Opinion

GROWING MARITIME DISPUTE BETWEEN CROATIA AND BOSNIA

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Since Hugo Grotius's famous *Mare Liberum* of 1609 the accessibility of the international waters (free naval regime) has been the international custom observed by all (civilized) nations. Ever since, the so-called Freedom of the Seas Doctrine has gradually elaborated on the notion of territorial waters, continental shelf, economic zones and its demarcation distances. As the technological breakthroughs made economic exploitation possible and military offences probable, the international community repeatedly tried to codify the customary rules into the text of the comprehensive universal legally binding instrument. Not before after WWII, which was extensively fought on the seas by nearly all major belligerent parties, the critical momentum has been built. The first two negotiation rounds have been conducted in 1950s leading to the successful closure of the UNCLOS I (1956) and UNCLOS II (1958, 1960). With over 160 participatory states and after nine consecutive years of heavy negotiations, the UNCLOS III was closed in 1982 (entering into force by 1994).

Without a wish to recapitulate on all details stipulated by the UNCLOS, let us only make a brief reference to the zones. The UNCLOS recognizes the right of the states to extend the national territory by several maritime zones from their respective coastlines.[1] Thus, the international instrument differentiates:

- *Internal Waters* (land-coast – baseline) – no passage prior to explicit permission;
- *Territorial Waters* (from baseline up to 12nM seawards, with the possible extension for additional 12nM of so-called *Contiguous Zone*) – innocent passage right;
- *Inner Sea* (archipelago states only) – innocent passage right;
- *Prolongation of the Continental Shelf* /PCS/ (territorial extension for up to 150nM seawards from baseline based on a confirmed geo-morphological proof) – innocent passage right;
- *Exclusive Economic Zone* /EEZ/ (from baseline up to 200nM seaward, upon the UNCLAS ratification) – innocent passage right;
- *PCS and EEZ* (up to 350nM seawards from baseline approved by the CLCS 10 years after the UNCLAS ratification);
- *High Seas* (beyond the limits of 200nM/350nM) – open for free passage and exploitation to all states.

The recognition of the Exclusive Economic Zone (EEZ) and PCS (prolongation of the continental shelf) by the UNCLOS surely obliges the Mediterranean/Adriatric states to grant innocent passage right to all foreign vessels. However, it firmly awards the littoral states since both zones are exclusive belts for any economic activity, be it seabed exploitation (ore, gas, oil, other minerals, and the like) or exclusivity in the fishing rights (marine biota).

[1] The basis is the drawing of baselines along the coastal lines - either by following the low water mark or by following the general direction of the land-coast.

The UNCLOS established the CLCS (Commission on the Limits of the Continental Shelf) as the standing (scientific) panel of the instrument to deal with the claims beyond the 200nM parameter. The CLCS is mandated to examine the maritime claims per individual state requests. Recommended deliberations of the CLCS are becoming final and binding if no contradictory claim is lodged (art.76). In case of disputes, the final settlement is subjected either to the Hague-based ICJ or to the Intl. Tribunal for the Law of the Sea.

Bosnian case

The bilateral international agreement on the state border between Bosnia and Herzegovina and the Republic of Croatia, known as the Agreement on the Border between the two states, or more familiarly, as the Tuđman-Izetbegović Agreement, signed in Sarajevo on 30 July 1999 between the then President of the Republic of Croatia, Franjo Tuđman, and the Chairman of the Presidency of Bosnia and Herzegovina, Alija Izetbegović, represents in its 23 Articles, conditionally, "a valid act since it has been applied until a new one is made" (V.Đ. Degan, 2013). This Agreement could also be perceived to contain a transitional or provisional solution, since it has never been ratified by any parliament and does not serve its ultimate purpose - the permanent establishment and determination of the land and sea border between the two neighbors. In this regard, it can even be argued that the Republic of Croatia *de facto* abandoned the execution of this Agreement when its official authorities decided to embark on the building of a permanent construction at sea. This all supports the fact that the issue of delimitation and demarcation at sea, especially in the area of the Bay of Neum and the Mali Ston Bay, is still permanently undefined and unsettled and thus requires, in our opinion, a serious step towards opening an official dialogue with Zagreb with the involvement of EU institutions, since the Republic of Croatia is a member of the European Union.

The second difficulty should be addressed together with the first. It would be especially important to define the sea boundary, regarding the tip of the Klek Peninsula and the uninhabited islets, Veliki and Mali Školj or, more precisely, the rocks in the Mali Ston Bay, which are part of a unique geomorphologic unit, together with the Klek Peninsula. If we draw the line of equidistance for purposes of delimitation of two states whose shores in one bay lie or are opposite to one another (the Peninsula of Klek and Pelješac), which is in accordance with the international law of the sea, as well as Article 4 (3) of the bilateral Agreement which, *inter alia*, prescribes that border at the sea stretches "the median line of the sea area between the land of Bosnia and Herzegovina and the Republic of Croatia", it could be claimed that the disputed area would belong to Bosnia and Herzegovina. Closely connected to this, the question of Bosnia-Herzegovina's access to the High Seas or international waters of the Adriatic Sea and other world seas should be addressed, where no country in the world has territorial sovereignty, nor does it exercise any sovereign rights. High sea areas are world seas and oceans which are outside any state territory and provide a regime of free navigation and overflight, as well as other freedoms inherent to the High Seas. On this part of the planet, according to general customary international law, all countries in the world, under certain circumstances, exercise their jurisdiction over vessels flying the flag of their country.

For these reasons, the UN Convention on the Law of the Sea from 1982 (UNCLOS) (ratified both by the Republic of Croatia and Bosnia and Herzegovina) states in Art. 7 (6) of the Convention that, in declaring its straight baselines, from which the width of the territorial sea is measured, the coastal State may not cut off the territorial sea of another coastal state from the High Seas or the exclusive economic zone. As things stand currently, in order to get from

the waters of Bosnia and Herzegovina by vessel to the High Seas, it is necessary to pass through the internal waters and the territorial sea of the other coastal state, so that, in crossing the line that represents the outer boundary of the territorial sea, one leaves the sovereign territory of the Republic of Croatia. Further into the High Seas, the Croatian Protected Ecological and Fishing Band (ZERP) has been declared and covers the sea area in the Adriatic Sea from the external border of the territorial sea in the direction of the open sea to its outer boundary, determined by the general international law, and temporarily follows the line of demarcation of the continental shelf established by the Agreement between Italy and the Socialist Federal Republic of Yugoslavia concerning the Delimitation of the Continental Shelf between the two Countries in the Adriatic Sea from 1968.

In fact, it is essential for Bosnia and Herzegovina to secure a specific route, that is to say, a corridor, which will physically connect its waters with the High Seas, since it is in an unfavorable geographic position, due to its sealed coastline. At this level, it is state practice to support coastal states to limit the width of their territorial sea, due to the undisputed flow or passage of the other coastal state to the High Seas, in accordance with the above-mentioned UN Convention on the Law of the Sea, which represents a codification of this branch of international law. Examples of this are the Republics of Estonia and Finland in the Gulf of Finland in the Baltic Sea, in relation to the Russian Federation (St. Petersburg area), and the Republic of France in relation to the territorial sea of the Principality of Monaco in the Mediterranean Sea.

Hence, Bosnia and Herzegovina should not accept the guarantee of the neighboring state that Bosnia and Herzegovina will have the right only to innocent passage for all vessels to and from Neum or, in the case of some other ports in the state territory of Bosnia and Herzegovina, since Neum is extremely unconducive to the construction of a larger port which would be open to international traffic - we predict that a port of this type and category could be built on the Klek Peninsula, whose waters are much more suitable, especially in respect of access and sea depth, for the construction of an international port. This is because the right to innocent passage of a vessel is linked to the territorial sea, not to the internal waters of the coastal state. This should have been precisely defined in accordance with the principles and rules of international law, preferably by a bilateral international agreement between the two neighboring states, namely, the existence, the position, the proper width and the *legal regime* of such a corridor or waterway, which would probably be through the Neretva and the Korčula Channel, to move all vessels to and from Bosnia and Herzegovina. The legal regime of such a corridor should be explicitly articulated in writing, together with the rights and obligations of both contracting parties, all in accordance with international law.

Therefore, it could be understood that there is a noticeable difference between the right to innocent passage of foreign ships through the territorial sea of a coastal state and the formation of a corridor with a *special legal regime*. The latter would most likely pass through Croatian territory, as it would be unrealistic to expect that the Republic of Croatia in the area of such a corridor remains without its territorial sovereignty and integrity. This is regardless of the fact that it not very legally rightly inherited from the Socialist Federal Republic of Yugoslavia, by its Maritime Code, the straight baselines under the conditions of more sovereign states whose coastlines are touched and lean on one another in the same sea area. Namely, the disputed area in terms of the declaration of these straight baselines is from theCape Proizd (near the island of Korčula) all the way to the southwestern tip of the island of Vodnjak, near some of the more famous Paklinski islands (along the island of Hvar), as this act simply contributed to the "closure" of Bosnian and Herzegovinian waters. We have written "most likely to pass" since it

is hard to imagine that in the area of the Neretva and Korčula Channels, with a width of not less than 1-1.5 nautical miles, that condominium (shared sovereignty) can be established or that an international legal regime be determined completely outside Croatian sovereignty.

Finally, in support of the assertion that any coastal state should have unimpeded (not just innocent passage, which is subject to various restrictions on the part of the coastal state) access to the High Seas, there is the final determination of the arbitral award of the Permanent Court of Arbitration in The Hague in the case the Republic of Slovenia and the Republic of Croatia of 2017, according to which the Republic of Slovenia, through the so-called *junction* of 2.5 nautical miles wide, i.e. the physical link of its territorial waters with the high seas area of the North Adriatic was awarded a corridor from their waters, where Slovenia enjoys full sovereignty to the High Seas, where many freedoms are guaranteed to all countries of the world, both coastal and non-coastal, as well as to those with an unfavorable geographic position regarding access to the sea, as in the case of Bosnia and Herzegovina. Namely, as the Chairman of the Arbitration Council in this very case, G. Guillaume, stated in the public statement of the arbitral award, "the junction between the Slovenian territorial sea and the High Seas is a space where ships and planes have the same right of access to Slovenia as well as in the High Seas. The Court identified the area of the Croatian territorial sea that is adjacent to the Italian waters within which a special legal regime would be applied. The corridor is approximately 2.5 nautical miles wide, and located immediately next to the border, according to the Treaty of Osimo, within Croatian territorial waters. A special legal regime should guarantee the integrity of the Croatian territorial sea, and Slovenian free communication between its waters and the High Seas." It follows that the free communication of a coastal state between its waters and the High Seas is not the same as its right/obligation to innocently pass through the waters of another coastal state. It should, therefore, be concluded that the first term refers to the freedom of navigation and over flight to a little more extent than that provided by the institute of the innocent passage of foreign ships to territorial sea, which is only a necessary passage, since every foreign vessel must navigate through this area on the shortest conventional route, without disruption or delay. Moreover, this accessory or connecting corridor would have a kind of *limitation of Croatian sovereignty and jurisdiction*, since it would be in the spirit of this particular legal regime that would go in the middle of the Neretva and Korčula Channel. It would be worth questioning, moreover, whether Croatian internal waters should be left where they are now. The same question appeared to have been posed by a legal scholar from Croatia – "the question remains whether the waters of Croatia delimited by the territorial sea of Bosnia and Herzegovina can continue to be considered as having the legal status of internal waters." (B. Vukas, 2006).

Accordingly, a maritime corridor with a specific legal regime needs to be differentiated widely, or clarified in detail, so it does not necessarily represent identical international legal categories with the right to innocent passage of foreign ships and the right of transit passage. These latter terms are characteristic of the very specific maritime zones and parts of the sea which are not the subject of our current exploration and explication.

When all interconnected notions finally acquire their coherent power in terms of consistency, then will be the time to discuss continuing the construction of a permanent artificial installation on the sea, called the Pelješac Bridge (mainland – Pelješac Peninsula). Having understood that the Republic of Croatia only wants to connect two parts of the mainland, that is, the northern and southern ends of their country with a high-quality road link, this modern traffic connection should not endanger, or be detrimental to, the interests of their neighbors. Therefore, for the purpose of solving the traffic difficulties of the Republic of Croatia, the continuation of the

construction of the Pelješac Bridge should be permanently solved by settling the so-called previous issues elaborated earlier - the permanent maritime delimitation on the Adriatic Sea as well as the permanent determination of the land border through a bilateral international frontier treaty, which will be applied equally and in good faith by both signatory parties and which will, above all, be confirmed in both the Croatian Parliament and the Parliamentary Assembly of Bosnia and Herzegovina, where the Vienna Convention on the Law of Treaties of 1969 would be applicable in the event of any dispute as to its application, and the interpretation of certain provisions thereof. In addition to this, as mentioned above, it is necessary to establish in an internationally appropriate manner the legal regime and the width of the future corridor, which will represent, *inter alia*, a junction between Bosnian and Herzegovinian waters and the High Seas of the Adriatic.

Hence, only after the final determination of all the aforementioned, and after a thorough, concrete and legally binding determination of the legal regime of the corridor above which the permanent bridge will be built, the scientific and professional processing of the project known as the Pelješac Bridge must be approached. This should meet all the technical characteristics of bridges that have already been built over water within the international legal regime, i.e. international waterways, such as the Fatih Sultan Mehmet Bridge and the Bosporus Bridge in Istanbul that cross over the waters of the Bosporus strait which is under international legal regime, or the Oresund bridge (although most of the international maritime traffic takes place above the underwater tunnel) linking the Kingdom of Denmark and the Kingdom of Sweden and which is also located over the international waterway. This means that if the agreement between the two neighboring coastal states in this part of the Adriatic Sea could be achieved, in the sense of completing its construction and opening it for all road traffic, the bridge of these dimensions must have a certain minimum navigation height and a minimum range between the pillars, or at least the central ones, so that big ships could also sail into the Neum waters.
Bosnia and Herzegovina somehow tend to always delay consideration of certain questions. If this continues, there is a great chance that there will be no single institutional response, with the result that the position of Bosnia and Herzegovina in relation to this important international legal issue will remain very vague and indeterminate. Additionally, there is a very long internal tradition which does not encourage political cooperation, and a lack of understanding of things that are of fundamental significance to the whole country, not just to one of its constituent peoples.

However, in expectation of any kind of determination on the part of Bosnia and Herzegovina, with or without the Pelješac Bridge, the problem of the permanent "drawing" of the borderline between the two countries, both on the sea and on the land, will remain. The question of the access corridor or the connection of Bosnia-Herzegovina's waters with the High Seas will not be sorted out alone. So, is it wise to wait for the international community or the Office of the High Representative in Bosnia and Herzegovina (if it is still here?!) to take steps to protect the international interests of this state?

This is an opportunity to see the strength of the Bosnian-Herzegovinian diplomacy which will once again demonstrate its position on the international stage. There is certainly a consistent lack of unity, resulting predominately from the less than satisfactory territorial organization, and attempts to build a state on the basis of ethnicity. This lack of unity is reflected in the impossibility of coming to clear institutional views on the part of the official state government. There may again be the emergence of a culture of conflict and non-cooperation at the Parliamentary Assembly of Bosnia and Herzegovina (which could, adopt the declaration, as a political act, with precisely defined conclusions), the Council of Ministers and the Presidency.

But if dialogue is opened, perhaps after formal disagreement through a diplomatic note to the Republic of Croatia, the latter will surely have the advantage, or at least a better negotiating position, due to its European Union membership. This fact may well be crucial (since the European Union also recognizes the interest in land consolidation of its territory, so that its members can better monitor and control their state territory, with the goal of Croatia's entry into the Schengen area) to the success of the negotiations as a diplomatic mean of settling one international dispute, which surely here does exist, at least with respect to the territorial title. Finally, it is worth mentioning that an international dispute does not need to be specifically proclaimed, the essence is in the existence of a disagreement with respect to essential facts, or in their apparently different interpretations.

If there is an international dispute between two coastal states that share the eastern coast of the Adriatic Sea - that is not debatable - it is now best to choose the most appropriate and effective means of settling the dispute with, if possible, mutual interest as its aim. In this respect, it would be best to choose the most appropriate means for peaceful settlement of disputes from a large palette of diplomatic and legal means that are equally available to each state. Based on the foregoing, a dispute can be brought before the ICJ in The Hague, the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, or it can be "easily" settled through *ad hoc* arbitration, i.e. special arbitration tribunals. But for the decision, which is the only outcome of these legal proceedings, it is necessary to wait for years, since such international legal processes can be very long-lasting and, above all, extremely expensive. In any case, Bosnia and Herzegovina will surely need to find a *modus operandi* in solving the above-mentioned issues with its western neighbor. This could be found in the Joint Team of Bosnia and Herzegovina and the Republic of Croatia for Negotiations on the Implementation of the UN Convention on the Law of the Sea and the Delimitation at Sea or, perhaps, on a general level, in a body that will be composed on a parity basis, such as the Inter-State Diplomatic Commission for the Determination of the Border Line, which should, *inter alia*, settle the border dispute over the Danube River between the Republic of Serbia and the Republic of Croatia, still, so far, with little success. All this graphically demonstrates the complexity of the international law of the sea, particularly in the area of delimitation.