



INSIGHT

## OPERATION SOPHIA BEFORE AND AFTER UN SECURITY COUNCIL RESOLUTION NO 2240 (2015)

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**ABSTRACT:** The Insight focuses on the Political and Security Committee Decision (CFSP) 2016/118 of 20 January 2016 concerning the implementation by EUNAVFOR MED operation SOPHIA of United Nations Security Council resolution 2240 (2015). It first provides the general context starting from Operation Sophia's founding instrument, Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED). It then analyses the impact, on the Operation, of Security Council resolution No 2240 (2015), and the consequent Political and Security Committee Decision (CFSP) 2016/118 implementing the former. From a broader perspective, the insight briefly comments on the international politics behind the Operation and the role of the Union in this context. It also reflects on crucial legal issues raised by Council Decision (CFSP) 2015/778 like the place of persons captured and/or rescued on board ships participating in the Operation, the Council's choice of the legal basis and the normative dimension of the Decision.

**KEYWORDS:** CSDP – Operation Sophia – migrant smuggling – human trafficking – Southern Central Mediterranean – UNSC – refugee crisis.

### I. THE CONTEXT. SPECIAL ATTENTION TO OPERATION SOPHIA'S FOUNDING INSTRUMENT: COUNCIL DECISION (CFSP) 2015/778

The Council established Operation Sophia on 18 May 2015<sup>1</sup> following the death, a month earlier, of 800 migrants after the boat in which they travelled sank off the Libyan coast. It is part of the European Union's (EU) comprehensive approach to migration and it constitutes the common security and defence policy (CSDP) military response to human smuggling and trafficking in the Southern Central Mediterranean. The Central Mediterranean route (mostly, from Libya to Italy) is, together with the Western route (mostly, from Morocco or Algeria to Spain) and the Eastern Mediterranean route (mostly, from Turkey to

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<sup>1</sup> Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

Greece), one of the three migration routes into the EU. The Operation is thus designed to tackle human smuggling and trafficking organised in Libya. Sophia is, furthermore, the second CSDP maritime operation, after Operation Eunavfor Atalanta.

According to Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), the Operation is mandated to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers. It shall unfold in three (arguably, four) successive phases, and the Political and Security Committee (PSC) has the power to decide on the transition between the different phases, subject to the assessment of the Council.<sup>2</sup> In a first phase, Sophia shall support the detection and monitoring of migration networks by gathering information and patrolling on the high seas. Phase two consists of two different parts. Sophia shall conduct boarding, search, seizure and diversion, on the high seas, of vessels suspected of being used for human smuggling or trafficking. I will refer to this as phase two A. The Operation shall, moreover, conduct the activities of phase two A also in the territorial and internal waters of the coastal State, subject to the conditions set out in any applicable United Nations Security Council (UNSC) resolution or in the consent of the coastal State. I will call this phase two B. Finally, in a third phase, Operation Sophia shall take all necessary measures against vessels and related assets, including through disposing of them or rendering them inoperable in the territory of the coastal State. This is, again, subject to the consent of the State concerned or any applicable UNSC resolution.

From 22 June 2015<sup>3</sup> to 7 October 2015, Sophia completed its phase one. Following a PSC decision of 28 September 2015, the Operation then transitioned into phase two A, which is the phase in which it is as of March 2016.<sup>4</sup> Since its launch, Sophia is supposed to have rescued more than 8 000 migrants, destroyed more than 60 boats and contributed to the detention of more than 40 suspected human smugglers/traffickers.<sup>5</sup> But the EU wants to be authorised to do more, aware that fighting smugglers and traffickers effectively requires doing so in Libyan waters and from Libyan land. This is why it has been seeking to obtain the consent of the Libyan Government of National Accord (GNA)<sup>6</sup> and/or a UNSC resolution authorising the activities foreseen under phases two B

<sup>2</sup> Arts 6, para. 1, and 2, para. 3, of Council Decision 2015/778.

<sup>3</sup> Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED).

<sup>4</sup> Political and Security Committee Decision (CFSP) 2015/1772 of 28 September 2015 concerning the transition by EUNAVFOR MED to the second phase of the operation, as laid down in point (b)(i) of Article 2(2) of Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

<sup>5</sup> Operation Commander Op Sophia (EEAS), *EUNAVFOR MED - Operation SOPHIA - Six Monthly Report: 22 June-31 December 2015*, of 29 January 2016, released by Wikileaks on 17 February 2016.

<sup>6</sup> The Libyan GNA is the only legitimate Libyan government under Security Council of the United Nations resolution No 2259 of 23 December 2015.

and three of Operation Sophia. The only result of these negotiations is, however, UNSC resolution No 2240 of 9 October 2015, which does not allow Sophia to move from phase two A, since it only provides for operations on the high seas. The resolution authorises to inspect, on the high seas off the Libyan coast, vessels suspected of being used for migrant smuggling or human trafficking from Libya (para. 7). If suspicions are confirmed, the UNSC authorises to seize the vessels, including their disposal, and to use all necessary measures against migrant smugglers or human traffickers (paras 8 and 10). Exactly three months after UNSC resolution No 2240 (2015) was approved, on 20 January 2016, the PSC adopted Decision (CFSP) 2016/118<sup>7</sup>, implementing the former.

In what follows, I will take a closer look at legal issues raised in the Decision 2016/118 and UNSC resolution No 2240 (2015), as well as in Council Decision 2015/778, more generally. These include the effects of UNSC resolution No 2240 (2015) as regards Operation Sophia, the international legality (and politics) of the Operation, as well as the Council's choice of the legal basis.

## II. POLITICAL AND SECURITY COMMITTEE DECISION (CFSP) 2016/118: WHAT'S NEW AFTER SECURITY COUNCIL RESOLUTION NO 2240 (2015)?

Art. 1 of Decision 2016/118 reads as follows:

"The European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) is hereby authorised to conduct boarding, search, seizure and diversion, on the high seas, of vessels suspected of being used for human smuggling or trafficking under the conditions set out in UNSC Resolution 2240 (2015), in accordance with Decision (CFSP) 2015/778, for the period set out in that Resolution including any subsequent extensions of that period by the Security Council".

The activities authorised in this provision coincide with those foreseen under phase two A of Sophia's mandate, which the Operation has been conducting since 7 October 2015. What is then the impact, in practical terms, of this PSC Decision, implementing UNSC resolution No 2240 (2015), on Operation Sophia? A first result is that, for the first time, Sophia's legal framework explicitly recognises that the Operation targets migrant smuggling and human trafficking from Libya. Even though only in a Recital (No 5), the PSC states that Sophia will operate on the high seas "off the coast of Libya". The PSC explicitly states that this innovation is, however, not fundamental to what Operation Sophia can do. According to the PSC, UNSC resolution No 2240 (2015) "reinforces the au-

<sup>7</sup> Political and Security Committee Decision (CFSP) 2016/118 of 20 January 2016 concerning the implementation by EUNAVFOR MED Operation SOPHIA of United Nations Security Council Resolution No 2240 (2015).

thority to take measures against the smuggling of migrants and human trafficking from the territory of Libya and off its coast”.<sup>8</sup>

A second consequence of the resolution is that Operation Sophia is now authorised to interdict not only unflagged vessels but also Libyan vessels (*para. 7 et seq.*). According to the UNSC, an operation like Sophia requires its authorisation or the consent of the State concerned to undertake the activities foreseen in phase two A (i.e. even when operating on the high seas) if the vessels interdicted are not without a nationality. Although not mentioned in Sophia’s mandate, the distinction between flagged and unflagged vessels is present in Council Decision 2015/778. Recital No 7 states: “on the high seas, States may interdict vessels suspected of smuggling migrants, where there is a flag State authorisation to board and search the vessel or where the vessel is without nationality”.

### III. SOPHIA AND THE EU IN THE WORLD: INTERNATIONAL POLITICS BEHIND THE OPERATION

To be able to move to phases two B and three of the Operation, the Union has been negotiating with its counterparts: member States at the UNSC and the Libyan GNA. At the UNSC, it has encountered the opposition of China and Russia. Its bilateral negotiations with the Libyan GNA have not been successful either. Interestingly, Wikileaks’ release of the EU Restricted Six-Monthly Report of Operation Sophia uncovered the Rear Admiral Enrico Credendino (Sophia’s Operation Commander) diplomatic strategy. The EU intends to convince Libya to give its consent by giving “the Libyan authorities something in exchange”. This shall be the capacity building of the Libyan navy and coast-guard, which Credendino suggests could also be done by Sophia. This can be considered a practical example of what “the EU’s comprehensive approach” is about. The Union is intervening in international politics by making a strategic use of its wide toolbox: it wants to obtain the Libyan GNA invitation, which is fundamental to realise the full mandate of Sophia, by offering the Libyan authorities military capacity building in return.

With Operation Sophia, the EU shows proactivity and ambition regarding its role on the international scene. First, the EU did not simply react to a UNSC resolution or wait for the Libyan GNA invitation to establish Sophia. UNSC resolution No 2240 (2015) only arrived on 9 October 2015, when the Operation had been active for four months, and had already transitioned into phase two A. Second, this is the first time when a CSDP operation foresees the possibility of acting in the territorial and internal waters, as well as on land of a sovereign State, without having the consent of that State, but with the only authorisation of the UNSC. Third, the EU is actively working to convince its counterparts to create international instruments enabling it to do more than it is currently allowed to do outside its borders.

<sup>8</sup> Recital No 3 of Decision 2016/118.

#### **IV. THE PLACE OF INDIVIDUALS IN THE LEGAL FRAMEWORK OF OPERATION SOPHIA**

An important question regarding Sophia's legal framework is that of individuals captured and/or rescued by ships participating in the Operation. UNSC resolution No 2240 (2015) places persons rescued in a central position when it justifies its authorisation: "with a view to saving the threatened lives of migrants or of victims of human trafficking on board such vessels" (para. 7). Likewise, the resolution authorises an Operation like Sophia "to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers" (para. 10).

In a very different fashion, Council Decision 2015/778 refers to individuals captured and/or rescued in the context of the Operation only in a very incidental manner. The only reference in Sophia's legal mandate to "persons taken on board ships participating in EUNAVFOR MED" refers to the collection and transmission of personal data regarding these persons. The rescue of migrants or victims of human trafficking is only foreseen in Recital No 6, para 2. The Council recalls "the obligation to assist persons in distress at sea and to deliver survivors to a place of safety" under the UNCLOS, SOLAS and SAR Conventions. It then indicates that Sophia will be prepared to comply with these duties. The Council does not mention the exercise of jurisdiction over human smugglers and traffickers captured in the context of Sophia either. The Operation is designed to deter the criminal activities of a specific group of actors, yet nowhere in the legal framework is the issue as to what to do with these individuals contemplated. This differs greatly from the other EU maritime operation, *Atalanta*, which has been countering piracy off the Somali coast since 2008. Art. 12 of Council Joint Action 2008/851/CFSP (*Atalanta's* founding instrument) is specifically devoted to the transfer of persons suspected of having committed acts of piracy and armed robbery with a view to their prosecution.

Why are individuals rescued or captured on board ships participating in Operation Sophia given such a secondary role in Council Decision 2015/778? As far as migrants or victims of human trafficking are concerned, the anomaly might be explained by the fact that, as will be seen later, the EU avoided presenting Sophia as a rescue operation. As for the individuals captured, a possible answer is that, while seeking to obtain Libyan GNA consent to operate in its territorial and internal waters (phase two B) and even on its land (phase three), the Council did its best not to openly allude to the exercise of jurisdiction over Libyan nationals captured on high seas.

#### **V. THE CHOICE OF THE LEGAL BASIS AND SOME NORMATIVE CONSIDERATIONS REGARDING SOPHIA**

Operation Sophia raises the perennial question of the adequate choice of the legal basis in EU action. In Sophia's founding instrument, the Council chose a single CFSP legal

basis. It identified as the mission of the Operation<sup>9</sup> the contribution to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean. The focus is, therefore, on deterring certain criminal activities. This differs greatly from UNSC resolution No 2240 (2015) where saving the lives of persons on board vessels used for human trafficking and migrant smuggling is the main reason behind the UNSC's authorisation to act against such vessels (para. 7). As mentioned earlier, the only reference to a rescue dimension of Operation Sophia is to be found in Recital No 6, para. 2, of Council Decision 2015/778, which recalls the assistance obligations under the UNCLOS, SOLAS and SAR Conventions.

The purpose of disrupting the business model of migrant smugglers and human traffickers in the Southern Central Mediterranean does not seem enough to justify the choice for a single CFSP legal basis. Identifying the Union's ultimate goal in countering these criminal activities is, therefore, crucial. Is it doing so to prevent further loss of life at sea or to prevent illegal immigration into the Union? Although not in a very transparent manner, Council Decision 2015/778 indicates that the answer is positive in both cases. Recital 2 of the Decision mentions that it is an immediate priority for the European Council "to prevent more people from dying at sea". This is different than conferring a rescue purpose to Operation Sophia. The idea here is that the Operation will fight human trafficking and migrant smuggling networks with a view of preventing more people from boarding boats where their lives will be at risk. The same Recital also recalls the European Council's commitment to prevent "illegal immigration flows". Given that Sophia is, to a great extent, concerned with stopping illegal migration into the EU by military means – it is part of the EU's comprehensive approach to migration – an additional AFSJ legal basis would have been desirable.

Besides what strictly concerns the choice of the legal basis, there are other issues to be raised regarding the normative dimension of Sophia's legal framework. Not only does Council Decision 2015/778 not explicitly confer a rescue mission to Sophia. It does not refer either to migrants trying to cross the Mediterranean as potential asylum seekers or to the existence of a refugee crisis. While acknowledging the existence of a human emergency in the Mediterranean, the crisis is treated as a migrant crisis only. UNSC resolution No 2240 (2015), on the contrary, recognises that among the migrants there may be persons who meet the definition of a refugee, speaks about asylum-seekers, and recalls that migrants should be treated in accordance to refugee law.<sup>10</sup>

The Council cannot be blamed alone for the normative downsides in Operation Sophia's legal framework (which are especially obvious when read together with UNSC resolution No 2240 (2015)). Besides the very different political sentiments among mem-

<sup>9</sup> Art. 1 (Mission) of Council Decision 2015/778.

<sup>10</sup> The only exception is to be found in Recital No 6 of Council Decision 2015/778 where the Council mentions the 1951 Geneva Convention relating to the Status of Refugees.

ber States regarding the EU's response to human emergency in the Mediterranean, the Council must deal with important constitutional constraints. The Council is not ignorant of the stands of the European Court of Justice when it comes to the use of CFSP-non CFSP dual legal bases.<sup>11</sup> By using a single CFSP legal basis, and thus dismissing an additional AFSJ legal basis, the Council is certainly safer from the annulment of Council Decision 2015/778. Be it as it may, considering the little role migrants (not to say refugees!) play in Sophia's legal framework, perhaps the EU should have avoided renaming the Operation as "Sophia",<sup>12</sup> after the name of a refugee girl born aboard a German ship participating in the Operation.

<sup>11</sup> See Court of Justice, judgment of 19 July 2012, case C-130/10, *Parliament v. Council*, "Sanctions Case".

<sup>12</sup> Council Decision (CFSP) 2015/1926 of 26 October 2015 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

