INFLUENCE OF PUBLIC OPINION ON INTERNATIONAL LAW IN THE NINETEENTH CENTURY

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This article examines the influence of public opinion on international law in the nineteenth century. The author argues that although the nineteenth century was dominated by imperialism and state interests, public opinion played an important role. The article first examines the Vienna Congress in 1815, where European representatives made a declaration condemning the slave trade. It then moves to 1864, when some European nations agreed at Geneva on a convention for humanitarian relief of war victims. Finally it looks at the Berlin Conference of 1885, where European representatives guaranteed African people freedom of conscience and religious toleration in the Berlin Final Act *of 1885. The author argues that each of these cases demonstrate circumstances in which it was possible for public opinion to influence the shaping of international documents binding upon sovereign states and concludes that although public opinion does not dominate international politics, it may play a minor influential role in the shaping of international norms. He concludes that historical analysis of these three cases provides lessons for our time and the future.*

*Cet article porte sur l'influence de l'opinion publique sur le droit international au dix-neuvième siècle. L'auteur fait valoir le fait que même si le dix-neuvième siècle était dominé par l'impérialisme et les intérêts de l'État, l'opinion publique a joué un rôle de taille. L'article examine d'abord le Congrès de Vienne de 1815 où des représentants européens ont fait des déclarations condamnant la traite des Noirs. L'article passe ensuite à 1864, lorsque certaines nations d'Europe se sont entendues à Genève sur une convention de secours humanitaire pour les prisonniers de guerre. Enfin, il se penche sur la Conférence de Berlin de 1885, où des représentants européens ont garanti la liberté de conscience et la tolérance religieuse aux peuples africains dans l'acte final (*Berlin Final Act*) de 1885. L'auteur fait valoir le fait que chacun de ces cas démontre les circonstances où il fut possible pour l'opinion publique d'influencer la forme de documents internationaux contraignant les États souverains. Il conclut en disant que bien que l'opinion publique ne domine pas la politique internationale, elle peut jouer un rôle d'influence mineure dans la forme des normes internationales. Il termine en disant que l'analyse historique de ces trois cas donne des leçons pour notre époque et l'avenir.*

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Is there any thing whereof it may be said, *See, this is new*?
It hath been already of old time, which was before us.

(Ecclesiastes, 1:10, King James Version)

Confucius said: "Who learn the new by ruminating on the old can be a teacher."

(*The Words of Confucius*, 2:11, [translated by author])

I. INTRODUCTION

As nineteenth century international politics were quite different from those of the following and of our century, we tend to think that the international law of those days was completely different from ours and dominated by state interests and had nothing to do with a democratic element like public opinion.[1] One may wonder how opinions of citizens could possibly have impacts on the highly undemocratic and state-centered international law of the century of imperialism.[2] However, in some countries, democratization of politics dates back to the nineteenth century or even before.[3] At the end of the eighteenth century, the importance of public opinion was already an issue of discussion.[4] That being said, the

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1 See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. by Thomas Burger (Cambridge, Mass.: MIT Press, 1989) at 236:

> 'public opinion' takes on a different meaning depending on whether it is brought into play as a critical authority in connection with the normative mandate that the exercise of political and social power be subject to publicity or as the object to be molded in connection with a staged display of, and manipulative propagation of, publicity in the service of persons and institutions, consumer goods, and programs.

Here in the context of its influence on international law, we deal with the concept of public opinion in the former sense. While it is difficult to give a more accurate definition to this elusive concept, we would like to understand it here as a conviction accepted and influential in a given society, more or less critical towards the government. The critical nature is important for the public opinion to have some influence on international law-making, because otherwise it would be only a subservient legitimizer of governmental actions. On the other hand, public opinion is not necessarily representative of views of the people (i.e. the popular opinion), because a minority view with strong conviction may be more influential than a majority view with weak conviction (see note 4, below for Nicolas de Condorcet's distinction between "l'opinion publique" and "l'opinion populaire").

2 See David J. Bederman, *International Law Frameworks* (New York: Foundation Press, 2001) at 4 ("Positivism reigned supreme in international relations from 1848 to 1919").

3 For the influence of public opinion of British legislation, see A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (London: Macmillan, 1905).

4 Jeremy Bentham, "Of Publicity" in "An Essay on Political Tactics, or Inquiries Concerning the Discipline and Mode of Proceedings Proper to be Observed in Political Assemblies" c. 2 in *The Works of Jeremy Bentham* (Edinburgh: William Tait, 1843) vol. 2 at 310-16, reprinted in "Bentham on Publicity" (1994) 6 Public Culture 579 at 581 ("The public [opinion] compose a tribunal, which is more powerful than all the other tribunals together.… [I]t is incorruptible; that it continually tends to become enlightened"). For Bentham's fragmentary remarks, made mostly in the 1820s, and a possible reconstruction of his notion of the public opinion tribunal, see Fred Cutler, "Jeremy Bentham and the Public Opinion Tribunal" (1999) 63 The Public Opinion Quarterly 321. Nicolas de Condorcet made a distinction in 1776 between "l'opinion publique" guided by "l'opinion des gens éclairés" and "l'opinion populaire," which is "celle de la partie du peuple la plus stupide et la plus misérable": "Réflexions sur le commerce des blés" in *Oeuvres complètes de Condorcet* (Bruswick: Vieweg, 1804) vol. 19, 173 at 312-13. The term "l'opinion publique" was already used by earlier writers, but they did not necessarily peceive it in the positive sense. For example, for Jean-Jacques Rousseau, public opinion was the result

relationship between international law and public opinion in those days may of course be quite different from the one that emerges in the following century, but it does not mean that it must have been non-existent. Indeed, a closer look at nineteenth century international law reveals that it did, in fact, incorporate some norms that were genuinely not motivated by state interests.

In 1815, European representatives at the Vienna Congress issued a declaration against the slave trade.[5] In 1864, they agreed at Geneva on a convention for humanitarian relief of war vicitms.[6] In 1885, they even agreed at Berlin to guarantee African people "freedom of conscience and religious toleration."[7] High politics alone could not have yielded such new norms for the prohibition of the slave trade, humanitarian treatment of wounded soldiers, or protection of human rights of non-Europeans. While we should not ignore the fact that those norms were created through political dealings between states and seemingly conscientious norms were most probably deeply entangled with state interests, it should also be pointed out, nonetheless, that without participation of non-governmental associations and movements, there could never have been such humanized rules in international law.

In this regard, we should perhaps recall the rather apparent, but often overlooked, fact that the international relations on which nineteenth century international law was built were quite different from those of the preceding century. Most importantly, European diplomacy was profoundly affected by the two great revolutions at the end of the eighteenth century: the French Revolution and United States Independence.[8] I do not intend to oversimplify the situations by saying that "two great democracies joined the concert of Europe." Rather, since 1789 French politics continued to oscillate between monarchy and demagogy throughout the nineteenth century and the U.S. government, which was certainly more democratic than the French one, could sometimes still take rather imperialistic moves, as is well-known, especially towards Latin American nations. That being said, we should not fail to notice that the French regime, if sometimes monarchical, never returned to the Louis XIV-style absolute monarchy and that *la démocratie en Amérique* was quite phenomenal compared to old European politics. The citizens of these countries obtained a power of influence on foreign policies, unimaginable under their *anciens régimes*.

In addition, the political culture in some of the other European countries went through significant changes over the course of the nineteenth century. Great Britain, no longer an

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of custom, sentiment, and prejudice rather than a conscientious judgment: Colleen A. Sheehan, "Madison and the French Enlightenment: The Authority of Public Opinion," (2002) 59 William and Mary Quarterly 925 at 934. For the concept of "public opinion" in the eighteenth century, see Laurence Kaufmann, "Entre fiction et réalité. L'opinion publique dans la France du XVIIIe siècle" in J. F. Sebastián & J. Chassin, eds., *L'avènement de l'opinion publique: Europe et Amérique, XVIIIe-XIXe siècles* (Paris: L'Harmattan, 2004) 91. See also Dale K. Van Kley, "In Search of Eighteenth-Century Parisian Public Opinion" (1995) 19:1 French Historical Studies 215.

5 *Declaration of the Powers Regarding the Abolition of the Slave Trade*, 8 February 1815, annexed to General Treaty Signed in Congress at Vienna, 9 June 1815, in *The Parliamentary Debates from the year 1803 to the Present Time*, vol. XXXII (London: T.C. Hansard, 1816) [*Vienna Declaration*].

6 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864 [*First Geneva Convention*].

7 *General Act of the Berlin Conference*, 26 February 1885 [*Berlin Final Act*].

8 For the significance of the French Revolution in the history of international law, see René-Jean Dupuy, "La révolution française et le droit international actuel" (1989) 214 Rec. des Cours 9.

absolute monarchy since the seventeenth century, extended the right to vote to ordinary citizens through the reform acts of 1832, 1867, and 1884.[9] The Netherlands, Prussia, Spain, Denmark, and many other countries on the continent were not only invaded by Napoleonic forces, but were also strongly influenced by the democratic ideals of the French Revolution and the revolutionary movements of 1830 and 1848. The liberalization of the press legislation in France and Germany in the 1870s and the early 1880s also contributed to the growing influence of the press on political opinion.[10]

Such changes in political climate ushered the way to the rise of the *esprit d'internationalité* in the last quarter of the century and to the creation of the *Institut de droit international* (*Institut*) in 1873.[11] At the end of the century, Pasquale Fiore, for example, sought the ultimate source of international law in "*convictions juridiques populaires*."[12]

While the history after the creation of the *Institut* has attracted some attention from historiographers of international law, the period before 1873 has been almost completely ignored. The formation of classical international law was achieved in 1758 by the publication of Emer de Vattel's famous compendium of *Le droit des gens*.[13] Many scholars, such as Georg Fredrich von Martens, Johann Ludwig Klüber, and Henry Wheaton continued to write textbooks on international law, but they gradually lost contact with the reality of the subject, and by the 1860s academic international law had become old-fashioned because "[i]t had compressed European reality into an *a priori* system of political ideas with little attention to the special nature and history of the relations between European sovereigns and even less to the political consciousness of European societies."[14] But the lack of doctrinal development during the first half of the nineteenth century does not justify our ignorance of the development of international law at the time.

This article explores the influence public opinions could have exercised on nineteenth century international law. For this purpose, I will go over the three successful cases mentioned above. Those cases may suggest under what circumstances it is possible for public opinion to get through to an international document that is binding upon sovereign states. It is of course not my intention to claim that already in the nineteenth century public opinion always supported humanitarian values in international relations. Even if it were the case, public consciousness would not always have been successful in penetrating the diplomatic pandemonium. The relationship between public opinion and international law-making must have been more complex and worth critical consideration. In doing so I hope to learn not only the history of the past events, but also lessons for our time and for the future.

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9 *Representation of the People Act, 1832* (U.K.), 2 & 3 Wm. IV, c. 45; *Representation of the People Act, 1867* (U.K.), 30 & 31 Vict., c. 102; *Representation of the People Act, 1884* (U.K.), 48 & 49 Vict., c. 3.

10 Elfi Bendikat, "The Berlin Conference in the German, French, and British Press" in Stig Förster, Wolfgang J. Mommsen & Ronald Robinson, eds., *Bismarck, Europe, and Africa* (Oxford: Oxford University Press, 1988) 377 at 377.

11 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001) at 3ff. For a comprehensive review of this very controversial book, see George Rodrigo Bandeira Galindo, "Martti Koskenniemi and the Historiographical Turn in International Law" (2005) 16 E.J.I.L. 539.

12 Pasquale Fiore, *Le droit international codifié et sa sanction juridique* (Paris: Plon, 1890) at 12.

13 M. de Vattel, *Le droit des gens* (Londres, 1758).

14 Koskenniemi, *supra* note 11 at 23.

II. ABOLITIONISM MOVEMENT AND THE 1815 *VIENNA DECLARATION* AGAINST THE SLAVE TRADE

By the middle of the eighteenth century, the slave trade had become a lucrative business and British ships were carrying about 50,000 black slaves a year across the Atlantic. Although a 1772 King's Bench decision denied slavery in the British metropole,[15] the slave trade continued.

First, it should be noted that the international law writers of the eighteenth century were not against slavery. Following the long tradition of its jus-naturalist justification since Aristotle and Saint Augustine,[16] Vattel, for example, wrote in 1758: "Is it lawful to condemn prisoners of war to slavery? Yes, in cases which give a right to kill them, — when they have rendered themselves personally guilty of some crime deserving of death."[17]

Of course, he is a man of enlightenment and naturally takes a critical posture against slavery by qualifying it as "contrary to the nature of man"[18] and welcomes the fact that slavery is no longer practiced in Europe: "fortunately this disgrace to humanity has been banished from Europe."[19] However, he does not condemn the practice out of Europe either. His position is to legitimize slavery as a benevolent institution for those prisoners who could have been killed. In the same token, Martens writes in 1789: "the old practice to put the losers in slavery is no more in use, execpt as retorsion against barbarious peoples."[20] This statement, like that of Vattel, does not contradict the practice of obtaining slaves as war prisoners on the coast of Africa.

It is against this doctrinal background that the Quakers filed a petition to the British Parliament in 1783 and the Committee for the Abolition of the Slave Trade (the so-called "Committee of Twelve") was set up in 1787. If lawful under general international law, they wanted to ban it by means of national and international voluntary legislation. In the famous 1789 speech before the House of Lords, William Wilberforce (1759-1833), one of the heroic figures of British abolitionism, made an eloquent plea: "A trade founded in inequity, and carried on as this was, must be abolished, let the policy be what it might — let the consequences be what they would, I from this time determined that I would never rest till I had [secured] its abolition."[21]

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15 Slavery was illegal in England since *Somerset v. Stewart* (1772), 12 Geo. 3, 98 E.R. 499 (K.B.). *Cf.* William M. Wiecek, "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World" (1974) 42 U. Chicago L. Rev. 86.

16 While Aristotle justified slavery rather straightforwardly by saying "some should rule and others be ruled is a thing not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule": Aristotle, *Politics*, trans. by Trevor J. Saunders (Oxford: Clarendon Press, 1997). Augustine accepts it more reluctantly as an institution introduced by sin and not by nature: St. Augustine, *Concerning The City of God against the Pagans*, trans. by Henry Bettenson (London Penguin Books, 1984) at 874.

17 Vattel, *supra* note 13, vol. 2, book III, c. VIII at 121 [translated by author].

18 *Ibid.* [translated by author].

19 *Ibid.* [translated by author].

20 Mr. Martens, *Précis du droit des gens moderne de l'Europe* (Gottingue Jean Chret. Dieterich, 1789) vol. 1 at Liv. 8, Ch. 3, §. 235 [translated by author].

21 Quoted in Kevin Belmonte, *William Wilberforce: A Hero for Humanity* (Grand Rapids, Mich.: Zondervan, 2007) at 109.

Although halted for a decade by the British war against revolutionary France, the abolitionists continued to exert considerable pressures on the British government, which in 1807 abolished the slave trade in all British colonies and made it illegal to carry slaves in British ships. Thus, the British abolitionists achieved the objective within the British Empire in 20 years after the foundation of the Committee of Twelve.[22]

Not surprisingly, the same objective was to be pursued on the international plane. The general sentiment of British public opinion may be represented by the declaration of the House of Commons on 2 May 1814:

> [T]hat the high rank which this kingdom holds among maritime and colonial stales imposes a very serious duty upon the British government at this important juncture; and that, unless we interpose, with effect, to procure a general abolition, the practical result of the restoration of peace will be to revive a traffic which we have prohibited as a crime, to open the sea to swarms of piratical adventurers, who will renew and extend, on the shores of Africa, the scenes of carnage and rapine in a great measure suspended by maritime hostilities, and the peace of Christendom will kindle a thousand ferocious wars among wretched tribes, ignorant of our quarrels and of our very name.[23]

George Ponsonby (1755-1817), then leader of the opposition in the House of Commons, "was happy to give his unqualified approbation to the Address."[24] With such considerations, the British abolitionists exerted strong political pressures on the Foreign Office, which deployed anti-slavery diplomacy throughout the nineteenth century. British Foreign Secretary, Lord Castlereagh (1769-1822), became a key player in the early stages of the European diplomatic struggles for the abolition of slave trades.[25]

All of the three major maritime powers other than the U.K., namely France, Spain, and Portugal, were reluctant to follow the British policy, but did not refuse to negotiate with London. In the years following the Napoleonic Wars, Spain was undergoing reconstruction and needed a foreign loan. London was a natural candidate for such a loan and offered Madrid a subsidy totaling £800,000 on the condition that Spain immediately limit the slave trade to the south of the equator and promise abolition in five years, but Madrid refused.[26] Meanwhile, Lisbon consented to limit its slaving activities to the area of Africa that lay to the south of the equator and, in return, London promised a loan of £600,000.[27]

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22 See David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (New York: Oxford University Press, 2006) at 231 for an insightful consideration of the British abolitionism.

23 U.K., H.C., *Parliamentary Debates*, vol. 27, col. 637 at 647 (2 May 1814).

24 *Ibid.* at 642. Ponsonby added that "[w]hatever advantages had been derived to this country from the Slave Trade, taken in a commercial point of view, they were certainly much greater than those of any other power; and having so cheerfully sacrificed them for the sake of promoting the ends of justice and humanity, we were certainly entitled to the right of endeavouring to bring our Allies into the same praise-worthy principles" (*ibid.* at 643).

25 See Sir Charles Webster, *Foreign Policy of Castlereagh, 1815-1822* (London: G. Bell and Sons, 1963) 454; Jerome Reich, "The Slave Trade at the Congress of Vienna A Study in English Public Opinion" (1968) 53 The Journal of Negro History 129.

26 Bernard H. Nelson, "The Slave Trade as a Factor in British Foreign Policy 1815-1862" (1942) 27 The Journal of Negro History 192 at 195-97.

27 *Ibid.* at 197-98.

It is interesting to see how revolutionary France reacted to British abolitionism. During his brief comeback for one hundred days,[28] Napoleon decreed abolition of the slave trade with hope to court the British government, but the Restoration made it invalid. Castlereagh worked hard to get Paris to sign an agreement attached to the Treaty of Paris of 30 May 1814 "to unite all His to those of His Britannic Majesty, at the approaching congress, to induce all the powers of Christendom to decree the abolition of the Slave Trade, so that the said trade shall cease universally, as it shall cease definitively, under any circumstances, on the part of the French Government, in the course of five years."[29] In fact, the British abolitionists did not wish to wait five years and, thus, Castlereagh offered Talleyrand a West Indies Island or a sum of money for an immediate abolition. But, French public opinion was against further concession and the French government, fearing a negative reaction from its own people, declined the offer.[30] The French slave trade was finally abolished in 1848.

After the partially successful negotiations with these countries, British abolitionist diplomacy eventually led the representatives of the European powers, namely the British, Russian, Swedish, Spanish, Portuguese, Prussian, and Austrian Plenipotentiaries, to declare on 8 February 1815 at Vienna that:

> [C]onsidering that the commerce known as the African negro trade has been held by enlightened men of all times as repugnant to the principles of humanity and universal morals … and that the public voice has been raised in all civilized nations to call for its earliest possible abolition … the said Plenipotentiaries agreed to deliberate upon the means to achieve such a salutary objective by a solemn declaration of the principles which guided them to this work.
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> Consequently, … regarding the universal abolition of the slave trade as a measure especially worthy of their attention … they are animated by the sincere desire to cooperate in executing it most promptly and efficaciously using every means in their power, with all the zeal and all the perseverance which they owe to such a great and beautiful cause.[31]

If formulated somewhat vaguely,[32] the significance of the declaration is apparent.[33] Even if London did not attain universal and definitive abolition of the slave trade, the other

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28 The French Revolution was followed by a nominal abolition of slavery on 4 February 1794 without substantial implementation, only to be reintroduced in 1803.

29 *Definitive Treaty of Peace and Amity between His Britannic Majesty and His Most Christian Majesty*, 30 May 1814 (London: R.G. Clarke, 1914), Additional Articles, art. 1.

30 Betty Fladeland, "Abolitionist Pressures on the Concert of Europe, 1814-1822" (1966) 38 The Journal of Modern History 355 at 361; Nelson, *supra* note 26 at 195.

31 *Vienna Declaration*, *supra* note 5 [translated by author].

32 And the delegations to Vienna did not forget to add a caution that "the said Plenipotentiaries at the same time acknowledge that this general Declaration cannot prejudge the period that each particular Power may consider as most advisable for the definitive Abolition of the Slave Trade. Consequently, the determining the period when this trade is to cease universally, must be a subject of negotiation between the Powers": *Vienna Declaration*, *ibid.* at 201.

33 The case of the *Vienna Declaration*, *ibid.*, against the slave trade made as part of the Congress of Vienna in 1815 has been already well studied by scholars of international relations: Ian Clark, *International Legitimacy and World Society* (Oxford: Oxford University Press, 2007) at 37-60. Most recently Professor Ian Clark investigated how and why the issue of slavery was brought to the international agenda and with what results. He analyzed the domestic political pressures on the British government exercised by William Wilberforce and the Abolition Society and their impact on European diplomacy, especially in connection with Castlereagh's foreign policy.

governments were prepared to make political, if not juridical commitments for the future abolition of the slave trade, all while their merchants were still engaged in the business.

A few scholars took note of the change in positive international law, such as August Wilhelm Heffter, who claimed in 1844 that an international agreement on enslavement "can never be validly concluded"[34] and that it was "a crime against the general human law" for a state to engage in a slave trade on the high seas.[35] Of course, Heffter's statement was contradicted by reality, because the moral and non-binding agreement at Vienna did not drive out slave traders from the Atlantic. The *Vienna Declaration* remained only a personal commitment of those who signed it, to the extent that there was no commitment officially agreed to by their governments. It was, nonetheless, a great step toward preparing the complete abolition of the slave trade in the following century.

The strongest opponent to abolitionism was the U.S., who did not take part in the Congress of Vienna. Many times between 1820 and 1842 British abolitionism almost caused a rupture of diplomatic relations between the U.K. and the U.S. In his annual message to Congress in December 1841, U.S. President John Tyler declared that he would not concede to the "interpolation into the maritime code at the mere will and pleasure of other Governments … without our consent."[36] In line with governmental policy, Henry Wheaton, an American diplomat, strongly affirmed the legality of the slave trade in 1836, even after many European countries prohibited the slave trade in order to abolish slavery not only in Europe but also outside of Europe.[37]

Even with the very rough sketch given here, one can clearly see that the dynamics between public opinion and international law-making do not necessarily work in favour of humanitarian causes; in the beginning, British opinion was the only national opinion vindicating the abolition of the slave trade. The public opinions in France and in the U.S. did

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34 August Wilhelm Feffter, *Das erupäische Völkerrecht der Gegenwart* (Berlin: Berlag von E.h. Schroeber, 1844) at 154 [translated by author].

35 *Ibid.* at 183 [translated by author]. See also Johann Ludwig Klüber, *Europäifches Völkerrecht* (Heidelberg: Julius Groos, 1847) at 83-84.

36 Reprinted in Nelson, *supra* note 26 at 206-207.

37 Henry Wheaton, *Elements of International Law: With a Sketch of the History of Science* (Philadelphia: Carey, Lea & Blanchard, 1836) at 117:

> Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world, of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question must be considered as decided in favour of the legality of the trade.

This passage was maintained in 1846 and again in 1866: Henry Wheaton, *Elements of International Law*, 3d ed. (Philadelphia: Lea & Blanchard, 1846) at 186; Henry Wheaton, *Elements of International Law*, 8th ed. by Richard Henry Dana, Jr. (Boston: Little Brown, 1866) at 212. It is interesting that not only American writers but also some international law writers of other nations remained, for a while, reluctant to admit the customary law emergence of a general rule of prohibition of the slave trade: see e.g. L. Oppenheim, *International Law: A Treatise* (New York: Longmans, Green, 1905) vol. 1 at 347, n. 1, where he states "It is incorrect to maintain that the Law of Nations has abolished slavery," even though he continues: "but there is no doubt that the conventional Law of Nations has tried to abolish the slave trade." Therefore, abolition of the slave trade was not seen as a matter of general international law, but a matter of legal policy of every sovereign state and the "principles of humanity and universal morals," declared in 1815 (*Vienna Declaration*, *supra* note 5), are no more than moral principles.

not allow their respective governments to make immediate concessions to the British demand. The French position, in particular, was more a result of suspicion against British diplomacy than a result of a rational calculation of French economic interests. In other words, public opinion is not always for progressive causes but is sometimes dominated by demagogic chauvinism. It was only in 1822 that, in France, the *Comité contre la traite négrière* was created in the largely protestant *Société de la Morale Chrétienne*, which in 1834 was extended to the *Société française pour l'abolition de l'esclavage*.[38]

It is quite startling that British public opinion alone dragged international law-making that far. One reason was, of course, the strong commitment of the British abolitionists. Another reason is probably the clear virtue of the anti-slavery arguments, accusing the slave trade as being an act against humanity.[39] But the most important, and yet very much mundane, reason was the power of the British nation. The British Empire dominated international relations from the Napoleonic time to the end of the nineteenth century, as evidenced by the naming of the period from 1815 to 1919 "the British Age" by German historiographers of international law, such as Wolfgang Preiser or Wilhelm Grewe.[40] The British had enough financial resources to elicit positive actions from the Spanish or Portuguese courts for abolition of the slave trade and had moral influences strong enough to affect the French and American public opinions. Public opinion of a single nation may strongly affect international law-making if it is a powerful nation.

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38 Victor Schoelcher was one of key figures in the French abolitionist movement, who published in 1833 *De l'esclavage des Noirs, et de la législation coloniale* (Paris: Paulin, 1833), to call for a universal abolition of slave trade and the progressive abolition of slavery.

39 Vattel considered slavery as an "opprobre de l'humanité," even though he did not consider it illegal. See also Thomas Paine, "African Slavery in America" in Richard Emery Roberts, ed., *Selected Writings of Thomas Paine* (New York: Everybody's Vacation, 1945) at 4. In the same vein, Paine considered that the slaves have "a natural, perfect right" to freedom and "the governments whenever they come should, in justice set them free, and punish those who hold them in slavery." I would like to thank Professor Diane Amann for an interesting suggestion on a possible link between the abolitionist discourse and the modern notion of "crime against humanity": see Diane Marie Amann, "Slave Trafficking as a Crime Against Humanity" (Paper presented at the Proceedings of the 101st Annual Meeting of the American Society of International Law, 30 March 2007), (2007) 101 American Society of International Law Proceedings 214 at 277.

40 Wolfgang Preiser, "History of the Law of Nations: Basic Questions and Principles" in Rudolph Bernhardt, ed., *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1984) vol. 7 at 126; Wilhelm G. Grewe, *The Epochs of International Law*, trans. by Michael Byers (Berlin: Walter de Gruyter, 2000).

III. THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE *FIRST GENEVA CONVENTION*

Before the *First Geneva Convention*,[41] there was no international rule to reduce the suffering of wounded soldiers. Contrary to Pufendorf, Vattel was eager to limit the suffering of soldiers in belligerency,[42] but even Vattel did not go as far as to claim a neutral status for medical staff.[43]

The initiative came not from a lawyer or a professional moralist, but from a businessman. In February 1863, Swiss businessman Henry Dunant founded the "Committee of the Five,"[44] and later renamed the committee the "International Committee for Relief to the Wounded." In October, the Committee organized an international conference in Geneva to develop possible measures to improve medical services on the battlefield, which 36 individuals, including 18 official delegates from national governments, attended.[45] In the next year the Swiss government invited the governments of all European countries, as well as the U.S., Brazil, and Mexico, to attend an official diplomatic conference, which adopted on 22 August 1864, the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*.[46]

The creation of the Committee in 1863 (later renamed the International Committee of the Red Cross (ICRC) in 1867) was not only a personal feat of Dunant, but was also made possible by the support of the Swiss government, by the administrative skill of Gustave Moynier, and, above all, by the collective enthusiasm for humanitarian assistance for war victims galvanized by Dunant's *A Memory of Solferino* (1862), describing the horror he witnessed in the bloody battle at Solferino on 24 June 1859 between the Austrians and the French-Sardinian alliance. Dunant called on European governments "to formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries."[47] Then, almost at the end of the booklet, he added:

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41 *First Geneva Convention*, *supra* note 6.

42 Vattel is from the Swiss canton of Neuchâtel, then a principality under the Prussian king, which was very much active in providing mercenaries to European wars: see Tetsuya Toyoda, "La doctrine vattelienne de l'égalité souveraine dans le contexte neuchâtelois" (2009) 11 Journal of the History of International Law 103.

43 The closest Vattel came to the idea was the episode of Duke of Cumberland: see Vattel, *supra* note 13 at Liv. 3, Ch. 8, §. 158, 131, wherein the lightly wounded English duke ordered his doctor to go see a seriously injured French officer. But this episode is mentioned only to praise the virtue of the duke and not to ascertain a legal prescription and it was only after the victory, thus the end of the belligerency. Martens went further to note that "c'est à celui qui est maître du champ de bataille à prendre soin des blessés et des morts": see Pierre Boissier, *De Solférino a Tsoushima* (Paris: Plon, 1963) at 205.

44 Other than Henry Dunant, the committee members were Gustave Moynier, a lawyer and chairman of the Geneva Society for Public Welfare, Louis Appia, physician who had significant experience working as a field surgeon, Théodore Maunoir, a member of the Geneva Hygiene and Health Commission, and Guillaume-Henri Dufour, a Swiss Army general of great renown.

45 They were from Baden, Bavaria, France, the United Kingdom of Great Britain and Ireland, Hanover, Hesse, Italy, the Netherlands, Austria, Prussia, Russia, Saxony, the Kingdom of Sweden and Norway, and Spain.

46 Representatives of 12 states and kingdoms signed the convention: Baden, Belgium, Denmark, France, Hesse, Italy, the Netherlands, Portugal, Prussia, Switzerland, Spain, and Württemberg.

47 Henry Dunant, *A Memory of Solferino* (Geneva: International Committee of the Red Cross, 1986) at 29.

> Humanity and civilization call imperiously for such an organization as is here suggested. It seems as if the matter is one of actual duty, and that in carrying it out the cooperation of every man of influence, and the good wishes at least of every decent person can be relied upon with assurance … in an age when we hear so much of progress and civilization, is it not a matter of urgency, since unhappily we cannot always avoid wars, to press forward in a human and truly civilized spirit the attempt to prevent, or at least to alleviate, the horrors of war?[48]

The plea of Dunant received favourable reaction from all over Europe. Three months before the diplomatic conference, Moynier had already received official notification of the constituting of committees from Vienna, Brussels, and Copenhagen,[49] and many private individuals "were also fired with enthusiasm and wrote direct from different countries offereing their services to the Geneva Committee."[50] The success of the Convention is attributable, on the one hand to the popular European support of the provision, among others, that "ambulances and military hospitals shall be acknowledged to be neutral"[51] and on the other hand to the fact that no government foresaw serious damage to national interests, even if the Swiss government did not have a strong levy to induce other governments to ratify the Convention and the delegations at the Conference may have been slightly skeptical as to the seriousness of the enterprise.[52] The British representative did not sign the Convention, but the government ratified it the following February. The King of Sweden and Norway ratified it in December 1864 and all countries participating in the Geneva conference, including those not giving a signature, ratified it by October 1866.[53] While there was no serious threat to national (or governmental) interests, it may have been good for governments to please the public opinion. Gustave Rolin-Jaquemyns, who would later be one of founders of the *Institut de droit international*, rightly saw "the increasing influence of humanitarian ideas in the limitation of warfare and in the conduct of hostilities."[54]

The important difference, which is of interest in this article, between the *Vienna Declaration* and the *First Geneva Convention* is that the former was led by the powerful British government while the latter was led by the humble government of the Swiss Confederation. The success of 1864, no less important than the success of 1815, illustrates that the leadership of a powerful government is not always necessary to reflect the public conscience onto international politics, on the condition that public opinion is united across nations. In 1864, there was no strong governmental leadership, but all governments concerned were under pressures from their respective national Red Cross movements.

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48 *Ibid.* at 29-30.

49 Léopold Boissier, "In 1864" (1964) 41 International Review of the Red Cross 394 at 394-95.

50 *Ibid.* at 395.

51 *First Geneva Convention*, *supra* note 6, art. 1.

52 *Cf.* Pierre Boissier, *Histoire du Comité international de la Croix-Rouge de Solférino à Tsoushima* (Paris: Plon, 1963) at 232-37.

53 For the dates of ratification, see the database of the International Committee of the Red Cross: "International Humanitarian Law — Treaties and Documents," online: International Committee of the Red Cross <http://www.icrc.org/ihl.nsf>.

54 Koskenniemi, *supra* note 11 at 15; G. Rolin-Jaequemyns, "De l'étude de la législation comparée et du droit international" (1869) 1 Revue de droit international et de législation comparée 1.

IV. THE *BERLIN FINAL ACT* AND HUMAN RIGHTS PROTECTION IN AFRICA

Finally, the last case is of much less political importance, almost completely ignored by authors writing on the Berlin Conference of 1884-85. In 1884, British diplomacy was still fighting for complete abolition of the slave trade and art. 6, *inter alia*, of the *Berlin Final Act*[55] dealt with that issue. I have already considered the influence British public opinion exerted on international law-making for the abolition of the slave trade and I do not intend to deal with the issue again.

What interests us most here is the sentence at the end of art. 6, which goes beyond the issue of the slave trade, showing us, I believe, another way in which the element of public opinion may be relevant in nineteenth century diplomacy. Article 6 of the *Berlin Final Act* reads:

> All Powers exercising rights of sovereignty or an influence in the Said territories engage themselves to watch over the conservation of the indigenous populations and the amelioration of their moral and material conditions of existence and to strive for the suppression of slavery and especially of the negro slave trade; they shall protect and favor without distinction of nationality or of worship, all the institutions and enterprises religious, scientific or charitable, created and organized for these objects or tending to instruct the natives and to make them understand and appreciate the advantages of civilization.[56]

With knowledge of the history that the Berlin Conference was to divide Africa among the European powers, the wording of art. 6 sounds almost ironical. However, when read as it is, this article is remarkable in the sense that such rights were granted not only to Europeans, but also to the native population of Africa, who were politically powerless in nineteenth century diplomacy, even if it was mostly Christian missionaries who enjoyed the "[f]reedom of conscience and religious toleration"[57] and the protection offered by Belgian Leopold II to the population of Congo-Zaire meant nothing but exploitation.[58]

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55 *Berlin Final Act*, *supra* note 7.

56 *Ibid.*

57 Despagnet proudly points out that "la liberté de conscience et la tolérance religieuse, même pour l'exercice public de toutes les religions, sont expressément garanties aux indigènes comme aux nationaux de chaque puissance et aux étrangers": Frantz Despagnet, *La diplomatie de la Troisième République et le droit des gens* (Paris: Librairie de la société du recueil Sirey, 1904) at 267. However, the convention was revised in 1919 and the relevant provision was reformulated: "Freedom of conscience and the free exercise of all forms of religion are expressly guaranteed to all nationals of the Signatory Powers and to those under the jurisdiction of States, Members of the League of Nations, which may become parties to the present Convention. Similarly, missionaries shall have the right to enter into, and to travel and reside in, African territory with a view to prosecuting their calling": *Convention Revising the General Act of Berlin, February 26, 1885 and the General Act and Declaration of Brussels, July 2, 1890*, 10 September 1919, U.K.T.S. 1919 No. 18. In reality, even the Europeans could not really enjoy the promised religious freedom. The British government later presented grievances to the Belgian King that their merchants and missionaries were uanble to fully pursue their works in spite of clear terms in the *Berlin Final Act*, because there were competitions between Protestants and Catholics of different nations: Arthur Berriedale Keith, *The Belgian Congo and the Berlin Act* (Oxford: Clarendon Press, 1919) at 150-51; *cf.* Hildegard Binder Johnson, "The Location of Christian Missions in Africa" (1967) 57:2 Geographical Review 168.

58 For the terrible reality of the reign under Leopold II, see e.g. Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Boston: Houghton Mifflin, 1998).

Such a provision was certainly based on colonialistic and imperialistic motives, but it was still drafted in a way to please the public opinion,[59] which was more sensitive to humanitarian issues than lawyers.[60] In the same token, the more general idea of *mission civilisatrice* itself may be considered as a result of the influence of public opinion on international politics, where governments needed to justify the colonial policies in order to please, or at least not displease, their respective peoples.[61] The Berlin Conference was advertised as a joint effort for the welfare of Africans,[62] and the creation of the Congo Independent State was believed to be for the good of the Congolese,[63] even if in fact "[t]he humanitarian intentions of the Berlin Conference ... remained largely on paper."[64] Here, the existence of public opinion made it necessary for governments to formulate their transactions in a civilized style.[65] This sounds to be rather trivial, compared to the effects of public opinions in 1815 and 1864, but it is not negligible.[66]

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59 An Italian diplomat complains to his colleague about "[l]'opinion publique qui se laisse si facilement capter par des phrases sonores": see "L'ambasciatore a Berlino, De Launay, all'ambasciatore a Vienna, Di Robilant" in Ministero Degli Affari Esteri, *I documenti diplomatici italiani*, 2d Series, vol. 17-18 (Instituto Poligrafico e Zeccda Dello Stato, 1994) 657 at 658.

60 It is regrettable that the *Institut de droit international*, established in 1873, did not pay attention to questions of human rights before its Stockholm session in 1929: Charles De Visscher, "La contribution de l'Institut de droit international au développement du droit international" in Institut de droit international, *Livre du Centenaire 1873-1973: Evolution et perspectives du droit international* (S. Karger, 1973) at 128. For the Congo Conference the *Institut* adopted a resolution for the free navigation of the Congo river, but no mention was made of rights of natives.

61 It is interesting to see, for example, that the term civilization appears alomost evey year throughout the nineteenth century in the U.S. President's state of the union speeches to ascertain, first, the efforts the federal government has taken for the "civilization of Indians" (of course, in the sense of "civilizing Indians") and, later in the century, the international efforts for civilization of uncivilized peoples. The U.S. Presidents mentioned it because such a language clearly pleased the U.S. public at the time. The Berlin Conference can be seen as an extension of American missionaries to Africa, as Joseph Hornung claimed that "un principe nouveau a été posé au congrès de Berlin, celui de l'intervention des États les plus civilisés en faveur des nationalités opprimées et du droit violé": M. Joseph Hornung, "Civilisés et barbares" (1885) 17 Revue de droit international et de législation comparée 5 at 14. In the same vein, the mandate system of the League of Nations was established for "a sacred trust of civilisation" (Parliament, "The Covenant of the League of Nations and Protocol for the Pacific Settlement of International Disputes" in *Sessional Papers*, No. 116 (1925), art. 22) and the trusteeship of the United Nations for "a sacred trust" (*Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 73).

62 Suzanne Miers, "Humanitarianism at Berlin: Myth or Reality?" in Förster, Mommsen & Robinson, *supra* note 10, 333.

63 After the Berlin Conference, the *Institut de droit international* expressed its gratitude to King Leopold for having assumed the humanitarian task of administering the Congo: "Vote d'une adresse à S.M. Léopold II, Roi des Belges, Souverain de l'État indépendant du Congo" (1886) 8 Annuaire de l'Institut de Droit International 17. For the self-deception of international lawyers before the terror of the Congolese, see Koskenniemi, *supra* note 11 at 155-66.

64 L.H. Gann, "The Berlin Conference and the Humanitarian Conscience" in Förster, Mommsen & Robinson, *supra* note 10, 321 at 329.

65 In French parliamentary discussions on the Congo Conference, against MP Mr. Maigne who rightly "voulut y voir l'expression de la doctrine qui donne un droit aux races supérieures sur les races inférieures," MP Mr. Steeg defended the *Berlin Final Act* for its "caractère d'œuvre pacifique et civilisatrice": see Despagnet, *supra* note 57 at 285.

66 Jesse S. Reeves, "The Origin of the Congo Free State, Considered from the Standpoint of International Law" (1909) 3 A.J.I.L. 99 at 99 ("the coercive power of ultranational [i.e. "transnational" in modern English] public opinion, upon which in the last analysis international law depends, has been plainly evident in the case of the Congo State").

V. CONCLUDING REMARKS

I believe that the international legal order, by its structure and nature, is sometimes more vulnerable to the influence of public opinion than it is often thought to be. That is not because governments and nations of the world are pious and conscientious, but because fragile balances among states can be easily disturbed, under certain conditions, by claims of universalistic value, such as abolition of slavery, humanization of wars, or freedom of conscience. International politics cannot simply ignore public opinion, both in the nineteenth and twenty-first century.[67] It does not dominate international politics, but may play a non-negligible role in its dynamics.

For public opinion to play a role in international politics, it is not always necessary to have democratic susceptibility in all countries. If public opinion compels a government with a hegemonic dominating power, it may, in its turn, drive the entire international community, even if there are some governments who have a conflict of interest with it. That was the case when British abolitionism eventually ousted the slave trade from all European colonies. In addition, if the cause particularly affects any country, the general public opinion may change international law even if there is no commitment from powerful governments. That was probably the case of the *First Geneva Convention*. Finally, the influence of public opinion may sometimes be more rhetorical than real, as was the case with art. 6(3) of the *Berlin Final Act* of 1884.[68]

In the political setting after the end of the Cold War, that is, in our world of relative hegemony of the U.S., we have seen some cases where public opinion affects international legislation. The most remarkable cases are the creation, in 1997, of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*[69] and the adoption, in 1998, of the *Rome Statute of the International Criminal Court*.[70] Both cases seem to be comparable to the case of the *First Geneva Convention*. Among the signatories of the *Ottawa Convention*, there were no powerful countries with particularly strong interests in anti-personnel mines. Yet, because the cause was sufficiently good and there was no strong opposition from sovereign states, the Convention was adopted. The same thing may be said about the case of the *Rome Statute*, with some qualifications. There are innumerable cases where international agreements use rhetorical, or even hypocritical, expressions, as was the case in 1885.

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67 Joseph Barthélemy, *Démocratie et politique étrangère* (Paris: F. Alcan, 1917) at 129 ("L'opinion publique des grands pays doit être mise en jeu pour consolider les résultat importants de la diplomatie, pour leur donner des racines populares").

68 See *supra* note 56 and accompanying text.

69 18 September 1997, 2056 U.N.T.S. 211 (entered into force 1 March 1999) [*Ottawa Convention*]. For the roles played by public opinions in the international law-making to ban anti-personnel landmines, see Kenneth Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society"(2000) 11 E.J.I.L. 91.

70 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002) [*Rome Statute*]. For the roles played by public opinions in international law-making to create a criminal tribunal of universal jurisdiction, see William R. Pace & Mark Thieroff, "Participation of Non-Governmental Organizations" in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 391.

Moreover, it is perhaps noteworthy that the introduction of elective democracy is not a condition *sine qua non* for public opinion to be influential on international law-making. The fact that in most Western nations voting rights were limited to wealthy male citizens throughout the nineteenth century did not prevent the public and popular conscience from exercising influence on political decisions of governments. In our time of the early twenty-first century, perhaps no less than half of the nearly two hundred nations on Earth are non-democratic or insufficiently democratic. Public opinions could be influential even in nineteenth century Europe where the degree of democratization was even lower. We can thus perhaps reasonably expect, in the current political conditions, public opinion of the world to affect the course of international political decisions.

It is equally noteworthy that there is no current case where the public opinion of today's most powerful nation affects international legislation. The public opinion of Great Britain, which was the hegemon of the nineteenth century, largely contributed to the abolition of the slave trade. The British Empire was not particularly virtuous, as we can easily understand from the wars of 1839 and 1856 waged against China in order to secure the opium trade, but as far as the slave trade is concerned, the Empire did good for humanity. We may wonder what contribution U.S. public opinion has made to international legislation. It has the power to change U.S. diplomacy as it did in the time of the Vietnam War. This gives an insight to the negative effects that the traditional propensity for isolation and disengagement of the U.S. public opinion may have had for global law-making.[71] If we could have just slightly more commitment from U.S. citizens to international values, would the American government be driven to create some international rules in the global interests as was the result of British public opinion in favour of the abolition of the slave trade in the nineteenth century?

[71] Matthew A. Baum, "Going Private: Public Opinion, Presidential Rhetoric, and the *Domestic* Politics of Audience Costs in U.S. Foreign Policy Crises" (2004) 48 J. Confl. Resolution 603 **(**Baum points out that U.S. presidents are trying more and more to hide foreign policy from the public, because of the potential price of a bad outcome, which may be raised disproportionately by the public scrutiny and because of possible backfires from the engaged public).