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## THE POWER OF INTERNATIONAL LAW AS LANGUAGE

DINO KRITSIOTIS\*

*An evocative—although fierce and tragic—moment occurs in Peter Carey’s telling novel, OSCAR AND LUCINDA, when the path of an entourage of white men hired to ferry a glass church “through country where glass had never existed before, not once, in all time” crosses that of the Narcoo community.<sup>1</sup> Members of the community are conscripted to help navigate the entourage’s way to its final destination at Bellinger in nineteenth century Australia but face certain death as the reward for their efforts: “When the white men wanted to cross Mount Dawson, the Narcoo men did not wish them to. Mount Dawson was sacred. The young men were forbidden to go there. It was against their law. Then the leader of the white men shot one of the Narcoo men with his pistol.”<sup>2</sup> This episode is but one among many of the rape and slaughter of defenseless individuals of various local communities by certain members of the entourage, supposedly taking their cue from their leader, their “man of authority”: “You can be raging boys at night, but, by God, you will be soldiers in the day.”<sup>3</sup> It is the same man of authority who reminds us that “[c]hurches are not carried by choirboys . . . [n]either has the Empire been built by angels.”<sup>4</sup>*

### I. INTRODUCTION

The passage above rehearses—albeit in microcosm form—the realist interpretation of international politics: a world that is free from all legal and moral restraint, where powerful (and even the not-so-powerful) states possess the freedom (though perhaps not the capacity) to act on instinct, at their own leisure and liberty, and ultimately to use force with impunity. The world—in accordance with this interpretation—is held hostage by the pursuit of the national (as opposed to the international) interest: what we expect and witness is the capricious application of power across frontiers, a world

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1. PETER CAREY, *OSCAR AND LUCINDA* 374 (1988).
2. *Id.* at 377.
3. *Id.* at 379-80.
4. *Id.* at 401.

in which there exists “no law or justice, no conception of right or wrong, and no morality—only a struggle for survival in a state of war waged by every state against every state.”<sup>5</sup> Such are the vagaries of power that have come to characterize the nature of international relationships in realist terms and thought. Power is *the* form of communication by which states interact and understand one another. The Law, to put it at its bluntest, is what the Power says it to be. To be sure, this system admits its own logic and rationality because the world is perpetually rescued from the depths of anarchy and its own total destruction. Power engenders its own rhythm, format and limitations. It is self-controlled and self-corrective as enunciated in the classic doctrine of the *balance of power*; and this explains why Europe was ushered into a sanctuary of peace for the better part of a century by the Vienna Congress in 1815.<sup>6</sup>

In this short essay, I wish to consider the creative impact and potential of *international law* as a new language (in broad comparative terms) for conducting international relations and, as far as the realm of the domestic political market is concerned, for the making of foreign policy choices, initiatives, and decisions. This is because, as a so-called language for international relations, international law introduces states to a new communicative medium which professes to be: more peaceful in its outlook on solving problems; more economical as far as human and financial resources are concerned; more secure in terms of the answers and solutions it provides; and, finally, more inclusive of the participants that make up the international system. The rhetoric and reality of might, power, force, and war are thus gradually being displaced by a new rhetoric—or, more accurately, a new *language* of law, principle, precedent, and procedure. It is in this rhetoric that the underpinnings of a radical new reality for the conduct of international relations are located.

## II. THE NATURE OF POWER

The predominance and pervasiveness of power in global and historical terms is best evidenced by the recurring division of the planet (its peoples

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5. Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193, 196 (1980).

6. Emerich de Vattel described the balance of power as “an arrangement of affairs so that no State shall be in a position to have absolute mastery and dominate over the others” in his *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS*, bk. III, ch. iii, § 47 (1758), reprinted in JAMES BROWN SCOTT, *THE CLASSICS OF INTERNATIONAL LAW* (Michel E. Slatkine & Jiri To-man eds., 1983). See also PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000* 29 (1987), who explains that the “manifold rivalries” of European powers “were spilling over into transoceanic spheres” in the age of exploration and imperial expansion. For the application of the balance of power rhetoric to Italian city-states and the decentralized European state system, see *id.* at 21-22.

and resources) into spheres of political, military, economic, religious, and even cultural *entente*: hence the litany of empires and hegemonies, dominions and colonies, and blocs and satellite states that have occupied (at one time or another) the political landscape. These poignant euphemisms have come to describe the various manifestations of power (and its respective equilibria) at any given moment in history. The present century has, of course, been no exception to this long-time phenomenon. It has, if anything, produced its own ringing endorsement of power techniques and the balance of power: we have witnessed, in particular, an entrenched political and ideological divide, vividly symbolized by Winston Churchill's "Iron Curtain." This cut the world in half for roughly forty-five years during which time two superpowers (and their respective kingdoms) emerged from the ashes of a second "great war"—and all to an endearing fanfare of world constitutionalism, the rule of law, collective security, and the authority of global institutions.

This euphoria and optimism did not last too long, even among those who were true believers of the *nouveau régime*. In the final analysis, the *realpolitik* of the Cold War seemed to differ in no substantive respect from what had gone before. The world continued to demonstrate the characteristics of what the arch positivist Georg Schwarzenberger once labeled a society "in which power is the overriding consideration, [and where] the primary function of law is to assist in maintaining the supremacy of force and the hierarchies established on the basis of power, and to give to the overriding system the respectability and sanctity [which] law confers."<sup>7</sup> So, even when the law presented itself as a genuine alternative language to power with its own psychology, infrastructure, and *modus operandi*, its single most important contribution has been to confer "sanctity" on an old system—where the epicenters and the exigencies of power have remained in operation. In short, the fanfare of 1945 has been fanfare—and no more than that. But how accurately does this understanding take account of the transformation within the international system since the Second World War regarding the range of participants in the world system, and the pioneering substantive legal developments that have occurred under the auspices and at the initiative of the United Nations? Close scrutiny reveals that the schema of such institutions has worked wonders for the prospect of international law as a new language because (as Professor Ian Brownlie has observed): "[the] cadences and subtleties of the process by which norms are developed, often without foresight of the ultimate product, go far beyond the normal calculus of power and politics."<sup>8</sup>

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7. GEORG SCHWARZENBERGER, *POWER POLITICS* 198-99 (3d ed. 1964). "Power" was defined by Schwarzenberger to be "the mean between influence and force [which] distinguishes itself from *influence* by reliance on external pressure as a background threat, and from *force* by preference for achieving its ends without the use of physical pressure." GEORG SCHWARZENBERGER, *THE DYNAMICS OF INTERNATIONAL LAW* 4 (1976).

8. Ian Brownlie, *The Relation of Law and Power*, in *CONTEMPORARY PROBLEMS OF*

Are we to understand from this, then, that the nature of the international system, and the nature of power in that system, has changed in any significant measure? For Koskenniemi, the system we have exists in the “formal sense of a shared vocabulary and a set of institutional practices that states use for cooperation or conflict.”<sup>9</sup> It would, of course, be a dangerous folly to assume otherwise: we do indeed live in an Orwellian world in which all states are equal, but in which some states are more equal than others. The concept of equality for all sovereign states (heralded by the 1919 Covenant of the League of Nations and embraced by the 1945 United Nations Charter) does exist—but it exists in some notional, fictional, even transcendental way.<sup>10</sup> Does it then follow that the “shared vocabulary” (what I term in this essay “the language of international law”) is an artificial creation, “a contrived synthesis of power and ideas”?<sup>11</sup> Is international law a meaningful and real counter-language to power, or are its credentials skin-deep and ephemeral?

### III. POWER AND INTERNATIONAL LAW

One does not need to cast the net too far afield in the lifetime of the United Nations to retrieve evidence which suggests that international law is a language subdued by power—even, on occasion, spoken by lawyers! When Dean Acheson addressed the 1963 Proceedings of the American Society of International Law on America’s quarantine of Cuba in 1962, he was frank and adamant that “[t]he power, position and prestige of the United States had been challenged by another state; and the law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty.”<sup>12</sup> Implicit in this statement was an acceptance of *some* (though unspecified) significance for international law in foreign policy matters, but the overriding message and impression of these words was that power prevails over whatever the law prescribes. “Ultimate power” is a trump card for all occasions and all seasons; the law, on the other hand, would seem to play a loyal second-fiddle.

This, however, is a most curious denial by Dean Acheson of the in-

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INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER ON HIS EIGHTIETH BIRTHDAY 19, 22 (Bin Cheng & E.D. Brown eds., 1988). For a more detailed study, see the seminal work of ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963).

9. Martti Koskenniemi, *The Future of Statehood*, 32 HARV. INT’L L.J. 397, 404 (1991) [hereinafter *Statehood*].

10. Although, for the view that “though the world of big and small and strong and weak states reflected in the United Nations Charter persists, the sharp asymmetries of 1945 have given way to complex international interdependencies,” see W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83 (1993).

11. Koskenniemi, *Statehood*, *supra* note 9.

12. Dean Acheson, Remarks before the American Society of International Law (Apr. 25, 1963), in 57 ASIL Proc. 13, 14 (1963).

tended impact of international law in such situations given the provisions in the United Nations Charter which deal precisely with the concerns he identified in 1963: national security is assured by the right of self-defense in Article 51, and the responsibility for international security is entrusted to the Security Council (Chapter VII) and regional bodies (Chapter VIII). Indeed, Acheson had himself spoken the language of international law and legal argument by invoking the right of self-defense when participating in the deliberations of the Executive Committee (a specialist branch of the National Security Council formed in October 1962 to deal with the imminent crisis). He viewed the right of self-defense as the most secure legal footing for whatever action (including military measures) President Kennedy ultimately chose to take.<sup>13</sup>

The repeated appearance of "international law talk" around the circle of power of the Executive Committee (principally revolving around the interpretations of the right of self-defense, and the relationship between regional action through the Organisation of American States and the enforcement powers of the Security Council) all took place behind closed doors; this is perhaps why international law appears so complicitous with the inner workings of the power machine of national defense. All the more reason we are entitled to ask why international legal language and argument surfaced at all in these deliberations—especially in a forum so conspicuously "close to the sources of sovereignty." This very fact should not, of course, delude us into thinking that because legal language was one of the tongues of the Committee, it was the dominant tongue and that international law considerations were the deciding factors in shaping the final decision of President Kennedy and his Administration. The acute insight of Professor Abram Chayes focuses our minds on the need for realistic expectations of what international law argument can and cannot do, and of what we can and cannot know about the rationale for a given decision. "We cannot," he argued in 1974, "ask for a demonstration that legal considerations *dictated* [the final] decision":

The military advice to the President was for an immediate invasion of Cuba or for a massive air strike, involving some 500 sorties. This course was supported by the most prominent practitioners of *realpolitik* among the President's advisers. *It was their views the President rejected, not the lawyers'.*

We would not conclude from this that military considerations played no

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13. See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS 13-14* (1974) (discussing the composition of the Executive Committee). See also ROBERT KENNEDY, *THIRTEEN DAYS* 30 (1969). Robert Kennedy, himself a lawyer and Attorney General of the United States at the time of the Crisis, was a fully-fledged member of the Executive Committee and advised against a surprise attack on Cuba, akin to that made on Pearl Harbor by Japanese forces in December 1941, because it was "not in our tradition." *THE KENNEDY TAPES: INSIDE THE WHITE HOUSE DURING THE CUBAN MISSILE CRISIS* 189 (Ernest R. May & Philip D. Zelikow eds., 1997).

role in the decision-making process. Conversely, I do not base a claim for the role of law on the congruence of the final decision with the lawyers' advice. It is no more possible to demonstrate "proximate" causation here than in any other human process. The weight and consequence of legal advice in the final decision, like the weight and consequence of military judgment or Kennedy's machismo or the bureaucratic rigidity of the Air Force are, and must remain, unknowable.<sup>14</sup>

This gives us, as lawyers, a sense of perspective and emphasizes the holistic context in which decisions are made. The imponderabilities that belie the decision making process and the "unknowable" mechanics of "the final decision" should not, however, serve to detract from the increasing influence that international law has as a language for inter-state and even intra-state intercourse. No formal obligation is placed on states outside the arena of litigation or official reporting commitments to justify their actions in international law and, yet, we find that even the most powerful states invoke international law principles and argument to defend their conduct. The United States is a principal case-in-point, offering legal arguments to explain why force was used in Grenada (1983), Libya (1986), Panama (1989), Iraq (1991, 1993, 1996), Somalia (1992), and Haiti (1994). This is not to say that the legal arguments advanced on each of these occasions were valid or accepted by other states or by international institutions—but it substantiates the claim that international law is something of a force to be reckoned with to the point where states invoke its terms to rationalize their behavior as well as to communicate the reasons for action to the outside world, so that it is unwise to give it such short shrift in the manner and spirit of the remark made by Dean Acheson.

Through the use of the law as language, we can then identify strands of *opinio juris* thought in state behavior (that is, incidents in state practice)—an essential legal ingredient in the creation of custom which, in turn, produces a normative system more reflective of the interests of its addressees. With its extraordinary dynamic and adaptability, custom is especially appropriate as a dialect of international law for allowing states to respond to complex emergencies or unanticipated crises, or perhaps to depart from treaty texts when appropriate. It promises solutions within—and this is important—a normative framework and rests on the assumption that states are indeed rational actors, able to appreciate the nature and the consequences of the decisions they make.<sup>15</sup> The rationality of an act is also *communicated* to other

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14. CHAYES, *supra* note 13, at 4 (emphasis added).

15. Citing President Nixon's 1971 statement, that "the rhetoric in international affairs *does* make a difference," Thomas M. Franck and Edward Weisband point out that "conduct explained by principles inconsistent with those applied previously in similar circumstances, tends to transform the system. This means that the other superpower in the future will expect to have recourse to the same principles." THOMAS M. FRANCK AND EDWARD WEISBAND, *WORD POLITICS: VERBAL STRATEGY AMONG THE SUPERPOWERS* 2, 6 (1972) (emphasis added). In such cases, the language of law is no more than "verbal strategy" and part of the complex matrix of power, employed to rationalize the use (and abuse) of power. But, as

states through the medium of law: states can afford to be specific about the legal principles which they seek to invoke when they are confident in their claims; and where legal grounds are less obvious, states are prone to make more general and polemical references to their territorial integrity, political independence and, of course, their sovereignty.

#### IV. INTERNATIONAL LAW AS LANGUAGE

The increasing purchase made on international law argument and interpretation by states (including the most powerful) contributes to a vital new dynamic in the history of international relations, with international law as an autonomous force or *power* among nations. As such and in the same way as power itself, international law prescribes its own limitations as a language and discipline—in the methods and arguments it allows, in its sources, in the interpretations and principles it accepts, and in its own *modus operandi*.<sup>16</sup>

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the authors stress, the full picture involves *more* than two superpowers; these superpowers operate in a world of other, though lesser, powers and one which is also proliferated by international institutions and other actors: "action explained by a principle inconsistent with prior conduct is likely to cost the actor in prestige among other states, not only because consistency is a part of everyone's definition of justice but also because all states have a stake in the stability of the system above and beyond their stake in a particular issue confronting this system." *Id.* at 6-7. Thus, not only an appreciation of the meaning of sovereignty, but recognition of the legal position generally held by states during the Cold War is what led the International Court of Justice to conclude in the *Nicaragua Case* (1986) that it could not "contemplate the creation of a new rule opening up the right of intervention by one state against another on the ground that the latter has opted for some particular ideology or political system." 1986 I.C.J. REP. 14, 133, para. 263. Furthermore, the Court was not convinced that the so-called principle of ideological intervention was advanced in anything other than "a political context"; the principle was "not advanced as legal arguments." *Id.* at 134, para. 266.

16. See, for example, the argument made by Rosalyn Higgins on the scope of the right of self-determination in the post-colonial world:

Can terms be invoked to mean whatever the user finds it convenient for them to mean? I am aware that I here approach the dangerous waters of linguistics and the current controversies of deconstructionism. My position is that I believe that legal ideas develop, and that that is proper. But that is not to say that they can mean simply whatever those using them want them to mean.

Rosalyn Higgins, *Comments*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 29, 30 (Catherine Brölmann et al. eds., 1993). International law is not therefore a promiscuous language; it survives post-modern decadence by its institution and identity as a discipline based on principles and rules, helped by its various sources and canons of construction, as Higgins demonstrates in her argument about who the "right" of self-determination belongs to in international law:

The [1966] Political Covenant gives entirely discrete rights to minorities on the one hand (minority rights, as elaborated in Article 27) and to peoples (self-determination rights, as provided in Article 1). One cannot—though many today try, lawyers as well as politicians—assert that minorities are *peoples* and that therefore minorities are entitled to the right of self-determination. This is simply to ignore the fact that the Political Covenant provides for two discrete rights.



It also has an expanding base of users. In discussing the various claims made for Palestinian statehood, Professor James Crawford observes the provenance international law has in contemporary political debate and dialogue. An “obstinate fact [identical to the synopses of American practice related above] remains that the actors, most of the time, continue to use the language of law in making and assessing claims.”<sup>17</sup> Once again, this is not pursuant to any legal obligation on such actors to do so, but resorting to legal language appears to yield a greater *prima facie* advantage to one’s case in the international sphere than resorting to the sheer force of arms—which, in any event, is shunned by legal doctrine and thinking.

International law offers a much more constructive communicative medium (with all the prospects and risks that this entails) than naked power could ever hope to do. Its very rules promise peace; they preach pacifism.<sup>18</sup> Compared with power, its old rival, international law creates the conditions for a genuine peace (based on negotiation and cooperation rather than threat, intimidation, and force) and a stable peace (which is protected by law and not by the balance of power). This peace is the platform for the prosperity of the system’s participants. In so doing, international law widens its circumference to include all states—be they strong or weak, wealthy or impoverished, large or small—as participants in the international system, potentially able to speak and use the same language, the same principles. They are able to appeal to reason, the same ideas, the same sense of justice: as Sir Robert Y. Jennings, onetime President and former Judge of the International Court of Justice, has observed: “the first and essential general principle of public international law is its quality of universality; that is to say, that it be recognized as a valid and applicable law in *all* countries, whatever their cultural, economic, sociopolitical, or religious histories and traditions.”<sup>19</sup>

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It also, more insidiously, denies the right of self-determination to those to whom it was guaranteed—the peoples of a state *in their entirety*.

*Id.* at 32. What is at stake here is the need for respect for the rules of recognition (to draw from the terminology of Professor H.L.A. Hart, *THE CONCEPT OF LAW* (2d ed. 1994) in the international legal system). For an analysis of the Hartian rule of recognition and its application to international law as “adherence [to a normative hierarchy] and community,” see Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT’L L.* 705, 751-59 (1988). Franck describes Hart’s rule of recognition as one of “ultimate” validity, that which “test[s] the validity of all other rules by standards that are not themselves subjected to being tested by reference to any superior rule” and this is praised as a “much more sophisticated critique of the international rule system than the simple Austinian one, which focuses on the absence of a system of coercion.” *Id.* at 751.

17. James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 *EUR. J. INT’L L.* 307, 307 (1990).

18. This fundamental principle is enunciated in Articles 2(3) and 33 of the United Nations Charter.

19. Robert Y. Jennings, *Universal International Law in a Multicultural World*, in *LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE* 39, 40-41 (Maarten Bos & Ian Brownlie eds., 1987).

Previous to this, power preached the politics of elitism and coercion: only those states or polities powerful enough could speak—or, rather, only the powerful that spoke would be heard.

International law, then, is constructive because it provides a voice and a language for a greater range of participants in the international system, including those who have traditionally been excluded from the great power rivalries of yesteryear: minorities, indigenous peoples, non-governmental organizations, and individuals.<sup>20</sup> Some, however, regard this voice as barely audible; others venture to say that it is the very acoustics of the system—rather than its communicative medium—that are at fault. This latter observation casts doubt on the promise of international law to be more inclusive than a system based on power imperatives and differentials: it is regarded as elitist unto itself (with its statist-driven philosophies and initiatives) and as having perpetrated its own system of exclusionary politics.<sup>21</sup> Be this as it may, international law is still (at base) more amenable to more claims by more participants on more issues than under any regime based on power. It is the machinations of internal change, vision, and reform that continue to refer international law back to its original ideas of peace and justice that will hold it accountable to changing community needs and expectations.

Notwithstanding these (and other) vices, the virtues of this language should continue to be sung. As an alternative to the belligerent pursuit of “self-determination” and the independence wars in the localized Balkans power-play after 1991, the recent strategy of the federal government of Canada to explore the legal meaning of self-determination comes as an instructive (if not timely) antidote. Here, the Canadian government has asked its Supreme Court for a reference on whether the planned secession of the French-speaking province of Quebec is in accordance with constitutional and international law.<sup>22</sup> Although the provincial authorities have refused to participate in this process (Lucien Bouchard, the Premier of Quebec, has spoken of Quebec’s “sacred right” to control its own destiny), what we are witnessing is international law in motion before a national court—with the opinions of international law experts ready-at-hand, the submissions of *ami-*

20. *See id.*

21. For criticisms made by the “feminist approaches” to international law, see Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991) (See especially page 625 and accompanying footnotes). Such approaches pride themselves on “the importance of participation, of listening to accounting for the particular experiences of women, especially those that are on the margins of power,” but face their own difficulties when they encounter movements that promote practices contrary to their objectives. Tracy Higgins, *Anti-Essentialism, Relativism and Human Rights*, 19 HARV. WOMEN’S L.J. 89, 91 (1996). See also the criticism made by Philip Allott that the “social world of humanity has been neither democratised nor socialised because humanity has chosen to regard its international world as an unsocial world” and, as such, revolutionary change is called for. PHILIP ALLOTT, *INTERNATIONAL LAW AND INTERNATIONAL REVOLUTION: RECONCEIVING THE WORLD* 8 (1989).

22. *See* Anthony DePalma, *Canada Seeks Legal Advice on the Status of Quebec*, N.Y. TIMES, Feb. 17, 1998, at A5.

*cus curiae*, and stock-in-trade international law issues such as the meaning of self-determination and the identity of the bearer(s) of such a right.<sup>23</sup> As this vexed question moves into the Supreme Court of Canada, we can appreciate the extent to which international law is given credence in world capitals; in this case, a calculated and some might say an innovative gamble on how to crack an old chestnut in the country's constitutional politics and history.

So the language of international law has become such an integral part of state behavior that it has entered the vernacular of domestic political discourse. The power of the words and ideas (and their respective histories) in this language has also contributed to their impact on contemporary political thinking. Perhaps this is best exemplified by one of the most powerful words to have been coined in this century: that of "genocide." Devised by the Polish scholar Rafael Lemkin in his famous work, *Axis Rule in Occupied Europe*,<sup>24</sup> it was adopted and defined by international law in the 1948 United Nations Convention on the Prevention and Punishment of Genocide.<sup>25</sup> So important is the resonance of this term in the contemporary world that conventional wisdom asserts that it was studiously avoided in American corridors of power in 1994, when Rwanda was convulsed by internecine warfare. The reason given for this is that the use of the term "genocide" would have increased public pressure to intervene in the conflict,<sup>26</sup> when many govern-

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23. See Janice Tibbetts, *Sovereignist Argument Wrong, Canadians A People*, *Ottawa Says*, THE GLOBE & MAIL (Toronto), Mar. 14, 1998, at A8 (outlining the Federal Government's rebuttal of the claim that the Canadians do not constitute a "people": (a) that under the Canadian Constitution, Parliament represents all Canadian people; (b) that French-speaking Canadians outside Quebec have constitutional rights that protect their language and culture; (c) that most English-speaking Canadians are not English Canadians in terms of their origin; and (d) that Canada possesses a multicultural heritage). For an excellent electronic resource prepared by the Canadian Department of Justice for the documentation for this litigation, consult <[http://canada.justice.gc.ca./Orientations/secess/index\\_en.html](http://canada.justice.gc.ca./Orientations/secess/index_en.html)>.

24. RAFAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944).

25. See 78 U.N.T.S. 277 (1951). Article 2 of the Convention defines "genocide" as:

acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

Although the Convention relates to the "prevention and punishment of the crime of genocide," its emphasis very much sides with the latter of these strategies. See, particularly, Article 3 (lists the acts that are punishable); Article 4 (deals with the act of punishment); Article 5 (requirement for effective penalties) and Article 6 (the importance of a competent tribunal). This is without prejudice to Article 1, according to which states undertake to prevent *and* punish the crime of genocide in international law and Article 8, whereby any contracting Party "may call upon the competent organs of the United Nations to take such action under the [United Nations Charter] for the prevention and suppression of genocide."

26. See Thomas W. Lippman, *Clinton to Visit Rwanda on Africa Trip: Airport Event*

ments were running shy of foreign military entanglement in the post-Somalia world. President Clinton admitted as much in March 1998 when, on the tarmac of Kigali Airport, he elected to use this word from the international law lexicon (and, in so doing, hinted at the legal implications of the categorization):

The international community, together with nations in Africa, must bear its share of responsibility for this tragedy . . . . We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe haven[s] for the killers. *We did not immediately call these crimes by their rightful name: genocide.* We cannot change the past. But we can and must do everything in our power to help you build a future without fear, and full of hope.

Each in their own way, these examples serve to demonstrate that international law is a language which is a necessary part of a "process of communication,"<sup>28</sup> a process that is altogether different in nature from that to which states (as political entities) have traditionally been accustomed to. This is because governments have created "formal arenas for certain matters, unwittingly inviting consolidations of authority and control that will be used in ways adverse to common interests."<sup>29</sup> Of course, this opens up a series of fundamental and recurrent questions—about compliance with and enforcement of the law—but it is the very existence, speaking and use of legal language that allows us to ask (and answer) such questions in the first place.

## V. CONCLUSION

This brief essay has explored the idea of international law as a language for international relations—and it has done so in a comparative and historical framework. Using the language of power as its comparator, international law is referred to as something of a "new" *lingua gentium* for state interaction and dialogue, even though its origins may be traced back to the year of 1648 and the Peace Settlement of Westphalia. This historical dimension of viewing international law as a serious rival language to that of power should not be lost sight of and cannot be over-stressed. We must appreciate that the learning of a completely new mode of communication—a new psychology almost—will not happen overnight or even in a generation. International law has centuries of a different language (with all the accompanying tradi-

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*Scheduled to 'Address and Acknowledge the Genocide'*, WASHINGTON POST, Mar. 11, 1998, at A26.

27. *Clinton's Painful Words of Sorrow and Chagrin*, N.Y. TIMES, Mar. 26, 1998, at A12 (emphasis added).

28. W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 ASIL PROC. 101 (1981).

29. *Id.* at 120.

tions) to overturn and replace. This is no mean or immediate task. But its lurking presence in state capitals, in national courts, and in the corridors of power means that international law has already made something of an impressive and important start.<sup>30</sup> International law should be able to take some credit for the relative state of peace that exists as the twentieth century draws to a close. Something dramatic has surely taken place in international politics in the past one hundred years or so if we consider that, at the end of the last century, nations vied for armaments and colonial acquisitions whereas today they are locked in fierce economic competition with each other and are busy comparing their criminal justice systems in preparation for the creation and institution of a permanent international criminal court.

It is worthwhile noting, in conclusion, that the metaphor of international law as a language for international relations was the theme chosen for the United Nations Congress on Public International Law in March 1995—the first event of its kind to be held in the history of the organization. Former United Nations Secretary-General Boutros-Ghali has explained that “next to the society of states, there is an international scientific community that desires to establish law as a language of international relations.”<sup>31</sup> The full thrust of the idea—it is true—has yet to take hold.<sup>32</sup> Depicting law as lan-

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30. In the field of international human rights law, for instance, the Human Rights Committee created by the 1966 International Covenant on Civil and Political Rights only has the power to “study the reports submitted by States Parties [and] shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties.” International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 40(4). While some may regard this system as rudimentary, powerless and unsatisfactory, the emphasis of this process has been on the establishment of “constructive dialogue” with states in a comparatively new and radically different branch of the traditional international legal order. See U.N. Doc. A/48/40 (1993), Part I, Annex X, 218. See also DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 103 (1991). However, if we consider that the Committee is a creature of the time of its creation, it is justified for us to ask at what future point in time “constructive dialogue” should become more than an exchange of communications between states and institutions and develop into a series of legally binding decisions (judgments) given by a court of law. See Yoram Dinstein, *Human Rights: Implementation Through the UN System*, 89 ASIL PROC. 242 (1995). This is especially so given the present system of individual communications set out in the First Optional Protocol to the Covenant where the Committee only has power to “forward its views to the State Party concerned and to the individual.” First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302, art. 5(4).

31. Boutros Boutros-Ghali, *Foreword*, in PROCEEDINGS OF THE UNITED NATIONS CONGRESS ON PUBLIC INTERNATIONAL LAW, NEW YORK, MARCH 13-17, 1995: INTERNATIONAL LAW AS A LANGUAGE FOR INTERNATIONAL RELATIONS xiv (1996) [hereinafter PROCEEDINGS]. For additional information, see Virginia Morris & M. Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Fiftieth Session of the U.N. General Assembly*, 90 AM. J. INT’L L. 491, 499 (1996).

32. It is the view of the Finnish international lawyer Martti Koskenniemi, who attended the 1995 United Nations Congress, that “a paradoxical contrast emerged [at the Congress] between the inflated global rhetoric of the speeches and the complete irrelevance with which the Congress was treated by the political centre.” He continues: “Globalist

guage in this way, however, presents the law as a creative (rather than destructive) alternative force in international relations because, as was said in another context, “[i]f only as a point of departure, the language of law and constitutionalism can provide a common set of reference points for people . . . who otherwise feel little in common.”<sup>33</sup> We are aware, *pace* the opening paragraph of this essay, of what the alternative may ultimately be: without international law as language, “antagonists could converse only in the grunt-and-click language of raw power, leaders would have no affective idiom for justifying compromises to their followers, and third parties would lack any principled basis for bringing power to bear when sweetness and reason fail.”<sup>34</sup> Moreover, through the law as a medium and through its use, we have the makings of a genuine *community* with its own sense of identity, values, vision, and solidarity.<sup>35</sup> The foundations of permanent and stable world peace require more than simple power-equation calculations and sensitivity to the shifting power bases and differentials. Through international law, nation shall finally be able to speak lasting and meaningful peace unto nation.

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rhetoric: marginal practice—and none of us was surprised, indeed, nobody expected otherwise.” Martti Koskeniemi, *International Law in a Post-Realist Era*, 16 AUSTRALIAN Y.B. INT’L LAW 1, 2 (1994) [hereinafter *International Law*]. He notes that “there was no sign of awareness that international law might participate in [the] restructuring [of politics], not only as a formal technique, to be employed at the service of diplomacy, but as the very site for the expression of new ideas, identities or strategies.” *Id.* at 2. What is particularly interesting and significant about the speeches presented at the Congress is the spectacular absence (generally speaking) of the theme of international law as a language for international relations. See PROCEEDINGS *supra* note 31. Perhaps this is one reason why “we have the sense that transformative language—democracy, interdependence, solidarity, shared values—is mere decoration, in fact useless for participation in or understanding of practice.” Koskeniemi, *International Law*, *supra* at 7. Or is the “truth of th[is] spectacle” explained by our alienation not only from practice but from related disciplines that cover the same ground but use a different language? Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205 (1993).

33. MARTHA L. MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW 139 (1997).

34. Tom J. Farer, *Conclusion: What Do International Lawyers Do When They Talk About Ethnic Violence and Why Does It Matter?*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 326, 346 (David Wippman ed., 1998).

35. See generally JOHN EDWARDS, MULTILINGUALISM 125-45 (1994).

