Introduction

On November 10, 1792, three years after the outbreak of the French Revolution, the people of the city of Berg in the western Holy Roman Empire made an astonishing request. "Legislators," they implored the National Convention in Paris, "declare to the universe that all peoples who suffer under the yoke of despotism, and who desire the protection of the French and union with their republic, will be protected and recognized as French."[1]

This entreaty is notable, first, because prior to the French Revolution, the free choice of a people hardly mattered for such matters; instead, dynasticism was the fundamental characteristic of international relations. Territory was either transmitted through marriage or succession, or conquered as a result of victory in war between sovereign princes. Then, in 1789, French revolutionaries proclaimed the sovereignty of the people, most notably in article 3 of the "Declaration of the Rights of Man and Citizen." In this historic document, they asserted that now "all sovereignty resides essentially in the nation," as opposed to in the person of the king.

At first, people at the time only understood this groundbreaking proposition as applying to French domestic politics. It underpinned France's first written constitution, promulgated in 1791. Deputies in

[1] *Archives nationales de France* (AN): AD/XV/42. "Adresse du Grand-Bailliage de Berg-Zabern à la Convention Nationale," written November 10, 1792, read in Paris November 19, 1792. The Convention was France's national unicameral assembly from September 20, 1792 until October 26, 1795.

the newly formed French National Assembly had worked tirelessly for more than two years on this charter – their explicit, self-appointed, and most important endeavor. Deputies also often assumed responsibilities related to the everyday administration of the country, and some of those tasks related to France's external affairs. But, in general, revolutionaries gave little thought to matters of international politics and law, in deference to their constitution-writing mission. They certainly did not aim, proactively, to support or apply the principle of popular sovereignty abroad. This is the second reason why the request from the German-speaking people of Berg, in the Rhineland, is extraordinary. In spite of revolutionaries' initial intentions, after the French abandoned monarchical government for a political system based on the will of the people, this novel idea inadvertently bled into international affairs, where it inspired a series of unprecedented and interconnected claims to territory. That is the subject of this book.

The first places where the principle of popular sovereignty upset the international status quo were on the periphery of France itself. The island of Corsica and borderland province Alsace had complex and anachronistic legal relationships with the rest of France due to the provisions of the treaties by which French kings had originally acquired them. In the summer and fall of 1789, revolutionary officials and everyday people invoked the will of locals in both provinces to be fully part of France and thereby resolve vexing ambiguities deriving from their arcane status. In so doing, advocates contended that the will of the people trumped and indeed nullified the older dynastic entitlements and existing treaty law. As one French official asserted, "The law of nations is not founded on the treaties of princes."[2]

These developments took place quite literally on the outer edges of France and were often driven by locals with distinct regional concerns. They therefore left French diplomats and leaders in Paris in a bind. Most officials were wary about applying the principle of popular sovereignty to international questions for fear of dramatically upsetting the international status quo. But they were also deeply committed to respecting the will of the people.

[2] *Archives parlementaires de 1787 à 1860 : recueil complet des débats législatifs et politiques des Chambres françaises*, vol. XX (Du 23 octobre au 26 novembre 1790) (Paris, 1885), 83.

Also in the first years of the Revolution, a dispute emerged that threatened to be even more contentious, because it was located within French borders even though on a tract of land not formally a part of France. Avignon had been a papal enclave on the Rhône in southern France since medieval times. In the spring of 1790, the city's inhabitants attempted to enact municipal reforms in emulation of what was happening around them. When His Holiness rejected their demands, the people of Avignon declared themselves "free, sovereign, and independent" in a series of plebiscites and requested annexation by France.[3] After considerable hesitation, the National Assembly in Paris accepted and, in September 1791, decreed union with Avignon – the first time in history a transfer of territory occurred on the legal basis of the will of that territory's people.

In Avignon, too, the impetus for this momentous change came mostly from locals and not deputies in Paris, and was achieved only after considerable legal debate and some bloodshed. And like in Corsica and Alsace, the events in Avignon showed the potential for the principle of popular sovereignty to undermine the edifice of ancien régime treaty law and, indeed, call into question all territorial claims since the Dark Ages. But prescient observers, then as now, noted that the most dangerous precedent set by France's annexation of Avignon was not the way it undercut preceding law, but, rather, how it opened up new justifications for conquest.

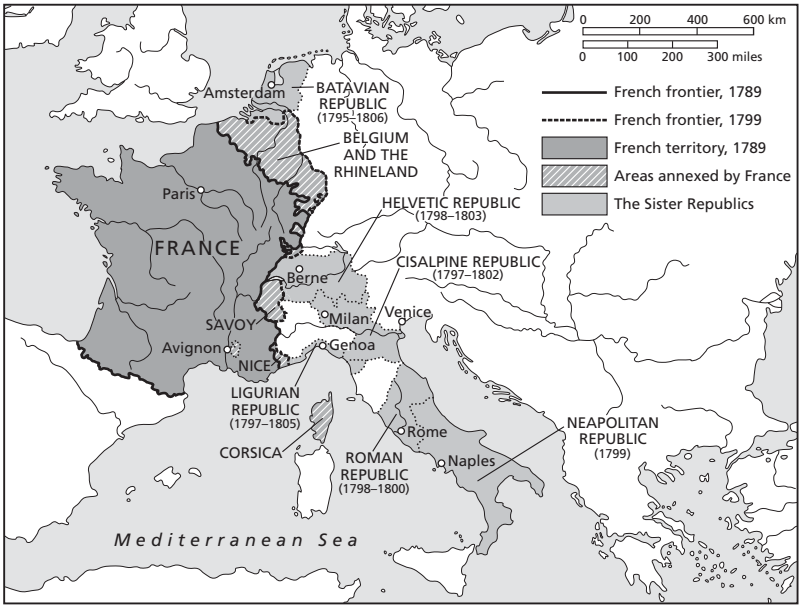
After the outbreak of the Revolutionary Wars in April 1792, and in response to the request for annexation this time by the city of Berg in November, the French were much less ambivalent than before, pledging to "accord fraternity and assistance to all peoples who wish to recover their liberty."[4] But soon, that "fraternity and assistance" and that "liberty" started often to take the form of conquest – foregoing whether the people in question actually wished it or not. It was in Habsburg Belgium, the most important early theater of the Revolutionary Wars,

[3] See *Archives départementales de Vaucluse*: 5/F/181. "Délibération du Conseil général de la commune de la ville d'Avignon du 12 juin 1790," or *Archives municipales d'Avignon*: 4/H/6. Deliberations of the districts, June 9–18, 1790. Deliberations of the district of Saint Symphorien, June 12, 1790.

[4] *Archives parlementaires de 1787 à 1860 : recueil complet des débats législatifs et politiques des Chambres françaises*, vol. LIII (Du 27 octobre au 30 novembre 1792) (Paris, 1898), 474.

that the French first invoked the will of the people and replicated the procedures for consulting them that had developed in Avignon. However, the French were forced to rework their approach when the people's choice was not to their liking. In such cases, revolutionary armies argued that they were emboldened to "abolish all the social institutions" or "tyranny" against the explicit wishes of locals and, indeed, annex their territory, if a people lacked the intelligence or "courage to want to be free."[5] Not only did the French thus begin to decide what was best for other peoples, but also, they claimed they were required to reform those areas they occupied in the war according to the principle of popular sovereignty, because the French could only legitimately interact with other free peoples. This is precisely what happened with the conquest of Belgium in the north, and Savoy and Nice in the south in late 1792 and early 1793.

After early military successes in these areas and in the German Rhineland, French armies suffered a series of setbacks. The specter of



MAP 1.1 French Claims to Territory, 1789–1799

[5] AN: D/§2/4–5 (Armée du Nord en Belgique), dossier 5. "Observations sur le décret du 15 Xbre 1792."

foreign invasion prompted the *levée-en-masse* in August 1793, when all men in France were summonsed for military service. This period, 1793–1794, also saw the French Revolution at its most radical domestically, with the establishment of the Republic, the execution of King Louis XVI, and the reign of Maximilien Robespierre and the Terror. In response to the foreign threat, and in this charged political atmosphere, revolutionaries again modified the way in which they drew on the principle of popular sovereignty to justify claims to territory. They now argued that because France was the bulwark against despotism, in war it could justifiably bolster its military position and protect its strategic interests, even if this were by acquiring lands against the wishes of a local populace. The first such population in question was that living on the German left bank of the Rhine.

This claim of strategic exigency, much like the French position in Belgium that they must impose "freedom" on people who were too stupid or cowardly to know it was best, seems actually to be inconsistent with the principle of popular sovereignty – indeed, the two stances appear explicitly contradictory. And yet, the train of French logic here was counterintuitive. In the face of opposition by locals, the French made territorial claims in the Rhineland by arguing that the necessities of war against dynastic tyrants and in support of free and popular government superseded the particular will of any inconvenienced people. French revolutionaries, therefore, had not necessarily abandoned their respect for the will of the people in the case of western Germany. Rather, they came to view the survival of France in the war – and anything which that required – as essential to the survival of the principle of popular sovereignty itself. As one French official inquired, "have we consulted the will of the people?" Ominously, the official then replied, "The will of peoples, it is their interests" and those interests were bound up with "the fate of the French."[6]

After the stabilization of France's international position and the establishment of a new regime, the Directory, in 1795, the French tried to square the legal circle of staying true to the principle of popular sovereignty while also, in the context of the ongoing war,

[6] AN: AD/XV/49 (Imprimé – Affaires étrangère, Hollande 1789–1806). [Louis] Portiez, "Seconde Partie: Vues sur la Hollande," 6.

continuing to prioritize France's national interests – interests which had advanced and expanded immeasurably with the wild success of the revolutionary armies. One army official expressed the quandary well: "Are the inhabitants of conquered territories mature enough for freedom?" Could they, therefore, be trusted to form independent states? If not, would their lands, like Belgium and the Rhineland, need to be appropriated by France? Or would these people be best off in a middle ground, as allies of, but dependent on France?[7]

Thus, the French innovated once more. In areas it conquered in war, France now established client states, which it called "Sister Republics" – first in the Netherlands, then in Switzerland and across Italy. Rather than face outright annexation, the people of these territories were essentially forced to draft constitutions on the French model, and to agree to alliances that rendered them subservient to France. Because the Sister Republics were technically autonomous and locally self-governing, they represented, and even respected, the will of the local inhabitants – in theory. In reality, the diplomatic, military, and financial relations between them and France made them vassals in everything but name.

Napoleon Bonaparte had an important role in France's military success and the establishment of Sister Republics in Italy. He would go on to even greater power and prominence after the coup of 18 Brumaire, on November 9, 1799.[8] This event ended the Directory and launched Bonaparte to political control of France, and onto a path that ultimately led to the Napoleonic or First French Empire.[9] The justifications that undergirded his later conquests, until his fall in 1814–1815, were still based at their core on the will of the people, even if hypocritically. These justifications had been established in Corsica, Alsace, Avignon, Belgium, the Rhineland, and the Sister Republics between 1789 and 1799. Those ten years – the focus of this book – show the important, if at times

[7] AN: AF/III/185 (Armée d'Italie). "Quelques observations sur les Pays Conquis."

[8] As Thierry Lentz notes, "A large part of the traditional historiography of the Revolution stops the Revolution at the Brumaire *coup*." Thierry Lentz, *Nouvelle histoire du Premier Empire*, 4 vols. (Paris, 2008–2010), III:31. See also Martin Lyons, *Napoleon Bonaparte and the Legacy of the French Revolution* (Houndmills, 1994), 2–3, where he argues that every potential end date for the Revolution "implies a particular interpretation of the Revolution and of Napoleon."

[9] The latter term differentiates the empire of Napoleon I from that of his nephew, Napoleon III, the Second French Empire from 1852 to 1870.

convoluted, impact and effects of the principle of popular sovereignty on international law during the French Revolution.

What Is International Law?

"International" is a murky and controversial concept, both today and in the past. Opinion varies greatly as to what constitutes international law, not least because there is no analogue in the international arena for the recognized creators of domestic law, such as national legislatures.[10] On one side, James Leslie Brierly, one of the classic authorities on the subject, defines international law as "the body of rules and principles of action which are binding upon civilized states in their actions with one another."[11] At the other extreme, some deny the existence of international law altogether.[12]

In eighteenth-century Europe, which provides the backdrop for this book, international law can be said to have existed as it did in any historical period: in the sense that people thought it existed, and acted accordingly. Diplomats employed legal terminology, French revolutionaries legitimated their actions in legal terms, and opposing powers explicitly described their positions as being in defense of the

[10] "The international lawyer," one scholar therefore bemoaned, "finds himself in the not too enviable position of having himself to frame his own concept of law." Maarten Bos, "Will and Order in The Nation-State System: Observations on Positivism and Positive International Law", in R. St.J. Macdonald and Douglas M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (Dordrecht, 1986), 68. He goes on, "In the absence of a legislator in the national sense of the word, indeed and there being no obligatory jurisdiction for an international court, nobody will perform the task for him." The historian of international law finds him- or herself in the same predicament.

[11] J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edn. (Oxford, 1963), 1. Randall Lesaffer defines international law as "all systems of law regulating relations between autonomous political entities throughout human history," in an "Introductory Note" to Raymond Kubben, *Regeneration and Hegemony: Franco-Batavian Relations in the Revolutionary Era, 1795–1803* (Leiden, 2011), xi. Another key German thinker from this tradition was lawyer and historian Otto Friedrich von Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, 2 vols., trans. Ernest Barker (Cambridge, 1934).

[12] Martti Koskenniemi adopts a more sophisticated if also critical position when he argues that international law is "vulnerable to the contrasting criticisms of either being an irrelevant moralist Utopia or a manipulable façade for State interests." Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, 2005), i.

rule of law. Evidence shows that international law has operated in this way, in practice, since at least 3100 BCE, when a treaty was negotiated between Eannatum, the ruler of a Mesopotamian city-state called Lagash, and the people of another city, Umma.[13] The treaties between France and the Sister Republics were merely more recent examples of the same.

Extensive, formal codification of international law did not take place until the twentieth century.[14] For the study of periods before that, a sociological account of international law is especially persuasive. It is a framework whose roots run deep. It revolves around an idea that goes back to the Roman saying *ubi societas ibi ius* – but which actually has even earlier origins, being attributed to Aristotle: "Where there is society, there will be law." Much more recently, in the early twentieth century, the Austrian jurist Eugen Ehrlich, widely regarded as the father of the sociology of law, similarly promotes the notion of law as social fact and deriving from social interaction.[15] His English contemporary, Brierly, also argues for the existence of international law on a sociological basis, positing that "ever since [people] began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations."[16] E. H. Carr, a prominent member of the "English School" of international relations theory, explains the symbiosis of society and law: "No political society, national or international, can exist unless people submit to certain rules of conduct," and furthermore, "law is regarded as binding because, if it were not, political societies could not exist and there could be no law."[17] Even Martti Koskenniemi, one of the leading critical theorists of international law, admits that

[13] Arthur Nussbaum, *A Concise History of the Law of Nations* (New York, 1950), 8.

[14] Generally speaking, codification started in the late nineteenth century with the law of war, but became expressly important since the Second World War especially after the International Law Commission was tasked with this mandate by the United Nations General Assembly.

[15] Kubben, 13. See also Eugen Ehrlich's *Fundamental Principles of the Sociology of Law*, trans. Walter Moll (1913; repr., New York, 1962).

[16] Brierly, 1. He later goes on to state, "Law can only exist in a society, and there can be no society without a system of law to regulate the relations of members with one another," 41.

[17] Edward Hallett Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (London, 1962), 41, 177. He believes, further, that international law differs from municipal law only in so far as being "the law of an

the idea of [the modern states] system is historically as well as conceptually linked with that of an international Rule of Law. In a system whose units are assumed to serve no higher purpose than their own interests and which assumes the perfect equality of those interests, the Rule of Law seems indeed the sole thinkable principle of organization – short of the *bellum omnium*.[18]

Coupled with the sociological, another helpful framework is termed "international legal process," which seeks to examine "the international legal system in operation."[19] It helps elucidate how principles – or, "principles of action," as Brierly puts it – such as popular sovereignty can acquire international legal legitimacy without being formally codified. On this process, Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld write: "The real world cannot wait for the articulation of a fully developed normative system. Actual problems must be resolved, or at least contained ... [T]he elaboration of precept and the response of the system to changing conditions often occur most

undeveloped and not fully integrated community, " 170–171 and asserts that international law is "a function of the political community of nations. Its defects are due, not to any technical shortcomings, but to the embryonic character of the community in which it functions," 178. Some would merely push the question back and to the existence of international society. Martin Wight, another member of the English School, argues that even if international affairs can be characterized as anarchic because of the lack of a formal system of governance, "if anarchy means complete disorder, it is not a true description of international relations," because any society is "a number of individuals joined in a system of relationships for certain common purposes." See Wight's "International Legitimacy," in *Systems of States*, ed. Hedley Bull (Leicester, 1977), 105. This view of the relationship between law and society is not unique to the English School. Robert Redslob, a French theorist, has likewise noted that "once states were constituted they formed a system of norms to govern their mutual relations: this is the law of nations"; Robert Redslob, *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la Grande Guerre* (Paris: Rousseau, 1923), 7. Like Gierke and Carr, Redslob is not concerned about the chicken-and-the-egg question of appearance, but rather emphasizes the existence of the link: "it is a perfectly spontaneous relationship," 7.

[18] Martti Koskenniemi, "The Politics of International Law," *The European Journal of International Law* 1:1 (1990): 1.

[19] Abram Chayes, Thomas Ehrlich, and Andreas F. Lowenfeld, *International Legal Process: Materials for an Introductory Course*, 2 vols. (Boston, 1968–1969), vii. Later, based on his experience as Legal Adviser at the State Department during the Cuban Missile Crisis, Chayes again argues against seeing law exclusively in terms of specific rules or norms. Instead, he aims to show how international law typically operates, first, as "a constraint on action," second, as "the basis of justification or legitimation for action," and last, in "providing organizational structures, procedures, and forums." See Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York, 1974), 7.

visibly and effectively in the process of dealing with concrete disputes."[20] One such set of disputes involved French revolutionaries applying the will of the people during the Revolution to resolve problems in Corsica, Avignon, Belgium, and elsewhere. The principle of popular sovereignty steadily gained acceptance, and accordingly became a compelling justification for actions such as French claims to international territory.[21]

The emphasis on process in this framework not only illustrates the functional relationship between law and society, but also highlights the protean nature and contingency of the law, as scholars analyze the evolving conditions under which certain principles gain legal potency. Study of this process in international law is almost by definition historical. Randall Lesaffer has asserted that through archival research one properly appreciates "how legal arguments were operated and formed" and calls this the study of "international law," again, "in action."[22] Indeed, this type of historical enquiry helps to produce the very theoretical framework that can shed light on how international law developed at a given historical moment. This book involves just such an examination of international law in action, showing how the will of the people became a candidate claim that

[20] Chayes, Ehrlich, and Lowenfeld, xi–xii.

[21] Thomas Franck has tried to measure the extent to which ideological and specifically legal factors come to play a role in international politics; he identifies four indicators of a specific norm's legitimacy – determinacy, symbolic validation, coherence, and adherence. See his *The Power of Legitimacy Among Nations* (Oxford, 1990), 49. Determinacy is based on "1. the transparency of the standard established in the rule text; and 2. the extent to which the rule is accessible to legitimate clarifying procedures," 67; just as "determinacy is the linguistic or literary-structural component of legitimation, so *symbolic validation*, *ritual*, and *pedigree* provide legitimation's cultural and anthropological dimension," 91; coherence is the ability of the legal cue to communicate the reality of a given situation, 135; adherence is fairly self-explanatory. Franck's work on international law's legitimacy is one of the many offspring of Louis Henkin's classic *How Nations Behave: Law and Foreign Policy*, 2nd edn. (New York, 1979), in which Henkin sought to explain why "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time," 47, even though the prescriptive elements of a judicial system do not "police" international law as they do in a Hobbesian state.

[22] Kubben, xii. Kubben also states that "studying matters of law from diplomatic practice has still been neglected," but likewise believes history is best suited to determine "how legal order is organized and conceived by practitioners [and] the concepts and rules of conduct that are recognised by relevant actors as legally binding or as sources providing legal claims and arguments," 7.