CHAPTER 4

REMEDIES:

RESTITUTION AND SPECIAL MEASURES

Let us face it, we are all here to stay.

Lamer C.J.¹

There is a clear principle that violations of human rights give rise to a right of reparation for the victims.² The availability of remedies is in itself a right enshrined in several instruments.³ Remedies refer to “the means by which a right is enforced or the violation of a right is prevented, redressed or compensated.”⁴ According to this definition, remedies entail different aspects: the means of enforcement, prevention and redress of a right. As Myntti pointed out “the term remedies has two inter-related aspects: recourse and redress.”⁵ In terms of land rights, remedy entails redress for historical land claims, but also special measures to protect land rights and social and economic plans for the protection of indigenous peoples’ rights over their territories. As highlighted in the previous chapter, indigenous peoples’ rights to their lands derive from traditional occupation and use, as well as indigenous laws and customs relating to land ownership. Thus, international law is dealing with arguments of a historical nature. Even though international human rights law is concerned with the present situation facing


indigenous peoples, it is certain that when addressing indigenous peoples’ land rights the “weight of history” cannot be ignored.⁶

The present chapter undertakes to explore the remedies offered by human rights law to the violation of indigenous peoples’ land rights, adopting a twofold approach. The first approach delves into the theories of land restitution. It will thus focus on theories of compensation, restitution and reconciliation and examine how such mechanisms are increasingly playing a large part in the human rights discourse on indigenous peoples’ land rights. The second method of redress for past dispossession is based on affirmative action. Since it is aimed at re-establishing a fair balance between historically marginalized groups and the rest of the dominant population, it has became a relatively effective human rights tool in dealing with past injustices. Thus, after exploring the means for reparations, the following analysis will examine how the language of affirmative action is being used in the indigenous peoples’ land rights context, as human rights law is articulating an obligation on States to put in place special measures of protection guaranteeing indigenous peoples’ rights over their territories.

A. REPARATIONS: RESTITUTION AND COMPENSATION

Under international law, the term reparation is often used as a generic term to refer to compensation claims. Compensation and restitution are usually the two forms of reparations.⁷ Restitution in international law is “aimed at the reparation of the effects of a proceeding that was unlawful under International Law.”⁸ Thus, the first and fundamental principal for restitution of lands supposes that the acquisition of indigenous territories was an unlawful act under international law. It follows that any meaningful consideration on restitution of indigenous peoples’ territories should start with an exploration of what are the rules relating to the removal or acquisition of the territories of indigenous peoples.

Under international law concerning indigenous peoples’ rights, the principle is that of “exceptional” removal. Unless the removal is voluntarily agreed to by indigenous peoples, the two ILO Conventions consider that the removal of indigenous peoples from their lands should take place strictly in “exceptional circumstances.” Article 12 of ILO Convention No. 107 provides that governments may

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⁶ As stated by Kreimer: “Indigenous peoples, because of their pre-existence to contemporary States, and because of their cultural and historical continuity, have a special situation, an inherent condition that is juridically a source of rights.” Osvaldo Kreimer, The Future Inter-American Declaration on the Rights of Indigenous Peoples: A Challenge for the Americas, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 69–70 (Cynthia Price Cohen ed., 1998).


⁸ ISTVÁN VÁSÁRHELYI, RESTITUTION IN INTERNATIONAL LAW 10 (1964).