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10-25-2023

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Recommended Citation

Bjørnstad, Martine, "From Maritime Pushbacks to Naval Blockade: How Europe is Drowning in Legal Pitfalls" (2023). *CICLR Online*. 93.

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From Maritime Pushbacks to Naval Blockade: How Europe is Drowning in Legal Pitfalls

By: Martine Bjørnstad



Image "HMS Richmond Sea Boats Rescue Migrants" by csdp.eeas is marked with Public Domain Mark 1.0.

As if haunted by the past, the headlines are once again filled with cautionary tales of Europe's insecure borders and looming migration crisis. The arrival of 11,000 migrants on the Italian island of Lampedusa in early September,[1] amidst deadlocked negotiations over the European Union's New Pact on Migration and Asylum,[2] has again sparked debate in Europe about how to tackle illegal immigration from North Africa.[3] The proposed solution that has perhaps drawn the most attention is that of a naval blockade.

A vocal opponent of migration, Italian Prime Minister Giorgia Meloni, since she came to power in the fall of 2022, has vowed to crack down on illegal migration and secure Italy's borders.[4] In response to the recent rise in migrant arrivals on Lampedusa, Meloni proposed in mid-September a *blocco navale* of North Africa "to prevent human traffickers from launching their smuggling boats into the Mediterranean." [5] The idea of deploying maritime vessels to the Mediterranean Sea to combat illegal migration from Africa to Europe is far from new. The European Union and its member states have conducted maritime operations in the Mediterranean for well over a decade. These operations have become increasingly infamous for

employing pushback procedures that seek to prevent migrants from reaching the European continent in violation of European and international law.[6]

While pushback procedures are employed to prevent migrant boats from reaching Europe, a naval blockade would prevent the boats from departing North Africa in the first place. Three alternative ways exist for the European Union to impose a naval blockade: (1) the European Union could, on its own initiative, deploy European vessels; (2) the European Union could, with the consent of North African states, deploy European vessels; or (3) the European Union could incentivize North African states to deploy its vessels. Each of the three alternatives is incompatible with states' obligations under international law.

Under the first alternative, the European Union would impose a naval blockade on North Africa unilaterally. To engage in an effective blockade, European vessels would have to enter into the territorial waters of sovereign states in violation of the Law of the Sea.[7] Such interference would be an act of aggression because a naval blockade is not considered a peacetime instrument but an act of war.[8] The use of force against another state violates Article 2(4) of the United Nations Charter[9] and would permit North African states to act in self-defense.[10] The severe nature of the international law violations that would arise if Europe were to engage in a naval blockade of North Africa unilaterally deems the prospect of such a blockade rather unlikely.

The second approach resolves some of the illegalities posed by a unilateral blockade. Acting with the consent of North African states, European vessels would not infringe upon the sovereignty nor engage in an unlawful use of force against North African nations. Instead, the European Union would act upon "invitation by the territorial state," a legally authorized exception to the prohibition on the use of force under Article 2(4) of the United Nations Charter.[11] Though bilateral initiatives resolve some of the legal issues, a European naval blockade imposed with the consent of North Africa would, regardless, breach European states' obligations under international law.

The right of a person to leave any country, including one's own, is guaranteed both under Article 13.2 of the Universal Declaration of Human Rights (formalized under Article 12.2 of the International Covenant on Civil and Political Rights) and Article 2.2 of Protocol No. 4 of the European Convention on Human Rights.[12] When efforts are made to block migrant boats from departing, such measures arguably violate the passengers' right to leave the country.[13] Moreover, preventing boats from departing is a breach of the UN Refugee Convention that establishes the right of a person to seek asylum because it interferes with the passengers' ability to cross an international border, which is a prerequisite to the right to enjoy international protection.[14] Effectively, acting with the consent of the migrants' country of origin does not make a naval blockade compatible with international law.

Under the third alternative, the European Union would not only outsource the blockade effort to North African states but also outsource any breaches of international law. Incentivizing North African states to blockade their coast does not amount to a naval blockade as defined under international law. Instead, it amounts to a situation where "a coastal state uses its powers under the law of the sea to enforce restrictions on the use of its territorial sea." [15] There is nothing inherently illegal about a state regulating activity in its territorial sea and contiguous zone. However, such restrictions still give rise to violations of international law if they take the form of a naval blockade.

In the same way European vessels engaged in a blockade of the North African coast would interfere with the inherent rights of passengers to leave the country and seek asylum, North African vessels preventing migrant boats from departing would give rise to the same international law violations. In other words, when the European Union externalizes its migration policy and outsources its implementation to North African states, rights violations are also outsourced. The effect is that North African states are not only responsible for enforcing aggressive and inhumane border measures to keep migrants from coming to Europe but are also shouldering Europe's human rights violations.[16]

Over the past decade, pushbacks and illegal expulsions have arguably established themselves as the new normal in European migration policy.[17] Proven ineffective in curbing immigration, naval blockades may be the newest weapon in Europe's policy arsenal. Though the idea of a naval blockade has been attributed to Prime Minister Meloni, the European

Union has quickly expressed interest in the proposal. In early September, Meloni met with the President of the European Commission, Ursula von der Leyen, on Lampedusa.[18] During the visit, von der Leyen stated that she “support[s] exploring options to expand existing naval missions in the Mediterranean or to work on new ones.”[19] The European Union’s willingness to consider a naval blockade was further endorsed the following week when a spokeswoman for the European Commission, Anitta Hipper, confirmed that the Commission “ha[s] expressed the support to explore these possibilities.”[20]

At the time of writing, no concrete steps have been taken to implement a naval blockade; it even remains uncertain whether such steps will ever be taken. Some speculate that the European Union entertains the proposal of a naval blockade to appease Prime Minister Meloni and appear tough on immigration amidst growing discontent with the continent’s failed migration policy.[21] It is, regardless, worrying to observe the increased willingness of the European Union and its member states to consider measures in clear violation of international law to tackle migration and secure the continent’s external borders. Amidst the extremist rhetoric and growing desperation emerges an image of a crumbling "Fortress Europe" that is drowning in the legal pitfalls of its own ineptitude.

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[1] Angela Giuffrida, *On Lampedusa, a Familiar Disillusion 10 Years After its First Refugee Tragedy*, The Guardian (Sept. 24, 2023), <https://www.theguardian.com/world/2023/sep/24/on-lampedusa-a-familiar-disillusion-10-years-after-its-first-refugee-tragedy> [https://perma.cc/79VC-BQD8].

[2] Gregorio Sorigi, *EU Lawmakers Pressure Member Countries to Complete Migration Deal*, Politico (Sept. 20, 2023, 12:46 PM), <https://www.politico.eu/article/eu-migration-deal-screening-pressure-european-countries/> [https://perma.cc/62CD-GLSM].

[3] Jorge Liboreiro, *Naval Blockades are an Act of War. Can Italy Find a Workable Alternative to Stem Migration Flows?*, Euronews (Sept. 27, 2023), <https://www.euronews.com/my-europe/2023/09/27/naval-blockades-are-an-act-of-war-can-italy-find-a-workable-alternative-to-stem-migration> [https://perma.cc/8Y2C-3ZZX].

[4] Angela Giuffrida, *Italian PM Steps Up Crackdown on Migrants with Deportation Decree*, The Guardian (Sept. 27, 2023, 5:00 AM), <https://www.theguardian.com/world/2023/sep/27/italian-pm-crackdown-migrants-deportation-decree-giorgia-meloni> [https://perma.cc/V4TL-S7NS].

[5] The Associated Press, *Italy Cracks Down on Migrants as Meloni Calls for a Naval Blockade off North Africa*, NPR (Sept. 18, 2023, 9:03 PM), <https://www.npr.org/2023/09/18/1200260635/italy-cracks-down-on-migrants-as-meloni-calls-for-a-naval-blockade-off-north-afr> [https://perma.cc/6YSY-S28N].

[6] See, e.g., Lydia Gall, *EU Should Stop Illegal Migrant Pushbacks at its Borders*, Hum. Rts. Watch (Dec. 8, 2022), <https://www.hrw.org/news/2022/12/08/eu-should-stop-illegal-migrant-pushbacks-its-borders> [https://perma.cc/33KY-XDY7]; Nathalie Weatherald, *Over 200,000 Illegal Pushbacks at EU External Borders, Says Report*, Euractiv (Mar. 23, 2023), <https://www.euractiv.com/section/justice-home-affairs/news/over-200000-illegal-pushbacks-at-eu-external-borders-says-report/> [https://perma.cc/57WE-WBKU].

[7] Liboreiro, *supra* note 3.

[8] *Id.*

[9] U.N. Charter art. 2, ¶ 4.

[10] U.N. Charter art. 51.

[11] Magne Frostad, *Naval Blockade*, 9 Arctic Rev. L. & Pol. 195, 201 (2018).

[12] Council of Eur. Comm’r for Hum. Rts., *The Right to Leave a Country*, Council of Eur. 3, 5, 13 (Oct. 2013), <https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510#>.

[13] *Id.* at 6.

[14] *Id.* at 31.

[15] Frostad, *supra* note 11, at 196.

[16] The memorandums of understanding signed between the European Union and Libya in 2017 and the European Union and Tunisia in 2023, respectively, are examples of how Europe is already externalizing its migration policy and alleviating itself of legal accountability. *See generally* Nicole Winfield, Lorne Cook & Angela Charlton, *Italy Approves New Migrant Detention as Talk Turns to Naval Blockade to Prevent Launching of Boats*, Assoc. Press (Sept. 18, 2023), <https://apnews.com/article/italy-migration-tunisia-eu-52dd1682214f2b7af27d26d0cec580e7> [<https://perma.cc/2JGV-9EVQ>]; Lisa O'Carroll, *EU Signs Off €1bn Deal with Tunisia to Help Stem Irregular Migration*, *The Guardian* (July 16, 2023), <https://www.theguardian.com/world/2023/jul/16/eu-deal-with-tunisia-help-stem-irregular-migration> [<https://perma.cc/29ZS-QBBV>]; Anthony Faiola, *The Racist Roots of the Rise in Migration to Europe This Year*, *Wash. Post* (June 30, 2023), <https://www.washingtonpost.com/world/2023/06/30/tunisia-migration-great-replacement/> [<https://perma.cc/VTP4-JPJR>]; *EU Migrant Deal with Libya is 'Inhuman' - UN*, *BBC News* (Nov. 14, 2017), <https://www.bbc.com/news/world-africa-41983063> [<https://perma.cc/SLD8-FY4N>].

[17] *See* Weatherald, *supra* note 6.

[18] Nikolaj Nielsen, *EU 'Exploring' Anti-Migrant Naval Blockade*, *EU Observer* (Sept. 18, 2023), <https://euobserver.com/migration/157434> [<https://perma.cc/WCV5-HCCD>].

[19] *Id.*

[20] *The Associated Press, supra* note 5.

[21] Hannah Roberts, *Von der Leyen Aligns with Italy's Tough Approach on Migration*, *Politico* (Sept. 17, 2023), <https://www.politico.eu/article/von-der-leyen-aligns-with-italys-tough-approach-to-migration/> [<https://perma.cc/J92F-XBNM>]. *See also* Robert Semonsen, *69% of French Support Mediterranean Naval Blockade*, *Eur. Conservative* (Sept. 23, 2023), <https://europeanconservative.com/articles/news/69-of-french-support-mediterranean-naval-blockade/> [<https://perma.cc/PVD3-JE3B>].