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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**JOINT OPINION**

**ON THE ACT ON PUBLIC ASSEMBLY  
OF THE SARAJEVO CANTON**

**(BOSNIA AND HERZEGOVINA)**

by

**THE VENICE COMMISSION  
and  
OSCE/ODIHR**

**Adopted by the Venice Commission  
at its 83<sup>rd</sup> Plenary Session  
(Venice, 4 June 2010)**

on the basis of comments by

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## **I. Introduction**

1. By a letter of 24 March 2010, Mr Zeljko Mijatovic, Minister of Internal Affairs of the Canton Sarajevo, Federation of Bosnia and Herzegovina, asked the Venice Commission to provide an expert assessment of the Act on Public Assembly of the Sarajevo Canton (CDL(2010)036) jointly with the OSCE/ODIHR.

2. Messrs Wolfgang Hoffmann-Riem and Kaarlo Tuori acted as rapporteurs on behalf of the Venice Commission. They worked in consultation with the OSCE/ODIHR Advisory Panel on Freedom of Assembly.

3. This opinion, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 83<sup>rd</sup> Plenary Session (Venice, 4 June 2010).

## **II. Executive Summary**

4. The Act under consideration enounces correct statements of principles governing freedom of assembly, which the Venice Commission and OSCE/ODIHR welcome. The Act, however, should better reflect the presumption in favour of holding assemblies. The Act should also regulate in less detail the conditions for exercising the constitutionally guaranteed right of assembly, especially where its exercise would pose no threat to public order and where necessity does not in fact demand state intervention.

5. The Act presents a certain number of shortcomings and its implementation may result in the infringements of fundamental right to assembly guaranteed by the Constitution and the ECHR. In this respect, the Venice Commission and OSCE/ODIHR make the following key recommendations:

- The drafting of a model law should preferably include the Federation of Bosnia and Herzegovina and should be open to all Cantons as well so as to ensure co-operation and coordination between all the Cantons of the Federation;
- The definitions provided in the Act should be both reduced in number and revised in content;
- In principle, every public space should be seen fit to host an assembly. Specified exceptions can be provided, if mandatory;
- Discrimination between nationals and non-nationals should be abandoned;
- A provision should be added on the three general principles to be followed in the application of the law: the presumption in favour of holding assemblies; the state's duty to protect peaceful assembly and proportionality;
- The relevant provisions on restrictions of peaceful assembly should be revised and allow for flexible solutions so as to bring them in line with the proportionality test;
- The reasons for ban or termination of an assembly should be narrowed down to a threat to public safety or clear and imminent danger of substantial disorder. Measures should only be taken against those persons who violate public order, commit or instigate commission of unlawful actions that prevent a peaceful assembly from meeting its objectives;
- The prohibition of a peaceful assembly on the grounds of failure to submit a notification as well as of a single participant being armed should be removed;

- Temporary injunctions by courts against bans or restrictions on assemblies should be provided;

- The obligations of organizers and stewards should be reduced, and the responsibility of the authorities, especially to provide public security and medical services clearly set up. The organizers should not be liable for damage and violations inflicted by others.

- Public events of a commercial nature should be excluded from the law and subject to separate regulations.

6. The Venice Commission and OSCE/ODIHR stand ready to continue to assist the authorities of the Bosnia and Herzegovina in this matter. An opportunity to meet with representatives of the Cabinet of Ministers as well as the key drafters of the anticipated amendments to the Act would be welcomed so that a fuller understanding could be gained of how the administrative and other systems are intended to operate.

### III. The European and international standards on the freedom of peaceful assembly

7. The European and international standards on the right to freedom of assembly mainly derive from the ECHR<sup>1</sup> and the ICCPR<sup>2</sup> together with the corresponding case law<sup>3</sup>. They have been presented and discussed in various opinions of the Venice Commission<sup>4</sup>. These standards have also been reaffirmed through political commitments of the OSCE and can be summarised as follows:

- *Freedom of assembly is a fundamental democratic right and should not be interpreted restrictively. It covers all types of gathering, whether public or private provided they are "peaceful".*

- *It is a "qualified" right and the state may justify what is a prima facie interference with the right. Article 11(2) ECHR expressly permits limitations provided they are "such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". The State is given a wide margin of appreciation in order to deal with disorder or crime or to protect the rights and freedoms of others.*

- *A regime of prior authorisation of peaceful assemblies is not necessarily an infringement of the right but this must not affect the right as such.*

- *The state may be required to intervene to secure conditions permitting the exercise of the freedom of assembly and this may require positive measures to be taken to enable lawful demonstrations to proceed peacefully. This involves arriving at a fair balance between the interests of those seeking to exercise the right of assembly and the general interests of the rest of the community i.e. by applying the principle of proportionality.*

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<sup>1</sup> "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

<sup>2</sup> "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."

<sup>3</sup> Other international instruments, such as the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Rights of the Child and the Council of Europe Framework Convention for the Protection of National Minorities, are also relevant to this area.

<sup>4</sup> Cf. for example, CDL-AD (2006) 034, para. 8; CDL-AD (2008), 025, para. 8; CDL-AD (2009) 035, para. 6.

- *The exercise of fundamental rights and freedoms is a constitutional matter par excellence and, as such, should be governed in principle primarily by the Constitution.*
- *Fundamental rights should, insofar as possible, be allowed to be exercised without regulation, except where their exercise would pose a threat to public order and where necessity would demand state intervention. A legislative basis for any interference with fundamental rights such as the right of peaceful assembly is required by the Convention. The relevant regulation, in other words, should focus on what is forbidden rather than on what is allowed: it should be clear that all that is not forbidden is permissible, and not vice-versa.*
- *Accordingly, it is not indispensable for a State to enact a specific law on public events and assemblies, as control of such events may be left to general policing and the rights in relation to them may be subject to the general administrative law.*
- *Laws specifically devoted to the right of freedom of assembly, if they are enacted, should be limited to setting out the legislative bases for permissible interferences by State authorities and regulating the system of permits without unnecessary details.*
- *The public should be informed which body is responsible for taking decisions about the regulation of freedom of assembly, and this should be clearly stated in law. The regulatory authority should ensure that the general public has adequate access to reliable information relating to public assemblies,<sup>5</sup> and also about its procedures and operation.*
- *The regulatory authorities must comply with their legal obligations, and should be accountable for any failure – procedural or substantive – to do so. Liability should be gauged according to the relevant principles of administrative law and judicial review concerning the misuse of public power.*

8. The Venice Commission and OSCE/ODIHR also make reference to their common Guidelines on freedom of assembly<sup>6</sup> (hereinafter referred to as “the Guidelines”), which reflect the international best practice and also provide useful guidance for implementing national legislation on freedom of peaceful assembly.

9. The Venice Commission further recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment.

#### **IV. General observations**

10. The present opinion essentially focuses on the wording of the provisions of the Act on Public Assembly of the Sarajevo Canton under consideration (hereinafter: “the Act”). The manner in which the Act is and will be implemented in practice by the competent administrative authorities, the police and the judiciary is not addressed. It should however be emphasised that how the Law is interpreted and implemented is of great significance in terms of its compliance with international human rights standards. In this regard, the Venice Commission and OSCE/ODIHR wish to recall that the right to peaceful assembly should not be interpreted restrictively and any restrictions should be construed narrowly, and that in general, rights must be “practical and effective” not “theoretical or illusory”<sup>7</sup>.

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<sup>5</sup> See, for example, ‘Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression’. One example of good practice is provided by the Northern Ireland Parades Commission which publishes details of all notified parades and related protests in Northern Ireland categorized according to the town in which they are due to take place. See further <http://www.paradescommission.org>. See also, for example, the records maintained by Strathclyde Police in Scotland relating to the policing of public processions. Available at <http://strathclydepoliceauthority.gov.uk/images/stories/CommitteePapers/FullAuthority2009/FA1October2009/item%206%20-%20review%20of%20police%20resources%20deployed%20at%20marches%20and%20parades.pdf>

<sup>6</sup> CDL (2008) 062. The new version of the Guidelines to be adopted...

<sup>7</sup> See CDL-AD (2006) 034, Opinion on the Law on Freedom of Assembly in Azerbaijan, para. 5.

11. National legislation governing freedom of assembly should thus clearly articulate three main principles:

- the presumption in favour of holding assemblies,
- the state's duty to protect peaceful assembly and
- proportionality<sup>8</sup>.

12. The philosophy of the Act under consideration does not appear to reflect these principles sufficiently. The legal aims for restrictions listed in Article 5 §1 of the Act are almost identical to those of Article 11 §2 of the European Convention on Human Rights (ECHR), which is welcome. However, the concrete restrictions under various provisions of the Act do not always sufficiently reflect these aims. Without awareness-raising measures and adequate training for the authorities and the police, there is a risk that a restrictive reading of the Act may prevail. It is recommended therefore to add a provision on the three aforementioned general principles to be followed in the application of the law.

13. Moreover, the Act lacks consistency, and covers topics which are not properly part of a law on public assemblies. For instance, Articles 17-24 are located in Part II referring to peaceful assemblies. At the same time, they are declared applicable on both public events and other types of gathering by reference in Articles 31 and 34. If norms are aimed at all kinds of gatherings, they should be located among the General Provisions of Part I. This is also true in case of the prohibition of weapons and uniforms in general (Articles 19 §§8-9) and specifically, for "monitors" (Article 21 §7).

14. In this regard, the Venice Commission and OSCE/ODIHR recall that uniforms and similar clothing should not be prohibited as such, since uniform clothing may legitimately be used as a mode of expression and is thus covered by the freedom of opinion. Therefore it should be made clear without leaving any doubt that uniforms and other markings are only forbidden, if they are used as means of "calling upon or inciting armed conflicts etc".

15. Commercial and other activities which are not covered by freedom of expression should not be included in the Act but rather be subject of greater regulation than public assemblies.

16. Finally, the language used throughout the Act appears to be vague and terms are left undefined making them difficult to interpret, thus a number of definitions provided need to be sharpened.

## **V. The legal context and legislative competence**

17. The freedom of peaceful assembly is guaranteed by Article 1 § 9 of the BiH Dayton Constitution and Article 2 Chapter II of the Constitution of the Federation of Bosnia and Herzegovina.

18. According to Article III§3.a) of the Dayton Constitution "*All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.*" Article III§1, regulating the exclusive competence of BiH institutions does not include any provision pertaining to the regulation of freedom of assembly. On the other hand, its paragraph 2 on the responsibilities of the entities, lays down that "*the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate*" (under c). Regulating the freedom of peaceful assembly thus belongs to the Entities.

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<sup>8</sup> OSCE/ODHIR Guidelines on Freedom of Peaceful Assembly (see CDL(2009)062), para. 24.

19. As for the division of competences between the Federation and Cantons, regulated by Chapter III of the Federation Constitution, residual powers lie with the Cantons (Article 4). According to Article 2 of Chapter III of the Constitution of the Federation, "*guaranteeing and enforcing human rights*" is a joint responsibility of the Federation and the Cantons. Arguably, legislating on public assemblies falls within such joint responsibilities. The provision in Article 4 a) which attributes "establishing and controlling police forces" to the exclusive competence of the Cantons does not alter this conclusion. Legislation on public assemblies does not pertain to establishing or controlling police forces but the powers and responsibilities of these forces.

20. Article 3§1 of Chapter III of the Federation Constitution provides that joint powers, as appropriate, "*may be exercised jointly or separately, or by the Cantons as coordinated by the Federation Government*". The Cantons shall consult each other as well as the Federal Government. This calls for cooperation, but allows for several models on how to exercise it.

21. Co-operation is mandatory in federal states. This relates to execution of both administrative and legislative powers. When dealing with the latter, there is a basic distinction of two models, framework laws and model laws.

22. A framework law is a federal law which supplies principles and targets in a certain field. The federal legislator must abstain from detailed regulation and must leave sufficient leeway to the legislators of the entities, who must then exercise their discretion within the leeway. A framework law is obligatory for the federated entities in that their legislation must comply with it. As they impose a limitation on the federated legislators, framework laws must be provided by the federal constitution.

23. A model law is a draft of an outright piece of legislation in a field where the entities hold the legislative power either exclusively or as a joint power. It can be drafted either by the federation or by some or all of the entities or the federations together with some or all of the entities as long as the drafting process is open to those units of the state aspiring to participate. It is therefore not necessarily drafted by a competent legislator and is non-binding. Thus, it does not call for constitutional coverage. Although a model law is non-binding, it usually proves beneficial for the entities to stick with it in principle and only deviate from it in minor issues or if it seems absolutely necessary.

24. Article 3 §1 of Chapter III of the Federation Constitution does not postulate federal framework laws. A possible solution in harmony with the provisions of Chapter III of the Constitution of the Federation would therefore be that each Canton adopts its own law on public assemblies while the legislative activity is coordinated by a model law, preferably drafted by the Federation of Bosnia and Herzegovina but open to all the Cantons.

## **VI. Analysis of the Act**

### **A. Scope of application and definitions**

25. The Act regulates three types of public assemblies:

- public assemblies "*for the purpose of expressing political, social and other beliefs and interests*" (peaceful assemblies and public protests, Article 1§1);
- "*gatherings organized for the purpose of making profit within registered activity which, considering the expected number of participants and character of the event, require special security measures*" (public events, Article 25§1);
- "*gatherings with the purpose of realisation of economic, religious, cultural, humanitarian, sports, entertaining and other interests that are not organized for the purpose of making profit*" (other types of gatherings, Article 32§1).

26. From the point of view of freedom of assembly and freedom of expression, the most important type of public assemblies are those called peaceful assemblies and public protests. However, freedom of assembly also covers other types of public assembly. In this sense, the regulation of these in the same Act as peaceful assemblies and public protests could be justified. There may be some doubts, however, as to the practical benefits of such a broad scope of application, as the issues dealt with are rather different.

27. The general definition of the key term “public gathering (assembly)” is given in Article 2§1: it refers to an “*organized assembly of the citizens held in an appropriate place*”. However, there are other distinct definitions of this term, and they are different and partly complementary. For example, Article 8§2 defines peaceful assembly also as any “*unorganised, spontaneous gathering*”, Article 32 defines “other types of gathering”, Article 18§1 allows for the public assemblies of non-citizens and Article 15 prohibits assemblies in inappropriate places. This shows that the criteria “organized”, “citizen” or “appropriate place” are not really constitutive for the term “public assembly”. Furthermore, Article 32 equates commercial, entertainment, and sports gatherings to religious gatherings, while the later are a form of expression and, therefore, when taking place in public places should be treated as public assemblies.

28. In addition, the given definition does not clearly delimit public from private gatherings. Here the crucial criterion is whether others than only those expressly invited can participate in the gathering. Indeed the expression “other gatherings”, stipulated in Article 32, may include gatherings and assemblies on private property which would then be subjected to the requirement of registration expressed in Article 33, in the event that ‘special safety measures’ would need to be taken as a result of the number of participants present.

29. While falling under the Articles related to exceptions in registration, the Venice Commission and OSCE/ODIHR note that the meaning of Article 12§3 (“*The protests of the individuals should not be reported.*”) is unclear. If the protest is carried out either by just one individual or by several but unconnected individuals, it falls out of the scope of the Act, since there is no assembly. If its aim was to exempt small assemblies from the requirement of advance notification, then this should be clearly stated and a concrete number of participants given such as, 10 or 20 for example. Furthermore, Article 12 appears also to differentiate assemblies and gatherings held by political parties, referring also to the Electoral laws of Bosnia and Herzegovina. It is suggested as good practice to include all assemblies (by political parties or other associations) under one act, as the distinction made in this Act is not sound.

30. The Venice Commission and OSCE/ODIHR recall that the Guidelines point out that “definitions should be neither too elaborate nor too broad”.<sup>9</sup> A definition of the term “public assembly” should thus usefully focus on traditional criteria such as a certain number of individuals with a local connection and a common expressive purpose<sup>10</sup>.

#### B. Location of an assembly

31. The location of an assembly is one of the key aspects of the freedom of assembly, together with the choice of the aims pursued and the time of the assembly. Assemblies in public spaces do not necessarily have to step back behind more routine uses of this space<sup>11</sup>. Moreover, the purpose of an assembly is often closely linked to a certain location. The freedom of assembly includes the right of the assembly to take place within “sight and sound” of its target object<sup>12</sup>. If such an assembly was displaced, this would be a severe encroachment upon the freedom of assembly. Mere inconvenience does not suffice as justification for displacing assemblies<sup>13</sup>.

<sup>9</sup> OSCE/ODHIR – Venice Commission Guidelines, para. 30.

<sup>10</sup> OSCE/ODHIR – Venice Commission Guidelines, para. 6 under a.

<sup>11</sup> OSCE/ODHIR – Venice Commission Guidelines, para. 18.

<sup>12</sup> CDL-AD (2009) 052, para. 51

<sup>13</sup> Ibidem.



32. The relevant provisions of the Act do not seem to meet the requirements emerging from the relevance of the location in relation to an assembly. According to Article 2 (1) of the Act, only a gathering “*held in an appropriate place*” is qualified as assembly. Arguably, the requirement of an appropriate place refers to the definition of a “*location suitable for a public assembly*” given in Article 3. Such a location must be public and “*accessible and suitable for gathering of persons whose number and identity are not determined in advance, and in which the assembly [...] does not cause threat to the rights [...] of other persons [...] and obstruction of public traffic*”. The terms “accessible” and “suitable” remain vague and the criteria to ascertain their content subject to discretion. Furthermore, Article 3 §1 appears to give priority to competing activities at the same place: it addresses content and manner of assemblies, as opposed to the location. For example, a counter-demonstration with a message disagreeing with that of the main demonstration could be understood to “cause a threat to rights and freedoms” of persons in the main demonstration. Furthermore, Article 3 §1 states that a location which would have the effect of obstructing traffic would also not be considered as appropriate. Whereas, it is contended that only concrete and severe threats to the rights of others as well as massive and unavoidable obstruction of traffic will suffice to justify encroachments upon the freedom of assembly.

33. Further, Article 15 giving a list of places where “peaceful assemblies” cannot be held is restrictive and may amount to a blanket restriction. In particular, neither the “undisturbed flow of traffic” (lit. e) nor “undisturbed movement and work of the larger number of citizens” (lit. f) can always be given the preference compared to assemblies. A weighing of interests in each specific case is generally required. Allowing public assemblies in certain places must not depend solely on the content of the assembly (lit. c) and restrictions should only be imposed to address specific concerns.

34. The definition of the location appears to overlap with the definition of a public assembly *via* the criterion “*persons whose number and identity are not determined in advance*”. The location of an assembly does not necessarily go hand in hand with its private or public character. Public assemblies can be held in private properties, too<sup>14</sup>.

35. According to Article 4 §2 public processions “*can only be held in an uninterrupted movement, except for the starting and finishing point*”. There is no justification for such a general restriction. A balancing of interests suffices to avoid massive and unavoidable obstruction of traffic or similar troubles. As long as the problems resulting from one or more stopovers are of minor importance, they must be accepted.

36. The Act appears to regulate also spontaneous assemblies, which is to be welcomed. However, it provides for the requirement to hold such assemblies in the location to be determined by the Sarajevo Canton Assembly (Articles 10 and 14). In this regard, the Venice Commission and OSCE/ODIHR wish to stress that the ability to respond peacefully and immediately (spontaneously) to some occurrence, incident, other assembly, or speech is an essential element of freedom of assembly<sup>15</sup>. Spontaneous events should be regarded as an expectable feature of a healthy democracy. As such the authorities should protect and facilitate any spontaneous assembly so long as it is peaceful in nature<sup>16</sup>. Furthermore, the Article should not allow for the designation of a specific location thus, even an assembly where the organizer is not known to the authorities should be permitted in any suitable public area.

37. It is therefore recommended that the relevant articles of the Act be amended to bring them into line with international standards by abandoning specifications of the location of an assembly, and to see, in principle, every public space fit to host an assembly and provide for specified exceptions if necessary, taking into account that proportionality calls for a balancing of interest in each specific case.

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<sup>14</sup> OSCE/ODHIR – Venice Commission Guidelines, para. 21.

<sup>15</sup> OSCE/ODHIR – Venice Commission Guidelines, para. 97.

<sup>16</sup> ECtHR, Oya Ataman v. Turkey, 2006, §§41,43.

C. Prior notification

38. Any regime of prior notification must not be such as to frustrate the intention of the organisers to hold a peaceful assembly, and thus indirectly restrict their rights (for instance, by providing for too detailed and complicated requirements, and/or too onerous procedural conditions).

39. Article 10 provides for the obligation to submit “an application to hold a peaceful assembly”. Read in combination with Articles 12, 16 and 18§1, it seems that the requirement in the Act is for *notification* and not for a *permission* to hold the assembly. In this regard, the Venice Commission and OSCE/ODIHR wish to recall that a permit requirement accords insufficient value to the fundamental freedom to assemble, while the need for advance notification is justified by the state’s interest to undertake the necessary arrangements to secure public order or safety. It is therefore strongly recommended to the authorities to make it clear in the Act that only a prior notification and not an application requiring permission is needed. In this context it must be noted, that Article 11 §4 and Article 27 §6 can be understood as calling for obtaining a permission of the Traffic Authority “if the road surface is to be occupied”. All the decisions concerning assemblies should be left to one competent and experienced authority, which takes into account specific issues such as the obstruction of traffic (cf. section B above) and can react to them if necessary.

40. It is also important that the requirement of prior notification should not prevent spontaneous demonstrations. It is recommended that the Act expressly provide for exceptions from the requirement of prior notification where giving a prior notification is altogether impracticable thus making allowance for spontaneous events.

41. Because of the assumption in favour of freedom of assembly as well as the principle of proportionality, the Act should not allow banning the holding of a peaceful assembly merely on the ground that “*it is not timely and properly reported, when application is mandatory*” (see below, under E).

42. Finally, the requirement that every change to the content of an application shall be a new application (Article 11 §7) is too burdensome, and ought to be narrowed down or deleted, the more so since the content of the application form under Article 11 is rather extensive. This requirement has the potential to preclude organizers from making minor adjustments that can easily be communicated to regulators ahead of time without starting the whole procedure over again. It will also needlessly cause organizers to lose their place in line to use the forum. Moreover, it is not clear whether this provision is applicable in case the organiser, for example, agrees with the proposal of police to move the assembly to another location.

D. Organisation of assembly by foreigners

43. Throughout the act there are various references to the “citizens”. It is unclear, whether these refer to the citizenship of the BiH Republic or the Federation of Bosnia and Herzegovina. However, all non-citizens are foreigners and therefore in the scope of Article 18 of the Act.

44. Under the ECHR, freedom of peaceful assembly is to be enjoyed equally by everyone. Article 14 ECHR and Article 26 ICCPR require that each state secure the enjoyment of the human rights recognized in these treaties to all individuals within its jurisdiction without discrimination.

45. The Venice Commission and OSCE/ODIHR note that the Act makes a distinction between the freedom of assembly of “*citizens*” and “*foreign physical and legal persons*”. According to Article 18§1 “*foreign physical and legal persons can organise the peaceful assembly ... only after submission of application and issuing a permit by an authorised police body*”.

46. The obligation to obtain a permit represents a discrimination of non-nationals. While it is true that Article 16 ECHR explicitly permits “restrictions on the political activity of aliens”, the content of this provision is questionable, and the Parliamentary Assembly of the Council of Europe has long ago called for its amendment so as to exclude restrictions currently allowed with regard to Articles 10 and 11 ECHR<sup>17</sup>. According to the OSCE/ODHIR Guidelines, the application of Article 16 ECHR should be confined to speech by non-nationals that directly threatens national security (paragraph 53). A more liberal approach without distinction between nationals and non-nationals is common in today’s Europe.

E. Banning and terminating a public assembly

47. As long as assemblies remain peaceful, they should not be terminated since termination of assemblies is a measure of last resort. They should be governed by prospective rules expressed in domestic police guidelines. Legislation should require that such guidelines be developed<sup>18</sup>.

48. An assembly can be subject to prohibition only if the prohibition pursues a legitimate aim, is proportionate and necessary in a democratic society. This implies that an assembly can be terminated in response to an imminent threat of violence and disorder associated with a particular assembly<sup>19</sup>.

49. Article 16 provides that “*the authorised police body shall make the decision to ban the holding of peaceful assembly*” on the grounds specified in its paragraphs a) to i). In the opinion of the Venice Commission and OSCE/ODIHR, this provision is formulated in an overly broad manner and some of the grounds for ban do not fully reflect the proportionality principle, as they are unlikely to be considered as necessary in a democratic society.

50. According to Article 16, letter a), a peaceful assembly shall be banned if “*its objectives are aimed at endangering the constitutional order*”. Yet, propagating constitutional change in constitutional order constitutes a wholly legitimate use of freedoms of assembly and expression. A specification of this ground for banning a public assembly is thus strongly recommended: a more appropriate wording can be found in Article 23. a), which provides that “*police officers are obliged to stop or ban the peaceful assembly if ... it is directed toward violent changes of the constitutional order*”.

51. In the opinion of the Venice Commission, and OSCE/ODIHR when the ban is motivated by the illegal nature of the aim pursued by the assembly (Article 16§1, lit. a, b, e), it must be ensured that the forbidden objective is the only one pursued by that assembly. If the assembly pursues other objectives, worthy of protection, besides the forbidden ones, a restriction of the aims would be sufficient. Thus, the restrictions in lit. b should be limited to prohibitions on assemblies that are inciting unlawful and physically dangerous or disruptive activities under circumstances, in which they are likely to occur. Prohibiting an assembly is the ultima ratio. Basing such a decision only on the content of the message communicated, poses a most severe threat to democracy. It should therefore be avoided unless it is indispensable for ensuring the continuity of the democratic state (cf. para. 48 above). Otherwise the assembly must be tolerated despite its aims. It may only be restricted or prohibited for other reasons.

52. The explicit provision for the termination of an assembly in cases when participants have violated the requirements of the law (lit. c, d and g) does not appear to be in line with the principle of proportionality as it does not take into account the specific circumstances of each particular case. For example, under letter d), a public assembly shall be banned if “it is reported to take place in location where, according to this Act, it cannot be held”. The Venice Commission and OSCE/ODIHR strongly recommend making this ground dependent on the

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<sup>17</sup> Rec. 799 (1977) On the Political Rights and Position of Aliens, paragraph 10.c.

<sup>18</sup> See CDL-AD(2009)052, Joint Opinion on the order of organising and conducting peaceful events of Ukraine, para. 66.

<sup>19</sup> Ibidem, para. 67.

police authority's prior obligation to indicate a proper location for the assembly and the organizer's refusal to accept the new location. In case of deficits in filing the application when mandatory (lit. c) or failure to take timely the measures ordered by the police (lit. g), penalty provisions will suffice to secure that applications are filed properly and orders obeyed. In addition, restrictions based on health issues, should also be considered on a case-by-case basis, rather than be generally restricted as established in the Act (lit. h).

53. Article 23 provides that the police is "*obliged* to stop or ban the peaceful assembly" in the cases given in lit. a-i. The lack of proportionality of this provision is most obvious in case of lit. h ("*any participant of the peaceful assembly is armed*"). It would be totally disproportionate to stop an assembly of several thousand people, if only one of them was armed. Recalling the principle of proportionality, the solution must be to disarm the one and – depending on the specific case – to ban him or her from the assembly.

54. It is recommended that the relevant provisions of the Act be modified so as not to allow for prohibition only, but see prohibition as *ultima ratio* and provide for a number of flexible solutions in favour of holding the assembly.

55. The Venice Commission and OSCE/ODIHR welcome Article 17 providing for a prompt review process by the Ministry of the police authority's decision to ban an assembly. The Ministry's decision can be appealed to "the competent court". (Article 17§6). It is highly appreciated that the urgency of the issue is expressly stated. The requirement of promptness should also be extended to judicial review. In addition, the urgency calls for the possibility of temporary injunction, which seems to be excluded by the rule that the complaint does not delay the execution of the decision (Article 17 §3).

#### F. Obligations of organisers, leaders and monitors (stewards)

56. The Act appears to impose law enforcement responsibilities on organisers and "monitors"<sup>20</sup> of public assemblies. Besides the obligation to submit an application (Article 10§1) the organizer must also ensure "*that the participants of the peaceful assembly are not armed and not causing damage*" (Article 19§2) and "*take adequate measures of medical and fire protection*" (Article 19 §3). Obligations of the leader include taking "*necessary measures to ensure order and peace*" during the assembly (Article 20 §3) as well as stopping "*the peaceful assembly in case of real threat to security and safety of the persons and property*" (Article 20 §4) that presents too much responsibility for the leader: his or her duties should be to act consistently with the terms of the notification and the description of the assembly. An organiser should not be mandated with law enforcement responsibility.

57. Furthermore, the obligations of the "monitors" also appear broad and include "*to immediately hand over to the police officer any participant of the peaceful assembly, as well as any person moving toward the location of the assembly who carries arms or objects that can be used to cause bodily injury*" (Article 21§3), "*to provide data to the police officer about the person who violated peace and order*" (Article 21§4) and "*to search any person who enters the area in which the peaceful assembly is taking place*" (Article 21§5 lit. a). Monitors should not be required to protect property, search people and make judgment calls on banning and removing people from the assembly.

58. In this regard, the Venice Commission and OSCE/ODIHR wish to stress the state's duty to protect peaceful assembly. This kind of obligations should not be imposed on private persons. Organisers bear a certain responsibility to prevent disorder, however, this responsibility should only extend as far as exercising due care to prevent interference with public order by the assembly participants. To make the organizer responsible for effects which go along with any public assembly, results in an indirect suppression of the freedom of assembly and should be

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<sup>20</sup> The term « monitor » is generally used to refer to neutral observers, while in the current Act it refers to person who performs the duties of maintaining peace and order, generally called "steward".

avoided, also in view of the penalties that may be imposed based on Articles 36, 37 and 38 of the Act.

59. It is interesting to mention in this regard the recent decision by the Higher Administrative Court of the State Hesse in Germany<sup>21</sup>, which stated that providing adequate security and safety is a central responsibility of the government. In particular, supplying medical and fire protection is a public task. The police have both power and experience required for identity verification, personal search or the use of coercion in law enforcement. "Monitors", in contrast, do not have the powers of law enforcement officials and cannot use force, but they should rather aim to persuade assembly participants to cooperate<sup>22</sup>.

60. Establishing the responsibility of the organizer for any damage caused by the participants of the public assembly according to the rules of objective responsibility (Article 6) exposes the organizer to a high financial risk and may thus prevent people from organizing assemblies. Liability should be confined to situations where the organizer intentionally caused the damage.

61. The obligation of the organizers to implement the "safety measures" required by police as stipulated by Article 22 §2 appears too broad and could create an obligation for organizers to modify the activity or message because of counterdemonstrators or, for example, to obtain medical care on a hot day for participants in assemblies. Addressing such problems is the responsibility of the government.

62. The Venice Commission and OSCE/ODIHR strongly recommend to eliminate mention of formal duties of organisers beyond compliance with the notice requirement and compliance with reasonable time, place, and manner restrictions equally applicable to all participating in the assembly. The duties of monitors should be confined to assisting in the orderly shepherding of the assembly acting to "direct the movement of the participants" (Article 21§5 lit. c) and urging participants to comply with the law and the terms of the notice or permit. This, however, should not be a legal obligation enforceable by criminal sanctions.

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<sup>21</sup> VGH Kassel, Judgment of 23. April 2010, Az. 6 B 961/10.

<sup>22</sup> OSCE/ODHIR Guidelines, para. 156.