

**The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World**

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**PROLOGUE**

In the 1974 book *The Fourth World: An Indian Reality*, George Manuel<sup>1</sup> and Michael Posluns<sup>2</sup> present a memoir of Manuel’s life to

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<sup>1</sup> Born in 1921 as a member of the Shuswap Nation (in the B.C. interior), Manuel was a First Nations and Indigenous activist, leader, elected head of the North American Indian Brotherhood, leader of the National Indian Brotherhood (precursor to the Assembly of First Nations), president of the World Council of Indigenous Peoples, and President of the Union of British Columbia Indian Chiefs. He died in 1989. *Biography of George Manuel*,

that date, interwoven with a description of the traditions, conditions, and struggles of Indigenous peoples in Canada and around the world. In the acknowledgements of the book, Manuel thanks Mbutu Milando, First Secretary and later High Commissioner of the Tanzanian High Commission in Ottawa, “who first suggested to me the concept and nature of the Fourth World—an idea that grew into a framework for much of my own thought.”<sup>3</sup> Among others, Manuel also thanks Marie Smallface Marule (Blackfoot), former secretary-treasurer of the National Indian Brotherhood, who “was also the first person to be able to show me, from direct and personal experience, the close relationship and common bonds between our own condition as Indian people, and the struggles of other aboriginal peoples and the nations of the Third World.”<sup>4</sup> In *The Fourth World*, Manuel

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UNION OF BC INDIAN CHIEFS, <http://www.ubcic.bc.ca/about/george.htm> (last visited Mar. 5, 2012). Among many other accomplishments, he was the driving force behind the founding of the World Council of Indigenous Peoples. See Douglas Sanders, *The Formation of the World Council of Indigenous Peoples*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS Document no. 29 (1980). Contrary to some interpretations, which do not appear consistent with the text, Manuel and Posluns clearly did not utilize this term in a derogatory or disempowering manner. Cf. Dianne Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia*, 21 SYRACUSE J. INT’L L. & COM. 65, 83 & 102 (1995). Otto’s devaluing of the term due to the potential for further stigmatization seems similarly unwarranted, especially given her otherwise uncritical acceptance of the term “Third World.” *Id.*

<sup>2</sup> Michael Posluns “is a journalist and researcher . . . Posluns has conducted research, written reports, briefs and monographs on behalf of and about First Nations in Canada and the United States.” He has been parliamentary adviser to many bodies, including the National Indian Brotherhood, the Assembly of First Nations, and the Dene Nation. *Inventory of the Michael Posluns Fonds*, YORK UNIVERSITY, <http://archivesfa.library.yorku.ca/fonds/ON00370-f0000382.htm> (last updated May 6, 2005).

<sup>3</sup> GEORGE MANUEL & MICHAEL POSLUNS, *THE FOURTH WORLD: AN INDIAN REALITY* (1974) at xvi (Milando is described as “the first diplomat to welcome a closer relationship with the Indian people through the National Indian Brotherhood.”). Milando reportedly told his friend, Manuel, that “We are called ‘the Third World’” and further that “When the Indian peoples come into their own, that will be the Fourth World.” *Id.* at 5. As described in the Author’s Note, this book is “a story told entirely in the voice of one man [that] is the work of two authors” who “should like to think that the dialogue from which that voice arose is in itself a sign of the Fourth World” *Id.* Given this single voice, references in the body of this article to the book’s author refer to Manuel alone. For an account of some of Manuel’s political and international organizing work, as well as the rise of (and some fractures within) the Fourth World project, see Sanders, *supra* note 1. For a recent review of international Indigenous activism, including the Fourth World concept, in the context of a book-length interrogation of the notion and strategies of Indigenous development, see KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* 49–52 (2010).

<sup>4</sup> MANUEL & POSLUNS, *supra* note 3, at xv. Marule had volunteered with CUSO in the newly decolonized state of Zambia for four years where she also met a member of the African National Congress who later became her husband, and was inspired by these experiences to draw connections between the Third and Fourth Worlds (Conversation with

anecdotally and programmatically sets out contemporary challenges facing Indigenous peoples and some responses to these challenges. Manuel does so by describing a common understanding of the universe and threatened worldview, stemming from a common attachment to the land, which he distinguishes from the First World and the experience of the decolonizing Third World at that time.<sup>5</sup> Drawing inspiration from the teachings of his grandfather, Manuel emphasizes the fact of Indigenous peoples' survival around the world and the potential for more than mere survival in the future:

The Fourth World is a vision of the future history of North America and of the Indian peoples. The two histories are inseparable. It has been the insistence on the separation of the people from the land that has characterized much of recent history. It is this same insistence that has prevented European North Americans from developing their own identity in terms of the land so that they can be happy and secure in the knowledge of that identity.<sup>6</sup>

Manuel's synthesis of a Fourth World perspective stems from a lifetime of political activism and observations of a common experience of colonialism, dispossession, and attempted assimilation (or termination as it was called in the United States). This common experience is complemented by a wide variety of Indigenous legal orders, which do not receive the recognition they deserve nationally

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Michael Posluns). Marule is now President of Red Crow Community College (online: <http://imap.ammsa.com/node/11593>).

<sup>5</sup> MANUEL & POSLUNS, *supra* note 3, at 5–6 (Manuel notes the Third World strategy including the fact that “it reacts to Western political concepts . . . while struggling to imitate them”).

<sup>6</sup> *Id.* at 11–12. Although too numerous to discuss completely here, Manuel's Fourth World thesis stems from an emphasis upon: spiritual relationships with the land, the awareness of ecological disaster and the social commodities of land, water, and air. *Id.* at 11; the use of story-telling for “moral teaching” and “practical instruction.” *Id.* at 37; the central notion and practice of giving as the foundation of Fourth World social and economic citizenship (the “whole foundation of our society . . . is summed up in one word: giving”). *Id.* at 41; the importance, even when there was “nothing to give,” of doing something “to make yourself a part of the household where you were a guest.” *Id.* at 42 (as opposed, perhaps, to the alienating theory of labor that creates exclusion through individual property); the connection between spiritual and material power. *Id.* at 43; and, the significance and practice of giving as extended to the entire continent of aboriginal peoples. *Id.* at 44. See also JOHN BORROWS, CANADA'S INDIGENOUS CONSTITUTION 351–62 (2010) (showing the use of stories as cases in ILT and the story of Mandamin/corn) and RAUNA KUOKKANEN, RESHAPING THE UNIVERSITY: RESPONSIBILITY, INDIGENOUS EPISTEMES, AND THE LOGIC OF THE GIFT ch. 1 (2007) (for a multifaceted approach to the complex notion, non-essentialized worldview, and logic of “the gift”).

or internationally while having to contend with the compounding challenges of European settlement, assimilation, and displacement.<sup>7</sup>

### INTRODUCTION

As both practice and discipline, international law has been the subject of serious and sustained internal and external critiques since its inception. In fact, the “inception” of international law itself has been the subject of serious and sustained critique for some time now. This debate is of special relevance for Indigenous peoples, most of whom suffer from a double burden in international law, as they are neither Europeans nor dominant political actors within the states whose borders now contain and divide their traditional territories. Apart from the changing role, place, and agency of Indigenous peoples in international law and fora generally,<sup>8</sup> this article raises the issue of Indigenous peoples’ prominence (or lack thereof) within critical and alternative approaches to international law, namely deconstructive/historical and Third World<sup>9</sup> Approaches to International Law (TWAAIL). The focus on critical and alternative approaches to international law speaks to the need for these theories and actors to learn from one another in their attempts to both describe the worlds comprised by international law and to change them. While the title of this article refers to the “South of the North” and the Fourth World generally, my focus in the following largely remains on Indigenous peoples and nations located within (and sometimes across) the borders of the Canadian state.<sup>10</sup>

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<sup>7</sup> JOHN BORROWS, *JUSTICE WITHIN: INDIGENOUS LEGAL TRADITIONS* (2006).

<sup>8</sup> See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996) [hereinafter ANAYA, *INDIGENOUS PEOPLES*]; James Anaya, *Keynote Address: Indigenous Law and Its Contribution to Global Pluralism*, 6 *INDIGENOUS L.J.* 3 (2007); S. James Anaya, *Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law*, 22 *WASH. U. J.L. & POL’Y* 107 (2006); JAMES (SA’KE’J) YOUNGBLOOD HENDERSON, *INDIGENOUS DIPLOMACY AND THE RIGHTS OF PEOPLES: ACHIEVING UN RECOGNITION* (2008).

<sup>9</sup> The term “Third World” has been defined, and resisted definition, widely, but arose in the context of the Cold War to distinguish between capitalist (First World), communist (Second World) and decolonized, non-aligned (Third World) countries. In this historical context, and as a political project see VIJAY PRASHAD, *THE DARKER NATIONS: A PEOPLE’S HISTORY OF THE THIRD WORLD* 6–7, 11 (2007). In legal scholarship, see also Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 *WIS. INT’L L.J.* 353, 356 n.15 (1998) (similarly noting French demographer Albert Sauvy’s non-derogatory coining of the term in a 1952 newspaper column).

<sup>10</sup> In Canada, the term “Indigenous” is sometimes used in the international context or interchangeably with “Aboriginal” as a general term domestically, though it is only the latter term that is included and defined as including the Indian Inuit, and Metis peoples of Canada. See Constitution Act § 35(2), 1982, *being* Schedule B to the Canada Act, 1982, c.

This Article begins by discussing two major writers who, respectively, form parts of two critical approaches to international law that have active and engaged followings in the legal academy. After assessing the valuable linguistic and historical lessons in some of the work of Martti Koskenniemi, the article touches upon two examples of Indigenous inter-National laws germane to, but not always acknowledged within, critical alternative histories of international law. In part, this acknowledgement requires a contestation of the term itself, given Indigenous petitions at imperial international law, transnationally with respect to domestic Canadian law, advocacy and activism at inter-state international law, and the abiding practice of Indigenous legal traditions and inter-National law and diplomacy amongst Indigenous peoples themselves. Next, this Article looks briefly at how the work of Antony Anghie and more recent writing within TWAIL address the nexus to Indigenous peoples, including lingering issues and questions as to the existence and quality of this relationship.

The final section of this Article looks in greater detail at the work and advocacy of Levi General in the 1920s at the League of Nations. General is known more widely by the hereditary chiefly title of Deskáheh (Young Bear Clan, Cayuga Nation, Haudenosaunee Confederacy (Six Nations of the Grand River)).<sup>11</sup> Given his inability to secure a hearing of the Six Nations' grievances against Canada before that League, this episode in the early institutional life of

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11 (U.K.). When referring to legal systems, I use "Indigenous" to refer to the laws of Indigenous nations and peoples, while I use "Aboriginal" to refer to the laws of the state. Where known or required for context, I also use the names of specific nations (e.g., Secwepmec or Cayuga), clans, confederacies (e.g., Six Nations), regional/international political organizations (e.g., Inuit Circumpolar Conference), and legislative or policy terms (e.g., Indian Act, R.S.C. 1985, c. I-5 (showing that this holds true for "Indian," or "status Indian" or "First Nations" under this act). For a further elaboration of the terminology in the Canadian context, see *Report of the Royal Commission on Aboriginal Peoples, Vol. 2: Restructuring the Relationship*, LIBRARY AND ARCHIVES CANADA, [http://www.collections.canada.gc.ca/webarchives/20071124125001/http://www.ainc-inac.gc.ca/ch/rcap/sg/sh1\\_e.html#Volume%202](http://www.collections.canada.gc.ca/webarchives/20071124125001/http://www.ainc-inac.gc.ca/ch/rcap/sg/sh1_e.html#Volume%202) (last updated Feb. 8, 2006).

<sup>11</sup> Levi General was installed in 1917 as a new hereditary chief of the Cayuga Nation by the matron of the Young Bear Clan, Louise Miller. See Donald B. Smith, *Deskaheh (Levi General)*, THE DICTIONARY OF CANADIAN BIOGRAPHY ONLINE, vol. XV, 1921–1930 (2000), [http://www.biographi.ca/009004-119.01-e.php?id\\_nbr=8103](http://www.biographi.ca/009004-119.01-e.php?id_nbr=8103). The Haudenosaunee Confederacy, originally comprised of the Five Nations of Cayuga, Seneca, Onondaga, Mohawk, and Oneida, is now comprised of Six Nations, reflecting the adoption of the Tuscarora Nation under the sponsorship of the Oneida Nation. See also Oren Lyons, *Indian Self-Government in the Haudenosaunee Constitution*, 55 NORDIC J. INT'L L. 117 (1986). For more information, see *infra* note 114; *infra* note 124 and accompanying text.

international law serves as one example of the transnational disappearing acts perpetrated by the then-burgeoning Canadian state<sup>12</sup> and its laws, as well as those of the British Empire, and the European international establishment.<sup>13</sup> It also provides the chance to recount the resistance to such magic tricks by the Haudenosaunee, and other Indigenous peoples, ever since. The pooling of such critical insights and histories will be a necessary step to achieve the emancipatory visions sought by a diversity of approaches (Indigenous, deconstructive, Third World, feminist, radical/Marxist, Fifth World, etc.), not the least being fundamental changes in “the politics of the economy (who writes the rules) and the economics of politics (who holds the economic muscle to allow themselves to write the rules).”<sup>14</sup> The aforementioned “pooling” and the attempt to build such coalitions could easily be met with skepticism. In fact, in his preface to *The Fourth World*, the late and seminal scholar, lawyer, and activist Vine Deloria (Standing Rock Sioux) described his distrust for the new American left’s ideology of the Third World purporting “to be a great coalition of oppressed peoples of the world,” in the name of decolonized African and Asian states, which also somehow attributed “to people of foreign lands a sophisticated knowledge of North American affairs that they did not have or feel.”<sup>15</sup> However, Deloria also wrote that, “No contemporary political and economic structure *has to be*. Whatever structures do exist must eventually find a reason for their existence above and beyond the political and economic values of today.”<sup>16</sup> In part, this Article attempts to bridge the

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<sup>12</sup> On this point, see Grace Li Xiu Woo, *Canada’s Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations L., SOC. JUST. & GLOBAL DEV. J.* (Apr. 30, 2003), <http://ej.warwick.ac.uk/global/03-1/woo.html>.

<sup>13</sup> See ANAYA, *INDIGENOUS PEOPLES*, *supra* note 8, at 57.

<sup>14</sup> PRASHAD, *supra* note 9, at 213. On the necessity of this “pooling” of critical resources of resistance, see ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 319–20 (2004).

<sup>15</sup> Vine Deloria, *Foreword* to GEORGE MANUEL & MICHAEL POSLUNS, *THE FOURTH WORLD: AN INDIAN REALITY*, at x (1974).

<sup>16</sup> See *id.* at xii. Born in 1933, Vine Deloria Jr. was a member of the Standing Rock Sioux (South Dakota), an activist, author (e.g., *Custer Died for Your Sins; God is Red*), educator, executive director of the National Congress of American Indians, lawyer, founder of the Institute for the Development of Indian Law, professor of law and political science at the University of Arizona, professor of American Indian studies and history (adjunct in law, political science, religion) at the University of Colorado, and one of the foremost American/Indian leaders and thinkers. He died in 2005. See James Treat, *Introduction* to VINE DELORIA, JR., *FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA* 1-18 (James Treat ed., 1999).

knowledge gap of “North American affairs” in the aforementioned critical approaches to international law by layering in some lessons from inter-National Indigenous laws while showing the related, but distinct, challenges of Indigenous advocacy at inter-state international law.

## I

### WHERE LANGUAGE AND HISTORY MIGHT FAIL

Critical approaches to international law, its history, and its theory are of particular importance to this article given the fact that they challenge dominant conceptions of the field while opening space for the emergence or recognition of alternative approaches. This next Part looks at one particularly powerful and compelling example in some of the scholarship of a practitioner and professor of international law, Martti Koskenniemi. I point to what I see as one particular shortcoming and propose supplements from inter-National Indigenous legal traditions that benefit from his otherwise convincing critique of international law and its historiography.

#### *A. On Speaking Without Being Heard*

For Finnish international law scholar Martti Koskenniemi, the characterization of international law as two equally competent advocates capable of arguing diametrically opposite positions using the same principles underpins his textual turn and conception of international law as a language.<sup>17</sup> Its history comprises the uses of, struggles over, and rising or falling enthusiasm and powers of that language over time. Given this, at best, ambivalence towards international law, pursuing a genealogical history of international law thus requires a contextual history of people and their projects.<sup>18</sup> This approach to international law as a language cultivates a careful skepticism of grand narrative, rejecting the three-headed monster of traditional legal historiography (“great men” hagiography, formal rule

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<sup>17</sup> See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 3–5, 12, 565–69 (2005).

<sup>18</sup> See generally MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870–1960 (2001). For the motivation behind this historically-focused complement to his earlier book, see KOSKENNIEMI, *supra* note 17, at 617. See also George Rodrigo Bandeira Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR. J. INT’L L. 539, 541, no.7 (2005).

history, and epochs of domination).<sup>19</sup> Thus, his alternative history of international law that is not simply a “shiny white knight” in opposition to state sovereignty or reasons may be important for a deconstructionist approach to international law.<sup>20</sup> In the context of this article, this invocation of alternative histories of international law is appealing where Emmerich de Vattel’s positivist understanding, of the internal self-determination and external nonintervention that breeds the equality of states, otherwise reigns supreme.

In the particular genealogy I had the good fortune to read and hear, Koskenniemi emphasized that the key historical event was not Columbus’ voyage in 1492, but instead French interventions in Northern Italy in 1494 and following.<sup>21</sup> The arc of the story to be told conformed to the following five-part incremental movement: (1) from the Medieval vocabularies of canonists, e.g., Aquinas’ *regnum animarum* (ruling or government of souls); to (2) Scholastic vocabularies of natural law distinct from *jus gentium*, e.g., Francisco de Vitoria; to (3) early Modern vocabularies where natural law is made equivalent to *jus gentium*, e.g., Samuel Pufendorf; to (4) Modern vocabularies of *jus gentium* as a “system,” e.g., Emmerich de Vattel, and then subsequently shifting completely from law; to (5) the language of economics, e.g., Friedrich von Martens and Adam Smith.<sup>22</sup> This movement aimed to show that international law was not and cannot be opposed to the state, nor used to critique its interests or sovereignty in any facile or guaranteed way. This is because international law is a functional “part and parcel” of state power and

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<sup>19</sup> Martti Koskenniemi, *The History of International Law Today*, RECHTSGESCHICHTE, 6–9 (2004), [www.helsinki.fi/eci/Publications/Koskenniemi/MHHistory.pdf](http://www.helsinki.fi/eci/Publications/Koskenniemi/MHHistory.pdf).

<sup>20</sup> See, e.g., KOSKENNIEMI, *supra* note 17, at 607 (noting “knights in white armour” with reference to the critique of Western military interventions to the elision of structural financial and economic interventions). This critique was made by Anne Orford. ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (2003).

<sup>21</sup> But see NICOLÁS WEY GÓMEZ, *THE TROPICS OF EMPIRE: WHY COLUMBUS SAILED SOUTH TO THE INDIES* (2008) (noting the continuing fallout of Columbus’ assumptions for North-South relations).

<sup>22</sup> See Martti Koskenniemi, *International Law and Raison d’état: Rethinking the Prehistory of International Law*, in *THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS: ALBERICO GENTILI AND THE JUSTICE OF EMPIRE 297–339* (Benedict Kingsbury & Benjamin Straumann eds., 2010); see also Seven Lecture Series to the University of Toronto Law Faculty Martti Koskenniemi, *International Law and Raison D’état: An Alternative History* (Jan. 2010) (syllabus on file with author).



the politics that accompany its use or abuse.<sup>23</sup> In this way, Koskenniemi concludes that the writings of jurists in this earlier period (prior to that treated in *The Gentle Civilizer of Nations*) do not actually amount to an autonomous international law *per se*, so much as they comprise its prehistory.<sup>24</sup>

However, Koskenniemi's conception of international law as a language, and attempt to recast the history of its use as one of continuous and particular political struggles, seems slightly incomplete.<sup>25</sup> First, the critical assumption that we all speak the same professional language skirts the issues of those who speak this language but remain unheard or ultimately reject its fundamental, statist grammar. Reflecting on his 1989 book *From Apology to Utopia* in the epilogue to its 2005 reissue, Koskenniemi notes that the book "seeks to articulate the competence of native language-speakers of international law," and specifically with an emphasis to the use of international law's rules and principles where lawyers' competence is not questioned because they support opposing sides in their work.<sup>26</sup> He goes on to write that: "[t]his is why the linguistic analogy seems so tempting. Native language speakers of, say, Finnish, are also able to support contrasting political agendas without the question of the genuineness of their linguistic competence ever arising."<sup>27</sup>

Building on a linguistic analogy that seeks to "go beyond metaphor," this construction of international law does not necessarily

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<sup>23</sup> See Martti Koskenniemi, *The Advantage of Treaties. International law in the Enlightenment*, 13 EDINBURGH L. REV. 27, 30 (2009); see also Koskenniemi, *supra* note 22.

<sup>24</sup> See Koskenniemi, *supra* note 22 ("The tradition and style of writing about international matters in the vocabulary of law, in particular of natural law and the *ius gentium*, whatever the fashion in which the line between the two was drawn, during the period from Gentili to Adam Smith was not the same as the 'international law' that grew from the liberal legal activism of the late nineteenth century. When natural law finally knew what it wanted to be—and needed to be in order to fulfil its programme—it became economics. There would no longer be any search for a legal *proprium*. That would become a task of courts and jurisprudence classes, distant from the serious business of governing the commonwealth.").

<sup>25</sup> Compare Martti Koskenniemi, *The Legacy of the Nineteenth Century*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 142 (David Armstrong ed., 2009) (footnotes omitted) ("[T]hese ideas lie behind the development of international law from a philosophical preoccupation in the eighteenth century to an instrument of diplomacy and an academic discipline in the nineteenth and an institutionally oriented formal—legal technique in the twentieth century—each period conserving something of the memory of its predecessor as a residue of assumptions and fallback positions.").

<sup>26</sup> See Koskenniemi, *supra* note 17, at 567.

<sup>27</sup> *Id.* at 568 (emphasis added).

reflect the true diversity of those caught up in the system that produces good legal arguments. In a different context, political science and Aboriginal Studies scholar Rauna Kuokkanen (Sámi) argues for just this making of space and showing of hospitality towards Indigenous epistemes in the academy. Describing the Deatnu river bordering Norway and Finland, Kuokkanen notes that “Samiland is also divided, by the borders of four nation-states” such that the “people on the river have been multicultural and multilingual out of necessity—understanding other cultures and languages has been the key to daily survival.”<sup>28</sup> People crossed the border for food, health care, school, family ties, news, provisions, and salmon.<sup>29</sup> Following the war the border started to be patrolled due to the differing wartime allegiances of Finland and Norway, which led to border posts and the weakening of connections across the Deatnu river and restricting land ownership across the river-border.<sup>30</sup> Kuokkanen further notes the long-time and continued “cultural and linguistic mingling” along the Deatnu:

Communication along the river takes place in various languages, and there are always people who do not understand all of the languages spoken. This is entirely normal, yet I paid attention to it only after my mother told me a story about a visitor from a completely monolingual part of Finland who expressed his uneasiness with languages he did not know. He had been resting upstairs when he realized that people downstairs were speaking at least a couple of different languages and that none of them was Finnish. *Imagine*, he thought, *all of these ‘foreign’ languages and so little Finnish even though this is Finland!*<sup>31</sup>

Kuokkanen’s description of the multiplicity of languages in one space—both across states and an interrupted traditional territory—serves to underscore some of the limits of linguistic/textual methodologies of international law or its history.<sup>32</sup>

Koskenniemi’s critical assumption that we must all be native speakers of a professional language is useful, but it is also clear that “native language speakers of, say, Finnish” are not necessarily able to support opposing political agendas without their linguistic

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<sup>28</sup> KUOKKANEN, *Indigenous*, *supra* note 6, at x–xi.

<sup>29</sup> *Id.* at ix–xi.

<sup>30</sup> *Id.* at xi–xii.

<sup>31</sup> *Id.* at xii (emphasis in original).

<sup>32</sup> See, e.g., Timo Koivurova, *Sovereign States and Self-Determining Peoples: Carving Out a Place for Transnational Indigenous Peoples in a World of Sovereign States*, 12 INT’L CMTY. L. REV. 191, 211 (2010) (noting that “general international law does not really give much politico-legal space for peoples divided by [state] borders”).

competence being raised or their opposition simply being lost in the translations.<sup>33</sup> People might not all speak Finnish in Finland, and not just because they choose to speak French. The enunciation of an “unauthorized” practice of international law, as detailed in Deskaheh’s attempts in Part IV below, can conflict with statist monopolies on access to international legal professions and the procedural aspects of international law. For example, in response to growing activism domestically and internationally with respect to land claims issues, Canada passed an amendment in 1927 (in effect until its repeal in 1951) requiring a license from the Superintendent General (Indian Affairs) for anyone soliciting funds for Indian legal claims, with punishment on conviction being either a fine or two months in jail.<sup>34</sup> This liability placed upon Indigenous peoples is an example of the state’s indirect determination of who gets to speak international law in the first place, which is reinforced by the determination of the international community of states about whose international legal speech is even heard. In such situations, faced inordinately by Indigenous peoples, it definitely matters that Koskenniemi seeks to cast international law as a formal language that assumes equality of competence while simultaneously shifting its pre/history from the fiction of idealistic opposition to its more accurate positivist concert with state powers. Koskenniemi’s project is helpful for the domestic, transnational, and international work of

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<sup>33</sup> LAWRENCE VENUTI, *THE TRANSLATOR’S INVISIBILITY: A HISTORY OF TRANSLATION* 18–20 (2d ed. 2008) (discussing the inevitable, largely invisible, violence of translation and the difference between “domesticating” and “foreignizing” methods).

<sup>34</sup> See, e.g., *The revised Indian Act*, R.S.C. 1927, c. 98, § 149A; COMMISSION ON ABORIGINAL PEOPLES, *LOOKING FORWARD, LOOKING BACK: PART TWO: FALSE ASSUMPTIONS AND A FAILED RELATIONSHIP, CHAPTER 9—THE INDIAN ACT* (2010), available at [http://www.collectionscanada.gc.ca/webarchives/20071207032318/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg25\\_e.html#89](http://www.collectionscanada.gc.ca/webarchives/20071207032318/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg25_e.html#89). Although protection of Indians from unscrupulous lawyers was the purported reason for the amendment, the Royal Commission argued that: “The true reason probably had more to do with the desire of federal officials to reduce the effectiveness of Indian leaders such as Fred Loft and of organizations such as the Allied Tribes of British Columbia and the Six Nations Council. These groups had already proven troublesome to Indian affairs officials because of their insistence that their unresolved land claims be dealt with. [ . . . ] The effect of this provision was not only to harass and intimidate national Indian leaders, but also to impede Indians all across Canada from acquiring legal assistance in prosecuting claims until this clause was repealed in 1951. The claims of most British Columbia Indians as well as those of the Six Nations are still outstanding—as are hundreds of others.” *Id.* (notes omitted). Seth Gordon also notes problems such as the “persistent objector” exception and that human rights laws are not self-executing in the United States. See Seth Gordon, *Indigenous Rights in Modern International Law from a Critical Third World Perspective*, 31 AM. INDIAN L. REV. 401, 423–24 (2007).

Indigenous peoples, but it must also clearly acknowledge the need to recognize precolonial sources of authority in the laws and practices of other political communities such as Indigenous peoples. Critical approaches to international law would also benefit from discerning the social and political determinants of speaking these Indigenous laws and claims to power in the context of inter-state international law. The issue of language (and knowledge) loss and revitalization in the wake of colonial encounter and assimilation programs, such as the Indian residential schools system, only heightens this concern.<sup>35</sup>

### *B. The History of International Law, Take Two?*

Following from the issue of language, it also seems that telling the stories and histories of particular political struggles serves to broaden the field of international law and point to the potential for alternative, even radically different, future structures of international law. If international law is the stories that we tell ourselves,<sup>36</sup> then are we telling the right stories, or all of the relevant ones? For instance, should “colonialism-on-the-ground” and its negotiations not factor into the conversation of alternative histories to international law? It might be argued that such stories are not seen to be law or legal per se, or if they are, that they do not belong to the domain, or discipline, or profession, or practice, or language of international law. Yet, Koskenniemi expansively retells international law’s history as:

- domestic stories for domestic audiences;
- the usurpation or turn from passions to interests to economics;<sup>37</sup>
- informal and then formal and then again informal colonialism;<sup>38</sup>
- the relatively short-lived heroic phase of white knight institutions;<sup>39</sup>

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<sup>35</sup> See, e.g., Christine Chinkin, Shelly Wright & Hilary Charlesworth, *Feminist Approaches to International Law: Reflections from Another Century*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 32–44 (Doris Buss & Ambreena Manji eds., 2005) (detailing Wright’s work as Northern Director of Akitsiraq Law School in Iqaluit, Nunavut, in charge of a transnational Indigenous legal education in Inuit, Canadian, and international law, including required learning of Inuktitut language). In response to a critique of Koskenniemi’s criticism of the feminist project for aggravating the fragility of international law while failing to provide the formal distance necessary for the good society, the authors emphasize international law’s failure to focus on those beyond the powerful few; essentially, they ask the important question: formality for whom? *Id.* at 44.

<sup>36</sup> Martti Koskenniemi, *The Fate of International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 1 (2007).

<sup>37</sup> See Koskenniemi, *supra* note 22, at 297–339.

<sup>38</sup> See Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1, 32 (2011).

- the fall or death of that field as it moved to the United States and American realism, pragmatism and functionalism rose to prominence;<sup>40</sup>
- the non-traditions of the pre-Revolutionary international law of France or the loss of the reins of power in Germany;<sup>41</sup> or
- an acknowledgment of the fragmentation of international law's present (where these *lex specialis* fragments do not materialize from 'thin air' but have their own heritages and histories worth telling in various traditions and competing languages).<sup>42</sup>

It now seems untenable that Indigenous legal histories do not yet make it into this radically expanded conversation. A 2007 working paper by Koskenniemi is instructive here for my argument that the acknowledgment of pluralism requires that it be acknowledged all the way up and down.<sup>43</sup>

As Koskenniemi notes in the paper on sociological thought and international law, international lawyers “spoke about universal laws of social life that, as confidently assumed by Montesquieu, would cover the whole of humankind ‘not excepting the Iroquois themselves.’ This may be true. And the fact that there are no longer any Iroquois tribes will have to be the measure with which we weigh our shared globalizing modernity.”<sup>44</sup> Of course, as the many references in this paper—and hopefully the paper itself—make clear, both mainstream and critical approaches to international law cannot ignore the continued existence of “Iroquois tribes” or the Haudenosaunee Confederacy or other Indigenous peoples.

On Turtle Island (in North America), for example, Indigenous peoples have long survived the “opening of the frontier” and the “closing of democracy” that followed encounters with Europeans.

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<sup>39</sup> Koskenniemi, *supra* note 17.

<sup>40</sup> *See id.* at 438, 474–76.

<sup>41</sup> *See* Koskenniemi, *supra* note 28, at 40, 47, 51, 62–63 (noting the lack of significant international law tradition in pre-Revolutionary France or Germany, and that French and German lawyers surrendered the reins of power to politics and economics).

<sup>42</sup> Martti Koskenniemi, UN Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (Apr. 13, 2006), available at [http://untreaty.un.org/ilc/guide/1\\_9.htm](http://untreaty.un.org/ilc/guide/1_9.htm).

<sup>43</sup> On the trickiness of scale, see Outi Korhonen, *The Role of History in International Law*, 94 AM. SOC'Y INT'L L. PROC. 45 (2000).

<sup>44</sup> Martti Koskenniemi, Max Weber Lecture, Not Excepting the Iroquois Themselves: Sociological thought and International Law 5 (Apr. 2007) (emphasis added), available at <http://www.helsinki.fi/eci/Publications/Koskenniemi/MKFlorence-07k.pdf>.

However, as noted, they do not always make it into the alternative historicizing and contemporary repurposing of critical and postmodern international law. It is clear that this conspicuous absence cannot be attributed to the lack of government or political community or impact of natural law or *jus gentium* among Indigenous peoples in, for example, North America. Instead, these histories and legal traditions were domesticated to the European sovereign's black box, which accompanies the alternating story of international law's contested mutual constitution with *raison d'état*. Indeed, as discussed at greater length in a later section, Levi General's Haudenosaunee delegation in the 1920s to have the League of Nations consider the Six Nations' dispute with Canada is a prime example of how the logic and politics of international law determined that their "grievances were a domestic concern of Canada and hence outside the League's competency."<sup>45</sup> Unfortunately, this act of disappearance in the formal and European legal sense also takes place in the historiographical aftermath. As argued above, it remains to incorporate the critical insights of Koskenniemi's deconstruction and historicism, and his powerful view of the real legacy of the Spanish scholastics,<sup>46</sup> with the critical realities of colonialism-on-the-ground.

In fact, there *are* still Iroquois tribes; indeed, the Haudenosaunee Confederacy adopted the Tuscarora Nation and expanded from the Five Nations to the Six Nations Confederacy around 1714.<sup>47</sup> This adoption was effected by virtue of the Haudenosaunee *Kaianerekowa* (Great Law of Peace/Great Good Way), which dates from between the eleventh and sixteenth centuries.<sup>48</sup> In helping to tell part of this

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<sup>45</sup> See S. JAMES ANAYA, *INDIGENOUS PEOPLES*, *supra* note 8, at 57 (1996).

<sup>46</sup> See Koskenniemi, *supra* note 44, at 12, 32, 35–36 (“[T]he formation of centralized political communities—states—that demanded absolute loyalty from their citizens; the emergence of a global economic system based on private ownership and the search for profit; and continuous warfare, not only against the infidel, but among Christian rulers themselves,” which is saying the same as “early articulators of the much more powerful and long-standing type of informal imperial domination that is achieved through a worldwide pattern of acquisition and exchange of private property by which—as the rulers of Castile would themselves learn quite rapidly—formal state policies are also controlled, enabled, or undermined, as befits the global market.”).

<sup>47</sup> Darlene M. Johnston, *The Quest of the Six Nations Confederacy for Self-Determination*, 44 U. TORONTO FAC. L. REV. 1, 8 (1986) (citing BRUCE JOHANSEN, *FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS AND THE RATIONALE FOR THE AMERICAN REVOLUTION* 21 (1982)).

<sup>48</sup> JOHN FADDEN, *THE GREAT LAW OF PEACE OF THE LONGHOUSE PEOPLE: IROQUOIS, LEAGUE OF SIX NATIONS* 66–70, 72–78 (1973); *see also* BRUCE JOHANSEN, *FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS AND THE RATIONALE FOR THE AMERICAN REVOLUTION* 21–22 (1982); FRANK G. SPECK & ALEXANDER GENERAL, *MIDWINTER RITES OF THE CAYUGA LONG HOUSE* 16 (1949); PAUL A.W. WALLACE, *THE*

story, legal scholar Robert A. Williams, Jr. (Lumbee) has presented American Indian visions of law and peace, which cross borders, cultures, languages, and are all about external relations in the law and governance of political communities.<sup>49</sup> Williams notes that:

The Encounter era treaty tradition recalls the long-neglected fact in American history that there was a time in our national experience when Indians tried to create a new type of society with Europeans on the multicultural frontiers of colonial North America. Recovering this shared legal world is crucial to the task of reconstructing our contemporary understandings of the sources and nature of the rights belonging to Indian peoples in present-day American society. . . . In countless reiterations, the Encounter era treaty literature affirms the sovereign capacity of Indian tribes to engage in bilateral governmental relations, to exercise power and control over their lands and resources, and to maintain their internal forms of self-government free from outside interference.<sup>50</sup>

Williams' references to bilateral relations, the exercise of power and control over lands and resources, and self-government form just the tip of an iceberg of Indigenous laws and legal traditions. Although there is no space here to begin to scratch this surface internationally, let alone in Canada, it is worthwhile to at least gesture toward the myriad Indigenous legal traditions that would fruitfully inform alternative and critical histories of international law for the purposes of accuracy, decolonization, and justice.<sup>51</sup>

### *C. Indigenous Inter-National Laws*

Although it is an artificial distinction, as should become clear, a focus on Indigenous legal traditions (ILT) that speak to *external relations*, such as between nations, to the land, animals, and newcomers, points to their relevance to this topic. For instance, given the frequently kinship-based practice of Indigenous law, there are

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WHITE ROOTS OF PEACE 41–42 (1946). *But see* TAIKAIKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 126 (1999) (cautioning against misappropriation and reification of a reduced-to-text version of the *Kaianerekowa*).

<sup>49</sup> See ROBERT A. WILLIAMS, LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997); Robert A. Williams, *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981 (1994). On the debate over the legacy of the colonizing legal tradition brought to the New World, see the fascinating contribution in Koskenniemi, *supra* note 44, at 10–11 (noting differences in his approach versus the postcolonial approach, by Anghie and others, and the liberal defense by Georg Cavallar and others).

<sup>50</sup> WILLIAMS, *supra* note 49, at 8–9 (notes omitted).

<sup>51</sup> For one of the best examples in Canada, see JOHN BORROWS, CANADA'S INDIGENOUS CONSTITUTION (2010).

several historical and contemporary examples of international (or inter-National) Indigenous laws that are relevant to alternative histories, repurposing mainstream international law, and the Third World project (discussed below). In a 2006 discussion paper written for the now-defunct Law Commission of Canada and entitled “Justice Within,” Anishinabe legal scholar John Borrows notes that:

Aboriginal peoples were the earliest practitioners of law in Canada. Living in communities and nations across the land, they developed norms and practices to govern their social interaction, regulate trade, resolve disputes and govern the relationships between different nations. The diverse traditions of different Aboriginal peoples grew into highly developed systems of law that guided Aboriginal societies for centuries in the governance of community, the environment and relationships between people. Passed down through the generations in stories, songs, ceremonies and practices, these legal traditions reflect the unique experiences of different Aboriginal peoples and communities, embodying their values and beliefs and resonating with their cultures.

The first Europeans to arrive in North America recognized Indigenous legal traditions and often followed Indigenous laws. Aboriginal laws, protocols and procedures provided the framework for the first treaties between Aboriginal peoples and the Dutch, French, and British Crowns. Commercial transactions often were conducted in accordance with Indigenous traditions, with the giving of gifts, the extension of credit and the standards of trade often based on Indigenous legal concepts.<sup>52</sup>

Among many other topics, Borrows outlines examples of ILT, including Mi’kmaq, Haudenosaunee, Anishinabek, Cree, Métis, Carrier, Nisga’a, and Inuit legal traditions. For example, Borrows details a wide variety of “Aboriginal-to-Aboriginal” relations existing prior to encounters with Europeans, including:

- treaties;
- inter-marriages;
- contracts of trade and commerce;
- mutual recognition for peace;
- occupations of land to secure resources; and
- “wider systems of diplomacy in use to maintain peace through councils and elaborate protocols.” Examples include feasting, smoking the peace pipe, holding a potlatch, exchanging ceremonial objects, and engaging in long orations.<sup>53</sup>

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<sup>52</sup> John Borrows, *Justice Within: Indigenous Legal Traditions* (Aug. 2006), available at <http://dalspace.dal.ca/dspace/handle/10222/10229>.

<sup>53</sup> *Id.* at 171–72.



Although many examples are about making or maintaining relations, the particular subset of treaty relationships, alliances, and confederacies is of particular relevance, as it comprises clear examples of Indigenous inter-National law.<sup>54</sup> The legal traditions and practices of two Indigenous Nations (as opposed to the fragmented hundreds of Canadian state-legislated bands (a.k.a. villages)) are particularly informative, namely the Mi'kmaq and Anishinabek. As should be clear, the wide variety and complexity of ILT prevents even the appearance of a comprehensive treatment here, but nevertheless, for myself, and hopefully others, this must remain a starting point only.

#### *D. Recurring Themes in Two Examples*

“Transnational confederations” (Nikmanen) exist or existed between the Mi'kmaw Nation and its Nikmaq (allies), comprising the Beothuk, Wulustukw keuwiuk (Maliseet-Passamaquoddy), the Wabanki Confederacy, Innu or Montagnais groups, Inuit, and even Saint Lawrence Haudenosaunee (Mohawk) in the 1500s.<sup>55</sup> Sákéj Henderson (Bear Clan, Chickasaw Nation; Cheyenne) notes that the norms of peace and harmony requiring “the victor to give presents and share with the losing party, to satisfy the reality that both parties had breached the law . . . often confused English negotiators, who defined peace in terms of submission and reparations from the defeated.”<sup>56</sup> Similarly, Mi'kmaq treaties were “living agreements” that “created a permanent, living relationship . . . expressed in terms of kinship—the English king as ‘father’ and the colonists as ‘brothers’” and requiring routine meetings “to renew friendships, reconcile misunderstandings, and share each other’s understandings, experiences and resources.”<sup>57</sup> Sákéj asserts that most of these treaties

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<sup>54</sup> In addition to the work of John Borrows, I am especially indebted here to Darlene Johnston, Dawnis Kennedy, and Lee Maracle on the recognition of inter-National Indigenous laws.

<sup>55</sup> James (Sákéj) Youngblood Henderson, *First Nations' Legal Inheritances in Canada: The Mikmaq Model* 23 MAN. L.J. 1, 1–31 (1996) [hereinafter Henderson, *First Nations' Legal Inheritances in Canada*]; JAMES (SÁKÉJ) YOUNGBLOOD HENDERSON, MI'KMAW CONCORDAT 17 (Donna Davis ed., 1997) [hereinafter HENDERSON, MI'KMAW CONCORDAT].

<sup>56</sup> E.g., Henderson, *First Nations' Legal Inheritances in Canada*, *supra* note 55, at § D; HENDERSON, MI'KMAW CONCORDAT, *supra* note 55, at 17.

<sup>57</sup> Henderson, *First Nations' Legal Inheritances in Canada*, *supra* note 55. For further examples of kinship-making, see J.R. MILLER, COMPACT, CONTRACT, COVENANT:

were renewal ceremonies reflecting “the flexible, kin-like nature of the confederation” conceptualized by the metaphor of the chain and combining the practices of all of the parties in a “sui generis” way.<sup>58</sup>

In a different context animated by similar principles, Borrows describes the 1701 treaty between the Haudenosaunee and the Anishinabek near Sault Ste. Marie, which was transacted orally and recorded on wampum with the image of a “bowl with one spoon” in order that “both nations would share their hunting grounds in order to obtain food,” with the spoon guaranteeing that there would be neither knives nor bloodshed on the shared land.<sup>59</sup> Writing on the treaty, Leanne Simpson (Mississauga of Nishnaabeg Nation) argues for the need to destabilize and decolonize the concept of the treaty and instead focus on their purpose of maintaining good relationships as a basis for lasting peace, *Bimaadiziwin* (living the good life), and being in balance with the natural world, family, clan, and nation through the Seven Grandfather teachings.<sup>60</sup> Citing Borrows and Grassy Narrows elder Judy DaSilva, Simpson emphasizes the diplomatic agreements and treaty relationships with attendant rights and responsibilities to respect the animal nations or risk their departure from the territory.<sup>61</sup>

Akin to Sakej’s explanation of Mi’kmaw treaties, Simpson emphasizes the open, ongoing, reciprocal, and dynamic relationships requiring nurturing, maintenance, and respect. This respect entailed “waiting in the woods” to build a fire before crossing to another’s territory to be met with wampum, a feast, and the exchange of gifts; generally, visitors were treated with “the utmost respect to promote peaceful diplomatic relations between nations.”<sup>62</sup> Simpson underscores the relevance of such relationships in contemporary times given that they, as with the “Common Dish” relationship between

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ABORIGINAL TREATY-MAKING IN CANADA at 7–10, 38 (Toronto: University of Toronto Press, 2009).

<sup>58</sup> Henderson, *First Nations’ Legal Inheritances in Canada*, *supra* note 55.

<sup>59</sup> BORROWS, *supra* note 6, at 172. Borrows also describes the Feast of the Dead conducted with the Wendat in order to ease tensions and celebrate ancestors. *Id.* at 173. In the context of the Haudenosaunee, see also PAUL A.W. WALLACE, *THE WHITE ROOTS OF PEACE* 31–32 (1946) (Deganawidah and “one dish” principles with common access, sharing, and the avoidance of bloodshed).

<sup>60</sup> Leanne Simpson, *Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships*, 23 *WICAZO SA REV.* 29, 31–32 (2008). Borrows poignantly evokes these teachings in John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (May 2008), Research Paper for the National Centre for First Nations Governance (online: [http://www.fngovernance.org/research/john\\_borrows.pdf](http://www.fngovernance.org/research/john_borrows.pdf)).

<sup>61</sup> Simpson, *supra* note 60, 34–35.

<sup>62</sup> *Id.* at 36.

Nishnaabeg people and the Haudenosaunee Confederacy, set “forth terms for taking care of a shared territory while maintaining separate, independent sovereign nations.”<sup>63</sup> Simpson emphasizes that the dish was practiced through responsibilities that included “taking care of the dish” by only taking as much as needed, sharing everything, and not wasting any part of the animal in accordance with Nishnaabeg environmental ethics.<sup>64</sup> These ethics required decision making cognizant of impact upon “the plant and animal nations, in addition to the next seven generations of Nishnaabeg,” in turn providing “an ancient template for realizing separate jurisdictions within a shared territory.”<sup>65</sup>

Having expanded the histories of international law, as well as problematized the professional languages of international law, it seems that both the mainstream and the critical histories can only be improved through acknowledgment of the laws and practices of other political communities, such as Indigenous peoples in the ongoing colonial encounter in North America. Ultimately, these histories would fruitfully inform formalist assertions emphasizing statist sovereign equality at international law in the face of arguably more threatening encroachments by private actors through the law of contract.<sup>66</sup> This connection of the public to the private sectors is especially relevant in the case of, for example, Indigenous peoples in Canada, whose reserves, traditional territories, and unceded territories are also rich with much of the natural resource wealth sought by both foreign and domestic extractive industries.<sup>67</sup> In these existing and

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 37.

<sup>65</sup> *Id.* at 37, 42. This particular treaty relationship has captured the imagination of non-Indigenous scholars and writers, such as Tony Hall and J.R. Saul, though the implications of the original context are not necessarily central in analyses aimed at different targets (i.e., American imperialism abroad and the “castrati” of the Canadian ruling elite). For a similar critique with respect to the Third World, the NIEO, and CHM, see Mickelson, *supra* note 9.

<sup>66</sup> See Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1, 36 (2011). For a similar iteration from an English perspective, see KURT BURCH, “PROPERTY” AND THE MAKING OF THE INTERNATIONAL SYSTEM (1998).

<sup>67</sup> For example, see Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Extractive industries operating within or near Indigenous territories A/HRC/18/35 (July 11, 2011). See also Committee on the Elimination of Racial Discrimination, 80th Session (Feb. 13–Mar. 9, 2012), <http://www2.ohchr.org/english/bodies/cerd/cerds80.htm> (“shadow reports” submitted by Indigenous organizations and Nations with respect to Canada).

potential conflict zones of mixed international, federal, and provincial jurisdictions, Indigenous laws and legal traditions emerge as important touchstones. If not always determinative, they would be informative in the counterpoints to automatic development afforded by the duty of consultation required of governments and private industry (if not yet to the extent of free, prior, and informed consent).<sup>68</sup> Of course, Canada may be one of only a few places in the world where the issues of climate change, energy demands, resource extraction, development-induced displacement, temporary migrant labor, mixed public-private jurisdictions, transnational corporations, NGOs, and Indigenous peoples will remain important ones. But that seems an unlikely scenario.

The next Part of this Article pursues this theme in the context of Antony Anghie's equally influential work and some of those within the larger, loose collection of international legal writers self-identifying under the rubric of TWAIL. It then moves on to discuss one particular example of an Indigenous or Fourth World approach to international law through the work of Levi General (Deskaheh), the Six Nations Confederacy Council, and others in Canada, the United States, London, and the League of Nations (Geneva). The Article concludes with a brief discussion on potential ways for linking together different approaches to international law that potentially make common criticisms but sometimes fail to benefit from the chance to share knowledge from their respective experiences.

## II WHERE TWAIL MIGHT FAIL? THE THIRD WORLD IS NOT ENOUGH

From a TWAIL perspective, postcolonial histories of international law that begin with an initial acknowledgment of Indigenous importance, or at least narrative necessity, are largely eclipsed by the focus on the European colonization and then decolonized states of Asia, Africa, and elsewhere. Of course, I am not arguing that this path-breaking approach is incorrect, but merely that it remains incomplete without returning to the so-called "scene of the crime."<sup>69</sup>

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<sup>68</sup> See also MANUEL & POSLUNS, *supra* note 3, at 252–54.

<sup>69</sup> This is especially true where there are transnational actors involved in the circulation and migration of cross-colonial spaces. For example, see AUDREY MACKLIN, HISTORICIZING NARRATIVES OF ARRIVAL: THE OTHER INDIAN OTHER 40–67 (Rebecca Johnson, Hester Lessard & Jeremy Webber eds., *Storied Communities*, 2010) (discussing the exclusion of the almost 400 British Indian subjects, mostly Punjabi Sikhs, aboard the Komagata Maru in 1914 at Vancouver Harbour, British Columbia, and its relationship to

International law, and especially critical approaches to it, must close this loop.

In “Francisco de Vitoria and The Colonial Origins of International law,” the first chapter of *Imperialism, Sovereignty and the Making of International Law*,<sup>70</sup> international law scholar Antony Anghie describes the genesis of international law in the colonial encounter, specifically through the example of Spanish jurist Francisco de Vitoria’s writing on the Spanish expeditions and colonization of the so-called New World. In so doing, Anghie aims to show how international law did not emerge out of Europe fully-formed, but instead through a material and juridical encounter with Indigenous peoples across the Atlantic Ocean. Unlike other jurists of the time, Vitoria recognizes the humanity of Indigenous peoples and their government and title to the land in his lectures.

However, Anghie skewers the promise of natural law in his criticism of the otherwise-lauded (“protector of native peoples”) Francisco Vitoria’s arguments against the “universal system of divine law administered by the Pope” to a “universal natural law system of *jus gentium* whose rules may be ascertained by the use of reason.”<sup>71</sup> Anghie outlines how, under *jus gentium*, the Spanish have a right to travel and sojourn in Indian lands such that they cannot be prevented as long as they do no harm.<sup>72</sup> Anghie argues that the equality and reciprocity of this system serves as a means for penetrating Indian lands and territory where the failure to give friendly hearing or innocent passage, or resistance to proselytizing and conversion, would lead to just cause for perpetual war.<sup>73</sup> For example, in part citing the

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the anti-colonial Ghadar movement in India). See also Sukhdeep Bhoi, *Ghadar, The Immigrant Indian Outrage Against Canadian Injustices 1900–1918* (1998) (unpublished Master’s thesis, Queen’s University, available at [http://www.nlc-bnc.ca/obj/s4/f2/dsk2/tape17/PQDD\\_0001/MQ36004.pdf](http://www.nlc-bnc.ca/obj/s4/f2/dsk2/tape17/PQDD_0001/MQ36004.pdf)).

<sup>70</sup> ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (Cambridge University Press, 2004) (1996) [hereinafter ANGHIE, *IMPERIALISM, SOVEREIGNTY*].

<sup>71</sup> *Id.* at 20.

<sup>72</sup> See also James Muldoon, *Discovery, Grant, Charter, Conquest, or Purchase: John Adams on the Legal Basis for English Possession of North America*, in *THE MANY LEGALITIES OF EARLY AMERICA* 37, 40–46 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

<sup>73</sup> ANGHIE, *IMPERIALISM, SOVEREIGNTY*, *supra* note 70, at 23–30, 301. See also Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States* 31 *GEORGETOWN L.J.* 1 (1942); Robert A. Williams Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought* 57 *S. CAL. L. REV.* 1, 63–99 (1983).

traditional golden rule, Vitoria states that, “Also, thirdly, the sovereign of the Indians is bound by the law of nature to love the Spaniards. Therefore the Indians may not causelessly prevent the Spaniards from making their profit where this can be done without injury to themselves . . . . If, after the Spaniards have used all diligence . . . then they can make war on the Indians.”<sup>74</sup>

Anghie then goes on to trace these colonial origins and further imperial impulses of international law through later centuries and forms, which are all underpinned by a civilizing mission and animated by an othering “dynamic of difference” (e.g., the “scramble for Africa” at the Berlin Conference of 1884–1885; the mandate system of the League of Nations; the role of international financial institutions in the ‘development’ of the Third World; and, the specter and exception of terrorism and wars against it in international law). As noted above, I am particularly interested in Anghie’s tracing of the colonial origins of international law to Francisco de Vitoria and how these antecedents of colonial law are later connected to the descendants of imperial law. Anghie accomplishes this linkage in several ways.

First, he does note some of the “brutalities” and colonial practices of the postcolonial state, including against smaller states, women, and Indigenous peoples.<sup>75</sup> Second, and more substantially, in a section of his book titled *The United States and Imperial Democracy*, Anghie returns to “close the circle” by connecting American colonization and the wars and dispossession of, and later trust relationship over, Native Americans to Elihu Root’s brand of American colonialism-as-trusteeship over the Philippines; Wilson’s international trusteehip in the Mandate system of the League of Nations; and, ultimately, a comparison between the historical construction of American Indians as savages and the contemporary justifications for occupying Iraq to combating Muslims-as-terrorists in the infinite War on Terror.<sup>76</sup> In a footnote to this discussion, Anghie writes that

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<sup>74</sup> Franciscus de Vitoria, *De Indis et De Ivre Belli Relectiones* (Ernest Nys ed., J.P. Bate trans., 1532), available at [www.constitution.org/vitoria/vitoria\\_.htm](http://www.constitution.org/vitoria/vitoria_.htm). See also ANGHIE, IMPERIALISM, SOVEREIGNTY, *supra* note 70, at 294 (discussing Vitoria, defensive war of Spanish in conquest of Indians, and comparing to preemptive self-defense of United States with respect to Iraq).

<sup>75</sup> See Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 749, 751 (2006) [hereinafter Anghie, *The Evolution of International Law*].

<sup>76</sup> See ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY, *supra* note 70, at 287–90. Anghie describes this War on Terror “as . . . a war in which America is projecting not only

[i]t could be argued that the circle is now complete: Western approaches to the American Indian were shaped by Christian approaches to the pagans of the Middle East, as Robert Williams has shown. Now, through the U.S. intervention in Iraq, the descendants of those same peoples of the Middle East are being thought of in terms developed in relation to the American Indians.<sup>77</sup>

I would only add that not only does this circle complete, but it also repeats, given the wider application of American and, inevitably, Canadian anti-terrorism efforts and rhetoric within broader regimes of securitization and surveillance of borders, lands, resources, and economic and political protest.<sup>78</sup> Although it is a small point, it underscores my emphasis on the need to track these processes of “othering” within and through international law at all of its scales and without prejudging its sources or borders.

Critical approaches to international law, *especially* ones such as TWAIL that reject the liberal protections of orthodox international law, must close the loop begun by the analysis of Anghie and others. However, despite the apparent dearth of such attention in the predecessors to Anghie and others’ work, in TWAIL 1,<sup>79</sup> a newer

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democracy, but its entire history of encounters with the ‘other’, within the United States and also in its previous imperial ventures” *Id.* at 291.

<sup>77</sup> ANGHIE, IMPERIALISM, SOVEREIGNTY, *supra* note 70, at 290 (references omitted). Along these lines generally, see also DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007); TONY HALL, THE BOWL WITH ONE SPOON, THE AMERICAN EMPIRE AND THE FOURTH WORLD (2003) and EARTH INTO PROPERTY: COLONIZATION, DECOLONIZATION, AND CAPITALISM (2010).

<sup>78</sup> See, e.g., Marlene Habib, *Monitoring of First Nations Beefed up in '06: Documents M*, CBC NEWS (June 13, 2011, 10:35 AM EST), <http://www.cbc.ca/news/canada/story/2011/06/13/first-nations-documents.html>. See also Press Release, Defenders of the Land, Defenders of the Land condemns Harper government surveillance of First Nations (Dec. 6, 2011), available at <http://www.defendersoftheland.org/story/312>.

<sup>79</sup> There is no room in this article to detail these changes, differences, and the apparent absence of Indigenous peoples in TWAIL 1. However, for a beginning on the distinctions between TWAIL 1 and 2, see Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77, 79–82 (2003) (boiling down five main points of TWAIL 1 and contrasting with TWAIL 2); ANGHIE, IMPERIALISM, SOVEREIGNTY, *supra* note 70, at 312; Mickelson, *supra* note 9, at 409 (drawing difference from potential Eurocentric imposition of nationalist historiography in earlier TWAIL); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 89–91 (2003) (on the Third World elite’s focus on nationalist-legalistic change and “fetishism” of international institutions); D. Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law* 2 CHINESE J. INT’L L. 29, 39–55 (2003) (on some of the grand initiatives of TWAIL 1 and their legacies (or lack thereof)). See generally James T. Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011).

generation of TWAIL scholars have raised and engaged with these issues in their own work. A brief review of this scholarship is worthwhile and serves the argument for increased engagement and cross-pollination between different critical approaches, alternative histories, and authoritative sources of international law.

The importance of the relationship between the Third World and Indigenous peoples has been raised to greater and lesser degrees in the work of Vijay Prashad, Balakrishnan Rajagopal, and Boaventura de Sousa Santos.<sup>80</sup> In *The Darker Nations*, historian Vijay Prashad traces and constructs a history of the Third World as “not a place” but a project “longing for dignity” and the “basic necessities of life (land, peace, freedom)” with key leaders (Nehru, Nasser, Nkrumah, Castro) in key movements (Afro-Asian Solidarity Conferences, Non-Aligned Movement, Tricontinental Conference, NIEO, G-77, UNCTAD) at key moments (Bandung (1955), Cairo (1957, 1961, 1964), Belgrade (1961), Havana (1966), Algiers (1973), NIEO (1974), CERDS (1976), ASEAN (1977), and New Delhi (1983)).<sup>81</sup> However, in noting an obituary of the Third World, Prashad points to its assassination by the First World through the “Trojan horse” of the 1970s debt crisis and IMF structural adjustment, which ensured structural poverty through recurring debt and eroded the “abbreviated project for the construction of Third World sovereignty.”<sup>82</sup> In his conclusion, Prashad portrays a fragmented and pluralistic universe of actors, networks, and theories, listing social movements “in the darker nations to challenge the Neoliberal states,” such as movements for land, water, women’s rights, Indigenous rights, cultural dignity, and economic parity that “draw on resilient ideological resources (such as Marxism, anarchism, and populism).”<sup>83</sup>

Prashad’s conclusions echo some of those made by law and development scholar Balakrishnan Rajagopal in his book, *International Law From Below*. Akin to Prashad, Rajagopal contests the seemingly natural classification of Third World states as low-income or poor.<sup>84</sup> Instead, Rajagopal notes the constructed and

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<sup>80</sup> Prashad, *supra* note 9; Rajagopal, *supra* note 79; BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995).

<sup>81</sup> PRASHAD, *supra* note 9, at xv–xvi.

<sup>82</sup> *Id.* at 231.

<sup>83</sup> *Id.* at 279–80. Prashad goes on to note that “It is from these many creative initiatives that a genuine agenda for the future will arise. When it does, the Third World will have found its successor.” *Id.* at 281.

<sup>84</sup> *Id.* at 276.



maintained character of this structural inequality, such that “the discovery of poverty emerged as a working principle of the process whereby the domain of interaction between the West and the non-West was defined.”<sup>85</sup> This working principle harkens back to Anghie’s notion of the dynamic of difference that plays out throughout history between colonizer and colonized in still-ongoing civilizing missions. Akin to Prashad, Rajagopal traces a similar story of the “failure of Marxism as a liberatory discourse” and the shortfalls of statist (“etatist”) nationalism, but does so with an emphasis upon the multiple and varied social movements of the masses that followed these failures.<sup>86</sup> Rajagopal argues that after:

[T]he splintering of the Third World coalition in the mid-1970s, the containment of nationalist and class movements by the two Super Powers, and the genuine grass-roots disillusionment with the violence of the nation-building project in many Third World countries, new forms of popular mobilization began to emerge . . . . *Indigenous peoples movements*, fishworkers’ movements, farmers’ movements, and anti-globalization protests are, then, a result of the failure of Marxism as a coherent left doctrine.<sup>87</sup>

In the wake of these failures and the disillusionment that followed, as well as the identification of the fragmented actors that might give shape to future agendas, how do we begin to find a successor to the Third World project?

Although not a TWAIL scholar, legal sociologist Boaventura de Sousa Santos addresses similar questions in his book, *Toward a New Common Sense*. Among many other things, de Sousa Santos traces the movement of global/collectivist concepts in the global commons regimes: Pardo’s 1967 articulation of the common heritage of humankind and the Law of the Sea;<sup>88</sup> the common heritage of humankind (CHM) and the Moon Treaty; the NIEO; telecommunications, the GSO; the Antarctic Treaty (as an elitist reconciliation of the CHM and the condominium); and the space age “overview effect” of seeing the Earth from outer space or from Lovelock’s Gaia hypothesis of an integrated, all-encompassing

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<sup>85</sup> RAJAGOPAL, *supra* note 79, at 108.

<sup>86</sup> *Id.* at 241.

<sup>87</sup> *Id.* at 238, 243 (emphasis added).

<sup>88</sup> For an excellent discussion on the common heritage of mankind, and how it cannot be ethically divorced from its Third World origins, see Karin Mickelson, *Co-opting Common Heritage: Reflections on the Need for South-North Scholarship*, in HUMANIZING OUR GLOBAL ORDER: ESSAYS IN HONOUR OF IVAN HEAD 112 (Obiora Chinedu Okafor & Obijiofor Aginam eds., 2003).

natural system.<sup>89</sup> De Sousa Santos sees the haphazard and uneven career of such concepts as ultimately striving, in the paradigmatic transition he describes throughout his book, towards the principle of *jus humanitatis*, or “a law of and for humanity, as a whole, the law of a decent human condition in a nondualistic, but rather, mutualistic, interaction with nature” that is “grounded on the idea of intergenerational responsibility” and the transmission of “the world’s cultural and natural heritage to future generations.”<sup>90</sup> Following from the gaps in mainstream and critical approaches to international law, and the future hopes of Rajagopal and Prashad’s post-Third World struggles, de Sousa Santos also raises the reality and hope of Indigenous peoples’ experience and mobilization.<sup>91</sup> Specifically, he asks “What can we learn from the Indigenous peoples who, in a sense, are the South of the South?”<sup>92</sup> As noted in the introduction to this article, I believe it is equally important to educate ourselves about some of the lessons from the “South of the North” gleaned from a North American Fourth World perspective and Indigenous legal theory and traditions.

### III

#### TWAIL 3 AND INDIGENOUS PEOPLES

Fortunately, this focus on Indigenous peoples is not an entirely new one.<sup>93</sup> Several recent pieces of scholarship written by adherents to, or readers of, TWAIL raise the relationship—for better or worse—to Indigenous peoples.<sup>94</sup> Notably, all but one of these discussions or

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<sup>89</sup> DE SOUSA SANTOS, *supra* note 80, at 365–73.

<sup>90</sup> *Id.* at 372–73.

<sup>91</sup> *Id.* at 313–27.

<sup>92</sup> *Id.* at 325.

<sup>93</sup> In reference to Malindo’s suggestion of the term “Fourth World” as referring to when “the Indian peoples come into their own,” Manuel noted the following:

I do not think he meant that we would create nation-states like his own, but that, like Tanzania, the nation-state would learn to contain within itself many different cultures and life-ways, some highly tribal and traditional, some highly urban and individual. At that point the Third World will no longer need to imitate and compete with the European empires from which they have so recently escaped.

MANUEL & POSLUNS, *supra* note 3, at 5–6.

<sup>94</sup> Karin Mickelson, Ibrionke Odumosu & Pooja Parmar, *Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities*, 10 INT’L CMTY. L. REV. 351 (2008); Ibrionke T. Odumosu, *Challenges for the (Present)/ Future of Third World Approaches to International Law*, 10 INT’L CMTY. L. REV. 467 (2008); Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, in LAWS OF THE POSTCOLONIAL 89 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999); Prabhakar Singh, *Indian International Law: From a Colonised Apologist to a*

asides emerge from the Americas with respect to Indigenous peoples in the hemisphere. The ambiguity of the relationship in some of the more recent writing is especially interesting here. For instance, in applying a TWAIL analysis to ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, Seth Gordon claims in a footnote that “Although TWAIL, by its definition, focuses on the Third World, it has an expansive definition including all peoples marginalized by the western legal system and, thus, the nexus between the Third World as an entity and Indigenous peoples can be assumed.”<sup>95</sup> Despite Gordon’s explanation, the nexus between the Third World and Indigenous peoples is a live issue that others have argued cannot be assumed. For instance, in his analysis of how World Bank development policies in Latin America further the dispossession of Indigenous lands and resources by transnational mining corporations, Gerardo Munarriz acknowledges TWAIL’s helpfulness in addressing neoliberal economics and human rights violations.<sup>96</sup> However, he also notes that Indigenous peoples are “missing” and should be included in TWAIL scholarship, both because they remain in a “colonial relationship” with international law and because they have emerged “as a political subjectivity within international human rights law.”<sup>97</sup> In contrast to Gordon’s assumed “nexus” or Munarriz’s call for more inclusion between the Third World and Indigenous peoples, Valerie Phillips seems to argue otherwise given their respective searches for distinctive solutions within or beyond the state. As with Munarriz, she notes the still-colonized status of Indigenous peoples, but goes further in contrasting differences in goals and approaches between Indigenous peoples and the Third World/TWAIL. Specifically, she pits Indigenous peoples’ pre-colonization, traditional political roles and groups (clan, village, tribe) and willingness “to contemplate the possible demise of the nation-state” against TWAIL’s “nation-state ideology” and the ultimately

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*Subaltern Protagonist*, 23 LEIDEN J. INT’L L. 1 (2010), available at <http://ssrn.com/abstract=1469223>.

<sup>95</sup> Seth Gordon, *Indigenous Rights in Modern International Law From a Critical Third World Perspective*, 31 AM. INDIAN L. REV. 401, 404 n.22 (2007).

<sup>96</sup> Gerardo J. Munarriz, *Rhetoric and Reality: The World Bank Development Policies, Mining Corporations, and Indigenous Communities in Latin America*, 10 INT’L COMMUNITY L. REV. 431, 435 (2008).

<sup>97</sup> *Id.* at 441–42.

assimilationist goals of social movements in decolonized states.<sup>98</sup> The different threads discussed so far are worth summarizing below.

Most of the writers discussed above—except for one—tend towards the inclusion or conflation of Indigenous peoples within the Third World or TWAIL. Some writers tend to a depiction of the Third World and Indigenous peoples as projects that happen in sequence (Prashad; Rajagopal). Others look at their discursive and actual relationship in more parallel, but still complementary, fashion (de Sousa Santos; Munarriz). In contrast to these approaches, Phillips stresses a stricter parallelism between the two, perhaps as two lines never destined, or desired, to meet. A third strain espouses expanded definitions of the Third World that incorporate Indigenous peoples, either automatically (Gordon) or through more concerted coalition building. This last approach is the one adopted by both women’s studies scholar Sunera Thobani and international law scholar Prabhakar Singh. Following a reading of Anghie’s work, and building upon an expanded category of Third World women that includes those who migrate to the West/North, Thobani argues that the exclusion of Indigenous peoples from the Third World category would be “scandalous,” and begs the question, “how do we account for the relationship between Third World peoples and Indigenous peoples?”<sup>99</sup> Singh makes a similar argument for a revision of this gap, given the fact that the globe is “populated by pockets of third world in the first world and pockets of first world in the third world.”<sup>100</sup> Indeed, Singh aims for the use of “Third World” as “a new currency for identifying the deprived of both the North and the South” that transcends the nation-state and serves as “a unified category of the famished of both; the first and the third world.”<sup>101</sup> Clearly, while the relationship between the Third and Fourth World and their projects

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<sup>98</sup> Valerie Phillips, *Indigenous Peoples and the Role of the Nation-State*, 101 AM. SOC’Y INT’L L. PROC. 319, 320, 322 (2007).

<sup>99</sup> Sunera Thobani, *Reading TWAIL in the Canadian Context: Race, Gender and National Formation*, 10 INT’L CMTY. L. REV. 421, 422 (2008). In the expansion of “Third World women” to encompass those who migrate from there to, e.g., North America, given their shared experience of migration and colonization, Thobani refers to Chandra Mohanty (referring to Chandra Talpade Mohanty, *Cartographies of Struggle: Third World Women and the Politics of Feminism*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM I* (Chandra Talpade Mohanty, Ann Russo & Lourdes Torres eds., 1991)).

<sup>100</sup> Singh, *supra* note 94, at 97. Singh’s comment on this gap in (India’s) TWAIL is made in the context of B.S. Chimni’s omission of tribal peoples from his “Six Tales of India” (referring to B.S. Chimni, *Alternative Visions of Just World Order: Six Tales from India*, 46 HARV. INT’L L.J. 389 (2005)).

<sup>101</sup> Singh, *supra* note 94, at 98, 102.

should not be either assumed or rejected outright, it is similar to international law in that there is no escaping from it.<sup>102</sup>

This Article cannot and does not seek to finally resolve the political relationship between Third World and Indigenous peoples, or the discursive fusion of TWAIL and ILT or, differently again, the Third and Fourth World projects. So far, it has attempted to show the importance of the question<sup>103</sup> and the open-endedness of its answer, especially in the context of critical approaches to international law whose allies and successes are few and far between. Despite their different interpretations and conclusions of the Spanish Scholastics, both Koskenniemi and Anghie show that the colonial encounter is central to understanding international law, and the wider world, historically and currently. It should be clear that any attempts to form such an understanding would be partial, at best, without addressing the distinctive experiences and activism of still-colonized Indigenous peoples. The next Part of this Article turns to an example of Indigenous legal activism and resistance at the “first institution of international law” in the moment when, simultaneously, international law became more than “simply a European law”<sup>104</sup> and Canada sought to assert its sovereign international status, “which before 1919 had in no sense existed.”<sup>105</sup>

#### IV

#### FROM 1492 TO 1924: “THE REDMAN’S APPEAL FOR JUSTICE”

A permanent police presence at Grand River, the replacement of the hereditary council by a compliant elective one, and the use of informers all ensured a degree of official control at the reserve level. On the international front, the services of the British

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<sup>102</sup> In different lectures in Toronto, both Anghie and Koskenniemi have commented on the lack of exit from international law (the former quoting the lyrics to the Eagles’ song “Hotel California,” the latter likening international law to one’s parents). See also MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT*, at xiv (Cambridge University Press 2005) (1989) (“there is no ‘outside-of-law’”); ANGHIE, *IMPERIALISM, SOVEREIGNTY*, *supra* note 70, at 318 (“At the very least, I believe that the Third World cannot abandon international law because law now plays such a vital role in the public realm in the interpretation of virtually all international events.”).

<sup>103</sup> On this point, although in the context of inter-minority coalitions in the United States, see Ediberto Roman, *Coalitions and Collective Memories: A Search for Common Ground*, 58 *MERCER L. REV.* 637 (2007).

<sup>104</sup> MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 50 (1979) (“Until the League of Nations came into being, this international law was simply a European law . . .”), *quoted in* Mickelson, *supra* note 9, at 406.

<sup>105</sup> RICHARD VEATCH, *CANADA AND THE LEAGUE OF NATIONS* 10 (1975).

diplomatic corps were effectively employed to intimidate governments sympathetic to the Indians.<sup>106</sup>

Up to this point, this Article has presented both the invisibility and the importance of Indigenous legal traditions and Indigenous inter-National laws to critical approaches to inter-state international law. It concludes with a section detailing an historical example of Indigenous legal activism and resistance that cuts across European inter-state international law, British imperial law, and Canadian domestic law, while exhibiting Indigenous inter-National law and legal traditions.

Although perhaps not a famous example in Canadian history, international law, or TWAIL circles, the work of Levi General (Deskaheh) in Geneva at the League of Nations has not been ignored in legal scholarship, or in other scholarship that I have reviewed.<sup>107</sup> Most important of the original documents are: the petition written and circulated by Deskaheh in Geneva and elsewhere in support of securing a hearing at the League's Assembly;<sup>108</sup> the unilateral report commissioned by Canada and written by Lieutenant-Colonel Andrew T. Thompson,<sup>109</sup> on the situation at the Six Nations of Grand River at

<sup>106</sup> E. BRIAN TITLEY, *A NARROW VISION: DUNCAN CAMPBELL SCOTT AND THE ADMINISTRATION OF INDIAN AFFAIRS IN CANADA* 134 (1986).

<sup>107</sup> As noted above, Deskaheh is a hereditary chiefly title of the Younger Bear Clan of the Cayuga Nation (e.g., Levi General's brother Alex assumed the title after his brother's death in 1925), which forms part of the Six Nations Confederacy or Haudenosaunee (People of the Longhouse), whose traditional territory spans the Northeastern United States and across the Canadian border. Although the Council of the Confederacy split at the time of the American Revolutionary War, due to the separate nations allying with opposing sides based in part on geography and politics, it resumed shortly thereafter in Oshweken at the Six Nations of Grand River. Apart from being a Chief, Levi General was also chosen as the Speaker for the hereditary Council of the Six Nations Confederacy (and its deputy to London and Geneva). A succinct account of Deskaheh's life and work is by Professor Donald Smith on the Dictionary of Canadian Biography Online. See Smith, *Deskaheh (Levi General)*, *supra* note 11. Finally, although I have reviewed all of the documents cited below regarding Deskaheh, I have not accessed original correspondence between the parties contained in various archives in Geneva, Ottawa, and at Six Nations. For these aspects, I rely as necessary, and with references, on the several writers who have done so (e.g., Veatch, Woo, et al.).

<sup>108</sup> Deskaheh, *The Redman's Appeal for Justice* (Aug. 6, 1923), available at <http://law.lib.buffalo.edu/collections/berman/pdfs/Redmanappeal.pdf>. See also SIX NATIONS, *THE REDMAN'S APPEAL FOR JUSTICE: THE POSITION OF THE SIX NATIONS THAT THEY CONSTITUTE AN INDEPENDENT STATE* (1924), available at <http://law.lib.buffalo.edu/collections/berman/pdfs/Redmanappeal2.pdf>; DESKAHEH, *CHIEF DESKAHEH TELLS WHY HE IS OVER HERE AGAIN* (1923).

<sup>109</sup> COL. ANDREW THORBURN THOMPSON, *COMMISSIONER TO INVESTIGATE AND ENQUIRE INTO THE AFFAIRS OF THE SIX NATIONS INDIANS* (Nov. 22, 1924), available at <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/thompson1924-eng/thompson1924-eng.pdf>. Thompson's inquiry looked at several matters, including education, health, morality, the election of chiefs, powers assumed by Council, soldier settlement, and

the time; and, Canada's belated response in the Official Journal of the League of Nations to Deskaheh's appeal.<sup>110</sup>

The next set of documents comprise the first secondary literature on the quest of Deskaheh and the Six Nations, with the earliest being a 1949 narrative historical account by Carl Carmer in the context of other "York State" (or New York) histories.<sup>111</sup> A pamphlet produced in the 1950s by the Akwesasne Mohawk Counselor Organization (and later reprinted by the influential international disseminator of Indigenous news and views, Akwesasne Notes) sheds some additional light on Carmer's account.<sup>112</sup> Moving to later decades, the standard account remains a chapter in Richard Veatch's 1975 book on Canada and the League of Nations.<sup>113</sup> Important additions and context are provided in both Canadian domestic law and in international law through a series of chapters written by Douglas Sanders in the 1980s and 1990s.<sup>114</sup> Apart from these accounts, there are several later analyses that have been made in law, anthropology, history, and political science, which add some further context and interpretations and will be discussed below as relevant.<sup>115</sup>

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the administration of justice. See generally Joëlle Rostkowski, *The Redman's Appeal for Justice: Deskaheh and the League of Nations*, in *INDIANS AND EUROPE: AN INTERDISCIPLINARY COLLECTION OF ESSAYS* 435 (Christian F. Feest ed., 1987).

<sup>110</sup> Joseph Pope, *Statement Respecting the Six Nations' Appeal to the League of Nations*, 5 *LEAGUE OF NATIONS O.J.* 829 (1924). Sent from Joseph Pope, Canada's Under-Secretary of State for External Affairs, but written by Duncan Campbell Scott. See *TITLEY*, *supra* note 106.

<sup>111</sup> CARL CARMER, *DARK TREES TO THE WIND: A CYCLE OF YORK STATE YEARS* 104–17 (1949).

<sup>112</sup> AKWESASNE NOTES, *DESKAHEH: IROQUOIS STATESMAN AND PATRIOT* (1976).

<sup>113</sup> VEATCH, *supra* note 105.

<sup>114</sup> See Douglas Sanders, *The Indian Lobby*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT* 301 (Keith Banting & Richard Simeon eds., 1983); Douglas Sanders, *Aboriginal Rights: The Search for Recognition in International Law*, in *THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS* 292 (Menno Boldt, J. Anthony Long & Leroy Little Bear eds., 1985); Douglas Sanders, *Remembering Deskaheh: Indigenous Peoples and International Law*, in *INTERNATIONAL HUMAN RIGHTS LAW: THEORY AND PRACTICE* 485, 485–504 (Irwin Cotler & F. Peral Eliadis eds., 1992).

<sup>115</sup> Although beyond the scope of this Article, it is worth briefly noting one methodological perspective that has helped to inform the foregoing and the following discussion. In part of a panel discussing universality and particularity in international law, Outi Korhonen noted that shifting scales in international law "does not automatically cure us" instead, "Moving from a grand universalizing narrative to many small narratives is good but it is very much like moving from London to Middlemarch. The countryside may free us from the monolithic metropolitanism yet the smaller entity with its particularized circumstances and available perspectives is not necessarily more enabling, liberating, or equalizing. It is often equally restricted and wrought with hierarchies and misconceptions."

Broadcast on the radio in Rochester, New York, on March 10, 1925, prior to his death “in exile” in June of that year, Deskaheh’s last speech succinctly sets out some of the context and consequences of his attempt to seek standing for the Six Nations Confederacy at the League of Nations in Geneva. Excerpts from his speech are worth quoting at length here:

About three winters ago, the Canadian Government set out to take mortgages on farms of our returned soldiers to secure loans made to them intending to use Canadian courts to enforce these mortgages in the name of Canadian authority within our country. When Ottawa tried that, our people resented it. We knew that would mean the end of our government. Because we did so, the Canadian Government began to enforce all sorts of Dominion and Provincial laws over us and quartered armed men among us to enforce Canadian laws and customs upon us. We appealed to Ottawa in the name of our right as a separate people and by right of our treaties, and the door was closed in our faces. We then went to London with our treaty and asked for the protection it promised and got no attention. Then we went to the League of Nations at Geneva with its covenant to protect little peoples and to enforce respect for treaties by its members and we spent a whole year patiently waiting but got no hearing.

To punish us for trying to preserve our rights, the Canadian Government has now pretended to abolish our government by Royal Proclamation, and has pretended to set up a Canadian made government over us, composed of the few traitors among us who are willing to accept pay from Ottawa and do its bidding.

. . . .

This is the story of the Mohawks, the sory [sic] of the Oneidas, of the Cayugas—I am a Cayuga, of the Onondagas, the Senecas, and the Tuscaroras. They are the Iroquois. Tell it to those who have not been listening. Maybe I will be stopped from telling it. But if I am prevented from telling it over, as I hope to do, the story will not be lost. I have already told it to thousands of listeners in Europe—it has gone into the records where your children can find it when I may be dead or be in jail for daring to tell the truth . . .

This story comes straight from Deskaheh, one of the chiefs of the Cayugas. I am the speaker of the Council of the Six Nations, the oldest League of Nations now existing. It was founded by Hiawatha. It is a League which is still alive and intends, as best it can, to defend the rights of the Iroquois to live under their own laws in their own little countries now left to them, to worship their Great



Spirit in their own way, and to enjoy the rights which are as surely theirs as the white man's rights are his own.<sup>116</sup>

Within these few paragraphs from his larger speech, Deskaheh provides some of the context for his unsuccessful appeal to the League of Nations. However, several additional points must be noted at the outset.

First, the Six Nations' long alliance as independent Nations with Great Britain, including during the war with its colonies, and the imperial promises of protection and compensation for any losses<sup>117</sup> (secured in part following Joseph Brant's trip to England to petition King George III to confirm that these promises would be honored).<sup>118</sup> Second, the 1784 Haldimand Treaty negotiating lands for the Six Nations on the banks of the Grand River (near present-day Brantford, Ontario, and purchased by Great Britain from the Mississaugas).<sup>119</sup> Third, the cessions and sales of Six Nations land to the Crown, which used them for British settlers, and was supposed to hold the purchase monies in express trust for the benefit of the Six Nations, with accruing annual interest. However, these funds were invested and lost in the failed investment of the Grand River Transportation Company by the Government of Canada without consent of Six Nations. Fourth, the confirmation of freedom of movement in 1796 Jay Treat Article III, confirmed in 1814 Treaty of Ghent, Art. IX.<sup>120</sup> And, finally, fifth being the pretensions to sovereignty by Canada due to British North America Act of 1867, including section 91(24) jurisdiction over "Indians and lands reserved for Indians" in conjunction with the 1869 Indian Act and policies of civilization and assimilation.<sup>121</sup>

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<sup>116</sup> Deskaheh, Last Speech of Deskaheh, Address on WHAM Radio in Rochester, N.Y. (Mar. 10, 1925), in *BASIC CALL TO CONSCIOUSNESS* 25–33 (Akwasasne Notes ed., 1978).

<sup>117</sup> See, e.g., TITLEY, *supra* 106, at 110–11.

<sup>118</sup> For some of the history behind Joseph Brant's particular petitions in 1775 and 1785, see Jim Miller, *Petitioning the Great White Mother: First Nations' Organizations and Lobbying in London*, in *CANADA AND THE END OF EMPIRE* 299, 301–05 (Phillip Buckner ed., 2004).

<sup>119</sup> See TITLEY, *supra* note 106, at 111; Darlene M. Johnston, *The Quest of the Six Nations Confederacy for Self-Determination*, 44 U. TORONTO FAC. L. REV. 1, 13–14 (1986). See Scott Trevithick, *Conflicting Outlooks: The Background to the 1924 Deposing of the Six Nations Hereditary Council* (June 1998) (unpublished Master's thesis, University of Calgary) (on file with author) at 44–46, for some background history to the land and political disputes over this land between the Mississaugas and Six Nations.

<sup>120</sup> See Audra Simpson, *Subjects of Sovereignty: Indigeneity, The Revenue Rule and Juridics of Failed Consent*, 71 LAW & CONTEMP. PROBS. 191, 203–07 (2008), for a description of the legal and other struggles for the border.

<sup>121</sup> See TITLEY, *supra* note 106, at 112.

Subsequent interventions upon the sovereignty of the Six Nations of the Grand River included: the 1919/1920 amendments to the Indian Act providing for compulsory enfranchisement<sup>122</sup> and forced removal of Indian status and reserve land; registration and conscription conducted for World War I (Deskaheh led a delegation to Ottawa to contest this for lack of jurisdiction and to note the 300 volunteers sent to fight by the Six Nations);<sup>123</sup> the subsequent setting aside and mortgaging of reserve lands for both Six Nations' and Canadian veterans of the First World War;<sup>124</sup> enforcement of penal liquor laws and imprisonment; and the "creation of a fifth-column party through persuasion, promises, and payments [ . . . it being] easier still to get the new minority to ask for protection."<sup>125</sup> Deskaheh (travelling on a Haudenosaunee passport) sought aid from the British Imperial Government following his petition in August 1921, to King George V, but the abrupt response by then-Colonial Secretary Winston Churchill in his letter to the Governor General of Canada read that as "the matters submitted within the petition lie within the exclusive competency of the Canadian Government, it should be referred to them."<sup>126</sup>

Although there was a desire to go to the Supreme Court of Canada on the issue of the Six Nations' status, it was to no avail due to the need for leave from the Governor General's office, which was deferred to a decision of the Department of Indian Affairs based on a negative opinion from the Department of Justice. Ongoing negotiations sought to achieve an impartial tribunal examining the question of Six Nations status/sovereignty,<sup>127</sup> but a Canadian offer of June 16, 1922, for arbitration by, first, three judges from the Ontario Supreme Court and, later in December 1922, for Six Nations' selection of any representative who was "a British subject" was rejected due to its bias and ploy to keep Deskaheh's American lawyer

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<sup>122</sup> *Id.* at 114.

<sup>123</sup> CARMER, *supra* note 111, at 106.

<sup>124</sup> See, e.g., Smith, *Deskaheh (Levi General)*, *supra* note 11; see also Woo, *supra* note 18, at 7-8. (referencing An Act to Assist Returned Soldiers in Settling Upon the Land and to Increase Agricultural Production, S.C. 1917, c. 21 (Can.)).

<sup>125</sup> CARMER, *supra* note 111, at 107; see also DESKAHEH: IROQUOIS STATESMAN AND PATRIOT, *supra* note 112, at 3 (suggested ploy by Indian agent, Col. Morgan, to discredit the community).

<sup>126</sup> See Sanders, *Aboriginal Rights*, *supra* note 114, at 292-304, for some of the long history of these imperial petitions; Keith Thor Carlson, *Rethinking Dialogue and History: The King's Promise and the 1906 Aboriginal Delegation to London*, 16 NATIVE STUD. REV. 1 (2005); Miller, *supra* note 123, at 299-318.

<sup>127</sup> TITLEY, *supra* note 106, at 115.

Decker from sitting on such a panel.<sup>128</sup> Additionally, in December 1922, there was a raid by the Royal Canadian Mounted Police (RCMP) (uncoordinated with the other arm of Canadian government, Department of Indian Affairs)<sup>129</sup> with arrests on the spurious pretence of liquor violations, including targeting Deskaheh's home. With the help and advance warning of neighbors, he was able to quickly cross the border to Rochester, New York.<sup>130</sup> In January 1923, the RCMP stationed a garrison<sup>131</sup> (captained by Lieutenant-Colonel Andrew T. Thompson)<sup>132</sup> and sacred wampum belts were taken from the Council house.<sup>133</sup> These actions conclusively led the Six Nations and Deskaheh to seek international (non-imperial) recourse in Geneva, with aid of Rochester lawyer George Decker,<sup>134</sup> who had litigated cases in New York State for the Oneidas and other nations.

Deskaheh and Decker had visited the Dutch charge d'affaires in Washington, D.C. in December 1922, to successfully request that they forward his petition to the League of Nations on the strength of the centuries old relations between Dutch settlers and the then-Five Nations (specifically Kanienkehaka (Mohawk) Nation). The Six

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<sup>128</sup> DESKAHEH: IROQUOIS STATESMAN AND PATRIOT, *supra* note 117, at 2. *See also* TITLEY, *supra* note 106, at 118–19 (initial proposal of royal commission of three Supreme Court of Ontario judges (one chosen by each party and nominees selecting final judge) and later allowance of Six Nations representative beyond Ontario so long as British subject due to the lack of available Ontario judges and desire to restrict Rochester lawyer George Decker from nomination to the commission).

<sup>129</sup> *See* Yale D. Belanger, *The Six Nations of Grand River Territory's attempts at Renewing International Political Relationships, 1921–1924*, 13 CAN. FOREIGN POL'Y 29, 37 (2007).

<sup>130</sup> CARMER, *supra* note 111, at 107.

<sup>131</sup> *Id.* (“The Canadian government then ordered barracks built for the housing of their police and Grand River was suddenly an occupied nation.”); TITLEY, *supra* note 106, at 119.

<sup>132</sup> Siomann Pulla, “Would You Believe That, Dr. Speck?” *Frank Speck and the Redman's Appeal for Justice*, 55 ETHNOHISTORY 183, at 190 (2008).

<sup>133</sup> *Id.*

<sup>134</sup> CARMER, *supra* note 111, at 107. *See* LAURENCE M. HAUPTMAN, SEVEN GENERATIONS OF IROQUOIS LEADERSHIP: THE SIX NATIONS SINCE 1800 124 (1st ed. 2008), for a contrast to other accounts and commentators, in which Hauptman emphasizes Decker's role above others and in distinction to a portrayal of Deskaheh as, at best, naive in his Geneva petition. *See* Belanger, *supra* 129, at 40, for a very different perspective and context, which attributes a similar naivete to the Six Nations hereditary Council about the “innovative political philosophies” and changing international relations of the League of Nations at the time. Both of these criticisms by Hauptman and Belanger are somewhat unsatisfying because they do not seem to explain what came to pass in years after with international Indigenous advocacy and law nor what either Deskaheh or the Six Nations Council might have done differently in the circumstances had their international relations been more enlightened or their Geneva tactics more savvy.

Nations Appeal was put forward under article 17 of the League Covenant providing for disputes between Member States and non-Member States (as opposed to article 1 dealing with new Members).<sup>135</sup> The Appeal described their current situation as “now constituting a menace to international peace” and requested relief including: recognition of the independent right of home rule; a just accounting of the trust funds and interest from the Imperial Government and the Dominion of Canada; and, freedom of transit for the Six Nations across Canadian territory to and from international waters.<sup>136</sup> Although it was unsuccessful in stopping him from circulating the petition to the Secretary General of the League requesting it be sent on to the League Council, the Netherlands’ foreign affairs minister was reminded that such interventions could be equally applied in the case of the Dutch and their “East Indian subjects.” However, the combination of Canada’s vehement denial of League jurisdiction and the Dutch failure to do more than forward the paperwork, led the League’s acting Secretary General to agree to “‘enterrer’ [bury] the matter” by distributing the petition to the Council on August 7, 1923, without any likelihood that any of its members would request it be added to the agenda.<sup>137</sup> Apart from soliciting the League, Deskaheh was lodged at the Hotel des Familles<sup>138</sup> with funds raised from home and the support of different international groups,<sup>139</sup> though money remained tight and at one point they had to raffle a couple portraits of Deskaheh in his regalia for 6,000 Swiss francs, which fit a larger European exoticist reception of Deskaheh. He tactically exploited this romanticism when lecturing across Europe and in the Grand Salle in his regalia for the larger strategy of securing League Member support and public sympathy. Indeed, Deskaheh and Decker waged a publicity campaign that

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<sup>135</sup> VEATCH, *supra* note 105, at 92.

<sup>136</sup> See Deskaheh, *The Redman’s Appeal for Justice*, *supra* note 108, at 1, 13, 20.

<sup>137</sup> See VEATCH, *supra* note 118, at 93–94. Veatch notes that the Canadian reply by Joseph Pope on May 25, 1923, called the Six Nations’ claim “an absurd one.” *Id.* at 94. (British Foreign Office “formally protested the Netherlands’ role in the affair, which it considered ‘an uncalled for interference in internal affairs of Canada’”).

<sup>138</sup> CARMER, *supra* note 111, at 107.

<sup>139</sup> Sanders, *supra* note 114, at 298. (discussing International Bureau for the Defence of Indigenous Peoples (BIDI) (and Rene Claparede), the Slavery and Aborigines Protection Society of London, etc.); See also Rostkowski, *supra* note 109, at 446–48, for a discussion on the skepticism of the League of Nations Union and the Law Reform Association, as well as the support of BIDI, Claparede, and the coordinating efforts of the Commission des Iroquois.

received much press coverage in Geneva and abroad<sup>140</sup> and set a precedent for many later campaigns.

Dated February 23, 1924, Canada's official reply argued (among other things) that:

- the Six Nations was not a state competent to apply within art. 17 of the League's Covenant;
- the Six Nations were subjects of the British Crown and not self-governing peoples nor recognized as such;
- the Nov. 30, 1890, Order-in-Council recognized their loyalty but noted they had no special exemption from the effect of the laws of the land (confirmed in 1921 in response to the Six Nations' request to refer the question of their status to the Supreme Court of Canada);
- discussing treaties with the Six Nations would be akin to "talk of making a treaty of alliance with the Jews in Duke Street or with the French emigrants who have settled in England." (citing Justice Riddell quoting then-Attorney General, and later Chief Justice, John Beverley Robinson);
- the Six Nations had natural born allegiance due to their birth within the Crown's dominions (citing Blackstone);
- the 1919 Indian Act enfranchisement sections provided for Indian acquisition of full Canadian citizenship and the chance to "stimulate progress among the Indians and to afford them an opportunity for self-development and advancement";
- the Six Nations had "in no way conducted or maintained any separate courts or legal machinery of their own";
- there had been no misappropriation or waste of large sums of Six Nations' trust funds;
- that hereditary Council's method of selecting chiefs was a "primitive matriarchal form where the oldest women of the clans hold voting power"; and,
- that recognition of the independent or sovereign status of Indians in treaties of cession, not used by the Dominion of Canada in the international law sense, would mean "the entire Dominion would be dotted with independent or quasi-independent Indian States

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<sup>140</sup> CARMER, *supra* note 111, at 109–10; VEATCH, *supra* note 105, at 95; *see* Carlson, *supra* note 126, at 15. (On the risk of becoming "an entertainment item rather than news" in the context of a different petition); *see also* Sanders, *supra* note 114, at 293, 296. (On the romanticism and "special status" of Indigenous peoples in European eyes, as well as Indigenous strategies of publicity and embarrassment beyond the nation state).

‘allied with but not subject to the British Crown’ [. . .] such a condition would be untenable and inconceivable.”<sup>141</sup>

Of course, it had been Canada’s longstanding desire, along with a minority of Six Nations Christian Reformers in Grand River Country, to install an elected Band Council government to displace the hereditary Haudenosaunee Confederacy Council favoured by the majority of Traditionalists (adherents of the Longhouse religion). This desire was given effect by the boycotted, one-sided, and biased Thompson Commission’s recommendation, among others, to install an elected council as soon as possible (appointed Mar. 1923, heard witnesses Sept. 1923, submitted report Nov. 1923, and circulated to the League of Nations in Feb. 1924).<sup>142</sup> Thompson’s inquiry looked at several matters, including education, health, morality, the election of chiefs, powers assumed by the Council, soldier settlement, and the administration of justice. In his discussion on the election of chiefs, Thompson criticized what he saw as a superficial matriarchal role in the selection of Chiefs and preferred instead, in combination with the

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<sup>141</sup> See Statement of Government of Canada respecting the “Appeal of the ‘Six Nations’ to the League” (June 1924) 5 League of Nations Official Journal 829 [Dec. 27, 1923]. Sent from Joseph Pope, Canada’s Under-Secretary of State for External Affairs but written by Duncan Campbell Scott; TITLEY, *supra* note 106, at 122; see Beverley Jacobs, *International Law/The Great Law of Peace*, (Spring 2000) (unpublished Master’s Thesis, University of Saskatchewan) (on file with the University of Saskatchewan College of Law Library), for a rebuttal on this last point concerning the meaning of treaty and the sources of the law; see P. Whitney Lackenbauer & Andrew F. Cooper, *The Achilles heel of Canadian International Citizenship: Indigenous Diplomacies and State Responses*, 13 CAN. FOREIGN POL’Y J. 99, at 100, 112 (2007). For a discussion on the abiding fear of a Dominion dotted with quasi-independent allies, and the spectre of Quebec, see Johnston, *supra* note 47, at 30.

<sup>142</sup> THOMPSON, *supra* note 109. For some of the many important criticisms of this flawed Commission, see Siomonn Pulla, “Would You Believe That, Dr. Speck?” *Frank Speck and the Redman’s Appeal for Justice*, 55 ETHNOHISTORY 183, 190, 193–94 (2008) (outlining Speck’s criticisms of Thompson’s report, including his objection to the shut down of the longhouse, which was also an “important place of worship” and Thompson’s misrepresentation of the acceptance of traditional government, in which 80 percent of community members participated (Thompson was also the head of the Grand River RCMP detachment)); Johnston, *supra* note 47, at 9 (on the unique role of women as titleholders and nominators of chiefs); *id.* at 19 (a community faction of acculturated abolitionists, the Royal Commission was to investigate a situation led by Thompson, “who had commanded several of the Six Nations men during the First World War,” from whom a group of veterans (Warriors Association members) “incited the campaign for an elective system” through a “deeply inadequate” and one-sided approach by Thompson, which “relied on oral testimony from witnesses and his personal observations,” without any historical or legal context and also lacked the appearance of most chiefs “in keeping with their non-recognition of Canadian jurisdiction”); *id.* at 20 (the non-participation of the chiefs in the Thompson Commission was mirrored in the first election where the majority of the community refused to vote).

limited witnesses he heard from, an elective system as soon as possible.<sup>143</sup> Thompson notes his conviction of corruption at the Council of Chiefs: “I am fully convinced that the present Council has undoubtedly been guilty of a serious usurpation of power, with regard to the Government of Canada on the one hand, and the people of the Six Nations Indians on the other, and that for a considerable time they have been acting very much as a law unto themselves.”<sup>144</sup> Given reports that he was in command of the RCMP detachment at the Grand River, it perhaps comes as no surprise that Thompson’s comment on the issue was simply that, “In this connection I wish to state that these men have carried out their duties with admirable tact and prudence, and seem to have aroused no feeling of personal animosity whatever. Their presence on the reserve, however, is deplored, not resented, by the law-abiding Indians, who constitute a vast majority of the population, for they feel that it stamps them in the eyes of the white community as a lawless people.”<sup>145</sup> Nowhere in these comments is there recognition of sources of authoritative law within the community itself. Interestingly, on the issue of the Six Nations trust funds that were invested without approval in the Grand River Navigation Company for a total loss and without compensation (in addition to both the Canadian and Imperial governments disclaiming liability), Thompson recommended that it be dealt with because he found it convincing and, according to one witness, it “shakes their confidence in British justice.”<sup>146</sup>

Unfortunately, and as noted above, the appeal of Deskaheh and the Six Nations was ultimately unsuccessful for a number of reasons. First, the lack of support from the Dutch beyond initial circulation of the petition did not help. Second, though Panama, Estonia, Ireland, and Persia were initially supportive and penned a letter on September 27, 1923, requesting the Six Nations question be put to the Permanent

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<sup>143</sup> THOMPSON, *supra* note 109, at 11, 14. Note that Thompson recommended that men have the franchise, but not women. *Id.* at 12.

<sup>144</sup> *Id.* at 14.

<sup>145</sup> *Id.* at 16; *see also* Pulla, *supra* note 132, at 190.

<sup>146</sup> THOMPSON, *supra* note 109, at 19. Interestingly, apart from acknowledging the reality of this merely pecuniary interest, Thompson also recommended negotiation between the Canadian and Imperial governments for the purpose of appointing a reputed jurist from a foreign country to determine the matter. *Id.* While the Canadian and Imperial governments could benefit in theory from an at least facially objective adjudication of their dispute of the liability for these mismanaged funds, Deskaheh and the Six Nations’ desire for such impartial international arbitration (beyond the bounds of British subjects) was not entertained by the Department of Indian Affairs. *See* TITLEY, *supra* note 106, at 119.

Court of International Justice for an advisory opinion,<sup>147</sup> they were ultimately pressured by the British Foreign Office to stop their “impertinent interference.”<sup>148</sup> All of the Six Nations’ attempts were further burdened by the Canadian desire for a more independent presence on the international stage and the largely unhelpful League bureaucracy (in part staffed or formerly staffed by Canadians knowledgeable of its intricacies, as well as some not exactly neutral Europeans).<sup>149</sup> On September 17, 1924, a further obstacle arose in the Order-in-Council mandating an elected band council pursuant to the Indian Act. On October 7, 1924, the Haudenosaunee hereditary Council was deposed and “free elections” were held, under the Indian Act, armed guard, and the dark cloud of a large boycott of the proceedings at Six Nations where less than 30 ballots were cast on October 21, 1924, with a significant benefit to the Canadian government from this coup being its interpretation that Deskaheh had “no authority to speak” for his community any longer.<sup>150</sup>

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<sup>147</sup> There are competing narratives about the rationales of support in the letters of these former colonies. While some accounts emphasize a natural solidarity of small nations between them and the Six Nations, *e.g.*, TITLEY, *supra* note 106, at 123, Veatch notes the fact that, “three of the four signers (the delegates of Panama, Persia, and Estonia) had, only two days earlier, addressed the Assembly in opposition to Canada’s efforts to obtain Assembly approval of its Article 10 interpretative resolution.” VEATCH, *supra* note 105, at 95 (footnote omitted). *See also* THOMPSON, *supra* note 109, at 99.

<sup>148</sup> On the general pressure brought to bear on these four states, see VEATCH, *supra* note 105, at 96–98. For the specific issue of pressure brought to bear on Persia’s delegate, Prince Arfa-ad-Dovleh, see *id.* at 96–97 (describing the “highly unusual procedure of challenging whether Prince Arfa was speaking for his government in officially raising the Six Nations question”).

<sup>149</sup> CARMER, *supra* note 111, at 111. Carmer notes that the Secretariat informed Deskaheh and Decker of the refusal to allow his appearance as a petitioner and also denied them gallery seats to observe the League’s deliberations. For some of the context behind Canada’s activities at the League of Nations, including its desire for independent international status, eligibility for membership in the ILO, and equal member status at the League, see VEATCH, *supra* note 109. [3.2(b)] For Canada’s work against the collective security guarantee of article 10 of the League’s Covenant, as well as equality for the rights of immigrant workers, see *id.* (explaining Canadian attempts to delete, then amend, then restrict through an interpretive clause, Veatch cites Department of External Affairs papers stating, “Our primary concern was with Article 10, “the heart of the Covenant,” as President Wilson called it, but a heart which from the beginning we would have been glad to see stop beating.” (footnote omitted) (citations omitted)). *See also, id.* at 8 (discussing the revision of the interpretive clause requiring the same treatment for foreign workers as for nationals, to having “due regard to the equitable economic treatment of all workers” given “restrictions on Oriental labour in effect in the provinces of British Columbia and Saskatchewan”). On the bureaucratic animus towards the Six Nations cause, see *id.* at 99, n.110.

<sup>150</sup> CARMER, *supra* note 111, at 110–11; Woo, *supra* note 18, at 8; *see also* TITLEY, *supra* note 111, at 132 (regarding the lack of evidence of majority support for the elective council); Johnston, *supra* note 47, at 20 (the non-participation of the chiefs in the



Ultimately, the denial by the League, Great Britain, and Canada, led Deskaheh to rent the Salle Centrale and present the Six Nations' case to the enthusiastic public, leading Carmer to write that, in addition to the press, "All the Geneva Boy Scouts were present, but not a single League of Nations official."<sup>151</sup> Deskaheh had to return to the U.S., as he was considered a criminal in Canada, and took refuge with Tuscarora chief Clinton Rickard near Rochester, New York, until his death in June 1925.<sup>152</sup>

### CONCLUSION

What are the implications of the struggle of Deskaheh and the Six Nations at the League of Nations and beyond? The argument in this article has been that international law, and especially critical approaches to international law as developed by Martti Koskenniemi, Antony Anghie, TWAIL and others, cannot ignore the experiences of Indigenous peoples within international law. Even further, this article has argued that critical approaches to international law, whether in search of a thicker, decolonized and anti-imperial international law, or a thinner, formalist defense of political and economic sovereignty and self-determination, cannot ignore their relationship to Indigenous peoples. Deskaheh's story shows the complexity of Indigenous peoples' relationship to international law, which registers at multiple

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Thompson Commission was mirrored in the first election where the majority of the community refused to vote); *Deskaheh*, *supra* note 112, at 4; Sanders, *Aboriginal Rights*, *supra* note 114, at 300 ("Since the confederacy supporters refused to participate in the new system, this had the effect of depriving Deskaheh of his right to speak for the confederacy, at least according to Canadian law." (emphasis added)). On the multiple registers of this action, see Scott Trevithick, *Conflicting Outlooks: The Background to the 1924 Deposing of the Six Nations Hereditary Council* 107, 116 (June, 1998) (unpublished M.A. Thesis, University of Calgary) (on file with author), available at <https://dspace.ucalgary.ca/bitstream/1880/26128/1/34920Trevithick.pdf> (addressing a confluence of factors having to do with the DIA desire for an elected council, international embarrassment from Deskaheh's actions, and local fractures between majority Traditionalists in control of council and minority Reformers). On the "distinct religious worlds" within the historical community between Protestant Christians and Longhouse traditionalists, see Smith, *supra* note 17.

<sup>151</sup> CARMER, *supra* note 111, at 112.

<sup>152</sup> *Id.* at 114–15. Note that the Six Nations did not stop their attempts to draw international attention to questions of their sovereignty and self-determination. See Johnston, *supra* note 47, at 23 (discussing 1945 submissions to United Nations representatives in San Francisco). See also Sanders, *Remembering Deskaheh*, *supra* note 114, at 487 *et seq.* (describing the Six Nations delegation to the UN in 1945, the ILO Convention of 1957, and 1960's extension of the vote by Diefenbaker to Canadian Indians in part to stymie embarrassing comparisons between Canada and the South African apartheid). See generally Sanders, *Aboriginal Rights*, *supra* note 119.

scales and defies any easy distinctions between public, private, national, domestic, foreign, and international. It also shows the myriad forces arrayed at every level against the continued assertions of Indigenous peoples to determine their own lives and secure their own distinctive futures as free as possible from outside coercion. Nonetheless, it can be seen as a hopeful story for several reasons, some of which are relevant to my discussion here about the need for mutual learning between critical approaches to international law.

First, playing on the historical insights and convictions of Koskenniemi and Anghie, it should be clear now that there is nothing outside of international law's colonial constitution, and thus no escaping from international law's relationship with Indigenous peoples.<sup>153</sup>

Second, from the work of Deskaheh and others in the decades to follow, culminating most recently perhaps in the belated endorsement(s) by Canada, Australia, New Zealand, and the United States (CANZUS) of the UN Declaration on the Rights of Indigenous Peoples,<sup>154</sup> Indigenous peoples have not been passive objects or victims within this narrative.

Third, if the spectrum of participants at international law is widened to include Indigenous peoples and poor migrants, potentially both the Fourth and Third Worlds, then the possibility for effective action and resistance, including material gains on the ground, should increase. Critical theories and actors in international law will do a better job of describing the world they seek to both change and explain if they work to appreciate the struggles of others grappling with a commonly denominated and disdainful state sovereignty that puts international migrants, Indigenous peoples, and others within the same nexus. As noted by Anghie, it will take insights from all cultures to realize an anti-imperial international law.<sup>155</sup> Citing Wallerstein, Chimni usefully expands on this call for pluralism by adding that

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<sup>153</sup> However fraught and contested the means and goals were and remain. For a discussion of the competing legacies and implications of Deskaheh, see generally Rostkowski, *supra* note 109; Woo, *supra* note 12; Belanger, *supra* note 129; Trevithick, *supra* note 119; Ronald Niezen, *Recognizing Indigenism: Canadian Unity and the International Movement of Indigenous Peoples*, 42 COMP. STUD. SOC'Y & HIST. 119 (2000).

<sup>154</sup> CANZUS = Canada, Australia, New Zealand, and the United States. On optimism, see Henderson, *supra* note 8 (regarding UNDRIP) *But cf., e.g.,* Patrick Macklem, *Indigenous Recognition in International Law*, 30 MICH. J. INT'L L. 177 (2008); Sheryl Lightfoot, *Selective Endorsement Without Intent to Implement: Indigenous Rights and the Anglosphere*, 16 INT'L J. HUM. RTS. 100 (2012).

<sup>155</sup> ANGHIE, *supra* note 14, at 319–20.

what is specifically needed are the stories of resistance that dialogue between old and new social movements, that are made integral to a theory of resistance to international law, that navigate between liberal optimism and left pessimism, and that strike alliances with other critics of neoliberal approaches to international law by getting to know and understand each other's stories, struggles, and strategies.<sup>156</sup>

Fourth, by expanding the scope of participants in and against international law, it is also possible to expand the scope of relevant and applicable laws and sources of law, as seen in decisions of the Supreme Court of Canada, the Inter-American Commission and Inter-American Court of Human Rights, and, most importantly here, Indigenous legal traditions and inter-National laws.<sup>157</sup> Consequently, if Koskenniemi's insight that the true legacy of the Spanish Scholastics remains their prophecy of centralized states, citizens laden with the expectation of absolute loyalty, a global economic system of profit and private ownership, and continuous warfare,<sup>158</sup> then it is important to understand the histories and current articulations of these laws and legal traditions for both reasons of solidarity and resistance. This resistance can come in many forms, including: letter writing, boycotts, the exercise of local jurisdiction, the making or renewal of inter-state and inter-National diplomatic ties, international petitions, the politics of embarrassment, naming and shaming, passive resistance, strategic litigation, occupations, blockades, and reclaiming and practicing one's languages and laws.<sup>159</sup> Of course, it will not likely come in the form of a law review article.<sup>160</sup> But efforts like

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<sup>156</sup> B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. L. REV. 3, 17–24 (2006). In a domestic context, see Roman, *supra* note 103 (assessing the pros and cons through Critical Race Theory and LatCrit literature, but ultimately weighing in favour of interminority coalitions).

<sup>157</sup> See, e.g., *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 (Can.); *Mayagna (Sumo) Awas Tingni Cmty v. Nicar.*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001). See also discussion *supra* Section 2 on John Borrows, Mi'kmaq, and Anishinabek laws.

<sup>158</sup> Koskenniemi, *supra* note 44, at 12.

<sup>159</sup> On this last point, see, e.g., Chinkin, Wright, & Charlesworth, *supra* note 35, at 32–44 (detailing Wright's work as Northern Director of Akitsiraq Law School in Iqaluit, Nunavut, in charge of a program of transnational Indigenous legal education in Inuit, Canadian, and international law, responsive to the Inuit context and needs of women (comprising the majority of students) and including required learning of the Inuktitut language). See also the important work undertaken in Anishinaabe law and education at Shingwauk Kinoomaage Gamig, available at <http://www.algomau.ca/about-algomau/shingwauk-kinoomaage-gamig>.

<sup>160</sup> For an extended polemic on this point, albeit made in a law review, in the context of radical and Marxist approaches to international law (also criticizing Chimni), see Bill

those made in this article might be of assistance in highlighting the means for connecting sometimes disparate critical projects together, through mutual education of alternative sources of law to govern relationships to the original sources of all wealth: the land and one another.<sup>161</sup> A potential starting list of such doctrines and sources could include: the Common Heritage of Mankind;<sup>162</sup> Permanent Sovereignty over Natural Resources;<sup>163</sup> the New International Economic Order;<sup>164</sup> Indigenous ownership and jurisdiction over the land,<sup>165</sup> or at least, commonly held, inalienable Aboriginal title whose source preexists the Crown/State;<sup>166</sup> the Bowl with One Spoon;<sup>167</sup> and the Seventh Generation teaching.<sup>168</sup> These are all examples of what might truly be called International Law and a grounded critical approach to its practice, theory, and teaching in today's world.<sup>169</sup>

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Bowring, *What is Radical in "Radical International Law"?*, FIN. Y.B. INT'L L. (forthcoming), available at <http://ssrn.com/abstract=1982159>.

<sup>161</sup> This is a slight modification of KARL MARX, *DAS CAPITAL* vol. 1 (1867), which claims the original sources of all wealth are the worker and the soil; see also Brett Clark & John Bellamy Foster, *Marx's Ecology in the Twenty-First Century*, 1:1 WORLD REV. POL. ECON. 142, 150–52 (2010). On a related point, see Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203, 259–60, 263 (2010) (discussing potential coalitions of marginalized groups and populations and the need to go beyond human rights discourse to address the just allocation of scarce resources like land and natural resources).

<sup>162</sup> See generally Mickelson, *supra* note 9.

<sup>163</sup> RAJAGOPAL, *supra* note 79; Chimni, *A Manifesto*, *supra* note 156.

<sup>164</sup> Anghie & Chimni, *supra* note 79; Fidler, *supra* note 79.

<sup>165</sup> See Mariana Valverde, *"The Honour of the Crown is at Stake": Aboriginal Land Claims Litigation and the Epistemology of Sovereignty*, 1 U.C. IRVINE L. REV. 955, 972 (2011) (noting the change in the original pleadings in the Delgamuukw case from "ownership and jurisdiction" to the lesser "aboriginal title").

<sup>166</sup> See, e.g., Leena Heinamaki, *Inherent Rights of Aboriginal Peoples in Canada: Reflections of the Debate in National and International Law*, 8 INT'L COMMUNITY L. REV. 155 (2006).

<sup>167</sup> See Simpson, *supra* note 60. For an articulation of similar principles concerned with the sharing of territory and resources from different legal traditions, see generally PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL* (Berkeley: University of California Press, 2008) at Ch. 11, "The Constitution of the Commons." For a different, crucially nuanced take on the issue of competing colonial and Indigenous commons, see Allan Greer, *Commons and Enclosure in the Colonization of North America*, AM. HIST. REV. 365 (Apr. 2012).

<sup>168</sup> ALFRED, *supra* note 48; Borrows, *supra* note 51. See also Oren Lyons, *Indian Self-Government in the Haudenosaunee Constitution*, 55 NORDIC J. INT'L L. 117 (1986).

<sup>169</sup> For example, see the ongoing situation of the Algonquins of Barriere Lake, their negotiated but unimplemented Trilateral Agreement, the imposition of § 74 of the Indian Act installing an elected band council (in which only 26 people voted) and deposing their traditional government. Barriere Lake Solidarity, *Algonquins of Barriere Lake vs Section 74 of the Indian Act*, VIMEO, <http://vimeo.com/23103527>. See also S. Pasternak (work in progress); On current issues in the community Deskaheh was exiled from after his efforts,

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see Susan M. Hill, *Conducting Haudenosaunee Historical Research from Home In the Shadow of the Six Nations–Caledonia Reclamation*, 33 AM. INDIAN Q. 479 (2009).

