Written observations of the OHR Legal Department concerning the request of the applicant in Case No. U- 01/11

I. Introduction

1. On 06 January 2011 the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) received an application of the Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for the review of constitutionality of the *Law on the Status of State Property Situated in the Territory of Republika Srpska and Under the Disposal Ban*, ("Official Gazette of Republika Srpska," no. 135/10).

2. The request, in relevant part, could be summarized as follows:

Firstly, there is no constitutional basis for the National Assembly of Republika Srpska (RSNA) to adopt the Law on the Status of State Property Situated on the Territory of Republika Srpska and Under the Disposal Ban ("Official Gazette of Republika Srpska" no. 135/10), which the RSNA adopted on 14 September 2010, and that the said law is therefore incompatible with the Constitution of Bosnia and Herzegovina.

Secondly, the Law on the Status of State Property Situated on the Territory of Republika Srpska and Under the Disposal Ban ("Official Gazette of Republika Srpska" no. 135/10), is not in conformity with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina, Articles I(1) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3. The applicant therefore requests from the Constitutional Court to determine that there is no constitutional basis for the RSNA to enact the Law on the Status of State Property Situated in Republika Srpska and Under the Disposal Ban ("Official Gazette of Republika Srpska," no. 135/10); to determine that the aforesaid law is not in conformity with the lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina, Articles I(1) and Article III(3)(b) of the Constitution of Bosnia and Herzegovina, and with the obligations arising under Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; and to annul and put out of legal force the challenged law as of the first day following publication of the Decision of the Constitutional Court in the "Offfficial Gazette of Bosnia and Herzegovina."

The applicant further requests that the Constitutional Court issue a provisional measure by which the application of the challenged law is prohibited pending the final decision of the Constitutional Court in this case.

4. On the 15th of March 2011, the Constitutional Court invited the Department for Legal Affairs of the Office of the High Representative to submit its written observations and other relevant information with regard to the applicant's request for review of the challenged law. On the 23rd of March 2011, the Office of the High Representative received from the Constitutional Court the response, along with the documentation attached to the response, of the RSNA to the request of Mr. Sulejman Tihić communicated to the Constitutional Court on 15 February 2011.

5. The Office of the High Representative has prepared this Amicus Curiae submission with the purpose of assisting the Constitutional Court in its examination of Case no. U 1/11.

II. Background

6. The Constitution of Bosnia and Herzegovina (hereinafter: the Constitution) contains no express provisions on how state property must be shared between levels of government and, as a result, the State and the Entities have disagreed as to what are their respective rights to use, manage and dispose of such assets, including assets over which the Socialist Republic of Bosnia and Herzegovina held rights of disposal (hereinafter: SRBiH Property), and assets derived by Bosnia and Herzegovina pursuant to the Agreement on Succession Issues (hereinafter: Succession Agreement Property).

7. In absence of express constitutional provisions in the Constitution of Bosnia and Herzegovina regulating the apportionment of state property between Bosnia and Herzegovina and its Entities, the Entities, for purely historical

reasons, have maintained possession over most of the public assets situated on their territory. However, since the entry into force of Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter: GFAP), competing ownership claims to State Property have emerged between the State, Entities and Brčko District, which appear to be based on contradictory readings of the Constitution.

8. Conscious of the legal uncertainty that this situation implied, the Steering Board of the Peace Implementation Council decided that this issue would need to be tackled in a way that ensures that all levels of government own the resources they need to carry out their responsibilities. In its Declaration adopted at the level of Political Directors in Sarajevo on 24 September 2004, the Steering Board called for a "lasting solution" to "the issue of State Property".

9. In an effort to resolve the dispute on the respective rights of ownership and management of State Property, in December 2004, the Council of Ministers of Bosnia and Herzegovina (hereinafter: Council of Ministers) established the 'Commission for State Property' (hereinafter: Commission) comprised of representatives of institutions at the level of the State, Entities, and Brčko District of BiH.[1] The Commission's mandate includes developing criteria for "identifying which property is owned by Bosnia and Herzegovina, the Entities and Brčko District," and drafting relevant legislation on the rights of ownership and management of State Property necessary for the implementation of the aforementioned criteria.[2]

10. State Property, in terms of the Commission's mandate, encompasses property that belongs to the State of Bosnia and Herzegovina pursuant to the international Agreement on Succession Issues, property over which the Socialist Republic of Bosnia and Herzegovina (hereinafter: SRBiH) and any of its bodies held the right of disposal or management before 31 December 1991, and property deemed subject to apportionment between the State and other levels of authority in Bosnia and Herzegovina based on an analysis of land registries and cadastres. All subsequent acts regarding State Property enacted by decisions of the High Representative since 2004 have a similar scope. The challenged law adopted by the RSNA also reflects this scope, albeit it is restricted to the territory of Republika Srpska. The term "state property" when used in this submission refers to the aforementioned definition.

11. The High Representative has supported, and continues to support the work of the Commission where representatives of his Office participate as observers and believe that the apportionment of state property should be achieved through a negotiated agreement between the respective governments, accompanied by appropriate implementing legislation. To facilitate the aforesaid negotiations, in March 2005 the High Representative enacted the Law on the Temporary Prohibition of the Disposal of State Property at the levels of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska (collectively hereinafter: Disposal Ban).[3] The High Representative introduced the Disposal Ban "*to protect the interests of Bosnia and Herzegovina, and its sub-divisions, from the potential prejudice posed by further disposal of State Property prior to the enactment of appropriate legislation, based on the aforementioned Commission's recommendation, which, on the basis of Constitutional competences, will enable the authorities to dispose of or otherwise allocate State Property in a manner that is non-discriminatory and in the best interests of the citizens...*"[4]

12. Although originally introduced for a period of one year, the High Representative has extended the Disposal Ban numerous times. By Decisions nos. 20/08, 21/08 and 22/08 of 25 June 2008, the ban was extended until either the entry into force of the aforesaid State Property legislation, or an "acceptable and sustainable" apportionment of State Property is endorsed by the Steering Board of the Peace Implementation Council, or until the High Representative decides otherwise.[5]

13. Over five years of negotiations within the Commission, and between political representatives of the State, Entities and Brčko District, have failed to produce an agreement on criteria for identifying which property is owned by Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska and the Brčko District, or on draft legislation specifying their respective rights over State Property.

14. During the negotiations two theories emerged about the basis upon which to identify public assets that are respectively owned by the State, Entities and Brčko District of BiH. The conflicting theories of ownership could be broadly summarized as follows:

a. Territorial Distribution
   All State Property in existence at the moment of entry into force of Annex 4 to the GFAP is

owned by the Entity where situated and the joint institutions of Bosnia and Herzegovina may use property needed for the exercise of its constitutional and legal responsibilities, insofar as the Entities may authorize by law[6].

b. Legal Continuation
   As the legal successor of the Republic of Bosnia and Herzegovina, Bosnia and Herzegovina is the titleholder to all State Property but the Entities and other levels of government may use or own those assets necessary for the exercise of their respective competences insofar as may be authorized by legislation adopted by the Parliamentary Assembly of Bosnia and Herzegovina.[7]

15. Additionally, the 'functional-territorial' apportionment of State Property emerged within the Commission as a third 'compromise' theory for the identification of property that is respectively owned by the State, Entities and Brčko District. According to this theory, the institutions of Bosnia and Herzegovina own all State Property situated within its internationally recognized borders that is required for the exercise of its Constitutional and legal responsibilities, as well as all SRBiH and Succession Agreement Property situated abroad. Under the aforesaid theory, the Entities or Brčko District government shall own all other State Property situated within their respective territories.[8] This principle was endorsed by the Ambassadors of the Peace Implementation Council (PIC) in a statement issued on 30 October 2008 by which they *"agreed that the starting point for resolving this long-standing issue should be the State Property Commission's own compromise which sees the State-level institutions owning those properties needed for them to 'functionally' exercise their constitutional competencies, while other levels of government would own the remaining State Property based on 'territorial' principles."*[9]

16. The National Assembly of Republika Srpska adopted the Law on the Status of State Property Situated in the Territory of Republika Srpska and Under the Disposal Ban (hereinafter: RS State Property Law), which unilaterally imposes Republika Srpska's vision for the division of State Property on a purely territorial basis and, as such, jeopardizes the possibility of a negotiated settlement.

17. In order to protect the ownership interests of Bosnia and Herzegovina and of other levels of government from the application of legal acts by which new rights of ownership may be established on State Property, and to preserve the chance of a negotiated settlement of the issue, on 6 January 2011 the High Representative issued the *Order Suspending Application of the Law on the Status of State Property Situated in the Territory of Republika Srpska and Under the Disposal Ban* ("Official Gazette of Bosnia and Herzegovina" no. 1/11), which remains in effect until a final decision of the Constitutional Court on said Law enters into force.

18. The applicant contends that, pursuant to Article I(1) and III(3)(b) of the Constitution, in conjunction with Article 2 of Annex II to the Constitution, Bosnia and Herzegovina is the titleholder to all immovable State Property over which SRBiH held the right of disposal and management until 31st December 1991 and over which RBiH became ownership titleholder in accordance with the Law on Transformation of Social Property of 1994 ("Official Gazette RBiH" no. 33/94), and pursuant to Article III(3)(b) of the Constitution, the titleholder to all property derived by Bosnia and Herzegovina pursuant to Annex A of the Agreement on Succession Issues ("Official Gazette of Bosnia and Herzegovina – International Agreements" no. 10/2001).

19. In its response to this application, the RSNA alleges, *inter alia,* that in accordance with Articles I(I), I(3), III(1) and III(3)(a) of the Constitution, the State has no competences with respect to constitutional matters regulated by the contested Law of Republika Srpska, except as may be agreed upon by the Entities in accordance with Article III(5)(a) of the Constitution. It further argues that, insofar as in this case there is no such agreement and that Republika Srpska did not transfer this competence to the institutions of Bosnia and Herzegovina, it belongs to the Entities to regulate these matters, including with respect to the titleholder of these assets. As a result, it is the view of Republika Srpska that the aforementioned provisions of the Constitution divide State Property between the Entities on a territorial basis.

III. Analysis

20. As noted above, the dispute over ownership of state property stems from conflicting readings of the Constitution. As such, the issue of ownership of state property and, in particular, the issue pending before the Court is a dispute that arises under the Constitution within the meaning of Article VI(3)(a) thereof and therefore falls under the exclusive jurisdiction of the Constitutional Court.

21. The present submission will examine the arguments put forwards in support of a strictly territorial division of

state property to conclude that nothing in the Constitution supports such a division of State Property between the Entities. The submission only treats this matter partially and does not cover all arguments made by the parties to the proceedings before the Constitutional Court.

1. Bosnia and Herzegovina consists of two Entities but exists independently of the Entities

22. As an argument supporting a territorial division of State Property under the Constitution, the response of the RSNA claims that the 51:49 territorial ratio between the Entities, which is contained in the Basic Principles Agreed in Geneva on 8 September 1995 and underlies Annex 2 to the GFAP, implies that there is no Bosnia and Herzegovina without and outside the Entities and thus precludes State institutions from owning any property situated in Republika Srpska. The RSNA further alleges that *"that Bosnia and Herzegovina is comprised of them in proportion 49:51, which has been determined territorially by the General Framework Agreement on Peace, i.e. by the IEBL,* [...] *that some other subjectivity of Bosnia and Herzegovina, without Entities comprising its structure, would be a virtual subjectivity,* [...] *that solutions in the contested law are based on the original principles of the Dayton Peace Agreement because the border between the Entities was clearly defined by the IEBL* [...]*, that the territory of RS is clearly determined also under the general principle of civil law according to which what is in the territory of RS is the ownership of RS [...] and that that all property situated in the territory of RS is the ownership of RS"*. Finally, the RSNA also put forward the Final Award of the Arbitral Tribunal for Dispute over Inter-Entity Boundary Line in Brčko Area (hereinafter: Final Award) of 5 March 1999 according to which the entire territory of Brčko District (i.e., the pre-war Brčko Opština) is held in "condominium" by both Entities simultaneously.

23. As to the argument drawn from Annex 2 to the GFAP, we note that the said Annex provides for territorial delineation between the two Entities and not between the Entities and the State of Bosnia and Herzegovina, the latter of which would be impossible. Annex 2 to the General Framework Agreement for Peace was signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, and provided for the establishment of an "Inter-Entity Boundary Line" ("IEBL") **between the Federation and the RS**. The Parties having failed to reach agreement during negotiations in Dayton on the allocation of Entity-control in the Brčko area, Article V of Annex 2, entitled "Arbitration for the Brčko Area", provided that the Parties "agree to binding arbitration of the disputed portion of the Inter-Entity Boundary Line in the Brčko Area." It is evident that Republika Srpska and the Federation of Bosnia and Herzegovina were the only parties in the proceedings concerning the Arbitration for the Brčko Area and that the Final Award of the Arbitral Tribunal of 5 March 1999 provides for a final and binding decision on the dispute **between the two Entities over the IEBL in Brčko Area**. We therefore submit that issues arising under the GFAP and its Annexes concerning the territorial delineation between the two Entities do not in any manner affect Bosnia and Herzegovina's exercise of its responsibilities on its territory and the ability of the institutions of Bosnia and Herzegovina to own property situated in either Entity.

24. We further note that the argument drawn from the concept of "condominium" also touches upon Amendment I of the Constitution of Bosnia and Herzegovina, which originates from and gives constitutional status to the Final Award, and thereby must be considered and interpreted in the context of this and other Awards of the Arbitral Tribunal Dispute over Inter-Entity Boundary Line in Brčko Area. In particular, we recall the following:

> *"81.The RS first contends that the GFAP incorporates the principle that the territory of Bosnia and Herzegovina should be divided in a ratio of 51:49 between the Federation and the RS. It then points out that the IEBL as shown on the Dayton map gives the RS less than 49 percent (by a small margin) and concludes that the Tribunal is precluded from making any reduction in the RS's territory. Second, the RS contends that the GFAP created a status quo, which has had the effect of ratifying both the territorial 'continuity' provided by the corridor shown on the map and RS control of Brčko.*
>
> *The Tribunal disagrees. First, it is true that the preamble to the GFAP reaffirms the parties' commitment to certain Pre-Dayton "Agreed Basic Principles," one of which provides that "the 51:49 parameter of the territorial proposal of the Contact Group is the basis for a settlement" subject to "adjustment by mutual agreement." That preambular language, however, did not itself create a binding obligation; the parties' obligations appear in the text of the GFAP, which modified the 51:49 parameter (by including a slightly different distribution) and left unresolved the territorial allocation in the Brčko corridor area. That lack of resolution is the reason for this arbitration. In short, the GFAP has ratified neither continued RS control of the disputed area nor territorial continuity for the RS."* [Emphasis added.]

Award of the Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brčko Area of 14

February 1997

"11. Upon the establishment of the new District, the entire territory, within its boundaries (i.e., the pre-war Brčko Opština) will thereafter be held in "condominium" by both Entities simultaneously: The territory of the RS will encompass the entire Opština, and so also will the territory of the Federation. Neither Entity, however, will exercise any authority within the boundaries of the District, which will administer the area as one unitary government. Existing Entity law will continue to apply as appropriate within the District until modified by action of the Supervisor or the District Assembly, and the IEBL will continue to exist within the District until the Supervisor has determined that it has no further legal significance and may cease to exist. See 39, infra. No subdivision of the District on any ethnic basis shall be permitted.

52. The RS continues to argue, as it has in the past, that one of Dayton's goals was to insure that in the post-Dayton world RS territory would include at least 49% of all of BiH. Nothing in this decision, however, will diminish that territorial share. Indeed, since the amount of territory added to the RS under the "condominium" arrangement will be greater than that added to the Federation, the RS' percentage share is being increased by this Award." [Emphasis added.]

Final Award of the Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brčko Area of 5 March 1999

25. Concerning the argument that equates ownership rights over territory with ownership over land and structures, we contend that nothing in the Constitution of Bosnia and Herzegovina or in comparative constitutional law supports this conclusion.[10] Such a link would produce absurd consequences: for instance, establishment of the ownership rights of an individual over certain pieces of land in a particular Entity may constitute an infringement of the "51:49 principle". Also, ownership by a foreign legal entity over certain pieces of land located in the territory of an Entity would mean that such land would become foreign territory. It is worth noting that the Arbitral Tribunal for Dispute over Inter-Entity Boundary Line in Brčko Area recognised this distinction between ownership over the territory and ownership over public properties including land in its Annex to the Final Award of 18 August 1999 where it stated:

"12. Public Properties

*All public properties within the District shall be administered by the District Government, which shall have the authority, with the approval of the Supervisor, to privatize public property in accordance with applicable BiH law. No public property in the District may be disposed of except in accordance with BiH law and with the approval of the Supervisor.***"** [Emphasis added.]

Annex to the Brčko Final Award (revised as of 18 August 1999)

26. Finally, the allegations of RSNA that only the Entities in Bosnia and Herzegovina own territory, that the State exists only as long and insofar as it is comprised of two Entities, and that the State without Entities comprising its structure would be a virtual subjectivity, denies the existence of the territory of Bosnia and Herzegovina, denies the attributes and responsibilities of the State in respect to its territory under the Constitution, and denies as well the State's sovereignty and territorial integrity.

27. It is important to emphasize that, under the Constitution, it is only the State of Bosnia and Herzegovina that is vested with the "state territory attribute," in terms of both domestic constitutional law and international law. In accordance with the earlier jurisprudence of the Constitutional Court (Third Partial Decision in Case no. U-5/98 of 1 July 2000, paragraphs 29-30):

"Article I.1 of the Constitution of BiH undoubtedly establishes the fact that only Bosnia and Herzegovina continues "its legal existence under international law as a state, with its internal structures modified as provided herein". In consequence, Article I.3 establishes two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska as component parts of the state of Bosnia and Herzegovina. In addition, as seen from Article III.2 (a) of the Constitution of BiH for instance, the Entities are subject to the sovereignty of Bosnia and Herzegovina. Despite examples of component units of federal states, which are also called states themselves, in the case of Bosnia and Herzegovina it is thus clear that the Constitution of BiH did not recognize the Republika Srpska and the Federation of Bosnia and Herzegovina as "states" but instead refers to them as "Entities".

Hence, contrary to the assertions of the representatives of the People's Assembly of the Republika Srpska, the Constitution of BiH does not leave room for any "sovereignty" of the Entities or a right to "self-organization" based on the idea of "territorial separation". Citizenship of the Entities is thus granted by Article I.7 of the Constitution of BiH and is not proof of their "sovereign" statehood. In the same manner, "governmental functions", according to Article III.3 (a) of the Constitution of BiH, are thereby allocated either to the joint institutions or to the Entities so that their powers are in no way an expression of their statehood, but are derived from this allocation of powers through the Constitution of BiH."

28. The RSNA alleges that "*the sovereignty of state government is a complex category and in the case of Bosnia and Herzegovina is very specific. Namely, originally, as a result of the Dayton negotiations and the General Framework Agreement for Peace in Bosnia,* [Bosnia and Herzegovina's] *sovereignty is derived* [from the Entities], *which is apparent from Articles I/1, I/3 and VIII/3 of the Constitution of Bosnia and Herzegovina*". We contend that the legal existence of the Entities is provided for by Article I(3) of the Constitution of Bosnia and Herzegovina which establishes two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska as component parts of the State of Bosnia and Herzegovina. The constitutional composition of Bosnia and Herzegovina is expressly provided by the Constitution and changes to the aforesaid composition can be adopted only in accordance with the Constitution of Bosnia and Herzegovina. The Constitution is also the source of competencies of the State and its Entities, and lower levels of government cannot limit the legitimate constitutional exercise of such responsibilities by the institutions of Bosnia and Herzegovina.

29. To conclude, it is submitted that a strictly territorial division of state property would imply that the State is a creation of the Entities, which enjoys only those competencies and means expressly transferred to it by the Entities as sovereign states. The Constitutional Court rejected such a reading of Article I(1), Article I(3), Article III(1) and Article III(3)(a) of the Constitution in the above mentioned paragraphs of its Third Partial Decision no. 5/98.

2. The Parliamentary Assembly of Bosnia and Herzegovina may adopt acts according to which the State decides on the sources and amounts of the funds necessary for the operation of the institutions of BiH

30. As to the supporting allegation of the RSNA that Bosnia and Herzegovina has neither "… its own income nor its own property from which [the State] could obtain revenues,"[11] we note that Article VIII(3) of the Constitution provides for revenue contributions of the Federation and Republika Srpska to the State budget in a two-thirds, one-third ratio, "except insofar as revenues are raised as specified by the Parliamentary Assembly" [emphasis added].

31. Further, in its Decision no. U 25/00 of 23 March 2001 the Constitutional Court of Bosnia and Herzegovina pointed out that "…Articles IV.4 (b) and VIII.3 of the Constitution indicate, *expressis verbis*, that the Parliamentary Assembly is competent to collect the income,"[12] and went on to conclude that: "*The issues not explicitly listed in Article III. 1 of the Constitution of BiH, referring to the competencies of the institutions of BiH, do not necessarily fall within the exclusive competence of the Entities*" and that "*Under the Constitution, the Parliamentary Assembly of BiH is competent to decide on the sources and amounts of the funds necessary for the operation of the institutions of BiH.*"

32. It therefore follows that, in accordance with Article III(1)(e), IV(4)(b) and VIII(3) of the Constitution, the Parliamentary Assembly of Bosnia and Herzegovina may adopt acts according to which the State decides on the sources and amounts of the funds necessary for the operation of the institutions of BiH, including acts by which the State acquires property and/or derives income, and that the absence of express Constitutional provisions dividing state property, does not automatically vest ownership over such assets with the Entities.

3. In a judgment against the Federation, the Court of Bosnia and Herzegovina rejected the principle of territorial ownership of State Property

33. As noted in the applicant's request, the Judgment of the Court of Bosnia and Herzegovina in Case no. P – 254/06 of 3 October 2008, the Court acknowledged that Bosnia and Herzegovina possesses an ownership interest in state property in accordance with Article I(1) of the Constitution. In Case no. P–254/06, where the State alleged that an institution of the Federation had unlawfully taken possession of property situated in Sarajevo, which is registered as state property, with the right of disposal being held by the Socialist Republic of Bosnia and Herzegovina, the court ruled that "…the Federation of Bosnia and Herzegovina violated the integrity and legal continuation of the plaintiff State of Bosnia and Herzegovina, as the legal successor of the property of the Republic of Bosnia and Herzegovina…" In relation to Article I of the Constitution, the Judgment no. P- 254/06 further

explained that *"...it stems from the said provisions of the Constitution that the legal successor of the Socialist Republic of Bosnia and Herzegovina is the Republic of Bosnia and Herzegovina, which shall continue its legal existence under international law as the State of Bosnia and Herzegovina with its internationally recognized borders, which confirms the legal continuation of the legal order of the State"*.

34. It remains, of course, for the Constitutional Court to ascertain whether the view taken by the Court of BiH in Judgment P- 254/06 is applicable in the present case.

4. The Agreement on Succession Issues does not, per se, resolve the issue of apportionment of State Property between Bosnia and Herzegovina and its Entities

35. Regarding the applicant's claim that, pursuant to Article III(3)(b) of the Constitution, in conjunction with the Agreement on Succession Issues, assets derived by Bosnia and Herzegovina pursuant to that treaty are owned by the State, and regarding the counterclaim of the RSNA by which it argues that the Entities own all assets derived by Bosnia and Herzegovina pursuant to the same aforementioned treaty, OHR refers the Court's attention to the attached "*Legal Department Opinion Concerning the Internal Distribution of State Property Pursuant to the Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia*".

36. In the attached Opinion of the Legal Department of the Office of the High Representative no. 2005/01 of 12 December 2005, this Office informed the members of the Commission for State Property that:

> *"We are of the opinion that the Succession Agreement cannot be construed as regulating the respective rights of the Institutions of Bosnia and Herzegovina, the Entities and the District of Brčko to assets derived under the treaty. It operates only to establish the normative rights of Successor States with respect to each other in their international personality. At the moment these assets pass to Bosnia and Herzegovina, in accordance with the treaty's terms, Bosnia and Herzegovina's rights vis-à-vis other Successor States are deemed fully vested and the limit in the scope of application of the Succession Agreement with respect to those assets is reached. Beyond this limit, the Constitution and Laws of Bosnia and Herzegovina operate within its territory to determine any further application of rights and obligations."*

37. As to the analogy drawn by the response of the RSNA with the distribution of Succession Agreement Property between the state and federal units of the then State Union of Serbia and Montenegro on a territorial basis and the distribution of Succession Agreement Property between Bosnia and Herzegovina and its Entities, we refer the Court's attention to paragraph 36 of this submission and highlight that it is the constitution and laws that governed the internal distribution of Succession Agreement Property of the State Union of Serbia and Montenegro, which has no bearing on the internal distribution of these assets within Bosnia and Herzegovina.

38. Regarding the distribution of assets derived from the Succession Agreement within Bosnia and Herzegovina, it is noted that the Parliamentary Assembly adopted the Law on the Purpose and Use of Part of the Property that Bosnia and Herzegovina Received under the Succession Agreement ("Official Gazette of Bosnia and Herzegovina" no. 11/02), which apportions financial proceeds derived from the treaty between the State, Entities and the District of Brčko.

5. A number of Laws adopted by the Parliamentary Assembly of Bosnia and Herzegovina recognize the principle of functionality and therefore advocate against a division of state property in line with the so-called territorial principle

39. We note that the practice of the Parliamentary Assembly of Bosnia and Herzegovina seems to endorse the principle of functionality rather than a hypothetical territorial principle. In this respect, we refer to a number of laws by which Bosnia and Herzegovina carried out its responsibilities under the Constitution.

40. By way of illustration, the Law on Defence of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina" no. 88/05), adopted pursuant to Article III(5)(a) of the Constitution by the Parliamentary Assembly of BiH, provides, under Articles 71-74, for the takeover of all rights to property that will continue to serve defense purposes and bans any disposal of such assets until the finalisation of the transfer of property rights.

41. We note that in this case, the Parliamentary Assembly of Bosnia and Herzegovina decided to follow the functional principle for the distribution of "property that will continue to serve defence purposes" and is thereby indispensable for the State to exercise its responsibilities over defense matters. It is important to emphasize that,

to date, the relevant act(s) required for the final takeover of all rights and liabilities related to the immovable property foreseen by Article 73, Paragraph (2) of the Law on Defence has not been signed and that the "disposal ban" provided in the Article 74 of the Defence Law over property provided in Article 71, Paragraph (3), remains in force.

42. Since the scope of the Law on the Status of State Property Situated in Republika Srpska and Under the Disposal Ban, ("Official Gazette of Republika Srpska," no. 135/10) also encompasses the state property that continues to serve defence purposes, we submit that the contested law raises questions under the Law on Defence of Bosnia and Herzegovina and therefore, under the provision of Article III(1)(a), III(3)(b) and Article III(5)(a) of the of the Constitution. It is also important to underline that further progress on the achievement of one of the main foreign policy objective of Bosnia and Herzegovina, i.e. accession to NATO, relies *inter alia* upon full implementation of the takeover of immovable property required for defense purposes by state institutions. The contested law therefore interferes with the constitutional responsibilities of the state institutions, including the responsibilities of Bosnia and Herzegovina over foreign policy.

43. The Framework Law on Privatization of Enterprises and Banks, which is invoked in the RSNA's response, was enacted by the Decision of the High Representative of 22 July 1998 ("Official Gazette of Bosnia and Herzegovina" no. 14/98). We submit that this law constitutes an example of a functional apportionment of public assets, rather than a territorial division as alleged by the RSNA. By adopting this framework law, the Parliamentary Assembly of BiH created a secure legal environment for privatization of banks and enterprises while recognizing that privatization is a matter primarily falling within the responsibilities of the Entities under the Constitution. As such, the law enables Entities to enact further legislation and to privatize non-privately-owned enterprises and banks. The Preamble of the Framework Law on Privatization of Banks and Enterprises provides that:

> ***"****The General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter called the GFAP) and particularly its Annex 4 determines the respective functions and responsibilities of the Institutions of Bosnia and Herzegovina and of the Entities as well as the financial obligations of the Entities towards those Institutions, but contains no specific provision regarding the ownership of public assets.*
>
> *The purpose of this law is to establish a secure legal environment for the privatization process of enterprises and banks and to permit that such process takes place as transparently and rapidly as possible for the benefit of the citizens of Bosnia and Herzegovina (BH), including displaced persons and refugees.*
>
> *Therefore, the Parliamentary Assembly of Bosnia and Herzegovina passes this Law expressly recognizing the right of the Entities to privatize non-privately owned enterprises and banks located on their territories and to receive the proceeds therefrom according to legislation adopted by their respective Parliaments."*

44. Other examples of application of the principle of functionality can be found in the Law on Indirect Taxation System in Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina" nos. 44/03, 52/04, 32/07, 34/07, 4/08 and 49/09) and the Law on Intelligence and Security Agency of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina" nos. 12/04, 20/04, 56/06, 32/07 and 12/09).

45. We note that the distribution of state-owned property between the different levels of government in a federal state is a matter regulated by constitutional law (i.e. the Constitution and its interpretation by the Constitutional Court). The Constitutions of Canada,[13] Australia[14] and Germany[15] all contain explicit provisions regulating the distribution of state-owned property between their various federal components. In Belgium, a special law regulates the distribution of state-owned assets.[16] The objective of these constitutional provisions is to apportion public assets. In most federal states, such assets are distributed between the various levels of government along functional lines. In other words, these states recognize, through their constitutions or equivalent acts, that each level of government should own property that is required for the exercise of its competencies under the Constitution.[17]

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46. Having examined and addressed the arguments put forwards in support of a strictly territorial division of state property, we would like to examine two assertions made by the parties to the proceedings in order to give the Court our views:

1. The disputed Law raises question under the Law on Temporary Prohibition of Disposal of State

Property of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", nos. 18/05, 29/06, 85/06, 32/07, 41/07, 74/07, 99/07 and 58/08)

47. The applicant argues that the challenged law is not in accordance with the laws enacted by the High Representative prohibiting disposals of State Property, in particular Articles 2 and 4 of the **Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina** ("Official Gazette of Bosnia and Herzegovina", nos. 18/05 , 29/06, 85/06, 32/07, 41/07, 74/07, 99/07 and 58/08) and that the challenged law is therefore null and void. In its response, the RSNA argued that " by no means is the Constitutional Court of Bosnia and Herzegovina competent to appreciate whether the Entity laws are in accordance with the laws imposed by the High Representative […] and that under the basic theory of law, **a law can not be null and void**, but only **unconstitutional**, given the fact that nullity, as a kind of unlawfulness of legal acts, applies only to individual legal acts and therefore this part of the application is not legally founded."

48. As noted above, Disposal Bans were introduced as temporary measures necessary:

> "*to protect the interests of Bosnia and Herzegovina, and its sub-divisions, from the potential prejudice posed by further disposal of State Property prior to the enactment of appropriate legislation, based on the aforementioned Commission's recommendation, which, on the basis of Constitutional competences, will enable the authorities to dispose of or otherwise allocate State Property in a manner that is non-discriminatory and in the best interests of the citizens...*"[18]

49. Three disposal bans were introduced at both State and Entity level to ensure that all property falls within the scope of the disposal ban, regardless of who has possession over these property and regardless of who would ultimately be recognized as owner of such property. As a result, a **Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina** was enacted as part of this package.

50. The Law on the Status of State Property Situated in Republika Srpska and Under the Disposal Ban, ("Official Gazette of Republika Srpska," no. 135/10) raises questions under Article 2 and 4 of the **Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina** ("Official Gazette of Bosnia and Herzegovina", nos. 18/05 , 29/06, 85/06, 32/07, 41/07, 74/07, 99/07 and 58/08). We note that, should the Constitutional Court decide that the institutions of Bosnia and Herzegovina own certain property covered by the disputed law or that Bosnia and Herzegovina is otherwise responsible to regulate all or part of these assets under the Constitution, it would belong to the Court to determine whether violation of Article 2 and 4 of the **Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina interfere with the Constitution and in particular with the first sentence of Article III(3)(b) thereof.**

2. *Bosnia and Herzegovina arguably has no legislative responsibility over matters related to state property situated on the territory of the RS*

51. In its response, the RSNA claims that the matter regulated by the challenged Law does not fall within the competence of the institutions of Bosnia and Herzegovina unless the Entities had agreed to transfer such competence in accordance with Article III (5)(a) of the Constitution.

52. It is noted that the Constitutional Court, in its Second Partial Decision in the Case no. U-5/98 of 18 and 19 February 2000 ("Official Gazette of Bosnia and Herzegovina" no. 17/00), determined that pursuant to line 4 of the Preamble and Articles I(4) and II of the Constitution, the institutions of Bosnia and Herzegovina enjoy certain competencies with respect to the transformation of socially owned property into other forms of ownership,[19] to the protection of privately owned property, and to the promotion of a market economy.

53. However, we note that the issue of legislative competencies over State Property is not central to the case at stake. Instead, as noted above, the dispute relates to the ownership of State Property situated in RS and the ability of the State to legislate with respect to those assets as a consequence of its ownership interests. In other words, we submit that, should the Court recognize that Bosnia and Herzegovina owns state property that falls within the scope of the challenged law, it would belong exclusively to the institutions of Bosnia and Herzegovina to regulate that property.

Notes:

[1] See the decision of the BiH Council of Ministers on "*Establishment of the Commission for State Property, for the Identification and Distribution of State Property, the Specification of Rights and Obligations of Bosnia and Herzegovina, the Entities and the Brčko District of Bosnia-Herzegovina in the Management of State Property*," Official Gazette of Bosnia and Herzegovina, no. 10/05, 18/05, 69/05 (Corrigenda) and 70/05.

[2] Id. at Articles 3 and 4.

[3] See High Representative Decision Nos. 342/05, 343/05, and 344/05 of 18 March 2005, respectively enacting *Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska,* ("Official Gazette of Republika Srpska" no. 32/06, 100/06, 44/07, 86/07, 113/07, and 64/08); *the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina,* ("Official Gazette of Bosnia and Herzegovina" no. 29/06, 85/06, 41/07, 74/07, and 58/08), and the *Law on the Temporary Prohibition of Disposal of State Property of the Federation of Bosnia and Herzegovina,* ("Official Gazette of the Federation of Bosnia and Herzegovina" no. 20/05, 17/06, 40/07, 94/07 and 41/08).

[4] Id. respectively at paragraph 8 of the Preamble.

[5] Id. at Article 4.

[6] See the "letter of the President of Republika Srpska to the Ambassadors of the EU Member States and Peace Implementation Council to Bosnia and Herzegovina":

http://www.predsjednikrs.net/index.php?option=com_content&view=article&id=8047&catid=39&lang=en&Itemid= a. See also the response of members of the Steering Board of the PIC attached to this submission by which they noted that they do not agree with the views contained in that letter.

[7] See attached "*Information on the Operation of the State Property Commission"* of 12 November 2008.

[8] See attached *Proposed Criteria for the Establishment and Distribution of State Property*, which was developed by a Working Group of the Commission and adopted by the Commission on 30 October 2007. Some members disputed the validity of the criteria's adoption based on procedural grounds.

[9] See Statement by the Ambassadors of the Peace Implementation Council's Steering Board of 30 October 2008 at https://www.ohr.int/pic/default.asp?content_id=42531.

[10] See for instance the Decision of the Constitutional Court of the Russian Federation of 23 April 2004 published in Rossiyskaya gazeta 28.04.1998; English translation and summary available at: CODICES, the infobase on Constitutional Case-Law of the Venice Commission;

http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm reference: RUS-2004-3-003

23.04.2004

[11] See *Response to Allegations from the request for Review of the Constitutionality of the Law on the Status of State Property Situated on the Territory of Republika Srpska and Under the Disposal Ban in Case no. U 1/11,* dated 14 February 2011.

[12] See Decision of the Constitutional Court of Bosnia and Herzegovina no. U 25/00 at paragraph 34.

[13] See the Constitution Act of Canada, 1867 to 1982, consolidated, at Articles 91, 107, 108, 113 and 117, which, *inter alia,* apportions public property between Canada at state level and its provinces.

[14] See the Commonwealth of Australia, Constitution Act, at Articles 51, 85, 98 and 114, et al., according to which, *inter alia*, ownership of property used exclusively in connection with state level competences is vested in the Commonwealth.

[15] See the Basic Law for the Federal Republic of Germany at Articles 14, 15, 74, 75, 87(e), 89, 90, 134 and 135, which, *inter alia,* apportions certain public assets and legislative between the Federal government and its

constituent states.

[16] See Constitutional Law of institutional reforms of 8 August 1980 (Loi spéciale de reformes institutionnelles du 8 août 1980) at Article 8 and 12, which was adopted after the transformation of Belgium from a centralized to a federal country; it apportions competencies and competencies between the State, the Regions and the Communities along functional lines.

[17] See, for instance, the following decisions: Decision of the Constitutional Court of Republic of Slovenia U-I-304/95 of 30 January 1997 ("Official Gazette of RS, no.11/97) available at: http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/DE2587B2E5B7D032C1257172002808D4; and, Decision of the Constitutional Court of the Russian Federation of 9 January 1998 (Rossiyskaya gazeta of 22 January 1998); English translation and summary available at: CODICES, the infobase on Constitutional Case-Law of the Venice Commission http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm reference: RUS-1998-1-001 09.01.1998;

[18] Ibid.,.See referenced documents in footnote 4, respectively at paragraph 8 of the Preamble.

[19] See Second Partial Decision no. U 5/98 of 19 February 2000 at paragraphs 11-17 (Official Gazette of Bosnia and Herzegovina no. 17/00).