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OSCE/ODIHR GUIDELINES

FOR DRAFTING LAWS PERTAINING TO THE FREEDOM OF ASSEMBLY

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These Guidelines are designed for use by practitioners involved in the preparation of draft legislation pertaining to the freedom of assembly. Recognizing a great diversity of country contexts and the need for the legislation to be adapted to national specifics in order to be fully implementable, the Guidelines do not provide ready-made solutions but rather seek to clarify key issues and discuss possible ways to address them. The Guidelines offer a practical toolkit for legislators by drawing on best practice examples from the OSCE participating States to illustrate the various legislative options used to regulate issues pertaining to the freedom of assembly.

1. INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The set of international and regional standards concerning the freedom of assembly mainly derives from two legal instruments: the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Below follows a brief overview of each of these treaties.

The ICCPR was adopted by the UN General Assembly in 1966. Together with the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, the ICCPR forms the backbone of the international framework for human rights protection. The ICCPR sets out universally accepted minimum standards in the area of civil and political rights. The obligations undertaken by States ratifying or acceding to the Covenant are meant to be discharged as soon as a State becomes party to the ICCPR.

The implementation of the ICCPR by its States Parties is monitored by a body of independent experts – the UN Human Rights Committee. All States Parties are obliged to submit regular reports to the Committee on how the rights are being implemented. In addition to the reporting procedure, Article 41 of the Covenant provides for the Committee to consider interstate complaints. Furthermore, the First Optional Protocol to the ICCPR gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States Parties to the Protocol.

The ECHR is the most comprehensive and authoritative human rights treaty for the European region. The treaty is open for signature since 1950. All member States of the Council of Europe are required to ratify the Convention within one year since the State's accession to the Statute of the Council of Europe. The ECHR sets forth a number of fundamental rights and freedoms (right to life, prohibition of torture, prohibition of slavery and forced labor, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination). Parties undertake to secure these rights and freedoms to everyone within their jurisdiction. The ECHR also establishes an international enforcement machinery. To ensure the observance of the engagements undertaken by the Parties, the European Court of Human Rights in Strasbourg has been set up. It deals with individual and interstate petitions. At the request of the Committee of Ministers of the Council of Europe, the Court may also give advisory opinions concerning the interpretation of the ECHR and the protocols thereto.

It is important to note that the significance of both treaties derives not only from the commitment made by States to fulfil their requirements but also from the interpretation provided by the European Court of Human Rights and the UN Human Rights Committee as to what is involved in fulfilling this commitment. The caselaw of these two bodies is particularly valuable in this regard and forms an integral part of relevant international standards, also due to its legally binding character.

It is essential that those involved in drafting laws pertaining to freedom of assembly adopt a holistic approach to the issue by viewing freedom of assembly in the context of other fundamental human rights and freedoms. In particular, since interference with the exercise of freedom of assembly has the potential to encroach upon freedom of conscience and expression (to mention only two of the human rights which may be implicated), legislators need to be acutely aware of the standards set out by the international human rights treaties and their monitoring bodies described above. The relationship between the freedom of assembly and the freedom of expression is further discussed under *Lawful assembly* below.

2. LEGISLATIVE BASIS FOR REGULATING THE EXERCISE OF FREEDOM OF ASSEMBLY

The approach to the form of the regulation of the right to freedom of assembly varies greatly across the OSCE space. Legislators in different countries have chosen a variety of models from adopting a specific law to govern the exercise of this fundamental right to introducing provisions concerning public assemblies across a diverse array of relevant legislation, most importantly, acts pertaining to the police and general administrative law.

It is, however, recommended that, in addition to indispensable constitutional provisions guaranteeing the right to peaceably assemble, the State adopt a specific law regulating the exercise of this right. This approach is better suited to ensure overall consistency and transparency of the legislative framework concerning freedom of assembly, *inter alia*, since it establishes a clear hierarchy of legislation. Following the *lex specialis* rule, norms contained in the specific act would step in to replace the norms established elsewhere in the case of conflict.

It is, however, essential to bear in mind that any legislation concerning freedom of assembly should focus on what is forbidden rather than on what is allowed. It should clearly establish that what is not forbidden is permissible.

3. DEFINITIONS

3.1 Principal categories of assembly

There is a range of forms of activity which are covered by freedom of assembly. These principal categories may comprise the following activities:

a) a procession, i.e. a gathering that moves along public thoroughfares;

b) a picket, i.e. a gathering outside premises that are specifically linked to the objective of this protest activity;

c) a meeting in a public place that is open to the elements (such as in a square or park);

d) a meeting inside premises (which may be publicly or privately owned).

3.2 Lawful assembly

"Lawful" in the context of an assembly implies that (a) the assembly is compliant with any admissible preconditions for the holding of an assembly; and (b) the assembly is peaceful in character and has a lawful objective. With regard to point (b), note that freedom of assembly permits promotion of a change in the constitution or the law where the means of doing so are constitutional and lawful. The caselaw of the European Court of Human Rights offers valuable guidance by stating the two essential conditions on which a such change may be promoted: "firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles."[1]

For instance, events aimed to make public calls to war, to incite hatred towards racial, ethnic, religious or other groups, or for other manifestly bellicose purposes would be deemed unlawful and their prohibition would be justified in the light of the requirement to balance the freedom of assembly against other human rights, including the prohibition on discrimination. There is, however, a fine line between the degree of restriction necessary to safeguard other human rights, and an encroachment on the freedom of assembly and expression. The test is the presence of the element of violence. Thus, calls to violent overthrow of the constitutional order would be deemed anti-democratic and a sufficient ground for banning an assembly, whereas expressing an opinion that the constitutional order be changed through non-violent means would deserve protection extended by the law to free speech.

For recommendations concerning the possibility to impose restrictions as to the assembly venue based on the content of the event, see paragraph 3 of *Place, time and manner* below.

4. GENERAL PRINCIPLES

Respect for the general principles discussed below needs to inform all aspects of the legislation, as well as its application. While some may be a matter of general law (such as proportionality and legal certainty and foreseeability), others must be clearly articulated in the governing legislation so that those applying it do not overlook their significance.

4.1 Presumption in favor of holding assemblies

The presumption in favor of holding assemblies should be clearly and explicitly established in the law. The onus should be on the body with the authority to impose restrictions or prohibit holding of an event to prove that there are well-founded justifications for the impositions of restrictions or preventing the assembly from occurring.

Any restrictions on the exercise of freedom of assembly must pass the proportionality test, i.e. the interests of those seeking to exercise the freedom of assembly need to be balanced against those of the rest of the community. The least intrusive means of achieving an objective should be always given preference. See *Proportionality* below for more information.

[1] See European Court of Human Rights, *Refah Partisi and others v. Turkey*, 13 February 2003, para 98.

4.2 Right to counter-demonstration

The legitimate objective of preventing the public event from being disrupted must be balanced against the rights of counter-demonstrators, the ability to express a contrary opinion being an indispensable element of both the freedom of expression and the freedom of assembly. For instance, a prohibition on conducting public events in the place and at the time of another public event would be a disproportionate response to the risk of disruption. A more appropriate solution would be to deal with counter-demonstrations through the exercise of policing powers. It is important to note that "policing" is meant to imply a range of measures to maintain public order, normally not amounting to more than organizing traffic control. In accordance to the below described principle of proportionality, only exceptional circumstances may warrant use of force in policing an assembly (see *Dispersal of assemblies* below).

Note that counter-demonstration may include, in addition to more organized gatherings, persons who heckle speakers at a meeting. Their ability to do so is an essential part of political debate as long as such heckling does not actually disrupt the holding of the meeting concerned. It is essential that the legislator bear this in mind when devising provisions concerning the liability for disruption of lawful assembly.

4.3 State's duty to protect lawful assembly

The state has a positive duty to actively protect peaceful and lawful assemblies. It is recommended that the relevant legislation include an express provision mandating the state to do so. The duty to protect implies that a lawful assembly must be protected against all those who would disrupt an assembly, including counter-demonstrators (however, without undue restriction of the right to counter-demonstration – see *Right to counter-demonstration* above for more information). This does not mean diminishing the responsibility of the assembly organizers to take necessary measures to prevent disturbances, but rather imposes the duty on the state where the organizers exercise due care but the situation goes out of their control.

The state's duty to protect lawful assembly is of particular significance where the persons holding, or attempting to hold, the assembly are espousing a view which is unpopular.

Note, however, that the duty of protection is not absolute. Limits on policing resources and the scale of the disorder may necessitate dispersal. However, the threat to public order created where hostility to an assembly is manifested cannot have the automatic response of terminating such assembly.

The duty to protect lawful assembly also implies that the police be appropriately trained to handle the holding of public assemblies. This not only means that they should be skilled in the use of crowd control techniques that minimize the risk of harm to all concerned, but also that they should be fully aware of and understand their responsibility to facilitate as far as possible the holding of an assembly.

4.4 Non-discriminatory decisionmaking

The principle that human rights shall be applied without discrimination lies at the core of the interpretation of human rights standards. Article 2 of the ICCPR and Article 14 of the ECHR require that each State undertake to secure the enjoyment of human rights recognized in these treaties to all individuals within its territory and subject to its jurisdiction without discrimination. In particular, this implies that decisions by the authorities concerning freedom of assembly must not have discriminatory impact – meaning that both direct and indirect[2] discrimination shall be prohibited.

4.5 Prompt judicial review of restrictions

It is essential that not only the assembly organizers have access to court to appeal any restrictions on the assembly (including, but not limited to, bans on assemblies), but that judicial review be prompt. A possible option would be to require the courts to give priority to appeals against restrictions on assemblies.

It is essential to bear in mind, however, that the availability of court appeal should not replace the availability of an efficient administrative procedure to review the decision. Such procedure would both reduce the burden on courts and help build a more constructive relationship between the authorities and the public. The central issue is that, once administrative remedies have been exhausted, the judicial review should be sufficiently prompt, namely, by allowing that the case should be heard and the court ruling be published before the planned assembly date, in order to make it possible to still hold the assembly without restrictions imposed if the court invalidates the restrictions.

4.6 Legal certainty and foreseeability

Restrictions should have a formal basis in the law and be sufficiently precise for an individual to assess whether or not his or her intended conduct would constitute a breach and what consequences this conduct may entail. The need for a formal basis does not necessarily mean a single law but rather requires a clear linkage between a series of measures used to regulate the holding of assemblies.

As far as the required level of precision is concerned, the more specific the legislation is, the more precise the language needs to be (e.g., constitutional provisions, because of their general nature, may be less precise than other legislation).[3]

With regard to the achievement of precision, clear criteria should be set out to govern the exercise of any discretionary power and to avoid the use of language intended to be, or giving the impression of being, subjective and thus not subject to judicial control. Following the recommendations spelled out in the current guidelines in the framing of relevant legislation will help meet the requirement of legal certainty and foreseeability.

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[2] Indirect discrimination occurs when a provision in the law which is non-discriminatory on its face tends to affect disproportionally certain groups of population. For example, if an employer decides that only persons over 180 cm tall are eligible for a job vacancy, but where the job does not objectively require only tall people to do it, the employer would be indirectly discriminating against women who would be less likely than men to be this height.

[3] See European Court of Human Rights, *Rekvényi v. Hungary*, Judgment of the Court, 20 May 1999, para 34.

It is important to bear in mind that legal certainty and foreseeability preclude the use of unpublished directions to those policing assemblies where these are inconsistent with the terms of the published law.

4.7 Proportionality

As mentioned above under *Presumption in favor of holding assemblies*, any restrictions on the exercise of freedom of assembly must pass the proportionality test.[4] The aims that may be legitimately pursued by the authorities to restrict the exercise of the freedom of assembly are provided for by Article 21 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 of the ECHR. Thus, the only purposes that may justify the restriction of the right to peaceably assemble are the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others. Such restrictions can only be imposed to an extent which is no more than absolutely necessary.

When assessing the proportionality of restrictions, one should take into account that all public events – official events as much as public assemblies – will cause some inconvenience to some members of the public not involved in them. Only when this inconvenience becomes excessive, i.e. manifestly out of proportion, may intervention become appropriate.

Note that dispersal of assemblies can only be a measure of last resort (see *Dispersal of assemblies* below).

5. REGULATION OF PUBLIC ASSEMBLIES

The objective of regulation is only to ensure a proper balance between the competing interests that must be secured, namely, the ability to protest and the objectives of maintaining national security or public safety, preventing disorder or crime and protecting health, morals and the rights and freedoms of others.

The principle of proportionality is critical in achieving that balance. This is dependent upon there being a proper evaluation of the individual circumstances affecting the holding of an assembly; the blanket application of rules is entirely inappropriate.

5.1 Requirement of advance notice

It is common for the public authorities to require an advance notice of a public meeting. Such requirement is justified by a legitimate interest to make the necessary arrangements to secure public order or public safety, and has been interpreted by the U.N. Human Rights Committee as a restriction falling within the ambit of the second part of Article 21 of the ICCPR.[5] However, the law should seek to strike a fair balance between the requirement to notify the authorities and the

[4] See Appl. 8191/778, *Rassemblement Jurassien Unité Jurassienne v. Switzerland*, 17 DR 93 (1979).
[5] See U.N. Human Rights Committee, *Kivenmaa v. Finland*, Communication No. 412/1990, views dated 31 March 1994, Doc. CCPR/C/50/D/412/1990.

demonstrators' right to hold a peaceful assembly (see *Proportionality* above). Such requirement should not stifle demonstrations thus negating freedom of assembly.

The issue of spontaneous demonstrations, which is discussed in detail below in a separate subsection (see *Spontaneous demonstrations*), merits special attention with regard to exceptions from the requirement of prior notification. The requirement to give advance notice can also be waived with regard to smaller scale events (e.g. where the number of participants does not exceed 50, 100 or another number set by the law). To allow correct evaluation of the number of participants (especially important in the cases of alleged noncompliance of organizers with the number restrictions), it is essential that the law makes it clear who is a participant of an assembly (see *Definition of participant* below).

Note that to ensure better consistency with the presumption in favor of holding public assemblies, it is strongly recommended that the provisions of the law concerning advance notice require a notice of intent rather than a request for permission. This implies, *inter alia*, that when the authorities do not respond to a notification on time, an assembly cannot be found unlawful merely on the ground that the authorities did not give their express permission. No prohibition means authorization by default.

5.2 Place, time and manner

It is assumed that all public places are available for the purpose of holding assemblies, as well as, in exceptional cases, it cannot be excluded that private property can be used as a venue for a public assembly. However, regulation of place, time and manner is justified by the need to take account of all interests that compete with freedom of assembly.

In the light of this, for example, a prohibition to hold an assembly in a specified location when there is a suitable alternative available, depending on the circumstances of the case, may be a proportionate response.[6] Note, however, that simultaneous holding of events is not *a priori* impossible, but depends very much on the policing resources available. Also, a "suitable alternative," where one is proposed, must be such that the message which the protest seeks to convey is still capable of being effectively communicated to those to whom it is directed, including the communication being in sufficient time to have a potential impact.

The law should be sufficiently flexible to allow the parties to achieve a negotiated compromise regarding the place, time and manner of the planned assembly, and avoid arbitrariness or having a discriminatory impact. Thus, it would be acceptable to propose an alternative venue on the ground that another group has already notified of their plans to hold an assembly in the specified place, if simultaneous holding of more than one event would not be possible due to shortage of policing resources available. It would, however, be impermissible to propose to change the venue because of the content of the planned event.

Note, however, that under exceptional circumstances the decision to ban an assembly from a particular area may be justified if the content of the event is likely to provoke hostility by the neighborhood residents or other persons who are expected to be in the place at the time (e.g., a demonstration outside a place of worship or a place of work). Banning an assembly from a particular location should not, however, be the automatic response and the final decision should

[6] See European Court of Human Rights, Appl. No. 25522/94 by *Rai, Almond, and "Negotiate Now" v. UK.*

pass the proportionality test (policing resources to protect public order balanced against the importance of the proposed venue for the demonstrators' cause).

Another concern that may be taken into consideration is the use of amplification (or the overall level of noise) and lighting and visual effects at the assembly. Regulation may be appropriate to control it because of the time at which the assembly is proposed.

As far as the regulation of assemblies held on private property is concerned, the choice of the venue itself does not preclude a public interest in the regulation of such assemblies, however, some considerations, including inconvenience to others who use a public place, would be irrelevant.

5.3 Spontaneous demonstrations

The possibility to respond immediately to an event by a public expression is an essential element of freedom of assembly. This includes the above-discussed essential right to counter-demonstration, however, the right to respond immediately in fact is much broader.

It is important to avoid the dangerous conflation of the notions of spontaneity and unlawfulness. A spontaneous event may be peaceful and pursue a lawful objective. On the other hand, a carefully planned assembly having met all necessary preconditions for its organization may disintegrate into a violent event and be subject to restriction.

It is therefore important that the law does not stifle spontaneous demonstrations by unnecessarily restrictive provisions, including those concerning the requirement of prior notice. It is recommended that the law provide for exceptions from the requirement of prior notification where giving a prior notification is altogether impracticable, thus making allowance for spontaneous events.

In defining what shall constitute obstructing a lawful assembly, one should be careful not to impose undue restrictions on the right to counter-demonstration, including spontaneous counter-demonstration. A possible option is to allow counter-demonstration to occur within "sight and sound" of the target of their protest as far as it does not prevent the other demonstration from taking place.

5.4 Prohibition on holding a public assembly

Prohibition is a measure of last resort, and it is unlikely to be needed to safeguard competing interests to freedom of assembly other than public order. The authorities should have the right to ban an assembly only if there exist reasonable grounds supporting the concern that the assembly would present a threat to public order, and where a less restrictive response would not be possible. This should be expressly provided for by the legislation.

The availability of judicial appeal against the prohibition decision may be an essential safeguard against the possibility of abuse. However, making a provision for judicial review alone is not likely to present a viable solution if other concerns that may ultimately render the judicial appeal ineffective are not adequately considered. Such concerns may include, for instance, delay in hearing the cases. It is essential that the case be heard and the court ruling be published before the planned assembly date, in order to make it possible to still hold the assembly if the court

invalidates the ban on assembly. A possible option would be to require the courts to give priority to appeals against bans on assemblies. Allowing for possibilities in the law to reach a mutual agreement on the time, place and manner of the event is an essential preventive tool helping avoid the imposition of unnecessary restrictions. It is therefore recommended that the law require the authorities to notify their decision to restrict or prohibit an assembly before a set deadline in advance of the event, so that the organizers can negotiate the terms with the authorities or appeal to the court if they do not achieve a compromise.

5.5 Dispersal of assemblies

As mentioned above under *Proportionality*, dispersal of assemblies should be a measure of last resort.

International standards give very specific and detailed guidance regarding the use of force in the context of dispersal of unlawful assemblies.

The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that "[i]n the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary."[7] They further stipulate that"[i]n the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9."[8]

Principle 9 provides that "[l]aw enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

Note that standards concerning the use of firearms are equally applicable to the use of other techniques of crowd control that are potentially harmful, such as batons, horses, tear gas and water cannon. See *Liability* below for issues concerning liability for abuse of force by the police.

[7] Principle 13, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
[8] *Id.*, Principle 14.

6. ORGANIZERS AND PARTICIPANTS

The delineation of organizers' and participants' responsibilities in the law requires particular attention to ensure fair balance between freedom of assembly and the necessity to maintain law and order.

6.1 Organizers' responsibilities

Organizers do not have to be a legal entity and so could, for example, be a committee of individuals or an as yet unrecognized organization.[9] The only condition here should be clarity as to those actually involved in running the event.

It is self-evident that, where prior notification is required, it will be the organizers who have to notify the authorities and to further negotiate with them if there is no consensus on the time, place or manner of the assembly. Note that the law should never impose on the organizing party an obligation to pay monies as a condition of organizing an assembly. The exclusion of the payment of monies as a condition stems from the right of everyone to freedom of assembly and the responsibility arising from this for the state to arrange appropriate policing. With regard to the policing of assemblies, it should be noted that it is appropriate for the law to put organizers (as well as participants) under a duty to carry out the lawful orders of law enforcements officials. Refusal to do so may entail liability (see *Liability* below).

Organizers 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.

In the context of organizers' duties with regard to policing public assemblies, stewarding of events comes to the forefront. Stewards are persons who are not themselves participants in the event and whose responsibility is to control the participants and to ensure that the imposed restrictions, if any, are complied with. Good stewarding means first of all appropriate balance: stewards must neither be overbearing nor get too involved in the event. Stewards do not substitute the police and it is still the police who bears overall responsibility for public order. However, efficient stewarding helps reduce the need for the police presence at public assemblies. This ultimately facilitates the negotiation process where the authorities may have concerns about public safety, and reduces the likelihood that an assembly be banned due to lack of resources to maintain public order and safety.

Thus, it is recommended that the law allow for organizers to be assisted by volunteers to act as stewards. Under some circumstances, it may be a legitimate condition to impose on organizers that they arrange a certain level of stewarding for their gathering. However, such condition should only be imposed as result of an assessment and never by default. Otherwise, it would violate the proportionality principle.

Relevant provisions should be carefully construed to set clear limits on the stewards' powers, and to delineate the framework for the police-organizer liaison and coordination in stewarding events.

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[9] See European Court of Human Rights, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, Judgment of the Court, 2 October 2001.

Stewards also need to have received a thorough briefing before the assembly takes place. It is also desirable that the law require that stewards be clearly identifiable (e.g. through wearing an armband).

6.2 Definition of participant

The law needs to make it clear who is "participant" of a public event to ensure that accidental bystanders or persons present as observers are not included and, consequently, not held liable for any breaches that may occur.

6.3 Specific groups as organizers or participants

6.3.1 Aliens

The international standards provide that aliens "receive the benefit of the right of peaceful assembly."[10] It is therefore important that the law does not extend the right to peaceful assembly to citizens only, but covers foreign nationals and stateless persons. Note, however, that Article 16 of the ECHR provides that this freedom is not to be regarded as preventing the imposition of restriction on the political activity of aliens.

6.3.2 Children

The Convention on the Rights of the Child requires the States Parties to recognize the rights of the child to freedom of peaceful assembly.[11] It further stipulates that "[n]o restrictions may be placed on the exercise of these rights 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."[12]

While it would not be consistent with the international standards to deny the child the right to organize assemblies altogether, it would nevertheless be permissible to impose certain constraints on the exercise of this right in light of the serious responsibilities of the organizers and the minors' status as not yet fully legally capable. The law may set a certain minimum age for the organizers of public assemblies, thus giving due regard to the evolving capacity of the child. It may also provide that minors may organize a public event only if their parents or legal guardians consent to this. However, parents or legal guardians consent should not be sought with regard to minors' participation in assemblies.

6.3.3 Persons without full legal capacity other than children

The international standards provide that"[e]very person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in … the International Covenant on Civil and Political Rights, and in other relevant instruments."[13] All

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[10] U.N. Human Rights Committee, General Comment 15, The position of aliens under the Covenant.

[11] Article 15, Convention on the Rights of the Child.

[12] *Id.*

[13] Principle 1 (5), United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, United Nations General Assembly resolution 46/119.

individuals should thus benefit from their right to participate in peaceful assembly, irrespective of their legal capacity.

As far as the organization of public events in concerned, imposition of certain restrictions may be justified in the light of the organizers' responsibilities. Legally incapable people, however, should never be denied this right altogether, since in many cases the issue that they would wish to raise is not likely to be raised by any other group. It is possible that the state make it a prerequisite to secure the consent of the incapable person's legal guardian. However, it may not be the best response considering the gaps in the mental health legislation in some participating States which may give rise to conflict of interest between the guardian and the ward (e.g. where the institution is the legal guardian of the institutionalized patient, such procedure would render it impossible for the patients to raise their concerns to the administration of the institution). Another option may be to extend to the legally incapable individuals the right to organize smaller scale events or to co-organize events with fully capable persons.

6.3.4 Detainees

It follows from the ECHR caselaw that the only restrictions that may be imposed on someone in prison are those consistent with the requirements of imprisonment.[14] This means that prisoners can be precluded from holding them in prison where this would be inconsistent with the maintenance of good order, as well as restrictions can be imposed on their capacity to appear as formal organizers of assemblies outside prison. However, it would be inconsistent with international standards to preclude prisoners from having any input into organizing assemblies outside prison.

6.3.5 Police or military officers or the administration of the State

ECHR allows to impose "lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."[15] Any such restrictions must be designed to ensure that both the responsibilities of those in the services concerned are properly discharged and that any need for the public to have confidence in their neutrality is maintained.[16] The definition of neutrality is central is this regard. Neutrality should not be interpreted as unnecessarily restricting the freedom to hold and express opinion. It is also useful to distinguish involvement in one's official capacity, where restrictions may legitimately be imposed to prevent conflict of interest, from that in a personal capacity.

The considerations of proportionality come to the forefront with regard to deciding on the lawfulness of restrictions. This can be assessed, at least in part, by taking account of other opportunities for giving expression to the views of those subject to these restrictions.

7. LIABILITY

The legislation may provide for liability (criminal, civil or administrative) for a range of acts dealing with public assemblies. Offenses may include, for instance, arranging or participating in

[14] See European Court of Human Rights, *Golder v. UK*, Judgment of the Court, 21 February 1975.
[15] Article 11(2), European Convention for the Protection of Human Frights and Fundamental Freedoms.
[16] See European Court of Human Rights, *Ahmed and Others v United Kingdom*, Judgment of the Court, 2 September 1998 and *Rekvényi v Hungary, supra*.

an unlawful public assembly (e.g. in violation of a prohibition or organized without a prior notification where such notification is required by law); failure to perform the duties of the organizer of the event; incitement of hatred towards different racial, ethnic, religious or other groups through speech or distribution of materials in a public assembly; carrying prohibited objects or substances (such as weapons, explosives, controlled substances, or alcohol); obstructing a lawful assembly; resisting lawful orders of law enforcement officials.

Special consideration needs to be given to the "reasonable excuse" defense in cases concerning violations of public assembly-related legislation. For instance, participants in unlawful assemblies should be exempted from liability when they had no prior knowledge that the assembly had not been authorized. Likewise, if an authorized demonstration turns out to be non-peaceful, individual participant who does not himself or herself commit any violent act cannot be prosecuted solely on the ground of participation in an illegal gathering.[17] Under similar circumstances, organizers cannot be held liable if they made reasonable efforts to prevent spontaneous violence but the situation went out of their control (as it has already been noted under *Organizers' responsibilities* above, their responsibility to prevent disorder should only extend as far as exercising due care to prevent interference with public order by the assembly participants). In no case should the law allow for holding organizers liable for any actions by the third parties, which is especially important in the context of the state's duty to protect lawful assembly.

The risk that demonstration goes out of control and results in damage to property inevitably raises the issue of who should be held liable for the damage. Holding organizers of the event liable would be a manifestly disproportionate response since this would imply that organizers are imputed responsibility for acts by individuals which were not part of the plans for the event and could not have been reasonably foreseen. It is possible that individual participants be held liable to compensate the damage caused, provided they benefit from the "reasonable excuse" defense.[18]

The law should also enable prompt and thorough investigation of unlawful use of force by the police in dispersal of assemblies and for subsequent prosecution where the evidence warrants it.

[17] See European Court of Human Rights, *Ezelin v. France*, Judgment of the Court, 18 March 1991, para 50.

[18] The defense of "reasonable excuse" will be applicable where failure to comply was not willful but a matter of impossibility. For instance, if a participant is pushed by someone and accidentally knocks over and breaks an object, this participant should be able to invoke the "reasonable excuse" defense since the immediate act causing the damage was an inevitable consequence of the act of another person.

8. FREEDOM OF ASSEMBLY IN A WIDER HUMAN RIGHTS CONTEXT

8.1 Freedom of assembly, freedom of expression and right to political participation

As mentioned above under *Lawful assembly* and *Place, time and manner*, the right to freedom of assembly is intrinsically and naturally related to freedom of expression, as enshrined in the ICCPR[19] and the ECHR[20] and understood as "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

The ECHR does not allow to impose restrictions on freedom of expression other than "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." The ICCPR is even stricter in this regard and only allows restrictions when absolutely necessary "for respect of the rights or reputations of others" or "for the protection of national security or of public order (ordre public), or of public health or morals."

As already mentioned, it is not permissible to impose content-based restrictions on the exercise of freedom of assembly, except when (a) the planned assembly aims at inciting violence or (b) under exceptional circumstances if the content of the event is likely to provoke hostility by the neighborhood residents or other persons who are expected to be in the place at the time (in which case the assembly cannot be banned altogether, but may be banned from a particular location).

It is recommended, however, that in all cases concerning advocacy of violence the authorities apply the "clear and present danger" test. This means that the authorities should only be able to impose restrictions when advocacy of violence is directed to inciting imminent lawless action and is likely to incite such action. This approach is designed to extend protection to controversial speech and political criticism as long as it does not present a real, imminent danger to public order and peace.

The application of the "clear and present danger" test in freedom of assembly and expression cases therefore ensures consistency of the outcome with the totality of human rights standards, most importantly, the right to political participation.

8.2 Counterterrorist measures and freedom of assembly

In times of terrorist threats, providing safeguards against possible abuses of human rights has become more important than ever. While efforts to tackle terrorism and to enhance security are incontestably important, they should be seen in a wider context of strengthening the rule of law, and never invoked to justify arbitrary action directed to limit human rights and freedoms.

The recent years have seen the body of anti-terrorism and anti-extremism legislation in the OSCE participating States rapidly growing. It is important to ensure that this legislation does not encroach on the right to peaceably assemble.

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[19] Article 19.
[20] Article 10.

One of the issues that may arise in the "war on terrorism" context is the blanket prohibition of peaceful assemblies which concern "extremist" causes, which should not be the case. It is essential that the same standard be applied to all peaceful assemblies regardless of their content. In this regard, note the landmark decision in the *Rai, Almond, and "Negotiate Now"* case,[21] where the European Court of Human Rights considered banning from the Trafalgar Square a rally concerning the Northern Ireland conflict to be proportionate, *inter alia*, because the ban did not amount to a blanket prohibition of the applicants' rally.

Drawing a separation line between events that advocate violence and all other public assemblies relating to "extremist" causes would mean that, for example, it should be possible to prohibit an assembly aimed to incite violence. However, it should not be permissible to ban a peaceful assembly in support of the release of individuals arrested on charges of inciting such violence.

Another issue that comes into focus when drafting freedom of assembly legislation in a world confronting heightened terrorist challenge is the extent of the assembly organizers' responsibility. As already discussed under *Organizers' responsibilities*, it should only extend as far as exercising due care to prevent interference with public order by the assembly participants. Under no circumstances, the terrorist threat being no exception, should the law assign the core duties of the law enforcement – the protection of public order and safety – to regular people, including public assembly organizers or participants.

[21] See *supra Rai, Almond, and "Negotiate Now" v. UK.*