

7 October 2024

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FAO Johan Callewaert, Deputy Grand Chamber Registrar

Application no. 43651/22
Kovačević v. Bosnia and Herzegovina



Dear Sir,

We refer to your letter of 16 September 2024, in which you indicated that the President of the Grand Chamber had granted leave for written and oral submissions to be made on behalf of the High Representative in the above case.

In accordance with the deadline stipulated in your letter, we enclose a copy of the written submissions on behalf of the High Representative. The submissions are being sent by both fax and courier; the package being sent by courier also includes a hard-copy bundle containing copies of documents referred to in the submissions.

Yours sincerely,

Timothy Otty

Timothy Otty KC and George Molyneaux
Counsel to the High Representative

IN THE EUROPEAN COURT OF HUMAN RIGHTS
GRAND CHAMBER
B E T W E E N:

KOVAČEVIĆ

Applicant

-and-

BOSNIA AND HERZEGOVINA

Respondent Government

WRITTEN OBSERVATIONS ON BEHALF OF THE HIGH REPRESENTATIVE

References in the form [X] are to page X of the accompanying bundle

A. INTRODUCTION

1. The High Representative is grateful to the Court for permission to intervene in this important case concerning Bosnia and Herzegovina ("BiH").
2. The position of High Representative was established in the aftermath of the armed conflicts which took place during the period 1991-95 in the States which had once comprised the Socialist Federal Republic of Yugoslavia. The General Framework Agreement for Peace in Bosnia and Herzegovina, commonly known as the Dayton Agreement, was signed on 14 December 1995 and provided for an end to the conflicts and the mutual recognition of the States concerned. It also laid down a constitutional framework for BiH which consists of two 'entities', namely (i) the Federation of Bosnia and Herzegovina ("the Federation"); and (ii) the Republika Srpska ("RS").
3. The High Representative is appointed by an international Peace Implementation Council, pursuant to Annex 10 of the Dayton Agreement. That Annex was agreed by BiH, the Republic of Croatia, the Federal Republic of Yugoslavia, the Federation and RS, which jointly requested the designation of a High Representative. Article II of Annex 10 provides that the High Representative shall, *inter alia*, "monitor the implementation of the peace settlement", "maintain close contact with the Parties to promote their full compliance with all civilian aspects of the peace settlement" and "facilitate... the resolution of any difficulties arising in connection with civilian implementation" [1]. See further *Berić and others v BiH* (dec., nos. 36357/04 and others, 16 October 2007).

4. The High Representative is independent of the Government of BiH, and frequently provides *amicus* submissions in legal proceedings relevant to his mandate.¹ In intervening in these proceedings, he does not seek to act as an advocate for the position of either the Applicant or the Government on the substantive issues. Nor does he address each of the issues that the Court may need to determine. Rather, his object is to endeavour to assist the Court by providing accurate information on matters which may be relevant to those issues and to assist with its deliberations in the particularly sensitive context of the present case.
5. The remainder of these observations is structured as follows: (i) Section B provides a brief background as to the Constitutional context of BiH; (ii) Section C addresses the Court's judgments in *Sejdić and Finci v BiH* ([GC], nos. 27996/06 and 34836/06, 22 December 2009) and *Zornić v BiH* (no. 3681/06, 15 July 2014); (iii) Section D addresses the situation in BiH in recent years; and (iv) Section E addresses matters potentially relevant to domestic remedies.

B. THE RELEVANT CONSTITUTIONAL CONTEXT

6. The Constitution of BiH was established as Annex 4 to the Dayton Agreement. The provisions of greatest relevance to this application are set out in *Sejdić* at §§11-12 and the judgment of the Chamber in this case at §§9-14. The key points are as follows.
7. First, the Constitution distinguishes between (i) "*constituent peoples*", i.e. persons who declare affiliation with Bosniacs, Croats and Serbs; and (ii) "*others*", i.e. persons who do not declare affiliation with any of those groups. It is open to each individual to decide whether to declare affiliation with any of the "*constituent peoples*" [4].
8. Second, Article IV provides that one of the two chambers of BiH's Parliamentary Assembly, the House of Peoples, shall comprise (i) five Croats and five Bosniacs, from the Federation; and (ii) five Serbs, from RS. The Croat and Bosniac Delegates are "*selected*", respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. To minimize confusion, references herein to the "**BiH House of Peoples**" are to the body which forms part of BiH's Parliamentary Assembly; references to the "**Federation House of Peoples**" are to the House of Peoples of the Federation.
9. Third, the Delegates to the Federation House of Peoples are elected by the members of the Cantonal legislatures within the Federation: see Articles IV.A.6-10 of the Federation's Constitution [31-32]. The Cantonal Legislatures are directly elected, there are no ethnicity requirements in respect of their composition, and the ethnic affiliation of candidates is not known to the voters: see Article V.5 of the Federation's Constitution [51]. Accordingly, a person

¹ For copies of such submissions, see <https://www.ohr.int/cat/amicus-briefs/>

resident in the Federation (such as the Applicant) will not participate in any election which directly determines the composition of the BiH House of Peoples. Rather, the selection of Delegates to the BiH House of Peoples results from a double indirect voting process; there is no direct link between voters and Delegates to the BiH House of Peoples, and voters cannot predict how their vote (in Cantonal elections) may indirectly affect its composition. The ethnic affiliation (if any) of a voter is not established as part of the electoral process, and does not affect for whom they may vote.

10. Fourth, Article V of the Constitution of BiH provides: *“The Presidency of Bosnia and Herzegovina shall consist of three members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska”* [11]. Accordingly, a person resident in the Federation (such as the Applicant) has no opportunity to vote for any candidate for the Presidency who has not self-declared as either a Bosniac or a Croat.
11. The context of the establishment of the above Constitutional provisions linking eligibility for the BiH House of Peoples and the Presidency to self-declared ethnic affiliation, which are central to the matter before the Court, was summarized by the Grand Chamber in *Sejdić* at §§13-14 and 45 as well. In short, the international mediators at the Dayton Conference reluctantly accepted such provisions *“because of strong demands to this effect from some of the parties to the conflict”* and in the light of then-prevailing political realities, which remain highly relevant today as explained further below. Notably, while the Dayton Conference did envisage *“their possible phasing out”* by allowing for amendment of the Constitution pursuant to Article X thereof, this requires a two-thirds majority of those present and voting in the House of Representatives [16].

C. SEJDIĆ AND ZORNIĆ

12. In *Sejdić*, the Grand Chamber held by a majority that the Constitutional provisions linking eligibility of individual candidates for election to self-declared ethnic affiliation gave rise to violations of the Convention in relation to the ‘passive’ right to stand for election, in the context of both the BiH House of Peoples (violation of Article 14, read with A3P1) and the Presidency (violation of A1P12). The Grand Chamber: (i) accepted that the provisions which restricted eligibility for certain positions to persons who affiliated with particular ethnicities *“pursued at least one aim which is broadly compatible with the general objectives of the Convention...namely the restoration of peace”* (§45); (ii) noted that, at the time the provisions were put in place, there was a *“very fragile ceasefire”*, and that *“the nature of the conflict was such that the approval of the “constituent peoples” (namely the Bosniacs, Croats and Serbs) was necessary to ensure peace”* (§45); (iii) expressed no view on whether the provisions would have been compatible with the Convention, at the time when they were made, which was prior to BiH’s ratification of the Convention (§46); but (iv) concluded that

the maintenance of the provisions could not be justified, in light of “significant positive developments” which had taken place in BiH since the Dayton Agreement (§§46-50). In reaching that conclusion, however, the Grand Chamber emphasised that “there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule” (§48).

13. *Zornić* was another case about ineligibility to stand for election to the BiH House of Peoples and the Presidency. The Court referred to the reasoning in *Sejdić* and said at §43:

“...now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.”

14. In the present case, a Chamber of the Fourth Section took these passages to have determined that the discrimination which the Applicant alleges in the present case is incapable of being justified (see §59). The High Representative respectfully invites the Grand Chamber to give careful consideration to whether *Sejdić* and/or *Zornić* stand for such a wide-ranging proposition, in particular for two reasons:

14.1. First, the proportionality analysis in *Sejdić* and *Zornić* was performed within the context of an individual’s right to stand for election *as candidate* based on his/her ethnicity. The present case concerns a legally and conceptually different issue, i.e. the alleged right of an *elector* to select from an unrestricted range of candidates, including in circumstances where all electors, regardless of their ethnicity (see §9 above), have only “a ‘double indirect’ right to vote”, as Judge Kucsko-Stadlmayer correctly observed at §18 of her dissenting opinion. It is submitted that it is at least open to question whether it should be assumed that the same proportionality analysis applies in these different contexts.

14.2. Second, the approach taken in the Chamber judgment apparently proceeds on the (unstated) assumption that the political situation in BiH is today at least as positive and stable as at the time of the judgments in *Sejdić* (2009) and *Zornić* (2014). That assumption is, unfortunately open to serious question too and is itself an issue upon which the judgment of the domestic courts could assist the Court in its analysis. The mere passage of time since the conflicts of 1991-95 (and indeed since 2009 and 2014) does not itself necessarily justify a conclusion that there has been improvement in the situation; nor can it necessarily be assumed that any improvement which has occurred is linear or secure. Indeed, and to the contrary, as explained below, there is evidence suggesting a regrettable

deterioration of the situation in BiH in recent years, also as a result of the deterioration in the broader international context.²

15. For the sake of clarity, the High Representative does not advance any case to the effect that, insofar as the impugned provisions may be found to interfere with the Applicant's rights under Article 14 and/or A1P12, such interference is, or is not, justified on proportionality grounds, such as to constitute or not constitute a violation of the Convention. Rather, the High Representative simply cautions against an assumption that the proportionality analysis in *Sejdić and Zornić*, each decided at a different time with respect to different elements of a Convention right, necessarily supplies the answer in this case, particularly in the uncertain and highly sensitive factual and political context which prevails in BiH at the present time. If and insofar as the Grand Chamber finds there to be any interference with the Applicant's rights, the High Representative submits that there should be a fresh analysis of proportionality, with close attention to the factual and temporal context of this case.

D. THE SITUATION IN BiH

16. If and insofar as it is necessary to evaluate whether any interference with the Applicant's rights under Article 14 and/or A1P12 is proportionate, the High Representative invites the Grand Chamber to have regard to his assessment of the current political situation in BiH, as set out in his periodic reports to the Secretary-General of the United Nations. As summarised briefly herein, the reports demonstrate that there have been unprecedented attacks against the Dayton Agreement and the territorial integrity, sovereignty and multi-ethnic character of BiH as well as its institutions. The High Representative draws the Court's attention to his latest four reports which cover the period since the elections which are the subject of the Applicant's complaint. In particular:

16.1. The High Representative's 62nd report covers the period 16 April to 15 October 2022 [137-159]. It noted that the elections on 2 October 2022 were "*held in a climate of mistrust and political deadlock, coupled in some cases with outright rejection...of fundamental elements of the General Framework Agreement*" (§2), and referred to "*the continuous political crisis that has characterized the period since the 2018 general elections*" (§88). The then Serb member of the BiH Presidency, Milorad Dodik, pursued a "*secessionist policy*", "*questioned the territorial integrity, sovereignty and multi-ethnic character of Bosnia and Herzegovina*", and made many statements

² The relevance of the wider context is noted at §24 of the European Parliament's resolution of 12 July 2023 regarding BiH, which "*reval[ed] that the Council acknowledged in the Strategic Compass that security and stability in the Western Balkans is still not a given and that there is a risk of potential spillover from the current deterioration in European security*" [560].

which were “*entirely incompatible with the letter and spirit*” of the Dayton Agreement (§§20, 114-115); there was also “*divisive and aggressive rhetoric*” in the Federation (§§20-21).

- 16.2. The High Representative’s 63rd report covers the period 16 October 2022 to 15 April 2023 [160-183]. During this period the RS authorities “*continued to undermine BiH state institutions*” and “*categorically reject[ed] the authority of the Constitutional Court of Bosnia and Herzegovina*”, and the RS ruling parties “*signed a joint statement with concrete steps toward secession*”; the High Representative described this as “*a dangerous development*” (§§4-5; see also §166³).
- 16.3. The High Representative’s 64th report covers the period 16 April to 15 October 2023 [184-206], which had been characterized by “*an unprecedented level of attacks against the General Framework for Peace*” (§1; see also §§11, 25). The ruling coalition of RS continued to promote secession, calling for the independence of RS and its unification with Serbia, and refusing to recognise the authority of the Constitutional Court of BiH (§§11-13, 27-36, 159-160). Among other things, the ruling coalition of RS called on RS-appointed judges to resign from the Constitutional Court, which declared that it was facing the “*biggest crisis in the last 28 years of its existence*” (§§137-138). The conduct of the RS ruling coalition “*threaten[ed] to paralyze the functionality of BiH as a state*” (§152), gave rise to “*direct and massive threats to the Peace Agreement*” (§14) and “*threaten[ed] peace and stability in the country and the region*” (§30). “*Violent incidents directed against returnees*” and “*inter-ethnic incidents not directed at returnees*” both increased (§89), and “*genocide denial and glorification of war criminals*” continued to occur (§§103-108).
- 16.4. The High Representative’s 65th (and most recent) report covers the period 16 October 2023 to 15 April 2024 [207-237]. During this period, the European Council decided to open EU accession negotiations with BiH. This was an important development, but the period was also again characterized by “*unprecedented attacks against the General Framework Agreement for Peace*” (Executive Summary, §2). The RS authorities continued to “*actively subvert the State of Bosnia and Herzegovina, its competences and institutions*”, threatened to “*paralyze State authorities*”, and advocated for “*a de facto, if not a de jure, dissolution of the State of Bosnia and Herzegovina*” (Executive Summary, §§5-6, 10; see also Report, §§14-28). “*Unprecedented pressure on judicial institutions continued*”, and the ruling coalition of RS “*undermine[d] the Constitutional Court of Bosnia and Herzegovina as the guardian of the constitutional and legal order of the country*”, including by disregarding its final and binding decisions (Executive Summary, §8; Report, §§24-26, 45, 80). There was “*backsliding in public efforts to deal with the past and an*

³ A broadcast showing the text of the signed statement is available at <https://www.rtrs.tv/av/pusti.php?id=113582> (at 2:00-2:15). For an English translation, see [238-241].

alarming level of ethno-nationalistic historical revisionism, denial of genocide and other war crimes as well as glorification of war criminals”, which was linked to *“general backsliding of democracy, respect for human rights, and the rule of law, which increase[d] mistrust and polarization within society”* (Executive Summary, §11; Report, §87). There was an *“increase in hate speech, interethnic violence, and intolerance, with recurrent violent incidents against returnees from minority groups, and religious and cultural buildings”*, and *“the denial of genocide and other war crimes, and the glorification of war criminals persist[ed]”* (Report, §§87-106). The multinational stabilization force in BiH (the continued mission of which was unanimously approved by the UN Security Council on 2 November 2023) was *“of the utmost importance for peace and stability”*, being *“needed now more than ever”* (Report, §229).

17. The stability of the political situation in BiH has continued to deteriorate since the end of the period covered by the High Representative’s 65th report. The High Representative anticipates that his next report will cover the period from 16 April to 15 October 2024, and he intends to provide a copy of that report to the Court once it has been published. Developments of note in this period include recent efforts by RS to advocate for the *“peaceful dissolution”* of the country and a protest note sent to all signatories and witnesses to the Dayton Agreement complaining about what the RS authorities see as repeated violations of that Agreement [242-250].
18. The High Representative’s assessment of the precarious and fragile situation in BiH is consistent with that of many other international actors. See, for example: (i) UN Security Council Resolutions 2604 (2021), 2658 (2022), 2706 (2023), which have repeatedly determined that *“the situation in the region of the Former Yugoslavia continues to constitute a threat to international peace and security”*, most recently on 2 November 2023 [251-256]; (ii) the European Commission’s reports on BiH for 2022 (SWD(2022) 336 final) and 2023 (SWD(2023) 691 final) [257-530]; (iii) the resolutions of the European Parliament dated 6 July 2022 and 12 July 2023 [531-571]; (iv) the communiqués of the Steering Board of the Peace Implementation Council dated 8 June 2022, 9 December 2022, 7 June 2023, 6 December 2023 and 20 June 2024 [572-584]; and (v) the US Department of State’s Integrated Country Strategy for BiH, which was approved on 6 June 2022 and most recently reviewed and updated on 27 February 2024 [585-607].
19. Relatedly, the High Representative notes the views expressed by the Council of Europe Commissioner for Human Rights (as cited at §§23 and 59 of the Chamber’s judgment), to the effect that there should be *“full elimination of ethnic discrimination from both the Constitution and the electoral legislation”* in BiH [612]. The High Representative sees this as a necessity but considers that institutional arrangements should reflect the multi-ethnic nature of BiH, which was established and recognised as an independent state in 1992 on the basis of a referendum

requested and endorsed by the international community which emphasised the state's multi-ethnic character. In addition: (i) the Dayton Agreement and the BiH Constitution that it established represent the only current legal framework for peaceful coexistence in BiH; (ii) at least in the short term, there is regrettably little prospect of far-reaching alterations to the existing Constitutional arrangements being achieved by consensus (and there is instead material to suggest an objective risk of attempts to alter the Constitutional settlement regardless of a lack of consensus); and (iii) in any event, for any alteration to the framework to be long-lasting and sustainable in the long term, it needs to come from within the country by compromise. The High Representative, therefore: (i) welcomes the Grand Chamber's indication in *Sejdić* that the Convention does not require the wholesale abandonment of the power-sharing mechanisms in the Constitution of BiH; and (ii) considers that BiH is not ready for a political system which would be a simple reflection of majority rule.

20. That is not to say that the High Representative considers that the Constitution should remain unchanged. On the contrary, he supports incremental change to the Constitution, and has repeatedly stressed the need for it to be amended to implement the judgments in *Sejdić* and related cases concerning eligibility to stand for election (see his 62nd report at §34 [144], his 63rd report at §13 [161], his 64th report at §42 [189], and his 65th report at §42 [215]). The fact that those judgments remain unimplemented is a reflection of the deep divisions which persist in BiH, and how difficult it is to achieve sufficient consensus to amend the Constitution. If the conclusions reached by the Chamber in the present case are confirmed, the High Representative is concerned that it may make the process of seeking to build internal compromise on Constitutional reform even more challenging: see the High Representative's 64th report at §43 [189]. The current situation in BiH calls for caution before reaching a decision which might be construed as delegitimizing BiH's constitutional framework as a whole. A determination that this framework can only be reconciled with the Convention to the detriment of power-sharing mechanisms may further affect the fragile foundation of BiH.

E. DOMESTIC REMEDIES

21. The Chamber of the Fourth Section held that an appeal to the Constitutional Court would have been "*bound to fail*" (§32), in light of certain decisions of the Constitutional Court cited at §§16-18 of the Judgment. The High Representative respectfully considers that the Chamber's reasoning in this regard is at least open to serious question, and invites the Grand Chamber to review carefully Judge Kucsko-Stadlmayer's analysis on this topic for the following reasons:

21.1. First, at §16, the Chamber referred to two decisions from the spring of 2006, in which the Constitutional Court held that it lacked jurisdiction to rule whether the Constitution of

BiH was in conformity with the Convention. However, it is not clear that it should follow from these decisions that an appeal would have been “bound to fail” in this case, since the Constitutional Court has already accepted that it *may* review claims by individuals that their rights under the Convention are violated in cases which include the application of the Constitutional and electoral framework regulating the composition and election of State-level bodies: see decision no. AP-2678/06 (29 September 2006) [119-136], which was discussed in *Sejdić* at §14.

21.2. Second, the Constitutional Court has had no opportunity to consider whether the current Constitutional framework violates the Convention rights of individual voters (such as the Applicant), as opposed to persons who wish to stand for office. The decisions of the Constitutional Court to which the Chamber referred at §§17-18 both concern the latter issue and it has not yet been demonstrated that the available domestic remedies would have been ineffective in the context of the different subject-matter to which this application relates.

21.3. Third, as Judge Kucsko-Stadlmayer pointed out at §12 of her dissent, the Constitutional Court is a very specific institution, distinct from all other Constitutional Courts in Europe. This is not only because of its legal foundation tailored under the Dayton Agreement but also because of its organisation, including that three of its nine judges (who must not be citizens of BiH or any neighbouring State) are selected by the President of this Court [13] to promote the implementation of the Convention in the legal system of BiH.

21.4. In fact, Article II/2 of the Constitution expressly gives priority to the rights and freedoms set forth in the Convention and its Protocols over other laws which are also directly applicable in BiH [6]. Article 18(2) of the Constitutional Court’s Rules [76] further confirms that the Court has jurisdiction to hear appeals “where there is no decision of a competent court, if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina” in addition to hearing appeals from lower courts.

22. Given the very particular historical and political context of the present case it may also be that the Court’s deliberations and consideration of the Applicant’s complaints would be facilitated by the domestic court’s up to date consideration of that context and any relevant factual findings in relation to it.

23. In light of the foregoing, the High Representative respectfully questions the Chamber’s conclusion that an appeal to the Constitutional Court would have been “bound to fail” in the Applicant’s case at §32 of the Judgment. On the contrary, the High Representative considers

that it is difficult to conclude that the Constitutional Court would necessarily be unable effectively to consider the question of whether the Constitution of BiH violates the Convention rights of individual voters having particular regard to the current prevailing political context, which question raises issues that have not hitherto been the subject of judicial determination. In this regard, the High Representative notes that the Chamber accepted that an appeal to the Constitutional Court potentially offered an effective remedy for certain other complaints (relating to constituency divisions, compensatory lists and the fact that the BiH House of Peoples is not directly elected) which have not previously been determined (§§76-80).

24. In circumstances where the Constitutional Court has had no opportunity to assess whether the Constitution of BiH violates the rights of individual voters as opposed to candidates, the High Representative considers that it would be premature to hold definitively that an appeal to the Constitutional Court would not be an effective remedy. In this regard, the High Representative recalls the Court's previous jurisprudence that "*the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress*". *Vučković and others v Serbia* ([GC], nos. 17153/11 and others, 25 March 2014), §§74, 84. Moreover, the High Representative considers that: (i) the principle of subsidiarity is of particular importance in sensitive cases like the present; and (ii) any eventual examination by this Court of the substance of the important issues raised by the Applicant would be greatly assisted by their prior examination by the Constitutional Court including by reference to such factual enquiries as the Constitutional Court might consider appropriate in light of the very specific history of BiH, the sensitivities of the current situation and the Constitutional Court's unique composition and procedure designed to "*ensure progress towards a democratic political system*" as noted by Judge Kucsko-Stadlmayer at §12.

25. When noting the above, the High Representative is particularly mindful of the recent attacks against the authority of the Constitutional Court, referred to at §16 above and the risk that a potentially premature finding by this Court could be exploited by those wishing to undermine the whole institution, and/or the competence or integrity of its members, to imply that the Constitutional Court is ineffective as a whole.

TIMOTHY OTTY KC
GEORGE MOLYNEAUX

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7 October 2024