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Policy, Protest and Multi-Level Games: Protesting the Deportation of Asylum-Seekers in France and the EU

What does the two-level game concept bring to our understanding of European level policy making on migration and asylum? How can we apply the two-level games theory to a relational concept of policy-making? My contention is that the two-level games theory does not adequately capture the complexity of migration and asylum policy-making in a multi-level context for several reasons: 1) Two-level games, even if they are expanded to include a third level of European policy-making in between national and international, assume a relatively straightforward and narrow "win-set" around a policy issue. However, they fail to account for ways in which policy outcomes or preferences can be funneled into other institutional channels at both the national and international level. 2) Two-level games do not capture the **ongoing** nature of policy struggle and contestation; for example, in the space where European level directives are implemented at the national level. 3) Also missing is the continual discursive work of both governments and their challengers to discursively shape not only individual policies but entire policy areas. In this assertion I follow the work of Nasri and Cinalli (2009) who suggest that there is a medium to long-term element to the associative sector's efforts to shape a European public sphere. I will explore these contentions by sharing some preliminary results of analysis of qualitative interviews and primary and secondary documents conducted over the past six months in France and the EU.

<u>Two-level games: Origins and Extrapolations</u>

The concept of policy-making as the outcome of a two-level game between national and international dynamics was popularized by Robert Putnam (1988). Briefly, Putnam argues that policy-makers utilize two levels of game-making and may in certain cases play them against one another to achieve their desired policy outcome. For example, if international players want the president of country X to agree to a certain action, such as joining a military campaign, the president can retort that he is constrained by the potential backlash of voters and interest groups back home. Conversely, the president or an interest group within a country may have a nationally unpopular policy preference that they are able to enact on an international stage. (Similarities between this latter option and "venue-shopping" arguments made by Guiraudon will be discussed below.) Putnam's conception of two-level games has spawned an entire research cottage industry applying the framework of assessing policy decisions from both international and national settings. (See, for example, Evan's et. al. 1993 work *Double-Edged Diplomacy.*) Discussion of this work will be limited, for the purposes of this paper, to some of the ways in which this theory has been applied to European Union politics in the realm of migration and asylum.

First, although not an explicitly-drawn comparison, one can make connections to Guiraudon's (2000) "venue-shopping" argument, which suggests that nation-states seek to bypass national courts, human rights obligations, ministries, parlimentarians, and migrant aid groups in order to enforce more restrictive migration policies at the European level: "Democratic constitutional principles (equality before the law, fundamental rights), general legal principles (due process, proportionality), national jurisprudence and laws, and albeit in a very limited

fashion, international legal instruments have developed since the 1970s in such a way to constrain the restrictive objectives of migration control policy" (258-9).[1]

Guiraudon points to the double-edged character of European-level participation for member states such as France and Germany: the very states that initiate Europeanization on matters of migration and asylum also want to assure that this dimension remains limited and perhaps even subordinated to national power, "insisting on labyrinthine procedures and unanimous voting" (257). In this way, the Europeanization of migration and asylum remains to some degree intergovernmental.

Intergovernmental perspectives usually seek to preserve the sovereignty of member states and agreements are contingent upon states' willingness, whereas supranational perspectives usually involve some relinquishing of decision-making power by states to European-level institutions. Generally, the supranational perspective is represented by the European Commission, while the intergovernmental perspective is represented by the member states and the European institutions in which they are most directly represented, the European Council (which consists of the heads of member states) and the Council of Ministers (which consists of committees of member state ministers who convene around certain issue areas, for example, the ministers of finance from each country). Regarding migration and asylum, this tension is exemplified by the leadership of certain member states such as France, who reiterate the need for increased cooperation at the European level around "illegal migration," for example, but, utilize European institutions (such as the Council Presidency), to advocate for positions based on national and intergovernmental perspectives (Carrera and Guild 2008). This tension is also

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[1] Guiraudon does draw a direct connection to her argument and James Caparaso's (1997) call for the integration of comparative politics and international relations approaches; Caparaso cites Putnam's two-level games argument as an early example of this cross-disciplinary development.

present in the creation of FRONTEX, which, although it has a budget, staff, and nominal authority to make decisions without member states, to some degree reflects member state preferences.

Despite the desire of many states to retain sovereign control over migration and asylum issues, cooperation does move forward, but this cooperation at the international and supranational levels must be discursively justified. One way in which this was done was by expanding the logic of already-existing transnational cooperation on issues regarding security and crime. (For example, the Trevi group had existed, in an intergovernmental, ad-hoc manner, since 1976 to promote cooperation on terrorism. [see Council of the European Union document, "Living in an Area of Freedom Security and Justice."]) Thus, Guiraudon and others such as Bigo (2002) point to the construction of a "European security space," under which issues of migration and asylum fell. Member states could thus justify the move to the European level by the need for transnational cooperation and specialized expertise. Within this context, concerns about "asylum fraud and smuggling" became paramount. This intergovernmental environment also leads to a lowest-common denominator outcome with regard to many migration and asylum policies (Guiraudon 267).

Guiraudon's argument suggests that states try to escape the influence of more human rights-oriented, pro-migrant non-state actors by moving to the EU level. The posited relative weakness of NGOs at the European level when it comes to migration and asylum support this claim. However, several authors now provide evidence of the involvement and influence of non-state actors in the development of migration and asylum policy at the European level. A recent example is Menz's (2011) application of two-level game politics to the EU and the work of NGOs involving migration and asylum policy. He argues that both employer associations and

humanitarian NGOs try to influence the outcomes of various EU directives related to migration and asylum. However, while Menz demonstrates that Europeanization cannot solely be thought of as a top-down process due to the influence that NGOs and collective actors have had on the shape of EU-level migration and asylum policy outcomes, his account fails to capture the full complexity of Europeanization. He suggests that the role of NGO influence is confined to shaping national negotiation positions (458). There are two relative critiques which can be made here: first, that NGOs attempt not only to shape national negotiation positions but may in fact be focused on the European level itself. Second, regarding the limited successes of NGOs to affect the content of directives: In actuality, while NGOs do exert pressure on migration policy outcomes in certain areas, states may be uploading their policy preferences into other areas/institutions. For example, Menz emphasizes NGOs' ability to influence family reunification policy. Similarly, Kaunert (2009) describes how the Commission has been able to largely protect liberal rights around asylum policy despite member states' tendencies toward restriction. However, while these policies may reflect a stance in which the NGOs and institutions have "won" a preferred policy outcome, an entirely separate set of policies falling under the auspices of FRONTEX and border management in actuality create a policy game in which states are able to upload their restrictive preferences to a different arena at the European-level. Therefore, it is not enough to understand the outcome of one policy, but one must take a broader view and look at the relationship between national and European institutions themselves with respect to the larger issue area of migration and deportation. To speak of the European-level is in fact to speak of disparate sets of institutions in which different, and perhaps even opposing logics, occur simultaneously. Thus, the tradition of rights-based claims and European notions of human rights have been protected by the Commission, European Parliament, and NGOs, while a

more restrictive emphasis and logic of securitization has been protected by the states and funneled into entirely different institutions such as FRONTEX at the European level, and back into national-level institutions. Additionally, states will use national level policies to pursue "exceptional" policies such as "fast track" asylum procedures and changes to national law in order to circumvent European-level protections. Thus, this paper argues that the two-level game theory must take into account the possibilities of moving to another institution, agency, or level to assert a particular policy preference.

Frontex's creation and evolution

FRONTEX itself represents a continued extension of the securitization logic, on one hand, while emphasizing an experimental/expertise logic on the other hand. It was founded as an outcome of a 2002 Commission recommendation of an agency to oversee "integrated border management." From the states' perspective, it provided an visible indicator of EU-level action on border control and management, which governments can use to signal to their voters in the member states (Leonard 2009). Thus, member states quickly agreed with the Commission's proposal to create FRONTEX because it included a foundational article that stressed its ultimately intergovernmental nature. The Council of Ministers also determined that the FRONTEX Management Board would include one member from each state and that each member would have one vote, meaning, as Leonard notes "control of the work of the Agency is to a large extent in the hands of the Member States, which have been considered the main stakeholders" (383). At the same time, FRONTEX remains a relatively autonomous agency and has become an object of protest in its own right. One example of a common critique is that the opaque nature of its decision-making process and lack of accountability structure (Pollak and Smolinski) make it difficult to make claims against FRONTEX or to provide oversight for its

actions. As an autonomous agency, it does have control over its own operations and distribution of its funds.

In 2009, the European Council called for the expansion of FRONTEX's power to include financing and coordination of joint charter flights to expel illegally present third country nationals. Bilateral and multilateral agreements between countries to charter these flights already existed; it had been a major policy goal put forward in 2005 at Evian at a G5 Meeting between Britain, France, Spain, Italy and Germany (Travis, The Guardian, 2005). A controversy emerged in 2009 when France and the UK chartered a flight to return several failed asylum seekers to Afghanistan. Due to NGO activity and public pressure in France, the expulsion of the Afghanis from France was halted. Just ten days later at the European Council summit, Nicolas Sarkozy was one of the major proponents of an increased role for FRONTEX in coordinating these flights. After the summit, he noted: "Nobody could have imagined a few years ago that governments of left, right, South and North would agree on the principle that someone who does not respect the rules must be brought back home by plane, train or other means in a worthy manner. It represents considerable progress" (Euractiv). He also suggested that the EU should work towards having its own border police.

The partial Europeanization of expulsion policies as advocated by Sarkozy is indicative of two points: the first is that member states venue shop in order to garner legitimacy from European Union-level institutions and support; the second is that paradoxically, moving responsibility for expulsions to the European level allows for a removal of direct public pressure on the national government. The structure of FRONTEX as an agency enhances this inability of collective actors to exert direct pressure, partly since it is an "expertise" driven agency that, while it relies on member states for ongoing member support, also prides itself on providing

technical solutions and risk management and seeks to further develop its mandate and its independence from member states (see Pollak and Smolinksi and Keller et. al). Thus, the author agrees with Leonard (2009) that the organizational development of FRONTEX as an agency was spurred on by member states' considerations of how to remain in control of the agency in an intergovernmental manner; however, FRONTEX itself has become an entity with goals not entirely captured by member states, and furthermore, it has become a target of protest that is to a certain degree separate from the member states and the major EU institutions (Council, Commission, Parliament), even if it derives its legitimacy from these.

FRONTEX as an object of protest and policy change: some examples

There are several avenues via which FRONTEX's expulsion policy has become an object of protest. First, the flights themselves, when information about them becomes available, are targets. The aim of these protests is to stop the flights or delay them long enough to present legal challenges to individual deportee's cases. A recent documented example occurred when No Borders activists, a loose coalition of grassroots actors, blockaded a flight in Belgium in 2011 (No Border).

Second, No Border has increasingly made FRONTEX the target of its protests, including a series of Anti-FRONTEX days held in 2012. No Border represents a loose, informal activist network throughout Europe, including a campaign called "FRONTEXPLODE," which coordinates information and actions specifically directed at FRONTEX. The Anti-FRONTEX days were held in Warsaw, the site of FRONTEX's headquarters (No Border). These grassroots protests presented a dimension of collective action missing from the two-level games theories discussed here, but one which the author argues is a complementary component of work to

change the discursive environment in which FRONTEX acts. By emphasizing the human rights violations that FRONTEX commits, these activists perform a parallel task to those who work to highlight legal gaps and contradictions in FRONTEX's policies.

Third, migrant rights' activists groups and NGO networks worked to raise awareness and provide policy recommendations through both political and public opinion channels. These actions of migrant activist organizations and umbrella networks can be seen as early as 2008 when the French umbrella organization Coordination française pour le droit d'asile (CFDA) published a white paper critiquing the European dimensions of the externalization of return and expulsion, titled "Bâtir une Europe de l'asile."

Additionally, the European Parliament in 2008 passed a resolution calling for FRONTEX to adhere to international human rights standards. This resolution was the outcome of over a year of work in EU committees, some of whom sought advice and expertise from NGOs: for example, in 2007 ECRE and the British Refugee Council submitted a report to a Home Affairs Committee conducting a FRONTEX inquiry. The report's first point was consideration of whether FRONTEX adequately protected the right of non-refoulement, enshrined by the Geneva Convention. Regarding European law, the ECRE/Refugee Council report explicitly called upon the Schengen Borders Code and the Asylum Procedures Directive, seeking to point out FRONTEX's potential violation of the right of persons seeking asylum to remain in the territory pending a claim, as well as the right of appeal. These examples show that national-level NGOs as well as European-level umbrella organizations are explicitly using *European* level rights claims and institutions to attempt to alter FRONTEX's practices.

A more recent example comes from Migreurop (Keller et. al.), an umbrella organization of European migrant rights' NGOs headquartered in France, in conjunction with the Green Group/European Free Alliance of the European Parliament, produced a report in 2011 entitled "FRONTEX Agency: Which guarantees for human rights?" ahead of a proposed amendment extending the agency's mandate. This report focused on human rights violations (or the potential for them) in FRONTEX's current operations. Additionally, ECRE and Amnesty International released a briefing in 2010 following the Commission's introduction of the proposed amendment. These reports included recommendations for altering the agency's practices, but revisited some of the themes from ECRE/Refugee Council and CFDA's 2007 and 2008 documents.

The 2011 report also concerned the implementation of the EU Charter of Fundamental Rights and the principle of non-refoulement. The EU Charter represents an interesting case because it was automatically binding upon FRONTEX as of 2009 when the Charter became incorporated into EU law via the Lisbon Treaty. Thus, NGOs were now able to use the Charter as a tool to frame opposition to and critique of FRONTEX's practices, as the two reports above (Migreurop and AI/ECRE) highlighted. These aspects were adopted into the 2011 amendments to the EU law establishing FRONTEX in Chapter 1, Article 1:

> The Agency shall fulfill its tasks in full compliance with the relevant
> Union law, including the Charter of Fundamental Rights of the European
> Union, international law," including the Convention Relating to the Status
> of Refugees of 28 July 1951 ("the Geneva Convention"), obligations
> related to access to international protection, in particular the principle of

non-refoulement, and fundamental rights and taking into account the

reports of the Consultative Forum referred to in Article 26a.

Amidst ongoing concerns about the failure of FRONTEX to comply with its Charter obligations after the adoption of the 2011 amendment, European NGOs have pressured the EU Ombudsman to investigate. Accordingly in 2012, the EU Ombudsman launched an own-initiative inquiry into FRONTEX's adoption of the law, particularly its fundamental rights provisions (EU Ombudsman). This investigation prompted a response from FRONTEX establishing a Consultative Forum on Fundamental Rights, inviting NGOs in a May 2012 call for applications to "enable the Agency to gain information and advice relevant to the aim of developing and promoting the full respect of Fundamental Rights in all the Agency's activities."

One of the most significant aspects of these actions are that they address the European level directly, suggesting the need to add complexity to Menz's theory of non-governmental influence at the national level. Furthermore, the idea of a "win-set" over a particular policy at the moment it is made must be discarded in favor of a longer time horizon in which policy-making and policy adjustments are part of an ongoing and contentious process within a certain issue area/policy field. These contentious aspects are not only represented by policy recommendations and critiques but also by grassroots protest actions and by attempting to influence the European public sphere.

Returns Directive creation and evolution

The Returns Directive (Directive 2008/115) was approved by the European Parliament in 2008. The directive sought to harmonize member states' policies and practices when returning

illegally-staying third country nationals. The directive is an excellent example of contentious policy-making, as it took over three years to approve and was also the first piece of immigration-related legislation subject to co-decision by the European Parliament (Baldaccini 2009). For the member states, the Directive was viewed as a way to facilitate and improve the efficiency of return and removal procedures; in this light, minimum guarantees for legal and human rights safeguards were often seen as an unwanted obstacle: "[member] states have displayed considerable unity of intent in diluting human rights standards and procedural guarantees which were embedded in the removal process, lest they become an obstacle to administrative cooperation on returns" (Baldaccini p. 116).

Within the deliberations over the shape and form of the Returns Directive, different EU institutions took divergent positions over what to prioritize. As Acosta (2009) notes, the traditional [author's note: and perhaps oversimplified] positions of the conservative approach held by the Council and the more liberal approaches of the Parliament and Commission with respect to migration and asylum were somewhat blurred with regard to the directive, as the Parliament ended up approving a version of the directive far from its original intentions with stronger protections for the rights of third country nationals. Acosta posits that expediency and a need for compromise were important components of the Parliament's decision to approve the directive. Regardless, the Parliament provided one of the major pressure points for NGOs to try to alter the content of the directive during negotiations.

The Returns Directive as an object of protest and policy change

Beginning in the early stages of negotiation for the Returns Directive, many of the same NGOs who worked on influencing the policies and regulations affecting FRONTEX were

involved in pressuring MEPs and European institutions in order to change the content of the Directive in a more rights-protecting direction. Again, both international human rights and European-based rights were the framing devices in which the claims were set. For the purposes of this paper however, the author will focus on how the Returns Directive *continued* to be an object of protest and target for policy change after it was passed by the European Parliament.

For example, ECRE and Amnesty International both published press releases immediately after the Directive's approval pointing out its failures to safeguard rights. Interestingly, as Baldaccini notes, and similarly to the work of these organizations regarding FRONTEX, one of the tasks of NGOs is to point out how the Returns Directive may in fact clash with other portions of European law, as there is "potential for considerable conflict amongst various provisions in the Community immigration and asylum *acquis*" (Baldaccini 2009, 5).

The contentious politics over the Returns Directive also presents a unique addition to the theory of multi-level policy change and protest because it exposes the space of activism around implementation of EU Directives. Because the work of adapting the law into national legislation is an ongoing process and itself is the object of contention, this example highlights that two-level games are in fact an oversimplification of how policies are contested in the EU (at the supranational, national, and even local levels). Directive implementation in the member states represents an ongoing opportunity for policy contestation, suggesting the need for a longer time-horizon for a theory of when non-state actors can have influence over policy.

In France, this contestation is represented by the ongoing struggle over implementation of the Returns Directive and incorporation into CESEDA. CESEDA (Code de l'entrée et du séjour des étrangers et du droit d'asile) has become the object of political maneuvering over the objections of NGOs and even some government actors and agencies. CESEDA is an extremely

broad law covering the right of foreigners to stay and reside in France and the manner in which they may be expelled or asked to leave. "Foreigners" in this case may apply to everyone who has to apply for a "carte de sejour" which includes everyone from those on student visas to asylum seekers. This law has been subject to manipulation over the course of the past ten years, when it has been tied to political goals of reducing the number of migrants and asylum seekers. Various NGOs have lamented these changes, including Le *Centre de Recherche et d'action sociales* (Ceras) who in a 2006 letter warned against the potential negative effects contributing to the precariousness of the right to seek asylum in France, L'Association Travailleurs Maghrebins de France (ATMF), who in 2010 noted that the 5th reform of CESEDA in 6 years contributed to the criminalization of migration, UCIJ, a collective of NGO organizations who in 2010 launched an awareness movement including the publication of a document explaining the reasons to fight against the latest revision of CESEDA (known as loi Besson), and even the (non-militant) Jesuit Refugee Service, who in 2012 advocated directly for the independence of OFPRA (the government office responsible for conferring the status of refugee) from political influence.

UCIJ also explicitly made the connection between the 2010 reforms of CESEDA and the transposition of European directives into French law, including the Returns Directive, the Blue Card Directive, and the Sanctions Directive. Regarding the Returns Directive, UCIJ notes that it is given by the government as a justification to prolong the maximum allowable period in which a person can be held in administrative detention, thus giving credence to the earlier claim that EU law regarding migration and asylum leads to lowest common denominator policies. Additionally, the vagueness of the directive regarding who should be held in detention and why left the definition up to the state, and in France this remained an ill-defined conception of those migrants who represented "a threat to the public order." The UCIJ document also notes that the

promulgation, via EU directive, of a ban on returning after an expulsion allowed for an opportunity for a transposition through loi Besson that lacked certain required protections such as the possibility of suspensive appeal, specification of protected categories of persons, and rules for appeal (p. 8-9). These examples of mobilization are used to demonstrate the multi-level effect of a European Directive being transposed into national law, and the subsequent targeting of the national level for activists. Thus far this type of activism would confirm Menz's theory that non-state actors attempt to influence national policy preferences; however, the timing has changed because these actors are not trying to influence input into a directive, but rather its transposition. This evidence suggests the need to add to Menz's theory and the theory of two-level games a notion of an expanded time horizon in which a particular policy unfolds.

Building a theory of a relational policy-making environment: A first attempt

The two examples looked at in this paper show how collective actors have responded to ways in which the external dimensions of asylum and migration policy, particularly expulsion, have been Europeanized. First, joint returns of irregular third country nationals, including failed asylum seekers, have been partially Europeanized vis-à-vis FRONTEX. The member states use FRONTEX to legitimize their own desire to expel unwanted migrants, and also to escape some national pressures. FRONTEX as an agency itself, though it remains largely intergovernmental, has also developed a degree of organizational independence from the member states. Migrant rights advocates and NGOs have responded to these developments in a number of ways: protesting FRONTEX and its actions directly, exposing potential contradictions between FRONTEX's practices and European and international law, especially the Charter of Fundamental Rights, and lobbying the EU Parliament and Ombudsman to investigate FRONTEX. This example shows that NGOs at both the member state and European level act at

the European level. Whereas Menz's theory limits influence of NGOs to the formation of national positions, this paper has posited an autonomous role for NGOs at the European level. Furthermore, this example highlights the ongoing nature of contestation over FRONTEX's practices. This element poses a challenge to two-level game theory and to agenda-setting literature that views the work of NGOs, interest groups, and lobbyists as contributing to a well-defined and temporally distinct, short-run "win-set." The author argues that with respect to how NGOs see their ongoing work, it is better to understand "win-sets" in a longer time horizon that includes trying to influence the practices of institutions as well as the framing of an issue area. For example, one can view the work of NGOs vis-à-vis FRONTEX as an attempt to re-frame the area of migration control and asylum to emphasize the rights of migrants, asylum-seekers, and third country nationals as they are enshrined in European law.

Secondly, the example of the Returns Directive demonstrates that the way policy-making works in the European Union leaves space for NGOs to act after the policy has passed in the EU institutions and while it is being implemented in the member states. Again, this example provided instances of national and EU NGOs referring to both national and European-based rights and institutions, for example, the Charter of Fundamental Rights, to argue for changes in how the Directive was being implemented. Therefore, there is a space for NGOs to act at both the European and national levels to try to change member state preferences and policy practices.

These examples certainly complicate the idea of two-level games as they may be applied to European policy-making and contestation. However, not all aspects of the two-level game theory should be jettisoned when considering how policies are made and contested. Firstly, the idea of simultaneity first posited by Putnam (the idea that diplomats are engaged on two "game boards" at the international and national level at the same time) is a crucial insight that carries

over into European politics. When combined with Menz's value-added proposition that NGOs can and do influence the content of European policy by working at the national level, these aspects provide a foundation for a new theory. It seems fruitful to add complexity, however, in several ways.

In particular, the idea of a field of contention as explored in Statham and Koopmans may be useful. When examining the dimensions in which NGOs and member states act one must try to add precision in terms of institutional targets and time horizons. Thus one potential way of examining a claim would be to name its intended target and specify the timing of the claim within the dimensions of a policy cycle. Thus, one could separate some of the actions listed here into claims made directly or indirectly at institutions, as well as within the stage of policy-making, or policy-implementation. This may get at the problem of what this paper has asserted is an overly static perception of a rigid definition between national and European level policies and actors. Additionally, both Statham and Koopmans and Nasri and Cinalli suggest that the discursive work of NGOs in contesting a policy field is important. This dimension was empirically revealed through the continued focus of NGOs on fundamental rights as a way to combat restrictive expulsion policies. However, this manner of classifying actors may run up against several conceptual problems: the first is that there is slipperiness between the categories of policy-making, policy implementation, and policy change. The second is that the parsimony of the two-level games theory is in danger of entirely disappearing. Future work that attempts to more systematically classify and theorize the actions described in this paper will have to account for those challenges.

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