

CENTRAL EUROPEAN UNIVERSITY

**EUROPEAN ASYLUM POLICY AND NGOs:
ADVOCACY STRATEGIES AND FACTORS OF INFLUENCE**

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BY

EVELYN MAIB

PROFESSOR BOLDIZSÁR NAGY, SUPERVISOR

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Abstract

The European Union is developing a European asylum system with common standards for the protection of refugees in Europe. However, refugee-supporting NGOs criticize restrictive European asylum policies that are being adopted into EU law. Several NGOs on the European level therefore try to advocate for more liberal asylum policies. The European Council on Refugees and Exiles (ECRE), a European network of refugee-assisting NGOs, is one of these NGOs lobbying the European institutions. This paper aims at analysing the different advocacy strategies that ECRE and other NGOs employ and the factors that influence the success of their strategies in order to gain a more differentiated understanding of the workings of NGOs on the European level and the determinants of their influence. As a case of advocacy failure, the detention provisions of the 2008 Returns Directive will be scrutinized. In contrast, as an example of success, the advocacy for more European engagement in resettlement will be examined. This paper argues that particularly issues with a high degree of conflict between different stakeholders are predisposed to be less amenable to NGO influence, as a high degree of conflict leads to conflicting positions of the different stakeholders from the very beginning.

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Introduction

The European Union is developing a European asylum system with common standards for the protection of refugees in Europe. As a regional sub-system of the international refugee regime, it has to adhere to the norms of international refugee and human rights law. The international system of refugee protection is founded on the 1951 Geneva Convention Relating to the Status of Refugees.¹ It was initially set up for refugees in Europe after the Second World War. The 1967 Protocol to the Convention² removed geographical and time limitations, so that the protection of refugees became universally applicable.³ The most important duty of states under the Refugee Convention is the non-refoulement principle as enshrined in Article 33. Accordingly, states are not allowed to return a refugee to a country where he would face the risk of persecution.

However, the Common European Asylum System (CEAS) has been harshly criticized for not being in line with the international refugee regime. Human rights NGOs in particular criticize restrictive European asylum policies that are being adopted into EU law. In their view, the CEAS is being developed according to an approach focused on security concerns and not on human rights.

Several NGOs on the European level therefore try to advocate for more liberal asylum policies. The European Council on Refugees and Exiles (ECRE), a European network of refugee-assisting NGOs, is one of these NGOs which lobby the European

¹ Convention Relating to the Status of Refugees. 1951.

² Protocol Relating to the Status of Refugees. 1967.

³ UNHCR 2007, 5

institutions. This paper aims at analysing the different advocacy strategies that ECRE and other NGOs⁴ employ and the factors that influence the success of their strategies in order to gain a more differentiated understanding of the workings of NGOs on the European level and the determinants of their influence. This paper argues that particularly issues with a high degree of conflict between different stakeholders are predisposed to be less amenable to NGO influence, as a high degree of conflict leads to conflicting positions of the different stakeholders from the very beginning.

This paper will proceed as follows. After outlining the theoretical framework on NGO advocacy strategies and the determinants of their success, the specificities of the EU lobby environment will be examined. A general introduction of ECRE and their strategies will then be followed by two case studies. Specific cases of failure and success are chosen in order to be able to evaluate the different strategies and their impact.⁵ As a case of failure, the detention provisions of the 2008 Returns Directive will be scrutinized. In contrast, as an example of advocacy success, the development of an EU Resettlement Scheme will be examined. These two cases were chosen because they are both very recent cases⁶ and they are embedded in very different political opportunity structures which allows for a wide range of insights. The conclusion in the end will summarize the main results. Finally, in order to set the discussion of ECRE's advocacy into a larger context, it

⁴ Besides ECRE, other NGOs such as Amnesty International, the Churches' Commission for Migrants in Europe (CCME), Caritas Europa, the Jesuit Refugee Service and the International Catholic Migration Commission (ICMC) advocate on behalf of refugees for a more inclusive EU asylum policy. The United Nations refugee agency UNHCR, though not an NGO, is also engaged in advocacy efforts with the EU. Therefore, the efforts of ECRE must be seen in this co-operative effort of these organizations.

⁵ A case of failure is a case where NGO advocacy has not yielded the results hoped for, whereas a case of success is an area where EU policy has been successfully influenced by refugee NGOs.

⁶ The Returns Directive was adopted in 2008 and the advocacy on resettlement is ongoing.

will be asked whether ECRE and other NGOs have an influence on a more general level and whether they can be a solution to the democratic deficit of the EU.

The methodology used in the case studies is based on the analysis of primary documents following the process of NGO advocacy in the two dossiers, as well as on qualitative interviews that were conducted for this research. The choice of interview partners was led by the aim to speak to a wide variety of actors as far as time and resource constraints allowed. Interviews were therefore held with NGOs in Brussels, namely ECRE, Amnesty International and Caritas Europa, with the national NGOs Hungarian Helsinki Committee (Hungary) and Pro Asyl (Germany), and, in order to add an outside perspective on NGO strategies, with an official of the Asylum Unit in the European Commission and the head of the EU Policy Unit of UNHCR.

While being aware of the fact that ECRE is but one European network lobbying for refugees, due to the limited scope of this paper the focus will be on ECRE, occasionally adding insights from other NGOs as well. The exclusive focus of ECRE on refugees and its broad membership justify this choice.

1. Theoretical framework

The theoretical framework of this paper is based on theoretical accounts of advocacy strategies and their success. Based on Keck and Sikkink⁷ and their analysis of advocacy strategies,⁸ ECRE will be considered a transnational advocacy network (TAN)⁹ which employs varied tactics to pursue its goals of more liberal asylum policies.

First of all, a definition of TANs must be provided. TANs are "networks of activists, distinguishable largely by the centrality of principled ideas or values in motivating their formation".¹⁰ This centrality of values is crucial for understanding why Keck and Sikkink assert that „advocacy networks often reach beyond policy change to advocate and instigate changes in the institutional and principled bases of international interactions”.¹¹ This observation can be applied to the case of European asylum policies as well, in which a securitarian approach to asylum seekers has gained ground over the past years. Asylum seekers are seen as a potential security threat and are often confounded with economic migrants.¹² Favell and Geddes show that a “‘crisis’ atmosphere” is created over asylum and migration matters and argue that “security-focused officials and anti-immigration politicians can draw on a good deal of capital through promoting the idea that a fortress

⁷ Margaret E. Keck and Kathryn Sikkink, *Activists beyond borders* (Ithaca: Cornell University Press, 1998)

⁸ Aware of the slight differences of the terms advocacy and lobbying, they will nevertheless be used interchangeably in this paper as it is considered that refugee-supporting NGOs engage in both.

⁹ The term TAN is replaced by NGO in this paper. According to Tarrow, TANs include international NGOs and social movements. See Tarrow 2001. Moreover, refugee-supporting NGOs are considered to be the advocates lobbying on behalf of the rather weak interest group of refugees. See Guiraudon 2001

¹⁰ Keck & Sikkink 1999, 89

¹¹ Ibid., 89

¹² Jef Huysmans, “The European Union and the Securitization of Migration,” *Journal of Common Market Studies* 38, no. 5 (2000): 751-777. See also Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (London: Routledge, 2006)

needs to be built to protect European welfare systems, or national models of democracy etc.”¹³ ECRE aims to contest this principled basis of associating asylum seekers with terrorists, criminals, or exploiters of European welfare systems, and fights this securitarian framing not only by advocating for changes in specific policies, but also by calling for another framing of asylum in Europe in general, firmly defending the values of the international refugee system and of international human rights.

This paper focuses on the two main questions posed by Keck and Sikkink: How do TANs work and what factors influence their success or failure?¹⁴ With regard to the first question of how networks work, Keck and Sikkink have developed a typology of different tactics used by TANs. They differentiate between four different strategies. First, TANs are involved in information politics "or the ability to move politically usable information quickly and credibly to where it will have the most impact".¹⁵ Second, they use symbolic politics or "the ability to call upon symbols, actions or stories that make sense of a situation or claim for an audience that is frequently far away".¹⁶ Third, they engage leverage politics in order to "call upon powerful actors to affect a situation where weaker members of a network are unlikely to have influence".¹⁷ Fourth, TANs use accountability politics or "the effort to oblige more powerful actors to act on vaguer policies or

¹³ Adrian Favell and Andrew Geddes, "Immigration and European Integration: New Opportunities for Transnational Mobilization?" in Ruud Koopmans and Paul Statham (Eds.) *Challenging Immigration and Ethnic Relations Politics: Comparative European Perspectives*. (Oxford: Oxford University Press, 2000), 417.

¹⁴ Keck and Sikkink, 91

¹⁵ Ibid., 95

¹⁶ Ibid.

¹⁷ Ibid.

principles they formally endorsed".¹⁸ Next to these four tactics, Keck and Sikkink point to the importance of framing and venue shopping.

How can the influence of TANs be measured? Keck and Sikkink view influence of networks in a progressive way and identify five different stages of network influence.¹⁹ Stage one concerns issue creation, generating attention and setting agendas. This is achieved when networks are able to raise attention about previously neglected issues. Stage two occurs when networks succeed in influencing discursive positions of their advocacy targets, stage three when they are able to have an impact on institutional procedures and stage four when they influence policy change. Networks have influence on stage five when they have an influence on state behaviour.²⁰

These different stages are very helpful when looking at the conformity of final policy acts with NGO positions. However, this method of examining "goal achievement"²¹ does not take into consideration that besides NGO advocacy strategies, also other factors may have an influence on policy outcomes. Along similar lines, Michalowitz and Dür criticize this method, which they term "(d)efining influence along end results"²² and "assessing the degree of preference attainment"²³ respectively. Michalowitz asserts that "(r)esults ... may not always be linkable to lobbying activities."²⁴ Dür consents that by using this measure of influence, "it can be difficult to control for alternative factors

¹⁸ Ibid.

¹⁹ Ibid., 98

²⁰ The terms describing stage four and stage five may be somewhat confusing; Keck and Sikkink understand policy change as the change in the law, whereas change in state behaviour would occur when states not only change their laws, but also apply these laws in reality.

²¹ Keck and Sikkink, 98

²² Michalowitz 2007, 133

²³ Andreas Dür, "Measuring Interest Group Influence in the EU: A Note on Methodology," *European Union Politics* 9, no. 4 (2008b), 566

²⁴ Michalowitz 2007, 133

explaining a coincidence between preferences and outcomes”²⁵. Keck and Sikkink thus seem to jump from examining NGO strategies to conclusions on their influence. This paper seeks to fill this gap by examining different factors of influence, considering NGO strategies, but also other factors.

What other factors may play a role in the level of NGO influence? Quite a few scholars take an institutional perspective and contend that institutional structures decide about the access and therefore also the influence of NGOs. Joachim and Locher²⁶ treat the issue of the impact of institutional structures on advocacy strategies at length in their book on that specific issue with regard to the EU and the UN. Greenwood²⁷ and Favell and Geddes also stress the importance of institutional structures. However, considering that a too exclusive focus either on NGO strategies or on institutional structures neglects other factors that may be of importance, this paper sets out to examine a variety of factors determining NGO influence in greater detail. With regard to the other factors of influence, this paper draws on the accounts of Michalowitz and Dür, pioneers of trying to set out different determinants of NGO success.

Until now, “no systematic empirical evidence has been gathered ... on when, and under what conditions, interest groups actually exert influence”²⁸ Ucarer for example only very shortly mentions that “NGO impact is difficult to measure”²⁹ researching rather NGO

²⁵ Dür 2008b, 568

²⁶ Jutta Joachim and Birgit Locher, *Transnational activism in the EU and the UN. Transnational Activism in the UN and the EU: A comparative study* (London: Routledge, 2008)

²⁷ Justin Greenwood, “Institutions and civil society organizations in the EU’s multilevel system,” in Jutta Joachim and Birgit Locher (Eds). *Transnational Activism in the UN and the EU: A comparative study*. (London: Routledge, 2008).

²⁸ Michalowitz 2007, 132

²⁹ Emek M. Ucarer, “Safeguarding asylum as a human right: NGOs and the European Union,” in Jutta Joachim and Birgit Locher (Eds). *Transnational Activism in the UN and the EU: A comparative study*. (London: Routledge, 2008), 121

strategies themselves than how they can have an influence. In contrast, as will be argued in this paper, an analysis of advocacy strategies of NGOs should go hand in hand with an assessment of the factors playing into their level of success.

As one of the pioneers writing about what determines the influence of interest groups in the EU, Michalowitz has come up with a model of three different factors based on the literature on EU and US interest intermediation. According to her, in order to identify interest group influence, the degree of conflict, the structural conditions of influence and the type of influence sought need to be examined.

First, the degree of conflict is a quite obvious but highly important point in the analysis of the influence of NGOs. There can be different kinds of conflict, between NGOs and decision-makers, but also between different NGOs or decision-makers themselves. Second, the type of influence sought by NGOs is already an indicator for their potential success or failure. If the type of influence that NGOs seek to achieve concerns a core point of a legislative proposal (directional influence), it is clear that the degree of conflict will be higher than if NGOs only advocate for minor technical changes in a proposal (technical influence). The third factor that plays a role in determining NGO influence concerns structural conditions. Michalowitz understands structural conditions mainly in terms of the transparency of the decision-making process. She asserts that “(i)n untransparent decision-making processes ... interest groups lack a strong negotiation position”.³⁰ Moreover, I consider that in order to incorporate the differences in decision-making procedures and in access to the different EU institutions, these political opportunity structures should also be considered under structural factors.

Another framework for assessing interest group influence in the EU is offered by Dür. According to him, there are four categories of determinants of NGO influence, namely interest group resources, political institutions, issue characteristics and interest group strategies.

First, interest group resources cover several different aspects, including money, legitimacy, knowledge, expertise, information and political support. Another resource that is of crucial importance is personal contacts. The importance of this resource will not be elaborated on in the case studies as it cannot be known to what extent personal contacts played a role in the lobbying in the two specific cases, but it should be kept in mind that successful advocacy is much easier when you personally know your advocacy target.³¹

The second determinant of NGO influence is political institutions which decide on the access of NGOs to policy-making processes. This second factor does incorporate already the notion of the differences of access to the different EU institutions which was missing in Michalowitz's account. Moreover, the transparency of political institutions and the decision-making process is important.³² However, Dür does not mention the differences in decision-making procedures at the European level either. As will be explained later, the consultation and the co-decision procedure involve very different power structures between the Council and the European Parliament, most probably also affecting the level of success of NGO advocacy down the line.

³⁰ Michalowitz 2007, 136

³¹ The Commission official interviewed capitalized on the importance of personal contacts. In his opinion, the importance of knowing the right people within the Commission services cannot be overemphasized: "It is not necessarily about the size or the importance of the NGOs, but about whom they know in the institutions and whether they have a good personal relationship with the officials." Interview

³² Dür 2008a, 1216

Issue characteristics form the third determinant of interest group influence. Dür identifies several issue characteristics, such as degree of technicality and public salience. The degree of technicality is a similar point that Michalowitz makes when she differentiates between directional or technical influence. Technical issues are not as politically sensitive and divisive as issues of 'high politics',³³ and thus the interests of NGOs and policy-makers may coincide more easily. The public salience of an issue may also affect interest group influence.³⁴ Moreover, the degree of conflict as identified by Michalowitz may be included in issue characteristics as well.

Finally, interest group strategies are the fourth determinant of interest group influence. It is interesting that NGO strategies figure as the last determinant in Dür's account of NGO influence, already pointing to a possible observation, that NGO strategies are not the most important determinant for their advocacy success.

Having reviewed some of the literature on NGO advocacy strategies and the different determinants of their influence, the theoretical framework of this paper is based on a combination of the main aspects of the work of Keck and Sikkink, Dür and Michalowitz. In the case studies, first of all, NGO advocacy strategies in the policy-making process will be examined according to the four different tactics identified by Keck and Sikkink. Then, the other determinants of influence will be scrutinized, building on a combination of Dür's and Michalowitz's account and complementing it by with own insights

Besides NGO strategies, this paper will thus examine issue characteristics, political opportunity structures and NGO resources. Issue characteristics will include an

³³ Ibid., 1217

examination of the type of influence sought by NGOs, the degree of conflict, and the influence of public opinion. Political opportunity structures can be divided into political institutions (decision-making procedure, access and transparency) and the specific political context that I consider of crucial importance. Lastly, NGO resources include knowledge, experience, expertise, information, legitimacy and political support.

³⁴ Ibid.

2. The specificities of the EU lobby environment

Next to the analytical background of the strategies of TANs, with regard to ECRE lobbying with the EU institutions, the very specific advocacy environment of EU asylum policy needs to be taken into account. Legislation on asylum is a joint exercise of the Council, the Commission and the EP, ECRE has thus several access points for its advocacy.

Before elaborating on the stance of the different institutions on asylum, a short historical overview³⁵ of the development of asylum cooperation in the EU shall illustrate the shifting political opportunity structures (POS) in European asylum policy. In the 1970s, informal cooperation on immigration, asylum, police and judicial matters started between some European countries. However, it was only with the 1992 Maastricht treaty that formal cooperation in the justice and home affairs (JHA) field as the third pillar of the EU temple structure was established. Under the third pillar, cooperation was purely intergovernmental, meaning that there was no real role for the European Commission or the EP, but that the Member States represented in the Council dominated decision-making. The 1997 Amsterdam treaty changed this institutional structure by shifting asylum matters from the intergovernmental third pillar to the first pillar of the European Communities, where it is possible to create legally binding instruments and where usually the Community method is used for legislation making. The Community method means that in terms of legislation-making, the Commission has the exclusive right of initiative, and that the legislative function is jointly shared by the Council and the EP in the so-called co-

decision procedure³⁶. In the same year that the Amsterdam treaty entered into force (1999), the creation of the Common European Asylum System (CEAS) was decided at the Tampere summit of the European Council. The first phase of the CEAS was to be achieved within a time period of five years, from 1999 until 2004. However, during this first period the Community method was not used and instead a five-year transition period applied, prolonging the dominance of the Council in decision-making as the Council shared the right of initiative with the Commission and the consultation procedure applied, meaning that the EP would only have to be consulted during legislation-making and it would not have an effective veto power as under the co-decision procedure. After the transition period, in the second stage of the CEAS addressed by 'the Hague Programme' as of 2004, the Community method applies in decision-making for asylum matters.

What consequences does this evolution of asylum policy have on ECRE and other NGOs wanting to advocate refugee rights at the European institutions? With the changes in the institutional balance of the Council, the Commission and the EP, the political opportunity structures for ECRE changed as well. As Ucarer comments, “(t)he post-Amsterdam changes not only meant an opening of the POS for the Commission and Parliament, but also signalled the same for NGOs.”³⁷ As of 2004, the powers of the Commission and the EP were considerably strengthened, the two actors, as we shall see now, that are more in favour of liberal refugee policies and are more accessible for NGOs than the Council.

³⁵ Based on Ucarer 2008, 124-126

³⁶ See http://ec.europa.eu/codecision/stepbystep/diagram_en.htm for a flow chart of the procedure.

³⁷ Ucarer 2008, 125

The EP is the institution most in favour of expansive policies for asylum seekers. It "seems more human rights oriented"³⁸ than the Council and follows a "largely humanitarian vision of refugee law."³⁹ It is also the institution which is the most accessible and frequently takes into account arguments brought forward by NGOs.

The Commission has a humanitarian stance on asylum and provides an easy access as well, enabling NGOs to be engaged in the policy cycle and provide substantial input. The Migration officer of Caritas Europa praises the Commission to be "very open towards dialogue".⁴⁰ Garcia Martinez, a Commission official of the Asylum Unit, affirms that they are in contact with NGOs on an almost daily basis.⁴¹

Lastly, the Council is the least accessible institution for NGO input and is criticized for its resistance to engage with civil society. Moreover, with regard to asylum, as the Council is composed of Member States, it follows the securitarian approach. A member of a Brussels-based NGO in the asylum field notes that "(t)he Council are national politicians... and they represent their national constituencies or governments and that's the biggest challenge for us in our advocacy work."⁴²

The European Court of Justice should not be forgotten either. With the Treaty of Amsterdam, judicial supervision by the ECJ in asylum matters became possible. Gilbert (2004) claims that "[a]t one level, therefore, the European Union has established the first

³⁸ Emanuela Canetta, "The EU Policy on Return of Illegally Staying Third-Country Nationals," *European Journal of Migration and Law* 9, (2007), 447.

³⁹ Satvinder S. Juss, "The Decline and Decay of European Refugee Policy," *Oxford Journal of Legal Studies* 25, no. 4 (2005), 771.

⁴⁰ Interview with Verhaeghe

⁴¹ Interview with Garcia Martinez

⁴² Quoted in Ucarer 2008, 127

international refugee tribunal.”⁴³ However, the jurisdiction of the Court in asylum matters is restricted. According to Article 68 EC, requests for preliminary rulings are restricted to courts of last instance, which do not have to refer the case to the ECJ, but only have discretion to refer if they consider it necessary. Lower national courts are thus not able to ask for ECJ guidance in cases of unclarity, and courts of last instance are not obliged to seek the opinion of the ECJ.⁴⁴

However, courts of last instance can refer cases to the ECJ. In the *Elgafaji* case⁴⁵, the Court’s first case on substantive international protection concepts, it clarified the eligibility for subsidiary protection in cases of indiscriminate violence in an expansive way⁴⁶, a judgment that was welcomed by UNHCR and NGOs alike. Pardavi asserts that “this first judgment was very promising.”⁴⁷ In future cases on asylum law, NGOs are thus hopeful that the ECJ will continue to interpret EU asylum law in a liberal way. Kopp (Pro Asyl) expects that “the Court may come to far-reaching decisions in asylum law and condemn restrictive practices in the EU.”⁴⁸

⁴³ Geoff Gilbert, “Is Europe Living Up to Its Obligations to Refugees?,” *The European Journal of International Law* 15, no. 5 (2004), 983.

⁴⁴ There are different interpretations of Article 68 EC as to whether courts of last instance have a discretion to refer (Gilbert 2004, 983) or whether they are obliged to do so (Peers 2007, 94). Given the wording ‘where necessary’ in Article 68 EC, the interpretation by Gilbert of a discretion to refer has been adopted in this paper.

⁴⁵ Case C-465/07 *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, European Court of Justice, 17 February, 2009

⁴⁶ The Court ruled that the applicant does not have to demonstrate that he is individually or ‘specifically’ targeted in order to be protected under Art. 15(c).

⁴⁷ Interview with Pardavi

⁴⁸ Interview with Kopp

3. Introduction of ECRE and general advocacy strategies of European NGOs

3.1 Introduction of ECRE

As a European network of 69 refugee-assisting NGOs from 30 European countries, ECRE focuses on influencing EU legislation-making on asylum issues. ECRE was already founded in 1974, when there was no formal European cooperation on asylum matters yet. It started out as an informal platform of five Western European NGOs, and as the number of 69 NGOs at present shows, has evolved substantially since then. The permanent secretariat in Brussels⁴⁹ with 17 staff members largely composed of lawyers is responsible for following the latest developments in EU policy making on asylum, conducting research, and developing ECRE's advocacy strategies. The 69 member NGOs meet once a year at the annual conference. In order to promote better coordination between the Brussels office and the member organizations, there are core groups on different issue areas,⁵⁰ which are composed of a smaller number of organizations particularly interested in an issue, acting as a forum of exchange and policy formulation.

3.2 General advocacy strategies of European NGOs

Before examining in more detail the two case studies of advocacy failure and success, on the basis of the interviews undertaken, the general strategies of NGOs will be

⁴⁹ ECRE's main office recently moved from London to Brussels (May 2008), indicating the importance of a stronger presence in Brussels, the centre of EU policy making on asylum.

⁵⁰ There are core groups on asylum systems, resettlement, access to Europe, return and integration.

analyzed, focusing in particular on the cooperation with their national members as well as with other European NGOs.

3.2.1 Cooperation with national members

European TANs stress the importance of cooperation with their national members. This cooperation is a two-way process: ECRE for example depends on its national members for information from the Member States, and the national members need ECRE to keep updated about European developments. Besides feeding ECRE with information from the MS, the most important function of the national members is of course to lobby their national capitals. ECRE and their members engage in venue-shopping and leverage politics by pursuing their advocacy both on the European and the national level. Due to the inaccessibility of the Council on the European level, national organizations can be very helpful in lobbying their governments and their MEPs. At strategic points in time, member agencies are asked to get in touch with their national decision-makers.

For the national agencies it is beneficial to be members of European networks as well. One of the main reasons is of course that ECRE lobbies the European institutions on their behalf. Pardavi, co-chair of the Hungarian Helsinki Committee (HHC) and vice-chair of ECRE Executive Committee, outlines that there are varied reasons for an organization to be an ECRE member. First, the information flow from Brussels is of utmost importance, it is indispensable to keep up with European developments in asylum policy. Second, ECRE's policy analysis and policy formulation is very useful for member agencies as they can use these resources on the national level. Pardavi frankly states that to follow

all European policies is too much to keep up with for a national organization that operates in a national context. That is why being a member of ECRE is a kind of “outsourcing.”⁵¹ A third advantage to be a member of ECRE is that it works as a natural platform facilitating cooperation with other refugee organizations. Fourth, another added value of being an ECRE member is the learning effect. ECRE’s legal network ELENA offers courses on international and European refugee law that member organizations can attend.⁵²

In developing a policy position, how does ECRE consult with its members to make sure that the position reflects the views of its membership? An ECRE staff member explains that it depends on the issue to what extent member organizations are consulted. For ECRE’s main position papers of “The Way Forward” series, ECRE consulted widely with its members. On other less high-profile issues only the core group members are consulted because “the time constraints inherent to legislative work make impossible to consult the whole membership.”⁵³ Of course, as she points out, the ECRE position cannot accommodate the opinions of all its 69 members, but through constant consulting, in particular with the core groups, it is ensured that ECRE does not act independently from its members.

One of the problems that the coordination between European networks and its national members faces is the complexity of the European decision-making system and the highly technical language of European legislation. All of the NGOs interviewed stressed that one of their main tasks is to explain the workings and the importance of the EU to their

⁵¹ Interview with Pardavi

⁵² Ibid.

⁵³ Interview with ECRE staff member

national members. That is why Caritas Europa for example organizes trainings for its member organizations on European migration and asylum policy.⁵⁴

3.2.2 Cooperation with other European NGOs

It has become clear that cooperation and networking with their national members is of crucial importance. However, the networking does not stop with establishing an office in Brussels, it is even multiplied in the dense EU NGO network. It is interesting to consider that organizations such as Amnesty, CCME and ICMC, besides maintaining their own networks, are all members of ECRE as well. Moreover, there is frequent cooperation between the different organizations in order to pool their resources and to maximize their advocacy impact. A certain pattern can be detected with the same organizations teaming up. ECRE and Amnesty cooperate a lot, drawing on ECRE's specific focus and expertise on refugee issues and the utilizing the established "brand"⁵⁵ of Amnesty. Church-related NGOs engage in common lobbying efforts as well, capitalizing on their moral authority and their large constituency composed of the different Christian denominations in Europe. Occasionally, at important junctures of the policy-making process, a larger NGO coalition is formed. In addition, an informal NGO Platform on EU Migration and Asylum Policy was established by UNHCR in 1994, with the aim of increased networking and cooperation. The platform meets every 3 months with a view to exchanging information and discussing lobbying strategies.⁵⁶

⁵⁴ Interview with Verhaeghe

⁵⁵ Interview with Pollet

⁵⁶ Info sheet on the NGO Platform on EU Migration and Asylum Policy, (May 2007)

Interestingly, the views on the value of cooperation differ. On the one hand, Verhaeghe, the Migration Officer of Caritas Europa stresses that they “do not avoid overlap” because in his opinion, the more pressure is exercised on decision-makers, the better. Verhaeghe questions the practicalities of closer cooperation between the different NGOs, stressing the fact that European-level NGOs are already networks and it is already difficult to come to an agreement among their respective members. Moreover, more coordination would be, although not impossible, very time-consuming.⁵⁷

On the other hand, there are also organisations which see an added value in more coordination. While acknowledging the fact that each NGO pursues its own agenda which complicates coordination, an ECRE staff member underlines that they look for synergies with other organizations in order to reinforce their message and to avoid duplication of work. Moreover, there is the danger of an “NGO-overload for EU decision-makers”,⁵⁸ leading to decision-makers getting tired of relentless NGO lobbying.⁵⁹ Amnesty’s Executive Officer on JHA affairs, Kris Pollet, recognizes the problem of “a lot of people are talking to the same people about the same things.” He acknowledges that a division of labour would be useful and is becoming increasingly necessary as well, taking into account the increasing number of players involved in EU asylum policy. It seems logical that it is simply not possible for one single organization to lobby 27 Member States, various Commission DGs and 785 MEPs.⁶⁰ At the same time, for an organization such as Amnesty it is important to talk to everyone and to ensure its visibility.

⁵⁷ Interview with Verhaeghe

⁵⁸ Ucarer 2008, 129

⁵⁹ Indeed, an ECRE staff member said that this was the case with the Returns Directive.

⁶⁰ This is of course exaggerated. But it illustrates the resource constraints of NGOs which often have only one person working on EU migration and asylum policy (such as the Brussels office of Amnesty).

It is also important to consider that cooperation is not easy due to differences in opinion between the NGOs. Even though most NGOs share the main human rights focus, differences exist with regard to their interpretation of EU policies and their interaction with the European institutions. The most visible example of a divide between NGOs is the establishment of the Migreurop network in 2005, comprising mainly French, Italian, Spanish and Belgian NGOs and taking a more idealist and radical stance than ECRE as will become clear in the case study on the Returns Directive.

These differences reflect a deeper dilemma that NGOs have to face: In their advocacy with the European institutions, can they stick to their principles or do they have to leave their idealism behind and become more pragmatic? ECRE, Amnesty and Caritas, as well as the Commission official, all agreed that in the EU lobby environment you have to be pragmatic. An ECRE staff member as well as Garcia Martinez (Commission) and Garlick (UNHCR) all referred to the two-track strategy of NGOs. On the one hand, NGOs have an official position based on their principles that can be found in their position papers and in their official discourse. On the other hand, in their informal discussions with decision-makers, they pursue a more pragmatic approach, forced to be more realistic in view of what they can achieve. The ECRE staff member asserts that “if you are too idealistic, you cannot do proper legislative work.”⁶¹ They have to be aware of the constraints of the Commission, for example, which is not able to propose something that contradicts the position of the Member States in all respects.

Advocacy with the institutions thus becomes a delicate balancing act, trying to propose something that is not too far away from your principled position but that is not

going to backfire on you either. More idealistic NGOs resist this pragmatism in what they see as the institutionalization of NGOs on the European level or even co-option by European institutions. The Migreurop network tries to stick to a more principled approach, but as a consequence, stays largely outside of the policy dialogue. There seems to be no alternative: You either want to stay in the dialogue and adapt to the workings of the EU, i.e. you are institutionalized in the process, or you resist this institutionalization but risk not having an impact at all.

This discussion relates to the form of social action that can have an influence on the European level. It has been argued that “(m)ost of the new forms of action associated with European integration ... are elite and technocratic in nature: this is an inescapable feature of the EU institutional context.”⁶² NGOs on the European level are thus institutionalized and evolve into highly technocratic organizations specialized in European affairs. Imig and Tarrow ask how Europeans engage in collective action on the European level and argue that “when they encounter the institutions of the European Union, Europeans model their behaviour around the techniques of interest representation that are accepted by European officials – they lobby them instead of engaging in more contentious behaviour.”⁶³ In the case study on return it will become clear that the NGO camp around ECRE lobbies the European institutions whereas the Migreurop group engages in contentious behaviour that can be termed protest politics, to be added to Keck’s and Sikkink’s strategies of information, accountability, symbolic and leverage politics.

⁶¹ Interview with ECRE staff member

⁶² Favell and Geddes 2000, 417

⁶³ Doug Imig and Sidney Tarrow. *Contentious Europeans: Protest and Politics in an Emerging Polity*. (Oxford: Rowman & Littlefield, 2001)

4. A case of failure: The maximum length of detention in the Returns Directive

The case of failure to be analysed concerns the maximum period of detention in the Returns Directive, stipulating that irregular migrants, such as asylum seekers who were not recognized as refugees, can be detained up to eighteen months while awaiting to be returned to their country of origin.

4. 1 Background to detention

As has already been established, the European asylum system is embedded in the international refugee regime and its policies need to correspond to the international standards set by the 1951 Convention, human rights instruments, court jurisprudence and state practice. In order to better understand the contentious issue of the detention of asylum seekers, around which the main debate in the Returns Directive was focused, a short background to detention of asylum seekers in international law will be provided. Moreover, NGOs use the relevant provisions in international refugee and human rights law as reference points in their advocacy.

States have the sovereign right to detain non-nationals who are going to be deported or who are waiting for decisions on their entry. This competence is confirmed in court cases and state practice. Goodwin-Gill therefore clarifies that the question is not

whether States are allowed to detain non-nationals, but whether that practice is limited in the case of refugees and asylum seekers.⁶⁴

According to the 1951 Refugee Convention, States explicitly retain the power to detain refugees, for example in the interests of national security, in exceptional circumstances, or if necessary after illegal entry or in the case of mass influx.⁶⁵ The non-penalization provision in the Convention⁶⁶, stipulating that refugees shall not be punished in the case of illegal entry or presence in a country is only “of limited application”⁶⁷

It is important to note that the 1951 Convention “does not limit the period of detention, require review of its legality or its necessity, or otherwise confine the discretion of the State.”⁶⁸ However, according to Goodwin-Gill, several limitations on the detention of refugees may be inferred from the Convention.⁶⁹ In general, asylum seekers shall only be detained until the regularization of their status or their admission to another country.⁷⁰ Moreover, Goodwin-Gill argues that the drafters of the Convention may have deemed detention for a few days appropriate, in order to verify identity, but that they considered further detention in need of justification.⁷¹

However, the 1951 Refugee Convention and the 1967 Protocol do not offer enough guidance on the detention of asylum seekers. Human rights law goes further in this regard and provides for a wider scope of protection against detention. According to State

⁶⁴ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed, (Oxford: Oxford University Press, 2007), 462

⁶⁵ Convention Relating to the Status of Refugees, Arts. 9, 26 and 31(2)

⁶⁶ Ibid., Art. 31

⁶⁷ Goodwin-Gill and McAdam 2007, 462

⁶⁸ Ibid., 462

⁶⁹ Ibid., 463

⁷⁰ Convention Relating to the Status of Refugees, Art. 31(2)

⁷¹ The justification would either have to qualify detention as necessary (1951 Convention, Art. 31(2)) or exceptional (Art. 9)

practice, the power to detain in immigration matters is acknowledged. However, human rights law offers an important safeguard, namely that no one shall be subject to arbitrary arrest or detention. This safeguard can be found in several human rights instruments, for example in Article 9 of the International Covenant on Civil and Political Rights and in Article 5 of the European Convention on Human Rights. As will be seen later, ECRE frequently refers to human rights in their advocacy efforts. Goodwin-Gill interprets this provision in a way that "all detention must be in accordance with and authorized by law" and "detention should be reviewed as to its legality and necessity."⁷² Human rights law is useful with regard to the conditions of detention as well, including the prohibition on cruel, inhuman or degrading treatment, the special protection granted to the family and children, and the importance of basic procedural rights and guarantees.⁷³

However, it is common knowledge that the advances of human rights law are oftentimes not reflected in state practice. With regard to the detention of asylum seekers and refugees, the debate on this issue within the Executive Committee of UNHCR at its 37th session in 1986 demonstrates how contested this topic is. States were divided between those who advocated for detention only as a last resort and exception and those pressing for wide discretion in controlling the movement and entry of asylum seekers. However, in the end, a report and conclusions⁷⁴ were adopted. Even though the conclusions⁷⁵ were not as progressive as had been hoped for by UNHCR, the principle

⁷² Goodwin-Gill and McAdam 2007, 463

⁷³ Ibid., 464

⁷⁴ UN doc. A/AC.96/688

⁷⁵ For further guidelines regarding detention, see UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, Geneva, Feb. 1999.

that “detention should normally be avoided”⁷⁶ was endorsed. Moreover, “fair and expeditious procedures”⁷⁷ for determining refugee status should be in place to ensure protection against prolonged detention. However, these conclusions are not binding for states.

As has become clear, the provisions on detention in the 1951 Refugee Convention and in other human rights instruments have not established a clear framework on detention. Detention of asylum seekers should normally be avoided, but in practice, “the use of administrative detention of asylum seekers and irregular migrants in Europe is a rule, rather than an exception.”⁷⁸ In the context of European asylum policy, provisions on detention can be found in several legislative instruments⁷⁹ and asylum seekers are regularly detained, whether in the context of having irregularly entered a Member State, awaiting transfer to another country responsible for the examination of their asylum claim or, as in this case study, being returned to their home country because their asylum request was denied.

4.2 Overview of the legislative process and NGO advocacy strategies

One of the most recent cases of failure was the provision in the Returns Directive of December 2008⁸⁰ stipulating that irregular migrants, such as asylum seekers who were not recognized as refugees, are to be returned to their home country or a transit country

⁷⁶ UN doc. A/AC.96/688, paragraph (b)

⁷⁷ Ibid., paragraph (c)

⁷⁸ Jesuit Refugee Service, “Detention in Europe, European Union”, May 2009.

⁷⁹ See Art. 7 of the 2003 Reception Conditions Directive, Art. 18 of the 2005 Procedures Directive and Art. 15 of the Returns Directive. Moreover, detention is practiced in the context of the Dublin II Regulation as well. The Regulation itself provides no guidelines on detention, but in practice, asylum seekers awaiting transfer to another Member State or to a third state under the Dublin system are regularly detained.

and can be detained for a maximum period of eighteen months.⁸¹ This unsatisfying result was all the more surprising as the Returns Directive was the first important legislative measure to be adopted jointly by the Council and the EP under the co-decision procedure,⁸² thus it was thought that with the migrant-friendly EP as co-legislator, the political opportunity structures had changed for the better from the point of view of the refugee-supporting organisations.

Detention of asylum seekers has been a concern of ECRE since the early years of European co-operation on asylum matters. Already in 1996 ECRE published a position paper with recommendations on the detention of asylum seekers.⁸³ ECRE made clear that “as a general rule, asylum seekers should not be detained.”⁸⁴ Other papers on the issue include a paper on detention and deportation (2003)⁸⁵ and an analysis of the compatibility of detention of asylum seekers with the European Convention on Human Rights (2004).⁸⁶ In these papers, ECRE clearly refers to human rights and, reminding Member States of their human rights obligations, uses accountability politics. ECRE has thus considered detention as an important issue for a long time and, anticipating European cooperation in this area, aimed to shape the debate from the beginning, engaged in problem formulation and information politics.

However, with regard to the legislation process and the informal lobbying on the detention provisions in the Returns Directive specifically, ECRE arguably entered the

⁸⁰ Directive 2008/115/EC

⁸¹ Ibid., Article 15

⁸³ ECRE, “Position Paper on the Detention of Asylum Seekers.” (1996)

⁸⁴ Ibid., 1

⁸⁵ ECRE, “Detention and Deportation.” (2003)

⁸⁶ ECRE, “Immigration, Asylum and Detention.” (2004)

debate a little bit too late. ECRE did publish its main position paper on return within its 'The Way Forward' Series in June 2005, just before the Commission issued its formal proposal on common return procedures on 9 September 2005. However, during the drafting of the Commission proposal, ECRE was not yet in contact with the Commission, and could therefore try to influence the draft legislation only after the release of the official proposal. The 2005 proposal contained provisions on the detention of irregularly staying third-country nationals for a period of up to six months, which was considered a controversial move and, arguably, could have been avoided in the case of earlier NGO advocacy efforts. When asked about possible mistakes in ECRE's advocacy strategy concerning the Returns Directive, an ECRE staff member acknowledged that "we should have started much earlier" with active advocacy on the Returns Directive, "already at the time when the Commission was working on the proposal."⁸⁷ This statement demonstrates that it is crucial for NGOs to be always updated about the latest developments on the European level and to engage in lobbying the institutions as early as possible.⁸⁸

With some delay, after the Commission proposal was adopted in September 2005, ECRE eventually became active in the matter and issued its comments in May 2006.⁸⁹ ECRE made clear that it was not content with the proposal and reiterated that "(d)etention should only be used as a last resort and in full compliance with international human rights."⁹⁰ In this argument, ECRE employs the tactic of accountability politics again; it refers to international human rights with which the Member States need to comply.

⁸⁷ Interview with ECRE staff member

⁸⁸ However, it must be taken into account that NGOs face resource constraints which makes it difficult for them to be equally active in a large number of dossiers.

⁸⁹ CO2/5/2006/ExtPC.

⁹⁰ Ibid., 28

However, ECRE's efforts were not successful. In the subsequent negotiation process of the Directive, this provision became even worse from the point of view of ECRE. It was watered down in the Council negotiations, and in the adopted Directive of December 2008,⁹¹ Article 15 provides for a maximum period of detention of six months, which however can be extended by a further period of twelve months when "the removal operation is likely to last longer owing to (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries." In its information note on the final Directive,⁹² ECRE voices its criticism of this excessive period of detention and, concerning the (b) provision, remarks that "prolonging detention due to the unwillingness or inability of a country to provide documentation is particularly unjust, as it amounts to penalizing individuals for circumstances that are completely beyond their control."⁹³

During the negotiation process in the Council and the EP, NGOs were proactive and engaged in even more information and accountability politics in trying to convince the different stakeholders of the illegality of the Directive. However, as NGOs are not formal partners in the decision-making process, it is difficult to always know what is happening behind the scenes. It is important to mention that the co-decision procedure in practice uses formal and informal trialogue meetings to achieve an agreement between representatives of the Council, Commission and the EP. This method is heavily criticized due to its lack of transparency.⁹⁴ Due to this lack of transparency on the part of EU institutions, in particular the Council, it depends on the goodwill of legislators which

⁹¹ Directive 2008/115/EC

⁹² CO7/1/2009/Ext/MDM.

⁹³ CO7/1/2009/Ext/MDM, 21

documents and information they leak to NGOs. This was the case with the Returns Directive as well. As Verhaeghe (Caritas) recalls, it was very difficult to obtain information on the discussions of the Returns Directive taking place in the trialogue meetings.⁹⁵

As outlined before, the EP is the actor most receptive to NGO input and the Returns Directive was the first major measure that it decided jointly with the Council under the co-decision procedure. MEPs became thus a more important advocacy target than before and ECRE and other NGOs approached MEPs not to vote in favor of the Directive. In order to reinforce their message, ECRE and Amnesty International cooperated and, at strategic points of time during the debates, wrote two joint letters to MEPs. The first letter from September 2007⁹⁶ is addressed to the MEPs of the responsible committee within the EP, the Committee on Civil Liberties, Justice and Home Affairs, which was going to vote on the EP Report on the Directive. ECRE and Amnesty urged the MEPs not to adopt the provision allowing for an 18-month detention period. Using accountability politics again, they referred to international human rights when they emphasized that “(d)etention is an extreme sanction for people who have not committed a criminal offence and violates one of the fundamental human rights protected by international law – the right to liberty.”⁹⁷

As the first letter did not stop the MEPs in the LIBE Committee from adopting the Report, ECRE and Amnesty saw themselves compelled to write a second letter to all

⁹⁴ Acosta 2009, 24

⁹⁵ He was finally able to get a draft Council document on the Returns Directive from the Finnish government through the Finnish Caritas agency. Interview with Verhaeghe

⁹⁶ On hold with the author.

⁹⁷ Ibid., 2

MEPs the following year just before the EP was going to vote on the compromise text of the Directive⁹⁸ urging the MEPs not to accept the text in its present form. This compromise text had been elaborated in a trialogue meeting and still included a maximum length of detention of eighteen months. However, the EP adopted the Directive in June 2008 with 369 votes in favor, 197 votes against, and 106 abstentions.⁹⁹

4.3 Factors of influence

4.3.1 Issue characteristics

Why have ECRE and other NGOs failed in advocating against a detention period of eighteen months? With regard to issue characteristics, it was clear from the beginning that detention would be an extremely sensitive and difficult issue to deal with. The type of influence that ECRE and other NGOs sought, i.e. to achieve a shorter maximum period of detention, at first sight is only a technical question and should thus not result in a high degree of conflict. However, the degree of conflict was exceptionally high between all stakeholders. As the length of detention was already regulated in national asylum laws, the Member States considered that the level of harmonization intended for by the Directive was too high. The maximum periods of detention differed considerably between the Member States, from 32 days in France over 18 months in Germany, 20 months in Lithuania to an unlimited period in seven countries.¹⁰⁰ To find an agreement on a common maximum period was therefore very difficult and the degree of conflict between the

⁹⁸ ECRE and Amnesty International EU Office. Letter to MEPs. (13 May 2008)

⁹⁹ EurActiv, “Fighting illegal immigration: The Returns Directive.” (26 August 2008)

Member States was exceptionally high. Detention is a highly symbolic measure of a state's sovereign prerogatives; states do not want to be told why, for how long and under what conditions they are allowed to detain someone.

Detention is highly symbolic from another viewpoint as well; it is the ultimate expression of the metaphor of 'Fortress Europe'. Europe makes it exceptionally difficult for migrants and asylum seekers to enter legally, and if they succeed in coming in an irregular way, they are detained and then sent back. It was thus obvious that the degree of conflict between NGOs and the Member States would be high as well. This point was emphasized by an ECRE staff member, stressing that "the problem with the Returns Directive was that it was a very sensitive issue for the member states."¹⁰¹

A more surprising and interesting phenomenon concerns the degree of conflict that existed between the different NGOs. There was a deep split between NGOs such as ECRE which wanted to participate in the decision-making process and up until the end tried to have some kind of influence to make sure that human rights were safeguarded at least to some extent. In order to stay in the negotiations, however, they had to be pragmatic and were not able to advance their principled position that asylum seekers should not be detained.¹⁰² Another group of NGOs around the network Migreurop did not want to give in to outrageous European proposals that could not be improved in their opinion. This group formed the so-called 'NO camp' around the "outrageous Directive" or "Directive of shame", and called for the complete abandoning of the Returns Directive. The NO camp,

¹⁰⁰ EP Background, "Returns Directive: first reading vote in the European Parliament."

¹⁰¹ Interview with ECRE staff member

¹⁰² Ibid.

under the leadership of French NGOs and Migreurop¹⁰³, did not want to compromise its view that detention should be forbidden in general and therefore did not want to enter the negotiations on the length of detention.¹⁰⁴

The evaluation of the impact of the NO camp on the failure of NGO advocacy on the Returns Directive is mixed. An ECRE staff member considers that the strongly adversarial approach adopted by the NGOs in the NO camp promoted the perception by decision-makers of NGOs as not searching for constructive dialogue. “This increased the difficulties faced by other organizations when trying to engage in the legislative process.”¹⁰⁵ Moreover, the high degree of mobilization by the NGOs forming the NO camp had an effect on the topics that were covered in the media. As the NO camp mainly focused on the maximum length of detention, this was the issue that was picked up by the media. On the one hand, it can thus be argued that the activities of the NO camp reflected negatively on the content advocacy that other European NGOs such as ECRE, Amnesty and Caritas were pursuing.

On the other hand, other observers attribute some positive impact to the NO camp as well. According to Pollet (Amnesty), the NO camp “succeeded in raising awareness” of the ‘outrageous Directive’ in the media and the general public, which can have “an effect on public opinion regarding Europe’s asylum laws, in the long run as well.”¹⁰⁶

¹⁰³ The NO camp of 15 NGOs from several European countries was driven by French NGOs such as Cimade. Interestingly, some ECRE members such as Pro Asyl were also members of the NO camp, demonstrating that the ‘official line’ of ECRE in its policy papers is not always shared by all its members.

¹⁰⁴ The NO camp was able to mobilize a considerable amount of supporters: On 7 November 2007, a petition for the withdrawal of the Directive was started, and a few weeks later, on 17 December 2007, it was already signed by 500 organizations and 15.000 individuals from all over Europe. See NO camp, “Non à la directive de la honte!” (2007).

¹⁰⁵ Interview with ECRE staff member

¹⁰⁶ Interview with Pollet

The two strategies that the different camps chose to pursue can thus be seen as a specific way of venue-shopping; ECRE choosing the venue of pragmatic cooperation with the EU, and the NO camp lobbying on the venue of protest politics. Indeed, the NO camp did not only set up a website¹⁰⁷ with a petition to sign, but also organized the first public demonstration against EU asylum and immigration policies¹⁰⁸ with several hundred irregular migrants, MEPs, NGOs, trade unions and students.¹⁰⁹

4.3.2 Political opportunity structures

Keeping in mind that the Returns Directive was the first major instrument adopted under the newly introduced decision-making procedure of co-decision in asylum matters, it is of crucial importance to take a closer look at the political opportunity structures (POS). Under the co-decision procedure, the EP is the co-legislator with the Council and thus has a lot more influence than under the previously used consultation procedure, under which it only had to be consulted. As the EP is usually considered the EU institution with the most liberal approach towards migrant and asylum seekers, at first sight, the POS seemed to have changed favourably for NGOs. NGO access to the EP is good and as mentioned earlier, they engaged in heavy lobbying with the MEPs.

Why did the EP in this case adopt a directive that is heavily criticized for its restrictive provisions? The specific political context of the directive was highly unfavourable. Five factors negatively affecting NGO advocacy may be advanced. First of all, even though one

¹⁰⁷ The website www.directivedelahonte.org is unfortunately not accessible anymore.

¹⁰⁸ NO camp. "Rassemblement européen contre la directive de la honte." (2008).

¹⁰⁹ "Protest against detention in Brussels". (2008).

would expect the co-decision procedure to be more advantageous for NGOs, precisely the first use of the co-decision procedure was an obstacle to NGO demands. It needs to be kept in mind that the EP had just been granted more powers in the interinstitutional balance between the different EU institutions and wanted to prove that it was worthy of this upgrade. The rapporteur remarked after the adoption of the Directive: “The European Parliament has shown that co-decision in the field of justice and home affairs works,”¹¹⁰ suggesting that in mere procedural terms, it was important that the EP demonstrated its willingness to work together with the Council. Therefore, it sought to present itself as a reliable partner and wanted to adopt the measure at first reading. Garcia Martinez (Commission) confirms that there was “a lot of pressure” on the EP and that they “accepted things that under other circumstances they may not have accepted.”¹¹¹

Second, the rapporteur in the EP is an important figure throughout the negotiations. The rapporteur of the Returns Directive was Manfred Weber, a member of the conservative CSU from Germany and of the European People's Party and European Democrats (EPP-ED) group in the EP. As a conservative politician, he was likely to disagree with NGOs advocating for more liberal asylum policies. Moreover, as a German, he was influenced by the position of the German government, one of the hardliners during the negotiations. According to Pollet (Amnesty), the rapporteur “was clearly carrying out the agenda of the German government.”¹¹² Regarding the maximum period of detention, with eighteen months Germany had one of the longest detention periods in Europe. As he revealed in a hearing with the House of Lords, Weber admitted that he was not interested

¹¹⁰ EurActiv, 2008

¹¹¹ Interview with Garcia Martinez

¹¹² Interview with Pollet

in the issue of the length of detention. He "wonder(ed) whether we need a maximum limit for detention" and personally thought that "each country should be able to do as it pleases."¹¹³ The period of detention, one of the most contested issues of the negotiations, clearly did not seem to be a priority for the rapporteur.

A third factor playing into the failure of NGO influence was a new development of government pressure on MEPs under co-decision. Due to the different circumstances under the co-decision procedure, i.e. the increase in the power of the EP, their governments may try to influence their MEPs to take their stance. An example of this development in the voting of the Returns Directive could be detected in the voting record of the Spanish and the German Socialist MEPs: although the official position of the PES (Party of European Socialists) was against the Directive, almost all of the Spanish and the German MEPs voted in favor of the Directive, in line with their governments.¹¹⁴

As a fourth element specific to the political context, there was a sense of pragmatism in the adoption of the Directive. Most of the MEPs agreed that "the Directive was not perfect", but at the same time considered that "it was better to have a poor minimum consensus than no rules at all."¹¹⁵ They were aware of the fact that the text was above all a compromise, but they rather wanted a compromised version of the Directive than no Directive at all. In this line of thinking, ALDE MEP Jeanine Hennis-Plasschaert asked her

¹¹³ House of Lords European Union Committee, "Illegal Migrants: proposals for a common EU returns policy. Report with Evidence." (2006), 198

¹¹⁴ Diego Acosta, "The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)," *European Journal of Migration and Law* 11, (2009), 38 and Interview with ECRE staff member.

¹¹⁵ Ibid., 37

colleagues during the debate on the Directive: “Do we want a directive or not?”¹¹⁶ She underlined that there was no EU legislation on returning illegally staying third-country nationals and that the Returns Directive would make infringement procedures, Commission reports and monitoring reports of the EP possible.¹¹⁷

Finally, due to the fact that the Directive was already a compromise struck between the Council and the EP, the MEPs knew that the negotiations would not become easier if the decision-making process was prolonged. An important consideration was that at first reading, the EP only needs a simple majority to adopt a Directive. If no agreement is found at first reading and the issue advances to the second reading, an absolute majority is required. MEPs were thus aware of the fact that an already heavily compromised issue such as the Returns Directive would be even more difficult to adopt at second reading.¹¹⁸ Another factor was that after the Slovenian presidency under which the Directive was adopted, the French would hold the presidency of the Council. As it was expected that France would take “a much tougher position”,¹¹⁹ it seemed better to adopt the Directive before the French presidency.¹²⁰ Moreover, MEPs wanted to close the dossier of the Returns Directive before a new Parliament would be elected in 2009. They did not want to prolong decision-making because “the closer the date of the elections, the more difficult it

¹¹⁶ EP Press Release. “Returns Directive debate: political groups hold different positions ahead of vote.” (2008), 2

¹¹⁷ Ibid.

¹¹⁸ Acosta, 38

¹¹⁹ Ibid., 37

¹²⁰ At a debate in the EP before the adoption of the Directive, this point was stressed by the Council representative Mr Mate. He warned the EP that “[i]f there was no first-reading agreement, some states would seek to introduce tougher measures at second reading.” See EP Press Release 2008

becomes to arrive at a controversial compromise as many MEPs would be facing re-election soon.¹²¹”

4.3.3 NGO resources

Concerning NGO resources, NGOs had of course information and knowledge about detention. However, detention was not a new issue that Member States or the Commission did not know anything about, Member States regularly detain irregular migrants and failed asylum seekers. For this reason, the expertise of NGOs was not needed.

However, these resources were of no help to NGO advocacy because they did not enjoy political support, which, as may be argued, is one of the most important resources for advocacy success. NGOs did not have powerful allies among decision-makers. The NO camp found an ally in the GUE/NGL group (European United Left/Nordic Green Left) of the EP.¹²² Surprisingly, political support also came from far away: Latin American governments denounced the Returns Directive as well.¹²³ However, among the more influential stakeholders, NGOs could not count on political support. As the argument for or against detention was a point of contention on principled grounds between NGOs and Member States, NGOs did not enjoy any political support on the part of the Member States. The Commission, an ally for NGOs in several domains, had come forward with the

¹²¹ Acosta, 38

¹²² GUE/NGL organized a hearing on the Returns Directive in December 2007 and invited only the NGOs of the NO camp to speak. See GUE/NGL, “Hearing with NGOs on the Returns Directive.” (2007)

¹²³ Acosta, 38

controversial move of fixing a maximum period of detention in the first place, and the majority of the MEPs, as argued above, were influenced by the specific political context of the Returns Directive as the first measure under co-decision and other considerations.

4.3.4 NGO influence and conclusion

With regard to the influence of NGOs, it has become clear that the advocacy efforts on the maximum period of detention in the Returns Directive were a complete failure. Its concerns with regard to the maximum length of detention were completely disregarded. The initial period of six months was already controversial and in the subsequent negotiations this provision even worsened to potentially eighteen months. Therefore, on Keck and Sikkink's scale of influence, only stage one of generating attention was achieved; there was indeed a lot of attention on the maximum length of detention.

It could possibly be argued that NGO advocacy had a minor influence when taking a closer look at Article 15 on detention. It reads "[a]ny detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence."¹²⁴ As this commitment is followed by the provisions on the long period of detention, it can be evaluated as a rather discursive commitment. Moreover, facing a lot of criticism on the draft Directive, the Council made a concession to the EP by signing a political statement saying that the Directive was not to be used to lower standards in the Member states.¹²⁵ Therefore, influencing discursive positions, NGO

¹²⁴ Article 15(1)

¹²⁵ EP Press Release 2008

advocacy may have reached stage two on the scale of influence. An indicator that they indeed were only able to influence the discourse but not state policy or practice can be seen in the fact that the Italian government has already tried to raise its maximum length of detention.¹²⁶

However, as has become clear in the analysis, policy outcomes cannot be linked solely to NGO advocacy. The failure of NGO lobbying does not necessarily mean that they chose the wrong advocacy strategies. ECRE could of course have started earlier to lobby on the Returns Directive. However, taking into account the issue characteristics (extremely sensitive issue with Member States, high degree of conflict), the disadvantageous political context (first use of the co-decision procedure, government influence, sense of pragmatism, no better prospects in the future) and the lacking political support, the overall context was clearly not favourable to accommodate NGO demands. It can therefore be stated that the quality of NGO strategies are but one minor factor in the overall interplay of factors determining their success in a case with a high degree of conflict.

¹²⁶ On 20 February 2009, the Italian Government adopted a legislative decree to extend the maximum period of detention of irregular immigrants from two to six months. However, on 8 April 2009 the lower house of the Italian Parliament voted against the decree. See ECRE Weekly Bulletins from 27 February 2009 and 10 April 2009.

5. A case of success: Advocating for more engagement in resettlement

In contrast to the detention provisions in the Returns Directive, NGOs have been more successful in their advocacy for more European engagement in resettlement. This case can therefore be seen as a success.

5.1. *Background to resettlement*

The concept of resettlement is not as easy to understand as the notion of detention of a failed asylum seeker. In simple terms, resettlement is the practice of relocating recognized refugees from one country of asylum to another country. A more extensive definition can be found in UNHCR's Resettlement Handbook:

Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status. The status provided should ensure protection against refoulement and provide a resettled refugee and his/her family or dependants with access to civil, political, economic, social and cultural rights similar to those enjoyed by nationals. It should also carry with it the opportunity to eventually become a naturalized citizen of the resettlement country.¹²⁷

It is important to keep in mind that resettlement has nothing to do with return and refugees are not sent back to their country of origin in resettlement procedures. However, the term resettlement is used differently in other contexts, which adds to the confusion of

¹²⁷ UNHCR Resettlement Handbook 2004, I/2

the general public. In fact, contrary to the 'expert' usage of the term, sometimes the term resettlement is also used with regard to the return of refugees to their countries of origin. More commonly, it is used when populations are moved from one area within a country to another, for example when a natural disaster occurs.¹²⁸

If the international protection of refugees is considered as a process with a beginning and an end, it approximately looks like this: The international protection starts with the admission of refugees to a country that examines their request for asylum and then recognizes their refugee status. It can only be completed when a permanent or durable solution is attained, i.e. when the refugee situation is 'solved'.¹²⁹ There are three durable solutions: First, there is the solution of voluntary repatriation, in which refugees return voluntarily to their country of origin. The second durable solution is local integration into the country of asylum. Resettlement is the third of these durable solutions.¹³⁰ Even though there is no hierarchy among these solutions,¹³¹ in practice the "decision to resettle a refugee is normally made only in the absence of other options,"¹³² thus when it is not possible to return to the country of origin or to integrate locally.

Resettlement serves three functions. Besides the first function of resettlement as a durable solution, it is a tool to provide international protection and an expression of solidarity. First, resettlement as a durable solution concerns larger numbers of refugees. Second, it is a tool to provide international protection to individual refugees whose life may be at risk or who can otherwise no longer be protected in their current country of

¹²⁸ Ibid., I/4

¹²⁹ ICMC, "A Guide to Resettlement: A Comparative Review of Resettlement in Europe." (2007), 8

¹³⁰ ICMC, 9

¹³¹ Ibid., 10

¹³² UNHCR Resettlement Handbook, I/3

asylum. Third, by engaging in resettlement, states express solidarity and share responsibility for refugees with the countries of first asylum.¹³³

Seeking durable solutions and thus managing resettlement fall under the mandate of the UNHCR. The legal basis for the UNHCR to engage in resettlement is provided by the UNHCR Statute which states that the UNHCR “shall assume the function of providing international protection ... to refugees ... and of *seeking permanent solutions for the problem of refugees* by assisting Governments ... to facilitate the voluntary repatriation of such refugees, *or their assimilation within new national communities*”.¹³⁴ In order to fulfill this mandate, UNHCR thus continually seeks to expand the number of resettlement countries.

It is important to note that there is no legal obligation for countries to resettle refugees¹³⁵ and there is no legal right to resettlement¹³⁶. It is interesting to consider the changing role of resettlement over time. Chimni points out that “in the period after World War II it was the West which preferred resettlement to repatriation as a solution.”¹³⁷ However, nowadays voluntary repatriation is advocated as the preferred solution.¹³⁸ It may be asked to what extent this situation is due to the fact that today most refugees come from the poorer countries. UNHCR praises the engagement of countries that do engage in resettlement as a “mark of true generosity”.¹³⁹ However, only a few states resettle

¹³³ Strengthening and Expanding Resettlement Today: Challenges and Opportunities, Global Consultations on International Protection, (2002), 2

¹³⁴ UNHCR Statute, Art. 1 (emphasis added)

¹³⁵ UNHCR Resettlement Handbook, I/3

¹³⁶ ICMC, 12

¹³⁷ B.S. Chimni, *International Refugee Law. A Reader* (New Delhi/Thousand Oaks/London: Sage Publications, 2000) 331

¹³⁸ Ibid.

¹³⁹ UNHCR Resettlement Handbook, I/3

refugees on a regular basis, only 16 countries worldwide (as of 2007) provide resettlement places every year. Australia, Canada, New Zealand, the Scandinavian countries, the Netherlands and the US have had longstanding resettlement programmes and are therefore considered ‘traditional resettlement countries’. The other countries that have started to provide resettlement places relatively recently and are thus considered ‘new’ resettlement countries and include Ireland, Portugal, the UK, Iceland, Argentina, Brazil and Chile. Moreover, other states, such as Belgium, the Czech Republic, France, Germany, Luxembourg, Spain and Switzerland do not operate regular resettlement programmes, but engage in *ad hoc* resettlement, meaning that they occasionally accept refugees.¹⁴⁰ In 2007, the total of resettlement places offered by the 16 resettlement countries numbered approximately 70.000. Strikingly, over 90% of these places are offered by three of the traditional countries, namely Australia, Canada and the United States.¹⁴¹

In contrast to these efforts of traditional resettlement countries, Europe has not shown ‘true generosity’ in resettling refugees. Only 5.610 out of the 70.000 places in 2007 were provided by European countries.¹⁴² Only recently, a growing number of European states have expressed an interest in resettling refugees. Currently, only thirteen European countries are actively engaged in resettlement, eleven EU Member States (Denmark, Finland, Ireland, The Netherlands, Portugal, Sweden, the UK, Italy, France, Romania and the Czech Republic) and Norway and Iceland.

¹⁴⁰ ICMC, 15

¹⁴¹ ICMC, 15

¹⁴² ICMC, 21

5.2 Overview of the evolution of resettlement and NGO advocacy strategies

Considering that traditionally there was only minimal engagement in resettlement on the part of European countries, how has the idea of a Joint EU Resettlement Scheme developed, and what role did NGOs play in this regard? What kind of advocacy strategies did ECRE and the other refugee-supporting NGOs employ in order to lobby for a joint EU resettlement scheme? In order to address these questions, the focus will be on ECRE's actions again, however it needs to be stressed that other NGOs, as well as the UNHCR, are very active advocating for more EU engagement in resettlement. In particular ICMC (International Catholic Migration Commission) and CCME (Churches' Commission for Migrants in Europe) can look back on a long-standing practical involvement with resettlement.

The first time that the Commission talked about the possibility of a resettlement scheme was in its Communication "Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum" of 22 November 2000.¹⁴³ The Commission referred to "facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme",¹⁴⁴ which marked the beginning of EU thinking on this topic. The Communication mentioned that only four Member States operated resettlement schemes at the time. A feasibility study was announced in the 2000 Communication, which resulted in the 2003 report of the Migration Policy Institute.¹⁴⁵

¹⁴³ COM(2000) 755 final.

¹⁴⁴ Ibid., 9

¹⁴⁵ Migration Policy Institute, "The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure" (2003)

Since then, the Commission actively examined the possibility of an EU legislative framework on resettlement.

In this early time of thinking about resettlement in the EU, ECRE already took part in the thinking process and, together with the US Committee for Refugees, had published an extensive report about resettlement.¹⁴⁶ ECRE thus made sure that it entered the negotiations on an EU resettlement scheme in the very beginning. When the Commission issued its Communication of June 2003 "Towards more accessible, equitable and managed asylum systems,"¹⁴⁷ proposing to further explore the possibility of an EU-wide resettlement scheme, ECRE responded firmly expressed its support.¹⁴⁸

The Commission came forward with a "Communication on improving access to durable solutions"¹⁴⁹ in 2004 outlining the key elements of such a scheme. The idea was that such a joint EU scheme could operate within the framework of Regional Protection Programmes (RPPs). These RPPs were also proposed in the 2004 Communication, aiming to support the protection of refugees in particularly affected regions by providing durable solutions, one of which would be resettlement to the EU. ECRE again issued its comments¹⁵⁰ and reiterated that it "fully supports the development of and indeed stresses the urgent need for an EU-wide resettlement scheme."¹⁵¹ Moreover, ECRE commented on the specific elements of the scheme, supporting for example that the proposed scheme would focus in particular on vulnerable groups, but regretting that the Commission did not

¹⁴⁶ ECRE and US Committee for Refugees, "Responding to the asylum and access challenge: An agenda for comprehensive engagement in protracted refugee situations," (April 2003)

¹⁴⁷ COM (2003) 315 final

¹⁴⁸ CO4/06/2003/ext/AS

¹⁴⁹ COM(2004) 410 final

¹⁵⁰ CO2/09/2004/ext/PC

¹⁵¹ Ibid., 2

consider the participation of refugees themselves in the elaboration of a potential scheme. In contributing to the discussions on an EU-wide resettlement programme, ECRE thus positioned itself as a partner from the very beginning, stressing its support and providing its expert opinion on the specificities of the scheme. They engaged in information politics, informing the Commission on what elements to consider in the elaboration of such a scheme.

Moreover, from the beginning, concerning the framing of resettlement, ECRE and the other NGOs made sure that it remained in the frame of the three defined functions of resettlement and would not be taken as a substitute to providing access to spontaneously arriving asylum seekers and examining their asylum claims. Therefore, in all of their documents on asylum, the fact that a joint EU Resettlement scheme has to be complementary and not seen as an alternative to determining asylum claims of spontaneously arriving asylum seekers is very much stressed.¹⁵²

In its 2004 Communication, the Commission announced that it would come forward with a proposal for an EU resettlement scheme by July 2005 provided that the EP, the Council and the European Council would endorse the idea.¹⁵³ The EP showed its support¹⁵⁴, as well as the General Affairs and External Relations Council¹⁵⁵, and in 2004, the European Council approved the Hague programme which confirmed the intention to develop RPPs with a joint EU resettlement project.¹⁵⁶ The support of all these actors demonstrates that the momentum created by NGO and UNHCR advocacy as well as by

¹⁵² See, for example, CO2/09/2004/ext/PC, 2, AD10/12/2008/ext/AB, 2, and ICMC, 22.

¹⁵³ COM(2004) 410 final, 21

¹⁵⁴ 2004/2121(INI)

¹⁵⁵ See PPI/04/2005/EXT/PC, 10.

¹⁵⁶ Presidency Conclusions, 4-5 November 2004, 21-22

the Commission Communications had already gone a long way. At this strategic point, ECRE issued its main advocacy paper on resettlement, “Towards a European Resettlement Programme”¹⁵⁷ of 2005. Examples of symbolic and accountability politics can be found in this paper. In order to make policy-makers understand a situation “far away”,¹⁵⁸ and to remind them of Europe’s own refugee crisis, ECRE recalled that “(i)n the past, the generous response of other countries to the need to resettle refugees from Europe ensured the region’s stability in the aftermath of World War II and in the early days of the Cold War.”¹⁵⁹

In 2005 then, the Commission issued a proposal¹⁶⁰ for developing a resettlement programme in the framework of the pilot RPPs in Tanzania (Great Lakes region) and the Western Newly Independent States of Ukraine, Moldova and Belarus, which eventually started in January 2007.¹⁶¹ Countries that have resettled refugees under the RPPs include the Netherlands and Denmark, which conducted selection missions to Tanzania in 2007 where they selected refugees from Congo and Burundi for resettlement.¹⁶² On the whole, however, the practice of resettlement under the RPPs has been disappointing.¹⁶³

Going further, the European Commission proposed further EU engagement in resettlement beyond the RPPs in its 2007 Green Paper on the future Common European Asylum System¹⁶⁴. Garcia Martinez (Commission) contended that in the consultation process on the Green Paper, resettlement was the one issue on which Member States, the

¹⁵⁷ PPI/04/2005/EXT/PC.

¹⁵⁸ Keck and Sikkink, 95

¹⁵⁹ PPI/04/2005/EXT/PC, 5

¹⁶⁰ COM(2005) 388 final

¹⁶¹ ICMC, 26

¹⁶² Ibid., 27

¹⁶³ Interview with ECRE staff member

EP, the Commission and NGOs all agreed that it would be beneficial to do more in this field.

Correspondingly, as of January 2008, the European Refugee Fund III has considerably expanded the financial support for resettlement activities by individual Member States. Under the ERF III, for the resettlement of refugees from a country under the RPPs and for the resettlement of certain vulnerable groups, Member States receive 4,000 euros for each resettled person.¹⁶⁵

As a result of the broad agreement on more efforts on resettlement, the Commission announced in its Policy Plan on Asylum of June 2008¹⁶⁶ that it would come forward with an official proposal on an EU resettlement scheme in the course of 2009. In anticipation of the proposal, the ECRE Resettlement Core Group issued its detailed recommendations for a joint European scheme in December 2008¹⁶⁷

The importance of continuous NGO advocacy and the creation of a momentum pushing decision-makers to take action is also illustrated by the decision to resettle 10.000 refugees from Iraq in 2008. The EU is currently engaging in an effort to resettle a group of vulnerable Palestinian refugees from Iraq, trapped in camps in Syria and Jordan. After extensive NGO and UNHCR lobbying and awareness raising of the particularly precarious situation of these refugees¹⁶⁸, the EU conducted a fact-finding mission to Syria and Jordan in November 2008 to obtain a first-hand impression of the situation. Before the JHA

¹⁶⁴ COM(2007) 301 final

¹⁶⁵ ICMC, 24-25

¹⁶⁶ COM(2008) 360 final

¹⁶⁷ AD10/12/2008/ext/AB

¹⁶⁸ See for example Amnesty International, "Rhetoric and Reality. The Iraqi Refugee Crisis" (June 2008). UNHCR organized an International Conference on Iraq in April 2007. See UNHCR Background Paper "EU Resettlement" (2008), 11

Council meeting on 27 November 2008, an NGO coalition of nine different NGOs including ECRE sent a letter to Brice Hortefeux, the Minister of Immigration, Integration, National Identity and Co-Development of France, then holding the EU Presidency.¹⁶⁹ Choosing this strategic point in time, just after the visit of the EU delegation to the refugee camps in Syria and Jordan and just before the Council meeting, the NGOs called upon the Member States “to join forces and help resolve this situation of the Iraqi Palestinians, by resettling them to Europe, based on their urgent protection needs”¹⁷⁰. And indeed, this call for imminent action and the appeal to urgency bore fruit: At the JHA Council meeting, the ministers set a tentative objective to resettle 10.000 Iraqi refugees to Europe.¹⁷¹ UNHCR considers that these conclusions are “the most decisive and positive step the EU collectively has taken so far on resettling refugees”¹⁷². This news was celebrated within the NGO community, an ECRE staff member qualifying this step as “revolutionary” and underlining that “it is also good to praise Member States sometimes”.¹⁷³

However, after a success in rhetoric, actions need to follow. ECRE is closely following the implementation of the stated goal of resettling 10.000 refugees, and, again ahead of a JHA Council meeting in February 2009, they called on the Member States “to show that the EU can really go from words to action”.¹⁷⁴ In reminding the Member States to now deliver on their stated commitment and counting the number of refugees already

¹⁶⁹ NGO letter to Brice Hortefeux, (November 2008)

¹⁷⁰ Ibid.

¹⁷¹ JHA Council Conclusions on the reception of Iraqi refugees, (27-28 November 2008)

¹⁷² UNHCR Background Paper, 2

¹⁷³ Interview with ECRE staff member

¹⁷⁴ AD/23/02/2009-AB/AP/MDM

resettled or in the process of being resettled,¹⁷⁵ ECRE is clearly using accountability politics.

NGOs had to make strategic choices on whom and when to lobby. Concerning whom to lobby, the ECRE staff member responsible for resettlement explains that they used a “two-fold strategy”, thus lobbying on the European and on the national level. The necessity of this venue-shopping and leverage politics, i.e. to lobby where it will have the most impact, was quasi imposed on the NGOs due to the nature of the issue; the majority of Member States did not operate resettlement schemes, thus lacked practice and were not considering to start to engage in resettlement themselves. Therefore, ECRE, and other European networks engaged in European advocacy and their national member agencies lobbied their respective governments.

On the European level, CCME provides an example of high involvement in information politics, producing a set of information materials on resettlement, including several reports¹⁷⁶, resettlement fact sheets in different languages¹⁷⁷ and a resettlement newsletter every few months. Currently, in anticipation of the Commission proposal on a joint EU resettlement scheme, CCME organizes a series of debates on resettlement in a number of different Member States, in cooperation with national organizations.

The Hungarian Helsinki Committee (HHC), a member organization of ECRE, provides an example of advocacy efforts on the national level that are linked to European activities. The HHC takes part in the Europe-wide “ASPIRE” (Assessing and Strengthening Participation in Refugee Resettlement to Europe) project which is led by

¹⁷⁵ ECRE mentioned the figure of 6.000 in April 2009 (Interview).

¹⁷⁶ See for example CCME, “Resettlement: Protecting Refugees, Sharing Responsibility” (2006)

CCME. The aim of this project is to encourage more EU Member States to engage in resettlement and to assess the added value of European cooperation in this area. Project partners such as the HHC are actively engaged in assessing existing policies and best practices, bringing together the different stakeholders, organizing debates and raising awareness among policy-makers as well as the general public.

Hungary is not involved with resettlement yet, but the new asylum law of 2007 provides a legal basis for resettlement,¹⁷⁸ so the HHC has a basis for their advocacy on resettlement. Moreover, the peer pressure of other countries in the region is growing as the Czech Republic has just started its first pilot resettlement programme¹⁷⁹ and Romania opened an Emergency Transit Center in Timisoara for refugees pending resettlement to a third country.¹⁸⁰ The advocacy efforts of the HHC include consultations with the Ministry of Justice and with the governmental working group on resettlement that was established. Moreover, bringing together the different stakeholders, the HHC is going to organize a roundtable on resettlement in September.¹⁸¹

¹⁷⁷ CCME Resettlement Factsheet (May 2008), in English, German, French, Spanish, Italian, Dutch and Czech.

¹⁷⁸ 2007 Hungarian asylum law, Art. 7(5)

¹⁷⁹ CCME Resettlement Newsletter 2009, 6

¹⁸⁰ *Ibid.*, 5

¹⁸¹ However, Pardavi (HHC) is not expecting any tangible progress in starting up an own resettlement scheme for at least a year. She underlines the importance of the domestic political context, including the current economic crisis (resettlement is expensive), the unstable political situation and a new government to be elected in 2010, as well as the current Minister of Justice who “has not shown a keen interest yet in refugee issues.”

5.3 Factors of influence

5.3.1 Issue characteristics

A few important points need to be made regarding the issue characteristics of resettlement. The nature of resettlement is very different from the issue of detention. First, in the majority of the Member States, resettlement was not practiced. For states that were not engaged in resettlement, the notion was quite new and as has already been explained, resettlement is often wrongly understood. That is why one of the first tasks of NGOs was to make the concept of resettlement more known with Member State governments, thus engaging in information politics to explain resettlement and in symbolic politics to bring the concept of resettlement closer to the EU audience.

Resettlement thus proves to be a topic on which NGOs had to be rather proactive, initiating interest and putting the issue on the agenda, in contrast to the issue of detention which is already regulated in the MS and where NGOs had to be reactive with regard to Commission proposals and negotiations between the different EU institutions. Second, resettlement is a special issue to negotiate on the European level because the idea is to introduce a voluntary EU scheme, meaning that the measure will not be binding for the Member States. In contrast to the binding provisions in legislative measures such as the Returns Directive, its non-binding and voluntary nature made resettlement thus less controversial among the Member States. The Member States know that even if a joint EU resettlement scheme exist, they will be able to decide themselves if they want to take part or not, there is no danger of the EU dictating them to resettle a certain number of

refugees. The degree of conflict was therefore not that high, making it easier to promote resettlement.

Third, with regard to the degree of technicality or the type of influence sought by NGOs it can be argued that resettlement does constitute an issue where NGOs sought a kind of directional influence: As resettlement was a whole new topic on the European scene, it cannot be considered to be only a technical influence. However, even though advocacy goals of directional influence are difficult to pursue, the case of resettlement constitutes a positive example of where the insistence of NGOs and other actors does pay off. Fourth, public opinion plays a role in resettlement as well. As stressed in almost all of the NGO and the Commission documents, resettled refugees tend to be welcomed by the host society and can contribute to a more positive image of refugees and asylum seekers in general. As resettlement has such a positive connotation with the public, decision-makers do not have to fear electoral punishment in case they agree to establish a resettlement programme. On the contrary, politicians may possibly even ‘use’ resettlement in order to portray themselves as humanitarian actors. It can be argued that public opinion played a positive role in the decision by the European Council to resettle the Iraqi refugees. The ongoing conflict in Iraq and the related refugee crisis have such high public salience that resettling 10.000 refugees from the region can be understood and related to.

5.3.2 Political opportunity structures

The political institutions or POS were quite relevant for the success of the resettlement dossier as well. With regard to the type of measure that the Commission seeks to introduce, an EU Resettlement Scheme will not be a legislative act binding for the

Member States. That is why there is no need for a Directive or a Regulation. It is not sure yet what form the Commission proposal will take, but a Commission Communication is most likely.¹⁸² The details of the measure will therefore not have to be negotiated by the Council and the EP. The lack of a legislative process involving the EP and the Council had of course a substantial effect on the advocacy strategies of NGOs. As the EP has no formal role in the decision-making on non-legislative acts, the advocacy efforts of NGOs concentrated less than usual on MEPs. However, even though the Council will not act as a legislator in creating the European Resettlement scheme, the JHA Council was heavily lobbied to resettle Iraqi refugees. Moreover, on the national level, NGOs engaged in advocacy with the Member States to start or extend their existing resettlement programmes so as to create more support for resettlement across Europe. This was not only important in view of creating more resettlement places, but also because the Commission does not usually propose something that the majority of Member States are opposed to.

Different political opportunity structures do have a markedly different impact on the advocacy strategies of NGOs. In the case of the Returns Directive, a lot of the advocacy efforts focused on MEPs, whereas concerning resettlement, most of the advocacy on the European level was focused on the Commission and the JHA Council or happened indirectly through capacity building and different projects on the national level.

¹⁸² Interview with ECRE staff member

5.3.3 NGO resources

With regard to NGO resources, it is clear that NGOs had the resources to substantially contribute to the debate on resettlement in Europe. Confronted with a majority of Member States unknowledgeable about resettlement and without national systems to facilitate resettlement, NGOs took up the challenge to explain the concept of resettlement and to facilitate exchanges between old and new resettlement states. Their experience and expertise in the domain of resettlement in particular of organizations such as ICMC and CCME, practically involved in resettlement operations for decades, bestowed legitimacy upon these NGOs that they were able to use strategically to convince the Member States to engage more in resettlement.

It is interesting to consider that once more Member States became involved in resettlement, these states had an interest in not being the ‘only humanitarian actors’, but engaged in trying to convince other states to do the same. The activism on the part of NGOs is then multiplied and supported by advocacy and ‘peer pressure’ from other Member States. Resettlement countries share their experience with countries interested to become engaged. Examples of such cooperation include so-called twinning programmes, in which experienced resettlement countries team up with countries interested in resettlement and go together on selection missions. In 2007, the Netherlands shared its experience with Belgium, the Czech Republic and Romania in the framework of the project ‘Durable Solutions in Practice’ and Finland engaged in a similar effort with Spain

as part of the MOST Modelling of Orientation, Services and Training Related to the Resettlement and Reception of Refugees’) project.¹⁸³

5.3.4 NGO influence and conclusion

NGO advocacy on resettlement was more successful than on the maximum length of detention in the Returns Directive. After extensive awareness raising and lobbying for a number of years, step by step a number of successes followed. From more Member States engaging in resettlement, over resettlement as part of Regional Protection Programmes, and funding for national resettlement efforts by the ERF, to a likely proposal of a joint European Resettlement Scheme, slowly but surely NGOs were able to bear the fruits of their advocacy. As the topic of resettlement gained in salience, it climbed the ladder on Keck and Sikkink’s scale of influence. NGOs first succeeded in raising attention for resettlement and were thus able to put resettlement on the Commission’s agenda (stage one). The Commission started to take up the issue and continued to mention it in its Communications, thus NGOs had influenced its discursive positions (stage two). Policy change (stage four) occurred when the first policies on resettlement were devised (RPPs, ERF), and stage five, i.e. influence on state behavior, when those policies were implemented. Moreover, another success at stage five includes the new or expanded resettlement programmes of individual Member States.¹⁸⁴

An influence on stage five is of course a great success for NGO advocacy. However, one needs to be careful not to attribute this success solely to the lobbying of

¹⁸³ ICMC, 29

NGOs. As in the case of the Returns Directive, where the policy outcome cannot be linked to bad strategies of NGOs, in the case of resettlement, it cannot be advanced that the favorable policy outcome is a result of perfect NGO strategies. In fact, NGOs used similar strategies in both cases, including Keck and Sikkink's four politics, venue-shopping and framing.

In the case of the movement towards a European resettlement scheme, then, what were the other factors determining advocacy success? One of the main reasons was the political support for more European engagement in resettlement. Over the years, as the momentum for resettlement gained ground, a broad advocacy coalition for resettlement has emerged, comprising not only UNHCR and NGOs, but also the European Commission and several Member States. In view of the influence of NGO advocacy, this is a highly relevant development because advocacy coalitions comprising not only private but also public actors are more likely to be successful. As "(t)he degree to which interest groups are part of or outside a strong coalition of interests is likely to influence the strength of an opinion",¹⁸⁵ it has become clear that in the case of EU resettlement efforts, the coalition of interests has grown stronger and stronger in the period from 2000 until 2009, benefiting the NGOs that started the advocacy on this issue. As the ECRE staff member puts it, in the area of enlarging numbers of refugees resettled to the EU there are only "small baby steps, but there is movement".¹⁸⁶ In order to pursue that metaphor, the broad advocacy coalition on resettlement took time to grow, but should a genuine joint EU-wide

¹⁸⁴ It is unclear what kind of influence in the resettlement dossier could constitute an influence on institutional procedures (stage three).

¹⁸⁵ Michalowitz, 135

¹⁸⁶ Interview with ECRE staff member

resettlement scheme be established this year, it is now mature enough to 'leave its baby shoes behind'.

Conclusion

Conclusion on the case studies

It has become clear that ECRE and other networks on the European level are European TANs, employing different strategies in order to lobby for more liberal asylum policies with the EU institutions. European refugee NGOs use Keck and Sikkink's information, accountability, symbolic and leverage politics. In particular the importance of framing EU asylum policies in human rights terms and venue-shopping on the European and the national level were highlighted.

With regard to their influence on asylum policy, it has become clear that the record is mixed. The advocacy on detention in the Returns Directive was a failure, whereas a number of successes were made regarding resettlement in the last few years. It has become clear that not only NGO strategies, i.e. not only the quality of their campaign, affect their level of influence. The different policy outcomes in the two case studies demonstrate that the strategies of information, symbolic, accountability and leverage politics, venue-shopping of lobbying at the European and the national level, framing, networking with other NGOs, etc. do not necessarily lead to success. Although these strategies were used to a different extent in the two cases, lobbying at the national level was for example more important in the case of resettlement, whereas lobbying the MEPs was more important concerning the Returns Directive, NGOs still used similar strategies in both cases. Sophisticated NGO strategies are obviously not the only factor influencing the success of their advocacy.

It has become clear that not one factor can be singled out as the main determinant for the level of NGO influence. This paper thus contests both the account of Keck and Sikkink who put too much emphasis on advocacy strategies and the argument put forward by Joachim and Locher , Greenwood, and Favell and Geddes which focuses too exclusively on the importance of institutional structures. As demonstrated by the case of the Returns Directive, the first major policy instrument adopted under the co-decision procedure, the specific political context of the issue at hand can render the influence of otherwise favorable institutional structures insignificant. Notwithstanding the attractiveness of a claim that explains the influence of NGOs by a single factor, the two case studies have shown that it is always an interplay of different factors that determines the success of NGO advocacy.

Is it still possible to identify which of the other factors are particularly important? It has become clear that the degree of conflict, the degree of political support as well as the political context have a crucial impact on the policy outcome. Concerning resettlement, due to its voluntary nature, only a low degree of conflict existed between NGOs and Member States. This made it easier for NGOs to gather political support for resettlement over the years. By contrast, the politically sensitive nature of detention ensured a very high degree of conflict which made it impossible for NGOs to find powerful allies. This paper therefore argues that particularly issues with a high degree of conflict are predisposed to be less amenable to NGO influence, as a high degree of conflict leads to conflicting positions of the different stakeholders from the very beginning. The political context, as demonstrated by the pressure to adopt the Returns Directive at first

reading and by the Iraqi refugee crisis, is a factor that can render favorable political structures ineffective or mobilize ‘revolutionary’ political support from Member States.

Influence on a more general level

Beyond its mixed record of influence on specific policies, one can ask if ECRE and other NGOs have an influence on a more general level. Does their presence as such, their oversight of EU asylum policy, have a larger impact that is not directly measurable? A thought experiment may render this point a bit clearer. If one imagines the scenario of a European asylum policy being construed completely without the criticism and suggestions of NGOs, the result would be an asylum policy exclusively modeled after the securitarian outlook of the Member States.¹⁸⁷ It may thus be argued that the presence of ECRE and its constant interaction with EU institutions ensures at least a minimum guarantee of human rights being taken into consideration.

Moreover, this constant interaction between NGOs and EU institutions may have a gradual influence on EU actors who start to view refugee issues from a different point of view after having been lobbied by NGOs. This may not have an immediate effect on the policy measure they are working on, but may translate into a different outlook on future policy measures. Dür also argues that “(i)nterest groups are not limited to influencing policy outcomes at the time of the passage of a bill”¹⁸⁸ and that “(p)olicy preferences ...

¹⁸⁷ This is an exaggerated scenario, of course. In practice, not all Member States share the securitarian outlook to the same extent.

¹⁸⁸ Dür 2008a, 1221

are often shaped by an actor's past experiences and socio-economic background".¹⁸⁹

Taking a long-term perspective, constant pro-refugee lobbying with EU officials may socialize them into the human rights mindset, and, from the NGO point of view, may have a positive outcome on asylum policy in the future.¹⁹⁰

NGOs and the democratic deficit

This positive view of a progressively more distinct impact on EU institutions can be further enhanced by the argument that NGOs counter the often-bemoaned democratic deficit of the EU. Gray and Statham assert that "NGO activity has an important role to play in narrowing the gap between European citizens and an EU dominated by supranational and national elites."¹⁹¹ By contrast, this view could be countered by other arguments such as the co-option of NGOs for the own purposes of the EU. As Favell and Geddes argue, NGOs are often examples of "a standard form of EU level interest co-option", and "fairly standard EU level attempts to inculcate participation and consultation as a device for imparting an air of legitimacy to institutional processes."¹⁹² Scholars thus disagree on whether the increasing activism of European NGOs can counter the democratic deficit, or whether NGOs are instrumentalized by the EU institutions in order to appear more democratic and transparent.

¹⁸⁹ Ibid.

¹⁹⁰ Moreover, an interesting development is that a lot of former NGO staff find employment with the Commission, thus coming already with an NGO socialization and mindset.

¹⁹¹ Emily Gray and Statham, Paul, "Becoming European? The Transformation of the British Pro-migrant NGO Sector in Response to Europeanization," *Journal of Common Market Studies*, 43, no. 4, (2005), 878

¹⁹² Favell and Geddes, 413

In the discussion on the co-option of NGOs by the EU, it is instructive to consider the two different responses of NGOs to the ‘outrageous’ Returns Directive. Whereas the NGO camp around ECRE objected the Directive but wanted to stay in the policy dialogue, the NO camp decided to oppose the Directive on principled grounds and engaged in protest politics and street action. Choosing a norm-free assessment, without accusing the NGOs that stayed in the policy dialogue of being co-opted by the EU, it can be ascertained that they have been institutionalized into the EU institutional workings. The NGO camp around Migreurop, on the other hand, resists being institutionalized or co-opted by the EU and has decided to follow its more principled and idealistic aims. Excluding themselves from the policy dialogue with a categorical no to detention and also to resettlement, the only option to raise awareness for their concerns is through protest politics.

Rather than providing a judgment on which of the two options NGOs should choose, this paper wants to suggest that the effects of both approaches on countering the democratic deficit should be valued. Both the NGO camp around ECRE and the Migreurop group represent civil society. Having access to policy-makers and participating in the legislative process, ECRE and other institutionalized NGOs can, depending on the circumstances, have a direct influence on EU asylum policy.

On the other hand, if the Migreurop group continues to engage in protest politics, it can attract more attention for controversial issues, with policy-makers, but also with the general public. The street demonstration of the NO camp was the first protest action on the European level against EU asylum and immigration policies. Considering the evolution of European NGOs into highly technocratic groups, this event of public protest is either an

exception to the rule or the precursor of more engagement in protest politics by the European public. It may be argued that this multiplication of venue-shopping on the different levels of legislative lobbying and protest action could only be of advantage in advancing the voice of civil society on different levels and thus in countering the democratic deficit of the EU.

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