OHR Legal Department's written observations concerning ongoing litigation procedure before the Court of BiH between the BiH MoD, as the plaintiff, and RS and others, as the defendant, in the matter of determination of ownership right and return to possession, Case No. S1 3 P016159 14 P

I. Introduction

1. On 30 May 2014 the Office of the Public Attorney of Bosnia and Herzegovina, as the competent legal representative, submitted on behalf of Bosnia and Herzegovina – Ministry of Defence (hereinafter: the plaintiff) a lawsuit against Republika Srpska and others (hereinafter: the defendant) in the matter of the determination of ownership rights and the return to possession of a prospective defence location (stationary communication site) "Veliki Žep" in Han Pijesak.

2. The relevant parts of the lawsuit could be summarized as follows[1]:

> Firstly, the plaintiff identified provisions of Article 1(1) of the Constitution of Bosnia and Herzegovina, which provide that: *"The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina', shall continue its legal existence under international law as a state, (...)"* as the basic legal grounds for filing the lawsuit. It follows from those provisions that BiH is the legal successor of the Socialist Republic of Bosnia and Herzegovina, which, in accordance with international law, continued its legal existence as the state of Bosnia and Herzegovina, thus affirming the continuity of the state's legal order within its internationally recognized borders.
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> Secondly, since the real estate in question belonged to the SFRY State Secretariat of People's Defence, pursuant to provisions of Article 1 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, 58/08), which provides for a definition of State Property, the property in question is the *"state property of Bosnia and Herzegovina which is subject to the division of the property of the former SFRY"*.
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> Furthermore, pursuant to the Agreement on Succession Issues of Former SFRY ("Official Gazette of Bosnia and Herzegovina-International Agreements", no. 10/01), Annex A, Articles 2 and 7, the real estate in question, as state property of the former SFRY located on the territory of Bosnia and Herzegovina, was transferred into the ownership of Bosnia and Herzegovina on 01 March 1992, i.e. on the day when BiH declared its independence. Thus, *"the ownership right [for the respective location] is enjoyed by the State of BiH"* and *"any contrary disposal or change of registration not based on the above regulations is unlawful"*.
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> Finally, pursuant to relevant provisions of the BiH Law on Defence ("Official Gazette of Bosnia and Herzegovina", no. 88/05) and the BiH Presidency Decisions on the Size, Structure and Locations of the Armed Forces of Bosnia and Herzegovina (Presidency Decisions No. 01-011-0111-6/06 from 5 July 2006, No. 01-011-69-61/08 from 17 January 2008, No. 01-011-618-6/08 from 18 March 2008, No. 01-011-1828-21/08 from 29 July 2008, No. 01-50-1-1067-10/12 from 18 April 2012 and No. 01-50-1-3666-41/12 from 12 December 2012), the real estate in question was declared *"a prospective [defence] location [which] cannot be handed over for possession and use by any subject other than those responsible for defence issues"*, i.e. the BiH Ministry of Defence.

3. The plaintiff, therefore, in its capacity as owner of the disputed real estate, requests from the Court of BiH the protection of its ownership rights and proposes to the Court to render a judgement determining the ownership right of the state of Bosnia and Herzegovina over the prospective defence location "Veliki Žep" in Han Pijesak and ordering the unlawful possessors to hand over to the plaintiff the real estate in question within 30 days from the entry into force of the court's judgement.

4. In accordance with the High Representative's mandate as provided under Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in Bosnia and

Herzegovina and relevant resolutions of the United Nations Security Council, mindful of the relevant decisions and conclusions of the the Peace Implementation Council Steering Board which *inter alia* declared "acceptable and sustainable resolution" of the issues of State and Defense Property a requirement for the closure of the OHR, the High Representative has an interest in the outcome of the proceedings before the Court of Bosnia and Herzegovina and has prepared these written observations with the purpose of assisting the Court of Bosnia and Herzegovina in the present case.

II. Jurisdiction of the Court of BiH

5. Pursuant to the lawsuit, the basis of the Court's jurisdiction is Article 8 Paragraph 2 Item b) of the Law on the BiH Court, which stipulates that *"the Court shall have, in particular, jurisdiction over […] property disputes between the State and the Entities, between the State and the Brcko District, between the Entities, between the Entities and the Brcko District and between the institutions of Bosnia and Herzegovina, which are interrelated with the exercise of public functions"*. In addition to this, Article 1 Paragraph 1 of the Law on Civil Procedure before the Court of BiH provides that *"this Law shall establish rules of procedure before the Court of Bosnia and Herzegovina in the resolution of property disputes (litigation procedure) between the State of Bosnia and Herzegovina and the Entities […]"*.

6. In this regard, it should be noted that the Court of Bosnia and Herzegovina already issued judgments in property disputes between the State of Bosnia and Herzegovina and the Entities, as in Case No. P-254/06, in which the Court acknowledged that Bosnia and Herzegovina possesses an ownership interest in state property in accordance with Article I(1) of the Constitution. In the said case the State, as the plaintiff, alleged that an institution of the Federation of Bosnia, namely the Joint Technical Service of the FBiH, 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. In the above mentioned judgment from 3 October 2008, the Court ruled that *"the defendant Federation of Bosnia and Herzegovina – Joint technical service of FBIH, violated the integrity and legal continuation of the property of the plaintiff State of Bosnia and Herzegovina as the legal successor of the Republic of Bosnia and Herzegovina, in a manner that it illicitly possessed the immovable property located in Sarajevo…"*. [emphasis added] In relation to Article I of the Constitution, the Judgment 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"*.

III. Interventions Before the Ruling of the Constitutional Court of Bosnia and Herzegovina: the High Representative's State Property Disposal Ban and the Law on Defense of Bosnia and Herzegovina

7. Conscious of the legal uncertainty stemming from the absence of solution to the issue of the apportionment of state property between levels of government, 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".

8. The High Representative has supported the efforts undertaken by all relevant stakeholders aimed at achieving a negotiated agreement accompanied by appropriate implementing legislation on State Property. To facilitate the aforesaid negotiations, in March 2005 the High Representative used his powers under the GFAP and relevant United Nations Security Council Resolutions to enact 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).[2] The High Representative introduced the Disposal Ban in order "*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…*"[3] 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 appropriate State Property legislation, or the endorsement of an "acceptable and sustainable" apportionment of State Property by the Steering Board of the Peace Implementation Council, or until the High Representative decides otherwise.[4] Although the state-level Disposal Ban was originally enacted by the High Representative in 2005, it is important to emphasize that it was adopted by the Parliamentary Assembly of BiH in 2007 ("Official Gazette of Bosnia and Herzegovina", No. 32/07).

9. Article 1 Paragraph 2 of the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina specifies that for the purpose of the Law, State Property is considered to be a) Immovable property, which belongs to the state of Bosnia and Herzegovina (as an internationally recognized state) pursuant to the international Agreement on Succession Issues signed on 29 June 2001, which, on the day of adoption of this Law, is considered to be owned or possessed by Bosnia and Herzegovina or other public organizations of Bosnia and Herzegovina; and b) Immovable property for which the right of disposal and management belonged to the former Socialist Republic of Bosnia and Herzegovina before 31 December 1991, which on the day of adoption of this Law is considered to be owned or possessed by Bosnia and Herzegovina, or public organization or body of Bosnia and Herzegovina and any of its subdivisions. The term "State Property" when used in this submission refers to the aforementioned definition.

10. It is important to underline that on 29 September 2006 the High Representative enacted the Decision Amending the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina, which reads: "The portion of State Property that will continue to serve defense purposes, pursuant to and in accordance with Articles 71-74 of the Law on Defense of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", No. 88/05), shall also be exempt from the temporary prohibition imposed by this Law."[5] Obviously, this amendment was intended to make way for the implementation of the Defense Law of BiH with regard to transferring property rights and liabilities over the so-called 'prospective defense property', in the absence of a comprehensive settlement of the issue of apportionment of State Property. In that respect, the above mentioned Decision of the High Representative specifically acknowledges "the importance of the full implementation of the Law on Defense of Bosnia and Herzegovina, the importance of defense-related immovable property for the normal functioning of defense related institutions of Bosnia and Herzegovina, and the urgency with which defense reform must be implemented".[6] Such implementation remains critical to the mandate of the High Representative and to the implementation of the foreign policy objectives of BiH. However, in this context it is important to note that Article 74 of the Law on Defense of Bosnia and Herzegovina prohibits any disposal of the so-called 'prospective defense property "until the effective day of […] relevant instrument […] finalizing the transfer of property rights from the former entity defense ministries to the Ministry of Defense".

IV. Ruling of the Constitutional Court of BiH in Case No. U 1/11 and its Impact

11. On 13 July 2012 the Constitutional Court of BiH adopted a Decision on admissibility and merits in case no. U 1/11 ("Official Gazette of Bosnia and Herzegovina", no. 73/12), whereby it established that Republika Srpska lacks constitutional competence to regulate the subject-matter of the Law on the Status of State Property Located in the Territory of the Republika Srpska and Under the Disposal Ban ("Official Gazette of the Republika Srpska", no. 135/10), as this, pursuant to Article I(1), Article III(1)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, falls within the responsibility of Bosnia and Herzegovina. The said RS Law on the Status of State Property ceased to be effective the day after the date of publication of the Constitutional Court's decision in the Official Gazette of BiH.

12. In its Decision in Case no. U 1/11 the Constitutional Court concluded the following:

> *"72. In view of the aforementioned, it is clear that the term "Bosnia and Herzegovina" under the Constitution of Bosnia and Herzegovina, includes several meanings: the highest level of government in Bosnia and Herzegovina, called "the government at the level of Bosnia and Herzegovina", Bosnia and Herzegovina, as a subject of international law, i.e. as a sovereign state overall, and as the legal successor of the (S) Republic of Bosnia and Herzegovina. Moreover, the term "Bosnia and Herzegovina" designates sometimes the state as a whole, the global system comprising the central institutions and the entities (for instance in Article I(1)), and sometimes the higher level of government opposed to the lower ones represented by the entities. However, the Constitution does not foresee different organs to act in behalf of the two functions of the state institutions; they are both unified in the same institutions. This idea of the existence of "three levels" in federal states or of the double function of the central level has been highlighted namely by Hans Kelsen and Georges Scelle. It can be helpful in the case at hand as it explains that the identity and the continuity between the Republic of Bosnia and Herzegovina and the former SFRY with Bosnia and Herzegovina leads to the conclusion that pursuant to the Succession Agreement the State of Bosnia and Herzegovina has been conferred with the state property mentioned in this agreement, i.e. it is the title holder of that property."* [emphasis added]
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> *"80. (…) Namely, on the basis of the previous reasoning about the continuity between the (S) Republic of Bosnia and Herzegovina and Bosnia and Herzegovina, it is clear that BiH is the title holder of this property.*

Pursuant to Article I(1) of the Constitution of BiH, BiH is entitled to continue to regulate "the state property" of which it is the title holder, meaning all the issues related to the notion of "state property", both in terms of civil law and public law. This conclusion is the sole possible logical and substantive content of the notion of "identity and continuity" under the quoted provision. In addition, the Constitutional Court reiterates that though any level of government enjoys constitutional autonomy, the Entities' constitutional competence is subordinated to the obligation to be in compliance with the Constitution and "the decisions of the Institutions of BiH." This clearly arises from the provisions of Article III(3)(b) of the Constitution of BiH. Furthermore, the right of the State of BiH to regulate the issue of state property also stems from the provisions of Article IV(4)(e) of the Constitution of Bosnia and Herzegovina. Therefore, taking into account all the conclusions reached above, primarily that the State of BiH is entitled to continue to regulate state property, i.e. that ***the State of BiH is the title holder of state property****,* [emphasis added] *and that the provisions of Article IV(4)(e) of the Constitution of Bosnia and Herzegovina prescribe that the Parliamentary Assembly will be responsible for regulating such other matters as necessary to carry out its duties and that state property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina, it is undisputed that the aforementioned provision gives the State of BiH, i.e. the Parliamentary Assembly, competence to regulate the issue of state property. (...)*

13. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, decisions of the Constitutional Court are final and binding. It is clear that the above cited decision of the Constitutional Court of BiH contains a very clear and detailed elaboration of relevant constitutional questions related to the matter of ownership over State Property and clearly establishes that the State of BiH is the title holder of the property covered by the Succession Agreement. In that regard, it is clear that under the relevant provisions of the Constitution of BiH as interpreted by the final and binding Decision of the Constitutional Court in Case U 1/11, the owner/title-holder of the property that is subject to the case pending before the Court of Bosnia and Herzegovina is the State of Bosnia and Herzegovina.

14. In this respect, it is important to highlight that the need to implement the above mentioned transferring modalities prescribed by the Law on Defence of Bosnia and Herzegovina, which was enacted prior to the Decision of the Constitutional Court of BiH in case U 1/11, cannot be construed as a process to determine existing ownership rights. The main aim of the transitional provisions of the BiH Law on Defense, which deal with transfer of 'prospective defense property' was to ensure that in the absence of legal clarity as to who owns which part of defense property no steps would be taken that would impair the possible property rights of other levels of authority. However, the Decision of the Constitutional Court of BiH clarified the question of ownership by ruling that the State of Bosnia and Herzegovina is the titleholder. As such, the State of BiH enjoys all associated property rights, including the right to have its interests recognized in relevant public registries and the entities have a constitutional obligation to register such properties in the relevant registries in the name of the State of Bosnia and Herzegovina which is for all purposes the lawful owner of such property.

V. Conclusion

1. Under the Constitution of BiH as interpreted by the Constitutional Court of BiH, the State of BiH is the titleholder/owner over state property and is responsible to regulate in matters related to such property. The disputed property falls under the category of state property.

2. It is the view of this Office that any attempt to register the said prospective defense property in the relevant real-property records as ownership of Republika Srpska interferes with the ownership rights of the State as well as the constitutional responsibilities of the state institutions.

Note:

[1] N.B. All quotes contained in this paragraph are taken from the original text of the lawsuit

[2] 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).

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

[4] Id. at Article 4.

[5] New Article 3, Paragraph 3.

[6] See High Representative Decision No. 25/06 of 29 September 2006, particularly Paragraphs 8 and 9 of the Preamble.