

# **ANCESTRAL LAND & LAND DISPOSSESSION**

**What does international human rights law (IHRL) demand?**

In Loving Memory Of...



A disclaimer....



# Structure of Presentation

1. Dispelling some myths
2. Ancestral land under PiL & IHL
3. International Concerns directed @ Namibia i.r.o dispossessed land
4. Some Best Practices
5. Eight Big Steps
6. Recommendations

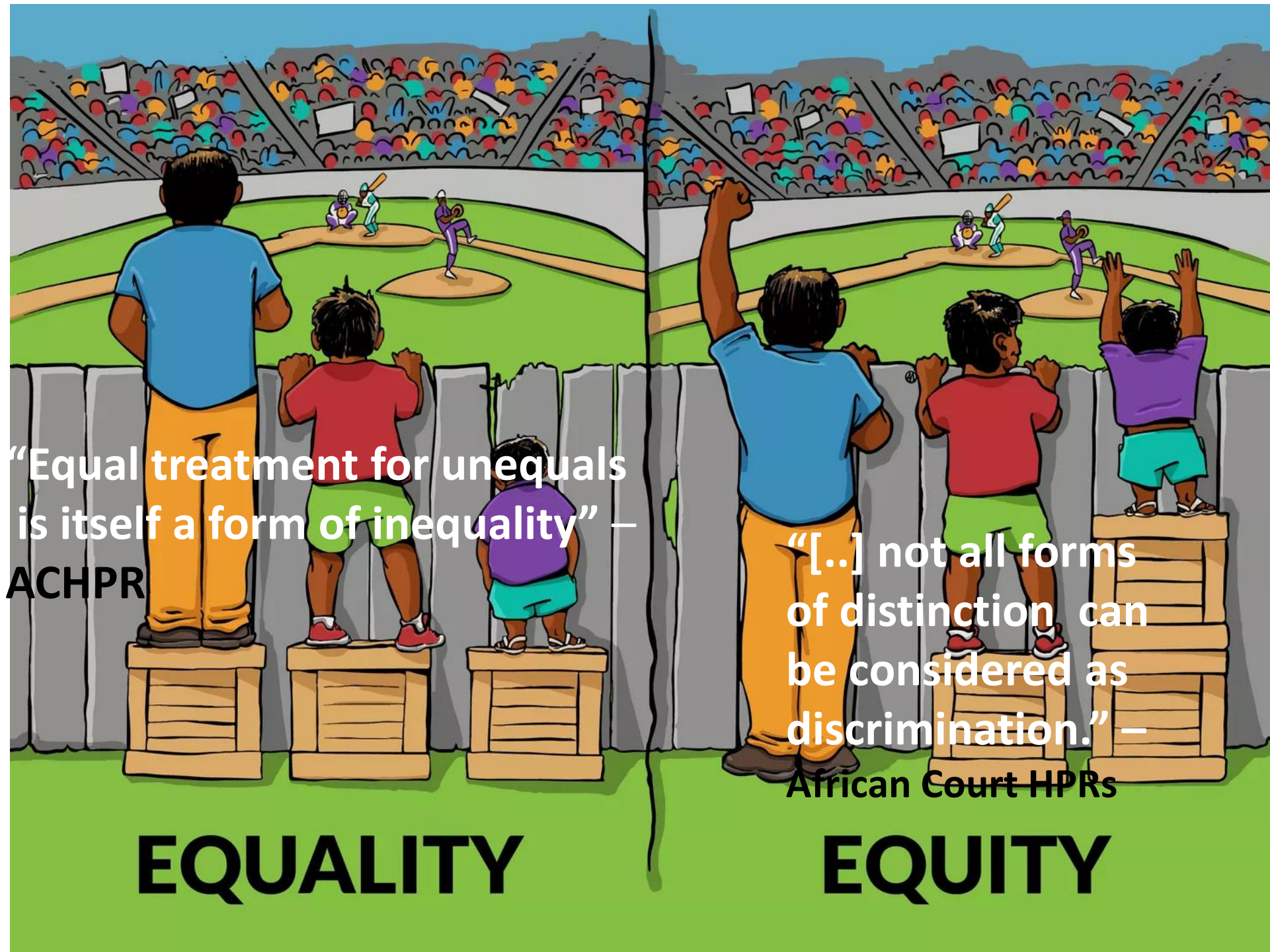
# Dispelling some myths....

## The Myth

1. Ancestral equates to Bantustans
2. The current legal framework does not provide the entertainment of ancestral land

## The Reality

- 1.1 Ancestral land & territories **predates** colonialism and/or Bantustans
- 1.2 Such arguments ratifies colonialists argument of *res nullius (niemand-land)*
- 2.1 **Groups rights** read into Nam Constitution via **art.144** (ACHPR & UNDRIP)
- 2.2. Treating dispossessed groups the same as non-disposed groups = DISCRIMINATION (art.10 .1)
- 2.3 Creative, imaginative & purposive interpretation & progressive laws.



“Equal treatment for unequals is itself a form of inequality” –  
ACHPR

“[...] not all forms of distinction can be considered as discrimination.” –  
African Court HPRs

**EQUALITY**

**EQUITY**

# Status of ancestral land under PiL & IHL

Legal Instrument	Article	Provision
C169 -, 19Indigenous and Tribal Peoples Convention89 (No. 169)	14	<ul style="list-style-type: none"> <li>✓ The Convention recognizes indigenous peoples' rights to the land and resources they traditionally occupy and use in a broad sense.</li> <li>✓ The recognition of land rights is based on the traditional occupation, meaning the land where indigenous peoples have lived over time and want to pass on to future generations.</li> <li>✓ <b>Traditional occupation confers “a right to the land, whether or not such a right was recognized [by the State]”, CEACR, 73rd Session, 2002, observation, Peru, para 7</b></li> </ul>
United Nations Declaration on the Rights of Indigenous People (UDRIP)	Article 26 (1)	<b>Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.</b>
African Charter on Human And Peoples' Rights (ACHPR)	Article 14	<p>The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.</p> <p><b>Per African Crt on HPRs:</b></p> <ol style="list-style-type: none"> <li><b>1. the right to property as guaranteed by Article 14 may also apply to groups or communities; in effect, the right can be individual or collective;</b></li> <li><b>2. Art 14 + art 26(1) of UNDRIP reads into the ACHPR the recognition of</b></li> </ol>

YEAR	CONCERN	RECOMMENDATION(S)
2005	<p><i>"[...] only two, the !Kung and Ju 'hoansi of Tsumkwe district, today control their ancestral land (now state-owned communal land) and thus have access to natural resources."</i> – par.40.10, African Commission's Working Group on Indigenous Populations/Communities</p>	<p><i>"The San should be provided with communal land they can call their own; The protection and expansion of land rights is one of the most fundamental interventions that can be made on behalf of the San in Namibia to secure their sustainable livelihood."</i> –par. 51.1, ACWGIPC</p>
2006	<p><i>"The Committee is concerned about the lack of recognition of the rights of ownership of indigenous communities over the lands which they traditionally occupy or have occupied. (art. 5(d)(v))"</i> – Concluding Observation on Nam, par.18, CERD Com</p>	<p><i>"In cases where indigenous communities have been deprived of their lands and territories traditionally owned, the Committee recommends that the State party take steps to return those lands and territories or to provide adequate reparation measures, in accordance with paragraph 5 of general recommendation No. 23 (1997) on the rights of indigenous peoples."</i> – Concluding Observation on Nam, par.19, CERD Com</p>
2011	<p><i>"Comprehensive measures are not taken to comprehensively address indigenous peoples' specific needs in relation to land [...]"</i> – par. 40(iii), ACHPR.</p>	<p><i>Take urgent measures to address indigenous populations/communities specific needs in relation to land [...] and further ensure that affirmative action policies and measures adopted in this respect effectively and adequately benefit them."</i> – par. 58(iii), ACHPR.</p>



2016	<p>(1) <i>The Committee is also concerned that indigenous peoples' traditional uses and occupation of land are not recognized and protected.</i>— UN CESRC Committee, Concluding Observation on Namibia, par. 15.</p>	<p>(1) <i>“Adopt a law recognizing indigenous peoples on the basis of self-identification and protecting their rights, including the right to ownership of the lands that they traditionally occupy or use as sources of livelihood and the respect of their free, prior and informed consent in decision-making processes affecting their rights and interests;</i></p> <p>(2) <i>Implement the recommendations made by the Special Rapporteur on the rights of indigenous peoples following his visit to Namibia in 2012.”</i></p> <p><i>UN CESRC Committee, Concluding Observation on Namibia, par. 16.</i></p>
2016	<p><i>“The Committee notes with concern that all traditional indigenous lands remain under State ownership while traditional authorities may only administer communal lands according to the Communal Land Reform Act, and that indigenous groups are insufficiently consulted regarding the extraction of natural resources on their traditional lands”-</i> UN Human Rights Committee, Concluding Observation on Namibia, par. 43.</p>	<p><i>“The State party should ensure that indigenous peoples have titles over lands and territories that they traditionally occupied or resources they owned. It should seek the free and informed consent of indigenous communities and give primary consideration to their opinions and decisions prior to granting licences to extractive industries.”</i> – UN HRC, Concluding Observation on Namibia, par. 44</p>

**Eight “giant steps” for achieving **reconciliatory / restorative justice** viz, ancestral land claims( per Robert Andrew Joseph endorsed by UN HRC)**

1. **Recognition**: finding truth and describing injustices;
2. **Responsibility**: the acknowledgement of responsibility for injustices;
3. **Remorse**: a sincere apology for injustices;
4. **Restitution** of lands and resources, and the power to determine their use;
5. **Reparation** for injustices in financial terms, recognizing that many harms are untouched by this compensation;
6. **Redesigning State political-legal** institutions and processes to empower indigenous participation in self-government and State governance;
7. **Refraining from future injustices** by assuring past and present injustices will not be repeated;
8. **Reciprocity in the obligation on the harmed** to do unto others as they would have done unto them

# Having said that....

- Human Rights-based approach (respect, protect & fulfill)
- Comprehensive constitutional audit
- Learn from others (Liberia,

new LRA), Botswana (art. 14.3.c), SA (restitution), Uganda (art 267 UC), Malaysia ( National Inquiry into the land rights of indigenous peoples)

- Bold, active Leadership!
- A Hage legacy (people's mandate)!

