

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – consolidated text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru

Ms. Valerija Galić

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso

Having deliberated on the appeal of the **Republika Srpska** in the Case no. **AP 548/17**, at its session held on 6 July 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of the **Republika Srpska** lodged against the verdicts of the Court of Bosnia and Herzegovina nos. S1 3 P 016159 16 Rev of 24 November 2016, S1 3 P 016159 15 Gž of 27 July 2016 and S1 3 P 016159 14 P of 24 May 2016 is hereby dismissed as ill-founded.

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 8 February 2017, the Republika Srpska (“the appellant”), represented by the Public Attorney’s Office of the Republika Srpska – the seat of the Deputy in Istočno Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”), against the verdicts of the Court of Bosnia and Herzegovina (“the Court of BiH”) nos. S1 3 P 016159 16 Rev of 24 November 2016, S1 3 P 016159 Gž 15 of 27 July 2016 and S1 3 P 016159 14 P of 3 July 2015. The appellant also filed the request for an interim measure, whereby the Constitutional Court would suspend the execution of the mentioned verdict of the Court of BiH of 3 July 2015 in the part of the verdict in which the right of ownership of Bosnia and Herzegovina was established with regards to the real properties registered in the temporary land registry sheet and specified in the verdict, and in the part of the verdict of the Court of BiH of 27 July 2016, whereby the Republic Administration for Geodetic and Property Legal Affairs (“the Republic Administration”) is ordered to register the right of ownership of Bosnia and Herzegovina (“the plaintiff”) over

the mentioned real properties and to erase the registration of all rights of the appellant over the mentioned real properties pending the adoption of the decision on the appeal.

II. Procedure before the Constitutional Court

2. The Constitutional Court adopted the Decision no. AP 4106/16 of 23 November 2016 whereby the appellant's appeal filed against the Verdict of the Court of BiH no. S1 3 P 016159 Gž 15 of 27 July 2016 was rejected as premature for the reason that the proceeding upon the appellant's petition for review was not concluded.

3. The Constitutional Court adopted the Decision no. AP 548/17 of 28 February 2017, whereby it dismissed the appellant's request for an interim measure as ill-founded.

4. Pursuant to Article 23 of the Rules of the Constitutional Court, the Court of BiH and the Ministry of Defense of BiH ("the plaintiff") were requested on 20 February 2017 to submit their respective replies to the appeal.

5. The Court of BiH submitted its reply on 24 February 2017 and the plaintiff did so on 3 March 2017.

III. Facts of the Case

6. The facts of the case, as they appear from the appellant's allegations and the documents submitted to the Constitutional Court, may be summarized as follows.

7. The Verdict of the Court of BiH no. S1 3 P 016159 14 P of 3 July 2015 granted the claim of the plaintiff and established the right to property of Bosnia and Herzegovina over the real properties registered in the temporary land registry sheet precisely specified in the verdict ("the real properties"), which, in nature, consist of the building of the Ministry of Defence and a pasture of the 4th class of 11, 474.00 m² of total surface area (paragraph 1). The Verdict ordered the Republic Administration to register the ownership rights over the real properties in the name of Bosnia and Herzegovina and to erase the registration of all rights of the appellant - the Public Company "Šume Republike Srpske" a.d. Sokolac ("the second defendant") and "M:tel" a.d. Banja Luka ("the third defendant") over the mentioned real properties from the land registry sheets specified in the verdict (paragraph 2). The verdict obligated the appellant, the second defendant and the third defendant to bear the

registration of the plaintiff in the cadastre of real properties of the Republic Administration as a holder of the ownership right over the real properties specified in the verdict and to erase all registered rights of the defendants over the real properties in question (paragraph 3). The verdict also obligated the appellant, the second defendant and third defendant to reimburse to the plaintiff the costs of the proceeding in the amount specified in the verdict.

8. It was stated in the reasons for the decision that the real property in question belonged to the State Secretariat of National Defence of SFRY, and that based on the provisions of Article 1 of the Law on Temporary Prohibition of Disposal of the State Property of BiH (“the Law”), the definition of the state property was given, so that such property implies the state property of BiH that is the subject of the distribution of the property of the former SFRY; that based on the Agreement on Succession Issues relating to the former SFRY (“the Agreement”), Annex A, Articles 2 and 7, the respective real property, as state property of the former SFRY located in the territory of BiH, was transferred to the ownership of BiH on 1 March 1992, when BiH proclaimed its independence and, accordingly, the right of ownership at the given location is enjoyed by the State of BiH. Therefore, any opposite disposal or change of registration, based on the previously mentioned regulations is unlawful. It is stated that based on the relevant provisions of the Law on Defense of BiH and the decision of the Presidency of BiH on the size, structure and locations of the Armed Forces of BiH, the real property in question was defined as “promising military location, which cannot be given into possession and for use to any subject that is not in charge of defence issues”, and which can be handed over only to the Ministry of Defence of BiH. According to the reasons given by the Court of BiH, on 26 September 2006, the High Representative for BiH issued a Decision on Amendments to the Law. It was reasoned that the relevant part of the mentioned decision reads as follows: “Part of the State property which shall continue to be used for the needs of defence on the basis of and in accordance with Articles 71-74 of the Law on Defence of BiH shall also be exempted from the temporary Prohibition proclaimed by this Law.” It was also stated that the Decision of the Constitutional Court of BiH no. U 1/11 noted that the State of BiH is competent to resolve the issues of state property, which also arises from Article IV(4)(e) of the Constitution of BiH, and that it is primarily the State of BiH which is entitled to continue regulating the State property, i.e. that it is the title holder of the ownership over the State property. The Court of BiH stated that the appellant’s objections that that court lacks

jurisdiction to deal with the case at hand are ill-founded as the jurisdiction of the Court of BiH to deal with this and similar cases is stipulated by Article 1 of the Civil Procedure Code before the Court of BiH, which, *inter alia*, stipulates that the Court of BiH shall deal with the property related disputes between the State of BiH and Entities.

9. The appellant, the second defendant and the third defendant lodged the complaints against the mentioned verdict with the Court of BiH (the second instance panel), which rendered a Verdict no. S1 3 P 016159 15 Gž of 27 July 2016, dismissing the complaint of the appellant and upholding the first instance verdict in the part in which the right of ownership of BiH over the real properties in question was established and the Republic Administration was ordered to register the ownership rights in the name of BiH regarding the real properties in question and to erase the registration of all rights of the appellant regarding the real properties in question and the appellant is obligated to accept that fact. This verdict granted the complaints of the second defendant and third defendant and quashed the part of the first instance verdict related to erasing all registered rights of these defendants over the real properties in question from the title deeds specified in the verdict. Therefore, the Court of BiH declared itself as not having the jurisdiction and all previously conducted actions were quashed and that part of the claim was rejected. Moreover, the complaints of the second defendant and third defendant were granted by the verdict and the part of the first instance verdict was modified, wherein the defendants were requested to bear the registration of the plaintiff in the cadastre of the real properties of the Republic Administration as a holder of the ownership right over the real properties in question by way of dismissing this part of the claim. By the said verdict the decision on the costs was modified as precisely stated in the verdict and the appellant was ordered to fulfil all obligations arising from this verdict within the time-limit of 30 days from the day of delivery of the second instance verdict. As regards the complaint of the appellant, it was stated in the reasons for the decision that the court accepts all reasons given by the court of first instance in the challenged verdict, as a result of which the complaint of the appellant is considered ill-founded. As regards the complaints of the second defendant and third defendant, it was stated that they are justified since these defendants lack the standing to be sued as they were not registered as title holders over the real properties in question.

10. The appellant filed the petition for review against the mentioned verdict with the Court of BiH (the Review Panel), which rendered the Verdict no. S1 3 P 016159 16 Rev of 24

November 2016 and dismissed the petition for review as ill-founded while accepting the legal position of the lower instance courts. It was stated in the reasons, *inter alia*, that there is no ground for the motion for review by the appellant with regards to the issue of standing to sue because, as stated by the appellant, the real properties in question fall within the scope of properties under the prohibition of disposal. The Court of BiH stated that it is true that Article 1 of the Law stipulates the prohibition of disposal of the state property. However, Article 3(3) of the Law Amending the Law excluded from the temporary prohibition imposed by this Law the portion of the state property which will continue to be used for the purposes of defence. The reasons given by the second-instance court with regards to the military property are granted in entirety by the reviewing panel, as clear and specified reasons were produced. In the opinion of the court, the present case concerns the military property having the character of promising property in military terms of the Ministry of Defence of BiH, and is related to the Stationary and Communication Nods, Veliki Žep, Municipality of Han Pijesak, in accordance with the BiH Presidency's Decision on the size, structure and locations of the Armed Forces of BiH, dated 18 April 2012, which, based on the decision of the Council of Ministers dated 23 October 2014, by means of a Rulebook, regulated the conditions and the procedure for renting out the resources of the Stationary and Communication Nods referred to in the BiH Presidency's decision to other users, and the manner of access to them. Unlike the appellant's opinion, the Court of BiH pointed out that there are no grounds for claiming that the Commission for the State Property is the only competent authority to establish whether that property is subject to the prohibition of disposal, the reason being that the amendments to the Law regulate the property excluded from disposal, the aim of which was obviously the enforcement of the Law on Defence of BiH with regards to the transfer of property rights and obligations on the so-called promising military property determined in the BiH Presidency's Decision.

11. Furthermore, the Court of BiH reasoned that the appellant wrongly interprets Annex A to the Agreement, which was ratified on 2 June 2004 and which has the character of an international treaty, wherein the movable and immovable property was transferred to the successor states in the manner that the immovable property referred to in Article 2 which was on the territory of the SFRY was transferred to the successor states, on the territory of which the property was located and that is the plaintiff in this case, and not to the subject on the territory of which the immovable property is located and that is the appellant in this case. The

fact that the mentioned provision cannot be interpreted differently, in the opinion of the Court of BiH, derives from Article 7 of the Agreement, wherein the ownership right is transferred to one of the successor states as of the day of the declaration of independence, i.e. 1 March 1992 in the present case, when BiH declared the independence, so that the legal ground and other rights related to that property of any of the successor states will be considered null as from that date. It was reasoned that the Law on Defence entered into force after the Agreement, which has been applicable as of 1 January 2006. The provisions of Articles 71-73 of that Law prescribe that a list of immovable property used for the purpose of defence at all levels will be made. Article 73(2) of the mentioned Law prescribes a time limit for signing the agreement not later than 31 December 2005, for the termination of disposal of all rights and obligations with regards to the movable and immovable property. Given that the Agreement on the transfer of property rights was not signed and that the real properties which belonged to the State Secretariat of Peoples' Defence of SFRY were registered as ownership of the Ministry of Defence – the appellant, for which obligations the RS Government is still responsible, the Court of BiH is of the opinion that the plaintiff's claim to determine the ownership right of the plaintiff is justified, for the purpose of the registration of the ownership right acquired by ratification of the Agreement.

12. The Court of BiH stated that Article I(3) of the Constitution of BiH defines the structure of Bosnia and Herzegovina as a State composed of two Entities and, in addition, of the Brčko District of BiH which exists as a separate local self-government unit; that the Constitutional Court, in its Decision no. U 1/11, pointed out that although Article III, paragraph 3 of the Constitution of BiH prescribes that all governmental functions and powers not expressly assigned in this Constitution to the Institutions of BiH will be those of the Entities, the same Article establishes a clear normative hierarchy between the State Constitution and the Entity legal system; that each level of the government has its own competences; that the Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state; that the term "Bosnia and Herzegovina", under the Constitution, implies the entire state as a subject of international law and the aforesaid follows from the line 6 of the Preamble of the Constitution of BiH, and Articles I(1), II(7) and VIII(1) of the Constitution of BiH, from which it clearly follows that the term "Bosnia and Herzegovina" under the Constitution of BiH includes several meanings: the highest level of the government in BiH called the government at the level of Bosnia and Herzegovina; Bosnia and

Herzegovina as a subject of international law, *i.e.* as a legal state, and as the legal successor of the Republic of Bosnia and Herzegovina and Bosnia and Herzegovina. It is furthermore stated that the Constitutional Court of BiH in its Decision no. U 1/11, in paragraph 72, *inter alia*, stated that “it can be useful 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, under the Agreement, the State of Bosnia and Herzegovina was conferred with the state property mentioned in that agreement, *i.e.* that Bosnia and Herzegovina is the title holder of that property. Accordingly, the State property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina”.

13. The Court of BiH stated that, because of the aforementioned, there is no ground to claim that the challenged decision resulted in the violation of Article I(3) of the Constitution of BiH, or that the granting of the plaintiff’s claim resulted in the reduction of the territory of the appellant by the surface area determined in the enacting clause of the verdict. Namely, as it was reasoned, the claim sought to determine the right of ownership of the plaintiff over the real property in question. In the opinion of the Review Panel, that does not in any way mean the reduction of the territory of the Entity - the appellant, but only the establishment of the fact as to who the title holder of the mentioned property is. The respective real property, as a state property of the former SFRY located in the territory of Bosnia and Herzegovina, according to the reasons adduced by the Court of BiH, was transferred and became the ownership of the appellant on 1 March 1992, *i.e.* on the day when BiH declared its independence. Therefore, according to the reasons of that court, the right of ownership on the given location is enjoyed by the plaintiff. Bearing in mind the aforesaid, the Court of BiH rendered the verdict as stated in the enacting clause.

IV. Appeal

a) Allegations stated in the appeal

14. The appellant considers that the challenged judgements violated her right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”), and the right under Article II(1), (3) and (5) of the Constitution of Bosnia and Herzegovina. The appellant sees the violation in the erroneously established facts and arbitrary application of the substantive law. The appellant is of the opinion that the

courts should not have allocated the real properties in question to the plaintiff, since only the commission made up of the representatives of all levels of the government, on the basis on the agreement on distribution of the state property in the territory of BiH, could have decided the issue of the distribution of the property such as the mentioned property. That has never been done as the agreement has never been made. Moreover, the appellant states that in the case at hand there was no ground for the application of the Agreement as that is the international agreement, which does not regulate the issue of the distribution of property within the levels of the government of the newly established states. The appellant states that there are the letters, which content is interpreted in the appeal and in which the High Representative addresses the Public Attorney's Office of BiH warning them to stop registering the property of the former SFRY in the name of BiH, as that violates the provisions of the Law on Prohibition of Disposal of Property. The appellant also holds that only in this case it was possible to apply the provisions of Article 71 of the Law on Defence of BiH, which clearly specifies that the legal basis for the distribution of property within BiH will be the agreement which, as already stated, has never been signed. Moreover, the appellant stated that it was unsuccessfully pointing out in the course of the proceeding that the position of the Constitutional Court presented its Decision in the case no. U 1/11 cannot be applied to this case, as the case no. U 1/11 dealt with the issue of the registration of property in the appellant's name, as, in that way, its property received under the Dayton Agreement is being taken away and that is in contravention of the Decision of the Constitutional Court no. U 5/98. The appellant also considers that the Court of BiH lacks jurisdiction. The appellant also considers that the Court of BiH lacks jurisdiction in the case at hand, since the Basic Court in Vlasenica has exclusive jurisdiction given that the real properties in question are located in the territory covered by the jurisdiction of that court.

b) Reply to the appeal

15. The Court of BiH stated that there was no violation of the rights in the relevant proceeding that the appellant refers to and that the appeal should be dismissed as ill-founded.

16. The plaintiff stated that there was no violation of the rights the appellant referred to and that, for the said reason, the appeal is considered ill-founded. She also said that it is indisputable that in its Decision no. U-1/11 the Constitutional Court established the exclusive jurisdiction of BiH to decide the status of property under Article 2 of the Law, and that the

appellant, in the present appeal, reiterates in entirety the allegations presented in the proceeding in the case no. U 1/11. The plaintiff stated that the allegation of the appellant is unfounded in that it read that concerning the resolution of property issues the Commission for State Property has competence, since the competence of the Court of BiH concerning the property-related disputes between the State and the Entities unambiguously follows from the Civil Procedure Code before the Court of BiH given that the case at hand concerns the issue of a property dispute between the State of BiH and the Entity of the Republika Srpska.

V. Relevant Law

17. The **Agreement on Succession Issues of Former SFRY**, as relevant reads:

Annex A

MOVABLE AND IMMOVABLE PROPERTY

Article 1

(1) In order to achieve an equitable solution, 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.

(2) Other proprietary rights and interests of the SFRY are covered by Annex F to this Agreement.

(3) Private property and acquired rights of citizens and other legal persons of the SFRY are covered by Annex G to this Agreement.

Article 2

(1) 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.

(2) The successor States shall use their best endeavours to assist each other with the exercise of their diplomatic and consular activities by the provision of suitable properties in their respective territories.

Article 7

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.

18. The **Law on Defence** (*Official Gazette of BiH*, 88/05 and 95/05), as relevant reads:

Article 71

(Transfer of Immovable Property)

- (1) On the day of the entry into force of this Law, the Ministry of Defence and the entity ministries of defence shall begin compiling all data on immovable property into an inventory list of immovable property used for defence purposes, for which the rights of management, disposal, use, or ownership are held by the Bosnia and Herzegovina Federation, the Government of the Republika Srpska, the Government of the Bosnia and Herzegovina Federation, defence ministries, the Army of the Republika Srpska, the Army of the Bosnia and Herzegovina Federation or another body of Bosnia and Herzegovina, or any administrative subdivision thereof (hereinafter referred to as: Immovable Property). The competent institutions shall deliver the comprehensive inventory lists of Immovable Property to the Ministry of Defence within sixty (60) days of the entry into force of this Law, but no later than 31 December 2005.*
- (2) Within thirty (30) days from the delivery of the comprehensive inventory list of Immovable Property, the Expert Team shall propose to the Minister of Defence a plan for the final status of all Immovable Property that will continue to serve defence purposes in accordance with valid regulations.*
- (3) On 1 January 2006, the Ministry of Defence shall begin to use and enter in possession of all Immovable Property from paragraph (2) of this Article.*

Article 72

(Transfer of Other Rights and Obligations)

(1) Within 30 days of this Law's entry into force, the Ministry of Defence and the entity ministries of defence shall make a comprehensive inventory list of other rights and obligations of the former entity ministries of defence, as of 1 January 2006, and propose a plan for the transfer of other rights and obligations to the Ministry of Defence.

(2) Unless otherwise determined by the plan for the transfer of other rights and obligations from paragraph (1) of this Article, approved pursuant to Article 73 of this Law, the entity governments shall remain accountable for all debts, encumbrances and other liabilities of entity ministries of defence incurred by 1 January 2006.

(3) The governments of the entities shall not be entitled to compensation, contribution or indemnification from Bosnia and Herzegovina in relation to the transfer of other rights and obligations, except as authorized by the Council of Ministers of Bosnia and Herzegovina or Parliamentary Assembly.

Article 73

(Agreement on Transfer of Property Rights)

(1) The Ministry of Defence shall present the plan for the final takeover of the property from Article 70, paragraph (3); Article 71, paragraph (3); and Article 72 to the Council of Ministers of Bosnia and Herzegovina for approval.

(2) Upon the approval by the Council of Ministers of Bosnia and Herzegovina and within a period of sixty (60) days, but no later than 31 December 2005, the Ministry of Defence shall submit agreements, decisions, resolutions or other relevant instruments required for the final takeover of all rights and liabilities related to the movable and immovable property to the Council of Ministers of Bosnia and Herzegovina, and Republika Srpska and Bosnia and Herzegovina Federation governments for signature.

Article 74

(Prohibition on Free Use of Property)

1) Any free use of the property from Articles 70, paragraph (3), 71, paragraph (3) and 72 of this Law, shall be prohibited from the day of this Law's entry into force until the effective day of an agreement, decision, resolution or another relevant instrument from

Article 73 of this Law, finalizing the transfer of property rights from the former entity defence ministries to the Ministry of Defence.

19. **The Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina** (*Official Gazette of BiH*, 29/06), as relevant reads:

Article 1

This Law prohibits the disposal of State Property.

For the purpose of this Law, State Property is considered to be:

- 1. Immovable property, which belongs to the state of Bosnia and Herzegovina (as an internationally recognized state) pursuant to the international Agreement on Succession Issues signed on 29 June 2001 by the states of Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia and the Federal Republic of Yugoslavia which, on the day of adoption of this Law, is considered to be owned or possessed by Bosnia and Herzegovina or other public organizations of Bosnia and Herzegovina; and*
- 2. Immovable property for which the right of disposal and management belonged to the former Socialist Republic of Bosnia and Herzegovina before 31 December 1991, which on the day of adoption of this Law is considered to be owned or possessed by Bosnia and Herzegovina, or public organization or body of Bosnia and Herzegovina and any of its subdivisions.*

For the purpose of this Law, disposal of the aforementioned property shall mean the direct or indirect transfer of ownership.

Article 2

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.

Article 3, paragraph 2

Assets and rights of enterprises, registered as such, which are subject to privatization pursuant to the Framework Law on Privatization of Enterprises and Prohibitions in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina no. 14/98 and 14/00), and applicable regulations thereunder, shall be exempt from the prohibition under this Law.

Additionally, the State Property Commission established by the Decision of the Council of Ministers of Bosnia and Herzegovina (“Official Gazette of Bosnia and Herzegovina”, No. 10/05, hereinafter: “the Commission”) may, upon the proposal of an interested party, decide to exempt certain State Property from the prohibition imposed by this Law.

Article 4

The temporary prohibition on the disposal of State Property in accordance with this Law shall be in force until entry into force of the law regulating implementation of criteria to be used for identification of property owned by Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of Bosnia and Herzegovina, and specifying the rights of ownership and management of State Property, which shall be enacted upon the recommendations of the Commission but not later than one year from the day of the entry into force of this Law.

20. **The Law Amending the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina** (*Official Gazette of BiH*, 85/06), as relevant reads:

Article 1

In Article 3, following paragraph 2 a new paragraph is inserted, which reads:

The portion of State Property that will continue to serve defence purposes, pursuant to and in accordance with Articles 71-74 of the Law on Defence of Bosnia and Herzegovina

(Official Gazette of Bosnia and Herzegovina, no. 88/05) shall also be exempt from the temporary prohibition imposed by this Law.

21. The **Civil Procedure Code before the Court of BiH** (*Official Gazette of BiH*, 36/04, 84/07, 58/13), as relevant reads:

(1) This Law determines the rules of procedure before the Court of Bosnia and Herzegovina (“the Court”) in resolution of property disputes (civil procedure) between the State of Bosnia and Herzegovina (“the State”) and the Entities, between the State and the Brčko District of Bosnia and Herzegovina (“the District”), between the Entities, between the Entities and the District and between the institutions of Bosnia and Herzegovina, which are interrelated with the exercise of public functions.

(2) The provisions of this Law shall apply to property disputes arising from the damage caused in the course of performance of the tasks by the administration of Bosnia and Herzegovina, including other institutions of Bosnia and Herzegovina and official persons of those bodies and institutions.

(3) The provisions of this Law shall apply to other property related disputes where the jurisdiction of the Court is determined by the laws of Bosnia and Herzegovina or international agreement.

22. The **Civil Procedure Code** (*Official Gazette of RS*, 58/03, 85/03, 74/05, 63/07, 49/09, and 61/13), as relevant reads:

Jurisdiction in Real Estate Disputes

Article 42

The court on whose territory the real property is located shall have the exclusive jurisdiction for adjudicating disputes involving ownership rights and other substantive rights in or over real estate, disputes involving trespass to real estate and disputes involving rent or lease of

real estate, as well as disputes arising from contracts on the use of apartment or business premises.

Where real estate is located on the territory of several courts each court on whose territory such real estate is located shall be competent.

VI. Admissibility

23. Pursuant to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

24. Pursuant to Article 18(1) of the Rules of the Constitutional Court, the Court shall examine an appeal only if all effective remedies available under the law against a judgment or a decision challenged by the appeal have been exhausted and if the appeal is filed within a time limit of 60 days as from the date on which the appellant received the decision on the last effective remedy she used.

25. In the present case, the subject-matter of the appeal is the Verdict of the Court of BiH no. S1 3 P 016159 16 Rev of 24 November 2016, against which there are no other effective remedies available under the law. Furthermore, the appellant received the challenged verdict on 27 December 2016 and the appeal was lodged on 8 February 2017, *i.e.* within the 60-day time limit provided for by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements set out in Article 18(3) and (4) of the Rules of the Constitutional Court, because there is neither a formal reason rendering the appeal inadmissible, nor is it manifestly (*prima facie*) ill-founded.

26. Having regard to the provision of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal in question meets the admissibility requirements.

VII. Merits

27. The appellant challenges the mentioned verdicts claiming that those verdicts violated its rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, including the rights under Article III (1), (3) and (5) of the Constitution of Bosnia.

28. Given the fact that the appellant is the holder of public office, the Constitutional Court recalls that it does not enjoy the protection of rights guaranteed under the provisions of the European Convention and its Protocols, which regulate the relationship of public authorities and individuals and provide individuals the protection of human rights and fundamental freedoms in their relationship with public authority. However, in its case-law the Constitutional Court indicated that the European Convention offers a minimum of protection with regards to human rights and fundamental freedoms, and the Constitution of Bosnia and Herzegovina provides wider protection and, therefore, it took a position that according to under Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, every person who was the party to a proceeding and has any court's judgment, for which he/she considers to be in violation of his/her rights, may file an appeal with the Constitutional Court. Accordingly, the State bodies and public authority, as participants in court proceedings, enjoy the guarantees of the right to a fair trial and of the right to property under Article II(3) (e) and (k) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision no. *AP 39/03* of 27 February 2004, published on the website: www.ustavnisud.ba). Having regard to the aforesaid, the Constitutional Court will examine the allegations of the appellant with regards to the right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina.

Right to a fair trial

29. Article II(3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

(e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

30. The appellant considers that in the process of rendering its decisions the Court of BiH applied the substantive law arbitrarily by concluding that the registration of ownership right over the real properties in question in the name of the plaintiff was based on positive regulations and that the court erroneously established the facts in that regard. The Constitutional Court indicates that, according to its consistent case-law, its task is not to examine the findings of ordinary courts concerning the facts of the case and the application of the substantive law. Namely, the Constitutional Court is not called upon to substitute ordinary courts in the assessment of facts and evidence, but, in general, it is the task of ordinary courts to assess the presented facts and evidence. It is the Constitutional Court's task to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, *etc.*) have been violated or disregarded, and whether the application of the law was, possibly, arbitrary or discriminatory.

31. First and foremost, the Constitutional Court observes that the subject-matter of the proceeding in the case at hand is the issue of ownership right over the real properties in question. Moreover, the Constitutional Court observes that the appellant is the Entity in BiH, while the plaintiff is the State of BiH, i.e. that this is the property related dispute between the State and an Entity. In that respect, the Constitutional Court recalls the provisions of Article 1 of the Civil Procedure Code before the Court of BiH, which prescribed that this law determines the rules of procedure before the Court of BiH in resolving the property related disputes (civil procedure), *inter alia*, between the State of Bosnia and Herzegovina and the Entities. Thus, the aforementioned law stipulates the exclusive jurisdiction of the Court of BiH in disputes of this kind from which it follows that in property-related disputes relating to the mentioned real properties this law is *lex specialis* with regards to the laws, which prescribe jurisdiction of courts according to the place in which the real property is located. For the mentioned reason, the Constitutional Court is of the opinion that the allegations of the appellant that the Court of BiH does not have jurisdiction in the case at hand are ill-founded.

32. Furthermore, the Constitutional Court observes that the real property in question constitutes prospective military property, which was owned by the State of SFRY-YPA (Yugoslav People's Army) before 1992. In this connection, the Constitutional Court recalls that the aforementioned cited Agreement, Annex A, Article 1, paragraph 1 and Article 2, paragraph 1, stipulates that in order to achieve an equitable solution, the movable and immovable State property of the federation constituted as the SFRY ("State property") shall be transferred, under the said Annex, to the successor states in accordance with the provisions of the following Articles of this Annex (Article

1, paragraph 1), i.e. that the immovable State property located on the territory of the SFRY shall be transferred to the successor state on which territory that property was located (Article 2, paragraph 1). Therefore, contrary to the appellant's claims, it unambiguously follows from the mentioned agreement, as argued by the ordinary court as well, that the real property in question, as state property, which was owned by SFRY-YPA at the time, was transferred to the ownership of the SFRY successor states, namely the successor state in this case is the plaintiff - BiH.

33. Furthermore, the provisions of Article 1, paragraph 1 of the Law prescribes that the state property implies, *inter alia*, immovable property, which belongs to the State of Bosnia and Herzegovina (as an internationally recognised state) pursuant to the international Agreement signed on 29 June 2001 by the states of Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia and the Federal Republic of Yugoslavia which, on the day of the adoption of this Law, is considered the ownership or possession of Bosnia and Herzegovina, or of other public organisation of Bosnia and Herzegovina. Next, Article 3, paragraph 2 provides that the State Property Commission established by the Decision of the Council of Ministers of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, no. 10/05; hereinafter: "the Commission") may, upon the proposal of the interested party, decide to exempt certain state property from the prohibition imposed by this Law, and Article 4 provides that the temporary prohibition on the disposal of state Property in accordance with this Law shall remain in force until entry into force of the law regulating the implementation of criteria to be applied for identification of property owned by Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina, and specify the rights of ownership and of the management of state property, which criteria shall be adopted upon the recommendations of the Commission, not later though than one year from the day of the entry into force of this Law. The prohibition of disposal of the property is also prescribed by the provisions of Article 74 of the Law on Defence. However, the Law on Amendments to the Law provides, as cited above, that the portion of state property that will continue to serve defence purposes, shall be exempt from the prohibition on disposal imposed by this Law (Article 1).

34. In this respect, it follows from the facts of the case at hand that there is no absolute prohibition on disposal of the property inherited from the former SFRY, which is contrary to the appellant's allegations, given the fact that the Commission may, at the proposal of the interested party, decide to exempt certain state property from the temporary prohibition of disposal and that the Law on Amendments to the Law "removed" the prohibition from the disposal of the property

that continues to serve defence purposes. Besides, with the aim of implementing the Law on Defence, in accordance with the provisions of the Law on Amendments to the Law, the Presidency of BiH, as it stems from the challenged decisions, rendered the Decision on the size, structure and locations of the Armed Forces of BiH, which includes the real property in question. Thus, it indisputably follows from the aforementioned that there is nothing to indicate that the Court of BiH acted arbitrarily when it established the right of ownership in favour of the plaintiff and ordered the registration of that right in the land registry. In addition, bearing in mind all the mentioned relevant regulations, the Constitutional Court holds that the mere fact that the real property is registered does not imply that it will remain registered in the future in the name of the plaintiff. The reason being that the aforementioned provisions of Article 73 of the Law on Defence, as stated in the reasons for the challenged verdicts, prescribe the obligation to conclude an agreement between the Council of Ministers and the RS and FBiH Governments on the distribution of property acquired through succession, which property, pursuant to the provisions of the Agreement, is currently owned by the plaintiff (State of BiH). The mentioned Agreement, as the Constitutional Court observes, has not been concluded yet (although it should have been concluded by 31 December 2005), the conclusion thereof however still remains the obligation for all levels of the government in BiH, and it does not preclude a possibility that, by agreement, following the conclusion of the said agreement, the real properties in question will change the title holder – the owner (which may or may not happen). The Constitutional Court is mindful that it follows clearly from the facts of the case at hand that the appellant had previously acted contrary to the regulations it referred to, given that it registered the real properties in question in its name.

35. Finally, the Constitutional Court considers as unfounded the allegations of the appellant that the registration of the right of ownership over the real properties in the name of the plaintiff is in violation of the Dayton Agreement and seizes the portion of the territory from the appellant. Namely, as argued by the ordinary court, the registration of the respective real properties, which are located in the territory that was allocated to the appellant under the Dayton Agreement, cannot constitute the seizure of the territory from the appellant, as in that case any registration of the real property in the name of a title holder other than the appellant would constitute the seizure of the territory from the appellant. Moreover, the appellant is the Entity, an integral part of the plaintiff as an internationally recognised state composed of two Entities – the appellant and FBiH (and the Brčko District as a local self-government within the territory) – they both share the plaintiff's territory in proportion agreed upon under the Dayton Agreement and that territory is located

within the internationally recognised borders of the plaintiff, which is the title holder of, *inter alia*, the property acquired through the succession from the former SFRY in its entire territory, including the property located in the territory of the appellant and FBiH. In view of the aforementioned, the Constitutional Court considers that there is nothing to indicate that the Court of BiH arbitrarily applied the law or erroneously established the facts when it rendered the challenged decisions, and that all the elaborated allegations made by the appellant are ill-founded.

36. Having regard to the aforementioned, the Constitutional Court considers that there is no violation of the appellant's rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina in the case at hand.

Other allegations

37. The appellant states that, due to the arbitrary application of law and erroneously established facts, i.e. due to the violation of the right to a fair trial, the right referred to in Article III (1), (3) and (5) of the Constitution of Bosnia and Herzegovina was violated too. The Constitutional Court already concluded in the foregoing paragraphs of this decision that the substantive law was not applied arbitrarily, i.e. that there was no violation of the right to a fair trial. The ordinary court dealt with the issue of jurisdiction and relations between the institutions of Bosnia and Herzegovina and the Entities, as stipulated in Article III of the Constitution of Bosnia and Herzegovina, in the proceeding of rendering the decision and in the reasoning for the challenged decisions, which carry clear reasons as to why the challenged verdicts are not in contravention of the mentioned constitutional provisions. In view of the aforesaid, the Constitutional Court also considers that the challenged verdicts are not in contravention of Article III(1), (3) and (5) of the Constitution of Bosnia and Herzegovina.

VIII. Conclusion

38. There is no violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article III(1), (3) and (5) of the Constitution of Bosnia and Herzegovina where there is nothing to indicate that the Court of BiH arbitrarily applied the substantive law upon establishing established that the plaintiff is the title holder of the right of ownership over the real properties in question, as it acquired them on the basis of the Agreement as a successor state, while, in the meantime, no agreement has been reached on the distribution of the property obtained through succession between different levels of the government in BiH.

39. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

40. Within the meaning of Article 43 of the Rules of the Constitutional Court, Vice-President Zlatko M. Knežević and Judge Miodrag Simović added dissenting statements.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina