

# **ADVOCACY BRIEF**

## **Rethinking the Proposed Restructuring of the ECOWAS Community Court of Justice**

**December 2017**

### **Background**

From its conception as a Tribunal to its current form as a Community Court, the ECOWAS Court of Justice (ECCJ) stands as one of the most transformed international courts in terms of functions, structure, and processes

Established under Article 6 and 15 of the Revised Treaty of Economic Community of West African States, (“ECOWAS”);<sup>1</sup> the ECCJ – the sole judicial organ of the community; initially had a very limited mandate to settle disputes arising out of the treaty as they related to states and institutions of the commission. However, the ECCJ has since evolved from an inter-governmental dispute settlement mechanism into a community court with an expanded mandate and jurisdiction including; an Advisory jurisdiction, contentious jurisdiction, and competence in matters of adjudication.

The ECCJ also has broad access and standing rules allowing individuals and NGOs to by-pass national courts and file directly to the regional court. This followed the Court’s ruling in *Olajide Afolabi v. Federal Republic of Nigeria*.<sup>2</sup>

The expanded mandate of the court – allowing for individual access; the open-ended legal norms application by the court;<sup>3</sup>and the absence of the requirement for exhaustion of local remedies as a prerequisite for admissibility of a complaint<sup>4</sup> - collectively give the ECOWAS Court the broadest authority of all the human rights tribunals in the world. The authority, coupled with the court’s mandate to hold at least two (2) mobile sessions in a year;<sup>5</sup> and the recent court directive requiring member states to indicate the competent national authority with the mandate to enforce the decisions of the court against the specific member state – strategically place the court to play a critical role in advancing accountability for victims of gross human rights violations, and in the fight against impunity.

### **The Proposed Restructuring of the ECOWAS Community Court of Justice**

In a bid to restructure the Commission of the Economic Community of West African States, with a view of ensuring efficiency; several recommendations have been made, including *inter alia* the need for the reduction of the number of statutory appointed positions across all institutions of the Commission.<sup>6</sup> One of the institutions affected by this proposed reduction is the ECCJ. It is proposed that the total number of judges at the Court be reduced from the current seven (7), to five (5) judges.<sup>7</sup>

This proposal – which will have the impact of essentially “dismantling the community court”<sup>8</sup> – cannot be justified because:

- (i) a five (5) member court can constitute one court session only, and two arbitration sessions concurrently – which will in turn result in the creation of unnecessary case backlog at the Community Court; and
- (ii) make the proposed constitution of an appellate chamber impossible.

Ultimately, the proposed reforms will detract from the desired “streamlined and efficient organisational structures capable of achieving cost savings whilst improving service delivery”<sup>9</sup> – which is the goal of the restructuring process proposed by the Ad hoc Ministerial Committee on Institutional Reform.

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## Why the proposed restructuring of the ECOWAS Community Court of Justice should be reconsidered

### 1. *The purpose of the restructuring is inconsistent with the Court’s purpose and role*

According to the terms of reference for the Consultants on Institutional Reform at the ECOWAS Commission, the rationale for the consultancy and eventual restructuring of the ECOWAS Commission is to contribute to the Treaty objectives of integration across the region. This objective however provides a very narrow scope for the evaluation of the efficiency of the ECCJ as an institution of the ECOWAS Commission, and does not take into consideration the evolution of the ECOWAS Community court of Justice from a tribunal established to solely help build a common market, to an international human rights court.

We would like to highlight that if the Community Court’s performance is measured against its original professed role, then the Court will be found lacking, mainly because the initial set up of the ECOWAS Court by West African States allowed for the persistent flouting of community economic rules, which in turn have resulted in the ECOWAS region making very little progress toward its professed goal of regional economic integration.<sup>10</sup>

Additionally, the performance of the court as an international tribunal fails to take into consideration the fact that since its establishment ECOWAS member states have yet to challenge barriers to intraregional trade before the ECCJ – which have made that jurisdiction of the court dormant, and also do not provide a basis for assessing the Court’s contribution to establishing a common market.

### ECCJ’s performance as a Facilitator for creating a common Market

The court’s performance is difficult to measure, because quantifying the outputs the court is expected to produce is complicated: “we can easily count case dispositions, but appraising the quality of justice is more subjective.”<sup>1</sup>

As a State funded service provider, the ECCJ suffers the same administrative challenges that other government service providers face including insufficient resources (financial and human) – in addition to unique management challenges, namely:

- Judges must work within the limits of due process requirements;
- Judges have minimal control over state actors upon whom they depend to handle their caseload, or the number of cases that enter the court.

This dormant jurisdiction notwithstanding the ECCJ has continued to remain relevant through its repurposing as an international human rights court which set the stage for the Court's high performance as discussed below.

## *2. The track record of the ECOWAS Community Court of Justice*

As noted above, the ECCJ as an international human rights court on the continent, provides citizens of West African member states an additional independent supra-national mechanism through which they can seek remedy for human rights violations.

Since acquiring jurisdiction over human rights complaints in 2005, the ECOWAS Community Court of Justice has issued 135 judgements<sup>11</sup> condemning human rights violations by member states. Among some of the Court's progressive jurisprudence are judgments against Niger for condoning modern forms of slavery<sup>12</sup> and that blanket amnesties deny victims the right to access remedies;<sup>13</sup> Nigeria for impeding support for the free basic education for all children,<sup>14</sup> and for failing to hold oil companies accountable for environmental pollution.<sup>15</sup>

Most recently the ECCJ reasserted itself as a women's rights promoter on the continent when it ruled that a domestic violence case against Nigeria was admissible;<sup>16</sup> and found Nigeria responsible for cruel, inhuman and degrading treatment, violating the right to freedom of movement, and dignity of women in the landmark "prostitution allegation" case.<sup>17</sup> It can be concluded that the Court has used individual cases to strategically speak to regional situations.

From the fore going, it is noted that the ECOWAS Community Court of Justice – as an institution of the ECOWAS Commission – has in fact proven, through its track record, that it is deserving of commendation and further strengthening – instead of the proposed reduction of judges, which will undermine the court's effectiveness to the point of weakening the ECCJ as an international court.

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## **Conclusion**

The proposed restructuring of the ECOWAS Commission although commendable and noble – as it relates to ensuring efficiency and results; is misguided and will in fact detract from the objectives of restructuring if the recommendation for the reduction of judges for the ECCJ is implemented.

It is highlighted that the establishment of the ECCJ although aimed at facilitating the establishment of a common market, the repositioning of the court ensured the continued relevance of the Court even in the face of the non-progress in the common market establishment.

Additionally, the Court has a proven track record as an international human rights court with judgements that show that the Court is developing a growing jurisprudence and tackling some of the key human rights issues under the African Charter; and that the Court has also adjudicated substantive issues like the justiciability of socio-economic rights in a region plagued with poverty and slavery – a detrimental practice which persists in several West African countries.

Therefore, the proposed reduction number of judges would not only weaken the court, but would also make the court inefficient. We therefore call upon the ECOWAS Commission to consider the recommendation of the ad hoc ministers' meeting with a view of retaining and/or increasing the current number of judges for a more efficient and effective Community Court.

We also call upon member states to: (1) financially support the court; (2) ensure greater cooperation with the court; and (3) ensure the implementation of the court's judgements. This would in turn address the main challenges that the court faces currently.

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<sup>1</sup> Economic Community of West African States (ECOWAS), *Revised Treaty of the Economic Community of West African States (ECOWAS)*, 24 July 1993, available at: <http://www.refworld.org/docid/492182d92.html>

<sup>2</sup> ECW/CCJ/APP/01/03 – ECW/CCJ/JUD/01/04 (2004 – 2009) CCJELR in this case the court underscored the shortcomings of the omission of direct individual access of the court

<sup>3</sup> Under Article 19 of the Supplementary Protocol A/SP.1/01/05 the court can apply the body of laws contained in Article 38 of the Statute of the International Court of Justice. It is also noted that the Community court does not apply a specific human right catalogue

<sup>4</sup> The community court is the only international human rights courts that does not condition admissibility on the applicant's exhaustion of domestic remedies. See Article 10(d) of the Supplementary Protocol A/SP.1/01/05

<sup>5</sup> Article 26(2) the Supplementary Protocol A/SP.1/01/05

<sup>6</sup> Maxwell Stamp PLC, "Reform of the Structure, Policies, Procedures, and Practices within ECOWAS Institutions", (Organizational Structure Report, Prepared for ECOWAS Commission) (May 2017) p.18

<sup>7</sup> ECOWAS, Memorandum on the ECOWAS institutional Reform Project, The Ad Hoc Ministerial Committee on Institutional Reform (2017) ECW/AHMCIRI/II/2, p.14

<sup>8</sup> A. Salau and C.A. Oloyede, "Economic Reason not Enough to Dismantle ECOWAS Court" (Daily Trust, October 10, 2017) available at: <https://www.dailytrust.com.ng/-economic-reason-not-enough-to-dismantle-ecowas-court.html>

<sup>9</sup> Ibid p. 3

<sup>10</sup> Trade Flows among West African nations remain extremely low; tariffs, customs regulations, non-tariff barriers, and roadblocks hinder cross-border economic transactions

<sup>11</sup> A list of all judgments and rulings of the ECOWAS Court, as well as copies of selected decisions, are available on the Court's website. ECOWAS Community Court of Justice, List of Decided Cases from 2004 Till Date, available at [http://www.courtecowas.org/site2012/index.php?option=com\\_content&view=article&id=157&Itemid=27](http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27)

<sup>12</sup> *Dame Hadijatou Mani Koraou v Republic of Niger* (2008) ECW/CCJ/JUD/06/08

<sup>13</sup> *Sidi Amar Ibrahim and Another v Republic of Niger* (2011) ECW/CCJ/JUD/02/11

<sup>14</sup> *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria*, Preliminary ruling (2010) ECW/CCJ/JUD/07/10

<sup>15</sup> *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) SERAP v the Federal Republic of Nigeria*, Judgment ECW/CCJ/JUD/18/12 of 14 December 2012

<sup>16</sup> *IRDA & WARDC on behalf of Mary Sunday v. The Federal Republic of Nigeria*, Admissibility Ruling ECW/CCJ/APP/26/15, 24th January 2017

<sup>17</sup> *Dorothy Chioma Njemanze et al v. The Federal Republic of Nigeria*, Judgment, ECW/CCJ/JUD/08/17