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Freedom of Peaceful Assembly
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Excellencies, ladies and gentlemen,

The protection of freedom of peaceful assembly has never been more important. Yet, as the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has made very clear, there is no monopoly on good practice when it comes to the regulation of freedom of peaceful assembly. OSCE Participating States from *both* the east and the west can do much to improve the way in which they facilitate the freedom of people to assemble peacefully.

In many countries, it is unfortunately still the case that the legislative framework governing freedom of assembly leads to inadequate protection of the right. Laws in many countries:

- place onerous bureaucratic and sometimes financial burdens on assembly organizers;
- unnecessarily prohibit assemblies in particular – often central – locations[1] or at particular times (for example, at elections);
- fail to provide effective and timely remedies for those who seek to challenge any restrictions imposed, or independent mechanisms through which to investigate and hold officials – including political leaders – to account).
- confer wide discretionary powers on local municipal officials and law enforcement personnel, potentially leading to
    - arbitrary and discriminatory restrictions,
    - the indiscriminate and disproportionate use of an array of weapons including tear gas and chemical irritants, or
    - the routine use of preventive tactics such as the 'kettling' and prior detention of peaceful demonstrators, or the unregulated deployment of undercover police officers and other forms of surveillance of protest groups;

[1] Several laws passed by OSCE Participating States impose blanket prohibitions on assemblies in the vicinity of locations such as hospitals, schools, local government offices, power stations, airports, and Parliament buildings (to name but a few). The OSCE-ODIHR – Venice Commission *Guidelines* stress that the blanket application of legal restrictions should be avoided.

In other countries, however, it is not the legislative framework that is at fault. On paper, at least, the law appears to reflect international standards and good practices. But nonetheless, bureaucratic and restrictive practices serve to significantly chill the enjoyment of this fundamental right.

In my introduction to this morning's session, I want to raise and focus upon two questions – (1) **why** do (or why should) we *value* freedom of assembly, and does the value of freedom of assembly differ from that of other rights like *expression* and *association*? and (2) **how**, then, should Participating States best seek to facilitate its exercise?

Given that ODIHR, with the Expert Panel on Freedom of Assembly, and with the Council of Europe's Venice Commission, is currently beginning work on a 3rd edition of the Guidelines on Freedom of Peaceful Assembly, it would be very helpful if during this session, you could highlight and point to any gaps, omissions, or weaknesses in the current Guidelines document that you would like to see remedied in the next edition. What new issues have arisen in relation to freedom of assembly, or what old challenges have arisen in new or unforeseen ways? What do you regard as the most pressing challenges in seeking to truly facilitate freedom of assembly, and monitor compliance with OSCE commitments?

1) Why is freedom of peaceful assembly valuable and how is its value to be distinguished from the value of the rights to freedom of expression and the right to freedom of association?

a) 'Assembly' versus the right to freedom of expression

It has been suggested that, because we live in a 'networked' society, the right of public assembly could today be regarded as *less* important than it once was – people now have so many communicative tools at their disposal, so many ways of making their voices heard.

I want to suggest, however, that such enhanced opportunities to 'speak' do not necessarily equate with increased prospects of being heard – not least because of the saturation of the media 'marketplace'. More fundamentally, the tools of communication which make freedom of *speech* possible (whether broadcast, print or online) are

qualitatively different from the ability to physically assemble together in public space.[2] While freedom of assembly *is* undoubtedly often about communication – conveying a particular message – it is not *only* the communicative aspects of freedom of assembly that we ought to value. The *physical presence* of people together in public space[3] serves to constitute 'the people'. Every gathering, every coming together in public represents a claim to a specific target audience that 'We are the people [too]' – not necessarily all the people, but a part of the people.[4]

In arguing then that freedom of assembly has such a role in constituting 'the people', I want to challenge the assumption that freedom of assembly is merely a subset of freedom of expression. On this basis, we must exercise great caution in transplanting, borrowing or applying to freedom of assembly some of the doctrines which are commonly used in the regulation of freedom of expression.

One such commonplace doctrine in the regulation of speech is the test which asks whether there might be ample 'alternative channels' available to a speaker – where the availability of such alternatives serves to mitigate the severity of any restrictions imposed. My point here is that the physical presence, the coming together of people in public space is irreducible – it cannot easily be substituted by, or switched to, an alternative channel (such as a venue which lacks the same spatial value or symbolic significance as the venue desired by the assembly participants).[5] We should never lose sight of the fact that *any* place-based restrictions – even seemingly minor restrictions – can seriously undermine this intrinsic (constitutive) role of freedom of assembly in enabling people to claim to a particular audience that they are 'the people'.

b) Assembly versus the right to freedom of association

- In thinking further about what it is that we value about freedom of assembly, I've spoken so far about the relationship between freedom of assembly and freedom of

[2] We might value freedom of *speech* because it advances self-fulfillment or individual autonomy, or because it assists us to discover 'truth', and/or because it strengthens democratic participation and will-formation. While we might value freedom of assembly for these reasons too, not only does freedom of assembly perform a different role from freedom of speech in relation to these goals, freedom of assembly is to be valued for other reasons.
[3] Which precedes any act of speech.
[4] Of course, 'the people' are fragmented and plural – the 'We' is not some homogenous, unified collective.
[5] Though in many speech cases, we might also properly question whether one form of speech can properly be defrayed by substituting it with another.

expression. I would like now to say a few words about the relationship between the right to freedom of assembly and the right to freedom of association – and more specifically, about the issue of leaderless assemblies.

- Freedom of assembly and freedom of association exist on the same spectrum – these two rights are not binary or bipolar provisions, entirely separate from one another.[6] Sometimes associations assemble, and sometimes those who assemble are also members of associations.[7] Furthermore, sometimes associations are highly structured and organised. Sometimes they are less so. The same is true of assemblies – sometimes there is a clearly identifiable organiser or organisers, but sometimes it is a more amorphous group with no clearly identifiable leader (as might, for example, be seen in Critical Mass bicycle rides, or in the Occupy movement where decisions are reached through horizontal rather than hierarchical processes).

- If we accept this factual reality – that assemblies might not be organised in the traditional way – it requires us to rethink the often taken-for-granted idea that an assembly must or should have an organiser. Many in this room will be familiar with legal provisions which require, for example, 'the organizer' to be present at an assembly, or which require there to be some kind of organizing committee. Such requirements to *be 'organized'* however may erode both the essential core of the *freedom* to assemble and the *spontaneity* with which it ought to be enjoyed.

- The key point here is that State and local authorities should seek to accommodate the preferred organizational form – or lack of organizational form – of those wishing to assemble. In an age when networks are created instantaneously, the authorities should not seek to impose an organizational straitjacket on those who gather together in public spaces, and assemblies should not be required to take on the characteristics of more formally constituted associations.[8]

I said at the outset that I wanted to touch upon two questions. The second of those was:

[6] Even though they are often properly treated as separable under the International Covenant or in the case law of the Strasbourg Court.
[7] The notion of 'occupation', for example, implicitly involves both assembly and association.
[8] Though this is not to suggest that associations ought to be more heavily regulated.

How can Participating States best facilitate the exercise of freedom of peaceful assembly?

Given the value of freedom of assembly, it is unsurprising that much attention has been placed on the **positive obligations** which States have in protecting freedom of peaceful assembly. These positive obligations include the duty of states to provide protestors with access to public space. The case law of the European Court of Human Rights makes it clear that positive obligations are especially important in relation to assemblies with controversial or unpopular messages. It is also worthy of emphasis that such obligations also extend to unnotified (in other words, technically unlawful), assemblies where these remain peaceful. The authorities must also ensure that every effort is made to facilitate simultaneous assemblies (rather than routinely using the notification of one assembly as the pretext for restricting another). Demonstrations and counter-demonstrations should take place within sight and sound of one another, though the authorities should ensure that those who assemble are adequately protected from others from whom they might fear violence. It is rightly emphasized that law enforcement officials and local authorities take such positive obligations seriously.

But such positive obligations are only one side of the story. There is also a negative obligation of the state not to interfere – and it is this negative obligation which underlies the presumption that everything not expressly forbidden in law should be permitted. A recent opinion written by judges of the European Court of Human Rights made the point very well. The judges argued that:

> 'There is a risk that by developing the notion of positive obligations to protect the [right to freedom of peaceful assembly (amongst others)], … one can lose sight of the fundamental negative obligation of the State to abstain from interfering.'[9]

The failure to give sufficient weight to this **negative obligation** of non-interference – of non-regulation – is one of the primary threats to the protection of freedom of assembly in the OSCE space. If we begin to think about and understand the *value* of assemblies, then we must also rethink the way in which we approach the regulation of assemblies, and some of the

[9] Joint dissenting opinion of Judges Ziemele, Sajó, Vučinić & De Gaetano in *Animal Defenders International v UK* (App. no. 48876/08, judgment of 22 April 2013).

assumptions that underlie familiar – but perhaps unnecessary – forms of restrictive intervention. The regulation of longer-term assemblies,[10] and the wearing of masks[11] during assemblies are two examples where regulation is often excessive and unnecessary.

Equally, when considering what a proportionate policing or law enforcement response might be to an assembly (including spontaneous assemblies) we must avoid making false equivalencies which undervalue freedom of assembly. One such false equivalency is that public assemblies are simply 'crowds'. Assemblies are fundamentally different from other crowds precisely because precisely because they engage a fundamental freedom – one that is regarded as foundational to the integrity of the democratic system. **The starting premise for law enforcement officials therefore, should not be one of a 'public order' problem to be managed or controlled, but rather of a fundamental freedom to be facilitated.**

We must also be attentive to the possibility that the practice of notification in some countries can be highly burdensome. So we cannot simply say that notification is good; and authorization is bad. Some notification processes are notification only by name – but are effectively authorization procedures in every other regard.[12]

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[10] It is sometimes emphasized that freedom of assembly is by definition temporary and transient. Yet, the Guidelines specifically state that the term 'temporary' should not preclude the erection of protest camps or other non-permanent constructions (para.18). Indeed, the physical presence of long-term protests **reflects the permanence of the very institutions and perceived injustices that they seek to challenge**. As such, the *duration* of an assembly may itself be intrinsic to the message being communicated. We should not, for example, be surprised that those who wish to assemble might wish to *occupy* public space to call into question issues of ownership, access, and legitimacy of those in positions of power. If we truly value freedom of assembly 'as the cornerstone of a vibrant and pluralist democracy' (as the description of this session in the programme claims), our starting point should not be to presume that a protest should be short-term, asking whether a group has been permitted to assemble for *long enough* – but rather, treating each case on its own facts, asking first and foremost whether it has been convincingly established that any form of intervention or regulation is necessary at all.

[11] Similarly, regarding the issue of wearing masks or otherwise concealing one's identity during an assembly – we should not assume that this is always an attempt to evade liability or that masks are inevitably a precursor to violence. Why should people not be able to protest anonymously, unless there is unequivocal and demonstrable evidence that they intend to use violence? Individuals might fear negative personal repercussions (either from the State or from family, friends or other third parties) for being identified as being part of a protest group; or a mask may itself be part of the message – representing both the identity and unanimity which the protesters embody.

[12] Under such systems, the relevant local authority might respond to the submitted notification by refusing to permit the assembly according to the terms notified, offering instead some alternative (often distant/remote) venue for the gathering. In many cases, no explanation – or an entirely spurious reason – is given by the authorities. Sometimes the refusal may be content-based, reflecting the political biases/ideological preferences of the local authority. Sometimes the authority might say that another assembly has already been notified for the same location. When the organiser receives this reply from the authorities, some organisers might simply accept the proposed alternative (believing that acceptance is the only possible/realistic course of action). In such cases, their right to freedom of peaceful assembly is very far from being 'practical and effective' as required by international human rights law. Other organisers may enter into back-and-forth negotiations about possible

Such procedures often entail negotiations between the authorities and the assembly organiser. Moreover, these negotiations are something that are almost always unregulated by law. Freedom of assembly must not be reduced to whatever remains – what is left behind – after protracted negotiations with the authorities. As the description of this session in the programme reads, negotiations between both sides should not oblige assembly organizers to accept suggestions made by the authorities.[13] Indeed – because protests may very well be directed *against* the police or municipal authorities – it ought to be possible for an assembly organiser to refuse to enter into negotiations without such a refusal immediately leading to restriction or prohibition.

In conclusion, it is imperative to re-conceptualize freedom of assembly as a democratic strength – not as a threat to it. I have suggested:

- That in a modern, networked society – far from the importance of freedom of assembly being diminished, its value is greater than ever;
- That freedom of assembly is not merely a facet – another form – of freedom of expression (and thus commensurate with broadcast, print or online media). As such we should not simply borrow from freedom of expression the test of whether there might be adequate 'alternative channels';
- That we should not impose necessarily impose organizational (association-like) requirements on those who wish to assemble spontaneously; and,
- That the positive obligations to protect and facilitate the right to freedom of assembly are only one side of the story, and we must pay greater attention to the negative obligation of the state to interfere – not to unnecessarily regulate – freedom of assembly.

It is my hope that this session will provide an opportunity to critically reflect upon what improvements could be made in each of our countries. As I said at the outset, we can all do better.

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venues (again potentially diminishing the core protection afforded by the right), while still others may seek to challenge the local authorities' refusal by way of lengthy court proceedings (often unsuccessfully).

[13] The *Guidelines* similarly emphasize that an assembly organiser should not be compelled to accept whatever alternatives the authorities might offer.