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Preliminary Ruling: East African Court of Justice (EACJ)

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A. Introduction

1 The → *East African Court of Justice (EACJ)* is the principal judicial institution of the → *East African Community (EAC)*. Its establishment and history are embedded in the African political and economic integration process (Viljoen and Baimu, 2004, 242). The Heads of State and Government of Kenya, Uganda, and Tanzania, on 30 November 1999, signed the Treaty for the Establishment of the East African Community ('EAC Treaty'). The EAC Treaty entered into force on 7 July 2000. It is important to note that this was the second attempt at forming an East African Community, as the first attempt failed in 1977 (Gathii, 2011, 40). The EAC Treaty was subsequently amended twice: on 14 December 2006 and 20 August 2007. The EAC currently has eight partner states: Burundi, Rwanda, Kenya, Tanzania, Uganda, South Sudan, Somalia, and the Democratic Republic of Congo ('DRC').

2 The partner states of the EAC established the EACJ as one of the organs of the EAC under Article 9 (1) (e) EAC Treaty. The EAC Treaty mandates the EACJ to ensure adherence to the law in the interpretation, application, and compliance with the EAC Treaty (Art 23 EAC Treaty). The EACJ became operational or was inaugurated on 30 November 2001 and heard its first case in 2005 (Fact Sheet: East African Court of Justice, 2013). The EACJ has contentious and advisory jurisdictions (Arts 27–36 EAC Treaty). In both instances, its primary role is interpreting and applying East African Community treaties (Art 27 EAC Treaty). In its original structure, the EACJ had one chamber whose decisions were final without the opportunity for appeal (EACJ User Guide, 2014, 3). However, amendments to the EAC Treaty that came into effect in March 2007 created an Appellate Division, making the EACJ a two-chamber Court with a First Instance Division and an Appellate Division (Art 23 (2) EAC Treaty; Gathii, 2018, 60). The First Division is comprised of ten judges, initially two from each of the former five EAC partner states. However, now this will change possibly on a rotation system with the addition of South Sudan into the EAC (Art 24 (1) EAC Treaty; Communiqué of the 18th Extra-Ordinary Summit of the East African Community Heads of State, 2021). The Appellate Division is comprised of five judges, one from each of the former five partner states (Art 24 (1) EAC Treaty; Gathii, 2018, 60). This number of judges could change with the addition of South Sudan and DRC into the Community.

3 The current location of the EACJ is Arusha, in the Republic of Tanzania. This location is deemed to be temporary since the Summit, the highest organ in the EAC (Art 10 EAC Treaty; Gathii, 2018, 60) has not yet determined a permanent seat for the EACJ (Art 47 EAC Treaty). The Summit also appoints judges to the Court (Art 24 EAC Treaty). Other than the President of the Court, who also heads the Appellate Division, and the Principal Judge of the First Instance Division (Art 24 (10) and Art 24 (8) EAC Treaty) the judges do not reside in Arusha (EACJ, Principle Judge Now Full-time in Arusha). They come to Arusha when there is a prescheduled convening of Court business. Judges hold office in the EACJ for seven years (Art 25 (1) EAC Treaty) and must retire at 70 years of age (see Art 25 (2) EAC Treaty).

4 As noted above, the EACJ primarily has jurisdiction 'over the interpretation and application' of the EAC Treaty (Art 27 (1) EAC Treaty). The EAC Treaty also provides that the EACJ 'shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date' (Art 27 (2) EAC Treaty). The Heads of State at the 15th Ordinary Summit of the EAC's Heads of State on 30 November 2013, decided to defer giving the EACJ jurisdiction over human rights and to instead consult with the → *African Union (AU)* on the matter (Communiqué of the 16th Ordinary Summit of the East African Community Heads of State, 2015). However, the Summit extended the court's jurisdiction over trade and investment cases and cases arising under the EAC's Monetary Union Treaty. The Court also has jurisdiction over disputes between the EAC and its employees (Art 31 EAC Treaty); arbitral disputes arising from commercial contracts between private parties; and agreements to which the EAC, any of its

institutions, or EAC partner states are parties if an arbitration clause in such a contract or agreement confers such jurisdiction (Art 32 EAC Treaty). Any EAC resident can bring cases to the EACJ (Art 30 (1) EAC Treaty). Such a suit can only be filed against one of the EAC partner states or an institution of the EAC for a declaration that its conduct is inconsistent with the EAC Treaty (Art 30 (1) EAC Treaty).

5 Often forgotten due to its scarcity of use is the jurisdiction of the EACJ over preliminary references or rulings from national courts (Art 34 EAC Treaty). This entry will focus on this provision as the basis of the EACJ's jurisdiction over preliminary references or rulings. The entry is divided into four main sections. The first section starts with the conceptual origins of preliminary rulings and relates this discussion to the EACJ. The second section then offers an in-depth analysis of the leading and only preliminary ruling in EACJ in the case *Attorney General of the Republic of Uganda v Kyahurwenda*, 2015 ('*Kyahurwenda*'). The third section analyses the procedural rules and practices governing preliminary rulings in the EACJ as provided in the Guidelines on a Reference from National Courts for a Preliminary Ruling ('EAC Preliminary Reference Guidelines'). The fourth and final section then offers three initial reasons for the paucity of preliminary rulings in the EACJ.

B. Conceptual Origins of the Preliminary Ruling Jurisdiction

6 The preliminary ruling procedure is primarily a scheme of collaboration and cooperation between two different judicial systems (→ *Preliminary ruling: European Court of Justice (ECJ)*). For international courts and tribunals (→ *International Courts and Tribunals, Procedure*), it is a procedure that allows national courts to collaborate, cooperate, and dialogue with international courts in the interpretation of especially international or community law. It is a request from the national court of a partner state or member state of a community court to the community court for an authoritative interpretation of community law, whether act or decision, or the validity of the act or decision (Broberg and Fenger, 2021, 1). Mandate designers of international law institutions, especially the integration schemes of regional economic communities, easily envision the procedure as a scheme of non-hierarchical and horizontal collaboration between national and international courts (Corrias, 2011, 117). The procedure originates from European Union ('EU') law, specifically Article 267 Treaty on the Functioning of the European Union, 2007 ('TFEU'). The EU system borrowed it from similar civil law-based procedures in Italian and German law where certain matters are referred to the constitutional court for a preliminary ruling (Broberg and Fenger, 2021, 3).

7 The rationale for the procedure is based on the simple idea that most EU law is enforced and applied within the member states (Cuyvers, 2017, 275). This position means that domestic courts in the EU share the competence to 'enforce and apply' but not necessarily to 'interpret' EU law with the Court of Justice of the European Union ('CJEU'). In many instances, domestic courts are the first port of call for domestic litigants, even on EU law matters. The CJEU has deployed the preliminary reference procedure to ensure clarity and uniformity of interpretation within the EU (Wahl and Prete, 2018, 512). The CJEU and EU member states' national courts have deployed the preliminary ruling procedure so effectively that some commentators have described it as the 'jewel in the crown' of the CJEU's jurisdiction (Craig and Burca, 2008, 460; Craig, 2001, 559).

8 It is essential to mention that the preliminary reference procedure of the EACJ, in many respects, resembles the corresponding EU procedure (Ugirashebuja, 2017, 262). Nevertheless, while the EU's preliminary procedure has been deployed effectively to fashion and enhance EU law, the EACJ procedure has had limited use. Despite the EACJ setting up sub-registries in the national courts of its partner states, litigants have not yet widely activated this procedure (Nalule, 2018, 6). Since its operationalization in 2001, the

EACJ has only received two preliminary ruling requests. The first was submitted by the High Court of the Republic of Kenya in 2011 (*Saida Rosemary & Hassan Elijuma Agade v Commissioner of Police, Commandant Anti-Terrorism Police Unit and Attorney General of the Republic of Kenya*, 2011 ('*Saida Rosemary and Hassan Elijuma Agade*')). The second was submitted by the High Court of the Republic of Uganda in the proceedings between the Attorney General of the Republic of Uganda and Tom Kyahurwenda on 31 July 2015 (*Kyahurwenda*). This second preliminary ruling was heard and finally determined by the Court. The EACJ stayed the first because the Kenyan High Court judge who requested a preliminary ruling had been removed from office, and the Court decided to await further directions from the Kenyan High Court (Lando, 2017, 59). The Kenyan High Court has not given directions on the matter to date. This apathy and the use of a non-existent procedural technicality by the EACJ is a manifestation of the lack of legal and political collaboration between partner states' institutions and the EAC's institutions that has resulted in the limited use of the preliminary reference procedure.

C. The Leading Preliminary Reference Jurisprudence in the East African Court of Justice

9 In the Kenyan High Court preliminary reference in the *Saida Rosemary and Hassan Elijuma Agade* case, it is unfortunate that the case was never heard and determined based on a non-existent procedural technicality. The matter is especially dire when the importance of the substantive facts is considered. The petitioners in the Kenyan High Court were representatives of Hussein Hassan Agade, Idris Magondu, and Mohammed Adan Abdow, who were rendered from Kenya to Uganda as terror suspects responsible for the World Cup final bombings that took place in July 2010 in Kampala, Uganda (Counterterrorism and Human Rights Abuses in Kenya and Uganda: The World Cup Bombing and Beyond, 2013). The petitioners made *habeas corpus* applications to the Kenyan High Court for these individuals who had been arrested as terror suspects. Since part of the defence of the Kenyan authorities was that the renditions were conducted pursuant to EAC law, the preliminary reference to the EACJ would have presented an excellent opportunity for the Court to lay down the law on such renditions that did not follow the legal channels of criminal extradition under the Extradition (Contiguous and Foreign Countries) Act (Kenya) Cap 76, 1966.

1. Tom Kyahurwenda v Attorney General of the Republic of Uganda

10 Despite the apparent failure in the *Saida Rosemary and Hassan Elijuma Agade* case, the EACJ got the opportunity to render its first ruling on a preliminary reference in 2015 in *Kyahurwenda*. The preliminary ruling arose from a miscellaneous application before the High Court of Uganda arising from the case *Kyahurwenda v Attorney General of the Republic of Uganda*, 2012 (*Kyahurwenda*, para 1). Tom Kyahurwenda, a former member of parliament in Buhanguzi County, had sued the Ugandan Attorney General for malicious prosecution linked to the alleged murder of his sister, Margaret Nusungwa (Mbila, 2020, 136). Tom Kyahurwenda lodged a civil appeal against his criminal prosecution, claiming that the defendant's actions caused him injury, loss, and financial damage. He claimed the action breached Articles 6, 7, 8, and 123 EAC Treaty. He, therefore, sought monetary compensation for loss, injury, and damage consequent upon the non-compliance with the EAC Treaty and the East African Community Act (Uganda) No 13 of 2002 (*Kyahurwenda*, para 3).

11 On 6 December 2012, the Attorney General of Uganda made an application in the case, requesting the Ugandan High Court to transmit the following two questions to the EACJ:

(i) Whether the provisions of Articles 6, 7, 8, and 123 read together with Articles 27 and 33 [EAC Treaty] are justiciable in the National Courts of Partner States; and,

(ii) Whether the provisions of Articles 6, 7, 8, and 123 read together with Articles 27 and 33 [EAC] Treaty confer sufficient legal authority on the National Courts of Partner States to entertain matters relating to Treaty violations and award compensation and/or damages against a Partner State (*Kyahurwenda*, para 4).

The High Court of Uganda referred both questions to the EACJ, requesting a preliminary ruling.

12 The EACJ first considered whether national courts could interpret the EAC Treaty and annul EAC acts, regulations, directives, and actions. Essentially the question was whether the national courts of partner states shared interpretative—and possibly application—jurisdiction with the EACJ over the EAC treaty. The EACJ concluded that it had exclusive interpretative jurisdiction but not application jurisdiction, which it shared with the national courts of the partner states. In other words, the EACJ had exclusive interpretative jurisdiction of the EAC Treaty, EAC acts, regulations, directives, and actions. It is valuable to break down the EACJ's reasoning in arriving at this conclusion. While the conclusion itself is plausible, the mode of reasoning and logic the EACJ applied can be criticized on some grounds. Below the steps of legal reasoning the EACJ undertook will be analysed and some criticisms of the interpretation and reasoning will be presented.

13 The starting point is the split in legal positions between the Republics of Uganda and Tanzania on one side and Kenya and the Secretary General of the EAC on the other. Uganda and Tanzania argued that the EACJ possessed exclusive interpretative jurisdiction over the EAC Treaty (*Kyahurwenda*, paras 12–14). Their argument was anchored on a reading of Article 27 (1) EAC Treaty that provides as follows:

> The Court shall initially have jurisdiction over the *interpretation and application* of this Treaty; Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States [emphasis added].

The EACJ did not offer the detailed arguments presented by the parties on the interpretation or analysis of this provision in their favour. As we will see below, the EACJ did not offer a robust interpretation of this provision in its analysis and findings. This provision would have provided an appropriate context for interpreting Article 34 EAC Treaty that was directly in question in this case.

14 The Kenyan and the Secretary General's legal positions were anchored on a cumulative reading of Articles 27 (1), 33 (2), and 34 EAC Treaty. Article 33 (2) states: 'Decisions of the Court on the *interpretation and application* of this Treaty shall have precedence over decisions of national courts on a similar matter' [emphasis added]. Article 34, which forms the crux of the case, additionally states as follows:

> Where a question is raised before any court or tribunal of a Partner State concerning the *interpretation or application* of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to

> enable it to give judgment, request the Court to give a preliminary ruling on the question [emphasis added].

The legal argument here is that Articles 27 (1) and 33 (2) should be interpreted to allow the national courts of partner states to concurrently interpret and apply the EAC Treaty together with the EACJ (*Kyahurwenda*, paras 15–27).

15 The EACJ began its analysis by correctly reiterating that it would engage in its herculean task of answering the first question on 'whether the provisions of Articles 6, 7, 8, and 123 read together with Articles 27 and 33 [EAC Treaty] are justiciable in the National Courts of Partner States' using the customary rules of interpretation in Articles 31 and 32 → *Vienna Convention on the Law of Treaties (1969)* ('VCLT') (*Kyahurwenda*, paras 33). The Court here slightly dovetailed into first answering a separate but related question, ie, which court(s) is mandated to interpret the EAC Treaty (*Kyahurwenda*, para 34). In other words, whether the interpretative jurisdiction of the EACJ is exclusive to the EACJ or is concurrently shared with the national courts of the partner states. Uganda and Tanzania had introduced a bifurcation between interpretation and 'enforcement'—the EACJ later uses 'application'—of the EAC treaty and argued that the interpretative jurisdiction is exclusively vested with the EACJ. Still, the enforcement jurisdiction is concurrently shared with national courts (*Kyahurwenda*, para 35). As argued below, this bifurcation quickly presents normative and interpretational difficulties since the provisions of the EAC Treaty in question all use the words interpretation and/or application together.

16 The EACJ then proceeded to 'concede' that 'on the face of it,' Article 33 (2) seems to allow for concurrent jurisdiction between the EACJ and partner states' national courts. The EACJ observed that the provision reinforces the Secretary General's view that the provision does not afford a monopoly of interpretation or application of the EAC Treaty to the EACJ (*Kyahurwenda*, para 37). A textual reading of this provision would show that the EAC Treaty's drafters envisioned that the EACJ would share its interpretative and application mandate with the national courts of partner states. The EACJ seemed to have been determined to carve out for itself an exclusive interpretative mandate contrary to the textual invocation of this provision, as it carefully begins the process of excluding the consequences of this provision. Without concluding what this 'face of it' reading implies or what effects it has, the EACJ immediately moved on to Article 34, arguing that only after examining this provision can an answer to the question 'by what courts is the treaty to be interpreted?' be offered (*Kyahurwenda*, para 38). What the EACJ ought to have done was to interpret the ordinary meaning(s) of the words in Articles 27 (1) and 33 (2) in their context and in light of the EAC Treaty's object and purpose conclusively before proceeding to Article 34.

17 The Court began its analysis of Article 34 by answering the question of what is 'any court or tribunal' in that provision. Thus, drawing inspiration from the CJEU in *Pretore di Salo v Persons Unknown* (1987), it found that 'any court or tribunals' is any entity that possesses the following attributes: 'established by law; have permanent existence; endowed with compulsory jurisdiction; have the ability to entertain procedures *inter partes;* apply rules of law; and, be endowed with functional independence' (*Kyahurwenda*, para 40). Since this issue was neither in question nor contested in this particular case, it is unclear why the EACJ thought it necessary to answer it. It is also unlikely that it would have assisted the EACJ in dealing with the specific issue of jurisdictional distinction that it was grappling with.

18 The EACJ then went to the specific text of Article 34 and presented the provision as correctly offering two separate procedural obligations. The EACJ found that the first part of the sentence, which uses the word 'shall' is a mandatory invocation directed at the national courts to transmit cases to the EACJ when the national courts or tribunals encounter a question of interpretation, application, or validity of EAC law (*Kyahurwenda*, para 41). The EACJ was also quick to note that the second part of the sentence using the words 'if it considers it necessary that a ruling on the question is necessary to enable it give judgment' gave further credence to the view of Kenya and the Secretary-General that the national courts have 'a wide → *margin of appreciation*' on whether to refer a matter of interpretation and application to the EACJ (*Kyahurwenda*, para 42). The EACJ then set out to determine the scope of discretion afforded to national courts under the second procedural requirement. It observed that in the absence of the second procedural requirement and with the use of the word 'shall' in the first, then it would have been clear that the national courts and tribunals would have no discretion whatsoever in matters of the interpretation and application of the EAC treaty and on the validity of regulations, directive, decisions, and actions of the EAC (*Kyahurwenda*, para 44).

19 In turning to the nature of the discretion introduced by the phraseology in the second procedural requirement, the EACJ reverted to the EU. The EACJ cited Article 234 Treaty establishing the European Community ('TEC'), which previously provided preliminary references in the EU. This reference to the TEC is, unfortunately, an erroneous reference. The EACJ writing in 2015 ought to have noticed that the TEC was renumbered by the → *Lisbon Treaty* that entered into force on 1 December 2009 and which renamed the TEC as the Treaty on the Functioning of the European Union ('TFEU'). Article 234 TEC was then renumbered to its present position at Article 267 TFEU. Admittedly, this error is only tenuous since the substantive content of the provision remains the same. But it does betray the EACJ's genuine desire for procedural cross-fertilization in an accurate and possibly context-specific manner. Notably, the EACJ correctly found that the texts of the provisions are dissimilar as Article 267 TFEU (ex Article 234 TEC) makes a distinction where a question of interpretation and validity is raised before lower courts and before the courts of last resort in EU member states (*Kyahurwenda*, para 45).

20 The Court then proceeded to approvingly cite Lord Denning's position in *Bulmer v Bollinger* (1974) on Article 177 TEC (now Art 267 TFEU ex Art 234 and for the EACJ Art 34) of the TFEU (*Kyahurwenda*, para 46). In *Bulmer v Bollinger*, Lord Denning made the point that using the emphatic word 'shall' meant the House of Lords of the United Kingdom did not have an option once a question of interpretation and validity was raised in domestic litigation. Based on this invocation, the EACJ stated that the drafters of Article 34 EAC Treaty also preferred the compulsive word 'shall' instead of the permissive word 'may' (*Kyahurwenda*, para 47). While the import of this usage would be evident by now and readily accepted by the parties, the EACJ did not make it apparent why it was emphasizing the point so labouredly. Recall that previously the EACJ had been on the analysis of how much discretion the national courts had under the second procedural invocation in Article 34 requiring them to request a preliminary ruling 'if [they consider] it necessary that a ruling on the question is necessary to enable it give judgment'. The EACJ then abruptly returned to the first procedural requirement without offering any reason. The EACJ did not frame the big question of whether the second procedural requirement includes an interpretative jurisdiction by the national courts of the partner states. Thus, without interpreting or analyzing this requirement's textual import, the EACJ moved on to the next

point on the significance of the preliminary ruling procedure. Thus, the EACJ explicitly avoided interpreting the second procedural requirement in Article 34.

21 The Court then described the preliminary reference procedure as the keystone of the arch that ensures that the EAC Treaty retains its Community character and is interpreted and applied uniformly with the objective of its provisions having the same effect in similar matters in all the partner states (*Kyahurwenda*, para 47). Specifically, the EACJ found that:

> In the absence of this procedure, it is possible that legions of interpretation of the same Treaty would emerge drifting hither and thither, aiming at nothing. This would at best create a state of confusion and uncertainty in the interpretation and application of the Treaty; and at worst, ignite an uncontrolled crisis which would destabilise the integration process. The situation could even be more disastrous were national courts and tribunals permitted to declare Community Acts, regulations, directives and actions invalid in the absence of a ruling to that effect by the East African Court of Justice (*Kyahurwenda*, para 48).

To bolster this position, the EACJ approvingly referred to the CJEU case of *Foto-Frost v Hauptzollamt-Ost* (1987).

22 The Court thus found that the resort to the word ‘shall’ and having regard to the *raison d’être* of the preliminary ruling procedure, it was the intent and purpose of the framers of the EAC Treaty to grant the EACJ exclusive jurisdiction concerning matters of interpretation of the EAC Treaty and annulment of EAC acts (*Kyahurwenda*, para 50). This conclusion is problematic and unpersuasive, especially noting the trajectory the EACJ took to arrive at it. But significantly, the EACJ’s reasoning has significant gaps and omissions going against the holistic interpretation required under Article 31 VCLT. The EACJ carefully ignored and omitted the textual and contextual implications of Articles 27 (1), 33 (2), and the second procedural requirement in Article 34 EAC Treaty for a broad invocation of *raison d’etre* of preliminary rulings. This omission leads to a non-holistic interpretation that concludes on the consequence of Article 34 in clinical isolation to other provisions in the EAC Treaty specifically pleaded by the parties in the case. The passing reference to Article 33 (2) in paragraph 37 of the case and then the quick move to Article 34 shows that the Court did not or was not willing to deal directly with this provision that is textually in favour of concurrent interpretation and application jurisdiction for the EACJ and national courts. The EACJ seems to have decided that it should have exclusive interpretative jurisdiction before engaging with these provisions directly. That conclusion would be reached even if it meant ignoring the textual invocations of the EAC Treaty.

23 As for Articles 27 (1) and 33 (2), the EACJ returned to them later in the judgment. It found that from its reading of the three provisions together, the framers of the EAC Treaty envisaged a situation where it is possible to contract out of the general norm of granting exclusive jurisdiction of interpretation of the EAC Treaty to the EACJ; and to give it instead, the concurrent jurisdiction of interpretation on given subject matter both to the EACJ and the national courts (*Kyahurwenda*, para 60). The reasoning here is flimsy, undeveloped, unpersuasive, and cursory. The EACJ does not mention on what textual basis it saw this contracting out possibility. It is unclear which specific subject matters, such as contracting out, would occur and whether such a scenario would itself be compatible with the EAC Treaty provisions. It is difficult not to reach the unenviable conclusion that the judges, instead of seeking to persuade our judgments, were aiming at coercing our wills and that of

the framers of the EAC Treaty to bend to their conclusion on exclusive interpretative jurisdiction.

24 Another significant concern with the Court's conclusion is the arguably uncritical reliance and borrowing of different though closely related textual language and jurisprudence from the EU and the United Kingdom. The idea of cross-fertilization of concepts, ideas, and jurisprudence between international courts and tribunals is highly welcome (→ *Judicial Cross-Referencing*). However, the EACJ here should have been more stingy in assessing the import of the textual language, jurisprudence, and policy implications of the preliminary reference procedure for the EU as compared to the EAC. While the EACJ noted the difference in textual language between the two provisions in the treaties it still went ahead to borrow very closely the jurisprudential implications of the EU provisions. This borrowing is especially accurate on what the EACJ calls the '*raison d'être*' of the preliminary reference procedure. This broad objective for uniformity and avoiding 'jurisprudential chaos' within domestic courts strongly swayed the EACJ to find that it had exclusive interpretative jurisdiction. A different *raison d'être* of the preliminary reference procedure would be collaboration, coordination, and dialogue between the EACJ and partner states' national courts. If this were taken as a given, like the EACJ takes the first objective of jurisprudential uniformity, it would have been possible to conclude that the EAC Treaty drafters intended the national courts of the partner states to exercise both interpretation and application jurisdiction concurrently with the EACJ.

25 Furthermore, even a faithful reading of the second limb of Article 34 would probably lead to a strong case of both concurrent interpretation and application jurisdiction. This limb requires that if the national court or tribunal considers its ruling on the question necessary to enable it to give judgment, it shall request the EACJ for a preliminary reference. The first obvious import of this provision is that it applies, or should be applied, before the first mandatory procedural requirement with the word 'shall' is applied. Secondly, the condition requires the national court to 'make an assessment' of whether the question would be one that would enable it to make a judgment. It is quite likely that the national court or tribunal would engage in the interpretation of the EAC Treaty or Community laws when 'making such an assessment'. This possibility goes to the difficulties of the bifurcation between interpretation and application, which is the next point the EACJ considers.

26 Recall that Uganda had argued that the EACJ should distinguish between interpretation and 'enforcement' and find that the interpretive jurisdiction is exclusive while the 'enforcement' jurisdiction is concurrent. This argument, unfortunately, does not have any textual basis from the EAC Treaty. Compared to the text of Article 267 TFEU that only uses the word 'interpretation,' the EAC treaty uses both 'interpretation' and 'application' in Article 34. This usage is tied to the first section of Article 34, which the EACJ found to be mandatory because of the word 'shall' The logical consequence of this reading would be that the exclusive jurisdiction of the EACJ mandate applies to both the interpretation and application of the EAC Treaty. Surprisingly, this is not the position that the EACJ arrives at. The EACJ finds in favour of Uganda that the exclusive jurisdiction only applies to interpretation and not the application.

27 The EACJ made this finding on the bifurcation between interpretation and application without distinguishing these two words as used in the provisions of the EAC Treaty. In its reasoning, the EACJ again went towards broad 'object and purpose', ie teleological

interpretation of a specific text, not the entire EAC Treaty, without addressing the issue of a lack of textual support:

> The Court deems it important to distinguish the application of the Treaty from interpretation of the same as found in Article 34. Whereas, as we held above, interpretation is the preserve of this Court, the same is not necessarily the case for the application of the Treaty by the national courts to cases before them. It would defeat the purpose of preliminary reference mechanism if the Court's interpretation of Article 34 of the Treaty extended to 'application of treaty provisions'. The purpose for the mechanism is for the national courts to seek interpretation of the Treaty provisions in order that they may then apply them to a case at hand. Hence, to interpret Article 34 as requiring '*application of the Treaty provision*' to be excluded from the purview of national courts would ***'lead to a result which is manifestly absurd or unreasonable'***. In this regard, Article 32 (b) of the Vienna Convention on the Law of Treaties cited above acknowledges an absurdity exception to the literal interpretation of any Treaty' (*Kyahurwenda*, para 51 [emphasis in original]).

The import of the above reasoning is that application comes after interpretation, and the EACJ can conduct the application without itself conducting the interpretation process. Additionally, in this instance, the EACJ arguably introduced another *raison d'être* of the preliminary ruling procedure, ie, 'communication between national courts and the EACJ' different from the one it used to justify its exclusive interpretative jurisdiction.

28 On the distinction between interpretation and application of treaty language, Gourgourinis has argued that the application of treaty norms can be divided into application *lato* and *stricto sensu*, ie, broad or narrow respectively (2011, 46). Citing McNair (1961, 365), who stated that the words 'interpretation' and 'interpret' are often used loosely as if they include 'apply' and 'application', although strictly speaking, when the meaning of a treaty is clear, it is applied, not interpreted. This view sees interpretation as a secondary process that only comes into play when the words in the treaty text are not plainly evident or when they are susceptible to different or multiple meanings (Pauwelyn, 2003, 244–47). Thus, in the broad sense, 'interpretation is one part of applying a rule, and it is present every time a rule has to be applied' (Gourgourinis, 2011, 47). In a strict sense, application occurs after the interpretative findings on rules relating to a specific set of facts to generate specific juridical results (Glass, 2000, 97). It is probably this second strict sense of application that the EACJ refers to in this case. But without analytically presenting the difficulties in assigning meaning to these words, it is not easy to know how the EACJ uses them.

29 The textual implications of Article 34 of 'concurrent jurisdiction' are said to lead to a manifestly absurd or unreasonable outcome. Under the schematic of Article 32 (b) VCLT, the EACJ should have proceeded to use supplementary means of interpretation to reach a different conclusion on the text of Article 34. Unfortunately, the EACJ didn't do this, nor in the circumstances, could do it since it had already concluded that the EACJ possesses exclusive interpretative jurisdiction. The reasoning here conflicts with the earlier reasoning by the EACJ that the object of the preliminary reference procedure is to ensure the 'treaty retains its community character and is *interpreted and applied* uniformly with the object of its provisions having the same effect in similar matters in all Partner States' (*Kyahurwenda*, para 48 [emphasis added]). If uniformity of interpretation justifies the end of exclusive interpretative jurisdiction, the EACJ does not tell us why it shouldn't also justify exclusive applicatory jurisdiction. The use of another purpose to justify concurrent jurisdiction in the

application of the EAC Treaty is an inverted use of the customary international law canons of interpretation in Articles 31 and 32 VCLT.

30 The EACJ then approvingly cited the *East African Law Society v Secretary General of the East African Community* (2013) decision and the early CJEU case *Van Gend Loos* (1963) for the proposition that national courts having jurisdiction to implement EAC law. The EACJ thus finds that it would be absurd if national courts and tribunals were to be excluded from the application of EAC Treaty provisions should the occasion arise before them (*Kyahurwenda*, para 51). This finding is another invocation of the absurdity position without applying the specific requirements of Article 32 VCLT. Therefore, preliminary rulings enable national courts to seek interpretation of the EAC Treaty from the EACJ and then apply it in domestic cases (*Kyahurwenda*, paras 51–52). The only instance where the national courts have jurisdiction to interpret the EAC law is if partner states have chosen to contract outside this principle and grant concurrent jurisdiction to the EACJ and national courts and tribunals. If this happens, Article 33 (2) EAC Treaty is invoked, and the interpretation of the EACJ takes precedence over that of the national court or tribunal (*Kyahurwenda*, para 61).

31 In paragraph 55 of the decision, the EACJ states that 'the other fundamental question that requires the attention of the Court is: What is the extent of the discretion conferred upon national courts by Article 34 of the Treaty'. This question appears for the second time in the decision having been the same question the EACJ invoked in paragraph 44 as to 'what is the nature of the discretion introduced by the above phrase if it considers it necessary?' The answer to the question led the EACJ to find exclusive interpretation jurisdiction for itself but concurrent application jurisdiction with national courts and tribunals. The EACJ again invoked the same question to help determine the extent of the application jurisdiction the national courts and tribunals can exercise. On the question of the extent of discretion, when the national court or tribunal considers it necessary to send a question to the EACJ, the EACJ found the discretion to be narrow (*Kyahurwenda*, para 56). The national courts and tribunals were only exempted from sending questions of interpretation to the EACJ in instances when the question is irrelevant, ie, EAC law is not required to solve the dispute or when the *acte éclairé* doctrine, where the Court has already clarified the point of law in previous judgments, and *acte clair* doctrine, where the correct interpretation of EAC law is obvious, apply (*Kyahurwenda*, para 57). Once the preliminary ruling is made, it is binding on the court or tribunal which sought it and applies as an → *Obligations erga omnes*, ie, on all national courts and tribunals in the EAC (*Kyahurwenda*, para 58).

32 Having dispensed with these issues, the EACJ then turned to the first question the Ugandan High Court raised on the justiciability of Articles 6, 7, 8, and 123 as read with Articles 27 and 33 EAC Treaty. In Articles 6, 7, and 8, which lay out the principles and objectives of the EAC, the EACJ referred to various of its decision which had answered that question in the affirmative (*Kyahurwenda*, paras 62–69). The EAC Treaty empowers the Summit to suspend any partner state that fails to observe and fulfill the fundamental principles and objectives of the EAC Treaty and to expel any that grossly and persistently violates these principles and objectives (Arts 146 (1) and 147 (1) EAC Treaty; *Kyahurwenda*, para 66). As for Article 123, the fact that its sub-section (5) envisions that 'the Council shall determine when the provisions of paragraphs 2, 3 and 4 of this Article shall become operative and shall prescribe in detail how the provisions of this Article shall be implemented', yet at the time of the determination of the case this was yet to happen, meant that that rendered those parts of the Article 123 non-justiciable (*Kyahurwenda*, paras 70–72). On the second question posed by the Ugandan High Court, the EACJ rehashed that since Articles 6, 7, and 8 of the Treaty are justiciable before national courts, these provisions confer legal authority on the courts to entertain their violations. However, since paragraphs 2, 3, and 4 of Article 123 were not yet in operation, the EACJ answered that

they are not justiciable (yet) (*Kyahur*wenda, paras 73–74). In concluding the final matter, the EACJ found that national courts can award compensation and damages against a partner state that has breached EAC Treaty provisions and occasioned damage to a plaintiff (*Kyahurwenda*, para 75).

D. Rules and Procedures Governing Preliminary Rulings in the East African Court of Justice

33 Since the EACJ's preliminary rulings jurisdiction relies on coordination between the EACJ and national courts (EAC Preliminary Reference Guidelines, para 5), the EACJ concluded the Guidelines on a Reference for Preliminary Ruling. These guidelines are intended to serve a dual purpose. First, to guide the national courts in determining whether, and when, it is appropriate to request for a preliminary ruling, and if they do, to help them formulate and submit questions to the Court (EAC Preliminary Reference Guidelines, para 6). Second, the EAC Preliminary Reference Guidelines state that the preliminary ruling system is a fundamental mechanism of EAC law that is aimed at enabling national courts to ensure uniform interpretation and application of EAC law in all the partner states (EAC Preliminary Reference Guidelines, para 1 (1)). In this sense, the preliminary reference mechanism in the EAC is formulated to serve the same aim as Article 267 TFEU (see Broberg, 2018). The Guidelines are intended as a tool of information for national courts to ensure effective cooperation between them and the EACJ.

34 As noted above, to ensure a uniform interpretation and application of EAC law by national courts in the partner states, the EAC Treaty included preliminary rulings jurisdiction for the EACJ (Art 34 EAC Treaty). When considering a case, Article 34 EAC Treaty directs national courts or tribunals to make a reference to the EACJ to give a preliminary ruling if a question (EAC Preliminary Reference Guidelines, para 22) is raised concerning the interpretation or application of the provisions of the EAC Treaty, being a reference on interpretation (EAC Preliminary Reference Guidelines, paras 11–12), or the validity of the regulations, directives, decisions, or actions of the EAC, being a reference on determination of validity (EAC Preliminary Reference Guidelines, paras 13–15). However, this is predicated on the condition that, according to the EACJ's consideration, such a question must be necessary to enable the court or tribunal to judge the case before it (Art 34 EAC Treaty; EAC Preliminary Reference Guidelines, paras 1–2).

35 The EAC Preliminary Reference Guidelines provide that the role of the EACJ is to give an interpretation of EAC law or to rule on its validity, not to apply the law to the factual situation underlying the main proceedings, which is the task of the national court (EAC Preliminary Reference Guidelines, para 7). The EACJ is not required to decide any issues of fact raised in the main proceedings or resolve a difference of opinion on the interpretation or application of rules of national law (EAC Preliminary Reference Guidelines, para 7). The first rule here on the EACJ not applying but only interpreting EAC law is similar to that of the CJEU, barring it from applying EU law but only interpreting it (Broberg, 2018, 74). In the case of the CJEU, Broberg argues that the difference between interpretation and application has not been unambiguous (2018, at 74). He also argues that the national courts sometimes do not make preliminary references because the national court is seriously in doubt but only because the national court is desirous of the authority and support of the CJEU (at 75). Since the EACJ has, overtime, gained the support of different constituencies such as nongovernmental organizations ('NGOs'), pro-democracy activists, national bar associations, and the East African Law Society ('EALS'), the addition of national judges to this group would enhance the legitimacy and authority of the Court beyond its intermediate at a thin elite level as argued by Gathii (Gathii, 2018, 59). The guidelines also state that the ruling on the interpretation or validity of EAC law that the EACJ renders should make every effort to offer a reply that will assist in resolving the dispute. It is, however, up

to the referring national court to draw the appropriate conclusion from the reply (EAC Preliminary Reference Guidelines, para 8).

36 It is important to note that while Article 76 (1) EACJ Rules of Procedure, 2013 expressly specified that a request for a preliminary ruling should be lodged at the EACJ Appellate Division, the 2019 Rules do not give this express direction (Art 126 EACJ Rules of Procedure, 2019). However, one would assume that this procedural instruction is presumed by the fact that in the 2019 Rules, Article 126 is housed in Part C of the Rules, which addresses proceedings in the Appellate Division. This arguably means that all preliminary references are to be lodged at the Appellate Division and not the First Instance Division. The procedural rule here is an important one for expediency and efficient administration of justice (→ *Good Administration of Justice*) as having preliminary references at the First Instance Division would have opened up a possibility or right for appeal to the Appellate Division. Such a case would have prolonged the timelines for preliminary references in the EACJ.

37 Procedurally, the national court or tribunal has to make the request on its own accord irrespective of whether the parties have requested it to do so or not (EAC Preliminary Reference Guidelines, para 10). Additionally, the court's reference must contain only the relevant information, clearly and simply written in English, which will help the EACJ make the ruling. The EAC Preliminary Reference Guidelines cap the number of pages for reference at ten (EAC Preliminary Reference Guidelines, paras 18–20). While the emphasis on the use of the English language corresponds with it being the official language of the EACJ, it remains to be seen whether French can be added with the entry of the DRC into the EAC. It would also be prudent for the EAC to add Kiswahili as a working language in the EACJ to raise the profile of the language widely spoken in many East African countries, including the DRC. Including French would also accommodate Rwanda and Burundi, which have it as their national language. However, it is submitted that the inclusion of Kiswahili would be more in step with promoting an indigenous and widely spoken language among the inhabitants of the EAC (→ *Working Language*). After drafting a reference that conforms with the EAC Preliminary Reference Guidelines, the reference and all relevant documents have to be sent by post to the EACJ's Registrar or its sub-registries in the partner states (EAC Preliminary Reference Guidelines, para 27).

38 In referring a question on interpretation to the EACJ, the onus is on the national court 'to explain why the interpretation sought is necessary to enable it to give judgment' (EAC Preliminary Reference Guidelines, para 12). Suppose a national court doubts the validity of EAC regulations, directives, decisions, or actions. In that case, it must refer a question to the EACJ, stating why they consider that that act may be invalid. If a national court has serious doubts about the validity of any of them, it can exceptionally suspend the measure or give an interim relief as it makes the reference (EAC Preliminary Reference Guidelines, paras 14–15). As already noted above, when considering this request, the EACJ's mandate is only limited to interpreting or ruling on the validity of the EAC law in question without applying the law to the facts of the case (EAC Preliminary Reference Guidelines, para 7). While courts have the discretion to determine when to make the reference, the EAC Preliminary Reference Guidelines advise that it should be made after both parties have been heard (paras 16–17).

39 Lastly, for the duration that the EACJ will be considering the preliminary reference, the proceedings at the domestic court or tribunal have to be stayed until the EACJ has given its ruling (EAC Preliminary Reference Guidelines, para 23). The EACJ's Registry must stay in communication with the national court during this duration and send it the procedural documents (EAC Preliminary Reference Guidelines, para 28). Even so, the fact that there are no timelines within which the EACJ is mandated to give the ruling opens the loophole

for unnecessary delays in the national proceedings if the EACJ does not deal with the preliminary reference expeditiously.

E. Some Preliminary Reasons for the Paucity of Preliminary Rulings in the EACJ

40 One of the main features of the preliminary reference procedure in the EACJ has been its paucity of use. The feature cannot be easily gainsaid, seeing that only one preliminary reference case has been fully heard on its merits in the EACJ since its creation as an international court (→ *Judicial Institutions of the East African Community (1967-1977)*). While the case settled some fundamental substantive questions on EAC law, the possibility of the EACJ attracting more preliminary references would be a highly welcome one for the development of EAC law generally. Therefore, one may wonder why the EACJ has not attracted a larger number of preliminary references or, put another way, why have national courts and tribunals not submitted more preliminary references to the EACJ. It is submitted that this scenario might be caused by, or correlates to, three reasons. The first is the limited judicialization of economic/commercial disputes within the EACJ, which would form a basis for possible preliminary rulings (sub-section 1 below). The second is the limited awareness of these jurisdictions among legal practitioners and domestic judges in EAC partner states' courts (sub-section 2 below). The third relates to the limited and constrained legal and political collaboration between national courts, judges, and the EACJ (sub-section 3 below).

1. The Limited Judicialization of Economic/Commercial Disputes within the East African Court of Justice

41 One enduring feature of the EACJ that is also shared with other sub-regional judiciaries in Africa is the limited judicialization of economic/commercial disputes. The EACJ has attracted few litigants and cases in trade, business, commerce, and investment. This is despite many tariff and non-tariff barriers to trade and commerce in intra- and extra-African trade. The EACJ, though established as a sub-regional economic/trade court, has primarily decided on human rights cases (Gathii and Mbori, 2020, 302). Thus, an important feature of the EACJ is how it was able to re-purpose its original mandate over trade disputes to become a bold adjudicator of human rights cases and disputes (Gathii, 2013, 249–53). One of the immediate casualties of this enviable and laudable development has been the EAC law that aims to push the EAC more substantively towards a common market. While the legal instruments for making the EAC a common market have all been enacted, the actual process of creating a common market has been quite slow. The more that judges in the national courts, as an important constituency for submitting the preliminary reference, continue to see the EACJ as a human rights court, the more the likelihood that they will not be encouraged to make preliminary references even in the few factual scenarios that such cases might emerge. The reason for the limited use of the procedure is a bit similar to that offered by Ugirashebuja that litigants in the EACJ have preferred the use of the direct action avenue to institute cases and this is a possible explanation for the limited use of the preliminary reference procedure (2017, 274).

2. The Limited Awareness of National Courts and Tribunals among Legal Practitioners and Domestic Judges in East African Community Partner States Courts

42 Writing in 2017, former judge and President of the EACJ, Emmanuel Ugirashebuja, pointed out the absence of knowledge of the existence of the jurisdiction as one of the reasons why the preliminary reference procedure has not been actively used in the EACJ (2017, at 274). Dr John Eudes Ruhangisa, former registrar of the EACJ, pondered on the question of the underutilization of the preliminary ruling jurisdiction by national courts and tribunals. Writing in 2011 on why this is the case, he identified that many national courts'

judges, magistrates, and lawyers were unaware of this provision (Ruhangisa, 2011, at 23). He also noted that that is why by then, only the High Court of Kenya had referred one matter to the EACJ for a preliminary ruling (*Saida Rosemary and Hassan Elijuma Agade*), yet the Court had been in operation for ten years (Ruhangisa, 2011, 23). Ruhangisa later revisits the question of preliminary rulings in a 2017 paper but only makes mention of *Kyahurwenda*, as the only other case to have been referred by a national court for the EACJ to issue a preliminary ruling (2017, at 156).

43 In recognition of this, the EACJ has undertaken to carry out sensitization across the partner states to make the preliminary rulings jurisdiction more known among judicial officers and practitioners. A case in point is in 2017, when the EACJ President paid a courtesy call to the Chief Justice and the Minister of Industry, Trade and EAC Affairs in Rwanda where it was acknowledged that part of the visit was to establish collaboration between the Rwandan national courts and the EACJ through the use of the preliminary rulings. During the visit, the EACJ President informed Rwanda's Chief Justice that this relationship needed to be strengthened by educating Rwanda's judicial officers on the workings of this jurisdiction so that they can use it when appropriate to do so (Court President Pays Courtesy to the Chief Justice & Minister of Industry, Trade and EAC Affairs in Rwanda, 2017).

3. The Constrained Legal and Political Collaboration between National Courts, Judges, and the East African Court of Justice

44 One of the glaring challenges presented by the preliminary reference procedure is the requirement for coordination and cooperation between the national courts of the partner states and the EACJ. This presupposes an existing relationship of cooperation between national and EAC institutions. The political rhetoric is robust that the EAC is an important supranational institution for cross-border economic, political, cultural, and social relations yet a deep cultural suspicion and mistrust persists when applying EAC law. Gathii has documented the sentiments among Tanzanian lawyers who culturally mistrust Kenyan lawyers, viewing them as 'pushy' (2011, at 192). It is unlikely in the space of such mistrust for domestic judges to view the EACJ as a legitimate node of authority to build strong community norms and deeper integration. The EACJ itself has also not taken an active role in stamping its jurisdictional authority on preliminary references. The Kenyan reference in 2010/11 was a lost opportunity where the EACJ could have issued its first preliminary reference. Former judge and President of the EACJ, Emmanuel Ugirashebuja, also lamented the lack of robust judicial dialogue between the domestic courts and the EACJ as one of the reasons for the few preliminary references to the EACJ (Ugirashebuja, 2017, 274).

F. Conclusion

45 This entry began by analysing the role of the EACJ as the principal judicial institution in the EAC. We saw how the EACJ has already actively distinguished itself as an important international court for East African residents and possibly for Africa as a whole. Since its operations began in 2001, it has gained prominence as a human rights Court, with most of its docket now dominated by human rights disputes. We have seen that the EACJ has broad jurisdiction, including entertaining preliminary references from partner states' national courts and tribunals. Such jurisdiction, however, has not been deployed as robustly as in the EU. The entry has analysed the single case so far in the EACJ where it offered a preliminary ruling and analysed the procedural rules from the EAC treaty, the Rule of Procedure of the Court, 2019, and the Guidelines on Preliminary References. There is still a great

opportunity and role that preliminary references can play in deepening integration in the EAC, and it is hoped that this procedure will be deployed more frequently in the future.

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