

Spain and the Law of the Sea: 20 years under LOSC

Piracy

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(A) INTRODUCTION

Maritime piracy is an ancient, recurring and present-day crime affecting the interests of the international community as a whole. Unlike in the past, however, today this crime occurs not only in its traditional form—illegal acts of violence, detention or depredation committed on the high seas for private ends by the crew or passengers of private ships—but also as illegal acts of violence committed in territorial waters and/or for political reasons, which hinders both its prevention and repression.¹

Spain is a country with a long maritime tradition and an extensive coast. It has felt the impact of these acts of violence at sea from time immemorial. Berber pirates once hindered the navigation of the Mediterranean and raided the coasts of the Spanish Levant, whilst pirates, buccaneers and filibusters harassed traffic between the Iberian Peninsula and the Americas; hence the Spanish authorities' concern for this crime at the time and their search for ways to address it, including, amongst others, the creation of the Navy Marine Corps to protect ships.

This “classical” piracy evolved and expanded between the 15th and 18th centuries, from the opening of the new maritime trade routes to the acquisition by states of powerful navies able to stop the pirates. Thereafter, piracy did not disappear but rather moved to other regions, where the presence of the Spanish fleet or interests was much smaller, with the consequent ebbing in Spain's interest in the repression of this international crime.

From the 19th century until the present one, international—and Spanish—attention to the criminal activity of pirates declined considerably. This was largely due to the remoteness of this activity from the major international maritime trade routes of the time and its minor media and

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¹ In contemporary piracy, private ends are often confused with political and terrorist objectives. Indeed, to be more effective, piracy is often coupled with banditry, situations that combine international and common law crimes that may moreover be further compounded by acts of terrorism, which logistically and financially support each other. On these matters, see, amongst others: E. Bertin-Mouro, *Terrorisme et piraterie : des menaces contemporaines à la sûreté des transports maritimes de marchandises* (Ed. L'Harmattan, Paris, 2005); M.N. Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* (Abingdon Routledge for the International Institute for Strategic Studies, London, 2007); J.M. Sobrino Heredia, “Piratería marítima y terrorismo en el mar”, *Cursos de Derecho Internacional Vitoria-Gazteiz* (Universidad del País Vasco, Bilbao, 2009), at 80-147; P. Chapleau and J.P. Pancraccio, *La piraterie maritime. Droit, pratiques et enjeux* (Ed. Vuibert, Paris, 2014); and P. Koutrakos, P. and A. Skordas, *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, London, 2014).

political impact. Thus, when the law of the sea began to be codified in the mid-20th century, neither the international conferences where it was discussed, nor the conventions in which it was ultimately set out (including both the Geneva and the Montego Bay Conventions²) showed any particular concern for this crime, but rather projected the idea that it was little more than an obsolete illicit activity or one that had fallen into disuse.

However, the maritime reality soon gave the lie to this perception, for shortly after the LOSC was signed, in 1982, acts of violence at sea began to proliferate. Events such as those befalling the Vietnamese boat people and incidents such as the hijacking of the *Achille Lauro*, coupled with the rise in transnational organized crime in Southeast Asia and its impact on maritime traffic, harshly showed that an activity thought to have been consigned to the history books was once again present on the world stage.

Notwithstanding the above, it was especially in the first decade of the 21st century that violence at sea emerged as a serious international problem. Acts of piracy have been multiplying, as have the maritime areas in which they occur. The reasons are manifold: the weakening or disappearance of central authorities in various states, the difficult economic and social situation in others, the cross-border presence of radical political and religious movements, organized crime, etc. All of these factors translate to “failed” or dangerous states and seas, where the acts of piracy that increasingly affect the security of maritime traffic are concentrated. In addition to in Southeast Asia, the situation is particularly serious in the Indian Ocean, off the coast of Somalia, and in West Africa, especially in the Gulf of Guinea. Spain maintains an important presence in both of the latter two maritime areas, through its commercial and, especially, its industrial fishing fleets.

The presence of Spanish-flagged ships in waters where acts of piracy are proliferating soon gave rise to incidents of various degrees of seriousness. The one to raise the alarm amongst the Spanish authorities, due to its gravity and repercussions, was the hijacking of the Spanish fishing vessel *Playa de Bakio* in April 2008.³ That incident showed the broad impunity enjoyed by Somali pirates to date and the lack of an organized international response to these events, as well as the lack of legal mechanisms in Spanish law to effectively prosecute these criminal acts.

This event, which caught the Spanish authorities off guard, was followed by other acts of violence at sea affecting Spanish-flagged vessels, in both the Indian Ocean and the Gulf of Guinea, prompting the Spanish government to take a series of measures to prevent and repress these actions. These measures were implemented on multiple fronts —the international (B), regional (C) and domestic

² The UN Convention on the Law of the Sea, [1833 UNTS 3](#) (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter) treats piracy very similarly —indeed, virtually identically— to how it is treated under the 1958 Geneva Convention on the High Seas, although it offers a very different legal regime for maritime areas and navigation. Articles 100 to 107 are devoted to piracy and establish the duty for all states to cooperate in the repression thereof. These provisions mainly cover the definitions of *piracy* and *pirate ship*, the seizure of pirate ships, and liability for such seizures. Articles 105 (on the seizure of a ship) and 110 (on the right of visit that warships on the high seas have in relation to a foreign ship) provide a legal basis for responding to acts of piracy. This legal basis also applies to the EEZ under Article 58(2). For an analysis of these provisions, see J.M. Sobrino Heredia, “Piratería marítima...”, *supra* n. 1, at 100–113.

³ The tuna vessel *Playa de Bakio* was hijacked from 20 to 26 April 2008. During that time, the crew of the Spanish trawler was held hostage by pirates off the coast of Somalia. Following payment of a substantial ransom, the pirates left the ship. Since then, the Spanish tuna fleet in the area has sustained around a hundred attacks and attempted boardings.

(D)— offering proof that Spain has gradually come to favour an increasingly broad conception of maritime piracy.

(B) AN INTERNATIONAL RESPONSE

Illegal acts of violence, detention or depredation at sea cover a wide variety of acts, both with regard to their nature and to the area where they are committed. Not all of these acts can be classified as international crimes of maritime piracy; hence, the need to turn to various legal instruments to seek a response to this problem.

The first such instrument is the well-known law of the sea, codified and implemented through LOSC, which, in particular through Article 101, includes a limited definition of piracy: in terms of both where the crime is committed and the characteristics of the vessels involved, as well as the reasons for the act. The terms of other articles, such as Article 58(2), have made it possible to broaden the conception of piracy contemplated under the Convention, but even so it does not cover all acts of violence at sea.

Thus, there arose the need to define these acts and establish mechanisms to prevent and ultimately repress them, which was attempted with the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.⁴ The IMO has also carried out important work, adopting numerous resolutions on the matter in favour of expanding the conception of maritime piracy to include armed robbery against ships as well. Likewise, the International Maritime Bureau (IMB), which has proposed a very broad definition of piracy as an “act of boarding or attempting to board a ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act”.⁵

This broad conception of maritime piracy can also be found in an avalanche of UN Security Council resolutions, beginning with Resolution 1814 (2008)⁶, which affirms that international law, as reflected in the LOSC, sets out the legal framework applicable to combating piracy and armed robbery. This has made it possible, ever since, for international organizations and individual states to carry out actions to prevent and repress these crimes off the coast of Somalia, leading to a, perhaps temporary, decline in violence at sea in this region.⁷ At the root of these Security Council resolutions, which have

⁴ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) [1678 UNTS 221](#), as amended on 14 October 2005 (IMO, [Protocol of 2005](#) to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21, Nov. 1, 2005) (hereinafter, 1988/2005 SUA Convention).

⁵ International Maritime Bureau, [Piracy and armed robbery against ships](#). Annual Report, 2007.

⁶ S/RES/1814 (2008), 15 May 2008.

⁷ From a peak of 47 hijackings in 2010, Somali piracy fell to none in 2013 and 2014. Three international military missions, military convoys, the hiring of armed private security contractors on board ships and self-defence in the form of evasive manoeuvres or the enclosure of the crew in a safe area are some of the reasons for this decline in piracy off the Somali coast. However, the first quarter of 2017 saw a slight increase in these acts, perhaps due to the completion of the NATO military operation. These new attacks include the one suffered by the merchant vessel *Cotina*, whose hijacking was

proliferated and whose effects have been extended to date, lies the uptick in acts of piracy in the Indian Ocean in those years, the attacks on World Food Programme vessels, the efforts of an eight-country working group led by Spain in support of new measures to combat piracy, and certain especially dramatic events, such as the hijacking of the French vessel *Le Ponant* and the Spanish trawler *Playa de Bakio* in 2008.

Specifically, the need to increase international measures led France and Spain, amongst other countries, to propose the adoption of a text by the Security Council that would allow the hot pursuit of pirates without the barriers imposed by territorial waters in cases of *flagrante delicto* and the conducting of international maritime patrols in the most dangerous areas in which the pirates act. This was achieved in UN Security Council Resolution 1816 (2008),⁸ which authorized states cooperating with the Transitional Federal Government of Somalia to enter the territorial waters of Somalia and to use all means necessary to repress piracy, a possibility that Resolution 1851 of 16 December 2008⁹ further extended to Somali territory itself and to the country's airspace. Thus, Spain, upon seeing that the acts of violence and pressure on its commercial and fishing fleet were growing more pronounced in this maritime area, became one of the countries to make the greatest effort to seek international legal coverage to repress that violence. At the same time, as will be seen below, from the outset it sent ships and aircraft to collaborate both with NATO and, later, in the context of the EU, on the surveillance and repression of piracy.¹⁰ These efforts were further supplemented by its active participation from the start in the Contact Group on Piracy off the Coast of Somalia (CGPCS).¹¹

Another region of the world beset by piracy that is giving rise to an international response in whose design and implementation Spain is involved is the Gulf of Guinea. This is because Spanish-flagged vessels and vessels owned by Spaniards have been subject to these illicit activities.¹² The seriousness of the crimes committed in this region, coupled with the particularly violent way in which they are committed, led the UN Security Council to warn in two different resolutions of the growing threat posed by piracy and armed robbery in the region and to express its support for regional organizations to combat this scourge and encourage Member States to support them and to take measures to counter these criminal activities.¹³ In this regard, Spain, both individually and within the framework of the EU, is taking measures to prevent and repress the activity of pirates, ranging from sending ships to participating in training projects for the naval forces of countries in the region.

prevented by the Spanish Navy ship *Galicia*.

⁸ S/RES/1816 (2008), 2 June 2008.

⁹ S/RES/1851 (2008), 16 December 2008.

¹⁰ In September 2008, Spain launched an exclusively national operation called *Centinela Índico* (Indian Sentinel), involving the deployment of a maritime surveillance aircraft to Djibouti.

¹¹ The Contact Group was established as an international cooperation mechanism to combat piracy, as requested in Resolution 1851, which was sponsored by the US and unanimously adopted on 16 December 2008.

¹² Most recently, a group of armed pirates attacked the Spanish LNG carrier *La Mancha Knutsen* in March 2017, as it sailed through waters in the Gulf of Guinea. On the activity of pirates in this region of the world, see, amongst others: Ad. Anyimadu, *Maritime Security in the Gulf of Guinea: Lesson Learned from the Indian Ocean* (Ed. Chatham House, London, 2013).

¹³ S/RES/2018 (2011), 31 October 2011, and S/RES/2039 (2012), 29 February 2012.

(C) A REGIONAL RESPONSE

Under the legal umbrella of the UN Security Council resolutions in particular and international law in general, three major military operations have been conducted by air and sea in the Indian Ocean: a coalition of Combined Maritime Forces, led by the US and represented by Combined Task Force 151; a pair of NATO-led air and sea operations (the operations Allied Protector and Ocean Shield); and, finally, the third operation, conducted by the EU, called EU NAVFOR Somalia or Operation *Atalanta*.¹⁴ Spain's collaboration or participation in these operations has been, and remains, quite considerable,¹⁵ particularly, for obvious reasons, in Operation *Atalanta*.

With regard to this latter operation, it is worth recalling that, following the capture of the fishing vessel *Playa de Bakio*, and on the occasion of the Spanish-French summit of 27 June 2008, a coordination cell was established¹⁶ through which Spain organized Operation *Centinela Índico* (Indian Sentinel) and based on which Operation *Atalanta* would later be organized. To this end, Spain promoted the inclusion on the agenda of the Council of Ministers for Fisheries and Maritime Affairs and the General Affairs Council of the EU of the issue of piracy in the fisheries sector. In this context, the Council adopted Joint Action 2008/851/CFSP of 10 November 2008, authorizing an EU military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.¹⁷ The operation is also tasked with protecting World Food Programme ships and other vulnerable maritime vessels, monitoring fishing activities off the coast of Somalia, and providing support to other EU programmes and missions in the region. In December 2009, the Council – at Spain's request – amended it to enable EU NAVFOR to supervise fishing activities off the Somali coast and around the Seychelles (where most of the Spanish fishing vessels operate). The operation, in which the Spanish Navy has a very strong presence,¹⁸ is carried out in

¹⁴ For an examination of these military operations, see: J.M. Sobrino Heredia, "Les opérations militaires Internationales dans la prévention et la poursuite de la piraterie maritime et l'usage de la force", in J.M. Faramiñán Gilbert and V.L. Gutiérrez Castillo (eds.), *Coopération, sécurité et développement durable dans les mers et les océans. Une référence spéciale à la Méditerranée/Sea and ocean-related cooperation, security and sustainable development: An analysis with a special focus on the Mediterranean* (Ed. Huygens, Barcelona, 2013), at 215-228.

¹⁵ The Spanish Navy has participated in multinational initiatives to improve maritime security, such as the African Partnership Station (APS), organized annually by the United States Africa Command (AFRICOM). It has likewise collaborated on the US initiatives Combined Task Force 150 (CTF-150) and 151 (CTF-151) as part of a multinational coalition dedicated to preventing terrorism and international crimes at sea, in which the Spanish Navy has permanently maintained a ship. Spain also participates, through both the EU and NATO, in the fight against piracy in the region. The inclusion of Spanish warships in Standing NATO Maritime Groups 1 and 2 and the Spanish Navy's participation in EU NAVFOR are an important factor in increasing maritime security in the area.

¹⁶ When, on 19 September 2008, the EU created a Naval Coordination Cell (EUNAVCO) in Brussels to support UN Security Council Resolution 1816, the mission was placed under the command of a Spanish naval officer.

¹⁷ OJ L301, 10 November 2008, at 33.

¹⁸ From the start of the operation, 32 Spanish ships have participated in a naval group whose command is rotated every four months amongst the countries contributing forces. To date, Spain has commanded the group (EU NAVFOR) six times since the operation was launched. Spain complements its contribution with the "Orión" detachment in Djibouti, which normally has a P-3 Orion maritime patrol aircraft and a D-4 VIGMA (CN 235). Since the operation began, they have carried out an average of 13 missions, or 100 flight hours, a month. Spain participates in the operation with one or two ships and the "Orión" Air Force detachment, equipped with a Maritime Patrol and Reconnaissance Aircraft (MPRA) unit deployed in Djibouti. Additionally, it is the only country to maintain standing surface facilities and the "Orión" detachment, such that it is presently the largest contributor to the operation.

collaboration with and with the authorization of the Transitional Federal Government of Somalia, as well as the Republic of Djibouti and the Republic of Seychelles, to deploy the European forces involved in the operation. Its duration has been successively extended until December 2018.¹⁹ Since it was launched, European sailors involved in Operation *Atalanta* have detained and brought to court numerous pirates, in addition to preventing many hijackings and significantly reducing assaults on ships in the region. Specifically, with regard to Spain, since Operation *Atalanta* began, Spanish naval units have captured a total of 168 pirates, of whom 50 were brought to justice (14 in Spain, 7 in France, 1 in Djibouti, 17 in Kenya and 11 in Seychelles) and 118 released at various points along the Somali coast.²⁰

However, Operation *Atalanta* is not the only one the EU is conducting in the region; it is complemented by two other missions, in which Spain also plays an important role: the European Union Training Mission (EUTM) Somalia, which aims to train the Somali armed and security forces,²¹ and EUCAP Nestor, which seeks to build and strengthen maritime capabilities throughout the region, including, in addition to in Somalia, in other countries in the region, such as Djibouti, Kenya or Seychelles.²² To this end, Spain supports the creation of a true regional maritime capability in the area and considers that this mission should be viewed as a necessary complement to the *Atalanta* and EUTM-Somalia operations, within the global approach the region requires.

Another regional piracy hotspot, as already noted, is the Gulf of Guinea. In implementation of UN Security Council resolutions, the EU and Spain have deployed their forces to combat violence at sea in the waters of this African region, too. As in Somalia, piracy in the Gulf of Guinea is rooted in endemic poverty, insecurity, inequality, corruption, misrule and the presence of armed groups. However, it differs from piracy in Somalia in various ways: the absence of “failed” states; the purpose of the crime, which here is related to the theft of goods (hydrocarbons) rather than hijackings; the violence employed, as no ransom is sought; and the fact that it often occurs in territorial waters, such that the vessels most often affected are not fishing vessels but oil or gas tankers. In light of this reality, in January 2013, the EU launched a cooperation programme with several African countries to build coastguard capabilities and strengthen the exchange of information in order to enhance the security of

¹⁹ In May 2016, the EU approved the Triple Review, the result of a consensus amongst the Member States, establishing the basis for furthering the EU’s comprehensive approach to the Horn of Africa. With regard to its impact on *Atalanta*, the operation’s mandate was extended until December 2018.

²⁰ It is well known that Operation *Atalanta*’s weak point is the prosecution and, where applicable, imprisonment of pirates.

²¹ On 15 February 2010, the European Council adopted Council Decision 2010/96/CFSP (OJ L 44 of 19 February 2010, p. 16) to launch a military mission to train Somali security forces in Bihanga, Uganda (EU Training Mission, EUTM), as a contribution to the training programme being carried out by AMISOM. Spain offered to be the framework country for the EUTM mission, which it thus leads with the ensuing additional effort (30% of the instructors and 50% of the commands up to 38 of the 134 members).

²² Council Decision 2012/389/CFSP, of 16 July 2012 (OJ L 187 of 17 July 2012, p. 40). The objective of EUCAP Nestor is to build regional maritime capacities in Western Indian Ocean states, promoting the development of a national capacity to enhance maritime security, including counter-piracy and maritime governance. The deployment of Spanish military personnel, which began in September 2012, ended on 17 February 2016. Spain continues to participate through the deployment of four civilians in the area.

maritime routes and counter piracy in the Gulf of Guinea.²³ The EU's economic contribution to this programme, called Critical Maritime Routes in the Gulf of Guinea (CRIMGO), amounts to €4.5 million, and seven countries with coasts in the Gulf of Guinea are involved: Togo, Benin, Cameroon, Equatorial Guinea, Gabon, Nigeria, and São Tomé and Príncipe. The Spanish Navy participates in this initiative. Specifically, several Spanish naval units are involved in various regional exercises, such as the Express series (Saharan Express and Obangame Express). They also carry out bilateral training activities according to the needs and requirements of the countries in the area and collaborate with the naval forces of countries such as the US, France and the UK, which, unlike Spain's, have local facilities from which to ensure a continuous presence and cooperation.²⁴ Additionally, in conjunction with Portugal, another European country with a marked historical presence in the region, Spain is designing a combined joint initiative, the Spanish-Luso Expeditionary Tactical Group (GTELE from the Spanish), which seeks to group the two countries' military activities in the area of the Gulf of Guinea, thereby fostering coordination and synergies. Unlike in Somalia, it is a setting in which the establishment of international naval protection operations or the use of private security contractors may not be enough to stop the pirates' actions due to their special nature. Thus, Spain's action is aimed, first, at strengthening the maritime capabilities and domestic security of the states in the region and, second, at supporting regional cooperation efforts undertaken by regional organizations and bodies in the area.

(D) A DOMESTIC RESPONSE

Piracy generates not only a universal policing jurisdiction, but also a universal criminal jurisdiction. However, the repression of piracy raises an additional question insofar as piracy is both an international crime and a crime under domestic laws. To this end, and although there is no obligation to adopt them, there are national laws and criminal codes with provisions that also apply to piracy and, thus, to the repression of such acts.

In the case of Spain, the country's domestic law has not always dealt with this crime, nor has it

²³ The EU approved an EU-Gulf of Guinea Action Plan (2015-2020) in which it advocates drawing on the experience of the missions in the Horn of Africa and emphasizes maritime capacity-building in coastal states that suffer from piracy, in addition to promoting the Yaoundé Code of Conduct concerning the repression of piracy, armed robbery against ships, and illicit maritime activity in West and Central Africa. Council Conclusions on the Gulf of Guinea Action Plan 2015-2020, Doc. 7168/15, Brussels, 16.3.2015.

²⁴ The Spanish Navy organizes four-month missions in which patrol boats, such as the *Serviola* and the *Vigía*, stay at ports in the region and patrol and monitor the sea. At each port where they make a stopover, they establish a close relationship with the navy of the country in question, thereby enabling the planning of maritime security cooperation and training activities. This initiative is supplemented with patrols and joint manoeuvres by both navies on the high seas. The objective, in addition to combatting piracy, is to train sailors and officers from the coastal countries of the Gulf of Guinea to be able to conduct effective operations to combat plundering at sea on their own. For more information on these activities and on Spain's interests in the region in general, see, amongst others: Escuela Superior de las Fuerzas Armadas, *La piratería emergente en el Golfo de Guinea. Estrategia de la UE para el Golfo de Guinea* (Ministerio de Defensa, Madrid, 2014); and G. Escribano and F. Arteaga, "[Seguridad y recursos en el Golfo de Guinea: algunas implicaciones para España](#)", ARI 28/2013, 16 July 2013.

always done so in the same way.²⁵ This is clear from a reading of the Spanish Criminal Codes of 1822, 1844 (reformed in 1850 and 1870) and, in the 20th century, 1928,²⁶ 1932, 1944,²⁷ 1963, and 1973. In their day, these texts, supplemented by special criminal legislation, enabled the prosecution of this crime in Spain. However, the situation dramatically changed with the Criminal Code of 1995, which did not include the crime of piracy, as lawmakers considered it to be an anachronism. This situation persisted for 15 years, until the reform implemented under Organic Law 5/2010, of 22 June 2010, which reintroduced the crime of piracy in Title XXIV (Crimes against the International Community), Chapter V of Book II (Criminal Offences and Penalties).²⁸

This reform was more than necessary, for the intervening years had seen a proliferation of acts of violence at sea affecting Spanish interests, the prosecution of which faced serious legal obstacles, as shown by the hijacking of the Spanish-flagged vessel *Alakrana* in Somali waters in October 2009, the detention of two of the alleged pirates, their transfer to Spain, and the challenges involved in trying and convicting them.²⁹

The amendment introduced by Organic Law 5/2010 is reflected in two new articles, 616 ter³⁰ and 616 quater,³¹ of the Criminal Code. These provisions contain a very broad definition of the crime of piracy that goes beyond the terms of Article 101 LOSC and is based on the provisions of the 1988/2005 SUA Convention, the resolutions of the IMO and the IMB, and the precedents developed by the Security Council in its resolutions on piracy off the Somali coast. With regard to the new definition of the crime of piracy, the fact that the territorial scope of commission of the crime is the sea in general and not just the high seas and maritime areas not subject to the jurisdiction of any state

²⁵ G.A. Oanta, "The Legal Treatment of Maritime Piracy Carried Out by the Spanish Legislator", G. Andreone et al. (eds.), *Insecurity at Sea: Piracy and Other Risks to Navigation* (Ed. Francesco Giannini & Figli S.P.A., Naples, 2013), at 123-135; and F.M. Marín Castán, "Tratamiento jurídico de la piratería marítima en el Ordenamiento Jurídico Español", 2 *Documento Marco del IEEE* (Instituto Español de Estudios Estratégicos, Madrid, 2011) 7-24.

²⁶ A definition of piracy was first included in Article 245 of the 1928 Criminal Code, which provided: "The crime of piracy is committed by anyone who, without authorization or a letter of marque from the government empowered to grant it, or through the abuse of a legitimate letter of marque or carrying such letters from multiple states, directs, commands or crews one or more armed ships or ships with armed crews that sail the seas committing, at sea, on their coasts or on other vessels, robberies or acts of violence."

²⁷ The common Criminal Code of 1944, which survived in the codes of 1963 and 1973, refers to piracy. Although it does not contain a definition of the crime, it can be concluded from its provisions that it considers as such not only acts of depredation and violence against persons committed at sea or from the sea by individuals from the crew of a vessel or on board it, but also the facilitating of a vessel's seizure with violence, or the robbing, harming or injury of the persons on board.

²⁸ Organic Law 5/2010, 22 June 2010, amending Organic Law 10/1995, 23 November 1995, on the Criminal Code ([BOE No. 152](#), of 23 June 2010).

²⁹ As the crime of piracy did not exist, the Spanish National High Court prosecuted them for crimes of illegal detention and violent armed robbery.

³⁰ Art. 616 ter: 'Anyone who, through violence, intimidation or deceit, seizes, damages or destroys an aircraft, ship or other kind of vessel or platform in the sea, or who attacks the persons, cargo or property found aboard them, shall be convicted of the crime of piracy and punished with a prison sentence of ten to fifteen years.'

³¹ Art. 616 quater: 'Anyone who, in the prevention or persecution of the events provided for in the preceding Article, resists or disobeys a warship or military aircraft or any other vessel or aircraft bearing clear markings and identifiable as a vessel or aircraft in the service of the Spanish state and authorized for this purpose, shall be punished with a prison sentence of one to three years. If force or violence is used in the aforementioned conduct, a prison sentence of ten to fifteen years will be imposed.'

stands out, as does the exclusion of the subjective element “private end”, so difficult to prove in modern piracy. At the same time, the covered conducts are increased through the tacit inclusion of armed robbery or even maritime terrorism.³²

These provisions of the reformed 1995 Spanish Criminal Code, coupled with the terms of Art. 23(4)(d) of the Organic Law on the Judicial Power,³³ also amended, by Organic Law 1/2009, of 3 November 2009,³⁴ and by Organic Law 1/2014, on Universal Jurisdiction³⁵ (under which, in application of the principle of universal jurisdiction, Spanish courts may try and prosecute crimes of piracy committed outside the national territory, provided the crime is committed against a vessel or aircraft flying the Spanish flag and the principles of territoriality and active personality are met), enable Spain to fulfil its duty to cooperate on the prevention and repression of maritime piracy established under Article 100 LOSC.³⁶ Thus, the Spanish naval forces can, in the context of the military operations in which they collaborate and individually where the occasion so requires, combat piracy, detain pirates and, where advisable, transfer them to Spanish territory to be tried.³⁷ However, if Spain does not wish to exercise its jurisdiction, it may also transfer it to a third party that does wish to exercise it.³⁸

Finally, attention should be called to another new feature in Spanish law, namely, that concerning private security services on Spanish vessels.³⁹ In this regard, it should be noted that, although the protection of maritime navigation is essentially being provided by armed forces from other states and international organizations, the increase in piracy and armed robbery at sea has led some flag states to authorize their ships to carry private armed forces on board. In the case of Spain, the 2009 hijacking

³² Given the breadth of the crime of piracy and in keeping with the 1988/2005 SUA Convention, it could include acts of violence at sea for political reasons and terrorist purposes. However, it is worth recalling that terrorism is defined as a crime in its own right in Articles 571 to 580 of the Spanish Criminal Code.

³³ Organic Law 6/1985, 1 July 1985, on the Judicial Power ([BOE No. 157](#), 2 July 1985). It regulates the jurisdiction of the Spanish courts to try certain crimes committed by Spaniards or foreigners outside the national territory in accordance with the principle of universal justice.

³⁴ [BOE no. 266](#), of 4 November 2009.

³⁵ Organic Law 1/2014, 13 March 2014, on Universal Jurisdiction ([BOE No. 63](#), 14 March 2014).

³⁶ On this matter, see, amongst others: J.L. Rodríguez Villasante y Prieto, “Aspectos jurídico-penales del crimen internacional de piratería”, in R. Castillejo (ed.), *La persecución de los actos de piratería en las Costas Somalíes* (Ed. Tirant, Valencia, 2011), at 113.

³⁷ By way of example, this happened with the Somali pirates who attempted to board the supply ship for the Spanish-flagged combat vessel *Patiño* under the EU NAVFOR command on 12 January 2012, who were tried by the First Section of the Criminal Division of the National High Court and convicted, amongst other crimes, of attempted piracy. Likewise, pirates caught by the ships of third countries as they attacked Spanish-flagged ships have been handed over to Spain and tried by Spanish courts for the crime of piracy, as in the case of the seven Somali pirates who attacked the Spanish-flagged tuna vessel *Izurdia* in the Indian Ocean in October 2012 and were convicted by the Third Section of the Criminal Division of the National High Court on 2 February 2015.

³⁸ To facilitate this situation, the EU has concluded agreements with Indian Ocean coastal states, such as Kenya (Council Decision 2009/293/CFSP) or the Republic of Seychelles (Council Decision 2009/877/CFSP), so that alleged pirates captured in the framework of Operation *Atalanta* can be handed over to and tried in those states. For example, in the case of the *Nepheli*, a Panamanian-flagged merchant vessel assaulted by Somali pirates on 6 May 2009, a Spanish Navy ship intervened and detained the seven assailants. The next day, the same thing happened with the Maltese-flagged merchant vessel *Anny Petrakis*. In both cases, the detainees were brought before Duty Central Magistrate’s Court No. 4 of the National High Court, although they were ultimately handed over to the Kenyan authorities, who tried and convicted them.

³⁹ J.M. Sánchez Patrón, “[Piratería marítima, fuerza armada y seguridad privada](#)”, *Revista Electrónica de Estudios Internacionales* (2012), at 1.

of the Spanish vessel *Alakrana* marked the start of armed security services for these types of ships, made possible through the amendment of Spanish law on private security services to allow their existence, the use of weapons of war, and the presence of security contractors on board Spanish-flagged ships navigating in waters where there is a serious risk to the safety of persons and/or property.⁴⁰ Consequently, today Spanish vessels, especially deep-sea fishing vessels, may carry private security contractors on board to defend them against pirates, something that can already be seen in practice, as evidenced by the frequent confrontations and incidents of this nature.⁴¹

(E) FINAL CONSIDERATIONS

Violence at sea, of which piracy is one of the main manifestations, has directly affected Spain, its maritime interests, and the security of its nationals and of ships flying its flag.

The upsurge in these criminal activities in the first decade of the 21st century caught the Spanish authorities off guard. The first measures they took were thus purely reactive: paying ransoms to secure the release of kidnapped Spanish citizens, deploying naval forces to protect ships. However, these measures were shortly joined by others aimed at preventing piracy and collaborating both internationally and regionally on its prevention and repression.

In these scenarios, the Spanish government's actions —coupled with those of other states— contributed to both the adoption by the Security Council of a battery of resolutions, first on piracy off the coast of Somalia and then on piracy in the Gulf of Guinea, and the launch by the EU of Operation *Atalanta* in Somalia and the implementation of the CRIMGO programme in the Gulf of Guinea. Spanish naval forces have played and continue to play a very significant role in the execution of these initiatives, in terms of both the number of troops assigned to them and the continuous nature of the human and financial effort involved.

At the same time, albeit with some delay, Spanish law has been updated —in particular, the Criminal Code, the Organic Law on the Judiciary, and the Law on Private Security— with a view to reintroducing the crime of piracy in the Spanish legal system, clarifying the application of universal jurisdiction in this matter by Spanish judges, and enabling private security services on Spanish-flagged vessels.

⁴⁰ Law 5/2014, 4 April 2014, on Private Security ([BOE No. 83](#), 5 April 2014). Royal Decree 1628/2009, 30 October 2009, amending certain precepts of the Private Security Regulations, approved by Royal Decree 2364/1994, 9 December 1994, and the Weapons Regulations, approved by Royal Decree 137/1993, 29 January 1993 ([BOE No. 264](#), 2 November 2009).

⁴¹ Many pirate attacks against Spanish-flagged vessels have been repelled through the use of weapons carried by private security contractors on board. By way of example, one might point to the incidents affecting the fishing vessels *Ortube Berria* in 2009 and 2010, *Albacan*, *Albacora*, *Elai Mai*, *Demiku* and *Playa de Anzoras* in 2010, *Felipe Ruano* in 2011, or *Txori Argi* in 2014.