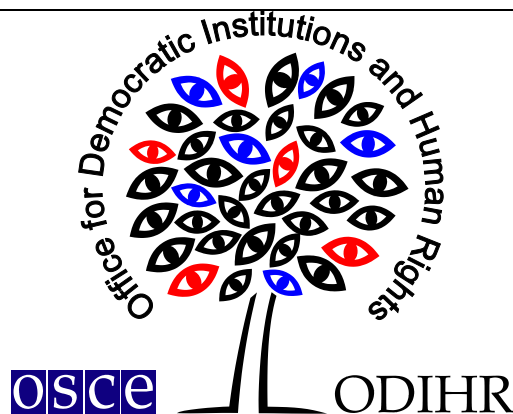


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COMMENTS ON THE DRAFT LAW ON PUBLIC ASSEMBLY IN THE FEDERATION OF BOSNIA AND HERZEGOVINA

**Based on an unofficial English translation of the draft amendments
provided by the OSCE Mission to Bosnia and Herzegovina**

*This Opinion has benefited from contributions made by members of the OSCE/ODIHR Panel
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*This Opinion is also available in Bosnian, however
the English version remains the only official version of the document.*

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Annex: *Draft law on Public Assembly in the Federation of Bosnia and Herzegovina*

I. INTRODUCTION

1. *On 1 February 2018, Ambassador Bruce G. Berton, Head of the OSCE Mission to Bosnia and Herzegovina sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request for a legal review of the draft law on Public Assembly in the Federation of Bosnia and Herzegovina (hereinafter “the draft law”).*
2. *On 14 February 2018, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare legal comments on the compliance of these draft amendments with OSCE commitments and international human rights standards.*
3. *This Opinion was prepared in response to the above request. The OSCE/ODIHR conducted this assessment within its mandate.¹*

II. SCOPE OF REVIEW

4. The scope of this Opinion covers only the draft law, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework Public Assembly in the Federation of Bosnia and Herzegovina (hereinafter the FBiH) governing Public Assembly in the FBiH.
5. The Comments raise key issues and provides indications of areas of concern. In the interests of conciseness, the Comments focus more on those provisions that require improvements rather than on the positive aspects of the draft law. The ensuing recommendations are based on international standards and practices related to Public Assembly. The Opinion will also seek to highlight, as appropriate, good practices from other OSCE participating States in this field.
6. This Opinion is based on an unofficial English translation of the Draft Law provided by the OSCE Mission to Bosnia and Herzegovina, which is attached to this document as an Annex. Errors from translation may result. This Opinion is also available in Bosnian. However, the English version remains the only official version of the document.
7. In view of the above, the OSCE/ODIHR would like to mention that these Comments do not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation of Bosnia and Herzegovina that the OSCE/ODIHR may wish to make in the future.

¹ Freedom of Assembly: The OSCE/ODIHR conducted this assessment within its mandate of the Human Dimension: OSCE participating States “confirm that they will respect each other’s right freely to choose and develop, in accordance with international human rights standards, their political, social, economic and cultural systems. In exercising this right, they will ensure that their laws, regulations, practices and policies conform with their obligations under international law”. See OSCE Copenhagen Document 29 June 1990, Part 1 par (4).

III. EXECUTIVE SUMMARY

8. It is positive that legislation on “public assembly” is planned to be enacted in FBiH. Hereafter in these Comments “public assembly” will be referred to as “Freedom of Peaceful Assembly” (FOPA), as this is the term used in international standards. As it is pointed out in the explanatory note to the draft law, it is problematic to have only cantonal legislation, as fragmented legislation renders it difficult for the authorities to act according to the law.
9. Generally, the draft law has a restrictive approach to FOPA and does not facilitate full enjoyment of this fundamental human right, as it places heavy burdens on organisers of assemblies; facilitating of FOPA is the responsibility of the state. Such burdens include an obligation to provide a detailed request for holding an assembly [par 34], to have a clear structure [par 58], maintain order [par 60], and placing strict duties on stewards [par 65]. The draft law needs to be substantially changed to be compliant with international standards.
10. The draft law also lacks a coherent structure. Many provisions that should have been grouped together are scattered in various sections or have been repeated unnecessarily; [pars 23, 31, 41, 43, 44 and 50].
11. More specifically, and in addition to what was stated above, OSCE/ODIHR makes the following key recommendations to further enhance the draft law:
 - A. Restructure the draft law for clarity, in particular clearer sections regarding notifications and restrictions; [par 18]
 - B. Delete section III on “public events” from the draft law as income generating public events as this falls outside the scope of FOPA and should be dealt with in separate legislation; [par 19]
 - C. Reformulate article 1 of the draft law to better reflect FOPA as a right, and that regulations/limitations of this freedom are subject only to those exceptions which are exhaustively permitted under article 21 ICCPR and article 11 ECHR; [pars 20, 24 and 25]
 - D. Revise the wording of article 2 of the draft law to include non-citizens in BiH in order to respect the international commitments on non-discrimination. Article 30 of the draft law on foreigners organising assemblies should be removed for the same reasons; [par 21]
 - E. Employ a simpler legal definition of assemblies, in line with international standards, without listing many types of assemblies. This definition should also clearly include spontaneous assemblies; [par 22]
 - F. Remove the proposed systems of requests for assemblies and redraft the articles using the word “request” or “application” and instead introduce a system of notification when necessary; [pars 26, 27, 28 and 30]
 - G. Introduce rules emphasising that prohibition of assemblies is a means of last resort, as the authorities must consider less drastic measures first; [pars 35 - 40]
 - H. Ensure that restrictions on content must be linked to a risk of imminent violence and not solely the content itself; [par 44]

- I. Remove absolute restrictions on the duration of assemblies as an assessment on the necessary duration should be assessed individually; [par 46]
- J. Strengthening the freedom to choose the venue of the assembly, by removing the wording “public place accessible and suitable” in article 13 of the draft law and instead emphasising that peaceful assemblies can take place unless restrictions are absolutely necessary (i.e. risk of violence); [pars 49 and 53]
- K. Delete section VII on penal provision of the draft law in its entirety and refer instead to penal provisions in other laws reacting against individual acts; [par 68]
- L. Introduce an appeals procedure against decisions regarding assemblies; [par 70]

Additional Recommendations, highlighted in bold, are also included in the text of the Comments.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards on Freedom of Peaceful Assembly

- 12. FOPA as elaborated by human rights law is considered a fundamental democratic right in several core human rights documents, including article 20 (1) of the Universal Declaration on Human Rights (hereinafter UDHR)², article 21 the International Covenant on Civil and Political Rights (ICCPR)³, article 11 of the European Convention on Human Rights (ECHR),⁴ and article 15 par 1 of the Convention on the Rights of the Child (CRC).⁵ It covers a wide range of different public gatherings, including, static assemblies (public meetings, mass actions and flash mobs), demonstrations, sit-ins, pickets and moving assemblies (parades, processions, funerals, pilgrimages etc.).⁶ The right also covers individual pickets or sit-ins; even if they are not assemblies in the strict sense, they are covered by the same set of standards. There should be a presumption that assemblies should be facilitated and enabled by the state. This should be clearly and explicitly established by applicable law.⁷
- 13. The country of Bosnia and Herzegovina (BiH) is a State Party to the said ICCPR⁸, the ECHR⁹ and the CRC.¹⁰ ECHR is particularly important as the Constitution of BiH

² Universal Declaration on Human Rights, adopted by (General Assembly resolution 217 A) on 10 December 1948.

³ International Covenant on Civil and Political Rights (ICCPR), adopted by UN General Assembly Resolution 2200A (XXI) on 16 December 1966.

⁴ Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, article 11, signed on 4 November 1950, entered into force on 3 September 1953.

⁵ Adopted by General Assembly resolution 44/25 of 20 November 1989.

⁶ OSCE/Venice Commission Guidelines on Freedom of Peaceful Assembly, 2nd edition (2010), par 17. Available here: <https://www.osce.org/odihr/73405?download=true>

⁷ *Ibid*, par 30

⁸ Bosnia and Herzegovina acceded as a State Party on 1 September 1993 by succession: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=en

⁹ Ratified by BiH on 12 July 2002 (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p_auth=HPNHLYm4).

clearly states that this Convention and its protocols are integral part of the Constitution shall apply directly in the Country and prevail over national laws.¹¹ ICCPR, the Convention on Elimination of Discrimination Against Women (“CEDAW”)¹² and CRC are also very relevant as they are specifically mentioned in Annex 1 of the Constitution. Furthermore, article 2 (1) (l) of the Constitution of FBiH also explicitly states that FOPA is a recognized right. This Constitution also clearly states in the Annex that ICCPR, CEDAW and CRC are integral parts.

14. BiH is a participating State of the OSCE, which is also committed to respecting the FOPA as stated in the Copenhagen Document, par 9.2.¹³ Further OSCE commitments regarding the Right to Peaceful Assembly include the Paris 1990 Charter for a New Europe (A new era for Peace, Democracy, Peace and Unity)¹⁴ and the Helsinki 2008 Statement from the Ministerial Council.¹⁵ The OSCE/ODIHR is also promoting its work on FOPA through the Guidelines on Peaceful Assembly in collaboration with the Council of Europe (CoE).
15. BiH is also a potential candidate country for accession to the European Union (EU),¹⁶ which will render it necessary to gradually approximate relevant state legislation to the EU *acquis communautaire*. When drafting new legislation, it is thus important to take into consideration EU primary legislation (the EU treaties and the EU Charter on Fundamental Rights). The latter explicitly contains the right to FOPA.¹⁷

2. Analysis of the draft law

16. The draft law contains 57 articles in 7 sections. Most articles are referred to below. The Comments will focus on the main thematic issues relevant to FOPA legislation and not comment on the draft law article by article.
17. It is positive that legislation on FOPA is planned to be enacted in FBiH. As it is pointed out in the explanatory note to the draft law, it is problematic to have only cantonal legislation on this issue as many assemblies involve participants from several cantons. Fragmented legislation thus renders its difficult for the authorities to act according to the law. **OSCE/ODHIR recommends that all cantonal laws be compatible with the federal law once it has been passed.**
18. In general the draft law lacks the understanding that it is the duty of the authorities to facilitate for FOPA as it places massive obligations on organisers instead. Furthermore, the draft law is missing a clear structure as, for instance, content regarding notification

¹⁰ Bosnia and Herzegovina acceded as a State Party on 1 September 1993 by succession <http://indicators.ohchr.org/>

¹¹ Constitution of Bosnia and Herzegovina, article II. 2:

¹² *UN Convention on the Elimination of All Forms of Discrimination against Women*, adopted by General Assembly Resolution 34/180 on 18 December 1979. Acceded as a State party on 1 September 1993, by succession: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en

¹³ Copenhagen Document on the Human Dimension of the Conference of Security and Cooperation in Europe (CSCE), 29 June 1990.

¹⁴ Adopted by the meeting of heads of state or government of the CSCE, 21 November 1990 (preamble).

¹⁵ Adopted by the sixteenth Helsinki Ministerial Meeting on 4 and 5 December 2008 (p. 5).

¹⁶ https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina_de

¹⁷ Charter of the Fundamental Rights of the European Union, (2000/C 364/01), article 12 par 1.

and request are scattered in several sections and mixed with restrictions during an assembly. **For the purposes of clarity, it is recommended to restructure the draft law.**

19. Section III of the draft law covers “Public Events”. It may be a translation issue but the context shows that this aimed to regulate income generating events. Public assemblies are for expression opinions and would seldom generate income, even when they have the form of a cultural event, such as a charity concert or a political play, money may be charged or collected from the participants to fund a fund particular cause, but this is still a non-profit activity, as the organisers do not seek to have personal financial gains. There should be a wide definition of public gatherings that fall under the scope of FOPA and which the authorities are obligated to facilitate, even when money is collected. Pure income generating activities, such as entertainment performances, musical concerts and other cultural events do not have the same entitlement to public facilitation and should be governed by a different law. **Thus, OSCE/ODIHR suggests section III on “public events” be deleted as income generating public events from the draft law as this falls outside the scope of FOPA and should be dealt with in separate legislation.** It must be underscored that such legislation must not be used to restrict events covered by FOPA.

2.1 General provisions of the draft law

20. The “Subject of the law” is dealt with in article 1 of the draft law. “Subject” seems rather imprecise. **Hence, it is recommended to change this to scope or aim of the law in order to better reflect the legal character of the document.** The draft law article 1 (1) and (2) also employs the word “regulate”¹⁸; this wording as well as the limiting approach which it carries with it, should not be used as international standards on FOPA states that the goal of the legislation should rather be to facilitate and protect FOPA.¹⁹ Restrictions on this right may only be imposed if strictly necessary²⁰. This is also a contradiction of article 1 (1) of the draft law itself as it is stated that the draft law aims to implement the international obligations set forth in the Annex I of the Constitution of Bosnia and Herzegovina (hereinafter the Constitution) which contains a list of international documents, including the ICCPR, and the CRC.²¹ Furthermore Article II.1 of the Constitution stipulates that BiH and both Entities of the country shall ensure “the highest level of internationally recognized human rights and fundamental freedoms”. Additionally, as the ECHR is directly applicable in BiH and as article II.3 of the Constitution also positively mentions FOPA (and Freedom of Association) as a right. Thus, as ECHR article 11 and extensive case law of the ECtHR²² recognise the right to FOPA and emphasises that only necessary restrictions may limit FOPA. **It is recommended that article 1 of the draft law be reformulated to better reflect the**

¹⁸ The OSCE Mission in BiH has confirmed that the original uses the word “uređuje” which translates as regulates or “governs”

¹⁹ *Op. cit.* footnote 6, par 11

²⁰ See in particular: ICCPR, article 21 and European Convention on Human Rights, article 11. See also: *OSCE/ODIHR-Venice Commission Joint Opinion (CDL-AD(2010)016) On the Act on Public assembly of the Sarajevo Canton (Bosnia and Herzegovina)*, pars 7 and 10, available here: http://legislationline.org/download/action/download/id/2992/file/158_FoA%20-%20BiH_2010.pdf

²¹ *Op. cit.* footnote 11, annex 1: <http://www.ccbh.ba/osnovni-akti/ustav/?title=clan-2>

²² See for instance: ECtHR *Plattform "Ärzte für das Leben" v. Austria*, 5/1987/128/179 judgment 25 May 1988, par. 34.

FOPA as a right and that regulations/limitations of this freedom are subject only to those exceptions which are exhaustively permitted under article 21 ICCPR and article 11 ECHR.

21. It is positive that article 2 of the draft law emphasises that there is a “right to organise public assemblies” and makes reference to rights referred to in international document. On the other hand, article 2 of the draft law provides this right only to citizens. According to OSCE/ODIHR this contradicts the “Non-Discrimination” principle in the Constitution, article II.4, which stipulates that the rights in article II. and international agreements mentioned in the said Annex 1 extends to all persons in BiH without discrimination on any ground, including nationality. The ECHR is as mentioned directly applicable as national law in BIH, see section 1 *supra*. Article 14, ECHR has an explicit ban on discrimination based on nationality (and several other grounds). Other international standards such as article 26 of the ICCPR, (mentioned in the said Annex 1 of the Constitution) have a similar ban. The United Nations Human Rights Committee has stated that non-nationals must “receive the benefit of the right to peaceful assembly”.²³ Article 16 of the ECHR states that restrictions on the political activity on non-nationals may be introduced. The OSCE/ODIHR-Venice Commission Guidelines on Freedom of Assembly also clearly recognise the importance of non-nationals receiving the benefit of the right to freedom of assembly and recommend that such restrictions on non-nationals are limited to speech activities that “directly burden national security”.²⁴ **OSCE/ODIHR recommends that the wording of article 2 of the draft law be revised to include non-citizens in BiH. Article 30 of the draft law on foreigners organising assemblies should be removed for the same reasons.**

2.1.1 Definitions in the draft law

22. Article 3 (1) of the draft law defines public assembly as “public assemblies shall imply any organized assembly of citizens held for public nonviolent expression of political, social and other beliefs or interests”. Article 3 (2) of the draft law also includes “unorganized spontaneous assemblies”, but the rest of the document remains silent on it. Spontaneous assemblies are important as they are often triggered by certain events requiring an immediate response and where a delay may invalidate the message sought to be conveyed.²⁵ Such assemblies should be included more specifically and no notification should be necessary if there is a notification system in place. With regard to the criteria of being “non-violent”, it is important to recall that the authorities have the burden of proof that the organisers and/or participants of the assembly have a violent intent and that this goes beyond a few individuals with whom authorities should be able

²³ The United Nations Human Rights Committee, General Comment 15 on the ICCPR (The Position of Aliens under the Covenant).

²⁴ *Op. cit.* footnote 6, par 55.

²⁵ See the judgment of the Hungarian Constitutional Court, *Decision 75/2008, (V.29) AB*, which established that the right of assembly recognized in Article 62 para. (1) of the Hungarian Constitution covers both the holding of peaceful spontaneous events (where the assembly can only be held shortly after the causing event) and assemblies held without prior organisation. The Court stated that “*it is unconstitutional to prohibit merely on the basis of late notification the holding of peaceful assemblies that cannot be notified three days prior to the date of the planned assembly due to the causing event.*”

to handle, without affecting the rights of others to hold the assembly.²⁶ Furthermore, article 4 of the draft law also defines assembly as “all public assemblies of citizens, public protests, performances, events, as well as other forms of assembly. The definitions are rather complex and do not really explain what an assembly is. **Articles 3 and 4 of the draft law could also be combined as they both attempt to define the notion of assembly.** The OSCE/ Venice Commission Guidelines on Peaceful Assembly define an assembly as: “the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose”.²⁷ This definition has been recommended in several opinions on laws on assemblies.²⁸ Furthermore, the opinions recommend a wide definition to avoid that certain assemblies unintentionally fall outside the scope of the definition.²⁹ **It is OSCE/ODIHR’s recommendation to introduce a simpler legal definition in line with international standards, without listing many types of assemblies.**

23. Furthermore, article 4 of the draft law seems to contradict or confuse the term of “other assemblies” in articles 44-46 of the draft law. **All assemblies should be governed by the same rules, and the said articles 44-46 shall be deleted and necessary provisions should be included in the General Provisions sections.** See also section 3.1 *infra* on procedural matters. Article 4 of the draft law also contains a reference to citizens, **which should be changed in line with the recommendation in par. 23 supra.**
24. Article 5 of the draft law is called “Meaning of individual terms”. **“Definitions of terms” would be a more precise term, and it is recommended to change this.** Other terms in article 5 are more problematic. In section a) “additional security measures” is used. In section b) the term, “particularly justified reasons” is employed. This term is also used in article 19 (4) of the draft law. **Both terms are most unclear and should be changed in order to ensure that the meaning of the law is to facilitate the right to FOPA.**

3. Restrictions prior to the peaceful assembly

25. Any restrictions to FOPA must be proportionate. The legitimate grounds for restrictions are prescribed in international and regional human rights instruments. These should not be supplemented by further restrictions in domestic legislation. Any restriction must be concise and clear.³⁰ This means that the imposed restrictions and actions shall be measured and not be more intrusive than necessary to avoid the identified problem.³¹ OSCE/ODIHR and the Venice Commission have also outlined, “that the right to peaceful assembly should not be interpreted restrictively and any restrictions should be

²⁶ ECtHR *Christian Democratic People’s Party v. Moldova (no. 2)* (Application no. 25196/04, judgment of 2 February 2010) para 23; and *Frumkin v. Russia* (Application no. 74568/12, judgment of 5 January 2016), para 98;

²⁷ *Op. cit.* footnote 6, section A, par 1.2.

²⁸ OSCE/ODIHR *Opinion on the Draft Organic Law on the Right to Peaceful Assembly of Tunisia* (14 May 2013), par 21 available here: <http://www.legislationline.org/documents/id/18001>,

²⁹ *Ibid.* par 22 and OSCE/ODIHR-Venice Commission (and others) *Joint Opinion (CDL-AD(2016)30) on two Draft Laws on Guarantees for Peaceful Assembly* (Ukraine), par 14, available here: <http://www.legislationline.org/documents/id/20079>

³⁰ *Op. cit.* footnote 6, section A, par 3.1-3.5 and par. 102. available here: <https://www.osce.org/odihr/73405?download=true>

³¹ See in particular: ICCPR, article 21 and European Convention on Human Rights, article 11.

construed narrowly, and that in general, rights must be “practical and effective” not “theoretical or illusory”.³²

3.1 Procedural matters

3.1.1 Notification and permission

26. Article 10 of the draft law imposes an obligation on the organiser to announce the assembly at least 72 hours in advance. There are no exceptions to this rule, apart from article 11 of the draft law, see par 32 *infra*. Article 10 of the draft law does not seem to require permission from authorities to hold assemblies, but when seen in context with articles 6, 19, 20, 21 and 24 of the draft law there seems to be a clear requirement to obtain permission, as these articles employ the word “request”. Article 12 of the draft law employs the word “application” which indicates the same. Rules requiring permission and an absolute rule to notify are contrary to international recommendations.
27. There should never be a requirement to obtain permission to organise an assembly as this is a restriction and an obstacle for fully enjoying FOPA.³³ **OSCE/ODIHR recommends that the articles which use the word “request” or “application” be redrafted. See also next paragraph on “notification”.**
28. Prior notification of an assembly is also a restriction of FOPA, but is, however, generally considered to be compatible with international standards as it may be necessary in a democratic society in order for the authorities to be able to prepare for larger assemblies.³⁴ The purpose of the notification should be to enable authorities to effectively facilitate the assembly and not to use it for the purpose of imposing restrictions on the assembly or considering an assembly unlawful in the case there is a failure to notify. A 72-hour notice deadline is technically in line with recommendations that state that “a few days” is generally sufficient as this should allow enough time for the authorities to prepare.³⁵ The timeline limit should only be indicative and late submission does not mean that the assembly cannot take place.³⁶ The 48-hour “late-limit” in article 19 (4) of the draft law is also problematic for the same reasons, as it

³² *Op. cit.* footnote 20 (*OSCE/ODIHR-Venice Commission Joint Opinion (CDL-AD(2010)016) On the Act on Public assembly of the Sarajevo Canton*), par 10.

³³ UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Report to the UN Human Rights Council (Best practices that promote and protect the rights to freedom of peaceful assembly and of association)*, UN Doc. A/HRC/20/27, 21 May 2012, par. 28, see also, *Balçık and Others v. Turkey* (Application no. 25/02, judgment of 29 November 2007), par. 49, where the ECtHR suggests that State provision of preventive measures is one of the purposes of prior notification. Cf. also Slovakian Constitution, Article 28 (2): “An assembly may not be made conditional on the issuance of an authorization by a state administration body.”

³⁴ European Commission on Human Rights: *Rassemblement Jurassien Unité Jurassienne v. Switzerland* (Application no. 8191/78, decision of 10 October 1979), p. 119. “Such a procedure is in keeping with the requirements of Article 11 .1 (of ECHR (editor’s remark)), if only in order that the authorities may be in a position to ensure the peaceful nature of a meeting, and accordingly does not as such constitute interference with the exercise of the right”.

³⁵ *Op. cit.* footnote 6, par 116

³⁶ ECtHR *Kuznetsov v. Russia* (2008), application no 10877/04, judgement 23 October 2008 the Court held (in para.43), that “merely formal breaches of the notification time-limit [were] neither relevant nor a sufficient reason for imposing administrative liability”. In this case, late notification did not prevent the authorities from adequately preparing for the assembly.

seems to be an absolute limit for notifying of assemblies, which would preclude spontaneous assemblies. **It is recommended to rewrite the rules on notification, avoiding absolute deadlines and providing an exception for spontaneous assemblies.**

29. Article 19 (5) of the draft law states that the request should be in writing and “submitted in person or by registered mail”. This seems very burdensome, given that there are other, easier forms of notification available that can equally serve the purpose of informing the authorities to ensure adequate preparation for the assembly, such as sending an email or calling. Access to online resources in relation to freedom of assembly has also been recommended by the CoE.³⁷ **There should be a possibility to notify via email or telephone. The police could also have an online service for such purposes.**
30. The “obligation to announce public assembly” in article 10 draft law of the draft law does not specify any exceptions, for instance for spontaneous assemblies. Article 11 of the draft law provides an exception for assemblies with 20 participants or less. In cases where domestic legislation imposes a notification requirement, the respective law should also take into account assemblies which, due to their nature or size, do not interfere significantly with the rights of others (and which, for that reason, entail minimal advance preparation by the relevant State authorities). These types of assemblies should be exempt from any prior notification requirement (as long as the definition of the exempted category is content-neutral and the exemption does not give rise to discriminatory treatment).³⁸ The 20-person limit may be useful even if no justification for the chosen figure is presented. Furthermore, it is not clearly specified that such assemblies are exempted from prior notification. The critical issue is that assemblies of any size are not met with bureaucratic hurdles that may prevent or present other obstacles. This can be deducted from article 11, but it should be clearer in the text. **Hence, it is recommended to clarify both article 10 and 11 of the draft law in line with the above.**
31. Article 11 of the draft law also refers to the content of assemblies similar to article 3 of the draft law. It is unclear why it is repeated. **Although not identical, it appears superfluous and should be deleted.**
32. Article 25 of the draft law also contains exceptions to the obligation to notify or submit a request. Article 25 (1) of the draft law exempts meetings of political parties and trade unions etc. Such meetings should not be considered public assemblies, as they are not open to everyone. This follows from the text of the draft law which prescribes that they take place in “enclosed surroundings”. Thus, they fall outside the scope of the draft law and should not be included in it. Article 25 (2) and (3) of the draft law should rather be in the general provision section and refer to the other laws. **OSCE/ODIHR recommends this article be deleted.**

3.1.2 Content of request/notification

33. Article 20 of the draft law presents a long list of information needed in the request. While information to the authorities in a notification may be useful in order for the

³⁷ Recommendation of the Committee of Ministers of 13 April 2016: CM /Rec (2016)5, par 3, available here: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415fa

³⁸ *Op. cit.* footnote 6, section A, par 2.5 and par 115.

authorities to prepare, the required information seems very elaborate and excessive. It is recommended to at least change article 20 1. of the draft law to state that notification “may” contain and not “shall” contain. Due to the extensive information required, article 20 of the draft law seems to imply that it concerns a large assembly, but it would according to article 11 of the draft law also apply to every assembly of more than 20 persons. Such requirements on also smaller assemblies, (with more than 20 participants) would be a clear restriction of FOPA, as it places a heavy burden on organisers and an obstacle to organise an assembly. It has also been outlined above that notifying, not requesting should be sufficient. (See section 3.1.1 *supra*).

34. Previous opinions on notification procedures clearly state that notification procedures should not be very burdensome as this may discourage the organisation of assemblies and subsequently mean a restriction of FOPA.³⁹ Information on venue/route, date, time and estimated duration as well as an estimate of number of participants should be largely sufficient, as the other information required would be very burdensome and should not be expected by an organiser.⁴⁰ **Thus, it is recommended to change the required content in the notification.**

3.1.3 Prohibition on holding assemblies

35. According to international standards, prohibiting assemblies should be a measure of last resort as this is a serious limitation of FOPA in terms of, procedural matters, content and location.⁴¹ Authorities have other, less intrusive, actions at hand before resorting to prohibition.
36. Article 28 of the draft law contains a long list of situations when organising assemblies can be prohibited by the Cantonal Ministry. Such provisions are problematic as it is the duty of the authorities to facilitate FOPA. In line with the principles of presumption in favour of holding assemblies⁴² and proportionality⁴³, each assembly should be reviewed on a case-by-case basis to assess the risk of violence, see section 2.1 *supra*.
37. Some of the situations listed, such as article 28 1. a), b), e) and f), of the draft law, may give justified reasons for concern. However, the principle of proportionality on restrictions continues to apply even in such situations, also when “national security”-issues may be relevant.⁴⁴ **Hence, it is recommended to revise the said provisions accordingly, and not install an outright ban on such assemblies.**
38. Article 28 1. c) and d) of the draft law seem overly restrictive as the provisions establish an outright ban on assemblies not following strict bureaucratic procedures. It has already been established above that a mandatory request system (section 3.1.1 *supra*)

³⁹ OSCE/ODIHR-Venice Commission Joint Opinion (CDL-AD(2009)034) on the Draft Law on Assemblies of the Kyrgyz Republic, par 35, available here: <http://www.legislationline.org/documents/id/15512>

⁴⁰ *Op. cit.* footnote 6, par 116.

⁴¹ *Op. cit.* footnote 6, pars 40-41, see also for instance: *op. cit.* footnote 30 (OSCE/ODIHR-Venice Commission (and others) Joint Opinion (CDL-AD(2010)033) on the Law on Peaceful Assemblies of Ukraine, par 74.

⁴² *Op. cit.* footnote 6, par 30, “As a basic and fundamental right, freedom of assembly should be enjoyed without regulation insofar as is possible.”

⁴³ *Op. cit.* footnote 39, par 29.

⁴⁴ OSCE/ODIHR-Venice Commission Joint Opinion (CDL-AD(2011)031) on the Law on Peaceful Assemblies in Ukraine, par 38, available here: http://www.legislationline.org/download/action/download/id/3547/file/Ukraine_Joint_ODIHR_VC_Opini_on_on_draft_law_on_freedom_of_peaceful_assembly_of_Ukraine_17%20Oct%202011_en.pdf

should not be established as it renders holding assemblies more difficult, and consequently presents a restriction on FOPA.⁴⁵ Blanket bans on venues should also not be established as it violates the principle of “sight and sound”, that is, that the assembly should be able to reach its target audience,⁴⁶ (see also section 4.3 *infra*). Furthermore, not notifying of an assembly should not lead to automatically rendering this assembly an unlawful one with the possibility to “discontinue” it. The purpose of notification should only be to provide for better facilitation, and should never serve as a pre-requisite for assessing the legality of an assembly. Therefore, the approach proposed by Article 28 1. pars c) and d) of the draft law is clearly not compatible with the principles of presumption in favour of holding assemblies and proportionality.⁴⁷

OSCE/ODIHR recommends these provisions be deleted.

39. Article 28 1. g) of the draft law describes a situation that is unlikely as it is the responsibility of the police to facilitate the assembly and ensure that it can take place as it is the police who are responsible for maintaining public order,⁴⁸ (see also section 2.1 *supra*). **OSCE/ODIHR recommends deleting this provision. Furthermore, it is recommended to delete article 28 1. i) of the draft law for reasons explained in section 3.3 *infra*.**
40. Article 34 of the draft law also functions as a means to possibly prohibit assemblies. Article 34 (1), (2) and (3)⁴⁹ of the draft law reverses the obligation of the State to provide for FOPA and places the burden on the organiser by providing information in the request and to ensure security. It has previously in section 3.1.1 *supra* been commented that a request system is problematic. Furthermore, even when an assembly has been notified, it should be the obligation of the state, not the assembly, to assess the situation on a case-by-case basis, and facilitate for an assembly to take place. See section 2.1 *supra*. The obligation to facilitate assemblies also applies in situations when there are conflicting interests between private individuals, such as participants in two different assemblies.⁵⁰ **For the stated reasons OSCE/ODIHR recommends deleting article 34 of the draft law.**

3.2 Restrictions on who may organise assemblies

41. Article 15 of the draft law imposes restrictions on who can organize assemblies. Article 15 (1) emphasizes that only this (draft) law may proscribe restrictions. This may be for reasons of clarity; however, it seems unnecessary to repeat the reasons for holding an

⁴⁵ *Op. cit.* footnote 34 (all sources).

⁴⁶ *Op. cit.* footnote 6, section A, par 3.5.

⁴⁷ *Ibid*, par 30

⁴⁸ *Ibid*, pars 31-34, and *Op.cit.* footnote 22, par. 32, and *Op.cit.* footnote 33 (*Balcik and Others v. Turkey*) par. 49. See further: CoE, Committee of Ministers The European Code on Police Ethics Standards, p. 20 and 36, available here: <https://www.dcaf.ch/sites/default/files/publications/documents/CoE.pdf>

⁴⁹ Article 34 (3) of the draft law is probably supposed to refer to article 28 paragraph 1, point (g), not article 27.

⁵⁰ *Op. cit.* footnote 22, par. 32 and *Promo Lex and Others v Moldova* (*app no 42757/09*) judgment 24 Feb 2015, par 22: “A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.”

assembly as they are mentioned in article 2 of the draft law. **Hence, this provision should be deleted.**

42. Article 15 (2) of the draft law places a ban on organising assemblies for “political or association of citizens whose work is prohibited”. This is highly problematic as FOPA per se does not presume any prior organisational structure on the part of those who are leaders, co-ordinators, organisers or participants in an assembly. Thus, it can be hard to distinguish an “illegal organisation” from other participants. **Even if organisations and associations are often part of assemblies, specific reference to them should be avoided.** Furthermore, it is not mentioned who should decide that their work is prohibited. The court ban mentioned in article 15 (3) of the draft law should at least also be applicable to organisations/associations. In that case there should also be reference to a clear legal procedure and on what legal grounds an organisation/association may be prohibited. **A better approach would be to ban assemblies in situations when they have a clear violent intent or the assembly is used to destroy the rights of others.**⁵¹
43. **It is suggested to delete article 15 (4) of the draft law as it seems unnecessary in view of article 15 (1) of the draft law.**

4. Restriction during assemblies

4.1 Restrictions on content

44. Article 9 of the draft law contains a rule for limiting the content of the assembly in cases of “hate speech” and “incitement to violence” etc.⁵² Speech and other forms of expression, including assemblies, enjoy protection under Article 19 of the ICCPR and Articles 10 and 11 of the ECHR.⁵³ In principle, therefore, any restrictions on assemblies should not be based on the content they wish to communicate.⁵⁴ Restrictions on content should only occur if there is an imminent risk of violence. Thus, the limitation on “hate speech or incitement to war, violence, religious, national or ethnic hatred and discrimination” may give reason impose restrictions on content , but there must be an evaluation whether the content in question gives reason to believe that there is a risk of imminent violence during the assembly. In order not to restrict FOPA unduly such restrictions must also be interpreted narrowly. **Consequently, it is recommended to clarify the need to assess the risk of violence in the article. Article 16 of the draft law can be removed as it states the same as article 9 of the draft law.**

⁵¹ For example, UN Human Rights Committee, *Zvozskov v. Belarus* (Communication no. 1039/2001, 10 November 2006), par 7.2, See also: Armenia, Law on Freedom of Assemblies 2011, chapter 2, Article 18: Proposing condition or limitations on Conducting the Assembly [...]

“(5) Conducting another assembly, including a counter-assembly, at the time and place specified in an assembly notification is per se not a ground for imposing limitations on the assembly, unless there is an imminent danger of clash between their participants. Otherwise, the provisions of the paragraphs 1 and 2 of this Article shall be applied to the assembly notified later”.

⁵² The OSCE mission in BiH has confirmed that there is an error in the translation of article 9 and that “invitations” is to be interpreted as “incitement”.

⁵³ ECtHR *Hyde Park and others v. Moldova* (2009), Application (45095/06) judgement 31 March 2009, par 26: *“The Court finds it unacceptable from the standpoint of Article 11 of the Convention that an 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”.*

⁵⁴ *Op. cit.* footnote 6, par 3.3.

45. Moreover, criticism of government policies or State officials' actions should never, in itself, constitute a sufficient ground for imposing restrictions on freedom of peaceful assembly – the ECtHR has often held that the “limits of permissible criticism are wider with regard to the government than in relation to a private citizen. **Consequently, article 9 of the draft law article should end after “discrimination”.**⁵⁵

4.2 Restriction on duration of assembly

46. Article 12 (1) of the draft law limits the duration of the assembly to 8 hours starting from the time indicated in the application. There are no exceptions to this limit. Restrictions imposed on the time or duration of an assembly must be based on an assessment of the individual circumstances of each case.⁵⁶ The ECtHR has ruled that demonstrators ought to be given sufficient opportunity to manifest their views.⁵⁷ In some cases, the protracted duration of an assembly may itself be integral to the message that the assembly is attempting to convey or to the effective expression of that message. There should therefore be no pre-determined time limit for assemblies which would imply a blanket bans on assemblies of longer duration; rather, these should be assessed individually. The same applies to assemblies taking place at certain times (e.g. at night).

⁵⁵ ECtHR *Incal v. Turkey*, (case no. 41/1997/825/1031) judgment 9 June 1998, par 54: “*The limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries*”, See also: OSCE/ODIHR-Venice Commission (and others) *Joint Opinion (CDL-AD(2010)031) on the Public Assembly Act in Serbia*, par 45. Available here:

http://www.legislationline.org/download/action/download/id/3118/file/Joint%20Opinion%20on%20the%20Public%20Assembly%20Act%20of%20Serbia_18%20Oct%202010.pdf

⁵⁶ See, for example, ECtHR, *Çiloğlu and Others v. Turkey* (Application no. (73333/01), judgment of 6 March 2007, par 51, French version), in which the ECtHR noted that unlawful weekly sit-ins (every Saturday morning for over three years) of around 60 people in front of a High School in Istanbul had become an almost permanent event which disrupted traffic and clearly caused a breach of the peace. It thus found that when dispersing the assembly, the authorities had reacted within the margin of appreciation afforded to States in such matters. Similarly, in ECtHR, *Cisse v. France* (Application no. 51346/99), judgment of 9 April 2002), pars. 39-40, the evacuation of a church in Paris which a group of 200 illegal immigrants had occupied for approximately two months was held to constitute an interference (albeit justified on public health grounds, para. 52) with the applicant's right to freedom of peaceful assembly. Also worth noting is the UK case concerning ‘Aldermaston Women's Peace Camp’ (AWPC) which, over the past 23 years, had established a camp on government owned land close to an Atomic Weapons Establishment. The women camped on the second weekend of every month during which time they held vigils, meetings and distributed leaflets. In the case of *Tabernacle v. Secretary of State for Defence* [2009], a 2007 by-law which attempted to prohibit camping in tents, caravans, trees or otherwise in ‘controlled areas’ was held to violate the appellant's rights to freedom of expression and assembly. The court noted that the particular manner and form of this protest (the camp) had acquired symbolic significance inseparable from its message.

⁵⁷ ECtHR, *Patyi v. Hungary* (Application no. 5529/05, judgment of 7 October 2008), par 42, cf. ECtHR, *Éva Molnár v. Hungary* (Application no. 10346/05, judgment of 7 October 2008), par. 42, and ECtHR, *Barraco v. France*, (Application no. 31684/05, judgment of 5 March 2009, in French only), par 47. See also *op. cit.* footnote 33 (*Balcik and Others v. Turkey*) par. 51: In finding a violation of Article 11 ECHR the ECtHR noted “*that since the rally at issue in the case began at about noon and ended with the group's arrest within half an hour at 12.30 p.m., it was “particularly struck by the authorities' impatience in seeking to end the demonstration”.* See also *op.cit.* footnote 6, par 18.

OSCE/ODIHR suggests that this blanket restriction be removed from the draft law.

47. Article 12 (2) of the draft law states that both the organiser of the assembly and the cantonal police are responsible for ensuring that this limit is respected. The organisers have, as mentioned, no obligation to perform such a task as it is the responsibility of the police to uphold legal provisions during assemblies. **However, first and foremost, in line with the recommendation above on the time limit itself, it is recommended to remove this rule.**

4.3 Restrictions on venue of assemblies

48. Freedom to choose the location of the assembly is often a key aspect of FOPA. The venue may be paramount for the message of the assembly to reach the target audience.⁵⁸ This is often described as being within “sight and sound” of the target of the assemblies. Furthermore, the daily routine often carried out at the venue can be interrupted as assemblies are also a legitimate use of the space.⁵⁹ The venue may also be public buildings.⁶⁰ On the other hand states have a margin of appreciation when it comes to determining the suitability of venues.⁶¹
49. It is welcome that article 13 of the draft law prescribes freedom of choice regarding the venue of the assembly. However, it is also stated that the venue must be “public, place accessible and suitable”, but it is not clarified who decides what venues fit this description. This lack of clarity could present a possible restriction of FOPA. The use of the term “suitable” is also problematic, as it is a very broad term open to many interpretations, which may present a possible restriction on FOPA. Furthermore, previous opinions also show that private venues may be chosen for assemblies. Furthermore, privately owned venues which are widely accessible to the public may also be used for peaceful assemblies, both open air and buildings, such as parks and shopping malls.⁶² No restrictions should be placed on assemblies on privately owned property when the owner has granted permission to organise an assembly there. **OSCE/ODHIR recommends that the narrow description of venue in the draft law and instead place the emphasis on access to space for peaceful assemblies be deleted.**
50. Article 13 of the draft law also restricts venues to areas which could be dangerous due to, for instance, health reasons. Such restrictions could be necessary as long as they are not used intentionally to restrict FOPA.⁶³ These restrictions should be equally applicable and necessary to protect other persons that would normally frequent the area, not only

⁵⁸ *Op. cit.* footnote 6, par 3.5.

⁵⁹ *Op. cit.* footnote 55 (*OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act in Serbia*), par 32, and *OSCE/ODIHR-Venice Commission (and others) Joint Opinion (CDL-AD(2010)033) on the Law on Peaceful Assemblies of Ukraine*, par 35.

⁶⁰ *OSCE/ODIHR-Venice Commission Interim Joint Opinion (CDL-AD(2010)049) on the Law on Assemblies of the Republic of Armenia*, pars 19-20 and *op. cit.* footnote 20 (*OSCE/ODIHR-Venice Commission Joint Opinion (CDL-AD(2010)016) on the Act on Public Assembly of the Sarajevo Canton*), par 34.

⁶¹ *ECtHR Lashmankin and Others v Russia*, Application Nos. 57818/09 and 14 others, judgment of 7 February 2017, para 417.

⁶² *Venice Commission (CDL-AD(2006)034) on the Law on Freedom of Assembly in Azerbaijan*, par 21. Available here: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)034-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)034-e)

⁶³ *Op. cit.* footnote 55 (*OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act in Serbia*), par 36.

those who participate in an assembly, for instance school children if there is a school nearby and local residents.⁶⁴ This is also valid for article 28 1. h) of the draft law. (For comments on the rest of this article, see section 3.1.3 *supra*). Article 13 (1) of the draft law states that “disturbance of public transport” may be a reason to restrict the choice of venue. The provision is modified by article 13 (2) of the draft law which states that the public transport can be adequately modified to suit the assembly. While the modification made by par (2) of the article is positive, ‘disturbance of traffic’ as a reason to restrict an assembly is not in line with international recommendations and should be deleted.⁶⁵ **The draft law should first and foremost establish a duty of the authorities to facilitate for FOPA and to make the necessary arrangement regarding traffic diversion etc.**⁶⁶ This applies even if traffic disturbances are foreseen, as an assembly should be regarded as constituting a legitimate use of public space (just as vehicular traffic).⁶⁷ **This should be rendered clearer in the text. Furthermore, the reference to public transportation in article 13 (1) of the draft law can be removed as it is mentioned in article 13 (2) of the draft law.**

51. **Article 14 of the draft law can be removed as moving assemblies should be covered by the same rules as static assemblies.** Venues for moving assemblies can be regulated similarly to static assemblies, regarding for instance disruption of traffic.
52. Article 21 of the draft law contains rules regarding protests near federal institutions. There should be no need to have a different regime of rules for such venues. The authorities must ensure that assemblies can take place near them and facilitate as for assemblies elsewhere.⁶⁸ **OSCE/ODIHR suggests this article be deleted.** Regarding the requirement for submitting a request in article 21 of the draft law, see section 3.1.1 *supra*.
53. Article 27 contains a long list of exceptions where assemblies cannot be held. These are in practice blanket bans on venues and therefore, a clear restriction on FOPA. There should instead be a case-by-case determination on the use of the venue for assemblies and the risk of violence. It is reiterated that the authorities have a duty to facilitate FOPA.⁶⁹ **OSCE/ODIHR recommends deleting article 27 of the draft law.**

⁶⁴ *Op. cit.* footnote 6, pars 76-77.

⁶⁵ *Ibid*, par 80.

⁶⁶ *OSCE/ODIHR-Venice Commission Joint Opinion (CDL-AD(2010)033) on the Law on Peaceful Assemblies in Ukraine*, par 43. “any such restriction must be based on factual concrete and objective grounds”.

⁶⁷ ECtHR *Oya Ataman v. Turkey*, (Application no. 74552/01), judgment 5 December 2006, pars 41 and 42, *Op. cit.* footnote 33 (*Balcik and Others v. Turkey*) and ECtHR *Ashughyan v. Armenia* (Application no. 33268/03) judgment of 17 July 2008 par. 90 “Furthermore, any demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption of traffic, and where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance”

⁶⁸ *Op. cit.*, footnote 66.

⁶⁹ *Op. cit.* footnote 6, par 8.

4.4 Termination and dispersal of assemblies

54. It is generally accepted that dispersal of assemblies should be a measure of last resort as it severely curtails FOPA.⁷⁰ Furthermore, dispersal may increase tensions and the risk of escalating the situation. The reasons for dispersing assemblies should be narrowed down to situations when there is a threat to public safety or danger of imminent violence that cannot be contained otherwise. Law enforcement authorities should not disperse assemblies unless they have taken measures to protect the assembly and there is still a risk of imminent violence.⁷¹
55. Article 35 of the draft law has a long list of situations when assemblies can be “discontinued”. The positive element of the article is that the obligation is placed with the police and not the organisers as in article 32 (4) of the draft law. On the other hand, the list is broad. **Instead of having a long list, the draft law should narrow the possibility of dispersal to situations where there is an imminent risk of danger and violence**, as not all violations of the law will justify a termination and dispersal.⁷² The principle of proportionality applies also in this context and this should be emphasised in the law.⁷³ Article 35 (1) a)-d) of the draft law may describe situations when termination/dispersal is justified, but it must be assessed in each situation. **Therefore, it is recommended that a general rule on risk of imminent violence be formulated instead.**
56. The situations described in Article 35 (1) e) to g) should under no circumstance justify termination/dispersal as it would limit FOPA disproportionately. It has been commented under section 3.1.1 *supra* that a request system, article 35 (1) e) and g) is problematic as this is a serious limitation of FOPA and also prevents spontaneous assemblies. The ECtHR has ruled that peaceful assemblies that take place without prior notification should not be stopped, as it is not a necessary restriction in a democratic society.⁷⁴ As commented above, linking legal provisions of the draft law to forbidden organisations, article 35 (1) f) in the draft law is also problematic, see section 3.2 *supra*. **OSCE/ODIHR recommends article 35 (1) e) to g) of the draft law be deleted.**
57. A positive element of article 36 of the draft law is encouraging peaceful dispersal/termination of the assembly when needed, and that it is the responsibility of the police not the organisers. **There should, however, be a greater emphasis on that such action is the last resort as per the comments on article 35 of the draft law. The reference to leader of the assembly should be deleted as per section 5.2 *infra*.**

⁷⁰ *Ibid.* pars 165-166. See also *Op. cit.* footnote 20 (*OSCE/ODIHR-Venice Commission Joint Opinion on the Act on Public Assembly of the Sarajevo Canton*), pars 47 and 51, and *Op. cit.* footnote 56 (*OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act in Serbia*), par 44.

⁷¹ *Op. cit.* footnote 20 (*OSCE/ODIHR-Venice Commission Joint Opinion on the Act on Public Assembly of the Sarajevo Canton*), par 5, and *Op. cit.* footnote 55 (*OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act in Serbia*), pars 44 - 45.

⁷² *Venice Commission CDL-AD(2012)007, Opinion on the Federal Law on assemblies, meetings, demonstrations, marches and pickets of the Russian Federation*, par 44

⁷³ *Op. cit.* footnote 55 (*OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act in Serbia*), par 13.

⁷⁴ ECtHR *Bukta and others v. Hungary*, Application 25691/04 judgment 17 July 2007, par. 36.

5. Obligations for the organiser

5.1 Structure of the organiser

58. Article 18 of the draft law implies that there must be a clearly defined organiser behind the assembly. It may be an advantage that, for planning purposes, this is known. However, this would mean a restriction on FOPA, as spontaneous assemblies and/or assemblies organised online would not be lawful. This is contrary to the principle that FOPA should not be interpreted restrictively and the right should be “practical and effective” and “not theoretical and illusory”.⁷⁵ **OSCE/ODIHR recommends deleting article 18 of the draft law.**
59. Article 26 of the draft law provides for the situation where the organiser is not known, but then the assembly must take place at predetermined venues. It is assumed that this applies to spontaneous assemblies and other assemblies when no notification is given, which is commendable. However, this may be in violation of the “within sight and sound principle” (see section 4.3. *supra*), as it may be far from the intended target audience. It seems to be hard to reconcile strict rules on venues with the provision of not limiting FOPA in article 26 (2) of the draft law. **OSCE/ODIHR recommends deleting this article.**

5.2 Obligation to maintain order

60. The responsibility to maintain law and order lies with the authorities.⁷⁶ Article 31 (1)-(5) of the draft law places considerable responsibility on the organiser to maintain order, including protecting people and property. This article is, as other provisions of the draft law, clearly incompatible with the principle that it is the responsibility of the authorities to facilitate for FOPA, see section 2.1 *supra*. **Consequently, it is recommended that article 31 (1)-(5) be deleted.**
61. Article 31 (6) of the draft law draws attention to core duties of the police. **This provisions should be extended to most provisions in sections in article 31 (1)-(5) (except (4), clearly establishing the duties for police, and not imposing them on organisers).**
62. Article 31 (7) of the draft law also describes one of the core duties in facilitating FOPA: “preventing interference when exercising FOPA”. It is unclear to whom this duty is assigned and what role the Cantonal Ministry has, but it is referred to in the said article. In any case the police would need to ensure the practical part of facilitating this right.
63. Article 31 (8) of the draft law is largely unproblematic as restrictions on carrying weapons and dangerous items can be paramount in ensuring a peaceful assembly. However, the wording “items suitable to cause body injuries” is very broad, as for example a stick for holding a banner may fall under this scope. In line with the principle of the least intrusive restriction possible, there should proof of a clear intent to cause harm before items should be restricted. Similarly, there should also be a case by case

⁷⁵ *Op. cit.* footnote 60 (*OSCE/ODIHR-Venice Commission Interim Joint Opinion on the Law on Assemblies of the Republic of Armenia*), par 40 and *Op. cit.* footnote 19 (*OSCE/ODIHR-Venice Commission Joint Opinion (CDL-AD(2010)016) on the Act on Public Assembly of the Sarajevo Canton*), par 10 (exact quote from latter source only).

⁷⁶ *Op. cit.* footnote 6, par 31

evaluation regarding uniforms and clothing mentioned in article 31 (9) of the draft law. See section 2.1 *supra*.

64. Article 32 of the draft law obliges the organiser to have a leader of the assembly. While it may be beneficial to have a leader to properly organise an assembly and to effectively communicate with authority, it is highly problematic that the leader is responsible for measures to ensure FOPA (article 32 (3) of the draft law) and to stop violent assemblies (article 32 (4) of the draft law). Such provisions are clearly touching upon the core responsibility of the state to facilitate FOPA, see section 2.1 *supra*. Article 32 does not differentiate between smaller and larger assemblies, and seems to apply to all kinds of assemblies. **Thus, it is recommended that article 32 of the draft law be deleted in its entirety.**
65. Similarly, the obligation to provide stewards in article 33 of the draft law is too burdensome on the organiser and could constitute a restriction on FOPA. The work of stewards should be entirely voluntary and not lead to strict legal obligations for them.⁷⁷ This provision also, similarly to article 32 of the draft law, seems to apply to all kinds of assemblies, which is not feasible. Stewards may be very useful and in some cases it may be justified to require stewards,⁷⁸ for instance if a very large assembly has been notified. Furthermore, stewards may serve an important role and can co-operate with authorities on providing information and notify of escalating situations⁷⁹, as indicated in article 33 (3) of the draft law (i.e. notify of persons with weapons or expressing with dangerous messages). However, the obligations such as to protect participants (article 33 (2) of the draft law) and “handing over persons” with weapons or expressing dangerous messages to the police (article 33 (3) of the draft law) are clearly core state obligations⁸⁰, as indicated in section 2.1 *supra*. The same is relevant for article 33 (4) and 33 (5) b) and c) of the draft law. Article 33 (5) a) is not problematic as long as the work of the steward is simply to guide and inform the assembly.⁸¹ Article 33 (7) of the draft law is also not problematic. Authorising armed stewards could cause unease amongst participants. It is noted that the current text of the draft law is inconsistent as some of the obligations placed on the stewards, such as handing over participants with weapons would not be feasible without the stewards having arms themselves. Similarly, article 33 (6) of the draft law is unproblematic as it is desirable that stewards can easily be identified,⁸² as this may facilitate their role. Consequently, **OSCE/ODIHR recommends rewriting article 33 of the draft law, to ensure that the role of stewards is clearly distinct from law enforcement officials and does not infringe on the core state obligation to uphold law and order.**

5.3 Responsibility for damage

66. Article 17 of the draft law places the responsibility for damage inflicted by the participants during the assembly with the organiser. This is problematic as it makes a potential organiser responsible to the actions of all participants. The ECtHR has ruled

⁷⁷ *Op. cit.* footnote 6, par 192.

⁷⁸ *Ibid.*, par 195.

⁷⁹ *Ibid.*, par 192.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*, par 194.

that an individual is responsible for his/her own actions.⁸³ Consequently, the organisers cannot be responsible for actions of individual participants. The provision is clearly contrary to international recommendations, as it could mean a significant obstacle to FOPA as fear of financial responsibility could hold people back from organising assemblies. Organisers should not be responsible for acts of individuals at their assembly as they cannot foresee in detail exactly who will participate, in particular spoilers, and know their intentions. It is the responsibility of the law enforcement forces to uphold law and order during the assembly.⁸⁴ Intentional unlawful acts can be punished individually, but would then normally be covered by other laws, as causing intentional damage would be unlawful both during assemblies and at other times.⁸⁵ Furthermore, cleaning up after the assembly is also the responsibility of the authorities.⁸⁶ **Hence, it is recommended to delete article 17 of the draft law.** See also section 6 *infra* on penal provisions

6. Penal provisions

67. Section VII of the draft law contains many penal provisions aimed at punishing leaders, stewards and other participants in public assemblies. Generally, the provisions are severe and disproportionate for the prescribed infringements of the draft law. Such legal provisions could serve as a means to dissuade people from participating in assemblies and thus a restriction on FOPA.⁸⁷ For instance the fines prescribed in article 51 of the draft law are up to 9,000 BAM, which is about six times the average monthly salary in BiH.⁸⁸
68. Liability should be based on individual culpability and must be supported by compelling evidence. Organisers and stewards are obliged to make reasonable efforts to comply with legal requirements and to ensure that their assemblies are peaceful. However, they should not be held liable for the actions and behaviour of others.⁸⁹ Liability will only exist where organisers or stewards have personally and intentionally incited, caused or participated in actual damage or disorder. Individual liability will arise for any steward or participant if he or she intentionally, or with gross negligence, commits an offence

⁸³ ECtHR *Ezelin v France* Application 11800/85 judgment 26 April 1991, par. 53: “The Court considers, however, that the freedom to take part in a peaceful assembly in this instance a demonstration that had not been prohibited is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion”

⁸⁴ *Op. cit.* footnote 55 (OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act in Serbia), par 16.

⁸⁵ *Op. cit.* footnote 38, par 41

⁸⁶ *Op. cit.* footnote 55 (OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act in Serbia), par 27.

⁸⁷ See, for example, Republic of Latvia Constitutional Court, *Judgment in the matter No. 2006-03-0106* (23 November 2006), at para.34.4 (English translation): “If too great a responsibility before the activity, during it or even after the activity is laid on the organiser of the activity ... then at other time these persons will abstain from using their rights, fearing the potential punishment and additional responsibilities”.

⁸⁸ <https://tradingeconomics.com/bosnia-and-herzegovina/wages>

⁸⁹ *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, : A/HRC/31/66, 4 February 2016, para. 26: “While organizers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, organizers should not be held responsible for the unlawful behaviour of others. To do so would violate the principle of individual liability, weaken trust and cooperation between assembly organizers, participants and the authorities, and discourage potential assembly organizers from exercising their rights.”

during an assembly or intentionally fails to follow the lawful directions of law enforcement officials. As pointed out in par. 66 the work of stewards should be entirely voluntary and not lead to additional legal obligations for them. See also section 5.3 *supra*. At the same time, if an assembly degenerates into serious public disorder, it is the responsibility of the State – not the organiser, representative, or event stewards – to limit the damage caused and to protect the assembly (see sections 2.1 *supra*). **OSCE/ODIHR recommends that section VII of the draft law be deleted in its entirety and that the draft law instead refers to penal provisions in other laws reacting against individual acts.**

7. Appeals against decisions

69. Those exercising, or seeking to exercise the right to freedom of peaceful assembly should have recourse to an effective remedy against decisions disproportionately, arbitrarily or illegally restricting or prohibiting assemblies. This includes being able to access independent and impartial administrative and judicial appeals mechanisms. The availability of effective administrative review can both reduce the burden on courts and help build a more constructive relationship between the authorities, the organisers, and the public in general. In administrative and court proceedings, the burden of proof should be on the relevant state authority to prove that the restrictions imposed are justified.⁹⁰
70. Article 29 of the draft law contains rules for an appeals procedure against decisions regarding article 28 of the draft law. The appeals procedure should be a general procedure for any decision rendered according to the provisions of the draft law. Such provisions should entail an effective procedure that can rule timely on relevant issues.⁹¹ There should also be a right for the organisers/relevant participants to be present during such proceedings.⁹² **OSCE/ODIHR recommends that such a procedure be introduced in the draft law.**

8. Other forms of assembly

71. Section IV of the draft law concerns other forms of assembly. This section seems unnecessary as all “non-income generating assemblies” should be governed by the same legal provisions. **It is recommended to merge the articles in the said section of the draft law in to relevant sections elsewhere. See also section 2.1 *supra*.**

⁹⁰ OSCE/ODIHR-Venice Commission Joint Opinion (CDL-AD(2010)050) *Opinion on the Draft Law on Peaceful Assemblies in the Kyrgyz Republic*, par 8. Available here: <http://legislationline.org/download/action/download/id/3229/file/Joint%20Opinion%20on%20the%20draft%20Law%20on%20Peaceful%20Assemblies%2022%20Dec%202010.pdf>

⁹¹ *Op. cit.* footnote 55 (OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act in Serbia), par 51.

⁹² *Op. cit.* footnote 60 (OSCE/ODIHR-Venice Commission Interim Joint Opinion on the Law on Assemblies of the Republic of Armenia), par 61.

9. Final Comments

72. OSCE commitments require participating States to adopt legislation “as the result of an open process reflecting the will of the people, either directly or through their elected representatives”.⁹³ As a consequence the draft law should undergo additional extensive consultation processes throughout the further drafting and adoption process, to ensure that human rights organisations, other civil society organisations, and the general public, are fully informed in a timely manner and able to submit their views prior to adoption.

[END OF TEXT]

⁹³ See par 18.1 of the Moscow Document on the Human Dimension of the CSCE (1991), available at <http://www.osce.org/fr/odihr/elections/14310>

ANNEX:

**Draft Law
On Public Assembly in the Federation of Bosnia and Herzegovina**