Policy coherence for development and migration
Analyzing US and EU policies through the lens of normative transformation

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Abstract: The European Union's (EU) 2015–2016 "migration/asylum crisis" gave discussions over the relationships between migration, security and development renewed prominence in global affairs. In response to record migratory flows, the EU, like the United States (US), has implemented security responses to migration aimed at protecting territorial integrity. This article addresses the migration–security–development nexus through the lens of policy coherence for development (PCD). It compares EU and US migration policies within the framework of the "transformative development" associated with the Sustainable Development Goals. It contends that these donors have undermined transformative development through the regionalization of development aid, which has contributed to the securitization of both development and migration policies. Thus, the article contends that new mechanisms for change need to be identified. It introduces the notion of "normative coherence" and proposes a potential role for regional human rights courts in fostering migration-related PCD.

Keywords: coherence, courts, development, EU, migration, policy, rights, security

The European Union's 2015–2016 "migration/asylum crisis" gave renewed prominence to discussions over the relationship between migration, security and development in global affairs. The EU's policy responses to these flows have confirmed that even though international organizations, such as the International Organization for Migration (IOM) have identified migration as an important contributor to development through transnational initiatives such as diaspora philanthropy (see Espinosa, 2015), nation-states

and regions generally address migration as a security threat reinforcing state-focused strategies. This article addresses the migration–security–development nexus through the lens of policy coherence for development (PCD). PCD is a policy norm that contends that development strategies should not be undermined by initiatives in non-development policy arenas, like migration and home affairs. Thus, it represents a policy tool and a normative statement in development discussions (Cercle de Cooperation, 2014). Nonetheless, Siitonen (2016) correctly argues that PCD has not yet been properly linked to transformative development or changes in power relations in global affairs. The present article asks: "Given the securitized migration policies implemented by donors such as the EU and the US, through what mechanisms can PCD promote transformative change in migration affairs?"

Transformative development is defined as (political, social, economic) processes that simultaneously address the local needs of communities and supranational power relationships that affect the abilities of communities to control their own life courses. This definition integrates notions of interconnectedness drawn from the "universal development" paradigm (Martens, 2015), political participation and the inclusion of development policy clients in policy processes (Otsuki, 2015) and development aid recipient ownership of development programs (Busan Partnership for Effective Development Cooperation, 2011). Transformative development strategies aim to not only deliver services that meet the needs of developing countries and their populations but also address the power imbalances that are endemic to development cooperation. Transformative development also aims to integrate human rights approaches in development cooperation (Fukuda-Parr et al., 2014) and establish coherence between development and non-development policy arenas around human rights. This has been difficult to achieve thus far because human rights courts have not played an active role in the governance of development cooperation (Alston, 2005).

Despite these limitations, this notion of transformative development was a central tenant of the United Nations' (UN) "World We Want" Campaign, and it is closely associated with the Sustainable Development Goals (SDGs). It represents the most significant advancement of the SDGs away from the indicator-based Millennium Development Goals, and it signifies a qualitative shift in the post–2015 SDG Agenda. For this reason, it should be considered an important standard by which development strategies are evaluated. PCD is a policy tool that has been adopted by supranational and international organizations in their implementation approaches to the SDGs. For these reasons, transformative development and PCD are the analytical lenses through which this article addresses the migration–development–security nexus. In response to the research ques-

tion stated earlier, the article contends that regional human rights courts could play a more active role in development cooperation governance and thus, infuse the development cooperation system with greater normative coherence for development with reference to human rights norms. Even though these courts do not exercise legal jurisdiction over development cooperation policies, they are important sources of international norms that can influence policy-making through soft power, defined as the ability to shape the preferences of stakeholders through the diffusion of core values or ideals, such as human rights (Nye, 2004). This would reinforce the transformative character of development aid in line with the broader goals of the 2030 Sustainable Development Agenda.

Research design and methods

This article examines PCD and migration in the EU and the US. The cases are comparable because both polities are regional hegemons in terms of migration and security policies—through the Union for Mediterranean (EU) and the Merida Initiative (US), among other programs—and both are important development aid donors as the EU, and its member states are the largest overall donors in the world ($73.9 billion in 2014) while the US is the largest state donor ($32.7 billion in 2014).[1] Conversely, these polities have demonstrated different levels of commitment to PCD as the EU has embedded it into its institutional and legal frameworks whereas the US has not. For this reason, the EU should be expected to be more supportive of normative positions related to PCD, migration and transformative development cooperation.

In terms of methods, the article is based on a review of secondary literature: EU, UN, Organization for Economic Cooperation and Development (OECD), European Court of Human Rights (ECHR) and Inter-American Court of Human Rights (IACHR) policy documents; reports from non-governmental organizations; and UN, ECHR and IACHR databases. This article is part of a larger project, funded by a University of Luxembourg faculty research grant that examines the potential for regional organizations to promote equitable development through PCD.

The article is divided into five parts. Following this introduction, part two examines migration and development within the framework of PCD. Part three presents empirical considerations through examination of EU and US development aid practices in relation to migration. Part four introduces the notion of "normative coherence" aimed at linking empirical research on migration to transformative development and proposes a potential role for regional human rights courts in fostering migration-related PCD. Finally, part five presents the article's conclusions.

Policy coherence for development and migration: A literature review

During the last fifteen years, the literature on PCD has emerged as this policy concept has moved to the center of international development agendas (Siitonen, 2016). PCD began as a policy tool aimed at improving the efficiency and effectiveness of development strategies. It has become, however, an important political objective. The EU first adopted PCD with the Maastricht Treaty in 1992 (Hoebink, 2004) and the Cotonou Partnership Agreement in 2000 (Laakso et al., 2007). In 2005 PCD was established on the EU agenda with the European Commission adopting a communication and the EU Council adopting conclusions on PCD (CEPS, 2006). PCD was also integrated into the EU development policy program (European Consensus on Development, EU 2006), and the 2009 Lisbon Treaty (see art. 208). In 2007, the decision was made to focus on five priority areas—trade and finance, climate change, global food security, migration, and security—the last two being the main focus of this article.

PCD has become so prominent in European politics that it has come to represent a political statement in global affairs supported by both the EU and the OECD, especially the Development Assistance Committee. No longer simply a technical tool, PCD holds a normative value because it prioritizes human development over competing policy arenas (Siitonen, 2016). PCD aims to ensure that developing countries' current or future prospects are not hurt by industrialized countries' policies (Chang, 2003). Through this approach, policy analyses have highlighted the normative value of PCD in relation to transformative sustainable development.

The academic literature on PCD has recognized these developments, but this body of scholarship has been characterized by very critical analysis. Earlier studies of PCD (Forster and Stokke, 1999; Hoebink, 2004) aimed at classifying this term through typologies and understanding its role in development cooperation. Empirical studies examined implementation of PCD (or lack thereof) in specific policy arenas such as security (Picciotto, 2004), trade (Grabel, 2007), agriculture (Matthews, 2008), etc., often with highly critical evaluations of donor policies. Grabel (2007) has indicated that PCD is a concept that has been abused by international organizations. Often, PCD has been criticized as an empty political discourse that is rarely implemented by powerful donor states and regions (notably the EU) (Thede, 2013).

More recent studies have raised important analytical questions. Carbone (2008) correctly contended that PCD can be viewed as both a decision-making process and a policy outcome. More recently, Carbone and Keijzer (2016) argued that the EU has in fact pursued the development of

institutional mechanisms at the cost of policy results. Siitonen (2016) has highlighted another duality: PCD can be intended and unintended, thus questioning the role of political agency within development systems. The former position views PCD as a mechanism through which to achieve a higher goal whereas the latter conceptualizes it as an overriding policy objective. For example, Koff and Maganda (2016) illustrate how the EU has pursued PCD as a policy objective aimed at efficiency/effectiveness in the field of water at the expense of reinforcing its normative impacts as a policy means for transformative change. Similarly, the present article views PCD as a process with normative consequences through which transformative development can be achieved within the context of the SDGs. The article applies this viewpoint to the field of migration.

PCD and Migration

The literature on migration and development has become both extensive and opaque. The plethora of works in this field has been matched by the variety of opinions on a very basic question: does migration support or undermine development? Some authors, such as Adams, Jr. and Page (2003) and Aguinas and Newland (2012) support World Bank and IOM programs by contending that international migration is a vital resource in the fight against poverty because of remittances. Others, such as Castle and Delgado Wise (2008), de Haas (2012), Espinosa (2015) and Geiger and Pécoud (2013), have contended that migration and remittances have had limited impacts on development because of unattractive domestic investment environments or global power imbalances. Delgado Wise et al. have compared the potential benefits of migration for development to the costs defined as "social exclusion, human insecurity, and criminalization suffered by international migrants" (2013, p. 430).

While the specific literature on PCD and migration is narrower in the questions that it asks and the analysis that it employs, it generally does follow the research agenda outlined above. Dayton-Johnson and Katseli (2006), for example, analyze OECD development policies through the lens of "flows." Specifically, these authors discuss aid flows, migration flows, foreign direct investment (FDI) and trade flows. PCD is defined as complementarity of flows, which suggests the need to manage circulation rather than control flows at national borders. The 2005 study completed by Xenogiani also examined PCD and trade, foreign direct investment and migration with a focus on how migration policies could complement policymaking in these arenas. Van Criekinge's work (2009) similarly advocates for the further inclusion of migration management in EU Economic Partnership Agreements (EPA) with African sub-regions and countries.

Nyberg-Sorensen has correctly taken a more systemic view of PCD and migration. Nyberg-Sorensen et al. studied the coherence between "relief, recovery, development and conflict prevention" (2002, p. 3) in relation to migration through a comparative analysis of PCD in both development and humanitarian aid. More recently, Nyberg-Sorensen has integrated security into her discussions of PCD and migration. In 2012, she identified policy incoherence resulting from the intersection of: (1) rising poverty and insecurity in the South; (2) the continuous demand for cheap labor in the North; and (3) border enforcement initiatives that increase risk and vulnerability in migration regimes (Nyberg-Sorensen, 2012). Her most recent work reflects on PCD and migration within the context of Danish development cooperation arguing that the goal of coherence between migration policies and development may have been "unrealistic" (Nyberg-Sorensen, 2016, p. 62). However, she contends that that the lack of coherence between migration and development may have saved Danish development budgets from being utilized for migration–management strategies. Observers of EU and US development aid (Gabrielli, 2007; Sandoval Palacios, 2006) contend that this has occurred at the regional level. This is the focus of the following section.

PCD and migration: Comparing the US and the EU

Globalization has de-territorialized international security politics since the end of the Cold War, and migration has been embedded in these debates as non-State threats to security (terrorism, transnational organized crime, etc.) have emerged (see Rudolph, 2006). Within this context, scholars of migration, such as Hollifield et al. (2014), have convincingly shown that the international migration system has witnessed policy convergence around the objectives of border controls, security and high-skilled migration. This has occurred because regional integration has promoted multilateral inter-state negotiation on immigration policies, which have led to least-common-denominator strategies. The rise of global terrorism and organized crime has created an international context of fear in which migration policies are framed in terms of security, aging advanced industrial states are experiencing similar demographic trends affecting labor markets and welfare, and the perceived failure of integration programs has led to a backlash against immigration. Despite the rise of transformative development as a norm in global affairs, this development approach has become less and less referenced in migration policy discussions.

In terms of development cooperation (Lavenex & Kunz, 2008), this has led to a convergence of four policy mechanisms among donors: (1) adoption

of conditionality in development aid aimed at suppressing unauthorized migration; (2) the promotion of agreements for repatriation of "illegal" migrants; (3) the externalization of migration controls to neighboring states through financial transfers; and (4) the establishment of migrant processing centers in third countries for the deportation of unauthorized migrants. Development aid plays a facilitating role in all four migration control mechanisms undermining normative commitments to transformative development. The following sub-sections examine these mechanisms in the US and the EU, two donors that profess commitment to transformative development as a norm, but they do not operationalize it in their migration and development strategies. Through this behavior, they can be considered representative cases for the study of the interaction of development cooperation and migration control.

Migration and development in the Americas

Since the September 11, 2001 attacks, the US has pursued a globalized security agenda (Rudolph, 2006), which has significantly affected immigration strategies throughout the Americas. In addition to the reinforcement of border patrols (Sabet, 2013), the US has pursued regional collaboration in the fight against human and drug trafficking and the prevention of illegal migration. This strategy includes the externalization of border controls through foreign aid, especially to Mexico. While this country has long been associated with dangerous border crossings to the north, Mexico's southern borders have recently become especially perilous (Kimball, 2007; Córdova & Rodríguez, 2015). Since the *Programa Frontera Sur* was announced in 2014 in response to US pressure, Mexican deportations of Central Americans has risen by 29,804.[2] Detentions have also increased. From October 2014 through April 2015, the U.S. Border Patrol detained 70,448 "other than Mexican" (i.e., overwhelmingly Central American) citizens at its border. During that same period, Mexican authorities detained 92,889.[3]

Mexico's Southern border is also the site of numerous human rights violations. When Mexican President Enrique Peña Nieto announced the *Programa Frontera Sur,* he highlighted the program's focus on protecting the rights and dignity of migrants.[4] Since the 2014 announcement, however, crimes against migrants have increased in the southern states of Chiapas, Veracruz, Tabasco and Oaxaca (Córdova & Rodríguez, 2015; WOLA, 2015). Even though statistics on the deaths of migrants vary, the estimates are high. According to a 2013 study by the *Instituto para las Mujeres en la Migración*, 47,000 migrants have died in transit through Mexico since 2007, of this number, 8,800 remain unidentified.[5] Other forms of abuse, such as robbery, beatings and rapes are equally alarming (Simmons & Tellez,

2014). Statistics have shown an increase in these crimes in Mexico's southern states since the implementation of the *Programa Frontera Sur*.[6] Scholars of migration in these states have verified these accounts through qualitative research based on interactions with migrants and migrants' rights associations (Córdova & Rodríguez, 2015).

The reason that this border has become so dangerous is that immigration takes place within a context of economic and governance transition. Because the region is one of Mexico's poorest, organized crime controls a significant amount of territory. Moreover, police corruption is prominent (WOLA, 2015). Non-governmental organizations (NGOs) working with female migrants have reported that it has become common practice to take contraceptives before crossing the border due to the high possibility of forced sex during the journey (Ogren, 2007, p. 222). Finally, serious structural problems exist within Mexico's institutional response to immigration. Because migration controls combine various authorities, including Mexico's immigration service and federal and local police, detention and deportation procedures are often poorly coordinated between unprepared officials. Moreover, many detention centers do not adhere to basic hygienic standards. Thus, by exporting migration controls to Mexico, US authorities have actually increased systemic risk in terms of migrants' rights and personal safety. This has occurred, in part, because repatriation of a Central American migrant from the US costs $1,700 while repatriation from Southern Mexico costs only $22 (Ogren, 2007, p. 211).

Of course, this situation seems to confirm the US' lack of commitment to PCD and transformative development. Development cooperation history has noted (Ruttan, 1996) that the US has utilized aid in order to reinforce domestic policy priorities (Almquist Knopf, 2013), homeland security in this case. The *Plan Sur* (also known as the Merida Initiative) was initially funded from 2007–2010 with $1.845 billion (US Department of State, 2009) in order to provide US military technology, intelligence and training to Mexico in the war against transnational organized crime, trafficking and money laundering. In 2014, the US contributed $112 million in technology to Mexico's Southern border control efforts. These investments included biometric kiosks, scanners, X-ray machines, federal police and customs stations, helicopters, ships, communications and training for state and fiscal police in Chiapas (Red de documentación de las organizaciones defensoras de migrantes, 2014, p. 62).

The US has renewed the *Plan Sur* with greater regional focus by increasing funding to Central America and the Caribbean (Tekin, 2015) and establishing links with *Plan Colombia* (United States military and diplomatic aid initiative aimed at combating Colombian drug cartels and left-wing insurgent groups in Colombian territory). This regionalization of

homeland security has been complemented by development cooperation through the Mesoamerica Project (known as the *Plan Puebla Panama* [PPP] until 2009). It has included $3.5 billion of funding in eight development areas: energy sector integration, transportation integration, telecommunications integration, trade facilitation, sustainable development, human development, tourism, disaster prevention and mitigation (Inter-American Development Bank, 2002, p. 139).

The Mesoamerica Project is a regional development initiative that includes ten member states (Belize, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panamá). In addition to the US, funding comes from participating governments, the Inter-American Development Bank, the private sector, the Central American Bank for Economic Integration and the World Bank.

The project represents a regional approach to development, security and stability that affects migration governance. When Mexican President Peña Nieto announced the *Programa Frontera Sur* he did so with then-Guatemalan President Otto Pérez Molina stating that border controls support a "humanitarian vision of development, commerce and close cooperation."[7] Consequently, even though migration is not explicitly designated as a prioritized policy arena, it is present in the program's agenda. Scholars of this initiative, such as Hendrix (2008), Sandoval Palacios et al., (2011) and Tekin (2015) have argued that the *Plan Sur* and the Mesoamerica Project have securitized non-security policy objectives, thus undermining transformative development in the Americas. Alba and Castillo have shown how the Regional Conference on Migration, including Mexico and Central American states, shifted its focus through the Mesoamerica Project from migrants' rights, development and sustainable management of migratory flows to security and migration control (2012, p. 12). Carlos Fazio (2002) and Slack et al. (2016) went so far as to discuss the militarization of development cooperation through these plans.

In line with these criticisms, numerous anti-PPP social movements were established in Mexico and Central America to protest the securitization of development and the lack of public space for democratic discussion of this plan (see Collombon, 2008). These movements indicate significant civil society dissatisfaction with the Mesoamerica Project. One point of contention states that the type of development supported by the project poorly addresses the lack of PCD in the field of migration, and critics contend that such development will actually further population displacement, especially in rural areas (Furlong Z. & Netzahualcoyotzi, 2012; Sandoval Palacios et al., 2011). This is a highly relevant discussion for transformative development debates, as PCD is neither implemented as a policy tool nor followed as a political doctrine essentially confirming

the aforementioned "convergence hypothesis," indicating a securitization of development aid in order to control migratory flows in a manner that reinforces power relationships throughout the hemisphere and undermines human rights-based development strategies.

EU migration governance and development policies

Like the US, the EU has prioritized the regionalization of security policies in its political agenda. Unlike the US, where the regionalization of security has predominantly occurred through informal or financial measures, the EU formalized this strategy through treaties and aid agreements. Since the 2002 Seville Council meeting, the EU has strengthened its efforts to control its external border through strategies including: (1) the harmonization of measures to combat illegal migration; (2) progressive operationalization of coordinated and integrated external border administration; and (3) the integration of immigration policy in the EU's relations with third countries, including "a clause be included concerning the common administration of migratory flows and regarding obligatory readmission in the case of illegal immigration in all future agreements of co-operation, association or the equivalent that the European Union or the European Community signs with any country" (Guardia), 2002. Obviously, this last strategy is most relevant for PCD.

Migration control was further strengthened by the so-called Hague Program, announced in November 2004, which established a five-year (2005–2010) multi-annual project in the field of justice and security that set "reinforcement of partnerships with third countries to tackle illegal immigration" as a priority for the Commission. Scholars of EU migration policies (Carrera et al., 2012; Lavenex, 2006) have documented the externalization of migration controls. Aside from the establishment of FRONTEX (from the French *Frontières extérieures*), the common European border enforcement agency, the EU has funded technical assistance in third countries and integrated migration into regional security strategies through the Global Approach to Migration Management (GAMM) (Marin, 2014).

The institutionalization of migration in development cooperation between Europe and Africa officially occurred through the establishment of the Cotonou Partnership Agreement between the members of the African, Caribbean and Pacific (ACP) states and the EU and its member states (Van Criekinge, 2013). Specifically, articles 13, 79 and 80 of the Cotonou Partnership Agreement defined the role of migration in development partnerships. In particular, article 13 introduced a readmission clause requiring any ACP State to readmit "its nationals illegally present on the territory"

of one of the States party to the agreement as well as migrants from other countries who have transited through its territory (art. 13, para. 5).

This decision-making does not support the idea that the EU is more committed to PCD or transformative development than the US. For example, scholars have noted that the signing of trade agreements and concessions of economic aid are subject to the application of best practices in the field of migration (Gabrielli, 2007; Miranda et. al., 2012). Subsequently, these themes have been developed in the various multilateral initiatives on migration and security involving the EU and its African partners (Fisher & Anderson, 2015). In 2005, the European Council established the GAMM, prioritizing actions in Africa and the Mediterranean with the main objectives of "reducing illegal migration flows and the loss of human lives and assuring the return of illegal immigrants in safe conditions" (Conseil Européen, 2005, p. 9). This approach also provided that any partnership between the EU and Africa must systematically include aspects related to the management of legal migration, the fight against illegal migration, and the promotion of the link between migration and development. These objectives have most recently been institutionalized in the 2015 West Africa Regional Initiative signed by the EU with the Economic Community of West African States (ECOWAS), *l'Union Economique et Monétaire Ouest Africaine* (UEMOA) and member states, which builds on previous agreements. The EU will provide €1.15 billion in funding for the initiative through 2020.[8] Similarly, in May 2015, the EU and the ACP States issued a joint document outlining joint strategies to combat human trafficking and smuggling.[9]

Within these initiatives, the link between migration and development has specifically been articulated through two sets of measures: (1) the outsourcing of border controls, through the sharing of responsibilities in the fight against illegal immigration with African countries (which is a short-medium term policy goal); and (2) the promotion of co-development, understood as development partnerships with African countries with the aim of restricting incentives for unwanted migration (which is a long-term policy objective). The first Euro-African Intergovernmental Conference on Migration (Conférence ministérielle, 2006a) conducted through the initiative of Spain, with the collaboration of Morocco and France, led to a declaration asserting the need to achieve a concerted management of migration in Africa, through the implementation of development projects. This conference was closely followed by another in Tripoli (November 2006), which resulted in a joint statement that discussed "strategies to reduce poverty" and "co-development of African countries" as key points to reduce flows of migrants and refugees (Conférence ministérielle, 2006b). The proposed solutions included the promotion of foreign direct invest-

ment, cooperation processes and regional economic integration in Africa through the signing of EPAs. Also worth mentioning are the axes of the Rabat Action Plan through which multilateral and bilateral political and financial instruments have been set up to promote cooperation with Africa on migration issues, including migration management, bilateral readmission agreements, and joint development agreements signed with allocation of specific budgets.

Within this framework, the EU has unlocked specific budgets since 2001 to finance projects with the main objective of controlling illegal migration (Commission Européenne, 2010). The EU allocated €40 million for "migration" under the Ninth European Development Fund (EDF). Ten million euros have been dedicated to the creation of a migration information management center in Mali, which was established in 2008 following signature of a joint declaration on Migration and Development between Mali, ECOWAS, France, Spain and the European Commission, on February 8, 2007. Also under the ninth EDF, €5.5 million were granted to Mauritania (€3 million) and Senegal (€2.5 million) for the establishment of "rapid response mechanisms for the fight against illegal migration to the European Union" (Commission Européenne, 2010).

The European response to the 2015–2016 migration/asylum crisis has also included significant development investments. The November 11–12, 2015 Valletta Summit on Migration defined EU policy on migratory flows, including conflict resolution, peace-building and Common Security and Defence Policy (CSDP) missions. Development cooperation and humanitarian aid were cited as means to address global challenges and drivers of migration.[10] Specifically, the EU established a €1.8 billion Emergency Trust Fund for Africa aimed at "addressing the root causes of irregular migration and displaced persons."[11]

Like the US, the EU has utilized development aid to reinforce the policy mechanisms listed in the introduction to this section, especially the externalization of border controls that seem to undermine the EU commitment to transformative development. The EU's March 2016 Refugee Agreement includes the disbursement of €3 billion already committed to Turkey and the promise of another €3 billion in development aid before 2018 to be distributed once the initial investment has been disbursed in exchange for Turkey's agreement to receive repatriated asylum seekers from EU member states.[12] In 2015, the EU announced that €3.9 billion had been allocated to countries hosting asylum seekers from Syria, notably Jordan, Lebanon and Turkey.[13] In September 2016, Jean-Claude Juncker, president of the European Commission, announced the European External Investment Plan, which committed €3.35 billion toward the implementation of the SDGs and the Addis Ababa Agenda on Financing for Development.

The plan is linked to migration policies as "a key contribution to addressing the root causes of migration, reinforcing our partnerships and looking at the long term drivers behind the large movements of population."[14] This approach seems incoherent with the transformative development agenda that characterizes the very SDGs that the plan professes to support.

Such practices are not new in Europe. It is important to mention that one reason the EU's migration policies have focused on security is because they represent the interests of the majority of EU member states. Since large-scale migration flows in the Mediterranean Basin began in the 1990s, responsibility sharing has been a major issue in EU migration affairs as Italy, Spain and Greece were criticized for being "Europe's soft underbelly" (Koff, 2008, p. 10). The 2015–2016 migration/refugee crisis has demonstrated that EU policy-making in migration affairs has not evolved significantly, and it has not sufficiently established a collective response in the field. The continuing lack of a common policy identity at the supranational level has contributed to a significant securitization of migration and asylum through the establishment of external border controls resulting from the militarization of the EU's territorial limits and the securitization of development aid through conditionality mechanisms as a means to enforce migration controls in third states.

The first European readmission agreements date back to 1965 when Austria signed an accord with Tunisia. Since then, other high-profile agreements include those concluded between Spain and Morocco (1992), the United Kingdom and Algeria (2006), and Italy and Egypt (2007) (Casserino, 2012). Casserino notes that these agreements were signed as parts of larger negotiations focused on conflict resolution, trade, foreign direct investment, energy security, anti-terrorism and political rapprochement with the EU. Furthermore, he contends that EU–third state readmission agreements are characterized by a flexibility that does not require lengthy ratification processes and permits states to renegotiate them based on their changing needs. This permits EU member states to renegotiate development agreements to promote domestic political agendas that are not necessarily coherent with the normative commitment to transformative development at the supranational level.

Libya is the country that has become most emblematic of these processes through its relationship with Italy. The two countries signed bilateral cooperation agreements in 2008 and 2014, the first of which permitted Italy to repatriate clandestine migrants (including non-Libyans) arriving to Italy after having transited through Libya. Because the ECHR rendered the 2012 judgment in *Hirsi Jamaa and Others v. Italy* prohibiting this practice, the second agreement focused on technical and military cooperation with Libyan officials to prevent human smuggling and human trafficking

in the Mediterranean. In 2014, the EU, through its Border Assistance Mission in Libya (EUBAM Libya) provided €30 million to Libyan authorities in order to combat illegal migration (Vasallo Paleologo, 2014). Both Italy and the EU have been criticized by numerous human rights organizations for their support of Libya in the field of migration (Human Rights Watch, 2009). In an October 8. 2012 report, the UN Special Rapporteur on the Human Rights of Migrants wrote: "Although the EU has negotiated a number of EU wide readmission agreements, the absence of a clear regional framework for such agreements, including a lack of minimum human rights standards, has led to the creation of a number of bilateral readmission agreements between Italy and its neighbors which often do not appear to have human rights at their core." (United Nations Office of High Commissioner on Human Rights, 2012). This seeming disregard for human rights undermines the transformative aspects of migration and development. The 2015 report from the Special Rapporteur's December 2014 follow-up mission to Italy repeated this point:

> "The Special Rapporteur reiterates his concerns about bilateral agreements being used as a means of border control, often without sufficient human rights safeguards. He remains concerned about the lack of transparency surrounding such agreements: not only are negotiations conducted seemingly with very little external oversight or input, but often the final text is not publicly available, thus contributing to uncertainty regarding the content, interpretation and implementation of the agreements." (United Nations, 2015, p. 11).

Specifically, observers have noted that the situation in Libya reflects the situation in Mexico discussed earlier in this article. Like in Southern Mexico, Libyan border guards are poorly trained, corruption is widespread, reaction capabilities of law enforcement are insufficient and immigration and border control officers "lack knowledge" of statutory international laws (Human Rights Watch, 2009). Furthermore, Libya has never signed the 1951 Geneva Convention on refugees, and the country does not officially acknowledge the presence of refugees and asylum seekers. Libya also does not allow the United Nations High Commission for Refugees (UNHCR) to monitor conditions for migrants in the country. As a result, like in Mexico, numerous human rights violations have emerged related to the absence of a legal protection framework for migrants and asylum seekers, deplorable detention conditions and expulsions of large numbers of clandestine migrants with insufficient attention paid to protection needs (Human Rights Watch, 2009). The use of EU and Italian development aid to securitize migration in Libya undermines not only the transformative potential of migration but also transformative development in Libya by

weakening rule of law in that country and reinforcing power discrepancies in the Mediterranean Basin.

While the most attention regarding human rights violations of migrants has focused on Libya, other countries with which the EU and member states have readmission agreements have also received prominent criticisms. Like Libya, the 2003 migration law in Morocco does not discern between economic migrants and refugees or asylum seekers, and the government has limited access to officials from the UNHCR (Carrera et. al., 2016). Critics highlight deportations that do not guarantee protection, and abuses of police power and corruption.[15] Of significant concern is the fact that migrants, upon arrest, are relocated to informal detention camps found in the desert, close to the Algerian border. Numerous deaths of migrants from Mali and Senegal in 2005, 2006 and 2013 brought international attention to these camps.[16]

These trends illustrate how migration has become securitized throughout the Mediterranean, which reduces the transformative potential of EU development aid. The recently established EUNAVFOR Med (European Union Naval Force- Mediterranean) mission aimed at disrupting human smuggling in the Mediterranean has received €11.82 million for 12 months of operations in 2015–2016.[17] Moreover, the North Atlantic Treaty Organization (NATO) agreed in February 2016 to send warships to the Mediterranean to fight human trafficking, further reinforcing the securitization of migration.[18]

Development cooperation has become a prominent tool that complements these military efforts, which seems to be incoherent with the SDGs and the EU's political commitment to uphold them. Thus, this article asks through what mechanisms can normative change aimed at reinforcing transformative development strategies aligned with the core principles of the SDG Agenda be promoted in migration affairs?

Regional courts, human rights and migration: Jurisprudence as a potential source of transformative PCD?

The EU recognizes that the 2015–2016 Mediterranean migration crisis is a humanitarian emergency as 5,083 migrants are confirmed to have perished in the Mediterranean in 2016.[19] Nonetheless, it has responded with measures aimed at controlling migratory flows. Development aid, especially the previously mentioned Emergency Trust Fund for Africa, has been included in these strategies, thus contradicting the normative principles of PCD and transformative development. The securitization of migration through measures including development aid actually undermines

the notion of transformative development, which, as stated in the introduction, is closely associated with the SDGs. How can donors like the EU and the US pursue SDG #10, "the reduction of inequality within and among countries,"[20] when they utilize development cooperation in order to erect political barriers between states/regions in the field of migration? In fact, Thede's (2013, p. 784) contention that PCD and securitization policies are actually complementary parts of a donor strategy attempting to stabilize power relations in a "contested and unstable international arena" is highly salient to understanding current practices in regional migration regimes.

PCD has been proposed as a mechanism for change, but it has not yet been implemented in the field of migration where development cooperation supports migration controls more than migration governance facilitates transformative sustainable development as defined under the SDGs (Nyberg-Sorensen, 2016). Scholarship on PCD and migration (Lavenex & Kunz, 2008; Wunderlich, 2013) and PCD in general (King, 2016; Carbone & Keijzer, 2016) has documented how this policy tool has been limited to discursive impacts due to a lack of effective implementation.

This article argues that in order for migration to contribute to transformative sustainable development in line with SDG #10 (amongst others) through PCD, new mechanisms must be developed that focus on normative coherence defined as coherence between policy strategies and key democratic norms, such as those expressed in the SDGs and donor states' constitutions, or constitutional treaties in the case of the EU. King (2016) correctly indicates that the key stumbling block to effective implementation of PCD has been the unwillingness of donor states to have their aid monitored. This is especially relevant for discussions on security. Even though development communities are often receptive of PCD, non-development policy actors in fields such as migration and security have rarely embraced this policy tool, thus impeding normative change focused on transformative development. Consequently, this article asks, through what mechanisms can PCD be promoted so that migration policies contribute to transformative development, reversing the current trend?

The proposed answer to this question is related to an important observation of PCD mechanisms. The EU and its member states have established numerous instruments to ensure PCD, including inter-ministerial committees, legislative committees, ombudspersons, parliamentary review, etc. However, virtually all of these institutional mechanisms focus on either the executive or legislative branches of government (Carbone, 2008). Part three of this article has indicated that executive and legislative bodies favor securitization in the field of migration due to prevailing public rhetoric. Thus, this article asks, if normative change is to be pursued, as dictated by commitments to the SDGs, and norms reflect liberal

democratic principles, why have PCD discussions ignored judiciaries thus far? Courts have been proponents of normative change for decades. In the US, courts effectively promoted social justice in the 1960s and 1970s in response to cases brought by leaders of the civil rights movement, especially the National Association for the Advancement of Coloured People (see Greenberg, 1995). In Europe, the ECHR has been a leader in the field of ethnic and minority rights on the continent (Guglielmo & Waters, 2005) promoting justice for groups, such as the Roma.

In fact, scholarship on supranational human rights courts has noted that these organs have increased their influence in global affairs through a recent globalization of human rights law. While Decaux (2011) has documented how the proliferation of human rights courts, ad hoc special case tribunals and international criminal justice tribunals can undermine their formal authority through competing mandates, other scholars, such as Brysk and Jimenez (2012), Sandholz (2012) and Nichols Haddad (2012) have documented the variety of ways that supranational human rights courts have augmented their political influence and increased the number of policy spheres in which they take action. All of these analyses focus less on direct, vertical institutional relationships between supranational and domestic courts and more on the formal and informal roles of courts in broader networks of actors participating in global governance. For example, Sandholz (2012) remarks that individual human rights are better protected in states where courts more effectively establish links with international law based on treaties (as opposed to the inclusion of rights in domestic constitutions). Brysk and Jimenez (2012) similarly examine these networks by contending that supranational courts affect human rights protection more through the promotion and expansion of norm change and sociological behavior than through direct legal implementation. Finally, Nichols Haddad (2012) contends that supranational human rights courts have increased their relevance through interactions between NGOs and civil society.

With regard to immigration, one of the traditional challenges for addressing the human rights of migrants has been the historical lack of judicial activity in this field due to its transnational nature, which permitted securitization at the expense of human rights (Crépeau et. al., 2007; Delgado Wise et. al., 2013). Scholars have demonstrated how traditional European Court of Justice (ECJ) activity has focused more on economic rights than people's rights (Guiraudon, 2003). Basilien-Gainche has examined the ECJ's activity in the field of migrant detention, and she describes the court's behavior as "vague and elusive" (2015, p. 104)

In the past, the ECHR also "extended to state authorities a wide margin of appreciation in maintaining immigration controls, thus affording

individuals only limited protection" (Rogers, 2003, p. 53). However, this stance has begun to change as the ECHR has delivered important judgments in favor of migrants' rights, most notably in matters related to interpretation of security threats and deportation (see *Saadi v. Italy*, 2008, and *A. and Others v. the United Kingdom*, 2009). Two benchmark rulings were also delivered by the court in relation to asylum-seekers. In *M.S.S. v Belgium and Greece* (2011), the court agreed that Greece violated article 3 of the European Convention of Human Rights because of the applicant's conditions of detention and living conditions in Greece. Moreover, Greece was found in violation of article 13 "because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy."[21] Similarly, in *Jamaa and Others v. Italy* (2012), the court ruled that Italy violated the convention by expelling asylum seekers "by sea to Libya, where they were at risk of violations of their human rights and in danger of being repatriated to their home countries" (Crépeau, 2014, p. 6). These verdicts were reinforced in 2013 and 2014 through various judgments.[22]

Despite a limited number of cases, the ECHR has generated jurisprudence in relation to protection from expulsion to face human rights abuses, protection from trafficking and forced labor, protection from collective expulsion, detention and the right to liberty and security of the person and children's rights. In terms of the Inter-American Court of Human Rights, the court has also established important jurisprudence in the fields of consular assistance (including the right to identity papers), the right to a fair trial, children's rights and non-discrimination and labor rights. Moreover, the Inter-American Commission of Human Rights has documented the violation of migrants' rights and worked with states to guarantee these rights (Inter-American Commission on Human Rights, 2013). Like the general literature on the globalization of human rights courts and laws, observers of migration in the Americas have noted that the IACHR has made a stronger impact through global governance networks than it has through judicial consultation. In fact, the IACHR has supported state sovereignty in the field of asylum more than the ECHR. In the case *Vélez Loor v. Panamá* (2010) the IACHR opinioned that member states have the right to regulate migration and detain persons entering their territories illegally. This was, however, tempered by the judgement in *Nadege Dorzema y otros v. República Dominicana* (2012), which stated that all officials responsible for migration decisions must guarantee impartiality.

These verdicts show that regional human rights courts have begun to hear important cases related to migration and asylum, and their influence grows through inclusion in partnerships with other branches of

government and NGOs/civil society. Thus, this article asks why regional human rights courts are ignored in transformative development discussions given that their influence is increasing in globalized human rights debates. Couldn't this activity be the basis for normative commitments to PCD in the field of migration, among others, so that development aid is not strictly aimed at securitization and control of migratory flows? This question is addressed in the following conclusion.

Conclusion: Normative PCD through regional courts as participants in governance networks

The main problem with referencing regional human rights courts as PCD mechanisms relates to institutional incoherence (Carbone, 2008). Both the ECHR and IACHR are associated with supranational organizations that are not the main actors for development cooperation, trade or migration in their respective continents. However, this interpretation of the roles of regional courts is premised on traditional views of judiciary impact that examine vertical institutionalization. Instead, more recent scholarship that highlights the further inclusion of regional human rights courts in global governance networks as documented in this article indicates different ways that these courts can potentially promote transformative development through human rights-based norm change. Following this logic, this article contends that globalized networks of development institutions and actors could propose policies that reference judicial decisions, even in a consultative manner, as the basis for PCD in relation to migration, and they could promote normative PCD frameworks favoring transformative development as defined in the SDGs. This argumentation is consistent with the emerging literature on the globalization of human rights law that emphasizes courts as sources for norm change through influence on networks of global actors.

This practice has already begun in other policy arenas. For example, Koff and Maganda's (2016) study of PCD and the human right to water shows how the European Court of Auditors produced a scathing special report in 2012 of EU development strategies in the field of water and sanitation in sub-Saharan African states (Angola, Benin, Burkina Faso, Ghana, Nigeria and Tanzania). This Court audited 23 programs in these six countries with the objective of determining whether or not the European Commission was carrying out its development programs in relation to water in an effective and sustainable manner. The Court's inquiry found that the European Commission's programs were successfully installed in terms of infrastructure and that the materials utilized to complete them were

locally available. Also, the technology employed was readily available to development aid recipients. Nonetheless, the Court's study indicated that fewer than half of the projects that were audited met the beneficiary's needs, and the court as well as the European Parliament particularly criticized these projects for shortcomings in terms of local ownership of development strategies that were considered incoherent with normative approaches to water rights (Koff & Maganda, 2016, p. 102–103).

In the Americas, the role of the IACHR and the Inter-American Commission on Human Rights is less direct for two reasons. First, legal scholars, such as Huneeus (2011), have noted that national courts often do not comply with the IACHR's rulings, as the court does not methodologically highlight regional consent (Neuman, 2008). Second, the IACHR and the Commission have aspired to influence human rights outside the Americas, and observers, such as Neuman (2008), have noted that attention to this external dimension has at times undermined the IACHR's regional impact. In relation to migration and development, for example, these bodies have not necessarily addressed the securitization of development in the Americas as described in this article, but the Commission has adopted Resolution 03/08, which is highly critical of EU readmission agreements (Inter-American Commission on Human Rights, 2008).

Nonetheless, the IACHR could potentially influence transformative development in two important ways. First, IACHR judgments and opinions could provide aid recipients (and sending countries) with normative arguments on which to advocate transformative development policies in bilateral and multilateral relations related to migration. Advisory Opinion OC-18/03, establishing legal status and fundamental rights for undocumented migrant workers, was issued following action taken by Mexico (Lyon, 2004). Second, the IACHR and the Commission, which have already reviewed US asylum, border protection and migrant detention practices, could provide members of the US development community with arguments in favor of PCD should they regionalize their focus. For example, Kate Almquist Knopf, a former assistant administrator for the US Agency for International Development (USAID), recently described the tension between many in the US development community and Congress arguing, "policymakers mistakenly equate development with foreign aid and conclude more foreign aid should result in more development" (Almquist Knopf, 2013). If nothing else, IACHR attention to development cooperation could further support those promoting PCD and transformative development from within the system.

At present, the regional securitization of migration through development aid contradicts various international norms aimed at transformative development (above all, those expressed in the SDGs) as well as donors'

constitutional values such as freedom, rule of law, and human rights. The 2015 declaration of the SDGs offers donors the opportunity to reflect on normative positions. Specifically, SDG #16 aims "to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."[23] Regional human rights courts could act as effective mechanisms for justice based on normative coherence should inter-institutional dialogue be fostered and should institutions, such as auditor courts or legislative committees, integrate/reference regional human rights jurisprudence into their activities. Investigating how to do so within the framework of PCD and the SDGs could be a fruitful avenue for future research on mechanisms for transformative development.

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NOTES

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20. http://www.un.org/sustainabledevelopment/sustainable-development-goals/
21. http://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609
22. See *Hussein v. the Netherlands and Italy* (2013), *Halimi v. Austria and Italy* (2013), *Abubeker v. Austria and Italy* (2013), *Sharifi and Others v. Italy and Greece* (2014), and *Tarakhel v. Switzerland* (2014).
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La coherencia de las políticas públicas para el desarrollo y la migración: Analizando las políticas públicas de EE.UU y la UE a través de los lentes de la transformación normativa

Harlan Koff

Resumen: La "crisis migratoria" de la Unión Europea (UE) del 2015–2016 arrojó discusiones sobre las relaciones entre migración, seguridad y desarrollo renovando su prominencia en los asuntos globales. La UE, como los Estados Unidos de América (EE.UU), ha implementado respuestas de seguridad a la migración dirigidas a proteger la integridad territorial. Este artículo se dirige al nexo entre migración, seguridad y desarrollo a través de la lente de la coherencia de políticas públicas para el desarrollo (CPD). Compara las políticas migratorias de UE y EE.UU dentro del marco del "desarrollo transformativo" asociado con los Objetivos de Desarrollo Sostenible. Sostiene que estos donantes han socavado el desarrollo transformativo mediante la regionalización de la ayuda al desarrollo, el cual ha contribuido a incorporar aspectos de seguridad. Así, el artículo sostiene que se requiere identificar nuevos mecanismos para el cambio. Se introduce la noción de "coherencia normativa" y propone el rol potencial de cortes regionales de derechos humanos para promover CPD relacionadas a la migración.

Palabras clave: coherencia, cortes, derechos, desarrollo, migración, política, seguridad, UE

La coherence des politiques publiques pour le développement et la migration: Une analyse des politiques de l'UE et des EU dans une optique de transformation normative

Harlan Koff

Résumé: La crise migratoire 2015-2016 de l'Union Européenne (UE) a replacé les discussions en matière de migration, de sécurité et de développement dans une perspective globale renouvelée. En réponse aux flux sans précédent, l'UE tout comme les Etats-Unis (EU) ont développé des réponses sécuritaires, destinées à protéger leur intégrité territoriale. Cet article évoque la connexion entre la migration, la sécurité et le développement à travers l'optique de la cohérence des politiques publiques pour le développement (CPD). Il compare les politiques migratoires de l'UE et des EU à partir du cadre du « développement transformateur » associé aux ODD. Il révèle que ces donateurs ont saboté le développement transformateur à travers la régionalisation de l'aide au développement, ce qui a contribué à octroyer un impératif sécuritaire. Ainsi, l'article soutient que de nouveaux mécanismes doivent être identifiés. Il introduit la

« cohérence normative » et propose un rôle potentiel pour les Cours régionales des droits humaines dans la perspective de promouvoir la CPD en matière de migration.

Mots clés: cohérence des politiques publiques pour le développement, Cours régionales des droits de l'homme, États-Unis, migration, sécurité, Union Européenne

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