

The jurisprudence of the African Court and the East African Court in protecting Indigenous land: An assessment of the Ogiek and Serengeti Cases in the Context of Forced Evictions Driven by Carbon Credits Associated with Green Grabbing

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Abstract

The African Court delivered two separate judgments—on merits and reparations—in African Commission on Human and Peoples’ Rights v Republic of Kenya (the Ogiek case). It found Kenyan government liable for forced evicting the Ogiek from their ancestral land, violating their land’ rights associated rights and ordering reparations. Despite these judgments, reports in 2023 show the Ogiek facing renewed forced evictions. This follows Kenya’s agreement with a UAE-based company, Blue Carbon, to develop carbon credit projects. Carbon credits rest on the assumption that the Global South’s public assets, particularly forests, can be mobilized to help the big emitters reduce their emissions. However, scholars and activists describe such projects as green grabbing. This is a process that alienates communities from their lands and place them under the control of powerful states and corporations to generate profits in the name of climate action. This concern reflects a 2019 UNEP report warning that even full implementation of carbon credit mechanisms under the Paris Agreement, global temperature will still rise of about 4°C by 2100. In other words, carbon credit projects do not reduce gas emissions.

Against this background, this article compares the approach taken by the African Court with the approach taken by the EACJ in the *Serengeti* case to determine which of the two forums may be the most appropriate forum for litigation challenging land appropriation for carbon credit projects. It concludes that the EACJ is the more appropriate jurisdiction because it reconceptualizes the relationship between substantive and procedural rules to better reflect the lived realities and socio-economic needs of the community. Unlike the African Court, which maintained a strict separation between procedure and substance resulting in "empty remedies" that failed to address the historical motives of the state or the disproportionate nature of the harm, the

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EACJ has shown a willingness to bypass doctrinal rigidities to protect environmental integrity. By integrating the motive and purpose of a breach with its material effects, the EACJ offers a pathway to issue permanent injunctions that can halt corporate-state contracts like the Blue Carbon deal.

I. Introduction

In 2015, approximately 600 million people in Sub-Saharan Africa lived in rural areas.²This number is projected to increase by about 380 million by 2050, bringing the total rural population to around 980 million people.³Population growth is expected to continue rising beyond mid-century.⁴For many Indigenous communities living in rural areas, land is deeply connected to their way of life.⁵ However, Western-dominated discourses often dismiss this deep connection Indigenous communities have with nature, labeling it as backward and uncivilized.⁶Such discourses prioritize privatizing nature, viewing it primarily as an economic asset for profit.⁷For Indigenous communities living in rural areas, this commodification is not just abstract, it threatens their means of survival.⁸Sadly, when they resist government or corporate actions that disregard their multi-dimensional values of nature, they frequently face forced evictions, and their fundamental right to self-determination is undermined.⁹The right to self-determination is an absolute right that protects Indigenous communities' collective life, determines their social,

² Matthias Saladin, 'The Overlooked Population Dynamics of Rural Africa' (Rural Water Supply Network, 3 September 2018) <https://www.rural-water-supply.net/en/news/72> accessed 29 November 2024.

³ Ibid.

⁴ Ibid.

⁵ Lucy C Laridge and Daniel Kobei, 'Protected Areas, Indigenous Rights and Land Restitution: The Ogiek' (2023) 57 (3) Cambridge University Press 314.

⁶ Carmen G Gonzalez, 'Environmental Justice, Human Rights and the Global South' (2015) 13(1) Santa Clara Journal of International Law 151-168.

⁷ Ibid.

⁸ Filiberto Penados, Levi Gahman, Shelda-Jane Smi, 'Land, Race, and (Slow) Violence: Indigenous Resistance to Racial Capitalism and the Coloniality of Development in the Caribbean', (2023) 145 Geoforum 4.

⁹ Ibid.

political and economic development path.¹⁰One of the Indigenous communities whose right to self-determination has been undermined because of the privatization of nature on the African Continent are the Ogiek of Kenya.

They have been victims of repeated forced evictions arising from the commodification of the Mau Forest as an economic asset. The United Nations defines forced evictions as the removal of communities from their homes and lands, leaving them vulnerable, homeless, and without legal protection.¹¹These forced evictions often occur under the guise of activities such as extractive ventures, illegal logging, agribusiness expansion, tourism, and large-scale infrastructure development.¹²

The Ogiek have turned to national courts for redress against the Government of Kenya repeated forced evictions. However, their efforts proved unsuccessful.¹³ Consequently in 2009, they petitioned the African Commission on Human and People's Rights (the African Commission).¹⁴The African Commission issued a permanent injunction on the ground that continuing Ogiek's forced evictions would cause irreparable harm to their lands and associated rights.¹⁵However, the Government of Kenya ignored this order, and the forced evictions persisted. This led the African Commission to refer the matter to the African Court on Human and People's Rights (the African Court) in 2012.¹⁶In 2017 and 2022, the African Court ruled in favor of the Ogiek.¹⁷ Despite the African Court's decision, the Ogiek's forced evictions continued. In 2023,

¹⁰ Humphrey Sipalla, 'A Human Rights Consistent Apartheid: Constitutional Design of the African State, Indigenous Peoples' Self-Determination and the "Other Native" Question' (2019) Kabarak University Press 256 - 260.

¹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions, para 3

¹² Ibid, para 5-7.

¹³ CEMIRIDE, Minority Rights Group International & Ogiek Peoples Development Programme (on behalf of the Ogiek Community) v Republic of Kenya, Communication 381/09.

¹⁴ Ibid.

¹⁵ African Commission on Human and Peoples' Rights v Republic of Kenya, AfCHPR, 2.

¹⁶ Ibid.

¹⁷ Ibid, para 227.

these forced evictions became linked to carbon credit-related green grabbing.¹⁸ Amnesty International, Minority Rights Group International, and BBC reported that ongoing Ogiek forced evictions follow Kenya's carbon credit agreement with UAE-based Blue Carbon over the Mau Forest.¹⁹

Carbon credits rest on the assumption that the Global South's public assets, particularly forests, can be mobilized to help the Global North meet its greenhouse gas reduction targets.²⁰ This means the Global South conserves forests to generate emissions reductions and sells those reductions to big emitters and their corporations to meet their targets.²¹ Scientists posit Carbon credits cannot reduce greenhouse gas emissions.²² Therefore, Scholars and activists have associated them with green grabbing. This is a process that alienates communities from their lands and place them under the control of powerful states and corporations to generate profits in the name of climate action.²³

This paper examines whether the African Court or the East African Court of Justice (EACJ) offers a better pathway for the Ogiek to protect their land from carbon credit-related green grabbing. It uses the African Commission on Human and Peoples' Rights v. Republic of Kenya (the Ogiek case) in the African Court and the African Network for Animal Welfare v. Attorney General of the United Republic of Tanzania (the Serengeti case) in the EACJ as illustrations.

In assessing which precedent better protects the Ogiek from carbon credit related green grabbing, this paper examines the approaches of the African Court and the EACJ to procedural and substantive rules in the Ogiek and Serengeti cases. Understanding the application of these rules is crucial because they shape the distribution of benefits and burdens within a legal system. If the Court treats procedural and substantive rule distinctively, it will award limited reparations

¹⁸ Claire Marshall, Kenya's Ogiek People Being Evicted for Carbon Credits- Lawyers, 9th November 2023, < [Kenya's Ogiek people being evicted for carbon credits - lawyers](#) >, 10th February 2026.

¹⁹ Ibid.

²⁰ Paris Agreement, Article 6.

²¹ Ibid, Article 5.

²² United Nations Environment Programme, *Emissions Gap Report 2019*, UNEP, 2019.

²³ James Fairhead, Melissa Leach, Ian Scoones, 'Green grabbing: a new appropriation of nature?'(2012) 39 (2) J Peasant Stud, 238- 239.

without fully engaging the motive or purpose beneath the violated right or obligation. As a result, awarded remedies will be empty and detached from the realities of the affected people.

Part One is this introduction. Part Two introduces the Ogiek way of life and their repeated forced evictions to provide the reader with appreciation of points of determination presented before the African Court. Part Three examines the African Court's handling of the Ogiek case and its strict separation of substantive and procedural rules. Drawing on Dire Tladi, Georges Abi-Saab, and Mohammed Bedjaoui, it argues the African Court must move beyond this distinction. As the paper goes on to discuss, such a shift would be necessary to address carbon credit-related green grabbing driving Ogiek forced evictions. Using the Serengeti case as illustration, Part Four shows how blending substantive and procedural rules with community realities provides a better approach. It addresses Ogiek forced evictions linked to carbon credits. Part Five is the conclusion.

II. Ogiek: Way of Life and Repeated Forced Evictions

The Mau Forest is the largest water drainage basin and water tower in Kenya, with forested mountains, springs, and streams that feed major rivers.²⁴The Mau forest supports essential water resources for Lake Turkana, Nakuru, and Baringo. It also sustains wildlife reserves, including the Serengeti National Park in Tanzania and the Masai Mara National Reserve in Kenya.²⁵The Ogiek, an Indigenous community of about 40, 000 people, have lived in the Mau Forest for immemorial time.²⁶The Ogiek have protected the Mau Forest through their deep experiences, skills, innovations, and practices embodied in their lifestyle.²⁷Despite this longstanding presence, the Government of Kenya has repeatedly forced evicted the Ogiek. The first reported forced eviction of the Ogiek occurred under the British colonial government following its occupation of Kenya in

²⁴ Patricia Kameni Mbote, Collins Odote, Celestine Musembi, and Margaret Kamande, 'Ours by Rights: Law, Politics and Property in Kenya' (2013) *Strathmore Law Review*, 61.

²⁵ *Ibid.*

²⁶ *Ibid* (n38), para 6.

²⁷ *Ibid* (n14).

1920.²⁸ The Ogiek were forcibly relocated to native reserves to advance colonial territorial consolidation and resource extraction through the appropriation of Indigenous lands for settler agriculture and forestry.²⁹ However, committed to their way of life, the Ogiek frequently returned to the Mau Forest. In 1938, the British colonial government gazetted the Mau Forest as government land to acquire the Ogiek territory.³⁰ To date, official records still classify Mau Forest as a Government of Kenya land. The Government justifies this by emphasizing the need for ecological protection, and conservation of the Mau Forest water catchment area.³¹ However, it has allocated the Ogiek's land to third parties, including political allies, and allowed extensive commercial logging without benefits sharing with the Ogiek.³²

In October 2009, the Government of Kenya issued a 30-day eviction notice to the Ogiek, citing conservation efforts.³³ Concerned that this action perpetuated historical land injustices and after unsuccessful national litigations, Ogiek filed a complaint against the Government of Kenya before the African Commission in the same year.³⁴ This resulted in the African Commission granting of a permanent injunction to prevent the 2009 forced evictions. It noted that if the forced evictions continue, they would cause irreparable harm to the Ogiek land and associated rights.³⁵ Despite the permanent injunction, the Ogiek forced evictions continued. On 12th July 2012, the African Commission seized the African Court. This is consistent with Article 5(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. This Article gives the African Commission the authority to submit cases directly to the African Court.³⁶ On 26th May 2017, the African Court found the Government

²⁸ Ibid (n 5), 317.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ African Commission on Human and Peoples' Rights v Republic of Kenya (Application No 006/2012) (African Court on Human and Peoples' Rights, 26 May 2017), para 3.

³⁴ Ibid, para 6.

³⁵ Ibid, para 4.

³⁶ Ibid, para 5.

of Kenya liable for violating the Ogiek's rights to land and associated rights.³⁷ Subsequently, on 23rd June 2022, the court ordered the Government of Kenya to take appropriate measures within a reasonable timeframe to remedy all violations and to report back to the court within six months of the judgment.³⁸ It is now 4 years later, the Government of Kenya has not yet complied with the African court decisions.

Most recently, in 2023, the Ogiek faced yet another wave of forced evictions from the Mau Forest. Reports by Amnesty International, Minority Rights Group, and the BBC indicate that ongoing Ogiek forced evictions stem from Kenya's agreement with UAE-based Blue Carbon to generate carbon credits from the Mau Forest.³⁹ The Blue Carbon has entered similar arrangements in other African countries, including Zimbabwe (20% of its territory), Liberia (10%), Zambia (10%), and Tanzania (8%).⁴⁰ The Paris Agreement permits these arrangements, allowing major emitters to purchase carbon credits from emission-reduction projects in the Global South. To make profit, the Global South's public assets, especially forests, are mobilized to help the big emitters meet greenhouse gas reduction targets.⁴¹ For the Government of Kenya, the Mau Forest has become a valuable investment. Middle Eastern investors, like Blue Carbon, will pay the Government of Kenya in exchange for opportunities to cancel out carbon emissions caused by their petroleum extraction activities.⁴² Critics argue that implementing carbon credits on Indigenous lands constitutes green grabbing.⁴³ This refers to the appropriation of land and resources for environmental purposes. Appropriation involves transferring ownership, user rights, and control over communally held resources into the hands of powerful actors, including states and

³⁷ Ibid, para 227.

³⁸ Human Rights in Context, The African Court's Ogiek Compliance Decision: A Turning Point for Indigenous Land Rights in Africa? 19th December 2025, < [The African Court's Ogiek Compliance Decision: A Turning Point for Indigenous Land Rights in Africa?](#)>, 18th February 2026.

³⁹ Ibid (n 18).

⁴⁰ France 24, The case of Africa's 'vanishing' carbon deals, 20th November 2025 < [The case of Africa's 'vanishing' carbon deals](#)>, 19th February 2026.

⁴¹ Paris Agreement, Article 5-6.

⁴² Ibid (n 45).

⁴³ Ibid (n 23).

corporations.⁴⁴This process separates communities from their land to extract value for private capital. It worth to note that green grabbing does not always require complete land alienation from existing communities. Instead, it creates a power structure that controls forests and the people living within them.⁴⁵ This structure reshapes land governance and reduces Indigenous Peoples to ecosystem service providers. Within this system, Indigenous peoples are valued primarily for sustaining the carbon credit market, rather than nature.⁴⁶

The part that follows examines the Ogiek merit and reparations cases in the African Court. It then proceeds to analyze the limitations in the African Court's application of procedural and substantive rules. Drawing on Dire Tladi, Georges Abi-Saab, and Mohammed Bedjaoui, it argues that African Court must move beyond procedural and substantive distinction. This is important to confront the Ogiek carbon credits associated with green grabbing.

III. Ogiek before the African Court: Procedural and Substantive Rules Distinction

a. Ogiek Case in the African Court

This section provides a summary of the Ogiek cases in the African Court. It is divided into two subsections. Part I provides a summary of the Ogiek merit case, Part ii provides a summary of the Ogiek reparations case.

i. Ogiek' Merit Case in the African Court

On 23rd November 2009, the African Court received a communication from the African Commission (Applicant). The communication stated that the Government of Kenya (Respondent), through the Kenyan Forestry Service, issued an eviction notice to the Ogiek.⁴⁷The Ogiek were

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid (n 38), para 6.

forced evicted on the grounds that the forest is a reserved water catchment and part of the Government of Kenya land.⁴⁸The Applicant also stated that the Government of Kenya failed to consider the importance of the Mau Forest for the Ogiek's survival. The Ogiek were not involved in the decision leading to their forced evictions and that the eviction notice perpetuate historical injustices suffered by the Ogiek since colonial time.⁴⁹

In contrast, the Respondent prayed the African Court to rule that the case was inadmissible. Additionally, it requested the African Court to refer the case to national courts for an amicable settlement and peaceful lasting solution.⁵⁰Finally, the Respondent prayed the African Court to put the Applicant on strict proof and find that there has been no violations of the Ogiek's rights as alleged.⁵¹

After hearing both parties, the African Court held that it had personal jurisdiction and material jurisdiction to entertain the case. For temporal jurisdiction, the African Court stated that the violations fell outside the critical dates—the Respondent became party to the charter on 10th February 1992 and party to the Protocol in 2004.⁵²However, it held that it has temporal jurisdiction because the Ogiek's forced evictions were continuing. It goes on to find that the Ogiek sufferings had been ongoing since independence. These sufferings are characterized by Ogiek's subjugation, marginalization, denial of access to land, and lack of adequate constitutional and judicial remedy.⁵³

On the merit stage, the African Court found that the Respondent had violated the Ogiek rights to property under Article 14, right to non-discrimination under Article 2, right to religion under Article 8, right to culture under Article 17 clauses 2 and 3, right to natural resources under Article 21 and right to development under Article 22 of the African Charter on Human and Peoples' Rights (the Charter).⁵⁴ It established that the Ogiek are Indigenous Peoples of Kenya entitle to right to

⁴⁸ Ibid, para 8

⁴⁹ Ibid, para 4-8.

⁵⁰ Ibid, para 46

⁵¹ Ibid, para 46.

⁵² Ibid, para 64

⁵³ Ibid, para 64.

⁵⁴ Ibid, para 219.

land, territories and resources. Therefore, Respondent should give them legal protection and recognition. Such recognition shall be conducted with due respect of the Ogiek's customs, traditions and land tenure systems.⁵⁵

The African Court went ahead and noted that the Ogiek's right to land, territory and resources are subject to restriction provided that such restrictions is in the public interest and meet the standard of necessity and proportionality.⁵⁶ However, the Respondent failed to provide evidence that the Ogiek's continued presence in the Mau Forest was the main cause of natural resource depletion. Instead, the depletion resulted from land encroachment by other groups and the Respondent's excisions for settlements and poorly planned logging concessions.⁵⁷

Additionally, the African Court found that the Ogiek's right to religion has been violated. Their traditional religious practices are interlinked to land and natural resources, therefore it's hindered their ability to conduct and engaged in spirituals practices.⁵⁸ Furthermore it held that the Respondent had violated the Ogiek's right to culture. It found that the forced evictions has affected the ability of the Ogiek to practice their culture interlinked to the Mau Forest.⁵⁹

The African court also held that the Respondent had violated the right to social, economic and cultural development and natural resources by continuing forced evicting the Ogiek without consultations.⁶⁰ In this context, the African Court ordered the Respondent to take all appropriate measures within six months to remedy the violations and report actions taken. The Court also decided to rule on reparations at a later date ⁶¹

ii. Ogiek Reparations Case in the African Court

On 23rd June 2022, the African Court delivered its reparations judgment. The African Court started by noting that its merit judgment remained unaddressed and the Ogiek forced evictions

⁵⁵ Ibid, para 127-129.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid, Para 164-165.

⁵⁹ Ibid, para 179- 180.

⁶⁰ Ibid, para 210.

⁶¹ Ibid African, para 223.

continued.⁶²In respect to material prejudice, the Applicant prayed for material compensation to be awarded to the Ogiek people as a result of human rights violations.⁶³It concerned all damages suffered as a result of Respondent violations of the Ogiek right to property, right to development and natural resources.

To substantiate its claim, the Applicant submitted a community survey quantifying the Ogiek's pecuniary loss, based on questionnaires administered to 151 household representatives and complemented by desk-based analysis.⁶⁴The report acknowledged evidentiary gaps caused by the number of Ogiek involved in forced evictions, the passage of time, deaths of certain community members, the peculiar nature of the Ogiek traditional life style, which makes difficult to preserve specific records and proof of lost property.⁶⁵However, the Applicant urged the African Court to acknowledge its efforts in quantifying compensation, accepting that some aspects may require speculation and application of equity, given the context of human rights violations.⁶⁶As a result, the applicant claimed at least US\$204,604,578 in damages for violations established by the African Court.⁶⁷The respondent challenged both the methodology and the analysis of the survey. It also raised issues of unjust enrichment and cautioned against placing the Government of Kenya in a hardship situation.⁶⁸

The African Court held that the report was marred by limitations and it was not bound by it.⁶⁹ Instead, it exercised its equitable jurisdiction and ordered the Respondent to compensate the Ogiek a sum of 57,850,000 Kenyan Shillings (equivalent to approximately USD 445,000 at an exchange

⁶² Commission on Human and Peoples' Rights (ACHPR) v. Republic of Kenya application no. 006/2012 judgment on reparations, judgment summary, page 2.

⁶³ Ibid, page 3.

⁶⁴ Africa Commission on Human and Peoples' Rights v Republic of Kenya (Application n. 006 of 2012) [2022] AfCHPR 1 (KLR) (Constitutional and Human Rights) (23 June 2022) (Judgment), Para 49-59.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid (n 68).

rate of Ksh 130 to USD 1) as compensation of material prejudice suffered.⁷⁰In respect to moral prejudice, the African Court alleged that it was not possible to allocate a monetary value equivalent to moral harm suffered by the Ogiek.⁷¹Nevertheless, in considering its exercise of judicial discretion, it awarded a sum of 100, 000, 000 Kenyan Shillings (approximately USD 769,231 at an exchange rate of Ksh 130 to USD 1) for moral prejudice suffered.⁷²In respect to non-pecuniary reparation concerning restitution of the Ogiek's ancestral land, the African Court held that physical delineation and demarcation of the Ogiek land is important.⁷³The Respondent should undertake exercise of delimitation, demarcation and titling in order to rehabilitate the Ogiek's rights to land and natural resources. These rights revolved around their occupation, use, and enjoyment of Mau Forest and its resources.⁷⁴The African Court also ordered that where Ogiek ancestral land has been granted to non-Ogiek individuals or corporations, the Respondent must initiate dialogue with the Ogiek representatives. These dialogues should involve all other parties concerned to reach an agreement on the continuation of their operations.⁷⁵ Any continuation can be by way of leases, royalties, and benefit-sharing with the Ogiek in accordance with the Kenyan Community Land Act.⁷⁶

Furthermore, the African Court ordered that in case where land was allocated to non-Ogiek and where it proves impossible to reach a compromise, the Respondent state must either compensate the concerned third parties and return the land to the Ogiek People or agree on an appropriate compensation.⁷⁷In respect to the guarantee of non-repetition, the African Court ordered the Respondent to take all necessary legislative and administrative measures to protect the Ogiek's rights to free, prior, and informed consent. This applies to conservation or investment projects on Ogiek land.⁷⁸The African Court finally ordered the Respondent to establish an Ogiek Development

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid, page 5.

⁷³ Ibid, page 6.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid, pages 6-7.

⁷⁷ Ibid, pages 7- 8.

⁷⁸ Ibid, page 8

Fund to ensure all the Ogiek benefit from the outcome of the litigation within 12 months from the litigation date.⁷⁹

On 12th November 2024, the African Court convened a public hearing on the status of the implementation of its decisions. However, the Respondent requested adjournment of hearing and come back in 3 months to file its reports.⁸⁰ The Applicant stressed the continuing forced evictions even after both the merits judgments and reparations judgment were delivered. The African Court agreed with the Respondent and the report was set to be filed on 4th June 2025.⁸¹ In June 2025, the Government of Kenya stressed its commitment to implementing the judgments, claiming reforms were underway through task forces and updates from environmental conservancies.⁸² However, the Ogiek emphasized that the forced evictions continued and that the Kenyan government has not complied with the African Court's decision.⁸³ On 4th December 2025, the African Court issued its first ever compliance decision, formally holding that the Government of Kenya has failed to comply with its 2017 merits judgment and its 2022 reparations judgment.⁸⁴

b. Ogiek Case: Procedural and Substantive Rules limitations

This section demonstrates how the African Court distinct application of procedural and substantive rules fails to address the Ogiek forced evictions driven by carbon credits associated with green grabbing. This distinct application affects not only the protection of the Ogiek's land right itself but also the scope, depth, and adequacy of reparations available for its violation. The Part is divided into 2 subsections. First, drawing from Dire Tladi, George Abi Saab and Mohammed Bedjaoui, it uncovers the limitations in the African Court distinct application of substantive and procedural rule. Secondly, it examines whether the African Court decision is

⁷⁹ Ibid

⁸⁰ Human Rights in Context, The African Court's Ogiek Compliance Decision: A Turning Point for Indigenous Land Rights in Africa? 19th December 2025, < [The African Court's Ogiek Compliance Decision: A Turning Point for Indigenous Land Rights in Africa?](#)>, 18th February 2026.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

capable to sufficiently respond to the 2023 Ogiek's forced evictions driven by carbon credits associated with green-grabbing.

i. African Court's Substantive and Procedural Limitations: Insights from Tladi, Abi-Saab, and Bedjaoui

As point of departure, this part takes Dire Tladi's thoughts on substantive and procedural rules.⁸⁵Tladi's points out that some rules are purely procedural, for example, the requirements for filing documents, the rules pertaining to the presentation of evidence. At the same time, many rules commonly labelled procedural such as admissibility, access to court, and reparations, actually contain substantive elements.⁸⁶ For Tladi, whether a rule sits at the purely procedural end or blends into substance is ultimately unimportant. Reparation is viewed as a form of remedy or consequence that arises after a breached obligation. Because of this, reparations are often treated as procedural rather than substantive in nature.⁸⁷ Yet, as Tladi emphasizes, reparations are not simply a way of processing a claim; they embody what a state must actually do or give after a breach. In this sense, reparations shape the real-world content of the obligation itself.⁸⁸

I am convinced of the closeness between substantive and procedural rule in Tladi's position and I believe that a broader rethink of procedure and substance has begun. Such a rethinking must be accompanied by substantial changes in the normative content of the law itself. George Abi-Saab argues that the content of the law must be subjected to careful critique rather than accepted formalistically if it is to respond to the fundamental sociological changes of the communities it governs.⁸⁹ Mohammed Bedjaoui shares this view of the power of the law to serve the socio-economic needs of the people but differs in one point. He argues that when legal procedure and content conflict with the living conditions of the people, the procedure and content of law must

⁸⁵ Ibid (n 27).

⁸⁶ Ibid, page 530.

⁸⁷ Ibid.

⁸⁸ Ibid, pages 545-549.

⁸⁹ G Abi-Saab, 'the Newly Independent States and the Rules of International Law: An Outline' (1962) 8 Howard Law Journal 118.

evolve. Law, in his words, “*is not an untouchable, sacrosanct monument; no norm is eternal or proof against erosion*”.⁹⁰

However in reading the African Court’s merit and reparation judgments, one will be amazed by the undeniable innovative reconceptualization of traditional property right and how the African Court extended the right to property and natural resources to the rights to lands as the backbone of all rights.⁹¹ Yet, when one reads in light of *Dire, Abi- Saab and Bedjaoui*, one discovers how the African Court gives *keys to the house but kept the locks to the pantry*. The Government of Kenya and corporate interests continue to exclude the Ogiek, framing their interests not as part of national priorities but in conflict with the State. In practice, the Government of Kenya consistently prioritizes corporate agendas over the rights and needs of the Ogiek.⁹² In determining temporal jurisdiction, the African Court found that the Ogiek have been marginalized and denied access to land and legal remedies since colonization.⁹³ Nevertheless, it went ahead and limited the Ogiek community’s right to land where public interest, necessity, or proportionality is proven.⁹⁴ Such an approach reflects an overly rigid reliance on the standard limitation clause.⁹⁵ It has applied this rule without fully considering the historical and empirical realities of the Ogiek’s forced evictions since colonial times. The African Court ignored the historical motivation and purpose behind the forced evictions, which is the Ogiek lands should benefit outside parties (Government or investors) rather than the Ogiek.⁹⁶ It is a pity that the African Court has missed a historic opportunity to harmonize Indigenous Peoples’ interests to national ones. Since the Ogiek’ right to land forms the bedrock of all other rights, these rights are consequently placed at risk.

The motivation or purpose of the breached obligation must be considered alongside the effects resulting from breached obligation. Failure to act accordingly produces empty remedies, detached

⁹⁰ M Bedjaoui, *Towards a New International Economic Order* (New York, Holmes and Meier, 1979) 101.

⁹¹ *Ibid* (n 61)

⁹² Lys Kulamadayil, *Pathology of Plenty: Natural Resources in International law*, Volume 98 in the series *Studies in International Law*, page 122.

⁹³ *Ibid*, (n 58).

⁹⁴ *Ibid* (n 60).

⁹⁵ Article 14 of the African Charter on Human and Peoples’ Rights

⁹⁶ *Ibid* (n 5).

from the realities of the affected people. The African Court considered only the effects resulting from the breach of the Ogiek land' rights. These effects are loss of culture, livelihood, and religion. Consequently, it awarded reparations addressing only the effects of the breach of the Ogiek's land rights.⁹⁷ Thus, reparations were empty and detached from the historical realities of the Ogiek. This failure is more evident in African Court reparations case, particularly in its handling of material and moral prejudice.⁹⁸ Material prejudice refers to the tangible and quantifiable harm suffered as a result of a wrongful act. It includes economic losses such as loss of land, income, property, resources, or livelihood. Moral prejudice, by contrast, concerns non-material harm, including emotional distress, humiliation, and loss of dignity, cultural disruption, and psychological suffering.⁹⁹

The Ogiek People submitted a survey report outlining the scope of their violations. However, the African Court rejected it and instead exercised its own equitable jurisdiction without providing any proof or explanation of how it arrived at its figures. Consequently, it awarded KES 57,855,000 for material prejudice – equivalent to approximately USD 445,000 at an exchange rate of KES 130 to USD 1 – and KES 100,000,000 for moral damage, amounting to roughly USD 769,230.¹⁰⁰ Throughout the proceedings, the African Court acknowledged that the Ogiek constitute a community of about 40,000 people. It further recognized that its reparations were intended to be both collective and individual.¹⁰¹ To problematize this, if the awarded sums were to be distributed equally among the Ogiek, each individual would receive approximately USD 11.13 for material damage and USD 19.23 for moral damage. This amount is grossly disproportionate to the magnitude of harm they have endured since the colonial period.

Had the African Court considered the survey report submitted by the Ogiek, which claimed a total of USD 204,604,578, each member of the community could have received approximately USD 5,115. Although this sum would not resolve all the challenges faced by the Ogiek, it

⁹⁷ Ibid (n 67).

⁹⁸ Ibid.

⁹⁹ Ibid (n 72).

¹⁰⁰ Ibid (n 72)

¹⁰¹ Ibid.

represents a significantly more meaningful and proportionate recognition of the harm endured. The African Court could have further strengthened their claim by addressing the limitations identified in their report and presenting a more robust, comprehensive assessment of the damages suffered.

Furthermore, in delivering its order on non-pecuniary compensation, the African Court held that the Government of Kenya should delimit and title the Ogiek people's land.¹⁰² Where the Mau Forest has already been granted to non-Ogiek parties, the African Court directed the Government of Kenya to engage in dialogue. The aim is to determine whether the Ogiek can access their land or, alternatively, reach an agreement on compensation or benefit-sharing over their ancestral lands.¹⁰³ This reasoning is deeply problematic. It implies that where Indigenous Peoples are forcibly dispossessed and their lands transferred to third parties, the remedy is not necessarily the restitution of the original land. Instead, Indigenous Peoples may merely be compensated or required to lease their lands where third parties refuse to vacate. In practical terms, this means the Ogiek may be compelled to relocate far from their ancestral lands to areas that are likely to differ in natural resources. Such an approach further entrenches the economic logic that treats nature as a commodity rather than a living, relational space integral to Indigenous identity and survival. It continues to prioritize state and corporate interest over Indigenous Peoples interests.

With respect to guarantees of non-repetition, the African Court ordered the Government of Kenya to adopt all necessary legislative measures recognizing the Ogiek's rights in accordance with their traditions and means of survival.¹⁰⁴ The African Court also directed the Government of Kenya to establish an Ogiek Development Fund to ensure that all members of the community benefit from the outcome of the litigation.¹⁰⁵ However, it failed to specify the nature of the legislative and administrative reforms to be undertaken or the concrete objectives such measures should achieve. It also failed to identify the responsible state agencies, their roles, or their

¹⁰² Ibid (n 74).

¹⁰³ Ibid

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

timelines. This lack of clarity risks transforming reparations into yet another tool of control rather than a path toward sociological justice.¹⁰⁶

ii. The African Court's Jurisprudence in Light of the 2023 Ogiek Forced Evictions

In 2023, the Ogiek face yet more forced evictions, which form part of a long history of forced displacement driven by both state and corporate interests over Ogiek's land. These forced evictions are not isolated incidents but reflect an ongoing pattern tied to the Government of Kenya's economic and environmental policies. It has been pointed out that the 2023 Ogiek forced evictions are linked to the Government of Kenya's carbon credit deal with the UAE-based company Blue Carbon.¹⁰⁷

Kenya has ratified the Paris Agreement and joined the global efforts to limit global temperature rise to well below 2°C above pre-industrial levels, while pursuing efforts to cap warming at 1.5°C.¹⁰⁸ Among the mechanisms developed to achieve these targets are carbon credits, which provide financial incentives for reducing greenhouse gas emissions. Although the Paris Agreement does not explicitly mention "carbon credits," its Articles 5 and 6 establish their legal foundation.¹⁰⁹ Article 6 allows countries to cooperate in achieving their Nationally Determined Contributions (NDCs) by transferring mitigation outcomes between nations.¹¹⁰ In practice, one country may reduce emissions and sell the resulting carbon reductions to another country, which can count them toward its climate targets. Meanwhile, Article 5 requires countries to conserve forests, enhance carbon stocks, and prevent deforestation.¹¹¹ By generating transferable mitigation

¹⁰⁶ Nelson Baiye Mbu & Fabrice Tambe Endoh: 'A Commentary on the African Court on Human and Peoples' Rights remedial approach in its ruling on reparations in African Commission on Human and Peoples' Rights v Kenya' Vo. 7 (2023) African Human Rights Year Book.

¹⁰⁷ Ibid (n19).

¹⁰⁸ Paris Agreement, Article 2.

¹⁰⁹ Ibid, Article 5, 6.

¹¹⁰ Ibid, Article 6

¹¹¹ Ibid, Article 5

outcomes through forests conservation, States can sell those credits to nations seeking to meet NDCs, linking global climate goals with financial markets.¹¹²

This is how the carbon credit deal between the Government of Kenya and Blue Carbon transforms Ogiek ancestral land into tradable carbon assets, creating financial incentives for the state. Scientists indicate that even if states strictly adhere to NDCs, the global temperature will increase to 4°C above pre-industrial levels.¹¹³ Therefore, in practice, Carbon credits have become instruments of green grabbing, transferring communal resources into the hands of private and powerful actors under the guise of environmental protection. It is worth noting that green grabbing does not always entail full alienation of land. Instead, it creates a power structure that controls forests and the people living within them.¹¹⁴ This structure reshapes land governance and reduces Indigenous Peoples to ecosystem service providers. Within this system, Indigenous Peoples are valued primarily for sustaining green projects, rather than for their livelihoods.¹¹⁵

This is the stark reality confronting the Ogiek ancestral land today. The African court is ill suited to address Ogiek case against carbon credit related green grabbing. This stems from overreliance on procedural doctrines undermining community interests and reproducing distributive injustice against the Ogiek. As a result, the African Court failed to cancel contracts threatening Ogiek ancestral land, such as carbon credit deal that reduces land to tradable economic assets, enabling green grabbing. Green grabbing is further evident when the Ogiek are forced to lease or relocate far from their ancestral lands where third parties currently in possession of their lands refuse to move. Furthermore, the African Court's moral and pecuniary prejudice reinforces this distributive injustice. Individual compensation fails to match decades of economic value extracted from Ogiek land, disregarding the depth of dispossession.

This analysis sets the stage for the next part of the paper, which turns to *the Serengeti case* to examine how the EACJ has approached the interplay between procedural and substantive rules. The aim is to demonstrate what happens when the procedural and substance rules align with the

¹¹² Ibid.

¹¹³ Ibid (n 23).

¹¹⁴ Ibid (n 48).

¹¹⁵ Ibid.

lived experiences of the people. It also assesses whether the EACJ can provide an alternative pathway to protect the Ogiek from forced evictions driven by carbon credits associated with green grabbing.

IV. Serengeti case Before the EACJ: Procedural and Substantive Rules Reconceptualization

a. Serengeti case in the EACJ

The African Network for Animal Welfare (ANAW), a pan-African non-profit environmental conservation group based in Kenya,¹¹⁶ filed a case against the Government of Tanzania in the EACJ. It contended that the Tanzania proposed construction of the Serengeti Highway would cause irreversible environmental damage to the Serengeti National Park, a UNESCO World Heritage site.¹¹⁷ ANAW argued that the road would disrupt wildlife migration, fragment animal habitats, weaken specific animal populations, and degrade the quality of air.¹¹⁸ To address these concerns, ANAW mobilized support through international conferences, alliances with conservation groups, Indigenous communities, and organizations such as the African Wildlife Foundation. This collaboration led to the filing of the case in the EACJ in 2010.¹¹⁹

In June 2014, the EACJ ruled in favor of ANAW. First, the EACJ confirmed that ANAW had the right to bring the case under Article 30(1) of the EAC Treaty.¹²⁰ It allows residents of Partner States to approach the EACJ if they believe the actions, regulations, or decisions of a Partner States violate the Treaty. The EACJ acknowledged that ANAW, as an environmental NGO in Kenya, had standing to challenge the proposed construction of the Serengeti Highway on the grounds of its

¹¹⁶ ANAW, 'Our Profile' <https://www.anaw.org/index.php/about-us/our-profile> accessed 16 October 2021.

¹¹⁷ African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania (Reference No. 9 of 2010, Judgment of 20 June 2014) East African Court of Justice (First Instance Division) para 10.

¹¹⁸ Ibid, para 11.

support

¹¹⁹ JTGathii, 'Saving the Serengeti: Africa's New International Judicial Environmentalism' (2015) 16 Chicago Journal of International Law, 388-406.

¹²⁰ East African Treaty, Article 30 (1).

potential harm to the environment.¹²¹Second, The EACJ emphasized that Tanzania, having ratified the EAC Treaty on 28th June 2000, is bound by its provisions. Then, referencing Articles 151 (1) and (4) of the Treaty, EACJ states that Tanzania's obligations under the Treaty were not negated by the absence of a specific protocol on environmental protection.¹²²Chapter 19 of the EAC Treaty mandates partner states to cooperate in managing and utilizing natural resources. Failure to enact a protocol operationalizing chapter 19 does not invalidate the Treaty's binding obligations on Tanzania.¹²³As a result, the EACJ held that Tanzania was bound to comply with the Treaty's environmental obligations.¹²⁴These obligations are entrenched in Article 114 (1) (a) of the Treaty which enjoins all Partner States to conserve, protect and manage the environment and natural resources.¹²⁵Additionally, Articles 5 (3) (c), 8 (1) (c) and 111 (2) which obligate Partner States to co-operate in the management and utilization of natural resources within the Community. They also require them to abstain from any measures that would jeopardize the attainment of the objectives.¹²⁶

Third, the Court found that the road's construction would disrupt vital animal migration routes and lead to the fragmentation of habitats, thereby causing long-term damage to the environment.¹²⁷Fourthly, the EACJ held that the litigation was in the public interest.¹²⁸This is because, ANAW was representing the broader public interest rather than seeking direct personal gain. For this

¹²¹African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania (n 42), para 49.

¹²²African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania (n 42), para 42.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania (n 42), para 13.

¹²⁶ Ibid

¹²⁷African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania (n 42), para 74.

¹²⁸ Ibid.

reason, the EACJ ruled that each party should bear its own costs.¹²⁹ Finally, it issued a permanent injunction, halting the construction of the Serengeti Highway.¹³⁰ The EACJ ordered the Government of Tanzania to refrain from the construction of the Serengeti Highway, on the ground that it would cause irreversible environmental impact.¹³¹

b. EACJ: procedural and substantive rule reconceptualization

As already noted, substantive and procedural rules have distributive impacts, ultimately shaping who wins or loses. This section demonstrates how the EACJ's reconceptualization of these rules makes it better suited to address the 2023 Ogiek forced eviction driven by carbon credit related green grabbing. It is divided into two subsections. Subsection i demonstrates the EACJ's reconceptualization of procedural and substantive rules to reflect the lived realities of the East African Community. Subsection ii outlines how the Ogiek should frame their claim before the EACJ. Additionally, it anticipates likely counterarguments from the State and Corporation, and highlights the points the EACJ should consider in its determination.

i. *EACJ Reconceptualization of Procedural and Substantive Rules*

Before sketching in the EACJ's application of substantive and procedural rules, it is important to clarify the EACJ point of departure. The East African Community (EAC) Treaty was drafted in 1990 and entered into force in 2000. Its primary objectives are to ensure the free movement of people and goods, the promotion of economic integration, and the advancement of political unity in the East African community region.¹³² The EACJ was established to ensure Member States

¹²⁹African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania (n 42), para 84.

¹³⁰ Ibid.

¹³¹African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania (n 42), para 85.

¹³² J Okola Onyango, 'Human Rights and Public Interest Litigation in East Africa' (2015) 47 *George Washington International Law Review* 801.

adhere to rule of law through proper interpretation and compliance of the Treaty.¹³³The EACJ was called to interpret and ensure compliance with trade law. However, while originally designed to focus on trade law, the EACJ has increasingly been called upon to address issues arising from broader socio-economic realities in East Africa.¹³⁴This is because East African autocratic regimes in alliance with corporations have promoted regressive policies undermining both human and environmental rights.¹³⁵Issa Shivji's critique of globalization captures this dynamic sharply.¹³⁶He argues that globalization is premised on the separation of self and society, privileging self-interest over communal welfare. It is rooted in private property and accumulation,¹³⁷giving rise to a triad of stakeholders: the state, private sector, and voluntary sector. The state is framed as a neutral referee, ensuring stability and an enabling environment for private capital, which is considered the main driver of economic growth. The assumption is that this growth will eventually benefit society through trickle-down effects.¹³⁸However, those marginalized or unable to cope with this system, the so-called poor, are left to the voluntary sector, primarily NGOs. The responsibility for social welfare and basic services is thus shifted away from the state and private sector, reinforcing an exploitative capitalist system.¹³⁹

This tour in Issa Shivji's thought demonstrates that the state is constitutive of the market. This implies that the legal rules it creates, particularly substantive and procedural rules, are not neutral. They privilege state and private parties' benefits, at the same time, they fail to systematically improve the material conditions of the people marginalized, subordinated, and oppressed by state and private entities projects.

¹³³ East African Community Treaty, Article 23.

¹³⁴ Ibid (n 133).

¹³⁵ Ibid.

¹³⁶ Makau Mutua, 'Human Rights NGOs in East Africa: Political and Normative Tensions' in Human Rights NGOs in East Africa' (2008) University of Pennsylvania Press 13.

¹³⁷ Issa Shivji, 'NGOs Silence in the NGOs Discourses: The Role and Futures of NGOs in Africa' (2006) 31 Africa Development 44.

¹³⁸ Ibid.

¹³⁹ Ibid.

It is within this context that this part argues that the EACJ has reconceptualized the application of substantive and procedural rules in the Serengeti case. This is evident in how the EACJ carefully balanced its jurisdiction to address both the social and environmental realities affecting the Serengeti National Park and the habitats it sustains. Traditionally EACJ jurisdiction often focuses on trade, but it expanded it to include environmental protection to restrain Tanzania's development activity that threatened the right of present and future generations to a clean and healthy environment.¹⁴⁰ Consequently States Parties must abstain from any measures contravening the Treaty environmental obligations under Chapter 19. It is worth noting that Chapter 19 of the Treaty has not yet been operationalized.¹⁴¹ Operationalizing Chapter 19 means sets out the steps, procedures, or mechanisms required to implement its substantive obligations.¹⁴² So when the EACJ enforces Chapter 19 despite the absence of an operational protocol, it is effectively bypassing a doctrinal requirement to focus directly on the seriousness of the obligations breached. Ultimately, the EACJ considered the reality that failing to protect the Serengeti National Park would prioritize state and corporate interests.¹⁴³ Consequently, the Serengeti National Park would be doomed to disappear. Based on this reasoning, the EACJ issued a permanent injunction halting the proposed construction of the Serengeti Highway. This remedy effectively undid the proposed construction of the Serengeti Highway intended economic purpose. The permanent injunction also prevented harms that would have occurred had the construction proceeded.

ii. Framing the Ogiek Claim, Anticipating Counterclaims, and Determinative Considerations before the EACJ

As mentioned, Carbon credits are mitigation strategies established under the Paris Agreement to limit global temperature rise below 2°C, while pursuing efforts to cap warming at 1.5°C.¹⁴⁴ However, scientific evidence shows that even if states comply with the spirit of the Paris Agreement, global warming will still rise to 4°C.¹⁴⁵ Paradoxically, since 2023, the Ogiek have

¹⁴⁰ East African Community Treaty, Chapter 19.

¹⁴¹ Ibid (n 132).

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Paris Agreement, Articles 5, 6.

¹⁴⁵ Ibid (n 22).

continued to face forced evictions from their ancestral land to pave the way for carbon credit projects.¹⁴⁶ In practice, carbon credits are green grabbing. They appropriate Ogiek's land and resources for false environmental purposes. This process separates Ogiek from their land to extract value for private capital, Blue Carbon.¹⁴⁷

The Ogiek can argue that the carbon credit deal between the Government of Kenya and Blue Carbon does not reduce greenhouse gas emissions. Rather, it facilitates continued emissions elsewhere while producing dispossession and ecological degradation within the Mau Forest. The deal restructures control over the Mau Forest in a manner that enables Ogiek's forced evictions under the guise of carbon credits. This violates Articles 6, 7 and Chapter 19 of the EAC Treaty. Articles 6 and 7 require the Government of Kenya to respect human rights, rule of law.¹⁴⁸ Furthermore, Chapter 19 imposes on the Government of Kenya obligations to conserve, protect, and manage the environment and natural resources. It must also abstain from any measures contravening the Treaty environmental obligations.¹⁴⁹

In his groundbreaking work on counter claims advanced by governments and corporations in climate litigation, Noah Walker Crawford points out that states and corporations rarely deny their contribution to climate change.¹⁵⁰ Instead, they strategically contest causation, standards of proof, and the admissibility of scientific evidence in order to avoid legal liability.¹⁵¹ In responding to the Ogiek claim, Blue Carbon and the Government of Kenya may deploy several strategies to shift or diffuse responsibility. First, Blue Carbon and the Government of Kenya may argue that they have a duty under the Paris Agreement to reduce greenhouse gas emissions and are therefore acting in the public interest. Framing the carbon project as compliance with international obligations allows them to recast the impugned conduct as climate mitigation rather than harm. In this way, the project

¹⁴⁶ Ibid (n 18)

¹⁴⁷ Ibid (n 48).

¹⁴⁸ East African Community Treaty, Articles, 6, 7.

¹⁴⁹ East African Community Treaty, Chapter 19.

¹⁵⁰ Noah Walker-Crawford, 'Save the Climate but Don't Blame Us: Corporate Arguments in Climate Litigation' (2026) *Transnational Environmental Law*, 1–28.

¹⁵¹ Ibid.

is presented as lawful and necessary state action.¹⁵²Public interest becomes a shield against liability. Second, Blue Carbon may argue that it is impossible to establish causal liability in cases of cumulative environmental damage. They may contend that numerous actors have emitted CO₂ and other greenhouse gases, which mix in the atmosphere, making attribution to a single entity impossible.¹⁵³By appealing to the materiality of CO₂, they may insist that the Ogiek must trace the impacts of individual molecules to prove liability. Because CO₂ molecules are indistinguishable and cannot be traced to a particular emitter at a specific time, it becomes impossible to determine whose emissions damaged which trees. This argument effectively postpones liability by deferring responsibility to further scientific development and awaiting greater judicial clarity.¹⁵⁴

Third, they may challenge the admissibility of expert evidence.¹⁵⁵By applying heightened expectations of impartiality, Blue Carbon and Kenya may argue that climate scientists who have expressed concern about corporate responsibility for global warming, or who have engaged in public advocacy, fail to meet legal standards of neutrality.¹⁵⁶On this basis, such experts may be portrayed as biased and therefore inadmissible. The result would be the exclusion of critical scientific evidence. Through evidentiary challenges, the burden of proof becomes increasingly difficult to satisfy.¹⁵⁷The strategies identified by Noah Walker Crawford show that corporation in climate litigation do not deny their key role in climate change. Instead, they turns on procedural contests over causation, standard of proof, and admissibility. These defensive tactics appear less neutral than they claim. They are not merely technical objections; they structure the substance of justice itself.

The EACJ has previously interpreted its mandate broadly, balancing its trade orientation with environmental protection and human rights. Even in the absence of a specific human rights or environmental protocol, the EACJ may read these provisions purposively. If the carbon credit scheme structurally undermines environmental protection, the defect lies in the agreement itself,

¹⁵² Ibid, 10.

¹⁵³ Ibid, 15-16

¹⁵⁴ Ibid,

¹⁵⁵ Ibid, 19-22.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

not merely in its implementation. Scientific evidence indicating that carbon credits increase emissions rather than reduce them would weaken the respondents' reliance on climate mitigation as a public-interest defence. In that case, the project would contradict, rather than fulfill, Treaty objectives. The Court could find that prioritizing private commercial gain over ecological integrity and Ogiek's land rights compromises the rights of present and future generations of the Ogiek.

Remedies will depend on whether the Ogiek land has become expendable—turned into sacrifice zones. Sacrifice zones completely alienate Indigenous Peoples such as the Ogiek, because they can no longer exercise their traditional activities on the land.¹⁵⁸ If the land has not yet become a sacrifice zone, the EACJ could issue a permanent injunction to enforce cessation of the breach. This would interrupt the legal effect of the carbon credit deal and prevents further reliance on it. The EACJ could also issue restitution as a remedy, restoring the Mau Forest to the condition it was in before the violation. It could also issue pecuniary compensation. This amount should be proportionate to the magnitude of harm they have endured since the colonial period.

If the land has become a sacrifice zone, injunction, restitution, pecuniary compensation will be more difficult to grant as remedies. This is because Carbon credit deal places a demand on law in how it conceives time. Time has direct implications for the allocation of responsibility and for questions of justice, including compensation, injunction, and restitution.¹⁵⁹In the context of climate change, carbon credits are presented as mitigation measures intended to address global warming caused one hundred years ago. That historical warming continues to determine present climatic conditions and futures yet to arrive.¹⁶⁰ However, rather than reducing global warming, carbon credits exacerbate it by commodifying nature. Without grasping these temporal dimensions, remedies to carbon credit related green grabbing begin on a flawed foundation.

¹⁵⁸ Carmen G. Gonzalez, 'Racial Capitalism, Climate Justice, and Climate Displacement', (2021) 11 Onati Socio-Legal Series 115.

¹⁵⁹Eerle Platvoet and Iyan Ofor, When Law Runs up Against Planetary and More-than-Human Temporalities, <<https://www.wheretheclimate.earth/planetary-blog/when-law-runs-up-against-planetary-and-more-than-human-temporalities>>, 19th February 2026.

¹⁶⁰ Ibid.

Some might argue that the doctrine of *res judicata* prevents the EACJ from hearing a matter already decided by the African Court. *Res judicata* is a legal principle barring the re-litigation of a claim that has already been finally adjudicated. However 2023 Ogiek forced evictions involved carbon credits related green grabbing. Therefore, they constitute a new cause of action, distinct from the 2009 forced evictions adjudicated by the African Court. Given the EACJ's reconceptualization of procedural and substantive rules to address urgent environmental issues affecting present and future generations, it may bypass purely procedural rules. This includes the *res judicata* doctrine when such it fails to reflect the material condition of the affected people.

V. Conclusion

This paper has argued that the African Court should move beyond a distinct application of procedural and substantive rules when addressing the forced evictions of the Ogiek arising from carbon market driven green grabbing. Such a shift is necessary not only to remedy the consequences of the breach of the Ogiek's land rights, but also to confront the underlying purpose and motive that animate the breach itself.

Drawing on the Ogiek merits and reparations decisions, the paper has highlighted the limitations inherent in a strict distinction between procedural and substantive rules. In response, it has proposed the EACJ as a complementary forum, given its potential to adopt an application of these rules capable of addressing both the material effects of violations and the capitalist logics that sustain them, often at the expense of communities whose livelihoods are eroded for the benefit of a clique of elites. While acknowledging a broader legal history characterized by an entrenched distinction between procedural and substantive rules, this paper has sought, in a modest way, to contribute to a reorientation of judicial reasoning. Its aim is to support the African Court in more effectively confronting carbon credit related green grabbing and to advance the basic needs of the people it seeks to rehabilitate. It is hoped that this paper has made a meaningful contribution toward that objective.