



THE SPANISH MARITIME SECURITY: MAIN CHALLENGES

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ABSTRACT: In this article, we have studied the more relevant events concerning Spanish maritime security in the last years and the main challenges ahead. First, it has been explained the way leading to the adoption in 2013 of the national maritime strategy. Second, a review was made to the participation of Spain in some international naval operations, like *Atalanta* and *Sophia* of the EU. Third, it has been exposed the cases in which the Spanish maritime security has been at risk in the last decades, like the clash against Canada concerning the halibut in 1995 or the Persil Island incident of 2002. Finally, it has been reflect over possible maritime conflicts in the future.

KEYWORDS: Maritime Security, Spain, Operation Atalanta, Operation Sophia, Armed Conflicts.

RESUMEN: En este artículo, hemos estudiado los acontecimientos más relevantes relativos a la seguridad marítima de España en los últimos años y los principales retos por delante. En primer lugar, se ha explicado el camino que condujo a la adopción en 2013 de la Estrategia Marítima Nacional. En segundo lugar, se pasó revista a las operaciones navales, como *Atalanta* y *Sophia* de la UE, en las que ha participado España. En tercer término, se han expuesto los casos en los que la seguridad marítima de España se ha visto comprometida en los últimos años, como con ocasión del conflicto con Canadá sobre el fletán negro en 1995 o el conflicto del islote Perejil con Marruecos en 2002. Finalmente, hemos reflexionado sobre posibles conflictos en el futuro.

PALABRAS CLAVE: Seguridad Marítima, España, Operación Atalanta, Operación Sophia, Conflictos Armados.

1. Introduction

It is well known that in the Spanish language the concept *seguridad marítima* encompasses the protection in regard with both the risks or threats arising from conditions inherent in the environment (maritime accidents and natural disasters) and the risks and threats caused by “unlawful acts” (piracy, terrorism, proliferation of weapons of mass destruction, seaborne irregular immigration and smuggling of migrants, illegal exploitation of marine resources, destruction or degradation of the marine environment, acts against underwater cultural heritage, cyber threats, etc). By contrast, the first aspects are generally covered in the English language by the expression “maritime safety” and the second ones by the expression “maritime security”.

In this regard, mention should be made to the fact that while in the first years of the new millennium a lot of attention was given in Spain to the maritime safety aspects due to the oil tanker *Prestige*'s accident in the proximity of the Galician

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coasts in 2002,¹ in recent years the defensive or military aspects in maritime security have acquired more relevance in Spanish public opinion and accordingly in Spanish politics and law. Indeed, the huge amount of people who are trying to arrive illegally to Spanish coasts in the last years together with the associated phenomenon of smuggling of people; the rebirth of the maritime piracy and its menace to Spanish interest in the waters of the Gulf of Aden, and the proportion of the jihadist terrorist attacks that we are witnessing, have placed the security issues in the first plane of the scene. For that reason, this article will focus exclusively in the “security” aspects and will let aside, for the sake of precision, the “safety” aspects of what in Spanish would be *seguridad marítima*. This option is exclusively methodological, because in reality both aspects are extremely interlinked and cannot be separated.

It seems to us that is not necessary to justify the necessity of a study about the maritime security of a country like Spain, for its geographical traits, being adjacent to one of the straits with the highest level of maritime traffic in the world; with nearly 8000 kilometers of coastline and adjacent waters, and the possession of some archipelagos and islands. Spain is a maritime nation in the fullest sense of the word.² We think also that the opportunity of the study is reinforced by the fact that in 2014 it was the twentieth anniversary of the entry into force of the United Nation Convention on the Law of the Sea (hereinafter UNCLOS) and in February 2017 it has been the twentieth anniversary of the entry into force for Spain, a good occasion for looking ahead.

The transnational nature of the above mentioned risks and threats requires that, in order to present an overview of the main challenges of the Spanish maritime security, the international perspective, mainly the European one, should be taken into account.³ In that respect, we must highlight that there is also a growing international concern about the maritime security based on acceptance of the importance of the world’s seas and oceans to the wellbeing and prosperity of our societies. This trend is reflected in documents of global organisations such as the United Nations (hereinafter UN) – annual resolutions of the General Assembly on oceans and the Law of the sea⁴ – and in those of its specialised agency, the International Maritime Organization⁵ (hereinafter IMO). Moreover, the regional organisations in which Spain is a member have developed strategies based on the close interdependence between maritime security and broader interests: That is the case of the North Atlantic Treaty Organisation (hereinafter NATO) with its Maritime Strategy of 2011,

¹ On this aspects see, for example: J. Juste, V. Bou, “After the Prestige Oil Spill: Measures Taken by Spain in an Evolving Legal Framework”, *Spanish Yearbook of International Law*, Vol. X, 2004, pp. 1-37; V. Frank, “Consequences of the Prestige Sinking for European and International Law”, *The International Journal of Marine and Coastal Law*, Vol. 20, No.1, 2005, pp. 1-64; F. González-Laxe, “International Regulation and Maritime Safety Mechanism after the Prestige Catastrophe on the Galician Coast”, *Ocean Yearbook*, vol. 20 (2006), pp. 533-560; F.J. Quel López, *Las lecciones jurídicas del Caso Prestige: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos*, Pamplona: Aranzadi Thomson Reuters, 2011.

² In that respect see: Presidency of the Government of Spain, *The National Maritime Security Strategy*, 2013, pp. 12-15.

³ See on this point also: R. Calduch, “Riesgos, amenazas y escenarios en el enfoque integral de la seguridad marítima española”, in: *Enfoque integral de la seguridad en el espacio marítimo español*, Escuela de Altos Estudios de la Defensa, Monografías 135, Ministerio de Defensa de España, 2013, p. 101.

⁴ The last one is: GA Res. 71/257, 23 December 2016.

⁵ See for instance: IMO A 22/Res.924, 20 November 2001, on the Review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships.

and the European Union (hereinafter EU), which has been working on a European Strategy for Maritime Security since 2010 until the adoption, on 24 June 2014, of its European Union Maritime Security Strategy.

For all those reasons, in this article, with the aim of presenting the main challenges of Spanish maritime security of today and tomorrow, we have chosen deliberately to deal with the fight against maritime piracy in the Gulf of Aden and the fight against the trafficking and the smuggling of people in the Mediterranean. In both situations, Spain is making an important military effort in conjunction with its European allies. We consider as well that, due to future exit of the United Kingdom from the EU, the Spanish claim of Gibraltar will regain relevance in the international sphere and could pose some security issues with an important maritime dimension. Furthermore, we think that an eventual secession of Catalonia would raise some issues that could end up by jeopardizing the maritime security of our country.

We will begin, however, by exposing the path to a national maritime security strategy in Spain in the context of the European Strategy for Maritime Security.

It can be argued, of course, that there are, and there would be, many more risks and challenges for our maritime security, but for the sake of conciseness we have chosen those ones.⁶

2. Towards a national maritime strategy.

Notwithstanding the fact that Spain is a maritime country for geographical, historical and economic reasons, during centuries there were not any comprehensive maritime policy;⁷ situation that was common in other countries of our environment. The Spanish maritime regime was characterized by institutional dispersion, fragmentation of competences and scanty functionality, something that created high level of uncertainty regarding risks evaluation and decisions adoption, from which the whole maritime security suffered considerably.⁸

Indeed, at present states are confronted with a new generation of complex problems having effects beyond their frontiers and borders that are not exclusively military to which they could not react efficiently on their own and with fragmented policies.⁹ Comprehensive and collective approaches and actions were thus required to face those new menaces, like maritime piracy, terrorism, illegal traffic of human beings, illegal traffic of narcotics and illegal traffic of weapons. In that context, the concept of maritime security has emerged as a set of activities and means aimed at protecting the life of people and goods at sea, both by means of the adoption of preventive measures and of corrective actions. That renewed dimension motivated that, with the change of Millennium, the more relevant states and international

⁶ For a presentation of other menaces see: Calduch, *supra* n° 3, pp. 129-135. It is obvious that the international terrorism is and will be, unfortunately, a great menace for the security of Spain and many other countries but, for the time being, it has not affected particularly the maritime security of our nation. On this point see particularly: *Ibidem*, pp. 131-132.

⁷ See on that point: J. L. Suárez de Vivero, "Políticas marítimas: experiencias comparadas", in: *Enfoque integral de la seguridad en el espacio marítimo español*, Escuela de Altos Estudios de la Defensa, Monografías 135, Ministerio de Defensa de España, 2013, p. 42.

⁸ On that matter see also: Calduch, *supra* n 3, p. 108.

⁹ For an extensive explanation of the necessity of a comprehensive and coordinated maritime strategy see, among others: F. Del Pozo, "La mar nunca está en calma (II). Análisis del concepto de seguridad marítima en España", Instituto Español de Estudios Estratégicos, Documento de Investigación del Instituto Español de Estudios Estratégicos, No. 12, 2015, pp. 17-18.

organisations of our background started to adopt comprehensive maritime strategies or policies against those new threats.¹⁰

The most influential was the 2005 National Strategy for Maritime Security of the United States of America. Indeed, since the 2001 terrorist attacks, the Federal Government reviewed all of its strategies to combat that plague. Therefore, various departments carried out different maritime security strategies, but lacked coordination. In December 2004, the President asked the Departments of Defense and Homeland Security to lead the Federal effort to develop a comprehensive National Strategy for Maritime Security, to better integrate and synchronize the existing Department-level strategies and ensure their effectiveness.¹¹ This process was completed in September 2005 when the National Strategy for Maritime Security of the United States of America was issued. It identified risks and threats for the maritime spaces and activities and set up programs in order to increase the security in those scenarios. The main innovations that this strategy carried out were, first, the emphasis in the need of cooperation and coordination between the agencies involved in security and, second, the introduction of traditional aspects of defence in the area of maritime security.¹²

That step did not pass unnoticed and was followed by the attempts made by some European allies to elaborate similar comprehensive maritime policies. For instance, Portugal issued in December 2006 a *Estratégia Nacional para o Mar*,¹³ France developed a *Livre blue: La stratégie nationale pour la mer et les océans* in 2009,¹⁴ Denmark opted as well for the adoption of *An Integrated Maritime Strategy* in 2010;¹⁵ Germany did the same in 2011 with its *Entwicklungsplan Meer – Strategie für eine Integrierte deutsche Meerespolitik*;¹⁶ Ireland published in July 2012 its *Harnessing Our Ocean Wealth: An Integrated Marine Plan for Ireland*;¹⁷ and The United Kingdom has also recently issued its integrated maritime strategy called *The UK National Strategy for Maritime Security*.¹⁸

Within the EU, the European Commission recognised the necessity of an integrated maritime policy and launched in the first years of the new century a comprehensive consultation and analysis of how Europe relates to the sea,¹⁹ which triggered a massive and positive response from stakeholders. That consultative process ended up by the presentation in October 2007 of a blue book called 'An

¹⁰ Regarding the concept and necessity of 'maritime security' see, for instance: F. Martín Castán, "Marco jurídico de la seguridad marítima", in: *Impacto de los riesgos emergentes en la seguridad marítima*, Instituto Español de Estudios Estratégicos, Cuadernos de Estrategia n.º 140, Ministerio de Defensa de España, 2008, pp. 182-183.

¹¹ Homeland Security Presidential Directive HSPD-13, 21 December 2004.

¹² In that sense see: Suárez de Vivero, *supra* n. 7, p. 37.

¹³ *Estratégia Nacional para o Mar, Resolução do Conselho de Ministros n.º 163/2006*, 12 December 2006.

¹⁴ Premier Ministre, Secrétariat général de la mer, *Livre blue: La stratégie nationale pour la mer et les océans*, 7 December 2009.

¹⁵ The Danish Government, *An Integrated Maritime Strategy*, July 2010.

¹⁶ Bundesministerium für Verkehr, Bau und Stadtentwicklung, *Entwicklungsplan meer: Strategie für eine integrierte deutsche meerespolitik*, 2011.

¹⁷ Inter-Departmental Marine Coordination Group, *Harnessing Our Ocean Wealth: An Integrated Marine Plan for Ireland*, 2012. Other countries out of the EU adopted also integrated maritime policies, in that sense see: Suárez de Vivero, *supra* n. 7, p. 71.

¹⁸ Secretary of State for Defence, *The UK National Strategy for Maritime Security*, May 2014. Other countries out of the EU adopted also integrated maritime policies, in that sense see: Suárez de Vivero, *supra* n. 7, p. 71.

¹⁹ See in that respect: Green Paper on A Future Maritime Policy for the Union: an European Vision of the Oceans and Seas – COM (2006) 275.

Integrated Maritime Policy for the European Union' based on the clear recognition that all matters relating to Europe's oceans and seas are interlinked and that sea-related policies must develop in a joined-up way if they are to reap the desired results.²⁰ The Commission proposed an integrated and inter-sectoral approach, which would require reinforced cooperation and effective coordination of all sea-related policies at the different decision-making levels.²¹ The first results of that new approach were already evident in 2008 by the adoption of a Marine Strategy Framework Directive, which established a framework within which member states should take the necessary measures to achieve or maintain good environmental status in the marine environment by the year 2020 at the latest.²² Nevertheless, that Directive did not yet take into account any aspect related to the defence.

The EU Maritime Security Strategy is a joint EU plan to improve the way in which the EU pre-empts and responds to the challenges that may affect our societies and our people in the line of the comprehensive maritime strategies that have been adopted during the last years in some states. The EU Maritime Security Strategy was built upon closer collaboration within the EU, across the regional and national levels and it strengthens the link between internal and external security, and couples the overall European Security Strategy²³ with the Integrated Maritime Policy. Furthermore, the EU Maritime Security Strategy aims at reducing costs and at increasing efficiency by fostering comprehensiveness, coordination and coherence between all the actors and activities involved in a wide variety of security-related issues in the maritime domain.²⁴

In the same line, NATO adopted the Alliance Maritime Strategy in 2011, which sets out, in consistency with its Strategic Concept, the ways that maritime power could help resolve critical challenges facing the Alliance now and in the future, and the roles - enduring and new - that NATO forces may have to carry out in the maritime environment in order to contribute to the Alliance's defence and security and to promote its values.²⁵

Within this context, in 2013, Spain finally adopted its own Maritime Security Strategy,²⁶ which develops the provisions set out in the National Security Strategy of 2013 and adapts them to the special requirements of the maritime domain, in line with the other strategic instruments in the international environment that we have already seen. The document is structured into four chapters. The first, entitled a *comprehensive vision of maritime security*, exposes the international legal context in

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An Integrated Maritime Policy for the European Union {COM (2007) 574 final} {SEC(2007) 1278} {SEC(2007) 1279} {SEC(2007) 1280} {SEC(2007) 1283} /* COM/2007/0575 final */.

²¹ *Ibidem*, Executive Summary.

²² Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L 164, 25 June 2008, pp. 19–40.

²³ European Security Strategy, adopted by the European Council, Brussels, 12 December 2003.

²⁴ For a commentary on the EU Union Maritime Security Strategy, see among others: L. Landman, "The EU Maritime Security Strategy Promoting or Absorbing European Defence Cooperation?", *Clingendael Policy Brief*, April 2015, pp. 1-12.

²⁵ Alliance Maritime Strategy, [Online: http://www.nato.int/cps/en/natohq/official_texts_75615.htm]. For a commentary over this instrument see: F. Álvarez Blanco, "Visión de la Armada sobre la seguridad marítima en nuestro país y la necesidad de una estrategia marítima de seguridad", in: *Enfoque integral de la seguridad en el espacio marítimo español*, Escuela de Altos Estudios de la Defensa, Monografías 135, Ministerio de Defensa de España, 2013, pp. 154-157.

²⁶ Presidency of the Government of Spain, *The National Maritime Security Strategy*, 2013.

which the document is born and lists the national maritime security interests and underlines the cross-cutting nature of some of the risks and threats posed to those interests, with the consequent response coordination requirements. The second chapter sets out to describe the *risks and threats to national maritime security*. It makes a distinction between risks or threats posed by deliberate actions directed against National Security in the marine environment and others arising from the danger intrinsic in any human activity carried out at sea. The *objective, principles and lines of action* of the Strategy are enumerated in the third chapter. The main aim is to maintain and to increase the maritime security through the application of the following basic principles: unity of action, anticipation and prevention, efficient and sustainable use of resources, and resilience or the ability to resist and recover. In accordance with that aim and those principles, five lines of strategic action are foreseen. The first involves adopting a comprehensive approach that fosters coordinated and cooperative action of the different agencies and departments that share responsibilities in the maritime environment. The second refers to the adoption of effective and efficient measures in order to make the most of available resources. The third and the fourth lines of action aim at promoting cooperation with the international actors and the private sector, respectively. Finally, the fifth line of action intends to improve cyber security in the maritime environment. The fourth and last chapter of the Spanish Maritime Security Strategy places the *maritime security in the National Security System* and establishes the organisational structure for maritime security.²⁷

In fact, the Spanish Maritime Security Strategy highlights the necessity of coordination between the different agencies with responsibilities in this area, something problematic in a field where there are so many functions and means involved and where the absence of a clear legislative scenario complicates even more the situation. The touchstone of the efficiency of this instrument will thus lay in the ability to avoid the overlapping of competences between the different actors, particularly between the national and the regional ones.²⁸

In that direction, the Spanish Government published in June 2013 a report – Report of the Commission for Public Administration Reform analyzing the public administration in our country with the aim to look for avenues to consolidate and to simplify the administration. As for the topic of the maritime security, that report includes some recommendations as for the management and operation of naval and air means.²⁹ In this same line, in June 2016, the Spanish Navy published an unofficial Handbook of the Law of the Sea, which also tends to shed light into the juridical aspects of the maritime security.³⁰ The future will say if this Maritime Strategy will be a useful tool for achieving and maintaining security in the maritime environment both in Spain and in the international society.

²⁷ For Fernando Del Pozo, the document, even if it can be considered a great improvement in regard with the previous situation of complete absence of any specific structure, it still lacks precision regarding the division of responsibilities between different levels of the line of command. See: Del Pozo *supra* n. 9, pp. 27-28.

²⁸ In that respect see: *Ibidem*, pp. 43-48.

²⁹ Government of Spain, *Report of the Commission for Public Administration Reform*, 2013. On this matter see: Del Pozo *supra* n. 9, pp. 50-52.

³⁰ See: *Manual de Derecho del Mar*, Ministerio de Defensa. Secretaría General Técnica, 2016.

3. The fight against maritime piracy.

Piracy is an old phenomenon. It has been with humanity practically since the origins of navigation,³¹ but it has its heyday between the 15th century, with the discovery of new trade routes, and the 18th century, when the great powers began to acquire powerful navies in a context of a general trend towards the monopolisation of violence by the State. Since then piracy declined significantly, remaining more or less latent for centuries without completely disappearing. Nevertheless, in the first decade of the new millennium piracy became once more a plague at several points on the globe, like the East and West coasts of Africa, the South China Sea, South America and the Caribbean, and also the Indian Ocean.³²

The gravity of the situation in the waters off the Somali coast and the Gulf of Aden raised a great concern in the whole international society and also in Spain due to the relevant Spanish interest in that area, where our tuna fishing fleet has been highly active for more than thirty years. Unfortunately, the danger was not merely theoretical, as the hijacking of two tuna boats sailing under the Spanish flag, the *Playa de Bakio* and the *Alakrana*, in 2008 and 2009 respectively, demonstrates.³³

In this context, it is worth to explain that the present rules in international law on maritime piracy – the essence of which is condensed in Articles 14 to 21 of the 1958 Geneva Convention of 29 April 1958 on the High Seas and in Articles 100 to 107 UNCLOS– empower all states to prosecute and punish acts of piracy committed on the high seas, within the exclusive economic zone and in other zones not subject to national jurisdiction. Within their territorial waters, however, only the coastal state may discharge police functions and combat acts of depredation committed against shipping, according to current international law. Therefore, the general legal rules currently in force are not suitable for combating the new forms of piracy that are emerging, particularly in territorial waters of states that, like Somalia or other failing states, cannot guarantee the security of navigation.

In view of the above, IMO³⁴ and the UN Security Council (hereinafter UNSC) began to adopt increasingly vigorous resolutions on matters of security, in order to fill

³¹ We can find references to piracy in ancient literature, like in the Homer's epos the *Odyssey*. In fact, in Book IX of this *opera magna*, when Ulysses and his men reach the island of the Cyclops and enter the cave of the one-eyed giant Polyphemus, the latter asks them "Strangers, who are you? Where do you sail from? Are you traders, or do you sail the sea as rovers, with your hands against every man, and every man's hand against you?", see: Homer, *Odyssey*, Book IX, [Online: The Internet Classics Archive, <http://classics.mit.edu/Homer/odyssey.html>]. On piracy in ancient times, we recommend, among others: L. C. Green, "Terrorism and the Law of the Sea", in: Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht: Martinus Nijhoff, 1989, pp. 251–252; V. Pella, "La repression de la piraterie", *Recueil des Cours de l'Académie de Droit International*, Vol. 15, 1926, pp. 151–164.

³² See IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships, Quarterly and Monthly Reports*, MSC.4/Circ.152, of 29 March 2010, par. 6.

³³ On that aspect see, for instance: C. Espaliú Berdud, "The Crime of Maritime Piracy in the 2010 Reform of the Spanish Penal Code", *Spanish Yearbook of International Law*, Vol. 16, 2012, pp. 60-61.

³⁴ See the following instruments of different nature adopted by IMO: MSC.1/Circ.1233, *Piracy and armed robbery against ships in waters off the coast of Somalia*, 16 April 2009; MSC.1/Circ.1332, *Piracy and armed robbery against ships in waters off the coast of Somalia*, 16 June 2009; MSC.1/Circ.1334, *Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships* 23 June 2009; MSC.1/Circ.1333, *Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships*, 26 June 2009; SN.1/Circ.281, *Piracy and Armed Robbery against Ships in Waters Off the Coast of Somalia – Information on Internationally Recommended Transit Corridor (IRTC) for Ships transiting the Gulf of Aden*, 3 August 2009; Resolution A.1026(26), *Piracy and armed robbery against ships in*

that legal gap. In regard with the Security Council, it has adopted several resolutions – 1816 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011), 2020 (2011), 2077 (2012), 2125 (2013), 2184 (2014), 2246 (2015) and 2316 (2016) – authorising ships of third states to carry out policing functions in Somali territorial waters, as a strictly temporary and absolutely exceptional measure, in view of the situation in that African state. Thus, since the adoption of Resolution 1816 (2008) of 2 June 2008, a considerable number of vessels from various states have been patrolling the waters around the Horn of Africa, escorting vessels belonging to the World Food Programme (hereinafter WFP) – which supply humanitarian aid to the population of Somalia – and helping to deter, prevent and repress acts of piracy and armed robbery.³⁵

In this universal effort, we should stress the role of the EU, which in application of the Security Council resolutions launched the first naval operation in its history, code-named *Atalanta*, under Council Joint Action 2008/851/CFSP of 10 November 2008.³⁶ Its aims were, first, the protection of vessels of the WFP delivering food aid to displaced persons in Somalia, in accordance with the mandate laid down in UNSC Resolution 1814 (2008), and, second, the protection of vulnerable vessels cruising off the Somali coast, and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in UNSC Resolution 1816 (2008). In addition, the EU is helping notably to implement other more general measures adopted by the Security Council to improve the economic, political and social situation in Somalia.

After some months from the launching of the operation, and in the light of its difficulties and achievements, by the subsequent Council Decision 2009/907/CFPS of December 2009 amendments to Joint Action 2008/851/CFSP were introduced in

waters off the coast of Somalia, 3 December 2009; Resolution A.1025(26), *Code of practice for the investigation of crimes of Piracy and armed robbery against ships*, 18 January 2010; MSC.1/Circ.1337, *Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area developed by the industry*, 4 August 2010; MSC.1/Circ.1390, *Guidance for company security officers (CSOs) – Preparation of a Company and crew for the contingency of hijack by pirates in the Western Indian Ocean and Gulf of Aden*, 9 December 2010; Resolution MSC.324(89), *Implementation of Best Management Practice Guidance*, 20 May 2011; MSC.1/Circ.1404, *Guidelines to assist in the Investigation of the Crimes of Piracy and Armed Robbery against ships*, 23 May 2011; MSC.1/Circ.1339, *Best Management Practices for Protection against Somalia Based Piracy (BMP 4)*, 4 September 2011; MSC.1/Circ./1406-Rev-1, *Revised Interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area*, 16 September 2011; MSC.1/Circ./1405-Rev-1, *Interim Guidance to Shipowners, Ship Operators, and Ship masters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area*, 16 September 2011; MSC.1/Circ.1408, *Interim Recommendations for Port and Coastal States regarding the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area*, 16 September 2011; Resolution A.1044(26), *Piracy and Armed robbery against ships in waters off the coast of Somalia*, 20 December 2011.

³⁵ Together with independently deployed naval ships, *Atalanta* has worked hand in hand with other international operations like the US-led Combined Task Force 151 established in January 2009 [Online: <https://combinedmaritimeforces.com/ctf-151-counter-piracy/>] and NATO's *Operation Ocean Shield*, which was approved by the North Atlantic Council on 17 August 2009 and it was terminated on 15 December 2016 [Online: <http://www.mc.nato.int/missions/operation-ocean-shield.aspx>]. According to governmental sources, Spain participated in the operation with a frigate from the class F 100 from December 2013 to June 2014, see: *Defence*, Spain, La Moncloa, Gobierno de España, [Online: <http://www.lamoncloa.gob.es/lang/en/espana/spaintoday/2015/defence/Paginas/index.aspx>].

³⁶ Council Joint Action 2008/851/CFSP, OJ 2008 L 301/33.

order to allow for the EU naval force to contribute to the monitoring of fishing activities off the coast of Somalia.³⁷

Furthermore, on 23 March 2012, by the Council Decision 2012/174/CFSP, the area of operations of *Atalanta* was extended to include Somali internal waters and Somali land territory.³⁸ The extension to the land territory of Somalia was based on the UNSC Resolution 851/2008, which enabled States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia to undertake all necessary measures that were appropriate *in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the Transitional Federal Government of Somalia.³⁹ This change allowed the European fleet, in May 2012, to attack Somali pirate assets on land for the first time since the beginning of the operation, in response to the previous hijacking of a Greek-owned oil tanker carrying crude oil.⁴⁰ On 21 November 2014 the Council of the EU extended the Mandate of Operation *Atalanta* until December 2016,⁴¹ and again, on 28 November 2016 until December 2018.⁴²

When it comes to examine the results, it appears that the number of the total attacks⁴³ have remarkably since the beginning of the operation. In fact, in 2009, there were 163 total attacks and in 2015 none. So far in 2017 there have been 6 piracy incidents.⁴⁴

As far as Spain is concerned, we should note that it is playing an outstanding role in the above mentioned universal effort of the International Community and the EU to combat maritime piracy. From the outset, Spain worked shoulder-to-shoulder with France to promote adoption of the relevant resolutions by the UN Security Council and the Council of the EU.⁴⁵ As a result of those diplomatic efforts, France raised the question in the UNSC, together with the United States of America, and it ended up

³⁷ Council Decision 2009/907/CFSP amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2009 L 322/27.

³⁸ Council Decision 2012/174/CFSP amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2012 L 89/69.

³⁹ SC Res. 1851 (2008) 16 December 2008, para. 6.

⁴⁰ On this issue see: "EU anti-piracy force in first attack on Somali land base", [Online: <https://euobserver.com/tickers/116275>]. On this point see also: P. Koutrakos, *The EU Common Security and Defence Policy*, Oxford: Oxford University Press, 2013, p. 122.

⁴¹ Council Decision 2014/827/CFSP amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast of 21 November 2014, OJ 2014 L 335.

⁴² See: EU NAVFOR Somalia, *Mission* [Online: <http://eunavfor.eu/mission/>].

⁴³ Total attack is the combined number of all attacks mounted by suspect pirates; those repelled/aborted and those leading to ships being in pirate hands and crews taken hostage. See in that respect: Operation Atalanta. Countering Piracy off the Coast of Somalia, Key facts and figures [Online: <http://eunavfor.eu/key-facts-and-figures/>].

⁴⁴ *Ibidem*.

⁴⁵ In this connection, see the appearance of the Minister of Defence to defend the request for authorisation of the Congress of Deputies for Spanish military personnel to take part in the European Union mission to train Somali security forces in Uganda: *Diario de Sesiones del Congreso de los Diputados*, 22 de abril de 2010, Vol. 157, IX Legislatura 2010, p. 15. It is also interesting in this connection that since September 2009 the Spanish and French shipowners' associations have had a liaison in the Operational Command of Operation *Atalanta* (see the Appearance, at her own request, of the first Deputy Prime Minister and Minister of the Presidency before the House in full session, to report on the action taken by the Government to secure the release of the vessel *Alakrana*: *Diario de Sesiones del Congreso de los Diputados*, 25 de noviembre de 2009, Vol. 126, IX Legislatura 2010, p. 32.

adopting the above mentioned resolutions allowing the intervention of third states and international organisations in the waters of Somalia and the Gulf of Aden.

With regard to the Spanish involvement in the Operation *Atalanta*, it has to be pointed out that 32 Spanish ships have taken part in the naval operation since the beginning and that Spain has taken the command of the fleet five times, the last one for six months in 2015.⁴⁶ Moreover, the Spanish naval units have captured a total of 168 suspects of piracy, of which 50 were transferred for trial to competent authorities (14 in Spain, 7 in France, 1 in Djibouti, 17 in Kenya and 11 in Seychelles) and 118 were liberated in different points of the Somali coast.⁴⁷

Alongside that international leading role, internally, Spain has also taken several relevant steps to combat maritime piracy. On the military side, in 2009 the Government approved a Royal Decree allowing personnel of private security companies to sail on Spanish tuna boats to enhance their security,⁴⁸ something that has come up to be instrumental in the reduction of successful pirate attacks.⁴⁹

Then, on the strictly legal side, we should highlight the criminal classification of maritime piracy introduced with Organic Law 5/2010 of 22 June 2010 amending the Penal Code Act, Organic Law 10/1995 of 23 November 1995.⁵⁰ This major reform assigns the crime of maritime piracy a chapter of its own in the title dealing with crimes against the International Community⁵¹. Furthermore, on 13 March 2014, the

⁴⁶ On the Spanish military effort in *Atalanta* and on its outcome see: Ministerio de Defensa de España, Estado Mayor de la Defensa, *Operación Atalanta* (para lucha contra la piratería en aguas de Somalia) [Online: <http://www.emad.mde.es/MOPS/060-Yibuti-ATALANTA/#sub2>].

⁴⁷ *Ibidem*.

⁴⁸ Royal Decree 1628/2009, 30 October 2009 (BOE n. 263, 31 October 2009). This Royal Decree was implemented by the Order PRE/2914/2009, 30 October 2009 (BOE n. 264, 2 November 2009). Although a measure adopted by several comparable countries in recent times, this decision is open to criticism in that it is a step further in the process of erosion of the States monopoly on the use of force as accepted by modern States. Moreover, the statute as adopted is rather sketchy and leaves major gaps unresolved. For instance, there is no regulation as to whether or not the personnel of private companies are authorised to detain alleged pirates and hand them over to the judicial authorities of Spain or other States. There is also no guidance as to who will be legally accountable for the actions of on-board guards, or what the rules of engagement for contractors will be. The terms of the regulations adopted by the Spanish government suggest that its main concern has been to regulate the type of weaponry that companies may use, and the rules governing their acquisition, safekeeping and transport. Thus, the only aspect of the exercise of police functions pertaining to the vessel's flag State that devolve on private security companies is the deterrent capacity inherent in the possession of weapons and the capacity to repel pirate attacks. There is therefore no definition of other capacities that international law vouchsafes to the flag State in attributing police powers, such as the right of visit, the power to chase and the authority to detain a pirate vessel and its crew. On the problems that the engagement of private military companies and mercenaries generally entails in international law, see: C. Espaliú Berdud, *El estatuto jurídico de los mercenarios y de las compañías militares privadas en el derecho internacional*, Pamplona: Thomson-Aranzadi, 2007, pp. 137–181. This measure was welcomed by the Spanish fisheries sector because it undoubtedly helped to improve on-board security; nonetheless, the sector has insistently asked the Spanish government to implement a public security system whereby the protection of vessels is assured not by private but by Spanish Navy personnel. The shipowners argue, in the line noted above, firstly that when private military companies are used it is not possible to determine the liability arising from the actions of contract personnel, and secondly that it is not clear.

⁴⁹ Over this statement see also: Ministerio de Defensa de España, Estado Mayor de la Defensa, *Operación Atalanta* (para lucha contra la piratería en aguas de Somalia), *supra* n. 46.

⁵⁰ See: BOE no 152, 23 June 2010.

⁵¹ There have been till now three occasions in which our courts have judged acts of piracy, all of them happened in the waters of Somalia: the kidnapping of the Spanish tuna boat *Alakrana*, in October 2009 (see STS 8470/2011, 12 December 2011 and the attempts of assault to the Fleet Replenishment ship *Patiño* of the Spanish Navy, in January, 2012 (see STS 313/2014, 2 April 2014 [Online: file:///C:/Users/k1645046/Downloads/TS%20Penal%202014%20(2).pdf]) and to the Spanish tuna boat

Organic Law 1/2014 Modifying the Organic Law 6/1985 of 1 July 1985 of the Judicial Power, on Universal Jurisdiction, was promulgated.⁵² This new law expands the list of crimes covered by universal jurisdiction, but for each type of crime, in most of the cases, the text introduces conditions restricting the jurisdiction of the Spanish courts in comparison with the previous one. In regard to the crimes of piracy and human trafficking, however, art. 23.4 d) of the Organic Law 1/2014 refers to the conditions set out in the international treaties ratified by Spain or the resolutions of the international organizations that create obligations to Spain.⁵³

Notwithstanding the success in the fight against piracy in the Gulf of Aden, other parts of the world have witnessed a rise in piracy activity in the last years, like the Gulf of Guinea in the western coast of Africa, relatively close to Spanish coasts. Indeed, since the late 1990s, the region has been facing acts of piracy targeting high-value assets, particularly oil shipments. Nevertheless, since 2010, incidents of piracy and armed robbery in the area are increasing significantly, making the region the second most acute piracy problem on the African continent.⁵⁴ Despite the fact that the Gulf of Guinea is, like the Gulf of Aden, in Africa, the socio-political context is different, mainly due to the absence of true failing-states like Somalia. In the Gulf of Guinea there are more political, juridical and military capabilities than in the Gulf of Aden and, notwithstanding strong difficulties, the riparian states can, in principle, maintain the maritime security in their waters.⁵⁵ For that reason, it appears that, an international military intervention would not be, for the time being, the best solution.⁵⁶

In view of the above described situation, some international organizations began to get involved in the matter soon. The UNSC started to deal with the issue since the moment in which the shift in the piracy activity from the eastern coast of Africa to the western one occurred. In its resolutions 2018 (2011)⁵⁷ and 2039 (2012),⁵⁸ the Security Council stressed the primary responsibility of the States of the Gulf of Guinea to counter piracy and armed robbery at sea in the area and urged them through the Economic Community of West African States (hereinafter ECOWAS), the Economic Community of Central African States (hereinafter ECCAS) and the Gulf of Guinea Commission (hereinafter GGC) to develop a comprehensive regional anti-piracy strategy for the Gulf of Guinea with UN support. As a result, a Summit of the Heads of State and Government of ECOWAS, ECCAS and the GGC on Maritime Safety and Security in the Gulf of Guinea was held in Cameroon, in June 2013.

Izurdia in October of the same year (see STS 134/2016, 24 February 2016 [Online: <http://idibe.org/wp-content/uploads/2013/09/N1.pdf>]). In all the occasions condemnatory sentence was pronounced, though in case of the *Alakrana* the crime of piracy was not still incorporated into the Penal Code and the authors were condemned for crimes of illegal association, unlawful detention and robbery with violence. In this sense, see: *Manual de Derecho del Mar*, supra n. 30, p. 143.

⁵² BOE n. 63, 14 March 2014.

⁵³ In this regard see: *Manual de Derecho del Mar*, supra n. 30, pp. 131-132.

⁵⁴ Report of the United Nations assessment mission on piracy in the Gulf of Guinea (7 to 24 November 2011), Letter dated 18 January 2012 from the Secretary-General addressed to the President of the Security Council, S/2012/45, p. 3. According to IMO, a total number of 965 incidents have been reported since 1995 in West Africa, see: IMO, GISIS: Piracy and Armed Robbery, Regional analysis of reports on acts of piracy and armed robbery.

⁵⁵ On that matter see: G. Escribano and F. Arteaga, "Seguridad y recursos en el Golfo de Guinea: algunas implicaciones para España", Real Instituto Elcano, *ARI*, Vol. 28, 2013, p. 9; J. L. Urcelay Verdugo, "La piratería en el golfo de Guinea: retos y soluciones", in: J.C. Muñoz-Delgado (ed.), *La piratería emergente en el Golfo de Guinea. Estrategia de la UE para el Golfo de Guinea*, Ministerio de Defensa de España, Escuela Superior de las Fuerzas Armadas, Monografías 143, 2014, p. 247.

⁵⁶ In that sense see also: *ibidem*, p. 240.

⁵⁷ SC Res. 2018 (2011) 31 October 2011.

⁵⁸ SC Res. 2039 (2012) 29 February 2012.

Among other decisions, the Summit agreed on the creation of an Inter-regional Coordination Centre (hereinafter ICC) to implement the Regional Strategy for Maritime Safety and Security in Central and West Africa and established a clear division of labour which charged the regional organizations with responsible for strategy and coordination, and the States with responsibility for operations.⁵⁹ During the summit, it was also decided to adopt the Code of Conduct concerning the repression of piracy, armed robbery against ships and illicit maritime activity in west and central Africa.⁶⁰ The ICC, which was inaugurated in Yaoundé on 11 September 2014 and was expected to coordinate two Regional Maritime Coordination Centres in the Republic of the Congo and Ivory Coast respectively, is not fully operational due to staffing, funding and other logistical constraints.⁶¹

IMO is also getting involved in the matter of piracy in the Gulf of Guinea. Likewise the UN Security Council, by its resolution 1069(28) of 29 November 2013, the IMO Assembly also acknowledged the leadership role and responsibility of the States of the Gulf of Guinea to counter piracy, armed robbery against ships and illicit activity in their region. Nevertheless, the IMO Assembly also urged the international community to cooperate with and assist states in the Gulf of Guinea to develop their national and regional capabilities to improve maritime governance in waters under their jurisdiction and to fight against piracy, armed robbery against ships and other illicit maritime activities.⁶² Together with IMO, the Maritime Organization for West Africa and Central Africa (hereinafter MOWCA) developed a Memorandum of Understanding on the Establishment of a Sub-regional Integrated Coast Guard Network in West and Central Africa, which was adopted in Senegal in July 2008. To date, it has been signed by 15 of its 20 coastal member States.⁶³

With regard to the Spanish maritime security perspective, it has to be stressed that both the EU and our country have major common economic, developmental, commercial and security interests with the countries of the region.⁶⁴ For instance, maritime trade to and from the Gulf of Guinea is largely conducted by the EU and an estimate ten percent of the EU oil and four percent of its natural gas come from that area.⁶⁵ For that reason, the Council of the European Union adopted on 17 March 2014 an EU Strategy on the Gulf of Guinea.⁶⁶ In the line of the UN and IMO resolutions, its objectives focus on building regional capacity: first, by providing assistance to the governments of the region to set up institutional capabilities to ensure maritime awareness, security and the rule of law along the coast; second, by supporting prosperous economies in the region to create employment and assist vulnerable communities to build resilience and resist criminal or violent activities; and third, by strengthening cooperation between the countries of the region and the regional organisations to enable them to take the necessary actions to mitigate the threats at sea and on land.⁶⁷

⁵⁹ See: Open Debate of the Security Council on Piracy and Armed Robbery at Sea in the Gulf of Guinea, Assistant-Secretary-General Tayé-Brook Zerihoun, 25 April 2016.

⁶⁰ *Ibidem*.

⁶¹ *Ibidem*.

⁶² IMO, A Res 1069(28), Prevention and suppression of piracy, armed robbery against ships and illicit maritime activity in the Gulf of Guinea, 29 November 2013.

⁶³ See: IMO, Integrated Coast Guard Function Network, page last visited on 27 July 2017.

⁶⁴ For an overview of the economic interdependence between Spain and the countries of the Gulf of Guinea see: Escribano and Arteaga, *supra* n. 55, pp. 1-4.

⁶⁵ Council of the European Union, Foreign Affairs Council meeting, EU Strategy on the Gulf of Guinea, 17 March 2014.

⁶⁶ *Ibidem*.

⁶⁷ *Ibidem*.

The EU engagement in the zone has been reasserted by the adoption by the Council of the European Union, on 16 March 2015, of the Gulf of Guinea Action Plan 2015-2020. This plan aims at increasing the close cooperation with partners across Western and Central Africa, in taking all appropriate measures to combat maritime crime, including piracy and armed robbery at sea, and to address the underlying causes to foster long-term security and stability in the region. In particular, the EU plan intends to build capacity of regional and national institutions but conducting needs assessments, providing external expertise, supporting regional and national coordination centers, helping to develop national maritime strategies and improve maritime intervention capabilities.⁶⁸

4. *The fight against human trafficking and smuggling of people*

In April 2015, in view of the recurrent human tragedies resulting from the smuggling of people across the Mediterranean, the EU acquired a strong commitment to prevent those atrocities. As a result, on 18 May 2015 the Council of the EU established a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED, later on called SOPHIA). Its aim was to undertake systematic efforts to identify, capture, and dispose of vessels and assets used or suspected of being used by migrant smugglers or traffickers.⁶⁹ The naval operation is to be conducted in sequential phases: in a first phase, already expired, *Sophia* has supported the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law. In a second phase, in which we are nowadays, the naval operation of the EU has two ambitious goals. On the one hand, *Sophia* is meant to conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking, under the conditions provided for by applicable international law, including UNCLOS and the Protocol against the Smuggling of Migrants. On the other hand, in accordance with a Resolution of the UNSC or the consent by the coastal State concerned, *Sophia* intends to conduct boarding, search, seizure and diversion, on the high seas or in the territorial and internal waters of that State, of vessels suspected of being used for human smuggling or trafficking, under the conditions set out in that Resolution or consent. Finally, in a third phase, in accordance with any applicable UNSC Resolution or consent by the coastal State concerned, the naval operation shall take all necessary measures against a vessel and related assets. This can include the disposal or confiscation of vessels or assets which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.⁷⁰

Therefore, the text of the Decision shows a relevant degree of willingness and determination in using the force in accordance with the level taken in the last phase of Operation *Atalanta* after the Council Decision 2012/174/CFSP of 23 March 2012,

⁶⁸ Council of the European Union, Conclusions on the Gulf of Guinea Action Plan 2015-2020, 16 March 2015.

⁶⁹ Council Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) OJ 2015 L 122.

⁷⁰ *Ibidem*, Article 2. By the Political and Security Committee Decision (CFSP) 2015/1772 of 28 September 2015, Operation *Sophia* moved to the second phase on 7 October 2015, see: Political and Security Committee Decision (CFSP) 2015/1772 of 28 September 2015 concerning the transition by EUNAVFOR MED to the second phase of the operation, as laid down in point (b)(i) of Article 2(2) of Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) (EUNAVFOR MED/2/2015), OJ L 258/5.

which was new in comparison with other military operations undertaken under the umbrella of the Common Security and Defence Policy (hereinafter CSDP). Indeed the Council of the EU authorizes the use of force necessary to render the vessels and enabling assets of the smugglers and traffickers inoperable, if the EU succeeds on getting the necessary UNSC backing or the consent of the coastal State.⁷¹

The necessary UNSC support came a couple of months afterwards, but only in partial measure. On 9 October 2015 the UNSC adopted its Resolution 2240 by which, acting under Chapter VII of the Charter of the UN, it decided to authorize Member States, acting nationally or through regional organizations, to use all measures in confronting migrant smuggles or human trafficking in full compliance with international human rights law.⁷² In fact, the UNSC Resolution authorizes the inspection on the high seas off the coast of Libya of suspect vessels of being used for migrant smuggling or human trafficking from Libya, provided that the States of the regional organisations engaged in the fight against migrant smuggling and human trafficking make good faith efforts to obtain the consent of the vessel's flag State prior to using that authority.⁷³ The UNSC also authorizes those States and international organisations to seize vessels inspected that are confirmed as being used for migrant smuggling or human trafficking from Libya.⁷⁴ Furthermore, the UNSC charges the States and regional organisations authorized with the obligation to "keep flag States informed of actions taken with respect to their vessels". However, at the same time, the Security Council calls upon "flag States that receive such requests to review and respond to them in a rapid and timely manner".⁷⁵ Finally, the UNSC noted that the previous authorisations apply only for the circumstances of the case "and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, mainly the general principle of exclusive jurisdiction of a flag State over its vessels on the high seas".⁷⁶

As we have seen, the UNSC Resolution 2240 provided the legal basis to implement some of the measures foreseen by the Council of the EU in its Decision (CFSP) 2015/778 and, of course, gave to it an important political endorsement.⁷⁷ Nevertheless, the UNSC Resolution falls short of authorizing the adoption of the extraordinary measures to fight against migrant smuggling and human trafficking established in the Decision of the Council of the EU setting up the Operation *Sophia* with regard to the waters and inland territory of Libya. Therefore, as long as the UNSC Resolution 2240 did not authorize third States or international organizations to impose order in the waters and inland territory of a coastal State, it is imperative to count on the agreement of that coastal State.⁷⁸

⁷¹ In that sense see also: Th. Tardy, "Operation Sophia. Tackling the refugee crisis with military means", *Brief Issue*, EU Institute for Security Studies, n. 30, 2015, p. 3.

⁷² SC Res. 2240 (2015) 9 October 2015.

⁷³ *Ibidem*, para. 7.

⁷⁴ *Ibidem*, para. 8.

⁷⁵ *Ibidem*, para. 9.

⁷⁶ *Ibidem*, para. 11.

⁷⁷ In this respect see the *Statement of the HR/VP Federica Mogherini on the vote of UN resolution 2240 on EU naval operation in the Mediterranean*, 9 October 2015.

⁷⁸ During the Warsaw Summit of NATO, in July 2016, the North Atlantic Council decided to transform the Operation Active Endeavour, its Article 5 of the NATO Treaty maritime operation in the Mediterranean, which was aimed at fighting against terrorism in response to the 11 September 2001 terrorist attacks on the United States, to a broader non-Article 5 Maritime Security Operation, Operation Sea Guardian, able to perform the full range of Maritime Security Operation tasks, as needed. Among other, Sea Guardian is cooperating with the EU Operation Sophia providing situational awareness and logistical support. In regard with Spanish contribution to both naval

In the case under consideration, the political situation of Libya difficults the presentation of the necessary accord from the national authorities for implementing the naval operation in the spaces under its jurisdiction and sovereignty. Nevertheless, the signature on 17 December 2015 of the Libyan Political Agreement of Skhirat, Morocco, to form a Government of National Accord consisting of the Presidency Council and Cabinet supported by the other institutions of State including the House of Representatives and State Council has showed to be an important step forward.⁷⁹

In fact, the Agreement of Skhirat is facilitating the relations between Libya, the UN and the EU in order to put an end to this great scourge. In this regard, based on UNSC Resolution 2292 (2016) on the arms embargo on Libya,⁸⁰ the Council of the EU, by its Decision (CFSP) 2016/993 of 20 June 2016, amended its previous Decisions setting up the military operation in the Mediterranean with a view to adding two new supporting tasks of *Sophia*: first, to assist in the development of the capacities and in the training of the Libyan Coast Guard and Navy in law enforcement tasks at sea and, second, to contribute to information sharing and implementation of the UN arms embargo within its agreed area of operation.⁸¹ With regard to the improving of the capacities of the Libyan Coast Guard and Navy, in the first instance that task is being implemented on the high seas in the agreed area of the operation.⁸² It is also foreseen, however, that in an subsequent phase that task may also be carried out in the territory, including the territorial waters, of Libya or of a host third State neighbouring Libya where the Political and Security Committee so decides following an assessment by the Council of the EU on the basis of an invitation by Libya or the host State concerned, and in accordance with international law.⁸³

In view of the continued loss of life due to migrant smuggling and human trafficking in the Mediterranean off the coast of Libya, on 6 October 2019, by its Resolution 2312 (2016), the UNSC extended its authorization for UN Member States to intercept vessels on the high seas suspected of being used for those illicit activities, for a further period of one year.⁸⁴

In addition, on 25 July 2017, the Council of the EU extended the mandate of the Operation *Sophia* until 31 December 2018 and also amended the mandate of the operation. The decision asked Operation *Sophia*, first, to set up a mechanism monitoring the training of the Libyan Coastguard; second, to conduct new surveillance activities and gather information on illegal trafficking of oil exports from Libya; and, third, to enhance the sharing information on human trafficking with member states' law enforcement agencies, Frontex and Europol.⁸⁵

operations of NATO see: Ministerio de Defensa de España, Estado Mayor de la Defensa, Operation Sea Guardian [Online http://www.emad.mde.es/MOPS/040_SEA_GUARDIAN/].

⁷⁹ In that respect see SC Res. 2259 (2015) 23 December 2015. It remains to be seen if that agreement has arrived on time to avoid the inefficacy of the naval operation of the EU with regard to the waters and inland territory of Libya.

⁸⁰ SC Res. 2292 (2016) 14 June 2016.

⁸¹ Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), OJ L 162/18.

⁸² *Ibidem*, article 2a, 2.

⁸³ *Ibidem*, article 2a, 3.

⁸⁴ Sc Res. 2312 (2016) 6 October 2016.

⁸⁵ See: EUNAVFOR MED Operation Sophia: mandate extended until 31 December 2018, Press release 494/17, Security & defence, 25 July 2017.

Turning to Spanish involvement, our country, by a resolution adopted by the Council of Ministers on 24 July 2015⁸⁶ authorising military participation, is contributing to the European effort with some officers both at the Operational General Headquarters in Rome and at the General Force Headquarters at sea, one maritime patrol aircraft part of the *Sigonella* detachment at Sigonella Base in Italy, and a frigate.⁸⁷ It should be noted as well that, in its national law, by the Organic Law 1/2014 Modifying the Organic Law 6/1985 of 1 July 1985 of the Judicial Power, on Universal Jurisdiction, the crime of human trafficking has replaced the crime of trafficking or illegal immigration of people. As it was stated before with respect to the crime of piracy, the Spanish courts will have jurisdiction regarding to the crimes of human trafficking committed in the maritime spaces in accordance with the conditions set out in the international treaties ratified by Spain or the resolutions of the international organizations that create obligations to Spain.⁸⁸

Regarding the outcomes of the naval Operation *Sophia*, until 27 July 2017, it is reported, officially, to have contributed to the saving of 42000 migrants, even if this was never among its main goals. At the same time, 110 suspected smugglers and traffickers have been apprehended and transferred to the Italian authorities. On top of that, 470 boats have been removed from illegal organizations' availability.⁸⁹

Moreover, since 20 June 2016, when the Council added the supporting task in connection with the training of the coastguard and the arms embargo, the operation has trained 136 Libyan Coastguard and Navy personnel. Next to that, it has also hailed over 650 ships, carried out 51 friendly approaches, 7 flag enquiries and 3 inspections within the framework of its contribution to the implementation of the UN arms embargo on the high seas off the coast of Libya.

Despite the magnitude of those achievements, some voices still question the efficacy of the new naval operation up to now, arguing that many similar activities were already undertaken by the Italian authorities before the launching of the European naval operation. It is obvious that sceptics will need to wait until the third phase, and the most powerful in military terms, to estimate a real difference with the traditional activities of the Italian coastguards in the zone.⁹⁰

At any rate, what seems remarkable is the number of Member States of the EU taking part in the operation and the extent of their combined contribution. Indeed, the contribution reaches, in February 2017, the number of 25 Member States, meanwhile the fleet deployed is made up of five vessels coming from Germany, Italy, Spain and United Kingdom, together with six air assets.⁹¹

⁸⁶ See: Gobierno de España, Consejo de Ministros, "ACUERDO por el que se autoriza la participación de las Fuerzas Armadas en la operación militar de la Unión Europea en el Mediterráneo Central Meridional, EUNAVFOR MED".

⁸⁷ In this sense see: Gobierno de España, "Operation Central Mediterranean - EUNAVFOR MED – SOPHIA".

⁸⁸ Article 23.4 d) of the Organic Law 1/2014 on Universal Jurisdiction. In this regard see: *Manual de Derecho del Mar*, *supra* n. 30, pp. 145-148.

⁸⁹ See: EUNAVFOR MED Operation Sophia: mandate extended until 31 December 2018, Press release 494/17, Security & defence, 25 July 2017, document quoted *supra* n.85.

⁹⁰ For instance, see the evidence produced by some witness during the inquiry into the effectiveness of naval operation Sophia carried out by the Parliament of the United Kingdom: Parliament of United Kingdom, EU External Affairs Sub-Committee, EU Naval Force – Mediterranean (Operation Sophia) inquiry, Examination of Witness, Evidence Session No. 3 Heard in Public Questions 31 – 53, Thursday 10 March 2016, evidence of Mr Peter Roberts and Mr Patrick Kingsley; or Evidence Session No. 4 Heard in Public Questions 54 – 68, Thursday 17 March 2016, oral evidence, Q57 Earl of Oxford and Asquith.

⁹¹ See: "European Union Naval Force – Mediterranean Operation Sophia", Factsheet of June 2017.

Finally, closely related to Operation *Sophia*, are the activities in the Mediterranean of Frontex, which was established by Council Regulation (EC) 2007/2004 in order to be responsible for the European integrated border management.⁹² Since Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016,⁹³ the integrated border management should, among other, consist in measures of coast guard, such as the prevention and detection of cross-border crime, like migrant smuggling or trafficking in human beings, and setting up search and rescue operations for persons in distress at sea.⁹⁴

In this regard, it is worth to mention that in November 2014, at the request of Italy, Frontex and the European Commission launched Operation *Triton*, which operational area covers the territorial waters of Italy as well as parts of the search and rescue zones of Italy and Malta. Even if border control and surveillance are the primary focus of *Triton*, since the beginning of the operation, Frontex vessels and aircrafts have on regularly been redirected by the Italian Coast Guard to assist migrants in distress.⁹⁵

In the same line, Frontex also launched Operation *Poseidon*, which provides Greece with technical assistance aiming at, among other, strengthening its border surveillance and its ability to save lives at sea. Its operational area covers the Greek sea borders with Turkey and the Greek islands.⁹⁶

In Spanish waters or in their vicinity, Frontex operations *Hera* and *Indalo*, deployed by the agency in Spain, assist the Spanish authorities with border surveillance and search and rescue. On the one hand, with Operation *Hera* Frontex aims at detecting vessels setting off towards the Canary Islands and at diverting them back to their point of departure thus reducing the number of lives lost at sea. On the other hand, Operation *Indalo* tries to coordinate the action of the different Police bodies involved for assuring an effective control of the aerial and maritime borders of the South of the Iberian Peninsula in order to avoid, among other crimes, migrant smuggling or human trafficking.⁹⁷

5. Military conflicts compromising the maritime security?

In the recent years, there have not been military conflicts compromising the maritime security of Spain and, fortunately, it is not likely that there would be one in the coming years. The crisis with Canada in regard with the halibut⁹⁸ in 1995 and with Morocco

⁹² Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349.

⁹³ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251.

⁹⁴ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 renamed Frontex the European Border and Coast Guard Agency.

⁹⁵ See the Frontex Press Release of 10 October 2016, “Joint Operation Triton (Italy)”.

⁹⁶ See the Frontex Press Release of 10 October 2016, “Joint Operation Poseidon (Greece)”.

⁹⁷ On the deployment and results of both operation in the year 2016, see: Government of Spain, Ministry for Home Affairs, “El director general de la Guardia Civil presenta las operaciones EPN-INDALO y EPN-HERA 2016”.

⁹⁸ On 9 March 1995, the *Estai*, a fishing vessel flying the Spanish flag and manned by a Spanish crew, was intercepted and boarded some 245 miles from the Canadian coast by Canadian Government vessels. Immediately, the Spanish Government and the European Union categorically condemned the act alleging that the Canadian authorities breached the universally accepted norm of customary international law codified in Article 92 and articles to the same effect of UNCLOS according to which

over the Parsley Island⁹⁹ in 2002 shows that military clashes are not necessarily a matter of the past, nonetheless.

In that regard, we think that two situations could risk to degenerate and to escalate and, eventually, to jeopardize the maritime security of Spain: an hypothetical conflict with the United Kingdom in relation with the waters of Gibraltar, or an even more hypothetical conflict with an independent Catalonia.

We recall that the sovereignty over Gibraltar is a dispute issue since the Treaty of Utrecht of 1713, which legitimized the cession of this territory to the United Kingdom¹⁰⁰ Gibraltar was designated a Crown Colony in 1830, but since then its status has evolved significantly.¹⁰¹ At present, as in the past, the essence of the problem remains that Spain contests the United Kingdom's sovereignty over the entire Crown Colony and especially British jurisdiction over part of the isthmus joining it to Spain with the airport constructed on it. Consequently, Spain has never officially recognized British sovereignty over territorial waters around Gibraltar, particularly in the Bay of Algeciras, taken into account that the Treaty of Utrecht of 1713 was silent over the maritime spaces around the rock.¹⁰² On the contrary, when Article X of the Treaty of Utrecht declared the yielding “[...] to the Crown of Great Britain the full and entire propriety of the town and castle of Gibraltar, together with the port, fortifications and forts thereunto belonging [...]” did not mention any projection of maritime spaces whatsoever. In fact, literally, in that provision it is stated that “[...] the above-named propriety be yielded to Great Britain without any territorial jurisdiction and without any open communication by land with the country round about”.¹⁰³ Nevertheless, even if

ships on the high seas shall be subject to the exclusive jurisdiction of the flag State. Canada replied that the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen. Spain reacted by deploying some patrol boats to protect its country's fishing vessels. In April 1995 Canada and the European Union signed an Agreement on fisheries in the context of the Northwest Atlantic Fisheries Organization Convention that put an end to the crisis regarding the fisheries issues. Nevertheless, on 28 March 1995, Spain filed an application against Canada before the International Court of Justice asking for reparation for the violation of its rights under international law (see: *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court*, ICJ Reports (1998) 432, pp. 443-444. By a Judgment of 4 December 1998, the Court found that it had no jurisdiction to adjudicate upon the dispute between Spain and Canada (*ibidem*, p. 468).

⁹⁹ In fact, it is tiny rocky islet located in the Strait of Gibraltar, around two hundred fifty meters off the Moroccan coast and 13.5 kilometers from the Spanish coast. The islet is around 0.15 square kilometers in size, and is up to seventy four meters in height. On 11 July 2002, some members of the Moroccan Army took into their possession the islet, which sovereignty was disputed between Spain and Morocco. After some diplomatic exchanges, concluded without success, Spanish military forces, on 17 July 2002 expelled the Moroccan soldiers. Some days later, the Spanish military abandoned the islet as well, turning back the situation as it was before the 11 July 2002. In this regard see: Cortes Generales, Diario de Sesiones del Congreso de los Diputados, Comisiones, Año 2002 VII Legislatura Núm. 543, Conjunta de Asuntos Exteriores y Defensa, Sesiones núms. 32 y 28, respectivamente celebrada el miércoles, 17 de julio de 2002, Comparecencia urgente de los señores ministros de Asuntos Exteriores (Palacio Vallelersundi) y de Defensa (Trillo Figueroa y Martínez-Conde), conjuntamente, para informar sobre la evolución de los acontecimientos tras la ocupación de la isla Perejil el día 11 de julio. A solicitud del Gobierno. (Número de expediente 214/000136).

¹⁰⁰ Article X, Treaty of Utrecht, 1713. See for instance: G. Chalmers, *A Collection of Treaties Between Great Britain and Other Powers*, Vol. II, London: Printed for J. Stockdale, 1790, pp. 83-84.

¹⁰¹ In this regard see: G. O'Reilly, “Gibraltar: Sovereignty Disputes and Territorial Waters”, Centre for Borders Research, University of Durham, *IBRU Boundary and Security Bulletin*, 1999, p. 71.

¹⁰² *Ibidem*, p. 76. On this issue see also: G. Naldi, “The Status of the Disputed Waters Surrounding Gibraltar”, *International Journal of Marine and Coastal Law*, Vol. 28, 2013, pp. 701-718.

¹⁰³ Article X, Treaty of Utrecht, 1713. In this regard see: P. A. Fernández Sánchez, “La controversia sobre la titularidad jurídico-internacional de los espacios marítimos adyacentes a Gibraltar”, 67 *Revista Española de Derecho Internacional*, Vol. 67, n. 13, 2015, pp. 28-30. See also: A. Del Valle

in the last years there are frequent clashes between Gibraltar, Spain and the United Kingdom mainly regarding fishing issues in the waters of the vicinity of Gibraltar, the fact remains that, since the Spanish integration both in NATO and the EU, the intensity of the Gibraltar problem has diminished significantly. By contrast, the voluntary and unilateral withdrawal of the United Kingdom from the EU could awake the dispute again.¹⁰⁴

In relation to the political process in Catalonia according to which this region is putting into question its integration in the Spanish State, we are witnessing a turmoil since the adoption, in 2006, of the new Statute of Autonomy of Catalonia and in particular since the Judgment 31/2010 of the Spanish Constitutional Court, of 28 June 2010, which considered as contrary to the 1978 Constitution some provision of the new Statute.¹⁰⁵ That judgment, for a lot of people in Catalonia, represented the proof that in spite of many efforts it would be almost impossible to find out a new insertion of Catalonia in Spain that could satisfy the aspiration for self-government. Therefore, some huge demonstrations were organized to canalize that frustration. The first one, on 10 July 2010, when thousands of people gathered for a protest action held under the motto “we are a nation, we decide”. The second one, on 11 September 2012, when the crowd shout the maxim “Catalonia: a new State of Europe”, and the third one, on 11 September 2013, in which an endless line of people showed the world the “Catalan way towards independence”. In the juridical scenario, an important step was taken by the Parliament of Catalonia through the adoption of the Resolution 5/X of 23 January 2013, approving the Declaration of Sovereignty and Right to Decide of the People of Catalonia,¹⁰⁶ which was declared in opposition with the 1978 Spanish Constitution by the Spanish Constitutional Court on 25 March 2014.¹⁰⁷ Presently the situation remains as it was, but if finally this political process ends up with the independence of Catalonia from Spain¹⁰⁸ there would be discussions over the territorial and maritime delimitation that could jeopardized the maritime security of the two States.

6. Conclusions.

Unfortunately, evil presents always new faces. Among other risks and menaces, in the last years the maritime security of Spain has been jeopardized by maritime piracy, terrorism, illegal traffic of human beings or illegal traffic of narcotics. In the face of those complex problems, neither Spain nor a single country can react

Gálvez, “España y la Cuestión de Gibraltar a los 300 años del Tratado de Utrecht”, *ARI*, Real Instituto Elcano, n. 23, 2013, p. 9.

¹⁰⁴ In this sense see: A. Mangas Martín, “¿Brexit? Escenarios internacionales y Gibraltar”, *Documento de trabajo*, Real Instituto Elcano, n. 9, 2016, pp. 12-14.

¹⁰⁵ STC 31/2010, 28 June 2010. In this sense see: X. Pons Rafols, “Legalidad internacional y derecho a decidir”, 27 *Revista Electrónica de Estudios Internacionales*, Vol. 27, 2014, pp. 6-12.

¹⁰⁶ Resolution 5/X of 23 January 2013, approving the Declaration of Sovereignty and Right to Decide of the People of Catalonia, *BOPC* 13, of 24 January 2013.

¹⁰⁷ STC 42/2014, 25 March 2014. On this judgment see, for instance: J. Ridao I Martín, “La juridificación del derecho a decidir en España. La STC 42/2014 y el derecho a aspirar a un proceso de cambio político del orden constitucional”, UNED. *Revista de Derecho Político*, Vol. 91, 2014, pp. 91-136, or, E. Fossas Espadaler, “Interpretar la política. Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña”, *Revista Española de Derecho Constitucional*, Vol. 101, 2014, pp. 273-300.

¹⁰⁸ About a perspective of the secession of Catalonia in both public international law and European law see: C. López-Jurado Romero de la Cruz, “La secesión de territorios no coloniales y el soberanismo catalán”, *Revista Electrónica de Estudios Internacionales*, Vol. 26, 2013.

efficiently on its own and with fragmented policies; it is necessary a comprehensive and international policy. Thus, the awareness of the new challenges to our security has led towards the elaboration of the national maritime strategy in 2013, in the line of similar initiatives adopted by some states of our environment, like the United States of America, Portugal, France or Germany and some international organisations to which Spain appertain, like NATO and the EU. Those maritime strategies consist essentially on a set of activities and means aimed at protecting the life of people and goods at sea through the adoption of preventive measures and of corrective actions. In our effort to present the main challenges for Spanish maritime security, however, we have witnessed that, beyond new policies and new regulations, Spain has also taken part actively in some international naval operations, like *Atalanta* and *Sophia* of the EU, against maritime piracy in the Gulf of Aden and human trafficking in the Mediterranean respectively.¹⁰⁹ That circumstance evidences that nowadays the national defense starts far from our frontiers and that contributing to the security of others a state protects itself as well.

Moreover, in terms of the law of the sea, a most salient aspect of the international naval operations in which Spain takes part is that third states or international organisations use the force, or are expected to do it in the case of the EU naval operation *Sophia*, in the waters of riparian states, like Somalia or Libya; even if that exercise is covered by the authority of the UNSC resolutions adopted under Chapter VII of the UN Charter or under the consent of the coastal state. It must be noted that the substitution of the sovereign state is becoming more and more frequent in the international society. In the present cases, this substitution has been decided and controlled by the Security Council, but in other contexts the use of force by foreign countries based on the consent of the sovereign state cannot help but raise a lot of concerns.¹¹⁰

Another interesting novelty that the Spanish practice in the field of maritime security shows in the last years is the successful use of private military companies to assure the security in Spanish fishing vessels navigating through the waters of Somalia. Indeed, together with the deterrence imposed by the EU ships in the area of the Gulf of Aden in the context of the operation *Atalanta*, the private security of the Spanish vessels has contributed decisively to the diminution of pirate attacks in those waters.

It has to be underlined as well that, in the recent years, Spanish maritime security has not been compromised by any military conflict whatsoever, but the clashes with Canada and Morocco in the cases of halibut in 1995 and with Morocco over the Parsley Island in 2002 show that, on the account of the maritime character of our country, the military dimension of maritime security cannot be overlooked. In this perspective, even if highly improbable, the status of the waters around Gibraltar after the Brexit or the delimitation of maritime frontiers with Catalonia are circumstances that give causes for concern in the coming years.

¹⁰⁹ With regard to the Spanish participation in other international operations see: Ministerio de Defensa de España, Estado Mayor de la Defensa, "Operations".

¹¹⁰ In this regard see, for instance: A.S. Deeks, "Consent to the Use of Force and International Law Supremacy", *Harvard International Law Journal*, Vol. 54, 2013, pp. 1-60, and M. Byrne, "Consent and the use of force: an examination of 'intervention by invitation' as a basis for US drone strikes in Pakistan, Somalia and Yemen", *Journal on the Use of Force and International Law*, Vol. 3, 2016, pp. 97-125. Next to the use of force by a third state with the consent of the sovereign state is the so call "intervention by invitation", which is becoming also frequent in the international society, mainly in Africa; on this point see: E. De Wet, "The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force", *The European Journal of International Law*, Vol. 26, 2016, pp. 979-998.

Furthermore, it cannot be denied that the international terrorism, mainly jihadism, constitutes probably one of the most acute preoccupations of the international society in terms of peace and security. Nevertheless, in regard with Spain, which has traditionally been a victim of this scourge, lately it remains, fortunately, only a latent menace for the maritime security, but its danger is beyond any doubt. In this line, it is worth to mention that Spain together with Romania is trying to promote the setting up of an International Court against Terrorism.¹¹¹

To finish our conclusions and in the light of the above mentioned, it seems that the more relevant menaces to the maritime security of Spain have been caused, and are caused, by non-state actors, like pirates, smugglers of people, human traffickers, terrorist, etc., in the line of the current trend of international society and international law in general. The fruitful use of private military companies in the fight against maritime piracy goes also in the same direction.

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¹¹¹ See “MFA officially initiates consultations on Romania's initiative to create an International Court to combat terrorism”. See also: B. Aurescu; J. García Margallo y Marfil, “Does the World Need an International Court against Terrorism?”, World Economic Forum, 17 November 2015.