China's Boycotts and the Emergence of International Sanctions Law

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In the summer of 1905, groups of "merchants, students, women, children, doctors, boatmen, and even beggars in more than twenty cities and small towns throughout China" began a boycott of American goods.[1] The occasion was the renegotiation of the lapsed 1894 Gresham-Yang Treaty, which permitted the U.S. to restrict Chinese immigration.[2] This boycott was "one of the earliest and largest popular movements in Chinese history," and it took direct aim at those international commitments.[3] While this act of protest did little to end Chinese exclusion in America, it did establish tactics, along with political and economic networks, that would be deployed frequently over the next three decades: between 1905 and 1932, Chinese publics launched at least eleven boycotts against foreign targets, irritating diplomats and eventually catching the attention of international lawyers.[4] Among these, some shared the sentiment of the U.S. Ambassador to China, who wrote in 1905 that the boycott represented an illegal and "unwarranted attempt of the ignorant people to assume the functions of government and to meddle with international relations."[5]

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1 GUANHUA WANG, IN SEARCH OF JUSTICE: THE 1905–1906 CHINESE ANTI-AMERICAN BOYCOTT 1–2 (1995).

2 *See* Convention, China-U.S., Mar. 17, 1894, 28 Stat. 1210, Treaty Ser. 51, 6 Bevins 691 (entered into force Dec. 7, 1894, and terminated Dec. 7, 1904) [hereinafter Gresham-Yang Treaty], art. I ("[F]or a period of ten years … the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited."). *See also infra* text accompanying notes __–__.

3 WANG, *supra* note __, at 2. *See also infra*, Part I.A.

4 C. F. REMER, A STUDY OF CHINESE BOYCOTTS WITH SPECIAL REFERENCE TO THEIR ECONOMIC EFFECTIVENESS 22 (1933). The 1905 boycott was also critical to forming the political and transpacific connections that supported the 1911 revolution. *See, e.g.*, WANG, *supra* note __, at 193–98.; Ts'ai, *supra* note __, at 110.

5 Letter from Minister W.W. Rockhill to Prince Ch'ing, Aug. 27, 1905, *reprinted in* PAPERS RELATED TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1905

This paper argues that the Western reaction to these "unwarranted" attempts to meddle with international relations shaped the international legal principles governing economic sanctions in ways that remain important today.[6] The contemporary view of economic sanctions is that they are relatively ungoverned by domestic or international law.[7] While sanctions may in some cases exceed states' jurisdictional limits, violate due process or other human rights, or breach specific obligations in trade and investment treaties,[8] the

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[hereinafter U.S. FOREIGN RELATIONS 1905], no. 77, inclosure 2 (Electronic ed. 2018). For an application of this sentiment by an international lawyer to subsequent Chinese boycotts, see C. L. Bouvé, *The National Boycott as an International Delinquency*, 28 AM. J. INT'L L. 19, 37–40 (1934).

[6] The terminology around "sanctions," "boycotts," and "economic warfare" is confusing and often muddled in practice. For the purposes of this paper, "economic warfare" is used capaciously to refer to a wide range of coercive economic techniques—such as blockades, seizures, asset freezes, export controls, or nationalizations—deployed for political ends, whether or not in connection with an armed conflict. *See* Vaughan Lowe & Antonios Tzanakopoulos, *Economic Warfare*, ¶ 1, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (last updated Mar. 2013). "Economic sanctions" are used in the modern sense to refer to coercive economic measures like trade restrictions or asset freezes deployed for political ends, usually by a state government or international organization against either a state or non-state target. *See, e.g.*, ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 850 (2d ed. 2008). "Boycotts," as used here, are a particular kind of state or non-state contentious action involving the refusal to deal economically with, or handle goods from, a country, a country's nationals, or a company. *See* Stephen C. Neff, *Boycott and the Law of Nations: Economic Warfare & Modern International Law in Historical Perspective*, 56 BRIT. Y.B. INT'L L. 115, 116 (1989). If these terms still appear to overlap and blur boundaries, that is because they do.

[7] *See, e.g.*, LOWENFELD, *supra* note __, at 925; Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1167 & n.12 (1987); Devika Hovell, *Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions*, 113 AJIL UNBOUND 141 (2019). *But see, e.g.*, Stephen C. Neff, *Economic Warfare in Contemporary International Law: Three Schools of Thought, Evaluated According to a Historical Method*, 26 STAN. J. INT'L L. 67 (1989) (cautiously speculating that "international law is moving in the direction of a general prohibition against economic warfare").

[8] For an excellent map of the various legal considerations that may apply to sanctions, see Tom Ruys, *Sanctions, Retorsions, and Countermeasures*, *in* RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW (Larissa van den Herik ed. 2017). It is also often argued that sanctions, even if illegal, can be justified as countermeasures, or what would have been called "reprisals" in the period studied in detail here, in response to an unlawful act by the sanctioned state. The countermeasure analysis, though, depends on the sanction being otherwise illegal. *See, e.g.*, Neff, *supra* note __, at 82–83. This paper, instead, is more concerned with the development of the modern legal regime in which sanctions can be a manifestation of sovereignty and not necessarily a violation of any treaty or customary norm. The question of countermeasures and reprisals will thus be largely left aside.

background law today is understood to be the same as what Hersch Lauterpacht argued in 1933: in the absence of a treaty commitment, states are free to decide with whom they wish their nationals to trade.[9] The international legal order's relatively "laissez-faire" attitude toward sanctions became especially salient in the response to Russia's unlawful invasion of Ukraine in 2022, as observers worried that countries were piling on sanctions too quickly and with little regard for those inadvertently affected.[10] The China cases, however, reveal that international law was historically far from silent in the face of legal sanctions. Indeed, international legal thought was in fact instrumental in creating the conditions for interstate economic sanctions, as that regime is currently constructed.

The widespread usage of the term "boycott," as it was understood then, is critical to understanding the importance of this episode to the development of sanctions law.[11] At the time, international lawyers used this term—a relative neologism—to describe both the Chinese protests and the power of the League of Nations to engage in cooperative international sanctions.[12] Indeed, writers through the 1980s often used the term "boycott" to describe a

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[9] Hersch Lauterpacht, *Boycott in International Relations*, 14 BRIT. Y.B. INT'L L. 125 (1933).

[10] Esfandyar Batmanghelidj, *Is the West Laissez-Faire About Economic Warfare?*, WAR ON THE ROCKS, Mar. 11, 2022, https://warontherocks.com/2022/03/is-the-west-laissez-faire-about-economic-warfare/.

[11] The term "boycott" originated in Ireland in 1880, in which Irish peasants used the technique to resist evictions, the payment of "starvation wages," and other burdens imposed by British landlords. *E.g.*, HARRY W. LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE 23–27 (1916). The name derives from a real person, Captain Boycott, who was a landlord's agent. *Id.* at 23. After Boycott served eviction papers on several tenants, the tenants organized and agreed to economically isolate Boycott and his family by refusing to do business with him and by "inducing" his servants to quit his employment. *Id.* at 24–25. Of course, the technique of boycotting is far older than the term—a fact that everyone at the time understood. *See, e.g.*, *id.* at 27–30. Nevertheless, there is a certain synchrony in the rise of the boycott as a labor tactic—and legal issue—in the late 19th century and the emergence of this term. *See id.* at 56–57. And when it comes to international affairs, the boycotts of the early twentieth century, in particular the Chinese boycotts, were at the time thought to pose special and new problems worthy of sustained consideration. *See, e.g.*, Lauterpacht, *supra* note __, at 125–128.

[12] *See generally* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 166–174 (2018); BOYCOTTS AND PEACE (Evans Clark ed. 1932). *See also infra* notes __–__ and accompanying text.

range of contentious economic measures, though the term was never consistently defined.[13] Today, though, the terms appear to inhabit separate spheres: "boycotts" are most likely to be thought of as the voluntary cessation of business by individuals and groups, while "sanctions" refer to state-backed, coercive measures.[14] Adopting this framing, most postwar legal thought treats international sanctions and consumer boycotts as being only superficially similar, readily acknowledging that any attempt to draw analogies between them is bound to be strained.[15]

This paper argues that the connection between modern international sanctions and the boycott is much richer than this contemporary separation acknowledges. As international lawyers were reacting to the Chinese boycotts of 1905 to 1931, Western countries were enduring their own tumultuous histories with the labor boycott, and their legal systems were adopting a range of responses that vacillated from outright hostility to cautious tolerance.[16] At the heart

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[13] "Boycotts," depending on a writer's usage, could include trade embargoes, hybrid public-private efforts, or sanctions under the U.S. International Emergency Economic Powers Act (IEEPA). *See, e.g.*, Christopher C. Joyner, *The Transnational Boycott as Economic Coercion in International Law*, 17 VAND. J. TRANSNAT'L L. 205 (1985); Neff, *supra* note __; Yehuda Z. Blum, *Economic Boycotts in International Law*, 12 TEX. INT'L L.J. 5 (1977); J. Dapray Muir, *The Boycott in International Law*, 9 J. INT'L L. & ECON. 187 (1974). For varying definitions, compare Neff, *supra* note __, at 115 (defining "boycott" as "the blanket refusal to have or permit economic dealings of any kind with the target country or countries"), *with* Joyner, *supra*, at 207 ("The transnational boycott can be described as a coercive quasi-conspiratorial combination effort by one state to prevent another state from transacting commercial business.").

[14] The description of these two measures by the contemporary BDS ("Boycott, Divestment, and Sanctions") movement is reflects what is probably the prevailing understanding of these terms in English. *See* BDS Movement, What Is BDS?, https://bdsmovement.net/what-is-bds.

[15] *See, e.g.*, Blum, *supra* note __, at 7 (noting that, if the "definition of domestic boycotts is borrowed from domestic law, some strange results may follow," and proposing modifications).

[16] In U.S. law, where this history is especially tumultuous, see Megan Stater Shaw, *"Connote No Evil": Judicial Treatment of the Secondary Boycott Before Taft-Hartley*, 96 N.Y.U. L. REV. 334 (2021); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919 (1988); William B. Gould, *Taft-Hartley Comes to Great Britain: Some Observations on the Industrial Relations Act of 1971*, 81 YALE L.J. 1421 (1972); J. James Miller, *Legal and Economic History of the Secondary Boycott*, 12 LAB. L.J. 751 (1961); Robert C. Barnard & Robert W. Graham, *Labor and the Secondary Boycott*, 15 WASH. L. REV. 137 (1940). For comparative work and for developments outside the U.S., see, among others, William E. Forbath, *Courts, Constitutions, and Labor Politics*

of this contest was the fear that the labor boycott was "an engine of harm and oppression," which would "place the weak at the mercy of the strong, foster monopoly, permit an unwarranted interference with the natural course of trade, and deprive the citizen" of constitutionally guaranteed economic liberties.[17] The boycott, in short, was an instrument of coercion: it set rules for proper consumption by private citizens, and boycotters backed those rules up with social pressure, intimidation, and violence.[18] Some went so far as to characterize the boycott as a species of extra-state lawmaking that challenged the state's monopoly on the legitimate use of force.[19]

Boycotts in international relations, this paper argues, presented a similar conceptual and political challenge. Like the labor boycott, the Chinese boycotts posed a threat of what this paper calls *para-state, transnational lawmaking*. "Lawmaking" here is meant in the strong sense that the boycotts created a "coercive order which stipulates sanctions" for failure to comply with a norm.[20] The Chinese boycott societies, as

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in England and America, 16 L. & SOC. INQ. 1 (1991); Janice R. Bellace, *Regulating Secondary Action: The British and American Approaches*, 4 COMP. LAB. L. 115 (1981). For a synoptic overview of U.S. and European experiences, see generally Thilo Ramm, *The Legality of Industrial Actions and the Methods of Settlement Procedure*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 255, 271–90 (B. Aaron & K. W. Wedderburn eds. 1972).

[17] *Am. Fed. Labor v. Buck's Stove & Range Co.*, 33 App. D.C. 83, 107 (1909); *see also Quinn v. Leathem*, [1900–03] All ER Rep. 1, [1901] A.C. 495; *cf.* Bouvé, *supra* note __, at 24 (citing these cases).

[18] *E.g.*, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 466 (1921). Whether the boycott was inherently coercive or only objectionable when it used coercive methods was a matter of some dispute, which at times could seem more important in theory than in practice. *See, e.g.*, *Buck's Stove*, 33 App. D.C. at 123 (Van Orsdel, J., concurring).

[19] See, in the U.S. context, Forbath, *supra* note __, at 1154.

[20] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 61 [1945] (Transaction 2006); *see also* Hans Kelsen, *The Law as a Specific Social Technique*, 9 U. CHI. L. REV. 75, 79–82 (1941). This definition does suggest that a legal order entails a degree of coercive force, but it is not used here to take sides in the debate over whether this is true for all legal orders (properly so-called) in all times at all places. Regardless of these decontextualized debates, there is something discretely interesting about a normative order that arrogates to itself the ability to enforce norms through force or coercion. *Cf.* FREDERICK SCHAUER, THE FORCE OF LAW (2015). And as a historical matter, the existence of such orders within or outside the state was a matter of substantial theoretical concern in the early twentieth century. *See, e.g.*, Harold Laski, *The Pluralistic State*, 28 PHIL. REV. 562 (1919); MAX WEBER, *Politics as a Vocation* [1919], *in* FROM MAX WEBER 77 (H.H. Gerth & C. Wright Mills eds. & trans. 1944). As Tomlins notes, the self-conception of the state as "the sole legitimate embodiment of the public interest," in which "[a]utonomous concentrations of power

will be shown, adopted rules, principles, and administrative actions in order to maintain the boycotts, and they enforced those norms against Chinese workers, households, and consumers through various modes of persuasion and coercion, up to and sometimes including violence. These societies were non-state, or para-state, entities in that they were controlled by guilds and other entities that were formally and, to some degree, materially autonomous from the state itself. If the "compliance pull" of this non-state lawmaking was strong enough, foreign traders could be significantly injured even if the boycott received no official governmental blessing, and even if boycotters pressured only their fellow Chinese nationals, and not the foreigners themselves.[21]

In response to this economic and political threat, international lawyers developed a sophisticated legal response in keeping with the liberal values of the times. First, lawyers and scholars followed domestic labor law in many Western countries by insisting on individuals' right to voluntarily choose with whom they wish to trade. Second, however, they deployed commercial treaties and customary international law to oblige states to actively monopolize the capacity to conduct economic warfare within their borders. This dual move prevented these non-state associations from becoming independently legitimate sites of normative and coercive power.[22] The state thus emerges from this period—in the international legal imagination—as the sole organ capable of legitimately prosecuting the rapidly developing technique of economic warfare.[23] In short, during this period, international legal principles were deployed to deny the power of coercive boycotts to unions, guilds, parties, and other non-state associations, and then to appropriate that same power for the state

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intermediate between the state and the citizenry were unacceptable" was by this point a century old in Europe and in the United States. TOMLINS, *supra* note __, at 21–22. But, by World War I, "the state described in nineteenth liberal theory was fast disappearing," as new theories described the state as constituted out of groups, or as only one of many abstract collective entities, surrounded by others with whom it "shared power." *Id.* at 8 (citing Laski, *supra*).

[21] *See generally* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) (explaining the concept of "compliance pull").

[22] *See infra* Part II.

[23] *See infra* text accompanying notes __–__ for discussion and qualification of this thesis.

itself. This laid the conceptual groundwork for "sending the bureaucracy to war" through the modern law of economic sanctions.[24]

This argument provides descriptive and normative payoffs. First, once we recognize the important role of the boycott, we can redescribe the contemporary law of sanctions in several important ways. At a basic level, reconnecting labor politics and sanctions law adds a new dimension to the already "blurred boundaries" of international economic law, both with respect to other international subdisciplines and domestic law.[25] By focusing on China as a catalyst for international legal change, this paper joins other work that focuses on how states perceived to be on the periphery of international relations have contributed to reshaping the international order.[26] The China example also shows that the inquiry cannot be limited to *state* power. The role of guilds, secret societies, and unions in the boycott suggest that, in today's politics, we should also broaden our investigations of "economic statecraft" and "weaponized interdependence" to explore how non-state or hybrid public-private actors, can exploit modern economic networks to achieve political ends.[27] This example also suggests the speculative and potentially radical possibility that economic warfare, now frequently understood

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[24] David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359 (2007).

[25] *See* Perry S. Bechky, *Sanctions and the Blurred Boundaries of International Economic Law*, 83 MO. L. REV. 1 (2018).

[26] *See, e.g.*, CHRISTY THORNTON, REVOLUTION IN DEVELOPMENT: MEXICO AND THE GOVERNANCE OF THE GLOBAL ECONOMY (2021); AMITAV ACHARYA, CONSTRUCTING GLOBAL ORDER: AGENCY AND CHANGE IN WORLD POLITICS (2018); KRISTEN HOPEWELL, BREAKING THE WTO: HOW EMERGING POWERS DISRUPTED THE NEOLIBERAL PROJECT (2016); ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW (2015); ROBBIE SHILLIAM, THE BLACK PACIFIC: ANTI-COLONIAL STRUGGLES AND OCEANIC CONDITIONS (2015); James Thuo Gathii, *Promise of International Law: A Third World View*, 114 AM. SOC'Y INT'L L. 165 (2020); Trang (Mae) Nguyen, *International Law as Hedging: Perspectives from Secondary Authoritarian States*, 114 AJIL UNBOUND 237 (2020); Adom Getachew, *Universalism after the Post-Colonial Turn: Interpreting the Haitian Revolution*, 44 POL. THEORY 821 (2016).

[27] For examples in contemporary international law from at times very different vantage points, see, for example, BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW (2003); Yuvraj Joshi, *Racial Justice and Peace*, GEO. L.J. (forthcoming 2022); Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189 (2020); Kishanthi Parella, *International Law in the Boardroom*, 108 CORNELL L. REV. (forthcoming 2023); B. S. Chimni, *Prolegomena to a Class Approach to International Law*, 21 EUR. J. INT'L L. 57 (2010).

as a tool of Western power, could again be refashioned and repurposed as a tool of subaltern or transnational resistance.

Second, this suggests that sanctions and other forms of coercive economic action can serve a generative transformative role in international law. The Chinese boycotts show how coercive economic power can be seized by non-state actors, turned into a kind of para-state lawmaking, and then deployed internationally. This kind of lawmaking can be an engine for what political scientist Adom Getachew calls "worldmaking": the reconfiguration of "juridical, political, and economic institutions in the international realm" to achieve new forms of world order.[28] As with other historical and contemporary boycott movements, these acts can express forms of transnational solidarity that cut across state lines.[29] Getachew's concept of worldmaking invites us to see these acts not only as expressions of ideological affinity, but as suggesting alternative institutional arrangements not limited to the interstate system.[30] This insight does not mean that sanctions are morally unproblematic. But it further underlines the contingency of any connection between economic warfare and liberal internationalism, emphasizing again that our assessment of this dangerous weapon may depend entirely on who wields it, and to what ends.

Together, these insights complicate the normative assessment of sanctions as a tool of international affairs.[31] In the past, sanctions have been viewed as a useful or even essential tool for the enforcement

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[28] ADOM GETACHEW, WORLDMAKING AFTER EMPIRE 2 (2018).

[29] *See, e.g.*, JULIE L. HOLCOMB, MORAL COMMERCE: QUAKERS AND THE TRANSATLANTIC BOYCOTT OF THE SLAVE LABOR ECONOMY (2016); Michiel Bot, *The Right to Boycott: BDS, Law, and Politics in a Global Context*, 10 TRANSNAT'L LGL. THEORY 421 (2019).

[30] On potential for security and its tools, such as economic sanctions, to generate thinking about alternative forms, see generally J. Benton Heath, *Making Sense of Security*, 116 AM. J. INT'L L. 289, 324–27, 339 (2022).

[31] Much of the normative assessment is bound up with the question of whether sanctions are "effective," which is usually understood to mean that they achieve their policy goals. *See, e.g.*, GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLY ANN ELLIOTT & BARBARA OEGG, ECONOMIC SANCTIONS RECONSIDERED (3d ed. 2007). This paper does not consider that question directly. But the importance placed both here and in the historical literature on symbolic value and worldmaking, *see infra* Part III, suggests that the near-term achievement of policy goals is only one measure of effectiveness. *Cf.* Rüdiger Graf, *Making Use of the 'Oil Weapon': Western Industrialized Countries and Arab Petropolitics in 1973–1974*, 36 DIPLOMATIC HIST. 185 (2012).

of international law and the protection of human rights.[32] Even where the ability of sanctions to change policy is contested, supporters have argued that these acts can articulate important values, such as a commitment to human rights or to the international legal order.[33] More recently, however, economic sanctions have come in for criticism as a dangerous tool in a state's economic arsenal, often deployed too quickly, without clear goals, and at great cost to human life and social cohesion.[34] This makes sanctions at best a necessary evil, or, to many leftist critics, simply an evil that a progressive foreign policy should abjure.[35] This critical turn has been associated with a turn to history, which reconceives sanctions as an instrument of tremendous violence, conceived in the crucible of the First World War, and closely associated with the dark sides of the liberal international order.[36] Our adherence to either the optimistic or the critical view, in turn, determines which sanctions episode we cite as our paradigm case: the cooperative international effort to end apartheid in South Africa, or the decade of widespread devastation caused by Security Council sanctions on Iraq.[37]

The China example situates those critiques within a wider context, thus offering new possibilities. If sanctions are engines for worldmaking, we must ask what kind of world is being made. For labor unions in the tumultuous decades of the early twentieth century, the assertion of something like lawmaking power was the germ of "a

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[32] *See, e.g.*, Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 5 (2001) (arguing that economic sanctions "are an important weapon in transnational efforts to promote respect for fundamental rights and can have substantial behavior-modifying potential").

[33] *See, e.g.*, Carla Norrlöf, *The New Economic Containment*, FOREIGN AFF., Mar. 18, 2022, https://tinyurl.com/ydjw8mf4.

[34] Daniel Drezner, *The U.S. Is Hooked on Economic Sanctions*, WASH. POST, Aug. 25, 2021, https://tinyurl.com/bdey7b7t.

[35] *See, e.g.*, Aslı U. Bâli & Aziz Rana, *Sanctions Are Inhumane—Now, and Always*, BOSTON REV., Mar. 26, 2020, https://bostonreview.net/articles/aziz-rana-asli-u-bali-sanctions-are-inhumane-now-and-always/; Nicholas Mulder, *A Left Foreign Policy Should Reject Economic Sanctions*, THE NATION, Nov. 20, 2018, https://www.thenation.com/article/archive/sanctions-economy-foreign-policy/.

[36] *See, e.g.*, NICHOLAS MULDER, THE ECONOMIC WEAPON 4–5, 291–97 (2022); Jamie Martin, *Economic Sanctions and the Backlash to Liberal Internationalism*, TOCQUEVILLE21, Mar. 2, 2022, https://tocqueville21.com/books/economic-sanctions-and-the-backlash-to-liberal-internationalism/ (reviewing MULDER, *supra*).

[37] JOY GORDON, INVISIBLE WAR 5–6 (2010).

new social and political order based on the harmonious interaction of workers voluntarily associated in their various trades and callings."[38] The Chinese boycotts of the same period sought to consolidate and mobilize a conception of nationhood, which stretched across territorial boundaries, could be counterposed against the official state government, and could compete on equal terms internationally with world powers.[39] These are not simply moral, but institutional visions, which seek to call into being alternative forms of political power. For sanctions' defenders, this insight suggests a need to move from the merely symbolic aspects of sanctions to their institutional dimensions, and to ask who is to be empowered by an act of economic warfare.[40] And, for critics, these insights suggest a criterion by which we can identify morally worthy, or at least tolerable, instances of economic sanctions. In both cases, the critical question is who, exactly, is being invited "to assume the functions of government and to meddle with international relations."[41]

The following paper proceeds in four further parts. Part I focuses on the series of boycotts imposed by Chinese associations between 1905 and 1932, showing how these actions reflected a form of lawmaking that, while not entirely divorced from the state, nonetheless existed outside of it. Part II argues that the reaction from international lawyers struggled with the para-statal character of the boycotts, and sought to deploy international law to require the Chinese state to assert a monopoly over the capacity to wage economic warfare. Part III then turns to the alternative possibilities for worldmaking and normative argument that this history reveals. A brief conclusion follows in Part IV.

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[38] CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 55–57 (1985). The unions' retreat from this vision is a dominant theme of Tomlins' book. *See id.* at 326–28.

[39] *E.g.*, WANG, *supra* note __, at 154–57, 188–91.

[40] This, in turn, suggests a need to return to the institutional dimensions of the "transnational legal process." *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184–86 (1996).

[41] *See supra* note __.

I. The Chinese Boycotts as Para-State Lawmaking

By the 1930s, China's use of the boycott had become a well-known tactic in international affairs and in the western imagination.[42] "China has won victory after victory since 1919 over almost all the foreign powers concerned with her," wrote columnist George Sokolsky with unabashed exaggeration, "not because her army is the largest in the world, … but through the use of the economic boycott."[43] International lawyers at the time were also familiar with the Chinese approach to economic warfare, and, as will be shown, these tactics figured prominently in their efforts to construct a legal framework for economic sanctions in the 1930s.[44] Nevertheless, the Chinese boycotts are seldom mentioned in today's discussions of international sanctions law, having been displaced by more recent, U.S.-, Europe-, and UN-led examples.[45] Recovering the constitutive role of these boycotts is thus important in itself.

This section describes the practice of the Chinese boycotts as they evolved from 1905 to 1932 as a form of non-state, or perhaps more precisely para-state, transnational lawmaking. This concept, as understood here, combines three critical elements. First, the boycotts were organized and run by organizations that maintained a distance from the state, even as they were increasingly connected with the Chinese nationalist party through the 1920s (the "para-state" dimension). Second, the focus of the boycotts was always transnational: they were triggered by events in international affairs and

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[42] Joyner, *supra* note __, at 211–12 ("[B]y the 1930s China had deservedly acquired an international reputation as the national boycotter *par excellence*.").

[43] George E. Sokolsky, *China Fights Again with the Boycott: A Weapon She Has Used Many Times Is Now Pointed Toward Japan*, N.Y. TIMES MAG., Nov. 8, 1931, at 3. This characterization usefully captures a depiction in the popular press of the Chinese boycott, but one should be careful not to make too much of the article's framing of the action as a "grassroots" or student-organized "popular boycott," as one recent history does. *See* MULDER, *supra* note __, at 182 & n.19 (citing Sokolsky, *supra*). This underplays the role of state and party officials, as well as the merchant class. *See infra* text accompanying notes __–__.

[44] *See infra* Parts II, III.

[45] For relatively recent examples briefly discussing the Chinese boycotts in international law, see Li Chen, *A Forgotten Proponent of a League of Nations and His Contributions to International Law*, LEIDEN J. INT'L L. (forthcoming 2022), at 9–10; Jean-Marc Thouvenin, *History of Implementation of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE 83, 84 (Masahiko Asada ed. 2020).

sought to influence those events in some way (the "transnational" dimension). Third, the boycotts required detailed administration, which involved deliberation on tactics, the adoption of resolutions and decisions, and enforcement through coercive sanctions up to and sometimes including violence (the "lawmaking" dimension). All these characteristics were in place by the 1905 boycott, and subsequently grew more consolidated by 1931.

A. The 1905 Anti-American Boycott

Although boycott tactics had been used for centuries under various names, the 1905 anti-American boycott is canonically and with some exaggeration referred to as "the first transnational boycott" in modern international affairs.[46] For the present purposes, the 1905 boycott is both notable and prototypical for its three features of para-state transnational lawmaking. First, the boycott directly targeted an international agreement (the 1894 Gresham-Yang treaty) and sought to alter the terms of an interstate relationship. Second, from the very beginning the boycotters were recognized to have a problematic and contested relationship to the Chinese state. Third, these groups developed rules and proposed financial and other punitive sanctions to enforce the boycott outside of the formal state apparatus.

Even as of 1905, the commercial treaty relationship between the United States and China was decades-long and complex.[47] After a series of one-way commercial treaties that mostly protected U.S. rights in China, the two nations in 1868 concluded the Burlingame Treaty,

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[46] Christopher C. Joyner, *Boycott*, ¶ 3, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (last updated Mar. 2009). Among other examples of boycotts that could qualify as transnational, the author of this piece includes actions by Greek city-states, the protests of American colonists against British merchants in the runup to the American Revolution, and even the 1880 action by Irish farmers against their English landlords to which the boycott owes its name. *See id.* ¶ 2. On the American boycotts in particular, see WOODY HOLTON, LIBERTY IS SWEET 98–106 (2021). Another, roughly contemporaneous example, would surely be the 1905 boycott by the *swadeshi* movement in colonial India against British textile imports. Joyner, *supra* note __, at 212–13 (citing B. CHANDRA, THE RISE AND GROWTH OF ECONOMIC NATIONALISM IN INDIA (1966)). Nevertheless, the pride of place that the Chinese boycotts occupy in in the international legal imagination makes them worthy of sustained consideration.

[47] *See generally* Anna Wei Marshall, *An Interplay Between Manifest Destiny and American Capitalism*, *in* THE ROUTLEDGE HISTORY OF U.S. FOREIGN RELATIONS 223 (Tyson Reeder ed. 2022).

which for the first time recognized personal and property protections for Chinese subjects in America, including the right to enter the United States "without restriction … for purposes of curiosity, trade, or as permanent residents."[48] These guarantees, however, would prove short-lived. The rise of racist, anti-Chinese sentiment in the 1870s would trigger a wave of legislation, judicial decisions, and treaty renegotiations that would frustrate the aims of the Burlingame Treaty.[49] An 1880 treaty modification granted the United States the unilateral discretion to "regulate, limit, or suspend," but not prohibit, the arrival or residence of Chinese laborers.[50] Then in 1882 Congress adopted the first Chinese Exclusion Act, prohibiting the entry of

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[48] *Chew Heong v. United States*, 112 U.S. 536, 542 (1884). Specifically, the treaty granted "most favored nation" treatment to all classes of Chinese subjects and their property and recognized "the mutual advantage of the free migration and emigration." Treaty of Peace, Amity, and Commerce, U.S.-China, June 18, 1868, arts. 5–6, 6 BEVANS 680 (entered into force Nov. 3, 1869; superseded Nov. 30, 1948) [hereinafter Burlingame Treaty]. The name refers to the American-born representative of China, Anson Burlingame, who had previously been President Lincoln's minister plenipotentiary in Beijing. Burlingame negotiated the treaty for China across from former supervisor, U.S. Secretary of State William H. Seward. *See generally* David L. Anderson, *Anson Burlingame: American Architect of the Cooperative Policy in China, 1861–1871*, 1 DIPLOMATIC HISTORY 239 (1977). For the earlier treaties, see *See* Treaty of Peace, Amity, and Commerce [Treaty of Wanghia], U.S.-China, July 3, 1844, 6 BEVANS 647 (entered into force Dec. 31, 1845; superseded Nov. 30, 1948); Treaty of Peace, Amity, and Commerce [Treaty of Tianjin], U.S.-China, June 18, 1858, 6 BEVANS 659 (entered into force Aug. 16, 1859; superseded Nov. 30, 1948). On the unusual circumstances of the 1848 concessions, see JOHN R. HADDAD, AMERICA'S FIRST ADVENTURE IN CHINA 136–59 (2013).

[49] *See, e.g.*, Wei Marshall, *supra* note __, at 231–32; Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path?: The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589, 599–600 (1995). President Hayes invoked Articles V and VI of the treaty in his message vetoing an 1879 precursor to the Chinese Exclusion Act. 8 Cong. Rec. 2275–76 (Mar. 1, 1879). This veto should not be confused with opposition to the spirit of the legislation, and indeed President Hayes suggested that a renegotiation of the Burlingame Treaty may be in order. *See id.* at 2275.

[50] Treaty, U.S.-China, Nov. 17, 1880, art. I, 6 BEVANS 685 (entered into force July 19, 1881; superseded Nov. 30, 1948) (modifying the Burlingame Treaty and an earlier commercial treaty of 1858) [hereinafter Angell Treaty]. The reference here to "laborers" is important, and this permission did not apply to other classes, including teachers, students, merchants, or what we would now refer to as tourists. *See id.* art. II. It also expressly provided that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." *Id.*

Chinese laborers for a ten-year period.[51] Subsequent acts of Congress renewed, tightened, and expanded the exclusion laws, finally making Chinese exclusion an indefinite policy in 1904.[52]

The Gresham-Yang Treaty of 1894 was concluded against this backdrop.[53] The occasion for the treaty was the Geary Act, which not only extended the earlier Exclusion Acts, but further required the registration of all Chinese subjects residing in the United States, with non-registration being punishable by deportation.[54] The Chinse government had protested the registration-or-deportation requirement, including by boycotting registration and by supporting an ultimately unsuccessful constitutional challenge to the law.[55] This series of protests ultimately led to the 1894 treaty, which codified the U.S. right to require registration and to exclude Chinese laborers.[56] The Gresham-Yang Treaty was to remain in force for a ten-year period, at which time either party could terminate it unilaterally.[57]

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[51] An Act to Execute Certain Treaty Stipulations Relating to Chinese, May 6, 1882, § 1, 22 Stat. 58.

[52] *E.g.*, Wei Marshall, *supra* note __, at 233. Any potential conflict between these Acts and the U.S.-China treaties was resolved by the Supreme Court in the so-called *Chinse Exclusion Case*, which held that the Acts effectively abrogated the conflicting provisions of those treaties as a matter of U.S. domestic law. *See Chae Chan Ping v. United States*, 130 U.S. 581 (1888).

[53] *See* Treaty on Immigration [hereinafter Gresham-Yang Treaty], U.S.-China, Mar. 17, 1894, 6 BEVANS 691 (entered into force Dec. 7, 1894; terminated Dec. 7, 1904).

[54] Pub. L. No. 52-60, May 5, 1892, 27 Stat. 25.

[55] *See Fong Yue Ting v. United States*, 149 U.S. 698 (1893); George E. Paulsen, *The Gresham-Yang Treaty*, 37 PAC. HIST. REV. 281, 281 (1968). On the registration boycott, see WANG, *supra* note __, at 34–35.

[56] Gresham-Yang Treaty, *supra* note __, arts. 1 & 5. The irony that Chinese government protests led not to a rollback of the 1892 law but to its codification in treaty is not lost on observers. *See, e.g.*, Paulsen, *supra* note __, at 281. China did receive some reciprocity in the 1894 treaty, including a commitment that Chinese persons residing in the United States would receive protection for persons and property under international law, and a reciprocal right of China to require registration for American laborers. *See* Gresham-Yang Treaty, *supra* note __, arts. 4–5.

[57] Mutual silence at that point would automatically extend the agreement for another decade. *See* Gresham-Yang Treaty, *supra* note __, art. 6.

Over the next ten years, the terms of the Gresham-Yang Treaty would become a flashpoint in China-U.S. relations.[58] The Chinese government protested that U.S. officials were abusing their discretion under the treaty, and were interpreting the exclusion on "laborers" so broadly as to bar the entry of a broad class of Chinese professionals.[59] And organized public and private violence against Chinese in America, discrimination against Chinese residents in San Francisco, and the extension of the Exclusion Acts to the newly annexed territories Hawaii and the Philippines further inflamed the relationship.[60] The Chinese government formally abrogated the treaty in 1904.[61] The United States and China continued to exchange drafts of a replacement treaty throughout 1904, but failed to reach agreement.[62]

These attempts to revive the Gresham-Yang Treaty through a new agreement would spark the boycott of 1905.[63] Historian Guanhua Wang argues that the failure of the 1894 treaty to establish a stable and predictable framework for Chinese migration and for protection of Chinese in the United States made Chinese merchants nervous.[64] U.S.-based merchants thus petitioned the newly established Chinese Foreign Ministry to either press for a "better treaty," or to abolish the

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[58] *See generally* George E. Paulsen, *The Abrogation of the Gresham-Yang Treaty*, 40 PAC. HIST. REV. 457 (1971).

[59] Letter of Wu Tsing-fang, Minister of the Chinese Legation, to Secretary of State John Hay, Nov. 7, 1898, *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1899 at 191–92 (1901) (Doc. No. 141). *See generally* Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 L. & SOC. INQ. 1 (2000).

[60] WANG, *supra* note __, at 36; Paulsen, *Abrogation*, *supra* note __, at 463–73.

[61] Prince Ch'ing to Amb. E.H. Conger, Jan. 25, 1904, *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1904 at 118 (1905) (Doc. No. 85). The Minister of the Chinese Legation, Sir Chentung Liang-cheng, later explained that "the exclusion laws were in a hopeless state of confusion … . The treaty … was being violated under the cover of enforcing the laws; the laws were being violated under cover of enforcing the regulations; and the regulations were being enforced in complete disregard of either the treaty or the laws." Paulsen, *Abrogation*, *supra* note __, at 475.

[62] *See* Paulsen, *Abrogation*, *supra* note __, at 476. This was the moment when exclusionists in Congress acted to make the Exclusion Acts permanent. LUCY E. SAYLER, LAWS AS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 163 (1995).

[63] *E.g.*, WONG SIN KIONG, CHINA'S ANTI-AMERICAN BOYCOTT MOVEMENT IN 1905: A STUDY IN URBAN PROTEST 21 (2002).

[64] WANG, *supra* note __, at 37.

exclusionary treaty in its entirety.[65] Diplomatic efforts in Washington stalled in part because the U.S. refused to continue negotiating with the Chinese minister, Liang Cheng, who was seen as obstructionist and who, in private communications, appeared to support a boycott.[66] To circumvent Liang, the United States dispatched Ambassador William W. Rockhill to continue negotiations over a new treaty.[67] This triggered a flurry of trans-Pacific activity on the part of Chinese merchants and intellectuals, ultimately culminating in boycott of American goods that surprised both the United States, and, according to some historians, the Chinese government itself.[68]

The boycott emerged from civil and commercial society in China, and not directly from the state.[69] The Shanghai Chamber of Commerce called the boycott on May 10, 1905, setting it to begin later in July.[70] The Chamber had been established just the previous year in

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[65] *Id.*

[66] *Id.* at 82–83.

[67] *See* Minister W.W. Rockhill, Memorandum to the Chinese Guilds, May 21, 1905, *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1905, at 206–207 (1906).

[68] *See, e.g.*, WANG, *supra* note __, at 37; WONG, *supra* note __, at 13.

[69] The exact origins of the boycott remain a point of debate among historians. *See, e.g.*, WANG, *supra* note __, at 4–7 (reviewing literatures that treat the boycott alternatively as an outgrowth of rising nationalism in China, a reflection of economic developments and class antagonisms, or a movement initiated by Chinese expats in the United States); WONG, *supra* note __, at 95–112 (supplementing the "expat" narrative by showing the influence of Chinese elites in Malaysia and Singapore); DELBER L. MCKEE, CHINESE EXCLUSION VERSUS THE OPEN DOOR POLICY, 1900-1906 (1977) (contending that "the movement started in America with the Chinese-American community in desperation over a particular stage in the exclusion policy"); KARL GERTH, CHINA MADE: CONSUMER CULTURE AND THE RISE OF THE CHINESE NATION 127 (2003) (locating this and subsequent boycott movements in the broader Chinese National Products Movement); CHU SHIH-CHIA, MEI-KUO P'O-HAI HUA-KING SHIH-LIAO [HISTORICAL MATERIALS CONCERNING AMERICA'S PERSECUTION OF CHINESE LABORERS] (1958) (quoted and translated in Ts'ai, *supra* note __, at 98) (contending that the boycott emerged from a clash between the Chinese national bourgeois class and foreign imperialistic capital); Daniel J. Meissner, *China's 1905 Anti-American Boycott: A Nationalist Myth?*, 10 J. AM.-E. ASIAN REL. 175 (2001) (arguing that existing histories of the boycott downplay the role of government officials).

[70] WONG, *supra* note __, at 50. As Jane Leung Larson argues, the idea for a boycott did not come from the members of the Chamber themselves, but were encouraged and planted by influential members of the *Baohuanghui*, a political reform society known as the Chinese Empire Reform Association in the United States. The organization, though banned in China, boasted more than 160 branches abroad, and "indisputably was the most powerful non-governmental Chinese political

the place of the Council of Shanghai Commerce.[71] Whereas the Council had been a "semi-governmental body" that advised the government in negotiations of commercial treaties, the new Chamber of Commerce was structured along the lines of the newly adopted Chinese Commercial Code and was a "private organization in which members elected their directors."[72] The Chamber's announcement of May 10 proposed that longshoremen cease unloading American goods, students stop attending American schools, employees of American companies and families resign, merchants stop selling American goods, and consumer stop buying them.[73] These were only "general guidelines," and the "Chamber of Commerce had no follow-up plan, it had prepared no actions of any kind, and it did nothing to clarify the movements objectives."[74]

The tactics and aims of the movement would instead be worked out as the boycott spread among other actors within Chinese

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organization" in 1905. Jane Leung Larson, *Articulating China's First Mass Movement*, 33 TWENTIETH CENTURY CHINA 4 (2007). She points out that the society "chose[ ]" Shanghai as the place to initiate the boycott because of its influence there. *Id.* at 9. *But see* WANG, *supra* note __, at 87 (arguing that "the boycott decision in Shanghai was not the handiwork of any particular group on U.S. shores").

[71] WANG, *supra* note __, at 102. The explanation for how this body came into existence is notable:

> Sheng [Xuanhuai, the Chinese minister for treaty negotiation] was … in Shanghai, negotiating a commercial treaty with Great Britain. During the negotiations, Sheng noticed that the British negotiators had received advice from their Chamber of Commerce in Shanghai. On the contrary, Sheng had no Chinese counterpart to consult. He asked a merchant leader … to oversee the establishment of a commercial organization.

WONG, *supra* note __, at 40–41. This reflects a much earlier example of the public-private cooperation discussed in Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264 (2016).

[72] WONG, *supra* note __, at 22. The members of the Chamber were not individuals but trade associations organized by geography (*huiguan*) or trade (*gongsuo*). WANG, *supra* note __, at 100–02. The private character of the Chamber could be overstated, since the organization maintained a close relationship with the Ministry of Commerce, which, among other things, could block "decisions on important commercial matters" by withholding its consent. *See id.* at 102. Nevertheless, the Chamber represented a shift from the earlier Council in that the Chamber's board was elected by its members, whereas the directors of the earlier body were appointed by the government. WONG, *supra* note __, at 41.

[73] WANG, *supra* note __, at 115.

[74] *Id.*

commercial and civil society.[75] Word of the boycott spread by telegraph and newspaper, and also in pamphlets, public speeches, open letters, plays, novels, and songs.[76] The boycott movement took advantage of the transformation of Chinese civil society that had taken place over the previous decade, as it spread through meetings of merchants' groups, guilds, charitable and religious associations, women's groups, artists, and "antitreaty" political organizations.[77] One estimate found that, in Shanghai alone, "more than twenty ad hoc organizations were established to promote the boycott, and at least 76 professional organizations participated."[78] These organizations "set up their own ad hoc committees to conduct boycott activities," and "[a]ctivists in each organization exchanged information about American brand names, showed each other samples of American goods, and distributed propaganda materials."[79]

These institutions also set rules of conduct for the boycott, which were then enforced against Chinese merchants using social and even coercive sanctions. At public meetings, boycotters solicited pledges to not buy or sell American goods, which were often memorialized in resolutions.[80] Some resolutions included specific sanctions for violators: fines for merchants who continued to by American flour or kerosene, for example.[81] In other situations, sanctions were more diffuse: guild leaders publicized the names of noncompliant merchants, and some even pressured Chinese banks to impose financial sanctions on those who broke the boycott.[82] Direct action against Americans or American property was far less common and was discouraged: boycott advocates communicated that violence against Americans could violate international law and give rise to

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[75] *Id.* at 115.

[76] *Id.* at 135.

[77] *Id.* at 109, 167–69.

[78] GERTH, *supra* note __, at 129 n.12 (citing ZHONGGUO JINDAI GUOHUO YUNDONG [CHINA'S MODERN NATIONAL PRODUCTS MOVEMENT] (Pan Junxiang ed. 1996)).

[79] WONG, *supra* note __, at 52.

[80] WANG, *supra* note __, at 166.

[81] *Id.*

[82] WONG, *supra* note __, at 53–54.

claims by the U.S. government.[83] Instead, the targets of the boycott resolutions were generally Chinese merchants, workers, and consumers.[84]

In the face of this burgeoning movement in civil society, the Chinese government took a Janus-faced stance.[85] Some high-level officials expressed support for the boycott, and official support was even more explicit at the local level in some cities and towns.[86] Other officials opposed the boycott, having little interest in Chinese emigration and fearing that the movement could turn into nationalist revolution or into "an antiforeign war like that of the Boxers."[87] Publicly, the foreign ministry, under increasing pressure from the United States, and eventually out of concern that the movement would get out of hand, called for an end to the boycott.[88] These public signals, however, were not uniform. The earliest edicts from government officials seemed to American officials almost deliberately hazy and uncommitted.[89] Local officials would at times resist U.S. pressure to

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[83] Indeed, the Chinese government was only recently made to pay significant reparations for civilian violence during the Boxer uprisings of a decade earlier. *See, e.g.*, William R. Manning, *China and the Powers Since the Boxer Movement*, 4 AM. J. INT'L L. 848, 856–863 (1910). Of course, boycotters sometimes took direct action against Americans, from raising prices when American customers entered a store to direct acts of violence. Among other direct actions, WANG, *supra* note __, notes that "[d]uring the night of July 18, someone cut down the American flag in front of the U.S. consulate in Xiamen and then defecated on it," precipitating a demand for apology from the American consul. *Id.* at 118. (Another source says these were animal droppings, Ts'ai, *supra* note __, at 107, and I've so far resisted the overwhelming urge to get to the bottom of this.) Most movement participants, notes Wang, *supra* note __, at 118, later disapproved of the act.

[84] Matters took a darker turn following the suicide of boycott activist Feng Xiawei outside the U.S. consulate in July 1905. As news of Feng's death reached his native Guangdong province, activists began to organize large public funeral processions, a practice that later spread as far as Singapore and Kuala Lumpur. Organizers, however, attempted to keep the demonstrations from becoming violent. *See generally* Sin-Kiong Wong, *Die for the Boycott and the Nation: Martyrdom and the 1905 Anti-American Movement in China*, 35 MODERN ASIAN STUDS. 565 (2001).

[85] WONG, *supra* note __, at 145–50; Ts'ai, *supra* note __, at 102.

[86] *See, e.g.*, WANG, *supra* note __, at 127–28; Leung Larson, *supra* note __, at 22–23.

[87] Ts'ai, *supra* note __, at 102–104.

[88] Imperial Edict, Aug. 31, 1905, *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1905, at 225 (1906).

[89] *See, e.g.*, Letter of Minister W.W. Rockhill to Prince Ch'ing, Aug. 7, 1905, *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1905, at 213–214 (1906).

end the boycott by claiming ignorance as to the movement or its organizers.[90] And, in diplomatic exchanges, the government continued to remind the Americans of the apparent justness of the boycotters' cause.[91]

The treaty relationship with the United States remained a primary target, even as participants articulated different aims at different times. This is not to say that the broad-based social movement was focused on the details of treaty provisions—often the reality was quite the opposite.[92] But the movement frequently articulated its demands in terms of the treaty relationship, from narrow process demands that any treaty text be shared with the Shanghai merchants' organizations before it was finalized, to broader demands that the exclusion treaties with the United States be simply abolished.[93] Even here, boycott activists disagreed about the purpose of abolition—whether it was to improve the situation of Chinese laborers in the United States or to spur them to return to China.[94] Despite these shifting and disputed aims, the boycott movement garnered the alternative name "treaty struggle" (*zhengyue*), drawing on an almost Hobbesian rhetoric of international conflict and national survival.[95]

If this was economic warfare, international law certainly did not fall silent. U.S. officials frequently reminded the Chinese government of its view that the boycott was in violation of treaties between the two countries, and that it would give rise to a claim for reparations.[96] Chinese officials also defended themselves in legal terms, denying that the boycott could be attributed to the state, and affirming

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[90] *See, e.g.*, WANG, *supra* note __, at 179.

[91] *See, e.g.*, Letter of Prince Ch'ing to Minister Rockhill, July 1, 1905, *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1905, at 207–208 (1906) ("[T]his movement has not been inaugurated without some reason, for the restrictions against Chinese entering America are too strong and American exclusion laws are extremely inconvenient to the Chinese.").

[92] *See* WANG, *supra* note __, 123, 186–87.

[93] *Id.* at 123–27.

[94] *Id.* at 126.

[95] *Id.* at 150.

[96] Letter from Minister Rockhill to Prince Ch'ing, Aug. 7, 1905, *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1905, at 213–214 (1906).

both the right of the people to choose with whom they do business and their legitimate grievances.[97] As noted above, movement participants were also keenly aware of the possibility that direct action or violence against Americans could give rise to international claims.[98] And at least one architect of the boycott even referred to international precedents when advocating privately for the tactic in the months before May 1905.[99]

The boycott did not achieve the aim of abolishing all exclusionary treaties, much less the U.S. exclusion laws. Complaining of the peoples' attempts to "meddle with international relations," U.S. Ambassador Rockhill refused to negotiate a new treaty until the boycott ended.[100] An agreement was never reached, and the 1880 treaty permitting some restrictions on Chinese laborer immigration remained in force through almost half of the next century.[101] In October 1905, President Roosevelt gave a public speech promising to roll back some of the more abusive and adventurous interpretations of the exclusion laws, though he never issued any proclamation or executive order to this effect.[102] But the exclusion laws themselves would remain in effect for decades to come until they were eventually replaced by the quota system.[103] Meanwhile, the merchant class and the government would eventually turn against the boycott in China, and the movement would ultimately collapse.[104]

If the boycott could be deemed a success, it would be in terms of organization and institutional development. The boycott, arguably the first mass social movement of its kind in modern China, activated a network of non-state guilds, secret societies, women's groups,

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[97] Letter from Prince Ch'ing to Minister Rockhill, Aug. 26, 1905, *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1905, at 222–223 (1906).

[98] *See supra* text accompanying note __.

[99] Leung Larson, *supra* note __, at 9.

[100] Rockhill, *supra* note __; WANG, *supra* note __, at 174.

[101] Angell Treaty, *supra* note __.

[102] Ts'ai, *supra* note __, at 109 (quoting Roosevelt's speech in Atlanta on October 20, 1905).

[103] *Id.*

[104] *See, e.g.*, WONG, *supra* note __, at 171.

students, and intellectuals that would become increasingly important to China's political development in the runup to the 1911 revolution.[105] The boycott itself would become a favored tactic for these organizations, acting outside the formal boundaries of the state, to attempt to influence the course of international affairs.[106] Over nearly thirty years, Chinese commercial and civil society developed an increasingly coordinated capacity to set the norms of protest, organize coercive power, and then project that power outwardly to the international scene.

B. Further International Boycotts, 1908–1928

The following two decades saw movements within China increasingly drawing on this boycott power. Each of these movements, to varying degrees, would reflect the characteristics of para-state, transnational lawmaking identified earlier: a motivating event in international affairs, a reliance on non-state societies and guilds, and the administration of boycotts by those guilds through forms of rulemaking backed by sanctions. As the years went on the boycotts showed an increasing amount of centralization under the Kuomintang—the Chinese nationalist party—though the exact degree of centralized control was and is a matter of dispute.[107] The boycott actions nevertheless remained at least formally separate from the state itself, and this centralization still relied on other organs in civil society to work out the details and implement the boycotts.

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[105] *See, e.g.*, WANG, *supra* note __, at 193–97; Akira Iriye, *Public Opinion and Foreign Policy: The Case of Late Ch'ing China*, *in* APPROACHES TO MODERN CHINESE HISTORY 216, 225–26 (Albert Feuerwerker ed. 1967); Marie-Claire Bergere, *The Role of the Bourgeoisie*, *in* CHINA IN REVOLUTION: THE FIRST PHASE, 1900–1913, at 229, 252 (Mary Clabaugh Wright 1968).

[106] *See, e.g.*, REMER, *supra* note __, at 22.

[107] For the Western view at the time, see *id.* at 110 & 127, stressing the importance of Kuomintang leadership to later boycotts. But, as Gerth notes, this importance can be overstated:

> The common assertion by foreign observers, especially Japanese, that the boycotts were run by the Nationalists was similar to the concurrent attempts to suggest that the anti-Christian movement was both 'xenophobic' and 'manipulated by Communists.' Such claims, it seems to me, systematically ignore the social bases of these popular movements.

GERTH, *supra* note __, at 177 n.34.

Several boycotts between 1908 and 1928 targeted foreign countries and their products.[108] In 1908, Chinese merchants called a boycott against Japanese goods as a protest against the Qing government's capitulation for Japan's demand for indemnity following the Chinese seizure of a Japanese vessel.[109] In 1915, students and merchants led a boycott to protest the presentation of the so-called "twenty one demands" by Japan—a document which sought various territorial and political concessions, and was widely viewed as an attack on Chinese political autonomy.[110] Another boycott erupted in response to Versailles Peace Conference of 1919 after it became known that the major European powers had agreed to recognize Japanese claims in Shandong province, a betrayal of both Wilsonian ideals and Chinese support for the Allies during the war.[111] In 1923, a brief but usually harsh boycott movement demanded the return of Japanese-occupied territories in Manchuria, which had been ceded by an 1898 treaty and then the cession extended as part of the twenty one demands.[112] Two years later, both Japanese and British goods were targeted as part of the anti-imperialist May 30th Movement arising out of unrest in Shanghai.[113] In 1927, a further boycott against British and Japanese goods erupted after Japanese troops in Qingdao killed several

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[108] *See* REMER, *supra* note __, at 22 (listing nine, then excluding two from the study).

[109] Chinese authorities seized the vessel, the *Tasu Maru*, after an inspection revealed that the ship was carrying arms and ammunition, which intelligence suggested was for rebels within China. The Chinese government, however, by then in a weak position internationally, quickly capitulated to Japanese demands for reparation. WONG, *supra* note __, at 172–22.

[110] Zhitian Luo, *National Humiliation and National Assertion: The Chinese Response to the Twenty One Demands*, 27 MODERN ASIAN STUDS. 297, 301–03 (1993). A reprinting of the demands, along with a "paraphrase" for the benefit of American readers, can be found in Thomas F. Millard, *What the Twenty-One Demands Mean to China*, 15 CURRENT HIST. 828 (1922).

[111] *See* EREZ MANELA, THE WILSONIAN MOMENT 184–196 (2007). This boycott was one part of a larger uprising, often referred to as the May Fourth Movement, which culminated "in a general strike in Shanghai that paralyzed the Chinese economy." Jeffrey N. Wasserstrom, *Chinese Students and Anti-Japanese Protests: Past and Present*, *in* 22(2) WORLD POL'Y J. 59, 59 (2005).

[112] GERTH, *supra* note __, at 160.

[113] *See generally* JEFFREY N. WASSERSTROM, GLOBAL SHANGHAI, 1850–2010: A HISTORY IN FRAGMENTS 62–76 (2009); Hung-Ting Ku, *Urban Mass Movement: The May Thirtieth Movement in Shanghai*, 13 MODERN ASIAN STUDS. 197 (1979); Odoric Y. K. Wu, *The Chinese Communist Party and the Labor Movement*, 23 CHINESE STUDS. IN HIST. 70 (1989).

Chinese citizens,[114] and the movement was renewed against the Japanese in 1928.[115]

These boycotts had varying relationships with the state.[116] As in 1905, activists relied on networks of guilds and craft associations, secret societies, and ad hoc organizations established specifically for the boycotts.[117] These ad hoc organizations could be quickly established, and often reflected "broad social coalitions" across industries as well as gender and class divides.[118] Later boycotts saw the emergence of so-called Groups of Ten—hierarchically organized sets of small groups that were modeled after traditional associations of mutual policing and accountability—to enforce the boycott.[119] The government in Beijing at times opposed, or even outlawed, these actions, though its enforcement abilities were limited in localities and provinces, where officials tempered their desire for public order with often unexpressed sympathy for the boycotters.[120]

Also like the 1905 boycott, these later actions required administration through forms of non-state lawmaking. Representatives from guilds and craft associations would adopt resolutions reflecting commitments to refuse to use or buy Japanese or British goods, use

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[114] Dorothy J. Orchard, *China's Use of the Boycott as a Political Weapon*, 152 ANN. ACAD. POL. & SOC. SCI. 252, 256 (1930).

[115] REMER, *supra* note __, at 138.

[116] The state itself struggled to monopolize authority during this period, as the political situation from the 1911 revolution onward was marked by "unstable and shifting regional power-structures, mainly under military control." ERIC HOBSBAWM, THE AGE OF EMPIRE, 1875–1914, at 282–83 (1987).

[117] *See* REMER, *supra* note __, at 41, 47–48, 56–57, 80–82, 97–109, 130–131, 138.

[118] GERTH, *supra* note __, at 132 (referring to the 1908 anti-Japanese boycott); Luo, *supra* note __, at 300 (quoting a newspaper columnist as saying that "everyday people established a new society" to support the 1915 boycott); Orchard, *supra* note __, at 254–55 (discussing cross-class organization of the 1919 and 1923 boycotts).

[119] JEFFREY N. WASSERSTROM, STUDENT PROTESTS IN TWENTIETH-CENTURY CHINA: THE VIEW FROM SHANGHAI 66–67 (1991) (arguing that the groups of ten "played an important function as watchdog structures that made their own members and outsiders stick to the 'laws' of the boycott").

[120] *See, e.g.*, WONG, *supra* note __, at 175 (noting that the Qing government outlawed the 1908 anti-Japanese boycott, though this ban was only "reluctantly enforced" by provincial authorities); GERTH, *supra* note __, at 136, 142; Luo, *supra* note __, at 303–05 (orders banning the 1915 boycott).

their ships, or maintain relationships with their merchants.[121] "[T]eams of students," writes one historian of the 1915 boycott, "would scour local stores looking for imports to impound, confiscate, or destroy."[122] Distinguishing sufficiently "Chinese" products from foreign ones posed a problem analogous to todays "rules of origin" in trade law, and movement organizations published lists of products that satisfied the boycott's criteria.[123]

These rules were also accompanied by sanctions. Merchant's guilds announced fines for members caught dealing in forbidden foreign goods.[124] Organizations supporting the boycotts sent "detailed directions to other cities on how to conduct a boycott, noting, among other things, how to publicly humiliate merchants caught selling contraband goods."[125] In some cases, Chinese subjects found on Japanese ships had their clothes stamped with the word "traitor," and those who worked for Japanese employers were forced to march at the head of demonstrations and apologize.[126] As boycott activities intensified through the 1920s, the movements were increasingly used "to legitimize coercion and violence against Chinese merchants."[127] Reports of "cheating" sometimes led to violence or riots.[128] To be sure, there was also a regular occurrence of violence and intimidation directed against foreign businesses or merchants.[129] But it is notable that "Japanese and Western observers claimed the boycotts were illegal by regularly and loudly citing the arbitrarily brutal and 'lawless' acts

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[121] *See, e.g.*, GERTH, *supra* note __, at 142; Orchard, *supra* note __, at 254, 257–58.

[122] GERTH, *supra* note __, at 143. In one town on the Yangtze, Gerth writes, merchants went so far as to establish an "ad hoc product inspection office … right at the dock," where Japanese products were burned upon discovery. *Id.* & n.37 (citing newspaper reports).

[123] GERTH, *supra* note __, at 144.

[124] *See, e.g.*, J. Laferrière, *Le Boycott et le Droit International*, XVII REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 288, 299 (1910) (citing René Pinon, *Une forme novelle des luttes internationales: le boycottage*, REVUE DES DEUX-MONDES, May 1, 1909, at 198).

[125] GERTH, *supra* note __, at 148–49 (referring to the 1919 boycott).

[126] *Id.* at 161.

[127] *Id.*

[128] *Id.* at 131 (citing reports of rioting in Hong Kong in 1908 to note that "participation was not voluntary").

[129] *See, e.g.*, Luo, *supra* note __, at 304 (reports of 1915 looting and bombing of Japanese stores).

directed against *Chinese* merchants," rather than the more sporadic targeting of foreigners.[130]

C. The League and the 1931 Boycott

The 1931 anti-Japanese boycott is worth treating separately because of the places it holds in both Chinese and international legal and political history. With respect to the former, the 1931 boycott is arguably "the most intense, the most effective, and the most prolonged" action of its kind.[131] As for the latter, the boycott is distinguished by the close involvement and investigation of the League of Nations, which generated a great deal of interest in the West and among scholars of international law and global affairs.[132] International law being a "discipline of crisis," it should not be surprising that a great deal of legal work arose out of this series of events, which aided the development of the modern law of economic warfare.[133] As Western observers turned themselves to the Chinese boycotts, they grappled with all of the elements of para-state, transnational lawmaking discussed above.[134]

This latest anti-Japanese boycott began in Shanghai in July 1931.[135] The proximate cause was an anti-Chinese demonstration in Japanese-occupied Korea—for which the local government authorities were alleged to have failed to provide adequate protections to Chinese persons and property—leading to dozens of deaths, significant property damage, and Chinese citizens having to seek shelter in the local consulate.[136] The boycott gathered strength later in 1931 after

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[130] GERTH, *supra* note __, at 162 (emphasis in original).

[131] REMER, *supra* note __, at 155.

[132] From the time, see, for example, Tyler Dennett, *Verdict of the Lytton Commission*, 37 CURRENT HIST. 239 (1932); Arthur K. Kuhn, Editorial Comment, *The Lytton Report on the Manchurian Crisis*, 27 AM. J. INT'L L. 96 (1933); The Rt. Hon. the Earl of Lytton, The Problem of Manchuria, Address Given at Chatham House, Oct. 19, 1932, *reprinted in* 11 INT'L AFF. 737 (1932).

[133] *See generally* Hillary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377 (2002).

[134] *See infra* Part II.

[135] REMER, *supra* note __, at 157.

[136] *Id.* The demonstrations in Korea were a response to what is still called the Wanposhan Incident in Manchuria, in which Chinese and Korean farmers clashed, leading to the intervention of local Japanese authorities. *See id.* at 156. On the

Japan launched a full-fledged invasion of Manchuria that September, and it spread all over the country and even to Chinese communities abroad.[137] Japan referred to the earlier boycott of Japanese goods, as well as reported violence against Japanese nationals, as a justification for its use of military force.[138]

The Japanese invasion led to a far more significant involvement from international institutions than previous boycotts. In September 1931, the Chinese government appealed to the League of Nations to take steps to prevent further deterioration of the situation.[139] The League responded by establishing a Commission of Inquiry, frequently referred to as the "Lytton Commission," to investigate the matter.[140] The Lytton Commission would ultimately produce an extensive report on the actions by both China and Japan, including a detailed study of the boycott.[141] The materials produced by the Lytton Commission, while ultimately ineffective in resolving the Sino-Japanese conflict, would prove critical for catalyzing the international legal debate on boycotts and sanctions.

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incident's use as war propaganda, see DONALD A. JORDAN, CHINESE BOYCOTTS VERSUS JAPANESE BOMBS 24–25 (1991).

137 On the "Mukden Incident" leading to the invasion, see generally MARK R. PEATTIE, ISHIWARA KANJI AND JAPAN'S CONFRONTATION WITH THE WEST 87–139 (1975).

138 JORDAN, *supra* note __, at 31 (citing internal legal memos as well as later evidence before the Tokyo war crimes tribunal).

139 [[OJ cite]]. The appeal invoked the procedures of Article 11 of the League Covenant, which provides:

> Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

[[LON Covenant, art. 11]].

140 [[Resolution of December 10]].

141 LEAGUE OF NATIONS, APPEAL BY THE CHINESE GOVERNMENT: REPORT OF THE COMMISSION OF INQUIRY 112–121 (Oct. 1, 1932) [hereinafter LYTTON REPORT]; LEAGUE OF NATIONS, *Study No. 8: Memorandum on the Boycotts and Japanese Interests in China*, *in* APPEAL BY THE CHINESE GOVERNMENT: SUPPLEMENTARY DOCUMENTS TO THE REPORT OF THE COMMISSION OF INQUIRY 208 (Nov. 15, 1932) [hereinafter Lytton Boycott Study].

As with previous actions, the 1931 anti-Japanese boycott involved significant institutional and quasi-legal machinery.[142] Organizations in Shanghai stood up a body called the Anti-Japanese and Chinese Emigration Support Association, which included representatives from the chamber of commerce, the nationalist party, labor unions, student groups, and others.[143] The Association began establishing basic principles of the boycott, set up pickets and other groups to implement the boycott's rules, and established penalties for their violation.[144] Any number of additional groups and committees emerged to suit local needs: for example, an "Enemy Fish Inspection Committee" was created in Shanghai to enforce a ban on Japanese-caught fish.[145] Inspectors were deputized to monitor the movement of Japanese goods and identify items of "doubtful origin."[146] Merchants who violated the rules were fined, and the associations would confiscate their goods and sell them at public auction.[147]

All of these aspects of the boycott are appear in the account of American journalist Edna Lee Booker.[148] Booker's memoir of her time in China contains a series of firsthand accounts from the headquarters

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[142] *See, e.g.*, LYTTON REPORT, *supra* note __, at 116 ("Essential as the political atmosphere of a boycott may be to its ultimate success, nevertheless no such movement could be effective if the boycott associations had not secured a certain uniformity in their rules of procedure.").

[143] REMER, *supra* note __, at 157.

[144] *Id.* at 157–58. For an example of a resolution from the Shanghai Anti-Boycott Association, see LYTTON REPORT, *supra* note __, at 116–117.

[145] GERTH, *supra* note __, at 178.

[146] LYTTON REPORT, *supra* note __, at 117.

[147] *Id.* One sanctions resolution mentioned three alternatives depending on the severity of the offense: branding the forehead of offending merchants with characters signifying "traitor," locking offenders in a wooden cage for a week, and parading offenders through the streets. REMER, *supra* note __, at 157–158. Remer writes that the first two of these were likely meant "chiefly as threats," for there was no evidence of such action being taken. *See id.* at 158. The account of American journalist Edna May Booker, if it is to be believed, shows all three of these sanctions in operation. *See infra* text accompanying notes __–__. Other associations published lists of "treasonous" merchants, guides for distinguishing Chinese from foreign products, and even fictionalized accounts of the consequences that would befall "unpatriotic" merchants and buyers. GERTH, *supra* note __, at 177–179.

[148] EDNA LEE BOOKER, NEWS IS MY JOB: A CORRESPONDENT IN WAR-TORN CHINA 247–250 (1940).

of the Anti-Japanese Association in a Shanghai temple.[149] The crowd assembled in the temple's courtyard reflected the broad base of the movement: students, merchants, bank clerks, and labor union representatives.[150] From this crowd, members were enlisted to engage in pickets, inspect the cargo and baggage of arriving trains, and enter into shops.[151] While these were not governmental organizations, "the regular Chinese police did not interfere with their activities" for fear of being branded "unpatriotic."[152] Booker describes witnessing the punishment of two merchants accused of dealing in Japanese goods: one is locked in wooden cage; the other is threatened with a hot brand featuring the words "foreign slave."[153] When Booker asks if the crowd would really use the brand, she is told that this is "an economic war! We must show a united front against Japan, or we cannot succeed."[154] Later, Booker follows another group as they inspect Chinese-owned shops; she notes that they do not enter Japanese shops at all.[155] In one wool shop, Japanese wool is discovered, and the picketers quickly start to carry the goods into the street and set them on fire.[156] Eventually, however, the wool merchant's wife produces accounting records showing the wool was purchased before the boycott had been called.[157] Just like that, "the affair is settled."[158]

This account, filtered through the gaze of a Western journalist and pitched for an American audience, contains all the elements of

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[149] *Id.* at 247–48.

[150] *Id.* at 248.

[151] *Id.* at 248–49.

[152] *Id.* at 248.

[153] *Id.* at 249.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 249–250.

[157] *Id.* at 250. The fact that this anecdote involves yarn underscores the economic dimensions of the boycott, which, among other things, sought protection of the Chinese textile industry against Japanese competition. *See, e.g.*, JORDAN, *supra* note__.

[158] BOOKER, *supra* note __, at 250. Noting that the boycotter who stopped to read the accounting book was also a woman, Booker remarks "[t]en years earlier this would have been impossible. China's women were now tackling her national problems." *Id.*

parastate, international lawmaking discussed above.[159] The boycotters insist they are in an "economic war" with Japan. This is a war that is being carried out not primarily by the state, but by a non-state association representing a coalition of social classes and professions.[160] The economic warfare is carried out according to norms about what products are forbidden, and what products—such as those purchased prior to the boycott—are permitted. These norms are imperfectly enforced, as reflected in the episode with the Japanese wool, but the norms are ultimately recognized.[161] And, as shown by the brand, punishment for violating these norms can be quite violent. This violence was not directed against the "enemy" Japanese, but rather against Chinese subjects perceived to be traitors. And the violence was carried out, not with the official sanction of the government, but without the interference of local police.

There is some evidence, further, that the local courts adopted a relatively "hands-off" attitude toward boycott activities so long as they were directed toward Chinese merchants. In one case submitted to the League, a group of boycotters forced their way into the shop of a cloth merchant, seized several bundles of merchandise suspected to be Japanese, and transferred them to the Shanghai Chamber of Commerce for inspection.[162] The defendants were charged with robbery, but the court held that these charges could not be sustained because the illegal seizure had been for the boycott and not for the

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[159] This is the arrangement of facts, and the set of implicit concerns, that appears to have gripped the Western legal imagination as it grappled with the Chinese boycotts. The point here is not to suggest that Booker's account reflects in all its particulars the truth of the matter. Rather, I have lingered on this account because, in a similar way, the international legal response to the boycott was filtered through a Western gaze—whether by directly involving Western international lawyers, or involving Japanese and Chinese lawyers speaking to a Western-dominated audience at the League of Nations and in the foreign press. Accordingly, we may look to the details in Booker's account for a sense of how the boycotts would have appeared in the international legal imagination at the time.

[160] This includes, as Booker notes, women playing prominent political roles. *See id.*

[161] One major absence from Booker's account is the role of resolutions and other law-like documents in framing the rules of the boycott, their administration, and sanctions for their violation. This is captured far better in REMER, *supra*, and in the material of the Lytton Commission cited below.

[162] *In re Ko Yun-ting et al.*, Judgment of the District Court of the First Special Administrative District, Shanghai, B1454 (1931), *reprinted in* 1 WELLINGTON KOO, MEMORANDA PRESENTED TO THE LYTTON COMMISSION 429, 430 (1932).

defendants themselves or for a third party.[163] Instead, the defendants were convicted of the seemingly lighter charge of intimidation.[164] Their sentences were further deferred for two years because their status as first-time offenders and "legitimate" businessmen, as well as the fact that their acts were "due to over-expression of patriotism," created grounds for leniency.[165] Cases like these furthered the impression of Western observers that the Chinese authorities were doing little to suppress illegal activity associated with the boycott.[166] This is where impressions stood in the West when the boycott came to the League of Nations in 1931.

II. International Law and the Consolidation of Economic Warfaring Power

The rapid development of the transnational boycott in China posed a distinct, if not entirely unique, problem for international lawyers. The social reality of the boycotts, as shown above, was that an independent site of normative and lawmaking power had emerged in civil society, which had a variable and contested relationship with the Chinese state.[167] But orthodox international law did not, and arguably still does not, deal well with such realities.[168] In the language of public international law, either the boycott was a state action, in which case it could engage state responsibility, or it was private conduct. If the latter, then the state could still be held responsible for its *inaction*—such as its failure to prevent or quell the boycott—if such inaction violated a rule of international law. For example, the state could not, and cannot, simply decline police protection to a discrete class of foreigners or their property without violating international standards.[169] But here again the structure of the boycotts posed special

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163 *Id.* at 430.

164 *Id.*

165 *Id.*

166 *See* Lytton Boycott Study, *supra* note __, at 219–220.

167 The Chinese state itself, of course, was also undergoing instability and contested authority during this period. *See supra* note __.

168 *See generally* Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481 (1992).

169 Astute readers will note that I have phrased this so as to be agnostic regarding the existence of an international *minimum* standard beyond a requirement of national

problems, as their sharpest edges (such as property damage, intimidation, and violence) were not directed against foreigners as such, but against other Chinese subjects.[170] These cases were thus a step removed from a "classic case" of property damage or injury to aliens.[171]

International lawyers of the period dealt with this problem by making it disappear.[172] A non-state boycott was either the spontaneous and peaceful decision of a people, or it was a coercive and conspiratorial action by groups of private citizens that merited a response from the state's criminal and private legal system. The notion of a "coercive" or unlawful boycott was inherently elastic, drawing on contemporary American, British, and Continental caselaw on labor relations. Among participants in these debates, there was a range of views: some argued that a "peaceful boycott" was almost a contradiction in terms, whereas others insisted that the spontaneous, cooperative, but non-coercive economic action of citizens was both a theoretical and practical possibility. But on all sides of this debate, the

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treatment, which was contested at the time. *See* CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 74–75 (1985). The international minimum standard is take up in more detail in Part II.B., *infra.*

170 *See, e.g.*, LYTTON REPORT, *supra* note __, at 119 ("[A] distinction should be made between the illegal acts committed against directly against foreign residents, *in casu* Japanese, and those committed against Chinese with the avowed intention, however, of causing damage to Japanese interests. As far as the former are concerned, they are clearly not only illegal under the laws of China but also incompatible with treaty obligations to protect life and property and to maintain liberty of trade, residence, movement and action. This is not contested by the Chinese, and the boycott associations, as well as the Kuomintang authorities, have tried, although they may not always have been successful, to prevent offences of this kind."); Lytton Boycott Study, *supra* note __, at 226, 228 (quoting Chinese assurances that the seizure by boycotters of property belonging to Japanese merchants would be punished and the goods returned).

171 *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 & n.2 (1987) (surveying standard cases, which generally involve direct injury to foreigners by states or by private persons).

172 When I refer to what "international lawyers" did during this period, I refer to the legal aspects of diplomatic correspondence about the boycotts between the Chinese government and foreign nations, the legal aspects of the submissions of Chinese and Japanese lawyers to the League of Nations in disputes over the 1931 boycott, the legal aspects of the conclusions by the Lytton Commission, and published legal scholarship of the period between 1905 and roughly 1939.

notion of coercion, or something similar, came to paper over the problem generated by the para-state action of the boycotters.

The practical effect of these moves was to also require the state, as a matter of international law, to prevent the emergence of these alternative sites of authority. Coercion, both theoretically and as it emerged in domestic case law on labor relations, was not limited to physical violence, and some understandings could be quite expansive.[173] As a result, the international legal rules governing the treatment of aliens would require states to keep a close eye on, and potentially repress through criminal or private law, the emergence of any alternative sites of transnational lawmaking power. If guilds, unions, or boycott societies were securing compliance with their "laws" through organized enforcement efforts, international law would require that the state legal system mount an appropriate response. At the same time, the emerging liberal legal paradigm, which permitted any state to decide with whom it wished to trade internationally, in principle would allow states to conduct the same kind of economic warfare through their central governments. The result was a surprisingly sophisticated set of legal rules that denied the power of coercive economic warfare to unions, guilds, parties, and other non-state associations, and then enabled, even required the state to appropriate that same power for itself.

While the result appears to be an elegant and intuitive system, arriving at that point took a great deal of work that is worth excavating here. First, international lawyers would have to dispense with the red herring of attribution—the idea that the boycotts were an act of China itself—and focus on the possibility that these were actions emerging in civil society. Second, however, lawyers would have to turn to the international standards for treatment of aliens and apply them to the boycott. This in turn required bringing to bear the then-contemporary, and contested, wisdom on labor boycotts, which I argue is an important but often missing part of the story today. Third, international lawyers would have to dispense with a normatively charged free-trade liberalism in favor of an anthropomorphized

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[173] *See, e.g.*, REMER, *supra* note __, at 6 ("If one were to look for a general category under which to put the contemplated League boycott, the Chinese boycott, and all other cases of boycotting on an international scale … one might find it in such a phrase as non-violent coercion. This seems a better term than peaceful pressure.").

liberalism that viewed each state as free consumers in an international marketplace. These moves together led to what I call an unspoken irony of attribution: a coercive boycott was actually *more likely* to pass international legal scrutiny if pursued by a state government, rather than by a private association. This irony, I argue, sets the groundwork for the modern law of sanctions.

A. The Red Herring of Attribution

Most investigations of the boycott from this period, both in politics and scholarship, began with a preoccupation with attributing the acts to the state itself.[174] This is evident in diplomatic correspondence, including statements from the U.S. ambassador and secretary of state.[175] It can also be found in the insistence by Chinese officials, at various times, that the boycotts "came directly from the tradespeople" and not the government,[176] or are a "spontaneous, legitimate manifestation" of popular sentiment.[177] And attribution is almost always the first issue dealt with by international legal scholars addressing the boycott.[178] In the early 1930s, attribution emerged as a central concern of the Lytton Commission.[179] All of these investigations, however, would eventually abandon any preoccupation with attribution. Lawyers would turn instead to the problem of state

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[174] The term "attribution," as used here, is something of an anachronism, in the sense that this usage did not gain prominence in the international law of state responsibility until later. *See generally* Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & POL. 265 (2004). It is nonetheless today a useful word with the preoccupation that many lawyers had in the period, which was whether and how to hold the Chinese state directly responsible for the acts of the boycotters.

[175] [[Letter from Ambassador Rockhill to Prince Cheng, FRUS 1905, p. 213]].

[176] [[Letter from Prince Cheng, FRUS 1905, p. 223]] ("This idea of a boycott of American goods came directly from the trades people. It did not come from the Chinese Government which certainly therefore cannot assume the responsibility.").

[177] 1 WELLINGTON KOO, *General Memorandum*, *in* MEMORANDA PRESENTED TO THE LYTTON COMMISSION 1, 52 (1932) (hereinafter Koo, *General Memorandum*).

[178] *See, e.g.*, Kenzo Takayanagi, *On the Legality of the Chinese Boycott*, PACIFIC AFF., Oct. 1932, at 855, 855; Lauterpacht, *supra* note __, 217–130.

[179] *See* LYTTON REPORT, *supra* note __, at 120; Lytton Boycott Study, *supra* note __, at 226, 228–232; GOVERNMENT OF JAPAN, THE PRESENT CONDITION IN CHINA 48–49 (1932) [hereinafter JAPAN, PRESENT CONDITION] (arguing that the boycott is the responsibility of the Chinese nationalist party, which is one and the same with the Chinese government).

inaction: what are the state's duties to prevent or suppress a boycott originating among the people? This question would open the door to a much richer set of issues regarding the relationship between the state and civil society.

The initial preoccupation with attributing the boycott directly to China is understandable for at least two reasons. First, as a practical matter, in many instances there were reasons to suspect the Chinese government was quietly supporting the boycott, even as its public actions sought to placate its trading partners. In the 1931 boycott, for example, the Lytton Commission noted that the Chinese government did "not like to show too openly" its support for the boycott, but nonetheless the Commission was convinced of this support.[180] It noted some evidence of direct support, including the apparent leniency of some court decisions such as the one described above, occasional expressions of support in internal government circulars, and the use of Chinese law to provide protection for certain anti-Japanese trademarks.[181] These suspicions and occasional acts of expressive support, however, were well understood by lawyers to provide only weak support for fully attributing the boycott to the state.[182]

The second, and far more politically and historically important, reason for focusing on direct attribution was the increasingly prominent role of the Chinese nationalist party.[183] The period from 1905 to 1932 that saw the rise of the boycott was also the age in world history that saw the rise of the party-state. Of particular importance was the Third International, or Comintern, established in 1919 as an instrument of transnational class struggle and eventually transformed into a tool of Soviet foreign policy.[184] Whether the acts of the Comintern could be attributed under international law to the Soviet Union was a matter of significant practical, political, and ideological

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[180] Lytton Boycott Study, *supra* note __, at 230.

[181] *See id.* at 230–231.

[182] *See, e.g.*, Lauterpacht, *supra* note __, at 132 & n.3.

[183] *See, e.g.*, Lytton Boycott Study, *supra* note __, at 227 (asserting that since 1927 the Chinese boycott movements had become "more and more centralised in the hands of the Kuomintang, … the standard-bearer of Chinese nationalism"); *see also id.* at 228–229 (discussing the role of the Kuomintang in some detail).

[184] *See generally* DUNCAN HALLAS, THE COMINTERN: A HISTORY OF THE THIRD INTERNATIONAL (1985).

importance, and drew no shortage of legal commentary in this period.[185] The structural similarities of the China case, as well as the critical differences, were lost on no one.[186] It is thus not surprising to see Japan reminding the members of the League that the Kuomintang was not "a simple political party in the Occidental sense of the term,"[187] and playing more explicitly on Western fears of communism by insisting that "the hand of the Third International" always lies behind the boycotts.[188]

The route of direct attribution, however, ultimately proved unattractive.[189] Arguments for direct attribution were highly fact-

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[185] *See, e.g.*, Lawrence Preuss, *International Responsibility for Hostile Propaganda Against Foreign States*, 28 AM. J. INT'L L. 649, 656–664 (1934) (surveying disputes between the Soviet Union and other powers over the relationship between the U.S.S.R., the Russian Communist Party, and the Third International).

[186] *See* Lauterpacht, *supra* note __, at 133–134; Takayanagi, *supra* note __, at 855–856.

[187] Observations of the Japanese Government on the Report of the Commission of Enquiry Constituted Under the Council's Resolution of Dec. 10, 1931; *see also* GOVERNMENT OF JAPAN, *Anti-Foreign Boycotts in China*, *in* PRESENT CONDITION, *supra* note __, Appendix A–7, at 49 [hereinafter Japan, *Anti-Foreign Boycotts*] (comparing the Chinese arguments to "the explanation, not devoid of ingenuity, offered by the Soviet Government when they disclaim responsibility for the 'bolshevizing' procedures" of the Third International).

[188] Japan, *Anti-Foreign Boycotts*, *supra* note __, at 33–34. For allegations of communist involvement in individual boycotts, see *id.* at 3, 10, 11–12, 13, 16, 19, 25, 28. The argument of outside communist influence in the boycott associations is in potentially irreconcilable tension with the insistence that the boycotts are state-directed, though Japan makes an attempt to square these two arguments in the above-cited passages.

[189] Remer's 1933 monograph, though primarily focused on the economic aspects, summarizes the legal and political problems well:

> The Chinese boycott, however we may solve the knotty problem of the relation between the government and the boycott, is not the formal act of the Chinese state. The boycott is not declared by any officer of the government. It does not operate to prevent ships from clearing with cargoes for the boycotted state. Goods from the boycotted state are not, by the existence of the boycott, prevented from being landed or refused passage through the customhouses of China. During the autumn of 1932 newspapers carried accounts of Chinese proposals to make the boycott 'legal.' The possibility of such a step was suggested in the discussion of the boycott at Geneva in November. The very fact that such proposals have been made is evidence that the boycott is not the Chinese state in action.

REMER, *supra* note __, at 4–5. The Lytton Commission phrased the issue this way:

> The necessity of such a discipline rather proves that, as in any popular movement, the loyalty of all adherents to a common cause is not equally strong, and that some of them will have to be supervised and even have to be punished for not having played the game. The Kuomintang and to-day's

dependent and relied on contested arguments about the relationship between party and state. They risked saddling China, which at the time was widely seen as the target of unwarranted aggression, with a burdensome set of legal concerns that Western political systems did not have to endure.[190] At the same time, exonerating China for any acts undertaken by the nationalist party would set a precedent for dealing with the Soviet Union and the Comintern that many governments and publicists may have been unwilling to accept.[191] On the whole, it was better to set aside the thorny problem of attribution as a matter that turned on difficult questions relating to the internal structure of the Chinese state, and let it rest there.[192] After all, there were other tools in the shed.

B. The Boycott Meets the International Minimum Standard

The alternative framework for addressing the boycott was the international law for the protection of foreigners and their property. The early twentieth century was a moment of rapid development, and

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> Anti-Japanese Associations, Chambers of Commerce, labour and student unions, are not doing anything else, in principle at least, than the old guilds — using, in fact, the boycott machinery established by them. The conclusion is justified therefore that to-day's boycotts are popular movements which have originated in an impulsive feeling, but which are strongly organised, directed and disciplined by a great number of bodies of various kinds under the super-control of the Kuomintang. From the point of view of the dispute under investigation, however, there is a question far more important than that of the spontaneous character of the boycott — that is, the question of the methods used.

Lytton Boycott Study, *supra* note __, at 217.

190 For the stakes of this debate, compare Lauterpacht, *supra* note __, at 134 ("To make the [government] responsible for acts of the part would mean to play havoc with the established rules of state responsibility."), *with* Preuss, *supra* note __, at 668 (arguing that allowing states to evade responsibility by acting through parties would "in effect, abrogate[e] an important part of international law").

191 *Cf.* Wolfgang Friedmann, *The Growth of State Control over the Individual, and Its Effect on the Rules of International State Responsibility*, 19 BRIT. Y.B. INT'L L. 118, 144–145 (1938) (noting that the differential treatment of one-party states and multiparty democracies leads to an "unequal measure of responsibility" which contributes "to the disintegration of the family of nations and the formation of homogeneous groups.").

192 LYTTON REPORT, *supra* note __, at 120 ("The Kuomintang may be the master of the Government, but to determine at what point the responsibility of the party ends and that of the Government begins is a complicated problem of constitutional law on which the Commission does not feel it proper to pronounce.").

deep contestation, of this body of customary international law, commonly referred to as the law of state responsibility for injury to aliens.[193] This body of law was useful because by this point is was well-established, at least in the jurisprudence of Western and colonizing states, that a state could be responsible for *inaction* that resulted in injury to a foreigner or their property.[194] In particular, the state could violate international law by its failure to enact or enforce appropriately protective laws for the benefit of investors or their property.[195] The international minimum standard thus promised a juridical link to private conduct that did not rely on direct attribution.

There was, at the outset, an obvious limit to how far the requirements could go. Not even the strongest critics of the boycott argued that international law could require a state to police the purchasing decisions of individual citizens or force them to buy foreign products against their will.[196] This would have been both unworkable and inconsistent with liberal principles that leave to individual consumers the choice of business partner.[197] As a result, a liberal

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[193] *See generally* E. M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD, OR THE LAW OF INTERNATIONAL CLAIMS (1922); CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928); Dionisio Anzilotti, *La Responsabilité Internationale des États a Raison des Dommages Soufferts par des Étrangers*, XIII REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5 (1906). On the legal and political disputes of this period, see LIPSON, *supra* note __, at __; ROLAND KLÄGER, 'FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL LAW 48–50 (2011); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT __ (4th ed. 2021).

[194] *See, e.g.*, Anzilotti, *supra* note __, at 14–15.

[195] Lauterpacht, *supra* note __, at 135.

[196] *See* Bouvé, *supra* note __, at 23. Even this would have to be qualified, though: a state could elect in a treaty to do something like this, or it could take such actions to suppress private choice of its own accord. *See* Lauterpacht, *supra* note __, at 128.

[197] In the 1932 disputes at the League, the Chinese government sought to take advantage of this point, arguing:

> Boycott in its simple form, … that is, the abstention of an individual from buying or utilizing the goods of a certain origin, or from establishing relations with the merchants and industrialists of a certain nationality, or from engaging the services of the enterprises of that nationality, is the pure and simple exercise of individual liberty of action to which all citizens are entitled.

1 WELLINGTON KOO, *Memorandum on the Boycott*, *in* MEMORANDA PRESENTED TO THE LYTTON COMMISSION 399, 404 (1932) (hereinafter Koo, *Boycott Memorandum*). As will be shown, this effort to present the boycott as the aggregation of individual

international lawyer seemingly had to accept, at least in principle, that a peaceful boycott, carried on by private individuals of their own free will, without intervention from the government, would not violate international law.[198] There was here a sphere of private, individual choice, which international law, as the law of states, simply did not reach.[199]

While this may seem a pro-boycott result, the actual effect of this result is more complex. The imaginary of a peaceful, almost spontaneous boycott resulting from individual choice could also act as a regulative ideal to be counterposed against most actually existing forms of economic protest.[200] The Lytton Commission, for example, stressed that popular sentiment and individual choice was necessary but not sufficient to sustain the boycott: the loyalty of all Chinese citizens to the boycott would not be equal, and "some of them [would] have to be supervised and even have to be punished for not having played the game.[201] Lauterpacht generalized this point, noting that the

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free wills ran headlong into concerns about organized, concerted action outside the state. *See infra* notes __–__ and accompanying text.

198 *See, e.g.*, 2 PAUL FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC § 985(3) (1926) (quoted and translated in Koo, *Boycott Memorandum*, *supra* note __, at 409 & n.4); Lauterpacht, *supra* note __, at 128; *cf.* LYTTON REPORT, *supra* note __, at 120 ("Nor is it possible to deny that the Chinese, acting individually or event in organised bodies, are entitled to make propaganda" for a boycott).

199 Laferrière addresses this point as part of a larger critique of the state-centric system of public international law that could have been written in 1990, instead of 1910:

> [T]he classic constructions, adapted from the traditional framework, can turn out to be insufficient and that the simple data to which we have endeavored to reduce them are upset by the appearance of such an unforeseen and complex factor. The solutions, a bit clumsy all in all that we end up with, are proof of this, and for example, in the hypothesis that presented itself to us, the difficulty of applying purely and simply to a situation, created by the fact of the only individuals, the theories of responsibility constructed exclusively for the state.

Laferrière, *supra* note __, at __. *Compare with The End of Sovereignty?: Roundtable*, 88 AM. SOC'Y INT'L L. PROC. 71 (1994).

200 *See, e.g.*, Takayanagi, *ssupra* note __, at 857 (referring to a lawful boycott as one where citizens "*ex proprio motu* and without any compulsion or coercion from others, abstain from dealing with foreign nationals); *cf.* Laferrière, *supra* note __ (suggesting that the 1908 Turkish boycott of Austria-Hungary, but not the 1905 and 1908 Chinese boycotts, met this standard).

201 Lytton Boycott Study, *supra* note __, at 247.

"normal type of boycott" is not merely a matter of individual choice, but is pursued "by means of conspiracy."[202] Kenzo Takayanagi was more explicit, arguing that any effective boycott would be an illegal one.[203] Writing in the *American Journal of International Law,* C. L. Bouvé agreed, arguing that the apparent "main attribute of the boycott" was the conspiracy by some private persons to deprive others of their "untrammeled liberty of choice" by means of threats and intimidation.[204] The question for international lawyers, then, was how much—if at all—boycotters could be permitted to put pressure on the economic liberties of their fellow citizens before the state would be required to step in.

This question was a live issue in Anglo-American and Continental private and labor law during this period, and these materials provided a reservoir of conflicting claims from which lawyers could and did draw.[205] At the dawn of the century, the mere fact of organizing to exert economic pressure had come to be considered a threat to the legal order, particularly in the United States.[206] Judges

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[202] Lauterpacht, *supra* note __, at 138.

[203] Takayanagi, *supra* note __, at 862 ("[T]he boycott in China, in order to obtain some measure of effectiveness, must necessarily assume illegal forms.").

[204] Bouvé, *supra* note __, at 23–24; *see also*

[205] *See, e.g.*, Koo, *Boycott Memorandum*, *supra* note __, § 4 (citing the British Trade Disputes Act of 1906); Bouvé, *supra* note __, at 23–24 (citing American and British cases); Lauterpacht, *supra* note __, at 136–37 (citing Australian, British, French, and German cases); THOMAS BATY, INTERNATIONAL LAW 67 (1909) (citing a case from Ireland). While many of the cited cases involved labor disputes, others involved disputes between trade groups or other private disputes. *See, e.g.*, *Sorrell v. Smith*, [1925] A.C. 700; *Sweeney v. Coote*, [1906] 1 Irish Rep. 105. One writer focuses more on civil law concerning tortious interference with contractual relationships. *See* Takayanagi, *supra* note __, at 858 (citing Chinese, Swiss, and German civil law).

[206] The U.S. perspective on the Anglo-American common law of boycott in 1933 was summarized thus:

> [The boycott] was quickly seized as a useful weapon. The courts had to tackle the resulting problem. When they did, they made clear a single point—that the combination of two or more persons might transform something that was itself quite legal and proper into something that was quite illegal and improper; and that the combining or uniting not to have intercourse with an individual was the essence of the wrong from which he was entitled to protection.

Charles Cheney Hyde & Louis B. Wehle, *The Boycott in Foreign Affairs*, 27 AM. J. INT'L L. 1, 1 (1933). *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 60–97 (1991) ("Before the 1890s, [U.S.] courts had barely considered the legal status of many kinds of boycotting activities. By the early

complained that labor had "erected itself as a rival lawmaker, challenging the courts' and the state's normative authority."[207]

By the 1930s, if not significantly earlier in some countries, the American and European private law of boycotts—both inside and outside the labor context—had begun to organize itself around the idea of "coercion" or similar concepts.[208] These cases used various concepts to distinguish lawful from unlawful boycott activity: the existence of an "unlawful" act to further the boycott,[209] the presence of an improper purpose,[210] malice,[211] the use of "coercion" or

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twentieth century, common law and antitrust doctrine condemned in needlepoint detail virtually the entire spectrum of peaceful secondary activities aimed at 'unfair' (nonunion) goods and materials.").

[207] FORBATH, *supra* note __, at 65; *see also In re Debs*, 158 U.S. 564, 592 (1895) (contending that the labor actions in that case constituted "the exercise by individuals of powers belonging only to government"); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911) (characterizing labor unions as organizations that have "acquired a vast power, in the presence of which the in- dividual may be helpless").

[208] *See, e.g.*, *Duplex Printing Press Co. v. Deering*, 254 U.S. 433, 466 (1921) (defining "secondary boycott" as a combination "to exercise coercive pressure upon [a complainant's] customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it"); *Buck's Stove*, 221 U.S. at 436 ("Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant. Some hold that a boycott against the complainant, by a combination of persons not immediately connected with him in business, can be restrained. Others hold that the secondary boycott can be enjoined, where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him by threats that unless they do they themselves will be boycotted. Others hold that no boycott can be enjoined unless there are acts of physical violence, or intimidation caused by threats of physical violence."); Ramm, *supra* note __, at 271–279 (tracking across American, French, British, Italian, German, and Swedish jurisprudence during this period the tension between rights of peaceful persuasion and prohibitions on strikes and boycotts by intimidation or coercion).

[209] *Sweeney v. Coote*, [1906] 1 Irish Rep. 105, 107 (FitzGibbon, L.J.); *Sorrell v. Smith*, [1925] A.C. 700 (Viscount Cave, L.C.).

[210] This usually meant a purpose to "willfully … injure the trade of another," as opposed to the proper purpose of furthering one's own trade. *Sorrell v. Smith*, [1925] A.C. 700 (Viscount Cave, L.C.); *id.* (Dunedin, L.J.); *see also Quinn v. Leatham*, [1901] A..C. 495 (Shand, L.J.).

[211] *Sorrell v. Smith*, [1925] A.C. 700 (Sumner, L.J.); FORBATH, *supra* note __, at 89 (collecting American cases).

"intimidation,"[212] the use of libel or fraud,[213] or a lack of proportion between the end sought and the means employed.[214] Whatever the precise words used, all of these cases signaled a shift from the mere fact of a combination or conspiracy to effect a boycott to the means employed.[215] The law thus recognized the right of a people, in coordination, to threaten to withdraw their business in order to achieve a shared aim. But there remained that point at which the combination of private persons to effect a boycott crossed a line that was seen to usurp the state's coercive authority, and thus to demand a state response.[216]

Coercion, however, was not identical to physical violence and could prove to be an extremely malleable concept.[217] The notion of coercion could include physical violence, explicit threats, menacing, and property damage, but could also extend to other activities to further a boycott, such as insults, threats to be named a boycott-breaker or placed on a blacklist, or even widespread picketing itself.[218]

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[212] Ramm, *supra* note __, at 274 (discussing French jurisprudence attempting to objectively define "intimidation" in this context).

[213] *Id.* (describing Swedish decisions as going "very far in prohibiting 'defamation' by insulting people to be strike-breaker or boycott-breaker").

[214] *Id.* at 275 & n.8 (explaining that in Germany, while boycotts were not per se illegal, they could become unlawful if, *inter alia*, "there is no tolerable relationship of the harm and the advantage demanded").

[215] As Forbath notes in the context of strikes, however, modes of analysis that hinge on means rather than ends ensure that no labor action is "immune from judicial intervention." FORBATH, *supra* note __, at 71.

[216] Bouvé summarizes the law, in a self-serving but largely coherent way, as follows:

> A has a legal right to withdraw his trade from B. It follows that A has a legal right to represent to B that he will withdraw that custom unless B ceases to trade with C. But when … A, acting in combination with others, coerces B to withdraw his trade from C, legal responsibility results, for C's loss in trade is the result of a conspiracy to intimidate B to the point of taking steps whereby C is injured.

Bouvé, *supra* note __, at 24. *But cf.* Friedmann, *supra* note __, at 143 (stressing, in response to Bouvé, that the coercion must be "unlawful," and that a "majority decision of a trade union binding dissentient members and carried out in an orderly manner certainly contains no unlawful coercion").

[217] On the opposition between "coercion" and "voluntarism," and the expansive conception of the latter, in nineteenth and early twentieth century labor law, see TOMLINS, *supra* note __, at 36–52.

[218] Ramm, *supra* note __, at 274–275.

The law of many jurisdictions still held that the mere fact of a private agreement to act in concert could, in the right circumstances, "supply evidence of malice, or undue pressure or even intimidation" that could give rise to a legitimate complaint.[219] One pair of American writers, observing the doctrine in 1940, explained that the legality of any given boycott depends on "whether or not the court is of the opinion that the pressure exerted upon [third parties] amounts to 'coercion.' Truly is this a test which can be and is used with impunity to cloak the opinions and economic predilections of the courts which would employ it."[220]

The concept of coercion, then, provided a useful and flexible hook for the international minimum standard. Under international law, it was argued, states had an obligation to exercise "due diligence" in preventing and punishing injuries to alien property.[221] For most imperial powers—including the United States, Japan, and much of Europe—it was important to insist that this rule supplied a minimum, objective standard for state conduct. Less than a year before the latest round of Chinese boycotts, these countries had sought within the League of Nations to codify a rule that, at the very least, created the possibility that foreign investors would receive more favorable treatment than a host state's own nationals.[222] This position had been opposed strongly by several countries, including China, who insisted that foreigners must not be "treated on a higher plane than the nationals of the country."[223] Disputes over precisely this point were among the main factors that led in 1930 to the collapse of negotiations at the League over a treaty governing state responsibility to foreign investors.[224] But nonetheless many governments and scholars

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[219] *Sweeney v. Coote*, [1906] 1 Irish Rep. 105, 109 (FitzGibbon, L.J.).

[220] Barnard & Graham, *supra* note __, at 141 (citing *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 931 (C.C.A. 1897) (Caldwell, J., dissenting); *Duplex Printing*, 254 U.S. at 485 (Brandeis, J., dissenting)).

[221] *See generally* Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT'L L. J. 1, 21–23 (1989).

[222] [[See Volume IV of Codification debates—joint proposal is at 233, vote (which includes Japan) is at 190. Greek explanation, which addresses this directly, is at page 186.]]

[223] [[See Volume IV p. 187]]. China's position, in other words, echoed what is commonly known as the "Calvo doctrine."

[224] *See generally* KATHRYN GREENMAN, STATE RESPONSIBILITY FOR REBELS (2021).

maintained allegiance to a "due diligence" standard, and the disputes over the Chinese boycotts provided an opportunity to press that case once more.[225]

In the hands of these writers, the international minimum standard thus became the legal basis for requiring states to consolidate and monopolize the capacity for economic warfare. As long as boycotts were "spontaneous," or matters of "individual" consumer choice, there was no reason for the state to interfere.[226] Indeed, this was China's argument: that the boycotts were spontaneous expressions of popular sentiment, that advocacy for the same was lawful political speech, and boycott associations are just "the collective expression of the same sentiments."[227] But the era's suspicion of organized pressure campaigns, as well as the sometimes violent realities of the boycotts, made this a tricky argument.[228] For many writers would hold that, as soon as one group of private persons is "coercing" or using "unlawful means" to pressure others to conform to the boycott, the state's duty to secure the property and interests of foreigners is engaged.[229] This

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[225] *See* Takayanagi, *supra* note __, at 857, 859; *cf.* Lauterpacht, *supra* note __, at 129; Bouvé, *supra* note __, at 19. That the references to due diligence appear far more frequently in the scholarship than they do in the League records may reflect the fresh memory of the role this standard played in the collapse of the codification conference. But note the acceptance by Wang, whose position is otherwise generally consonant with the Chinese view, that the state is "bound to do [its] best with the means at [its] disposal" with respect to the protection of foreign property. H. C. Wang, *International Law and Anti-Japanese Boycott*, 6 PACIFIC AFF. 373, 377, 380 (1933).

[226] Takayanagi, *supra* note __, at 857, is the clearest statement of this view.

[227] Koo, *General Memorandum*, *supra* note __, at 52; Koo, *Boycott Memorandum*, *supra* note __, at 405 ("So long as the usual restrictions are observed, public order not disturbed , no violence employed , no instigation trespassing the penal law practised, and no violation committed against the provisions of the Code which affords protection to the person and the reputation of the chiefs and representatives of all friendly states, every person has the incontestable right [under the Chinese Provisional Constitution of June 1931] to persuade his fellow-citizens by means of the press, public meetings or speeches , personal approachments or letters, etc., to abstain from supplying themselves with the products of a certain origin or to utilize the services of individuals or companies of a certain nationality.").

[228] *Cf.* BATY, *supra* note __, at 65–66 ("The true objection to measures of boycott is that they are generally enforced on unwilling parties by violence and threats of violence. We have long heard of 'the boycotting whose sanction is murder.' But it is strange that this accident should so far blind statesmen that they should wish to eradicate the combination itself … .").

[229] *See, e.g.*, Lauterpacht, *supra* note __, at 136–138; Takayanagi, *supra* note __, at 858–859.

proved a flexible standard, which could extend beyond the use of organized violence to other forms of coercion or unlawfulness.

Here, it became important for showing coercion that the boycott used lawlike regulations and penalties.[230] For example, in pressing its case before Chinese authorities and the League, Japan argued that "in meeting out penal sentences to individual citizens, the anti-Japanese societies, which are purely private organizations, are clearly usurping the authority of the National Government."[231] China must therefore "restrain" and "suppress" the boycott associations in order to reassert control over the state and comply with its international obligations.[232] The Lytton Commission itself followed a similar path, devoting the first several pages of its study to the growth of the Chinese guild system, which was described uncharitably as "self-governing bits of democracy" outside the control of the state, which result in "a tyranny of the many over the individual, and a system of control which must by its nature hinder 'freedom of enterprise and independence of individual initiative.'"[233]

This structure, the Commission suggested, was inconsistent with both China's legal obligations and its political aspirations. As

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[230] *See, e.g.*, Japan, *Anti-Foreign Boycotts*, *supra* note __, at 2 ("The executive body of a boycott under the direction of the Kuomintang is allowed to set up and enforce quasi-legal regulations and to inflict upon the violators penalties—confiscation of goods, fines, public exposure, imprisonment and even death, without any interference from the Government. This fact alone serves to prove that the directing bodies of boycott movements are not simply private organizations of students or tradespeople."); *id.* at 18–19 ("The 'Fight-Japan and Save-the-Nation Society' at each locality, set up and directed by the Kuomintang headquarters as the main organ of boycott, is a powerful body being recognized and supported by the National Government and embracing the local leaders of the Kuomintang and the representatives of commercial and industrial groups as members of various committees. The society has set up quasi-legal rules, which are enforced under penalties. In fact, it has acquired such power that no Government authorities dare oppose its tyranic régime, nor the court can refuse to accede to its demands.").

[231] *Id.* at 61.

[232] *See id.*

[233] Lytton Boycott Study, *supra* note __, at 210 (quoting HOSEA BALLOU MORSE, THE GUILDS OF CHINA (1909)). This part of the study is quoted with a seemingly gleeful enthusiasm by Bouvé, *supra* note __, at 27–28. The Commission's reliance on Western observers' characterizations of Chinese civil society, and on their blanket judgments about "the Chinese race," *id.*, reflects the Commission's own colonial composition, as well as its eagerness to treat deviations from Western forms of capitalist state organization as backward and in need of reform. *Cf.* NTINA TZOUVALA, CAPITALISM AS CIVILIZATION 82 (2020).

explained in a detailed study on the boycott prepared for and appended to the Commission's report:

> The fact that all of these methods are essentially the same as those used in China of olden days may be an explanation of what is happening now, but it should not be accepted as an excuse. When in former days a guild elected to declare a boycott, searched the houses of suspected members, brought them before the guild court, punished them for a breach of rules, imposed fines and sold the goods seized, it acted in conformity with the customs of that time. Moreover, it was an internal affair of a Chinese community, and no foreigner had anything to say in the matter. To-day, things have changed. China has entered the family of nations, and is linked up with that larger community and with its individual members by ties of a legal nature and by common conceptions of what is right and wrong. China has accordingly given herself a code of modern laws, and wants to be considered by other nations as an equal among equals. When such is China's desire, the rest of the world should rejoice in it; but at the same time she should realise that modern legal principles are incompatible with traditional Chinese boycott methods.[234]

This passage, though it does not directly mention the minimum standard, brings international law directly into confrontation with the non-state sites of lawmaking authority that carried on the boycott. These authorities—the boycott associations, the guild courts, the "self-governing bits of democracy"—were inconsistent with the legal and moral ties that bound the community of states.[235] While the main body of the report summarized this point by saying that the boycott methods were "illegal under Chinese law," it was clear the Commission was not signing itself up to a detailed investigation of the provisions of the Chinese civil and criminal codes.[236] Indeed, the Chinese government had argued that the leniency its courts had shown to the boycotters was both consistent with Chinese law and at any rate remained an

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[234] Lytton Boycott Study, *supra* note __, at 247. A similar passage appears in abridged form in LYTTON REPORT, *supra* note __, at 119.

[235] *See id.* at 210, 247.

[236] *See* LYTTON REPORT, *supra* note __, at 120; Lytton Boycott Study, *supra* note __, at 248.

internal affair.[237] But that was beside the point. It seems that it wasn't Chinese law specifically, but "modern legal principles" more generally, that were opposed to the Chinese state's seeming toleration of these boycott associations and guild activities. This incompatibility rendered the boycott methods "irregular" and "illegal," and they took place on such a scale that "clearly established rights and interests of Japanese residents are constantly violated," even if Japanese merchants are not directly targeted.[238]

In short, on this view, membership in the "family of nations" required the state to exercise a certain kind of monopoly over coercive lawmaking authority. This applied not just to its direct dealings with foreigners, but also among its own citizens insofar as their dealings with each other might affect foreign interests. This assertion validated and continued the earlier insistences of the British, American, and Japanese governments that the Chinese government was internationally responsible for wresting authority back from boycott and strike associations.[239] It also found favor with many contemporary legal commentators.[240] This did not mean, in theory, that all boycott

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[237] Koo, *Boycott Memorandum*, *supra* note __, at 415–417, 420.

[238] Lytton Boycott Study, *supra* note __, at 248; *accord* LYTTON REPORT, *supra* note __, at 120.

[239] *See, e.g.*, [[Letter from Ambassador Rockhill to Prince Cheng, FRUS 1905, p. 213]] ("[T]he Government of the United States will hold [China] directly responsible for any loss our interests have sustained or may hereafter have to bear through the manifest failure on the part of the Imperial Government to stop the present organized movement against us, which the President considers if allowed to continue is an open violation of the rights granted to us by China in Article XV of our Treaty of 1858."); Public Declaration of the Governor-General of the Colony of Hong Kong, Feb. 4, 1926 (quoted in Koo, *Boycott Memorandum*, *supra* note __, at 412) ("The Government of Canton is naturally responsible for the maintenance of legal order in the territories under its administration, and as it has tolerated the illegal activities of the Committee of Strike at Canton, it is responsible for all the losses suffered from the fact of these activities.").

[240] *See, e.g.*, Lauterpacht, *supra* note __, at 136 ("It is submitted that this is the only correct view. It is a well-recognized rule of municipal law of most countries that in cases of conspiracy and intimidation in which illegal action is taken to the detriment of a third party, that third party is entitled to a legal remedy."); Bouvé, *supra* note __, at 24 (arguing that "coercion took the form of penalizing parties … by the imposition of so-called 'fines,' by the destruction of their property, and by violence to their persons," to the detriment of Japanese interests); Takayanagi, *supra* note __, at 858 ("It is the practice in civilized countries that where A coerces B to sever advantageous economic relations with C to the damage of C, A is liable in tort or delict against C, unless there exist grounds of justification"); *cf.* Hyde & Wehle, *supra* note __, at 2 (explaining that a boycott may become "the obvious means of fomenting a sinister

organizations and groups in civil society must necessarily be repressed. Rather, it meant that, at some point, the public pressure, shame, and coercion used to enforce the boycott becomes sufficiently organized, powerful, coercive, or lawlike that the state was required to step in and prevent things from getting out of hand.[241] Whether this doctrine left any room at all for effective boycotting by a populace was a matter of some dispute.[242]

The insistence on the existence of this threshold, wherever it was, marked a victory for the international minimum standard at a time when such victories mattered. The line between a "peaceful, spontaneous" picket, strike, or boycott and a "coercive" one was notoriously difficult to draw, as would have been obvious to anyone who studied the matter at the time.[243] Many states, including arguably China, did not have either a statute or a clear body of decisional law that would have assisted in drawing that line.[244] As such, there was a strong case to be made that the line-drawing should be left to domestic law and domestic institutions, and China made that case at the League in 1932.[245] While this argument was not finally settled in the League

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situation which may get beyond control and result in what a state finds itself obliged to endeavor to thwart"). *But see* Wang, *supra* note __, at 376 (arguing that, even if China had failed to enforce the law in cases where Chinese citizens were unlawfully prevented from dealing in Japanese goods, "it is pretty difficult to say that China is internationally responsible at the present stage of international law, when there is no injury to Japanese life nor damage to Japanese property").

[241] *See, e.g.*, Bouvé, *supra* note __, at 25 ("The essence of a national boycott is publicity. The government must and does know what is going on. If the methods employed by the people are unlawful, it is the duty of the government to use adequate means to put a stop to the movement.").

[242] *Compare* Lauterpacht, *supra* note __, at 138 ("So long as the means used are not otherwise unlawful, it would be possible for a boycott of foreign goods to be conducted without contravening the law of the land. Against the toleration of such a boycott the foreign state is not entitled to protest."), *with* Takayanagi, *supra* note __, at 862 ("[T]he boycott in China, in order to attain some measure of effectiveness, must necessarily assume illegal forms. For, after all, [the purely peaceful and spontaneous boycott] is an illusory weapon, serving, sometimes, perhaps, as a safety valve or expression of resentment …, but without bringing about any serious or permanently injurious consequences … .").

[243] *See supra* notes __–__ and accompanying text.

[244] Koo, *Boycott Memorandum*, *supra* note __, at 406.

[245] *See id.* ("Picketing is a method usually employed by the workers in time of strike. The legislation of certain states authorizes its use in a moderate way. In China where the conflicts between capital and labour have not existed till only recently and where social and economic conditions do not permit the promulgation of a complete set of

and remained contested throughout the twentieth century, the response of Western and Japanese legal scholars was to assert a primary role for international standards in drawing that line.[246] This reflects the next phase in what Kathryn Greenman has identified elsewhere as a battle by scholars to rationalize and internationalize the legal relationship between states, foreign investors, and organized opposition.[247]

C. Anthropomorphizing the Liberal International Order

While the minimum standard purported to ensure that state involvement was not necessary to establish an international legal wrong arising from a boycott, other moves also ensured that state control also was not sufficient. The international legal response to the 1931 boycott, in particular, triggered a new wave works expressing the view that states are free to choose with whom they wish to trade.[248] In other words, if the government of China decided it wished no trade with Japan, and sought to enforce this prohibition through punitive laws aimed at its own nationals, China was in principle free to do this. Today, this is often cited as an abstract and almost self-evident first principle—a point of departure which states are free to modify by joining trade or investment treaties.[249] But at the time, it was neither abstract nor self-evident. Rather, this principle joined with the international minimum standard to establish the foundations of a state-centric economic liberalism, wherein national governments were

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labour laws, the question as to the legitimacy of resorting to picketing has not yet been clearly settled. Nevertheless, the general tendency of our labour regulations is altogether democratic and is inclined to consider the interest of the worker and his aspirations. In conformity with such political reasoning, cases have been presented before the courts as so-called 'hindrances to the liberty of work' only when intimidation exercised by the pickets has assumed a violent character. Besides, it is impossible exactly to fix in a formula the line of demarcation which separates the regular exercise of the right of strike and the illegitimate encroachment upon the liberty of others. It is a question which should be left to the judgment of the court.").

[246] *But see* Hyde & Wehle, *supra* note __, at 3 (seemingly suggesting that any existing diligence requirement for policing boycotts was "purely" a matter of policy rather than law).

[247] GREENMAN, *supra* note __, at 109–141.

[248] *See, e.g.*, Lauterpacht, *supra* note __, at 130; Wang, *supra* note __, at 377.

[249] *See, e.g.*, Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control?*, BRIT. Y.B. INT'L L. (2020).

expected to ensure that they, and only they, retained the capacity to conduct economic warfare.

The principle that states are free to decide with whom they wish to trade was not entirely self-evident in the early twentieth century and was contested in some quarters. After all, the emerging shape of interwar international law—as expounded by the Western and imperial powers that make up the primary focus of this paper—was liberal, but the precise shape of liberalism was contested.[250] Some writers on the subject expounded what might be called a *normative* liberalism, wherein the law nudged or even required states to open themselves to foreign trade as a condition of entering the "family of nations."[251] Such a requirement could emerge from often one-sided international treaties with imperial powers,[252] or it could be an emergent principle of a liberal international law.[253] On the latter view, customary international law itself becomes a vehicle for securing liberalized trade. This is in contrast to the prevailing understanding today, where commitments to liberalize trade are governed by bilateral and multilateral treaties.

Counterposed to this was what might be called an *anthropomorphized* liberalism, in which states are treated as if they were

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[250] *See generally* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS (2001).

[251] Neff describes the emergence at the end of the nineteenth century of a "prohibitionist school" on the international law of economic warfare, which drew from the political economy of Adam Smith as filtered through nineteenth century liberal political thought. *See* Neff, *supra* note __, at 80–85. On this view, "[a]ny deliberate disruption of the "natural" flow of economic transactions constitutes an injury not simply to the target country but to the global economy at large," and boycotts and other acts of economic warfare are thus "wrongful, and states resorting to them must be prepared to justify their conduct." *Id.* at 82.

[252] *See, e.g.*, JAPAN, PRESENT CONDITION, *supra* note __, at 48 ("The nationals of countries which have concluded treaties with China, such as Great Britain, America, France, Italy, Japan, etc., enjoy, in virtue of those treaties, rights of trade, of residence and of economic activity in China," which are "thwarted by the actions of the anti-foreign societies."); Japan, *Anti-Foreign Boycotts*, *supra* note __, at 54–55 (listing treaty provisions on "liberty of trade" that are violated by the boycott).

[253] *See, e.g.*, Bouvé, *supra* note __, at 35–36 (treating a governmental boycott as both a violation of treaty commitments and a violation of principles of the law of nations); *cf.* Lytton Boycott Study, *supra* note __, at 225 (stating that, even if the boycott had been officially proclaimed by the Chinese government, had been carried out by legal methods, and been accompanied by China's efforts to suppress illegal methods, "there would still remain to be solved a problem of international law, on which very different and even opposing opinions would probably be expressed."). *See generally* Neff, *supra* note __, at 81 & n.53 (citing publicists).

individuals acting on an international plane.[254] On this view, a single state, when choosing not to trade with another, is analogized to "a single family that agrees with itself not to buy chairs or chewing gum at a particular shop."[255] Stated this way, it is hard to see what is wrong with a state-ordered boycott, or what could be done about it anyway. After all, a state could not be forced to trade any more than a private person could be forced to spend her money rather than hiding it in a mattress.[256] The same emphasis on "individual choice" that marked the debate over non-state boycotts, in this view, also governed foreign affairs.[257] Under this paradigm, international law's role in liberalizing trade would be primarily through commercial treaties, which at the time were mostly bilateral. This view remains the dominant paradigm today.

Both the normative and anthropomorphized views had their adherents in the debates over the Chinese boycotts, but the latter seems to have ultimately carried the day.[258] In what a particularly influential statement of this view, Hersch Lauterpacht argued that:

> Is there a good reason for assuming that, in the absence of a commercial treaty and without infringing the rules of international law as to the protection of the life and property of aliens, a state is liable for initiating and supporting a boycott of goods from another country? It is difficult to see on what grounds international responsibility could in such cases be based. In the absence of explicit convention obligations, particularly those laid down in commercial treaties, a state is entitled to prevent altogether goods form

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[254] *See, e.g.*, Hyde & Wehle, *supra* note __, at 1.

[255] *Id.*

[256] *See id.*

[257] *See supra* text accompanying notes __–__.

[258] *But see* Neff, *supra* note __, at 82. It should be noted that Neff's description of the debates over the 1931 China boycott at the League as being an example of this school seem to ignore the arguments of the Chinese government that the boycott was in fact legal, and not simply as a matter of reprisals (or what today would be referred to as countermeasures). *See id.* The present investigation arguably goes too far in the other direction by ignoring the arguments over whether the boycott could be justified as a reprisal, which certainly met with substantial discussion at the time. This was a conscious decision, which was taken to counteract the tendency—still common today—to discuss boycotts and modern sanctions in terms of retorsion and countermeasures without first addressing their underlying legality. *See supra* note __.

> a foreign state from coming into its territory. … The foreign state may treat such an attitude as an unfriendly act and retort accordingly. But it cannot legitimately regard it as a breach of international law.[259]

This passage is frequently cited as the point of departure, though not the final word, for the international law of boycotts and modern sanctions.[260]

This statement was not the final word for Lauterpacht either, as the passage indicates. He is careful to qualify this rule by insisting on conformity with international standards for the protection of aliens and their property.[261] This, as discussed above, indicates the important ways in which the protection of aliens was intertwined with the principles of anthropomorphized liberalism and helps to construct the modern law of sanctions. In addition, Lauterpacht makes clear that states may tie their own hands in this regard by signing commercial treaties.[262] These included, for example, Article 15 of the 1858 China-U.S. treaty, which provided that U.S. citizens shall at designated ports "be permitted to import from abroad and sell, purchase, and export all merchandise of which the important is not permitted by the laws of the Empire."[263] By invoking this article, Lauterpacht was pushing back against arguments by U.S. scholars suggesting that such treaties do not prohibit state-backed boycotts for political reasons, or at least that such a prohibition should not be "lightly imputed."[264] Even so, Lauterpacht was also seemingly eager to play down the obstacle posed by commercial treaties to state-backed boycotts, arguing that commercial

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[259] Lauterpacht, *supra* note __, at 130.

[260] *See, e.g.*, NIGEL D. WHITE, THE CUBAN EMBARGO UNDER INTERNATIONAL LAW 95–96 (2014); BALDWIN, *supra* note __, at 351; Ruys, *supra* note __; Richard J. McLaughlin, *The United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and other International Marine Living Resources*, 21 ECOLOGY L.Q. 1, 61 (1994); Omer Y. Elgab, *Coercive Economic Measures Against Developing Countries*, 41 INT'L & COMP. L.Q. 682, 691 (1992); Blum, *supra* note __, at 7–8; Muir, *supra* note __, at 188; John Dugard, *Naciones Unidas, Derechos Humanos y el Apartheid*, 11 FORO INTERNACIONAL 286, 302 (1970).

[261] Lauterpacht, *supra* note __, at 130, 134–38.

[262] *Id.* at 130–32; *accord* REMER, *supra* note __, at 5. *See also supra* Part II.B.

[263] [[1858 Treaty, art 15]]. [[See diplomatic protest]].

[264] *See* Hyde & Wehle, *supra* note __, at 3–4; Lauterpacht, *supra* note __, at 132.

treaties often are short-lived or can be terminated on "reasonable notice."[265]

The emphasis here on states' liberty to pursue boycotts internationally reflected the high stakes of the situation. While the Chinese boycotts were often the initial spark for scholarly investigations, the Japanese invasion of Manchuria in 1931 posed a boycott problem of a different order. There was a strong case to be made that Japan's conduct merited sanctions under the League of Nations Charter.[266] The League's sanctions power, at the time, was frequently referred to as the power to call a "boycott."[267] The legality of a boycott by League members against one of their own was uncontestable: by joining the League, each country had agreed that it might be boycotted in the circumstances and according to the procedures laid down in the Charter.[268] But what about countries that had not joined the League, such as the United States? Could the United States join a hypothetical boycott against Japan or another country that pursues an aggressive war, as Italy would in 1935? These questions were of significant practical and political import for the prospects of the United States' cooperation with the League's vision for maintaining peace.

For some American lawyers, anthropomorphized liberalism provided a means to resist close cooperation with League sanctions. As Charles Cheney Hyde and Louis Wehle argued, each state is like a single person acting on the international plane, and as such, each person-state is free to choose to trade, or not, with any other.[269] But, as English and American courts decided in the cases governing labor boycotts, "the combination of two or more persons might transform something that was itself quite legal and proper into something that is

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[265] Lauterpacht, *supra* note __, at 132 & n.2.

[266] [[citations]]. [[Refer here to Article 16 of the Covenant]].

[267] *E.g.*, AMOS HERSHEY, ESSENTIALS OF PUBLIC INTERNATIONAL LAW AND ORGANIZATION 542 (Rev. ed. 1927); REMER, *supra* note __, at 2 (noting that, unlike earlier times, today the technique of "boycotting" an aggressor "plays a part in the program for preventing war in the Covenant of the League of Nations"); Koo, *Boycott Memorandum*, *supra* note __, at 427. *See also supra* note __.

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[269] Hyde & Wehle, *supra* note __, at 1–2, 10.

quite illegal and improper"—namely, an unlawful boycott.[270] Similarly, they reasoned, if two or more countries "combine to cut off all commercial intercourse" with a third, without the protection of a treaty like the League charter, their conduct gains "a sinister aspect," about which the boycotted country "may oftentimes justifiably complain."[271] Accordingly, the United States would be "exposed" if it were to join an international boycott against a country in Japan's position.[272] Its actions could be seen as a violation of the law of neutrality, leading the United States to be regarded as a belligerent in the conflict.[273]

Hyde and Whele's approach merits sustained consideration here because it reflects again the outsized influence of the common law of boycotts on the development of sanctions law, at least in the United States. As with the labor boycott, it reflected view that the mere fact of "combination" among free individuals can transform lawful acts into lawless ones.[274] The reason for this concern was also similar to the context of industrial relations: the states acting in concert would become a law unto themselves.[275] On this view, the law of neutrality preserved the unity and universality of international law by requiring all bystander states to treat equally both sides to a conflict.[276] The League Covenant, by contrast, was seen to reflect a "taking-of-sides theory" of international relations, in which states were expected to determine "which is the good, and which is the bad belligerent."[277] While this might be acceptable in a universal organization like the League sought to be, or like the United Nations would become, outside such a centralized architecture the taking of sides would lead to a

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[270] *Id.* at 1. Indeed, the authors state, with some exaggeration for the time, that "the domestic boycott is *never* sanctioned by the domestic law." *Id.* at 4 (emphasis mine).

[271] *Id.* at 4.

[272] *Id.* at 8.

[273] *Id.* at 8–9.

[274] For the labor boycotts, see *supra* notes __ and accompanying text.

[275] For the analogous concern, see *supra* text accompanying notes __.

[276] For perspectives, see [[cite]].

[277] Hyde & Wehle, *supra* note __, at 9–10; *see also* Charles Chaney Hyde, *The Boycott as a Sanction of International Law*, 27 AM. SOC'Y INT'L L. PROC. 34 (1933).

fracturing of the international legal order.[278] As states join boycotts and therefore line up on their favored side of the conflict, Edwin Borchard argued, this would only "enlarge the area of conflict and keep the world in more or less perpetual turmoil."[279] Rephrased in a way that echoes the concerns with para-state lawmaking, the law of neutrality preserved the existence of international law as a single source of normative authority, whereas the taking of sides through boycotts would fracture this authority into multiple sides—multiple orders of international law—thus leading to an inherently more contested and violent, and less stable, world order.[280]

This argument, of course, did not ultimately carry the day, though the debate left its mark. The position articulated by Hyde and Wehle, in particular, was parochial in its characterization of the boycott, and was might have seemed blatantly self-serving in its effort to distance the United States from the League while still preserving a free hand for the U.S. to act unilaterally. The founding of the United Nations in 1945 would mark the victory of the "taking-of-sides" theory over the earlier law of neutrality.[281] What did survive, however, was the anthropomorphized liberalism that created common ground between Lauterpacht and his American interlocutors. This liberalism today may be modified by principles of non-intervention, of human rights, or

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[278] This was a common critique, as reflected in the debates at the 1927 meeting of the American Society of International Law. *See* 27 AM. SOC'Y INT'L L. PROC. 55–65 (1933).

[279] Edwin Borchard, Book Review, 33 COLUMBIA L. REV. 552, 553 (1933) (reviewing BOYCOTTS AND PEACE (Evans Clark ed. 1927)).

[280] Borchard put this view in stark and disturbing terms at the 1933 meeting of the American Society of International Law:

> If neutrality were a thing of the past, every nation would have to arm to the teeth. Its privilege to exist would be jeopardized. I have for some time come to the conclusion that it is not our military men who are bringing on the next war. It is our so-called pacifists, who in their desire for universal peace would fight anybody they considered an "aggressor." *It was the abolitionists, you know, who were largely responsible for the Civil War.* It is the abolitions of neutrality who will probably have a lot to do with the next war. In a paroxysm of righteousness they will fight to get us into it.

27 AM. SOC'Y INT'L L. PROC. 55, 62 (1933) (emphasis added).

[281] *See generally* [[Hathaway and Shapiro]].

trade law.[282] But the point of departure remains the principle that each state is at liberty to decide with whom it wishes its nationals to trade.[283]

D. The Irony of State Action

These rules as they developed through the interwar period essentially turned the question of state action and attribution on its head. From 1905 through the debates at the League of Nations, many actors began with the question of whether the state—here, China—could be held directly responsible for organizing, conducting, or condoning the boycott.[284] And much of the Chinese defense, in reference to the boycotting citizens, could be summed up by the phrase "it's not us, it's them."[285] But by the end of the 1930s, this preoccupation could seem almost backward. On the one hand, the state continued to have significant, if indeterminate and deeply contested duties, to police any organized and concerted effort by private organizations to engage in contentious economic action on the international plane. And, on the other, the state was not necessarily in violation of any legal rule—other than its mutable treaty commitments—if it engaged in international boycotts of its own accord. The state was thus in its strongest position, legally as well as politically, if it consolidated its own power over economic warfare and vigilantly protected that power from challengers.[286]

The aftermath of the Second World War would, of course, work a massive transformation in the international legal and political order.[287] In the West, the conflictual years of labor-capital relations would finally be supplanted by national policies that sought to tame

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[282] For a helpful overview, see Ruys, *supra* note __.

[283] [[citation]]

[284] *See supra* Part II.A.

[285] *See supra* notes __ & __ and accompanying text.

[286] The clearest prediction in this respect came from Wang, *supra* note __, at 380 ("In the past the boycott has been largely a private affair. But with the adoption of the boycott as a legal sanction in the Covenant of the League of Nations and with the general desire to find a substitute for war, boycott will soon become a public policy enforced by governmental agents.").

[287] *See generally* IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 131–151 (2005); John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

the labor movement and prioritize stability and industrial peace.[288] This was accompanied by the consolidation and growth of an administrative and a national security state, the latter of which was well equipped to use newfound techniques of surveillance and governance to deploy sanctions and export controls.[289] The latter was enabled by a multilateral trading system, the General Agreement on Tariffs and Trade, which bound likeminded states into a trade relationship, but which also featured security exceptions that enabled the West to freely restrict trade in response to perceived Soviet aggression.[290] Meanwhile, the practice of economic sanctions was expressly endorsed in the United Nations, an organization whose effective universality solved the problem of American neutrality from the interwar years.[291] At the same time, the organization stopped far short of monopolizing the recourse to either armed force or economic warfare, leaving substantial liberty for states to protect their own interests unilaterally while claiming to follow the law.[292]

These developments transformed the legal terrain against which the boycott debates of the 1930s would be read. In the relatively early days of this new order, Wolfgang Friedmann revisited those debates and suggested that they were now of little more than theoretical importance.[293] The advent of the GATT and bilateral trade treaties, with their detailed stipulations of states parties' trade commitments, seemed to confirm that in the absence of such treaties states would be free to cut off trade as they saw fit.[294] The legality of state-based sanctions, then, would largely be a question of treaty law,

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[288] *See* Ruggie, *supra* note __, at 393–394. In the United States, see TOMLINS, *supra* note __, at 247–251.

[289] *See generally* DOUGLAS T. STUART, CREATING THE NATIONAL SECURITY STATE (2008); MULDER, *supra* note __, at __.

[290] *See* J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1051 (2020).

[291] *See* U.N. Charter, art. 41.

[292] The ability to resort to armed force unilaterally in cases of asserted self-defense is preserved in *id.* art. 51. As to economic measures, unilateral recourse is neither permitted nor prohibited by the text of the Charter.

[293] Wolfgang Friedmann, *Some Impacts of Social Organization on International Law*, 50 AM. J. INT'L L. 475, 495–498 (1956).

[294] *Id.* at 496–497.

if it were a hard question at all.[295] Accordingly, even if the trade unions of a Communist country were so closely associated with their government that the state was responsible for their actions, this would not give rise to an international wrong absent treaty stipulations.[296]

At the same time—and here it is worth noting that Friedmann is writing at the height of the Montgomery bus boycott—democratic countries need not fear or repress boycott movements in their own borders.[297] "Where there is a minimum of genuine group autonomy, where trade associations, labor unions, religious or political associations, or racial groups can operate in freedom," the state cannot be held directly responsible for their actions.[298] The older obsessions with conspiracy and combination in the Anglo-American law of boycott was slowly dying, as those conflictual legal doctrines were being replaced by a paradigm of industrial peace.[299] But this did not mean that these non-state organizations could simply reassert their power against that of the state. Rather, it was simply assumed that any boycott activity would be subject to "the general security laws of the country."[300]

In this framework, we can see a pincer move that finally erases, as a legal matter, the irritating sites of "self-governing" legal authority that characterized the earlier boycotts. That is, in the postwar legal order, the state is expected to monopolize the use of coercive power one way or another. It could do so by exerting total control over civil society, as exemplified by the relationship between state-sanctioned trade unions and the Soviet government. Or the state could adopt a liberal posture toward civil society, while ensuring that its "security laws" kept dissent within tolerable bounds. Meanwhile, the capacity to pursue economic warfare internationally is consolidated firmly by the national government, subject only to whatever conditions it has agreed to in trade and commercial treaties. In many cases, the only real legal constraints on state-ordered sanctions would be in domestic law.

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[295] *Id.*

[296] *Id.*

[297] *See id.*

[298] *Id.* at 497.

[299] *Id.* at 496 (citing cases and doctrine).

[300] *Id.*

As those constraints loosened, governments (in particular the United States) found themselves free to conduct "unrestrained economic warfare."[301]

As stated, this set of principles reflects in many ways the conventional wisdom that remains with us today. There are of course no shortage of legal rules—from trade law to human rights to the law of jurisdiction—that might bear on the legality of a given sanctions program.[302] But the liberty of states to conduct these programs seems to be a social and political fact, if not a universally accepted legal doctrine. Meanwhile, the highly contested international minimum standard has been translated into a routinely applied component of investment and commercial treaties.[303] In this way, the "due diligence" obligation continues to be imposed on state governments that fail to monopolize the use of coercive power within their borders, to the detriment of foreign investors.[304] The result, as James Gathii suggests, is to vindicate the rights of powerful states to engage in economic warfare, while pushing the less powerful to consolidate control over dissident elements in their territory.[305]

The legal principles giving rise to this reality, however, were never fully settled.[306] As decolonization proceeded, advocates for a New International Economic Order pressed for a strong norm of non-intervention, which would render many state-backed sanctions programs illegal under customary international law, thus pushing back against the prevailing embrace of anthropomorphized liberalism.[307] At the same time, many of these countries supported the cooperative public-private boycotts against Israel, insisting on their legal right to do so, and pushing some Western lawyers back to an embrace of

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[301] HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 47–48 (1990).

[302] *See* Ruys, *supra* note __.

[303] [[Dolzer & Schreuer]].

[304] *See, e.g.*, *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012–2, Award, ¶¶ 6.82 – 6.83 (Mar. 15, 2016); [[other investment cases]].

[305] *See* [[Gathii]].

[306] For diverging views in the postwar order, see Neff, BYBIL, *supra* note __.

[307] [[citations]].

normative liberalism.[308] From the United States, many municipalities, trade unions, and private organizations adopted boycotts against the products of Eastern Bloc countries, cutting against the official policy of the United States and one again raising concerns about private persons meddling in the affairs of state.[309]

Some of these controversies would simply raise questions about the best balance between state and private liberty in the economic realm.[310] But sometimes these controversies would hint at new versions of the old problems posed by the Chinse boycott societies. That is, to what extent can our commitments to modern state organization be squared with, or modified by, alternative visions of social order?

III. From Lawmaking to Worldmaking

The foregoing investigation has presented the transnational boycott as an engine for creating non-state sites of legal and political authority. This aspect of the boycott was a central organizing principle in the Chinese cases, as guilds and *ad hoc* societies emerged to implement and administer the boycott and to assert the power of the Chinese nation both internationally and internally against the Chinese state. Non-state coercive authority was the key problem for international lawyers as they struggled to address the boycott, ultimately devising doctrines that required the state to monopolize for itself the power to conduct economic warfare. The result, as it emerged in the postwar order, was a consolidated state, juridically empowered to conduct economic warfare internationally while required to repress analogous acts by non-state groups within its jurisdiction. This is not simply a juridical but also an institutional vision, as the legal arguments about the boycott, and sanctions more generally, "shaped … the political and economic order we have today."[311]

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[308] [[See Claggett, Bluestein & Paust]].

[309] Richard B. Bilder, *East-West Trade Boycotts: A Study in Private Labor Union, State, and Local Interference with Foreign Policy*, 118 U. PA. L. REV. 841 (1970).

[310] *See id.* at 938 (describing concerns with East-West boycotts as one involving a delicate balance between civil liberty and the national interest).

[311] MULDER, *supra* note __, at 3.

The story of the Chinese boycotts invites us to ask what alternative visions of world order might be embedded in the unruly practices that the international lawyers of the period sought to monopolize and tame. In reflecting on the boycott, I argue, it is useful to conceptualize this tactic as a vehicle for "worldmaking," in the sense recently popularized by Adom Getachew.[312] Worldmaking, in this sense, is a practical and intellectual project that seeks to call into being a new set of international institutional arrangements that contend with and correct for inequities in the existing system.[313] Getachew deploys this concept to correct a common view that casts the anticolonial nationalists of the twentieth century as being "parochial and anti-universal."[314] Instead, she shows that these thinkers and political actors sought political independence as part of a broader internationalist vision premised on non-domination, federation, and redistribution.[315] While Getachew's work focuses on the projects of intellectuals in the Black Atlantic of the twentieth century, the concept of worldmaking has proven useful in other historical and present-day contexts.[316]

Economic tactics like the boycott provide a vehicle—if an imperfect one—for catalyzing such worldmaking projects.[317] Forbath makes this point, though he does not of course use Getachew's terms, in connection with the labor boycott, distinguishing it even from a strike.[318] A strike, Forbath notes, may often seek to achieve aims such as better pay or working conditions, which can be seen as somewhat

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[312] GETACHEW, *supra* note __, at 2–5.

[313] *See id.* at 2.

[314] *Id.* at 3.

[315] *Id.*

[316] *See, e.g.*, OLUFEMI O. TAIWO, RECONSIDERING REPARATIONS 69–103, 172–190 (2022); Robert Flahive, *Building the United Nations Headquarters as Worldmaking?*, ALTERNATIVES (forthcoming 2022); Begüm Adalet, *Infrastructures of Decolonization: Scales of Worldmaking in the Writings of Frantz Fanon*, 50 POL. THEORY 5 (2022); Christopher Gevers, *"Unwhitening the World": Rethinking Race and International Law*, 67 U.C.L.A. L. REV. 1652 (2021).

[317] Getachew herself recognized both the power and limits of such actions. *See* GETACHEW, *supra* note __, at 69 (discussing C. L. R. James's call for "workers sanctions" in response to Italy's invasion of Ethiopia, in lieu of British imperial intervention or League sanctions); *id.* at 169–171 (noting that OPEC control over oil served as a "model" for Global South commodity associations, but also that the price spikes caused by OPEC actions in 1973 significantly injured postcolonial states).

[318] *See* FORBATH, *supra* note __, at 82–85.

transactional—once the terms of employment improve, the strike has achieved its objective. Boycotts, however, are more typically about power, control, and institutions:

> In boycotts, … "control" issues—enforcing unions' work rules and standards—predominated over wage demands. In addition, the 1880s boycott was almost always a rich illustration of … a "compound" or "secondary" boycott. If a city labor federation, for example, called a boycott against a brewer who persistently hired "unfair" men or spurned union work rules, then it would do more than declare his beer "unfair." Representatives would visit saloons and call on them to cease serving his beer or face boycotts and picket lines themselves. … These boycotts provoked court's anxiety and rage, in part because they mobilized whole working-class populations—broad networks of workers (and their families) not linked to individual workplaces or particular unions. … They rested on a notion of a moral circulation of goods and money …, *a world of exchange relations under the rules and norms of working-class organizations. …, rather than under the norms of the marketplace and the rules of courts.*[319]

The parallels to the Chinse boycotts, in terms of both tactics and objectives, should be readily apparent. The 1905 boycott, for example, catalyzed a dense array of trans-Pacific networks that would articulate a sense of Chinese nationalism counterposed to the Qing dynasty, linking the American Chinese exclusion policy to the weakness of the Chinese state.[320] In China, this meant the inauguration of a new era of urban protest, the rise of a "national products movement" to support domestic industry, the rising role of women's associations in local politics, and ultimately the nationalist spirit that culminated in the 1911 revolution.[321] This was not just a political and moral vision but also an institutional one. It relied on the empowerment of "overlapping networks of native-place associations, secret societies, merchant guilds, and political parties" as new loci of power in an emergent Chinese civil society.[322] And it was global in

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[319] FORBATH, *supra* note __, at 83–84 (emphasis added).

[320] *See, e.g.*, MAE NGAI, THE CHINESE QUESTION: THE GOLD RUSHES AND GLOBAL POLITICS 290–301 (2021).

[321] *Id. See also supra* Part I.A. and sources cited therein.

[322] *Id.* at 289.

scope. Historian Mae Ngai notes the influence of philosopher Kang You-wei, who in 1902 conceptualized Chinese emigration as a kind of counter-imperial economic expansion, in which wealth would be based on the "remittances of working people" rather than colonial extraction.[323] The Chinese exclusion laws of the United States—itself a rising imperial power—threatened this peaceful economic expansion.[324] The boycott, by challenging the exclusion laws, affirmed not only a national consciousness within the diaspora, but also an international vision based on emigration and peaceful commercial expansion rather than imperial capitalism.

As China passed from the imperial era to its tumultuous republican period, the meanings of the boycott also naturally shifted and multiplied. A consistent thread would of course be resistance to imperial—specifically Japanese—encroachments on Chinese territory and independence.[325] As one supporter of the boycott asserted in 1932, "[t]he boycott proclaims the fact that no person can be compelled to buy the goods of another at the barrel of a gun."[326] The heterogenous makeup of the boycott associations—encompassing, at times, labor and merchants' guilds, student radicals and intellectuals, republican nationalists and communists—meant that, of necessity, any richer vision of Chinese and world order was bound to be contested and fractured within these organizations.[327] Nonetheless, the institutional architecture of the boycott provided the setting where visions supporting Chinese self-determination, and opposing the country's "unequal integration" into the family of nations, could be articulated and put into practice.[328]

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[323] *Id.* at 290.

[324] *Id.*

[325] *See supra* Part I.B.–I.C. and sources cited therein.

[326] Judge Liang Yuen Li, *Some Aspects of the Sino-Japanese Conflict*, CHINA WEEKLY REV., Nov. 12, 1932, at 473 (reprinted from the PEOPLE'S TRIBUNE).

[327] Others have noted that, after 1919, the boycott associations came under greater control of the Chinese nationalist party. *See supra* text accompanying notes __–__ and sources cited therein. For the reasons discussed by Gerth in note __, *ssupra*, I do not think this means we should think of the post-1919 boycotts as monochromatic or fully centralized in their purposes and political orientations.

[328] The quoted phrase comes from GETACHEW, *supra* note __, at 40, in reference to the later era of decolonization.

None of this suggests that boycott tactics should be understood, then or now, as all of a piece with each other, or as unproblematic engines of international justice. To take just one obvious example, the Chinese boycotters of 1905 and the American labor unions of the same period were neither allied nor wholly the "good guys" of history. The American labor movement, quite famously, "played a leading role in the struggle to exclude Chinese and Japanese from American life altogether," including by supporting the Chinese exclusion policies that later sparked the anti-American boycott.[329] Unions were even engaged in their own brand of imperial worldmaking: after unsuccessfully opposing U.S. imperial expansion in 1898, the AFL and its allies fought to extend the Chinese Exclusion Acts to the United States' new Pacific holdings, thereby ensuring that imperial expansion and racial exclusion operated together, rather than at cross-purposes.[330] The boycotters, in turn, were fully aware of American labor's role in pressing for Chinese exclusion, to the point that American organized labor was often treated in boycott propaganda as the policy's chief initiator and orchestrator.[331] This critique of American labor often then spilled over into a critique of American-style democracy.[332] It would thus be a mistake to imagine the picture of benign, counter-imperial economic expansion that was expounded by some boycott intellectuals as necessarily entailing a democratic political order.[333]

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[329] DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 85–86 (1987).

[330] This argument is detailed in William D. Riddell, *Does Exclusion Follow the Flag?: Merchant Sailors and U.S. Imperial Expansion, 1895–1906*, 66 INT'L REV. SOC. HIST. 389 (2021).

[331] WANG, *supra* note __, at 154.

[332] *Id.* at 325. As one popular song went:

> When American laborers get power, Chinese workers will suffer ...
>
> [If] the Labor Party says yes, Americans will hush
>
> [If] the Labor Party says no, its countrymen will echo ...
>
> Why is it so? It is the way a democratic country works
>
> and civilized law dictates.

Id.

[333] *See supra* text accompanying note __.

The normative upshot of this analysis is, instead, far more modest. That is, if we think of sanctions and boycotts today as engines for worldmaking, this both complicates and clarifies the normative stakes. The ethics of economic sanctions remain understudied and contested, but as a general matter modern sanctions programs are usually justified by reference to policy goals, punishment, or expression.[334] Accordingly, some have justified sanctions programs on the ground that their policy goals—such as deterring aggression or atrocities—are important enough to justify the suffering they surely cause to innocent parties and even to the sanctioning parties themselves.[335] This, of course, requires sanctions to actually have clearly articulated goals and to be actually effective at accomplishing those goals—a dubious proposition in many if not most cases.[336] The lack of articulated or achievable goals also undermines many rationales, such as deterrence, for sanctions as punishment.[337] And, while sanctions may express a commitment to human rights, international law, or the "liberal international order,"[338] such justifications are problematic when sanctions impose real harm on innocent parties.[339] This absence of a clear justification thus sets up a strong critical case that sanctions are tools of "mass immiseration" that must be rejected.[340]

The concept of worldmaking provides a potential alternative justification for economic warfare, though one that most sanctions

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[334] *See* Joy Gordon, *A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions*, 13 ETHICS & INT'L AFF. 123 (1999). One can find longer lists; for example Christensen and Powers list five justifications for sanctions. Drew S.J. Christensen & Gerard F. Powers, *Economic Sanctions and the Just War Doctrine*, *in* ECONOMIC SANCTIONS: PANACEA OR PEACE-BUILDING IN A POST-COLD WAR WORLD? 97, 98 (David Cortright, George A. Lopez & Ronald V. Dellums eds. 1995).

[335] *See, e.g.*, Chrstensen & Powers, *supra* note __, at 100–101.

[336] *See, e.g.*, HUFBAUER ET AL., *supra* note __; Dursun Peksen, *Political Effectiveness, Negative Externalities, and the Ethics of Economic Sanctions*, 33 ETHICS & INT'L AFF. 279 (2019).

[337] Retribution remains an available justification for punishment that is neither effects- nor expression-based. But one would have to (a) be willing to be a retributivist; and (b) be willing to use this rationale justify the collateral harm imposed by sanctions. Neither is a convincing proposition in my view.

[338] *E.g.*, Norrlöf, *supra* note __.

[339] Gordon, *supra* note __, at 138.

[340] Bali & Rana, *supra* note __.

programs today would likely fail. Worldmaking, as noted above, has an expressive component, but also implies an institutional dimension.[341] When sanctions adopt a worldmaking function, they reflect and assert the power of alternative sites of authority, which may exist alongside or even in competition with the state. These could be the "workers' sanctions" of C.L.R. James' imagination, which he envisioned would have united leftist and anti-imperialist forces against the Italian invasion of Ethiopia and set the stage for an international socialist movement.[342] Or they might be the global movement to end apartheid in South Africa, which united Black South Africans with their allies across the globe in opposition to racial segregation and violence.[343] The Chinese boycotts thus exist alongside these and other such movements as historical examples of worldmaking projects through coercive economic action.

By no means does this suggest that the concept of worldmaking renders all or even most sanctions and boycotts palatable or unproblematic. Indeed, if we look at the history of boycotts in the nineteenth and twentieth centuries, we can find many examples of violent anti-Japanese and anti-Chinese boycotts in the United States, where the tactic was employed as part of a worldmaking project based on white supremacy and the exclusion of foreign and racialized labor.[344] The Chinese boycotts themselves were not, by contemporary measures, necessarily emancipatory projects, given the important and powerful role of the merchant classes and, later, the consolidation of the nationalist party.[345] If we fast forward to the present moment, we find that modern forms of sanctions, whatever their stated intentions, serve to empower a national security state that remains in the hands of a narrow privileged class while subjecting minority communities and dissidents to an unending stream of surveillance, coercion, and

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[341] *See supra* notes __, __–__ and accompanying text.

[342] GETACHEW, *supra* note __, at 69.

[343] The difficulties that the South African case poses for the critical view of sanctions is discussed in GORDON, *supra* note __, at 5–6.

[344] [[cites]].

[345] *See supra* Part I.

violence.[346] The world that sanctions have made, it turns out, can be a remarkably violent and oppressive place.[347]

The value of worldmaking as a justification for sanctions, instead, is that it opens up a new avenue for inquiry. Sanctions are not always and necessarily unjustified because they inflict pain, deprivation, and even death—after all, boycotts and strikes can do the same. But neither are sanctions justifiable simply because they are imposed in the service of putatively noble aims, such as protecting human rights or remedying violations of international law. Rather, the key question for normative inquiry, on this view, is one of empowerment: what institutional vision is being asserted by a given act of economic warfare, and who does that vision empower? This frame provides a vantage point that can remain critical of most—if not all—actually existing state-based sanctions programs, while accepting the need for, and even the moral value of, contentious acts of economic warfare. After all, there are times when it is necessary for the disfavored or disenfranchised "to assume the functions of government and to meddle with international relations."[348]

IV. Conclusion

This project began with the recognition that most of the literature on "sanctions" in international law and politics is focused on programs by Western countries and major international organizations. This focus is not unwarranted, given the size and scope of U.S. sanctions in particular, and the millions of people who are subject to them.[349] Nevertheless, the hypothesis was that we miss important aspects of the story by focusing only on the Western cases, to the exclusion of acts of force and resistance by smaller states or other actors. This investigation of the Chinese boycotts, it is submitted, validates this hypothesis by showing the importance of that story to

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[346] *See, e.g.*, Maryam Jamshidi, *Whose Security Matters?*, 116 AJIL UNBOUND 237 (2022): Jaya Ramji-Nogales, *Race in Security*, 116 AJIL UNBOUND 242 (2022).

[347] *See, e.g.*, MULDER, *supra* note __, at [[epilogue]]; GORDON, *supra* note __.

[348] *See supra* note __.

[349] [[citation on scope]].

the development of international law and to broadening the horizons for descriptive and normative inquiry.

But this avenue of inquiry is far from exhausted. Although this paper sought to show how states that were (at the time) on the periphery of international law nonetheless contributed substantially to its development, this inquiry has been only partly successful in de-centering the West from the study of international law and politics. While this paper has highlighted the role of Chinese merchants, activists, diplomats, and lawyers in creating and justifying the boycotts, it has focused mostly on debates in the League of Nations and in the pages of Western journals and treatises. But the boycotters also articulated their own visions of international law and politics.[350] These remain ripe for investigation, apart from the debates in Geneva or the pages of the *American Journal*, as examples of international law "from below."[351]

In addition, the Chinese example, while a formative one, is not the only instance of non-Western economic warfare. A broader research program on "subaltern sanctions" could usefully explore the possibilities for economic statecraft and resistance outside the American and European contexts. This is an area ripe for historical and normative inquiry, in a mold similar to this paper. But there is also an urgent need for a positive political theory of subaltern sanctions that describes the conditions under which smaller states or networks of non-state actors might exploit economic interdependence to secure political advantages.[352]

Finally, if sanctions and boycotts are not just about policy goals and expression but about worldmaking, then there is more work to do in mapping the world that modern sanctions have made. The past two decades have seen a dramatic increase in sanctions programs in Washington and at the United Nations.[353] These rely on a massive surveillance and administrative apparatus, and they also depend on a worldwide network of sanctions professionals in legal and compliance

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[350] *See, e.g.*, WANG, *supra* note __, at [[cites]].

[351] RAJGOPAL, *supra* note __, at [[cite]].

[352] For examples, see [[Barkawi and Laffey; Narlikar; Nguyen]].

[353]

departments to implement blocking orders and asset freezes.[354] This reality invites us to consider sanctions as less a purely governmental activity than as a public-private partnership, involving the development of significant expertise and access among sanctions professionals outside government.[355] There is thus more work to be done in tracing power as it flows out from the government bureaucracy and into the transnational, public-private networks that maintain the contemporary international sanctions order.

[354] [[Saravalle]]; [[Verdier]].

[355] [[Chachko on the internet]].