

EXTERNALISATION OF BORDERS

detention practices and denial of the right to asylum

February 25th and 26th, 2020

LAGOS (Nigeria)

ECOWAS free movement area: interference of European policies and remedies

by Ibrahim Muhammad Mukhtar*

1.1 Introduction

Free movement has been naturally ingrained in West Africans from time immemorial¹. Evidence from pre-European colonial period has clearly shown the existence of durable economic and social relation among the different ethnic groups occupying the territories of what came to be the modern West African countries. Free mobility including population movement and migration is an indelible feature of these relationships. The free movement regime installed by the Economic Community of West African States (ECOWAS) within the West African region can therefore be viewed as nostalgic leap to recreate and revive this age-long notion of one people artificially separated by European colonial borders. For four decades, the ECOWAS region has been experimenting with the idea of achieving full economic integration propelled by the wheels of free movement within the vision of a borderless ECOWAS area. In spite of its partial success, the free movement vision of the ECOWAS has not been fully realized owing to many internal and external challenges. One of the latest threats to intra-regional free movement forewarned by the emerging literature is the impact of European migration policies currently being implemented in the region.

Over the past two decades, European policy makers have recognized migration and asylum crisis as a top priority. Measures to curb the surge of refugees and asylum seekers lead to the adoption of the so-called externalization of migration control which currently defines EU's policy direction regarding migration and asylum. West African region became one of the priorities of EU's attempt at curbing irregular migration since the closure of the Balkan route and the fall of Gadhafi in 2011. This made Libya one of the main gateways to Europe with the ECOWAS free movement area as the main route for migrants heading for Europe. This and many other factors have caused a paradigm shift in EU's

* Law clinic coordinator, NILE University of Nigeria, Abuja, Nigeria

imukhtary@nileuniversity.edu.ng/ibmuktary@gmail.com +2347060957697

¹ See Agyei, J. and Clottey, E. (Undated), Operationalizing ECOWAS Protocol on Free Movement of People among the Member States: Issues of Convergence, Divergence and Prospects for Sub-Regional Integration, retrieved on 02/12/2019 from <https://www.migrationinstitute.org/files/events/clottey.pdf>.

policy direction in the region from that of cooperation in economic and social development to the priority of migration control. Over the past years, EU's development aid programs have been defined by the priority of securitization of borders and addressing the so-called root causes of migration. The implementation of these policies have created a tension between the EU's priority of stemming irregular migration and the ECOWAS agenda of achieving regional free movement as observed by many stakeholders. This paper is a contribution to this emerging debate. The paper subscribes to thesis that EU migration policies interfere with free movement in the ECOWAS region. The objectives of the paper is to examine how the EU's aggressive effort to stem irregular migration is standing in the way of achieving ECOWAS objective of effective free movement and integration within the sub-region. The paper examines the areas of such interference and suggests possible legal remedies to the impact of such interference.

1.2 Clarification of Key Concepts

In this section we will attempt to clarify the meaning of some key concepts with recurrent occurrence in this paper. This will aid the proper flow and understanding of the discussion that will follow.

Freedom of movement refers to the right to travel within the boundaries of a political entity². Free movement denotes the right to move and circulate without hindrance within a particular territory. Such right may include the right to enter into such territory set up residence and even establish family and business therein. Therefore, free movement is such movement of persons within a borderless area which may or may not include the changing of residence outside place of origin. It therefore, include the right to migrate from one location to another including inter-country migration. ECOWAS refers to the Economic Community of West African states established under article 2 of the Revised Treaty of the Economic Community of West African State Treaty of 1993.

ECOWAS Free Movement Area is used here to denote the entire geographical area of the 15 countries³ signatories to the ECOWAS treaty and (especially) the ECOWAS Protocol Relating to the Movement of Persons, Residence and Establishment.⁴ The citizens of these countries are equally the citizens of the Community⁵ who enjoy the rights and privileges established and recognized under the ECOWAS Treaty and the Protocols thereto most of important of which is the Freedom of circulation or Freedom of movement. Such freedom as shall be seen later includes the freedom to enter upon the territory of a member state without a visa and stay for 90 days, the right to obtain residence permit and establish residence within such host state as well as the right to establish by having access to and carrying out economic activities without hindrance or discrimination⁶.

The term *European policies* is used to refer to those policies of the European Union whether executed by the EU itself, a member country or anybody or person acting for or at the instance of the union. The use of the term is however restricted to those European policies which seek to achieve

² Garner, B. A. (2014), *Black's Law Dictionary*, 11th ed., Thomas Reuters, United States, p. 779.

³ These are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Nigeria, Senegal, Sierra Leone and Togo.

⁴ Protocol A/P.1/5/79 *Relating to the Movement of Persons, Residence and Establishment*.

⁵ The ECOWAS Treaty refers to them as "community citizens".

⁶ See Generally ECOWAS Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment; Supplementary Protocol A/SP.1/7/86 on the Right of Residence; and Supplementary Protocol A/SP.2/5/90 on the Implementation of the Right Establishment.

externalization of migration control objectives within the West African sub-region. In this context, *externalization of migration controls* describes extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims. These actions include unilateral, bilateral, and multilateral state engagement as well as the enlistment of private actors⁷. These can include direct interdiction and preventive policies, as well as more indirect actions, such as the provision of support for or assistance to security or migration management practices in and by third countries⁸.

Externalization occurs through formalized migration policies and visa regimes, through bilateral and multilateral policy initiatives between states, as well as through ad hoc policies and practices. Such policies have been negatively linked to directly or indirectly exposing migrants to human rights abuse, perils of having to embark on more dangerous journeys to reach destination and generally undermining both intra and extra-territorial freedom of movement guaranteed within national, regional and international legal orders.

The term *interference* is used to denote the *intended* or unintended consequences or impacts of the implementation of European migration policies on free movement in the ECOWAS region. A *remedy* refers to the means of enforcing a right or preventing or redressing a wrong⁹. Remedies are usually procedural rights within a legal system that allow a victim to seek redress in form of reparation, review of a wrongful conduct or action by undoing its consequence or retraining it. The next section will examine free Movement in West African Sub-Region.

1.3 Free Movement in West Africa

1.3.1 Free Movement in West Africa Prior to ECOWAS

Free mobility of persons, goods and services including migration has existed in the area forming what come to be known as today's West Africa from time immemorial. As noted above, migration is a way of life among West Africans. Long migration is not new in West Africa. Population movement (the entire movement of tribe or family from one place to another) as a form of migration occurs within the West African sub-region since the 19th Century inter-tribal wars. During this period, commercial migration occurred prominently.

The West Africans have always considered the region as an economic unit within which people trade in goods and services and moved freely without restrictions.¹⁰ European colonial occupation brought about the creation of modern borders which scattered ethnic groups over territories of different states. But this colonial occupation did not stop the age-long free movement tradition among West Africans. Cultural and ethnic affinities facilitated continued movement among these groups which now carry different nationalities especially where the same

⁷ Frelick, B. *et al* (2016), 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants'. *JMHS* 4(4): 190-220.

⁸ *ibid*

⁹ Garner, B. A. *op cit*, p. 1485.

¹⁰ Addo, N. O. (1975), Immigration and Socio-Demographic Change, in: Caldwell J. C. ed. *Population Growth and Socio-Economic Change in West Africa*, The population council, New York.

language and culture is shared. Colonial policies of using cheap labor for production also brought about more internal and cross-border movements.

It was in the aftermath of colonial rule that free movement suffered a set-back owing to the emergence of restrictive policies aimed at protecting economic and political interest of the individual countries. This happened especially in the late 1960s through the 1970s when many countries in the region embarked on massive expulsion and deportation of non-nationals¹¹. An estimated one-third of West African population is believed to reside outside their place of birth. It was in a bid to revive this age-long west African culture particularly taking a cue from successful regional cooperation such as the EU, that the Economic Community of West Africa otherwise known as ECOWAS was established to engender development through regional economic integration facilitated by free movement of persons goods and services.

1.3.2 The ECOWAS Free Movement Regime

The Economic Community of West African states was established in 1975 by the treaty of that year¹². The member states include Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Nigeria, Senegal, Sierra Leone and Togo. Mauritania was formally a member but later left the community¹³. Currently there is an attempt by Morocco to join the community. The main aim of the community is the achievement of economic integration including free flow of persons, goods and services. It was in the realization of this that the Protocol on Free Movement of persons and the right of residence and establishment was enacted in 1979 and ratified by all member-states in 1980. The protocol established the right of every citizen of the community to free entry into all member countries for 90 days without visa, right of residence and the right of establishment. This implies the adoption of common passport, the abolishing of visa thereby establishing free movement of persons within the area subject to possession of valid traveling document and international health certificate.

Under the regime which has since taken effect, both private and commercial vehicles can move freely within the ECOWAS area. The former can stay in the cross-border country for 90 days while the latter is restricted to 15 days within which it cannot engage in any commercial activity. Free entry of vehicle is subject to possession of valid driver's license, matriculation certificate or ownership card, insurance policy and international customs documents recognized within the community. A member state however has the right to deny entry of any immigrant considered to be inadmissible by its laws¹⁴. It has been observed¹⁵ that this provision has provided broad scope to member states to undercut the purpose of the protocol through the elaboration of overly restrictive domestic inadmissibility laws.

Thus, the grounds for denial of entry varies across the states as Benin may refuse entry of a minor except with a guardian and also if person may likely constitute threat to public peace.¹⁶ Burkina

¹¹ Countries that expelled and deported foreigners include Sierra Leone in 1968; Cote d'Ivoire in 1958, 1964 and 1999, Ghana in 1969; Equatorial Guinea 1968, Nigeria 1983, 1985; Liberia 1983 and Benin 1998.

¹² The original Treaty was signed in Lagos On 28th May, 1975. Later a revised version of the treaty was agreed and signed on 24 July 1993 in Cotonou.

¹³ This happened in this year 2002.

¹⁴ See Article of the Protocol Relating to Free Movement of Persons, Residence and Establishment.

¹⁵ Adepoju *et. al* op. cit. p. 9

¹⁶ *ibid*

Faso may refuse entry on health grounds whereas in Cote d' Ivoire ECOWAS citizen cannot exceed 30 months except with residential permit. Ghana, Nigeria, Gambia, Guinea Bissau, Liberia, Senegal all may refuse entry on health grounds, crime, threat to public peace, insanity, idiots, spies, communicable diseases, paupers, brothel keepers, sex workers, trafficking as well as lack of valid travelling documents or any person likely to be burden or public charge.¹⁷

Free movement in terms of visa-free entry for 90 days is the first phase of the implementation of the full right to Freedom of movement recognized by the Treaty and subsequent protocols. The other two rights of residence and establishment were to be implemented in the second and third phases. In spite of the existence of Protocols to that effect, implementation of the remaining phases is proving to be slow owing to some challenges.

Major issues bedeviling the full implementation of the free movement program in the region include political and economic instability of the member states, refusal by member states to transfer sovereignty to the regional body, weak intra-regional trade, inability of the regional body to enforce its laws, coexistence of several regional groups with overlapping functions, different programs and calendars, lack of harmonization between community and national legislations,¹⁸ inadequate infrastructure to facilitate the realization of a borderless sub-region and ignorance of the general community population about their responsibilities regarding the free movement regime. It is amid these challenges that Euro-African cooperation on migration control set in to constitute yet another obstacle on the realization of free movement in the region which will be discussed in the next section.

1.3.3 EU's Migration Agenda and the Significance of the ECOWAS Free Movement Area

Since the Valetta Summit of 2015 which came on the heels of unprecedented crossing of 1.3 million refugees and migrants to Europe, the EU formally recognized migration as a priority in its relationship with other regions. EU's policy has since been defined by the priority of stemming migration by nipping its causes at the bud using the departure and transit countries through the so-called policy of externalization. The ECOWAS area is an important source of irregular migrants whose destination is the Europe. The fall of Ghadafi in 2011¹⁹ who used to be a reliable ally for the Europe in preventing the crossing of migrants and going further to offer them alternative economic opportunities in Libya gave birth to a refugee crisis that was to lay the basis for active European policy on migration with ECOWAS region being the focus center. Note that since the closure of the Balkan route through which refugees and migrants from Middle-East and South Asia crossed to Europe, Europe's migration policy focus shifted its priority lens towards Africa particularly with the projection of population explosion in the continent which is already riddled by political, economic and social crises thereby making it conducive source for migrants. The ECOWAS free movement area is important to the realization of any policy by Europe to stem irregular migration for obvious reasons. The area hosts some of the poorest nations on the planet. Europe is therefore an appealing paradise for the impoverished population of the sub-region who see migrating to Europe as a solution to their economic plight owing to social media

¹⁷ Ibid. p. 10

¹⁸ Kabbanji, L. (2017), Regional Management of Migration in West Africa: the Case of ECOWAS and UEMOA, in: Nita, S. et al eds. *Migration Free Movement and Regional Integration*, UNESCO, Paris, Pp. 106-107.

¹⁹ Idrissa, R. *Dialogue in Divergence, the Impact of EU Migration Policies on West African Integration. The Case of Nigeria, Mali and Niger*, Fredrich Elbert Stiftung, Germany, p.6.

influence and often diaspora assistance²⁰. The incessant security issues rocking the region from the myriad of insurgency, banditry, farmer-herder crises has continued to cause displacement of people within the sub-region thereby constituting a refugee breeding ground with Europe as a potential destination. Cross-border movement in both regular and irregular patterns has arguably been made easy by the ECOWAS free movement policy discussed above²¹. Therefore, it is easy for intending migrants to Europe to travel from their countries of origin unhindered up to the other African countries such as Morocco, Algeria and Libya which have easy Mediterranean crossing to the EU. While movement through Morocco and Algeria may prove to be difficult, Libyan crisis provides an easy access particularly through Niger thereby making the country an important transit country for refugees and migrants traveling across the Mediterranean to Europe. As shall be discussed later, this would explain the EU's choice of Niger as an important partner in the policy.

According to the European Border and Coast Guard Agency, in 2017 almost 143,000 migrants irregularly crossed borders via the Western Mediterranean Route and the Central Mediterranean Route to Europe, with Libya the most important transit and destination country for migrants coming from the ECOWAS region²². The largest number of irregular migrants to the EU comes from Nigeria, with the vast majority having travelled overland through the ECOWAS region. These patterns of irregular migration are driven by a range of push factors in West Africa, such as economic and population pressures, poor governance and insecurity, family pressures and aspirations, as well as pull factors including social media and support from diaspora.

1.4 EU's Policies in the ECOWAS Area and their Interference with Free Movement in the Region

1.4.1 EU's Externalization Policy: A Brief Overview

Over the past two decades EU policy makers have recognized migration and asylum crisis as a top priority. Measures to curb the surge of refugees and asylum seekers lead to the adoption of the so-called externalization principle which currently defines EU's policy direction regarding migration and asylum. Within this context, externalization as a concept refers to the extraterritorial control of migration flows into the EU through the transfer of European borders to third countries. Rather than wait for migrants to get to the region, the policy uses measures of cooperation and political arrangement with the departure and transit countries to make it difficult if not impossible for migrants to reach the shores of Europe. Bilateral and regional cooperation agreements to manage and control irregular migration are the main legal vehicle of transporting this Policy to various countries and regions identified as sources of especially irregular migration to Europe. The main focus here is identifying and dealing with the root causes of migration in origin countries, facilitating easy readmission and repatriation of migrants back to their countries as well as strengthening border control in transit countries to make crossing to Europe difficult for immigrants.

²⁰ Castillejo, C. (2019), *The influence of EU Migration Policy on Regional Free Movement in the IGAD and ECOWAS Regions*, Deutsches Institut für Entwicklungspolitik gGmbH, Bonn, Germany.

²¹ See for example the 2015 Nigerian Policy on Migration which linked irregular migration to the porous borders facilitated by ECOWAS free movement regime.

²² *ibid*

Huge budget is dedicated to achieving the objectives of this policy. Developmental aid drawn from such budget constitutes the main bargaining chip used by the union in negotiating such cooperation agreements with the third countries. According to Hyndman and Mountz²³ countries that refused to cooperate with the EU on its externalization policy are penalized by cuts in development aid. Example of such agreements is the Cotonou Agreement which commits all parties to accept the return and the readmission of any of their nationals who are illegally present in the territory of a state party²⁴. Commenting on the aid agreement for example Hayes and Bunyan²⁵ observed that with €8.5 billion as a bargaining chip, the EU would not sign any association or cooperation agreements unless the ACPs²⁶ agree to these standard clauses on migration control.

1.4.2 Externalizing Migration Control to the ECOWAS Free Movement Area

It has been variously observed by writers²⁷ that free mobility within the ECOWAS was the main preoccupation of the ECOWAS community so much so that migration was never considered as an issue of concern for any policy discussion. Also prior to the 2000s, cooperation between the EU and ECOWAS had been largely concerned with regional development and trade with free mobility featuring conspicuously in the discussion and action. During this period therefore, EU could be said to be a viable partner for the ECOWAS in its attempt to achieve economic integration with free mobility at the forefront. However this changed completely when the EU decided to securitize the issue of migration making it top on its cooperation agenda.

Migration was first introduced to Africa through policy dialogue between EU and African Union (AU). Due to its strategic importance to the EU's migration concerns, ECOWAS was placed at the center of the said dialogue. The International Organization on Migration (IOM) which is largely funded by the EU played a significant role in dragging the ECOWAS into this discussion. Flowing from this, we see the establishment of the Migration Dialogue for West Africa (MIDWA) in December, 2000 to assist countries in the region in addressing migration issues with the EU rhetoric of linking migration to terrorism, drug trafficking and human smuggling being the main talking points. IOM also played a significant role here in getting ECOWAS countries to formulate specific policies on migration with the above concern in contemplation. Eventually in 2008, the ECOWAS unrolled its Common Approach to Migration "making the management of intra-regional migration and migration to Europe a priority for the organization."²⁸ The fact that Europe is identified as a priority shows the clear footprint of European influence in the formulation and adoption of this common approach. Nevertheless this common approach had fortunately introduced the ECOWAS concern by incorporating inter-regional migration into the discussion.

²³ Hyndman, J. and Mountz, A. (2008), Another Brick in the Wall? Neo-"Refoulement" and Externalization of Asylum by Australia and Europe, *Government and Opposition*, Special Issue on Refugee: In Trans/National Politics and Society Representation and Control, 2(1): 249 at 246

²⁴ *ibid*

²⁵ Quoted in *ibid*.

²⁶ ACP is an acronym for African, Caribbean and Pacific parties to the Cotonou agreement.

²⁷ see

²⁸ Idrissa, R. *op.cit*.

The Valetta Summit of 2015²⁹ appears to be the main conference that heralded the era of rigorous cooperation between EU and ECOWAS on managing migration flows from West Africa to Europe. The fifth paragraph of the Summit's Political Declaration embodied this idea by stating that the signatories recognize "the high degree of interdependence" between Africa and Europe as they face "common challenges" that have impact on migration. This paradigm shift was later operationalized by Migration Partnership Framework which redefined priorities of the previous agreements such as political, social and economic development around migration management. These priorities are now being used in the context of addressing the root causes of irregular migration and forced displacement rather than being goals in their own rights³⁰.

Since then, various bilateral agreements have been concluded with countries within the ECOWAS region bordering on readmission and repatriation, border security and control, managing irregular migration, strengthening capacity in terms of immigration management etc.

As stated earlier, the main thrust of the EU policy in this regard is stemming irregular migration. Thus, virtually all development aid programs executed in the region have this idea as the main driving objective from the perspective of the EU. The main source of EU funding for the execution of this policy comes from the European Trust Fund (EUTF). The EUTF funds about 92 projects across the region, with the total value of €1,587,682,162. Of these, 18 are regional projects at a total value of € 354,079,096. The majority of regional-level funding goes to migration management projects, followed by projects on resilience. None of these projects involves ECOWAS or has a direct focus on regional free movement.

EU's approach to cooperation in the region is characterized by negotiating bilateral agreements directly with individual member states rather than with the ECOWAS secretariat as the economic governing body of the region. The convenience this offers to the EU is the ability to select the countries identified as migration risks either for being countries of origin or transit for migrants. This explains why countries like Niger, Mali and Nigeria feature prominently in this regard due to their significance in the EU's fight against irregular migration. Niger appears to be most significant due to its strategic location as the main transit country to Libya the main feeder route for migrant influx into Europe. This is why Niger benefits more than any other country from the EUTF. Within three years only, the country had received 266.2 million euros from the EUTF. As derogatorily noted by one writer Niger has over the years constituted itself into a chief immigration officer³¹ for the EU, apparently frenzied by the EU's euro bags. Areas of cooperation within such bilateral agreements usually include strengthening capacity in terms of border security, fighting illicit trafficking of drugs and humans, developing appropriate immigration policies and laws and building capacity to facilitate easy readmission of returnees.

As can be gleaned from the foregoing, Free Movement appears to be paying the expensive price of being relegated to the background in the EU's vigorous policy prosecution in the region. The EU appears to care less about the regional free movement program of the ECOWAS even if same ends up to be the collateral damage of its efforts towards tackling irregular migration in the region. This potential tension between EU's migration policy and the right to free movement has been forewarned by Collett and Ahad when they stated that "forceful border management may...

²⁹ Uzelac, A. (2019), Incoherent Agendas, Do European Union Migration Policies Threaten Regional Integration in West Africa?, Policy Brief, Clingendael Netherlands Institute of International Relations.

³⁰ Ibid,

³¹ Idrissa, R., op. cit

fundamentally undermine regional integration by imperiling the mobility goals of existing regional and continental associations such as the Economic Community of West African States”³². The question therefore remains: Do European policies within the sub-region interfere with free movement? Data in this regard is still being documented, but it is the view of the present writer that such interference does exist as exposed by the scarce evidence available which will be discussed in the succeeding section.

1.4.3 How European Policies interfere with Free Movement in the ECOWAS Region

Some of the areas of interference by European policies with free movement are discussed below.

- i.** The EU’s aggressive peddling of the security threats constituted by irregular migration within the ECOWAS region is forcing the region to view and reframe free movement from the perspective of irregular migration³³. Practice within the ECOWAS region has shown the clear influence of this narrative in the attitude of member states towards free movement. Free movement particularly towards the Libyan border across countries like Nigeria and Niger is viewed with the suspicion that persons embarking on such journeys are headed for Europe. Passenger vehicles transporting community citizens are equally viewed with the suspicion of human trafficking and smuggling. This has clearly affected free movement. Apart from discouraging mobility within the ECOWAS area, it often subjects travellers to unnecessary harassment, extortion and stigmatization.
- ii.** Another effect of the EU’s policy on free movement is the paranoid securitization of borders within the free movement area. There is now a general presumption by some ECOWAS states that porous borders which have been arguably attributed to the free movement regime of the ECOWAS is responsible for infiltration of arms to terrorists and bandits, smuggling of contraband goods, human trafficking and other security threats within such countries. Tighter border control is seen by countries across the region as the best way to addressing this. Nigeria for example, views its ECOWAS neighbors like Niger, Chad and Benin as being responsible for allowing this illegal movement into its territory through their borders. This led the country to embark on a total shut down of its borders which is currently being tipped to last till the year 2023. Although this may not be directly instigated by the EU itself, Nigeria’s decision is largely influenced by the general trend towards border securitization a gospel propagated by the EU. Also, the EU’s partnership with Niger and Mali as stressed by the officials of the AU and UNECA³⁴ has involved securitization of border that directly hinders movement for ECOWAS citizens. Again, stakeholders directly involved in the EUTF projects relating to border securitization raised concerns that these EU supported measures may reduce free movement for ECOWAS citizens. Tiekstra and Schmauder (2018) rightly posited that “the Valletta Action Plan’s pillar on “fighting irregular migration” has been implemented forcefully in Niger [and] both multilateral and bilateral engagements continue to rely on security-focused initiatives³⁵.”

³² Quoted in Castillejo, C. op. cit, p. 28.

³³ See for example, Nigeria’s National Migration Policy 2015 which links irregular migration and trafficking to the opportunities provided by the ECOWAS free movement regime.

³⁴ United Nations Commission for Africa

³⁵ Castillejo, C. , op. cit, p. 28

iii. Facilitating the enactment of laws that clearly violate free movement rights

EU is clearly facilitating if not forcefully procuring the enactment of laws that directly offend the ECOWAS integration program and which launch an affront on freedom of movement of the community citizens. A clear example of this is *Law 2015-36* enacted by Niger Republic specifically to criminalize aiding, abetting or procuring the movement of migrants across the country particularly through Agadez with heavy penalties of up to 10 years in prison. In fact, under the said law, it is an offence punishable with up to 5 years imprisonment to provide accommodation or feeding to migrants within the area. Sources within the Niger's government admitted that the law was enacted owing to pressure from the EU with the help of French civil servants.³⁶ In their report after a mission in Niger in 2018 the UN Special Repertoire on Human Rights of Migrants noted as follows:

In reality, the implementation of the law has resulted in a de facto ban on all travel north of Agadez... the lack of clarity of the law and its implementation as a repressive- instead of protective- measure has resulted in the criminalization of all migration...and has pushed migrants into hiding, which renders them more vulnerable to abuse and human rights violations³⁷.

The curious point to note here is that, this area within which travel is practically banned pursuant to EU migration agenda is part and parcel of the ECOWAS free movement area. Most of the so-called migrants and other persons plying the route are ECOWAS citizens. The implementation of the law therefore, violates Niger's commitment under the ECOWAS treaty, infringes on the freedom of movement of the travellers as well as undermines the integration agenda of the ECOWAS.

iv. Encouraging policies that facilitate the abuse of rights of migrants and other ECOWAS citizens

Implementation of European policies in the region has also raised the number of cases of human rights abuse within the free movement area. Apart from the fact that restricting or preventing free mobility infringe on the rights of community citizens to free movement, the manner in which such EU-inspired policies are carried out exposed migrants to vulnerability of abuse. ECOWAS citizens travelling across these borders often undergo harassment by security officials which may constitute violation of fundamental rights to personal liberty and dignity of human persons. Also, the crackdown on migrants especially across the Northern routes has caused migrants to embark on taking irregular and more dangerous routes which exposed them to risks of life and abuse. Moreover, reports of testimonies from travellers within the area show that, the so-called traffickers against whom these laws and policies are enacted hardly get stopped at the borders, as they have the resources to bribe their ways through. In the end it is the innocent ECOWAS citizens travelling within the area that bear the brunt of the policy.

v. Diverting the attention of member states from developing the necessary instrument for free movement to paranoid priority of border security

³⁶ Carayol, R. (2019). What happened When the EU Moved its Fight to Stop Migration to Niger, *The Nation* July 5, 2019, Retrieved 07/02/2020, from www.thenation.com.

³⁷ *ibid*

The free movement regime of the ECOWAS as noted above is intended to be implemented in phases starting with free movement to residence and then establishment. These three rights are what constitute the “complete freedom of movement envisaged by the ECOWAS Treaty.”³⁸ While only the first phase was effectively implemented with the abolishing of visa and adoption of common travel documents, the last two phases are yet to be fully implemented as they depend largely on commitment and setting the necessary infrastructure by the member states internally. The integration agenda of the ECOWAS is largely anchored around freedom of movement which include among others the right to migrate and settle in the territory of a member state other than the state of origin of the migrant community citizens. EU policies in the ECOWAS are undermining this agenda in two ways. First, member states are now more preoccupied with tightening border security and preventing irregular migration than facilitating the full enjoyment of the rights of residence and establishment which will technically promote intra-regional migration. Second, EU-supported sensitization campaigns which are prevalent across these countries, aim primarily at convincing potential migrants to stay in their home countries. The so-called search for the root causes of migration in Africa essentially hopes to culminate in preventing people from migration. EU’s efforts in this regard interfere with the ECOWAS vision of achieving productive intra-regional migration, which will boost the region’s economy.

vi. Causing further division among ECOWAS member states to serve the selfish interest of the EU and its members

The EU’s policy on migration may threaten the collective unity among ECOWAS member states and ultimately the free movement objective from a number of perspectives. First EU’s bilateral rather than regional approach to cooperation in the region has caused a lot of tension among the member states. Selective concentration of development aid to those countries with strategic significance in tackling irregular migration may undermine any effort at developing a common approach particularly to regional free movement in relation to the renewed efforts to tackle irregular migration. Countries that benefit most from the EUTF will hardly heed any warning issuing from the ECOWAS secretariat about its potential sabotage of the ECOWAS regional integration vision. It is the view of the present writer that EU’s approach here is more of a divide-and-concur strategy.

Closely related to this is the apparent resurgence of the Francophone-Anglophone dichotomy within the ECOWAS particularly with the attempt to realize the adoption of ECO as a common currency for the region. Nigeria’s belated declaration to adopt the ECO was followed by France’s attempt to hijack the currency by getting its former colonies to officially drop the CFA Franc and adopt the ECO pegging it to the Euro. This is seen as France’s attempt to alienate Nigeria and further sustain its influence on the economy of its former colonies. This was swiftly responded by Nigeria rallying the former British colonies to reject the declaration thereby exposing the deeper tension in the region. Although this is not directly connected with free movement of people, it constitutes a threat to the general integration framework of the ECOWAS of which free movement is an essential element.

³⁸ Adepoju, A. *et al* , *Promoting Integration Through Mobility: Freedom of Movement under ECOWAS*, retrieved 2/2/2019 from www.unchr.org/49e47

The next section will highlight some legal remedies to EU's interference with free movement within the ECOWAS area.

1.5 Remedies

A central point pervading the forgoing discussion is that, current European policies within the West African region are interfering with free movement regime institutionalized by the ECOWAS treaty and protocols. This portends an obstacle to the achievement of the ECOWAS objective apart from creating a fertile ground for the violation of human rights including migrant rights as well as international and regional legal commitments. In order to counter these issues the following are some viable legal options for access to remedies:

- i. Although the EU has always denied the interference of its irregular migration policies in West Africa with the regional free movement agenda of the ECOWAS, evidence abounding from the implementation of the policies contradicts this denial. Therefore, ECOWAS as a regional body must have an honest discussion with the EU on one hand and its member states on the other. ECOWAS must adopt a stronger common position regarding implementation of policies and cooperation within the region that potentially undermines its free movement agenda. Such common position should insist that all migration policies must take into consideration the promotion of productive regional migration, protection of rights of migrants and must conform to the letter and spirit of the ECOWAS Treaty. Any bilateral agreement concluded by member states which potentially undermines the integration agenda of the ECOWAS must be rejected within the framework of the ECOWAS Treaty.

It is important here to note that existing bilateral cooperation agreements between the EU and some ECOWAS member states whose implementation interferes with the free movement and integration objective of the ECOWAS may amount to breach of the ECOWAS Treaty and protocol on free movement and may constitute a good cause of action before the Community court of justice against the member states. This can be gleaned from the ECOWAS Treaty itself. Article 79 empowers the community to enter into cooperation agreements with other regional economic communities "in the context of realizing its regional integration objectives." By Article 84 member states may also conclude agreements with non-member states, regional organizations or any other international organizations "provided that the agreements are not incompatible with the provisions of the treaty." Clearly agreements with the EU that tend to undermine freedom of movement and integration are incompatible with the treaty and are not within the context of regional integration objectives of the community. By article 76 of the treaty, disputes relating to the provisions of the treaty are to be settled amicably by direct agreement failing which referral will be made to the community court whose decision will be final. Therefore the jurisdiction of the community court can be invoked for the purpose of declaring such actions inconsistent with the treaty and appropriate injunctive reliefs obtained to restrain them.

- ii. **Remedies within the Human Rights Regime of the Community Court and other Universal and Regional Treaty implementing Bodies**

A human right approach can also be used to tackle this interference. The various measures taken to suppress irregular migration within the ECOWAS area more often results in violation of the right to freedom of movement, personal liberty and dignity of human persons and a host

of other rights recognized under International human rights law particularly those applicable to refugees and asylum seekers. The various international and regional human rights instruments particularly the African Charter on Human and Peoples Rights and the relevant provisions of the ECOWAS treaty and Protocols on Freedom of movement may be used to found human right actions before the community court and other judicial and quasi-judicial implementing bodies of universal and regional human rights treaties to obtain remedies for victims. In spite of its challenges, the community court of justice has, over the years, developed a rich jurisprudence in the area of human rights in cases emanating from member states. One of the advantages of the community court's jurisdiction is that its invocation does not require exhaustion of local remedies. Victims and civil society organizations can therefore utilize the community court system to challenge violations resulting from implementation of EU policies within the ECOWAS region. The utilization of this system will equally help develop jurisprudence in the area of the relationship between migration policies and human rights violation.

iii. Remedies within National Human Rights Regimes

Another alternative is to seek relief within the human right systems of the member states. Legal actions for the enforcement of fundamental rights enshrined under the constitutions of the member states or recognized under international treaties ratified by the member states may be explored for the purpose of obtaining remedies for the victims of violation resulting from the implementation of the EU policies. In some of these countries human rights commissions exist. Petitions may be written to these commissions seeking investigation and review of actions by bodies within the countries that violate the rights of migrants particularly those relating to freedom of movement and non-refoulement. Also, the freedom of information regimes in these countries can be properly exploited to gain access to the contents of the bilateral agreements. Nigeria for example, has a very refined regime of access to information³⁹ which allows everyone whether directly interested or not to apply and obtain any information in the custody of any public authority subject to some limited exceptions. Failure by the authority to give access is actionable before a Federal High Court.

iv. Greater advocacy and pressure by civil society to demand for change in policy and even influence policy formulation to be in line with the integration agenda and the need to protect and facilitate safer migration.

Evidence has shown that countries with greater presence of civil society action are less influenced by the European externalization policy. On the other hand, countries in which civil societies are less active are the ones most affected by the policy- typical example is Niger Republic⁴⁰. Here, civil society groups with particular focus on migration should embark on advocacy; seeking inclusion in terms of formulation of laws and policies relating to migration within these countries. Pressure can also be applied in the area of seeking judicial and administrative review of actions that tend to encourage violation of rights and harassment of migrants and persons exercising rights of free movement within the ECOWAS area.

³⁹ See the Nigeria's Freedom of Information Act 2011, Federal Republic of Nigeria Official Gazette No. 36 vol. 98.

⁴⁰ See Idrissa, R. op. cit.

1.6 Conclusion

The forgoing discussion has attempted to expose the latent dangers of EU's migration policies to the survival of free movement within the EOWAS free movement area. The paper has been able to demonstrate that whether intentionally or otherwise, EU's policies have interfered negatively with the integration agenda of the ECOWAS. It is therefore imperative for ECOWAS member-states to wake up to this new challenge and redefine EU-ECOWAS partnership in the context of peaceful co-existence and harmony between the need to manage migration and the promotion of the intra-regional free movement agenda of the region. There is need to develop a common regional framework of migration management which takes into consideration, the protection of the rights of migrants including appropriate mechanisms for redress and access to justice in the face of violation and denial of right of access to asylum.