

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

Police at Sea

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(A) THE FRAGMENTED AND DISPERSE LEGISLATION REGARDING MARITIME LAW ENFORCEMENT IN SPANISH LAW

The regulation regarding maritime law enforcement in Spanish Law is defined by its fragmented and disperses nature. There is no single legislative act to regulate these powers as a whole and in a systematic manner. Furthermore, there is an absence of a definition of maritime policing including all the actions which the Spanish authorities may carry out in order to enforce compliance with the Law of the Sea, particularly as far as the rules contained in the United Nations Convention on the Law of the Sea (LOSC), are concerned, along with other related treaties, with the aim of forcing any possible offender to observe the law.

The closest term to this idea, although it does not encompass all of its aspects, is that of “policing navigation” included in Law 14/2014 on Maritime Navigation¹. The text of this Act contains the basic legislation regarding maritime policing powers in Spain covering two criteria. According to a territorial criterion, the afore-mentioned powers are applied to all vessels which are sailing in waters over which Spain has sovereignty, sovereign rights or jurisdiction (Article 4.1). According to the criterion of the flag, these powers are exercised over Spanish vessels, regardless of the place where they are located and without prejudice to the powers that, pursuant to the applicable treaties, are the remit of other coastal States or that of the port (Article 5(1)).

In general, all vessels sailing in Spanish waters, be it in transit or in order to enter or leave ports or terminals located on the Spanish coast, have the obligation to respect the rules of the Law of the Sea and “the restrictions and requisites established in this Act and, where appropriate, pursuant to the laws on safety, defence, customs, health, border controls and immigration” (Article 19). Likewise, Article 20 gives the Spanish maritime authorities the power to condition, restrict or prohibit navigation in certain spaces in the Spanish maritime areas for reasons of maritime safety and security, the conservation of marine biodiversity or of underwater cultural heritage and in order to prevent

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¹ Law 14/2014, 24 May 2014, on Maritime Navigation ([BOE No. 180](#), of 25 July 2014), an English version available [here](#).

unlawful activities or conducting any prohibited trafficking.

More specifically, the regulation of maritime law enforcement powers is carried out in accordance with the maritime zone in which the vessel is located. Thus, in internal waters and in ports, ships must respect the “port legislation, safety, customs, borders and immigration, police, health, the environment and fishing, as well as the operating conditions established” (Article 7(1)). The Spanish maritime authorities may prohibit or condition entry to ports due to emergency reasons or specific risks to public health, safety of navigation, protection of traffic and the port facilities, repression of illegal fishing or environmental sustainability, according to the terms foreseen in the applicable provisions (Article 7(2)).²

In territorial sea, in addition to the LOSC, ships must respect the provisions of the aforementioned Act, along with other laws and regulations governing navigation, border controls and immigration, customs, health and public security as well as those relating to the protection of the marine environment and underwater cultural heritage (Article 38)³. In the event that the passage of foreign ships through territorial sea is not innocent, the Spanish Maritime Administration may condition, restrict or prohibit navigation in those waters (Article 20(1))⁴.

In the contiguous zone, Spain is authorised to exercise control over foreign ships in order to prevent breaches of customs, tax, health and border control and immigration laws which may be committed within Spanish territory and in territorial waters, as well as in its criminal and administrative jurisdiction, and to penalise those who commit offences against such laws (Article 23)⁵.

As far as the exclusive economic zone is concerned, it is established that “[t]he Government shall ensure that when foreign [fishing] ships exercise their rights and fulfil their duties in the exclusive economic zone they duly take into account the rights of the Spanish State and fulfil the provisions of this Act and those of the fishing legislation, that comply with European Union and International Law” (Article 24.3).

² Furthermore, Art. 8(2) allows the Maritime Administration to provisionally propose the prohibition of navigation in ports and their access channels, as well as the entry and exit of ships when there are “reasons of protection, emergency, public security, and environmental or public security reasons”. In this regard, according to Art. 266.4.a) and b) of the Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act ([BOE No. 253](#), 20 October 2011), “the authorisation or prohibition of entry and exit of ships in waters situated in zones in which Spain exercises sovereignty, sovereign rights or jurisdiction, and the dispatch of ships” corresponds to the harbour master, along with the designation of “prohibited zones for navigation for reasons of maritime safety and protection [security], safety of navigation, the prevention and combating of marine contamination or other duly justified causes”. On this question, see the contribution in this volume by Díez-Hochleitner on “[Maritime zones under sovereignty and navigation](#)”.

³ When the wreck of the frigate *Nuestra Señora de las Mercedes* was plundered, the *Ocean Alert* (12th July 2007) and the *Odyssey Explorer* (16th October 2007), belonging to the company *Odyssey Marine Explorer*, were intercepted by the Maritime Service of the Civil Guard on leaving the port of Gibraltar in execution of an order from the Examining Magistrate's Court N° 3 of La Línea de la Concepción. Both ships were transferred to the port of Algeciras in order to be inspected and their occupants to be identified. The captain of the latter ship was arrested for a crime of disobedience, after denying access to the ship and not providing the means for the ship to be boarded. On this question, see the contribution in this volume by Carrera Hernández on “[Protecting Underwater Cultural Heritage](#)”.

⁴ On this question, see the contribution in this volume by Díez-Hochleitner on “[Maritime zones under sovereignty and navigation](#)”.

⁵ According to paragraph 2, the unauthorised extraction of archaeological and historic objects found on the seabed or subsoil of water in the contiguous zone shall be considered a breach of the laws and regulations referred to in the preceding Section, as well as of the provisions on underwater cultural heritage.

These provisions relating to policing navigation are complemented by the legislation regarding State ports and merchant shipping. Thus, the Royal Legislative Decree 2/2011, of 5th September, which approved the Consolidated Text of the Law on State Ports and Merchant Marine states that “in order to prevent the carrying out of unlawful activities or the exercise of any prohibited trafficking, the Government may impede, restrict or condition the navigation of certain categories of civil ships in internal waters, the territorial sea or the contiguous zone” (Article 301).

More specifically, in matters relating to maritime security, Royal Decree 1617/2007, of 7th December, setting measures to improve protection of ports and maritime transport⁶ establishes measures to “increase the protection of ports against the threat of deliberate events or unlawful acts which affect maritime security, and to determine the competent entities and institutions in the application of the measures contained in the legislation relating to the protection of maritime transport”. As far as the safety of navigation is concerned, Article 3 of Royal Decree 394/2007, of 31 March, on measures applicable to vessels in transit carrying out discharge in Spanish maritime waters⁷ regulates the policing measures which may be adopted by the Spanish Maritime Administration in collaboration with other coastal States and with port States in order to avoid the discharge of contaminating substances in Spanish maritime waters by vessels in transit⁸. These measures must be compatible with the rules contained in Part XII, section 7, of the LOSC.

As far as fishing is concerned⁹, the exercise of policing powers is regulated by Royal Decree 176/2003, of 14 February, regulating the monitoring and enforcement of sea fishing activity¹⁰, which defines maritime fishing inspectors carrying out their jobs as law enforcement officer (Article 2.2) and defines their sphere of activity (Article 3) and their roles (Article 4). To this effect, it is stipulated that, if necessary, to ensure the effective fulfilment of their task, fishing inspectors may request the support of the State and Autonomous Communities law enforcement agencies¹¹.

As for the fight against different kinds of unlawful trafficking, Law 12/1995, of 12 December, on the suppression of smuggling¹² includes within this offence the clandestine contraband or transshipment of any kind of goods within internal waters or in Spanish territorial sea or contiguous zone, or in the

⁶ BOE No. 304, 20 December 2007.

⁷ Royal Decree 394/2007, 31 March 2007, on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters, transposing EP and Council Directive 2005/35/EC (OJ 2005 L 255/11) ([BOE No. 81](#), 4 April 2007).

⁸ Paragraph 2 of this article establishes that “when there is evidence that a vessel navigating in Spanish territorial waters or waters in the Spanish exclusive economic zone has carried out a contaminating discharge which entails or may entail considerable prejudice to the natural resources of these waters, to the coast or to contiguous areas, the Spanish Maritime Administration shall adopt the necessary police measures including, when appropriate, the detention of the ship, for the protection of this legal interests. If necessary, appropriate disciplinary proceedings shall be initiated or the case shall be forwarded to the public prosecutor. The flag State of the ship must be informed in all cases”.

⁹ On actions against IUU fishing and the jurisdictional limits of the Spanish courts, see the contribution in this volume by Pons Rafols on “[IUU fishing](#)”.

¹⁰ BOE No. 50, 27 February 2003.

¹¹ However, the Ministry of Agriculture and Fisheries, Food and Environment lacks the necessary material means to effectively carry out these surveillance tasks on fishing. Therefore, agreements have been signed with the Ministry of Defence and the Ministry of the Interior so that ships belonging to the Navy and the Maritime Service of the Civil Guard may collaborate in inspection and monitoring activities.

¹² BOE No. 297, 13 December 1995.

circumstances set out in article III of the LOSC (Article 2(1)(g))¹³. As far as the unlawful trafficking of weapons is concerned¹⁴, Article 11 of Law 53/2007, of 28 December, on the control of foreign trade in defence and dual-use material¹⁵ enables the Spanish authorities to confiscate defence material, other material and products and technology of dual use in transit through the maritime area which is subject to Spanish sovereignty, when the circumstances set out in Article 8 of the Law arise.

(B) THE EXTRA-TERRITORIAL EXERCISE OF MARITIME LAW ENFORCEMENT JURISDICTION

The Spanish authorities may also exercise their maritime law enforcement jurisdiction extra-territorially, in other words, over vessels whose flag State is not Spain and outside of maritime zones in which Spain has sovereignty or sovereign rights. This is made possible due to the attribution of jurisdiction laid out in Article 23(4) of Law 6/1985, of 1 July, on the Judicial Power, in the version resulting from Law 1/2014, of 13 March, modifying the Organic Law 6/1985, of 1 July, of the Judicial Power, on Universal Jurisdiction¹⁶. The afore-mentioned provision, in section (d), establishes the jurisdiction of the Spanish courts relating to “crimes of piracy, terrorism, the illegal trafficking of toxic drugs, narcotic drugs and psychotropic substances, trafficking in human beings, crimes against the rights of foreign citizens and crimes against shipping safety perpetrated at sea, in those cases envisaged in the treaties ratified by Spain or in the regulatory acts of an International Organisation of which Spain is a member”. “In accordance with this principle, its application is connected to the existence of an international treaty which attributes jurisdiction to Spanish authorities to board, seize and prosecute these crimes¹⁷.”

Without detriment to the questions which arise in relation to the rest of the offences contemplated in section (d)¹⁸, the regulation in section (i) of the article 23(4) of the conditions for the attribution of jurisdiction to Spain in cases of drug trafficking (the Spanish nationality of the suspect or the carrying out of acts with a view to committing such crimes in Spanish territory) has led to problems of interpretation with regard to the interception by the Spanish authorities of vessels used for drug trafficking on the high seas. Such doubts have been resolved in a series of judgements handed down by the Second Division of the Supreme Court, responding to appeals for annulment from the public prosecution service against writs from the Criminal Division of the National High Court (*Audiencia*

¹³ It should be mentioned that this legal text alludes to the LOSC in its definition of smuggling when this treaty did not come into force for Spain until 14th February 1997, whereas Art. 2(1)(i) of Royal Decree 1649/1998, of 24 July, implementing Title II of Organic Law 12/1995, of 12 December, on the repression of smuggling relating to administrative offences of smuggling ([BOE No. 214](#), 7 September 1998) mentions the Geneva Convention on the High Seas, of 29 April 1958, when Spain was already part of the LOSC.

¹⁴ On 21st August 2015, the replenishment oiler *Cantabria*, part of the Standing NATO Maritime Group 2, boarded and searched a merchant vessel on the high seas as part of the NATO operation *Active Endeavour*. The merchant vessel boarded was suspected of the unlawful trafficking of weapons and activities related to terrorism. On the Spanish participation in NATO naval operations, see the contribution in this volume by Espaliú Berdud on “[Security and military questions](#)”.

¹⁵ [BOE No. 312](#), 29 December 2007.

¹⁶ Organic Law 1/2014, 13 March 2014, on Universal Jurisdiction ([BOE No. 63](#), 14 March 2014).

¹⁷ This has been confirmed by the Supreme Court in the STS 592/2014, 24 July 2014 (ECLI: ES:TS:2014:3082) and in the STS 1977/2015, 25 March 2015 (ECLI: ES:TS:2015:1977).

¹⁸ On this question, see the contribution in this volume by García Andrade on “[Migrants by Sea](#)”.

Nacional) which confirmed the dismissal of criminal proceedings following drug crimes decreed by the Central Examining Magistrate's Courts in accordance with an "unexpected" lack of jurisdiction resulting from the modification of Article 23.4 of the Organic Law on the Judicial Power put into effect by Organic Law 1/2014.

In these judgements, the Supreme Court recognises that the vague wording of these provisions has given rise to diverging interpretations. Faced with this situation, the Court has clarified that sections (d) and (i) of Article 23.4 establish two distinct and autonomous rules for attributing jurisdiction. Although they refer to the same types of conduct (crimes relating to the illegal trafficking of drugs, narcotics or psychotropic substances), both "are distinguished by one fundamental element: section (d) is applied specifically when dealing with actions carried out in "marine areas" (international waters), whereas if this circumstance is not met, section i) shall be applied". Therefore, as the Supreme Court has pointed out, section (d) must be applied in a preferential manner when international treaties allow for such an attribution so that via a legislative act of the concerned State (such as Organic Law 1/2014) "it can be proclaimed that jurisdiction is held with the entitlement of the aforementioned international treaties"¹⁹.

This interpretation also extends to actions carried out in the contiguous zone. In relation to this aspect, the Public Prosecution Service has expressly stated that "the contiguous zone allows the coastal State to take the afore-mentioned measures. Thus, while not forming part of the national territory, our domestic law foresees the commission of crimes which can be prosecuted in Spain. Therefore, it can be considered that we are dealing with a crime committed outside of the national territory, as laid out in Article 23(4)(d) of the Organic Law on the Judicial Power"²⁰.

Spain's exercising of maritime law enforcement jurisdiction in an extra-territorial dimension may also be provided for in cooperation agreements with other States which allow for joint patrols, as is the case of the *Agreement between Spain and Cape Verde on the joint surveillance of maritime spaces under Cape Verde's sovereignty and jurisdiction*²¹.

(C) THE LACK OF A SINGLE STATE AGENCY RESPONSIBLE FOR THE SURVEILLANCE AND MONITORING OF MARITIME ZONES OVER WHICH SPAIN HAS SOVEREIGNTY, SOVEREIGN RIGHTS OR JURISDICTION

The complexity and fragmentary nature that characterises the regulation of maritime policing powers is demonstrated in the institutions responsible for carrying them out. What is more, the term "Maritime Administration" employed by the Spanish legislation does not correspond to a set of institutions that can exercise these powers. Mention is made exclusively to the Ministry for

¹⁹ STS 592/2014, 24 July 2014 (ECLI: ES:TS:2014:3082); STS 3089/2014, 24 July 2014 (ECLI: ES:TS:2014:3089); STS 5199/2014, 5 December 2014 (ECLI: ES:TS:2014:5199); STS 5433/2014, 11 December 2014 (ECLI: ES:TS:2014:5433). Also, the STS 3581/2016, 15 July 2016 (ECLI: ES:TS:2016:3581) in relation to the interception of a ship in international waters by the Civil Guard 26 miles from the Portuguese coast.

²⁰ STS 866/2014, 11 December 2014 (ECLI: ES:TS:2014:5433).

²¹ BOE No. 136, 5 June 2009. On this question, see the contribution in this volume by García Andrade on "[Migrants by Sea](#)".

Development (the Directorate General of the Merchant Marine), which is responsible for the management and monitoring of maritime traffic in waters over which Spain has sovereignty, sovereign rights or jurisdiction²². In reality, the Spanish Administration has no single agency responsible for the surveillance and monitoring of maritime areas. This fact is reflected in Article 223 of Royal Decree 876/2014, of 10 October, approving the General Regulations on Coasts²³, which establishes in paragraph 2 that “the functions of the General Administration of the State in the territorial sea, internal waters, the economic zone and the continental shelf in matters of defence, fisheries and aquaculture, rescue missions, the combating of pollution, human safety at sea, the extraction of remains, the protection of Spanish archaeological heritage, research and the exploitation of resources [...] shall be exercised in the appropriate manner and by the departments or institutions to which they have been entrusted”. This fragmentation of maritime policing powers may give rise to a serious lack of coordination among the different ministries and agencies (not to mention the powers which may be held by the Autonomous Communities and local entities)²⁴, which, in theory, operate independently. In the light of this fact, collaboration among different ministries with powers concerning the surveillance and monitoring of maritime zones is essential for their roles to be carried out appropriately²⁵.

In accordance with the provisions of the LOSC, which attributes the exercise of maritime law enforcement jurisdiction to warships and other vessels which are clearly indicated and identifiable as being at the service of a government or authorised for that purpose, there are three State agencies in Spain which dispose of the means to exercise such jurisdiction. These agencies are distributed among three ministries: The Ministry of Defence, the Ministry for Home Affairs and the Ministry of Finance and Public Administrations. In addition to the vessels of the Spanish Navy and those of the

²² This results from Art. 263 of the Law on State Ports and Merchant Marine.

²³ [BOE No. 247](#), 11 October 2014.

²⁴ One example of the powers of the Autonomous Communities concerning surveillance and maritime monitoring can be found in the case of Galicia with Law 2/2004, of 21 April, on the creation of the Galician Coastguard Service ([BOE No. 113](#), 10 May 2004).

²⁵ This willingness to promote inter-ministerial collaboration is reflected in the Additional Provision Four of the Law on State Ports and Merchant Marine and has led to the signing of several agreements, such as the Interdepartmental Agreement between the Ministry of Defence and the Ministry for Home Affairs on collaboration and coordination between the Navy and the Civil Guard in the marine environment, of 14 February 2006; the Interdepartmental Agreement between the Ministry of Defence and the Ministry for Home Affairs in combating the unlawful trafficking of drugs, of 14 February 2006; the Protocol on inter-ministerial collaboration in combating human trafficking by sea, of 29 July 2005; the Interdepartmental Agreement between the Ministry of Defence (Navy) and the Ministry for Development (State Ports) on the interchanging of information; the Agreement between the Ministry of Defence and the Spanish Tax Agency on collaboration in the maritime context, of 14 September 2011; the Joint Agreement between the Ministry of Defence and the Ministry of Agriculture, Fishing and Food on the inspection and surveillance of maritime fishing activities, of 24 October 1988; the Framework Agreement between the Ministry for Home Affairs and the Ministry of Agriculture, Fishing and Food on the monitoring, inspection and surveillance of maritime fishing activities of 12 November 1997; the Agreement between the Ministry for Home Affairs (the Directorate General of the Civil Guard) and the Ministry of Agriculture, Food and Environment (General Secretariat of Fisheries) for the coordination of the use of helicopters in activities relating to surveillance missions of fishing activities, of 14 December 2015; the Interdepartmental Agreement between the Ministry of Defence and the Ministry of Culture on collaboration and coordination in the area of the protection of subaquatic archaeological heritage, of 9 July 2009; the Agreement between the Ministry for Home Affairs and the Ministry of Culture, of 21 December 2011 in order to apply the SIVE programme.

Customs Surveillance Service (which, according to Decree 1002/1961, of 22 June, of maritime surveillance²⁶ are classified as “auxiliaries of the Navy”²⁷), ships belonging to the marine service of the Civil Guard are also considered as vessels of State at the service of public security, surveillance and the repression of unlawful activities.

According to Organic Law 2/1986, of 13 March, on State security forces and services²⁸, in Article 11.2 b), the role of policing in territorial waters corresponds to the Civil Guard²⁹. This attribution of powers was confirmed, and even extended, by Royal Decree 246/1991, of 22 February, which regulates the maritime service of the Civil Guard³⁰. According to the first article of this decree, “the functions that Organic Law 2/1986, of 13 March, on State security forces and services attributed to the Civil Guard Corps shall be exercised in Spanish maritime waters up to the outer limit of the territorial sea determined in the current legislation and, exceptionally, outside the territorial sea, in accordance with what is established in existing international treaties”³¹. Furthermore, the Order of 26 July 1994 on the regime, flagging and registration of ships of the maritime service of the Civil Guard³² states that “the ships of the maritime service of the Civil Guard [...] shall be considered, to all intents and purposes, as ships of the State expressly authorised by the Government to exercise the functions set out by the current legislation”.

However, in the absence of a modification of Organic Law 2/1986, of 13 March, in order to attribute powers to the Civil Guard to act beyond Spanish territorial waters, the position of jurisprudence is not uniform. On occasions, such actions have been backed without recourse to any kind of strong rationale³³. On other occasions, the existence of prior judicial authorisation has been considered sufficient, under the understanding that such operations were supported by the general principle of international cooperation to combat the unlawful trafficking of narcotic drugs and psychotropic substances being carried out by vessels on the high seas and the right of visit contemplated in Articles 108 and 110 of the LOSC respectively³⁴. The Supreme Court has even justified such operations by considering, erroneously, that the Civil Guard forms part of the Spanish Armed Forces³⁵.

On the other hand, the Spanish Customs Surveillance Service (*Servicio de Vigilancia Aduanera*,

²⁶ [BOE No. 157](#), 3 July 1961.

²⁷ They appear as such in the *Lista Oficial de Buques de la Armada*. April 2015.

²⁸ [BOE No. 63](#), 14 March 1986.

²⁹ Art. 7 of Organic Law 2/1986 establishes that the members of the State law enforcement agencies shall have, to all legal purposes, the character of law enforcement officers in the exercise of their functions, which includes the Civil Guard when it acts as a maritime policing force.

³⁰ [BOE No. 52](#), 1 March 1991.

³¹ More specifically, Royal Decree 770/2017, of 28 July, which implements the basic organisational structure of the Ministry for Home Affairs ([BOE No. 180](#), 29 July 2017) entrusts the Civil Guard with the task of “preventing and pursuing contraband, fraud, drug trafficking and other kinds of unlawful trafficking in the sphere of the functions entrusted to the Civil Guard by the current legislation, in addition to the custody, monitoring and surveillance of the coasts, borders, ports, airports and territorial waters and, in this context, the monitoring of irregular immigration”.

³² [BOE No. 181](#), 30 July 1994.

³³ STS 1198/2010, 4 March 2010 (ECLI: ES:TS:2010:1198).

³⁴ STS 2756/2008, 20 May 2008 (ECLI: ES:TS:2008:2756).

³⁵ STS 9617/2001, 10 December 2001 (ECLI: ES:TS:2001:9617).

SVA) is attributed powers in the pursuit of contraband and other related crimes, among which drug trafficking is included. In the exercise of these powers, according to Royal Decree 319/1982, of 12 February, regarding the assignation and restructuring of the Customs Surveillance Service³⁶, the SVA holds responsibility for “the investigation, discovery and prosecution of contraband violations throughout the nation, territorial waters and airspace; to which effect...it will exercise the functions of maritime, air and terrestrial surveillance oriented to this end”³⁷. Furthermore, according to the First Additional Provision No.1 of Organic Law 12/1995, of 12 December, regarding the repression of smuggling, in “the investigation, persecution and uncovering of smuggling activities [...] The Customs Surveillance Service shall act in coordination with the State law enforcement agencies and shall have the legal status of collaborator with the latter in the investigation, persecution and repression of smuggling”³⁸.

Although officers of the SVA are recognised as law enforcement officers, the exercise of their role as judicial police has not been exempt from controversy as far as the boarding and inspection of ships transporting drugs in the contiguous zone and on the high seas is concerned. In these cases, the Supreme Court has reasserted the role of the SVA as judicial police in several judgements, based on the interpretation contained in the Consultation of the Attorney General of the State 2/1999, of 1 February and in the agreement of the non-jurisdictional plenary meeting of the Second Division of the Supreme Court of 14 November 2003³⁹. According to this decision, the SVA is not considered to be judicial police in the strict sense, due to the fact that it is not included in Article 283 of the Criminal Procedural Act⁴⁰, although it is in a generic sense on the basis of the drafting of the first paragraph of this Act. As a consequence, the objection to “the actions of a service such as the Customs Surveillance Service, equipped with the means to carry out interceptions and to board ships trafficking drugs in international waters as judicial police, accompanied or not by members of other State law enforcement agencies, lacks any legal basis”⁴¹.

Last of all, the role played by the Spanish Navy must be highlighted, as it also carries out maritime law enforcement operations as set out in Organic Law 5/2005, of 17 November, on National Defence⁴². Article 16.a) mentions “the surveillance of maritime areas as a contribution to the action of the State

³⁶ [BOE No. 48](#), 25 February 1982.

³⁷ According to Art. 16(1) of Organic Law 12/1995, of 12 December, on the repression of smuggling, in the exercise of their functions of monitoring and surveillance, they may undertake to search and inspect any vehicle or means of transport.

³⁸ In this regard, Art. 9 of Royal Decree 319/1982, of 12 February, establishes that “in carrying out their mission, the civil servants of the Customs Surveillance Service shall have the character of law enforcement officers and shall have, within their powers, the faculties and attributions laid out in the prevailing Laws for civil servants charged with investigating and uncovering the corresponding offences”.

³⁹ STS 3207/2006, 19 May 2006 (ECLI: ES:TS:2006:3207); STS 605/2007, 23 January 2007 (ECLI: ES:TS:2007:605); STS 3605/2007 20 April 2007 (ECLI: ES:TS:2007:3605); STS 4517/2007, 22 June 2007 (ECLI: ES:TS:2007:4517); STS 1410/2010, 3 March 2010 (ECLI: ES:TS:2010:1410); STS 7050/2010, 10 December 2010 (ECLI: ES:TS:2010:7050).

⁴⁰ The consolidated text incorporates all the amendments up to Organic Law 13/2015 of October 5, 2015, on Reform of the Criminal Procedural Law on Strengthening Procedure Guarantees and Regulating Technological Research Measures ([BOE No. 239](#), 6 October 2015).

⁴¹ STS 4685/2009, 16 June 2009 (ECLI: ES:TS:2009:4685)

⁴² Organic Law 5/2005, 17 November 2005, on National Defense ([BOE No. 276](#), 18 November 2005). On this question, see the contribution in this volume by Espaliú Berdud on “[Security and military questions](#)”.

at sea” among the operations to be carried out by the Armed Forces⁴³. Within the structure of the Navy, the Maritime Security and Surveillance Command is “responsible for the planning, conducting and monitoring of surveillance and security operations in maritime zones of sovereignty, responsibility and national interest”⁴⁴. However, this role is merely a participation in the exercise of powers attributed to other State Administration bodies and is of a subsidiary nature. In order to carry out these functions, according to Royal Decree 194/2010, of 26 February, on the rules on security in the Armed Forces⁴⁵, members of the Navy shall have “the character of law enforcement officers in the exercise of functions of surveillance and maritime security legally attributed or due to international agreements subscribed to by Spain, which shall be carried out without prejudice to those attributed to members of the State law enforcement agencies or to members of other bodies with the role of maritime surveillance in the exercise of their powers” (Additional Provision First (4)).

(D) MEASURES WHICH MAY BE TAKEN BY THE SPANISH AUTHORITIES REGARDING MARITIME LAW ENFORCEMENT OPERATIONS.

As far as the exercising of maritime policing powers are concerned, the State authorities responsible for the surveillance and monitoring of Spanish maritime zones may adopt a series of measures to combat offences committed by both Spanish and foreign ships. However, no Law exists in Spain which lists or defines these measures in a systematic manner.⁴⁶ The most complete list in current

⁴³ In Annex D of the *Strategic Revision of Defence* (Ministry of Defence, Madrid, 2003) it is established that the contribution of the Navy to State action at sea includes “the naval presence and surveillance of our key maritime areas, the exercise of sovereignty in our territorial waters and the collaboration, along with the other State Institutions with competences at sea, in tasks such as maritime law enforcement, the combating of marine pollution, scientific research, hydrographic work, the maintenance of submarine archaeological heritage, search and rescue and cooperation in all tasks of civil protection.”

⁴⁴ Ministerial Order 86/2012, of 4 de December, establishing the Surveillance and Maritime Security Command and the Defence and Air Operations Command (*Boletín Oficial del Ministerio de Defensa* n° 242, 13 December 2012).

⁴⁵ [BOE No. 64](#), 15 March 2010.

⁴⁶ When negotiating current Law 14/2014 on Maritime Navigation, its 2008 Draft included a wide-ranging list of these kinds of measures was included in then Chapter VIII of Title I, which was dedicated to the power to intercept, inspect and detain ships. Art. 81(1) in particular, which was aimed at defining the general framework of the powers of maritime policing, established that “the Maritime Administration and the other competent bodies of the General Administration of the State may intercept, request information, visit, inspect, detain, escort to port and adopt any other measure which is deemed necessary” in order to safeguard the safety of navigation, prevent the pollution of marine environment and ensure the observance of the applicable laws and regulations “regarding national ships which contravene these legal rights or infringe upon the afore-mentioned laws”. Paragraph 2 of this same article states that these measures may be adopted “regarding foreign ships which are navigating in Spanish maritime zones, respecting the provisions in this Act for ships from foreign States and in matters of right of hot pursuit”. Paragraph 3 establishes the obligation to inform the diplomatic or consular representative of the flag State “of the measures adopted in the shortest possible time.” In a complementary manner, Art. 82 conferred upon the “personnel endowed with public functions of inspection or monitoring” the power to board ships which were the object of maritime law enforcement action in order to carry out “the necessary inspections and actions”, albeit with prior judicial authorisation to gain access to the cabins when opposition arises on the grounds of the inviolability of domicile. To that end, concerning ships in port or in internal waters, Article 20(2) of the Draft established that “the judicial authority may order the appropriate diligences to be performed aboard, as well as boarding and searching the ship, including its cabins, with no further requisite than notification to the Consul of the flag state as soon as possible”, as current Law 14/2014 does in its Art. 12(2). See the 2008 Draft at *Boletín de las Cortes Generales. Congreso de los Diputados, IX Legislatura, Serie A. N° 14-I*, of 19 December 2008.

legislation can be found in Article 297 of the Law on State Ports and Merchant Marine, which states that:

“In waters in which Spain exercises sovereignty, sovereign rights or jurisdiction, with the aim of safeguarding safety of navigation and preventing the pollution of the marine environment, the Ministry for Development, by way of the Port Authorities and Harbour Masters, may visit, inspect, condition the anchoring, seize, initiate legal proceedings and, in general, adopt the measures which are deemed necessary regarding ships which infringe upon, or may infringe upon, these legal rights.”

Although these measures have the objective of guaranteeing safety of navigation and preventing the pollution of the marine environment, they may also be appropriate in combating other types of offences committed in the maritime environment⁴⁷. Furthermore, in certain cases, the possibility of retaining or immobilising the offending ship is contemplated⁴⁸.

These measures can be adopted in the maritime zones over which Spain exercises sovereignty and jurisdiction⁴⁹. However, Law 14/2014 on Maritime Navigation only mentions maritime law enforcement measures which can be adopted in the contiguous zone. More specifically, the Spanish maritime authorities shall have the right to intercept, request information and carry out the appropriate inspection of any foreign ship located in that area which may have infringed, is infringing or may have the intention of infringing the customs, fiscal, health or border control and immigration laws or regulations, or may be carrying out the “unauthorised extraction of archaeological and historic objects found on the seabed or subsoil of water in the contiguous zone” (Article 35(1))⁵⁰. In order to prevent or punish the infraction of these laws and regulations, if appropriate, other necessary and proportional measures can be adopted, including arrest and escorting to port (Article 35(2)).

In addition, Law 14/2014 also makes reference to the rights of hot pursuit and of visit (Article 48) and to the escorting to port of ships which have been the object of the exercise of such rights (Article

⁴⁷ In this way, Decree 1002/1961, of 22 June ([BOE No. 157](#), 22 June 1961), recognised the power of the SVA to “detain, inspect and apprehend Spanish and foreign ships suspected of carrying out smuggling whilst navigating in Spanish territorial waters” (Art. 3).

⁴⁸ The detention of the ship as a precautionary measure as part of an infringement procedure is set out in Art. 320 of the Law on State Ports and Merchant Marine and in Art. 20 of Royal Decree 1737/2010, 23 December 2010, transposing EP and Council Directive 2009/16/EC on Port State Control, and repealing Directive 95/21/EC (OJ 2009 L 131/57) ([BOE No. 317](#), 30 December 2010), amended by Royal Decree 1004/2014, 5 December 2014, transposing EP and Council Directive 2013/28/EU, amending Directive 2009/16/CE (OJ 2013 L 218/1) ([BOE No. 295](#), 6 December 2014).

⁴⁹ The exercise of these law enforcement measures in the ports was raised in the case of the M/V *Louisa*, who was seized when it was docked in a Spanish port in the context of criminal proceedings relating to the alleged violations of Spanish laws on the protection of the underwater cultural heritage and the possession and handling of weapons of war in Spanish territory. In this case, the International Tribunal for the Law of the Sea stated “that there is no provision in the Convention which requires a port State to notify the flag State or to obtain the authorization of the flag State or of the master of a foreign vessel operated for commercial purposes such as the M/V “*Louisa*” before boarding and searching such a vessel docked at its port”. M/V “*Louisa*” (*Saint Vincent and the Grenadines v. Kingdom of Spain*), *Judgment*, ITLOS Reports 2013, at 39-40. On this question, see the contribution in this volume by Díez-Hochleitner on “[Maritime zones under sovereignty and navigation](#)”.

⁵⁰ In the application of the legislation regarding the protection of cultural heritage, naval vessels intercepted the *Seaway Invincible* (December 2012) and the *Seaway Endeavour* (26 May 2013) in waters of the Alborán Sea, in the Spanish contiguous zone, under the suspicion of searching for shipwrecks. Following their identification and inspection, the former was expelled from Spanish waters while the latter was escorted to the port of Algeciras in order to carry out an inspection.

49)⁵¹. In the regulation of these rights, this Act opts for “the use of the technique of remission according to the content of the international texts applicable to the different aspects of maritime navigation”⁵². In particular, it stipulates that these rights “shall be exercised for the reasons and in the manner established in the United Nations Convention on the Law of the Sea and other applicable international conventions.”

As far as the right of hot pursuit is concerned, Decree 1002/1961 states that “the pursuit of foreign ships must begin whilst they are located in waters under Spanish jurisdiction and may be continued outside of territorial waters on the condition that it is not interrupted. As regards Spanish ships, pursuit may be carried out in any case and circumstance. In both cases, the pursuit must cease when the ship being pursued enters the territorial waters of another State” (Article 3).

The right of visit has not been the object of any specific regulation⁵³, although its content has been clarified by jurisprudence with regard to the exercise of extra-territorial maritime law enforcement jurisdiction derived from Article 23(4)(d) of the Organic Law of the Judicial Power. The Supreme Court has stated that this provision “confers jurisdiction on Spanish authorities to board, inspect, confiscate substances and detain the crew of any ship which flies the flag of another State, on the condition that authorisation is obtained from that State”⁵⁴. The jurisprudence of this Court has reiterated the need for prior authorisation from the flag State in order to fulfil what is established in Articles 97(3) and 108 of the LOSC, in addition to Article 17(3) and 17(4) of the United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances of Vienna of 1988⁵⁵. The State may establish its jurisdiction for the purposes of judging the accused when giving authorisation⁵⁶, or possess it by virtue of agreements adopted on the basis of Article 17.9 of the 1988 Convention, such as the *Treaty between the Kingdom of Spain and the Portuguese Republic to combat illicit drug trafficking at sea*, signed in Lisbon on 2 March 1988⁵⁷ and the *Treaty between the Kingdom of Spain and the Italian Republic*, signed in Madrid on 23 March 1990⁵⁸.

⁵¹ Inexplicably, the English version of Law 14/2104, carried out by the Spanish Ministry of Justice, uses the terms “the rights to pursue and inspect” that does not correspond with those of Arts. 110 and 111 LOSC.

⁵² General Council of the Judiciary, *Report on the draft bill of the Law on Maritime Navigation*, of 20 December 2012.

⁵³ In the case of the Navy, the operational procedure to be followed in unopposed and non-cooperative boarding operations is detailed in D-SF-71 (A), *Procedimientos de actuación de los trozos de visita y registro*, General Staff of the Navy, May 2010.

⁵⁴ STS 648/2016, 15 July 2016 (ECLI:ES:TS:2016: 3581)

⁵⁵ STS 2487/2001, 26 March 2001 (ECLI: ES:TS:2001:2487); STS 1398/2003, 28 February 2003 (ECLI: ES:TS:2003:1398); STS 7739/2003, 3 December 2003 (ECLI: ES:TS:2003:7739); STS 2756/2008, 20 May 2008, (ECLI: ES:TS:2008:2756); STS 592/2014, 24 July 2014 (ECLI: ES:TS:2014:3082); STS 3089/2014, 24 July 2014 (ECLI: ES:TS:2014:3089); STS 5199/2014, 5 December 2014 (ECLI: ES:TS:2014:5199); STS 5433/2014, 11 December 2014 (ECLI: ES:TS:2014:5433). Exceptionally, the STS 7476/2003, of 25 November 2003 (ECLI: ES:TS:2003:7476) states that “the fact remains that the omission of requesting the pertinent authorisation does not have the consequences that the appellant State may attach to it. In other words, in any case it may constitute an irregularity which does not invalidate the boarding, neither does it extend its consequences to the examination of the evidence obtained without authorisation”.

⁵⁶ However, in some cases, confusion remains regarding the effects attributed to the possible reservation of jurisdiction over the ship, its crew and the goods on board held by the flag State when giving authorisation, STS 3370/2007, of 4 May 2007 (ECLI: ES:TS:2007:3370).

⁵⁷ BOE No. 18, 20 January 2001. STS 4587/2015, 11 November 2015 (ECLI: ES:TS:2015:4587STS) and 5245/2015, 14 December 2015 (ECLI: ES:TS: 2015:5245).

⁵⁸ BOE No. 108, 6 May 1994. With the same aim of developing Art. 17(3) of the United Nations Convention, Spain

Likewise, the practice confirms that the right of visit can be exercised without authorisation in cases in which the ship does not exhibit an identifiable flag⁵⁹ or when the ship is “officially sailing without a flag and the apparent flag State of the ship relinquishes responsibility”⁶⁰. This circumstance is not only common in the case of the unlawful trafficking of drugs but, as is clearly shown in practice, is also frequent in the case of vessels which are used in the unlawful trafficking of immigrants by sea to Spain⁶¹.

(E) THE USE OF FORCE IN MARITIME LAW ENFORCEMENT OPERATIONS

As far as the exercising of these policing powers at sea are concerned, Spanish legislation has been extremely imprecise regarding the employment of coercive measures and, particularly, the use of force. The Organic Law 9/1970, of 4 July, on the Navy established that the Navy “shall have the specific mission of achieving the maritime objectives of the Nation in peace and at war, making use of force when necessary”⁶². This extremely generic reference does not allow for a definitive clarification on whether this use of force refers to situations which are not prohibited by Article 2.4 of the United Nations Charter or whether it includes maritime law enforcement activities, as Article 1.4 of this Act attributes to the Navy the mission of “ensuring the fulfilment of Laws and national and international Agreements in the maritime context”.

Only Decree 1002/1961, of 22 June, relating to the Customs Surveillance Service recognises that “fiscal surveillance ships shall be equipped with the fixed and mobile weaponry necessary for the fulfilment of their mission, being able to employ them in case of self-defence and for the arrest at sea of suspicious ships” (Article 8)⁶³.

Although the above-mentioned *Draft Maritime Navigation Act* made reference to these types of measures in its Articles 82(3) and (4)⁶⁴, Law 14/2014 does not contain any specific mention of them⁶⁵.

presented an “Initiative of the Kingdom of Spain with a view to adopting a Council Act establishing in accordance with Article 34 of the Treaty on European Union, the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas” (OJ 2002 C 45/8).

⁵⁹ STS 5577/2006, 20 September 2006 (ECLI: ES:TS:2006:5577); STS 4310/2016, 4 October 2016 (ECLI: ES:TS:2016:4310).

⁶⁰ STS 2040/2008, 15 May 2008 (ECLI: ES:TS:2008:2040)

⁶¹ STS 4011/2007, 25 June 2007 (ECLI: ES:TS:2007:4011); STS 5261/2007, 5 July 2007 (ECLI: ES:TS:2007:5261); STS 96/2008, 3 January 2008 (ECLI: ES:TS:2008:96). On this question, see the contribution in this volume by García Andrade on “[Migrants by Sea](#)”.

⁶² [BOE No. 161](#), 7 July 1970.

⁶³ In this regard, Royal Decree 319/1982 establishes that “due to the nature of their missions and their condition of law enforcement officers, they shall be authorised to use weapons, in conformity with what has been established in Decree 1002/1961, of 22 June, regulating maritime surveillance.”

⁶⁴ The text of Art. 82(3) is as follows: “In any case and if it is deemed necessary, the competent Administration shall adopt the necessary and proportional coercive measures in order to prevent the offending vessel from derogating from its obligations, sanctions and responsibilities.” And Art. 82(4) says: “To this effect, the collaboration of the State law enforcement agencies can be sought, who shall act in accordance with the provisions of the regulating legislation, including, when necessary, the use of weapons”.

⁶⁵ However, this could be inferred from the generic mention made in Art. 35.2 of this Act to the special measures which may be adopted in the contiguous zone. This article states that “[w]here necessary, other necessary and proportional measures may be adopted to prevent or penalise the offence, including arrest and escorting it to port”.

Therefore, it is necessary to turn to laws which regulate law enforcement actions in the fulfilment of their mission in a general way, which can be applied, *mutatis mutandis*, to law enforcement operations at sea⁶⁶. This is confirmed by jurisprudence, as is stated in the writ from the Central Examining Magistrate's Court N° 5 of the National High Court of 26 February 2016 in the case of an attempt to board the drill ship *Rowan Renaissance* on the part of Greenpeace activists in waters close to the Canary Islands⁶⁷. In assessing the coercive measures employed by the Navy, the judge considered that they were legal due to the fact that the military personnel involved were acting as law enforcement officers exercising a role of maintenance of public order in order to guarantee compliance with an administrative decision of the General Directorate of the Merchant Marine (the creation of a maritime exclusion zone) in the face of a "conduct of clear rebellion towards a legitimate authority" on the part of the ecologists, which led them to repeatedly disobey orders to abandon the exclusion zone. Faced with this situation, the Navy's mission was to impede the boarding of the *Rowan Renaissance*, using the minimum degree of non-lethal force.

This writ is significant because it recognises the possibility of employing coercive measures in law enforcement operations at sea. However, it is also relevant due to the fact that it determines the limits and conditions under which the actions of State agents may be considered justified:

"1) that the active subject is a figure of authority or civil servant authorised by the corresponding provisions to make use of violent means in the exercise of the duties of his/her responsibility; 2) that the possible offence may have occurred in the course of carrying out the functions of the corresponding duties; 3) that, in order to carry out the specific duty in the sphere of which his/her activity is being carried out, the use of violence is necessary (an abstract necessity) as, without such violence, it would be impossible to fulfil the obligation incumbent upon him/her at that moment; 4) that the specific violence employed is of the lowest possible degree in order to achieve the intended aim, that is, on the one hand, that the least dangerous means is employed and, on the other hand, that this means is used in the least harmful way possible. All of this shall be measured with a relative order of criteria. In other words, the specific circumstances of the case shall be taken into account, among them the possibilities for action at the disposal of the law enforcement officer (specific necessity); and 5) the proportionality of the violence employed in relation to the situation which led to the intervention of the police".

These requirements have been formulated with a general character by the Supreme Court when it has

⁶⁶ According to the Order of 26 July 1994 on the regime, flagging and registration of ships in the Maritime Service of the Civil Guard, "the Maritime Service of the Civil Guard, with the weaponry incorporated in the ships at its disposal, shall carry out the missions which the Law attributes to it and may make use of weapons, in situations of strict necessity, in accordance with the principles included in Art. 5(2)(c) and (d) of Organic Law 2/1986, of 13 March, on the State Law Enforcement Agencies". These Art. 5(2)(c) and (d) say: "in the exercise of their functions, they shall act with the necessary decisiveness and without delay when the prevention of serious, immediate and irreparable harm depends upon it; guided in the exercise of such functions by the principles of coherence, opportunity and proportionality in the use of the means within reach" and "firearms shall only be used in situations in which there is a rationally serious risk to their life, their physical integrity or to third persons or in those circumstances which may suppose a serious risk to public safety and in accordance with the principles referred to in the previous section." More specifically, and in line with the role of the Civil Guard in the exercise of maritime policing functions, Organic Law 11/2007, of 22 October, regulating the rights and duties of the members of the Civil Guard ([BOE No. 254](#), 23 October 2007) states that "the members of the Civil Guard are obliged to strictly observe the legislation regarding the legitimate use of force and must always respect the life and the physical and moral integrity of the person" (Art. 17).

⁶⁷ AAN 29/2016, 26 February 2016 (ECLI:ES:AN:2016:29A)

prosecuted the actions of law enforcement officers in the carrying out of their function of maintenance of public order. What the judge of the National High Court did in this case was to apply them to a maritime law enforcement operation.

Otherwise, the Spanish authorities have been opposed to the use of coercive measures in the exercise of maritime policing powers, especially in the case of fishing incidents in which Spanish vessels have been involved (seizure of the vessel *Estai* by Canadian authorities)⁶⁸. On the contrary, the use of these measures has been raised in Spanish practice in the framework of the fight against piracy as a consequence of the participation of the Navy in the *Atalanta operation*⁶⁹. The naval force deployed by the European Union (EU NAVFOR Somalia) in the Western Indian Ocean has been authorized to use armed force “to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present”⁷⁰. In the context of this operation, the Ministry of Defense has stated that the rules of engagement allow “the right of self-defence and the use of the minimum force absolutely necessary to fulfil the assigned protection mission and in this case, it would be targeted preferably at the parts of the structures of the ships which pose the least risk of damage to the crew, without excluding of course a risk-based escalation for the protected ships and / or the protection force”⁷¹.

⁶⁸ The objection of Spain to the use of force in the application of enforcement measures in fisheries inspection activities on the high seas by other States than the flag State was included in the declaration made upon the ratification of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The Instrument of Ratification is published in BOE No. 175, 21 July 2004. On this question, see the contribution in this volume by Borrás Pentinat on “[Related agreements and Spain: Fish stocks and marine biological diversity](#)”.

⁶⁹ On this question, see the contribution in this volume by Sobrino Heredia on “[Piracy](#)”.

⁷⁰ This authorization is based on the resolutions approved by the United Nations Security Council and is foreseen in the article 2(d) of Council Joint Action 2008/851/CFSP of 10 November 2008 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 L 301, 12.II.2008).

⁷¹ Request for authorization from the Congress of Deputies for the participation of a Spanish military contingent in the “Operation Atalanta” of the European Union to fight against piracy in Somali waters. Madrid, 21 January 2009. Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, IX Legislatura, 2009, nº 58, p. 18.