

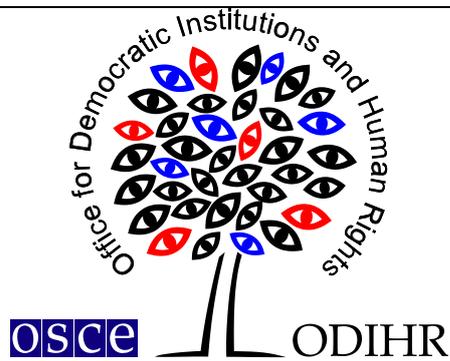
Warsaw, 7 September 2007

Opinion-Nr.:

[Opinion-Nr.: FoA – MDA/093/2007

(IU)]

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## **OSCE/ODIHR Panel on the Freedom of Assembly**

### **OSCE/ODIHR OPINION**

### **ON THE DRAFT LAW OF THE REPUBLIC OF MOLDOVA**

### **ON ASSEMBLIES**

*Disclaimer: This Opinion was approved by the OSCE/ODIHR Expert Panel on Freedom of Assembly as a collective body and should not be interpreted as endorsing any prior comments on the Draft Law made by individual Panel members in their personal capacities.*

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Draft Law of the Republic of Moldova on Assemblies*

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## **I. INTRODUCTION**

1. On 21 August 2007, the OSCE/ODIHR was requested by the Ministry of Justice of the Republic of Moldova to review the draft Law of the Republic of Moldova on Assemblies (hereinafter referred to as the “draft Law” or the “Draft”).
2. This Opinion has been prepared based on the unofficial English translation of the draft Law.

## **II. SCOPE OF REVIEW**

3. The Opinion analyzes the draft Law from the viewpoint of its compatibility with the relevant international and regional standards and the OSCE Commitments. The Opinion also examines the draft Law in light of international good practices on the regulation of public assemblies and freedom of peaceful assembly, as well as the relevant caselaw.
4. The standards referred to by the Opinion may not be only those legally binding for the Republic of Moldova, but may include international instruments not binding upon Moldova as well as documents of declarative or recommendatory nature which have been developed for the purpose of interpretation of relevant provisions of international treaties. The Opinion makes extensive use of the OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly<sup>1</sup> (hereinafter referred to as “the OSCE/ODIHR Guidelines” or “the Guidelines”).
5. The OSCE/ODIHR notes that the opinion provided herein is without prejudice to any other opinions or recommendations that the OSCE/ODIHR may wish to make on the issues under consideration.

## **III. EXECUTIVE SUMMARY**

6. The Draft Law marks excellent progress in creating a favorable legal framework for the exercise of freedom of peaceful assembly in the Republic of Moldova. It is not only a significant improvement compared to the extant law on the subject, but may well serve as example of good practice in the OSCE region. Particularly welcome are provisions enabling the application of the presumption in favor of holding assemblies and allowing the dispersal of public assemblies only as a measure of last resort.
7. At the same time, a number of provisions raise concerns of varying degrees of importance. In particular, there remains the need to clearly spell out the principle of proportionality in the law and to incorporate the corresponding balancing test, to improve safeguards against discrimination, and to clarify the definition of places available for public assemblies.
8. Below follows a detailed list of recommendations:
  - a) It is recommended that a clear definition of a public assembly be incorporated in the text of the Draft. The drafters may consider covering also religious assemblies which fit the standard definition of assemblies in that they have an expressive rather than celebratory purpose. At the same time, clear definitions

<sup>1</sup> The Guidelines on Freedom of Peaceful Assembly have been prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly. They have been published in 2007. The text of the Guidelines can be found in English and Russian at the following address: [http://www.osce.org/odihr/item\\_11\\_23835.html](http://www.osce.org/odihr/item_11_23835.html).

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by the Draft of “*spontaneous assemblies*” and “*simultaneous assemblies*” are welcome as contributing to the overall clarity of the law and predictability in its application. (Article 3)

- b) It is suggested that the principle of proportionality be added to the list of main principles the regulation of public assemblies shall be based on, and the Draft reword the definition of the presumption in favor of holding assemblies so as to draw a clear separation line between the presumption and the principle of proportionality. (Article 4)
- c) It is recommended that the provisions concerning the principle of non-discrimination be revised and “*all citizens*” be replaced with “*everyone*.” Should the drafters wish to retain the possibility of imposing restrictions on political activity of aliens under the proposed law, very specific language allowing to ban speech activities by non-nationals that directly burden national security may be added. (Article 4(2))
- d) It is therefore recommended that the provisions concerning places open for public assemblies be revised so as to clearly state that public places that everyone has an equal right to use and that are not buildings or structures (such as public parks, squares, streets, avenues, sidewalks, pavements, and footpaths) are available for assemblies. (Article 5(1))
- e) It is suggested that Article 5(2) be deleted. The listed facilities are not public places since they exist for particular purposes (transportation, medical treatment, etc.) and it cannot be claimed that everyone has an equal right to use them, and listing them separately is superfluous. (Article 5(2))
- f) The imposition of any restrictions on the ground that the assembly would otherwise unreasonably infringe others’ human rights should thus always be a result of a balancing exercise taking into account all circumstances of each individual case in strict accordance with the principle of proportionality. It is therefore recommended that the provision requiring the organizers to “*select the place of assembly so that to minimally restrict the traffic on the public roads*” be removed from the Draft. For the same reason, it is recommended that the reference to traffic be removed from the provisions of Article 16 of the Draft. (Articles 5(3) and 16)
- g) It is recommended that “*inconvenience*” be replaced with more specific language. It is also recommended that reference be made to the principle of proportionality and the balancing test. On the other hand, since visual and/or sound effects may also unreasonably interfere with others’ human rights, therefore the drafters may consider expressly mentioning that their use shall be subject to the balancing test as well. The use of the word “*irrational*” in the wording of the article also adds vagueness to the provision and it is recommended that “*irrational*” be replaced with a more specific word (unless the vagueness is not caused by problems with the translation and the Romanian original reads different.) (Article 9)
- h) The requirement that the authorities provide the organizer with a valid proof of the receipt of notification, as well as the express provision for the use of

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negotiation in the case of conflicting notifications are welcome. (Articles 10 and 11)

- i) It is recommended that the provisions setting a time limit before which a notification cannot be filed be removed from the Draft. (Article 10(1))
- j) It is recommended that provisions which prohibit advertising the event prior to the filing of the notification be deleted as an abridgement of freedom of speech, as well as presenting purely logistical problems for the organizers (talking about the assembly is a way to make sure that participants can plan ahead, particularly if they need to travel to it) (Article 13(1))
- k) The provision approving the right to discourage participation in assemblies is recommended for deletion (Article 13(2))
- l) It is recommended that the relevant provisions of Article 14 concerning non-spontaneous assemblies be amended to similarly place the burden of proof on the plaintiff to that other measures to the same effect be taken. (Articles 12 and 14(3))
- m) It is recommended that the provision on video/audio recording of assemblies be complemented by an express prohibition against data retention. The drafters may also wish to consider adding a provision subjecting any requirement by the police to surrender data carrier (such as film, miniDV or magnetic tape) to prior judicial scrutiny. (Article 17(1))
- n) It is recommended that the provisions concerning stewarding of public assemblies be revised to remove the requirement that organizers deploy stewards and instead to provide for a possibility for the organizers to make stewarding arrangements. It is recommended that the requirement that prospective stewards' names be communicated to the police be removed. Instead, the drafters may consider including a provision requiring stewards to wear special badges making them easily identifiable. It is also recommended that the definition of a steward be revised to clarify that stewards do not have the powers of law enforcement officials and cannot use force, but their responsibilities lie with facilitating the event they are deployed to and helping ensure compliance with any lawfully imposed restrictions. (Article 18(3))
- o) The express provisions that isolated incidents of sporadic violence during an assembly should be dealt with on an individual basis rather than serve as a ground for dispersing an assembly, that a dispersal can only be a measure of last resort, as well as that an assembly cannot be dispersed on the sole ground of not being notified are welcome. (Article 21)
- p) It is recommended that the Draft be reinforced with a safeguard against inappropriate, excessive, or unlawful use of force by law enforcement (possibly via inserting references to relevant legislative acts). It should set out the circumstances that justify the use of force (including the need to provide adequate prior warnings), as well as the level of force acceptable to deal with various threats. (Article 21(3))

- q) It is recommended that the Draft include a provision that the police be liable for breaches of the Law. (Article 23)

#### **IV. ANALYSIS AND RECOMMENDATIONS**

##### ***4.1 Definitions***

9. The Draft Law does not define an “assembly,” only providing that its coverage extends to events that take place in public places,<sup>2</sup> and expressly excluding religious and commercial events from its scope.<sup>3</sup>
10. A clear and unambiguous definition of a public assembly is central to ensuring efficient operation of an act regulating such assemblies and to minimizing the risk of arbitrary interpretation. Among other issues, the definition of a public assembly helps distinguish between a public assembly (defined by the OSCE/ODIHR Guidelines “*the intentional and temporary presence of a number of individuals in a public place that is not a building or structure for a common expressive purpose*”<sup>4</sup>) and a gathering that does not qualify as such without, however, being governed by any specific legislation. An example may be a group of teenagers “hanging out,” which, despite its being an intentional and temporary presence of a number of individuals in a public place that is not a building or structure, does not, however, constitute a public assembly due to the lack of the element of “common expressive purpose.” Moreover, a clear definition helps distinguish between participants and mere bystanders by placing a due stress on the element of intentional presence.
11. It is recommended that a clear definition of a public assembly be incorporated in the text of the Draft. The drafters may consider covering also religious assemblies which fit the standard definition of assemblies, meaning where the religious has an expressive purpose (communicating and/or arguing a certain viewpoint), rather than celebratory (as in the case of a religious festival). The OSCE/ODIHR Guidelines may be recommended to the drafters as a source of inspiration.
12. At the same time, clear definitions by the Draft of “*spontaneous assemblies*” and “*simultaneous assemblies*”<sup>5</sup> are welcome as contributing to the overall clarity of the law and predictability in its application.

##### ***4.2 Main principles***

13. Article 4 of the Draft sets forth the main principles the public assemblies law shall be premised on, these principles being the presumption of favor of holding assemblies, non-discrimination, and legality.<sup>6</sup>

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<sup>2</sup> Draft Law, Article 2(1) (“*This Law stipulates the procedure for arrangement of processions, meetings, assemblies, pickets or other forms of assemblies organized in public, hereinafter referred to as meetings.*”)

<sup>3</sup> *Id.*, Article 2(2) (“*The provisions of this Law do not refer to organizing and holding of: (a) religious meetings, inform of public workshop or other traditional manifestations; (b) commercial cultural events, sports competitions, concerts and entertainment activities.*”)

<sup>4</sup> OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, at p. 24.

<sup>5</sup> Draft Law, Article 3 (“*For the purposes of this Law: A spontaneous assembly shall mean an assembly, that has been arranged or organized as a direct and immediate response to social events, which, in the opinion of participants, cannot be postponed, and as a result the usual notification procedure is not practical or possible; Simultaneous assemblies shall mean assemblies organized in the same place and time, which may or may not have the same motives and purposes, and whose organizers may have similar, different or controversial opinions.*”)

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14. With respect to the presumption in favor of holding assemblies, the Draft provides that both at the stage of the consideration of the notification and later during the actual assembly the authorities should be facilitating the assembly to the maximum extent possible, making sure any breaches of the law that may occur are addressed on a case-by-case basis and do not serve as a justification for banning or terminating the assembly in question (“*such actions shall be taken as to remove only illicit elements of the meeting*”).
15. While a clearly welcome move on the part of the drafters, this provision pertains to the principle of proportionality rather than to that of the presumption in favor of holding assemblies. Again, the OSCE/ODIHR Guidelines may prove useful to the drafters in wording the relevant provisions as they dwell at length at both principles. With regard to the proportionality, the Guidelines provide that “[a]ny restrictions imposed on freedom of assembly must be proportional. The least intrusive means of achieving the legitimate objective being pursued by the authorities should always be given preference. The dispersal of assemblies may only be a measure of last resort. The principle of proportionality thus requires that authorities not routinely impose restrictions that would fundamentally alter the character of an event, such as routing marches through outlying areas of a city. The blanket application of legal restrictions tends to be overly inclusive and thus fails the proportionality test because no consideration is given to the specific circumstances of the case in question.”<sup>7</sup> In turn, the presumption in favor of holding assemblies means that “[a]s a fundamental right, freedom of peaceful assembly should, insofar as possible, be enjoyed without regulation. Anything not expressly forbidden in law should be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so.”<sup>8</sup>
16. It is therefore suggested that the principle of proportionality be added to the list of main principles the regulation of public assemblies shall be based on, and the Draft reword the definition of the presumption in favor of holding assemblies so as to draw a clear separation line between the presumption and the principle of proportionality.
17. With respect to the principle of non-discrimination, the wording of the relevant provisions, in particular the use of the word “citizens”, may be interpreted as restricting the exercise of freedom of assembly by non-nationals (foreign nationals and/or stateless persons). This is internally contradictory since it singles out a group which may be lawfully discriminated against. Moreover, this is clearly incompatible with international law, which requires that non-nationals “*receive the benefit of the right of peaceful assembly*.”<sup>9</sup> It is therefore important that the law does not extend freedom of peaceful assembly only to citizens, but that it also includes stateless persons, refugees, foreign nationals, asylum seekers, migrants and tourists.

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<sup>6</sup> *Id.*, Article 4 (“*This Law applies with respect of the following principles: the presumption in favour of organization of an assembly, according to which at the examination of a request by the authorities, as well as during the insurance of the public order at the meetings, such actions shall be taken as to remove only illicit elements of the meeting, otherwise granting to the possible extent the right of assembly; non-discrimination, according to which the right to assembly is guaranteed to all citizens, irrespective of their race, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, wealth or social origin; legality, according to which as justifying reasons for any form of prohibition or limitation of the freedom of assembly shall serve only the legal provisions, without the possibility for authorities to question the opportunity of an assembly.*”)

<sup>7</sup> OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, at p. 14.

<sup>8</sup> *Id.*, at p. 13.

<sup>9</sup> U.N. Human Rights Committee, General Comment 15, The position of aliens under the Covenant.

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18. It may be argued that restrictions on the exercise of freedom of assembly by non-nationals can be justified in the light of Article 16 of the ECHR which provides that “[n]othing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.” However, there is a growing international consensus that the imposition of blanket restrictions on the right of non-nationals to peaceably assemble would be a disproportionate response<sup>10</sup>. The OSCE/ODIHR Guidelines emphasize that “*the application of Article 16 [...] should be confined to speech activities by non-nationals which directly burden national security. There is no reason to stop non-nationals from participating in an assembly that, for example, challenges domestic immigration laws or policies. The increase in transnational protest movements also underscores the importance of facilitating freedom of assembly for non-nationals.*”<sup>11</sup>
19. It is recommended that the provisions concerning the principle of non-discrimination be revised and “*all citizens*” be replaced with “*everyone*.” Should the drafters wish to retain the possibility of imposing restrictions on political activity of aliens under the proposed law, very specific language allowing to ban speech activities by non-nationals that present a real threat to national security may be added.

#### **4.3 Place and manner of assembly**

20. The Draft Law provides that “[a]ssemblies may be organized in any open to the public place, where a prior obtaining of an authorization does not condition the access.”<sup>12</sup>
21. It is not clear what places may fall in the category of “open to the public” but nevertheless requiring a prior authorization of access. If this language implies places other than publicly owned (i.e. private property such as shopping malls, showrooms or privately owned concert facilities), the Draft should say so explicitly so as to prevent any possible misunderstanding and misinterpretation of the provision as allowing restrictions on access to and assembling in public places (which would be contrary to the very nature of public places as sites which everyone has equal right to use). The OSCE/ODIHR Guidelines stress that “[p]articipants in public assemblies have as much a claim to use such sites for a reasonable period as everyone else. Indeed, public protest, and freedom of assembly in general, should be regarded as an equally legitimate use of public space

<sup>10</sup> In this regard, it is noteworthy that the European Court of Human Rights has ruled that “*the fact that the applicant was an illegal immigrant [does not suffice] to justify a breach of her right to freedom of assembly*” (European Court of Human Rights, *Cissé v. France* (9 April 2002), paragraph 50). This implies that aliens regardless of their status (legal or illegal, stateless persons, refugees, asylum seekers, tourists) should not be prevented from exercising their right to freedom of peaceful assembly. The above-mentioned Court decision does not make a distinction between “participants” and “organizers”, which would imply that such distinction is irrelevant. Furthermore, international law on this matter has evolved over time. The CCPR General Comment No 15 on the Position of Aliens under the Covenant stresses that “[a]llies receive the benefit of the right of peaceful assembly ... 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 lawfully imposed under the Covenant.” (para 7) This trend is further evidenced in the Council of Europe Parliamentary Assembly Recommendation on the Political Rights and Position of Aliens which recommends the development of “*proposals for the amendment of the European Convention for the Protection of Human Rights and Fundamental Freedoms in such a way as to exclude restrictions at present authorised by Article 16 with respect to political activity on the exercise by aliens of the freedoms guaranteed by Article 10 (freedom of expression) and Article 11 (freedom of association)*.” (Council of Europe Parliamentary Assembly Recommendation 799 (1977) on the Political Rights and Position of Aliens).

<sup>11</sup> OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, at pp. 36-37.

<sup>12</sup> Draft Law, Article 5(1) (“*Assemblies may be organized in any open to the public place, where a prior obtaining of an authorization does not condition the access.*”)

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*as the more routine purposes for which public space is used (such as pedestrian and vehicular traffic).<sup>13</sup>*

22. It is therefore recommended that the provisions concerning places open for public assemblies be revised so as to clearly state that public places that everyone has an equal right to use and that are not buildings or structures (such as public parks, squares, streets, avenues, sidewalks, pavements, and footpaths) are available for assemblies.
23. With respect to the provisions that prohibit assemblies “*on the territories of airports, railroad stations, public authorities, hospitals or medical institutions,*”<sup>14</sup> there is no clear reason for the inclusion of such list. The listed facilities are not public places since they exist for particular purposes (transportation, medical treatment, etc.) and it cannot be claimed that everyone has an equal right to use them, and listing them separately is superfluous. It is suggested that Article 5(2) be deleted.
24. The Draft Law also requires that the organizers “*select the place of assembly so that to minimally restrict the traffic on the public roads.*”<sup>15</sup> This requirement is vulnerable to overly restrictive interpretation and may result in assemblies forced out of the livelier, more populated neighborhoods – which are naturally more attractive as assembly venues as they allow to communicate the message to more people as well as possibly by virtue of closer proximity to the government buildings – to quieter, less central districts, thus preventing the organizers and participants from exercising their fundamental freedom.
25. The protection of the rights and freedoms of others, albeit a legitimate ground for restricting the exercise of freedom of peaceful assembly under the international law,<sup>16</sup> requires that the balancing test be applied to ensure that the restrictions are not imposed unless the assembly in question will unreasonably infringe the rights and freedoms of others. It should always be borne in mind that freedom of assembly, by definition, amounts only to temporary interference with these other rights.
26. The regulatory authority has a duty to strike a proper balance between the important freedom of peaceful assembly and the competing rights of those who live, work, shop, trade, and carry on business in the locality affected by an assembly. The OSCE/ODIHR Guidelines provide that “[w]here the regulatory authority restricts an assembly for the purpose of protecting the competing rights and freedoms of others, the body should state:
  - *The nature of any valid rights claims made;*
  - *How, in the particular context, these rights might be infringed (outlining the specific factors considered);*

<sup>13</sup> OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, at p. 25.

<sup>14</sup> Draft Law, Article 5(2) (“*Meetings shall not be organized on the territories of airports, railroad stations, public authorities, hospitals or medical institutions.*”)

<sup>15</sup> *Id.*, Article 5(3) (“*The organizers shall select the place of assembly so that to minimally restrict the traffic on the public roads.*”)

<sup>16</sup> See the International Covenant on Civil and Political Rights, Article 21 (“*No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*”) and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 11 (“*No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*”) (Emphasis added.)

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- *How, precisely, the authority’s decision mitigates against any such infringement (the necessity of the restrictions); and*
- *Why less intrusive measures could not be used.*<sup>17</sup>

27. In summary, the imposition of any restrictions on the ground that the assembly would otherwise unreasonably infringe others’ human rights should always be a result of a balancing exercise taking into account all circumstances of each individual case in strict accordance with the principle of proportionality. It is therefore recommended that the provision requiring the organizers to “*select the place of assembly so that to minimally restrict the traffic on the public roads*” be removed from the Draft. For the same reason, it is recommended that the reference to traffic be removed from the provisions of the Draft requiring that assemblies be held so as to ensure “*the access to the buildings and the traffic on public roads.*”<sup>18</sup>

28. The Draft expressly allows the use of special equipment for creating visual and/or sound effects, as well as putting up temporary structures.<sup>19</sup> The only condition it stipulates concerns temporary structures, in which respect the organizer is required to “*take measures in order to prevent causing of any inconveniences or irrational damages to the participants, by-passers or environment.*” The use of the word “irrational” also adds vagueness to the provision and it is recommended that “irrational” be replaced with a more specific word (unless the vagueness is not caused by problems with translation and the Romanian original reads different.)

29. The word “inconvenience” may be deemed inappropriate in this context due to its vagueness, and it is recommended that it be replaced with more specific language. It is also recommended that reference be made to the principle of proportionality and the balancing test (see discussion under para 15-16). On the other hand, visual and/or sound effects may also unreasonably interfere with others’ human rights (e.g. at night in a residential neighborhood), therefore the drafters may consider expressly mentioning that their use shall be subject to the balancing test as well.

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#### **4.4 Notification process. Spontaneous assemblies**

30. The requirement that the authorities provide the organizer with a valid proof of the receipt of notification,<sup>20</sup> as well as the express provision for the use of negotiation in the case of conflicting notifications<sup>21</sup> are welcome.

<sup>17</sup> OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, at p. 41.

<sup>18</sup> Draft Law, Article 16 (“*The assemblies shall be held only in a peaceful manner, without the use of weapons, ensuring the access to the buildings and the traffic on public roads.*”)

<sup>19</sup> *Id.*, Article 9 (“(1) *During the assemblies, any graphic or sound device for expression of attitudes or opinions, any special sound amplifiers and other objects specific to organization of an assembly may be used.*

(2) *It should also be allowed to set any temporary constructions, however the organiser shall take measures in order to prevent causing of any inconveniences or irrational damages to the participants, by-passers or environment.*”)

<sup>20</sup> *Id.*, Article 10(3) (“*The local authority body responsible for the registration of the requests shall register the prior declaration and shall issue the organiser a stamped copy of it, containing the number, date and hour of registration of the prior declaration.*”)

<sup>21</sup> *Id.*, Article 11(1) (“*If there are more applicants that have registered prior declarations regarding the organization of meetings in the same place and time, the competent local public authority shall organize a sitting with the participation of all applicants in order to find the adequate solution for organization of each simultaneous meeting.*”)

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31. It is particularly welcome that the Draft accommodates spontaneous assemblies by allowing not to file a written notification or to file one after the deadline.<sup>22</sup> It is also welcome that the Draft contains an express requirement that the State extend protection to spontaneous assemblies.<sup>23</sup> Finally, the express provision that, where the legality of an assembly is being challenged in court, the court proceedings do not have a suspensive effect on the assembly is welcome as practically reinforcing the presumption in favor of holding assemblies.<sup>24</sup> Moreover, this rather innovative approach may well serve as an example of good practice.
32. It is also welcome that, where a lawsuit is filed seeking to restrict or ban a spontaneous assembly, the Draft places the burden of proof on the plaintiff<sup>25</sup>. This should however not be construed as implying that *a contrario* the burden of proof does not rest on the plaintiff when the assembly is not spontaneous. Therefore, it might be worth considering amending the relevant provisions of Article 14 or taking any other step so that such interpretation cannot be held.
33. At the same time, the Draft does not allow notification more than a month prior to the event.<sup>26</sup> It is hard to see why such a short time frame (or any time limit, for that matter) needs to be imposed. A large assembly may require advance preparation and time for publicity. For example, if the organizer wants to have an assembly to propose a major reform and plans to have well known political figures present during the assembly, plans will have to be made far ahead of time in order to be sure the political figures in question are available and do not have conflicting commitments. The 30 day limit may preclude this since such political figures tend to have busy schedules and are unlikely to be available at a short notice. It is recommended that the provisions setting a time limit before which a notification cannot be filed be removed from the Draft.
34. This problem is made more complicated by provisions which prohibit advertising the event prior to the filing of the notification.<sup>27</sup> If passed, these provisions would effectively prohibit discussing an assembly publicly (which is a way of advertising it) more than a month prior to the event. Apart from posing purely logistical problems for the organizers

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<sup>22</sup> *Id.*, Article 12(1) (“*In case of spontaneous assemblies notification is admissible even without respecting the conditions regarding the written format or the time limit when it has to be submitted. In this case it is sufficient to provide information on the date, hour and place of the meeting, its organisers, as well as services requested from authorities.*”)

<sup>23</sup> *Id.*, Article 12(3) (“*Authorities shall take all necessary measures to ensure the security of all spontaneous assemblies.*”)

<sup>24</sup> *Id.*, Article 12(4) (“*Competent public authorities may file lawsuits in order to challenge the conditions and terms in which spontaneous meetings have taken place. The judicial procedure does not have a suspensive effect on the meetings and the burden of proof is on the initiator of the lawsuit.*”) and Article 14(3) (“*If after consultation with police, the local public authorities hold convincing evidence that the envisioned assembly will be organised in violation of the provisions of article 8 of this law or of article 40 of the Constitution, the responsible person representing the local authorities may file a lawsuit at a *ratione loci* competent court, requesting the prohibition of the respective assembly. Initiation of the lawsuit does not suspend the right to hold the assembly.*”) (Emphasis added.)

<sup>25</sup> *Id.*, Article 12(4) (“*Competent public authorities may file lawsuits in order to challenge the conditions and terms in which spontaneous meetings have taken place. The judicial procedure does not have a suspensive effect on the meetings and the burden of proof is on the initiator of the lawsuit.*”) (Emphasis added.)

<sup>26</sup> *Id.*, Article 10(1) (“*Any person intending to hold an assembly, shall notify the public authorities from the respective region or territorial-administrative unit, in writing, by a prior declaration, with at least five days but not earlier than a month prior to the meeting.*”)

<sup>27</sup> *Id.*, Article 13(1) (“*Organisers of the assembly, as well as other persons or legal entities, have the right, from the moment the prior declaration has been submitted, to disseminate information regarding the organisation of the assembly, place, time and its purposes or any other relevant information, to encourage the public to take part at the meetings through speeches, flyers, announcements, information campaigns, other legal methods.*”)

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(talking about the assembly is a way to make sure that participants can plan ahead, particularly if they need to travel to it), these provisions may be seen as exceeding the scope of restrictions upon the freedom of expression that are permissible under international law. It is therefore recommended that they be deleted.

35. On a similar note, the provision approving the right to discourage participation in assemblies<sup>28</sup> is recommended for deletion. This provision is superfluous in that it addresses an issue that pertains to freedom of opinion and expression (as a specific case of exercising the right to disagree with a certain opinion and to publicly express this disagreement). It creates the impression that such a right could only be exercised if specifically provided for in the law, an approach which is not compatible with very essence of the freedom of expression.

#### **4.5 Video/audio recording**

36. The Draft contains a provision that “[a]ny person may register the meetings on audio or video devices.”<sup>29</sup> While apparently intended to facilitate media coverage of public events (the provision is question is directly followed by a clause requiring that organizers and the authorities facilitate media access to assemblies),<sup>30</sup> this provision, in the absence of safeguards against data retention, may result in interference with privacy, for instance, not preventing the police from storing the recorded data for unlimited periods of time. It is therefore recommended that the provision in question be complemented by an express prohibition against data retention, either through inserting the prohibition in the text of the draft, or through inserting references to relevant legislation. The drafters may also wish to consider adding a provision subjecting any requirement by the police to surrender data carrier (such as film, miniDV or magnetic tape) to prior judicial scrutiny.

#### **4.6 Stewarding of assemblies**

37. The Draft requires assembly organizers to “nominate the persons responsible for maintaining the public order in a proportion of approximately one person per fifty participants and shall communicate their names to the police within a reasonable time.”<sup>31</sup>
38. While organizers should certainly be encouraged to deploy stewards during the course of large or controversial assemblies, the decision whether or not to provide stewarding of the event should be ultimately left to the organizers, and an obligation to deploy stewards at all times can hardly be justified. The law should also never require that prospective stewards’ names be communicated to the police, since this would discourage people from becoming stewards. A better approach would be for the stewards to wear special badges making them easily identifiable. Finally, the definition of a steward as a “person responsible for maintaining the public order” is problematic as the responsibility to maintain public order rests with the police, while stewards should be responsible for no more than facilitating the event and helping ensure compliance with any lawfully imposed restrictions. Stewards do not have the powers of law enforcement officials and

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<sup>28</sup> *Id.*, Article 13(2) (“Any person has the right to take actions similar to those mentioned in the previous paragraph in the same conditions in order to discourage the public to take part at the assembly.”)

<sup>29</sup> *Id.*, Article 17(1).

<sup>30</sup> *Id.*, Article 17(2) (“Access of the press to the meetings shall be facilitated by the organisers and authorities.”)

<sup>31</sup> *Id.*, Article 18(3) (“Organiser shall nominate the persons responsible for maintaining the public order in a proportion of approximately one person per fifty participants and shall communicate their names to the police within a reasonable time.”)

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cannot use force, but they should rather aim to persuade assembly participants to cooperate.

39. It is recommended that the provisions concerning stewarding of public assemblies be revised to remove the requirement that organizers deploy stewards and to provide for a possibility for the organizers to make stewarding arrangements instead. It is recommended that the requirement that prospective stewards' names be communicated to the police be removed. Instead, the drafters may consider including a provision requiring stewards to wear special badges making them easily identifiable. It is also recommended that the definition of a steward be revised to clarify that stewards do not have the powers of law enforcement officials and cannot use force, but their responsibilities lie with facilitating the event they are deployed to and helping ensure compliance with any lawfully imposed restrictions.

#### **4.7 Policing of assemblies. Termination and dispersal**

40. The express provisions that isolated incidents of sporadic violence during an assembly should be dealt with on an individual basis rather than serve as a ground for dispersing an assembly,<sup>32</sup> that a dispersal can only be a measure of last resort,<sup>33</sup> as well as that an assembly cannot be dispersed on the sole ground of not being notified<sup>34</sup> are welcome.
41. The Draft does not include any language on the use of force by the police in dispersing assemblies, although it is implicit that force can be used.<sup>35</sup> It is recommended that Article 21(3) be reinforced with a safeguard against inappropriate, excessive, or unlawful use of force by law enforcement (possibly via inserting references to relevant legislative acts). In accordance with the OSCE/ODIHR Guidelines, it should set out “*the circumstances that justify the use of force (including the need to provide adequate prior warnings), as well as the level of force acceptable to deal with various threats.*”<sup>36</sup>

#### **4.8 Liability**

42. The Draft as it stands now does not expressly provide that the police be liable for breaches of the Law. It is recommended that Article 23<sup>37</sup> be complemented with such a provision.

[end of text]

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<sup>32</sup> *Id.*, Article 21(1) (“If during the holding of the assemblies, isolated actions that violate the public order or the provisions of article 8 have been noticed, the organiser, or in case of necessity together with police, shall remove participants that take such actions.”)

<sup>33</sup> *Id.*, Article 21(2) (“If during the meetings there are actions that seriously violate the provisions of article 8, the representative of the local public authority shall request the organiser to cease the meeting, this being the extreme measure that can be used only if other measures are not sufficient to ensure holding of an assembly in a legal manner.”)

<sup>34</sup> *Id.*, Article 21(4) (“The lack of the prior declaration is not a reason for terminating a meeting.”)

<sup>35</sup> *Id.*, Article 21(3) (“If the organiser of the assembly does not comply with the request of the public authority or is not able to cease the meeting, the police, at the express request of the representative of the local authority, shall interrupt the meeting and ask the participants to diffuse.”)

<sup>36</sup> OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, at p. 64.

<sup>37</sup> Draft Law, Article 23 (“(1) Local public authorities shall be responsible for rendering the services requested by the organiser, which are, normally rendered by the bodies in their subordination and by the enterprises administered by them. (2) Police is responsible for ensuring peaceful holding of meetings, the security of participants and by-passers.”)

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