

Between:

Kovačević

Applicant

and

Bosnia and Herzegovina

Respondent

**APPLICATION FOR LEAVE TO INTERVENE BY
THE DEMOCRATIZATION POLICY COUNCIL**

1. This application is made by the Democratization Policy Council (“DPC”). DPC’s mission is to press established and emerging democracies and transnational and international institutions to pursue policies based on liberal democratic values and principles within the scope of their international engagements and commitments. Through its research, analysis, advocacy and public engagement, DPC seeks to draw the attention of policymakers, legislators and civil society to encroachments on freedoms within the democratic framework.
2. DPC has no links to any party in the case. It wishes to provide observations in the public interest and in the interests of the proper administration of justice.
3. For the purposes of Article 36(2) of the Convention and Rule 44(3)(a) of the Rules of Court, DPC is a person concerned for the purposes of this important application concerning Bosnia and Herzegovina (“BiH”). In the interests of expediency, DPC is making this application and has taken the unusual step of also providing its proposed written observations at the same time. It is recognised that that is outside the usual practices of this Court and DPC wishes to be clear that it means no disrespect to the Court in having taken that action. DPC wishes simply to avoid any possibility of unnecessary delay and wishes to avoid any suggestion that its intervention should not be permitted as it could not be made in time to avoid disrupting the upcoming hearing.

4. DPC has particular knowledge in terms of the political and civic society in BiH which will be of assistance to this Court. DPC is keen to ensure, having regard to the submissions made on behalf of the High Representative, that this Court has a balanced view of the political landscape in BiH. That, it is respectfully submitted, can only be achieved if one has regard not only to the original Dayton Agreement framework but also to the manner in which BiH has evolved as a society and a democracy since 1995. It is on those matters, and the exercise by different High Representatives of the Bonn Powers, that the DPC wishes to assist this Court. DPC respectfully submits that such contextualisation will be of assistance – and indeed may be essential – when this Court is considering the application.
5. It is hoped that, having seen these observations, the Court will recognise that they ought to be taken into account and considered as part of the determination of the application, and therefore that the discretion afforded to the President of the Chamber in Rule 44 to permit the application to be made outside the usual time limits will be exercised. DPC respectfully submits that consideration of these observations would be in the interest of justice for the purposes of Article 36(2) of the Convention and Rule 44(3)(a) of the Rules of Court and, accordingly, invites the Court to allow these observations to be considered.
6. DPC has provided its written observations. It is hoped that they will be of assistance to the Court.

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Between:

Kovačević

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and

Bosnia and Herzegovina

Respondent

THIRD PARTY OBSERVATIONS BY
THE DEMOCRATIZATION POLICY COUNCIL

1. These third party observations are provided by the Democratization Policy Council (“DPC”).¹ DPC’s mission is to press established and emerging democracies and transnational and international institutions to pursue policies based on liberal democratic values and principles within the scope of their international engagements and commitments. Through its research, analysis, advocacy and public engagement, DPC seeks to draw the attention of policymakers, legislators and civil society to encroachments on freedoms within the democratic framework.
2. Since its foundation in 2007, DPC has closely followed the political and security developments in the Western Balkans and the role of Western actors, in particular the US and the European Union, in line with its stated mission. DPC has undertaken wide-ranging research, analysis, and advocacy over the years, becoming the most consistent think-tank outside the region, tracking the ups and downs of democratic development and the involvement of outside actors in the six countries of the Western Balkans.

Interest and application to have these observations considered

3. DPC has provided these observations at the same time as making its application to intervene. DPC recognises that this application is made unusually, in that the request to

¹ DPC is a registered voluntary association (e.V.) in Germany and a 501(c)(3) non-profit in the US.

be permitted to make observations is being made at the same time as submitting the proposed observations. This is as a result of the limited time available before the listed hearing before the Grand Chamber, and borne of a desire by DPC not to cause any unnecessary delay. No disrespect is intended toward the Court in this approach. DPC respectfully submits that consideration of these observations would be in the interest of justice for the purposes of Article 36(2) of the Convention and Rule 44(3)(a) of the Rules of Court.

Observations

4. DPC makes these observations because of its reasonable concern that a reversal of the first instance decision would create an artificial ceiling on the potential for citizens to develop constitutional alternatives which would be compatible with the core findings informing the Kovačević ruling, as well as its five antecedents, starting with the *Sejdić* and *Finci*² cases in 2009.

5. The current constitutional arrangement in Bosnia and Herzegovina (BiH) protects the incumbent political elites in a manner which has engendered widespread anger, dissatisfaction and disillusionment with the political system; trends clear through both low voter enthusiasm and protests. It would appear to DPC that those elites are seeking to lock in their advantage by, among other things, mobilising international actors to advocate for the current system. The primary reason these observations were not made earlier by DPC is that DPC was not aware of the position reportedly taken by the High Representative in his submission to the Court.³ Having been made aware of that position, DPC felt obliged to ensure that this Court had submissions on the factual position in BiH, from an observer aware of the arc of developments over 30 years, so as not to proceed on the basis of a misapprehension.

² [GC], nos. 27996/06 and 34836/06, 22 December 2009.

³ A copy of a document said to be 'Written Observations on behalf of the High Representative' was published by Istraga and is available at <https://istraga.ba/wp-content/uploads/2024/10/schmidt-pismo-ESLJP.pdf>

6. These observations are set out in three sections, as follows: (1) Dayton and key post-1995 developments; (2) the Bonn Powers and the relevance of international involvement; and (3) civil society reform initiatives and their potential.

Dayton and key post-1995 developments

7. It is recognised in the recitals to the Dayton Agreement that the purpose of that agreement was not only to bring an end to the war, but also to contribute toward, and to promote, an enduring peace and stability. While a generation has passed, and peace has been maintained, citizens frustration with the “straitjacket” of Dayton governance structures is commonly expressed. There is an inherent illogicality in a constitutional arrangement, which is designed to prevent conflict between ethnic groups, being designed around rigid and exclusionary rules relating to those ethnic groups. As an overarching observation, DPC notes that the entrenching of the citizens of BiH along ethnic lines does not serve to foster good relations between those ethnic groups, but seeks artificially to maintain and even reify lines (and separations) between them.
8. In the early years after the Dayton Agreement, the wide international understanding which prevailed was that BiH’s political leaders saw the benefit in continuing the process of Euro-Atlantic integration (and therefore reform) - and would continue this process on their own initiative.⁴
9. In June 2003, at the Thessaloniki European Council summit, Western Balkan countries, including BiH, were declared eligible to become EU Member States in the future. On 25 November 2005, BiH’s Stabilisation and Association Agreement (“SAA”) negotiations opened in Sarajevo, with BiH signing the SAA on 16 June 2008, and ratifying it in 2010.
10. An attempt to facilitate BiH’s reform processes to join the European Union (later known as the “April Package”), informed by the March 2005 Venice Commission Opinion⁵ would

⁴ High Representative Ashdown’s “from the push of Dayton to the pull of Brussels”:
<https://www.ohr.int/article-by-paddy-ashdown-high-representative-for-bih-from-dayton-to-brussels>

⁵ Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, 11 March 2005, available at
[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e)

have written all the *de facto* constitutional reforms of state-building from 1998-2005 (such as the development of the competences of state level institutions in the areas of defence, security and intelligence; or setting up of the state-level institutions, such as the Court of BiH and Indirect Tax Authority) into a new written constitution, as well as creating two new ministries and clarifying some constitutional competences. The April Package failed to achieve the 28/42 majority in the House of Representatives by two votes in April 2006. It deserves mention that there was little outreach to citizens that might have enabled bottom-up pressure in support of the April Package.

11. The SAA came into force on 1 June 2015, and BiH submitted its application to become an EU Member State on 15 February 2016. The EU Commission identified 14 key priorities for BiH in December 2019, and thereafter adopted an Economic and Investment Plan in October 2020, with a view to bringing the Western Balkan countries closer to the EU. In December 2022, BiH was granted candidate status by the EU and, in March 2024, the European Council agreed to open accession negotiations with BiH.
12. The Directorate for European Integration (“DEI”), the BiH state institution responsible for European Integration, has become an expert advisory body rather than an executive body. It was not always this way. The role of the DEI was affirmatively noted in the BiH 2005 Progress Report of the European Commission (EC):

‘[t]he DEI, which is under the direct responsibility of the Chairman of the Council of Ministers, has improved co-ordination with, and the involvement of State and Entity ministries through regular meetings with the EU Integration Coordinators of these ministries.’⁶

13. The role of the DEI was ultimately scuppered, however, by the (largely ethnically centred) policies of Milorad Dodik and Dragan Čović, and the blowback from the failed April Package and subsequent political consequences. Sidelining the DEI in favour of a loose

⁶ https://neighbourhood-enlargement.ec.europa.eu/bosnia-and-herzegovina-progress-report-2005_en

“coordination mechanism” suited the state-undermining agenda of entrenched political party leaders and elites.

14. A shift in rhetoric in 2011 heralded an EU policy shift related to two events: (i) the 2011 “standoff” between the RS and Brussels, in which Dodik’s threats of a secession referendum succeeded in opening up discussion on state-level justice sector issues, a move viewed by many as EU capitulation to RS blackmail, and (ii) the ‘Instrument for Pre-accession Assistance’ (“IPA”) funds controversy, in which IPA fund allocation decisions made by the appropriate Council of Minister bodies were, after the fact, rejected by Banja Luka. At the last minute, following a deal between party leaders on a new coordination mechanism (which put entities and cantons on par with the Council of Ministers, counteracting the constitutional competence of the Council of Ministers) the EU allowed new, entity-driven priorities.
15. These capitulations marked the beginning of the end of efforts to strengthen BiH as a state, and ushered in a new process of negotiating subtle means of further entrenching political-ethnic internal partition and weakening the state. That entrenchment, for which DPC understands the High Representative in effect to argue, is the antithesis of the more European, outward-looking BiH which was always intended to be the destination goal from the early days of the Dayton Agreement. It is not in the interests of the people of BiH to continue to be divided along rigid ethnic lines - that is advantageous to some of its politicians.
16. While the international community would continually claim to want citizens to become more active and involved in demanding change, in two cases of protests in which citizens did go onto the streets to demand social, economic and political change, in 2013 and 2014, the political elites successfully worked to limit any potential support from the “West” for these citizens by, again, raising the spectre of violence. Time and time again, the West missed opportunities to recognize that *Sejdic, Finci* and other case law were not just technical boxes to be ticked, but could and should be the propulsion needed to provoke discussions on a new social contract.

The Bonn Powers and the relevance of the international involvement

17. The Peace Implementation Council (“PIC”) in December 1997 first articulated powers to be held by the High Representative (commonly known as the Bonn Powers).
18. The Bonn Powers include the ability to annul laws made by BiH authorities which are deemed (by the High Representative) to be in violation of the Dayton Agreement. The High Representative also has power to *impose* laws to facilitate the implementation of the Dayton Agreement, to remove officials deemed to be violating the Dayton Agreement, and even to ban such spoilers from political activity altogether. These are wide-ranging powers and, accordingly, must be exercised with restraint.
19. The Bonn Powers were used increasingly strategically from 1998-2005 to enable implementation of the Dayton Agreement, including assisting in refugee return and war crimes accountability. Most importantly, the Bonn Powers and the use of them by High Representatives Westendorp, Petritsch, and Ashdown changed the incentive structure for Bosnia’s political actors. It is interesting to note that there was little genuine citizen protest against the use of the Bonn Powers; citizens saw anything that marginalised the self-interested elites as enabling forward motion.
20. As noted above, by 2006 the idea of moving from the “push of Dayton to the pull of Brussels” began to gain traction and was consistent with the prevailing idea that BiH’s political elites would seek to preserve the state institutions built since the Dayton Agreement, and would seek to develop the state capacity to adopt and adhere to EU and NATO standards. While the Powers remained, Paddy Ashdown’s successor, Christian Schwarz-Schilling (February 2006-June 2007) made clear upon arrival that he would only use his executive authorities minimally. His successors (in part due to lack of Western consensus and strategy) took a similar approach without regard to the impact on reform progress – or even preserving the achieved reforms made by their predecessors.
21. Christian Schmidt, the current High Representative who assumed the role in August 2021, has employed the Bonn Powers in a different manner. Most notably in this context,

he has used the Bonn Powers to impose amendments to the state election law and to the Federation of Bosnia and Herzegovina Constitution on election night, 2 October 2022,⁷ two hours after the polls had closed and people had already voted. Such actions would not be tolerated in any modern, liberal democracy. They are anathema to the principles of democracy.

22. While some of those amendments made it more difficult for parties to block government formation processes (as the HDZ had done through the prior government's term of office), the essence of those amendments was to reinforce the tighter ethnic delineation desired by Croat nationalists, who continue to seek further election law changes regarding elections to the state presidency to ensure what they judge to be 'legitimate' ethnic representation.⁸ Those amendments, therefore, were the first instance since the Bonn Powers were articulated by the PIC in which those powers were employed to narrow the political field, rather than further open it.
23. There is no foundation for any suggestion that the Dayton Agreement (and the role of the High Representative) were intended to be immutable. The Dayton Agreement was intended to be the starting point to permit a modern and liberal democracy to grow from the ashes of war. There was from the beginning an understanding that it was an imperfect agreement, with the terms being made against the backdrop of war, and with glaring asymmetries and dealmaking necessary to secure signatures as is the case with any international – indeed any – agreement. James Pardew, a key member of the negotiating team for the Dayton Agreement is on record saying: *"The Dayton peace agreement has flaws. It was a document made in compromise. It was never imagined for it to be absolute and the only solution for the future of Bosnia and Herzegovina. It was a starting point."*⁹

⁷ <https://www.ohr.int/decision-enacting-the-law-on-amendments-to-the-election-law-of-bosnia-and-herzegovina-8/>

⁸ <https://www.justsecurity.org/83373/us-reinvests-in-ethnic-oligarchy-in-bosnia-abandoning-support-for-integration/>

⁹ <https://www.globalsecurity.org/military/library/news/2019/12/mil-191214-rferl02.htm>

24. In DPC's opinion, it was clearly the intention of the drafters of the Dayton Agreement that there would be subsequent constitutional change as BiH grew into a modern democracy. It is for that reason that there are procedures for such changes in the Constitution itself. While the constitution, in its description of governing bodies and legislative processes, is focused almost solely on the envisioned participation of the three constituent peoples, one cannot avoid the fact that in the preamble to the constitution, Citizens and Others are specifically noted. This, from the beginning, expresses the understanding that constituent peoples, divided along ethnic lines, would not eternally dominate the political space, therefore marginalising others and preventing the full participation of citizenship on an equal and non-discriminatory basis.
25. Common language heard particularly in the first 5 to 10 years of peace implementation was that the Dayton Agreement was "the floor and not the ceiling."¹⁰ This approach was not simply aspirational, but viewed the processes of peace implementation and reform unfolding within the country as a reflection of the entire body of the peace agreement. It was expected that human rights would be protected according to European and other conventions, and that, in instances where there seems to be some contradiction, the European standards and practices would prevail, thereby necessitating reforms in the country's constitution or lower-level legislation.
26. It is submitted that the constitutional structure of BiH cannot properly be understood if one omits from consideration the post-war developments in which the High Representative was catalytic. To do so is to fail to acknowledge the development of the state through the first decade following the war; and it is to ignore the real impetus for changes brought about, for example, by the Venice Commission Opinion and the *Sejdić Finci* and *Zornić* rulings of this Court.
27. The competencies of the state authorities of BiH - and the legal mechanisms by which the entire governance structure of the country were to be held accountable to the law (and ultimately to citizen democratic control) - developed considerably from the 1995

¹⁰ <https://www.ohr.int/inaugural-speech-by-paddy-ashdown-the-new-high-representative-for-bosnia-herzegovina/>

baselines reflected in the constitution. The failure of the April Package and the 2009 Butmir effort left these institutional developments not written into the formal constitutional structure.

28. It is accepted that the argument that the situation in the country is less positive and stable than when *Sejdić Finci* and *Zornić* rulings were delivered is true. Yet, this deterioration can be directly attributed to the accommodating posture of the “international community” (meaning, in the BiH context, those countries on the PIC Steering Board, the EU, and NATO), which favoured “ownership” by BiH domestic political leaders to facilitate Euro-Atlantic integration. Those political leaders have taken that ‘ownership’ and turned it to their advantage. In essence, the High Representative would appear to argue that Bosnia’s political elites should be enabled in their state-weakening pursuits, even allowed to ignore the legal obligations that BiH has undertaken to the Council of Europe. The role of the peace guarantors - the PIC Steering Board, and the enforcement instruments of the High Representative and EUFOR - though is precisely to maintain the “safe and secure environment” and deny local political actors the latitude to threaten instability in the short-and long-term.

Civic society reform initiatives and their potential

29. Someone born in BiH the day after the signing of the Dayton Agreement is almost 30 years old now, and, it is submitted, ought to be able to live in a country which has put the disputes of the past behind it. However, such a person continues to be subject to an electoral system divided along artificial (and unhelpful) lines, serving as a constant reminder of the divisions of the past.
30. The suggestion that citizens of BiH can only envision or tolerate “incremental change” is deeply troubling and would not be a tolerated statement made of any modern democracy. The world is not the same place it was in 1995, and nor is BiH. To tie BiH and its citizens to an unyielding framework, established in order to end a war, and to disallow the progression of that state towards EU membership, and towards a more stable

platform on the world stage is something that simply would not be countenanced in any situation.

31. DPC maintains that there is a real potential in BiH for its citizens to develop constitutional alternatives and they need to be supported and encouraged in the right way. The proportionality analysis set down in the case law of this Court since *Sejdić and Finci* continues to hold true. The constitutional reform initiatives such as the one developed by Forum of Citizens of Tuzla, or the Young Lawyers Association (later renamed the Law Institute) in 2010, had a potential, but were not being developed in an environment nurturing new social contract and engagement. The municipalisation model,¹¹ developed originally by two DPC associates and subject to consultation with experts and citizens, proposes one model of governance congruent with BiH's international obligations and aspirations. It is an example of a model that can be built from the ground up. At the same time, the recent environmental activism in the country illustrates clearly citizens' desire to be engaged in decisions on the type of country they wish to live in. Any suggestion – for example, through the reversal of the Kovačević decision – that the citizens of BiH are not “ready” for their human rights to be respected, or should themselves be punished for the ethno-nationalist leaders' obstruction of constitutional reforms, would, if submitted, carry a serious risk of the weakening of respect for the rule of law in the country.

32. DPC respectfully invites the Grand Chamber to have regard to these observations. They are made in the context of (a) the principle that discrimination on account of a person's ethnic origin is a form of racial discrimination, a particularly egregious kind of discrimination, where the notion of objective and reasonable justification must be interpreted as strictly as possible;¹² (b) the fact that, since its inception in 1959, the rulings by this Court have helped to strengthen the rule of law in Europe.

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¹¹ <https://municipalizacija.ba/document/?lang=en>

¹² *DH v Czech Republic* [GC], no 57325/00, 13 November 2007; (2008) 47 E.H.R.R. 3.