2. The criminalization of the failure to notify authorities.

**Submissions on the two questions**

1. **Organizer Liability**
2. The right to freedom of Assembly is guaranteed in Article 11[[1]](#footnote-1) of the African Charter on Human and Peoples’ Rights (the African Charter) and in most national constitutions, including South Africa.
3. The Centre recognizes that although the freedom of assembly is a crucial tool for enhancing democracy, not all assemblies are peaceful and some assemblies could descend to chaos that lead to the infringement of the rights of others. As such, there is a need to strike a balance between the right of members of the public to participate in assemblies and the rights of non-participants. South Africa’s Regulation of Gatherings Act 205 of 1993 provides for civil liability of organizers or conveners of gatherings for reasonably foreseeable damage arising from gatherings or demonstrations.[[2]](#footnote-2)
4. While organizers of assemblies should be conscious of the possibility of damage resulting from the actions of participants in assemblies, care should be taken to ensure that the prospects of being made to pay for damages does not discourage the exercise of the right of peaceful assembly. In ***South African Transport and Allied Workers Union v Garvas***[[3]](#footnote-3)where the Constitutional Court of South Africa considered the question of liability of a trade union for damages to private property resulting from chaotic industrial action, the Court observed that owing to the possibility of organizers of assemblies being made to pay for damages caused by assembly participants, “poorly resourced organizations that wish to organise protest action about controversial causes that are nonetheless vital to society could be inhibited from doing so.”[[4]](#footnote-4) According to the Court, this could then amount to a limitation on the right to gather and protest. Nevertheless, the Court also recognised that organizers of an assembly that leads to personal injuries, deaths and damage to property might be held liable if they choose to hold a gathering in spite of the foreseeable damage that may befall others in the course of the gathering.[[5]](#footnote-5) The Court stated that “when a gathering imperils the physical integrity, the lives and the sources of livelihood of the vulnerable, liability for damages arising therefrom must be borne by the organizations that are responsible for setting in motion the events which gave rise to the suffered loss.”[[6]](#footnote-6) With this pronouncement, the Court may seem to have placed the burden of ensuring that an assembly is conducted peacefully entirely on the organisers. However, the court also explained that the question of what damage was foreseeable is interlinked with the question of what steps an organisation took to prevent harm. The steps an organisation is required to take must be within the powers of that organisation[[7]](#footnote-7) and where the preventive measures needed to be taken are beyond the powers of an organiser, then the organiser must notify the authorities that have a duty to take steps.[[8]](#footnote-8) Failure to do so could give rise to liability. The message the Court was sending is that organizers of assemblies are required to be conscious of any foreseeable harm that innocent bystanders may suffer as a result of the assemblies, and they must take reasonable steps to prevent the harm from occurring. This is important because a balance has to be struck between the rights of participants in an assembly and the rights of innocent bystanders.
5. The position in the above-mentioned case is largely consistent with the ACHPR’s Guidelines on Freedom of Association and Freedom of Assembly in Africa (the Guidelines) which provide for circumstances under which liability may be imposed on organizers of assemblies. The Guidelines provide that “organizers may only be subject to monetary sanction where all four of the following conditions are met: they fail to notify; there is harm caused by the assembly; that harm was reasonably foreseeable; and they fail to take reasonable steps within their power to prevent the act or omission in question.”[[9]](#footnote-9) As per the Guidelines, it seems that provided that an assembly organizer has notified the authorities about a planned assembly, the organizer cannot later be held financially liable for any damages caused in the course of the assembly. This is a more protective standard than that of the South African Constitutional Court in the ***Garvas*** case where apart from the notification about an assembly, organizers are also under an obligation to notify authorities about the need for them to take steps to prevent harm from occurring during an assembly if the harm is foreseeable and the reasonable steps needed to be taken to prevent the harm are outside the powers of the organizers.
6. Aside from financial liability of organizers for foreseeable damages caused during assemblies, organizers or participants in an assembly should not be subjected to sanctions of any kind for acts committed by others.[[10]](#footnote-10) This is the position the ACHPR took in ***International Pen and Others on Behalf of Saro Wiwa v Nigeria***.[[11]](#footnote-11)The brief facts of the case were that four Ogoni chiefs were killed following a riot during a public meeting organised by the Movement for the Survival of the Ogoni Peoples (MOSOP or the Movement) whose president was Kenule Saro Wiwa.[[12]](#footnote-12) Mr Saro Wiwa and other leaders of the Movement were arrested on allegations that they had incited members of their Movement to murder the four rival Ogoni leaders.[[13]](#footnote-13) These accusations stemmed from the fact that the four chiefs were killed in the course of a rally that turned chaotic. A Nigerian tribunal that tried the leaders of the Movement held that they had caused the death of the four chiefs “by wrongfully organising election campaign rallies and permitting a large crowd of fanatical MOSOP… youth to congregate.”[[14]](#footnote-14) From the Tribunal’s reasoning, the MOSOP leaders were found guilty only because they had organized the rally in question. The ACHPR expressed its reservations with this position and noted that it could adversely affect the right to assembly.[[15]](#footnote-15)
7. In light of the position taken by the South African Constitutional Court in the above-mentioned cases and the ACHPR Guidelines, the Centre recommends that the Committee should emphasise that the State has a positive obligation to protect members of the public, including those participating in assemblies. The State, through law enforcement officials, ought to work hand in hand with the organizers of assemblies to ensure that peace and order is maintained before, during and after the assemblies. Liability should then only be attached if the organizers engage in or overtly encourage or condone the commission of offences during assemblies, or if they ought to have foreseen the possibility of damages being caused but they failed to take reasonable steps to prevent the damage. Again, the responsibility of organizers to take reasonable steps must not be so onerous as to discourage less financially endowed organizations from organizing assemblies. Further, criminal liability should be personal and organizers should not be sanctioned for wrongful acts committed by others.
8. **The criminalization of the failure to notify authorities**
9. In relation to the requirement that organizers of assemblies give prior notification to authorities, the Centre notes that there are a number of national statutory laws[[16]](#footnote-16) which require organizers of assemblies to notify authorities about their intention to hold an assembly. A notification regime should only serve to give organisers and authorities a chance to plan for the peaceful conduct of an assembly. The provision of notice should not be seen as a request for permission to hold an assembly. As noted by the ACHPR, “participating in and organizing assemblies is a right and not a privilege, and thus its exercise does not require the authorization of the state. A system of prior notification may be put in place to allow states to facilitate the exercise of this right and to take the necessary measures to protect public safety and rights of other citizens.”[[17]](#footnote-17) It is also important to note that it is not in all cases that prior notification will be required. According to the ACHPR, notices do not need to be issued “for small assemblies, assemblies unlikely to generate disturbance or spontaneous assemblies.”[[18]](#footnote-18)
10. Importantly, the Guidelines also state that “states shall not impose criminal sanctions in the context of laws governing assemblies.”[[19]](#footnote-19) Contrary to this provision, a number of national laws[[20]](#footnote-20) criminalize the failure of conveners of gatherings to give notice to authorities of planned gatherings or demonstrations. Such provisions have been interpreted as unjustifiable limitations on the right to freedom of assembly.
11. In the very recent case of ***Mlungwana and Others v the State and the Minister of Police***[[21]](#footnote-21), the South African Constitutional Court ruled against Section 12(1)(a) of the Regulation of Gatherings Act which provided for criminal penalties (fines, imprisonment, or both) against conveners of gatherings for failure to notify authorities of planned gatherings of 15 or more people. The Court considered, first, whether the criminalization of the failure to give notice was a limitation on the right of peaceful assembly, and secondly it considered whether the limitation (if it was one) was reasonable and justifiable in an open and democratic society. The Constitutional Court found that section 12(1)(a) of the Regulation of Gatherings Act was an unjustifiable limitation of the right of peaceful assembly. This decision is consistent with the Human Rights Committee’s decision in **Kivenmaa v Finland,[[22]](#footnote-22)** at least insofar as it related to criminalization.
12. In light of the above, the Centre recommends that the Committee affirms its position in the ***Kivenmaa*** case and the position of the South African Constitutional Court in the ***Mlungwana*** case and urges it to make it clear in General Comment 37 that national laws that criminalize the failure by conveners of gatherings to notify authorities or the participation of the public in gatherings for which notices were not issued have a chilling effect on the exercise of the right to freedom of assembly and are inconsistent with international standards.
13. The Centre also recommends that, in line with the ACHPR Guidelines on the Freedom of Association and Freedom of Assembly, the Committee should emphasise that the requirement of notification is subject to a proportionality assessment and should only apply for assemblies expected to attract large numbers or cause a lot of disruption.
1. Art 11 of the African Charter states that “every individual shall have the right to assemble freely with others.” [↑](#footnote-ref-1)
2. S 11 of the Regulation of Gatherings Act, No. 205 of 1993. Available at

https://www.saps.gov.za/resource\_centre/acts/downloads/juta/a205of1993.pdf [↑](#footnote-ref-2)
3. *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13. Available at <http://www.saflii.org/za/cases/ZACC/2012/13.pdf> Accessed on 26 February 2019. [↑](#footnote-ref-3)
4. Ibid, para 57. [↑](#footnote-ref-4)
5. Ibid, para 68. [↑](#footnote-ref-5)
6. Ibid, para 67. [↑](#footnote-ref-6)
7. Ibid, para 45. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. ACHPR Guidelines on Freedom of Association and Freedom of Assembly in Africa, para 102(c). Available at <http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf> Accessed on 2 March 2019. [↑](#footnote-ref-9)
10. Ibid, para 101. [↑](#footnote-ref-10)
11. *International Pen and Others (on behalf of Ken Saro-Wiwa) v. Nigeria*, Comm Nos 137/94, 139/94, 154/96 and 161/97 (1998). Available at <http://www.achpr.org/files/sessions/24th/comunications/137.94-139.94-154.96-161.97/achpr24_137.94_139.94_154.96_161.97_eng.pdf> . Accessed on 2 March 2019. [↑](#footnote-ref-11)
12. Ibid, para 2. [↑](#footnote-ref-12)
13. Ibid. [↑](#footnote-ref-13)
14. Ibid, para 106. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. See, for instance, s 3 of the South African Regulation of Gatherings Act (n 2) and s 5(2) of the Kenyan Public Order Act (available at <http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2056>) [↑](#footnote-ref-16)
17. ACHPR Guidelines on Freedom of Association and Freedom of Assembly in Africa, para 71. Available at <http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf>. Accessed on 2 March 2019. [↑](#footnote-ref-17)
18. Ibid, para 75. [↑](#footnote-ref-18)
19. Ibid, para 99. [↑](#footnote-ref-19)
20. See, for instance, s 12(1)(a) of the South African Regulation of Gatherings Act (n 2). [↑](#footnote-ref-20)
21. *Mlungwana and Others v S and Another* (CCT32/18) [2018] ZACC 45; Available at <http://www.saflii.org/za/cases/ZACC/2018/45.html> . Accessed on 26 February 2019. [↑](#footnote-ref-21)
22. Communication No. 412/1990 UN Doc CCPR/C/50/D/412/1990 (1994) at para 9.2. Available at <https://www.ohchr.org/Documents/Publications/SDecisionsVol5en.pdf>. [↑](#footnote-ref-22)