

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2), and, Article 63(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Mr. Constance Grewe

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the request of Mr. **Sulejman Tihić, the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request**, in case no. **U 1/11**, at its session held on 13 July 2012, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. **Sulejman Tihčić, the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request**, is hereby granted.

It is hereby established that the Republika Srpska lacks a constitutional competence to regulate the legal subject-matter of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the 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 BiH, falls within the responsibility of Bosnia and Herzegovina.

Pursuant to Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court of BiH shall render ineffective the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the Official Gazette of the Republika Srpska*, no. 135/10).

Pursuant to Article 63(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the Official Gazette of the Republika Srpska*, no. 135/10) shall cease to be effective the day after the date on which the present Decision of the Constitutional Court of BiH has been published in the *Official Gazette of Bosnia and Herzegovina*.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

## REASONING

### I. Introduction

1. On 6 January 2011, Mr. Sulejman Tihčić, the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, ("the applicant"), lodged the request for review of the constitutionality of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the Official Gazette of the Republika Srpska*, no. 135/10; "the challenged Law"), for:

a) the lack of constitutional basis for the National Assembly of the Republika Srpska ("the National Assembly") to enact the challenged Law;

b) the incompatibility of the challenged Law with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina ("the Constitution of BiH"), Articles I(1) and III(3)(b) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention").

2. The applicant also requested that the Constitutional Court order an interim measure whereby it would suspend the application of the challenged Law pending a final decision on the request. In his request, the applicant stated the following: *The issuance of the interim measure is necessary in order to prevent the detrimental consequences which Bosnia and Herzegovina might suffer as a result of the application of this law, such as: this law would allow the Republika Srpska to register, i.e. to make an entry into the land registry books, the state property located in the territory of that Entity and under the disposal ban. This would enable the bodies of the Republika Srpska to dispose of that property, which would cause irreparable damages. The application of this Law would be in direct violation of a ban on the*

*disposal of state property imposed by the High Representative and thereby in direct violation of the High Representative's powers under Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, which would amount to a flagrant violation of the Dayton Peace Agreement. This would aggravate the process of resolving the issue of state property, which is of great importance for further negotiations with the European Commission in the process of Bosnia and Herzegovina's application to receive EU candidate status. The State would be deprived of its property on the territory of the Republika Srpska, which would endanger its sovereignty and territorial integrity as well as the execution of its obligations under international law.*

## **II. Procedure before the Constitutional Court**

3. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 17 January 2011 the National Assembly was requested to submit its reply to the request.
4. Pursuant to Article 15(3) of the Rules of the Constitutional Court, the Office of the High Representative for Bosnia and Herzegovina ("the Office of the High Representative"), the European Commission for Democracy through Law ("the Venice Commission"), the Faculty of Law in Sarajevo, the Faculty of Law in Banja Luka, the Faculty of Law in Mostar, the Federal Administration for Geodetic and Property-Legal Affairs in Sarajevo, and the Republic Administration for Geodetic and Property-Legal Affairs in Banja Luka ("the Republic Administration"), between 14 March and 22 July 2011, were invited to submit their expert opinion in writing in respect of the request in question.
5. On 14 February 2011, the National Assembly submitted its reply to the request.
6. On 26 April 2011, the Office of the High Representative submitted its written observations on the request in question.
7. On 18 October 2011, the Venice Commission submitted its written expert opinion in respect of the relevant request.
8. On 30 September 2011, the Republic Administration submitted its written expert opinion.

9. The Faculty of Law in Sarajevo, the Faculty of Law in Banja Luka, the Faculty of Law in Mostar, the Federal Administration for Geodetic and Property-Legal Affairs in Sarajevo failed to submit their respective opinions.
10. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicant on 26 September 2011.
11. At its plenary session of 27 May 2011, the Constitutional Court decided to hold a public hearing in the present case. The public hearing took place on 18 November 2011.
12. Prof Dr Edin Šarčević and Mr. Mustafa Begić submitted their written expert opinions on 16 and 29 November 2011, respectively.
13. On 24 November 2011, the Constitutional Court forwarded the written opinion of the Office of the High Representative, the written opinion of the Venice Commission, the written opinion of the Republic Administration, the written opinion of Prof Dr. Edin Šarčević and the written opinion of Mr. Mustafa Begić to the applicant and the National Assembly.
14. On 5 December 2011, the Constitutional Court forwarded the aforementioned opinions to the Office of the High Representative, for possibly making a supplement to its opinion.
15. Pursuant to Article 93(3) of the Rules of the Constitutional Court, the Constitutional Court dismissed a request for exemption of Ms. Seada Palavrić, the Vice-President of the Constitutional Court, and Mr. Mirsad Ćeman, the Judge of the Constitutional Court, as they did not participate in the enactment of the challenged Law, which is the subject-matter of the present dispute.

### **III. Request**

#### **a) Statements from the request**

16. In the reasoning of the first part of the request, where it is stated that the National Assembly has no constitutional basis to enact the challenged Law, the applicant underlines that the National Assembly enacted the challenged Law at its session held on 14 September 2010 and that it referred to Amendment XXXII paragraph 1 item 6 to the Constitution of the Republika Srpska, as the constitutional basis for enacting the challenged Law, which reads: *The Republic shall regulate and ensure property and obligation relations and protection of*

*all forms of property...* However, Amendment XXXII amending Article 68 of the Constitution of the Republika Srpska in its paragraph 1 item 6, as a whole, reads: *The Republic shall regulate and ensure property and obligation relations and protection of all forms of property, legal status of enterprises and other organizations, their associations and chambers, economic relations with foreign countries, which have not been transferred to institutions of Bosnia and Herzegovina, market and planning.* In this regard, the applicant holds that the aforementioned Article of the Constitution of the Republika Srpska does not constitute a constitutional basis for enacting the challenged Law by the National Assembly. Pursuant to Article I(1) of the Constitution of BiH, the first sentence, Bosnia and Herzegovina (“BiH”), from the standpoint of international law, is not a new creation, *i.e.* it, as a state, continues the international legal personality of the Republic of Bosnia and Herzegovina within the outer borders which were recognized at the moment of the adoption of the Constitution in accordance with international law. This means that it is not about a legal successor, but BiH is the same State which came into existence following the dissolution of Yugoslavia and which was recognized in 1992 as an independent state. To corroborate the aforementioned, the applicant emphasizes that the interim provisions of Articles 2 through 5 of Annex II to the Constitution of BiH foresee the continuity of the “former” law, the continuation or transfer of the judicial and administrative procedures, the destiny of international treaties, as well as the continuity of the existence of the BiH institutions until they are replaced.

17. The applicant also states that on 28 November 2001, the Presidency of BiH passed its Decision on Ratification of the Agreement on the Succession Issues (“the Succession Agreement”), and both Houses of the Parliamentary Assembly of BiH gave their consent to the ratification thereof. According to the Succession Agreement, *the movable and immovable State property of the Federation constituted as the SFRY (“State property”) shall pass to the successor States in accordance with the provisions of the following Articles of this Annex i.e. immovable State property of the SFRY which was located within the territory of the SFRY shall pass to the successor State on whose territory that property is situated, and where pursuant to this Annex property passes to one of the successor States, its title to and rights in respect of that property shall be treated as having arisen on the date on which it proclaimed independence, and any other successor State’s title to and rights in respect of the property shall be treated as extinguished from that date.* It follows from the aforementioned that BiH is a legal owner of the immovable property of the former SFRY which, after the dissolution of the former SFRY, was located in the territory of Bosnia and Herzegovina. Hence, BiH is a

signatory to the international agreement - Succession Agreement and pursuant to Article III(3) (b) of the Constitution of BiH, the general principles of international law constitute an integral part of the law of Bosnia and Herzegovina and the Entities. BiH has already decided on the property passed to it under the Succession Agreement, *i.e.* in 2002 BiH passed the Law on Purpose and Utilization of the Portion of Property obtained by Bosnia and Herzegovina Under the Succession Agreement. In addition, on 22 February 2005, the Parliamentary Assembly of BiH passed the decision to sell to the United States of America part of the “Maršal Tito” Barracks in Sarajevo, which it acquired based on the Succession Agreement. In view of the above, it follows that BiH has already disposed of the movable and immovable property obtained under the Succession Agreement. Furthermore, another confirmation that BiH has a legitimate right to register the immovable property obtained under the Succession Agreement is a Ruling of the Municipal Court in Mostar, allowing the registration of the right of ownership, in favour of the State of BiH, over two buildings which used to be the property of the Federal Directorate of Industrial Products Reserves Belgrade. Moreover, the Court of BiH passed a decision establishing that the Federation of BiH violated the integrity and legal continuity of the property of BiH by entering into possession of the immovable property located in Sarajevo. Finally, the Law on the Transformation of Socially Owned Property prescribes that *the Republic of Bosnia and Herzegovina shall become a holder of the right to socially owned property of which the Federation of BiH has no right of disposal, such as: natural resources and public property, assets over which local communities have the right of disposal and management...* The applicant also underlines that the provisions of the mentioned law are in effect in accordance with the constitutional provision of paragraph 2 of Annex II to the Constitution of BiH.

18. The applicant further states that simultaneously with the enactment of the state Law on the Temporary Ban of Disposal of State Property of Bosnia and Herzegovina, the High Representative also declared two Entity laws prohibiting the disposal of state property in the territory of the Federation of BiH, *i.e.* in the territory of the Republika Srpska, and that the Council of Ministers formed the Commission for State Property, Identification and Distribution of State Property, Specification of Rights and Obligations of Bosnia and Herzegovina, the Entities and the Brčko District of BiH in the Management of State Property, which has failed to achieve an agreement on the key provisions of the Law on State Property at the level of Bosnia and Herzegovina. It follows from the above stated that the State of Bosnia and Herzegovina, *i.e.* the Parliamentary Assembly of Bosnia and Herzegovina,

pursuant to Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, is competent to resolve the issues of state property and that Amendment XXXII, which amended Article 68 of the Constitution of the Republika Srpska, lacks the constitutional basis which may entitle the Republika Srpska, as one of the Entities constituting the state of Bosnia and Herzegovina, to unilaterally decide upon the status of state property located in the territory of the Republika Srpska and under the disposal ban. By enacting the challenged Law, the National Assembly usurped the responsibility of the Parliamentary Assembly of Bosnia and Herzegovina, and, at the same time, it violated the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina as well as the Law on the Temporary Ban of Disposal of State Property of the Republika Srpska, declared by the High Representative in BiH in accordance with his constitutional powers.

19. In the reasoning of the second part of his request, alleging that the challenged Law is incompatible with lines 2 and 6 of the Preamble of the Constitution of BiH, Articles I(1) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, the applicant asserts as follows: *The provisions of the Law are incompatible with lines 2 and 6 of the Preamble to the Constitution of BiH because the unilateral imposition of solutions by the Republika Srpska, without agreeing on a common solution, does not contribute to achievement of justice and tolerance in society and the imposition of such legal solutions negates the sovereignty of the State of Bosnia and Herzegovina as accorded with international law because the state property in the territory of the Republika Srpska is being seized by a unilateral act of one of the Entities thereby depriving the State of its intabulated right of disposal/management over that property. The regulations which governed this area and which remained in force in accordance with the constitutional provision of Annex II of the Constitution of BiH on the continuation of laws are being derogated from. This negates the laws of the High Representative on the disposal ban over state property which shall remain in effect until entry into force of the law regulating the implementation of criteria to be used for identification of property owned by Bosnia and Herzegovina, the Federation of BiH, Republika Srpska and Brčko District of BiH and specifying the rights of ownership and management of State Property, which shall be enacted upon the recommendations of the Commission or until either an acceptable and sustainable resolution of the issue of apportionment of State Property has been endorsed. Furthermore, the challenged Law is inconsistent with Article I(1) of the Constitution of BiH, as the issue of the legal continuity of the State entails the legal continuity of the property for which the right*

*of disposal, management and use belonged to the State. The challenged Law is also incompatible with Article III(3)(b) of the Constitution of BiH because the general principles of international law are an integral part of the law of Bosnia and Herzegovina, and the Entities and the State of BiH are under obligation to comply with all ratified international agreements, including the Succession Agreement. In addition to the pacta sunt servanda principle which is being violated by enacting this Entity law, the nemo plus iuris ad alium transferre potest quam ipse habet principle has been violated as well, since a question may be posed here as to how anyone who is not the title holder of ownership rights over property may transfer rights it does not have. The applicant further states that the challenged Law is also incompatible with Article 1 of Protocol No. 1 to the European Convention, since the State of BiH has property, including legitimate expectations from the property that passed to it pursuant to the Succession Agreement, whereas the enactment of the Entity Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban gave rise to the interference with the right of the State to peaceful enjoyment of property. Namely, the challenged Law prescribes, *inter alia*, that property located in the territory of the Republika Srpska is owned by the Republika Srpska, that the ownership right over the property shall be registered in the land registry books or any other public registers in favour of the Republika Srpska pursuant to a decision by a body competent for property law affairs or a court decision, that the Attorney's Office of the Republika Srpska shall file a request to conduct proceedings and establish the criteria for meeting the conditions to establish the ownership right over the property in favour of the Republika Srpska to the competent administrative body for property law affairs, and that the Attorney's Office of the Republika Srpska shall, within six months from the date this law becomes effective, initiate proceedings to register the ownership right over the property, which is the subject matter of the challenged Law, in the land registry books or any other public registers in favour of the Republika Srpska. The interference of the Entity Republika Srpska with the right of the State to peaceful enjoyment of property is not lawful because it is inconsistent with the laws of the High Representative, which prescribe that *notwithstanding the provisions of any other law or regulation, State Property may be disposed of only in accordance with the provisions of this Law. Any decision, act, contract, or other legal instrument, disposing of property referred to in Article 1 of this Law concluded contrary to provisions of this Law, after its entry into force, shall be null and void.* This means that the challenged Law is null and void. Furthermore, pursuant to Article 4 of the Law on the Temporary Prohibition of Disposal of State Property of BiH, the temporary prohibition of disposal of state property in accordance with this Law*

shall be in effect until entry into force of the law regulating the implementation of criteria to be used for identification of property owned by Bosnia and Herzegovina, the Federation of BiH, Republika Srpska and Brčko District of BiH, and specifying the rights of ownership and management of state property, which shall be enacted upon the recommendations of the Commission or until either an acceptable and sustainable resolution of the issue of distribution of the state property has been endorsed. The applicant alleges that the interference is unlawful because it is inconsistent with the principle of sovereignty of the State and constitutional continuity of statehood, *i.e.* that there has been a violation of the State's right to property under Article 1 of Protocol No. 1 to the European Convention because the Entity law deprives the state of its legitimate right to peaceful enjoyment of property protected by the mentioned Article.

#### **b) Reply to the request**

20. The National Assembly alleged that the general elections in Bosnia and Herzegovina had been conducted on 3 October 2010 and the Presidency of Bosnia and Herzegovina and the House of Representatives of the Parliamentary Assembly of BiH were constituted in accordance with the results of the elections, so that it must be deemed that the mandate of the earlier House of Peoples of the Parliamentary Assembly of BiH ceased. As the legislative body cannot be composed of the two Houses out of which one is composed of members from the previous assembly, it follows that the applicant is not authorized to initiate a dispute, so that the National Assembly proposed that the request be rejected.

21. As to this part of the request, *i.e.* the lack of constitutional basis for enacting the challenged Law, the National Assembly alleges as follows: *The Constitutional Court of Bosnia and Herzegovina decided the issue of responsibility for regulating this matter in its Second Partial Decision no. U 5/98 of 18 and 19 February 2000 with regards to the review of compatibility of the Constitutions of the Entities with the Constitution of Bosnia and Herzegovina, in which it found that Article 68, as amended by Amendment XXXII, item 6 (which was the constitutional basis for enacting the challenged law), was not inconsistent with the Constitution of Bosnia and Herzegovina. The Constitutional Court decided that Republika Srpska had this responsibility, which explicitly followed from the enacting clause and reasons for the Decision, where it is stated as follows: Regarding the challenged provision of Article 68, item 6 of the Constitution of RS, the Constitutional Court notes that this provision confers onto the Republika Srpska the power to regulate, inter alia, property*

*and contractual relations, protection of all forms of property, market and planning. [...]. Article 68, item 6 is thus within the ambit of the constitutional distribution of powers between the institutions of BiH and the Entities and is therefore in line with the Constitution of BiH.* The National Assembly alleges that according to the fundamental legal principles the same matter cannot be deliberated and decided twice and, accordingly, this part of the request is irrelevant. Furthermore, it alleges that the only court which is competent to deal with this issue is the Constitutional Court of the Republika Srpska, which had already deliberated on this issue with regards to the deliberations on a violation of the vital national interest of the Bosniac people and which made decision no. Uv-6/10 of 10 December 2010, concluding that the Law in question was enacted in accordance with the Constitution of the Republika Srpska. The applicant refers to the Decision on Ratification of the Agreement on Succession Issues, the Law on the Purpose and Utilization of the Part of Property Passed to Bosnia and Herzegovina by Succession Agreement, the Law on the Temporary Prohibition of Disposal of State Property of BiH and other laws. However, as the only standard of review in such disputes, in terms of Article VI(3)(a) of the Constitution of BiH, is the Constitution of BiH, which regulates the distribution of responsibilities between the Entities and the institutions of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina is not competent to decide on the compatibility of the Entities' laws (as to their constitutional basis) with the laws of Bosnia and Herzegovina, decisions of the Parliamentary Assembly of Bosnia and Herzegovina, rulings and judgments of the ordinary courts or laws imposed by the High Representative for Bosnia and Herzegovina. The National Assembly alleges that the first part of the request should be rejected as *res iudicata*.

22. As to the second part of the request, asserting that the challenged Law is not compatible 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 No. 1 to the European Convention, the National Assembly alleges as the following: *The applicant has not specified the articles of the law, which would be unconstitutional in his opinion, but he quotes the law as a whole, which is not in accordance with the Rules of the Constitutional Court of Bosnia and Herzegovina so that it can be considered that he challenges the whole law within the substantive meaning. Although this part of the request relates to the substantive aspect of the Law, according to the applicant, it follows from the reasons that the case relates to challenging responsibilities of the Republika Srpska to enact such law, which constitutes the formal aspect thereof, which the Constitutional Court of*

*Bosnia and Herzegovina already decided in case no. U 5/98. The challenged Law was enacted in accordance with Articles I(1), I(3), III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina, i.e. the case relates to a matter which does not fall within the scope of the responsibilities of the institutions of Bosnia and Herzegovina unless the Entities entered into an agreement on it in accordance with Article III(5)(a) of the Constitution. As there is no such agreement, i.e. as the Republika Srpska did not transfer this responsibility to the institutions of Bosnia and Herzegovina, the National Assembly did not endanger in any way peace, justice, tolerance, reconciliation, sovereignty, territorial integrity and political independence of Bosnia and Herzegovina.*

23. As to the allegations about the violation of Article I(1) of the Constitution of Bosnia and Herzegovina, the National Assembly outlines that the present case relates to the constitutional basis which was previously elaborated. The National Assembly outlined that the applicant disregards the fact that the aforementioned Article prescribes that Bosnia and Herzegovina *shall continue its legal existence under international law as a state, with its internal structure modified as provided herein (...)*, which means in practice that the consequence of legal continuity of international personality of Bosnia and Herzegovina is not the legal continuity of the same form of property. In this connection, this Article cannot be considered or interpreted without being connected to Article I(3) of the Constitution, which regulates that Bosnia and Herzegovina shall consist of two Entities: Federation of Bosnia and Herzegovina and Republika Srpska, and without being connected to Articles III(1) and III(3) (a) of the Constitution regulating distributions of responsibilities between the Entities and institutions of BiH. Furthermore, the challenged Law is based on the original principles of the Dayton Peace Agreement, since the Inter-Entity Boundary Line clearly regulates the boundary line between the Entities, i.e. the territory where Republika Srpska exercises in full capacity its legislative, executive and judicial powers in accordance with the distribution of responsibilities between Bosnia and Herzegovina and Entities. According to the same constitutional basis, the National Assembly of the Republika Srpska adopted the Law on Real Rights as a systemic law regulating the acquisition, use, disposal, protection and cessation of the ownership rights. One of the reasons for enacting this Law is the fact that the Brčko District of BiH, according to the same principles, enacted the Law on Public Property of the Brčko District, with the supervision of the OHR. The challenged Law rests on territorial/functional principle and in the best possible manner regulates the status of property under the disposal ban. This practically means that all property on the territory of the

Republika Srpska is the ownership of the Republika Srpska and that according to the functional principle the Republika Srpska may cede a part of that property for use to the institutions of Bosnia and Herzegovina in order for the institutions of Bosnia and Herzegovina to exercise its powers. The challenged Law does not resolve the status of property under the disposal ban and is located beyond the boundaries of Bosnia and Herzegovina as the territorial principle could not apply to this property and this principle must be regulated in a special law.

24. As to the allegations relating to the violation of Article III(3)(b) of the Constitution, the National Assembly stated that it is not clear why the applicant holds that the enactment of this Law deprives BiH of the possibility to enact the regulation for implementation in accordance with Article 8 of the Agreement on Succession, since, by enacting that Law, the Republika Srpska actually contributed to the fulfilment of the obligation referred to in Article 8 of the mentioned Agreement, that it prevents in no way the institutions of BiH, if there is a political will, from adopting a Law at the state level to regulate the remaining issues (the property of BiH beyond BiH borders, that is beyond the territory of the Entities). The National Assembly stated that the Constitutional Court articulated the following in the Decision U 5/98: *Nevertheless, the Constitutional Court finds that the Framework Law on Privatization of Enterprises and Banks in BiH (Official Gazette of Bosnia and Herzegovina, no. 14/98) entered into force on 4 August 1998. The goal of this law actually was to harmonize the Entities' legislation in this area and to include all persons in the privatization process in a non-discriminatory manner (...), while, at the same time, the legislative responsibility of the Entities was, in principle, recognized (Article 2 of the Framework Law).* The National Assembly outlined the fact that the Agreement on Succession was signed by the then Federal Republic of Yugoslavia, that the Constitutional Charter of the State Union of Serbia and Montenegro defines Serbia and Montenegro as a single personality in the international law, however Article 59 of the Charter prescribes that *the property of the Federal Republic of Yugoslavia required for the operation of the institutions of Serbia and Montenegro shall be the property of Serbia and Montenegro...* As to the violation of the principle *nemo plus iuris ad alium transfere potest quam ipse habet*, pointed out by the applicant, the National Assembly also stated that the basis for the aforementioned allegations are not clear if one takes into account the Decision of the Constitutional Court no. U 5/98. Namely, if that is not the property of the Republika Srpska which, in addition to the Federation of BiH, makes up BiH, then the question arises as to whose property it is, whether it is a property of some other state of BiH? In support of the aforementioned, we refer to Article VIII(3) of the Constitution

of BiH wherefrom it follows that BiH does not have its own revenues, nor does it have its own property from which it could collect revenues.

25. As to the applicant's allegations relating to the violation of the right to property under Article 1 of Protocol No. 1 to the European Convention, the National Assembly stated that the European Convention protects human rights against interventions of the state, and not the rights of the state against its Entity, that is there is no human right of the state to peaceful enjoyment of property. The right to peaceful enjoyment of property relates to private property of physical and legal persons, which may be observed from a series of judgments of the European Court of Human Rights. Furthermore, as to the unlawful interference of the Republika Srpska with this on the grounds that it is inconsistent with the laws of the High Representative, the National Assembly stated that the right of the State to the peaceful enjoyment of property is a nonsense, so that any further comment is unnecessary. The Constitutional Court is not competent to consider whether the laws of the Entities are compatible with the laws imposed by the High Representative, thus a law cannot be null and void but only unconstitutional. As to the allegations stated in the request relating to the continuity of legal acts, the National Assembly outlined that the applicant in the aforementioned decision no. *U 5/98* had the same arguments, which the Constitutional Court did not accept.

26. The National Assembly stated that the request is unfounded and that it ought to be dismissed along with the request for adoption of an interim measure. Furthermore, taking into account the fact that the applicant indicated as a standard of control of constitutionality of the challenged Law the Law on Destination and Use of a Part of the Property, which BiH acquired in accordance with the Agreement on Succession, as well as the Decision of the Parliamentary Assembly of BiH, although that is not what these acts are, the National Assembly requested exemption of the Vice-President of the Constitutional Court, Ms. Seada Palavrić and of Judge Mr. Mirsad Ćeman who, during the period from 2002-2006, were members of the House of Representatives of the Parliamentary Assembly of BiH and participated in the enactment of the aforementioned acts. In addition, it is necessary that this request be discussed and decided at the sessions of the Constitutional Court in full composition, and not that the discussion and decision be passed by five out of nine judges, whereby four other judges have no opportunity whatsoever to voice their respective opinion (the so-called Chamber of the Constitutional Court of BiH is not recognized by the

Constitution of BiH), which has become the practice of the Constitutional Court and is inconsistent with the BiH Constitution. In addition, the Republika Srpska still has not filled one of the two seats, and, according to the Rules of the Constitutional Court, the four judges from the Federation of BiH and only one judge from the Republika Srpska can make any decision of the Constitutional Court. The National Assembly stated that, if a decision is made to deliberate on the merits of the request, that a public hearing be held in accordance with Article VI(2)(b) of the Constitution of Bosnia and Herzegovina.

**c) Opinions given in the capacity of *amicus curiae***

27. The High Representative stated that the Constitution of Bosnia and Herzegovina contains no express provisions on how state property must be shared among different levels of government and that there is no agreement between the State and the Entities as to what their respective rights to use, manage and dispose of such assets are, including assets over which the SFRY held the right of disposal and assets which BiH got under the Agreement on Succession. In December 2004, the Council of Ministers of BiH established the Commission for State Property comprised of representatives of the State, the Entities and the Brčko District, which ought to draft criteria for identifying which property is owned by the state, the Entities and the Brčko District, and the legislation on the rights of ownership and management of state property. The High Representative said that he enacted the Law on the Temporary Prohibition of the Disposal of State Property at the levels of BiH and the Entities. Although the mentioned ban was introduced for a period of one year, it was extended numerous times, so that it was extended up until the entry into force of the law on state property, that is up until “acceptable and sustainable” solution of the apportionment of state property. Further, in the period of over five years the Commission for State Property failed to reach an agreement on criteria for identifying which property is owned by the State, the Entities and the Brčko District, or on draft legislation specifying their respective individual rights. During negotiations two theories emerged as to how to establish the aforementioned, namely the theory of territorial distribution and the legal continuity. In addition, “the *functional-territorial*” apportionment emerged within the Commission as a third “*compromise*” theory for the identification of property that is respectively owned by the State, the Entities, or the Brčko District. The National Assembly adopted the challenged Law, which unilaterally imposes Republika Srpska’s vision regarding the division of state property on a purely territorial basis, which jeopardizes the possibility of a negotiated settlement. As a result of the

aforementioned, the High Representative stated that he issued on 6 January 2011 the Order Suspending the Application of the challenged Law, which shall remain in effect until a final decision of the Constitutional Court on the challenged Law enters into force.

28. As to the arguments presented by the National Assembly in support of the territorial principle drawn from Annex II to the General Framework Agreement, the High Representative stated that Annex II to the General Framework Agreement *provides for territorial delineation between the two Entities and not between the Entities and the State, the latter being impossible*. It was emphasized that *issues arising under the General Framework Agreement and its Annexes concerning the territorial delineation between the two Entities do not in any manner affect the exercise of responsibilities on the part of BiH on its territory and the ability of the BiH institutions to own property situated on the territory of either Entity*. 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*. As to the allegations of the applicant that the Succession Agreement has itself resolved the distribution of state property, i.e. that the Entities are owners of the entire property which BiH got, the High Representative pointed to the attached Opinion of the Legal Department of the Office of the High Representative dated 12 December 2005, wherefrom it follows that the *Succession Agreement cannot be construed as regulating the respective individual rights of the institutions of BiH, the Entities and the Brčko District, to assets derived under the agreement. The agreement operates exclusively in order to establish normative rights of Successor States with respect to their mutual relations...* In support of the principle of functionality regarding the territorial principle, the High Representative referred to the Law on Defence, which was adopted pursuant to Article III(5)(a) of the Constitution of BiH, which in Articles 71-74 provides for the finalization of disposal of all rights to property that will continue to serve defence purposes and bans any disposal whatsoever of such assets until the finalization of the disposal of property rights. As to the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (“the Framework Law on Privatization”), the High Representative stated that this law precisely constitutes an example of a functional apportionment of public assets, as by adopting this law BiH created a legal environment for privatization of banks and enterprises while simultaneously recognizing that privatization is a matter falling primarily within the responsibilities of the Entities under the Constitution. As such the law enables the Entities to enact further legislation and to privatize non-privately-owned enterprises and banks

(the Preamble of the Framework Law on Privatization was mentioned in support of the aforementioned).

29. As to the applicant's allegations that the challenged Law violates the Law on the Temporary Prohibition of Disposal of State Property of BiH, or the allegations of the National Assembly that the Constitutional Court is not competent to appreciate whether the Entity laws are in accordance with the laws imposed by the High Representative, and that a law cannot be null and void but only unconstitutional, the High Representative stated *three disposal bans were introduced at both the State and Entity levels to ensure that all property falls within the scope of the disposal ban, regardless of who has possession over this property and regardless of who will ultimately be recognized as the owner of such property*. The challenged Law raises questions under Articles 2 and 4 of the Law on the Temporary Prohibition. Should the Constitutional Court decide that the institutions of BiH are the owners of certain property covered by the challenged Law, or that BiH is otherwise responsible to regulate all or part of these assets under the Constitution, the Constitutional Court would be competent to determine whether violations of Articles 2 and 4 of the Law on Temporary Prohibition of Disposal of State Property of BiH interfere with the Constitution of BiH, in particular with the first sentence of Article III(3)(b) thereof. As to the allegations of the National Assembly that BiH has no legislative competence over state property issues, the High Representative said *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 on the territory of the Republika Srpska 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 BiH owns state property that falls within the scope of the challenged Law, it would belong exclusively to the institutions of BiH to regulate that property*.

30. The Venice Commission stated that the Constitution of BiH contains no explicit provisions on the distribution of state property among the levels of government. The State and the Entities failed to reach an agreement regarding their respective rights to use, manage and dispose of state property. *It is said, in Federal States, the distribution of state property between the central state and the federated entities is usually regulated by an explicit constitutional provision. When this is not done, the issue of state property may be regulated on the basis of the rule on incidental powers. Indeed, public authorities, unlike private*

*individuals, in principle only own those assets which are necessary to provide public services or possibly to earn revenues; state property may thus be seen as an issue of incidental powers.*

31. Furthermore, pursuant to Article VI(3)(a) of the Constitution of BiH, *the Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:... Whether any provision of an Entity's constitution or law is consistent with this Constitution.* Therefore, normative criteria that should be applied in this case are prescribed by the Constitution of Bosnia and Herzegovina. Article VI(3)(a) of the Constitution of BiH clearly indicates that the legislative bodies of the Entities must perform their legislative competencies in the manner compatible with the Constitution of BiH. It is stressed that under Articles I(1) and I(3) of the Constitution of BiH, both, the Republika Srpska and the Federation of BiH are Entities of Bosnia and Herzegovina *which shall continue its legal existence under international law as a state, with its internal structure modified as provided by this Constitution...* meaning that the Entities are part of the internal structure of BiH and cannot be sovereign states on their own. The division of responsibilities between the Institutions of BiH and the Entities has been regulated by Article III of the Constitution, paragraph 1 of which lists the exclusive responsibilities of the Institutions of BiH and paragraph 2 the responsibilities of the Entities. Paragraph 3 awards the incidental powers to the Entities: *All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.* Moreover, paragraph 5 prescribes the additional responsibilities of the state of Bosnia and Herzegovina and especially the possibility of transfer of responsibilities from the Entities to Bosnia and Herzegovina by the agreement. *Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities.* The Venice Commission further stresses that under the Succession Agreement, ownership over state property in the territory of BiH has been passed to the state of BiH. Two opposite claims have been made in this respect by the appellant and the National Assembly. According to the applicant, Bosnia and Herzegovina has continued the international legal personality of the Republic of Bosnia and Herzegovina and is the title holder 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. According to the National Assembly of the RS, Bosnia and Herzegovina does not exist without or beyond Entities; 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. In the view of the Venice Commission, neither claim is well-founded. It is obvious that, in order to carry out its primary functions, the State of Bosnia and Herzegovina must own and dispose of (some) state property. And so do the entities. As concerns the first claim, the Constitution of BiH clearly indicates the distinct legal existence of the state of Bosnia and Herzegovina under both international law and domestic legal order, *i.e.*, an existence which is not reducible to that of the Entities. The principle of legal continuation (in international law) needs to be combined with the rules of distribution of powers set out in the federal constitution. The division of state property is substantively a constitutional issue. As such, in principle it should have been regulated in the constitution of the State of BiH, but due to historical reasons this was not done, so that there is a lack of explicit constitutional law. The issue of ownership and concomitant legislative competence must be resolved on the basis of the constitution, in a way which is in harmony with the distribution of constitutional powers. This essentially constitutional issue is necessarily to be decided by the State of BiH in such manner that the property must be allocated to each level so as to enable every component of the State to carry out its constitutional functions. In a subsidiary manner, territorial and historical criteria may also be used in the allocation of state property.

32. The Venice Commission concluded that the challenged Law *violates the fundamental principle that, in federal states, issues of distribution of powers (state property may be seen as an issue of incidental powers) between the central state and the federated entities must be settled at the federal level, either in the federal constitution or through federal legislation taken pursuant to such constitution. The basic principle on which such distribution needs to be based is that property must be distributed to each level so as to enable every component of the State to carry out its constitutional functions. In a subsidiary manner, territorial and historical criteria may also be used in the distribution of state property.* The challenged Law, therefore, *arrogates powers which may not belong to a federated entity because they deal with distribution of powers and are thus intrinsically federal.* The challenged Law also *violates the functional principle of distribution of property in a federal state. It encroaches on the autonomy of Bosnia and Herzegovina by providing that the Republika Srpska may enter*

*into an agreement with the Council of Ministers of BiH “on transfer of usage of the part of property required by the institutions of BiH for conduct of affairs within their competence. The usage of such property belongs, ipso iure, to the State and cannot depend on a possible agreement by the Republika Srpska.*

33. The Republic Administration points out that *the Dayton-Paris Agreements (intentionally in plural because of the basic agreement and 12 annexes thereto), determined Bosnia and Herzegovina as the state where two entities concluded an agreement, giving only to the entities the right to be the parties in some future amendments of what had been concluded on 14 December 1995.* That is also confirmed by Articles I(3), III(4), III(5)(a) and (b), IV(4)(e) and V(3)(i). It is alleged that Article I(1) of the Constitution of BiH is clearly and precisely determined in three segments as follows: “under international law as a state“, within “its internationally recognized borders“ and “it shall remain a Member State of the United Nations“ all of the above in the internal structure modified as provided for by the Constitution of Bosnia and Herzegovina. Not in a single provision, the International Agreement has provided for the internal continuance of Bosnia and Herzegovina, which does not exist in the political, constitutional or any legal sense, so that any referral to the internal continuity has no legal grounds in the International Agreement under which the present Bosnia and Herzegovina came into being and was determined. The Republic Administration further states that Article I(3) of the Constitution of Bosnia and Herzegovina provides for Bosnia and Herzegovina to consist of two entities. No Article of the Constitution gives right to Bosnia and Herzegovina to any property. The Constitution of Bosnia and Herzegovina or any other Annex to the Dayton Agreement does not contain legal grounds by which the right of Bosnia and Herzegovina to have the property would be established. Therefore, Article III(3)(a) of the Constitution of Bosnia and Herzegovina allocates the right to property to the entities exclusively. Also, *the Constitution of Bosnia and Herzegovina does not contain grounds for the adoption of the Law on Division of State Property on the level of Bosnia and Herzegovina since the exclusive competence for the adoption of such legislation is on the Entity level.* Furthermore, the Constitution of BiH that Bosnia and Herzegovina, as a State, has responsibilities only towards outside, in relation to other states, and everything else is the issue for the Entities and the organization of government as provided by the constitutions of Entities. In that manner the Constitution of BiH defined the Entities as holders of government on the territory of Bosnia and Herzegovina and has not determined any other Ministry on the

level of Bosnia and Herzegovina that would have competencies or responsibilities for exercising powers within Bosnia and Herzegovina.

34. The Republic Administration points out that it is indisputable that Bosnia and Herzegovina, pursuant to the International Agreement on Succession Issues, acquired certain property and it is also indisputable that on the basis of Article I(1) of the Constitution of BiH it continued its legal existence under international law as a state but with its internal structure modified, *i.e.*, it is a complex state union (confederation or loose federation). The High Representative by his decisions of 2005, imposed three Laws the aim of which was to secure an appropriate property for the joined institutions of Bosnia and Herzegovina as necessary for exercising its functions. After considering the Information on the State Property Inventory prepared by the OHR, the Government of the Republika Srpska concluded that the Inventory does not correspond to the realistic state of affairs and invited the Council of Ministers to state within 60 days its needs for the property located in the territory of the Republika Srpska. As the aforementioned time limit has not been complied with, the National Assembly of the Republika Srpska passed the challenged Law based upon the general principles of civil law which recognizes the institute of legal unity of a land and a building, *i.e.*, under this principle all immovable property (facilities and other structures) located in the surface or below the ground, and are intended for permanently stay thereon, are sharing a legal destiny of the land. Furthermore, *the territory of the Republika Srpska has been determined by the Dayton Agreement, it is divided by the inter-entity boundary line, and as a territory it belongs to the Republika Srpska. Under the same principle all the construction and other facilities that are located in the territory of the Republika Srpska are the property of the Republika Srpska. Under the same principle, under the supervision of the OHR, the Law on Public Property of the Brčko District is adopted providing for all the property located in the territory of the Brčko District is the property of the Brčko District and the logical conclusion imposes that such principle should be applied also when the property located in the entities' territory is concerned.* The Republic Administration stresses that the Constitution of BiH does not give to Bosnia and Herzegovina the explicit right to property, so that Bosnia and Herzegovina has no property, and the immovable property located outside the territory of Bosnia and Herzegovina, diplomatic and consular buildings, could become the property of Bosnia and Herzegovina while all other immovable property (official apartments, resorts, hotels, etc.) would be subject-matter of division between the Entities and Bosnia and Herzegovina. The Republic Administration indicates that it expects the Constitutional Court of Bosnia and

Herzegovina to reject the request, as it cannot modify or amend the constitutional provisions and as its obligation is to protect the Constitution as a part of the International Agreement and to determine the right of BiH to property would be contrary to the International Law and the Vienna Convention on the Law of Treaties.

35. The Republic Administration refers to Article 1 Section 8 of the US Constitution under which the Congress shall have power *to exercise exclusive legislation in all cases whatsoever, over such District as may, by cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States (note: Washington DC), and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall...* Moreover, *the Switzerland is composed of 27 Cantons and the Cantons are owners of immovable property on their territory...*

#### **IV. Public Hearing**

36. Pursuant to Article 46 of the Rules of the Constitutional Court, at its plenary session held on 27 May 2011, the Constitutional Court decided to hold a public hearing on which it would discuss on the present request. Pursuant to Article 47(3) of its Rules, on the Plenary session held on 15 July 2011, the Constitutional Court decided to summon the following to the public hearing: the applicant's representative, the representative of the National Assembly, Prof Robert Badinter, the President of the Arbitration Commission for the former SFRY, Prof Dr Joseph Marko, the former Judge of the Constitutional Court, Mr. Zvonimir Kutleša, the Chair of the Commission for State Property, Prof Dr Edin Šarčević, Associate Professor on the Law School in Leipzig and Mr. Mustafa Begić, lawyer and geodesic engineer.

37. On 18 November 2011, the Constitutional Court held the Public Hearing attended by: the applicant's representative, the representative of the National Assembly, Mr. Zvonimir Kutleša, the Chair of the Commission for State Property, Prof Dr Edin Šarčević, Associate Professor on the Law School in Leipzig and Mr. Mustafa Begić, lawyer and geodesic engineer.

38. The applicant's representative briefly presented the subject-matter of the request, mainly within the scope of the lodged request. The National Assembly presented the arguments in favour of the adoption of the challenged Law, mostly within the scope of the reply thereto.

39. Mr. Zvonimir Kutleša, the Chair of the Commission for State Property, amongst other things, stressed that the Commission had been established seven years ago, that in the course of its operations the adjustment of positions occurred; for example, that the Succession Agreement cannot represent the legal grounds for the registration of ownership right in favour of Bosnia and Herzegovina, as the state property is internal issue that should be resolved by the adoption of the law; that all levels of government must possess their own property; and that the future law could not be applied retroactively because of the protection of acquired rights. During its operations, the Commission was faced with a misunderstanding of a term the state property; some of the members of the Commission held that the public property, i.e., publically used property and natural resources represented the state property. However, the State cannot possess the ownership right over such property but only the right of exploitation. Although some adjustments of positions occurred, the Commission did not succeed to establish criteria and to draft the Law on State Property that would be placed on the Agenda of the Parliamentary Assembly of Bosnia and Herzegovina. Furthermore, Article 1 of the Law on Temporary Disposal Ban over the State Property regulates what is the property the status of which needs to be solved, and Article 4 of the same Law provides for the temporary disposal ban over the state property shall remain in effect until the moment of enactment of the Law on State Property that shall be passed upon the proposal set forth by the Commission. Mr. Kutleša pointed out that this indicated that it is within the jurisdiction of the Parliamentary Assembly of BiH to pass the Law on State Property, which was also confirmed by the decision on the establishment of the Commission, and the National Assembly had already adopted the challenged Law. The state property is the internal issue of a state and Bosnia and Herzegovina should resolve it in such a manner that all the levels of government would have their own property.

40. Among other things, Prof Dr Edin Šarčević noted the following: *Regulation of the state property matter by an Entity law is inconsistent with the Constitution of BiH because taking over of the state property matter into the exclusive responsibility of the Entities violates the principle of continuity under Article I(1) of the Constitution in conjunction with the regulations on responsibility of the institutions of BiH under Article III(1)(a) and (e) and the regulations on powers of the Parliamentary Assembly of BiH...therefore, the challenged Law is unconstitutional for formal reasons. Furthermore: Regulation of the issue of state property by the Entity law is inconsistent with the Constitution of BiH because it regulates, on entity level, the disposal of the state property contrary to the explicit provisions of the state*

law. In this case the principle of normative hierarchy under Article III(3)(b)- the first sentence of the Constitution, has been violated. Also, by enacting the entity law on state property, which is the subject to be regulated by the state law and is under the disposal ban, the constitutional law has been violated, i.e. the principle of the rule of law under Article I(2) of the Constitution, and, therefore, the challenged Law is unconstitutional for formal reasons. In the event that the enactment of the challenged Law would not be considered unconstitutional for any of the mentioned reasons, then its formal unconstitutionality will be reflected in the violation of an unwritten constitutional principle – *the principle on obligation of pro-federal comity or loyalty, which follows from the systematic conjunction of Articles III (5), III(2) (d), III(3) (b), the second, third and sixth line of the Preamble and Article 1(1) of the Constitution of BiH...* As to the issue of violation of the right to property, Prof Dr Edin Šarčević noted that the state lacks the standing to sue as it does not belong to the group of persons that may refer to violation of Article 1 of Protocol No. 1 to the European Convention. The state is not prevented from regulating the issue of usage of state property by law or some other legal act, so that it may dispose of the owned property by way of regulating it. Therefore, Article 1 of Protocol No. 1 to the European Convention has not been not violated.

41. Mr. Mustafa Begić, *inter alia*, stated that all treaties, apart from the Dayton Peace Agreement, were signed by the guardians of BiH, while no norm relating to its interest (for example, compensation for war damages, ownership, and suchlike) was ever satisfied. The BiH Archives do not have a single copy of the mentioned treaties, as they were never ratified in BiH. Nevertheless, Bosnia and Herzegovina, at all stages of its development, has had the appropriate legislation on land records, suitable for the time. Furthermore, two years ago, through a wide-ranging administrative action, *the OHR established that there were solely 979 facilities in state ownership in BiH, although in reality there are around 16,972, materials on which were packed in 14 big boxes. A number of the most distinguished intellectuals, whose reputation is indisputable, contest the Dayton norms as well as the norms of the OHR, a protector of BiH. It has never been scientifically explained, although it is essential, what was a legal basis for dividing the territory of Bosnia and Herzegovina into the two “so called” entities, which, throughout its history, never existed.* Mr. Begić noted that there is no constitutional provision giving the power to the National Assembly of the Republika Srpska to enact the law, by way of which the acquired and administrative ownership right over real properties is being altered. The National Assembly of the Republika Srpska unlawfully embarked upon the enactment of the challenged Law, it effected “the acquisition without

grounds”, because it disposes with much real estate unlawfully and it engages in “running someone else’s business contrary to the ban”. Also, *the territory of BiH, symbolically speaking, has been “carved up” for over 300 years already, to be precise since the Karlovac Peace (1699); bribe and corruption of statesmen played a significant role in unlawful expropriation of the territory of Bosnia, as the Serbian historians openly wrote. The enactment of the challenged Law is contrary to the norms banning the disposal of the state property, and the norm of the Law on Obligations, agreements on succession issues and law on land books. In view of the aforementioned, the suggestion of the applicant denying the constitutionality of the challenged Law ought to be accepted.*

## V. Relevant Laws

42. The **Constitution of Bosnia and Herzegovina**, as relevant, reads:

### *Preamble*

[...]

*Dedicated to peace, justice, tolerance, and reconciliation,*

[...]

*Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law,*

[...]

### *Article I(1)*

#### *Continuation*

*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, with its internal structure modified as provided herein and with its present internationally recognized borders. [...]*

### *Article I(3)*

#### *Composition*

*Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter "the Entities").*

*Article III(1)*

*Responsibilities of the Institutions of Bosnia and Herzegovina*

*The following matters are the responsibility of the institutions of Bosnia and Herzegovina:*

- a) Foreign policy.*
- b) Foreign trade policy.*
- c) Customs policy.*
- d) Monetary policy as provided in Article VII.*
- e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.*
- f) Immigration, refugee, and asylum policy and regulation.*
- g) International and inter-Entity criminal law enforcement, including relations with Interpol.*
- h) Establishment and operation of common and international communications facilities.*
- i) Regulation of inter-Entity transportation.*
- j) Air traffic control.*

*Article III(3)*

*Law and Responsibilities of the Entities and the Institutions*

*a) All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.*

*b) The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.*

*Article III(5)(a)*

*a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities. [...]*

*Article IV(4)(e)*

*The Parliamentary Assembly shall have responsibility for:*

*[...]*

*e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.*

43. **The Annex II to the Constitution of Bosnia and Herzegovina**

*[...]*

*2. Continuation of Laws*

*All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.*

*3. Judicial and Administrative Proceedings*

*All proceedings in courts or administrative agencies functioning within the territory of Bosnia and Herzegovina when the Constitution enters into force shall continue in or be transferred to other courts or agencies in Bosnia and Herzegovina in accordance with any legislation governing the competence of such courts or agencies.*

#### *4. Offices*

*Until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law.*

#### *5. Treaties*

*Any treaty ratified by the Republic of Bosnia and Herzegovina between January 1, 1992 and the entry into force of this Constitution shall be disclosed to Members of the Presidency within 15 days of their assuming office; any such treaty not disclosed shall be denounced. Within six months after the Parliamentary Assembly is first convened, at the request of any member of the Presidency, the Parliamentary Assembly shall consider whether to denounce any other such treaty.*

44. **The Constitution of the Republika Srpska**, as relevant, reads:

**Article 68 has been replaced by Amendment XXXII** (*the Official Gazette of RS* no. 28/94), reading as follows:

*The Republic shall regulate and ensure:*

[...]

*6. property and obligation relations and protection of all forms of property, legal status of enterprises and other organisations, their associations and chambers, economic relations with foreign countries, which have not been transferred to institutions of Bosnia and Herzegovina, market and planning;*

[...]

45. **The Law on Status of the State Property Located in the Territory of the Republika Srpska and Under the Disposal Ban** (*the Official Gazette of Republika Srpska no. 135/10*, hereinafter: challenged Law), as relevant, reads:

*Article 1*

*This law shall regulate the issue of the status of state property located in the territory of the Republika Srpska and under disposal ban.*

*Article 2*

*The property located in the territory of the Republika Srpska and under disposal ban is considered to be:*

*a) Immovable property which passed to Bosnia and Herzegovina pursuant to the international Agreement on the Succession Issues and is considered to be either owned or possessed by any level of governmental body or public organization in the Republika Srpska 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 is considered to be either owned or possessed by any level of governmental body, public organization or any other body in the Republika Srpska.*

*Article 3*

*(1) In terms of this law, the property located in the territory of the Republika Srpska and under disposal ban is owned by the Republika Srpska.*

*(2) The ownership right over the property referred to in Article 2 of this law shall be evidenced in the land registers or any other public registers in favour of the Republika Srpska pursuant to a decision by a body competent for property law affairs or a court decision.*

*(3) The Attorney's Office of the Republika Srpska shall file a request to conduct proceedings and establish the criteria for meeting the conditions to establish the ownership right over the property referred to in Article 2 of this law in favour of the Republika Srpska to the competent administrative body for property law affairs.*

*(4) Subsequent to the issuance of a ruling of the body referred to in paragraph 3 of this article, the Attorney's Office of the Republika Srpska shall initiate proceedings to evidence the ownership right over the property which is the subject of this law in the land registers or any other public registers in favour of the Republika Srpska.*

*(5) The Attorney's Office of the Republika Srpska shall, within six months from the date this law becomes effective, initiate proceedings to establish and evidence the ownership right over the property which is the subject of this law in the land registers or any other public registers in favour of the Republika Srpska.*

#### *Article 4*

*(1) The property referred to in Article 2 of this law shall be under management and disposal of the Government of the Republika Srpska (the "Government").*

*(2) The right of disposal and management, in terms of this law, shall be considered to be sale, exchange, transfer of usage, lease, establishment of easement, establishment of the right to build, establishment of concession, establishment of mortgage and other forms of disposal in accordance with the applicable regulations.*

#### *Article 5*

*The Government may conclude with the Council of Ministers of BiH an agreement on transfer of usage of the part of property required by the institutions of Bosnia and Herzegovina for conduct of affairs within their competence.*

#### *Article 6*

*The usage of property transferred to the institutions of Bosnia and Herzegovina shall involve the possibility for the user, as investor, to build, reconstruct, remodel or rehabilitate facilities and infrastructure on the transferred property or to put the land to purpose in accordance with the nature of its business.*

#### *Article 7*

*(1) After the need of the institutions of Bosnia and Herzegovina to use the transferred property ceases, the possession of the said property shall be returned to the competent bodies of the Republika Srpska in the condition as found.*

*(2) When the property referred to in paragraph 1 of this article is repossessed, the user shall not be entitled to any compensation for conceivable investments in remodelling of the immovable property.*

*Article 8*

*The Government referred to in Article 2 of this law may transfer ownership or usage of property to the units of local self-government, public institutions and public companies founded by the Government.*

*Article 9*

*The Government shall, by a separate agreement with the Council of Ministers of BiH and the Government of the Federation of BiH, regulate the issue of perspective military property, required by the Armed Forces of Bosnia and Herzegovina.*

*Article 10*

*The proprietary rights over the property referred to in Article 2 of this law, acquired on a legal basis and in a valid manner, shall undergo no changes.*

*Article 11*

*This law shall enter into force on the 8<sup>th</sup> day from the day of its publication in the Official Gazette of the Republika Srpska.*

## **VI. Admissibility**

46. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

*The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:*

- *Whether an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina;*
- *Whether any provision of an Entity's constitution or law is consistent with this Constitution;*

*Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly; by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.*

47. The applicant seeks that the Constitutional Court establish that there is no constitutional basis for the National Assembly to enact the challenged Law and that the challenged Law is not compatible with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina and Articles I(1) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In its reply the National Assembly stated that the general elections in Bosnia and Herzegovina had been conducted on 3 October 2010 and that the Presidency of Bosnia and Herzegovina and the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina were established in accordance with the results of the elections and that it must be deemed that the mandate of the then composition of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ceased. As the legislative body cannot be composed of the two Houses out of which the House of Peoples is composed of the members from the previous assembly, the applicant is not authorized to submit the request, and therefore the National Assembly proposed that the request be rejected. Furthermore, it stated that the Constitutional Court of Bosnia and Herzegovina is not competent to decide on the compatibility of the Entities' laws (as to the constitutional basis) with the laws of Bosnia and Herzegovina, decisions of the Parliamentary Assembly of Bosnia and Herzegovina, rulings and judgments of the ordinary courts or laws imposed by the High Representative for Bosnia and Herzegovina.

#### **VI(1) Standing to sue**

48. As to the allegation that the applicant Mr. Sulejman Tihić, the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request was not authorized to submit the relevant request, the Constitutional Court recalls that in its the Decision on Admissibility and Merits *U 2/11* (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 2/11* of 27 May 2011, available at the website of the Constitutional Court [www.ustavnisud.ba](http://www.ustavnisud.ba)), it considered the same allegation and concluded that it was not well-founded taking into account the provisions of Article 1.3.a, 1.8 and 1.10 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08 and 32/10). According to the aforesaid provisions, the rights and obligations will commence on the day when the representative body has been constituted and when the elected holder of the mandate that has been elected in the direct and indirect elections has signed a declaration by which he/she will refuse or accept the mandate. As to the present case, it is undisputable that at the time of filing the request the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, being constituted by indirect elections, was not constituted in accordance with the results of general elections held on 3 October 2010 and that its mandate, having started on 14 of March 2007, was running until the 14 of March 2011 unless the new House of Peoples was constituted until that date.

49. This provision aims at securing the continuity of government and the permanence of the Parliamentary Assembly in the State, as the fact that bodies cannot be constituted after the elections should not affect the ability to exercise power and thus affect the functionality of the state. Furthermore, the applicant is not a simple delegate to the House of Peoples but he fulfilled the very official function of deputy chair which is referred to “the continuity of the functioning of the state” and thus to the right of action of persons authorized under Article VI(3)(a) of the Constitution of BiH. Namely, the Constitutional Court emphasizes that the constitutional task of authorized parties is not only “the authorization” to initiate proceedings for a review of constitutionality pursuant to the above referenced article but also implies a “constitutional task” to do so. Indeed, the Constitution of BiH has entrusted these subjects, as the representatives of the highest state and entity authorities, a task to initiate an institutional mechanism that safeguards constitutionality, given that the Constitutional Court cannot *ex officio* perform this duty, as it acts exclusively on “a principle of request”. Should these subjects be denied the right to do so in the period from new elections until the constituting of

the relevant authority, it is obvious that there would be a gap in the protection of constitutionality, and it was certainly not the intention of the framers of the Constitution.

50. Consequently, this objection is unfounded.

## **VI.2. *Res iudicata***

51. In response to the request, the National Assembly has made an objection that the present case has already been adjudicated and that it constitutes *res iudicata* (page 10, the second last paragraph). The Constitutional Court of BiH emphasizes that it has examined in the second partial decision no. *U 5/98* (of 18 and 19 February 2000, paragraphs 26 and 27) the constitutionality of the provisions of Article 68(6) of the Constitution of RS in the form of Amendment XXXII. However, in the instant case, the Constitutional Court has a task to examine the request for review of conformity of the disputed law with the Constitution of BiH, which is, for the first time, the subject of an abstract review of constitutionality before the Constitutional Court of BiH. These involve two different cases and there is no possibility for the challenged Law to share legal fate of the decision in the above referenced case *U 5/98-II*, because these two requests are not identical.

52. Consequently, this objection is unfounded.

## **VI(3) Objection as to jurisdiction *ratione materiae* in part relating to the examination of the constitutional basis for the enactment of the challenged Law**

53. In respect of the objection that the Constitutional Court has no jurisdiction to decide whether the entity law, “in terms of constitutional grounds, is in compliance with the laws of Bosnia and Herzegovina, the decisions of the Parliamentary Assembly of Bosnia and Herzegovina, rulings and judgments of regular courts or laws imposed by the High Representative”, the Constitutional Court reiterates that the present case concerns the proceedings of an abstract review of constitutionality under Article VI(3)(a) of the Constitution of BiH, *i.e.* the Constitutional Court emphasizes that the consideration of the existence or absence of a “constitutional basis” is *par excellence* jurisdiction of the Constitutional Court. Namely, the basic principle of constitutionality, which is inherent in the rule of law principle under Article I(2) of the Constitution of BiH, implies that any law has its basis in the Constitution. Indeed, the term “constitution”, from the point of view of the Constitutional Court of BiH, implies the Constitution of BiH, as it is the standard of review of

constitutionality. Therefore, the standard of review of constitutionality cannot be any other legal act at the level of BiH nor the Constitutional Court of BiH may review conformity of the entity laws with the constitutions of the Entities (compare, Decision *AP 724/07* of 14 October 2009, paragraph 51).

54. However, in the instant case, the Constitutional Court of BiH notes that the applicant does not seek a review of the compatibility of the challenged Law with other laws or legal acts of BiH, but argues that the Republika Srpska has no constitutional basis for enacting the challenged Law (page 10 of the request, the last paragraph). It is true that the applicant analyzes the compatibility of the disputed Law with "the laws of the High Representative" (page 10, second paragraph); however, it follows from the Constitution of BiH (Article III(3) (b) and Article VI(3)(c)) that the Entities must comply with the decisions of the institutions and the laws of Bosnia and Herzegovina according to the principles of constitutionality of all legal acts and the rule of law.

55. Consequently, this objection is ill-founded, too.

#### **VI.4. As to the objection *ratione personae* in relation to the right to property**

56. In response to the request of 15 February 2011, the National Assembly has noted that the applicant cannot invoke the constitutional right to property under Article II(3)k of the Constitution of BiH and 1 Protocol No. 1 to the European Convention, for it is *ratione personae* incompatible. The National Assembly is of the opinion that the State, as a public-law person, does not enjoy the protection under this Article but that this is an exclusive right of private natural and legal persons.

57. The Constitutional Court emphasizes that in the case *AP 39/03* (of 27 February 2004, paragraph 15), it has changed its previous position *vis à vis* the right of action of public and legal persons, which also include certain administrative-territorial levels of government (state, entities, cantons, *etc.*), in terms of the enjoyment of constitutional rights and freedoms. On that occasion, the Constitutional Court of BiH stressed that the European Convention affords a minimum level of protection in terms of human rights and fundamental freedoms, while the Constitution of BiH affords a much broader level of protection. Guided by this conclusion, the Constitutional Court has extended the enjoyment of constitutional rights and freedoms so as to include the public-law legal persons, finding that there is reasonable justification to treat this

protection at the international level differently from the protection within the constitutional law context.

58. The Constitutional Court of BiH concludes that the State, as an administrative-territorial level of government, may enjoy the right to property. However, whether in the present case the State has a protected right to property and whether there has been a violation of the mentioned right, the Constitutional Court will consider it on the merits of the case.

59. Consequently, this objection is ill-founded, too.

#### **VI.5 Conclusion as to the Admissibility of the case**

60. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Constitutional Court's Rules, the Constitutional Court establishes that the request is admissible as it has been submitted by an authorized person and as there is no reason under Article 17(1) of the Rules of the Constitutional Court for rendering the request inadmissible.

### **VII. Merits**

61. The applicant considers that there is no constitutional basis for the enactment of the challenged Law by the National Assembly, since the challenged Law is not compatible with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina and Article I(1) and Article III(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

62. State property, although similar in its structure to civil-legal private property, is a specific legal concept enjoying a special status for this reason. State property is characterized by the public law nature of the the relationship between the subjects and the use of that property as well as its title holder. It includes, first of all, movable and immovable objects in the hands of public authorities and can include furthermore a "public good" (sea water and seabed, river water and river beds, lakes, mountains and other natural resources, public transport networks, traffic infrastructure, *etc.*). It, by its nature, primarily serves all people in the country. As such, the "public good" may be exempted from legal transaction (*res extra commercium*) due to its importance, as it is the only way to preserve and protect it.

63. In other words, state property is a means of exercising public authority and is therefore closely related to the territorial and substantial competences of the public bodies, namely to the territorial integrity and the sovereignty of the state. Although the Constitution of Bosnia and Herzegovina distributes the responsibilities between the state and the entities it does not entail any provision related to state property.

64. Given the aforementioned, the Constitutional Court concludes that the question of whether the challenged law has a constitutional basis requires examining the whole Constitution as well as its context. Indeed, the complexity of the constitutional order of BiH indicates a *sui generis* system. Therefore, it appears impossible to deduce any regulation competence, such as in the *amicus curiae* opinion of the Venice Commission, from the form of the State and furthermore the comparison with other countries should be taken into account with great caution. In the light of the distribution of competences resulting from this analysis, the Court will examine the challenged Law. This will allow answering the questions of the title holder of the competence to regulate the state property and of the extent or the proportion of this competence.

### **VII.1. The complex distribution of responsibilities in the Constitution of BiH**

65. Article I(3) of the Constitution of BiH defines the structure of BiH, as a State composed of the two Entities. In addition, the Brčko District of BiH exists as a separate unit of the local self-government. The basic distribution of responsibilities between BiH and its Entities is stipulated in Article III(1) and Article III(3)(a) of the Constitution of BiH, which enumerates the State responsibilities, while the residual competencies are prescribed in favour of the Entities.

#### **VII.1.1. Article III**

66. The Constitutional Court reiterates that Article III of the Constitution of BiH regulates the issue of responsibilities and relations between the Institutions of Bosnia and Herzegovina and the Entities and specifies that paragraph 1 of this Article prescribes the responsibilities of the Institutions of Bosnia and Herzegovina, which include foreign policy, foreign trade policy, customs policy, monetary policy, finances of the institutions and for the international obligations of Bosnia and Herzegovina, immigration, refugee and asylum policy and regulation, international and inter-Entity criminal law enforcement, including relations with Interpol, establishment and operation of common and international communications facilities,

regulation of inter-Entity transportation and air traffic control. These are the exclusive responsibilities of the Institutions of Bosnia and Herzegovina. Paragraph 2 of this Article prescribes the responsibilities of the Entities, which include also the right to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina, as well as the right of each Entity to enter into agreements with states and international organizations with the consent of the Parliamentary Assembly, though the Parliamentary Assembly may provide by law that certain types of agreements do not require such consent. The aforementioned paragraph also prescribes an obligation of the Entities to provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina and to provide a safe and secure environment for all persons in their respective jurisdictions. This paragraph does not contain any other list of exclusive responsibilities of the Entities. However, the third paragraph of this Article prescribes that all governmental functions and powers not expressly assigned in this Constitution to the Institutions of Bosnia and Herzegovina will be those of the Entities.

67. In its further analysis of the provisions of Article III of the Constitution of BiH, the Constitutional Court notes that, although paragraph 3 of Article III of the Constitution of BiH prescribes that all governmental functions and powers not expressly assigned in this Constitution to the Institutions of Bosnia and Herzegovina will be those of the Entities, it establishes also a clear normative hierarchy: Article III(3)(b) prescribes that the Entities and any subdivisions thereof will comply fully with the Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities and with the decisions of the institutions of Bosnia and Herzegovina. Thus, there is a hierarchy between the state constitution and legal systems of the entities. From this relation arises a system of derogation, starting from the very constitution of the entity, which the Constitutional Court of BiH clearly demonstrated in the case no. *U 5/98*: constitutional provisions of the entity cannot be inconsistent with the provisions of the Constitution of BiH. Also, each level of government has its own competence, determined or determinable by the Constitution of BiH. The Constitution of BiH, and not the entity's constitution, is a guarantor of the relation of distribution of responsibilities between the State, on the one hand, and the entities, on the other hand. Such a relation can only be amended in a way as stipulated by the Constitution of BiH (*inter alia*, the provisions of Article III(5) and Article X of the

Constitution of BiH). The legal system of the entities, including their constitutions, can treat just those competences conferred upon them by the Constitution of BiH.

68. Specifically, for the abstract review of constitutionality of an entity law it is not important whether or not such a law was enacted on the basis of certain entity constitutional grounds, even provided that such a constitutional norm has already been examined before the Constitutional Court of BiH in terms of an abstract review of its constitutionality. Certainly, this refers to the provision of Article 68 of the RS Constitution, in the wording of Amendment XXXII, which was the constitutional basis for the National Assembly of RS to enact the challenged Law. The Constitutional Court has concluded, in its decision *U 5/98-II* (of 18 and 19 February 2000, paragraphs 26 and 27) - in the context considered - that this provision is in compliance with the Constitution of Bosnia and Herzegovina, which is emphasized by the National Assembly of RS. However, the obligations of the entity legislative and executive authority (executive and judicial authorities) are, on the one hand, to secure that the entity legal norms are not applied arbitrarily, and that the standards under the Constitution of BiH are taken into account when interpreting the entity norms, including the interpretation of the norms of the Constitution of RS. Accordingly, an entity constitutional norm can formally be constitutional in one context but not in other. Moreover, the constitutional entity provision may be concretized in unconstitutional law if the superior standards under the Constitution of BiH (or other governmental act, which in this case is superior) are not taken into account when applying and interpreting it. A similar conclusion holds true when it comes to the implementation of a specific act: a constitutional law can be implemented in an unconstitutional manner. Otherwise, the jurisdiction of the Constitutional Court of BiH for the purpose of Article VI(3)(a) of the Constitution of BiH to control the constitutionality of entity legal acts of the lower legal force compared to the entity constitutions would be superfluous ("Whether any provision of the Entity's constitution or law is consistent with this Constitution"). Based on the foregoing, one can clearly conclude that an entity law must be declared unconstitutional if that law normatively regulates an issue which does not belong to that entity under the Constitution of BiH, regardless of the fact that the entity has invoked certain constitutional basis under its constitution. In that event, there is no "constitutional basis" for the enactment of the law in terms of competence of the entities which is an essential element of the so-called formal constitutionality of laws. In such cases, it is pointless to argue about the constitutionality of certain constitutional provisions, given that the entire matter falls outside the competence of the legislative body of the entity (in this regard, compare, for

example, Judgment of the Constitutional Court of FBiH, no. *U 26/08* of 14 April 2009). If, however, there is a competence of the entities, then the task of the Constitutional Court of BiH is to review the substantive constitutionality, *i.e.* whether the incorporated normative solutions are consistent with substantive-legal standards under the Constitution of BiH. Indeed, the legal situation is much more complicated in the substantive-legal areas in which there is a common framework or competitive competence of the state and entities. In such cases, the task of the Constitutional Court of BiH is to clarify the extent to which the State and the entity have the right to derive their powers from the respective constitutional competence. Consequently, the residual competencies of the entities must be interpreted in the light of this hierarchy. In addition, paragraph 5(a) entitles Bosnia and Herzegovina to assume “additional responsibilities”. According to the interpretation by the Constitutional Court, there are three situations in which the responsibilities can be taken over, as follows: the responsibilities for (1) such matters that are agreed by the Entities; (2) such matters that are provided for in Annexes 5 through 8 to the General Framework Agreement; and (3) such matters that are necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the Institutions of Bosnia and Herzegovina according to Articles III(3) and III(5) of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision no. *U 26/01* of 28 September 2001, published in the *Official Gazette of BiH* no. 4/02).

69. Having in mind the aforementioned, the list of exclusive responsibilities of the Institutions of BiH under Article III(1) of the Constitution of BiH, *i.e.* the responsibilities assigned to the Entities under Article III(3)(a) of the Constitution of BiH, cannot be construed independently of other constitutional provisions. The Constitutional Court recalls its position that Article III(1) of the Constitution of Bosnia and Herzegovina does not contain a complete catalogue of the responsibilities of the Institutions of Bosnia and Herzegovina, but there are responsibilities of the Institutions of Bosnia and Herzegovina in other regulations of the Constitution as well, in particular in connection with Article IV(4)(e) and V(3), *i.e.* that Article IV(4)(e) of the Constitution of Bosnia and Herzegovina may encompass a broader scope of responsibilities than those enumerated in Article III(1) of the Constitution of Bosnia and Herzegovina (in this regard, see, Constitutional Court, Decision no. *U 25/00* of 23 March 2001).

## **VII. 1.2. Other relevant provisions**

70. There is a number of other constitutional norms which also regulate the responsibilities of the state institutions and the entities [e.g. Articles I(4), I(7), II(1), II(6), and III(4) of the Constitution of BiH, *etc*; see, in this regard, Decision of the Constitutional Court of BiH no. *U 5/98-II*, paragraph 12]. Furthermore, the provision of Article IV(4) of the Constitution of BiH prescribes the powers of the Parliamentary Assembly to enact legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution and to decide upon the sources and amounts of revenues for the operations of the Institutions of Bosnia and Herzegovina and to approve a budget for the institutions of Bosnia and Herzegovina and to decide whether to consent to the ratification of treaties and such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

71. In the opinion of the Constitutional Court, this list must be completed by the provision of Article I(1): “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, (...)”. The term “Bosnia and Herzegovina”, under the Constitution, implies the entire state as a subject of international law. This conclusion is clearly corroborated by line 6 of the Preamble of the Constitution of Bosnia and Herzegovina and Articles I(1), II(7) and VIII(1) of the Constitution of Bosnia and Herzegovina. The State of Bosnia and Herzegovina, as a subject of international law, is represented by the state level of government in functional terms, first and foremost through the responsibilities of the Presidency of Bosnia and Herzegovina for “foreign and foreign trade policy” [Article V(3) in conjunction with Article III(1)(a) and (b) of the Constitution of BiH], the responsibility of the Parliamentary Assembly to ratify international agreements [Article IV(4)(d) of the Constitution of BiH], and the role of the Constitutional Court as the guardian of the international subjectivity and territorial integrity of BiH (Article VI(3), the first sentence, the Constitution of BiH). The Constitution of Bosnia and Herzegovina treats “Bosnia and Herzegovina” in terms of the state and legal continuity with respect to the Republic of Bosnia and Herzegovina. That is not visible solely from the explicit provision of Article I(1) of the Constitution of Bosnia and Herzegovina, but also from Article I(7)(c) of the Constitution of Bosnia and Herzegovina and also from the declaration given in the name of the Republic of Bosnia and Herzegovina, which approves the Constitution of Bosnia and Herzegovina. This continuity is confirmed in the case-law of the Constitutional Court (see Decision *U 5/98-III*, paragraph 29).

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.

73. The Constitutional Court reminds in this regard the aforementioned characteristics of state property as a means of exercising public authority and as closely related to the territorial and substantial competences of the public bodies, namely to the territorial integrity and the sovereignty of the state. Yet, territorial integrity and sovereignty are clearly state attributes as it results from line 6 of the Preamble in conjunction with Article III(2)a and III(5)a. According to these provisions, the state property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina. Therefore it forms an integral part of the constitutional attributes and powers of the state.

74. This is the context in which the Constitutional Court has to examine the challenged law in a next step.

## **VII.2. *Materia legis* of the challenged Law and the question of the property title holder**

75. The challenged Law regulates the issue of state property located in the territory of Republika Srpska and under the disposal ban. The property located in the territory of the Republika Srpska and under disposal ban is considered to be: *a) immovable property which passed to Bosnia and Herzegovina pursuant to the international Agreement on Succession*

*Issues and is considered to be either owned or possessed by any level of governmental body or public organization in the Republika Srpska, 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 is considered to be either owned or possessed by any level of governmental body, public organization or any other body in the Republika Srpska” (Article 2). The exception to this property is perspective military property, required by the Armed Forces of Bosnia and Herzegovina (Article 9 of the Law).*

76. Pursuant to Article 3(1) of the challenged Law, the previously mentioned property will be owned by the RS, which means that the law regulates the change of the title holder from BiH and the former SRBiH to the RS. The real rights over the mentioned property, acquired on the legal grounds and in a valid manner, are exempt from the transfer of ownership. Paragraph 2 and onwards of this Article regulates the procedural competence of the RS authorities to initiate the procedure of the registration of the right of ownership and the entry into books of the same right in favour of the RS. Article 4 defines the scope of the right to manage and dispose of the registered property and determines this notion in functional terms as well (the RS Government). Articles 5 through 7 of the challenged Law represent in a certain manner the provision *specialis* with regard to Article 4, as it grants the right to the RS Government to cede certain property to the government at the state level and prescribes the rights and obligations arising from that relationship. Article 8 allows the Government to cede ownership of a property or to grant the right to dispose of a property to a unit of local government founded by the Government of the RS.

77. In view of the aforementioned provisions, it follows that the subject-matter regulated by the challenged Law is “the immovable property which Bosnia and Herzegovina got on the basis of the International Agreement on Succession Issues“, and “the immovable property over which the former SRBiH had the right to manage and to dispose of”; therefore, challenged Law regulates the state property of which “Bosnia and Herzegovina” and “the former SRBiH” are title holders transferring it to the RS.

78. According to the analysis of the challenged Law, it follows that the RS took over the responsibility to regulate, on the one hand, the issue of denying “Bosnia and Herzegovina” the right of ownership over “the state property”, and the legal transformation thereof into the Entity property, and, on the other hand, the right to protection of property, the ceding of the right to property and the use of that property. In its reply to the request, the RS National

Assembly stated that the Constitution of BiH does not provide for the responsibility of BiH to regulate the issue of state property and, given the residual nature of the Entities' responsibilities, such responsibility then belongs to the RS. As claimed, that is precisely for this reason that the RS has incorporated the constitutional provision of Article 68(1)(6) of the Constitution of RS. Furthermore, it is stated that the responsibility of BiH for regulating this issue cannot be derived from any other act but the Constitution of BiH. On the other hand, the Office of the High Representative and the Venice Commission hold that there is no *expressis verbis* constitutional norm that regulates the issue of responsibility for the distribution of property in BiH and/or the very distribution of property.

79. The Constitutional Court of BiH agrees with the opinion of the RS National Assembly that the Constitution of BiH does not contain an explicit provision establishing the responsibility of BiH to regulate the issue of state property which belongs to BiH within the meaning of Article 2 of the challenged Law. In that sense, the Constitutional Court of BiH supports the opinion of the Office of the High Representative and the Venice Commission.

80. However, the Constitutional Court of BiH cannot support the position of the RS National Assembly for this issue to automatically fall within the so-called residual competencies of the Entities. In this regard, reference is made to the above mentioned position that Article III(1) of the Constitution of BiH does not contain a complete catalogue of the responsibilities of the Institutions of Bosnia and Herzegovina, but there are responsibilities of the Institutions of Bosnia and Herzegovina also in other provisions of the Constitution. 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 "the 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 the state property, *i.e.* that the State of BiH is the title holder of the state property, 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 the 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. Therefore, this concerns the exclusive responsibility of BiH derived from Article I(1), Article III (3)(b) and Article IV(4)(e) of the Constitution of BiH.

81. Taking into account the aforementioned, the Constitutional Court concludes that the Republika Srpska enacted the challenged Law contrary to both Article I(1) of the Constitution of BiH and Article III(3)(b) of the Constitution of BiH, which reflects the principle of constitutionality, and Article IV(4)(e) of the Constitution of BiH, which gives the Parliamentary Assembly competence to regulate such other matters as necessary to carry out the duties of the State, as the matter falls under the exclusive responsibility of BiH to regulate the issue of property referred to in Article 2 of the challenged Law. For the aforesaid reasons, the challenged Law is unconstitutional. The whole law cannot remain in force. This conclusion cannot be affected by the fact that the Brčko District of Bosnia and Herzegovina enacted the Law on Public Property of the Brčko District of Bosnia and Herzegovina, with its specific arrangements. This law is not challenged before the Constitutional Court of BiH nor is it the subject of constitutional review. Therefore, the Constitutional Court is not called upon to conduct an examination as to the competence for enacting this law. Any contrary approach may be considered as prejudging the mentioned issue and would be in contravention of the method of work of the Constitutional Court of BiH, which requires “the submission of requests”.

### **VII(3) The proportions of the state property and the positive obligation of the State of BiH**

82. The Constitutional Court reiterates that the state property has a special status that encompasses, on the one hand, movable and immovable objects in the hands of public authorities used to exercise that authority and, on the other hand, the state property can include a public good, which, by its nature, primarily serves all people in the country (running water, protection of climate-related living conditions and protection of other natural resources

such as forests and state infrastructural networks within the meaning of Annex 9 to the General Framework Agreement for Peace in BiH, *etc.*). Such property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina. Furthermore, the interest of BiH should not be disregarded when it comes to preserving its “public good”, as a part of the state property serving all citizens of BiH and as a part which is not essential in order for specific competence of certain administrative-territorial level of government to be effectively exercised in the state. In addition, this property may serve as “another means for financing the expenses necessary for performing the operations of the Institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina“, within the meaning of Article IV(4)(b) in conjunction with Article VIII(3) of the Constitution of Bosnia and Herzegovina (in this regard, see the Decision of the Constitutional Court of BiH no. *U 1/08* of 25 January 2008, paragraph 15).

83. The Constitutional Court does not support the position of the applicant that the exclusive responsibility of BiH to regulate the issue of immovable property (*“immovable property passed over to [...] on the basis of international Agreement on Succession Issues and “immovable property over which former SRBiH had the right of disposal and management until 31 December 1991)* may be exercised without taking into account the whole normative context of the Constitution of BiH, as an essential factor when interpreting the Constitution of BiH and the responsibilities of BiH in connection with this problem, even in the case where the need of BiH to possess the state property is taken into consideration as stated in the present Decision. Namely, according to the opinion of the Constitutional Court of BiH, there is a positive obligation of the State of BiH to take into consideration, when exercising these responsibilities, the whole constitutional order of BiH. A positive obligation exists in the case where BiH takes over international obligations and also in the case where BiH regulates the issues related to the property of former SRBiH, as the functionality of BiH, in its capacity as a state, is not a simple sum of functionalities of territorial-administrative levels of government and competencies thereof but rather the harmony of all levels of government being reflected, *inter alia*, in the normative hierarchy, which the Constitution of BiH, *expressis verbis*, establishes in Article III(3)(b) of the Constitution of BiH and in Article XII(2) of the Constitution of BiH. It incorporates, *inter alia*, the principle of cooperation, coordination and mutual comprehension amounting to “justice and tolerance” in the best possible way (the second line of the Preamble), “peaceful relations” (the third line of the Preamble), promotion of the general welfare and economic growth (the fourth line of the

Preamble), and preservation of the sovereignty, territorial integrity, and political independence (the sixth line of the Preamble). The prerequisite for the aforesaid is the compliance with the competencies of the Entities and protection thereof, given the fact that the Constitution of BiH, as it has already been stated, is the one to protect the competencies of both the State and the Entities and to support the concept of effective exercise of the mentioned competencies. For this very reason and pursuant to the basic provision of Article III and other provisions of the BiH Constitution prescribing the Entities' competencies (for instance, Article I(4), Article I(7), Article II(1)...*etc.* of the Constitution of BiH in conjunction with Article I(3) and Article III(3)(b) of the Constitution of BiH - the first sentence), Bosnia and Herzegovina, in exercising the responsibilities relating to the property the title holder of which is BiH, is obliged to take into consideration the interests and needs of the Entities, so that they can also effectively exercise their public powers which are connected with their competencies. For, "the state property" is one of the essential means for the public powers to be exercised. At the same time, the State and the Entities must take into account the principle of proportionality, as an important factor for resolving this issue.

84. Furthermore, the Constitutional Court is aware of the fact that the State tried to resolve this issue by the Decision of the BiH Council of Ministers of December 2004 on the formation of the State Property Commission. The aforementioned Commission was tasked to select the criteria for the purpose of establishing which property is owned by the State and which property is owned by the Entities and the Brčko District of BiH. In addition, the State Property Commission was tasked with preparing the path leading to the legislation on the state level and legislation on the lower administrative-territorial level regarding the ownership rights, management and other issues related to the state property. Moreover, the High Representative, in order to help this process, passed the relevant laws on the temporary prohibition of the disposal of state property. This is a positive step as a state expert body was established, so that both the Entities and the Brčko District of BiH may articulate their respective interests. Nevertheless, this issue has not been resolved yet. This issue was neither resolved at the time of the establishment of the mentioned Commission nor at the time of the entry into force of the Constitution of BiH, *i.e.* on 14 December 1995. Therefore, there is a true necessity and positive obligation of BiH to resolve this issue as soon as possible.

#### **VII.4. Allegations with regard to the right to property**

85. Taking into account the preceding conclusions, the Constitutional Court considers that it is not necessary to deal with the issue of violation of other norms referred to in the request.

### **VIII. Conclusion**

86. In view of the aforementioned, the Constitutional Court of BiH concludes that the Republika Srpska enacted the challenged Law on Status of State Property located in the territory of Republika Srpska and is under the Disposal Ban contrary to Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH, as the matter falls under the exclusive responsibility of BiH to regulate the issue of property referred to in disputable Article 2 of the challenged Law. For these reasons, the challenged Law is unconstitutional. The whole law cannot remain in effect.

87. Having regard to Article 61(1) and (2) and Article 63(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

88. Considering the Decision of the Constitutional Court in this case, the Constitutional Court will not examine separately the request for an interim measures.

89. Pursuant to Article 41 of the Rules of the Constitutional Court, Annex to the Decision shall be Separate Dissenting Opinion of Judge Zlatko M. Knežević.

90. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Valerija Galić  
President  
Constitutional Court of Bosnia and Herzegovina

## SEPERATE DISSENTING OPINION OF JUDGE ZLATKO M. KNEŽEVIĆ

### I

By its decision, the Constitutional Court of Bosnia and Herzegovina, granted the request for the review of constitutionality lodged by Mr. Sulejman Tihic, purportedly the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, stating as follows:

- It is hereby established that the Republika Srpska lacks a constitutional competence to regulate the legal subject-matter of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the 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 BiH, falls within the responsibility of Bosnia and Herzegovina.
- that, pursuant to the provisions of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Law on the Status of State Property Located in the Territory of the Republika Srpska shall cease to be effective, as already stated in the decision.

### II

Regretfully I must note that I had disagreed with the majority when it comes to the decision-making on the lodged request and with the final decision as well, for the reasons mentioned, in principle, in this Separate Dissenting Opinion, as I had presented them in detail at the sessions of the sessions of the Constitutional Court of Bosnia and Herzegovina on a number of occasions.

Applying logic, my arguments for dissenting opinion can be brought down to the following reasons:

- the applicant's standing to sue;
- lack of power in the Constitution of Bosnia and Herzegovina by way of which the Constitutional Court may embark on distributing constitutional responsibilities between the state of Bosnia and Herzegovina and the Entities, if such distribution of responsibilities has not been specified in the text of the Constitution;
- absence of powers in the text of the Constitution of Bosnia and Herzegovina on the part of the state of Bosnia and Herzegovina to regulate the legal status of property and property rights;
- the previous decision of the Constitutional Court of Bosnia and Herzegovina which confirmed the responsibility of the Entities to regulate legal status of property and property rights in the territory of the Entities; and
- failure to consider different (even discriminatory) manners of regulating the same subject-matter in other areas of Bosnia and Herzegovina, of lower level than the Entities (in particular the Brčko District of Bosnia and Herzegovina).

### III

1. As to the standing to sue (the right of one to institute a dispute) in the case at hand, it is quite easy to distinguish the presence or absence of the applicant's standing to sue.

Namely, the Constitution of Bosnia and Herzegovina, in this type of request, recognizes as an authorized applicant also the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. So, the only question here is whether Mr. Sulejman Tihić had held that function at the time of lodging the request.

Through brief analysis we note the following: Mr. Sulejman Tihić had lodged the request on 6 January 2011. The general elections in Bosnia and Herzegovina (in addition to the Entities and the election of the authorities at the state level – the Presidency of Bosnia and Herzegovina and the House of Representatives) had been conducted on 3 October 2010. Thus, the mandate of the representative bodies had ceased at least one day before 3 October 2010. The Presidency and the House of Representatives had been constituted before 6 January 2011. The House of Peoples, under the principle of delegation, is constituted under special procedure and by indirect elections. The claim that the mandate of Mr. Tihić had existed on 6 January 2011 is, to say the least, surprising – we have the House of Representatives of newly elected representatives who had received their respective mandates at the General Elections and the purportedly existing House of Peoples constituted indirectly by the convocations of the Entities' Assemblies which mandates had ceased and new ones had been elected?! This is clearly related also in the Election Law of Bosnia and Herzegovina, Article 1.3.a.(2), which reads: "Mandate of the members of the representative bodies elected in the regular elections shall be four years and shall commence from the day of the publication of the election results in *the Official Gazette of BiH*." All far-fetched interpretations regarding "the continuity of the functioning of the state" do not relate to the representative bodies because the Election Law prohibited the length of the mandate exceeding four year. Otherwise, we would be facing a legally unsustainable situation whereby one chamber (the House of Representatives) has legitimacy obtained on the basis of "the new" elections, and the other indirect one (the House of Peoples) neither has "the new" legitimacy nor do the convocations of the Assemblies which had elected it exist?!

In all other cases, the Constitutional Court is extremely mindful of the issue of the standing to sue. The Constitutional Court strictly scrutinizes real life problems of citizens who address it with appeals, in terms of whether an applicant is authorized to lodge an appeal, and if not, then it reviews it uncompromisingly on an admissibility basis.

As to this request, the approach is not the same.

According to my deep belief, when it comes to examining admissibility through formal elements of the initial act, there is no difference between a citizen who lodges an appeal and an official who files a request for review of constitutionality; they are all subject to the same rules. Unless they are not, as is the case here!

2. As to the lack of jurisdiction of the Constitutional Court to decide on the distribution of the constitutional responsibilities between the state and the entities (if the Constitution does not specify the responsibility), in particular, without excessive need for argumentation, I refer to the provision of Article VI(3)(a) line 2, which vests the power in the Constitutional Court to decide *whether any provision of an Entity's constitution or law is consistent with this Constitution*.

So, the Constitutional Court may have decided whether some article/articles, and even a law in its entirety, is consistent with the Constitution of Bosnia and Herzegovina.

However, it may not have done so as such a power does not exist in the Constitution, that is, for it (the Constitutional Court) to distribute constitutional responsibility or to adopt (it decision by way of which it (the Constitutional Court) would establish distribution of the competence of different constitutional categories.

Therefore I find it acceptable (regardless of whether I agree or disagree with the decision) to declare inconsistent with the Constitution an article/articles or an entire law,

which is challenged, but not that the Constitutional Court assumes a role of a legislator and amends the explicit provision of the Constitution on what competences belong to the state and what (everything else) to the Entities.

This very dangerous tendency, according to which the Constitutional Court, through decisions of nine judges, takes the liberty to interpret the text of the Constitution, while simultaneously not only forming but essentially adopting new provisions of the Constitution, casts a serious doubt on the legitimacy of the representatives obtained at the General Elections and who are the only ones entitled to amend the Constitution.

3. The Constitution of Bosnia and Herzegovina does not contain a provision bestowing upon any body of the state of Bosnia and Herzegovina the competence to regulate, through legislative or other normative activity, property, property rights and the protection of property or property rights. Differing interpretations are solely interpretations derived from some other provisions of the Constitution.

4. Further, I also refer to the Decision of the Constitutional Court no. U 5/98 (the second partial decision) upholding the competence (power) of an Entity (in particular the Republika Srpska), which reads that Article 68 of the Constitution of the Republika Srpska, as amended by Amendment XXXII item 6, is in compliance with the Constitution of Bosnia and Herzegovina. That article served as the constitutional basis for the enactment of this law, and it reads, among other things, as follows: “[...] the Republika Srpska shall regulate, *inter alia*, property and obligation relations and protection of all forms of property [...]”. This Decision (U 5/98 – the second partial decision) upholds the constitutional basis for the enactment of the law and overthrows hypothesis that the Republika Srpska has no competence to enact this law. At the same time, they may have decided about whether individual provisions of law are consistent with the Constitution of Bosnia and Herzegovina, but I have already spoken on that matter.

5. And to conclude these principled remarks, I am particularly concerned about discrimination in the legislative activity, as to property as the subject-matter of this constitutional dispute, being completely tolerated in other territorial-political categories as is the Brčko District of Bosnia and Herzegovina. Namely, the Property Law of the Brčko District of Bosnia and Herzegovina exclusively applies the territorial principle and all property! even including the property acquired in this manner (through the Succession Agreement), which is located in the territory of the District, belongs to the District! By the way, with the direct participation of OHR, as the Deputy High Representative is at the same time the Supervisor of the Brčko District of Bosnia and Herzegovina.

Finally, I am saddened that the issue of a constitutional gap, with its serious consequences for the citizens of Bosnia and Herzegovina and its constitutional system (and the constitutional system of Bosnia and Herzegovina is, in addition to the Constitution of Bosnia and Herzegovina, made up of the Constitutions of the Entities, including some other constitutional sources of domestic and international nature), has not been resolved in a way, which, according to my deep belief, is Bosnia-Herzegovina’s way.

In accordance with the Constitution of Bosnia and Herzegovina, and if there is no constitutional provision, then through the distribution of rights and competencies between the state and the Entities, or to paraphrase the opinion of the Venice Commission, [...] the state and the entities shall have the right to property in accordance with their respective needs and the territorial-functional principle.

As in discussions, so will I repeat now the opinion of the American Professor of Constitutional Law Mark A. Graber who, in his brilliant essay *Dred Scott and the Problem of*

*Constitutional Evil*, which is my guide on how one should not to behave when interpreting the constitutional norms, noted the following:

“Constitutional theorists of all political persuasions often display less interest in determining what is constitutional than in making arguments that they believe will help the social movements they favor achieve desired ends constitutionally.”

The task of the Constitutional Court is to interpret the Constitution and not to stretch the membrane of constitutionality to where it does not belong.

For these, as well as for other reasons of minor importance, I was against the decision of the majority of the Constitutional Court of Bosnia and Herzegovina.