

My proposed research contribution will consider how international law on treaties relates to treaties signed with Métis people. Supreme Court of Canada jurisprudence holds Crown-Aboriginal Treaties are *sui generis* and not having an international character.<sup>1</sup> British courts have also expressed a similar understanding.<sup>2</sup> However, given the recent shift recognized in international law, these understandings of Treaties may no longer be tenable.

Under international law in the 1500s, according to Vitoria, Indigenous peoples had rights based on natural law; however, ideas of a just war permitted Europeans to acquire those rights. Writing in the 1600s, Grotius built upon these principles accepting that Indigenous peoples had the ability to enter into treaties. It was not until Vattel and Oppenheimer that international law began to refocus its attention to nation-states and European centric notions of governance. However, Vattel did note that a state does not lose its independence or sovereignty by placing itself under the protection of another, so long as self-government is retained.<sup>3</sup>

International law has again begun to shift, recognizing Indigenous peoples' as subjects of international law, possessing certain rights. The status of Treaties signed between Indigenous peoples and European states has also gained international attention. In 1987 Miguel Alfonso Martinez was appointed as Special Rapporteur to undertake a study on Treaties, Agreements and Other Constructive Arrangements, in which he concluded "In the case of indigenous peoples who concluded treaties or other legal instruments with the European settlers and/or their continuators in the colonization process, the Special Rapporteur has not found any sound legal argument to sustain the argument that they have lost their international juridical status as nations/peoples."<sup>4</sup> He further concluded that the treaties and agreements made between Indigenous peoples and European colonizers were and continue to be international treaties.<sup>5</sup> He further noted that the obligation to fulfill obligations is a preemptory norm as well as an obligation under the UN Charter.<sup>6</sup>

The most recent acknowledgement of this shift has been the recognition of the importance of Treaties in the UN *Declaration on the Rights of Indigenous Peoples*<sup>7</sup> recognized that treaties between Indigenous peoples and colonial powers are of international concern and character – there has been increased attention paid to the need to fulfill these obligations. The United Nations International Day of the World's Indigenous Peoples' theme in 2013 was "Indigenous peoples

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1 *Simon v The Queen*, [1985] 2 SCR 387, *R v Sioui*, [1990] 1 SCR 1025.

2 *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte: the Indian Association of Alberta, Union of New Brunswick Indian, Union of Nova Scotia Indians*, [1982] 2 All E.R. 118; [1981] 4 CNLR 86.

3 S. James Anaya, *Indigenous Peoples in International Law*, 2nd edition, (Oxford University Press: New York, 2004).

4 UN Commission on Human Rights, "Study on treaties, agreements and other constructive arrangements between States and indigenous populations," Final report by Miguel Alfonso Martinez, E/CN.4/Sub.2/1999/20 22 June 1999 at para 265.

5 UN Commission on Human Rights, "Study on treaties, agreements and other constructive arrangements between States and indigenous populations," Final report by Miguel Alfonso Martinez, E/CN.4/Sub.2/1999/20 22 June 1999 at paras 270-272.

6 UN Commission on Human Rights, "Study on treaties, agreements and other constructive arrangements between States and indigenous populations," Final report by Miguel Alfonso Martinez, E/CN.4/Sub.2/1999/20 22 June 1999 at para 277.

7 GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol. III, UN Doc A/61/49 (2008) 15.

building alliances: Honouring treaties, agreements and other constructive arrangements.”<sup>8</sup> On the occasion, there were many calls for action to respect and implement treaties.<sup>9</sup>

Potential ramifications of the recognition of the international character of Treaties include that disputes arising under these Treaties should be resolved in international fora as opposed to domestic courts and governed according to international Treaty law.<sup>10</sup> Relevant international Treaty law includes the Vienna Convention on the Law of Treaties, which encapsulates existing international law on treaties in 1969 and can provide the basis for understanding the rules that govern Métis-Crown Treaties.<sup>11</sup> Part of the challenge of the research relates to questions of inter-temporal law, the application of the rules of international law at the time the Treaties were signed.

This research will identify the international rules on treaties and consider the implications for Métis Treaties in Canada, with a potential focus on Treaty 3 and the *Manitoba Act, 1870*. My research will explore whether Canadian law needs to be re-evaluated and altered in order to keep up with Canada’s international obligations. If the Treaties remain “*sui generis*,” there may still be a need to modify Canadian jurisprudence which holds that the Canadian Government can unilaterally modify the terms or rights contained in treaties,<sup>12</sup> as well as justifiably infringe treaties, therefore, subjecting treaties to limitations imposed by Government.<sup>13</sup>

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8 United Nations, “International Day of the World’s Indigenous Peoples”

<http://www.un.org/en/events/indigenousday/>.

9 The High Commissioner recognized “States need to do more to honour and strengthen their treaties with indigenous peoples, no matter how long ago they were signed.” Office of the High Commissioner for Human Rights, “UN rights chief Navi Pillay urges Status to do more to respect treaties with indigenous peoples” press release, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13610&LangID=E>.

10 Russel Lawrence Barsh and James Youngblood Henderson, “Final Report: International Context of Crown-Aboriginal Treaties in Canada” Prepared for the Royal Commission on Aboriginal Peoples, May 12, 1995, available on CD.

11 UNTS vol 1155, p 331, 23 May 1969, Entry into force 27 January 1980. See Arnold Duncan McNair, *The law of treaties: British practice and opinions* (Oxford : Clarendon Press, 1938).

12 See for example, *R. v. Badger*, [1996] 1 SCR 771 where the court held that the Constitutional transfer of lands from the Federal government to the Provincial governments could place a geographical limit on hunting rights protected in the Numbered Treaties.

13 *R. v. Sioui*, [1990] 1 SCR 1025.