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Readmission agreements:
Evidence and the prime concern

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20 points

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Summary

According to a European Council recommendation, the prime concerns member states should consider when negotiating and concluding new readmission agreements are speed and simplicity.

The readmission agreements are written in a reciprocal manner, but it is easy to imagine that they are not for the mutual benefit of the states involved. Usually, the state insisting on a readmission agreement has a problem with migrants, where as the other does not. This, in reality, makes only one state obligated to readmit persons from the other. Hence, the agreements, despite their wording, are not reciprocal. Is it possible to pierce through the reciprocal wording of the agreements and find said inequality in the text itself? Is it possible to assume the use of bargaining power by one state upon another to get to the conclusion of a readmission agreement, just from the wording? Most readmission agreements are quite similar. However, in the section of evidence used to identify persons considered for return, be they nationals, third country nationals or stateless persons, you can find some differences.

The object of the thesis is to research the means of evidence in readmission agreements, concerning both nationals and third country nationals or stateless persons, in order to see if it is at all possible, from the text alone, see traces of inequality. Is there a difference between the readmission agreements concluded by two highly developed states and those where one state is much less developed than the other?

There are tendencies that states in the north use their bargaining power when negotiating the evidence to be used for proving or substantiating nationality. The tendencies are not seen in the general acceptance of the evidentiary forms but rather the acceptance of a somewhat detrimental version of the same evidence. Therefore, these tendencies are vague and can be even further clouded by the fact that states are obligated to readmit their own nationals. The acceptance of an extensive list of proving or substantiating nationality can also be a manifestation of what states already consider them obligated to do. Concerning the evidence used for proving entry of third country nationals and stateless persons, these seem to be more than tendencies. The Community has in fact better deals for Hong Kong SAR and Macao SAR than Albania and Sri Lanka. Also, Italy and Spain have a very wide range of options in proving an entry from the requested party by a third country national.

Preface

I began working on this thesis in the spring of 2006 and virtually finished it a little more than a year later. The work was in many aspects tedious. For instance, I had to translate agreements written in Italian and Spanish into Swedish and English, none of which is my native language. Hiring a translator was out of the question, the money just was not there. Therefore, my first thanks should go to the fine people making dictionaries and translation software. I presented the thesis to Gregor Noll and my fellow student Per Malm just before Christmas of 2007, with high hopes of actually getting it finished and finally be something more than just a law student. The thesis, eighty pages and more, was too long. In the spring of 2008, I spent the dark nights of February at the faculty in Lund, trying to make it shorter. And then, nothing. Now it is late summer of 2009. I am still typing. I could blame this on my friends, who persuade me into relishing life in all its forms, but I will not. I could also blame this on the state of Sweden, for employing me almost two years ago and keeping me busy since, but I will not. Finally, I could blame this on a higher power or fate and what not, but I will not. The only thing that has kept me from finishing this thesis, I realize now, is the fact that I like the thought of being a student, forever learning.

I would like to thank Gregor Noll for all his help, wonderful tuition and inspiration. Without him there would never had been a thesis. Great thanks also to Jean-Pierre Cassarino with the MIREM project (www.mirem.eu), who provided me with valuable research material. I would also like to thank my family for supporting me, and especially my brother Benjamin for giving me the technical means to write this thesis. Finally, I would like to thank Johanna Fragiadakis Olsson, who nourished me with food, shelter and companionship during the time of writing, for which I am forever grateful. Thank you all.

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Abbreviations

CIA	Central Intelligence Agency
CSR	Convention relating to the Status of Refugees
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
GDP	Gross Domestic Product
HDI	Human Development Index
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ID	Identity card
IGC	Inter-Governmental Consultations for Asylum, Refugee and Migration Policies in Europe, North America and Australia
OJ	Official Journal of the European Union
PPP	Purchasing Power Parity
SAR	Special Administrative Region
UK	United Kingdom
UMA	Unione Maghreb Arabe
UN	United Nations
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

Most formal readmission agreements are written in a reciprocal manner, with equal obligations laid upon all parties to the agreement. Still readmission agreements are said to be agreements of unequals,¹ and that states in reciprocal relations, often do not have equal obligations.² Despite their wording, it is quite easy to imagine that the readmission agreements themselves are not for the mutual benefit of all states involved, and that states in reality do not have the equal obligations. The state that has a problem with migrants coming from another state, might insist on a readmission agreement with that state. The agreement is written reciprocally even though the latter state does not have a problem with migrants coming from the first state. Thus, in reality it is only one state that is obligated, unless reality radically changes. Is it possible to pierce through the reciprocal wording of the agreements and find said inequality in the text itself? Is it possible to assume the use of bargaining power by one state upon another to get to the conclusion of a readmission agreement, from the wording? Readmission agreements are for the most part, quite similar. There is, however, in one area where there can be found significant differences between agreements, and that is in the section of evidence used to identify persons considered for return, be they nationals, third country nationals or stateless persons.

1.2 Object and delimitation

The object of the thesis is to research the means of evidence in readmission agreements, concerning both nationals and third country nationals or stateless persons, in order to see if it is at all possible, from the text alone, see traces of inequality. Is there a difference between the readmission agreements concluded by two highly developed states and those where one state is much less developed than the other?

Since the European Community is authorized to negotiate with Algeria on readmission,³ there is also a comparison between previous Community agreements and other member states agreements with Algeria. In accordance with long established case law of the European Court of Justice, it is clear

¹ See for instance Cassarino, Jean-Pierre, "Informalising Readmission Agreements in the EU Neighbourhood", *The International Spectator* (Routledge), 42 (2), 2007, p. 179-196.

² Keohane, R. O., "Reciprocity in International Relations". *International Organization*, vol. 40 (1), 1986 p. 7.

³ Council Decision authorising the Commission to negotiate with the People's Democratic Republic of Algeria a readmission agreement between the European Community and Algeria, Brussels, 25 November 2002, can be viewed at Statewatch News online, (<http://www.statewatch.org/news/2003/may/12falgeriamdte.html>), last accessed August 8th 2009, (henceforth *Council Decision 2002*).

that a Community readmission agreement with a third state, would always supersede any existing member state readmission agreement or arrangement with that same state.⁴ Assuming that this new agreement, between the Community and Algeria, will be similar to existing ones, how will this affect the other member states current position towards Algeria? According to the Commission as late as June 2009, several attempts have been undertaken, both formal and informal, to engage in readmission negotiations with Algeria. Algeria, however, is still very reluctant. The Commission will continue its effort in order to start talks with Algeria.⁵

The delimitation has somewhat been covertly defined. The thesis only considers agreements with at least one European party representing the more developed party. The parties are apart from the European Union, also the European states of Italy, Spain, Sweden, Switzerland, United Kingdom on the one end. The other end is represented by the Maghreb Countries of Algeria, Morocco and Tunisia, Albania and Romania of Europe and Sri Lanka, Macao SAR and Hong Kong SAR of Asia.

1.3 Method and material

The thesis compares means of evidence in various readmission agreements. In so doing, it takes use of different sources of international law. The main sources are the agreements themselves as well as other treaties of international law. Apart from customary law, the thesis also draws upon the knowledge of scholars in articles and books.

Article 38(1) of the Statute of the International Court of Justice⁶ (hereinafter the ICJ Statute) is widely accepted as the most authoritative statement of the sources of international law.⁷

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

Technically, this formulation is limited to the sources that the International Court of Justice (hereinafter ICJ) must apply. Since all members of the

⁴ Schieffer, Martin, Community Readmission Agreements with Third Countries – Objectives, Substance and Current State of Negotiations. *European Journal of Migration Law* 5: 343-357, 2003, p. 350f.

⁵ Answer given by Mr. Barrot on 3rd of June 2009, on behalf of the Commission in reply to a written question, (<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-2262&language=en>), last accessed August 8th 2009.

⁶ The Statute of the International Court of Justice.

⁷ Shaw, M., *International Law*, 5th edition, Cambridge, Cambridge University Press, 2003, p.66.

United Nations are parties to the ICJ statute through article 93 of the Charter⁸, then there is no serious contention as to whether this list expresses the universal perception of the sources of international law.⁹ This list has been criticized for not listing all the sources of international law or that it includes aspects which are not genuine sources, but none of the alternative lists of sources of international law produced has won general approval.¹⁰ According to article 38(1) of the Statute, the sources of law are legit.

The translation of the agreements not originated in the English language was done with the help of dictionaries and translation software. The interpretation of agreements have been done in accordance with the principle of good faith and in light of the object and purpose of said agreements, as intended according to article 31(1) of the Vienna Convention on the Law of Treaties.¹¹ The comparisons between the different agreements have also been conducted with full respect to articles 31-32 VCLT. ICJ has reaffirmed that these articles themselves reflect customary law.¹²

The terms nationality and citizenship is used interchangeably, so is 'right of abode' and residence. In the cases of Hong Kong SAR and Macao SAR, the term permanent resident is equal to that of national concerning other states. 'Proving' and 'establishing' nationality is also used as meaning the same. Same reasoning applies to 'establishing' or 'proving' entry of a third country national or stateless person. In a similar manner, 'prima facie' evidence of nationality is used as the equivalent of 'validly assuming' nationality or 'presumption' of nationality. It is all different forms substantiating nationality and as earlier noted, the same applies to substantiating entry of a third country national or stateless person.

1.4 Outline

After this short introduction, chapter 2 moves on to discuss readmission agreements in general, to lay a sort of foundation for the next segment. Chapter 3 introduces the various actors, the parties to the agreements that have been chosen for this research. Statistics on migration, development and economy is presented to make a distinction between the different countries and put them in two groups, north and south. Chapter 4 lists all the evidence in all agreements chosen. Chapter 5 then breaks down and analyzes the evidence presented in chapter 4 in a comparative fashion. Chapter 6 finishes off with conclusions drawn from the analysis in chapter 5.

⁸ Charter of the United Nations, adopted June 26 1945, T.S. 993, in force October 24 1945, 1 UNTS XVI.

⁹ Shaw, 2003, pp. 66-7.

¹⁰ Malanczuk P., *Akehurst's Modern introduction to International Law*, 7th edition, London, Routledge, 1997, p. 36.

¹¹ Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331, entry into force on 27 Jan. 1980. (hereinafter VCLT).

¹² See e.g. *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), 4, Judgment, ICJ. Reports 2002, p. 625, para. 37. See also Shaw, 2003 p. 839.

2 Readmission Agreements in general

2.1 Definition

A readmission agreement regulates the return and readmission of persons between two or more states in a treaty of international law.¹³ Readmission agreements require a party to the agreement to readmit to its territory, certain categories of persons on the request of another contracting party.¹⁴ Persons to be readmitted under such agreement are a country's own nationals and, under certain conditions, third country nationals or stateless persons who have passed through the territory of the requested party, or have otherwise been granted permission to stay on the territory of the requested party.¹⁵

2.2 History

Readmission agreements have been around for quite some time. After the Second World War a number of bilateral readmission agreements were concluded between the states in Western Europe. In 1957 the Convention on the waiver of Passport Controls at the IntraNordic Borders¹⁶, and 1960 the Benelux Convention¹⁷, which included readmission clauses, were concluded. In the 1960s, member states of the European Economic Community signed readmission agreements to cope with irregular movements of persons amongst member states.¹⁸ In the seventies no readmission agreements were concluded.¹⁹ Since the mid eighties and the fall of the Berlin Wall, political and migratory changes, deregulation of emigration, an increased interest in readmission agreements have emerged.²⁰ Because of this newfound interest, a cobweb of bilateral and multilateral readmission agreements have developed, with European states

¹³ Noll, G, 'Readmission Agreements' in Gibney/Hansen, *Immigration and asylum*, ABC CLIOS, Santa Barbara, 2005, p. 495.

¹⁴ IGC Report on Readmission Agreements, January 2002, p. 9.

¹⁵ Ibid.

¹⁶ Överenskommelse med Danmark, Finland, Island och Norge om tillägg till den nordiska överenskommelsen av den 12 juli 1957 om upphävande av passkontrollen vid de internordiska gränserna, ändrad genom överenskommelsen den 27 juli 1979 samt tilläggsöverenskommelsen av den 2 april 1973 (SÖ 1958: 24, SÖ 1979: 26, SÖ 1973: 43), Köpenhamn den 18 september 2000 (Convention on the waiver of Passport Controls at the IntraNordic Borders).

¹⁷ Traité instituant l'Union économique Benelux, entered into force 1st of November 1960.

¹⁸ Bouteillet-Paquet, Daphne, Passing the Buck: A critical analysis of the Readmission Policy Implemented by the European Union and Its Member States, *European Journal of Migration and Law*, vol. 5. 359-377, 2003, p. 259.

¹⁹ IGC Report on Readmission Agreements, January 2002, p. 9.

²⁰ Ibid. and Noll, 2005, p 495.

as the main initiators.²¹ These ‘second generation’ agreements have introduced more flexibility into the readmission framework. Some novelties are e.g. ‘presumption of nationality’ rather than just formal proof, readmission obligation rising from illegal stay and not just illegal entry and time-limits for readmission requests starting from ‘after discovery’ rather than ‘after entry’.²² Due to the development in the early nineties and the opening of borders, Western European states concluded readmission agreements with Eastern European states, hoping that these would take control of their borders and so prevent the migratory flow of third country nationals passing through on their way to Western Europe and North America.²³ To get a grasp on the vast increase in the number of agreements concluded: between the years 1950 and 1990 eighteen readmission agreements were concluded and between 1990 and 2000 some 302 agreements were concluded.²⁴

2.3 Types of readmission agreements

There are five basic types of readmission agreements, three types of formal readmission agreements, agreements with readmission provisions and informal arrangements on readmission and return.

2.3.1 Bilateral formal agreements

Most readmission agreements are bilateral.²⁵ This most likely has to do with it being easier to negotiate on bilateral terms than on multilateral. Besides saving a lot of negotiating, another advantage is that detailed provisions can be adapted to the special circumstances and the special relations between the two parties.²⁶ A disadvantage is that a growing number of bilateral agreements can complicate future negotiations between states that already have entered into many agreements and have a preconceived view of which provisions should be included.²⁷

2.3.2 Multilateral formal agreements

A few of the existing readmission agreements are multilateral. The two mentioned above,²⁸ Schengen²⁹, Schengen and Poland³⁰ and a few recent

²¹ Noll, 2005, p 495.

²² IGC Report on Readmission Agreements, January 2002, p. 9.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid. pp. 10, 12.

²⁶ Ibid. p. 12.

²⁷ Ibid. p. 13.

²⁸ See notes 15 and 16.

²⁹ THE SCHENGEN ACQUIS as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999 (OJ L 176, 10.7.1999, p. 1.), OJ 22.9.2000.

³⁰ DECISION OF THE COUNCIL OF THE EUROPEAN UNION of 14 April 2003 on the admission of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of

Community readmission agreements with Macao SAR³¹, Hong Kong SAR³² and Sri Lanka³³, which are based on the EU Model agreement but in essence are multilateral. A multilateral readmission agreement is often the consequence of decision by several states to ease their internal border control. Example of that are the 1957 IntraNordic Passport Convention³⁴ and Schengen³⁵. If an assembly of states wish to increase the freedom of movement of their own nationals but not to third country nationals, a readmission agreement might be required between the contracting parties and perhaps even with surrounding states.³⁶ Some advantages are that the risk of being met with cross-demands, such as visa-exemptions or financial aid can be reduced. Such agreement ensure a certain degree of uniformity in readmission practice within the participating states. Disadvantages are: they often require long negotiations and detailed provisions can be harder to achieve the more countries are involved. The readmission issue is more of a priority to some states than others.³⁷

2.3.3 Model agreements

A third type is the model agreement, which is an agreement with standard clauses, which could act as a stop gap mechanism until regional or international conventions are concluded.³⁸ The Community readmission agreements with Macao SAR³⁹, with Hong Kong SAR⁴⁰ and with Sri Lanka⁴¹ are all based on a model agreement established by the European Union. Advantages are reduced negotiation times and increased consistency in implementation but a disadvantage is that the provisions in a model agreement can be too general to deal with specific readmission problems between two states.⁴² If you study the above mentioned agreements, which are based on the model agreement, you will find that the Macao SAR and Hong Kong SAR agreement are nearly identical, and Sri Lanka Agreement is slightly different. We will address these small differences in the context of evidence.

Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, OJ 23.9.2003.

³¹ AGREEMENT between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, OJ L 143/99, 30/04/2007 p. 99 – 115.

³² AGREEMENT Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the European Community on the readmission of persons residing without authorisation OJ L 17/25, 24/01/2004 P. 0023 - 0039.

³³ Proposal for a COUNCIL DECISION concerning the signing of the agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation, Brussels, 21.3.2003, SEC(2003) 255 final, 2003/0043 (CNS).

³⁴ See note 16.

³⁵ *Supra note 29.*

³⁶ IGC Report on Readmission Agreements, January, 2002, p. 13.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ See above, note 31.

⁴⁰ See above, note 32.

⁴¹ See above, note 33.

⁴² IGC Report on Readmission Agreements, January 2002, p. 13.

2.3.4 Readmission provisions

A fourth way of dealing with return is having readmission provisions in agreements not specifically on readmission. An advantage is being that states are more likely to fulfil their readmission obligation as to not lose the other benefits from the agreement. The main disadvantage is the possible lack of precision, which can hamper the effective implementation of the readmission provisions.⁴³

2.3.5 Informal arrangements

Finally, some states engage in informal arrangements concerning readmission. There are a few reasons why states would like to have informal readmission arrangements. First, one of the contracting parties refuses to enter into a formal agreement. Second, being an informal agreement, either in written or oral form, it can be an exchange of notes or merely a handshake, the terms are more easily re-negotiable due to changed circumstances, and perhaps even more adaptable to individual cases. With a formal agreement, re-negotiations could be lengthy. Third, it may very well be sufficient with an informal agreement for an effective readmission procedure between the two states. States have even pointed out that these informal arrangement leads to a more 'formal' and efficient procedure than do normal formal agreements. The reason being that the arrangements are a better functioning implementation of an agreement, and leads to a better and frequent contact between the authorities managing readmissions and returns. Other states lean towards the view that it is not the type of agreement that matters but rather how well established communications and good intentions between the two states in question are.⁴⁴ A main concern with informal agreements, from a human rights perspective, would be the lack of insight of the actual procedure.

2.4 Why do states conclude readmission agreements?

Readmission agreements are part of the complex issue of return of nationals, third country nationals and stateless persons who entered illegally or whose stay subsequently became illegal and who therefore should be returned to their country of origin or a third country.⁴⁵ They could also be seen as an integral part of developing regional and intercontinental regimes to control and discourage migration.⁴⁶

According to the IGC Report on readmission agreements of 2002, states enter into readmission agreements because of various reasons.⁴⁷ These

⁴³ Ibid. p. 13-4.

⁴⁴ Ibid. p. 14.

⁴⁵ Ibid. p. 8.

⁴⁶ Noll, 2005, p. 495.

⁴⁷ IGC Report on Readmission Agreements, January 2002, p. 10.

reasons are: significant numbers of illegal residents on their territory, lack of co-operation by countries of origin, as a pre-emptive measure, to clarify international obligations, establishing effective procedures and because of already existing readmission agreements between other countries.⁴⁸

2.5 The legal base of readmission

The international obligation to readmit own and foreign nationals should be distinguished from the individual right to return to the country of nationality. Every individual has a right to leave any country, including his own, as well as to return to his own country, according to Art 13.2 of the Universal Declaration of Human Rights.⁴⁹ The individual however, does not have a right to enter any country. In international law, states are also free to decide which aliens may stay and which have to leave the country. International refugee law also authorizes states to expel even refugees.⁵⁰ Therefore, if for some reason, a person no longer is welcomed on that state's territory, there has to be another state willing to welcome that person, namely the state of which he or she is a national. In this case, the individual's wish to stay or not to return is trumped by state sovereignty, the right to expel. Since there is nowhere the individual has a right to go but home, so the logic goes, the state of which he or she is a national would then be obligated to readmit him or her.⁵¹ However, the right to expel is in relation to that particular individual, not the individual's home state. To invoke a duty to readmit upon the home state would mean the subordination of that state's personal delimitation to that of another state. The right to expel, merely commands a weak duty on the home state to respect the individual's right to return.⁵²

2.5.1 Nationals

Readmission of own nationals is a recognized general principle within treaties under international law. Due to *opinio juris* and consistent state practice it is also recognized under customary international law.⁵³ The foundation of the obligation to readmit is found in the personal and territorial sovereignty and the right to expel unwanted aliens from the territory. If there were not a state obligated to readmit the no longer wanted aliens, the right to expel would essentially lose all practical importance.⁵⁴ The right to expel is, however not without restrictions. There may be human

⁴⁸ Ibid.

⁴⁹ UNGA Res. 217 (III).

⁵⁰ Achermann, A., Gattiker, M., 'Safe third Country: European Developments', *International Journal of Refugee Law*, vol. no 1. 1995 p. 25.

⁵¹ Hailbronner, Kay, *Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals*, 1997, p. 7.

⁵² Noll, G., 'Return of persons to states of origin and third states' in Aleinikoff T.A. and Chetail V. (eds.), *Migration and International Legal Norms*, T.M.C. Asser Press, The Hague, 2003, p. 71.

⁵³ Hailbronner, 1997, p. 45.

⁵⁴ Ibid. p. 11f.

rights considerations. The alien could face real risks in the country of origin and should therefore not be expelled there, also the expulsion could be collective and therefore a direct human rights violation or the perhaps the practices of the expulsions violate human rights.⁵⁵ It also follows from the obligation that state are not to make claims for the readmission and from the principles of good faith, that states of origin do not make their obligation to readmit their nationals dependent on any formalities, as the presentation of valid documents.⁵⁶ From same principles follows that states of origin are obligated to co-operate in the execution of the readmission of their nationals and issue the necessary travel documents.⁵⁷

2.5.2 Third country nationals and stateless persons

There is a readmission obligation for own nationals in customary international law, but there seems to be no indications of such obligation regarding readmission of third country nationals and stateless persons who have entered illegally and who are to be expelled shortly.⁵⁸ Therefore readmission agreements can serve a purpose to create such an obligation. The means of evidence used to facilitate readmission of a third country national is of a complete different nature. It is no longer necessary to establish nationality or citizenship, it might even be impossible due to statelessness, but rather establish entry across a common external border.

2.5.3 The human rights perspective

*The need for simplicity and speed should be the prime concern.*⁵⁹

Readmission agreements generally do not appreciate the situation of asylum seekers.⁶⁰ Some agreements do specifically mention the obligations of the contracting parties of 1951 Convention relating to the status of refugees,⁶¹ many do not,⁶² and the quote above from the Council Recommendation is quite telling on what the main concerns are. Although states may expel aliens from their territory, there are limitations to this right in the CSR,

⁵⁵ Noll, Gregor, 'Rejected Asylum Seekers: The problem of return', *International Migration* VOL. 37 (1) 1999, p.277f.

⁵⁶ Hailbronner, 1997, p. 45.

⁵⁷ Ibid.

⁵⁸ Ibid. p. 37.

⁵⁹ European Council Recommendation of July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements, Official Journal C 274, 19/09/1996, Annex II.3 article I.1, (henceforth *Council Recommendation 1995*).

⁶⁰ UNHCR Position on Readmission Agreements, 'Protection Elsewhere' and Asylum Policy, 1 August 1994.

⁶¹ The 1951 Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S 150, (henceforth *Refugee Convention* or *CSR*).

⁶² Of the readmission agreements discussed here 11 of 20, explicitly mentions Refugee Convention. Of those 9 that do not mention the refugee convention, 7 are in the 'South' group (see chapter 3.2 below).

ICCPR⁶³ and ECHR⁶⁴. There are a number of ways return through a readmission agreement can breach international obligations. Most obvious would be the breach of article 33 of the CSR, which forbids expelling refugees to countries where they may be persecuted. Further, article 3 of the ECHR and article 7 of the ICCPR both forbid expulsion of persons to countries in which they can expect torture or other cruel, inhuman or degrading treatment.

Current theory and practice prohibits refoulement, it is forbidden, not only to send refugees back to the persecutor state, but also to send the refugee to a third state that in turn will expel him to the persecutor state. On the basis of article 33 in the Refugee Convention, expulsion is impermissible if there are serious grounds for assuming that the third state does not observe the non-refoulement principle.⁶⁵ The same argument applies on article 3 of the ECHR. If there is a risk that the refugee will be expelled to the persecutor state, he must not be returned to that third state. Article 3 also forbids expulsion to third countries if the alien cannot be guaranteed residence, provided he cannot be lawfully expelled to the country of origin. This prevents people from being deported from one country to the other and becoming refugees in orbit.⁶⁶

Facilitating the return of persons through a readmission agreement does not alleviate states from their responsibilities. When it comes to the means of evidence, the proof, for asserting nationality or identity, it is an issue of great importance that states have the right nationality or identity of the persons considered for return, otherwise you do not know whom you are sending back to what.

2.6 Proof in readmission agreements

As mentioned above it is of great importance to know the right nationality or identity of persons considered for return, but what constitutes proof is not all that clear. State practice is not sufficiently uniform to be able to establish detailed rules on what constitutes sufficient proof. In international practice the possession of a passport is in principle viewed as a *presumptio juris*, but not as conclusive proof.⁶⁷ If the person to be expelled does not have a passport or other means of identification, the requested state must accept other means of evidence of nationality of said person. In modern state practice a substantiation is uniformly held as sufficient, and often the requesting state cannot present definite proof at a reasonable cost. The requested state refusing to readmit in such cases would be a frustration of

⁶³ International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 Mar. 1976.

⁶⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force 3 Sept. 1953.

⁶⁵ Achermann, A., Gattiker, M., 1995, p. 26.

⁶⁶ Ibid. p. 26-7.

⁶⁷ Hailbronner, 1997, p. 14.

that states obligations.⁶⁸ There is no customary rule, due to lack of state practice, that obligates states of origin to readmit it's own nationals without a valid travel document. The requested state, however, is forced to issue substitute travel papers, allowing the national to return.⁶⁹

⁶⁸ Ibid. p. 14f.

⁶⁹ Ibid. p. 15.

3 The countries involved

In order to research if more developed countries are giving different deals in readmission agreements depending on the bargaining power of its adversaries, it is necessary to get statistics on the development of the countries with in the field of research.

3.1 The Statistics

The contracting parties of the various agreements will serve us with on what countries we need to get statistics. The agreements are; the European Union agreements with Hong Kong SAR⁷⁰, Macao SAR⁷¹, Albania⁷² and Sri Lanka⁷³; the Switzerland agreements with Sri Lanka⁷⁴, Macao SAR⁷⁵, Hong Kong SAR⁷⁶, Albania⁷⁷, Romania⁷⁸, Algeria⁷⁹ and Sweden⁸⁰; Sweden's

⁷⁰ AGREEMENT Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the European Community on the readmission of persons residing without authorisation OJ L 17/25, 24/01/2004 P. 0023 – 0039, (henceforth *EU – Hong Kong agreement*).

⁷¹ AGREEMENT between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, OJ L 143/99, 30/04/2007 p. 99 – 115, (henceforth *EU – Macao Agreement*).

⁷² Proposal for a COUNCIL DECISION concerning the signing of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation, Brussels, 12.2.2004, COM(2004) 92 final, 2004/0033 (CNS), (henceforth *EU – Albania agreement*).

⁷³ Proposal for a COUNCIL DECISION concerning the signing of the agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation, Brussels, 21.3.2003, SEC(2003) 255 final, 2003/0043 (CNS), (henceforth *EU – Sri Lanka agreement*).

⁷⁴ Notenaustausch vom 10./11. Januar 1994, zwischen der Schweizerischen Eidgenossenschaft und der Demokratischen Sozialistischen Republik Sri Lanka betreffend die koordinierte Rückführung von abgewiesenen Asylsuchenden nach Sri Lanka, (henceforth *Switzerland – Sri Lanka agreement*).

⁷⁵ Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung der Besonderen Verwaltungsregion Macao der Volksrepublik China über die Rückübernahme von Personen mit unbefugtem Aufenthalt, (henceforth *Switzerland – Macao agreement*).

⁷⁶ Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung der Besonderen Verwaltungsregion Hongkong der Volksrepublik China über die Rückübernahme von Personen mit unbefugtem Aufenthalt, (henceforth *Switzerland – Hong Kong agreement*).

⁷⁷ Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung der Republik Albanien über die Rückübernahme von Personen mit unbefugtem Aufenthalt, (henceforth *Switzerland – Albania agreement*).

⁷⁸ Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung von Rumänien über die Rückübernahme von Personen mit unbefugtem Aufenthalt. (henceforth *Switzerland – Romania agreement*).

⁷⁹ Abkommen zwischen dem Bundesrat der Schweizerischen Eidgenossenschaft und der Regierung der Demokratischen Volksrepublik Algerien über den Personenverkehr (henceforth *Switzerland – Algeria Agreement*).

agreement with Romania⁸¹; the United Kingdom agreements with Romania⁸², Algeria⁸³ and Albania⁸⁴; they Italy agreements with Algeria⁸⁵, Tunisia⁸⁶ and Morocco⁸⁷ and finally the Spain agreements with Morocco⁸⁸ and Algeria⁸⁹.

On all the 14 countries of the 20 agreements, there will be presented statistics on GDP in US dollars, which is gross domestic product converted to US dollars using the average official exchange rate reported by the International Monetary Fund.⁹⁰ Since there is a big difference in the population of the various countries, the GDP per capita (PPP in US dollars) is also listed, which is the gross domestic product (in purchasing power parity terms in US dollars) divided by the population at midyear. PPP (purchasing power parity) is the rate of exchange that accounts for price differences across countries, allowing international comparisons of real output and incomes. At the PPP US\$ rate, PPP US\$1 has the same purchasing power in the domestic economy as \$1 has in the United States.⁹¹

⁸⁰ Avtal med Schweiz om återtagande av personer, Bern den 10 december 2002, SÖ 2003:48 (Agreement between the Government of the Kingdom of Sweden and the Swiss Federal Council on the Re-admission of Persons), (henceforth *Switzerland – Sweden agreement*).

⁸¹ Avtal med Rumänien om återtagande av personer, Bukarest den 2 april 2001 SÖ 2002:5, (henceforth *Sweden – Romania agreement*).

⁸² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania on the Readmission of Persons Protocol for the implementation of the Agreement, Bucharest, 20 February 2003, Romania No. 1 (2003) (henceforth *UK – Romania agreement*).

⁸³ Agreement on the Circulation of Persons and Readmission between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Democratic Republic of Algeria London, 11 July 2006, Algeria No.1 (2006) (henceforth *UK – Algeria agreement*).

⁸⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Albania on the Readmission of Persons and Protocol for the implementation of the Agreement, Tirana, 14 October 2003, Treaty Series No.40 (2005), (henceforth *UK – Albania Agreement*).

⁸⁵ Accordo tra il Governo della Repubblica Italiana e il Governo della Repubblica Algerina Democratica Popolare sulla Circolazione delle Persone, (henceforth *Italy – Algeria agreement*).

⁸⁶ Nota Verbale, 088/643, Roma, 6 Agosto, 1998 (henceforth *Italy – Tunisia agreement*).

⁸⁷ Accordo tra la Repubblica Italiana ed il Regno del Marocco sul Riaccompagnamento al Confine dei Cittadini e sul Transito in Vista dell' Allontanamento, (henceforth *Italy – Morocco agreement*).

⁸⁸ ACUERDO DE 13 DE FEBRERO DE 1992 ENTRE EL REINO DE ESPAÑA Y EL REINO DE MARRUECOS RELATIVO A LA CIRCULACIÓN DE PERSONAS, EL TRÁNSITO Y LA READMISIÓN DE EXTRANJEROS ENTRADOS ILEGALMENTE, FIRMADO EN MADRID. APLICACIÓN PROVISIONAL. (BOE núm. 100, de 25 de abril y núm. 130, de 30 de mayo de 1992), (henceforth *Spain – Morocco agreement*).

⁸⁹ PROTOCOLO entre el Gobierno de España y el Gobierno de la República Argelina Democrática y Popular sobre circulación de personas, hecho ad referéndum en Argel el 31 de julio de 2002, Jueves 12 febrero 2004, BOE núm. 37, 6350 (henceforth *Spain – Algeria agreement*).

⁹⁰ The Human Development Report 2006 - Beyond scarcity: Power, poverty and the global water crisis, published for the United Nations Development Programme, New York 2006, (<http://hdr.undp.org/hdr2006/pdfs/report/HDR06-complete.pdf>), Last Accessed 8th of August 2009, (henceforth *UNDP 2006*)p. 406.

⁹¹ Ibid. pp. 406, 409.

Furthermore, the net migration statistic for each country is listed. If a country has a net migration of more than zero, then that country is considered to have net immigration, conversely, if the net migration is less than zero, then that country is said to have net emigration. Some of the countries, are ‘transit countries’, meaning that there are persons migrating through their territory. In the case of Maghreb, many migrants come from the sub-Saharan region and migrate through e.g. Morocco, on their way to Spain. This does not show in the statistics. Also included in the statistics table are population and the human development index (HDI).⁹² The HDI is a fairer way of measuring the development in countries. Especially since all countries do not use the same way of changing commodities. In short, everybody doesn’t use money.⁹³

The statistics are all taken from The CIA World Factbook 2007,⁹⁴ except for the HDI, which is from the United Nations Development Programme.⁹⁵

⁹² Ibid. pp. 263-73.

⁹³ Ibid.

⁹⁴ Central Intelligence Agency – The World Factbook, (<https://www.cia.gov/library/publications/the-world-factbook/index.html>), last accessed 8th of August 2009.

⁹⁵ *UNDP 2006*, p. 283-285.

Table 1a. ‘Statistics’⁹⁶

Country	GDP PPP (billion \$US)	GDP PPP per Capita (\$US)	Population	Net. Migration	HDI
Europe					
The Community	12 820,00	29 400,00	490 426 060	1,60	N/A
Albania ⁹⁷	20,21	5 600,00	3 600 523	-4,54	0,784
Italy	1 727,00	29 700,00	58 147 733	2,06	0,940
Romania	197,30	8 800,00	22 276 056	-0,13	0,805
Spain	1 070,00	27 000,00	40 448 191	0,99	0,938
Sweden	285,10	31 600,00	9 031 088	1,66	0,961
Switzerland	252,90	33 600,00	7 554 661	2,66	0,947
United Kingdom	1 903,00	31 400,00	60 776 238	2,17	0,940
Maghreb					
Algeria	253,40	7 700,00	33 333 216	-0,33	0,728
Morocco	147,00	4 400,00	33 757 175	-0,82	0,640
Tunisia	87,88	8 600,00	10 276 158	-0,47	0,760
Asia					
Hong Kong SAR	253,10	36 000,00	6 980 412	4,72	0,927
Macao SAR ⁹⁸	10,00	24 300,00	456 989	4,42	0,909
Sri Lanka ⁹⁹	93,33	4 600,00	20 926 315	-1,16	0,755

3.2 Grouping

From the above we can divide the countries into two groups, one group that has net Immigration (net Migration > 0) and one that has net Emigration (net Migration < 0). The net Immigration group also has GDP per Capita of over \$24 000, while the net Emigration group has a GDP per Capita of less than \$9 000, and that would then also cover the eventuality of a 50% increase of the Albanian economy. In addition, all countries in the net immigration group have a high-ranking HDI (0,800 and above), while in the net emigration group, all countries have medium-ranking HDI (0,500 - 0,799), except for Romania that is slightly above the 0,799 mark with an index of 0,805.

Group one, the North, with net Immigration and high GDP per Capita, and high ranked HDI, would consist of the European Union, Italy, Spain,

⁹⁶ Source: See note 73 above. The GDP PPP figures are an estimate of 2006, except for Macao SAR, which is the number for 2004. The GDP PPP per Capita figures are an estimate for 2007, except for Macao SAR, which is the figure for 2005. The population numbers are an estimate for July 2007 as are the net migration figures. The HDI numbers are calculated 2007 by the UNDP.

⁹⁷ Albania has a large grey economy that may be as large as 50% of official GDP. With an 50% increase of GDP, Albania would have a GDP PPP per Capita of \$8 400.

⁹⁸ The UNDP does not calculate the HDI for Macao SAR, the authorities of Macao have calculated this figure, 2007 Macao in Figures, (http://www.dsec.gov.mo/english/indicator/e_mn_indicator.html), Last Accessed June 15th 2007.

⁹⁹ Since the outbreak of hostilities between the government and armed Tamil separatists in the mid-1980s, several hundred thousand Tamil civilians have fled the island and more than 200,000 Tamils have sought refuge in the West (source: see note 73 above).

Switzerland, Sweden, the United Kingdom, Hong Kong SAR and Macao SAR.

Group two, the South, with net Emigration and lower GDP per Capita, and medium ranked HDI, would consist of Albania, Romania, Algeria, Morocco, Tunisia and Sri Lanka.

This grouping allows us to also divide the agreements into two specific groups. Group North where both parties have net immigration and high GDP per Capita, and group South where one of the parties has net immigration, high GDP per Capita and high HDI, and the other party net emigration, low GDP per Capita and medium HDI.

Table 1b ‘Agreement grouping’

Group North	Group South
European Union – Hong Kong SAR	European Union – Albania
European Union – Macao SAR	European Union – Sri Lanka
Switzerland – Macao SAR	Switzerland – Sri Lanka
Switzerland – Hong Kong SAR	Switzerland – Albania
Switzerland – Sweden	Switzerland – Romania
	Switzerland – Algeria
	Sweden – Romania
	United Kingdom – Romania
	United Kingdom – Algeria
	Italy – Algeria
	Italy – Tunisia
	Italy – Morocco
	Spain – Morocco
	Spain – Algeria

Following this grouping, it is now time to turn to the analysis of means of evidence used to identify persons.

4 Analysis of the evidence

The evidence will be analyzed with guidance by the Council Recommendation of July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements - list of evidence in section II.2,¹⁰⁰ which the European Council recommends as means of identifying persons to be returned. Following this list in the analysis will hopefully add some structure and readability. The list is somewhat extensive, although not as extensive as some of the agreements mentioned in the previous chapter, and one may very well assume that this is a list made in the interest of the European Union and therefore reflecting a maximum position.

According to Annex II.3 article II.2 in the recommendation, nationality may be proved by means of:

- nationality papers which can be definitely ascribed to a particular person;
- any type of passport (national, diplomatic or official duty passport or officially issued passport substitutes with photograph) or any other travel document indicating nationality;
- consular registration cards;
- a minor's travel document in lieu of passport;
- provisional identity papers;
- service record books and military passes.

A presumption of nationality may be established in particular by means of:

- specific information from the official authorities;
- an official service pass;
- a company pass;
- a driving licence;
- an extract from register office records;
- a seaman's book;
- a bargeman's identity document;
- photocopies of any of the above documents;
- statements by witnesses;
- particulars supplied by the person concerned;
- the language of the person concerned.

Entry via an external frontier may be proved by:

- an entry stamp or equivalent entry in a travel document;
- an exit stamp of a state adjacent to a member state, taking into account the travel route and the date of the frontier crossing;
- an entry stamp in a false or falsified passport;
- travel tickets which can formally establish entry across an external frontier;

¹⁰⁰ Council Recommendation 1995.

- fingerprint taken by authorities at the time of crossing an external frontier.

A presumption of entry via an external frontier may be established in particular by means of:

- statements by the person to be transferred;
- statements by officials and other persons;
- fingerprints other than those taken by the authorities at the time of crossing an external frontier;
- travel tickets;
- hotel bills;
- cards for access to public or private amenities in the member states;
- appointment cards for doctors, dentists, etc.;
- data showing that the person to be transferred has used the services of a facilitator or travel agency.¹⁰¹

This list is not supposed to be a complete list as can be understood by the wording of the recommendation, “A presumption of nationality may be established *in particular* by means of...” and “A presumption of entry via an external frontier may be established *in particular* by means of...”.¹⁰² It should also be noted that the listings under “Nationality may be proved by..” and “A presumption of nationality...” in the recommendation, refers to readmission of nationals, and listings under “Entry via an external frontier...” and “A presumption of entry via an external frontier..” refers to the readmission of third country nationals.

There is also a short analysis of the Community agreements with Albania and Sri Lanka compared to the other Algerian agreements analyzed in this thesis.

4.1 Proof and presumption of Nationality

4.1.1 Passports and minor’s travel document, in lieu of passport

Most states accept all passports as proof of nationality, even if they are expired. Not so with photocopies. Apart from Algeria in all her agreements, the only states accepting a copy of a passport as proof of nationality are Morocco and Italy in their agreement. Most agreements that mention photocopies as proof, do however accept them as presuming nationality. This is valid within the net immigration group, as well as net emigration group.

All agreements agree that a valid passport is proof of nationality. There is however some disagreement on expired passports. The agreements with

¹⁰¹ Ibid. Article (II.3) II.2.

¹⁰² Ibid.

Algeria¹⁰³ as a party, all consider expired passports proof of nationality. So does the agreement between Italy and Tunisia.¹⁰⁴ Neither the Community agreements with Albania, Hong Kong SAR nor Macao SAR use the term ‘expired passport’. They do mention ‘other official documents that mention or indicate citizenship’¹⁰⁵, but since ‘passports of any kind’ is mentioned in the same enumeration, we can assume that an expired passport is not such another official document. An expired passport in these agreements would better suit as ‘any other document which may help to establish the nationality or the permanent residence status of the person concerned’ in Annex 2 of any of the agreements. Support for this interpretation can be found in the agreement between EU and Sri Lanka, where expired passports are explicitly mentioned as proof of nationality in Annex 1 to that agreement.

The remaining agreements, Switzerland’s agreements with Hong Kong SAR, Macao SAR, Albania and Romania, UK’s agreements with Albania and Romania and the Sweden – Romania agreement consider an expired passport as allowing presumption of nationality or equivalent.¹⁰⁶ Regarding photocopies, the agreements with Algeria as a party consider photocopies of both valid and expired passports, proof of nationality.¹⁰⁷ While the Italy – Morocco agreement accepts copies of valid but not expired passports.¹⁰⁸ The UK agreements with Albania and Romania, the Switzerland – Romania agreement and the Community agreements with Hong Kong SAR, Macao SAR and Sri Lanka all consider photocopies of passports presuming nationality.¹⁰⁹ The agreements UK – Albania, UK – Romania, Switzerland – Romania and the Community – Sri Lanka allow photocopies of expired passports for presuming nationality.¹¹⁰ Regarding the Community agreements with Albania, Hong Kong SAR and Macao SAR, the same argument as with expired passports goes for photocopies.

Only in the agreements between the UK and Albania, and the UK and Romania is there mention of minor’s travel document, in lieu of passport. In

¹⁰³ See the *Italy – Algeria agreement* art. 1.2, *Spain – Algeria agreement* art. 1.2, *Switzerland – Algeria agreement* art. 1.2, and *UK – Algeria agreement* art. 1.2.

¹⁰⁴ See the *Italy – Tunisia agreement* art. II.3.

¹⁰⁵ See e.g. Annex 1 of the *EU – Albania agreement*.

¹⁰⁶ See the *Switzerland – Hong Kong agreement* art. 1.2 of the appendix for Swiss nationals and art. 2.2 of the same appendix for Hong Kong residents, *Switzerland – Macao agreement* art. 1.2 of the appendix for Swiss nationals and art. 2.2 of the same appendix for Macao residents, *Switzerland – Albania agreement* art. 1.3, *Switzerland – Romania agreement* art. 1.3 for Swiss nationals and art. 2.3 for Romanian nationals, *UK – Albania agreement* art. 3.2, *UK – Romania agreement* art. 3.2 and the *Sweden – Romania agreement* art. 3.2.

¹⁰⁷ See the *Italy – Algeria agreement* art. 1.3, *Spain – Algeria agreement* art. 1.3, *Switzerland – Algeria agreement* art. 1.3 and the *UK – Algeria agreement* art. 1.3.

¹⁰⁸ Compare articles 2.1 and 2.2(a).

¹⁰⁹ See the *UK – Albania agreement* art. 3.2, *UK – Romania agreement* art. 3.2, *Switzerland – Romania agreement* art. 1.3 for Swiss nationals and art. 2.3 for Romanian nationals and Annex 2 of the EU agreements with Hong Kong, Macao and Sri Lanka.

¹¹⁰ See the *UK – Albania agreement* art. 3.2, *UK – Romania agreement* art. 3.2, *Switzerland – Romania agreement* art. 1.3 for Swiss nationals and art. 2.3 for Romanian nationals and Annex 2 of the *EU – Sri Lanka agreement*.

these instances, they are treated as passports. A valid travel document is considered proof of nationality and an expired travel document, as well as any photocopy are considered allowing for presuming identity, citizenship or right of abode.¹¹¹

4.1.2 Other nationality papers and official documents of citizenship or residence

There is no real indication that other types of documents indicating nationality or citizenship is an evidentiary mean which is more common among any of the two groups. It is most likely used as an easy way of describing the different forms of nationality papers which may used as evidence.

The Switzerland – Romania agreement considers a Swiss nationality paper proof and in the Italy – Morocco agreement, the same goes for Italian citizenship. According to the Switzerland – Algeria agreement, a certificate of nationality suffices as a presumption of nationality.¹¹²

In the Community – Hong Kong SAR and the Community – Macao SAR agreements, official documents of nationality are valid as proof for member states, while for Hong Kong and Macao, the equivalent is named official document of permanent residence. These agreements also accept photocopies as prima facie evidence of nationality.¹¹³ The Switzerland – Macao agreement also mentions documents of permanent residence as a proof of nationality for citizens of Macao.¹¹⁴

In the Community – Sri Lanka agreement documents that indicate citizenship constitutes proof and in the similar Community – Albania agreement the same applies to citizenship certificates and other official documents of citizenship.¹¹⁵

The Italy – Tunisia agreement has a very vague phrasing regarding to which documents may be accepted as proof, but ‘any document accepted on the international level’ (even expired) and perhaps even ‘a document issued by Tunisian authorities, identifying the person concerned, containing a photograph’ may suffice as other documents indicating nationality, even though the latter maybe just is an identity card.¹¹⁶

¹¹¹ See the UK agreements with Albania and Romania, articles 3.1 and 3.2.

¹¹² See the *Switzerland – Romania agreement* art. 1.2, *Italy – Morocco agreement* art. 2.2a and *Switzerland - Algeria agreement* art. 1.4.a.

¹¹³ See Annex I.

¹¹⁴ See the appendix art. 2.1.

¹¹⁵ See Annex I of both agreements.

¹¹⁶ Article II.2 and 3.

The Sweden – Romania agreement also mentions ‘identity documents stating citizenship’ as a way of proving nationality.¹¹⁷

4.1.3 Travel documents

For the sake of this thesis ‘travel document’ means ‘any document indicating nationality, issued by an official authority in a state, intended for use when travelling across an international border, not a passport’ such as laissez-passer or other travel documents, valid or expired.

A valid laissez-passer generally is accepted as evidence in the net emigration group, but there is no mention of laissez-passers in the net immigration group. Switzerland – Albania (only on behalf of Switzerland though)¹¹⁸, Switzerland – Romania, UK – Albania, UK – Romania all accept a valid laissez-passer as proof of nationality.¹¹⁹ So do the Algerian agreements.¹²⁰ The Italy – Morocco agreement does not mention valid laissez-passer, but only the expired one. However, since an expired laissez-passer constitutes evidence in the agreement, then we can safely assume that this also should cover a valid laissez-passer, since it would be unnecessary to issue a new laissez-passer, if one already existed.¹²¹ The same can be said for the Italy – Tunisia agreement, since it, on behalf of Tunisia accepts an expired laissez-passer.¹²²

Talking of expired laissez-passers, only the Maghreb agreements in the net emigration group accepts an expired laissez-passer as proof of nationality. The Switzerland – Albania, UK – Albania and UK – Romania agreement, all three only accepts them as presumption of nationality.¹²³ The Switzerland – Romania agreement does not even accept that, since there is no mention of an expired laissez-passer. Depending how we value proof against presumption this might show that the European countries have a slightly better bargaining position. This seems even clearer in the light of acceptance of photocopies as proof of nationality, which only the Algerian agreements do. They even accept photocopies of expired laissez-passer.¹²⁴ Switzerland – Romania, UK – Albania and UK – Romania accept photocopies of valid passports as presuming nationality, while the two latter

¹¹⁷ Article 3.1.

¹¹⁸ See Protokoll article 1.1.

¹¹⁹ See *Switzerland – Romania agreement* article 1.2 concerning Swiss nationals, and the UK agreements with Albania and Romania, article 3.1(b) in both agreements.

¹²⁰ See the *Italy – Algeria agreement* article 1.3, *Spain – Algeria agreement* article 1.3, *Switzerland – Algeria agreement* article 1.3 and the *UK – Algeria agreement* article 1.3.

¹²¹ Article 2.2a

¹²² Article II.3

¹²³ See the *Switzerland – Albania agreement* article 1.3(a) concerning Swiss nationals, the *UK – Albania agreement* article 3.2 and *UK – Romania agreement* article 3.2.

¹²⁴ See the *Italy – Algeria agreement* article 1.3, *Spain – Algeria agreement* article 1.3, *Switzerland – Algeria agreement* article 1.3 and the *UK – Algeria agreement* article 1.3.

also accept photocopies of expired laissez-passer as presuming evidence of nationality.¹²⁵

There is also mention of ‘other travel document’ in the Switzerland – Romania agreement and the Italy – Tunisia agreement. As long as these documents are valid, they are accepted as proof. The Switzerland – Romania agreement also accepts any other travel document, not explicitly ‘valid’, as a presumption of nationality, even any photocopies.¹²⁶

4.1.4 Consular registration Cards

In some of the agreements, consular registration cards are referred to as tickets and more, all depending on translation, nevertheless they are all treated the same. The only agreements accepting consular registration cards as proof of nationality are Maghreb agreements with Italy and Spain. Spain – Algeria, Italy – Morocco and Italy – Tunisia, all accept this. The Spain – Algeria agreement even accepts a photocopy as proof of nationality.¹²⁷

4.1.5 Identity cards or papers, even provisional or temporary and other documents of identification

All agreements accept valid identity cards as evidence proving nationality, even though the Sweden – Romania agreement requires the additional ‘indication of nationality’.¹²⁸ In addition, all the Algerian agreements, as well as the Italy – Morocco agreement consider a photocopy of a valid ID proof of nationality.¹²⁹ The agreements UK – Albania, Switzerland – Romania as well as the Community agreements with both Hong Kong and Macao all considers photocopies of a valid identity card proof of nationality.¹³⁰

Community agreements with Albania and Sri Lanka, both accept temporary or provisional identity papers as proof of nationality, so does Switzerland’s and the UK’s agreements with Albania, Romania and Algeria, and also the Spain – Algeria agreement.¹³¹ Switzerland’s agreements with Hong Kong

¹²⁵ See the *Switzerland – Romania agreement* article 1.2 concerning Swiss nationals, and the UK agreements with Albania and Romania, article 3.1(b) in both agreements.

¹²⁶ See the *Italy – Tunisia agreement* article II.2 and II.3, and *Switzerland – Romania agreement* articles 2.2 and 2.3, concerning Romanian nationals.

¹²⁷ See the *Spain – Algeria agreement* article 1.3, *Italy – Morocco agreement* article 2.2a and *Italy – Tunisia agreement* article II.3.

¹²⁸ Article 3.1.

¹²⁹ See articles 1.2 and 1.3 in the Algerian agreements with Italy, Spain, Switzerland and the UK, and articles 2.1 and 2.2a of the *Italy – Morocco agreement*.

¹³⁰ See the *UK - Albania agreement* article 3.2(b), the *Switzerland - Romania agreement* article 1.2 and 1.3 for Swiss nationals and articles 2.2 and 2.3 concerning Romanian nationals and Annex 1 of the EU agreements with Hong Kong SAR and Macao SAR.

¹³¹ See Annex I of the EU agreements with Albania and Sri Lanka, the *Switzerland - Albania agreement* Protokoll article 1.1, *UK – Albania agreement* article 3.1(a), *Switzerland – Romania agreement* articles 1.2 and 2.2, *UK – Romania agreement* article

SAR and Macao SAR accept valid identity cards as proof and expired identity cards as presuming nationality.¹³²

The Community agreements with Hong Kong SAR and Macao SAR, accepts temporary or provisional identity cards for person from the member states as proving nationality, but there is not such explicitness on the permanence of the Hong Kong or Macao equivalents.¹³³

Photocopies of temporary or provisional identity cards are accepted as presuming evidence in the UK – Albania agreement and the Switzerland – Romania agreement.¹³⁴

Expired identity papers and identity cards and photocopies are considered proof of nationality in the Algerian agreements with Spain, Switzerland and UK.¹³⁵ Expired identity cards and photocopies are considered presuming nationality in the agreements between UK – Albania and Switzerland – Romania.¹³⁶

A few agreements mention ‘other documents of identification’. They are the UK agreements with Albania and Romania, where photocopies also are covered, all presuming nationality, and the agreement between Sweden and Romania.¹³⁷

Valid identity papers of any form are generally accepted as proof of nationality, even temporary and provisional. However, the weaker the proof gets, as it is with photocopies and expired identity papers, the only agreements accepting them as proof are Algerian.

4.1.6 Service record books and military passes

All agreements accept service records, or equivalent, as proof of nationality, except for the Sweden – Romania agreement and Italy – Morocco agreement, which do not mention them at all and the agreements between Switzerland and Hong Kong and Macao, which allows them to presume nationality.¹³⁸ The Switzerland – Romania agreement accepts personal army

3.1(a), *Spain - Algeria agreement* article 1.3, *Switzerland - Algeria agreement* article 1.2 and *UK - Algeria agreement* article 1.2.

¹³² See the Appendix article 1.1 for Swiss nationals, or article 2.1 for Hong Kong or Macao residents.

¹³³ Annex I.

¹³⁴ See the *UK – Albania agreement* article 3.1(a) and the *Switzerland – Romania agreement* article 1.2 for Swiss nationals and article 2.3 for Romanian nationals..

¹³⁵ See the Algerian agreements with Spain, Switzerland and the UK, article 1.2 in each agreement.

¹³⁶ See the *UK – Albania agreement* articles 3.2(a) and 3.2(k), and the *Switzerland – Romania agreement* article 1.3..

¹³⁷ See the *Sweden – Romania agreement* article 3.2, *UK – Albania agreement* articles 3.2(j) and 3.2(k) and the *UK – Romania agreement* articles 3.2(i) and 3.2(j).

¹³⁸ See the Switzerland agreements with Hong Kong SAR and Macao SAR, the appendix article 1.2.

member cards for Swiss citizens, and the Switzerland – Albania agreement accepts this for both Swiss as well as Albanian nationals.¹³⁹

Photocopies are accepted as proof only in the Algerian agreements,¹⁴⁰ while it is considered prima facie evidence in the Community – Hong Kong SAR and the Community – Macao SAR agreements,¹⁴¹ and presuming nationality in the UK – Albania and UK – Romania agreements.¹⁴²

There seems to be a general acceptance on service records bearing proof of nationality, although only Algerian agreements accept photocopies as proof.

4.1.7 Company Pass

Company passes and alike as evidence of identity or nationality is mostly of European concern. All Community Agreements list them, and photocopies of them, as prima facie evidence,¹⁴³ and so do the UK – Albania and UK – Romania agreements.¹⁴⁴ The Switzerland – Romania agreement accepts the company pass, but not explicitly a photocopy of it, as presuming nationality.¹⁴⁵

4.1.8 Driving Licence

Driving licences are a popular form of evidence, though only the Italy – Morocco agreement¹⁴⁶ and the Switzerland – Albania agreement list them as proof of nationality, the latter only for Albanian citizens.¹⁴⁷

Driving licences as presuming nationality or as prima facie evidence are generally accepted, even if it is only photocopies. It is so in all the Community agreements,¹⁴⁸ all the Algerian agreements,¹⁴⁹ the UK – Romania and UK – Albania agreements,¹⁵⁰ and the Switzerland – Romania agreement.¹⁵¹ The Switzerland agreements with Hong Kong SAR and

¹³⁹ See the *Switzerland – Romania agreement* article 1.3 and the *Switzerland – Albania agreement*, Protokoll article 1.1 a) for Swiss nationals and 1.1 b) for Albanian nationals.

¹⁴⁰ See the Algerian agreements with the UK, Switzerland, Spain and Italy, article 1.3.

¹⁴¹ Annex 2 for member states.

¹⁴² See the UK agreements with Romania and Albania, articles 3.1 and 3.2(a).

¹⁴³ Annex II.

¹⁴⁴ Article 3.2(f) of the *UK – Albania agreement* and article 3.2(e) of the *UK – Romania agreement*.

¹⁴⁵ Article 1.3 for Swiss nationals and article 2.3 for Romanian nationals.

¹⁴⁶ Article 2.2a.

¹⁴⁷ Protokoll article 1.1 b).

¹⁴⁸ See the EU agreements with Hong Kong SAR, Macao SAR, Albania and Sri Lanka, Annex II.

¹⁴⁹ See the Algerian agreements with Italy, Spain and Switzerland, article 1.4a and the *UK – Algeria agreement* article 1.4.

¹⁵⁰ See the *UK – Romania agreement*, articles 3.2(b) and 3.2(j), and the *UK – Albania agreement* articles 3.2(b) and 3.2(k).

¹⁵¹ Article 1.3 for Swiss nationals and article 2.3 for Romanian nationals.

Macao SAR allow driving licences for presuming nationality but do not mention photocopies.¹⁵²

4.1.9 Seaman's book or bargeman's identity document

This section gathers all 'nautical' documents. They can be called all sort in the agreements, from 'seaman's registration books' to 'skipper's service cards' etc. If it is a list and comes from a ship, this is where you can find it - with one exception, passenger lists referring to third country nationals.

These types of evidence concerning nationality cannot be found in any agreement with a Maghreb country as a party. Only the Community agreements list them as proof of nationality.¹⁵³ The Switzerland agreements with Macao¹⁵⁴ and Romania,¹⁵⁵ together with the UK agreements with Albania and Romania,¹⁵⁶ list these documents as presuming nationality. Photocopies of these documents are accepted as presuming nationality in the UK agreements with Albania and Romania,¹⁵⁷ and as prima facie evidence in the agreements between Community and Hong Kong and Macao.¹⁵⁸

Interestingly these types of evidence seem to be merely of European concern, and as such, it does not seem to matter whether the parties are a net immigration or net emigration country.

4.1.10 Statements by witnesses

This section addresses every type of evidence that is a declaration of fact by someone other than the person concerned, such as statements by witnesses, border authorities and expert's opinion in a court of law.

A statement by border authorities as a means of evidence of nationality is uncommon. Only in the agreement between Sweden and Romania is there any mention of this and then it is only as a presumption of nationality.¹⁵⁹ In

¹⁵² See the appendix of the *Switzerland – Macao agreement* article 1.2, regarding Swiss nationals, and articles 1.2 and 2.2 of the appendix in the *Switzerland – Hong Kong agreement*, regarding Swiss nationals and Hong Kong residents respectively.

¹⁵³ See Annex I of the EU agreements with Hong Kong SAR, Macao SAR, which only applies to member states and the EU agreements with Albania and Sri Lanka, which applies to both parties of each agreement.

¹⁵⁴ Article 1.2 of the appendix, applying only to Swiss nationals.

¹⁵⁵ Article 1.2, for Swiss nationals, and article 2.2 for Romanian nationals.

¹⁵⁶ See the *UK – Albania agreement* article 3.2 (h) and the *UK – Romania agreement* article 3.2 (g).

¹⁵⁷ See the *UK – Albania agreement* articles 3.2 (h) and (j) and the *UK – Romania agreement* articles 3.2 (g) and (k).

¹⁵⁸ See the EU agreements with Hong Kong SAR and Macao SAR, Annex II, applying to member states.

¹⁵⁹ Article 3.2.

addition, the expert's opinion in a court of law is only used in the Italy – Tunisia agreement, then only as a presumption of nationality.¹⁶⁰

Statements from other witnesses in general is never used as proof of nationality but merely as a presumption of nationality. Like with company passes and seaman's service records, no Maghreb agreements have this form of evidence of nationality. All Community agreements,¹⁶¹ Switzerland's agreements with Hong Kong SAR, Macao SAR, Albania and Romania,¹⁶² United Kingdom's agreements with Albania and Romania,¹⁶³ and Sweden's agreement with Romania¹⁶⁴ all list statements from witnesses as prima facie proof, allowing for presumption of nationality.

Statements from witnesses seems to be widely recognized as a way of allowing for presumption of nationality, however is it unheard of in the agreements European countries have with Maghreb countries regarding nationality.

4.1.11 Particulars supplied by the person concerned

Particulars supplied by the person can be '...such as surname, given name, any previous name, nickname or pseudonym, alias, date and place of birth, sex, current and any previous citizenship', according to the Sweden – Romania agreement article 8(a) on Data protection.

All agreements consider statements by the person concerned as prima facie evidence of nationality or allowing to validly assume nationality. However, in the above mentioned Swedish agreement, the phrasing is 'statement of *persons*' and so might include other witnesses as well as the person concerned. The Italy – Tunisia agreement also mentions statements by the person concerned 'before judicial or administrative authorities', this is however just a special case of a statement by the person concerned.¹⁶⁵

There seems to be consensus that statements by the person concerned are allowed as presuming nationality.

4.1.12 Language of the person concerned

An analysis of the language spoken to determine nationality is used in some of the agreements, only as presumption of nationality though. As in

¹⁶⁰ Article II.5.

¹⁶¹ See the EU agreements with Hong Kong SAR, Macao SAR, Albania and Sri Lanka, Annex II.

¹⁶² See the *Switzerland – Macao agreement* and *Switzerland – Hong Kong agreement* appendix articles 1.1 and 2.1, *Switzerland – Albania agreement* Protokoll article 1.3 and *Switzerland – Romania agreement* articles 1.3 and 2.3.

¹⁶³ See the UK agreements with Albania and Romania, article 3.2 (c).

¹⁶⁴ Article 3.2.

¹⁶⁵ Article II.5.

regarding, e.g. company passes, statements by witnesses, no agreement with Maghreb countries mentions this type of evidence. The agreements using this form of prima facie evidence are all the agreements with the Community as a party,¹⁶⁶ Switzerland's agreements with Hong Kong SAR, Macao SAR, Albania and Romania,¹⁶⁷ and the UK – Albania Agreement.¹⁶⁸

The agreements between the Community and Hong Kong SAR, Macao SAR and Albania also allow official language test result as prima facie evidence of nationality.¹⁶⁹

4.1.13 Other official documentation accepted as evidence

This section will gather the remaining evidentiary forms mentioned in the agreements. These types of evidence are all official documents of different sorts, but often only mentioned in one or two agreements, with the notable exception of birth certificates, which are fairly common as evidence.

Birth certificates are considered prima facie evidence of nationality, or presumption of nationality in all the Community agreements,¹⁷⁰ all Switzerland's agreements,¹⁷¹ and all Algerian agreements.¹⁷² Noteworthy is that the UK – Albania and Romania respectively, do not mention birth certificates at all. Photocopies are accepted as prima facie evidence in the Community agreements,¹⁷³ and as presumption of nationality in the UK – Algeria agreement,¹⁷⁴ as presumption of Swiss nationality in the Swiss agreement with Romania.¹⁷⁵ Also, the agreement between Switzerland and Albania considers an Albanian birth certificate with a photograph of the person concerned, proof of Albanian nationality.¹⁷⁶

An extract from the register office is presumption of nationality in the UK agreements with Romania and Albania. In the latter, a photocopy will do.¹⁷⁷ A document on civil status, or even a photocopy is presumption of

¹⁶⁶ See the EU agreements with Hong Kong SAR, Macao SAR, Albania and Sri Lanka, Annex II.

¹⁶⁷ See the *Switzerland – Macao agreement* and *Switzerland – Hong Kong agreement* appendix articles 1.1 and 2.1, *Switzerland – Albania agreement* Protokoll article 1.3 and *Switzerland – Romania agreement* articles 1.3 and 2.3.

¹⁶⁸ Article 3.2 (e).

¹⁶⁹ Annex II.

¹⁷⁰ Ibid.

¹⁷¹ See the *Switzerland – Macao agreement* and *Switzerland – Hong Kong agreement* articles 1.2 and 2.2, *Switzerland – Albania agreement* Protokoll article 1.3, *Switzerland – Romania agreement* article 1.3 and *Switzerland – Algeria agreement* article 1.4b.

¹⁷² See the Algerian agreements with Italy, Spain and Switzerland, article 1.4a, and the *UK - Algeria agreement*, article 1.4.

¹⁷³ Annex II.

¹⁷⁴ Article 1.4a

¹⁷⁵ Article 1.3.

¹⁷⁶ Protokoll 1.1 b.

¹⁷⁷ See the *UK – Romania agreement*, article 3.2 (f) and the *UK – Albania agreement*, article 3.2 (g).

nationality in the Italy – Tunisia agreement.¹⁷⁸ The Italian agreement with Tunisia mentions ‘personal card of employees of state’ as presumption of Italian nationality or citizenship.¹⁷⁹ Insurance certificates are presumption of Swiss nationality in the Switzerland – Romania agreement.¹⁸⁰ An application for visa or a photocopy of the application is proof of citizenship in the Spain – Algeria agreement. An application for residence permit, or an extension of an existing residence permit, or photocopies, are proof of nationality in the Algerian agreements with Spain and Italy.¹⁸¹ The somewhat cryptic ‘information from national authorities’ is considered presumption of nationality in the Sweden – Romania agreement.¹⁸² And finally, it is possible to send a photograph of the person concerned, to the authorities in the requested state, to determine nationality in the Italian agreement with Tunisia.¹⁸³

Except for birth certificates, all of these other forms of evidence are contained in agreements from the net emigration group. Moreover, most of them come from agreements Italy – Tunisia, Italy – Algeria and Spain – Algeria. Maybe these types of evidence are just being ‘fleshed out’ in these agreements instead of, as might be the case in other agreements, be included in a provision saying ‘any other document allowing to presume nationality’.

4.2 Proof or presumption of entry via an external frontier by a third country national

With third country nationals, there are much fewer types of evidence to consider, and fewer agreements. But also, the differences between the agreements seems to be bigger. A different approach from the one in section 5.1 is taken in this analysis. The Community agreements are all very similar, albeit not identical, so they will be compared to the list in the Council recommendation of 24 July 1995, art II.2. Then the agreements UK – Albania and UK – Romania are compared to the European Agreements. After that the Italy – Tunisia agreement, the Spain – Morocco agreement and finally Switzerland’s agreements with Hong Kong SAR and Macao SAR are discussed.

Identifying a third country national or stateless person and proving their entry across an external border, is quite different from ‘just’ proving his or her nationality. While in the latter case you just need to prove one thing, namely nationality, when it comes to proving entry across a border, you need some sort of identity of the person concerned and you need to prove entry. This is to show that the person concerned is actually the person,

¹⁷⁸ Article II.5.

¹⁷⁹ Article II.3.

¹⁸⁰ Article 1.3.

¹⁸¹ See the Algerian agreements with Italy and Spain, article 1.3.

¹⁸² Article 3.2.

¹⁸³ Article II.8.

which the evidence concerns. Any way of showing identity as evidence is nevertheless lacking in all readmission agreements regarding third country nationals and stateless persons.

4.2.1 The European Union agreements

The list of documents which are considered proof or prima facie evidence of the conditions for the readmission of a third country national and stateless persons can be found in the annexes of the EU agreements. Proofs are listed in Annex 3 and prima facie evidence in Annex 4.

Entry and exit stamps or similar endorsements are considered proof of entry by a third country national, and so are travel tickets that formally can establish an entry across an external border. This is in full correspondence with the list in the council recommendation.¹⁸⁴ An interesting point is that documents, certificates and bills of *any* kind, is considered proof of entry, if they somehow clearly show that the person concerned stayed on the territory of the requested state. In the recommendation, such items are merely considered prima facie evidence. Likewise, the information on the use of a travel agency is considered proof in the agreements, but presumption of entry in the recommendation.

Regarding ‘official statements by border authority staff and other witnesses, who can testify to the person crossing the border’, they are considered proof in the agreements with Albania and Sri Lanka, but only prima facie evidence in the recommendation and in the agreements with Hong Kong SAR and Macao SAR.¹⁸⁵ This could be seen as the Community exercising its bargaining power vis-à-vis weaker opponents. ‘Statements by the person concerned’ is considered prima facie evidence of the conditions for readmission in the agreements and the recommendation, with the exception of the agreement with Sri Lanka, which does not contain such a provision.

There are some evidence that doesn’t quite fit in the list in the recommendation. For instance, passenger lists of train, air, coach or boat passages, which show the presence and itinerary of the person concerned on the territory of the requested state, which are considered proof in the agreements.¹⁸⁶ This is probably due to the fact that, these lists are lists of the ticket holders and can therefore be used when the actual ticket has been lost. Another proof added in the agreements is ‘official statement by the person concerned in judicial or administrative proceedings’. However, this is only added in the agreements the Community have with Sri Lanka and Albania.

Added prima facie evidence, with regards to the list, are

¹⁸⁴ See pages 20 - 21 above.

¹⁸⁵ Compare e.g. *EU – Albania agreement*, Annex 3 and *EU – Macao agreement*, Annex 4.

¹⁸⁶ This is the wording taken from the *EU – Albania agreement*, Annex 4. The wording in the Hong Kong and Macao agreements with the Community is similar, but not identical.

- description of place and circumstances under which the person concerned has been intercepted after entering the territory of the requesting State, issued by the relevant authorities of that State;
- information related to the identity and/or stay of a person which has been provided by an International organisation; and
- reports/confirmation of information by family members, travelling companions, etc.¹⁸⁷

Last is the addition in the European Union – Sri Lanka agreement, which says, unofficial documents such as hotel bills, car rental agreements or credit card receipts, as long as they *clearly* specify the name and passport number *or* other identifying feature of the person concerned, can be used as prima facie evidence of entry.¹⁸⁸

The agreements are both more and less detailed than the recommendation list. For instance, fingerprints are not mentioned in the agreements, but in the recommendation, description of place is mentioned in the agreements but not in the recommendation. Overall, though, the agreements are more detailed than the recommendation list.

There can be seen subtle differences, and they favour the net immigration states. For example, ‘official statements by border staff’, is regarded as prima facie evidence in the Hong Kong SAR and Macao SAR agreements but as proof in the Albania and Sri Lanka agreements. Moreover, ‘official statement by the person concerned in a judicial or administrative proceeding’ is considered proof in the Albania and Sri Lanka agreements, but not mentioned at all in the other two agreements.

4.2.2 UK Agreements

The UK agreements on readmission of third party nationals and stateless persons are much less detailed than the European Union equivalents. The evidence is identical in the UK – Albania agreement and the UK – Romania agreement. Only border seals or other appropriate annotations of entry or departure in travel documents are considered proof.¹⁸⁹ This would be the same as entry or exit stamps in the recommendation list.

Transport documents, proof of payment of hotel, medical or other services and statements by witnesses or the person concerned is seen as presumption of entry.¹⁹⁰ Especially, comparing the UK – Albania agreement with the EU – Albania agreement, it is clear that the UK agreement does not put as much weight in these forms of evidence. However, these differences do not say much about the use of bargaining power.

¹⁸⁷ See e.g. *EU – Albania agreement*, Annex 4.

¹⁸⁸ See *EU – Sri Lanka agreement*, Annex 4.

¹⁸⁹ See e.g. *UK – Albania agreement*, article 9.1.

¹⁹⁰ *Ibid.* article 9.2.

4.2.3 The Italy – Tunisia agreement on third country nationals, or stateless persons

The Italian agreement with Tunisia does not differentiate between proof and presumption of entry. It only lists ways of establishing entry. I interpret this to mean proof. Proof has to be accepted without further negotiation, a presumption should be deemed accepted, unless proven otherwise.¹⁹¹

With that said, all proof of entry as well as presumption of entry in the recommendation list is considered proof of entry in the Italy – Tunisia agreement, except for ‘fingerprints’ which are in the recommendation, but not in the agreement.¹⁹² Besides this, there are much more evidence that can be used. The agreement is, in this regard, very detailed.

Proof which are in the Italy – Tunisia agreement but not in any of the other agreements are:

- stamp in travel document from a third country, adjacent to the requested state;
- travel tickets, ascribed to the person concerned;
- official documents issued by requested state authorities such as:
 - o booklet of navigation,
 - o drivers licence,
 - o weapons licence,
 - o identity card;
- permit of stay, even if expired (since at most 2 years);
- photocopy of permit to stay;
- certificate of civil status;
- photocopy of certificate of civil status;
- method of transport, registered in requested state;
- receipt of exchange;
- declaration by the person concerned to a public servant.

It is clear that Tunisia has agreed to a wide range of proof, much more than is the norm. It is, however, not entirely clear, if this is because of Italy’s bargaining power. It might also be a way for Tunisia to show that she is favourably disposed to trade with European countries.

4.2.4 The Spain – Morocco agreement

According to the Spain - Morocco agreement, third country nationals are to be readmitted by the requested party if it is proven *by any means* that they come from the territory of that party.¹⁹³ The provision does not depend upon the other party’s acceptance of the evidence either. Whether it is so in reality, I cannot say. This agreement has been around for a while and often it

¹⁹¹ Council Decision 2002, paragraph 6.

¹⁹² Ibid. Annex II.3, article II.2.

¹⁹³ See *Spain – Morocco agreement*, article 2.

has not been implemented, even if it has been in force. This is due to diplomatic differences between the Moroccan and Spanish governments.¹⁹⁴

4.2.5 The Switzerland agreements

The Swiss agreements are quite different from the others in regards to third country nationals. One major difference is that they do not require proof as to how the person concerned travelled across the border. The proof is more to establish that the requested state is obligated to readmit the person concerned because of the strong connection to that party. The only proof accepted are valid travel document for convention refugees,¹⁹⁵ valid passport for foreigners (issued by Switzerland and only for people entering from Switzerland), and different residence permits.

In the Switzerland – Albania agreement and Switzerland – Romania agreement, the residence permit and passport for foreigners are only considered proof, for persons entering from Switzerland. However, the travel document for convention refugees is valid proof for both contracting parties.¹⁹⁶

The agreements between Switzerland and Hong Kong SAR and Macao SAR only allow valid travel document for convention refugees as proof for persons entering from Switzerland, same goes for the passport for foreigners, while residence permits of different kinds are valid proof for all.¹⁹⁷

It is hard to draw any conclusions on the differences between Switzerland's agreements with states that have net immigration versus states that have net emigration. The only difference is that in the agreements with Albania and Romania, residence permits are not considered proof.

¹⁹⁴ Amnesty International 'Spain and Morocco. Failure to protect the rights of migrants – Ceuta and Melilla one year on', AI Index EUR 41/009/2006, p. 18f.

¹⁹⁵ CSR, Article 28. "1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence. 2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article. "

¹⁹⁶ See e.g. *Switzerland – Albania agreement*, Protokoll, article 2.2.

¹⁹⁷ See e.g. *Switzerland – Hong Kong agreement*, appendix, article 4.2.

4.3 The Community agreements with Sri Lanka and Albania versus the various Algerian agreements on nationality

The European Council has authorized the commission to negotiate with Algeria on a readmission agreement.¹⁹⁸ The negotiations are not done, but that agreement will likely be very similar to the other model agreements. Therefore, it is interesting to analyze the model agreement and the various Algerian agreements and compare. Here is what the decision says about means of evidence to be used in the agreement:

“6. MEANS OF IDENTIFYING PERSONS TO BE READMITTED

The readmission agreement should clearly lay down the means of proving or establishing, within a clearly defined time frame, a presumption of nationality and/or transit via the territory of the other Contracting Party of persons to be readmitted to the effect that

- proof produced of nationality and/or transit has to be accepted without further negotiation;

- a presumption established of nationality and/or transit should be deemed accepted unless it is proved otherwise.

In an annex forming an integral part to it, the readmission agreement shall contain a common and extensive list of the means and documents proving or establishing a presumption of nationality and/or transit[...].”¹⁹⁹

We will assume that the Annex containing the common and extensive list of means and documents proving or establishing a presumption of nationality is also similar to the annexes in the existing agreements. I will only go through the evidence on proving nationality since the Algerian agreement only covers own nationals. The authorisation however, mandates negotiation on both nationals and third party nationals or stateless persons.

The comparison used is the Community agreements with Albania and Sri Lanka, since they have more similar migration statistics with Algeria than Hong Kong SAR and Macao SAR do.²⁰⁰ This short analysis is divided into Annex 1 and 2, just as the model agreements are.

4.3.1 Annex 1

The means to prove nationality are found in annex 1 of the Community agreements. The only proofs in the Community agreements that are not in the Algerian agreements are:

- seaman’s registration books and skippers’ service cards;
- citizenship certificates and other official documents that mention or indicate citizenship.²⁰¹

¹⁹⁸ *Council Decision 2002.*

¹⁹⁹ *Ibid.*

²⁰⁰ See above chapter 3.1.

²⁰¹ See e.g. *EU – Albania agreement*, Annex I.

On the other hand, the proofs listed in the Algerian agreements, which are not in the Community agreements are:

- photocopies of valid or expired laissez-passer;
- photocopy of a valid identity card;
- photocopy of service records.²⁰²

Proof listed in the Spanish and Italian agreements with Algeria, but not the EU, the Swiss or the United Kingdom agreements with Algeria are:

- applications for residence permits, or photocopies of the same;
- applications for extension of residence permits, or photocopies of the same;²⁰³

The proofs listed only in the Spanish agreement with Algeria but not in the Community agreements are:

- consular card of registration, or photocopies;
- application for visa, or photocopies;
- photocopy of an expired identity card.²⁰⁴

Photocopies of passports, valid or expired, are considered proof in the Algerian agreements, but only presumption of nationality in the Community agreements.²⁰⁵

Clearly, Italy and especially Spain, would be in a much better position with their current agreements than with a Community agreement that would supersede their existing ones, provided that the agreement with Algeria were to be identical to the ones with Albania and Sri Lanka.

United Kingdom would also be in a better position with their old agreement rather than with a new Community agreement, if they were to choose not to “opt in” on the Algerian agreement. Switzerland, not a member state, is not bound by the Community agreement. Cases where people gain access to the Community because of these differences in the readmission agreements will probably be rare though, since the only evidence where the Community agreements are harsher than the UK and Swiss agreements are regarding seaman’s registration records, and citizenship certificates. However, persons who gain access to the Community would also gain access to Switzerland and the United Kingdom.

4.3.2 Annex 2

Annex 2 in the Community agreements covers prima facie evidence, or presumption of nationality. Regarding presumption, the Community agreements contain some means of evidence, which are not present in the Algerian agreements, namely:

²⁰² See e.g. *Spain – Algeria agreement*, article 1.3.

²⁰³ Ibid.

²⁰⁴ See *Spain – Algeria agreement*, article 1.3.

²⁰⁵ Compare e.g. *Spain – Algeria agreement*, article 1.3 and *EU – Albania agreement*, Annex 2.

- photocopies of birth certificates;
- company identity cards or photocopies thereof;
- statements by witnesses;
- language spoken by the person concerned, including by means of an official test result;.

Since these means of evidence are not in the Algerian agreements, persons gaining access to, for instance Swiss territory, and who are not readmitted by Algeria following the agreement, could then move on to another member state. This might not have been possible if the Swiss agreement had the same provisions as the Community agreement.

5 Conclusion

State practice is not sufficiently uniform to establish detailed rules on what constitutes sufficient proof in readmission agreements.²⁰⁶ Indeed this is what we also see in treaty law. The agreements are in many ways similar, but not in the fine details. States are also obligated according to customary international law to readmit its own citizen and substantiation of nationality is uniformly held sufficient, as the requesting state cannot produce definite proof at a reasonable cost.²⁰⁷ Because of this obligation, we will need to be somewhat conservative in our evaluation of the evidence presented on nationality.

5.1 On nationality

State practice, in principle, views the possession of passport as a presumption *juris*. This is also very clear in the agreements. The presumption though, is now presented as definite proof. Photocopies of passports as proof is rarer but Algeria has it in all her agreements and also the Italy – Morocco agreement. Photocopies and expired passport are generally accepted as a substantiation of nationality, even photocopies of expired passports. Only the Algerian agreements accept photocopies of expired passport as proof. There is in general a very clear acceptance of passports, even expired and photocopies of passports as proof or substantiation. There cannot be said to be any real difference between the emigration versus immigration groups in this respect. Neither when it comes to other nationality papers and documents of citizenship or residence, is there any indication that they are more common in one of the two groups. *Laissez-passer* and other travel documents are only mentioned in the emigration group. If the *laissez-passer* is valid it is accepted as proof of nationality and if it is expired then as a substantiation of nationality, apart from the Maghreb agreements which would still consider them proof. Regarding consular registration cards, they are only mentioned in the Maghreb agreements with Italy and Spain, and accepted as proof of nationality. ID cards and other identity papers, even temporary or provisional, have a general acceptance as proof of nationality. If they are expired or copied then presuming nationality is most common, only the Algerian agreements accept them as proof. Service records and military books are generally accepted as proof of nationality, but only the Algerian agreements accept photocopies as proof. Company passes presumes nationality in most but not Maghreb agreements, where they are not listed as means of evidence. Driving licences are a popular form of evidence presuming nationality over all, even photocopied, but two agreements, Switzerland – Albania and Italy – Morocco list them as proof of nationality. Seaman's books are only a concern of non-Maghreb agreements, and as such they are either proof of nationality, as in all the

²⁰⁶ See chapter 2.6 above.

²⁰⁷ *Ibid.*

Community agreements, or presumption of nationality. Statements by witnesses is unheard of in Maghreb agreements but are generally recognized as substantiating nationality in the other agreements. Statements, or particulars supplied, by the person concerned on the other hand is generally accepted as presuming nationality. But an analysis of the language spoken, as a means of determining the nationality of the person concerned, is unheard of in Maghreb agreements, but fairly used as prima facie evidence in the other agreements. Moving to the other types of evidence, birth certificate have a general acceptance as presuming nationality. However, other official documents that do not really fit anywhere else are only mentioned in the emigration group.²⁰⁸ Moreover, they are predominant in the Maghreb agreements. ‘Other official document’ are mostly recognized as presuming nationality, but occasionally, they are considered proof.

Here is an overly simplified table of the general acceptance of certain means of evidence as both proving and substantiating nationality.

Table 2. ‘General acceptance of proof on nationality’

Means of evidence	Immigration Group	Emigration Group, Maghreb area only	Emigration Group, other than Maghreb area
Passport	Yes	Yes	Yes
Papers of nationality or residence	Yes	Yes	Yes
Travel documents, laissez-passer	No	Yes	Yes
Consular registration cards	No	Yes	No
Identity cards	Yes	Yes	Yes
Service records	Yes	Yes	Yes
Company pass	Yes	No	Yes
Driving licence	Yes	Yes	Yes
Seaman's book, etc.	Yes	No	Yes
Fingerprints	No	No	No
Statements by witnesses	Yes	No	Yes
Statements by person the concerned	Yes	Yes	Yes
Language	Yes	No	Yes
Birth certificate	Yes	Yes	Yes
Other official documents	No	Yes	Yes

Looking at just general acceptance, and not specifically evaluating the different evidentiary means, there seems to be little difference between the acceptance level of proof and substantiation of nationality. It even looks like the Maghreb agreements generally accept fewer types of evidence. This might partially be explained by the fact that states indeed think of themselves as obligated to readmit their own nationals. But, looking deeper into the evidence, we have found that more often than not, agreements in the

²⁰⁸ This might be a problem caused by the classification system used by the author.

emigration group accept weaker forms of the same evidentiary means. For instance, we could consider an expired passport as a weaker proof of nationality than a valid passport. A photocopy of any document is weaker than the actual authentic document. This seems to be particularly true for Maghreb agreements.

5.2 On third country nationals and stateless persons

In this area, it seems there are more indications of the inequality between parties to the agreement. Problem with this section is that there are so few agreements.

Regarding the evidence used to identify and return third party nationals, the agreement between Italy and Tunisia is by far the most detailed and the agreement between Spain and Morocco, the most extensive, allowing for 'proof by any means'. The Italy – Tunisia agreement is much more detailed than even the council recommendation, and we can assume that the council recommendation is some sort of maximum position to look for by member states. This can mean one of two things, either Italy has a very strong bargaining position or Tunisia is eager to be cooperative for future benefits, such as lifted visa restrictions etc. The same might be said for the 1992 agreement with Spain and Morocco. Remember, there is no customary obligation on readmitting third country nationals, this obligation has to come from an agreement. The more evidence a state allow to be used as proof for the readmission of third country nationals, the worse bargaining position might that state be in. In these cases, it is in the interest of Italy and Spain to have the most extensive list possible because, as fact is that third country nationals, are indeed coming from Tunisia to Italy and from Morocco to Spain. Spain has managed to obtain an optimum position, while Italy also might be said to have struck a good deal.

It is quite reasonable to take the position that the Switzerland agreements do not take evidence into consideration as such. These agreement are more interested in finding which state is responsible for the third country national and do that by rather standard ways, such as checking residence permits and travel documents. There is nothing indicating that Switzerland treats immigration countries any different from emigration countries.

The UK agreements are much less detailed than the Italy – Tunisia agreement, the Community agreements and the council recommendation. There is however, no indication that the UK uses any bargaining power to achieve an advantage over emigration countries.

The Community agreements indeed treat Albania and Sri Lanka differently from Macao SAR and Hong Kong SAR with respect to third country nationals. In annex 3 of the agreements between the Community and Sri Lanka and Albania, 'official statements by border authority staff and other

witnesses who can testify to the person crossing the border' is listed as a document which is considered proof of the conditions of readmission of third country nationals and stateless persons. The same document is found in Annex 4 in the Hong Kong SAR and Macao SAR agreements, then listed as a document considered as prima facie proof of the conditions for the readmission of third country nationals and stateless persons. Another difference is the document 'official statement by the person concerned in a judicial or administrative proceeding' in the Albania and Sri Lanka agreements, which is considered proof of the conditions for readmission, but this document is not at all mentioned in the Hong Kong SAR and Macao SAR agreements. Finally, there are 'unofficial' documents considered prima facie evidence of the conditions for the readmission of third country nationals and stateless persons in the Sri Lanka agreement, not in the other agreements. These documents can be a hotel bill, car rental agreement and such, as long as they clearly specify the name and passport number, *or* any other identifying feature of the person concerned. It seems obvious that Hong Kong SAR and Macao SAR are offered one deal and Albania and Sri Lanka another. The differences between these agreements are also very comparable in that we see directly that one type of party is indeed being treated less favourably than another.

The Swiss agreements and the agreements with UK as a party do not indicate that emigration countries are treated differently than immigration countries. If we instead look at the Community agreements, we do indeed see that there are several differences and they are all in favour of the immigration countries. Regarding the Maghreb agreements, Spain – Morocco and Italy – Tunisia, we can see the inequalities of having very detailed provisions only from empirical fact. If there had not been a migration flow from Maghreb area to the south of Europe, we could not have said with certainty that the agreements are unequal. As it happens, empirical fact supports the idea that the Maghreb agreements indeed indicate that powerful states use their bargaining power. The argument is quite different with the Community agreements. It is quite clear, just from comparing agreements, that there are different provisions for different parties and emigration nations are less favoured by this.

5.3 On the Community agreements with Sri Lanka and Albania versus the various Algerian agreements on nationality

A Community agreement with Algeria will supersede any agreements member states, except Denmark and the UK, currently have with Algeria. The UK can however choose to opt-in, and then the Community agreement would supersede the UK agreement with Algeria.

There is some likelihood that a Community agreement with Algeria in many respects will resemble the agreement with Albania. Concerning evidence of nationality, member states now have a relatively better position towards Algeria, than the Community has towards Albania. This may present a problem when the Community is negotiating this agreement, since it is definitely not in the interest of member states to be worse off. Indeed, member states currently do not have readmission of third country nationals and stateless persons provisions in their agreements. This is maybe something that member states can gain from a Community agreement with Algeria. Maybe even something for which it is worth losing their current position on nationality. It is still so that states are obligated to readmit its own nationals, and a substantiation of nationality is enough, whereas readmission of third country nationals and stateless persons must be agreed upon. As mentioned above though, Algeria is still very reluctant in engaging in any readmission negotiations with the Community.

5.4 Summary

There are tendencies that states in the north use their bargaining power when negotiating the evidence to be used for proving or substantiating nationality. The tendencies are not seen in the general acceptance of the evidentiary forms but rather the acceptance of a somewhat detrimental version of the same evidence. Therefore, these tendencies are vague and can be further clouded by the fact that states are obligated to readmit their own nationals. The acceptance of an extensive list of proving or substantiating nationality can also be a manifestation of what states already consider them obligated to do. About the evidence used for proving entry of third country nationals and stateless persons, there are more than just tendencies. The Community in fact has better deals for Hong Kong SAR and Macao SAR than Albania and Sri Lanka. Italy and Spain, have a very wide range of options in proving an entry from the requested party by a third country national.

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