Symposium VII: The Economic Community of West African States in its Fifties – Exploring Implied Consent to Treaties as the Basis of the ECOWAS Court's Jurisdiction over Member States that are not Signatories or Parties to the Court's Protocols

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I. Introduction

Under the relevant rules of the law of treaties as provided for in Article 11 of the Viena Convention on the Law of Treaties (VCLT), a state's consent to be bound by a treaty "may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." It appears from the text of Article 11 of the VCLT that expression of consent to a treaty must generally be by means of an express or overt act, notice of which must be given, or received by, the other parties to the treaty.

In contrast to the above legal position, the practice of some ECOWAS Member States in relation to Protocols governing the ECOWAS Court of Justice raises the question of whether a state's consent to be bound by a treaty may be implied from its conduct. Of particular interest in this regard, is the Republic of Cape Verde. As of 2025, it has not ratified either the 1991 Protocol of the ECOWAS Court or the 2005 Supplementary Protocol that expanded the jurisdiction of the Court to include adjudication of human rights cases. Yet, with just about one exception, Cape Verde has generally not contested the jurisdiction of the Court. Indeed, it has recently filed an application in the Court against the ECOWAS Parliament challenging the 2024 election of the Speaker and other leaders of the ECOWAS Parliament. See *Republic of Cape Verde v ECOWAS Parliament* [ECW/CCJ/APP/27/24]. Additionally, it has always exercised its option to nominate a judge to the ECOWAS Court whenever it has been allocated a slot.

Slightly similar to Cape Verde, Guinea Bissau has ratified the 2005 Supplementary Protocol of the ECOWAS Court but not the 1991 Protocol, which actually established the Court. Despite this, Guinea Bissau routinely defends cases brought against it in the Court. Several other Member States have signed but not ratified the 2005 Supplementary Protocol of the Court, which has been applicable provisionally since January 2005. They continue to participate in the Court through the nomination of judges and participation in proceedings, albeit with isolated protests by some to the Court's jurisdiction for non-ratification or non-domestication of the Court's Protocol.

This essay seeks to determine whether the concept of implied consent could offer a conceptual justification for the exercise of the ECOWAS Court's jurisdiction over Member States that have either not signed or ratified the relevant Protocols governing the Court's jurisdiction.

II. The Conduct of ECOWAS Member States in Relation to Treaties Governing the Jurisdiction of the ECOWAS Court

(a) Conduct of Member States concerning the Adoption and Ratification of the ECOWAS Court Protocols

In 1975, West African States met in Lagos, Nigeria and adopted the Treaty on the Economic Community of West African States, informally known as the Lagos Treaty, to create the ECOWAS. The Lagos Treaty provided for a Tribunal to be responsible for the interpretation and application of the Treaty and other ECOWAS legal texts in the resolution of disputes among the Member States. Eventually in 1991, the Protocol relating to the Community Court of Justice was adopted to establish and operationalize what is now the ECOWAS Court of Justice. Article 34 of the Protocol provided that it would come into force upon ratification by seven Member States; however pending its entry into force, the Protocol would apply provisionally upon signature. The Protocol entered into force in 1996 after attaining the minimum ratifications.

In 2001, the Court became operational after the first judges of the Court were appointed and sworn into office. However, the Court was hardly active in its early years. Member States and ECOWAS Institutions that had access to the Court had not invoked the Court's jurisdiction in any contentious case or sought an advisory opinion. By 2005, the only cases the Court had received were two individual applications that were dismissed on grounds that the Court was not open to individuals to present cases. This prompted a rethink of the design and mandate of the Court leading to the adoption in January 2005 of a Supplementary Protocol that amended the 1991 ECOWAS Court Protocol and expanded the Court's jurisdiction. In addition to disputes involving member states and/or ECOWAS institutions and requests for advisory opinions by member states or ECOWAS organs, the Court was granted jurisdiction in ECOWAS staff matters, arbitration, and human rights. The Supplementary Protocol was to apply provisionally upon signature, and definitively enter into force upon ratification by 7 Member States.

As of 2025, all Member States except Cape Verde and Guinea Bissau have ratified the 1991 Protocol of the Court. However, of the current 12 ECOWAS Member States, only Liberia and Sierra Leone have ratified both the ECOWAS

Court Protocol 1991 and the 2005 Supplementary Protocol. Nigeria, Benin, Togo, Ghana, Cote d'Ivoire, Guinea, Senegal and the Gambia have ratified the 1991 Protocol, but not the 2005 Supplementary Protocol which has been provisionally applicable to them since signing it in 2005. In 2014, Guinea Bissau ratified the 2005 Supplementary Protocol leaving the substantive Protocol which applies to it provisionally. Cape Verde has not ratified the 1991 Protocol, and has also neither signed nor ratified the 2005 Supplementary Protocol. However, given that it has signed the 1991 Protocol, it is applicable to it provisionally.

(b) Consent to Treaties and Challenges to the Court's Jurisdiction

The attitude of Member States to the jurisdiction of the Court has been one of general acceptance with occasional protest in some cases. Grounds of contesting the Court's jurisdiction have ranged from non-domestication of a Protocol of the Court into national law, to not signing or ratifying a relevant Protocol of the Court.

In at least two cases, *Moukhtar Ibrahim Animu v Nigeria* [2011] CCJELR 177 and *The Trustees of the Jama'a Foundation v Nigeria* [2012] CCJELR 317, Nigeria contested the jurisdiction of the Court on grounds that the 2005 Supplementary Protocol that granted the Court human rights jurisdiction had not been domesticated into Nigerian law. Nigeria argued in those cases that by Section 12(1) of its Constitution, a treaty does not have the force of law unless it has been enacted into law by the National Assembly. It therefore contended that since the 2005 Protocol of the Court had not been enacted into national law, Nigeria was not subject to the Court's human rights jurisdiction. In both cases, the Court dismissed the objection to its jurisdiction. It held that domestication was a matter of Nigeria's internal legal requirement which could not be pleaded to avoid its international obligation under the Protocols of the Court and the ECOWAS Revised Treaty.

The more serious challenges to the Court's jurisdiction have been by Member States who have argued that they were not bound by the 2005 Supplementary Protocol either because they have not signed or ratified it. In the case of *Hans Capehart Williams v Liberia & Others* [2015] CCJELR 471, the Applicants had been convicted of murder by a Liberian court. They alleged that their conviction

and sentence which was based on defective and fabricated evidence was a violation of their rights to life, fair trial and freedom of movement. Liberia argued that the Court had no jurisdiction in the matter because it had not ratified the 2005 Supplementary Protocol of the Court. The Court dismissed the objection. Relying on the rules of the VCLT, the Court noted that signature was one of the means by which states may bind themselves to treaty obligations. The Court noted that Liberia signed the Supplementary Protocol on 19 January 2005. Per Article 11(1) of the Protocol, Member States had agreed that it would apply provisionally from the date of signature. Accordingly, the Court held that it had jurisdiction over the case.

In the case of *Alex Saab Moran v Cape Verde*, [ECW/CCJ/APP/43/20] a Venezuelan diplomat *en route* to Iran was arrested in Cape Verde when the aircraft on which he was traveling made a stop in the country to refuel. The United States had requested the arrest and extradition of Mr. Saab to the United States for alleged crimes committed by him under U.S. law. Mr. Saab filed an application before the ECOWAS Court alleging, among others, the violation of his right to liberty. Cape Verde contested the personal jurisdiction of the Court on grounds that it had neither signed nor ratified the 2005 Supplementary Protocol of the Court. During a hearing on provisional measures, the Court found that it had *prima facie* jurisdiction over the subject matter of the application. It ordered that Mr. Saab be placed under supervised home detention pending the hearing of the substantive application, but did not frontally address the question of personal jurisdiction raised by Cape Verde. At the merits stage of the proceedings, the Court again avoided the jurisdictional question raised and relied on its prima facie finding of subject matter jurisdiction in the ruling on provisional measures. Cape Verde refused to honour the orders of the Court in the *Alex Saab* case. It based its refusal on the ground that it had neither signed nor ratified the 2005 Supplementary Protocol of the Court and was, therefore, not subject to the Court's jurisdiction. Nor was it obliged to enforce its orders.

Following its frosty relations with the African Court that led to the withdrawal of its declaration allowing individuals and NGOs to submit cases to the African Court, the ECOWAS Court became the next target for Benin's backlash against (sub)regional courts. For many years, Benin had recognised the ECOWAS Court's jurisdiction and nominated judges to the Court. However, it decided to

no longer do so. In *Africa Agro-Industries Benin SA v Republic of Benin* [ECW/CCJ/JUD/13/24] an Italian investor whose permit to set up a cotton factory in Benin was revoked submitted a case to the ECOWAS Court. Among others, he alleged the violation of his property rights. In its defence, which addressed only jurisdiction, Benin submitted that it was not subject to the Court's jurisdiction as the 2005 Supplementary Protocol of the Court had never been ratified nor published in its official Gazette in accordance with its Constitution. It cited in support of its argument, a decision of the Benin Constitutional Court. The Constitutional Court had ruled that because Benin has never officially ratified the 2005 Protocol in accordance with its Constitution, all decisions of the ECOWAS Court made pursuant to the Protocol are null and void relative to Benin. Accordingly, successive governments of Benin had acted unconstitutionally by heeding decisions or orders of the ECOWAS Court.

The Applicant counter-argued that because Benin has ratified the 1993 ECOWAS Revised Treaty, Article 15 of which establishes the Court, as well as the 1991 Protocol of the Court which governs the Court's jurisdiction, Benin was a de facto member of the Court. Further, that by Articles 45 and 46 of the VCLT, Benin could not, by virtue of its Constitution, plead the inapplicability of the 2005 Supplementary Protocol since it had tacitly accepted the Court's jurisdiction consistent with the principle of *forum prorogatum*.

In its decision on the objection to jurisdiction, the Court noted that a state may not invoke its internal law as an excuse to avoid its international legal obligations. Accordingly, Benin could not invoke its constitutional provisions to derogate from international obligations it has freely contracted. The Court observed that by Articles 11 and 12 of the VCLT, signature is a means of consenting to treaty obligations. Therefore, since the 2005 Supplementary Protocol provides that it would enter into force provisionally upon signature of Member States, and Benin had signed the Protocol, it was bound by it and could not deny the Court's jurisdiction in the case.

III. Implied Consent to Treaties and the ECOWAS Court's Jurisdiction over Member States that are not Signatories or Parties to Relevant Protocols

The evolution of treaty law, particularly with the adoption of the VCLT, reflects a significant shift from rigid formalism to a more flexible approach in how states express their consent to be bound by treaties. Historically, treaty-making was characterized by traditional formalities that required explicit consent through signature or ratification, which often led to delays and limited participation. The VCLT aimed to address these inefficiencies by allowing for various means of expressing consent, as articulated in Article 11, which permit states to agree on alternative methods beyond the conventional formalities. The theoretical debate surrounding this shift centres on the legitimacy and propriety of less formal means of consent, such as tacit or implied acceptance. Proponents of formalism argue for the necessity of clear, explicit expressions of consent to ensure juridical security and predictability in international relations. They contend that formal procedures, like ratification, safeguard state sovereignty and maintain a communicative element essential for mutual understanding among states. This perspective emphasizes the importance of established norms, and the risks associated with ambiguity in consent.

Conversely, advocates of flexibility argue that the contemporary geopolitical landscape demands a more dynamic approach to treaty-making. They assert that the traditional formalities can hinder timely and effective law-making, particularly in a rapidly changing world. This school of thought posits that flexibility does not undermine state sovereignty; rather, it enhances consensualism by allowing states to develop innovative and efficient means of treaty-making. To them, international law should evolve to accommodate the realities of state practice, which often exceeds the confines of the VCLT. Consequently, by this approach, the VCLT does not exclude the possibility of tacit consent when a state's conduct indicates a clear intention to accept treaty obligations.

To a limited extent, the contention between some ECOWAS Member States and the ECOWAS Court regarding the latter's jurisdiction in the absence of signature or ratification of relevant Protocols could be said to mirror the formalist and non-formalist approaches to treaty making. While Member States' objection to jurisdiction in this context appears to be grounded in the formalist viewpoint, the Court's treatment of its jurisdiction seems to reflect the flexible or non-formalist view on expressing consent to treaties. In the *Han Capehart* and *Africa Agro-Industries* cases, the Court demonstrates a willingness to interpret its

jurisdictional provisions broadly to address alleged violations, even if it means overriding Member States' legal arguments concerning procedures and formalities on treaty ratification. While this approach is essential for the court to function as an effective protector of human rights within the region, it also raises legitimate questions about the balance between international judicial authority and the sovereignty of member states, potentially leading to critiques regarding perceived overreach in certain instances. Nevertheless, the Court's decisions in the *Han Capehart* and *Africa Agro-Industries* cases were rightly decided. Liberia and Benin have signed the 2005 Supplementary Protocol which is provisionally operational and, therefore, fully binding on them as if it had entered into force. Furthermore, it may be argued that the Court's assumption of jurisdiction in both cases was a necessary measure to preclude the Respondents from circumventing accountability for human rights violations pending the domestic ratification of the Protocol (after signature), a procedure which may be protracted.

In contrast, the *Alex Saab* case presents a different scenario regarding jurisdiction. Here, jurisdiction was assumed without any extensive discussion, as according to the Court, no objection was filed by Cape Verde. However, a perusal of the pleadings filed in the case shows that an objection was in fact raised. Thus, the Court's assumption of jurisdiction without specifically addressing the issue of personal jurisdiction raised by Cape Verde was unfortunate. As a principle of international law and in line with best judicial practice, an international court cannot exercise jurisdiction over a state without the latter's consent. Therefore, a court must satisfy itself that it has jurisdiction over a state, whether the state challenges its jurisdiction or not.

In the *Alex Saab* case, even if there was no objection to jurisdiction, the Court should have raised and addressed the issue *suo motu*, considering that Cape Verde had neither signed nor ratified the 2005 Supplementary Protocol. Indeed, taking account of factors such as Cape Verde's nomination of a judge to the Court, the Court could have premised its jurisdiction on the concept of implied consent and noted that Cape Verde has, by unequivocal conduct, accepted its jurisdiction under the Protocol. Other bases of jurisdiction including the doctrine of *forum prorogatum* raised by the Applicant could also have been explored. This would have brought better clarity to the legal basis on which the court assumed jurisdiction.

As it stands now, the Court's reason for assuming jurisdiction over Cape Verde in the case is very laconic, and this casts much doubt on its propriety under international law. If presented with an opportunity to revisit the issue in the future, the Court must rise to the occasion. The concept of implied consent to treaties may prove useful in providing a conceptual justification for the Court's assumption of jurisdiction over such Member States that are not signatories or parties to relevant Protocols of the Court.

POSTSCRIPT: In December 2025, the ECOWAS Authority of Heads of State and Government adopted Supplementary Act SA.1/12/25 Relating to the Community Court of Justice ("ECOWAS Court Supplementary Act 2025"). The new Supplementary Act consolidates the 1991 ECOWAS Court Protocol and the 2005 ECOWAS Court Supplementary Protocol. Cape Verde and eight other Member States have signed the Supplementary Act, while Benin, Guinea-Bissau, and Togo have not. In a forthcoming expanded paper on this topic, the authors analyse the extent to which the new Supplementary Act affects the Court's jurisdiction over Member States that did not sign or ratify the two Protocols on the Court that have now been consolidated.

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