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Equality of treatment for refugees with other citizens of Member States of ECOWAS in the exercise of Free Movement, Right of Residence and Establishment

MEMORANDUM

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ECOWAS Commission

INTRODUCTION

Migration movements across borders in West Africa, voluntary and involuntary, legal and illegal have always taken place. Migration is a broad-ranging concept and could encompass situations as diverse as nomads in search of pasture, the exodus of young people from hinterlands to cities in search of jobs, departure from of the region for better prospects abroad or escaping conflict, civil war persecution, serious human rights violations or natural disasters.

In the recent past, the number of refugees in the region increased significantly owing to major conflicts in Liberia and Sierra Leone and, to a lesser extent, Cote d'Ivoire, Guinea Bissau and Togo. The return of peace in these countries has not resulted in all refugees returning home. Some individuals, because they share ethnic, linguistic or other affinities with the populations where they are hosted or because they feel safer there or because they have made their lives there, are opting not to return to their countries of origin after their refugee status has ceased.

Are such individuals entitled to benefit from the rights established for ECOWAS citizens in the 1979 *Protocol relating to Free Movement of Persons, Residence and Establishmen (A/P.1/5/791985)* and supplementary protocols¹.

Relevant entitlements in the protocols

According to the protocols on the free movement of persons and the rights of residence and establishment, the following rights exist for all citizens of ECOWAS member states seeking and/or carrying out income earning employment in ECOWAS member states:

- the right of entry
- the right of stay
- the right of residence
- the right of establishment²

¹ *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*
1986 *Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment*
1989 *Supplementary Protocol A/SP.1/6/89 amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment*
1990 *Supplementary Protocol A/SP.2/5/90 on the implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment*

² Revised Treaty Arts. 3(d)(iii) and 59; Protocol Art. 2; and Supplementary Protocols (see table)

All citizens of a member state enjoy the right to enter into the territory of another member state without visa, provided they possess a valid travel document (such as for example travel booklet, ECOWAS passport or as regards refugees a Convention travel document³) and health certificate.

For up to 90 days, citizens can stay in any ECOWAS member state without any prior administrative or police formality linked to the stay.

The right to reside in an ECOWAS member state is based on the presentation of a residence card or residence permit issued to all citizens who desire one. The duration and validity of the residence card is three (3) years. And it can be renewed though as with issuance in the first place, refusal is possible on grounds of public order, public security or public health.

The right to access economic activities and to hold employment, including pursuit of the liberal professions, is entrenched in the protocols for all citizens of an ECOWAS member state holding a residence card or residence permit.

Equality of treatment for refugees who are ECOWAS citizens with other ECOWAS citizens in the exercise of the rights of residence and establishment

The founding fathers of ECOWAS had an ardent desire to establish a unified space for citizens of all member states to move about, reside and establish themselves in, without discrimination. This desire was articulated in the Protocol on Free Movement of Persons, Residence and Establishment adopted 29 May 1979.

The protocol confers on ECOWAS citizens, the right to freely enter member states without visa and to reside and establish themselves in such states in order to carry out economic activities and contribute to the achievement of meaningful regional integration.

Notwithstanding challenges relating to resources or otherwise, the Protocol and its four Supplementary Protocols deserve to be recognized for the catalysts to the economic and social integration of the sub region that they clearly represent.

Such benefits are not confined only to those citizens fortunate enough not to have been displaced by conflict. Many refugees from Sierra Leone, Liberia, Cote d'Ivoire and Togo, for example, have chosen not to repatriate but to remain in the ECOWAS countries where they enjoyed a warm reception and continue to benefit from the hospitality that makes them feel at home. Such cohabitation has

³ Travel document issued according to Article 28 (1) of the 1951 Convention relating to the Status of Refugees and VI of the OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

generated a true spirit of oneness between populations frequently sharing social and cultural values. This social cohesion is in a turn a major objective of the principle of free movement of persons and needs to be preserved. ECOWAS is aware of the social role the free movement of persons plays in the broader education and unification of the region. For these reasons as well as the evident legal soundness of such an interpretation, ECOWAS recognise the imperative need to ensure that refugees benefit from the protocols on free movement.

While the recent sub-regional environment has been characterised by a re-emergence of armed conflicts requiring efficient management of borders bearing in mind legitimate preoccupations with security, it is also necessary to find a balance between the protection of human rights of migrants or refugees and such security considerations.

In the case of refugees benefiting from the protocols on free movement, the mechanisms required to bring this about –the issuance of high quality travel documents and residence permits-- will simultaneously further, not undermine, regional security.

Relevant entitlements in other legal instruments

While the ECOWAS Treaty is primarily economic in orientation, it promotes greater integration within the West African region for other reasons, including solidarity and collective self-reliance,⁴ maintenance of regional peace, stability and security through the promotion and strengthening of good neighbourliness⁵ and promotion and protection of human and peoples' rights in accordance with the provisions of the *African Charter on Human and Peoples' Rights*.⁶

Neither the ECOWAS Treaty nor its Protocols on Free Movement purport to limit the applicability of benefits conferred in other regional or universal instruments or agreements. This is explicit in Article 84 of the revised 1993 *Treaty of ECOWAS* and the 1986 *Supplementary Protocol on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Rights of Residence and Establishment*,⁷ which read:

Revised 1993 Treaty of ECOWAS (Art. 84)

1. Member States may conclude agreements among themselves and with non-Member States, regional organisations or any other international organisation, provided that economic agreements are not incompatible with the provisions of this Treaty.

⁴ Article 4(b) of revised 1993 ECOWAS Treaty

⁵ Article 4((e) of revised 1993 ECOWAS Treaty

⁶ Article 4(g) of revised 1993 ECOWAS Treaty

⁷ The rights of migrant workers as set out in this Supplementary Protocol (A/SP.1/7/86) are deemed in Article 25 to be non-derogable.

Supplementary Protocol 1986 (Art. 24)

1. No provisions of this Protocol may be interpreted to adversely affect more favourable rights or liberties guaranteed to migrant workers or members of their families by
 - a. law, legislation or practice in a Member State, or
 - b. any international agreement in force vis-à-vis the Member State concerned.

The 1951 *Convention relating to the status of refugees*⁸, which aims to ensure that refugees at a minimum enjoy fundamental human rights, contains a similar provision which clarifies that refugees may benefit from more favorable provisions where they exist. All ECOWAS Member States have signed and ratified the Convention:

Art. 5

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Accordingly, where provisions overlap on any given right or entitlement available to ECOWAS citizens who are also refugees, the most generous provision applies.. Rights refugees enjoy according to either body of law may be applied simultaneously. A comparative table of the rights and entitlements enjoyed by refugees who are ECOWAS citizens residing in ECOWAS countries is attached as an annex to this document.

Refugees may therefore enjoy rights under the Free Movement Protocols additional to the rights to which they are entitled under international refugee law.

In other cases, the rights and entitlements in the Protocols will provide a sufficiently secure legal basis for refugees to stay in the host country when they have voluntarily surrendered their refugee status and no longer require international protection.

RECOMMENDATIONS

Bearing in mind the absence of legal incompatibility between refugee-specific instruments and the ECOWAS protocols on free movement and the consonance between the social and humanitarian nature of refugee situations and the social harmony objectives of the ECOWAS protocols on free movement, the following measures are recommended:

⁸ Please note that countries are entitled to make and some have made reservations on articles within the 1951 Convention, with the exception of articles 1 (definition), 3 (non-discrimination), 4 (religion), 16(1) (access to courts) and 33 (non-refoulement).

1. Recognise that refugees from ECOWAS countries continue to enjoy ECOWAS citizenship and are thus entitled to take full advantage of the ECOWAS protocols on free movement and the right of residence and establishment provided they reside in ECOWAS territories.

2. Encourage the countries of origin of refugees to issue valid travel documents (ideally ECOWAS passports) to those of their nationals who request such documents and are residing in other ECOWAS countries in the sub-region.

3. Urge member states to issue residence cards or permits to refugees from ECOWAS countries residing in their territories at no or reduced cost.

4. Ensure that the duration of the validity of the residence card or permit is three (3) years, with the possibility of renewal. Non-renewal should be based only on the grounds prescribed in the protocols (primarily, national security, public order or morality and public health)⁹ and adhere to the notice and process safeguards therein described.

5. Encourage close collaboration with UNHCR to, among other things:

- (a) facilitate the acquisition of ECOWAS residence status, including assisting member states where appropriate in verifying individuals' possession of refugee status;
- (b) establish jointly a mechanism to:
 - a. promote awareness by refugees and members states in the sub-region of the ECOWAS protocols and national laws and regulations appertaining to residence and employment;
 - b. identify and promote linkages between the residence and establishment provisions in the ECOWAS protocols and national legislation on naturalization;
 - c. counsel refugees on accessing relevant entitlements under the ECOWAS protocols;
 - d. monitor the issuance and renewal of ECOWAS residence permits for refugees in the sub-region
 - e. encourage referral of appropriate question and cases to the Community Court of Justice;
- (c) determine the appropriateness and timing for expansion of entitlements under the protocols to refugees from non-ECOWAS countries .

⁹ See Article 3 of the 1986 Supplementary Protocol stipulating that restrictions on the right of residence are limited to those justifiable on grounds of public order, public security or public health.