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Or. Engl

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

**JOINT OPINION**  
**ON THE PUBLIC ASSEMBLY ACT**  
**OF THE REPUBLIC OF SERBIA**

**by**  
**the Venice Commission**  
**and**  
**OSCE/ODIHR**

**Adopted by the Venice Commission**  
**at its 84<sup>th</sup> Plenary Session**  
**(Venice, 15-16 October 2010)**

**On the basis of comments by**

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**Mr. Wolfgang HOFFMANN-RIEM (Member, Germany)**  
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## I. INTRODUCTION

1. On 26 July 2010, the Ministry of Human and Minority Rights of the Republic of Serbia requested the OSCE/ODIHR and the Venice Commission to provide legal review of the current Public Assembly Act of the Republic of Serbia, adopted in 1992, which was amended several times during the past 15 years.
2. The Ministry of Human and Minority Rights believes that the Public Assembly Act needs further improvement in order to bring it into compliance with international standards. Upon initiating the revision of the current legislation concerning freedom of assembly, the Ministry set up a Working Group in March 2010. This Working Group, which includes stakeholders from the relevant ministries, judiciary bodies and civil society, was tasked to analyze the legal framework pertaining to freedom of assembly issues and draft recommendations on how to improve this legislation.
3. Messrs Wolfgang Hoffmann-Riem and Bogdan Aurescu acted as rapporteurs on behalf of the Venice Commission. They worked in consultation with Messrs Niel Jarman and Serguei Ostaf, who acted for the OSCE/ODIHR Advisory Panel on Freedom of Assembly.
4. This opinion, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 84<sup>th</sup> Plenary Session (Venice, 15-16 October 2010).

## II. SCOPE OF REVIEW

5. The scope of this Opinion covers only the Public Assembly Act (hereafter, "the Act"). Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing freedom of assembly issues in the Republic of Serbia.
6. This Opinion analyses this Act in terms of its compatibility with relevant international and regional standards and OSCE Commitments, and in light of Article 54 of the Constitution of Serbia which guarantees the citizens of the state, the right to assemble peacefully.<sup>1</sup>
7. This Opinion raises key issues and provides indications of areas of concern. The suggested recommendations are based on international agreements and commitments ratified and entered into by Serbia, in particular, the International Convention on Civil and Political Rights (ICCPR)<sup>2</sup> which guarantees the right to peaceful assembly<sup>3</sup>, the European Convention on Human Rights (ECHR) which guarantees the right to assemble in similar terms to the ICCPR<sup>4</sup>, the extensive jurisprudence of the European Court of Human Rights (ECtHR) which establishes important benchmarks

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<sup>1</sup> The Constitution, Article 54 reads that „ Citizens may assemble freely. Assembly held indoors shall not be subjected to permission or registering. Gathering, demonstrations and other forms of assembly held outdoors shall be reported to the state body, in accordance with the Act. Freedom of assembly may be restricted by the Act only if necessary to protect public health, morals, rights of others or the security of the Republic of Serbia. ”

<sup>2</sup> Entered into force in Serbia in 2000

<sup>3</sup> The full text of the ICCPR is available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (last visited on 12 February 2009). Article 21, in particular, reads: “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 Act 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>4</sup> The full text of the ECHR is available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm> (last visited on 12 February 2009); Articles 11, in particular, reads: “1. 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. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by Act 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 Actful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”.

8. This Opinion also refers to the international standards which have been presented and discussed in various opinions of the Venice Commission and to OSCE commitments pertaining to freedom of peaceful assembly<sup>5</sup>. It makes extensive use of the OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly, as revised in 2010 (hereinafter referred to as “the OSCE/ODIHR – Venice Commission Guidelines”).<sup>6</sup>

9. This Opinion is based on an unofficial translation of the Act, and consequently, certain comments may be due to problems of translation.

10. The Opinion was approved by the Venice Commission and the OSCE/ODIHR Expert Panel on Freedom of Assembly as collective bodies and should not be interpreted as endorsing any comments on the Act made by individual Panel members in their personal capacities.

11. The OSCE/ODIHR and the Venice Commission note that the Opinion provided herein is without prejudice to any other opinions or recommendations that the OSCE/ODIHR or the Venice Commission may wish to make on the issues under consideration in the future.

### III. EXECUTIVE SUMMARY

12. The Venice Commission and the OSCE/ODIHR welcome the efforts undertaken by the Serbian authorities to assess the current Act in order to identify provisions that may be in need of improvement and bring them in line with international law and standards.

13. Nevertheless, the Act presents a certain number of shortcomings and its implementation may result in the infringements of the fundamental right to assembly guaranteed by the Serbian Constitution and the ECHR. Therefore, in order to ensure the full compliance of this Act with international standards, the OSCE/ODIHR and the Venice Commission wish to make the following recommendations:

#### 1. Key Recommendations

A. The title of the Law, currently “Public Assembly Act”, should be reformulated as “Law on the *freedom* of assembly” or “Law on freedom of *peaceful* assembly”;

B. It is important that the reference to “application” in the Act refers to a system of notification of assemblies and not the issuance of permission. The Act should also provide for the exception to notification requirements, that being spontaneous assemblies;

C. In the event that a notification period remains in place, its length and conditions should be reasonable not only in relation to the authorities but also allowing for a judicial review to take place before the scheduled assembly date. Omissions in the notification should be easily rectifiable without causing unnecessary delay of the assembly;

D. This Act should be applicable to both nationals and non-nationals as well as other categories of people, including aliens, minors and migrants;

E. Every public space should be seen fit to host an assembly, except hazardous facilities which are closed to the public;

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<sup>5</sup> Paragraph 9(2) of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990) reasserts that: “*Everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by Act and consistent with international standards.*”

<sup>6</sup> The full text of the Guidelines is available at [http://www.osce.org/odihr/item\\_11\\_23835.html](http://www.osce.org/odihr/item_11_23835.html), or at: <http://www.venice.coe.int/docs/2010/CDL-AD%282010%29020-e.pdf>.

F. All provisions constituting amounting to blanket restrictions on time and location of a peaceful assembly should be revised and removed. The Act should state that any restrictions placed on time and location of holding a particular assembly should pass the test of proportionality in each individual case.

G. The reasons for suspension, ban or termination of an assembly should be narrowed down to a threat to public safety or danger of imminent violence;

H. Measures should be taken only against those persons who violate public order, use hate speech or instigate violence, whereas not against the whole assembly;

I. The organisers should not be liable in relation to financing of public services provided during an assembly and their obligations regarding maintaining of public order should be reduced;

J. The procedure of review of decisions to ban an assembly should be established in such manner so as to ensure that a decision on the legality of the ban on the assembly is made available to organisers before the planned date of the assembly. Considering the narrow schedule this can be achieved best by allowing for temporary injunctions.

## **2. Additional Recommendations**

K. The requirement for submission of a notice of an assembly should be limited to providing a schedule of events and the statement of purpose;

L. The Act should define 'spontaneous assembly';

M. The Act should require the authorities to issue a written confirmation to the organisers immediately upon its receipt; any failure to provide confirmation by the authorities being tantamount to a confirmation being issued;

N. It should be expressly provided that a lack of application does not lead to an automatic prohibition of an assembly;

O. The Act should use the language of the ICCPR and refer to "everyone" while defining the categories of people who enjoy the right to freedom of peaceful assembly;

P. Holding assemblies should not be limited to designated sites, which should be defined broadly as a "public place";

Q. The scope of the act should cover public assemblies which take place on public space that being, space that is generally freely accessible to the public;

R. The Act should envisage a possibility for organisers to deploy stewards who can help facilitate the assembly;

S. It should be defined, in this Act, what remedy the organisers and participants have in cases of improperly terminated or dispersed assemblies;

T. The provisions concerning termination of assemblies should be brought in line with the legality and proportionality principle;

U. It should be ensured that the burden of proof for banning an assembly lies with the body which seeks for the assembly to be banned.

14. The OSCE/ODIHR and the Venice Commission stand ready to continue to provide assistance to the authorities of the Republic of Serbia in reviewing the relevant legislation. An opportunity to meet with the Working Group members drafting the recommendations for anticipated amendments to this Act would be welcomed so that a fuller understanding could be gained of how the administrative and other systems are intended to operate.

#### IV. ANALYSIS<sup>7</sup>

##### Title of the Law and definitions

14. The title of the Law, currently “Public Assembly Act”, should be reformulated as “Law on the *freedom* of assembly” or “Law on freedom of *peaceful* assembly”. An assembly must be ‘peaceful’ if it is to be afforded the protection guaranteed in international instruments.

15. Article 3 currently provides for certain definitions of types of assemblies (processions), while the first paragraph of Article 2 defines demonstrations. This should not be seen as limitative as to other types of assemblies, such as *static* forms of assembly like ‘flash mobs’, sit-ins, and pickets.

##### Notification of Assemblies

15. Article 6 of the Act provides an obligation of the organiser to submit an application prior to the assembly. Pursuant to international human rights law prior notification can only be required in order to enable the state to make necessary arrangements to facilitate freedom of assembly and to protect public order, public safety and the rights and freedoms of others.<sup>8</sup> Therefore, it should be ensured that the understanding of the term “application” in the Act refers to a system of notification, rather than permission<sup>9</sup>.

16. Any notification process established by the Act should not be onerous and must not frustrate the intention of the organisers to hold a peaceful assembly, and thus indirectly restrict their rights. As it stands, the Act envisages the application to contain detailed information on the “*program, purpose location, duration, measures taken by the organiser for the purpose of maintaining order and the monitoring service organized for the purpose, together with the estimated number of participants of the public assembly*”<sup>10</sup>. This provision is considered too broad and should be limited to requiring the providing a schedule of events and a general statement of purpose. As regards the obligation to give the estimated number of participants, this may sometimes be possible but equally an organiser, despite providing a best estimate, may prove to be significantly wrong in the numbers that participate. This should not lead to any consequences for the demonstration unless they are linked to legitimate reasons for restriction detailed in Article 11(2) ECHR<sup>11</sup>. Further, the obligation to submit a list of intended measures to be taken by the organiser in order to ensure the maintaining of public order is incongruent with the scope of obligations of the organisers. 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. The Venice Commission previously commented in relation to another law that an organiser cannot be held responsible for everything that occurs at a gathering governed by the draft law. A better approach to this issue “would 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.”<sup>12</sup> As will be discussed below, the overall

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<sup>7</sup> It is not a standard Serbian drafting style to number paragraphs within Articles of legal instruments, but to assist the reader the sequential number of a paragraph to which reference is made in the Opinion is included in after the number of the Article.

<sup>8</sup> OSCE/ODIHR – Venice Commission Guidelines, para. 4.1

<sup>9</sup> Public Assembly Act, Articles 4, 6, 7, 15

<sup>10</sup> *Id.*, Article 6§4

<sup>11</sup> CDL-AD(2006)034, Opinion on the Law on Freedom of Assembly in Azerbaijan, paragraph 26.

<sup>12</sup> CDL-AD(2006)033, Joint Opinion on the Draft Law on Peaceful Assemblies in Ukraine, paragraph 28; CDL-AD(2009)052, Joint Opinion on the Order of Organising and Conducting Peaceful Events of Ukraine, paragraph 36.

responsibility to ensure public order should lie with the law enforcement bodies, not with the organiser of an assembly.

17. Article 6 currently provides for certain time limits for prior notification. It is recommended that if a notification period is established in the Act, the time limits set down for the application to be made should be more flexible, in the sense that they should be set forth "as a rule". According to the OSCE/ODIHR – Venice Commission Guidelines, "The notification process should not be onerous or bureaucratic. The period of notice should not be unnecessarily lengthy, but should still allow adequate time prior to the notified date of the assembly for the relevant State authorities to plan and prepare for the event in satisfaction of their positive obligations, and for the completion of an expeditious appeal to (and ruling by) a court should any restrictions be challenged. If the authorities do not promptly present any objections to a notification, the organisers of a public assembly should be able proceed with their activities according to the terms notified and without restriction." The Guidelines also mention that "When a certain time limit is set forth by the law, it should be only indicative"<sup>13</sup>.

18. Article 7 § 2 of the Act points out that an assembly will only be considered as reported "after the submission of complete application" and that every change of content will be seen as a new application. It is recommended that these provisions be amended as they are too strict in relation to minor omissions or changes and will needlessly cause organisers to lose their place in line to use the forum, all the more since as mentioned above, the required content of the application under Article 6 § 4 is rather too detailed and extensive.<sup>14</sup> The principle of proportionality calls for a more flexible solution taking into account whether the omissions or changes relate to facts that would provide grounds to terminate an assembly or whether the omissions may easily be rectified and are purely formalistic in nature.

19. The Venice Commission and the OSCE/ODIHR are also of the opinion that the Act could exempt small assemblies such as those estimating the participation of 10 to 20 persons, from the requirement of advance notification<sup>15</sup>.

20. Finally, in relation to notification, the Act is recommended to provide for exceptions to prior notification and repeal Article 14 of the Act which instructs the authorized body to prevent an assembly that has not been notified from taking place. Many assemblies which take place as an immediate response to an event carry a message that would be weakened if the legally established notification period were adhered to<sup>16</sup>. Such "spontaneous assemblies" should be protected and facilitated by the authorities so as long as they are peaceful in nature<sup>17</sup> It should be noted that the ECtHR has stated that "a decision to disband such assemblies 'solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly.'<sup>18</sup>

21. In order to bring into effect a provision which would provide an exception to notification of assemblies, the Act is also recommended to provide a definition of "spontaneous assemblies".

22. The Act is also recommended to require the authorities to issue a written confirmation to the organisers immediately upon receipt of the notification. The act should also stipulate that any failure to provide confirmation by the authorities is tantamount to such a confirmation being issued<sup>19</sup>.

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<sup>13</sup> Paragraph 116.

<sup>14</sup> CDL-AD (2010) 016, para. 42.

<sup>15</sup> CDL-AD(2010)016,) Joint Opinion on the Act on Public Assembly of the Sarajevo Canton (BiH para. 29.

<sup>16</sup> The OSCE/ODIHR – Venice Commission Guidelines stress that the ability to respond peacefully and immediately that is, spontaneously and without providing formal notification, to some events, news, incidents or other assembly is an essential element of freedom of assembly.

<sup>17</sup> See OSCE/ODIHR-Venice Commission Guidelines para. 97-98

<sup>18</sup> See ECtHR judgement, *Bukta v. Hungary* (2007), para.36

<sup>19</sup> CDL-AD(2009)052, *cit.*, paragraph 44.

## **Enjoyment of Freedom of Peaceful Assembly by Non-nationals and Other Groups**

23. Article 1 of the Act states that “[p]ublic assembly of the citizens is free and should be exercised in the manner prescribed by this Act”. It is not clear whether the Act refers only to nationals of the Republic of Serbia, thereby excluding non-nationals or aliens or whether this may be the result of a translation error.

24. Nevertheless, it is important to note that the freedom to organize and participate in public assemblies must be guaranteed to nationals and non-nationals as well as stateless persons, refugees, foreign nationals, asylum seekers, people with disabilities and migrants<sup>20</sup>. Illegal migrants must also have the right to exercise their freedom of peaceful assembly<sup>21</sup>. It would therefore be recommended to amend this provision by using the language of the ICCPR and referring to “everyone” in this regard. Such a reference would then include also minors, as required under the UN Convention on the Rights of the Child. 22.

25. Further, mentioning not only the relevant constitutional provisions, but also the relevant norms of the international and European instruments on the matter (ICCPR, ECHR, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Framework Convention on National Minorities) would be useful. Alternatively, they could be mentioned in a Preamble of the law. A reference to article 11 of the European Convention on Human Rights would be especially useful.

## **Financing Peaceful Assemblies**

26. Article 4 §§ 3 and 4 of the Act envisage that organisers of an assembly shall bear the costs incurred by temporary alteration of traffic and other costs incurred by additional performance of public services<sup>23</sup>. It is strongly recommended to repeal these provisions in view of the standard set by the OSCE/ODIHR-Venice Commission Guidelines, which note that “the costs of providing adequate security and safety measures (including traffic and crowd management, and first-aid services) should be fully covered by the public authorities. The state must not levy any additional financial charge for providing adequate and appropriate policing.

27. Further to the above, it ought to be noted that organisers of public assemblies should also not be required to obtain public-liability insurance for their events. Similarly, the responsibility to clean up after a public assembly should lie with the municipal authorities. This is because, imposing onerous financial requirements on assembly organisers is likely to constitute a disproportionate prior restraint.

## **Restrictions on a Peaceful Assembly**

28. Article 11 of the ECHR protects freedom of assembly, however, only freedom of peaceful assembly is guaranteed. Although 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, this freedom is fundamental and presents such an essential element of a democracy that it cannot be restricted unless the persons exercising it have committed a reprehensible act. It is a positive obligation of the state to guarantee the effective exercise of the freedom of assembly.

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<sup>20</sup> OSCE/ODIHR-Venice Commission Guidelines, p. 14. Also see General Comment 15 by the UN Human Rights Committee under the ICCPR, at § 7: “*Aliens receive the benefit of the right of peaceful assembly and of freedom of association. (...) There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be Actfully imposed under the Covenant*”. See also Venice Commission, Opinion on the Act on freedom of assembly in Azerbaijan, CDL-AD(2006)034, §§ 29 -30..

<sup>21</sup> ECtHR, *Cissé v. France*, para. 50: the Court found that a breach of the right to freedom of peaceful assembly cannot be justified by reference to the fact that the applicant is an illegal immigrant.

<sup>22</sup> UN Convention on the Rights of the Child, Article 15 states as follows: , “[s]tates Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly”. The full text can be found at <http://www2.ohchr.org/english/Act/crc.htm>

<sup>23</sup> Public Assembly Act, Article 4.2

29. Any restrictions imposed must have a formal basis in the primary legislation at the national level. This legislation should also state the mandate and powers of the restricting authority. The Act itself must be sufficiently precise to enable an individual to assess their anticipated conduct in view of its compliance [or non-compliance] with the Act in question and realise possible consequences of their conduct. The incorporation of clear definitions in domestic legislation is vital to ensuring that the Act remains easy to understand and apply.

30. Therefore, it is recommended to include in this Act a provision mirroring paragraph 2 of Article 11 of the ECHR. Such a provision would provide a proper basis for deciding upon restrictions on assemblies, including restrictions on the location of holding an assembly, on a case-by-case basis. A general provision can be introduced to the effect that restrictions of the right to freedom of assembly must pursue one of the legitimate aims listed in the Constitution of Serbia. Another provision should establish the meaning of proportionality of a restriction. Assembly Location and Time.

31. Article 2 of the Act introduces limitations on the location and time of assemblies. Whereas, legitimate grounds for restrictions are prescribed by the relevant international human rights treaties and should neither be supplemented by additional grounds in domestic legislation nor loosely interpreted by the authorities.<sup>24</sup> In this context it must be highlighted, that blanket legislative provisions, which ban assemblies at specific times or in particular locations, require much greater justification than restrictions on individual assemblies.<sup>25</sup> Generally, all restrictions require a weighing of interests in each specific case.<sup>26</sup> As the European Court of Human Rights has stated, “[s]weeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.”<sup>27</sup>

32. Location is therefore one of the key aspects of freedom of assembly. The privilege of the organiser to decide which location fits best for the purpose of the assembly is part of the very essence of freedom of assembly. Assemblies in public spaces should not have to give way to more routine uses of the space, as it has long been recognised that use of public space for an assembly is just as much a legitimate use as any other. Moreover, the purpose of an assembly is often closely linked to a certain location and the freedom of assembly includes the right of the assembly to take place within “sight and sound” of its target object.

33. It is therefore highly recommended to reconsider Article 2 § 2, which stipulates that assemblies may only be held in a location where it would not cause obstruction of public traffic (amongst others). As most assemblies are likely to cause an obstruction, the only question is whether the obstruction in any given case is reasonable or not. Otherwise, such a provision may be considered as a blanket limitation and thus excessive.

34. Additionally, Article 2 § 4, which prohibits assemblies taking place in the vicinity of the Federal Parliament and the National Parliament (immediately before and after the sessions) should be narrowed down to a more specific restriction keeping in mind that individual solutions are needed for proportionality reasons.

35. Article 2 § 1 of the Act establishes that it covers assemblies taking place in "*a location adequate for the purpose*". It is recommended to ensure that the scope of the act covers public assemblies which take place on public space that being, space that is generally freely accessible to the public.

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<sup>24</sup> Guidelines, Section B, para. 69.

<sup>25</sup> Guidelines, Section B, para. 102.

<sup>26</sup> CDL-AD (2010) 016, para. 33.

<sup>27</sup> See OSCE/ODIHR-Venice Commission Guidelines para. 102; also see *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (2001, para. 97; *Association of Citizens Radko & Paunkovski v. The Former Yugoslav Republic of Macedonia* (2009), para.76.

36. Paragraphs 2 and 5 of Article 2 of the Act allow the local authorities to designate certain locations for holding assemblies. Designation by the authorities of assembly locations raises concerns as it is incompatible with the very concept of the right to peaceful assemble as a fundamental freedom. As already mentioned above, all public spaces should be open and available for the purpose of holding assemblies and so, official designation of sites suitable for assemblies inevitably limits the number of public places that may be used for an assembly as it excludes locations that are suitable for assemblies, simply because they have not been designated. The only legitimate restriction on location of an assembly is on site of hazardous areas and facilities which are closed to the public. It is therefore recommended to amend these provisions so as to include streets, sidewalks, and parks and to ensure that the list of possible locations is not exhaustive or better to delete from the legislation any attempt to designate areas.

37. Article 2 §§ 4 and 6 also provide for bans on assemblies at specified times, which is unnecessary and amounts to an excessive restriction. Paragraph 4 refers to a prohibition on assemblies in the vicinity of Parliament (as mentioned above) but also before and during the sessions, which would presumably be one of the most opportune times for assemblies to convey their message to members of parliament (when parliamentarians are going to or exiting their sessions). Meanwhile, paragraph 6 introduces what may be considered blanket restriction on the time during which an assembly may be held at all. This provision should be amended to the effect to safeguard that each location for an assembly be subject to individualized, reasonable regulations of time, place, and manner based on the particulars of each assembly and relevant governmental interests.

38. Finally, there appears to be no good reason to impose a restriction such as that established in Article 3 par 2 of the Act which requires that a public procession can only be held "in motion". Firstly, there are many forms of an assembly and secondly, even if the assembly indeed takes the form of a procession, there would not be any reason to prevent it from stopping at certain places (monuments, etc.) during the procession. The provision is therefore recommended to be repealed.

### **Liability of Organisers and Participants**

39. Articles 4 and 5 and Article 15 of the Act place many obligations (including financial) on the organisers and participants of the assembly. Whereas, it should be noted that organisers and participants have only the duty to act peacefully and comply with the terms of the notification of the assembly.

40. Indeed the financial obligations contained in Articles 4 and 5 of the Act should be repealed as the costs of providing adequate security and safety (including traffic and crowd management) should be fully covered by the public authorities.

41. Furthermore, Article 15 of the Act envisages a number of penalties for the organiser in case of failing to meet certain requirements<sup>28</sup>. This article, together with administrative fines, also imposes criminal penalties, including incarceration for up to two months, for minor offenses.

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<sup>28</sup> *Id.*, Article 15 reads: "Monetary fine in the amount of maximum 10,000 dinars or term of imprisonment for the maximum of 60 days shall be the penalties for: 1) organiser of the public assembly who had not taken the measures to maintain order in the public assembly, that is, who had not organized the monitoring service (article 5 paragraph 1); 2) person gathering citizens without a previous application (article 6); 4) organiser of the public assembly who holds the assembly regardless of the ban under article 9 paragraph 1, and article 11 paragraph 1 of this Act; 5) organiser of the public assembly who does not terminate the assembly according to article 12 of this Act. For the offence under paragraph 1, points 1, 2, 4 and 5 of this article, the legal entity shall be fined with 500.000 dinars maximum, and the responsible person with 50,000 dinars maximum."

42. The OSCE/ODIHR-Venice Commission Guidelines provide that “organisers of assemblies should not be held liable for their failure to perform their duties if they make reasonable efforts to do so, nor should organisers be held liable for the actions of non-participants or agents provocateurs”<sup>29</sup>. Organisers should not be liable for the actions of individual participants, either. In case there is no genuine criminal activity punishable by other laws, violation of the requirements prescribed by this Act should be addressed by fines.

43. Therefore, recalling the state’s duty to protect peaceful assembly, the obligations set out in the Act are too extensive and are recommended to be repealed. Providing adequate security and safety free of charge is a central responsibility of the government.<sup>30</sup> Organisers cannot guarantee the maintenance of order in a public assembly, but they may be obliged to make certain arrangements such as deploying stewards who can help facilitate the assembly and comply with lawfully imposed restrictions. Therefore, establishing a penalty fee in case the organiser fails to maintain order in the assembly is inadmissible.

### **Assembly Termination**

44. The OSCE/ODIHR – Venice Commission Guidelines emphasize that the termination and dispersal of assemblies should be a measure of last resort. Furthermore, dispersal should not occur unless law enforcement officials have taken all reasonable measures to facilitate and to protect the assembly from harm and unless there is an imminent threat of violence<sup>31</sup>.

45. Article 9 § 1 of the Act provides a list of circumstances, under which the right to hold a peaceful assembly may be limited, by stipulating the reasons for which an assembly may be suspended. Among the reasons directly connected to violence, instigation of hatred, threat to public health or life, and violation of territorial integrity and autonomy of Serbia. Since speech and other forms of expression usually enjoy protection under Article 19 ICCPR and Article 10 ECHR, restrictions on public assemblies should not be based upon the content of the message they seek to communicate. It is especially unacceptable if the interference with the right to freedom of assembly could be justified simply on the basis of the authorities’ own view of the merits of a particular protest.<sup>32</sup> Any restrictions on the message of any content expressed should face heightened scrutiny and must only be imposed if there is an imminent threat of violence.<sup>33</sup> Therefore, speeches and demonstrations which call for territorial changes or constitutional changes do not automatically amount to a threat to the country’s territorial integrity and national security, unless the element of incitement to hatred or violence is included.

46. Furthermore, what needs to be taken into account in the case that Article 9 paragraph 1 is revised is that, as noted by the Guidelines that while expression should normally be protected even if it is hostile or insulting to other individuals, groups or particular sections of society, there are specific instances of hate speech that may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the ECHR to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the ECHR or their limitation to a greater extent than provided therein. Even then, the resort to such speech by participants in an assembly does not of itself justify the dispersal of the event, and law enforcement officials shall take measures only against the particular individuals involved (either during or after the event).

47. Article 11 par1 of this Act also provides the possibility for banning an assembly “on the grounds of preventing obstruction of public transport(...)”. Similarly to the recommendation provided on Article 2 par 2 (concerning the expression “obstruction of traffic” contained in the

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<sup>29</sup> See OSCE/ODIHR-Venice Commission Guidelines, para. 5.7

<sup>30</sup> OSCE/ODIHR-Venice Commission Guidelines, para. 5.2.

<sup>31</sup> See OSCE/ODIHR-Venice Commission Guidelines, para 154.; see also the ECtHR judgements: *Oya Ataman*, 2006, paras.41-42; *Balçık and Others v. Turkey*, 2007, para.51, and *Éva Molnár v. Hungary*, 2008, paras.42-43

<sup>32</sup> Guidelines, Section A, para. 94

<sup>33</sup> Guidelines, Section A, para. 94

provision) this article is recommended to be repealed as it does not present legitimate ground for banning an assembly. Indeed, the provision contradicts Article 11 par 2 of the ECHR and should be narrowed to circumstances, in which such obstruction is unreasonable and when no reasonable alternative to the ban, such as the temporary re-routing or short interruption of traffic is available.

48. In view of the occurrence of a concrete assembly, Article 12 appears to establish a mechanism for restoration of order. Indeed while the intention of the Article is understood, par 1 in particular, is recommended to reflect the necessity to differentiate between an assembly and the behaviour of one individual or several individuals in an assembly. That is, the assembly should not be prohibited or dispersed simply because an individual or group commit acts of violence and any such measures should only be taken against those particular individuals who violate public order or commit or instigate unlawful actions.

49. Furthermore, Article 12 § 1 should be amended to ensure that police undertake all possible actions to restore order, prior to dispersing an assembly, which should always be seen as the last possible resort.

50. The Venice Commission and the OSCE/ODIHR note that according to Article 9 § 3 of the Act the burden on initiating court review, concerning the banning of an assembly, falls on the relevant state body. It is positive that the ban on an assembly can only be imposed by the court. However, it is to be stressed that the organizer should always be heard by the court before it decides on the ban, and the court review should be “prompt so that the case is heard and the court ruling published before the planned assembly date”<sup>34</sup> (see below).

### **Remedies and Judicial Review**

51. The right to an effective remedy entails a right to appeal the substance of any restrictions or prohibitions on an assembly. Appeals should take place in a prompt and timely manner so that any revisions to the authorities’ decision can be implemented without further detriment to the applicant’s rights. Therefore, the Act should establish clearly the remedies available to organisers in cases of improperly prohibited or dispersed assemblies. The prompt and thorough investigation of any suspected unlawful use of force by the police during assemblies, including dispersal of the assemblies, should also be ensured. The subsequent prosecution, if required, must also be safeguarded.

52. Article 9 raises concerns as it seems that the ban on the assembly stipulated therein is temporary in nature, affirmed by a court of law. While judicial review is welcomed, the time frame provided in this article (no later than 12 hours prior to the assembly) is incongruent with the time frame provided in Article 10 par 1 which provides that a hearing shall be held and decision handed down by the county court within 24 hours. Furthermore, any appeal of the court decision should also be lodged within the next 24 hours and the Supreme Court would then have another 24 hours to hand down its decision. The effect of the provisions is that a final decision may not be handed down in time for the assembly to take place. This is recommended to be revised, as such a delay could seriously weaken the message to be expressed through the assembly and is thus unacceptable. As the OSCE/ODIHR – Venice Commission Guidelines state, “there should be an opportunity to appeal the decision of the regulatory authority to an independent court. Appeals should take place in a prompt and timely manner so that any revisions to the authorities’ decision can be implemented without further detriment to the applicant’s rights. A final ruling should, therefore, be given prior to the date of the assembly in the notification. In the absence of the possibility of a final ruling, the law should provide for the possibility of interim relief by injunction.”<sup>35</sup>

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<sup>34</sup> See OSCE/ODIHR-Venice Commission Guidelines, para. 138.

<sup>35</sup> See OSCE/ODIHR-Venice Commission Guidelines, para.66

53. Furthermore, it would be beneficial if the Act explicitly provided that the burden of proof for establishing the grounds upon which an assembly may be banned lies with the body which seeks for the assembly to be banned, both in administrative proceedings and as part of the judicial proceedings.

54. Finally, Article 10 also provides that "*In the procedure upon the claim to ban the public assembly, relevant provisions of the Criminal Procedure Act are applied accordingly, if not otherwise stipulated by the law*". The application of the criminal procedural law to the judicial procedure on assemblies raises concerns and needs further explications from the Serbian authorities.