M.A. and Z.R. against Cyprus

Third Party Intervention by EuroMed Rights and KISA, the Human Rights Center (HRC) and the European Law Institute at Ghent University

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1. The case M.A. and Z.R. against Cyprus raises important issues concerning procedural and substantive positive obligations stemming from the non-refoulement principle (Art. 3 ECHR) and the prohibition of collective expulsion (Art. 4 Protocol 4 ECHR). In addition, this case provides the ECtHR the opportunity to clarify how the right to an effective remedy (Art.13 ECHR) can be safeguarded in the context of systematic return practices of Third Country Nationals (TCNs) that are not officially recorded by state actors.
2. In Section I, the submission sets how legal standards regulate the removal of TCNs. In particular, the submission discusses (A) jurisdiction, (B) substantive positive and procedural obligations concerning the prohibition of refoulement, and (C) the prohibition of collective expulsions.
3. In Section II, the submission sets out general facts as they relate to policies and practices in Cyprus and Lebanon. In particular, the submission discusses (D) the arrival of boats from Lebanon into Cypriot territorial waters and land, (E) treatment of new arrivals by Cypriot coastguard officials, (F) return practices by Cypriot coastguard officials, (G) forced non-debarkation from boats, forced transfers and access barriers to legal assistance in Cyprus, (H) direct and indirect refoulement in Lebanon, and (I) living conditions for Syrians in Lebanon.
4. Section I is based on a careful doctrinal and comparative analysis of ECHR and EU legal standards as it emerges from case law and academic literature. Section II is based on an analysis of evidence as it emerges from a desk review of the work of international organizations, civil society organizations and journalists, as well as longitudinal monitoring data about boat arrivals from Lebanon to Cyprus as carried out by KISA and EuroMed Rights. In addition, the shared submission draws on interviews carried out by Dr. Jill Alpes (Human Rights Centre, Ghent University) in the spring of 2021 with 20 policy makers and practitioners in Lebanon and Cyprus, 13 displaced Syrians in Lebanon, as well as 26 Syrian and Lebanese nationals who were summarily removed from Cyprus to Lebanon in 13 incidents in between August and September 2020. During the interviews, summarily removed individuals shared photos and videos of their arrival at the Cypriot coast, treatment by Cypriot coastguard and forced return to Lebanon with Dr. Jill Alpes.

I. DOCTRINAL PRINCIPLES

A. Jurisdiction

5. On numerous occasions the Court has held that jurisdiction is primarily territorial and only in exeptional cases, will extra-territorial jurisdiction be established. Such extra-territorial jursdiction arises in the event of spatial effective control over a territory by a Signatory State,[1] when authorities of a Signatory

[1] See and sources cited therein: ECtHR (Grand Chamber) Judgment of 29 January 2019, *Güzelyurtlu and others v Cyprus and Turkey,* App no. 36925/07, § 179.

State exercise state-agent control over an individual,[2] and in the event where special features of a particular case trigger extra-territorial jurisdiction.[3]

6. In the absence of an internationally agreed definition of pushbacks in the context of migration and for the purposes of the present report, the UN Special Rapporteur on the human rights of migrants describes pushbacks as "various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border."[4]
7. The Courts interprets the concept of 'jurisdiction' for the purposes of Article 1 of the Convention to reflect its meaning in public international law.[5] Territorial waters constitute part of the territory of the state over which it exercises territorial sovereignty.[6] Principally, territorial jurisdictional carve-outs are not permissible under the Convention[7] and the Convention does not discriminate between different areas of the territory of a Signatory state to establish territorial jurisdiction.[8] Insofar no "*constraining de facto situation"* or "*objective facts"* prevent the Signatory state from exercising full authority and limiting the effective exercise over its national territory, territorial jurisdiction may be established.[9]
8. A finding to the contrary would be tantamount to disregarding international law on the matter of territorial delimitation and would serve to arbitrarily exclude TCNs from Convention safeguards "*in a manner that they are not covered by a legal framework*"[10] rendering the Convention provisions theoretical and illusory. In the event the Court were to find that territorial jurisdiction is not established, extra-territorial jurisdiction would nevertheless trigger the applicability of the Convention. In line with *Hirsi Jamaa v Italy*, authorities are considered to exercise state-agent control over individuals by restricting their movements, preventing access to State territory, detaining individuals on vessels without sufficient basic amenities, and by deceptively transferring individuals to domestic vessels to effectuate returns to potentially unsafe third countries. Accordingly, extra-territorial jurisdiction can be established on account of the state-agent control exercised by the Cypriot authorities *in casu*.
9. Bearing in mind that the Court pursues a teleological and contextual interpretation of the Convention provisions, and due regard must be given to other international and regional instruments binding upon the Signatory states,[11] it is crucial to note that none of the grounds for territorial and extra-territorial jurisdiction are affected by provisions of EU law. According to Article 51 of the Charter of Fundamental Rights (CFR, Charter), the provisions of the Charter will be triggered as soon as Member States are implementing EU law, without any territorial constraints. In other words, the prohibition of *refoulement* and collective expulsion encompassed in Article 19 CFR, are triggered as soon as Member States are implementing EU law.
10. Finally, the burden and standard of proof are generally determined by the "*specificity of the facts, nature of the allegation and the Convention right at stake.*"[12] It is clear from the ECtHR case law, that in cases in which the applicant has no ability to assert evidence, the burden of proof does not rest solely on the applicant. This is particularly relevant when all the direct evidence lies in the hand of the state, such as in detention cases. As established by the ECtHR in *Ilias and Ahmed v Hungary*, in cases concerning returns of TCNs specifically, when the direct evidence lies in the hand of the state it suffices for the applicants to provide *prima face* proof to substantiate their claim. Once they are able to do this, the burden of proof shifts to the state.[13]

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[2] ECtHR Judgment of 23 July 2020, *MK and others v. Poland,* Application nos. 40503/17, 42902/17 and 43643/17, § 128.
[3] ECtHR (Grand Chamber) Judgment of 29 January 2019, *Güzelyurtlu and others v Cyprus and Turkey,* App no. 36925/07, §182 -187.
[4] Special Rapporteur on the human rights of migrants, Felipe González Morales, (2021), Report on means to address the human rights impact of pushbacks of migrants on land and at sea, A/HRC/47/30, p. 4.
[5] ECtHR (Grand Chamber) Judgment of 13 February 2020, *N.D. and N.T. v. Spain,* App nos. 8675/15 and 8679/15, §109.
[6] Article 2, Section 1, Part 2 United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS).
[7] ECtHR (Grand Chamber) Judgment of 13 February 2020, *N.D. and N.T. v. Spain,* App nos. 8675/15 and 8679/15, §106 - 107; ECtHR Judgment of 5 April 2022, *AA and others v North Macedonia,* App Nos 55798/16, §61.
[8] ECtHR Judgment of 8 April 2004, *Assanidze v Georgia,* App No 71503/01 § 146 – 147.
[9] ECtHR (Grand Chamber) Judgment of 13 February 2020, *N.D. and N.T. v. Spain,* App nos. 8675/15 and 8679/15, §107-108.
[10] *Ibid.*
[11] *Ibid* §172.
[12] (*AA v North Macedonia* § 53)
[13] ECtHR (Grand Chamber) Judgment of 21 November 2019, *Ilias and Ahmed v Hungary,* App no. 47287/15, § 141.

11. The burden of proof must shift to the signatory state when conclusive evidence is retained by its authorities. Insofar as *prima facie* evidence is provided attesting to the fact that Cypriot police arrested and detained TCNs, refused entry to Cypriot territory for the purpose of asking international protection and transferred individuals back to a third country without any assessment, the burden of proof would shift to the Signatory State. Any alternative finding would be tantamount to requiring an impossible proof – *probatio diabolica* – by the applicants.

B. Prohibition of refoulement (Art. 3) and right to an effective remedy (Art. 13)

12. The *non-refoulement* principle inherent to Article 3 ECHR, provides a caveat to the general rule whereby States retain the prerogative to "*control the entry, residence and expulsion of aliens."*[14] The principle seeks to prevent all forms of ill-treatment meeting a given severity threshold in a holistic and preventative manner.[15] More concretely, the ECHR protects against removal where a real risk exists that the person removed will be subjected to treatment that amounts to torture, or cruel, inhuman and degrading treatment or punishment, upon arrival in the country of origin or a third country, irrespective of whether this is the result of an act or omission on behalf of the receiving state.[16]
13. *Non-refoulement* under Article 3 ECHR, relates to the existence of a *possible future violation* pursuant to the expulsion of the individual concerned.[17] Such cases concern *hypothetical* violations that can occur once the expulsion has been effectuated, irrespective of the legal grounds for, or the mode of expulsion.[18] Such hypothetical violations engage the responsibility of the expelling state.[19] A violation of the *non-refoulement* principle is generally raised by reference to Article 3 ECHR[20], but has also been raised in relation to a number of *other* Convention rights, including importantly, for the present submission, Article 4 Protocol 4 ECHR concerning collective expulsions.[21]
14. The Court has clarified the specific substantive and procedural obligations that must be met for a signatory state to be considered to have abided by the obligation of *non-refoulement*. These concrete procedural and substantive, negative and positive obligations were most recently and thoroughly articulated in *Ilias and Ahmed v Hungary*. Under the ECHR, signatory states are bound by the negative obligation to refrain from pushing individuals back to a third country or a country of origin, where "*a real risk exists that the person removed will be subjected to treatment that amounts to torture, or cruel, inhuman and degrading treatment or punishment*". This negative obligation binds states, regardless of the location of the pushback – whether this occurs at a port, a land border, on account of irregular entry or in a transit area. Furthermore, this prohibition binds the states irrespective of the mode of pushback. Finally, both direct and indirect refoulement are prohibited by the Convention. The foregoing modalities of the negative obligation inherent to the *non-refoulement* principle, are demonstrative of a teleological

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[14] ECtHR (Grand Chamber) Judgment of 28 February 2008, *Saadi v Italy*, App no. 37201/06, §124. ECtHR (Grand Chamber) Judgment of 21 November 2019, *Ilias and Ahmed v Hungary*, App no. 47287/15, §125; ECtHR (Grand Chamber) Judgment of 23 March 2016, *F.G. v Sweden*, App no. 43611/11, §111.

[15] Fanny de Weck, *Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture – The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee Against Torture under Article 3 CAT* (Brill Nijhoff 2017) p. 17 – 18.

[16] On the expulsion to the country of origin or a third country: ECtHR (Grand Chamber) Judgment of 21 November 2019, *Ilias and Ahmed v Hungary*, App no. 47287/15, §128. On the indifference or an omission on behalf of a duty-bearer, see: ECtHR (Grand Chamber) Judgment of 21 January 2011, *M.S.S. v Belgium*, App no. 30696/09, §253, 263.

[17] Fanny de Weck, *Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture – The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee Against Torture under Article 3 CAT* (Brill Nijhoff 2017) p. 19.

[18] Article 3 ECHR applies to *inter alia* extradition, expulsion, or deportation. ECtHR (Grand Chamber) Judgment of 13 February 2020, *N.D. and N.T. v. Spain*, App nos. 8675/15 and 8679/15, §172 – 188; ECtHR (Grand Chamber) Judgment of 21 November 2019, *Ilias and Ahmed v Hungary*, App no. 47287/15, §126.

[19] Eman Hamdan, *The Principle of Non-Refoulement Under the ECHR and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brill Nijhoff 2016) p. 22.

[20] See for an extensive discussion on the matter: Fanny de Weck, *Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture – The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee Against Torture under Article 3 CAT* (Brill Nijhoff 2017) p. 23 – 33.

[21] See amongst other the most notable cases: ECtHR Judgment of 21 October 2014, *Sharifi and others v Italy and Greece*, App no. 16643/09; ECtHR (Grand Chamber) Judgment of 23 February 2012, *Hirsi Jamaa and others v Italy*, App no. 27765/09, §207; ECtHR Judgment of 5 February 2002, *Conka and others v Belgium*, App no. 51564/99, §63. Eman Hamdan, *The Principle of Non-Refoulement Under the ECHR and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brill Nijhoff 2016) p. 93 – 102.

understanding thereof, whereby the *impact* of the measure is determinative. In other words, it is not relevant how the push-back is effectuated. Instead, it is relevant whether the individual is effectively returned to a third country where that person is at risk of being subjected to anticipated ill-treatment reaching a particular severity threshold that is relevant.[22]

15. In addition to the negative obligations stemming from the *non-refoulement* principle, signatory states are bound by positive obligations, that can likewise be found and further articulated in the EU secondary *acquis* on border management (Article 77 TFEU) and international protection (Article 78 TFEU). From a positive **substantive** perspective, a distinction is made between pushbacks to the country of origin, as opposed to pushbacks to a third country. As concerns the latter – the object of the present case – this Court has held that the expelling signatory state is under a positive obligation to verify individually, whether there is a discernible risk of ill treatment of an individualized and/or generalized nature upon return **(1)**, and whether there is a risk of chain/indirect refoulement in the country of return **(2)**. This obligation has likewise been transposed to the EU's Qualification Directive in Article 9 (regarding refugees), and Article 15 (regarding subsidiary protection) and Articles 21-22. In fact, Article 15 Qualification Directive, is directly linked to the understanding of *non-refoulement* under Article 3 ECHR, as confirmed in the case of *Elgafaji (C-465/07)*[23] and the case of *M'Bodj (C-542/13)*[24] before the Court of Justice of the European Union (CJEU). Complementary thereto, there is an obligation for the signatory state to ensure that there is an effective mechanism in place to ask for international protection in the country of return, as a means to prevent chain/indirect refoulement **(3)**. Insofar this is not ascertained, the expelling signatory state, is additionally under an obligation to procure assurances from the country of return, that the expelled individual will have access to an individualized and effective mechanism to request international protection **(4)**. The mere fact that the country of return is a signatory party to international human rights instruments, however, does not suffice to meet this obligation.
16. The foregoing underscores that the onus of proof to demonstrate anticipated ill-treatment in the country of return is on the expelling state, when there are documented systemic issues in the country of return such as the case in Lebanon, as recalled in the seminal case of *Hirsi Jamaa.*[25]
17. Complementary to the substantive positive obligations, which bind the expelling state, the latter is likewise bound by positive **procedural** obligations. First and foremost, the expelling state must foresee in a procedure allowing the applicant to submit a request for international protection, to be assessed by an (administrative) state authority.[26] While such procedures can arguably be effectuated in an expedited manner, such expedited procedures must meet minimal requirements to meet the substantive positive obligations under the *non-refoulement* principle. Second, when a return decision has been decided upon, the expelling state must foresee in effective (suspensive) proceedings to ensure that the applicant can contest the return decision and thus avoid return to a third country where the individual may be subject to ill-treatment reaching a particular severity threshold.
18. For the right to an effective remedy as included in Article 13 ECHR, to be discharged, the remedy must be prompt, accessible, and capable of yielding a reasonable prospect of success.[27] The ECHR provide a definition of the right to an effective remedy and require instead that for it to be considered effective, a number of factors affecting must be considered: "*…to be effective, the remedy required by Article 13 must be available in practice as well as in law … its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State… in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary*

[22] ECtHR (Grand Chamber) Judgment of 13 February 2020, *N.D. and N.T. v. Spain,* App nos. 8675/15 and 8679/15, § 184.
[23] CJEU (Grand Chamber) Judgment of 17 February 2009, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, C-465/07, ECLI:EU:C:2009:94.
[24] CJEU (Grand Chamber) Judgment of 18 December 2014, *Mohamed M'Bodj v État belge,* C-542/13, ECLI:EU:C:2014:2452.
[25] ECtHR (Grand Chamber) Judgment of 23 February 2012, *Hirsi Jamaa and others v Italy,* App no. 27765/09, §132-134.
[26] See for the EU's concretization of this obligation: Article 21 – 22 Qualification Directive and more generally Asylum Procedures Directive.
[27] ECtHR Judgment of 21 January 2011, *M.S.S. v Belgium,* App no. 30696/09 § 290 – 293.

to Article 3 … as well as a particularly prompt response; it also requires that the person concerned should have access to a remedy with automatic suspensive effect."[28]

19. The expelling state is effectuating expulsions without any formalities, such as individualized assessment, registration procedure, interviews and return decisions. The modalities of summary returns to Lebanon (see *infra*, par. 35- 36) highlight the impossibility for asylum-seekers who are subjected to them to communicate with legal or other representative, be informed about their rights, collect evidence or make an official complaint. Thereby the expelling state is unjustifiably hindering the applicant through its act (*pushback*) and omission (*refusal to meet the formal requirements under the ECHR and EU law*) in obtaining an effective remedy. Furthermore, by pushing the individuals back without a procedure in which the substance of the claim can be addressed, the individuals are likewise deprived of an appeal procedure with automatic suspensive effect. Finally, requiring evidence to be furnished concerning *omissions* on behalf of the respondent state, is tantamount to requiring *probatio diabolica*. Consequently, this militates in favour of a shift of the burden of proof to the respondent state where *prima facie* evidence has been furnished by the Applicant, to respect the right to an effective remedy. In the seminal case of Hirsi Jamaa, the Court considered that it was for the national authorities, faced with a situation in which human rights were being systematically violated to find out about the treatment to which the applicants would be exposed after their return (see, mutatis mutandis, Chahal, cited above, §§ 104-05; Jabari, cited above, §§ 40-41; and M.S.S. v. Belgium and Greece, cited above, § 359).[29]
20. The prohibition of refoulement applies to any act or omission resulting in transfer from the territory of a Contracting Party of individuals under its jurisdiction. The Contracting Parties shall not evade responsibility – whether through bilateral arrangements or other means - under the Convention.[30] The bilateral readmission agreement between Cyprus and Lebanon does not contain an explicit non-refoulement clause.[31] Article 11 of the agreement provides only that it "shall in no way affect the Contracting Parties' rights and obligations arising from the Convention of 28 July 1951 on the Status of Refugees."[32] When considering access barriers to international protection and refoulement risks in Lebanon (see *infra*, par. 41- 44), it emerges that a bilateral readmission agreement with Lebanon cannot be consonant with human rights obligations that Cyprus has under the ECHR. In the seminal case of *Hirsi Jamaa*, the Court noted that none of the provisions of international law cited by the Government justified the applicants being pushed back to Libya, in so far as the rules for the rescue of persons at sea and those governing the fight against people trafficking impose on States the obligation to fulfil the obligations arising out of international refugee law, including the non-refoulement principle.

C. Prohibition of collective expulsions

21. The prohibition of collective expulsion (Article 4 Protocol 4 ECHR) encompasses a set of procedural safeguards, aimed at "*preventing States from being able to remove aliens without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the relevant authority*".[33] The Court has previously held that the prohibition of collective expulsion must be understood in its generic meaning, bearing in mind not only the objective of the prohibition, but likewise relevant international instruments.[34] In other words, while the Convention is autonomously applicable in the Signatory states (entailing that arbitrary Signatory state carve outs are not permissible), its provisions must be interpreted contextually and teleologically, mindful *inter alia* of international and regional legal provisions.
22. The prohibition of collective expulsion distinguishes itself from the *non-refoulement* prohibition, as the latter encompasses both procedural *and* substantive positive obligations and is applicable only where there is a risk of significant ill-treatment upon being expelled to a third country. Conversely, Article 4

[28] *Ibid*, § 293.
[29] ECtHR (Grand Chamber) Judgment of 23 February 2012, *Hirsi Jamaa and others v Italy*, App no. 27765/09, §132-134. Here, the Court considered that it was for the national authorities, faced with a situation in which human rights were being systematically violated to find out about the treatment to which the applicants would be exposed after their return (see, mutatis mutandis, Chahal, cited above, §§ 104-05; Jabari, cited above, §§ 40-41; and M.S.S. v. Belgium and Greece, cited above, § 359).
[30] Grand Chamber judgment in *Iliás and Ahmed v. Hungary, Application No. 47287/15*
[31] In addition, Lebanon only ratified the agreement, but not its implementing protocol.
[32] Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Lebanon on the readmission of persons without unauthorized stay, 2002, at: http://www.cylaw.org/nomoi/arith/2009_3_017.pdf.
[33] *Ibid* § 197; ECtHR (Grand Chamber) Judgment of 15 December 2016, *Khlaifia and others v Italy*, App. No. 16483/12, § 238.
[34] ECtHR (Grand Chamber) Judgment of 13 February 2020, *N.D. and N.T. v. Spain*, App nos. 8675/15 and 8679/15, § 172.

Protocol 4 ECHR is not solely applicable to situations concerning *non-refoulement,* thus casting a wider net of application, and solely encompasses procedural positive obligations for the Signatory states.

23. Relying on the methods of interpretation provided by the Vienna Convention on the Law of Treaties (VCLT), this Court has previously affirmed that the term expulsion must be understood in its generic meaning, irrespective of the mode of expulsion or the location of the expulsion (see *supra*). Concretely, this means that measures of *non-entrée* and pushbacks are also considered expulsion measures, even when the applicant has not yet passed the territorial land border of a signatory state. While Spain noted that there may be a 'calling effect' in justifying recourse to the notion of an operational border (as something distinct from its territorial border), it is likewise crucial to recall, that narrowing the generic interpretation of expulsion would incentivize states to further render ineffective the protection afforded by the Convention.[35] In other words, if the notion of expulsion were not to include pushbacks (**mode**) within the territorial sea (**location**), this would *ipso facto* render such practices legitimized, following which the *non-refoulement* principle becomes theoretical and illusory, as opposed to practical and effective. Moreover, it would disregard applicable provisions of international law by which the signatory states are bound.
24. In keeping with this teleological and contextual interpretation, the collective nature of the expulsion prohibition is neither determined by a numerical minimum of applicants, nor is it determined by a set of shared characteristics between the applicants. Instead, the decisive factor triggering this prohibition is the "*absence of a reasonable and objective examination of the particular case of each individual*" for which the burden of proof lies with the Signatory in showing the availability of such an assessment, and for which the state and the applicant share the burden of proof in showing that a genuine and effective assessment has occurred.
25. To determine whether a violation of collective expulsion has occurred, the ECtHR has held that Signatory states are bound by the positive procedural obligation to foresee in a genuine and effective mechanism (1) whereby individual applicants may submit arguments against their expulsion. Concomitant thereto, States are bound by the positive procedural obligation to provide an appropriate assessment (2) of these arguments. These obligations are couched as obligations of means, rather than result, as the *genuineness*, *effectiveness* and *appropriateness* of the assessment will be informed by substantive Convention guarantees, such as the prohibition of *refoulement*. In turn, whether there are factual and/or legal considerations warranting the suspension and annulment of the expulsion measure, is a matter of fact, for which the evidentiary burden is shared between the expelling state and the applicant (see *supra*).
26. As an exception to the general rule, the *absence* of a "*genuine and effective possibility*" to contest an expulsion measure and an "*appropriate examination*" thereof, will not result in a violation of Article 4 Protocol 4 ECHR, if such absence is the result of the culpable conduct of the Applicant. The Court applies a two-tier test, whereby it assesses whether the expelling state provides legal and effective means of entry (1) and insofar this is the case, whether there are cogent reasons attributable to the expelling state explaining why the applicant does not make use of these legal pathways (2).[36]
27. *In casu*, the question emerges whether irregular entry suspends the right to access international protection proceedings insofar legal and effective means of entry exist. Crucial here is that 'Limited Territorial Validity' visas for the purpose of obtaining international protection, in line with Article 25 of the EU's Visa Code, does not provide a legally enforceable right of entry to ask for international protection. Consequently, this militates *against* the existence of *effective* legal pathways to request international protection.[37] Bearing in mind this absence, as well as the absence of a "*genuine and effective opportunity of submitting reasons"*[38] against return to Lebanon, culpable conduct *in casu* cannot be established as a means to repudiate Cypriot obligations under the ECHR.

II. GENERAL FACTUAL CONTEXT

[35] *Ibid,* §184.
[36] ECtHR (Grand Chamber) Judgment of 13 February 2020, *N.D. and N.T. v. Spain,* App nos. 8675/15 and 8679/15.
[37] CJEU (Grand Chamber) Judgment of 7 March 2017, *X and X v Belgium,* C-638/16 PPU, ECLI:EU:C:2017:173. ECtHR (Grand Chamber) Judgment of 5 March 2020, *M.N. and others v Belgium,* App no 3599/18.
[38] ECtHR (Grand Chamber) Judgment of 13 February 2020, *N.D. and N.T. v. Spain,* App nos. 8675/15 and 8679/15, § 208 – 209.

D. Arrival of boats from Lebanon into Cypriot territorial waters and land

28. Interviewed individuals who were summarily returned in August and September 2020 all provided convincing evidence that they had been in Cypriot territory prior to their removal to Lebanon. Some interviewed individuals and their families had been in the Pournara camp on Cypriot land prior to their removal, evidenced by photo and video material. Some interviewed individuals explained during the interview that they had been removed after having been able to land at the Cypriot coast. Their explanations of procedures after their landing were coherent with those of other removed individuals interviewed on separate occasions. Finally, some interviewed individuals explained that they had come under the control of Cypriot state authorities upon seeing the Cypriot coastline. In these cases, Cypriot coastguard officials encircled their boat, depriving them of any possibility to move, and later directly transferred them to a Cypriot vessel, which effectuated the return to Lebanon.

E. Treatment of new arrivals by Cypriot coastguard officials

29. Human Rights Watch documented with the help of 15 testimonies that Cypriot coastguards repeatedly brandished weapons at incoming boats from Lebanon, encircled them at high speed, abandoned some at sea without fuel and food and in other instances proceeded to beat passengers on board.[39] Interview material with 32 additional individuals summarily returned from Cyprus to Lebanon in the same period confirm these findings. Interviewees systematically mentioned that they did not have sufficient water and food while detained on their boats prior to their removal to Lebanon. Children and people with medical conditions were not evacuated from the boats while immobilized in front of the Cypriot coast. Only in very urgent cases, the police agreed to bring a doctor to the boat for examinations.
30. The Independent Authority for the Investigation of Allegations and Complaints against the Police in Cyprus has admitted a complaint by the Cypriot NGO against inhumane and degrading treatment of new arrivals by Cypriot coastguard officials. Also, the human rights committee of the House of Parliament in Cyprus felt obliged in September 2021 to organize a hearing[40] on a pushback incident in which a 9-month pregnant woman was mistreated and then forcibly separated from her husband and two children who were removed to Lebanon while she gave birth.[41] During another pushback incident, the Cypriot police failed to rescue a person who had jumped into the sea.[42]
31. During the summary returns, the Port and Marine Police is present on the Cypriot vessels.[43] Photos from the interviewees show how the Cypriot police is putting their feet on the bodies of returnees who are lying on the floor of Cypriot vessels during the removal, as well as handcuffed men. Many interviewees stated that they deleted photos and videos during the return because they were scared of both the Cypriot and Lebanese police.

F. Return practices by Cypriot coastguard officials

32. Since March 2020, the Council of Europe's Commissioner for Human Rights[44], the UN Special Rapporteur on the human rights of migrants,[45] the UN Refugees Agency (UNHCR),[46] the US State

[39] Human Rights Watch, 29 September 2020, *Cyprus: Asylum Seekers Summarily Returned: Pushbacks Against Surge of Arrivals by Boat From Lebanon.*
[40] Kathimerini, 21 September 2021, *Shocking details emerge after pushback in Cyprus.*
[41] KISA, 23 August 2021, https://twitter.com/KISAOfficial/status/1429708374753619970.
[42] EuroMed Rights, 4 October 2021, *Cyprus: no to pushbacks, yes to family reunification!*
[43] Offsite News, 23 August 2021, Στον Λίβανο επιστρέφουν οι μετανάστες που εντοπίστηκαν χθες. Kathimerini, 23 August 2021, Επιστρέφουν στον Λίβανο οι μετανάστες που εντοπίστηκαν ανοιχτά της Κύπρου; More recently, Nomisma, 23 August 2022, Πλοιάριο με 100 μετανάστες επιστρέφει στο Λίβανο με συνοδεία.
[44] Council of Europe, 7 April 2022, *Pushed beyond the limits. Urgent action needed to stop pushbacks at Europe's borders*.
[45] Special Rapporteur on the human rights of migrants, Felipe González Morales, (2021), Report on means to address the human rights impact of pushbacks of migrants on land and at sea, A/HRC/47/30; Special Rapporteur on the human rights of migrants, Felipe González Morales (2022), Human rights violations at international borders: trends, prevention and accountability, A/HRC/50/31; Letter from the Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2021), AL CYP 2/2021. See also the US Department of State 2020 Country Reports on Human Rights Practices on Cyprus.
[46] See the December 2021 report by the UN Secretary General (p. 7) at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2021_1110.pdf.

Department,[47] and several international and national NGOs[48] have raised concerns about the systematic nature of Cypriot removal practices. In September 2020, at least 229 individuals were pushed back and expelled by Cypriot authorities in at least five separate instances from Cypriot waters to Lebanon.[49] Summary returns of Syrians from Cyprus to Lebanon and Turkey have continued in 2021 and 2022.[50] In March 2021, the Council of Europe's Commissioner for Human Rights urged Cypriot authorities to "investigate allegations of pushbacks and ill-treatment of migrants."[51]

33. Cypriot authorities have publicly acknowledged that they expel individuals from Cyprus to Lebanon.[52] In 2020, Cypriot officials travelled to Lebanon,[53] reaffirming "their firm willingness to implement the 2002 Agreement between the two countries."[54] As interveners, we the undersigned have concerns about the potential evasion of non-refoulement responsibilities through this bilateral agreement. On 10 November 2021, Cyprus furthermore announced that it was submitting a request to the European Commission to suspend applications for asylum for all those arriving in the country irregularly, thus *de facto* suspending the right to apply for asylum and to have a proper assessment of the asylum claim.[55]
34. UNHCR Cyprus has credible reports indicating that some of those pushed back had repeatedly asked for asylum.[56] Testimonies collected by Dr. Jill Alpes (Human Rights Centre, Ghent University) confirm that Cypriot authorities systematically ignored explicit and repeated asylum requests. Although all interviewees testified that they had expressed their desire to seek asylum, this expressed will was not noted. Instead, Interviewees reported that the translator of the Cypriot coastguards would systematically tell them that the coastguard had received instructions not to let refugees enter the island. Interviews with summarily returned people reveal that access to legal assistance is not possible even when new arrivals are not directly returned to Lebanon, but first granted access to the quarantine section of the Pournara camp.
35. Finally, all 32 interviewed individuals summarily returned from Cyprus to Lebanon confirmed that they had benefitted from *neithe*r an identification procedure, *nor* from an interview that would have allowed them to clarify the reason for their arrival. All interviewed individuals were summarily returned *without* a written return decision from Cypriot officials.
36. The described modalities of summary returns to Lebanon clearly highlight the impossibility for asylum-seekers who are subjected to them to communicate with the outside world, collect evidence or make an official complaint. As evidenced in the case law (ECtHR, O.M. and D.S. v. Ukraine, no. 18603/12, Judgment of 15 September 2022, paras 92-93) all these elements must be taken into account when evaluating whether an asylum-seeker who has undergone a pushback has discharged his/her burden of proving the allegations made before the Court. This is in line with the more general consideration that the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (El Masri v. the former Yugoslav Republic of Macedonia [GC], no. 39630/09, § 151), and that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit* probation, especially when the events in issue lie within

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[47] US Department of State 2021 *Country Reports on Human Rights Practices: Cyprus*

[48] Human Rights Watch, 29 September 2020, *Cyprus: Asylum Seekers Summarily Returned: Pushbacks Against Surge of Arrivals by Boat From Lebanon;* ECRE, 8 October 2021, *Cyprus: Families separated by pushbacks to Lebanon – Cyprus Calls for Greater Solidarity;* KISA, EuroMed Rights, ALEF; CLDH, ACHR, 16 July 2021, *Pushbacks from Cyprus to Lebanon lead to chain refoulement to Syria.*

[49] See also data on the arrivals of refugees from Lebanon by boat provided by the Cyprus Police to the journalist Michalis Hatzivasili as published on 25th of September 2020 by Φilenews: https://www.philenews.com/f-me-apopsi/arthra-apo-f/article/1025188/.

[50] AlarmPhone, 7 July 2022, https://twitter.com/alarm_phone/status/1545002257166508032; Philenews, 8 January 2021, Η Λιμενική απέτρεψε την προσέγγιση πλοιαρίου με μετανάστες.

[51] Council of Europe, 18 March 2021, *Cypriot authorities should investigate allegations of pushbacks and ill-treatment of migrants, improve reception conditions, and ensure an enabling environment for NGOs.*

[52] DW, 8 September 2020, Επαναπροωθήσεις προσφύγων στην Κύπρο.

[53] Information for meetings among representatives of the two countries from the Twitter profile of the Cypriot Minister of Interiors, 6 October 2020.

[54] Announcement of Ministry of Interior of Cyprus, 7 October 2020, at: http://www.moi.gov.cy/moi/moi.nsf/All/27007FD32087C1D2C22585FA0031E861?OpenDocument; Brief, 6 October 2020, Συνάντηση ΥΠΕΣ με τον Λιβάνιο Στρατηγό - Τι συζήτησαν.

[55] Wallis, Emma, 11 November 2021, *Cyprus requests the suspension of asylum applications*, InfoMigrants.

[56] UNHCR Cyprus was able to talk with individuals who were admitted to the territory and asylum procedures in Cyprus and some family members of others in the concerned boats. These individuals confirmed that many on the respective boats did express their intention to ask for asylum. See EuroMed Rights, (2021), "Pushbacks and expulsions from Cyprus and Lebanon: The risks of (chain) refoulement to Syria," chapter 6, in Return Mania: Mapping policies and practices in the EuroMed region.

the exclusive knowledge of the authorities (El Masri v. the former Yugoslav Republic of Macedonia [GC], no. 39630/09, § 152), as is clearly the case in the summary returns described above.

G. Forced non-debarkation from boats, forced transfers and access barriers to legal assistance in Cyprus

37. Amongst 13 summary removal incidents evidenced through 32 testimonies, asylum seekers on two boats were forced to spend four nights on the boat after being under the control of Cypriot authorities. Asylum seekers on the other six boats were forcibly prevented from disembarking for respectively one or two nights.
38. Interviewed individuals summarily removed from Cyprus systematically reported that they had not been informed neither in writing, nor orally that they were to be returned to Lebanon. Instead, interviewees reported that they had been transferred under the pretext to be taken for PCR resting, or reception facilities at other locations in Cyprus. Some interviewees noticed that they were being lied to, but many reported to have only noticed while they were already in high seas. Even when asylum seekers became aware of the reasons of their transfer onto a Cypriot vessel, interviewees all testified that they were forced to board the vessel nonetheless. The deceitful nature of the transfer rendered access to legal assistance in most context near to impossible.
39. Asylum seekers in Cypriot territorial waters are not able to access legal assistance also because the Cypriot government is increasingly criminalizing civil society actors able to provide such services,[57] as well as even UN organizations. On 24 August 2022, for example, the Cypriot Ministry of Interior sent a letter to UNHCR Cyprus, accusing them of delivering false information, as well as of being involved with the "illegal entry of foreigners."[58] Alerted by a man who claimed to be Palestinian onboard of a boat with allegedly 100 people, predominantly of Syrian origin, including 30 children and five dead people, UNHCR requested by email on 22 August that the Cypriot Asylum Service ensures access to the asylum procedure for all passengers.[59] Subsequently, the Cypriot police launched an operation and summarily removed all passengers to Lebanon.[60] Accusations against UNHCR Cyprus by the Cypriot government represent a very dangerous escalation of the ongoing criminalization of any actor working on human rights in Cyprus.[61]

H. Direct and indirect refoulement in Lebanon

40. Summarily returned Syrians face risks of both direct and indirect refoulement in Lebanon. With regards to direct refoulement, Syrian refugees do not have meaningful access to international protection in Lebanon. Lebanon is not party to the 1951 Refugee Convention and has not developed a national asylum procedure.[62] While UNHCR is responsible for the process of Refugee Status Determinations (RSD), UNHCR was able to arrange for only 8,359 resettlement departures in 2019.[63] In May 2015, Lebanese authorities de-facto instructed UNHCR to suspend registering Syrian refugees in Lebanon.[64] Having a UNHCR registration card does not grant Syrians access to a regular stay in Lebanon.[65] A mere 20% of all Syrian refugees above 15 years hold a valid temporary residence permit.[66] Nevertheless, article 32 of the "Law Regulating the Entry and Exit of Foreigners in Lebanon and their Exit from the Country" (1962) provides criminal charges and penalties, such as imprisonment of one to three years, payment of a fine, and expulsion from Lebanon, for individuals convicted of entering and staying in Lebanon without valid travel documentation and visas.[67]

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[57] KISA, December 2020, *Report of attacks, defamation, persecution and prosecution of KISA and its leadership.*
[58] Sigmalive.com, 18 September 2022, Διεθνείς οργανισμοί λειτουργούν ως διαμεσολαβητές fake news για «νεκρά παιδιά».
[59] Sigmalive.com, 18 September 2022, Διεθνείς οργανισμοί λειτουργούν ως διαμεσολαβητές fake news για «νεκρά παιδιά».
[60] Sigmalive.com, 18 September 2022, Διεθνείς οργανισμοί λειτουργούν ως διαμεσολαβητές fake news για «νεκρά παιδιά».
[61] Five UN special rapporteurs have written a letter on this matter. See also: KISA, December 2020, *Report of attacks, defamation, persecution and prosecution of KISA and its leadership.*
[62] UNHCR, July 2022, Lebanon Factsheet.
[63] UNHCR, January – September 2022, Resettlement Data, at: https://www.unhcr.org/resettlement-data.html
[64] UNHCR, April – June 2020, Operational Update; UNHCR, May 2021, Lebanon Fact Sheet.
[65] UNHCR Reception Centres Q&A, at : https://www.refugees-lebanon.org/en/qa/index.
[66] VASyr, 2020 Vulnerability Assessment of Syrian Refugees in Lebanon, at: https://data.unhcr.org/en/documents/details/85002.
[67] Badalič, Vasja. 2019. 'Rejected syrians: violations of the principle of "non-refoulement" in Turkey, Jordan and Lebanon'; Lebanese Center for Human Rights, 2021, *Return to Syria: Challenges faced by Syrian Refugees*

41. With regards to indirect refoulement, pushed back Syrians are at risk of secondary deportation to Syria for several reasons. Fist, Lebanon has a general return policy for Syrians even though Syria is not safe for returns.[68] In July 2020, for example, the Lebanese Ministry of Social Affairs announced a "Return Plan", which was discussed at the Damascus conference in November of the same year.[69] In July 2022, the Lebanese government announced a plan to repatriate 15,000 Syrians every month to Syria.[70] Second, there is no legal grounds on which Lebanon would be obliged to readmit Syrians into its territory. The bilateral readmission agreement between Cyprus and Lebanon is not ratified by Lebanon, nor does it include a clause for TCNs. Third, Lebanese NGOs documented and Lebanese lawyers have in interviews with Dr. Jill Alpes (Human Rights Centre, Ghent University) confirmed that in practice Lebanese General Security Directorate has deported Syrians to Syria after decisions of non-admission at other borders.[71] Aware of this practice, UNHCR mobilized itself and managed to closely monitor the reception of summarily removed individuals from Cyprus in August and September 2020.[72] Without UNHCR's presence at Lebanese ports at the time, it is plausible to assume that some of the summary returns might have resulted in chain refoulement to Syria.
42. In 2021, the undersigned third party interveners have been able to monitor that summary returns from Cyprus to Lebanon have indeed resulted in chain refoulement to Syria.[73] On 16 May 2021, a boat with 56 migrants on board (39 men, seven women and ten children) was spotted by Cypriot authorities, who denied entry to Cyprus and pushed the boat back to Lebanon.[74] After a period of detention in Lebanon, on 1 June 2021, at least five Syrians on board of this boat were deported by Lebanese authorities to Syria.[75]
43. The risk of refoulement to Syria is particularly high for, but is not limited to Syrians who entered Lebanon after April 2019. The Lebanese Higher Defence Council, an inter-ministerial body headed by the President of Lebanon, decided in 2019 that Syrians who had entered Lebanon after April 2019 could be expelled to Syria without judicial procedure or legal remedies.[76] This decision allows for expulsion orders to be issued and executed on the basis of a mere verbal order from Public Prosecution without any judicial oversight and procedural safeguards for concerned individuals. Because of its volatile position engrained in the MoU with Lebanon,[77] UNHCR access to monitor and stop deportations to Syria is extremely limited. Between between 25 April 2019 and 19 September 2021, the Directorate General Security deported 6,345 Syrisan refugees to Syria under the Higher Defense Council Decision.[78] In practice, General Security has on several occasions also deported Syrians who had entered Lebanon before April 24,[79] as well as Syrians who are fully registered with UNHCR.[80]

I. Living conditions for Syrians in Lebanon

[68] Lebanese Center for Human Rights, (2021), *Return to Syria: Challenges faced by Syrian Refugees* ; OHCHR, 14 September 2021, *Don't look away: Syrian civilians face the prospect of a new escalation* ; Human Rights Watch, 20 October 2021, *"Our Lives Are Like Death"Syrian Refugee Returns from Lebanon and Jordan*; Amnesty International, 7 September 2021, *Syria: "You're going to your death" Violations against Syrian refugees returning to Syria.*

[69] Labude, David, Franziska Amler, and Tobias Winkelsett. 2020, "Fragwürdige Konferenz in Damaskus," Konrad Adenauer Stiftung.

[70] Anadolu Agency, 4 July 2022,*Lebanon plans to repatriate 15,000 refugees monthly to Syria.*

[71]Human Rights Watch, 24 May 2019, *Lebanon: Syrians Summarily Deported from Airport*., Lebanese Centre for Human Rights, Submission to the United Nations Universal Periodic Review of Lebanon; Anti-Racism Movement, 14 July 2021, Lebanon Civil Society Submission to the 104th Session of the Committee on the Elimination of Racial Discrimination.

[72] EuroMed Rights, (2021), "Pushbacks and expulsions from Cyprus and Lebanon: The risks of (chain) refoulement to Syria," chapter 6, in Return Mania: Mapping policies and practices in the EuroMed region.

[73] EuroMed Rights, 3 June 2021, *Pushbacks From Cyprus To Lebanon Lead To Chain Refoulement To Syria.*

[74] Wallis, Emma, 17 May 2021, "*Sent back: 56 migrants were refused entry to Cyprus at the weekend*, InfoMigrants.

[75] In order to verify these reports of chain refoulement, Dr. Jill Alpes (Human Rights Centre, Ghent University) interviewed the respective staff within the EuroMed Rights member organization who was in direct contact with the deported individuals in Syria. The findings were also corroborated by the Lebanese Center for Human Rights in their 2021 report entitled *Return to Syria: Challenges faced by Syrian Refugees* .

[76] Amnesty International, 8 September 2021, *Lebanon: General Security must halt imminent deportation of six Syrians*.

[77] Janmyr, Maja, November 2017, 'UNHCR and the Syrian Refugee Response: Negotiating Status and Registration in Lebanon', The International Journal of Human Rights.

[78] Lebanese Center for Human Rights, (2021), *Return to Syria: Challenges faced by Syrian Refugees*

[79] Human Rights Watch (2019) '*Lebanon: Syrians Summarily Deported from Airport'*.

[80] Access Centre for Human Rights, (2019), Arbitrary Deportation of Syrian Refugees in Lebanon.

44. Syrians in Lebanon struggle with restrictions to labour rights,[81] livelihood conditions[82] and restrictions on movement.[83] In 2021, 88% of Syrian refugee households were below the Survival Minimum Expenditure Basket (SMEB), the absolute minimum amount required to cover lifesaving needs.[84] Consequently, around half of Syrian refugee households were food insecure and unable to access needed medication in 2021.[85]
45. As evidence of their living conditions in Lebanon, interviewed individuals summarily returned from Cyprus showed to Dr. Jill Alpes (Human Rights Centre, Ghent University) amongst others medical certificates for urgent treatment and medication that respondents were unable to access in Lebanon, removal orders from Lebanon's General Security Organization (GSO) and references to protection needs that had remained unaddressed by UNHCR.

[81] Access Centre for Human Rights, (2020), Unwrapping the rights to work for Syrian and Palestinian refugees in Lebanon.
[82] Access Centre for Human Rights, (2021), Refugees in Lebanon: An Unknown Path, Policy Paper.
[83] MENA Rights Group (2022), Joint report on the erosion of the non-refoulement principle in Lebanon since 2018.
[84] VASyr, 2021 Vulnerability Assessment of Syrian Refugees in Lebanon, at: https://reliefweb.int/report/lebanon/vasyr-2021-vulnerability-assessment-syrian-refugees-lebanon
[85] *Ibid.*