

# The Role of Parliaments in Creating and Enforcing Foreign Relations Law

## *A Case Study of Bosnia and Herzegovina*

Ajla Škrbić

### I INTRODUCTION

The growing importance of foreign relations law raises the question of whether the traditional exclusion of parliaments from a country's foreign affairs is wrong and utterly flawed. While there are practical benefits in seeing foreign relations as belonging only to the executive branch, this approach undermines the potential for national parliaments to engage in developing this area of law.<sup>1</sup> Hence, in this chapter I examine the role of parliaments in foreign relations law taking Bosnia and Herzegovina (BiH) as an example.

BiH is particularly interesting in this regard for several reasons. Firstly, BiH has a unique constitutional framework and special relationship with international law due to the Dayton Peace Agreement (DPA).<sup>2</sup> Even though this uniqueness is in a certain tension with the approach to discuss the general question of the role of parliaments in foreign relations law, the example of BiH is interesting because it can show that the impact of parliaments on foreign relations law depends on parliaments' role in a state and effective use of their competencies. Secondly, BiH has an extremely complex and multilevel system of state organisation as a result of the same treaty. Finally, the complex internal structure combined with weak institutions and the absence of

<sup>1</sup> This doctrine has its origin in Locke's 'Two Treatises of Government' (1689) and is later confirmed in Montesquieu's 'The Spirit of Laws' (1748), Blackstone's 'Commentaries on the Laws of England' (1765), as well as Dicey's 'Lectures Introductory to the Study of the Law of the Constitution' (1885). Cf. Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), pp. 149–218.

<sup>2</sup> General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), Paris, 14 December 1995, (1996) 35 ILM 89, 172.

a dedicated law on foreign relations<sup>3</sup> leads to a large number of actors (international and domestic) that can and has a major role in creating and implementing foreign policy.

In this chapter, I will first provide some general information on the constitutional design in BiH, on the institutions established by the Constitution, and the general separation of powers as arranged by the Constitution. I will further examine the foreign relations law of BiH and the respective competencies of the Parliamentary Assembly of BiH (PA) in the implementation of the foreign policy. I argue that foreign affairs should be analysed as a matter of the distribution of powers between the executive and legislative branch, and not the exclusion of the foreign affairs power from the legislature.<sup>4</sup> Finally, the chapter will turn to foreign relations law as a field of scholarship and research in this country. The chapter ends with conclusions and recommendations. This part of the chapter addresses some of the practical issues related to the smaller and larger role of the legislature in shaping foreign policy. It also addresses the future perspective of the role of parliaments in the issue under examination.

## II A GENERAL CONSTITUTIONAL AND LEGAL FRAMEWORK IN BIH

BiH is rather unique when it comes to (subsection A) its internal organisation and (subsection B) its relation to international law. This special position of BiH is owed to a violent international armed conflict that lasted on Bosnian territory from 1992 to 1995 and ended with the signing of the DPA with the Annex 4 serving as the Constitution for BiH.

### *A Internal Organisation of Bosnia and Herzegovina*

One of the main questions raised during the negotiations of the DPA was a question of how to organise the internal structure of BiH. In an effort to end the war, the DPA was negotiated and signed by all three parties to the conflict,

<sup>3</sup> Even though this is also the case with many other states, I believe it is a problem when it comes to weak and divided states such as BiH. Namely, the existence of a distinct law with clear rules and guidance could introduce a cohesion in foreign policy and reduce the possibilities for excuses for self-interested conduct of political parties in foreign policy. Or, referring to what Dire Tladi has addressed in his chapter, I believe that current BiH statutes that deal with foreign relations are written for strong, independent and rule-of-law committed actors, whereas in BiH, quite the opposite is true.

<sup>4</sup> This goes in line with the finding of Campbell McLachlan (Cf. McLachlan, *Foreign Relations Law*, p. 150).

that is BiH, Croatia, and Serbia (along with the representatives from the European Union (EU), France, Germany, Italy, Russia, the United Kingdom and the United States). With so many parties to the agreement, the provisions therein represented a compromise of the parties' respective interests. Consequently, the DPA achieved its main purpose of ending the war, but it left in place the ethnic division established by war. More specifically, the solutions provided by the DPA succeeded in preserving BiH as a sovereign state; however, it divided BiH into two parts: the Federation of BiH (decentralised and predominantly with Bosniac and Croat population) and Republika Srpska (relatively centralised and predominantly with Serb population). Furthermore, the Federation of BiH was divided into ten cantons with great powers and competencies. However, the complexity of the state organisation does not end there. In addition to these two Entities (and cantons in Federation of BiH), the town of Brčko became an independent district in 1999, being the only part of BiH not governed by the DPA.

As regards the institutions established by the Constitution and the issues of separation of powers as arranged by the Constitution, they are weak and reflect the ethnic divisions in BiH.<sup>5</sup> This is an expression of a balance of power and a drafting compromise between the warring DPA parties.<sup>6</sup> Against this background, all governmental functions and powers not expressly assigned to the institutions of BiH are within the jurisdiction of the Entities.<sup>7</sup> As a consequence, many important areas such as education or the police apparatus have been constitutionally placed under the jurisdiction of the Entities, which is not the case for the field of foreign policy, however.<sup>8</sup>

The weak position of national institutions is further complicated by their ethnically defined structure.<sup>9</sup> In addition, each of the constituent

<sup>5</sup> The institutions on the state level include the PA, the government (Council of Ministers), the Presidency, the Constitutional Court, and the Central Bank (BiH Constitution, Articles IV–VII).

<sup>6</sup> Marko Joseph, 'Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance' (2004) *European Diversity and Autonomy Papers* 7/2004, p. 6.

<sup>7</sup> BiH Constitution, Article IV(3)(a).

<sup>8</sup> BiH Constitution, Article III(1)(a).

<sup>9</sup> For example, the PA is bicameral and encompasses a House of Representatives and a House of Peoples (BiH Constitution, Article IV). The members of the House of Representatives are directly elected in the Federation of BiH (two-thirds of members) and in the Republika Srpska (one-third of members), while the members of the House of Peoples are indirectly elected by the parliaments of the Entities [BiH Constitution, Article IV(1) and (2)]. Here, two-thirds of members are elected from the Federation of BiH (and include five Bosniacs and five Croats), while the remaining one-third of members are elected from Republika Srpska (five Serbs).

Even the Constitutional Court for which the Constitution does not contain express rules on an ethnic quota has ethnically defined structure. Namely, the Court has nine members. Six of

peoples<sup>10</sup> has a veto power over all essential decision-making, that is, is entitled to invoke the 'vital interest' that enables them to block every proposal they deem harmful to their respective peoples.<sup>11</sup> This may, and very often does, paralyse the national institutions. It is worrying also for foreign policy which is a responsibility of the tripartite Presidency.<sup>12</sup> Even though the Constitution of BiH declares that the Presidency shall endeavour to adopt all Presidency decisions by consensus, and the conducting of foreign policy is particularly emphasised in this regard,<sup>13</sup> this procedure may lead to stalemate of the Presidency and foreign policy. Namely, if no consensus is reached, two members of the Presidency may adopt a decision. However, the dissenting member may then declare a proposed decision to be destructive of a 'vital interest' of the Entity from the territory from which he/she was elected.<sup>14</sup> In that case, a separate proceeding for the resolution of a dispute will be initiated.<sup>15</sup> Accordingly, each of the constituent peoples may have a final say in the Presidency and foreign policy, which goes in line with my claim regarding a large number of actors that can have a major role in foreign policy in BiH.

them are selected by the Entities, while the remaining three members are appointed by the President of the European Court of Human Rights (ECtHR), again pointing to the unique openness to international law. And although there is no constitutional or other rule on an ethnic quota for local judges, for the two positions allocated to the Republika Srpska, the judgeships are always filled by Serbs; and for the four positions allocated to the Federation of BiH, two judgeships are filled by Bosniacs while two are filled by Croats.

<sup>10</sup> Pursuant to the Preamble of the Constitution, Bosniacs, Croats and Serbs are described as 'constituent peoples'.

<sup>11</sup> The fact that the term 'vital national interest' is not defined in the BiH Constitution presents a further challenge.

<sup>12</sup> BiH Constitution, Article V(3)(a).

The Presidency has to comprise one Bosniac, one Croat and one Serb. Hence, anyone identifying other than a member of constituent peoples is ineligible for Presidency. However, it is noteworthy that the candidates for every function in BiH are 'self-defined' and can even change their ethnic affiliation throughout the time. This issue was raised after it came to light that several individuals (in connection to some prominent functions at the state and Entity levels) have changed their ethnicity in order to be eligible for certain functions and to be 'a representative' of a certain constituent peoples.

<sup>13</sup> Cf. Article V(2)(c) of the Constitution.

<sup>14</sup> Again, this is supposed to ensure equality of the ethnic groups.

<sup>15</sup> Pursuant to the Article V(2)(d) of the Constitution, such a decision will be referred immediately to the National Assembly of Republika Srpska (if the declaration was made by the member from that territory), to the Bosniac Delegates of the House of Peoples of the Federation (if the declaration was made by the Bosniac member), or to the Croat Delegates of that body (if the declaration was made by the Croat member). Finally, if the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency decision will not take effect.

Finally, in addition to these state-level institutions, both Entities, the Federation of BiH and Republika Srpska, have their own separation of powers-structures.<sup>16</sup> Furthermore, the Brčko District has its own division of powers.<sup>17</sup> Also, both Entities have their own Constitutions, while the Brčko District has the Statute of the Brčko District of BiH.<sup>18</sup>

### B *BiH and International Law*

The Constitution of BiH and the DPA have led to a special situation of BiH vis-à-vis international law. The fact that the Constitution is a part of an international treaty enables it to be interpreted as a treaty defined by the 1969 Vienna Convention on the Law of Treaties.<sup>19</sup> Furthermore, its content makes BiH uniquely open to international law. This is the result of the DPA makers trying to develop and to guarantee pluralism and non-discrimination of both the majority and minority in BiH with respect to the application and protection of the whole range of different legal instruments and human rights and freedoms. This is best demonstrated by:

- The direct applicability of the fundamental freedoms of the European Convention of Human Rights (ECHR) and its Protocols;<sup>20</sup>

<sup>16</sup> They have their own parliaments, governments, presidents and an extensive network of courts.

<sup>17</sup> Its legislative power is exercised by the District Assembly, the executive power is exercised by the District Government, while the judicial power is exercised by the District courts.

<sup>18</sup> Hence, even though having a very complex administrative division, BiH does not have a supreme court, or any other court of last resort or court of appeal, ensuring a uniform application of laws in BiH. Along with the Constitutional Court, the only court on the state level is the so-called State Court. Quite interesting and in line with my claim regarding Bosnian internationalised structure, the judges and prosecutors of the State Court were until 2012 appointed from international staff. This certainly fostered easier introduction of international legal solutions into national legal framework and institutions.

On the other hand, Federation of BiH and Republika Srpska *do* have their own Supreme Courts, as well as lower courts.

<sup>19</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331; (1969) 8 ILM 679; UKTS (1980) 58.

<sup>20</sup> BiH Constitution, Article II(2), sentence 1. Although there are differing views on what the obligation to directly apply the ECHR means, the prevalent conclusion is that the rights and freedoms under the ECHR form directly applicable law which require no special transformation procedure. For different conclusion see Decision on Admissibility and Merits, U 106/03, 27 October 2004, where the Constitutional Court comprehended 'direct applicability' in a way that ordinary courts are under the obligation to directly apply the rights and freedoms set forth in the ECHR without taking into account the laws which are contrary to them and without forwarding the issue of the constitutionality of those laws to the Constitutional Court (Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits, U 106/03, 27 October 2004, [www.ustavnisud.ba/dokumenti/\\_bs/11-106-03-26086.pdf](http://www.ustavnisud.ba/dokumenti/_bs/11-106-03-26086.pdf), accessed

- The provision on the absolute supremacy of ECHR and its Protocols over all other law;<sup>21</sup>
- The provision on an additional fifteen international conventions on human rights and protection of national minorities to be applied in BiH;<sup>22</sup>
- The provision stating that the general principles of international law shall be an integral part of the law of BiH and the Entities;<sup>23</sup>
- The provision that highlights that no amendment to the Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II, or alter this provision.<sup>24</sup>

Furthermore, the DPA has established the Office of the High Representative (OHR)<sup>25</sup> as an ad hoc international institution responsible for overseeing implementation of civilian aspects of the DPA.<sup>26</sup> The OHR has the status of

17 July 2020, in English: [www.ustavnisud.ba/dokumenti/\\_en/u-106-03-26086.pdf](http://www.ustavnisud.ba/dokumenti/_en/u-106-03-26086.pdf), accessed 17 July 2020). However, the Court later changed its position (see Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits, AP 1603/05, 21 December 2006, [www.ustavnisud.ba/dokumenti/\\_hr/AP-1603-05-102456.pdf](http://www.ustavnisud.ba/dokumenti/_hr/AP-1603-05-102456.pdf), accessed 17 July 2020, para. 37). Cf. Christian Steiner et al., *Constitution of Bosnia and Herzegovina: Commentary* (Sarajevo: Konrad Adenauer Stiftung, 2010), pp. 105–7.

<sup>21</sup> BiH Constitution, Article II(2), sentence 2. This provision was contested among some scholars due to its ambiguity. The first issue was whether the ECHR has priority over the laws of BiH or both in relation to the laws and the Constitution. Since the BiH Constitution was written in English and has not been officially translated in the official languages of BiH, the problem could have not been solved by reading the respective constitutional provision. However, it seems that the Constitutional Court of BiH is of view that the ECHR is not above the Constitution (see Decision on Admissibility, U 5/04, 27 January 2006, where the Constitutional Court held that the ECHR cannot have superior status over the Constitution, since the superior status and constitutional power of the ECHR in BiH stem from the BiH Constitution itself, [www.ustavnisud.ba/dokumenti/\\_bs/u-5-04-71799.pdf](http://www.ustavnisud.ba/dokumenti/_bs/u-5-04-71799.pdf), accessed 21 April 2020, in English: [www.ustavnisud.ba/dokumenti/\\_en/u-5-04-71799.pdf](http://www.ustavnisud.ba/dokumenti/_en/u-5-04-71799.pdf), accessed 26 April 2020).

The second issue was whether this provision invokes all ECHR Protocols or just the ones that were in force on the day of entry into force of the BiH Constitution. It seems logical that the Constitution drafters had *all* protocols in mind since they used the notion of ‘protocols’ without enumeration, as was the case with the International Covenant on Civil and Political Rights, for example. (cf. Christian Steiner et al., *Constitution of Bosnia and Herzegovina: Commentary* (Sarajevo: Konrad Adenauer Stiftung, 2010), p. 159).

<sup>22</sup> Annex I to the BiH Constitution. Since they are integral part of the Constitution, they too have priorities over all other laws in BiH.

<sup>23</sup> BiH Constitution, Article III(3)(b).

<sup>24</sup> BiH Constitution, Article X(2).

<sup>25</sup> The Austrian diplomat Valentin Inzko has filled this post since March 2009.

<sup>26</sup> The civilian aspect of the DPA is a non-military aspect of the peace settlement set forth in Annex X of the DPA. It entails a wide range of activities, including the continuation of humanitarian aid efforts for as long as necessary, the rehabilitation of infrastructure and reconstruction of the economy, the establishment of political and constitutional institutions

a diplomatic mission to BiH and its main task is to ensure that BiH evolves into a peaceful and viable democracy, as well as to serve as the final authority for interpretation of the DPA on the civilian implementation of the peace settlement.<sup>27</sup> The High Representative has the power to impose decisions in cases where BiH authorities are unable to agree or where important issues are being considered or require resolution. Consequently, in the past, the High Representative has removed elected officials from office, imposed numerous laws and bylaws, and banned individuals from running for office, among other measures.<sup>28</sup>

Its work has been challenged in front of different courts. The main takeaway from these efforts has been that the foundation for the OHR's legislative acts lies in international law<sup>29</sup> and, therefore, it cannot be challenged by courts (whether it is the Supreme Court of the Federation of BiH or Republika Srpska, the State Court of BiH, the Constitutional Court of BiH or even the ECtHR).<sup>30</sup> However, it is worth noting that after its adoption, relevant

in BiH, the promotion of respect for human rights and the return of displaced persons and refugees, and the holding of free and fair elections.

<sup>27</sup> Dayton Peace Agreement, Annex X, Article V.

<sup>28</sup> The laws he imposed or amended are many and even include amendments to the Entity constitution and the declaring unconstitutional a law adopted by the PA. For instance, he imposed the laws on the transfer of competencies from the Entities to the state level, laws on privatisation, new currency, citizenship, the freedom of movement, the customs tariffs schedule, the law on foreign investment, the law on the flag, on the coat of arms of BiH, the laws on privatisation of banks and enterprises, on telecommunications, on the common driving licence, the Law on the Court of BiH, etc. Among the most challenged OHR decisions were the ones on removing from office civil servants or elected public officials (that even included a member of the Presidency of BiH and the President of an Entity) – mostly for non-cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) but also for corruption, mismanagement of public assets, interference with the judiciary, or not carrying out duties as a judge. The number of his interventions is indeed extensive. For example, only in one day in 2004, the OHR removed fifty-nine members of the political leadership of Republika Srpska because of their non-cooperation with the ICTY (list available at: [www.ohr.int/list-of-removed-and-conditionally-removed-officials-by-the-high-representative/](http://www.ohr.int/list-of-removed-and-conditionally-removed-officials-by-the-high-representative/)). The number of interventions reached 153 per year at the high point of the OHR's activities (see Constance Grewe and Michael Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' (2011) 15 *Max Planck Yearbook of United Nations Law* 1, 56, and Karin Oellers-Frahm, 'Restructuring Bosnia-Herzegovina: A Model with Pit-Falls', in A. von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Volume 9 (The Netherlands: Koninklijke Brill, 2005), pp. 179–224 at 208).

<sup>29</sup> Its mandate derives from Annex X of the DPA, the relevant resolutions of the United Nations (UN) Security Council, and the Bonn Declaration.

<sup>30</sup> See, e.g., ECtHR, *Kalinić and Bilbija v. Bosnia and Herzegovina* (Appl. Nos. 45541/04 and 16587/07), Admissibility Decision (Fourth Section), 13 May 2008, <http://hudoc.echr.coe.int/eng?i=001-86652>, accessed 21 April 2020; Office of the High Representative in Bosnia and

legislation becomes part of domestic law and is consequently reviewable by the Constitutional Court.<sup>31</sup> More specifically, although the OHR is acting on the basis of international law, legislation that it adopts replaces acts of the PA and becomes part of domestic law (and, in accordance with the Constitution, all acts, regardless of who adopts them, are reviewable by the Constitutional Court). Therefore, the Constitutional Court *can* review the constitutionality of the content of legislation enacted by the OHR, but *not* whether there was enough justification for the OHR to enact the legislation in the first place.

It is thus not surprising that the work of the OHR has been, and still is, highly criticised.<sup>32</sup> The main criticism is that the OHR has de facto, unlimited legal powers that are contrary to the essential democratic principles it promotes. On the other hand, there are also legitimate arguments that, due to the ethnic composition of BiH institutions and institutions on the substate level, the intervention of the OHR is welcome and often necessary.

In my view, even though the objections to the OHR are justified, its work (as well as the work of other international actors in BiH) is indeed still necessary. However, three points of concern stand out: first, its role should be more transparent and better explained to the citizens. Second, it should use its powers more effectively in critical situations for which it is made (which has been not the case since the former and most active High Representative Paddy Ashdown has left office). Finally, it should work towards enabling domestic actors to work fully independently.

Not only BiH, but also the Brčko District has a ‘special supervisor’. However, in 2012 the High Representative announced that the Brčko Supervisor would suspend his functions while retaining all his authority, as he believed that the District’s institutions now have the capacity to address their challenges on their own. Thus, while the Special Representative position

Herzegovina, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05, 23 March 2007, [www.ohr.int/?p=64783](http://www.ohr.int/?p=64783), accessed 21 April 2020; Constitutional Court of Bosnia and Herzegovina, Decision No. U 26/01, 28 September 2001, [www.ustavnisud.ba/dokumenti/\\_hr/u-26-01-51291.pdf](http://www.ustavnisud.ba/dokumenti/_hr/u-26-01-51291.pdf), accessed 21 April 2020, in English: [www.ustavnisud.ba/dokumenti/\\_en/u-26-01-51291.pdf](http://www.ustavnisud.ba/dokumenti/_en/u-26-01-51291.pdf), accessed 26 April 2020.

<sup>31</sup> See, e.g., Constitutional Court of Bosnia and Herzegovina, Decision U 9/00, 3 November 2000, [www.ustavnisud.ba/dokumenti/\\_bs/u-9-00-12134.pdf](http://www.ustavnisud.ba/dokumenti/_bs/u-9-00-12134.pdf), accessed 26 April 2020, in English: [www.ustavnisud.ba/dokumenti/\\_en/u-9-00-12134.pdf](http://www.ustavnisud.ba/dokumenti/_en/u-9-00-12134.pdf), accessed 26 April 2020, 83–93.

<sup>32</sup> In August 2019, leaders of BiH’s leading political parties have signed an Agreement on the Principles of Establishing Authorities in BiH, which includes the creation of preconditions for the OHR’s departure from BiH. Nevertheless, this departure is explicitly conditioned by a positive assessment of the political situation in BiH based on full respect for the DPA, which the OHR itself, along with the UN Security Council and the Peace Implementation Council should assess.



continued to exist, the full responsibility for the District's affairs were devolved to local administration.

Finally, the Constitution has articles that deal with the Entities' relations with international law. Namely, the relations between them and foreign states are regulated in Article III(2)(a) and (d) of the Constitution. Pursuant to these provisions, Entities may establish 'special parallel relationships' with neighbouring states if these relationships are consistent with the sovereignty and territorial integrity of BiH. Each Entity may also enter into agreements with states and international organisations with the consent of the PA. However, the PA may provide by law that certain types of agreements do not require such consent.<sup>33</sup>

### C Shortcomings of the Current System

Although very open to international law and explicitly securing the enjoyment of the rights and freedoms to all persons in BiH without discrimination on any grounds, the BiH Constitution should and has been subject to a large amount of criticism. The main reason is its discriminatory nature, since it discriminates the very persons it should protect. The citizens not belonging to the mentioned 'constituent peoples' are being discriminated against, since they are ineligible to stand for election for certain prominent positions in BiH. However, it is not just them: Bosniacs, Croats, and Serbs are also discriminated against based on the territory in which they live (e.g. a Serb member of the Presidency may only be directly elected from the territory of Republika Srpska, thus discriminating all Serbs in the Federation by disabling them to choose 'their' representative in the Presidency).

This has led to several lawsuits against BiH before the ECtHR.<sup>34</sup> The most famous and widely discussed case among them is the Case of Sejdić and Finci.<sup>35</sup>

<sup>33</sup> Several agreements on these special parallel relationships were signed. However, some of them (between Republika Srpska and Serbia in particular) were criticised due to their alleged unconstitutionality (see, e.g., Constitutional Court of Bosnia and Herzegovina, Decision U 42/01, 26 March 2004, [www.ustavnisud.ba/dokumenti/\\_bs/u-42-01-12264.pdf](http://www.ustavnisud.ba/dokumenti/_bs/u-42-01-12264.pdf), accessed 26 April 2020, in English: [www.ustavnisud.ba/dokumenti/\\_en/u-42-01-12264.pdf](http://www.ustavnisud.ba/dokumenti/_en/u-42-01-12264.pdf), accessed 26 April 2020).

<sup>34</sup> See ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (Appl. Nos. 27996/06 and 34836/06), Judgment (Grand Chamber), 22 December 2009, ECHR 2009-VI, 273; *Zorić v. Bosnia and Herzegovina* (Appl. No. 3681/06), Judgment (Fourth Section), 15 July 2014, <http://hudoc.echr.coe.int/eng?i=001-145566>, accessed 21 April 2020; and *Šlaku v. Bosnia and Herzegovina* (Appl. No. 56666/12), Judgment (Fifth Section), 26 May 2016, <http://hudoc.echr.coe.int/eng?i=001-163056>, accessed 21 April 2020.

<sup>35</sup> It was the first time the ECtHR declared a constitutional provision of a state party to be in violation of the ECHR. Namely, Mr Sejdić (Bosnian national of Roma ethnicity) and Mr Finci (Bosnian national of Jewish ethnicity) complained that the BiH Constitution prevented

However, even after more than ten years since the delivery of this judgment, the necessary reforms in BiH have not been adopted.<sup>36</sup> This has led to the characterisation of the situation in BiH by the Committee of Ministers of the Council of Europe as a manifest breach of the country's obligations under the ECHR, as well as of its undertakings as a member state of the Council of Europe.<sup>37</sup> Thus, even though the BiH Constitution is continuously described as uniquely open to international law, the truth is that not all of its provisions are in line with international law. The scars of the war in the 1990s remain deeply enshrined in how BiH functions in general and the DPA continues to be the basis for the present political divisions of BiH.

The 'world's most complicated system of government'<sup>38</sup> has consequences for the foreign policy as well. The prominent role of the constituent peoples in

them from being candidates for the Presidency of BiH and the House of Peoples of the PA solely on the ground of their ethnic origins. The ECtHR held that BiH had violated Article 14 of the ECHR and Article 3 of Protocol No. 1 as regards to the applicants' ineligibility to stand for election to the House of Peoples of the PA, as well as Article 1 of Protocol No. 12 as regards to the applicants' ineligibility to stand for election to the Presidency. And while the ECtHR judgment recognised that BiH has a particularised system designed to ensure peace in the 1990s, it noted that a mechanism of power sharing with careful balancing of the rights of all, not just some, communities is possible and needs to be introduced (ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (Appl. Nos. 27996/06 and 34836/06), Judgment (Grand Chamber), 22 December 2009, ECHR 2009-VI, 273, para. 48.).

<sup>36</sup> Status of Execution of the Judgment in *Sejdić and Finci*, <http://hudoc.exec.coe.int/eng?i=004-3141>, accessed 21 April 2020.

The amendments to the BiH Constitution were introduced only once in 2009 with an Amendment that established the constitutional status of the Brčko District (Amendment I to the Constitution of BiH, Official Gazette of BiH, 25/09). All other attempts to amend the Constitution were unsuccessful since, pursuant to Article X(1), the Constitution may be amended only by a decision of the PA, including a two-thirds majority of those present and voting in the House of Representatives. Hence, BiH political leaders (through BiH institutions and with the agreement of all three 'constituent peoples') need to reach an agreement on the content of reforms. It is evident, though, that the nationalist political leaders want the status quo to be preserved as it enables them to stay in power. Thus, it does not seem likely that the Case of *Sejdić and Finci* will be implemented in the near future.

<sup>37</sup> Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, 'Sejdić and Finci – After 10 years of absence of progress, new hopes for a solution for the 2022 elections', 22 December 2019, [www.coe.int/en/web/execution/-/sejdic-and-finci-after10-years-of-absence-of-progress-new-hopes-for-a-solution-for-the-2022-elections](http://www.coe.int/en/web/execution/-/sejdic-and-finci-after10-years-of-absence-of-progress-new-hopes-for-a-solution-for-the-2022-elections), accessed 21 April 2020.

Also, in the following cases on similar issues, the ECtHR stated that the failure of BiH to introduce constitutional and legislative reforms is not only an aggravating factor as regards to the BiH's responsibility under the ECHR for an existing or past state of affairs, but also a threat to the future effectiveness of the ECHR machinery (see, e.g., ECtHR, *Zomčić v. Bosnia and Herzegovina* (Appl. No. 3681/06), Judgment (Fourth Section), 15 July 2014, <http://hudoc.echr.coe.int/eng?i=001-145566>, accessed 21 April 2020, para. 40.).

<sup>38</sup> Alberto Nardelli, Denis Džidić and Elvira Jukić, 'Bosnia and Herzegovina: the World's Most Complicated System of Government?', *The Guardian*, 8 October 2014, [www.theguardian.com](http://www.theguardian.com)

the national institutional system combined with the substantial involvement of the international community leads to foreign policy being governed by a number of different and sometimes opposing actors. The domestic ethnically divided institutions (controlled by the same political parties for thirty years) disable genuine political change, making it impossible to reach decisions against the will of the ruling elites. On the other hand, the power of the international community represented through the OHR not only makes BiH foreign relations law dependent on international law but it also allows the previously mentioned domestic political actors to evade the political responsibility for their (in)actions. This reality does not lead to strengthened capacities of BiH institutions in exercising foreign affairs, nor does it lead to creation and implementation of common external goals. It only undermines institutional actions in the domain of foreign affairs and leads to political stalemate and institutional ineffectiveness.

Interestingly, the dependency of BiH foreign relations law on international law seems to be somewhat similar to the states in the 'Global South', as explained by Michael Riegner in his chapter. Notwithstanding the fact that BiH does not belong to the Global South, its foreign relations law, just like foreign relations law of the states in the 'Global South', does not shape the outside world as much as the outside world shapes their internal sphere. And although BiH's constitutional structure adds a new layer of complexity to the study of foreign relations law, there is a similarity in terms of the openness to and acceptance of international law, which is expressed in their respective constitutions. By allowing a special status of international law within their domestic legal systems, these states try to derive the formal validity of their constitutions from international law, to modernise their image and to build up their reputation within the international community. Hence, the transnational and hybrid categories of their foreign relations law transcend the binary opposition between national and international, political and economic, while the normative functions of their foreign relations law include enhancing economic self-determination, socio-economic development and equality.<sup>39</sup> All these states also share a similar goal: to take a more prominent role in the international community, which makes their foreign policy issues more relevant over time.

</news/datablog/2014/oct/08/bosnia-herzegovina-elections-the-worlds-most-complicated-system-of-government>, accessed 21 April 2020.

<sup>39</sup> See the chapter by Michael Riegner, p. 69.

### III BOSNIA AND HERZEGOVINA'S FOREIGN RELATIONS LAW

The foreign policy of BiH is implemented through the Presidency of BiH,<sup>40</sup> the Ministry of Foreign Affairs of BiH,<sup>41</sup> and the resident and non-resident diplomatic and consular missions of BiH.<sup>42</sup> There is no dedicated law on foreign relations in BiH yet.<sup>43</sup> Moreover, until March 2018, the only document specifically regulating foreign relations law in BiH were the three-pages-long General Guidelines on and Priorities of Conducting the Foreign Policy of BiH.<sup>44</sup> However, there are many other laws (including the Constitution) that deal implicitly with foreign relations.<sup>45</sup>

'The General Guidelines on and Priorities of Conducting the Foreign Policy of Bosnia and Herzegovina' established the following as the priorities of BiH's foreign policy:

- Preservation and protection of the independence, sovereignty, and territorial integrity of BiH within its internationally recognised borders;
- Full and consistent implementation of the DPA;

<sup>40</sup> See the responsibilities of the Presidency in Article V(3) of the BiH Constitution.

<sup>41</sup> See the responsibilities of the Ministry of Foreign Affairs in Article 8 of *Zakon o ministarstvima i drugim tijelima uprave Bosne i Hercegovine* [Law on Ministries and Other Bodies of Administration of BiH], Official Gazette of BiH, 83/17, available in English at: [www.ohr.int/laws-of-bih/public-institutions/](http://www.ohr.int/laws-of-bih/public-institutions/).

<sup>42</sup> There are also other local bodies that indirectly deal with foreign relations of BiH, such as the Ministry of Foreign Trade and Economic Relations of BiH, the Ministry of Defense of BiH, the Ministry of Security of BiH, the Ministry of Human Rights and Refugees and the Ministry of Communications and Transport.

<sup>43</sup> However, its adoption is foreseen in the new Foreign Policy Strategy of BiH 2018–2023, [www.predsjednistvobih.ba/vanji/?id=80826](http://www.predsjednistvobih.ba/vanji/?id=80826), accessed 21 April 2020, p. 2.

Also, a significant part of foreign relations law is covered by *Zakon o postupku zaključivanja i izvršavanja međunarodnih ugovora* [Law on the Procedure of Concluding and the Execution of International Treaties], Official Gazette of BiH, 32/13 (see part IV of this chapter).

<sup>44</sup> Ministry of Foreign Affairs of Bosnia and Herzegovina, 'The General Guidelines on and Priorities of Conducting the Foreign Policy of Bosnia and Herzegovina', 26 March 2003, [www.mvp.gov.ba/vanjska\\_politika\\_bih/osnovni\\_pravci\\_vanjske\\_politike\\_bih/?id=2](http://www.mvp.gov.ba/vanjska_politika_bih/osnovni_pravci_vanjske_politike_bih/?id=2), accessed 21 April 2020.

<sup>45</sup> Some of them are the previously mentioned Law on the Procedure of Concluding and the Execution of International Treaties, Law on Ministries and Other Bodies of Administration of BiH, *Zakon o Vijeću ministara BiH* [Law on the Council of Ministers of BiH], *Zakon o državnoj službi u institucijama BiH* [Law on Civil Service in the institutions of BiH], etc. Further, throughout the years, there were several legal acts that dealt with foreign relations law in BiH (e.g. *Platforma za djelovanje Predsjedništva Republike Bosne i Hercegovine u ratnim okolnostima* [Platform for the Action of the Presidency of the Republic of BiH under War Conditions] and *Uredba sa zakonskom snagom o vršenju inostranih poslova* [Decree with the Force of Law on Conducting Foreign Policy and the Rules on Inner Organization of the Ministry of Foreign Affairs]). More on that in: Jasmin Hasić and Dženeta Karabegović (eds.), *Bosnia and Herzegovina's Foreign Policy Since Independence* (Cham: Palgrave Macmillan, 2019), pp. 27–30.

- BiH inclusion into European integration processes;
- Participation of BiH in multilateral activities; and
- Promotion of BiH as a partner in international economic relations.<sup>46</sup>

However, in March 2018, the Presidency of BiH decided to revise these guidelines and it adopted ‘The Foreign Policy Strategy of Bosnia and Herzegovina 2018–2023’ (hereinafter Strategy) establishing a wider framework on the activities of the relevant institutions of BiH in the realm of foreign relations law.<sup>47</sup> The Strategy was adopted in accordance with the constitutional competencies of the Presidency,<sup>48</sup> and the institutions of BiH are obliged to implement it.

Given that the global situation has changed since 2003 (the growing problem of terrorism and radicalism, the refugee crisis, challenges that the EU faces, etc.), the Strategy proposes several novel approaches to address these global challenges. However, it does not bring anything that has not been previously confirmed as foreign policy goal by the competent legislative and executive bodies of BiH.

Hence, this document states as its goal the establishment of a wider framework and guidelines on the activities of the relevant institutions of BiH in the realm of foreign policy.<sup>49</sup> It also emphasises the necessity for the Ministry of Foreign Affairs of BiH to prepare every two years a draft action plan with detailed objectives and priorities on the implementations of the Strategy.<sup>50</sup> In addition, it reiterates the obligation of the same Ministry in monitoring the implementation of the Strategy, as well as the Ministry’s duty to annually inform the Presidency of BiH on the

<sup>46</sup> Ministry of Foreign Affairs of Bosnia and Herzegovina, ‘The General Guidelines on and Priorities of Conducting the Foreign Policy of Bosnia and Herzegovina’, 26 March 2003, [www.mvp.gov.ba/vanjska\\_politika\\_bih/osnovni\\_pravci\\_vanjske\\_politike\\_bih/?id=2](http://www.mvp.gov.ba/vanjska_politika_bih/osnovni_pravci_vanjske_politike_bih/?id=2), accessed 21 April 2020.

<sup>47</sup> It is unknown when and where the consultations for the adoption of such an important document took place or who was involved in the process since the media, academia, experts and relevant non-governmental organisations were surprised when this was announced (cf. Davor Vuletić, ‘Towards New Foreign Policy Strategy of Bosnia and Herzegovina 2018–2023’, Friedrich-Ebert-Stiftung Sarajevo, November 2018, <http://vpi.ba/wp-content/uploads/2019/01/Towards-New-Foreign-Policy-Strategy-of-BiH-2018-2023.pdf>, accessed 21 April 2020, p. 6).

Concurrently, the 2003 General Guidelines on and Priorities of Conducting the Foreign Policy of BiH were adopted with the consultations with the academia, nongovernmental organisations and business community (see Vuletić, ‘Towards new Foreign Policy Strategy’).

<sup>48</sup> BiH Constitution, Article V(3)(a).

<sup>49</sup> The Presidency of Bosnia and Herzegovina, ‘Foreign Policy Strategy of Bosnia and Herzegovina 2018–2023’, 13 March 2018, [www.predsjednistvobih.ba/vanji/?id=80826](http://www.predsjednistvobih.ba/vanji/?id=80826), accessed 21 April 2020, p. 2.

<sup>50</sup> The Presidency of BiH, ‘Foreign Policy Strategy 2018–2023’, p. 2.

efficiency of its implementation and suggests measures on redefining of the Strategy.<sup>51</sup>

As regards the principles of the foreign policy of BiH, the Strategy emphasises openness, equality, reciprocity, peaceful cooperation, and non-interference in internal affairs of other countries, as well as the protection and promotion of the BiH's own basic constitutional principles, such as constitutionality, sovereignty, territorial integrity and the rule of law.<sup>52</sup> Also, the respect for and protection of human rights and fundamental freedoms and the fight against all forms of violent extremism are stated as priority principles.<sup>53</sup> In addition and due to the uniquely complex political structure of BiH, the Strategy underlines the importance of the principle of consensus in every public appearance of foreign policy actors in the country.<sup>54</sup> Finally, efficiency, transparency, responsibility for the results achieved, together with the universally endorsed principles of international law and the general principles of diplomatic practice are among the principles of the implementation of BiH's foreign policy.<sup>55</sup>

The central part of the Strategy refers to the pillars of BiH's foreign policy. Those pillars are the strategic directions and dynamic guidelines of the foreign policy of BiH within which the objectives of the Strategy shall be pursued. These pillars are, first 'security and stability', second 'economic prosperity', third the 'protection of the interest of BiH's nationals abroad and international legal cooperation' and fourth and finally the 'promotion of BiH in the world'.<sup>56</sup>

These pillars are intertwined and depend on one another. Thus, economic prosperity cannot be achieved without the security and stability of BiH, while the promotion of BiH in the world is not possible without the protection of BiH's interests and cooperation of BiH in international institutions.<sup>57</sup>

In addition, the importance of BiH's integration in EU and NATO, as well as dedication to values of the UN are highlighted.<sup>58</sup> Indeed, it can be said that

<sup>51</sup> The Presidency of BiH, 'Foreign Policy Strategy 2018–2023', p. 2.

<sup>52</sup> The Presidency of BiH, 'Foreign Policy Strategy 2018–2023', pp. 3–4.

<sup>53</sup> The Presidency of BiH, 'Foreign Policy Strategy 2018–2023', p. 4.

<sup>54</sup> The Presidency of BiH, 'Foreign Policy Strategy 2018–2023', p. 3.

<sup>55</sup> The Presidency of BiH, 'Foreign Policy Strategy 2018–2023', p. 4.

<sup>56</sup> The Presidency of BiH, 'Foreign Policy Strategy 2018–2023', pp. 5–13.

<sup>57</sup> The Presidency of BiH, 'Foreign Policy Strategy 2018–2023', p. 5.

<sup>58</sup> This was followed by the accusations by the then President of Republika Srpska Milorad Dodik (and current Serb member of the Presidency of BiH) towards the then Serb member of the Presidency Mladen Ivanić that, by accepting NATO integration provisions, he attempted to rebut the 2017 Resolution on the Protection of the Constitutional Order and the Proclamation of the Military Neutrality of Republika Srpska. The Resolution is available at: [www.narodnaskupstinars.net/?q=la/akti/ostali-akti/rezolucija-o-zaštiti-ustavnog-poretka-i-proglašenju-vojne-neutralnosti-republike-srpske](http://www.narodnaskupstinars.net/?q=la/akti/ostali-akti/rezolucija-o-zaštiti-ustavnog-poretka-i-proglašenju-vojne-neutralnosti-republike-srpske), accessed 21 April 2020.

from 1997 onwards,<sup>59</sup> all foreign relations policies of this country have been focused on BiH's membership in the EU, and anything done by the relevant actors in BiH is expected to be done with the EU integration as a primary goal in mind.<sup>60</sup>

There are both legal and political considerations associated with the compliance of Bosnian institutions and political actors with EU foreign policy declarations. Each country aspiring to become an EU member has committed itself to gradually align its policies and practices with the EU's foreign policy activities, which is demonstrated through the adoption of foreign policy declarations and the eventual implementation of the measures that may result from them. Therefore, the majority of agreements signed jointly between BiH and EU, as well as BiH acts passed after its decision on the accession to the EU, highlight the duty of an increasing convergence of positions of BiH with the EU.<sup>61</sup> In addition, this is important as it shows that BiH is trustworthy and can act in accordance with the obligations arising from concluded and accepted agreements as well as from any other obligation stemming from the European integration process.

However, the practice of the BiH institutions shows something different. Political actors in BiH work on the above-mentioned priorities and principles in only a declaratory fashion (and sometimes not even that). This has been emphasised by the European Commission, too.<sup>62</sup> For example, the Strategy highlights the membership in NATO as one of the BiH's priorities. However,

<sup>59</sup> In 1997, the EU Council of Ministers established political and economic requirements for the development of bilateral relations with BiH.

<sup>60</sup> The Strategy also emphasises that the foreign policy of BiH should work more intensely to achieve:

- More comprehensive and efficient participation in important international events;
- Promotion of tourism and business trips to Bosnia and Herzegovina;
- Promotion and capacity building of the 'country of origin' concept aimed at exporters of goods and services;
- Better and more comprehensive presentation in the international media;
- Usage of contemporary communication technologies for promotion of Bosnia and Herzegovina's values;
- Further enhancement of cultural relations with other states and regions.

(Cf. The Presidency of BiH, 'Foreign Policy Strategy 2018–2023', p. 13).

<sup>61</sup> See, e.g., the Foreign Policy Strategy itself, or Article 10(2) of the Stabilisation and Association Agreement Between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, Luxembourg, 16 June 2008, in force 1 June 2015, [http://dei.gov.ba/dei/bih\\_eu/sporazum/glavni\\_text/default.aspx?id=1172&langTag=en-US](http://dei.gov.ba/dei/bih_eu/sporazum/glavni_text/default.aspx?id=1172&langTag=en-US), accessed 21 April 2020.

<sup>62</sup> European Commission, Commission Staff Working Document, Bosnia and Herzegovina 2018 Report, Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2018 Communication on EU Enlargement Policy, 17 April 2018, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herze>

the current chairman of the Presidency of BiH Milorad Dodik almost daily declares that BiH membership in NATO is unacceptable.<sup>63</sup>

The second problem is that the three-member Presidency of BiH (as well as other BiH's institutions) do not share the same views on a number of domestic and international issues. This is a major obstacle for every decision that must be made in BiH. For example, BiH has not yet recognised Kosovo as an independent state due to the lack of unanimity within the Presidency of BiH. Namely, Serb members of the Presidency throughout the years have always opposed this recognition as their policies are usually in line with Serbia.<sup>64</sup> The Ministry of Foreign Affairs is united with them on this issue as well.<sup>65</sup> Their stance is determined by the stance of Republika Srpska, which is strongly opposed to the recognition of Kosovo.<sup>66</sup> BiH is therefore currently the

[govina-report.pdf](#), accessed 21 April 2020, p. 3: 'Bosnia and Herzegovina's alignment with EU Common Foreign and Security Policy has yet to be improved'.

<sup>63</sup> A significant amount of research confirms that BiH is not acting in accordance with what it has committed to. For example, in the period 2014–17, BiH did not support any of the more than 20 EU declarations related to Moscow's actions in Ukraine and cyber-attacks directed at the EU member states for which the EU accuses Russia (Denis Hadžović, 'Where is the Foreign Policy of Bosnia and Herzegovina Shaped?', Centre for Security Studies – BH, 7 February 2018, <http://css.ba/press-release-where-is-the-foreign-policy-of-bosnia-and-herzegovina-shaped/>, accessed 21 April 2020, p. 2.). Furthermore, between January 2018 and January 2019, in fourteen cases political actors in BiH did not join foreign policy positions or EU declarations directed against Russia's actions that endangered the sovereignty and territorial integrity of Ukraine and Georgia (S. Degirmendžić, 'The Conduct of Foreign Policy Shows the Pro-Russian Commitment of our Officials', *Avaz*, 7 April 2019, <https://avaz.ba/vijesti/bih/473386/hadzovic-vodenje-vanjske-politike-pokazuje-prorusku-opredijeljenost-nasiv-zvanicnika>, accessed 21 April 2020). Given that many important political actors from Republika Srpska and the media they control are openly endorsing Russia against the EU, and taking into account slow progress made by BiH on its road towards EU accession, many civil society organisations in BiH claim that even after the adoption of the Strategy, the foreign policy of BiH is more in line with the pro-Russian than pro-European views.

<sup>64</sup> For example, current Serb member of the Presidency Milorad Dodik has made threats even while he was a Prime Minister of Republika Srpska, stating that he will act on secession of Republika Srpska from BiH if Kosovo becomes independent (comparing the secession of Kosovo from Serbia with the potential secession of Republika Srpska from BiH).

<sup>65</sup> Minister of Foreign Affairs (Bosnian Serb) highlighted that the issue of recognising Kosovo will not even be considered while he occupies the office and during the mandate of the current Council of Ministers. See Oslobodjenje, 'Crnadak: No recognition of Kosovo or decision on MAP', 30 April 2019, [www.oslobodjenje.ba/vijesti/bih/crnadak-nema-priznanja-kosova-niti-odluke-o-map-u-453466](http://www.oslobodjenje.ba/vijesti/bih/crnadak-nema-priznanja-kosova-niti-odluke-o-map-u-453466), accessed 21 April 2020.

<sup>66</sup> In 2008, National Assembly of Republika Srpska even adopted a resolution denouncing the unilateral declaration of independence of Kosovo and declaring that, if a majority of EU and UN states recognise Kosovo's independence, it would consider it as a precedent and signal it could declare its own secession from BiH. This resolution also called upon all officials from Republika Srpska to prevent BiH from recognising Kosovo's independence. See Narodna skupština Republike Srpske, 'Rezolucija o nepriznavanju jednostrano proglašene nezavisnosti Kosova i Metohije i opredjeljenjima Republike Srpske', 22 February 2008, [www.narodnaskupstinars.net](http://www.narodnaskupstinars.net)



only country in the region other than Serbia that has not recognised Kosovo. This complicates not only the movement of people ('it is easier to get to London than to Priština') but also economic cooperation (e.g., in response, Kosovo at one point introduced 100 per cent Tariff on the import of goods from BiH).

The situation in BiH foreign affairs is nevertheless not all bad. From its independence onwards, BiH has presided over the UN Security Council and the Council of Europe, has been preparing applications for admission to memberships in NATO and EU, has contributed to international crisis management, peacekeeping and peace building missions worldwide, and has been solving its disputes with other states before international courts.<sup>67</sup> BiH has demonstrated that, even though it has been grappling with its own uniquely complex system of government, it has somehow succeeded in implementing some of its foreign policy goals. However, it is without question that BiH lacks an effective institutional apparatus and a clear strategy on foreign relations.<sup>68</sup>

#### IV THE ROLE OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA IN BOSNIAN FOREIGN RELATIONS LAW

The role of the PA in the foreign policy of BiH is not much emphasised in the Constitution or any of the BiH laws. Pursuant to the Constitution, foreign policy is a responsibility of the institutions of BiH,<sup>69</sup> more specifically of the Presidency. Thus, the Presidency is responsible for conducting the foreign policy of BiH, for appointing ambassadors and other international representatives of BiH, for representing this country in international and European organisations and institutions and for seeking membership in such organisations and institutions of which BiH is not a member.<sup>70</sup> Furthermore, the

[/?q=la/akti/ostali-akti/rezolucija-o-nepriznavanju-jednostrano-proglašene-nezavisnosti-kosova-i-me-tohije-i-opredjeljenjima-republike-srpske](#), accessed 21 April 2020.

<sup>67</sup> Hasić and Karabegović, *Bosnia and Herzegovina's Foreign Policy*, p. 3.

<sup>68</sup> Hasić and Karabegović, *Bosnia and Herzegovina's Foreign Policy*, p. 4.

<sup>69</sup> In contrast to matters that fall into the responsibilities of the Entities.

<sup>70</sup> BiH Constitution, Article V(3)(a)–(c).

The Constitutional Court however emphasised that the PA has responsibility for enacting legislation as necessary to implement decisions of the Presidency in the area of foreign policy (see Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits, U 9/07, 4 October 2008, paras. 16, 18 and 21, [www.ustavnisud.ba/dokumenti/\\_bs/U-9-07-214754.pdf](#), accessed 13 July 2020, in English: [www.ustavnisud.ba/dokumenti/\\_en/U-9-07-214754.pdf](#), accessed 13 July 2020).

Presidency is also responsible for negotiating, denouncing and ratifying treaties of BiH.<sup>71</sup> Finally, its competencies include coordination of the country with international and nongovernmental organisations in BiH.<sup>72</sup>

The Law on Ministries and Other Bodies of Administration of BiH details these issues further. It regulates that the Ministry of Foreign Affairs is responsible for the implementation of the foreign policy of BiH and development of BiH's international relations.<sup>73</sup> However, it sets out that this should be done in accordance with the positions and directions of the Presidency of BiH. What is more, the same Ministry is responsible for proposing the adoption of positions concerning the issues of interest for foreign policy activities and the international position of BiH, as well as for representing BiH in foreign relations, and carrying out the professional tasks in relation thereto.<sup>74</sup> Pursuant to the regulations set out in the same Law, the Ministry of Foreign Affairs is responsible for proposing to the Presidency of BiH the establishment and termination of diplomatic or consular relations with other states, the cooperation with international organisations, as well as the preparation and organisation of international meetings and agreements.<sup>75</sup> Moreover, its competencies also include preparing documents, analyses, information, and other materials serving the needs of the bodies competent for the foreign policy implementation.<sup>76</sup>

Nevertheless, for the reasons listed below, the role of the PA in the foreign policy of BiH is not insignificant.

Firstly, it has been highlighted that the Presidency is responsible for negotiating, denouncing, and ratifying treaties of BiH. However, it cannot do so without the consent of the PA.<sup>77</sup> This is confirmed by the Law on the Procedure of Concluding and the Execution of International Treaties.<sup>78</sup> Hence, even though the Law stipulates that international treaties on behalf of BiH are concluded by the Presidency of BiH,<sup>79</sup> the Presidency must, for the

<sup>71</sup> BiH Constitution, Article V(3)(d).

<sup>72</sup> BiH Constitution, Article V(3)(h).

<sup>73</sup> Law on Ministries and Other Bodies of Administration of BiH, Article 8 (available in English at: [www.ohr.int/laws-of-bih/public-institutions/](http://www.ohr.int/laws-of-bih/public-institutions/)).

<sup>74</sup> Law on Ministries and Other Bodies of Administration of BiH, Article 8.

<sup>75</sup> Law on Ministries and Other Bodies of Administration of BiH, Article 8.

<sup>76</sup> Law on Ministries and Other Bodies of Administration of BiH, Article 8.

<sup>77</sup> BiH Constitution, Article V(3)(d).

The consent of the PA is published in the Official Gazette of BiH (see Council of Europe, Committee of Legal Advisers on Public International Law (CAHDI), Expression of Consent by States to be Bound by a Treaty, Analytical Report and Country Reports, 23 January 2001, <https://rm.coe.int/168004ad95>, accessed 11 July 2020, p. 226).

<sup>78</sup> Law on the Procedure of Concluding and the Execution of International Treaties, Articles 15–17.

<sup>79</sup> Law on the Procedure of Concluding and the Execution of International Treaties, Article 3(1).

purpose of obtaining the prior approval for ratification, submit the concluded international treaty to the PA. The Presidency should also submit a detailed explanation of the need and conditions for concluding a considered treaty.<sup>80</sup> Thus, the PA decides to give (or not) prior consent for the ratification of an international treaty, while the Presidency, upon obtaining that consent, decides on the ratification of an international treaty. Additionally, the Council of Ministers is responsible for implementing international treaties, and shall notify the Presidency and the PA about said implementation at least once a year.<sup>81</sup>

Secondly, even though the Presidency shall decide on the cancellation or withdrawal from an international treaty (either on its own initiative or at the proposal of the Council of Ministers), it cannot do so without the prior approval of the PA.<sup>82</sup>

Thirdly, it has been emphasised that the Ministry of Foreign Affairs is responsible for proposing the adoption of positions concerning the issues of interest for foreign policy activities and the international position of BiH, as well as for representing BiH in its foreign relations, and carrying out the professional tasks in relation thereto. However, it should report on these activities to, among others, the PA.<sup>83</sup>

The controlling role of the House of Representatives of the PA is also reflected in its authority to confirm the appointment of the Council of

<sup>80</sup> Law on the Procedure of Concluding and the Execution of International Treaties, Article 15.

<sup>81</sup> Law on the Procedure of Concluding and the Execution of International Treaties, Article 30.

The Law on the Procedure of Concluding and the Execution of International Treaties stipulates that the Council of Ministers of BiH is responsible for the execution of international treaties through the competent institutions of BiH and the Entities. International treaties which establish direct obligations for BiH are executed by the competent institutions of the state administration whose competence covers areas regulated by those treaties, while the treaties which are concluded by BiH, and which establish obligations for domestic legal persons, are directly executed by those legal persons.

There is however no explicit provision defining the rank of international treaties in domestic law or provision regulating the introduction of international treaties in domestic law as condition for their applicability. The Constitution also does not provide any clarification on the matter (see generally Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits, U 5/09, 25 September 2009, [www.ustavnisud.ba/dokumenti/\\_bs/U-5-09-290456.pdf](http://www.ustavnisud.ba/dokumenti/_bs/U-5-09-290456.pdf), accessed 10 July 2020, in English: [www.ustavnisud.ba/dokumenti/\\_en/U-5-09-290456.pdf](http://www.ustavnisud.ba/dokumenti/_en/U-5-09-290456.pdf), accessed 10 July 2020). The ratified and published international treaties are directly applicable and incorporated into domestic law by promulgation and publication in the Official Gazette of BiH (see Council of Europe, Expression of Consent by States to be Bound by a Treaty, pp. 225–7).

<sup>82</sup> Law on the Procedure of Concluding and the Execution of International Treaties, Article 33(2).

<sup>83</sup> Law on Ministries and Other Bodies of Administration of BiH, Article 8.

Ministers of BiH, to oversee and control its work, and to vote no confidence when deemed necessary.<sup>84</sup>

Furthermore, the House of Representatives has several Permanent Committees, including, among others, the Committee on Foreign Affairs.<sup>85</sup> Its jurisdiction is to monitor the conduct of foreign policy and to consider all issues in the field of international relations and foreign affairs.<sup>86</sup> This includes a role in adopting legislation in the field of foreign affairs.<sup>87</sup> This also includes engaging with the cooperation of BiH with international organisations and the international community, as well as inter-parliamentary cooperation with the respective parliamentary committees of other countries. In addition, the Committee considers granting and revoking consent to the ratification of international treaties, agreements and conventions.<sup>88</sup> The role of the Committee can also be important when it comes to the cancellation or withdrawal from an international treaty.<sup>89</sup> Therefore, perhaps the biggest influence of the PA on BiH's foreign policy may be made through the work of this Committee. Nevertheless, this influence will depend on its very members. In fact, some of its Chairs have done everything in their power to minimise the role of the Committee.<sup>90</sup> As a result, the internal division and complexity of BiH have its impact on the work of this Committee as well.<sup>91</sup> It seems as this Committee in BiH exists only formally. For example, the 2017 annual report of the Committee states that the Committee has held twelve sessions and adopted four conclusions. The average attendance of its members

<sup>84</sup> See the responsibilities of the PA in Article IV(4) of the Constitution.

<sup>85</sup> They are not defined in the Constitution but in *Poslovnik Predstavničkog doma Parlamentarne skupštine BiH* [Rules of Procedure of the House of Representatives], Official Gazette of BiH, 97/15.

<sup>86</sup> Article 43 of Rules of Procedure of the House of Representatives.

<sup>87</sup> The Rules of Procedure of the House of Representatives requires this Committee to be consulted 'for the purpose of obtaining its opinion on the principles on which the proposed law is based' (Articles 106 and 109). If the House does not accept opinion of the Committee, it must request that the Committee provides a new opinion (taking into account the debate conducted at the session of the House). This process can be repeated two times at most, after which the legislative procedure shall be suspended in case that the opinion is not adopted (see Articles 113 and 121).

<sup>88</sup> For the full list of Committee's competencies see Article 45 of the Rules of Procedure of the House of Representatives of the PA.

<sup>89</sup> In accordance with Article 139 of the Rules of Procedure of the House of Representatives, prior approval of the PA which is required in this regard means, among others, that the House of Representatives will have to seek the opinion of the competent committee on the matter.

<sup>90</sup> The Secretary of the Committee on Foreign Affairs, personal communication, April 2019.

<sup>91</sup> For example, it is not uncommon for Committee members to form a single-ethnic delegation when meeting with members of other countries' foreign affairs committees (Hasić and Karabegović, *Bosnia and Herzegovina's Foreign Policy*, p. 235).

to its sessions was 70 per cent, and the sessions lasted on average 39.5 minutes. Therefore, the members of the Committee spent only eight hours in a whole year working on their tasks. Moreover, in the same year, this Committee had a meeting only with the Committee on Foreign Affairs of the Parliament of Italy. If compared to the previous reports, it seems also that the work of the Committee is decreasing and becoming less influential.<sup>92</sup> Even though the Committee's dependence on the work of other state organs is one of the reasons of its lack of efficiency, one of the main reasons is certainly the reluctance of its members to use the competencies given to them in the realm of foreign relations. Therefore, the Committee on Foreign Affairs has never effectively scrutinised the actions of the executive and its work is without practical effect in shaping the BiH's foreign affairs.<sup>93</sup>

In conclusion, it is obvious that the PA has instruments to influence the foreign policy of BiH. Certainly, a function that is primarily linked to the PA is the legislative function.<sup>94</sup> However, in executing such a role the PA has ways to influence the foreign relations, too. Thus, the role of PA in this area is indirect but can be significant. I believe that this is primarily due to two explanations: first, the legislature may slow down the executive in the conduct of foreign policy (and thus should not have any bigger role in this area). Second, it is important to have a certain level of control of the executive in carrying out the functions entrusted to it (ensuring therefore that the PA has a system of checks and balances). Namely, the PA's size and probable non-expertise in foreign relations law are not practicable for foreign policies to be made by parliament directly. Members of the PA are not used to making and dealing with foreign policies. However, they are representatives of the people. On the contrary, the government and the ministries are used to working on foreign aspects and to doing so quickly. Since 'good

<sup>92</sup> For example, in 2016, the Committee held fifteen sessions and adopted two conclusions. The average attendance of Committee members to its sessions was 81.66 per cent, and the sessions lasted forty-one minutes on average. Further, the Committee considered and granted positive opinions for the ratification of sixty-three international treaties and had meetings with three foreign committees on foreign affairs. As regards the legislative activity, the Committee did not do activities proposed in the Work Plan because the draft laws did not enter the parliamentary procedure.

In 2015, the Committee held eighteen sessions and adopted eleven conclusions. The average attendance of Committee members to its sessions was 74 per cent, and the sessions lasted fifty minutes on average. Further, the Committee considered and granted positive opinions for the ratification of seventy-seven international treaties. Finally, in 2015, the Committee did not do activities proposed in the Work Plan either because the draft laws did not enter the parliamentary procedure.

<sup>93</sup> Similar in Hasić and Karabegović, *Bosnia and Herzegovina's Foreign Policy*, p. 235.

<sup>94</sup> BiH Constitution, Article IV(4).

scrutiny makes for good government',<sup>95</sup> the PA should and does have the means at its disposal to monitor the executive, to scrutinise its practice, and to keep it in appropriate bounds, ensuring both openness and efficiency. Its members should not be indifferent to issues of foreign relations. This does not mean they challenge executives but that they strengthen them.<sup>96</sup>

However, the PA is currently mostly interested in domestic politics and the ethnic divisions, which brings foreign relations barely in its focus. Its members were largely elected because of their nationalist sentiment and membership in a particular political party, allowing the ruling elites to capture the PA. Also, the peculiar relationship between the international community and the PA (as well as other national institutions) has consequences for BiH foreign relations law too. The power of the OHR to act in substitution for the domestic institutions makes it a very relevant actor in BiH foreign affairs. Moreover, while acting as domestic institution, the OHR places himself above the domestic legal system, making BiH a unique example in this regard. Even though the OHR acts only if the PA had failed to act, and although his actions are less frequent than before, the mere fact that he possesses these powers contributes to the erosion of the boundaries between the domestic and international domain. Consequently, BiH foreign relations law is developing in the various and quite special connection between international and domestic law.

## V FOREIGN RELATIONS LAW AS A FIELD OF SCHOLARSHIP IN BOSNIA AND HERZEGOVINA

When it comes to the foreign relations law as a field of scholarship and research in BiH, it has been seen mostly as a part of the political and not legal scholarship. There have been virtually no scholars with exclusive and foremost expertise in this area. Most of the scholars have seen it as a part of some other, 'bigger' discipline, such as international relations or political science.

As far as law professors are concerned, international law professors and national law professors are partly isolated from each other, and they mostly teach one discipline or the other, although it is not uncommon that the same

<sup>95</sup> Robin Cook, Leader of the House of Commons, 'Modernisation of the House of Commons: A Reform Programme for Consultation', December 2001, [www.publications.parliament.uk/pa/cm200102/cmselect/cmmodern/440/44003.htm](http://www.publications.parliament.uk/pa/cm200102/cmselect/cmmodern/440/44003.htm), accessed 21 April 2020.

<sup>96</sup> Andrés Malamud and Stelios Stavridis, 'Parliaments and Parliamentarians as International Actors', in Bob Reinalda (ed.), *The Ashgate Research Companion to Non-State Actors* (Farnham: Ashgate, 2011), pp. 101–15 at 103.

professor teaches courses in both public international law and public law fields. In addition, curricula for the courses are generally separated from one another and provide little connection between the disciplines.<sup>97</sup> Therefore, most courses either do not touch upon foreign relations law at all, or only sporadically mention it (for example, Public International Law curricula and/or Constitutional Law curricula). Thus, foreign relations law is taught scarcely and mostly within Public international law or/and Constitutional Law courses.

The state of affairs in BiH is comparable to other jurisdictions like China. As Congyan Cai explains with respect to Chinese foreign relations law,<sup>98</sup> few international lawyers at Chinese universities know constitutional law well and, vice versa, few constitutional law professors have much knowledge of international law.<sup>99</sup> Another similarity concerns the manner in which China and BiH conduct foreign relations; namely, the fact that political expediency is routinely invoked to justify the obscurity and low transparency in activities in foreign relations.<sup>100</sup> Finally, as in China, in BiH, there are two recent developments in foreign relation law that merit attention. The first concerns a recent important legislative initiative concerning foreign relations (explained earlier in this chapter). The second is related to the fact that recently this area began to grow in academic importance. Specifically, there has been an increase in the number of books and papers on the subject.<sup>101</sup> Also, there are growing numbers of faculties and special study programs with a particular focus on foreign relations.<sup>102</sup> Accordingly, it can be said that with the rise of BiH foreign relations, the interest for this topic is expanding

<sup>97</sup> Unlike for example law schools in the United States, which have a more flexible structure that allows faculty to more easily cross historic subject matter divides. See the chapter by Curtis A. Bradley, p. 343.

<sup>98</sup> Congyan Cai, 'Chinese Foreign Relations Law' (2017) 111 *AJIL Unbound* 336. See also Section II in Ji Hua, 'China and Global Environmental Governance: Coordination, Distribution and Compliance', in this volume.

<sup>99</sup> Cai, 'Chinese Foreign Relations Law', 336.

<sup>100</sup> Cai, 'Chinese Foreign Relations Law', 336–7.

<sup>101</sup> See, e.g., Hasić and Karabegović, *Bosnia and Herzegovina's Foreign Policy*; and Bernhard Stahl and Soeren Keil (eds.), *The Foreign Policies of Post-Yugoslav States: From Yugoslavia to Europe* (Basingstoke: Palgrave Macmillan, 2014).

<sup>102</sup> See, e.g., the Faculty of Political Science and International Relations at the Sarajevo School of Science and Technology, the Faculty of International Relations and Diplomacy at the University of Herzegovina, or special study programs such as International and Public Relations at the International University of Sarajevo, International Relations and Diplomacy at the Faculty of Philosophy at the University of Tuzla, and Master's degree program in International Relations and Diplomacy at the American University in BiH.

as well. Yet, this still remains a largely unexplored research area in the legal discipline.

## VI CONCLUSION

My main conclusion is that the impact of parliaments on foreign relations law depends on their role in a state and effective use of their competencies. Their means to impact the conduct of foreign relations become more diverse with the strengthening of their role in a state. Looking at the example of BiH, it seems that this impact can be seen mostly in the ratification of international treaties, in the use of committees on foreign affairs, and in the annual checks and reports. Nevertheless, the development of foreign relations law demands constant adaptation of methods of its implementation. I believe this competency should be used to a full extent as the increase in this practice can improve the quality and transparency of foreign affairs. However, both internal and external factors affect this effectiveness. Individual members of parliament (and its committee on foreign affairs) can also make a major contribution to this effectiveness. As a result, their personal views are vitally important.

This is especially true for BiH because its complicated internal system adds another layer of complexity to BiH foreign relations. Here, not only the political parties but also state institutions (as well as institutions on the substate level) are mainly organised along ethnic lines. With the general lack of trust between different ethnic groups, it is almost impossible to reach consensus on many questions. This makes BiH ineffective on a daily basis, including on foreign relations law. In this regard, a solution must be found to enact a constitution that institutes a legitimate form of government and guarantees the protection of all ethnic groups, while at the same time creating the shared political identity that transcends the dominant ethnic allegiances.<sup>103</sup>

However, Bosnia's extremely complex and multilevel system of state organisation is not the only feature that makes BiH special when it comes to foreign relations. Its constitutional structure also creates unique relationship between international and domestic sphere and has consequences for foreign relations law too. In particular, the OHR's powers make BiH dependent on foreign actors' decision-making process. The OHR can substitute himself for the national authorities, including the PA, and can even overrule the PA's decisions. This makes the boundaries between 'international' and 'domestic' more fluid and can greatly affect the foreign relations law as well.

<sup>103</sup> Grewe and Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies', 4.



When it comes to foreign relations law in BiH, it is necessary to strengthen co-operation between the PA and the executive branch in the creation and implementation of foreign policy, as well as to strengthen the co-operation of the Committee on Foreign Affairs with parliamentary counterparts from other states. In addition, the importance of foreign relations law and major changes in the world order require an assessment of the effectiveness of the current system in achieving the goals set out in the 2018 Strategy. Currently, each and every conduct constituting relations of BiH with other countries is actually the result of improvisation arising from this general document. It is necessary to regulate this field by a more comprehensive act, which is also something that professional diplomats have been lobbying for since 2001.<sup>104</sup> It is also important to involve all relevant actors in drafting this act (from the academic community to business actors). This could reduce the possibilities for self-interested conduct of political parties in foreign policy, while leading to the development of foreign policy that is in the interest of BiH and its citizens.<sup>105</sup> It is therefore necessary to concretise the 2018 Strategy with clear directives for foreign affairs on the basis of the priority interests of BiH. The executive should remain the main figure in foreign relations law, but the scrutiny, guidance, and support of the PA must be enhanced. Otherwise, the potential of the PA will be wasted unnecessarily.

In conclusion, it is true that the traditional doctrine generally excludes parliaments from any role in the conduct of foreign affairs and that there are indeed practical benefits in seeing foreign relations as belonging only to the executive branch. However, the traditional approach seems much less persuasive today as it undermines the potential for national parliaments to engage in developing this field of law. The legislative branch can certainly add another layer of scrutiny and expertise to the foreign relations law. Therefore, the emphasis needs to be on the construction of more 'bridges' and the erection and shifting of fewer 'boundaries', respectively.

<sup>104</sup> Davor Vuletić, 'Towards New Foreign Policy Strategy', p. 7.

<sup>105</sup> Of course, discretion based on coordination and consensus is required in the conduct of foreign relations. However, when it comes to divided states such as BiH, more transparency is needed.