Hybrid Sovereignty in World Politics

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ABSTRACT

This dissertation explores public and private hybridity in the production of sovereign power, or hybrid sovereignty, through the cases of the English East India Company, Blackwater, International Chamber of Commerce, and Amnesty International. It asks: What forms and dynamics are featured in hybrid sovereignty? What implications does hybrid sovereignty have for politics? The dissertation aims to better reflect the diverse power relations we see in our headlines and our lives into our scholarship. A core part of this diversity is that not all actors in international politics are the same or endure in the same way. I argue that the indivisible sovereign state is more fiction than reality and that it takes a whole lot of diverse relations to produce sovereign power. These are relations of hybridity and I focus on public and private hybridity in particular. In this hybrid sovereignty, I complicate standard separations of state and nonstate and make clear the political stakes of their co-production. I also construct a conceptual framework where hybridity is foundational rather than incidental to sovereign politics. All of this supports the empirical weight of the cases, which reveal different hybrid relations across time and context to show the scope of this world. I offer a tour of its possibilities in accounts that are not usually put together across security, political economy, and law, to represent the same phenomena and the same politics. In brief, the world we inhabit on page one of our analysis dictates the remaining pages. I introduce a novel world of hybrid sovereignty. I contend that we have to be more thoughtful and precise about the power of and in hybridity if we want to intervene in ongoing debates about how we live responsibly with each other. In doing so, I contribute to research about sovereign authority and power; about relations and the construction of public and private; about historical methods and interpretive methodologies; and about breaking with conventions in unconventional times.
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Reading the right book at the right time is life-steering. The three books that steered me toward this project are not obviously connected. David Foster Wallace’s *Infinite Jest* stirred me to write about complex relations as a profession; Zadie Smith’s *White Teeth* confirmed that I had valuable things to say; Alexander Wendt’s *Social Theory of International Politics* made me feel less alone. This dissertation, and indeed the entire Ph.D. venture, would not be possible without these inspirations.

The steering continued past these origins. Ian Hurd served as the ultimate advisor, trusting me to pursue a project of atypically immense ambition. He alternately let me run wild and queried my wildness, always at the necessary times. His imprints of how to think about politics are on every page of this manuscript without any imposition of what to think. These qualities also flowed to the rest of my advising committee. With Mary Dietz, I ruminated on conceptualizing the problems of sovereign power and how they escape easy resolutions. Jim Mahoney guided in organizing case materials and proved a model for mapping the metaphorical larger forest from the details of specific trees. Bruce Carruthers encouraged exploration in various archives and offered support in corralling the different stories into coherent narratives. In every sense of the word, Ian, Mary, Jim, and Bruce were exemplary.

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To my mother and father.
Every moment happens twice: inside and outside, and they are two different histories.
- Zadie Smith, *White Teeth*

The sea is the land’s edge also, the granite
Into which it reaches, the beaches where it tosses
Its hints of earlier and other creation
- T.S. Eliot, *The Dry Salvages*
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Chapter One

INTRODUCING HYBRID SOVEREIGNTY

I. PUBLIC OR PRIVATE?

II. THE ARGUMENT

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I. PUBLIC OR PRIVATE?

Blackwater had power like Saddam Hussein. The power comes from the United States.¹

American forces killed 17 Iraqis without cause in Nisour Square, Baghdad, on September 16, 2007.² The Americans did not wear military uniforms nor did they answer to U.S. military standards. Instead, they worked for Blackwater, a firm contracted by the State Department for diplomatic security. The shooting was a watershed moment in the War in Iraq. Resulting media coverage revealed the increasing use of security contractors abroad as more contractors were deployed in Iraq and Afghanistan than U.S. military servicepersons.³ Contractors “carried weapons, had their own helicopters, and defended against insurgents in ways hard to distinguish from military actions.”⁴ Blackwater was the most infamous contractor, founded by billionaire Erik Prince whose sister, Betsy DeVos, is now the Secretary of Education.⁵ Prince sold Blackwater following the Nisour Square fallout in 2009. Yet he remains a key figure in American security. Just last month, the White House asked Prince to prepare an Afghanistan

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⁵ Blackwater has undergone many name changes, including Xe, and now goes by Academi. I refer to the company as Blackwater since this is its most easily recognizable form in public discourse.
military strategy. In response, he argued for deploying more contractors and installing a viceroy like the English East India Company did centuries earlier.

For many, the pertinent question to settle is whether Blackwater is public or private. The answer matters for accountability in law and responsibility in politics. Consider another incident. On Christmas Eve 2006, a drunken Blackwater contractor fatally shot a guard of the Iraqi Vice President. The contractor was fired, fined $2,000, and sent back to U.S. without facing any charges. “If this had happened in the United States, the contractor would have been arrested and a criminal investigation launched. If a drunken U.S. soldier had killed an Iraqi guard, the soldier would have faced a court martial.” But security contractors have an unclear legal status since they “are not quite civilians, given that they often carry and use weapons, interrogate prisoners, locate bombs, and fulfill other critical military roles,” and “yet they are not quite soldiers.” Moreover, Blackwater operated under multiple government contracts. Seven years after the Nisour Square shooting and after an initial botched trial, in 2014 four Blackwater guards were convicted of the Nisour Square shootings. One year later they were sentenced in the first known criminal conviction of global security contractors under U.S. law. The verdict now faces an appeal because it is not entirely settled whether the Justice Department had jurisdiction to prosecute under a State Department contract.

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8 U.S. House of Representatives, “Blackwater USA,” Hearing before the Committee on Oversight and Government Reform, October 2, 2007: 3.
11 “Under federal law, the government has jurisdiction for overseas crimes committed by defense contractors or those supporting the Pentagon’s mission. Blackwater was working for the State Department, a distinction
During the sentencing trial, one witness made a startling observation, quoted in the epigraph: Blackwater had sovereign power, like Saddam Hussein’s, sourced from the United States. Sovereign power is usually reserved for holders of territory with a successful monopoly over the use of violence and those recognized with international legal sovereignty. Sovereignty defines the bounds of power, legality, and ethics in international politics. For instance, it is legal to kill if you are a sovereign state declaring war; it is illegal if you are a nonsovereign entity declaring resistance. What does it mean for Blackwater to wield sovereign power in international politics?

II. THE ARGUMENT

The dissertation turns away from settling whether Blackwater is public or private to explore instead how Blackwater’s public and private hybridity produces sovereign power. American security contracting abroad represents the broader phenomena of hybrid sovereignty, which I define as overlapping public and private relations in sovereign realms of violence, markets, and rights in global politics. Even before the American election of a “businessman president,” public and private hybridity were essential to producing and mobilizing sovereign power in world affairs. The Ukrainian crisis began when security
contractors working for Russia took over airports in Crimea.\textsuperscript{15} Brexit prompted a slew of lawyers, trade experts, lobbyists, and public relations firms to advise the British government in its pending negotiations with the European Union.\textsuperscript{16} The World Bank announced a change in strategy to development financing where it would now serve as a broker for investors rather than a lender to governments.\textsuperscript{17} WikiLeaks and Russian hackers collaborated to release emails of the Democratic National Committee to influence the American election.\textsuperscript{18}

While public and private hybridity of this sort is pervasive, it has yet to receive sustained attention in political science. The dissertation then puts at its core public and private hybrid configurations in sovereign politics. It asks: What forms and dynamics do public and private relations take in hybrid sovereignty? What implications does hybrid sovereignty have for politics? Given that “the international system comprises diverse actors with legitimated power and so has diverse locations of sovereign authority,”\textsuperscript{19} I specify the source of this diversity as configurations of hybrid sovereignty. I also deviate from conventional treatments of public and private in two ways. First, I do not assume public and private as independent but rather train my analysis on public and private interdependence. Second, I underscore that an effect of sovereign power is to determine what counts as public and private in the first place.

The dissertation is about a new set of power relations in sovereign politics. Sovereignty heightens the tension between public and private by drawing borders between them. However,

\textsuperscript{17} The World Bank, Speech by President Jim Yong Kim, “Rethinking Development Finance,” April 11, 2017.
public and private bargains are also what sustain sovereign power. My theoretical focus is on introducing a novel understanding of sovereignty, one that is not a static attribute in which states have more or less power, but a relation that various actors help construct through dynamic hybridity. My empirical focus is on the assemblage of hybrid relations in transnational organizations, an underdeveloped field of study because of poor longitudinal data quality. I construct rich political histories of a wide variety of global organizations: the English East India Company, Blackwater, the International Chamber of Commerce, and Amnesty International. I find that these organizations expend tremendous resources on hybrid relations and for them politics is about determining relations, not just interests. Moreover, their hybridity constitutes sovereign power in ordering violence, markets, and rights across the world.

Responding to this hybrid landscape, the current White House national security advisor and the director of the national economic council asserted jointly that “the world is not a ‘global community’ but an arena where nations, nongovernmental actors and businesses engage and compete for advantage. We bring to this forum unmatched military, political, economic, cultural and moral strength. Rather than deny this elemental nature of international affairs, we embrace it.” In hybrid sovereignty, these statements collapse unto themselves: national governments, nongovernmental actors, and businesses engage and compete with each other to produce shared military, political, economic, cultural, and moral strength in the world. The key to this shared production is hybridity.

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Taking Hybridity Seriously

So which is the lie? Hard or soft? Silence or time?
The lie is that it’s one or the other.
A still, floating bee is moving faster than it can think.²²

Hybridity is the condition of being in between. When something is not fully encompassed by one way of being and spills to another, it is hybrid. For instance, hybrid cars run on a combination of electricity and fuel. They are not fully electric nor fully gas. Biology references hybrids in cross breeding (liger as lion and tiger) or hybridity in maturation processes (caterpillar to butterfly). Hybrids proliferate the political world as well. In a “mixed market economy,” states organize political economy as a combination of market control and deference to mobile capital. “Quasi-authoritarian regimes” might feature competitive local elections without national elections or a free press. The Cold War was a relatively stable condition of almost-war and almost-peace. In fact, given that political categories like democracy and capitalism are ideal types, most political phenomena fall on a spectrum of hybridity. However, political scientists disproportionately focus on the ideal types, the poles of a category, rather than the middle space. It is in this middle space that hybridity thrives, when something is not one or the other, or at times multiple things at once.²³

Political hybridity thus exudes a built-in tension. The tension is an urge to belong to one end of the pole or another. The belonging responds to political imperatives to draw borders

²³ Hybridity is a prominent concept in cultural studies, especially for constructing postcolonial identity as a “difference ‘within,’ an ‘in-between’ reality.” Homi Bhabha, The Location of Culture, London: Routledge, 1994: 19. However, other disciplines have taken up hybridity to question taken for granted dualisms like human-nature, modern-traditional, international-local, and us-them. For a recent overview, see Nicolas Lemay-Hebert and Rosa Freedman, editors, Hybridity: Law, Culture, and Development, New York: Routledge, 2017.
that claim duties and responsibilities. We care whether a state is democratic or not because
democratic ideals are held to a different standard for politics than non-democratic ones.
Without the political imperative to differentiate, there would be nothing at stake in political
categories and ideal types. The content of those stakes and the contours of the categories are
contested. Democracy does not look the same everywhere and does not hold the same valence
for all political questions. Its value is lost in all-encompassing universality. Instead, we argue
to what extent differences in particulars change the overarching category. We revise our
minimal democratic thresholds. We come close to abandoning the ideal type but then revive it
for yet another political question with democratic stakes. This is the labor of negotiating a
socially constructed concept. Such labor is multiplied in hybridity because categories are pulled
in multiple directions, each with its own set of claims and stakes. The labor to resolve tensions
in hybridity leaves a mark. We can trace these marks in the form of contestation and
negotiation over affixing hybridity so it belongs to one thing or the other.

Sovereignty is also hybrid. We typically think of sovereignty as indivisible and public.
Sovereignty is indivisible because it allocates sole custody of political authority. Sovereignty is
public because it monopolizes legitimate control of the state away from the private. This
version of sovereignty is *Imagined Sovereignty*, like the ideal typical poles of a category, and it
serves as useful fiction for state power. *Imagined Sovereignty* allows us to concoct a narrative
of unity, project accountable sovereign representatives, and claim grievances against
usurpations of power. However, *Imagined Sovereignty* does not cover all our experiences of
sovereignty. *Lived Sovereignty* is the divisible and diverse practices of sovereignty. Sovereignty
is divisible because political authority is fragmented. Sovereignty is diverse because a panoply
of controllers maintain order in fragmentation. Both types of sovereignty are important.
Consider that there is a front and back stage to sovereign power. *Imagined Sovereignty* is front stage projecting absolute indivisibility, and *Lived Sovereignty* is back stage keeping the show running through diverse relations. Sovereignty is hybrid then in two ways. First, sovereignty oscillates between its imagined and lived expressions. Second, sovereignty lives in hybrid configurations of political relations.

However, hybridity in sovereignty is not the same as hybridity in cars. The pure types of cars that are electric or run on gas have a material existence. Similarly, the biological types of lion and tiger can stand apart to then create a liger. However, sovereignty does not have the same material status. Sovereignty is not a dichotomous variable but a social construct that is *inherently* fluid in a way that cars and animals are not. The pure type of sovereignty is imagined. In practice, sovereignty is hybrid. David Lake asks, “what we learn by acknowledging that not all interesting actors within the international system are fully sovereign.”24 This study shifts the emphasis to inquire instead what we learn by acknowledging that all interesting actors within the international system reflect hybrid sovereignty. Taking hybridity seriously means to reconsider the entire conventional form of sovereign politics.25 It is not enough to add hybrids and stir26 as hybridity changes the foundation of political authority by transforming our units of analysis, the purpose of sovereign power, and dilemmas of sovereign accountability.

26 This is the dominant approach of recent scholarship in international politics that flirts with hybrid forms without taking stock of the foundations of sovereign politics or how hybridity can be accommodated in the conventional framework. See for instance: Edgar Grande and Louis W. Pauly, editors, *Complex Sovereignty: Reconstituting Political Authority in the Twenty-First Century*, Toronto: University of Toronto Press, 2005; Anne Marie Slaughter, *A New World Order*, Princeton: Princeton University Press, 2005; Deborah Avant,
Hybrid Sovereignty

Hybrid sovereignty raises foundational tensions for the nature of political authority by blurring the public and private distinction along with any easy demarcation of roles the distinction makes possible. More than any other construct in international politics, sovereignty relies on bright line markers of public and private. Conventional state sovereignty privileges indivisible public control over private control. Sharing sovereignty is regarded a sign of state weakness or even state failure. Hybrid sovereignty, in contrast, rejects the indivisible hand of the state and redefines sovereignty as a shared construct of power relations. The shift to hybrid sovereignty calls out the standard debates about the future of sovereign states as a distraction. These debates test state resilience in response to emerging privatization or private authority. Instead, in hybrid sovereignty it becomes unclear who counts as public or private in the throes of maintaining and mobilizing sovereign power. A focus on hybrid sovereignty then highlights transforming sovereign politics beyond state capacity.

The most profound expression of hybridity in sovereign politics is between public and private. The public and private distinction is a “master distinction” that organizes domestic and international, internal and external, and war and crime. It is at the center of legitimating


political authority, which Bernard Williams calls the “first question of politics.” Constructing the public and private distinction means creating political authority and allocating who counts as legitimate with what powers and obligations. Precisely because the lines between various public and private relations inform what is state-sanctioned, determining these relationships is deeply political and is at the heart of debates about the state’s future. It is important to specify how these constructions take place and where they fall short. Hybrid relations reconfigure the public/private distinction, becoming “less a ‘grand dichotomy’ than a grand relationship.”

Like most relationships, public and private hybridity is fluid and ever-changing.

Traversing the public and private boundaries is pervasive in international politics. Hybridity is not about “simply the emergence of significant transnational or sovereignty free actors in international politics, but private actors exercising power that is perceived as legitimate, actors who are engaged in authoritative decision-making in areas of governance that were traditionally the domain of sovereign states.” Hybridity abounds in security where “the public–private distinction is further complicated by a constellation of negotiations, contestations, and stake-claiming among different competing public bodies, as well as private ones. Hence, what we may deem as belonging to the public realm is also a site of contestation and negotiation.”

Hybridity abounds in political economy where “a redistribution of

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responsibilities for the production of common goods among public and private actors, the emergence of new forms of private interest government (i.e., the private production of public goods), and new modes of cooperation between public and private actors (e.g., policy networks and public-private partnerships).”

Hybridity abounds in international law where

the development of basic principles of administrative law beyond the state triggered by globalization, the blurring line between what is public and what is private, and the emergence of hybrid forms of governance, the proliferating relations between different actors (agencies, corporations, non-governmental organizations (NGOs), individuals, etc.) which currently dominate the global legal landscape, and the crisis of legality enhanced by the growth of norm-making activities beyond the state.

The hybridity in these phenomena in security, political economy, and law is fueled by public and private entanglements.

Yet hybridity is not taken seriously by the conventional approach to sovereign politics that keeps apart private and public. The separation is reflective of a refusal to link private with state power. Early modern scholars prominently feature public-private bargains in their accounts of state formation. For Charles Tilly, public authorities used privatized violence to help control their populations from rivals and secure revenue. Mercenaries and pirates played a key role in how effectively power holders could wield coercion. For Hendrik Spruyt, public authorities were spurred on by long-distance traders to create new alliances. Merchants were the first movers in the game by making themselves attractive as partners or by going it alone and threatening public authorities as rivals. Over time, however, both Tilly and Spruyt phase out private actors from statehood: “The state claims a domestic and external monopoly of force.

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32 Grande and Pauly 2005: 5.
As a consequence, nonstate actors are stripped of coercive means—mercenaries and privateers thus have disappeared."³⁶ Janice Thomson notes that, “little more than a century ago, the state did not monopolize the exercise of coercion beyond its borders. This means that the state, portrayed in theory as monopolizing coercion, is distinctively modern. It emerged only after some three hundred years of state-building.”³⁷ The state formation narrative ossifies public as state, private as nonstate, and sovereignty as public control over private. Private actors peek in from the margins, if at all, and appear puzzling when they take center-stage. In reference to security contractors we are told “not since the eighteenth century has there been such reliance on private soldiers to accomplish tasks directly affecting the tactical and strategic success of military engagement.”³⁸ Hybridity surprises conventional sovereign politics.

In the conventional framework, if hybridity is recognized at all, it is recognized as an illegitimate imposter. We need to settle hybridity, to affix it so it belongs to one or the other category, because of political anxieties with things falling through cracks unaccountably. Normative concerns follow hybridity like “the crisis of legality” in international law above. Hybridity poses a problem because “this alliance between public and private agents, between governmental and corporate elites, is working a reconfiguration of authority relations. It is blurring the distinction between the public and private realms and enhancing the legitimacy of the latter as a source of authority.”³⁹ In other words, hybridity creates an

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³⁶ Spruyt 1994: 16.
Imposter layering public legitimacy with private action. Understanding the imposter’s motives are paramount, for “hybridity can and should be unpacked in order to realize whether it is the result of pursuing the most powerful interest, instead of the very public interests that required the emergence of a global regime.”\textsuperscript{40} Hybridity is a mask for private, nefarious purposes.

A different approach, forming gradually, considers hybridity not as an aberration but an opportunity to evaluate the contingency of the public and private distinction.\textsuperscript{41} In this view, there are no imposters. Instead, “innumerable fundamental but hidden issues in seemingly simple cases involving, for example, the contracting-out of types of governmental services, have a profound effect on how we begin to redefine the public and the private and, in the process, structure a more fluid, flexible, and democratic governmental system appropriate for the global era.”\textsuperscript{42} Contingency in the public and private distinction means the definitions are not settled in the conventional state/non-state roles. Rather, any idea of the public is \textit{made} public and the private is \textit{made} private. The constructions vary, and we can begin mapping these varieties, for instance in international investment arbitration:

Under [one] “public/private” distinction, the “public” is the international community as a whole, and this is contrasted with “private,” quasi-contractual arrangements between particular states or between states and investors. [...] Under [another] “public/private” distinction, the “public” is the collective interests of a host state, and the “private” is the individual interest of an investor company in protecting, and profiting from, its capital.\textsuperscript{43}

\textsuperscript{40} Casini 2014: 403.
The referents to public and private change with context: what might appear public in one, like governmental interests to regulate corporations, becomes private in another context, like governmental interests to expropriate corporations when party to investment arbitration treaties. Demarcating hybridity is the mask, not hybridity itself.

In hybrid sovereignty, hybridity is not an imposter to unmask but an expression of contingency in flux. Public and private hybridity is not an outcome. Instead, hybridity is the raw material of sovereign politics. More specifically, it is hybrid *relations* and not hybrids as fully realized fact. A relational view of sovereign politics is vastly different from the conventional perspective that reduces sovereignty and sovereign power to an attribute as something a state *has* or an institution to which a state adheres. If we begin with assuming attributes and institutions as the basis of sovereign politics, then we end up in a place where they are under attack from hybridity. Hybridity erodes. When we begin with assuming relations as the basis of sovereign politics, it is not difficult to construct various configurations of public and private hybridity that prop up sovereign functions. Hybridity builds. Attributes or institutions of sovereign politics are relational compositions. Hybrid relations are contested battlegrounds and just like any relationship, hybridity brings its own toxicity. However, we are unable to see toxic relations if we continually focus on hybridity eroding state power.

Not all actors occupy hybridity in the same way. Figure 1 presents hybrid sovereignty along two dimensions: sovereign realm and hybrid relations. I elaborate on this construction in the next chapter, but on a basic level it captures the types of relations between public and private (contractual, institutional, shadow) and which sovereign realm they engage with (violence, markets, rights). The types of hybrid relations vary in their formalization and publicity. *Contractual hybridity* includes formalized and publicized contractual relations
between public and private actors, such as public-private partnerships in international development. *Institutional hybridity* includes linkages where public and private relations are embedded in wider institutions, such as when weapons manufacturers employ former members of congress. *Shadow hybridity* includes informal side bargains, which are often obscured from publicity, such as when corporations negotiate quid pro quo deals for reducing international trade barriers.

Hybrid sovereignty thus means that public and private hybridity is not incidental or detrimental but integral to sovereignty and sovereign power. The standard zero sum “sovereignty contests” of state decline or state autonomy look differently when we unveil the relations upholding sovereign governance. It means there might be more continuity in sovereign relations under the hood than the surface suggests. Consequentially, as hybrid relations reconfigure, so do sovereignty and sovereign power.

**Figure 1. Hybrid Sovereignty**

<table>
<thead>
<tr>
<th>HYBRIDITY</th>
<th>CONTRACTUAL</th>
<th>INSTITUTIONAL</th>
<th>SHADOW</th>
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<tbody>
<tr>
<td><strong>SOVEREIGN REALM</strong></td>
<td>VIOLENCE</td>
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The rest of the dissertation theorizes hybrid sovereignty, shows its forms and dynamics in practice, and contemplates its implications for politics.
III. RESEARCH DESIGN

An interpretive methodology guides the project. I do not seek to demonstrate the causal effect of a sample of phenomena or causal mechanisms for a specific phenomenon.\(^{44}\) Instead, I make claims about how to interpret and understand a set of phenomena.\(^{45}\) The study is one of “world-building,” where I create a new world of relationships that cohere and change over time. I pay attention to the “softness and historical boundedness” of politics in this world.\(^{46}\) I build a new world because hybrid sovereignty transforms our units of analysis meaning we cannot explore it using existing foundations. I populate this new world with detailed political histories of the forms and dynamics of the hybridity to investigate how hybridity emerges and engages with sovereign politics and what this means. The dissertation takes seriously that the definitions we use in the first page of our research – for instance by answering “what is this a case of?” – has consequences for how we analyze politics in the rest of the pages. An interpretive methodology then allows me to show how hybrid sovereignty better classifies cases thought of as singularly nonsovereign or a threat to sovereignty.

Cases

The dissertation draws on historical methods to investigate four cases: the English East India Company, Blackwater, the International Chamber of Commerce, and Amnesty International. The East India Company was created by royal charter in 1600 for trade to “the

\(^{44}\) Gary Goertz and James Mahoney, A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences, Princeton: Princeton University Press, 2012.


Indies” and was the dominant form of British rule in India until 1858. Blackwater was formed in 1996 as a weapons training facility and became the largest security contractor for the U.S. State Department in Iraq. The International Chamber of Commerce was founded in 1919 and is a world federation for free trade composed of more than 8,000 corporations and chambers of commerce in 130 countries. Amnesty International was formed in 1961 and is the foremost human rights international non-governmental organization with over three million members.

I reclassify the cases from the conventional private authority or state-centric accounts who think of them as apolitical, private, sovereignty challengers to be cases of hybrid sovereignty.

While the project has a broad scope, it takes historical research seriously by drawing from over 120,000 pages of original data collected at various national and private archives. Some data was previously restricted and some took over five years to gain access. I collected systematically high-level meeting minutes of the formative periods of each case except Blackwater. From these minutes, I traced how the organizations strategized governmental relations over time. For the East India Company, from the British Library’s India Office Records, I collected all the minutes for the 14,400 Court of Directors’ (top managers) meetings between 1678 and 1780. In addition, I collected reports and correspondence from its field operators, petitions to and correspondence with members of parliament and the monarchy, charters, preparations and arguments for trials, and various publications and public propaganda. For Blackwater, from the U.S. national security archive, I obtained recently declassified documents on security firms in the 1990s. I also drew on 2,238 news articles on Blackwater between 2000 and 2016, Congressional hearings and reports, and legal briefs and filings from Blackwater’s criminal and civil cases in U.S. courts through WestLaw. For the International Chamber of Commerce, from the Bibliothèque National de France and the International Chamber of
Commerce archives, I collected minutes from its top executives' meetings between 1919 and 1970 (last available year), minutes and speeches from the annual meetings of its international congress, and various publications and propaganda. Finally, for Amnesty International, from the International Institute of Social History, I collected minutes from its top executive committee meetings between 1961 and 1986 (last available year), oral history interviews, annual international council agendas, correspondence from its founders, drafts of petitions and campaigns, and reports from its field researchers.

Relations are not easy to trace and it is hard to capture their essence in meaningful ways. I relied on content analysis and event mapping to look for indicators of hybrid sovereignty. For contractual hybridity, I used evidence of formal contracts and public exchanges, for institutional hybridity I used evidence of institutional links and political representation, and for shadow hybridity I used evidence of side bargains and hidden backchannels.

The East India Company was one of the first to leverage its transnational hybridity for competitive advantage. By the 19th century, the East India Company had control over a greater land size and population than Great Britain's. In India, the Company established forts and trading posts, created local currency, organized land and naval forces, collected taxes, and produced laws, all through a trade in spices, textiles, and opium. In my account, the East India Company began with contractual hybridity, which involved formal and frequent charter negotiations with Crown and Parliament, moved into institutional hybridity, which involved more use of political networks and fewer charter negotiations, and slithered into shadow hybridity, which involved behind-the-scenes trades and infrequent charter negotiations. As a response to this shadow hybridity, the East India Company was reined with contractual hybridity again. Navigating these hybrid forms undergird the micro-foundations of the East
India Company’s rapid growth and demise, allowing it to pursue global domination on an unprecedented scale.

I use this earliest case to interpret patterns in the contemporary organizations. While the East India Company occupied all configurations of hybrid sovereignty at various times of its history (Figure 2), the contemporary cases are representative of particular hybrid configurations (Figure 3).

Figure 2. Hybrid Sovereignty: English East India Company

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SOVEREIGN REALM

English East India Company

Figure 3. Hybrid Sovereignty: Blackwater, International Chamber of Commerce, and Amnesty International

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SOVEREIGN REALM

Blackwater

International Chamber of Commerce

Amnesty International
Blackwater represents *contractual hybridity* in organizing violence abroad, configured through formal and publicized contracts with the U.S. government. Blackwater’s hybridity sustains the U.S. war effort without the political costs of deploying troops or the legal ramifications of following the rules of engagement. The International Chamber of Commerce represents *institutional hybridity* in organizing global markets, configured through informal and less publicized institutional lobbying channels and formal and more publicized self-regulatory corporate networks. The International Chamber of Commerce’s hybridity produces an elite network for global rules entrepreneurship in trade and markets. Amnesty International represents *shadow hybridity* in organizing transnational rights, configured primarily in close informal and unpublicized relations with governments. Amnesty’s hybridity allows it to manufacture a moral foundation for promoting a rights agenda as a government watchdog, while maintaining its political survival through the support of various governments.

My comparison strategy is not across the cases – that is, I do not argue that the East India Company’s hybrid forms evolve into the contemporary cases (although, Erik Prince, Blackwater’s founder, has directly advocated for an East India Company strategy in Afghanistan⁴⁷) or that the contemporary cases all reflect the same type of phenomena done differently. Instead, I apply hybrid sovereignty to different times, places, and contexts to maximize variation in building a more diverse, relevant, and political world.

⁴⁷ “For 250 years, the East India Company prevailed in the region through the use of private military units known as ‘presidency armies.’ They were locally recruited and trained, supported and led by contracted European professional soldiers. [...] An East India Company approach would use cheaper private solutions to fill the gaps that plague the Afghan security forces, including reliable logistics and aviation support.” Erik Prince, “The MacArthur Model for Afghanistan,” *The Wall Street Journal*, May 31, 2017.
IV. CONTRIBUTIONS

The dissertation shows hybrid sovereignty in world politics in theory, history, and practice. It intervenes in leading debates on the nature of political authority, sovereignty, and public and private relations.

The dissertation interrogates the automatic coupling of “public” with sovereign power and the state and of “private” with the nonstate and nonsovereign. “Historically, western political theory has designated the state as the quintessentially public actor, leading to one characterization of the public/private distinction as political/nonpolitical.”48 I move beyond this limited version of political authority to build on other political and social theorists for whom sovereign power has always been a bargain between varied types of public and private actors. When IR scholars foreground private authority, their focus is on epistemic49 or moral authority50 but never political or sovereign authority. Moreover, these approaches inquire whether private authority matters for state behavior instead of whether such authority is constitutive of state power. If most conventional scholarship “is obscured by public definitions of authority that render privatized authority relations analytical and theoretical impossibilities,”51 then introducing hybrid public and private authority as constitutive of sovereign power unsettles this occlusion. Hybrid sovereignty argues that the most important structures of power in world politics do not feature just one type of authority, constituted in a

fixed way. Instead, these power structures feature different configurations of hybridized authority which interact to govern us. I clarify these interactions and provide analytically useful ways to differentiate overlapping relations. Such clarification is the first step to knowing how sovereign power operates and reorients questions on unitary state authority. Furthermore, apart from challenging that the private is nonsovereign, the study also debunks the illusion of an entirely public sovereign state. This means that the United States reflects hybrid sovereignty as much as Blackwater does.

The dissertation also redefines sovereignty as relational to emphasize hybridity as constituting rather than challenging sovereignty. Typically, scholars conflate sovereignty and sovereign power and conceptualize both as quantifiable possessions that states take away from other states. This offers a zero-sum perspective on the possibilities of sovereignty. However, in defining sovereignty a generalized set of relations that supports sovereign power, the dissertation offers a more productive perspective on sovereignty as resource. Redefining sovereignty is important for supporting the more expansive types of sovereign power. When sovereign authority has diverse sources, IR scholars often decry an erosion of state sovereignty. Here, Imagined Sovereignty stands as the default version of sovereignty that is indivisible and public. However, the dissertation’s relational approach pivots to Lived Sovereignty as another version of sovereignty that is divisible and diverse. Hybrid sovereignty explores the lived version of sovereignty for producing sovereign power, meaning hybridity does not lead to a decline but rather a transformation in state sovereignty. The new framework

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of sovereign politics then discards the stagnant state decline versus state resurgence debates prevalent in assessing global power.

Finally, the dissertation offers a fresh position on how to imagine public and private relations. I assert that we do not begin with self-evident public and private authority but only “authority that is made public and authority that is made private.”

In the real politics of world affairs, there is no autonomous public or autonomous private; all we have is their mingling to various degrees and levels of success. The public and private distinction “allows us to distinguish between various social relations, such as society/individual, civil society/family, state/family, state/civil society, state/market, and we may add international society/domestic state, and international society/global civil society.”

Given the centrality of the public and private distinction for international politics, it is puzzling how little research IR scholars have produced on it. The exception is a small field of feminist scholars who interrogate the gendered dynamics of the public and private distinction in international law. In the dissertation, I illuminate current and historical cases representing configurations of hybridity, addressing a clear dearth of empirical studies on public and private relations in IR. I also consider the wider

54 Lu 2006: 15.
implications of public and private hybridity for accountability. Precisely because the lines between “public” and “private” inform what is considered state-sanctioned practice, determining these relationships is deeply political and is at the heart of debates about political accountability. However, in hybrid sovereignty it becomes unclear who counts as public and private, which complicates who we hold accountable in politics. My research suggests that if we begin from a place where the private is already political, it is easier to create awareness and dialogues surrounding accountability. While most discussion of hybrid relations centers around privatization framed as public functions being removed from politics, we should instead think of hybrid relations as taking on political character. Diversifying our conversation beyond privatization can then expand political accountability and bring hybrid relations under more scrutiny than shunning hybridity to a nonpolitical sphere.

V. PLAN OF THE WORK

In the following pages, I conceptualize hybrid sovereignty and show its various forms and dynamics in practice. The second chapter introduces a new conceptual architecture of sovereign politics. This architecture disaggregates between three confluences: sovereignty and sovereign power, imagined and lived sovereignty; and sovereign power in statehood and governance. I show how scholars studying private authority, state formation, and global governance conflate different components in this architecture, leading to knowledge gaps. I then move to conceptualizing the different configurations of hybrid sovereignty and address their respective accountability dilemmas.

In chapter three, I explore hybrid sovereignty in the English East India Company. I cycle through the East India Company's various hybrid forms: *contractual hybridity* featuring formal and public charter negotiations until 1698, *institutional hybridity* featuring more lobbying and use of political networks until 1730, and *shadow hybridity* featuring informal behind-the-scenes trades with the Crown and Parliament. I also use legal cases to highlight the transformation in the East India Company's self-understanding of sovereign authority shifting from a sovereign privilege to a sovereign right.

The fourth chapter examines *contractual hybridity* in Blackwater organizing international violence. The analysis fuses IR and American political development to present accountability gaps in Blackwater's contracting practices while also situating security contracting within a moment in the state of American contracting where all contracting becomes securitized. The chapter also investigates various contours of sovereign authority buried in the bureaucratic politics that continually redefine “inherently governmental functions.”

In chapter five, I analyze *institutional hybridity* in the International Chamber of Commerce organizing global markets. I highlight its evolution from a lobby group to a service provision organization. To capture the International Chamber of Commerce’s various institutional networks, I focus on its role in killing the International Trade Organization post-World War II and its self-regulatory global governance apparatus. I also compare the International Chamber of Commerce’s public and private relations to that of the medieval Law Merchant.

Chapter six examines *shadow hybridity* in Amnesty International organizing human rights. I focus on the tension between moralizing and politicizing Amnesty, and then show its shadow relations with governments that involved funding and access to field sites. This
hybridity is surprising because Amnesty represents a global human rights agenda that is oppositional to governments. I show how these shadow relations are integral to the survival of Amnesty and the mobilization of sovereign power in promoting and protecting transnational rights.

The seventh chapter concludes by reconsidering power in world politics given a turn to hybrid sovereignty and proposes a research agenda. The networks of sovereign politics we are part of have always been hybrid. If we are to sustain meaningful dialogues about sovereign power, it is crucial that our research begins to reflect this hybridity.
Chapter Two

A NEW ARCHITECTURE OF SOVEREIGN POLITICS

I. A NEW SOVEREIGN POLITICS

II. THREE CONFLATIONS IN SOVEREIGN POLITICS

   Sovereignty and Sovereign Power

   Imagined Sovereignty and Lived Sovereignty

   Statehood and Governance

III. CONFIGURATIONS OF HYBRID SOVEREIGNTY
1. **A NEW SOVEREIGN POLITICS**

To renegotiate the ethos of sovereignty in the contemporary context requires an audacious pluralization. Such a political project is demanding.\(^{57}\)

This chapter constructs a new architecture of sovereign politics where hybridity is made visible. Sovereign politics encompasses the full range of sovereignty, sovereign power, and sovereign dilemmas that accompany political authority. The design of a structure does not offer neutral vantage points. Instead, each structure contains its own expanse and constraint where features take on a starring or background role. Some designs showcase light, others texture or form, or others yet play. The design of sovereign politics thus far conceived is not best suited to show hybridity. We need a new architecture of sovereign politics for an appropriate vantage point on hybridity. I begin this venture by identifying public and private hybrid relations as its key materials. The following sections build the various components of sovereignty and sovereign power that are upheld by configurations of hybridity. The chapter moves carefully in setting up a series of distinctions that challenge the conventional treatments of sovereignty and sovereign power thereby making space for a new sovereign politics.

Any “audacious pluralization” of sovereign politics requires we start with public and private hybridity. To be sure, hybridity can extend to other categories too, like global and local. However, the most pressing questions of sovereign politics are questions about settling the public and private. From the materials of public and private hybrid relations, I build a new

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architecture of sovereign politics. Hybrid sovereignty means sovereignty navigates the condition of being in between public and private, which challenges the traditional exclusionary purpose of sovereign states. Weaving hybridity into the fabric of sovereign politics, as opposed to embellishing it outward, means to tackle a sacred relationship where “anyone wishing to unravel the relationship between sovereignty and the state must therefore face the formidable challenge of expanding the space of the political beyond the borders of nation-states.”\textsuperscript{58} The new architecture shows that sovereign politics is broader than sovereignty, and that sovereignty itself is broader than typically conceptualized.

As perhaps the key concept in international politics, sovereignty invokes equal parts apathy and contention. Most scholars prefer not to get involved in defining sovereignty and prefer to get on with doing research on all the international phenomena that sovereignty makes possible. However, for theorists of sovereignty, it remains a highly “contested”\textsuperscript{59} and “ambiguous”\textsuperscript{60} “sponge-concept.”\textsuperscript{61} Frustrated scholars have variously outlined,\textsuperscript{62} contended,\textsuperscript{63}

\begin{itemize}
  \item \textsuperscript{59} Connolly 2005: 141.
  \item \textsuperscript{60} Kalmo and Skinner 2010: 1.
  \item \textsuperscript{62} Nicholas Onuf, “Sovereignty: Outline of a Conceptual History,” \textit{Alternatives} 16, 1991: 425-446.
\end{itemize}
realized, rethought, reconsidered, relocated, historicized, contemporized, fragmented, disaggregated, and deconstructed sovereignty. Beyond international politics, scholars abandon sovereignty increasingly frequently in “the most urgent task for political theory.” But defenders of sovereignty push back that “those who would banish sovereignty as an outworn fiction are really only trying to shirk the whole problem of politics.” Even when global governance scholars acknowledge that “in a world of disaggregated states, the sovereignty that has traditionally attached to unitary states should arguably also be disaggregated,” the corresponding accounts “come up with an impoverished conception of

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70 Kalmo and Skinner 2010.
75 Slaughter 2005: 12.
order exclusively based on efficiency and structural necessities and leaves no room for a sensible account of the political.”

The extant conceptualizations of sovereignty are too limited and disconnected from broader sovereign politics. They are limited in that they only deal with an imagined version of sovereignty for political fiction. They are disconnected from other aspects of sovereign politics, more specifically sovereign power. A new architecture of sovereign politics addresses hybrid sovereignty by embracing the complexity and contestation in sovereign politics. Instead of making *ad hoc* changes to the conventional framework on sovereignty, I begin anew to broaden what we think is sovereign and what we think is political about it. I pursue an approach similar to Michael Hardt and Antonio Negri who construct a layered global “empire” of capital and sovereign power across the public and private confines. However, I broaden my lens beyond capital to include violence and rights and do not reduce all sovereign expressions to empire. I also follow John Agnew’s critical geography approach to politics which “involves different spatial modalities, only one of which is territory.” I too decenter territorial sovereignty but also imagine beyond spatiality altogether as the bedrock of sovereign politics.

The new architecture addresses three key conflations (Figure 1). The first conflation is sovereignty with sovereign power. The second conflation is between indivisible and absolute *imagined* sovereignty and divisible and diverse *lived* sovereignty. The third conflation is between two kinds of sovereign power: one that makes the state (*Statehood*) and one that mobilizes the state (*Governance*).

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78 Agnew 2005: 39; Spatial integration and place-making are the other two.
Analytically, all of the concepts are related to sovereign authority. Sovereignty is the relational web cradling sovereign authority, like a hammock; Sovereign power is the material and ideational manifestation of sovereign authority. Imagined Sovereignty is the fictionalized representation of an indivisible and absolute sovereign authority; Lived Sovereignty is the grounded practice of divisible and diverse sovereign authority. Statehood is the coordination of sovereign power across sovereign realms. Governance is the organization of sovereign power within a sovereign realm. These distinctions appear in other forms. Consider Stephen Krasner’s four types of sovereignty:

*Domestic sovereignty*, referring to the organization of public authority within a state and to the level of effective control exercised by those holding authority; *interdependence sovereignty*, referring to the ability of public authorities to control transborder movements; *international legal sovereignty*, referring to the mutual recognition of states or other entities; and *Westphalian sovereignty*, referring to the exclusion of external actors from domestic authority configurations.79

Krasner’s Westphalian sovereignty and international legal sovereignty are components of Imagined Sovereignty, domestic sovereignty is reflected in Statehood, and interdependence sovereignty in Governance. The new architecture of sovereign politics adds Lived Sovereignty and separates sovereignty from sovereign power. In doing so, I respond to critics who contend

that “Krasner does not take up the question of whether the deviations he identifies matter for international relations.”

The deviations here matter for two reasons. First, they allow a more succinct view of the knowledge gaps in sovereign politics. For instance, in conventional accounts, state-formation scholars like Tilly and Spruyt focus on *Imagined Sovereignty* and *Statehood* (Figure 2a) and global governance scholars like Slaughter and Cutler focus on *Imagined Sovereignty* and *Governance* (Figure 2b). Crucially, enveloping the deviations within a broader architecture of sovereign politics means these differences are a result of research strategy not of getting the world wrong. In other words, I do not see the relatively rare focus on *Lived Sovereignty* in *Statehood*, for instance in the work of James C. Scott, or *Governance*, like in the work of Robbie Shilliam, as more “right” or “accurate” than work on *Imagined Sovereignty*. I do, however, see the overproduction of knowledge on *Imagined Sovereignty* as a problem because as we lack similarly sophisticated accounts for the rest of sovereign politics. In short, the conventional understandings of sovereign politics render the world incompletely.

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80 Lake 2003: 310.
81 James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*, New Haven: Yale University Press, 1998. While Scott is informative for IR, he is not considered an IR scholar. This reflects a division of labor between IR and Comparative Politics where the latter takes on the “lived” expressions of sovereign authority. However, Comparativists rarely confront theories of sovereignty and engage less with transnational governance. I then urge IR to “take back” lived sovereignty as an exclusive purview of Comparativists.
Second, rendering the world incompletely matters because it limits our understanding of the world, and in this case, hybridity. The hysteria that follows public and private hybridity for sovereign politics subsides once we acknowledge that any conventional framework is unnecessarily limiting. A strong architectural foundation can withstand complexity. Concepts remain slippery but are allowed more space to move and opportunities to hold on. Hybrid Sovereignty, as presented in this work, embraces a fuller extent of sovereign politics (Figure 2c). It adopts a Lived Sovereignty approach to Statehood and Governance. Imagined Sovereignty is not absent from the story, however. Instead, Imagined Sovereignty is the background of contestation against which hybridity reveals itself. In other words, it would be harder to see hybridity and evaluate its stakes in an architecture of sovereign politics without Imagined Sovereignty.
Later in the chapter, I introduce configurations of hybrid sovereignty within this new architecture of sovereign politics. The rest of the dissertation examines these configurations in practice. Before we get there, it is important to theorize the different components of sovereign politics and why they should not be conflated.

II. THREE CONFLATIONS IN SOVEREIGN POLITICS

The denunciation of sovereignty occurs much more frequently than does a serious endeavor to comprehend its nature and the function it performs for the modern state system.\(^8\)

Sovereign politics captures some inherent paradoxes of sovereignty where it stands for both absolute authority and freedom from absolute authority, producing hierarchy within a state and anarchy between states.\(^8\) Perhaps it is then no surprise that when IR scholars get messy with sovereignty, they “disagree about almost everything—what sovereignty is and where it resides, how it relates to law, whether it is divisible, how its subjects and objects are constituted, and whether it is being transformed in late modernity.”\(^8\) These disagreements are

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steeped in three conflations of sovereign politics between sovereignty and sovereign power, imagined and lived sovereignty, and statehood and governance. Disentangling the conflations and putting them in productive tension with each other addresses Hans Morgenthau’s urging to understand sovereignty’s “nature and the function it performs for the modern state system.” Moreover, the process also reveals the wide range of issues wrapped up in sovereign politics.

**Sovereignty and Sovereign Power**

In its earliest formulations in the 16th century, sovereignty was tied to understanding “the sovereign” as “a centralized power which exercised its law making and law enforcing authority within a certain territory.” The idea was popularized by French theorist Jean Bodin who wrote in 1576 that “sovereignty is the absolute and perpetual power of a commonwealth.” Scholars focus often on the “absolute and perpetual” part of Bodin’s claim. However, equally intriguing is that sovereignty is the “power of a commonwealth.” It is important here that Bodin does not refer to sovereign power but sovereignty as power. Indeed, he goes on to clarify that “sovereignty is not limited either in power, or in function, or in length of time.” In this understanding, sovereignty is an underlying condition that empowers political authority so it becomes sovereign power. As a condition, sovereignty “points to and receives its power from some further notion or structure which, in that sense, is even more ‘absolute and perpetual’ than it.”

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89 Bodin 1992: 3.
90 Koskenniemi 2010: 223.
of sovereignty not just as a condition but as a powerful resource. Its purpose is “to express and realize the principles that make a state a particular state.” One way sovereignty realizes the state, or sovereign power, is by serving as a strategic “argumentative resource” in various contexts where the “argument is about allocating power.” In this view, sovereignty is an argument from which to build sovereign power.

Sovereignty as an argumentative resource can lead to different manifestations of sovereign power. We can argue our way into different sovereign possibilities. For instance, Robert Jackson identifies how sovereignty is like Lego: it is a relatively simple idea but you can build almost anything with it, large or small, as long as you follow the rules. The British used sovereignty to separate themselves from the medieval Catholic world. Then they used it to build an empire that encircled the globe. Then they used it to decolonize and thereby created a multitude of new states.

For Jackson, sovereignty is an idea that states can use for contradictory purposes, like to colonialize and decolonize. Jackson’s use of sovereignty as an argumentative resource show two problems. First, Jackson is vague on the historical specificity of argumentation, which can be explored by inquiring: “In what context is a claim of sovereignty likely to occur? To whom is sovereignty claims addressed? What normative structures are used to determine the legitimacy of a claim to sovereignty? What consequences follow from acceptance of a sovereignty claim?”

Second, buried in the analogy with Lego and building blocks is the conflation of sovereignty and sovereign power. Thinking of sovereignty as literal building blocks instead of discursive

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resource leads to equating “more sovereignty blocks” with “more sovereign power.” However, the specific practices (or blocks) of building sovereign power should not be confused with the generalized condition of sovereignty. When we do, we enter the pantheon of sovereignty debates that are reduced to state capacity contests or treat state autonomy as the only important indicator of sovereignty. Jackson does precisely this by setting criteria of “strong” and “weak” states based on their capacity to stay autonomous from external influence. To move beyond this conflation between sovereignty and sovereign power, we must adopt a further specification of sovereignty: not just as condition or argumentative resource but as a relational web.

Recently, Arjun Chowdhury and Raymond Duvall contrast sovereignty with sovereign power arguing that sovereignty comes first as “a more general set of relations.” I use this emerging relational view of sovereignty to conceive of sovereignty as a relational web for supporting sovereign power. Sovereignty then underlies the politics of making and unmaking sovereign power in striking bargains for sovereign power to exist. However, I do not limit sovereignty to a generalized resource as those perspectives have trouble accounting for how “while the specific expression of sovereignty may remain constant, that which is considered to be sovereign changes.” Instead, a web of sovereign relations produce discourse and practice. Sovereign relations include multidimensional networks of governors and governed. Shifting relations in turn shift sovereignty’s particular resourcefulness for particular sovereign power.

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In this conceptualization, "sovereignty codifies a historically specific answer to historically specific questions about political community." Relational sovereignty explores how the "ambiguity of sovereignty has historical depth; it is not the result of conceptual confusion born out of a persistent misunderstanding of its 'true nature." Unlike Legos, a relational web is interwoven non-hierarchically and without the materialist temptation to equate the supporting condition (sovereignty) with the effect (sovereign power). As such, for sovereignty as relational web, external influence does not automatically result in state weakness. The separation of sovereignty from sovereign power allows us to see how hybrid relations in sovereignty might actually enhance state capacity or sovereign power to build a global empire.

The relational coupling of sovereignty and sovereign power raises its own set of issues. For many, the productive connection between sovereignty as a resource for sovereign power is cause for concern. Theorist Georgio Agamben famously wrote that “the sovereign decides the exception." Whereas, following Agamben, most regard sovereign power as making the exception to law as “if sovereignty means anything, it means that the sovereign can always disregard the rights of subjects under law." Chowdhury and Duvall instead argue that the sovereign suspends the law in Agamben’s exception precisely so that the sovereign does not transcend it. Agamben thus forwards an “equivocation inside the idea of sovereignty between acting with final authority and acting with irresistible power.” William Connolly picks up this

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101 Chowdhury and Duvall 2014: 197.
102 Connolly 2005: 140.
oscillation as “not a confusion in the idea of sovereignty – a misunderstanding to be eliminated by a sharper definition of the term. It is rather, the zone of instability that sovereignty inhabits.”\textsuperscript{103} In other words, when sovereignty empowers sovereign authority it also empowers excesses of sovereign power by design not error. Moreover, this problem is compounded with “a fragmented, divisible conception of sovereignty [,which] serves to separate the relationship between power and responsibility.”\textsuperscript{104} Even when we separate sovereignty from sovereign power, the ”concepts are so intimately related that the ambiguity affecting one of them necessarily spills over to the other.”\textsuperscript{105} If relational sovereignty authorizes a whole range of sovereign possibilities, including what some consider sovereign irresponsibility, then there are strong political imperatives to reaffirm responsible expressions of sovereignty.

Two recent examples in political theory have different responses to this imperative. Wendy Brown identifies new barriers, like border walls, as targeting “nonstate transnational actors” rather than states in response to “persistent, but often informal or subterranean powers” and therefore “appear as signs of a post-Westphalian world.”\textsuperscript{106} Crucially, for Brown, states and sovereignty do not simply decline in power or significance, but instead come apart from one another. States persist as non-sovereign actors, and many characteristics of sovereignty appear today in two domains of power: ... political economy and religiously legitimated violence. ... Rather than resurgent expressions of nation-state sovereignty, the new walls are icons of its erosion.\textsuperscript{107}

In articulating “non-sovereign” states, Brown rejects sovereignty as a necessary condition for sovereign power. One reason for the rejection is Brown’s assumption about indivisible sovereignty where “the state can be divided, disunified, subordinated, even captured, and still

\textsuperscript{103} Connolly 2005: 141; some emphases removed.
\textsuperscript{104} Bickerton, Cunliffe, and Gourevitch 2007: 12.
\textsuperscript{105} Kalmo and Skinner 2010: 12.
\textsuperscript{106} Brown 2010: 21.
survive. Not so political sovereignty, which, is finished as soon as it is broken apart. Brown also contextualizes borders as a backlash to eroding sovereignty. From a different perspective, Joan Cocks writes for a new book series on “Theory for a Global Age” to renovate sovereignty in response to globalization. Cocks defines sovereignty as “the power to command and control everything inside a physical space” and sovereign power as “an end that is possible to strive for but impossible to arrive at.” Cocks critiques Brown for a “too singular focus on the fantastical quality of sovereign state power in the context of the twenty-first century [,which] obscures the ways in which sovereign power is fantastical in any context.” For Cocks, the question is not about emerging non-sovereign states, but sovereign non-states: “What happens to sovereign power as it drains away from the modern state, to the extent that it does drain away? When it flows out of the nation-state, does it flow into some other container?” Brown and Cocks represent two different conceptions of sovereignty: imagined and lived, which the next section elaborates.

**Imagined and Lived Sovereignty**

**Imagined Sovereignty** is the myth of an indivisible public sovereign authority that serves as useful fiction for sovereign power. **Lived Sovereignty** is the divisible and diverse public and private practice of maintaining and producing sovereign power. Both types of sovereignty are important. Consider there is a front and back stage to sovereign politics. Imaged Sovereignty is front stage projecting absolute indivisibility and Lived Sovereignty is back stage keeping the

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108 Brown 2010: 70; emphasis removed.
10 Cocks 2014: 3.
show running through diverse relations. What happens when we see public and private hybridity? In *Imagined Sovereignty*, sovereignty is a state possession that hybridity takes away. In *Lived Sovereignty*, sovereignty is a relation upholding a state effect that hybridity is a part of producing. In the face of hybridity, what *Imagined Sovereignty* calls an erosion of state sovereignty, *Lived Sovereignty* calls a transformation in state sovereignty. Imagining and living sovereignty are dual parts of the same coin in sovereign politics: representation and practice. We cannot disregard sovereign representation in *Imagined Sovereignty* any more than we can sovereign practice in *Lived Sovereignty*.

The problem happens when we only focus on *Imagined Sovereignty* in sovereign politics, as is usually the case. *Lived Sovereignty* allows a richer exploration of hybridity without relegating the private outside the state and outside politics.

*Imagined Sovereignty* is the most common way of conceptualizing sovereignty. In this version, sovereignty is reduced to a final, indivisible authority governing its society. *Imagined Sovereignty* focuses on the possessive and institutional nature of sovereignty, which enables discussions on eroding sovereignty when a public authority is less capable of solely governing its society, securing policy autonomy, or excluding external actors from domestic politics. Sovereignty is imagined this way by scholars who write about international politics, by leaders who project their insecurities about international politics, and by publics who buy into sovereign myths while remaining oblivious about international politics. In all projections, *Imagined Sovereignty* is as useful as imagined communities are for representing a socially

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constructed political entity.\textsuperscript{115} Collectively, we imagine the sovereign state into existence. We conjure sovereign imaginations in abstract symbols, ideologies, promises, and visions and concrete five-year plans, party platforms, policy justifications, and media discourses. Some imaginations are more powerful than others in gluing a coherent polity. \textit{Imagined Sovereignty}'s power enables various collectives to articulate sovereignty erosion, which in turn allows sovereign revenge. For Agnew, sovereignty “has a primal status as a term that underpins and gives permanence to flitting everyday politics.”\textsuperscript{116} For Morgenthau, sovereignty provides “the national democratic state with a potent political weapon in the conception of popular sovereignty.”\textsuperscript{117} Sovereignty may be a “political delusion,”\textsuperscript{118} but “the fiction is a potent one and has suffused the internal and external relations of nation-states.”\textsuperscript{119}

Absolute indivisibility as the hallmark of \textit{Imagined Sovereignty} has a rich legacy. Bodin sets the absolutist extreme “persons who are sovereign must not be subject in any way to the commands of someone else.”\textsuperscript{120} For Bodin, the sovereign, made after god’s image, is infinite. Thus, “the prerogatives of sovereignty have to be of such a sort that they apply only to a sovereign prince. If, on the contrary, they can be shared with subjects, one cannot say that they are marks of sovereignty. [...] By logical necessity two infinities cannot exist.”\textsuperscript{121} Theorists since have come to interpret this as “a theory of ruler sovereignty,” which “meant that the high powers of government could not be shared by separate agents or distributed among them, but

\begin{footnotes}
\item[117] Morgenthau 1948: 341.
\item[118] Cocks 2014.
\item[119] Brown 2010: 22.
\item[120] Bodin 1992: 11.
\item[121] Bodin 1992: 49-50.
\end{footnotes}
all had to be entirely concentrated in a single individual or group.”

Bodin’s indivisible sovereignty meant division based on a distribution of powers arrangement, like the U.S., cannot “even be imagined” and would result in anarchy “worse than the cruelest tyranny.” Thomas Hobbes also adds that the rights of sovereignty “are incommunicable and inseparable.” Hugo Grotius, the Dutch legal theorist, conceived “sovereignty as a unity, in itself indivisible.’ In this view, a state is either sovereign—or it is not a state.

In IR, the indivisibility doctrine combines with final authority within a territory insulated from outside pressure. F.H. Hinsley settles on the classic definition of sovereignty as “the idea that there is a final and absolute political authority in the political community ... and no final and absolute authority existed elsewhere.” Hinsley argues for an indivisible sovereign authority that resides in “the state [which] imposes itself on society, or attempts to do so, as the instrument of a power that is alien to those natural ways [of undeveloped societies].” Morgenthau argues “the conception of a divisible sovereignty is contrary to logic and politically unfeasible.” Even critics of absolutist sovereignty admit, “if sovereignty is divided, it loses its distinguishing trait.” Indivisibility has its function in a “unitary approach” to law where

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125 Thomas Hobbes, The Leviathan, Chapter XIII, xii. I elaborate on Hobbes more in the section on disaggregating sovereign power.
129 Morgenthau 1948: 364.
sovereignty “brought forth as the regulative principal of what would otherwise have been a chaos of authorities, powers, magistrates, etc.”

Indivisibility and final authority are connected since “if sovereignty means supreme authority, it stands to reason that two or more entities—persons, groups of persons, or agencies—cannot be sovereign within the same time and space.” Bodin’s absolutist sovereign exemption softens to Morgenthau’s more palatable “existence of a person or a group of persons who within the limits of a given territory are more powerful than any competing person or group of persons.” In addition to internal supremacy, Robert Gilpin internationalizes the claim as “the state is sovereign in that it must answer to no higher authority in the international sphere.” Again, even scholars wary of ahistorical treatments of sovereignty assume it “implies immunity from external interference” and that a sovereign state “has the exclusive authority to intervene coercively in activities within its territory.”

Sovereignty can be imagined as an attribute or an institution. Sovereignty as an attribute refers to a possession that a state has in the conventional Westphalian sovereignty narrative: “Territory was consolidated, unified, and centralized under a sovereign government.” Approaching sovereignty as an attribute cuts across theoretical traditions in IR. For instance, “realist scholars have tended to devote little attention to the nature or history of sovereignty, instead treating it as an empirically measurable attribute of statehood.” Krasner too adopts attributes as his “various kinds of sovereignty do not necessarily covary. A state can have one

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132 Morgenthau 1948: 360.
133 Morgenthau 1948: 349.
137 Glanville 2013: 80.
but not the other."³⁸ Constructivists also argue that “sovereignty is an intrinsic property of states, like being six feet tall, and as such it exists even when there are no other states."³⁹ Oxymoronically, “although sovereignty may be a social construct that changes over time, it is still perceived as a system-wide attribute inhering in all state members identically.”⁴⁰ Daniel Philpott’s historical investigation of sovereignty reifies the immutability of Westphalian sovereignty: “In the history of sovereignty one can skip three hundred years without omitting noteworthy change.”⁴¹ Imagining sovereignty as an unchanging attribute gives sovereign power a finitude it must ration carefully.

Institutionally, sovereignty is recognized as a right between states of “freedom from interference.”⁴² As an international legal institution, sovereignty “authenticates a political order based on independent states whose governments are the principal authorities both domestically and internationally.”⁴³ Therefore, “when states recognize each other’s sovereignty as a right then we can speak of sovereignty not only as a property of individual states, but as an institution shared by many states.”⁴⁴ An institutional perspective allows mutual constitution of sovereign status where “the existence of states as a particular kind of political community and of the world of states as a different, more permissive kind of political community are joint consequences of the very same acts.”⁴⁵ Institutionally imagining sovereignty involves “ongoing

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³⁸ Krasner 1999: 4; emphasis added.
⁴⁰ Lake 2003: 308.
⁴² Glanville 2013: 79.
⁴³ Jackson 1999: 432.
interactions between states in which the practically derived norms of sovereignty emerge. As such, sovereignty should be treated not as an attribute, nor as a set of normative constraints, but as an institution that empowers states vis-à-vis people.¹⁴⁶ Scholars who imagine sovereignty in institutional terms see themselves as doing something different than imagining sovereignty as attribute: “Sovereignty is not a resource to exchange. It is a status.”¹⁴⁷ However, the institution of international legal sovereignty is still regarded as a monolith where recognition depends on exhibiting institutionally appropriate sovereign signals, for instance a defined territory.¹⁴⁸ Moreover, the imagined institutional right of non-interference develops “in clear tension with the continued assertion of the essential right of sovereigns to determine for themselves when they had just cause to wage war and to intervene in the affairs of other sovereigns.”¹⁴⁹

Both expressions of Imagined Sovereignty as attribute and institution rely on the mythical basis of sovereignty as indivisible, public territorial authority. For instance, the “institutional framework of sovereignty differentiates units in terms of juridically mutually exclusive and morally self-entailed domains. However, the scope of these domains is defined not only territorially but also functionally, depending upon the range and depth of state

¹⁴⁷ Jackson 1999: 443. Imagining sovereignty as attribute or institution maps on to two expressions typically called de facto and de jure sovereignty. De facto sovereignty captures whether a state possesses classic Westphalian sovereignty and de jure sovereignty captures whether a state is institutionalized into international legal sovereignty.
¹⁴⁹ Glanville 2013: 80.
intervention in domestic social and economic affairs.\(^{150}\) In other words, the institutional right of sovereignty relies not only on territorial control but the “range and depth of state intervention” where state stands in for public authority. While there is tremendous functional variation in the degree to which public authorities have controlled their territories and populations, their ability to claim political authority remains constant in *Imagined Sovereignty*. Indeed, *de facto* sovereign control does is independent of *de jure* sovereign authority meaning “sovereignty is best conceptualized in terms, not of state control, but of state authority. State control has waxed and waned enormously over time, regions, and issue-areas while the state’s claim to ultimate political authority has persisted for more than three centuries.”\(^{151}\) From *Imagined Sovereignty*’s perspective, sovereign authority mutates into something else when the change in state’s ability to “make authoritative political decisions” has eroded “that is, whether ultimate political authority has shifted from the state to nonstate actors.”\(^{152}\) Therefore, public and private hybridity for *Imagined Sovereignty* would not register as recognizably sovereign at all. Instead, hybridity would bring “the end of sovereignty and the beginning of some fundamentally different post-sovereign arrangement of world politics.”\(^{153}\)

In contrast, *Lived Sovereignty* argues that sovereignty lives in relations that include and often transcend public and private actors. *Lived Sovereignty* thinks beyond the myths of *Imagined Sovereignty* to inquire “what if the absolute and indivisible political authority implicit in this story about state sovereignty and its presumed territorial basis is problematic to begin


\(^{152}\) Thomson 1995: 216.

\(^{153}\) Jackson 1999: 434.
Nicholas Onuf agrees, “it is no less a paradox that the standard conception proclaims sovereignty to be indivisible even as it divides sovereignty along internal and external dimensions. It might better be said that sovereignty makes the state indivisible.” The key contention is that *Imagined Sovereignty* bestows a state with certain qualities, which it then takes and interacts with other states. However, “a state is not ontologically prior to a set of interstate relations. A state emerges and is recognized as such within a set of relationships that define the rules for what is and what is not a ‘state.’” Sovereignty is “not exogenous to the system but produced through practice.” Challenging the *de jure* and *de facto* separation of *Imagined Sovereignty*, for Agnew, “de facto sovereignty is all there is when power is seen as circulating and available rather than locked into a single centralized site such as ‘the state.’” *Lived Sovereignty* features hybridity at its core. Unlike *Imagined Sovereignty*, *Lived Sovereignty* does not see public and private hybrid relations as being governed by a different set of rules from public sovereigns. Instead, focusing on relations shows how public and private sovereigns together have state-like effects that authorize political power.

*Lived Sovereignty* shifts attention to sovereignty as not just that which makes particular claims possible, as in *Imagined Sovereignty*, but as also that which is made possible because of particular claims. The sovereign may decide the exception, but it is not guaranteed that one sovereign will make one exception. *Lived Sovereignty* acknowledges that in practice the performance of sovereign exception is diffuse and not absolute and that “within the idea of the

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157 Lake 2003: 308.
exception ‘decided’ by the sovereign, an oscillation lingers between a juridical authority that decides the exception when available law is insufficient and other cultural forces that insert themselves irresistibly onto the outcome.”\textsuperscript{159} Crucially, sovereignty as lived involves multiple often contradicting exceptions emanating from multiple sources rather than “a specific person or body of persons whose actions are equivalent to the actions of the state.”\textsuperscript{160}

As such, in \textit{Lived Sovereignty}, sovereignty is an ongoing performance in which the specific contours of statehood are determined. Jens Bartelson avoids “the direct question of what sovereignty is, and instead ask[s] how it has been spoken of and known throughout a period of time, and connect[s] the answer to this question of \textit{why} it seems so difficult to speak of and to know sovereignty today.”\textsuperscript{161} Bartelson pays attention to the intellectual history of sovereignty in political theory and critiques scholars who, puzzled by the fact that political philosophers before the modern age had very little to say about international relations, “continue with an analysis of this silence, instead of reaching the more obvious if not unproblematic conclusion that there was no ‘international’ until this concept entered political discourse towards the end of the eighteenth century.”\textsuperscript{162} Recalling Anthony Giddens, "'International relations' are not connections set up between pre-established states, which could maintain their sovereign power without them: they are the basis upon which the nation-state exists at all.”\textsuperscript{163}

\begin{enumerate}
\item Connolly 2005: 140.
\item Bartelson 1995: 4; emphasis original.
\item Bartelson 1995: 60.
\end{enumerate}
Sovereignty is one particular power relation that makes the state possible. In *Lived Sovereignty*, states thus do not “have” sovereignty as much as exert sovereign effects. These effects may vary in their scope and impact; such questions are better left for empirical investigations that examine how sovereignty is accomplished and expressed. Michel Foucault conceptualizes state power as exhibiting “governmentality,” or “government rationality” where “what is important for our modernity, that is to say, for our present, is not the state’s takeover of society, so much as what I would call the ‘governmentalization’ of the state.”¹⁶⁴ Instead of creating artificial state/nonstate dualities, Foucault urges the examination of discourse to see how “nonstate” excludes particular forms of power from being visible. The framework of governmentality helps recover such occluded power by highlighting:

> the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument.¹⁶⁵

Both private and public actors perform governmentality, meaning that state power is constitutive of public and private authority. Privileging the public side as state power results in zero-sum dilemmas of state power against the private. This perspective creates enduring circles of arguments about what is authoritative in international politics and international law, missing the larger picture on how state power is actually produced.

*Lived Sovereignty* then builds a relational web of sovereignty as reflexive and dynamic whose “empirical contents are not fixed but evolve in a way reflecting the active practical

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¹⁶⁵ Foucault 2007: 108.
consensus among coreflective statesmen who are ever struggling.”\textsuperscript{166} In doing so, \textit{Lived Sovereignty} follows the emerging pluralist view of popular sovereignty, which moves beyond “the people” as unitary. For instance, Hardt and Negri contrast their concept of “the multitude” as “a multiplicity” with the people who “tend toward identity and homogeneity” such that “whereas the multitude is an inconclusive constitutive relation, the people is a constituted synthesis that is prepared for sovereignty.”\textsuperscript{167} When popular sovereignty challenges what counts as popular and “the figure of the people dissolves, the concept of sovereignty itself demands to be reinterpreted.”\textsuperscript{168} Imaginations often outlive their origins and sovereignty is no different. While the concept “demands to be reinterpreted,” the core of \textit{Imagined Sovereignty} rarely changes. It took two and a half centuries to imagine beyond the sovereign as a literal embodiment of divine will to an assembly of sovereigns. It might take longer still to make the imagination leap to a divisible hybrid sovereignty. As such, imagining and living sovereignty represent the possibilities and bounds of sovereign politics and

\begin{quote}
  establish the transcendental conditions of possibility of the modern state as \textit{subject}, telling us in the abstract what is a state and what is not, and what a state is and what it is not. Sovereignty differentiates the state ontologically and ethically from other forms of political life, and furnishes us simultaneously with the conditions for knowing the state as such.\textsuperscript{169}
\end{quote}

Sovereignty sets the condition for sovereign power, and yet sovereignty does not contain enough theoretical content to sustain a rich differentiation of “the state ontologically and ethically from other forms of political life.” For that, we need to turn to specific theorizing of sovereign power.

\begin{itemize}
\item[\textsuperscript{167}] Hardt and Negri 2000: 103.
\item[\textsuperscript{168}] Kalmo and Skinner 2010: 15.
\item[\textsuperscript{169}] Bartelson 1995: 189; emphasis original.
\end{itemize}
Statehood and Governance

All right, but apart from the sanitation, the medicine, education, wine, public order, irrigation, roads, a fresh water system, and public health, what have the Romans ever done for us?\textsuperscript{170}

While there are many social, economic, and political activities in the world, not all require a sovereign authority. Following Max Weber, scholars most likely think of the sovereign state as “nothing more than the name of an established apparatus of government.”\textsuperscript{171} Sovereign power is what a state does. But of course, it is not settled that we know what a state does or should do. In the U.S., the left and right disagree about the size and scope of the state, for instance whether the state should include a social safety net. In Japan, there is disagreement on whether the state should provide for its own self-defense. Indeed, Quentin Skinner argues that “there has never been any agreed upon concept to which the word state has answered.”\textsuperscript{172}

While slippery in concept, the state appears stickier in practice. As the Monty Python recount of their Roman oppressors, there are some public goods we link with sovereign power like sanitation, education, public order and health. Even still, the specifics of sovereign responsibility for public goods are not fixed and the difference becomes meaningful in typologizing political regimes. The Scandinavian model of public goods is vastly different than the American and Congolese ones. Bruno Latour too asks how we know when we see the state and whether when we see a police car go by we exclaim, “there goes the state!”\textsuperscript{173} Seems plausible. But do we make the same exclamation when it’s the private security car of state

\textsuperscript{170} Monty Python’s Life of Brian, Handmade Films, 1979.
\textsuperscript{172} Skinner 2010: 27.
leaders? Furthermore, answers to the nature of sovereign power “after the rise of the idea of modern democracy break in important ways with answers before yet also contain a strong residue of those earlier answers.”\textsuperscript{174} Theorizing sovereign power then wrestles with the somewhat bounded nature of sovereign authority – police cars, infrastructures – with its contingent expressions – not all police cars, not all infrastructures. In other words, it means acknowledging there are no wholesale necessary or sufficient conditions of sovereign power. And yet, something resembling sovereign power exists in particular domains.

Without reviewing all of political theory of the state, a few key examples shade the broad contours of sovereign space. Aristotle begins with “three parts of a state, one in deliberating and taking counsel; another in creating officers and establishing the duties of each; and the third in rendering justice.”\textsuperscript{175} Bodin quotes Aristotle before identifying his own necessary “marks” of a sovereign, or “what prerogatives a political authority must hold exclusively if it is not to acknowledge a superior or equal in its territory.”\textsuperscript{176} Bodin claims: “For who would not deem someone sovereign who gives law to all his subjects, makes peace and declares war, provides all the officers and magistrates of the land, levies taxes and exempts whom he pleases, and pardons persons who deserve to die?”\textsuperscript{177} This “adequate typology of public powers”\textsuperscript{178} then combines broad rule-making and enforcing authority with some specific functions like taxation. For Bodin, public authority rests in the sovereign (as monarch) and requires “each individual and entire people as a body must swear to keep the laws and take an oath of loyalty

\textsuperscript{174} Cocks 2014: 29.
\textsuperscript{175} Aristotle, \textit{Politics}, Book IV, Chapter II.1, as loosely rendered in Bodin 1992: 47.
\textsuperscript{176} Franklin 1992: xv.
\textsuperscript{177} Bodin 1992: 48.
\textsuperscript{178} Franklin 1992: xvii.
to the sovereign."\textsuperscript{179} Skinner traces Bodin’s absolutist theory of the state to doctrine of the divine right of Kings, which was challenged by the populist theory of the state arguing for “sovereignty to be possessed by the union of the people themselves.”\textsuperscript{180}

The populist theory was in turn challenged by defenders of absolutism with a caveat in Hobbes’ theory of public power of not men in the abstract but the “nature of the commonwealth or state.”\textsuperscript{181} Hobbes is equally displeased with the populist notion of the people “united” in a body and the absolutist notion of the people passively obedient to a sovereign head. Instead, “when a multitude of men do agree and covenant, every one with every one” to authorize a sovereign “to be their representative,” they are transformed from a passive people to a body politic. However, “if sovereigns are representatives, what is the name of the person whom they represent?” For Hobbes, the “multitude so united in one person is called a commonwealth, in Latin \textit{Civitas}” or the state.\textsuperscript{182} For Hobbes, the sovereigns “represent the state” in a “fictional” theory of the state enduring beyond sovereigns.\textsuperscript{183} Other than this right of governing through the covenant, sovereign power is to: judge “peace and defence”\textsuperscript{184} and “opinions and doctrines;”\textsuperscript{185} make “rules of propriety and of good, evil, lawful, and unlawful;”\textsuperscript{186} decide “all controversies which may arise concerning law;”\textsuperscript{187} make “war and peace with other

\begin{itemize}
\item \textsuperscript{179} Bodin 1992: 25.
\item \textsuperscript{180} Skinner 2010: 30.
\item \textsuperscript{181} Skinner 2010: 34.
\item \textsuperscript{183} Skinner 2010: 37.
\item \textsuperscript{184} Hobbes 1994: 113 (Chapter XVIII, para 8).
\item \textsuperscript{185} Hobbes 1994: 113 (Chapter XVIII, para 9).
\item \textsuperscript{186} Hobbes 1994: 114 (Chapter XVIII, para 10); emphasis removed.
\item \textsuperscript{187} Hobbes 1994: 114 (Chapter XVIII, para 11).
\end{itemize}
nations” and “levy money”\textsuperscript{88} choose “all counsellors, ministers, magistrates, and officers;”\textsuperscript{89} “rewarding” and “punishing,”\textsuperscript{90} give “titles of honour,”\textsuperscript{91} “coin money,” “dispose of the estate and persons of infant heirs,” and “have preemption in markets.”\textsuperscript{92} From these general sovereign powers, Hobbes identities three marks of “the essence of sovereignty”: controlling the military, raising money, and governing doctrines.\textsuperscript{93}

Rejecting the method of outlining state functions exhaustively, I argue that at a minimum sovereign power organizes realms of violence, markets, and rights. The realms loosely mimic the three sub-fields of IR: security, political economy, and humanitarian governance. Sovereign power organizes violence internally to control populations and externally to protect national security. Sovereign power organizes markets internally to regulate commerce and finance and externally to control the flow of goods and capital. Sovereign power organizes rights internally to determine citizenship and externally to influence subjectivity. Within the general realms of violence, markets, and rights, the specifics of sovereign power are contested in two ways. First, sovereign power is accompanied by debates over which functions are sovereign and which are not. The market realm probably sees the most overt contestation in this regard with competing claims of a state-less “invisible hand” or a state-controlled “visible hand” in managing economic relations. However, violence and rights feature their own set of contestations over the “proper” reach of sovereign power. Second, sovereign power does not contain self-evident criteria for how to organize violence, markets,}

\textsuperscript{88} Hobbes 1994: 114 (Chapter XVIII, para 12).
\textsuperscript{89} Hobbes 1994: 114 (Chapter XVIII, para 13).
\textsuperscript{90} Hobbes 1994: 115 (Chapter XVIII, para 14).
\textsuperscript{91} Hobbes 1994: 115 (Chapter XVIII, para 15).
\textsuperscript{92} Hobbes 1994: 115 (Chapter XVIII, para 16).
\textsuperscript{93} Hobbes 1994: 115 (Chapter XVIII, para 16).
or rights. Such variation is what informs differences in political regimes, political economies, and legal cultures.

The organization of violence, markets and rights can be coordinated together or separately. **Statehood** is the coordination *across* all three realms of violence, markets, and rights, for the purpose of building and maintaining sovereign power. **Governance** is the separate organization *within* violence, markets, or rights, for the purpose of mobilizing sovereign power. For instance, the creation of tax structures for financing troops to secure citizens is an instance of **Statehood** while creating the specific tax policy is an instance of **Governance**. We lack as rich a legacy in theories on governance as we possess on the state. But political theorists sometimes conceptualize **Statehood** as stuck, territorially or corporally, whereas **Governance** is mobile: “By contrast with government, responsibility or even power, the particularities of ‘governance’ lies in its free-floating and largely non-transitive character. Governance does not demand to be pegged to any point of origin – it comes close to dispensing with human agency altogether.”[^94]

I do not assume **Governance** to be as free-floating or without agency. Instead, I see **Statehood** as the realized coherence of **Governance** across multiple realms. Both can be stuck or mobile, with territory or without, in a corporal body or not. The difference is about the level of coordination across or organization within violence, markets, and rights.

Disaggregating **Governance** from **Statehood** broadens the space of sovereign politics so it is not monopolized by impact on the robustness of **Statehood**. That is, sovereign power is often reduced to a particular matrix of material resources in military and economy, or “guns and butter.”[^95] It becomes easy to treat the state as a grand unitary project, which may be

[^95]: From macroeconomics, the analogy refers to spending on the military or economy.
threatened by like units, other states with guns and butter, or dislike units, nonstates with guns and butter. However, sovereign power is more than guns and butter. As previously argued, sovereign power necessitates a variety of resources, including different kinds of sovereignty imaginations and practices, to keep it afloat. Sovereign power in Statehood is a coordinated accomplishment and Governance organizes resources of sovereign power. There is no inevitability to when and how they co-vary. There are different ways in which shifting relations of Governance (for example changes in hybridity) may play out for Statehood (for example making certain coordination more likely) and vice-versa. It therefore makes little theoretical sense to jump from hybridity to state weakness. Separating the processes of Governance and Statehood, while both serving sovereign power, then allows more analytical clarity on the contingency of sovereign power in all its moving parts.

There are also claims about the difference between Statehood and Governance that are overplayed and do not vary in theory. Some may think of Statehood as mapping on to domestic sovereignty and Governance to international sovereignty (or Krasner’s transnational sovereignty). But the domestic and international distinction is equally wrapped up in public and private; the latter’s hybridity impacts the former. In other words, global politics should not just concern itself with only literal transnational processes but reconsider the domestic and international binary in the new sovereign politics. In such reconsideration, we notice that globalizing sovereign politics concerns the mutual constitution, or co-production, of any “domestic” Statehood as well as “international” Governance.\textsuperscript{196} Empirically, however, there is

\textsuperscript{196} This is a separate point than the “second image” perspectives in IR, given Waltz’s three images of international politics (Individual, State, International System), which test the impact of a state’s domestic politics on the international system or vice versa (“second image reversed”). The difference is that in public and private hybridity, the clear links between domestic and international also break down (what is “external”
evidence that sovereign power as expressed in *Statehood* is more limited on the global scale than sovereign power in *Governance*. However, this is a historically contingent phenomena and one that I show through the English East India Company case in chapter three. Nevertheless, there is no theoretical justification for limiting the global scale of sovereign power *a priori* to analysis.

**III. CONFIGURATIONS OF HYBRID SOVEREIGNTY**

The preceding distinctions set the theoretical framework for defining hybrid sovereignty as *Lived Sovereignty* producing *Statehood* and *Governance*. Hybrid sovereignty inhabits a new sovereign politics: one that does not rely on static attributes where states have more or less power, but a relation that various actors help construct through dynamic bargains. Hybrid sovereignty thus means that private actors, and specifically their relations with public ones, are not incidental or detrimental but integral to sovereignty and sovereign power. The standard zero sum “sovereignty contests” of state decline or state autonomy look differently when we unveil the relations upholding sovereign governance. It means there might be more continuity in sovereign relations under the hood than the surface suggests. Consequentially, as hybrid relations reconfigure, so do sovereignty and sovereign power. This section identifies different configurations of hybrid sovereignty in the new sovereign politics.

Hybrid sovereignty is visible through contestation and negotiation about the sources and forms of sovereign authority, which center around the following questions: Where is the locus of sovereignty and how is sovereign power accomplished? The imagined and lived

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versions of sovereignty put forward competing claims. *Imagined Sovereignty* forwards a singular, indivisible, public version of sovereignty where a final arbiter of authority legitimates itself by defending public interests. *Lived Sovereignty* forwards a plural, divisible, diverse public and private version of sovereignty where a contingent arbiter of authority legitimates itself by shifting public interests. One marker of hybrid sovereignty, then, is the contestation between these two visions of the locus of sovereignty. Hybrid sovereignty is also evident in the shifting relations of *Lived Sovereignty* weaving the webbed conditions to support the accomplishment of sovereign power. The public and private relations cohere in configurations of hybrid sovereignty upholding sovereign power in *Statehood* and *Governance*. The hybrid configurations may differ on many dimensions but two key relational aspects are *formality* and *publicity*.

The first dimension is whether hybrid relations of public and private are formalized. Relations are formalized through contracts, treaties, agreements, or membership. Formality may come in different guises with an underlying commitment to acknowledge the relationship. The process of formalization also bounds the relationship, often by creating labels: partner, contractor, agent, member, etc. Relations with high formality reflect more formalized agreements that adopt a label for the particular public and private configuration. Relations with medium formality have less formalized agreements and an indifferent desire to label the relationship. Relations with low formality shun formalized agreements and reject labels for the relationship.

The second dimension is whether hybrid relations of public and private are publicized. If formality acknowledges the relationship, publicity communicates the acknowledgement to others. Publicity may occur by choice, scrutiny, or mandate. I set aside the voluntary or
involuntary nature of publicity to examine whether relations are publicized and how much access they offer. Relations with high publicity feature more publicized acknowledgment with relatively open access to the relationship specifics. Relations with medium publicity feature some publicized acknowledgment with not very open access to relationship specifics. Relations with low publicity feature no publicized acknowledgement with no open access to relationship specifics.

Within these two dimensions, relations may cohere in configurations across spectrums of formality and publicity (Figure 3). Relations with high formality and publicity are contractual divisions of labor for sovereign power. Relations with medium formality and publicity are institutional arrangements for sovereign power without formal agreements. Relations with low formality and publicity are shadow exchanges of sovereign power purposefully kept informal and secretive. I label these respective relations as configurations of Contractual, Institutional, and Shadow hybridity. The different types show meaningful variation in how hybrid relations are organized. There are multiple ways to be hybrid which produce unique consequences for politics. One big consequence is legitimating sovereign authority, which relies on the standard narrative of public sovereign power and public accountability.\textsuperscript{197} In hybrid sovereignty, it becomes unclear who counts as public and private, which complicates how we think about accountability. Typically, scholars are concerned with democratic deficits when governing systems lack proper due process or deliberation from core constituencies.\textsuperscript{198} However,

\textsuperscript{197} For an overview, see Ian Hurd, “Legitimacy and Authority in International Politics,” International Organization 53(2), 1999: 379-408.
accountability problems in hybrid sovereignty exceed these concerns to create legitimacy crises. Legitimacy of sovereign authority is threatened by perceptions of unfairness, exclusivity, and distrust. I elaborate on these below.

**Figure 3. Configurations of Hybrid Relations**

CONTRACTUAL

Publicity

INSTITUTIONAL

SHADOW

Formality

Contractual hybridity features formal and publicized performances of sovereign power contracted between public and private. For instance, governments contract out a variety of sovereign functions, including manufacturing weapons, providing security in conflicts, insuring healthcare, policing public schools, and running prisons. The relations are formal because they involve formalized agreements or contracts and are publicized in official announcements or are monitored in government records. Contractual arrangements are more prolific than the standard recognition in international politics of public-private partnerships, like in international development. Contracts can include a whole variety of “privatized” actors spanning for profit, not-for-profit, and profit indifferent. Contractors include large corporations, small businesses, nongovernmental organizations, universities, religious organizations, and individuals, among others. Contractual hybridity faces a problem of fairness in accountability because public and private are treated interchangeably in governing functions without symmetric obligations in law and politics. For instance, contractors do not face the
same financial disclosure or conflict of interest rules as government employees. The legitimacy crisis then stems from accountability gaps or loopholes in hybrid sovereignty and addressing the legitimacy crisis means closing the gaps through symmetric obligations for same sovereign functions.

*Institutional hybridity* features informal and partly publicized performances of sovereign power embedded in public and private networks. For instance, governments participate in a variety of influential networks for making policy and allocating resources in commerce, defense, or human rights. Institutional networks can include different kinds of influence through bribery, lobbying, soft power,\(^{199}\) or convergence pressures. Institutional networks include capital, labor, collective security, and illicit activity, among others. Relations have medium formality because there is a shared understanding which does not assume an enforceable legal contract. Institutional context can be more formal, with pre-defined memberships like the United Nations Global Compact, or informal, with no pre-defined memberships like trade delegations. Relations have medium publicity because they may be visible but not publically traceable. *Institutional hybridity* faces a problem of inclusivity in accountability because public and private are implicated in elite institutional networks that exclude non-members. For instance, corporations can take governments to arbitration in investment courts based on privileges granted by the bilateral investment institutional network whereas consumers cannot. The legitimacy crisis arises from disproportionate advantage of elite influence based on hybrid sovereignty and addressing the legitimacy crisis means making

institutional networks more inclusive of a variety of non-elite polities impacted by sovereign functions.

Shadow hybridity features informal and non-publicized performances of sovereign power exchanged in the shadows between public and private. For instance, governments work through many secret backchannels with other governments and nongovernmental actors. Shadow contacts work in gathering intelligence, financing elections, procuring weapons, and investigating crime, among others. Relations are low in formality because they may not include legally binding agreements to maintain plausible deniability of the relationship. Relations are low in publicity because they are made invisible and untraceable, often with great effort and high levels of complicity. We probably assume that most public and private relations happen in the shadows, and it is difficult to clearly grasp the scope of such hybridity unlike in contractual and institutional configurations. Shadow hybridity faces a problem of trust in accountability because public and private make behind-the-scenes deals that undermine mandates and lack transparency. For instance, government watchdog groups may cooperate with governments for information and security. The legitimacy crisis concerns a lack of trust from deliberate obscuring of beneficial relations in hybrid sovereignty and addressing the legitimacy crisis means making public the hidden deals behind sovereign functions.

There are three important caveats about the typology. The first addresses whether the three configurations exhaust the possible combination of relations in the two dimensions. The second is about the stability of public and private categories in the configurations. The third considers whether the typology of hybrid configurations is generalizable beyond sovereignty.

First, the hybrid configurations are ideal types. Moreover, these types are congruent blends, meaning they follow a high/high, medium/medium, and low/low combination across
the dimensions. *Contractual* and *Shadow* reflect the ends of the spectrum, whereas *Institutional* occupies a large portion of the space between them. This middle space is a hybrid of its own with configurations that include Shadow-Institutional and Contractual-Institutional. That is, *Institutional hybridity* blends into versions of *Shadow* and *Contractual hybridity*. On the other hand, there are possibilities of incongruent high/low mixes on the spectrums (Figure 4). For instance, Shadow-Contractual relations would be high formality with low publicity. This is probably the default assumption of most laypersons of how public and private interact: with secretive highly formal coordination and agreement. While some Shadow-Contractual relations do exist, one of the contributions of this project is to show many hybrid relations in sovereign governance *do not* operate solely in this combination. There is also the possibility of relations with low formality and high publicity, akin to Proxy relations diverting attention, like a sham celebrity relationship for a publicity stunt. In other words, a Proxy configuration of highly publicized relations might misdirect our attention to other features of sovereign governance. While I only focus on the congruent mixes in *Contractual*, *Institutional*, and *Shadow* configurations, it is important to draw attention to the universe of other possible hybrid configurations for future research.

*Figure 4. Configurations of Hybrid Relations (Incongruent)*
Second, the hybrid configurations feature public and private relations in a particular arrangement. The configurations are structured by the formality and publicity of public and private relations. The configurations also structure how public and private relations cohere and function in political life. However, what counts as public and private within the configurations remain blurry and contested. On the one hand, we need a stable enough version of public and private to discern how they relate to each other across the dimensions. On the other hand, this version is destabilized by the content of hybrid relations which expands the condition of being in between. Ultimately, the configurations are *relational*. The relational nature of categories makes them contingent on each other and their structures. So what I refer to as public and private relations in the hybrid configurations are in fact relations that are made public and made private, or publicized and privatized. I maintain the distinction momentarily so I can freeze how the relations are organized. However, I do so with the knowledge that I focus on what is *between* publicized and privatized actors rather than on reifying the actors themselves. The relational balance is tricky and we cannot completely evade being trapped in the categories we uphold as stable. But every theoretical framework needs a foundation, which is ingrained with its own set of tradeoffs.

Third, the configurations of hybrid relations could extend beyond sovereignty. Up until now, my scope condition relies on regarding public and private relations for sovereign power as seen in the accomplishment of *Statehood* or *Governance*. That is, relations may coordinate across violence, markets, and rights or organize within one or more of the sovereign realms. However, hybridity is not confined to sovereign power. Other kinds of public and private hybridity exist in politics, to produce and mobilize democracy or capitalism, for instance, and outside politics, to maintain relations in the family or to engineer new cultural forms. Hybridity
in these relations can also take the forms of Contractual, Institutional, and Shadow configurations. However, the stakes of the differing relations change as it is no longer about accountability and legitimacy in sovereign politics.

Configurations of hybrid sovereignty begins from a new architecture of sovereign politics that disaggregates three conflations. The disaggregation allows us see the effects of hybridity on sovereign politics without devolving into debates about eroding state capacity. By conceptualizing sovereignty as a relational web for sovereign power, the chapter emphasizes the complicated entanglements of public and private relations in producing global power. In contrast to the myth of sovereignty as a public attribute, the research here focuses on the power politics of making and unmaking authority. The configurations of hybrid sovereignty represent Lived Sovereignty where sovereignty is divisible and diverse. Configurations of hybrid sovereignty operate in three realms of sovereign power: violence, markets, and rights. Across these three realms, the configurations feature relations that vary in formality and publicity to cohere in Contractual, Institutional, and Shadow hybridity (Figure 5).

Figure 5. Hybrid Sovereignty

Hybridity
The rest of the dissertation shows the configurations of hybrid sovereignty in practice. Chapter three takes up how the three configurations of hybrid sovereignty work in maintaining sovereign power through *Statehood*. The English East India Company represents transnational hybridity that coordinated violence, markets, and rights while cycling through *Contractual*, *Institutional*, and *Shadow* hybridity over its 250 years. The Company provides leverage on how we see each hybrid configuration in practice as well as how they change across time. Chapters four to six each take up one configuration of hybrid sovereignty in mobilizing sovereign power through *Governance*. Blackwater, the International Chamber of Commerce, and Amnesty International reveal one hybrid configuration in a distinct realm of sovereign power to more deeply evaluate the respective accountability dilemmas of sovereign politics.
Chapter Three

HYBRID SOVEREIGNTY IN THE ENGLISH EAST INDIA COMPANY

I. HYBRIDITY IN A GLOBAL COMPANY

II. A COMPANY WITHOUT POLITICS?

III. SEEING LIKE A COMPANY-STATE

   Hybrid Sovereignty: Functions

IV. TRANSFORMING FORMS

V. TRANSFORMING DYNAMICS

   Contractual Hybridity

   Institutional Hybridity

   Shadow Hybridity
I. HYBRIDITY IN A GLOBAL COMPANY

It remains an oddity that although companies are among the most powerful institutions of the modern age, our histories still focus on the actions of states and individuals, on politics and culture, rather than on corporations, their executives and their impacts.200

The beginning of the seventeenth century offered a unique opportunity for an experiment in transnational ordering. The Spanish and Portuguese had thus far monopolized trade in the “East Indies,” which consisted of spices and textiles for the European market. However, a sharp decline in Portuguese dominance set off a race to take over their market share. The Dutch, with their deep financial pockets and advanced naval technology were poised to assume this position. The English, who had stalled in their efforts during the preceding century, had to try something new in order to compete. The result after much negotiation between Queen Elizabeth I and London merchants was the establishment of the English East India Company (hereby “the Company”) by royal charter on December 31, 1600. Initially, the Company was financed one voyage at a time without any stable stockholders. However, after figuring out sea routes and establishing local contact in the Indies, the Company negotiated steady financing by the middle of the 1650s. The Company then experienced rapid growth from the 1660s till the 1700s as its trade volume, number of ships, and access to ports grew exponentially.201

By the beginning of the nineteenth century, the Company had control over a greater land and population size than Great Britain's. In India, the Company established forts and trading posts, organized land and naval forces, created local currency, collected taxes for themselves and the Mughals, and administered justice, all through a trade in spices, textiles, and opium. Yet scholars of global politics do not consider the Company as sovereign nor is it included in analyses of international politics of that time. This neglect is symptomatic of a broader bias, discussed more fully in the previous chapters, where sovereignty is uniquely represented by public authority. In history, there is a growing recognition of hybrid cases like the Company as important for politics. Nick Robins claims that “a peculiar amnesia continues to hang over the role that corporations such as the East India Company had in the creation of the modern world.”

The Company’s sovereign power is affirmed by Philip Stern:

> With its roots planted in both hemispheres, the Company’s constitution could be volatile and fragile, dependent as it was on constantly changing regimes in both Europe and Asia as well as its own inchoate and often resource-starved political institutions and practices. At the same time, the ability to borrow and balance these various sources of authority and legitimacy potentially offered a remarkably flexible and robust form of political power. Unlike a monarchical state, the Company could modulate between positions of deference and defiance, between claims to be "mere merchant" and an independent "sovereign."

This complicated blend of public and private made the Company different from its peer trading corporations and allowed it to simultaneously occupy the spaces of “merchant” and “sovereign,” “subject” and “authority.”

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202 Robins 2006: xii.
The Company’s early history mark it as one of the first to leverage hybrid sovereignty for competitive advantage. However, no systematic inquiry into this hybridity exist. Briefly, the Company’s big milestones were: its first royal charter (1600), being formally incorporated as a permanent corporation (1657), facing a rival in the form of a new East India Company (1698), which led to a merger of the old and new companies soon after (1709). It made big military gains at the Battle of Plassey in Bengal (1757), leading the way for increased wealth and regulation from a parliamentary commission (1773), whose changes were made more permanent by another parliamentary act (1784). After 213 years, the company lost its trade monopoly (1813), and then ceased to trade altogether and becoming a territorial administrator (1833), before the British government took over direct rule, starting the Raj in India (1858). While the Company occupies 250 years of international history, I am interested in the period where it established itself as a permanent successful corporation in the late-1600s and before it became a colonial state apparatus in the late 1700s. This is a critical period where the Company’s authority changed dramatically and set up the modern foundations of capitalism and state power.

In this chapter I use extensive archival data collected over three years at the British Library to construct a rich hundred-year political history of the Company. The Company’s high-level managers met three times a week and performed the routines of running an organization. In addition, the Company’s shareholders held quarterly and special session meetings. My primary data source is all the 14,400 managerial and shareholder meetings between 1678 and 1780. The data quality is beyond what most historians, sociologists, and economists of the

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204 Stern (2011) remains an exception but he too glosses over the relational tensions inherent in any “company-state” much less focusing on how these relations change over time.
Company usually have access to, partly because these materials were only recently allowed to be photographed. In addition to standard meeting minutes, the data also features drafts of correspondence and petitions, along with summary data on company finances and operations.

The data shows two key transformations. The first transformation was of the Company's self-understanding of its political authority shifting from a sovereign privilege to a sovereign right. The second transformation was the Company's shifting hybrid relations with the government meaning it did not hold the same form of hybrid sovereignty over its tenure. The Company began with contractual hybridity, which involved formal and frequent contract negotiations with the Crown and Parliament, moved into institutional hybridity, which involved embedding in political networks, and slithered into shadow hybridity, which involved behind-the-scenes trades. As a response to this shadow hybridity, the Company was reigned in the latter half of the eighteenth century with contractual relations again.

The chapter first sets up the context of the Company by evaluating standard accounts, and then moves into examining the two transformations in more detail.

II. A COMPANY WITHOUT POLITICS?

Recently, Barry Buzan and George Lawson argue that IR is defined by five historical dates: 1500, 1648, 1914, 1945, and 1989. A large gap exists between the peace of Westphalia in 1648 and the first World War. Of course, theorists and scholars of nationalism pay attention to the French revolution and other events. But there is a huge gap, and this gap is significant for

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205 However, while I have digital photocopies of the data, a combination of document quality and old English handwriting makes these image files unreadable by software. As a result, I hand transcribed and hand coded close to 55,000 pages of all the meeting minutes.

global politics as this is the period where state formation scholars tell us the public consolidated sovereign authority. I argue that the Company helps us fill the gap and it could be as important to the understanding of global politics as World War I. The Company not only occupies 250 years of international history, much longer than most states today, but also flourished during the immediate post-Westphalian period precisely when we should have seen it disappear. Furthermore, its reach into English society was unheralded where it seemed “almost everyone in eighteenth- and nineteenth-century England was connected to the East India Company.”

I imagine if IR scholars existed in the time of the Company, it would be like our China with an unparalleled obsession over categorizing it and debating whether or not it was a great power and how to fit its authority within our conventional Western notions of sovereign power.

There are three standard accounts that form the context for the Company.

First, state formation theorists, like Charles Tilly, argue for the emergence of a consolidated public sovereign authority in Europe after 1648. Historically, public authority did not have exclusive control over governance and Early Modern scholars prominently feature public-private bargains in their accounts of state formation. For Tilly, public authorities used private actors to help control their populations from rivals and secure revenue as needed. Mercenaries and pirates played a key role in how effectively power holders could wield coercion. For Hendrik Spruyt, public authorities were spurred on by private actors conducting long-distance trade to create new alliances. Merchants were the first movers in the game by making themselves attractive as partners or by going it alone and threatening public

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authorities as rivals. Over time, however, both Tilly and Spruyt emphasize the phasing out of private actors from the public functions of statehood as “the state claims a domestic and external monopoly of force. As a consequence, nonstate actors are stripped of coercive means—mercenaries and privateers thus have disappeared.”

Second, private authority scholars like Janice Thomson argue that private violence functioned mostly apart from the state. Thomson shows how the alleged disappearance of private actors occurs because their state-generating functions are no longer recognized as legitimate by the Westphalian state system. This system’s legacy leaves us with the myth of an independent public and an eschewed private in international relations. However, scholars disagree about how seriously we can take Westphalian sovereignty since “the Peace of Westphalia did not establish the ‘Westphalian system’ based on the sovereign state. Instead, it confirmed and perfected something else: a system of mutual relations among autonomous political units that was precisely not based on the concept of sovereignty.” Even still, when confronting this legacy, narratives on private authority overcompensate their neglect by basing claims to private power on autonomy from the public.

Third, most Company histories claim the company remained a purely commercial venture until the early 18th century when it became more colonial. It is standard practice to treat the Company in its early history as “just for trade” and to emphasize its colonial

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210 Spruyt 1994a: 16.
enterprises beginning from the latter half of the eighteenth century.\textsuperscript{213} Many describe the
dramatic rise and fall of the Company due to corruption. The British parliament’s website on
its history affirms this account: “Parliament had to determine its relationship with this private
trading company \textit{once it became a territorial and political power} in India, arising from its
military victories at Plassey (1757) and Buxar (1764). [...] The Company was badly administered,
with corruption among its officials in Britain and India.”\textsuperscript{214} Two points stand out. First, that
Parliament had to “determine its relationship” with the Company foregrounds the relational
approach to politics advanced here. Second, however, is the standard account that the
Company was only a political power after 1757 and that corruption played a big role in the
eventual government takeover. Against these standard histories, Stern argues the Company
was always a “Company-State,” “possessed of political institutions and underscored by coherent
principles about the nature of obligations of subjects and rulers, good government, political
economy, jurisdiction, authority, and sovereignty.”\textsuperscript{215} The next section more fully explores how
hybrid sovereignty is expressed in a Company-State.

\section*{III. SEEING LIKE A COMPANY-STATE}

The Company’s political authority was originally based on a charter, first by royal
sanction and then by Parliamentary acts. A charter was an exemption, which the company
required because the three things the Company needed to trade were all illegal: trade against
non-Christians, a monopoly, and exporting gold and silver. In addition to the exemptions to

trade, the Company also negotiated to extend its sovereign governing functions in the charters. These included controlling and regulating military, territory, laws, commerce, and money.

**Hybrid Sovereignty: Functions**

I examined all Company charters between 1600 and 1780, of which 37 charters specifically related to the Company’s sovereign functions, which I graph in Figure 1.\(^{216}\)

![Figure 1: NUMBER OF SOVEREIGN FUNCTIONS IN EIC CHARTERS, 1600-1780](image)

Figure 1 shows how the majority of the Company’s sovereign functions were in place before 1700, which puts into question the standard historical account of a purely commercial enterprise until 1757, the standard private authority account of this sovereign power being independent from the state, as well as the standard state formation account of sovereignty consolidating in public authority after 1648. I code these sovereign functions as falling under

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\(^{216}\) There is no complete collection of all Company charters in print. My reproductions of the charter texts are mostly from the Company meeting minutes.
five categories: Laws (creating and administering laws and justice), Military (creating and regulating armed forces), Territory (taking control of territory), Money (creating and regulating money), and Private Trade (creating trading licenses and regulating private trade). Figure 2 graphs when these specific sovereign functions appeared between 1600 and 1780.

In the first charter in 1600, the Company had liberty to make laws and impose penalties on offenders, as long as they were not repugnant to the Laws of England. In the same charter, the Company exercised authority over private trade, where the Crown prohibited subjects from trading without a license upon pain of forfeiture and imprisonment. But importantly, the Company was allowed to grant license to trade. In 1661, the Company had authority to raise

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217 “And the company to have liberty during the said 15 years to assemble together, and make laws and revoke the same, and impose penalties on offenders as shall seem convenient to be for the use of the Company so as such laws not repugnant to the Laws of England.”

218 “East-Indies shall not be traded unto by our subjects and by virtue of our prerogative we strictly prohibit all our said subjects from trading thereto ... upon pain of forfeiture of the goods, ships, and furniture so traded
military forces. Specifically, they could send out ships of war, men or ammunition for security and defense; they could choose commanders and officers; and they had power and authority to continue or make peace with non-Christians.\textsuperscript{219} Soon thereafter in 1669, the Company had sovereign authority over a territory in Bombay, and crucially this was also the first mention of sovereignty in the charters.\textsuperscript{220} Finally, in 1677 the Company had authority over making their own money, to stamp and coin gold, silver, copper, tin or lead.\textsuperscript{221} One more sovereign function of collecting taxes was granted to the Company much later in 1765 by the Mughals.

The progression of these sovereign grants is interesting in one way since we almost always expect territory and military to come before law-making. However, in another way, they reflect that both the Crown and the Company were figuring out sovereign authority as they went along. The key to hybrid sovereignty is the inherent authority negotiation between public and private actors. These negotiations end up advancing particular visions of sovereignty that we do not observe in accounts of sovereignty that treat it as a static possession of the state. To this end:

Given the contingent nature of the rights enjoyed by joint-stock companies [like the Company] (what the King gives, the King can also take away), their relationship with the Crown was a crucial and problematic one of mutual dependence. The balance of power obviously favored the King but at times he had to lean very heavily on his merchant constituents for crucial monetary

\begin{flushright}
\textsuperscript{219} “Company may send out either Ships of War, Men or Ammunition, into any their Factories or other Places of their Trade, in the said East-Indies, for Security and Defence; And to choose Commanders and Officers over them; and to give them Power and Authority to continue or make Peace with any Prince or People, that are not Christians.”
\end{flushright}

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\textsuperscript{220} “cede Bombay together with all the Rights, Profits, Territories and Appurtenances thereof, and as well the Property as the direct, full and absolute Dominion, and Sovereignty of the said Port and Island.”
\end{flushright}

\begin{flushright}
\textsuperscript{221} “full and free Liberty, Power and Authority within the Port and Island of Bombay to stamp and coin Monies of Gold, Silver, Copper, Tin or Lead, to be current within the said Port and Island.”
\end{flushright}
Balancing power relations relied on two differing dimensions: formality and publicity. As the Company developed, its relations with public authority took on more informal and non-publicized characteristics. These changes, in turn, herald the shifting types of hybrid sovereignty.

As previously noted, the first transformation was the Company’s shifting hybrid configurations with the Crown and Parliament meaning it did not hold the same form of hybrid sovereignty over its tenure. To preview the shifts, the Company began with contractual hybridity, which involved formal and frequent charter negotiations with Crown and Parliament, moved into institutional hybridity, which involved more use of political networks and fewer charter negotiations, and slithered into shadow hybridity, which involved behind-the-scenes trades and infrequent charter negotiations. As a response to this shadow hybridity, the Company was reined with contractual hybridity in the latter half of the eighteenth century.

The second transformation was the Company’s self-understanding of its authority shifting from a sovereign privilege to a sovereign right. “Today, people regard the ability to establish a company as a basic right in democratic market economies. In the Company’s time, however, this was a special privilege granted by the Crown (and later Parliament).”223 The shift from privilege to right becomes evident in the Company’s articulation of the basis for its authority. For instance, in a 1684 legal case the Company’s lawyer argued: “There is a great deal of difference between trading in a company, and trading out of a company: if they trade in a

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223 Robins 2006: 27.
company, they trade under the government of England; if they trade out of a company, then they trade out of the government of England, and *out of its protection.*”224 Here the Company’s self-understanding of its authority is based on a royal privilege extended to the Company. Then, almost a century later, in a 1772 petition to Parliament regarding an enquiry into the Company’s affairs, the Company wrote: “the intention of Parliament to *infringe those sacred rights* which the East India Company have hitherto enjoyed and exercised with the greatest and most extensive advantages to the commerce and revenue of this kingdom, the interest of which your petitioners hold to be inseparably connected with that of the company.”225 Now the Company’s self-understanding of its authority is based on a self-asserted right with a shared interest in the kingdom. I will explore the dynamics of this change after the next section.

IV. TRANSFORMING FORMS

Public and private relations in hybrid sovereignty take the forms of formal contracts, institutional linkages, and shadow bargains. This section shows these forms in the Company by layering different data.

Figure 3 shows all of the Company’s main charters which extended its monopoly between 1678 and 1780. The vertical lines represent whether or not there was a charter in that year.


225 1772 Petition to Parliament; IOR-B.88, p. 309; emphasis added. All IOR records refer to the India Office Records at the British Library. The B series hold the Court of Directors (general managers) meeting minutes.
Paying attention to the density over time, Figure 3 shows that the number of charters decreased over time and their duration increased. The number and distribution of charters tell us that formal contract negotiations were more common early on. The decreasing trend gives a clue that the Company does not exhibit the same kind of hybrid sovereignty, for example contractual hybridity, over time. I treat these main charters as focal points around which the Company staged authority negotiations.

To capture these negotiations, out of the 14,040 meetings I singled out special sessions for Company shareholders known as the general court of directors. The Company bylaws required that all charters and policy changes must be approved by the shareholders. There were 812 special sessions between 1678 and 1780, of which 212 were for annual elections and 600 were non-election special sessions. Any charter or other authority negotiations should then be in these 600 special sessions. Figure 4 shows the distribution of the 600 total special sessions as
The average number of Company shareholders’ special sessions per year was four (one more than the required three). The trend for 1679-1780 in Figure 4 shows many spikes in number of special sessions with volatility at the end just as the first regulating act of parliament was about to happen. Focusing on the special session spikes and the presence of charters, Figure 4 also suggests a fairly close relationship where it was likely that a charter year would have higher than average special sessions. This is the sort of relationship undergirding contractual hybridity: formal and frequent negotiations as the basis for public and private relations.

To observe institutional linkages, I collected data on the number of Members of Parliament who were also Company directors. This data collection features some challenges
after 1750 but the preliminary results, shown in green in Figure 5, show a steady peak starting around when the two political parties, the Whigs and Tories, became more established in British politics at the turn of the eighteenth century. Importantly for shadow hybridity, we should also expect that institutional links drop out as the main feature of public and private relations, which begins to happen towards the mid-1700s.

Figure 5 also overlays the number of MP-Directors with the distribution of number of special sessions and the main charters. Collectively, Figure 5 shows the focal points in the main charters, the negotiations in the special sessions, and the institutional effects in the MP-Directors. From these three interactions, we can notice shifting hybrid types, which Figure 6 highlights.
In Figure 6, for contractual hybridity from the early period until the turn of the century in 1700 there are lots of main charters and a high number of special sessions, in the 1690s in particular. This reflects that the public and private relations were characterized by formal and frequent negotiations. For institutional hybridity from 1700 till 1738 there are fewer main charters and a rise in MP-Directors, which coincides in 1712 with the Company’s longest lasting charter thus far, lasting till 1730. This reflects that the public and private relations were characterized by fewer formal negotiations and more use of institutional networks. For shadow hybridity from 1738 to 1770 there are almost no main charters and a general plateauing and decline of institutional linkages in MP-Directors. This reflects that the public and private relations were characterized by almost no formal negotiations and a decline in public representation for the
use of institutional networks. Finally, towards the middle of the 1770s emerges an anticipatory
response of reigning back the Company to contractual hybridity, with an astounding 42 special
sessions in 1773, more than ten times the expected average.

Why did the hybrid sovereignty forms shift? While embedded in this 102-year period
are accounts of changing British politics, property rights, and military might, one other
compelling answer to this question is internal to the relational dynamics of hybrid sovereignty,
which I turn to next.

V. TRANSFORMING DYNAMICS

This section focuses on the second transformation, which is the Company’s self-
understanding of sovereign authority as it moved through and inspired these hybridity shifts.

The Company was authorized by the Royal Charter to set up trading posts and generally
act as they see fit on foreign lands meaning “the corporation thus had a dual personality: subject
to the English Crown in one sense but possessed of a supreme rule abroad in another: ‘wee act
by his authority, so their dependence is on us, and they act by ours.’”226 Beyond a simple
principal-agent relationship, this meant the Company was constituted by the Crown’s authority
but in asserting its own authority often superseded the Crown. Consider this: “If the Crown had
indeed created a grant that rendered the Company something other than a direct agent or
ambassador for the monarch, it could never be withdrawn.”227 But could the Company “argue
the king by his prerogative out of his prerogative?”228 The transformation of the Company’s
sovereign authority depended on the answer to this question and provided impetus for the

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227 Stern 2011: 54.
228 Stern 2011: 54.
Company’s experimentation with moving beyond government privilege as the basis of its authority.

**Contractual Hybridity**

In contractual hybridity, the Company’s relations were dominated by formal and frequent charter negotiations with public authorities – for its first hundred years with the Crown, and from then with the Parliament. The Company’s self-understanding of sovereign authority was based on privileges granted by public authorities, primarily the Crown. One place to look for capturing how the Company perceived its sovereign authority is in the Company’s legal cases, especially concerning non-licensed traders.

By the late 1670s, interloping, or trading without a license, was a familiar topic of concern in London and the Company used it as justification to reward intelligence on suspected interlopers, board ships, detain illegal traders, and bring them to English courts all the while launching a vigorous public relations campaign in print. One such interloper was Thomas Sandys, who in 1682 was preparing to make an unauthorized trip to the East Indies. The Company stopped his ship, the Expectation, on the Thames and brought in the Court of Chancery to have his goods forfeited. Sandys, unlike other interlopers, “challenged the Admiralty’s right to seize his ship, arguing that its civil law jurisdiction extended only to the high seas. Before the Chancery, he similarly made no effort to deny he planned an eastward voyage. He insisted instead that, according to common law, he had every right to do so, since the Company’s charter, being for a monopoly, was ‘in it self void.’”

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229 State Trials: 385.
230 Stern 2011: 46.
The resulting case, *East India Company v. Sandys*, also known as “Great Case of Monopolies” was argued by some of London’s most prominent lawyers and was ruled in favor of the Company. As aforementioned, the Company’s main line of argument was using an umbrella protection under the Crown’s authority: “There is a great deal of difference between trading in a company, and trading out of a company: if they trade in a company, they trade under the government of England; if they trade out of a company, then they trade out of the government of England, and *out of its protection.*”231 This umbrella authority extended to the Company’s privileges including prosecuting interlopers. However, Sandys’ defense turned this umbrella privilege on its head and questioned the Company’s standing to sue since “the defendant trades there without licence, this may subject him to penalty at the suit of the king, but this gives no title to levy money upon the defendant for trading without licence, there is no privity, no cause of action.”232 Furthermore, the defense claimed and the Company agreed that Sandys did not impose considerable damages on Company profits. Instead: “Keeping with the general principle that interloping was more an offense against jurisdiction than commerce, Company advocates maintained that Sandys’ crime was not his trade per se but his intent in the first place to traffic into the East Indies without the Company’s permission to do so.”233

Here the question is not the limits to royal authority but how the Company manages incursions into its own jurisdiction as each interloper represents a disavowal of the Company’s authority to trade and govern exclusively. The aggressive pursuit of interlopers by the Company and especially the resources and arguments employed in the *Sandys* case are not simply for the

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231 *State Trials*: 379-380; emphasis added.
232 *State Trials*: 403.
233 Stern 2011: 56-57.
protection of its commercial profits but of its hard-won right to establish a political jurisdiction abroad (which of course feed back into its profits).

It is useful to place the Sandys case in the context of the Company’s broader case law. I used Hein Online to search for all the recorded cases in which the Company was named as plaintiff or defendant between 1650 and 1880. I found 107 total cases, of which the Company was the plaintiff in 44 cases. As a marker of sovereign authority, it is interesting to see what type of claims the Company pursued, which I code as four broad categories: Private Trade, like going after non-licensed traders, Payment, like collecting debts, Property, like building new headquarters or warehouses, and Procedural, like setting standards on what is a late payment.

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234 “The bill was brought by the company, setting forth their letters-patent, and the great charges they were at in making leagues with Princes, and building forts, and maintaining forces in India, and prayed a discovery what the defendants had traded for there, and that they might be compelled to bear a proportionable part of the said charges.” East India Company v. Evans (1684).

235 “In 1796 Alexander Mackonochie borrowed from the Plaintiffs £10,000; and to secure the re-payment, he, and Boddam, Sibbald, and Brodie, as sureties, executed a joint and several bond, with condition for payment on or before the 10th of March 1801, with interest. Mackonochie went to the East Indies; and paid the interest up to the 15th of March 1799. No payment being made upon the bond afterwards, the bill was filed in December 1801, against the obligees; stating, that Mackonochie was out of the jurisdiction; suggesting, that the bond was lost; praying payment; and offering an indemnity; as the Court shall direct.” East India Company v. Boddam (1804).

236 “Where a man suffers another to build on his ground, without setting up a right till after wards, the Court will oblige the owner to permit the person building to enjoy it quietly. Lengthening of windows, or making more lights in the old wall than formerly, does not vary the right of persons.” East India Company v. Vincent (1740).

237 “At what time a goldsmith’s note must be demanded. At half an hour after eleven in the morning of 18 January, the defendant being indebted to the plaintiffs, paid to their cashier a note of Caswell and Mount, goldsmiths in Lombard-Street; they continued to pay all notes till the next day at two; and immediately after they had stopt payment, the Company’s servant came with the note. The question was, who should bear the loss. And upon examining merchants, it was held, that the Company had made it their own, by not sending it out the afternoon of the 18th, or at furthest the next morning. So there was a verdict for the defendant.” East India Company V. Chitty (1789).
Figure 7 plots the 44 cases by type across time. Private trade and procedural types account for \( \frac{1}{3} \) each of all the cases, while a quarter were payment related and 7% were property cases.

Figure 7 suggests the Company pursued more private trade earlier and more procedural cases later in the period. This could imply the Company was initially more interested in establishing authority vis-à-vis rivals than regulating standards but this dynamic slowly reversed over time.

Other than case law, the dynamics of hybrid sovereignty are also evident in the Company’s managerial accounts. For the Company, the primary means of negotiating hybrid relations in contractual hybridity was through the exchange of formal contract privileges with forced loans or government fiscal extractions. Forced loans were when the Company gave a loan to the government at below market interest rates, which sometimes were lowered even still over the course of repayment. Some forced loans were never repaid. Fiscal extractions
included income taxes and customs duties. In 1697, as the pressure for a second East India
Company mounted, the Company offered a forced loan to the Crown:

governor represented unto the Court the present state of company affairs and the difficulties
they were under in carrying on their trade, by reason of the number of interlopers daily set forth
and that there had been several discourses of late touching this company as procuring a
parliamentary establishment: that by setting the East India Company, a loan of 700,000 pounds
may be made to his majesty.  

Figure 8 shows all the forced loans and fiscal extractions between 1678 and 1780. The clustering
of loans and extractions towards the early period is indicative of formal transactions.
Overlaying main charters (orange) with the forced loans (green) shows a close relationship
between a loan or extraction and charter negotiation. In contractual hybridity we expect to see
publicized loans and extractions as standard payments for sovereign privileges. However, in
institutional and shadow hybridity, these standard exchanges will reduce along with charters.

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238 IOR-B.41, p. 272.
Another indicator of public relations are the official sub-committees of Company’s affairs, which the 24 Company managers were elected to co-chair. In 1695, the sub-committees were all of commercial nature: Treasury; Shipping and Private Trade; Buying of Goods; Warehouses; Company Books and Accounts; House Keeper Accounts; Law Suits and Debts; Husbands Accounts; Secretaries Accounts; and Writing of Letters.\(^{239}\) Importantly, there were no sub-committees on public or government relations. In 1698, the Company formed an ad-hoc parliament pressure committee (though not an official sub-committee) “to solicit the Members of Parliament for preserving to the Company their just Rights, Privileges, and Inheritance.”\(^{240}\) It is telling that the language includes rights, privileges and inheritance as the basis of Company authority, which is also the earliest mention of rights. This ad-hoc committee both inspires and anticipates the shift from contractual to institutional hybridity. The Company explored moving to a model where their sovereign authority is more stable and taken-for-granted without requiring formal and frequent exchanges. Figure 9 shows the area distribution of the number of special sessions that were explicitly about relations with the Crown or Parliament. During contractual hybridity, there are an above average number of sessions concerning public authorities, which reduce and refocus mostly on the Commons as the Company moved into the eighteenth century.

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\(^{239}\) IOR-B.41, p. 6.

\(^{240}\) IOR-B.41, p. 286.
In institutional hybridity, the Company’s relations were dominated by political institutional networks through lobbying and political representation, which coincided with the emergence of the Tories and Whigs as prominent political parties. The Company’s self-understanding of sovereign authority was based on a mix of privileges and rights granted by public authorities, primarily the Parliament.

Crucially, the Company’s close ties with the Crown in contractual hybridity became a liability after King James II was overthrown in the Glorious Revolution in 1688 and power shifted from the Tories to the Whigs and the Crown to the House of Commons in Parliament. These changes resulted in a temporary dissolution of the Company’s charter, which:

had constitutional implications since one key question was whether a company could legitimately possess monopolistic trading privileges on the basis of a royal charter alone, or if it needed parliamentary sanction. As power shifted to the Commons in the aftermath of the
Glorious Revolution, it became clear that the old East India Company needed to consolidate its position with an Act of Parliament.\textsuperscript{241} As the locus of public authority shifted from the Crown to Parliament, the Company adjusted its relational strategy to move beyond currying royal favors and privileges. After Parliament approved the creation of the new East India Company, the old Company found itself lacking political leverage when the Tories lost the house majority. Indeed, by one analysis of London city leaders during this time, two-thirds of the old Company directors were Tories while 80% of the new Company directors were Whigs.\textsuperscript{242} In 1704 to prevent a damaging bill on trade barriers and, the Company recommended that shareholders “solicit their Friends in this affair, and to use their best endeavors to prevent passing the said Bill.”\textsuperscript{243} Keep in mind this call is for the prevention of passing a bill. In 1718, the Company created an official sub-committee “For the House” – recall how in 1695 the sub-committees were all operations related.\textsuperscript{244} Also in 1718, the Company again recommended shareholders “to solicit their Friends that in case such Bill be brought into Parliament.”\textsuperscript{245} The Company shifted its institutional strategy to a more sophisticated lobbying, which also accounts for the rise of MP-Directors during this time. Unlike in 1704, in 1718 the solicitation through institutional hybridity was meant to prevent having damaging bills brought up in the Commons in the first place.

After the merger with the new Company was finalized in 1709, the United Company sought a charter through a parliamentary act in 1712, which was the longest lasting charter for the Company thus far, lasting till 1730. The Company paid 1.2 million pounds for this charter in

\textsuperscript{241} Carruthers 1996: 148.  
\textsuperscript{242} Carruthers 1996: 150.  
\textsuperscript{243} IOR-B.44, p. 180; emphasis added.  
\textsuperscript{244} IOR-B.55, p. 9; emphasis added.  
\textsuperscript{245} IOR-B.55, p. 135.
the form of a grant rather than a forced loan. Increasingly, “the 24 directors controlled the Company’s system of patronage, enabling them to place friends, relatives and business partners in key positions, a gift that became increasingly valuable in the second half of the eighteenth century.” Referring back to Figure 9, which graphs the number of special sessions that were about relations with the Crown or Parliament, the only times there were above average sessions during institutional hybridity were around 1720, when the South Sea Company’s share bubble burst, and around the 1730 charter. In 1730, the Commons asked for money as payment for charter extension: “The further sum of two hundred thousand pounds to be paid by the Company for the use of the Publick – without any interest or addition to their Capital.” However, 200,000 pounds is far less than what the Company paid in 1712 when it was at the cusp of embedding itself in institutional hybridity. Moreover, relative to contractual hybridity, the Company had infrequent negotiations in the form of formal contracts with public authorities. Instead, it used institutional networks like its MP-Directors to handle incursions into its political authority, which the Company increasingly came to see as a right. In institutional hybridity, the Company was “a corporate battleground for Whigs and Tories.” These partisan contests spilled over to the special sessions; “not for nothing were the annual meetings of the shareholders described as ‘little parliaments’ by William Pitt the Elder.”

The Company’s use of legal arguments again provides insights on how it thought about sovereign authority in institutional hybridity. In a 1715 case against private traders, EIC v. Atkins, the Company prosecuted one of its captains who was sent to Canton, China. The Court

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247 IOR-B.60, p. 435.
of Equity heard a plea from the defendant to not force discovery of evidence because “the defendant is not bound to discover what will subject him to a penalty.” Sir Thomas Powys, Counsel for the Company argued:

I would observe, that the Act 9 W. 3, has established an oath to be taken by members of the Company, that they will not send to the East Indies any goods for their private account, contrary to that Act. So that we are upon an Act of Parliament, and the covenants the Company takes from their supercargoes, is in pursuance and execution of that Act; and there is nothing charged in this bill but what is forbidden by that Act; for we ask them, did not you carry more goods than the Company allowed. [...] It is very considerable, that this thing should be settled between us; for if this plea should stand, it may be the overthrowing the Act of Parliament and the Company too. Compared to the Sandys case, here the Company invokes a modified umbrella authority where it cites the specific Parliamentary acts authorizing the Company to regulate its employees’ trade and also ties the fate of Parliament’s authority with the Company’s. However, unlike in contractual hybridity where the Company used generalized sovereign privileges as an exclusive purview of the Crown’s sovereign authority, in institutional hybridity the Company expands sovereign authority on the basis of specific “rights, privileges, and inheritance” that leverage Parliament’s recognition of the Company’s legal basis for sovereign authority and not as a client of Parliament’s protection.

Shadow Hybridity

In shadow hybridity, the Company’s relations were dominated by informal and non-publicized side bargains with the Crown and Parliament, largely through the use of secret committees. The Company’s self-understanding of sovereign authority was based on rights that it sought to fiercely self-protect.

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250 EIC v. Atkins (1715), p. 73.
251 EIC v. Atkins (1715), pp. 73-75; emphasis added.
Previously, when Parliament was considering giving a license to trade to the new Company as early as 1693, one of the Company’s directors, Thomas Cooke, “tried to co-opt key members of the opposition by secretly giving them company stock, and engaged in widespread bribery of politicians. The latter strategy backfired when it came to light in 1695 and was fully exploited by the Whigs to create a public scandal.”\textsuperscript{252} The Thomas Cooke Affair, as it came to be known, served as a reminder of the careless side dealings of contractual hybridity. Through institutional hybridity, the Company expanded its deals in more sophisticated networks, and “what the Company sought was a zone of commercial sovereignty that ensured it free rein to operate as it wished. Giving presents to princes and paying bribes to parliamentarians were simply part of the fundamental costs of business.”\textsuperscript{253} However, where Robins, typical of Company historians, regards this authority as “commercial sovereignty,” I argue we should interpret this authority as hybrid (political) sovereignty that is also good for business. While relations in institutional hybridity were working quite well for the Company, the relations still depended on a quasi-patronage with Parliament to protect and renew the Company’s sovereign rights, privileges, and inheritance. After 1738, the Company reflected a different strategy, where it assumed recognition of its sovereign authority and proceeded as if it did not need permission. In other words, it began acting more like it had intrinsic sovereign rights.

This shift also shows up in the legal cases, for instance when a defendant’s lawyer argued in a 1749 private trade case, EIC v. Campbell, how “the Company is considered in the East Indies as a surety for every Englishman, and answerable for any damage done by them there; and as every surety may come upon his principal, has a right to be indemnified by the person, from

\textsuperscript{252} Carruthers 1996: 149.
\textsuperscript{253} Robins 2006: 28.
whom the Indians suffered an injury, for which the company are to make satisfaction.\textsuperscript{254} The Company acts as a guarantor for “every Englishman’s” claims in India without any reference to the Crown or Parliament as a further backer to the Company.

In 1718, the Company created an ad-hoc “secret committee to prevent the progress of a new trade to the east indies under the colour of foreign commissions.”\textsuperscript{255} It took another 23 years before such a committee was formally introduced as an official sub-committee in 1741 by the formation of a Committee on Secrecy, also known as the Secret Committee.\textsuperscript{256} For many, “the all-powerful Secret Committee defined the Company’s political and military strategy in times of war.”\textsuperscript{257} Indeed, the Secret Committee was responsible for such things as negotiating an agreement with the French East India Company in 1753 during the Second Carnatic War between England and France for control of South India, “which had previously been communicated by the Secret Committee to the Court of Directors.”\textsuperscript{258} However, the Secret Committee’s bounds extended beyond times of war to envelop ordinary operations of the Company. By 1762, “The Secret Committee ...recommending... the observance of an inviolable secrecy as to their contents,” received direct communications from the government like a “Letter from James Rivers, Esq, one of the Under Secretaries in the Right Honorable the Earl of Egremont’s Office to the Deputy Chairman – dated at Whitehall.”\textsuperscript{259} What is important for shadow hybridity is that these secret communications between the Company and governemnt

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{254} EIC v. Campbell (1749).
\item \textsuperscript{255} IOR-B.55, p. 133.
\item \textsuperscript{256} IOR-B.66, p. 269.
\item \textsuperscript{257} Robins 2006: 32.
\item \textsuperscript{258} IOR-B.72, p. 493.
\item \textsuperscript{259} IOR-B.78, p. 337.
\end{itemize}
\end{footnotesize}
were not a case of rerouting messages meant for the managers or shareholders; they were backchannels properly understood.

Referring back to Figure 8 that graphs all the forced loans or fiscal extractions from the Company shows that the Company avoided formal payment during a vast portion of its shadow hybridity. Even more surprising is that while the Company was forced to lend to the Government in each of the wars up to 1750, it did make any forced loans or extractions during the Seven Years War from 1756 to 1763.

In 1765, the secret committee was made aware of a “parliamentary Enquiry on the committee and company affairs.” Parliament, in an unprecedented move, created its own secret committee to investigate the Company’s secret committee and shadow dealings. However, in an amusing turn of events, the Company had access to the Parliament’s secret committee and obtained a list of its members by the end of day. In any case, this inquiry led to a subsequent investigation where the Commons required a thorough audit not only of the Company’s financials and operations but also of all its communications and sub-committee meetings. In response, in 1772 the Company sent the aforementioned petition: “the intention of Parliament to infringe those sacred rights which the East India Company have hitherto enjoyed and exercised with the greatest and most extensive advantages to the commerce and revenue of this kingdom, the interest of which your petitioners hold to be inseparably connected with that of the company.” The petition mentions sovereign rights standing alone without also foregrounding “privileges and inheritances” as happened almost a century before in 1698. Moreover, the petition also laced in shared national interests, whereas before it

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260 IOR-B.81, p. 388.
261 IOR-B.88, p. 309.
deferred interests to the Crown or Parliament. In addition, the Company wrote: “That notwithstanding the firm reliance of your petitioners on the protection of parliament, they cannot avoid being alarmed at the appointment of a Committee of Secrecy, as an uncommon mode of proceeding, and which they are informed has not hitherto been instituted.”

Here the Company is alarmed that Parliament created a secret committee to deal with, among other concerns, the Company’s secret committee and shadow hybridity.

This chapter showed the form and dynamics of hybrid sovereignty in the East India Company. Key to the Company’s success were the public and private relations ranging from contractual, institutional, and shadow configurations. Determining and changing relationships in hybrid sovereignty were central to the Company’s survival and success, but also brought them under greater scrutiny. It also muddied who counted as public and private in the process and transformed the company’s self-understanding of its authority. The Company’s analysis depicts the promises of a fuller representation of sovereignty in global politics by focusing on relations. When we do, we notice contestations that are usually glided over in studies on sovereignty and power, and in slowing down we show where the public and private distinction labors the most to produce itself.

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262 IOR-B.88, p. 309.
Chapter Four

CONTRACTUAL HYBRIDITY IN BLACKWATER

I. CONTRACTING AMERICAN SECURITY

II. FROM BUREAUCRATS TO VENTURE CAPITALISTS

Dilemmas in Sovereign Politics

III. THE “FEDEX OF NATIONAL SECURITY”

Accountability Gaps

IV. THE STATE OF AMERICAN CONTRACTING

Bureaucratic Wrangling

Inherently Governmental

V. PUBLIC AND PRIVATE RELATIONS IN CONTRACTUAL HYBRIDITY
I. CONTRACTING AMERICAN SECURITY

The war will be won in large measure by forces you do not know about, in actions you will not see and in ways you may not want to know about, but we will prevail.\(^{263}\)

At the height of the war in Iraq in 2007, contractors outnumbered American troops with estimates of 180,000 contractors from 630 companies and 100 countries deployed alongside 160,000 soldiers.\(^{264}\) By late 2009, 104,000 contractors and 64,000 American troops were on the ground in Afghanistan.\(^{265}\) For the first time in the history of major American wars, the ratio of contractors to military servicepersons increased to more than 1:1 (Table 1). A third of all Iraqi reconstruction funds went to security contractors, equaling the combined payments of “more than 90 percent of all taxpayers” who “might as well remit everything they owe directly to [contractors].”\(^{266}\) The trend led practitioners to observe that “in Iraq, the postwar business boom was not oil, it was security,”\(^{267}\) and scholars to examine the “growing market for force [that] now exists alongside, and intertwined with, state military and police forces.”\(^{268}\) The epigraph quotes the Central Intelligence Agency’s (CIA) then number three official, Buzzy Krongard, whose reference to “forces you do not know about” could be a general nod to physical


\(^{266}\) Donald Bartlett and James Steele, “Washington’s $8 Billion Shadow,” Vanity Fair, March 2007.


forces or events. But Krongard’s statement also foreshadows an unprecedented contractor force in American security.

Table 1. Contractors in Major American Wars

<table>
<thead>
<tr>
<th>War</th>
<th>Contractors</th>
<th>Military</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Revolution</td>
<td>1,500</td>
<td>9,000</td>
<td>1:6</td>
</tr>
<tr>
<td>Mexican/American</td>
<td>6,000</td>
<td>33,000</td>
<td>1:6</td>
</tr>
<tr>
<td>Civil War</td>
<td>200,000</td>
<td>1,000,000</td>
<td>1:5</td>
</tr>
<tr>
<td>World War I</td>
<td>85,000</td>
<td>2,000,000</td>
<td>1:20</td>
</tr>
<tr>
<td>World War II</td>
<td>734,000</td>
<td>5,400,000</td>
<td>1:7</td>
</tr>
<tr>
<td>Korean War</td>
<td>156,000</td>
<td>393,000</td>
<td>1:2.5</td>
</tr>
<tr>
<td>Vietnam War</td>
<td>70,000</td>
<td>359,000</td>
<td>1:6</td>
</tr>
<tr>
<td>Gulf War</td>
<td>50,400</td>
<td>541,000</td>
<td>1:10</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>104,000</td>
<td>64,000</td>
<td>1.6:1</td>
</tr>
<tr>
<td>Iraq War II</td>
<td>180,000</td>
<td>160,000</td>
<td>1:1</td>
</tr>
</tbody>
</table>

Security contracting reflects the general predicament governments face in a “make or buy” decision when industry is capable of providing comparable goods or services for governance. The conventional wisdom for the rise in global security contracting is that the end of the Cold War “gave states a reason to downsize their military forces, freeing up millions of former military personnel from a wide variety of countries, many of them Western. At the same time, the end of the Cold War lifted the lid on many long-simmering conflicts held in check by the superpowers.” Security contractors filled the vacuum for these peripheral conflicts when the U.S. and others turned a blind eye. This market-driven narrative makes sense for security contractors in what political scientists term “weak states” like Sierra Leone (who used Executive


270 Isenberg 2008: 1.
Outcomes) and Papua New Guinea (who used Sandline). However, the explanation falls short of accounting for the rise in American security contracting for a “strong state.”\footnote{271}

The American security market is traditionally dominated by weapons manufacturers like Lockheed Martin, which as the largest federal contractor received $36.8 billion in 2016, more than the budgets of the Department of Commerce, the Department of Interior, the Small Business Administration, and Congress combined.\footnote{272} In Iraq, security contracting diversified beyond manufacturing to include service provision. Contractor roles varied from logistical “life support,” like setting up bases, to security roles when protecting top diplomats during counterinsurgency campaigns. Indeed, “with every week of insurgency in a war zone with no front, these companies [were] becoming more deeply enmeshed in combat, in some cases all but obliterating distinctions between professional troops and private commandos. More and more, they give the appearance of private, for-profit militias.”\footnote{273}

This chapter contextualizes the emerging security market within the larger American bureaucratic apparatus for contracting and explores contractual hybridity in ordering international violence. The effort reveals the bureaucratic scaffolding behind a grand strategy that tips the scale of American security toward a hybridized public and private force. Using the particularities of security contracting and Blackwater, I investigate the broader debates raging for the past five decades on how to accommodate private within public. I situate Blackwater’s contracting practices within a moment in the state of American contracting where all

contracting becomes securitized. We cannot fully appreciate the stakes of hybrid sovereignty until we pay attention to the wider context of producing these arrangements that are only now subject to scrutiny.

Many scholars in international politics study security contractors systematically,\textsuperscript{274} or as single-case studies,\textsuperscript{275} in historical\textsuperscript{276} and contemporary\textsuperscript{277} accounts. A popular line of inquiry is asking “whether privatization of security in strong states will lead to disruptive change in military effectiveness or will be folded into a new reinforcing process of control.”\textsuperscript{278} The conventional investigations of security contractors follow two classic problems for sovereignty: Weberian monopoly of force and Huntingtonian civil-military relations. Contractors represent a challenge to conventional sovereignty because sovereign states are not supposed to outsource war to private forces. Security contractors also disrupt the civil-military balance by posing as a hybrid entity that does not face the same loyalty tests as the military or the same scrutiny as civilians. For some, contractors raise a deep challenge to the guardians of the public as “a

\textsuperscript{275} On the Iraq case, see David Isenberg, A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq, British-American Security Information Council, 2004; Stanger 2009.
\textsuperscript{278} Avant 2005: 256.
government dependent on contractors to function too easily loses sight of those things that only government can do well."²⁷⁹

This chapter questions any taken-for-granted notion of “things that only government can do well.” It argues that public and private interact in messy ways rather than stay apart in tidy boxes. The Blackwater archival materials show accountability gaps in finance, law, and politics where the same demands that sustain contracting ultimately undermine effective accountability. Blackwater is often pushed to a parallel sphere of “shadow” governance separate from a purer sovereign space. However, contractors are a part not apart from sovereign politics. Such inclusion raises its own set of problems that we are ill-equipped to recognize from the Weberian and Huntingtonian dilemmas. Namely how public and private are treated interchangeably without symmetric obligations for political authority.

Scholars of grand strategy consider the various military, economic, and diplomatic means for high-level foreign policy coordination.²⁸⁰ Grand strategy involves collective deliberation on four key elements: defining national interests; identifying state threats; allocating state resources; and mobilizing policy support.²⁸¹ For some, grand strategy reflects a macro-micro gap where high-level deliberations stand apart from on-the-ground decisions.²⁸² However, for others, it “takes a whole apparatus of the state to execute a grand strategy.”²⁸³ Most recently, a new direction in grand strategy research pushes scholars to evaluate the

“politics of collective mobilization” in power politics from traditional *realpolitik* to critical security studies.\(^{284}\) However, discussions of implications of security contractors for grand strategy are in its infancy.\(^{285}\) Perhaps contractors provide a back-door to achieve a hegemonic grand strategy where the U.S. maintains a “role of guarantor of global stability at a time when the American public is unwilling to provide the resources necessary.”\(^{286}\) The Iraq war represents how “almost no thought had been given to an overall strategy to determine which jobs and functions should be handled by the government, and which could be turned over to private companies.”\(^{287}\)

This chapter also highlights the bureaucratic struggle in maintaining a grand strategy of sovereignty under contract by connecting the macro-micro gap and taking seriously the labor of collective mobilization in power politics. From Eisenhower’s outsourcing directive to the current massive contracting apparatus, American bureaucrats engaged in debates on demarcating the role of contractors so that they do not take over “inherently governmental functions.” Buried in bureaucratic politics are the dramatic redefinitions of “inherently governmental functions” and the changing contours of sovereign authority. In order to accommodate security contractors, bureaucrats create new categories of government functions, revise examples of necessary governmental authority, and prohibit particular types of contracting relations that affect all facets of governance. In doing so, the state of American contracting became “securitized.” While the deployment of security contractors enables a


\(^{286}\) Isenberg 2009: 5.

particular fulfillment of American grand strategy abroad with limited political costs, the use of contractors initiates another set of grand strategic bargains about the form and purpose of governance. At the heart of these grounded practices of grand strategy is a productive tension where contracting continually defies the bureaucratic borders of public and private within sovereign power.

The rest of the chapter proceeds as follows. The second section introduces the context and sovereign dilemmas in security contracting. The third section introduces the case of Blackwater and uses it to illustrate accountability gaps in finance, law, and politics. The fourth section broadens the lens to trace the history of American contracting in general and the bureaucratic construction of “inherently governmental” functions. The fifth section concludes by specifying how American security contracting dynamically interacts with bureaucratic demarcations of public and private in sovereign politics.

II. FROM BUREAUCRATS TO VENTURE CAPITALISTS

In 1992, former Vice-President and then Secretary of Defense Dick Cheney commissioned a study from Halliburton on how to quickly privatize the military bureaucracy. By the end of his term, Cheney reduced military spending by $10 billion and the number of troops by 27% from 2.2. million to 1.6 million. As the budget and manpower shrunk, Cheney’s “idea was to free up the troops to do the fighting while private contractors handled the back-end logistics.” As Cheney went on to lead Halliburton, in 1995 a Defense Science Board report suggested that “the Pentagon could save up to $12 billion annually by 2002 if it contracted out

\[\text{footnotes}
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\[\text{footnote 129} \quad \text{Dan Briody, } \text{The Halliburton Agenda: The Politics of Oil and Money, New Jersey: John Wiley & Sons, 2004, pp. 195–196.}\]
all support functions except actual warfighting." During this time, the U.S. diversified its international security and peacebuilding operations to include contractors. For instance, in 1996, the Clinton administration sent Military Professional Resources Incorporated (MPRI) to train the Croatian military against Yugoslavia, “a contract that ultimately tipped the balance of that conflict.” DynCorp, another early contractor, “supported every major U.S. military campaign since Korea.” Outside international wars, “virtually all U.S. contributions to international civilian police units in the 1990s were DynCorp employees.”

By 2000, American security contracting was in position for an unprecedented boom. Secretary of Defense Donald Rumsfeld continued Cheney’s transformation, stating that the Pentagon “must behave less like bureaucrats and more like venture capitalists.” The military moved to expand the 1985 Logistics Civil Augmentation Program, or LOGCAP, under which “contractors provided services ranging from building bases to cooking food and doing laundry.” Apart from Cheney, the George W. Bush administration appointed many former executives of defense contractors, like Under Secretary of Defense Pete Aldridge (Aerospace Corporation), Army Secretary Thomas White (Enron), Navy Secretary Gordon England (General Dynamics), and Air Force Secretary James Roche (Northrop Grumman). Following the 9/11 attacks, the military awarded a 10-year $32 billion LOGCAP contract to Halliburton/KBR for the “war on terror.”

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200 Isenberg 2008: 2.
201 Scahill 2008: 52.
202 Isenberg 2008: 2.
206 Scahill 2008: 53.
Defense contractors make up a large share of all American contracting (Table 2). Whereas most defense contractors have long established manufacturing links with the American government, the Iraq war saw a proliferation of security service providers deployed alongside the military. A 2013 investigation by *The Financial Times* estimates the U.S. spent at least $138 billion on security contractors, with former Halliburton subsidiary, Kellogg, Brown and Root (KBR), awarded the highest contract value of at least $39.5 billion.\(^{297}\) None of the top contractors in Iraq included weapon manufacturers. Instead, the demand for security contractors in Iraq came from needs outside traditional combat.

**Table 2. Top 10 American Contractors by Contract Value and Industry, 2016\(^{298}\)**

<table>
<thead>
<tr>
<th>Rank</th>
<th>Name</th>
<th>Contract Value</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Lockheed Martin</td>
<td>$36.8 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>2</td>
<td>Boeing</td>
<td>$16.5 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>3</td>
<td>General Dynamics</td>
<td>$13.8 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>4</td>
<td>Raytheon</td>
<td>$12.7 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>5</td>
<td>Northrop Grumman</td>
<td>$11 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>6</td>
<td>McKesson</td>
<td>$8.4 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>7</td>
<td>United Technologies</td>
<td>$7.2 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>8</td>
<td>L-3 Communications</td>
<td>$5.4 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>9</td>
<td>Bechtel Group</td>
<td>$4.9 billion</td>
<td>Defense, Energy</td>
</tr>
<tr>
<td>10</td>
<td>BAE Systems</td>
<td>$4.6 billion</td>
<td>Defense</td>
</tr>
</tbody>
</table>

The State Department’s Bureau of Diplomatic Security began a Worldwide Personal Protective Services in 2002, “originally envisioned as a small-scale bodyguard operation to protect small groups of U.S. diplomats and other U.S. and foreign officials. In Iraq, the administration turned it into a paramilitary force several thousand strong. Spending on the program jumped from $50 million in 2003 to $613 million in 2006.”\(^{299}\) In 2007, former

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\(^{298}\) Bloomberg Government: [https://about.bgov.com/bgov200/](https://about.bgov.com/bgov200/)

Ambassador Ryan Crocker stated, “there is simply no way at all that the State Department’s Bureau of Diplomatic Security could ever have enough full-time personnel to staff the security function in Iraq. There is no alternative except through contracts.”300

While competitors, the security firms coordinated and subcontracted with each other, leading one government official to foresee how “each private firm amounts to an individual battalion. Now they are all coming together to build the largest security organization in the world.”301 The coordination stepped up in May 2004 when the U.S. awarded a $293 million three-year contract to the newly formed British firm Aegis Defense Services, founded by Tim Spicer who previously ran Sandline.302 Aegis was contracted to “coordinate and oversee the activities and movements of the scores of private military firms in the country servicing the occupation, including facilitating intelligence and security briefings.”303 The resulting self-regulation worried politicians that “the fastest-growing component of government is the ‘shadow government’ represented by private companies doing public work under federal contract.”304 The shadow government nature of security contractors recalls two conventional dilemmas in sovereign politics.

Dilemmas in Sovereign Politics

American security contracting challenges what it means to be a sovereign state by disrupting the Weberian monopoly of force. The Weberian state is one that “(successfully)

303 Scahill 2008: 223-224.
claims the monopoly of the legitimate use of physical force within a given territory." The lines between various “public” and “private” relations inform state-sanctioned, state-controlled, and state-legitimated security practices. Security contractors directly control governmental resources and decision-making by their participation in the “formal capacity to decide over the use of force.” Within this context,

the private provision can change the underlying meaning of the state. Because the state is the sphere within which public is defined, moving from public to private provision can shift people's expectations of the proper size and responsibilities of the public sphere and thus the value attached to the public delivery of services.

When the use of force goes beyond public control, the state undergoes a transformation to determine its political authority. In addition, security contractors indirectly control governmental resources and decision-making because of close ties with politicians (Cheney and Halliburton being the most obvious example). As such, an accountability gap emerges where security contractors exert tremendous discretionary power in interpreting their mandated duties, especially in uncertain war zones. Former Ambassador to Gabon and Deputy Chief of Mission in Iraq, Joe Wilson, echoes these concerns in Weberian terms:

I think it’s extraordinarily dangerous when a nation begins to outsource its monopoly on the use of force and the use of violence in support of its foreign policy or national security objectives. The billions of dollars being doled out to war companies makes them a very powerful interest group within the American body politic and an interest group that is in fact armed. And the question will arise at some time: to whom do they owe their loyalty?

There are two related issues. The first is that outsourcing a monopoly on the use of force undermines American standing as a sovereign state. The second and less commonly articulated

\footnote{Max Weber, “Politics as a Vocation,” The Vocation Lectures: Science as a Vocation; Politics as a Vocation. T. Strong et al., eds. Hackett, 2004 [1919]: 32.} 
\footnote{Leander 2005: 807.} 
\footnote{Avant 2005: 43-44.} 
\footnote{U.S. diplomat Joe Wilson, Scahill interview July 2007. Scahill 2008: 45.}
is that precisely because this is about the use of force, security contractors are not the same as any other interest group. They are armed and have the capacity to use force, which further undermines Weberian sovereign power.

Ambassador Wilson’s final point about loyalty sounds less Weberian and more resonant of a distrust of contractors long preceding sovereign states. Machiavelli famously railed against mercenaries:

Mercenary and auxiliary troops are both useless and dangerous; and if any one attempts to found his state upon mercenaries, it will never be stable or secure. [...] The reason of all this is, that mercenary troops are not influenced by affection, or by any other consideration except their small stipend, which is not enough to make them willing to die for you. They are ready to serve you as soldiers so long as you are at peace; but when war comes, they will either run away or march off.309

Security contractors then also complicate standard civil-military relations. Samuel Huntington identifies a theory of civil-military relations where “objective civilian control” is crucial to striking the balance between a military strong enough to keep a state from conquest yet obedient enough to not result in a coup.310 Huntington addresses this “civil-military problematique”311 by advocating for societal ideology to align with a conservative-realist military ethic and making the military politically sterile through professionalization.312 However, security contractors create a third civil-military actor beyond military and society that has implications for striking any Huntingtonian balance. Security contractors also alter civil-military relations by serving as leverage between government and soldiers. For instance,

312 Huntington 1957: 91.
in 1997, Papua New Guinea’s military mutinied and toppled the government after the latter contracted with Sandline, sliding into the coup portion of Huntington’s problematique.\textsuperscript{313}

Moreover, while contractors are often functionally like soldiers, they may not share Huntington’s professionalization or conservative-realist ethic. To be sure, most security contractors have a military background, with special forces being in especially high demand, but it is not clear if the military ethic travels to those who do not wear a military uniform. The difference is about obligation. Whereas military personnel are obligated to risk their lives or face disciplinary action, security contractors have been known to break their service contracts when the risk is too high without significant costs. In doing so the security contractors endanger their reputation, but this is a different kind of cost under a different ethic than the one faced by soldiers.\textsuperscript{314}

The Weberian and Huntingtonian dilemmas play out in contemporary American security contracting. However, tensions go deeper than such conventional frames to raise more profound implications for accountability and authority. To fully understand the scope of the new security dilemmas, it is useful to dig into one particular contractor and its politics.

\textbf{III. THE “FEDEX OF NATIONAL SECURITY”}

Blackwater is perhaps the most infamous American security contractor. Its founder, Erik Prince, has stated his corporate goal is “to do for the national security apparatus what FedEx did to the postal service.”\textsuperscript{315} Prince is an ex-Navy SEAL and well-connected billionaire

\begin{footnotesize}


\textsuperscript{315} Erik Prince speaking at West 2006 conference, January 11, 2006.
\end{footnotesize}
from Michigan. His sister, Betsy DeVos, is Trump's Secretary of Education. Prince established Blackwater in 1996 as a military training facility, receiving an FBI contract to train police officers after the Columbine school shootings and a Navy contract for counter-terrorism after the bombing of the USS Cole destroyer in 1999. Following the 9/11 attacks, the FBI extended their contract to include counter-terrorism and the CIA contracted to protect stations in Afghanistan, which led to a big contract in 2003 to protect Paul Bremmer, the top American diplomat in Iraq. By 2005, Blackwater had more than half a billion dollars in federal contracts and in 2007 they had more than a billion.

All throughout, Blackwater headhunted high-ranking government officials. After stepping down from the CIA, Buzzy Krongard went on to work as an executive at Blackwater. In 2005, Joseph E. Schmitz, the Pentagon’s Inspector General, and “the top U.S. official in charge of directly overseeing military contractors in Iraq and Afghanistan,” resigned to serve as the Prince Group’s chief operating officer and general counsel.316 J. Cofer Black, a former CIA director of operations and the State Department’s head of counterterrorism and leader of the hunt for Bin Laden, joined Blackwater in 2004 as the company’s vice chairman.317

Between 2001 and 2008 Blackwater saw an incredible growth of 162,000% from less than a million dollars in federal contracts to over $1.2 billion (Figure 1). These are only the contracts we know about. Many contracts, like with the CIA, are off-the-books or known as black contracts. In September 2007, Blackwater contractors killed 17 and injured dozens of Iraqi

civilians in Nisour Square, Baghdad, provoking public outrage. Blackwater rode out the scandal for a couple of years, changed their name, and then sold the company now known as Academi. The rise of Blackwater offers an effective prism to evaluate the politics of sovereignty under contract. Journalists cited Blackwater as building “a privatized parallel structure to the U.S. national security apparatus.” Politicians echoed this concern, like in a Congressional hearing focused entirely on Blackwater whose purpose was “to question whether [Blackwater] created a shadow military of mercenary forces that are not accountable to the U.S. Government or to anyone else.” Scholars maintain that “systemic privatization” shrinks the state and “changes who guards the guardians.” However, Blackwater does not reflect a parallel

<table>
<thead>
<tr>
<th>Year</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value (Millions USD)</td>
<td>0</td>
<td>200</td>
<td>400</td>
<td>600</td>
<td>800</td>
<td>1,000</td>
<td>1,200</td>
<td>1,060</td>
</tr>
</tbody>
</table>

FIGURE 1. VALUE OF BLACKWATER FEDERAL CONTRACTS, 2001-2008

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38 Scahill 2008: 43-44.
apparatus or shrinking of the state; instead, it reflects the diversification of security structures
to include both public and private actors. The hybridity creates alternative narratives where
contractors are seen as an intrinsic part of a state’s “self” or just one of many “help for hire.”

At first, contractors like Blackwater are just one cog of the larger security arrangement
that governments marshal to meet their needs. Congressman Yarmouth questions Prince on
whether Blackwater poaching Navy SEALs is part of the state competing with itself:

But in this situation, the American taxpayers are bidding against themselves. Because we trained
Navy SEALs, Navy SEALs then go into your employ, then the Navy has to bid, as I understand,
in one report, $100,000 to get them back. But we are bidding against ourselves, aren’t we? We
are not bidding against another external competitor.322

Both the government and contractor perspectives deploy this “demand-based” argument for
initial contracting. As Krongard warned the American public about the coming war on terror
and hidden forces, he also brokered Blackwater’s first major war contract. In early 2002,
Krongard visited the CIA’s outpost in Kabul and “realized the agency’s new station was sorely
lacking security. Blackwater received a $5.4 million six-month no-bid contract to provide
twenty security guards for the Kabul CIA station in April 2002.”323 A little over a year after the
Kabul contract, Blackwater employees, under contract with Iraq’s Coalition Provisional
Authority (CPA), “carried weapons, had their own helicopters and fought off insurgents in ways
that were hard to distinguish from combat.”324 The convergence between contractors and
government functions then forces a position of public and private demarcation vis-à-vis the
state.

322 U.S. Congressman John A. Yarmouth and Erik Prince, U.S. House of House of Representatives Committee
on Oversight and Government Reform, Hearing on “Blackwater USA,” October 2, 2007: 90.
In response, the demand-contingent arguments shift to a universal appeal to normalize contracting. After the CPA contract, Prince began to position Blackwater as “a patriotic extension of the U.S. military, and in September 2005 he issued a company-wide memorandum requiring all company employees and contractors to swear the same oath of loyalty to the U.S. Constitution as the Pentagon, State Department and intelligence agencies.”\(^\text{325}\) When asked why there was no clause in Blackwater’s by-laws forbidding it to work for American enemies, Prince replied:

This idea that we have this private army in the wings is just not accurate. The people we employ are former U.S. military and law enforcement people, people who have sworn the oath to support and defend the Constitution against all enemies, foreign and domestic. They bleed red, white and blue. So the idea that they are going to suddenly switch after having served honorably for the U.S. military and go play for the other team, it is not likely.\(^\text{326}\) Prince opened several new offices in Baghdad, Amman, and Kuwait City, “as well as headquarters in the center of the U.S. intelligence community in McLean, Virginia, that would house the company’s new Government Relations division.”\(^\text{327}\) After a 2004 ambush of four Blackwater guards in Fallujah, “under the guise of doing damage control and briefings, Prince and his entourage would be able to meet with Washington’s power brokers and sell them on Blackwater’s vision of military privatization at the exact moment that those very senators and Congressmen were beginning to recognize the necessity of mercenaries in preserving the occupation of (and corporate profits in) Iraq.”\(^\text{328}\) Key to Prince’s sell was to move away from the language of mercenaries and loyalty tests to a partnership against emerging threats. For


\(^{328}\) Scahill 2008: 211.
instance, Prince argued, “the Oxford Dictionary defines a mercenary as a professional soldier working for a foreign government. And Americans working for America is not it.”

The efforts paid off as legislators began referring to Blackwater as “our silent partner in this struggle.”

The argument shifts again from patriotic partners to contractors as a special kind of security actor informally part of the state but where the government benefits from plausible deniability:

The existence of a powerful shadow army enabled the waging of an unpopular war with forces whose deaths and injuries went uncounted and unreported. It helped keep a draft, which could make the continuation of the war politically untenable, off the table. It also subverted international diplomacy because the administration didn’t need to build a “coalition of the willing”: it rented an occupation force. Private soldiers were hired from countries that had no direct stake in the war or whose home governments opposed it, and were used as cheap cannon fodder.

Security contractors like Blackwater keep down the political costs of war and reduce incentives for coaxing precarious alliances. Other than mitigating domestic audience costs and international cooperation, contracting also allows governments to do more in war. Prince tells how “Blackwater's work with the CIA began when we provided specialized instructors and facilities that the Agency lacked. In the years that followed, the company became a virtual extension of the CIA because we were asked time and again to carry out dangerous missions, which the Agency either could not or would not do in-house.” Prince then echoes the perception of Blackwater as an extension of the U.S. government taking advantage of legal ambiguity for strategic purpose.

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331 Scahill 2008: 46.
There are three ways to understand Blackwater: a standard demand-based security supplier; a patriotic partner of new American security; and a shadow agent that does the U.S.’s dirty security work. No one framing is truer than the other as representation depends on the audience. However, the competing narratives point to the indeterminacy of hybrid status. It is this indeterminacy that ultimately raises profound tensions for American security. While the Weberian and Huntingtonian dilemmas may keep scholars awake, for practitioners deciding what Blackwater is and what it is for is tied to accountability in governance. From this vantage point, Blackwater represents a new security dilemma in contractual relationships between public and private actors where it is often difficult to oversee contracts and maintain channels of accountability that are symmetric for both public and private purposes. In other words, in sovereignty under contract, problems arise when contracting relationships formally serve public functions without formal public oversight and accountability. For the American contracting state, such ambiguity is a strategic asset that also poses fundamental problems for the nature of governance. I discuss these accountability problems next.

**Accountability Gaps**

What the Weberian and Huntingtonian dilemmas miss about sovereignty under contract is that the same pressures to contract out result in spiraling accountability gaps. During the massive security contracting boom in 2006, the size of the U.S. federal workforce had remained the same since 1963. However, the size of the federal budget has grown threefold. Each federal employee was now responsible for seeing over a million dollars more with the same resources. The government has made investments, especially in computers, in the last

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40 years, but these were not enough to keep track of an additional $2 trillion with the same workforce. Critically, the human capital shortfall also sustained the demand for contractors while making it more difficult to oversee them. Oversight is the first step for accountability.

At a minimum, oversight requires knowing how many contractors are employed by the government. But counting contractors is difficult. For instance, in December 2006, two different government groups came up with wildly different counts of the number of contractors in Iraq. The bipartisan congressional Iraq Study Group estimated the number at 5,000 contractors whereas the Pentagon’s central command estimated the number at 100,000. It is difficult to count contractors because of different definitions and black contracts. But the biggest reason is subcontracting. A federal contract can go through as many as three layers of subcontracts and firms refuse to publically disclose subcontractors for proprietary reasons. In 2004, four Blackwater contractors were murdered in Fallujah, Iraq, and their families filed a wrongful death suit against Blackwater. The slain contractors had inadequate protection, including vehicles without armor, which the families claimed was against their contract. A Congressional oversight committee tried to figure out whose contract Blackwater was operating under, which eventually turned out to be with Halliburton. However, Halliburton denied subcontracting with Blackwater until 2007. It took regulators three years to figure out whether Blackwater violated its contract because it was unclear whose contract it was under.334

Contractors also remain outside public scrutiny. Conservative estimates suggest at least a quarter of all American casualties in Iraq were of contractors. By May 2007, The New York Times reported the total number of contractors killed to be at least 917, along with more than

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12,000 wounded.”\(^{335}\) By February 2008, the U.S. Department of Labor adjusted the figure to 1,123 contractors killed and over 13,000 injured.\(^{336}\) Even though contractors performed key roles on the new battlefield and represented at least a quarter of the casualties, they did not receive proportionate attention. According to a study from the Project for Excellence in Journalism, less than 0.25% of coverage about the Iraq war in a sample of 100,000 news stories between 2003 and 2007 mentioned contractors.\(^{337}\) My own media study of Blackwater revealed more coverage in the aggregate (2,238 stories on Blackwater between 2000 and 2016); however, I lack a comparative context of the general war coverage.

When media scrutiny is present, investigations are often restricted by blocks to Freedom of Information Act (FOIA) requests. Some activities of security contractors should be covered by the Arms Export Control Act, which opens contractors up to public disclosure and Congressional approval.\(^{338}\) However, many contractors circumvent the export regime by working under the Foreign Military Sales Program where they are employed as a Pentagon liaison to foreign governments. This program avoids the export controls and also provides a reason to deny FOIA requests. For instance, “when journalists sought access to information about Halliburton subsidiary Kellogg, Brown, and Root’s work to repair oil fields in Iraq, significant portions of a Pentagon audit sent to the international monitoring board were

\(^{335}\) Isenberg 2008: 12.

\(^{336}\) Scahill 2008: 304.


blacked out.” KBR successfully claimed proprietary information could be used by its competitors to censor the report.

Three accountability gaps concerning finance, law, and politics emerge without proper oversight and public scrutiny. While IR scholars cover the implications of security contractors for democratic politics, the emphasis is often restricted to legal responsibility or industry self-regulation. I expand the accountability domains to finance and politics.

First, financial accountability becomes a problem when there are not enough people to oversee fair and open competition. Of Blackwater’s total contracts worth over a billion dollars, only $47 million or less than 5% were under full and open competition, meaning the contract was awarded when more than one competitor made a bid. $87 million or less than 9% were under partial competition, meaning the contract was awarded with open competition but no other competitors made a bid, which happens with extremely short deadlines. A third of all contracts were awarded under no competition, meaning the contract was closed to bids from other competitors. There is no data on more than half of all Blackwater contracts worth half a billion dollars, but we can assume these were also awarded under partial to no competition.

The lack of fair and open competition can result in monopoly and waste. For instance, Blackwater held 84% of all State Department diplomatic protection contracts around the world in 2007. This monopoly made it difficult to terminate the relationship when things went

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341 Data obtained from the Federal Procurement Data System and legal briefs filed on behalf of Blackwater in civil trials.
342 Blackwater legal brief, filed May 1, 2008.
wrong. This was indeed the case following the 2008 Nisour Square civilian shootings, when the State Department retained the Blackwater contract as otherwise there would have been a security vacuum. Monopolies also shift the bargaining leverage to contractors.\textsuperscript{343} A lack of oversight can also result in abuse and waste. Blackwater’s original contract with the State Department in 2004 was originally of $229.5 million for five years, but by “June 30, 2006, just two years into the program, it had been paid a total of $321,715,794. A government spokesperson later said the estimated value of the contract through September 2006 was $337 million. By late 2007, Blackwater had been paid more than $750 million under the contract.”\textsuperscript{344} Subcontracting compounds the waste. In a typical relationship, Blackwater’s subcontracting charges of a $600 daily rate per contractor increased to more than three times as the main contractor charged the government $2,500 for the same job.\textsuperscript{345}

Second, legal accountability is especially elusive for contractors as they are ruled by an unclear legal status since they “are not quite civilians, given that they often carry and use weapons, interrogate prisoners, local bombs, and fulfill other critical military roles” and “yet they are not quite soldiers.”\textsuperscript{346} Contractor obligations under international humanitarian law remain muddy with questions of “state responsibility for the actions of those acting in their name.”\textsuperscript{347} Contractors do not fit the “lawful combatant” definition under the third Geneva convention because they do not wear military uniforms or answer to a military hierarchy. Nor

\begin{itemize}
  \item \textsuperscript{343} Mahoney 2017: 41.
  \item \textsuperscript{344} Scahill 2008: 229-230.; Scahill E-mail from State Department representative, August 2006.
  \item \textsuperscript{345} Henry Waxman, U.S. House of House of Representatives Committee on Oversight and Government Reform, Hearing on “Blackwater USA,” October 2, 2007: 3.
  \item \textsuperscript{346} Peter W. Singer, ”Outsourcing War” Foreign Affairs 82 (2), 2005: 126.
\end{itemize}
do contractors fit the “mercenary” definition under Article 47 of the First Additional Protocol to the Geneva Conventions or the UN Mercenary Convention because they do not have a clear overriding profit motive or foreign national status. Contractors perhaps fit best under the Bush administration’s “illegal enemy combatant” status deployed for Guantanamo Bay detainees. In any case, a lack of clear legal status makes international regulatory action very difficult. Most recently, a multi-stakeholder process with the help of the International Committee for the Red Cross and the Swiss government culminated in the Montreux Document for industry self-regulation.\textsuperscript{348} However, the Montreux Document is nonbinding and relies on government adoption into contracts. The scope of adoption remains to be seen.

In terms of U.S. law, a patchwork of contractor protections developed during the Iraq war. In 2004, right before he left Iraq, Paul Bremmer issued Order 17 stating that “contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”\textsuperscript{349} Order 17’s immunity effectively barred the Iraqi government from prosecuting contractors. In 2006, Rumsfeld classified contractors as part of the “Defense Department’s Total Force,” seen as “its active and reserve military components, its civil servants, and its contractors” that “constitute its warfighting capability and capacity.”\textsuperscript{350} Blackwater jumped on Rumsfeld’s “Total Force” language in its legal battles, claiming immunity from the Fallujah families suit arguing it was “performing a classic military function—providing an armed escort for a supply convoy under orders to reach an Army base—with an authorization from the Office of the Secretary of

\textsuperscript{349} Coalition Provisional Authority Order Number 17, June 27, 2004.
\textsuperscript{350} \textit{Quadrennial Defense Review Report}, Department of Defense, February 6, 2006, emphasis added.
Defense” and that “any other result [than immunity] would amount to judicial intrusion into the President’s ability to deploy a Total Force that includes contractors.” Blackwater was successful in dismissing the suit in favor of forced arbitration, which was appealed by the families, who later settled.

Armed with immunity reserved for the military, contractors also remained outside the Pentagon’s Uniform Code of Military Justice (UCMJ). The in-between legal status was most evident in 2006 when a drunken Blackwater contractor shot and killed a bodyguard for the Iraqi Vice-President. Instead of criminal proceedings, he was fined and sent home. The accountability gap is stark: were this contractor in the U.S. he would face criminal charges or if in the military he would have faced a court martial. An exchange between Erik Prince and Congresswoman Maloney highlights the discrepancy:

Mr. PRINCE. Look, I am not going to make any apologies for what he did. He clearly violated our policies.
Mrs. MALONEY. OK. All right. Every American believes he violated policies. If he lived in America, he would have been arrested, and he would be facing criminal charges. If he was a member of our military, he would be under a court martial. But it appears to me that Blackwater has special rules. That is one of the reasons of this hearing.

In fact, it was unclear which U.S. laws could apply to Blackwater. In the aftermath of the 2007 Nisour Square shootings, a team led by diplomat Patrick Kennedy concluded that they were “unaware of any basis for holding non-Department of Defense contractors [like Blackwater] accountable under U.S. law.” In addition to immunities under Bremmer’s Order 17 and Rumsfeld’s Total Force categorization, the State Department offered immunity to contractors

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351 Blackwater appellate brief, filed October 31, 2005.
353 Scahill 2008: 36.
willing to cooperate with the investigation without prior authorization from the Department of Justice. As a result, the State Department admitted “it might be the case that Blackwater can’t be held accountable” for the Nisour Square killings.\textsuperscript{354} Iraq ended the Order 17 immunity for contractors as of December 31, 2008 during the next Status of Forces agreement with the U.S.\textsuperscript{355}

Meanwhile, the U.S. began a lengthy process to hold Blackwater contractors accountable for the Nisour Square shootings. A Federal Bureau of Investigation (FBI) report found Blackwater guards killed 14 of those civilians without cause.\textsuperscript{356} However, the first criminal proceedings against four Blackwater contractors resulted in a mistrial because of the State Department’s immunity deal, “which made it significantly harder for the Justice Department to build its case.”\textsuperscript{357} There were further reports of the State Department helping to cover up the crime scene in Nisour Square as the FBI investigated, and some senior Justice officials in turn undermined the FBI’s intention to bring more serious weapons charges.\textsuperscript{358} After a re-trial in 2014, the four contractors were convicted of the shootings – one of murder and the other three of manslaughter and firearm charges – in the first known criminal conviction of security contractors under U.S. law and were sentenced in 2015.\textsuperscript{359} However, the verdict now faces an appeal because it is not entirely settled whether the Justice Department had jurisdiction to

prosecute: “Under federal law, the government has jurisdiction for overseas crimes committed by defense contractors or those supporting the Pentagon’s mission. Blackwater was working for the State Department, a distinction that jurors concluded did not matter but which has not been tested.”

Finally, political accountability rests on determining whom the contractors represent. During the Nisour Square sentencing trial, one witness observed: “Blackwater had power like Saddam Hussein. The power comes from the United States.” The statement speaks directly to a concern from Congressman Cummings “that the ordinary Iraqi may not be able to distinguish military actions from contractor actions. They view them all as American actions.” For regulators like Congressman Kucinich, such conflation is a problem because contractors are not seen as representing U.S. public interest:

If war is privatized and private contractors have a vested interest in keeping the war going, the longer the war goes on, the more money they make. Eighty-four percent of the shooting incidents involving Blackwater are where they fired first, and Blackwater did not remain at the scene. So Blackwater’s shoot first and don’t ask questions later approach undermines the U.S.’ position and jeopardizes the safety of our soldiers.

Politically, there are two interrelated issues about the public interest. First, the private interest in war-profiteering is at odds with the public interest in security, which might not include prolonging conflict. Of course, this distinction breaks down with the military-industrial complex and the incentives to justify high defense spending. Second, the private interest of

protecting assets might actually undermine public efforts to win hearts and minds in a counterinsurgency campaign like Iraq.

In most military accounts, the second political accountability issue comes up more often than the first. Ann Starr, a former CPA advisor, exemplifies this perspective: “Those, for example, doing escort duty are going to be judged by their bosses solely on whether they get their client from point A to point B, not whether they win Iraqi hearts and minds along the way.” Another Colonel said “the problem is in protecting the principal, they had to be very aggressive and each time they went out, they had to offend locals, forcing them to the side of the road, being overpowering and intimidating, at times running vehicles off the road, making enemies each time they went out.” Blackwater was “actually getting our contract exactly as we asked them to, at the same time hurting our counterinsurgency effort.” Security contracting, then poses a challenge to the broader political obligations of the security mission. In this case, to Iraqis who rely on American support and to the other U.S. servicepersons whose lives become riskier because of contractor backlash.

The three accountability gaps pose costs financially, legally, and politically that ultimately force the government to demarcate clearer lines between the public and private when sovereignty is under contract. The call to demarcate usually appears as follows:

We need more accountability. We need to clarify and update our laws. We need to restore the Government’s ability to manage any such contracts. We need to punish corporations that

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commit fraud or undermine our security. Basically, we need to reconsider which jobs should be private and which jobs should remain in the public sector.\textsuperscript{367}

Demarcating public and private roles is tantamount to determining the nature of sovereign governance. These demarcation efforts are not limited to security contracting and the next section examines the emergence of overall American contracting through a bureaucratic history.

IV. THE STATE OF AMERICAN CONTRACTING

American contracting is not a new phenomenon\textsuperscript{368} even though the scale of contracting has recently exploded. The U.S. government’s prime contract obligations in federal procurement spending varies from 1984 to 2014 (Figure 2).\textsuperscript{369} Federal contract spending had a downward trend with some spikes until 2001, after which it increased 86% between 2000 and 2005 from $300 billion to $477.5 billion.\textsuperscript{370} By 2009, the U.S. was spending $612.4 billion on contracting, spending more than “40 cents of every discretionary dollar on contracts with private companies.”\textsuperscript{371} Accompanying this rise in American contracting are increasingly complex bureaucratic guidelines to regulate such activity. The U.S. Code of Federal Regulations states that “contracts shall not be used for the performance of inherently governmental


\textsuperscript{368} “America’s first experience with privatization happened in 1492 when Queen Isabella hired an Italian contractor to explore the western ocean. [...] And America itself is named after a contract mapmaker Amerigo Vespucci.” U.S. House of Representatives, Subcommittee on Government Operations, Hearing on Contracting Fairness, July 8, 2016: Testimony of John M. Palatiello, President, Business Coalition for Fair Competition.

\textsuperscript{369} Sourced from the U.S. Office of Management and Budget and Bloomberg Government, 2015.


functions.” However, confusion remains with defining “inherently governmental” versus “commercial” functions that may be contracted. Typical examples of commercial activities include “audiovisual products and services, automatic data process, food and health services, management support services, system engineering, and transportation.” Contractor associations refer to this as the “yellow pages test,” where “if you can find firms in the Yellow Pages of the phone book providing contracts or services that the government is also providing, then the government service should be subject to market competition.” In deciding the rules of contracting, bureaucratic politics demarcate public and private roles within sovereign governance.

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372 48 C.F.R. § 7.503(a).
373 U.S. Office of Management and Budget, Circular A-76 (Revised), August 4, 1983, Attachment A.
Bureaucratic Wrangling

Early American bureaucratic discussions of contracting included a 1932 special House of Representatives Committee on “government competition with private enterprise.” By 1953, the Intergovernmental Relations Subcommittee of the House Committee on Government Operations “reported that the number of [commercial and industrial] activities conducted by Government agencies posed a real threat to private industry and imperiled the tax structure,” recommending that “a permanent, vigorous, preventive and corrective program be inaugurated.”

Moreover, two reports from the Commissions on Organization of the Executive Branch of Government in 1949 (First Hoover Commission) and 1955 (Second Hoover Commission), developed 22 recommendations aimed at moderating government competition with the private sector.

The big breakthrough came in 1955 under President Eisenhower when the Bureau of the Budget, the predecessor of the Office of Management and Budget (OMB), issued Bulletin Number 55-4: “It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels.” In 1966, the Johnson administration formalized the first permanent directive for government contracting with the Bureau of the Budget’s Circular A-76: “Each agency will

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377 Information about the bulletin was obtained from the U.S. Office of Management and Budget, Office of Federal Procurement Policy. Two subsequent bulletins, Numbers 57-7 (February 5, 1957) and 60-2 (September 21, 1959), reiterated this policy of governmental reliance on the private sector. Congressional Research Service Report for Congress, “The Federal Activities Inventory Reform Act and Circular A-76,” April 2007, p. 3.
compile and maintain an inventory of its commercial or industrial activities having an annual output of products or services costing $50,000 or more or a capital investment of $25,000 or more.\textsuperscript{378} Moreover, Circular A-76’s policy statement was to ensure that “[i]n the process of governing, the Government should not compete with its citizens.”\textsuperscript{379} A memo from President Johnson explained that Circular A-76 offered “uniform guidelines and principles to conduct the affairs of the Government on an orderly basis; to limit budgetary costs; and to maintain the Government’s policy of reliance upon private enterprise.”\textsuperscript{380}

The OMB revised the circular in 1967, 1979, 1983, 1996, 1999, 2000, and 2003.\textsuperscript{381} In 1977, the OMB acknowledged that implementation of “Circular A-76 has been heavily criticized as inconsistent and frequently inequitable.”\textsuperscript{382} As additional guidance, the OMB then published the Supplemental Handbook in 1979, “intended to promote more effective and consistent implementation.”\textsuperscript{383} The 1979 version of Circular A-76 also revised the 1966 policy statement to add a specific type of political system: “In a democratic free enterprise economic system, the Government should not compete with its citizens. The private enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength.”\textsuperscript{384}

\textsuperscript{381} The \textit{Federal Register} entries for major revisions to Circular A-76 are: vol. 44, no. 67, Apr. 5, 1979, pp. 20558-20566; vol. 48, no. 159, Aug. 16, 1983, pp. 37110-37116; vol. 61, no. 63, April 1, 1996, pp. 14338-14346; vol. 64, no. 121, June 24, 1999, pp. 33927-33935; vol. 65, no. 175, Sep. 8, 2000, p. 54568; and vol. 68, no., March 31, 2004 103, pp. 32134-32142.
The next major change came in 1996 when the Clinton Administration used Circular A-76 to insert language on “reinventing government.” Specifically, they claimed “Circular A-76 is not designed to simply contract out. Rather, it is designed to empower federal managers to make sound and justifiable business decisions.”\(^{385}\) W. Scott Gould of the U.S. Department of Commerce echoed:

> Throughout the first Clinton administration, while the Office of Management and Budget was revising the A-76 supplemental handbook, we at Commerce shifted our emphasis to the principles of government-wide reinvention. [Commerce also explored] downsizing, reengineering, reinvention labs, performance-based organizations, franchise funds and customer service improvement.\(^{386}\)

Following this revision, the Clinton administration pushed for the passing of the Federal Activities Inventory Reform (FAIR) Act of 1998 that gave statutory force to Circular A-76’s requirement for submitting annual inventories of commercial functions. Prior to the FAIR act, federal agencies had a spotty record in submitting their inventories on time. For instance, “in 1971, the OMB gathered data on the status of A-76 efforts and discovered that 16% of agency activities had not been reviewed despite the fact that the deadline had been June 30, 1968.”\(^{387}\)

Then in June 1996, “the OMB requested that agencies submit their inventories by September 13, 1996. Six of the 24 largest agencies had not submitted their inventories as of April 1998.\(^{388}\) Agency reporting under FAIR improved dramatically.

After the FAIR act, Circular A-76 had a major revision in 2003 when the OMB required agencies to submit inventories of their inherently governmental activities in addition to

\(^{385}\) Quoted in Stanger 2009: 15.
commercial activities. Moreover, the revised policy statement in 2003 changed the 1979 language of a free enterprise system: “The longstanding policy of the federal government has been to rely on the private sector for needed commercial services.” Finally, the 2003 revisions also eliminated the 1966 policy statement that the government should not compete with its citizens. After the record contracting booms depicted in Figure 4, in the 2009 budget, the Obama administration placed a moratorium on public-private competition that would covert federal employee positions to contractors. The Department of Defense faced a separate moratorium with the passing of the 2010 National Defense Authorization Act. Both moratoriums remain till today.

As of 2016, the Federal government has 2.6 million Executive Branch employees (excluding uniformed military and postal service). The OMB estimates that among agencies covered by the FAIR act, 1.12 million full-time employees are engaged in performance of functions that are not inherently governmental, or that 43% are commercial functions. Circular A-76, the FAIR act and related policy letters together create the backdrop for American contracting. They also attempt to define which functions were unsuitable for contracting for being “inherently governmental.” In other words, the bureaucracy aims to draw the line between public and private.

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392 Public Law No. 111-84 §325 (2010).
Inherently Governmental

For 25 years, American bureaucrats used Circular A-76’s sparse definition of “inherently governmental” as “a function which is so intimately related to the public interest as to mandate performance by Government employees.” In 1992, the H.W. Bush administration published the first comprehensive clarification on “inherently governmental” in Policy Letter 92-1:

"Inherently governmental" functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: (1) The act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlements.

Policy Letter 92-1 specifies discretionary exercise of authority and control over money as the basis of an inherently governmental function. The letter lists 19 illustrative inherently governmental functions in its Appendix A, such as conducting criminal investigations, commanding military forces, conducting foreign policy, and hiring federal employees. Meanwhile, the letter also states that information gathering, recommendations, and other “ministerial and internal” activities, like “building security, mall operations, operation of cafeterias,” are not inherently governmental functions.

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395 OMB Circular A-76 (Revised), August 4, 1983, 6(e).
396 U.S. Office of Management and Budget, “Policy Letter on Inherently Governmental Functions,” Federal Register, Vol. 57, No. 190, Sept. 30, 1992, p. 45100. The letter goes on: “An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to: (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise; (b) determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; (c) significantly affect the life, liberty, or property of private persons; (d) commission, appoint, direct, or control officers or employees of the United States; or (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.
397 OMB Policy Letter 91-1, Sept. 30, 1992, p. 45101. “Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include any functions that are primarily ministerial and internal in nature, such as
functions that are “closely associated” with inherently governmental functions as “services and actions that are not considered to be inherently governmental functions. However, they may approach being in that category because of the way in which the contractor performs the contract or the manner in which the government administers contractor performance.” All subsequent Circulars A-76 insert a version of Policy Letter 92-1’s definition. The FAIR Act also used the same definition verbatim to statutorily define inherently governmental functions.

However, right on cue with the contracting boom from the war in Iraq, the 2003 revised Circular A-76 modified Policy Letter 92-1’s definition: “[inherently governmental] activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.” After this modification and in response to the slight variations on “inherently governmental functions” in the U.S. Code of Federal Regulations, a 2009 Presidential Memo urged the Office of Federal Procurement Policy (OFPP) in the OMB to “create a single definition for the term ‘inherently governmental function’ that addresses any deficiencies in the existing definitions and reasonably applies to all agencies.” In response, the OFPP issued Policy Letter 11-01, which is the latest guidance for contracting. Policy Letter 11-01 adds three crucial components to the debate. First, it adds more illustrative examples of inherently governmental functions. Second, it develops a new category of work, “critical functions,” that agencies must maintain in-house. Third, it offers agencies guidance on how to

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398 OMB Policy Letter 91-1, Sept. 30, 1992, Attachment B.
400 OMB Circular A-76 (Revised), May 29, 2003, Attachment A, §(B)(i)(a); emphasis added.
negotiate contracting when functions are “closely associated” with inherently governmental functions.

First, Policy Letter 11-01 adopts the 1992 letter’s definition of inherently governmental functions, ignoring the 2003 Circular A-76’s addition of substantial discretion. Policy Letter 11-01 also expands the illustrative listing of inherently governmental functions to 24.\(^{402}\) Table A1 in the appendix lists these examples. In addition, Policy Letter 11-01 further clarifies “closely associated” functions:

For instance, within the function of source selection, the tasks of determining price reasonableness and awarding a contract are inherently governmental, the task of preparing a technical evaluation and price negotiation memorandum are closely associated (provided the government has sufficient time and knowledge to independently evaluate alternative recommendations and decide which is in the government’s best interest) and the task of ensuring the documents are in the contract file is neither inherently governmental nor closely associated.\(^{403}\)

In this example, within the same function, various tasks could be coded as governmental, closely associated with governmental, and neither. Policy Letter 11-01 slightly modifies the list of “closely associated with governmental functions” from the 1992 letter. Table A2 in the appendix lists these examples. Of particular interest is the contracting process itself. While awarding and terminating contracts are inherently governmental functions, governments may contract out “contract management,” in “the evaluation of a contractor’s performance (e.g., by collecting information performing an analysis, or making a recommendation for a proposed performance rating), and providing support for assessing contract claims and preparing termination settlement documents.” However, if the basis of awarding and terminating


\(^{403}\) OMB Policy Letter 11-01, September 12, 2011, p.56234.
contracts depends on contractor evaluation, then the inherently governmental line becomes more complicated.

Second, Policy Letter 11-01 develops the category of “critical functions” as a response to the increase in hiring contractors. Specifically, “if contractors are used to perform [closely associated with inherently governmental functions], agencies must give special management attention to contractors’ activities to guard against their expansion into inherently governmental functions.”\textsuperscript{404} Management safeguarding means requiring “agencies to identify their ‘critical functions’ in order to ensure they have sufficient internal capability to maintain control over functions that are core to the agency’s mission and operations.”\textsuperscript{405} The OMB will “hold an agency responsible for making sure that, for critical functions, it has an adequate number of positions filled by Federal employees.”\textsuperscript{406} Crucially, “so long as agencies have the internal capacity needed to maintain control over their operations, they are permitted to allow contractor performance of positions within critical functions.”\textsuperscript{407} Of course, critical functions are dependent on a particular agency’s mission and will hugely vary across agencies. The introduction of critical functions then makes it more difficult to assess government contracting outcomes as “over-relying” on contractors now depends on whether agencies maintain overall control rather than the overall number of contractors. Recall Rumsfeld’s inclusion of contractors into the Defense department’s Total Force, who “serve in thousands of locations around the world, performing a vast array of duties to accomplish critical missions.”\textsuperscript{408} While

\textsuperscript{404} OMB Policy Letter 11-01, September 12, 2011, p. 56227.
\textsuperscript{405} OMB Policy Letter 11-01, September 12, 2011, p. 56228.
\textsuperscript{406} OMB Policy Letter 11-01, September 12, 2011, p.56229.
\textsuperscript{408} Quadrennial Defense Review Report, Department of Defense, February 6, 2006, emphasis added.
the OMB develops even more fine-grained definitions of agency functions, especially with “critical functions,” Rumsfeld uses the same language of mission-criticality to include rather than exclude contractors from the public interest.

Third, Policy Letter 11-01’s most ambitious goal is to “refine existing criteria (e.g., addressing the exercise of discretion) and provide new ones (e.g., focused on the nature of the function), to help an agency decide if a particular function that is not identified on the list of examples is, nonetheless, inherently governmental.” Since 2003, the OMB recognized that “the line between inherently governmental activities and commercial activities has become blurred, which may have led to the performance of inherently governmental functions by contractors and, more generally, an overreliance on contractors by the government.” Since almost half of all discretionary spending was going to contractors, the OMB sought to develop tests for identifying inherently governmental functions that do not fall within the illustrative list. Policy Letter 11-01 includes two tests. The first test is functional:

(i) The nature of the function. Functions which involve the exercise of sovereign powers of the United States are governmental by their very nature. Examples of functions that, by their nature, are inherently governmental are officially representing the United States in an inter-governmental forum or body, arresting a person, and sentencing a person convicted of a crime to prison. A function may be classified as inherently governmental based strictly on its uniquely governmental nature and without regard to the type or level of discretion associated with the function.

The first test explicitly introduces sovereignty and sovereign powers to what used to be referred to as just governing. However, the nature of the function test kicks the “inherently governmental” definitional question over to “sovereign powers” from “governing authority” and

it is not clear that the former offers a more straightforward governmental test than the latter. This first test is also purely functional and “without regard to the type or level of discretion,” which expands the previous definitions. The second test applies when the function is unclear:

(ii) The exercise of discretion.

(A) A function requiring the exercise of discretion shall be deemed inherently governmental if the exercise of that discretion commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that:

(I) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and

(II) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.

(B) A function may be appropriately performed by a contractor consistent with the restrictions in this section—including those involving the exercise of discretion that has the potential for influencing the authority, accountability, and responsibilities of government officials—where the contractor does not have the authority to decide on the overall course of action, but is tasked to develop options or implement a course of action, and the agency official has the ability to override the contractor’s action. The fact that decisions are made, and discretion exercised, by a contractor in performing its duties under the contract is not, by itself, determinative of whether the contractor is performing an inherently governmental function.\(^{412}\)

The second test further specifies the conditions under which discretion applies to an inherently governmental function as being when “two or more alternative courses of action exist” without precedence. This test wades into murkier waters than the first test because it identifies that one reason why inherently governmental functions blur with closely associated functions is because contractors exercise discretion often. In fact, the illustrative list in Figure 3 shows examples of discretion in commercial activity. This was one reason why the 2003 revision of Circular A-76 modified the inherently governmental definition to read “substantial” discretion. In Policy Letter 11-01, the OMB goes in a different direction to state that a closely associated function is when a “contractor does not have the authority to decide on the overall course of

action, but is tasked to develop options or implement a course of action, and the agency official has the ability to override the contractor’s action.” In other words, the difference is not discretionary authority, it is decision-making authority. However, this too is complicated in security contracting. The final section brings together the larger American contracting apparatus with public and private tensions in security contracting.

V. PUBLIC AND PRIVATE RELATIONS IN CONTRACTUAL HYBRIDITY

The chapter thus far foregrounds how the purpose and form of sovereign governance is far from self-evident. When sovereignty is under contract, as in security contracting, we are allowed a rare look at the bureaucratic apparatus that produces the aims and means of political authority. The grounded context is an underappreciated facet of understanding sovereign politics and grand strategy. This section will conclude by integrating the pieces that have come before on Blackwater and bureaucratic debates to show three tensions in security contracting that also offer broader implications.

The first tension is about the blurring of public and private within sovereign authority. Security contracting creates bureaucratic tensions for sovereignty when public and private actors are intertwined in formal relationships and are treated interchangeably. For instance, security contractors claim they are part of the government, or its total force, for sovereign privileges like international legal immunity but that they are not part of the government’s sovereign obligations to disclose their finances and practices. Crucially, while security contracting challenges traditional sovereignty from the Weberian perspective, it also helps sustain sovereign power by avoiding counting contractors in the political cost of war. Congressman John Tierney observes: “The all-voluntary professional force after the Vietnam
War employed the so-called Abrams Doctrine. The idea was that we wouldn’t go to war without the sufficient backing of the Nation. Outsourcing has circumvented this doctrine. It allows the administration to almost double the force size without any political price being paid.”

Contracting poses a special problem because “this alliance between public and private agents, between governmental and corporate elites, is working a reconfiguration of authority relations. It is blurring the distinction between the public and private realms and enhancing the legitimacy of the latter as a source of authority.”

Such blurring is a challenge to the traditional use of the public and private distinction that defines roles and obligation in law and politics. For instance, “public war (bellum hostile) referred to war between two sovereign Christian princes, in which spoils could be taken but prisoners had the right to expect to be ransomed. Feudal, covered war, or what came to be known as private war, referred to other conflicts where warring parties had license to wound or kill, but not to burn or take spoils.”

The public and private distinction serves to demarcate boundaries. It is not a surprise, then, that when the distinction is blurred, we see attempts to redraw boundaries. Like general American contracting, for regulators, “contracts for the use of force in war also pose legitimate questions about the propriety of hiring private firms to perform such a public, some would say inherently governmental, function.”

The second tension is about demarcating the public and private distinction in spite of

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their blurred nature. We can follow the labor of producing the distinction through the bureaucratic processes, such as the 2011 OMB Policy Letter 11-01 in light of the Iraq war and American security contracting. Per standard practice, before publishing Policy Letter 11-01, the OMB issued a proposed policy letter 10-01 on March 31, 2010, which was made available for public comment.47 When the last proposed Policy Letter 91-1 opened for comment in 1991, it received 35 responses. Proposed Policy Letter 10-01 received 30,350 responses. However, all but approximately 110 responses were submitted as a modified form letter. One form letter was submitted by more than 29,900 respondents and was critical of government outsourcing. “The form letter recommended expanding the definition of inherently governmental functions and approved of creating the critical functions category. The letter also proposed augmenting the list of inherently governmental functions to include all security functions and intelligence activities, training for interrogation, military and police, and maintenance and repair of weapons systems.”48 A second form letter from 240 respondents was supportive of contracting and cautioned against the “increased attention on having non-inherently governmental functions performed by Federal employees.”49 The remaining 110 responses were a mix with general support of the proposed policy letter but with additional suggestions for clarifying the scope of contracting.

The public comments showed concern for the new tests of inherently governmental functions. The OMB’s move to the “sovereign functions” test was unclear to some:

A number of comments questioned the likely effectiveness of the proposed “nature of the function test,” which would ask agencies to consider if the direct exercise of sovereign power is

involved. Some respondents suggested that the term “sovereign” be explained while others concluded that the manner in which sovereign authority is exercised is so varied that it is better explained by example than further definition.\textsuperscript{420}

The comments highlight how the bureaucratic efforts to replace governing authority with sovereign functions do not bring in additional clarity on the nature of inherently governmental functions. In addition, respondents were also concerned about including security contractors in governmental functions, whether inherently or closely associated:

I can understand, and agree with, the use of private contractors in war zones if they are engaged, as KBR and Halliburton have sometimes been, in civilian activities such as construction and engineering, but I strongly oppose using them in paramilitary activity, including guarding important persons (as in the case in Baghdad in which Blackwater employees slaughtered 17 civilians “in self-defense”). We must not use contract workers as mercenaries or in any roles approaching that.\textsuperscript{421}

This response is attuned to the difference in contractor roles, separating “civilian” support contractors like Halliburton from combat contractors like Blackwater. However, the respondent still lacks information about subcontracting and the interchangeable civilian and combat roles in counterinsurgency. Finally, respondents felt that the proposed the illustrative list of inherently governmental functions was too narrow and “suggested the addition of functions involving private security contractors, especially when performed in hostile environments or involving intelligence.”\textsuperscript{422}

The third tension is about security contractors coopting the conversation on public and private relations across all contracting. While the draft policy letter 10-01 concerned all government contracting, security contractors took center stage in shaping most public grievances. Most respondents against contracting cite accountability – national, international

\textsuperscript{420} OMB 11-01, September 12, 2011, p. 56231.
\textsuperscript{421} Public comment from “David Eggenschwiler” on proposed OMB Letter 10-02, accessed online on regulations.gov (Docket ID OFPP–2010–0001).
\textsuperscript{422} OMB Policy Letter 11-01, September 12, 2011, p. 56231.
legal, and moral – and aim to situate security contractors within the public purview:

It’s outrageous that we would use contractors to fight our dirty wars that the American people wouldn’t have wanted if they had known the circumstances. The people would not have sanctioned the war if their own sons and daughters were being killed. The company involved makes ludicrous amounts of money stolen from the American people, they have no accountability, we are absolved from any national or international legal accountability, but the world knows that it does not absolve us from any moral accountability. We have lost face in the eyes of the world, and have created a lifetime of hatred in the countries we have attacked.423

This comment covers all the accountability dilemmas where contractors “steal” American money, are absolved of legal accountability, and jeopardize political accountability by “losing face” in international relations. If security contracting stood-in for all government contracting, then Blackwater stood-in for all security contracting. Of the 110 non-form responses, 65 responses mentioned Blackwater. A typical comment included:

It is important that we have representatives of the government who have some accountability rather than private corporations like Blackwater and Halliburton who seem accountable to no one and have actually interfered with the work of the soldiers, etc. They are mercenaries and only in it for the money so they have no concern about human rights, morals, etc. Don't waste taxpayers' money on these people who give America a bad name.424

Again, the themes of financial, legal, and political accountability laced with morality comes through in the public outrage rather than concerns about monopoly of violence or civil-military relations.

The main changes from the proposed policy letter were accommodating the tensions of security contracting with the new bureaucratic guidelines. Based on the public comments in the final policy letter 11-01, the OMB: “added to the list of inherently governmental functions:

(i) All combat and (ii) security operations in certain situations connected with combat or

424 Public comment from “Millie Brady” on proposed OMB Letter 10-02, accessed online on regulations.gov (Docket ID OFPP–2010–0001).
potential combat. OFPP concluded these were clear examples of functions so intimately related to public interest as to require performance by Federal Government employees."\textsuperscript{425} The key addition here is of “situations connected with combat or potential combat.” In Blackwater’s case, for instance, it would be hard to find a situation when it was not connected with potential combat in a war zone. In fact, as the nature of warfare changes to move beyond easily distinguishable front-lines of combat, any conceivable international security deployment would involve potential combat.

However, even moving away from combat roles, security contractors complicate the governmental functions in other ways: “For example, serving as an interpreter during an interrogation of an enemy prisoner of war could potentially constitute a function approaching inherently governmental. It is less clear that transcribing a recording of that interrogation approaches being inherently governmental.”\textsuperscript{426} For such entanglements, the OMB introduces a further test to check whether a function should be contracted out:

> A function is not appropriately performed by a contractor where the contractor’s involvement is or would be so extensive, or the contractor’s work product so close to a final agency product, as to effectively preempt the Federal officials’ decision-making process, discretion or authority. [...] For example, providing security in a volatile, high-risk environment may be inherently governmental if the responsible Federal official cannot anticipate the circumstances and challenges that may arise, and cannot specify the range of acceptable conduct (as required by paragraph 5-1(a)(i)(ii)). Agencies should also consider if the level of management and oversight that would be needed to retain government control of the operation and preclude the transfer of inherently governmental responsibilities to the contractor would result in unauthorized personal services. In such cases, the function should not be contracted out.\textsuperscript{427}

In summary, the new revisions single out security contractors as an instance of not contracting

\textsuperscript{425} OMB Policy Letter 11-01, September 12, 2011, p. 56231.
\textsuperscript{427} OMB Policy Letter 11-01, September 12, 2011, pp.56237-38.
out a closely associated function such as in a “volatile, high-risk environment,” or most war-zones where security contractors are required.

Given the trends in American security contracting, the Defense Department would find these revisions to inherently governmental functions as problematic. On January 10, 2006, the Pentagon’s Office of General Counsel issued an opinion permitting the use of contractors to protect U.S. personnel and property. The opinion does not directly address whether security contractors perform inherently governmental functions, but does state that “when using contractors for security services, the purpose must be to provide such services other than uniquely military functions.”\(^\text{428}\) The opinion goes on to state that it would be inappropriate to use armed security contractors in “situations where the likelihood of direct participation in hostilities is high. For example, they should not be employed in quick-reaction force missions, local patrolling, or military convoy security operations where the likelihood of hostile contact is high.”\(^\text{429}\) In July 2009, the Pentagon addressed the issue more directly, stating that “[c]ontractors performing private security functions are not authorized to perform inherently governmental functions. In this regard, they are limited to a defensive response to hostile acts or demonstrated hostile intent.”\(^\text{430}\) However, defensive response still assumes presence in situations of potential combat with volatile, high-risk environments. Since the 2010 moratorium on new contracts, the Defense Department has not had an opportunity to respond to the new 2011 guidelines against security contractors. However, the debate is far from settled.

\(^{428}\) Department of Defense, Office of General Counsel Memorandum, Request to Contract for Private Security Companies in Iraq, January 10, 2006, p. 2.
\(^{429}\) Department of Defense, Office of General Counsel Memorandum, Request to Contract for Private Security Companies in Iraq, January 10, 2006, p. 4.
for the next major American war.

This chapter showed that Blackwater's contractual hybridity is useful to maintain a specific American grand strategy without the political costs of a fully public security force abroad. However, security contracting also brings accountability problems that challenge how we conventionally allocate responsibility in sovereign politics. The problems lead to bureaucratic attempts to redefine the aims and means of sovereign authority. The subsequent wrangling over the many manifestations of American federal contracting guidelines show the effort it takes to codify a neat public and private distinction that defies stability. Meanwhile, security contractors monopolize the debate on all contracting, in a sense securitizing the American bureaucratic apparatus. Security contracting then reveals the productive tensions in sovereign politics and ties grand strategy's macro goals to micro foundations. Ultimately, this chapter suggests that perhaps one inherently governmental function is to demarcate public and private functions in what remains a fluid relationship.
Chapter Five

INSTITUTIONAL HYBRIDITY IN THE INTERNATIONAL CHAMBER OF COMMERCE

I. NETWORKS OF COMMERCE

II. MERCHANTS OF PEACE

III. WHO KILLED THE INTERNATIONAL TRADE ORGANIZATION?

Lobbying and Network Power

IV. SELF-REGULATING THE GLOBAL MARKET

Regulation and Network Power

V. PUBLIC AND PRIVATE RELATIONS IN INSTITUTIONAL HYBRIDITY
I. NETWORKS OF COMMERCE


Global commerce operates on the basis of a variety of rules. For instance, a Letter of Credit allows a seller to guarantee release of funds from a buyer's bank following evidence that the transaction has proceeded as described in the Letter. The Letter of Credit shifts the seller's risk of delivery without cash on hand to a more quantifiable risk of buyer default or bank fraud. Letters of Credit facilitated an estimated $1 trillion in annual trade in 2016.\footnote{ICC Global Trade and Finance Survey, 2016.} The rules governing Letters of Credit are highly regulated and technical. Most of these rules are created and maintained by a small group of commercial bankers working with the International Chamber of Commerce's Banking Commission. The rules cohere into the Uniform Customs and Practices for Documentary Credits (UCP), and their use spread such that "exporters and importers almost always incorporate the UCP into their Letters of Credit, and most banks will not issue an international Letter of Credit unless it is explicitly subject to the UCP."\footnote{Janet Levit, “Bottom-up Lawmaking through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit,” \textit{Emory Law Journal} 57, 2008: 1147-225, at 1177.} In addition, the UCP is now incorporated into many domestic banking regulations.\footnote{"Some countries, by statute, subject all documentary credits to the UCP. In other countries, domestic law explicitly incorporates the UCP or grants deference to it when it is the chosen law of the documentary credit. In other instances, the UCP becomes a type of default law, explicitly complementing (i.e., filling gaps) domestic statutes. Other domestic statutes echo UCP provisions, sometimes explicitly and sometimes in their overarching, rather generic, consistency with the UCP. Yet, nowhere in the world is the UCP’s influence
rules for global commerce, the International Chamber of Commerce (ICC) organizes markets through institutional networks using its membership of more than 8,000 corporations and chambers of commerce in 130 countries. The ICC targets policy advocacy at national governments and international organizations and provides services to business groups and corporations. Along with the UCP, the ICC wrote the widely adopted global investment norms and import/export lending practices and the International Commercial Terms for global commercial shipping (INCOTERMS). The ICC also promotes business self-regulation through the leading International Court of Arbitration and the International Maritime Arbitration. Most recently, the ICC’s Commercial Crime Services aims to assist corporations in fighting against international commercial crimes like piracy on the seas and online.

The activities of the ICC echoes in many nongovernmental transnational actors today who organize markets in financial accounting and auditing, product standards, foreign investment, insurance, bankruptcy, bond ratings, Internet commerce, and forest

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436 Büthe and Mattli 2011.


These actors inspire foundational questions about diffusing power and authority beyond governments for scholars in international politics. Research on “transnational private authority” brings together those who examine private authority in international relations with others who explore the politics of global business. These accounts often begin conceive of privatized market organizing power as a new kind of global authority on epistemic or moral grounds. The normative implications are two-fold. At minimum, scholars are concerned with the legitimacy deficit of private governors that are unaccountable to any public and remain nontransparent in their actions. Furthermore, some are also varyingly skeptical or critical of private governors, especially transnational corporations, for improving socioeconomic realities for all involved. On the one hand, in creating a distinct nonpolitical “market authority” for transnational private governors, transnational private governance depoliticizes market organizing power and renders it

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446 Cutler et al. 1999.
447 Hall and Biersteker 2002.
449 Graz and Nölke 2008.
“nonstate.” On the other hand, it often relies on private governors as meaningful only when acting as an agent for government principals in explicit or implicit ways.

In another set of research inquiries, comparative political economy scholars show the impact of business on politics, and especially the role of organized business interest associations on states. Most accounts treat the business-state relationship as externally imposed and one of “pressure.” Even more sociological approaches treat state capacity and autonomy as exogenous to relations with business coalitions. For instance, Peter Evans offers an “embedded autonomy” account of business-state relations by arguing for close ties between bureaucrats and business structured to benefit from the ties while avoiding state capture. As a result, business associations are portrayed as apart from the state apparatus, which remains “beyond business.” The normative preoccupation is to reduce the conditions of “state capture,” defined as the cooption of politics by business interests. Most research also emphasizes public authorities coordinating between business entities, thereby missing out on the self-directed coordination efforts amongst firms.

\[451\] Hall and Biersteker 2002; Katsikas 2010.

\[452\] Katsikas 2010.

\[453\] Graz and Nölke 2008.


According to these extant research agendas, the ICC should either be a case of a new market authority in world politics or an organized interest locked in a zero sum game over state resources. This chapter presents an alternate understanding of the ICC as representing institutional hybridity to mobilize sovereign power in governance through networks of commerce. Rather than represent a separate type of nonpolitical market authority, the ICC’s transnational governance shows a political-market authority where markets serve politics and politics serve markets. In addition, instead of capturing the state through zero sum contests, the ICC’s market organizational prowess is constitutive of sovereign power. The “illusion of free markets” extends to the illusion of autonomous sovereigns. The ICC’s institutional hybridity brings its own set of accountability problems, key among them is the exclusionary nature of global commercial networks to publics outside the networks.

In this chapter, I trace the ICC’s relatively unknown almost 100-year history and contextualize two challenges for its institutional hybridity: gaining exclusive access and creating alternatives to government controlled institutions. First, I examine network power through lobbying as seen in the ICC’s role in the demise of the International Trade Organization (ITO) in the post-World War II period. Western powers constructed the ITO to round out the Bretton Woods triad with the International Monetary Fund and the World Bank. However, the U.S. failed to ratify the ITO, killing a permanent multilateral trade organization until the World Trade Organization (WTO) in 1996. The demise of the ITO shows the importance of exclusive access and how lobbying networks emerge. At first glance, an international organization facilitating trade liberalization fits in with the ICC’s agenda.

However, while initially in favor of the ITO charter, the ICC moved to formally oppose its ratification through the U.S. Chamber of Commerce. The case ultimately shows that nongovernmental actors were involved from the beginning of multilateral global governance efforts but their institutional access varied across multilateral and national networks.

Second, I investigate the ICC’s self-regulating apparatus for global commerce including its policy commissions, arbitration, and crime service bodies. The apparatus works to create an alternate to government regulation, yet I position the self-regulation within the broader sovereign network of global markets. I use a debate on the Law Merchant to work through the claims and stakes of any “independent” market authority. Private authority in the Law Merchant is deeply contested as scholars alternately propagate\(^\text{458}\) and refute\(^\text{459}\) the existence of a medieval Law Merchant. At stake in these debates is what it means for private authority to exist, to have its own identity, and to have relations with the world. Some argue that the type of contractual relations between the merchants betray the preponderant arguments for merchant custom,\(^\text{460}\) while others question the autonomy of merchants from local public authorities.\(^\text{461}\) Meanwhile, the Law Merchant provides analytical leverage to understand the ICC’s institutional hybridity in ordering market relations. Conventional Law Merchant and ICC authority rests on papering over their hybrid networks to claim self-regulation and arms-length


relations with public authority, which clouds the actual exercises of sovereign power for governing markets.

II. MERCHANTS OF PEACE

In the wake of World War I, financiers, industrialists, traders and government ministers from the Allied bloc established the Atlantic Charter in 1919 that served as the basis for the ICC’s formation. The founders asserted the mission of the organization early on:

The purpose of the organization is to promote international commerce, to facilitate the commercial intercourse of nations, to secure harmony of action on all international questions involving commerce and industry, and to promote peace, progress and cordial relations between the countries and their citizens by the cooperation of business men and their associations devoted to the development of commerce and industry.\(^{462}\)

Calling themselves the “merchants of peace,” the ICC embarked upon post-war discussions on reparations and the German role in European reconstruction. Most of the congresses, or meetings held every other year, in the early-1920s focused on reparations. The ICC contributed towards the Dawes Plan and the subsequent 1924 Treaty of London. At the 1927 World Economic Conference held by the League of Nations, the ICC submitted a 150-page report forming a blueprint for the General Agreement on Tariffs and Trade decades later. However, the ICC’s efforts on liberalizing trade came to a halt with the 1930 Smoot-Hawley Tariff Act. The resulting “tariff wars” and increasing linkage of free trade with the Great Depression resulted in a greatly reduced role for the ICC in the 1930s as compared to the 1920s.

The rise in hostilities in mid-1930s curtailed the ICC’s progress even further and once it became clear that Europe was headed for another great power war, the ICC rallied against such

\(^{462}\) Introduction, *Organization Meeting of the ICC*, June 23-30, 1920; p.6
a development. The 1937 congress was held in Berlin, and in the presence of Adolf Hitler, the 
ICC president declared:

On the psychological as well as on the material plane, the complicated mechanism of 
international relations had been too far seriously set out of gear by the war to permit rapid repair 
of the damage effected. Today only is it perhaps possible to realize as a whole the incalculable 
disasters caused by the World War, and I feel sure you will join me in wishing that we may never 
see another such war.

The ICC continued to meet right up to the eve of World War II and conducted its 1939 congress 
in Copenhagen with the opening session broadcasted on radio around the world. The ICC 
created a plan for world economic development in the Copenhagen Plan, which was referred 
to during the war by the ICC’s Committee for International Economic Recovery. This 
committee consisted of representatives from twenty-one countries, including states at war with 
each other. As World War II went on, the ICC continued to operate with a skeleton crew, even 
under Nazi occupation in Paris, updating records and publishing technical reports on member 
countries.

The end of World War II ushered the creation of the United Nations and the ICC was 
one of the first international non-governmental organizations to be given consultative status 
with the Economic and Social Council. During the 1960s, the ICC strengthened its ties with 
other international organizations, especially the United Nations Conference on Trade and 
Development (UNCTAD) and the General Agreement on Tariffs and Trade (GATT). The ICC-
UNCTAD-GATT partnership proved crucial for the 1963-1967 Kennedy Round and resulted in 
the deepest cuts to tariff barriers yet. While working through formal institutional networks,

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463 ICC 1935 Congress.
464 Address by Fentener van Vlissigen, President of the ICC, Ninth Congress Opening Session, June 28, 1937; p. 18.
the ICC also produced policy influence through its own rules, codes, and standards in numerous policy commissions meetings. Most of its congresses were also focused on forward-looking challenges of technology, urban growth, and the environment to anticipate lobbying needs and focus areas.

The decolonization of the late-1950s and 1960s signaled new market opportunities and the ICC expanded its membership into Asia and Africa. The ICC also focused on building greater organizational capacity following an increased presence of multinational corporations in terms of financial contributions via national committee membership dues and as technical expertise providers. The ICC began defending multinational corporations from attacks in developing and newly decolonized regions. This endeavor informed much of the ICC’s policy work starting from the late-1950s and carried into the late-1960s, with a significant 1969 Istanbul congress whose theme was “International Economic Growth: The Role, Rights and Responsibilities of the International Corporation.” The branding of a new “selfless business man” was the focal part of this campaign to paint multinational corporations in a positive light.

The ICC recognized the increasing importance of multinational corporations for organization strategy in 1975 in the first major revision to the ICC’s 1920 constitution. The revision allowed the ICC to treat multinational corporations as independent members. Until then, corporations had to go through their national committee representative to access the ICC. However, recognizing geographic diversification in supply chains and expanding global markets, the ICC allowed multinational corporations to independently contract with the ICC, bypassing the national committee requirement. However, only national committees were

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ICC 1975 Constitution
allowed voting privileges in the ICC’s council—the supreme governing body—although corporations were allowed to sit on meetings as consultants. That the ICC membership was restricted to national committees for over 55 years “suggests that most [nongovernmental organizations] use a model of national representation and some variant of majoritarian decision-making, reflecting the long-standing presumption of legitimacy for the nation-state as a sociopolitical unit.” The change in membership rules reflected the growing influence of corporations in global governance and the changing dynamic of business-state relations. While the ICC’s financial data is not publically available, a high-ranking ICC official disclosed that the change in membership status of corporations for contracting ICC services now contributes to a higher portion of ICC’s revenue stream compared to national committee membership dues. This does not lead to an irrelevance of lobbying at the domestic level; according to the same ICC official, 60% of the ICC’s efforts are still spent on state policy influence through national committees. However, the direct membership of multinational corporations shows another dimension of networks of commerce.

The 1980s was known for the aggressive comeback of the multinational corporation after the oil crises and economic slowdown of the previous decade. The comeback was especially pronounced in the American merger and acquisition consolidation tactics for global expansion. The rapid expansion accompanied a growing need to protect intellectual property as multinational corporations went into emerging markets as well as to invest in research for information systems. In such conditions, the ICC unveiled special projects for its corporate members. The most significant of these was the establishment of the Commercial Crime

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466 Büthe and Mattli 2011: 194.
467 ICC Interview, July 2010.
Services (CSS) in 1982. The CSS is headquartered in London instead of Paris and is the ICC’s most distant organizational branch. Tasked with combating all forms of commercial crime, the CSS division contracts with corporate members to tackle fraud in international trade, insurance fraud, financial investment fraud, money laundering, shipping fraud and product counterfeiting. I will elaborate on the various components of the CSS later in the chapter, but for now it is worth noting the context of the 1980s spawning the CSS’s creation.

During the 1990s, the ICC suspended its congresses and decided to conduct all policy work through appointed commissions without a membership-wide consensus. The ICC also moved away from the “merchants of peace” brand to become the “world business organization.” At the same time, it began taking a leading role for corporate social responsibility, for instance by being a founding partner of the United Nations Global Compact. In the late-1990s and early-2000s, the ICC added more resources for the national committees by forming the World Chambers Federation (WCF) to support local chambers of commerce through trainings and competitions. Meanwhile, the calls for business self-regulation became louder and the ICC created more specialized projects for corporations like the Business Action to Stop Counterfeiting and Piracy (BASCAP) and Business Action to Support the Information Society (BASIS). These projects are funded on a contractual basis from corporations, rather than from membership dues, creating the seeds for an increasingly service-based model following into the late-2000s.

The 2007-2008 financial crisis led to wider business self-reflection about regulation. In the aftermath of the crisis, the ICC promoted that it has never argued for a world without rules; with increased globalization, global rules are required. The ICC advocated for a blend of global self-regulation and national laws with an increasing need for intergovernmental organizations
to collaborate.\footnote{ICC interview July 2010.} For instance, at the 2010 G20 summit, the ICC urged an overhaul in financial regulation in response to the global crisis. In addition, the ICC continued to push for the conclusion of the WTO Doha Round of trade negotiations. Since 2010, the ICC’s agenda included making connections using Regional Consultative Groups, informal groups of ICC representatives from a specific region, to augment its global networks.

Figure 1 shows the total ICC national members (the main national chamber of commerce in a country, like the U.S. Chamber of Commerce) per decade from 1920 till 2010. Figure 2 shows the cumulative number of new ICC national members per decade from 1920 till 2010 by region. In the early Interwar decades, the new national members came largely from Western Europe. 1950s saw the pivot to Asia and Africa following decolonization. Africa became important again in the 1970s. Eastern Europe dominated new membership in the 1990s and 2000s, and Latin America gradually emerged as the next frontier for membership expansion in the 2000s. The Middle East shows the steadiest source of expansion with a few countries becoming national members per decade. The regional breakdown shows that networks of commerce do not scale all at once. The ICC’s membership expansion follows general trends in trade liberalization, particularly in Asia. But there is also a hint of ICC membership itself serving as an indicator of trade readiness. In other words, the ICC may amplify domestic networks of commerce, which may prime a country to liberalize. The next section addresses the history and politics of trade liberalization and the ICC’s role in it.
Figure 1. TOTAL ICC NATIONAL MEMBERS, 1920-2010

Figure 2. ICC NEW NATIONAL MEMBERS, CUMULATIVE BY DECADE AND REGION, 1920-2010

- Western Europe
- Eastern Europe
- Americas
- Asia
- Oceania
- Latin America
- Middle East
- Africa
III. WHO KILLED THE INTERNATIONAL TRADE ORGANIZATION?

The International Trade Organization (ITO) was intended to round out the Bretton Woods triad with the International Monetary Fund and the World Bank. The ITO Charter lists its functions as collecting information on international trade, tariffs and business practices while facilitating consultation among members. However, the power of the ITO was in its administrative capacity as “the Charter made interpretation one of the essential functions of the Organization, not in a general directive, but in a large number of isolated instances.” The ITO’s interpretive position allowed it to make exceptions to the general rules by outlining when, for instance, quantitative restrictions were permissible. Unlike the other two Bretton Woods institutions, the ITO never got off the ground and “the Charter’s history covers nearly five years of preparation in wartime, over two years of lengthy, laborious, full-dress negotiations that eventually involved over fifty governments, and then nearly three years more of waiting and arguing, ending with what an Italian journal has called a ‘second class funeral’ in the dying days of 1950.” So, what happened?

The ITO was revolutionary in its attempt to address trade along with labor by specifying a governmental obligation to full employment. Governments nearly everywhere recognized the

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social problems accompanying massive unemployment in the Interwar years and one of the first postwar commitments articulated full employment as a public good in the 1941 Atlantic Charter. Soon thereafter an endorsement in the 1944 British White Paper on Employment followed. Full employment was also central to the passage of the U.S. Employment Act of 1946 where Congress debated “how much responsibility should the government take for keeping the national economy at a high level of activity, and how should it carry out whatever responsibility it was to have.” The American position was summarized in Proposals for Expansion of World Trade and Employment: “Every country will seek so to manage its own affairs that its business life will be free from violent depressions.” The ITO Charter also left it up to each member country to decide how best to achieve full employment. Even at a high level of generality the ITO's labor commitments “offer an unparalleled case study of a short period in history when free trade, labor standards and human development were friends and not historical antagonists.” For some, it was this ultimate compromise that might have signaled the ITO’s demise as “the possibility that the ITO might have produced a more inclusive, productive, orderly, and just world economy than that which in fact emerged lends strong interest to the reasons for its stillbirth.”

Early on, the drafters of the Charter encountered a typical dilemma in organizational design of this encompassing magnitude where either they would “tackle the difficult problems of fitting different trading methods into one system” or they would “draft a clear-cut set of

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472 1941 Atlantic Charter.
473 1944 British White Paper.
474 Bidwell and Diebold 1949: 212.
477 Toye 2003: 283.
principles applying only to private trading which will be unacceptable to most of [their] partners in the trading world.”478 The dilemma is evident in the styling of the Charter as usually beginning with a pithy general principle followed by long list of exceptions. The general principles were some variation of assuring non-discrimination in administering tariffs, taxes, or trade controls, and prohibiting quantitative restrictions or quotas on imports and exports. The exceptions to these general principles were attributed as loopholes “to accommodate countries which have difficulties with their balance of payments, or to permit undeveloped countries to protect their infant industries, or to permit preferential trading arrangements.”479

The loopholes, in turn, were a product of the large number of developing countries present at the final drafting conference in Havana in 1948. The meeting gave rise to protectionist concessions for developing countries and mitigating these concessions with counters from developed ones. Arthur Guinness, the President of the ICC, gave some personal impressions of the conference: “Great differences of opinion had arisen, mainly owing to the presence of a large number of countries that had not taken part in the work of the Preparatory Committee. The most extreme demands had been made by certain countries.”480 One such demand was the loosening of foreign capital protections, which were not on the table during the initial Charter negotiations in London in 1947 but were put on the agenda in Havana. However, the resulting compromise in the final Charter led a committee of the U.S. Associates of the International Chamber of Commerce to report that “assurance of fair treatment of foreign capital is so vague as to afford little encouragement if, in fact, it does not make the

478 Bidwell and Diebold 1949: 223.
479 Bidwell and Diebold 1949: 194.
situation cloudier than it was before. The negotiators responded that at least the Charter now offered a multilateral forum to resolve disputes on capital expropriation, which had only been (and remains) handled through a diverse array of bilateral investment treaties. As the tradeoffs mounted, the British delegation in particular considered excessive the U.S. attempts to compromise with the Latin American and other developing countries. However, scholars since consider the outcome at Havana as “substantially a product of the U.S. decision to extend its concept of multilateralism so as to allow a wide range of countries to help to design the new organization, rather than hoping that they would accede, passively, to a U.S. blueprint.”

American business associations in general were in support of the ITO in the beginning. In 1945, the ICC recognized its potential for free trade early in the negotiations: “The [ICC] President said that the initiative of the U.S. government in drawing up proposals for an international trade organization charter was one for which the ICC had been waiting for many years.” The following year, while recognizing the difficult reconciliation of trade and employment, the Council of the ICC noted, “it was a remarkable fact that the American Proposals were government proposals and yet imbued with the spirit of free enterprise.” The ITO Charter drafters, in turn, were keen to reach out to the ICC for early support as evident by the presence at the December 1946 ICC Council meeting of S. Wyndham White, Executive Secretary of the Preparatory Committee of the International Trade and Employment Conference that kicked off the ITO negotiations. White briefed the Council on the recently concluded draft Charter round in London and said it “was a special pleasure and privilege to

481 Bidwell and Diebold 1949: 211.
482 Toye 2003: 284.
483 Executive Committee Meeting, New York, Dec 6, 1945, p.9.
address the Council of the ICC in view of his past associations with the Chamber. He had attended the [ICC annual] Congress in Berlin in 1937, and at Copenhagen in 1939.\textsuperscript{485} In an optimistic tone, Ernest Mercier, chairman of ICC’s French National Committee, emphasized that “employment could not be maximized by governments alone, by business alone, or by labor alone, but demanded that the three work together in cooperation. Hence, the necessity for the ICC to establish contacts with governmental organizations on the one hand, and labor organizations on the other, which was in accordance with the general methods adopted by the Council.”\textsuperscript{486}

The optimism did not last long. At the following Executive Committee meeting, discussion on the upcoming Geneva talks were somber in a report previewing ICC’s strategy of reducing loopholes:

All sorts of difficulties arose when one attempted to reconcile emergency measures and long-term aims in the hope of building world economy based on international cooperation and freer trade and non-discrimination; when full employment had to be reconciled with the need to eliminate unduly nationalistic programs; when national development of less developed areas had to be reconciled with the desire to get a freer trade and to promote an equitable distribution of international labor. The answer given to these questions by the Charter was not the perfect answer.\textsuperscript{487}

Even before the official Charter was approved, the ICC was using language of perfection to voice their concerns. This aligns well with William Diebold’s classification of the business opposition to the ITO: “the businessmen who took these views held that the Charter was not ‘liberal’ enough or ‘internationalist’ enough. ... It will be convenient to call this group the ‘perfectionists,’ in contrast to the ‘protectionists.’”\textsuperscript{488} In order to make the Charter better, the

\footnotesize{\textsuperscript{485}65\textsuperscript{th} Session of the Council of the ICC, Paris, December 3-4, 1946, p. 5. \textsuperscript{486}65\textsuperscript{th} Session of the Council of the ICC, Paris, December 3-4, 1946, p. 9. \textsuperscript{487}39\textsuperscript{th} Meeting of the Executive Committee of the ICC, Paris, April 2, 1947, p. 2. \textsuperscript{488}Diebold 1952: 14.}
ICC created a report for drafters in Geneva offering two suggestions: the establishment of uniform procedure for conciliation and international arbitration; and recommending the elaboration of a code of fair practice in foreign investments.\textsuperscript{489} Representative of the push and pull from optimism to caution, the ITO discussion entered in a characteristic encounter. Michael Heilperin, Rapporteur General of the ICC for the Trade and Employment Conference, declared, “on a world in which private enterprise was on the defensive, the ICC had an active part to play. It must help build up an International Trade Organization that would be a constructive element of world peace.”\textsuperscript{490} In a tempered response, Wallace B. Phillips, representing U.S. Associates of the ICC, considered that Heilperin’s report “could not claim the unanimous support of governments but that it was a very constructive work which should considerably enhance the prestige of the Chamber in Geneva.”\textsuperscript{491}

The oscillating optimism and caution continued for many more months. In early June of that year, Phillips provided an update on the ongoing Geneva meeting to the Council of the ICC. The issue of access to the Charter drafters became especially salient:

He wished to draw attention to the note of optimism he perceived among leaders of delegations. There were, however, difficulties, for it was by no means easy to conciliate the conflicting interests of so large a number of countries. The ICC Report, which was the first document to be submitted by a non-governmental organization had been very well received and carefully studied by 18 delegations. The task of the ICC representatives was however a difficult one for non-governmental organizations were not allowed to attend most of the meetings. But a Committee had just been set up to examine the suggestions of these organizations; the ICC delegation had been heard; it defended neither political not personal views, its viewpoints were constructive not destructive and it was to this attitude that a large part of its influence was due.\textsuperscript{492}

\textsuperscript{489} 39\textsuperscript{th} Meeting of the Executive Committee of the ICC, Paris, April 2, 1947, p. 3.
\textsuperscript{490} 39\textsuperscript{th} Meeting of the Executive Committee of the ICC, Paris, April 2, 1947, p. 3.
\textsuperscript{491} 39\textsuperscript{th} Meeting of the Executive Committee of the ICC, Paris, April 2, 1947, p. 3.
\textsuperscript{492} 66\textsuperscript{th} Meeting of the Council of the ICC, Montreux, June 2, 1947, p. 5.
Phillips observes the on the ground realities of complicated sovereign relations. The ICC while formally invited by the Executive Secretary of the Preparatory Committee of the International Trade and Employment Conference did not have as much access to the Charter negotiators as it desired. If the ICC delegation were not allowed to attend most of the meetings, it is difficult to imagine the kind of influence they would have had in the ongoing debates. Its strategy of eliminating loopholes in the Charter appeared to fall flat.

By the time the talks moved to their final stage in Havana, the ICC President, Arthur Guinness, felt that the conference would probably succeed in agreeing upon a charter: “It would not be an ideal document, but at the present juncture he felt that the important thing for the ICC was to have a Charter adopted and the Organization under way. The ICC could then strive to ensure the satisfactory operation of the Charter by the Organization and to have amendments adopted where actual practice might show these to be necessary.”

Frustrated by the lack of access to the drafting process, the ICC now shifted gears to amending the Charter after its acceptance and ratification. Once the ITO Charter was agreed upon, however, representatives of the ICC moved to informally oppose its ratification in the U.S. Congress through its U.S. Associates National Committee. The latter organization had no trouble accessing lawmakers in Washington D.C. in stark contrast to their diplomatic counterparts in Geneva and Havana.

The U.S. Associates wrangled a coalition with protectionists like the National Association of Manufacturing. In fact, the Congressional hearings show that the protectionist statements against the ITO used perfectionist arguments. Furthermore, “it is interesting to note

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that the U.S. Chamber of Commerce – which opposed the Charter on perfectionist grounds — was represented at the Havana conference by Elvin Kilheffer who appeared before the House Foreign Affairs Committee on behalf of several protectionist groups in the chemical industry. Groups in favor of ITO included the National Council of American Importers, the Committee for Economic Development, National Planning Association, the Committee for the International Trade Organization. Groups opposed to ITO included the United States Chamber of Commerce, the National Association of Manufacturers, the National Foreign Trade Council, and the United States Council of the International Chamber of Commerce. The added value of having normally free trade business groups opposing a free trade organization was a tremendous force swaying undecided members of Congress.

From the beginning of the process, the ICC had two important reservations about the ITO charter: “government commitments to maintain ‘full’ employment instead of ‘high’ employment” and “the lack of adequate checks upon the use of quantitative restrictions and subsidies.” But as late as February 1948 the ICC found the Charter workable even if not ideal. Once it became clear that the ITO charter as it then stood was too restrictive, the ICC faced supporting a compromised Charter or refusing to endorse the first international charter for world trade. There was no clear consensus within the ICC membership and the schism was most evident with Great Britain pushing to support the ITO regardless of its flaws in face of U.S. refusal to look beyond “economic nationalism.” The result was no formal endorsement or rejection from the ICC on the ITO charter; however, the American contingent used the ICC’s

494 Diebold 1952: 24, fn17.
495 Diebold 1952: 15.
496 Report issued on March 6, 1947, ICC publications.
497 ICC Session on the ITO charter, June 3, 1947.
information and perceived prestige to wage war on the ITO through their coalition with protectionists to block any ratification measure in Congress. In their final Statement of Position to Congress in 1950, the Committee of the United States Council of the International Chamber of Commerce stated its opposition in direr terms than the ICC ever did:

It is a dangerous document because it accepts practically all of the policies of economic nationalism; because it jeopardizes the free enterprise system by giving priority to centralized national governmental planning of foreign trade; because it leaves a wide scope to discrimination, accepts the principle of economic insulation and in effect commits all members of the ITO to state planning for full employment. From the point of view of the United States, it has the further very grave defect of placing this country in a position where it must accept discrimination against itself while extending the Most-Favored-Nation treatment to all members of the Organization. It places the United States in a permanent minority position owing to its one-vote-one-country voting procedure. Because of that, membership in the ITO based on this Charter would make it impossible for the United States to engage in an independent course of policy in favor of multilateral trade.\"498

The ICC had not raised the issue of a voting bloc against the U.S. and had generally commended the drafters’ commitment to the free enterprise system. Nonetheless, in light of this collective opposition and the increasing complications in Korea, the Truman Administration took the view that “the Charter would have to be accepted as it stood; reservations would invite similar action by other governments, pulling apart the government already reached; renegotiation was impossible.”499 In 1951, President Truman withdrew the ITO Charter for ratification and it was never reintroduced to Congress until a shadow version of it appeared in the WTO 44 years later.

\[499\] Diebold 1952: 22.
Lobbying and Network Power

In a conventional sense, the ITO's demise is a case of lobbying. We know quite a lot about lobbying through organized business interests impacting state development, institutional strength, and collective learning. In the “developmental state,” one that aims for economic growth and development, the key question is the right blend of lobbying to not overpower the state. For instance, Evans’ “embedded autonomy” argues for business-state “synergy” between bureaucrats and business while avoiding state capture. To strike such a balance means to insulate the state as a Weberian bureaucracy with “highly selective meritocratic recruitment and long-term career rewards.” For Evans, administrative coherence allows the state to engage with business elites and maintain information flows on productive enterprises and sectors while resisting rent-seeking. “Embedded autonomy” assumes a zero sum relationship between business and state. The developmental state can produce economic growth only in “strong” states with a passive business class. However, by relegating healthy business-state relations to economies that can afford Weberian bureaucracies, this perspective on lobbying neglects to see markets as constitutive of sovereign power. Moreover, it suggests that market potential would be unrealized in “weak” states. However, the strong/weak state distinction is not useful because it assumes state capacity is

500 Schmitter and Streeck 1981; Granovetter 1995; Lucas 1997; Schneider 1998; Bell 2008.
502 Doner and Schneider 2000.
504 Evans 1995: 12.
505 Evans argues this was the case in Latin America under a fragmented Brazilian bureaucracy.
exogenous rather than constructed from the relations that make a state. As chapter two details, sovereign power involves a radical pluralization on who counts as sovereign and how sovereign authority is produced. Claims of business over powering or “capturing” the state misunderstand the operations of sovereign politics.

Lobbying is better understood through network power, which moves beyond a zero sum view of sovereign politics to an institutionalized allocation of power sharing where state is complicit in business power and business is complicit in state power. Networks play a key role in re-conceptualizing the developmental state given the more hybrid business-state arrangements in East Asia. Instead of states “disciplining” business, networked relations create shared advantage for business and state. The network power approach often uses South Korean chaebols or conglomerate-type business organizations as an example of mutually reinforcing business-state relations. According to one view, networked relations promote reciprocity between business and state, for instance in the allocation of subsidies, quotas, market shares etc., from the state to business in exchange for certain performance standards, usually in the export sector. With more reciprocal relations, the pace of economic growth would be faster. Reciprocal relations also lead to collective learning where firms internalize


508 Amsden 1989.
performance expectations and welcome compliance-inducing monitoring. Business’ gain is not a state loss nor is it expected for business to reach full potential independent of states.\textsuperscript{509} Instead, in the reciprocal network approach, states collaborate with firms far more extensively than in embedded autonomy.

Moving beyond the autonomy of state and business actors, the study of the ITO shows how the ICC is particularly representative of mobilizing sovereign power to organize markets. Much like the English East India Company, the negotiations over who decides the rules for market governance features both public and private actors. It was telling that the ICC was brought early into the fold of post-World War II public multilateralism, first through its UN ECOSOC consultative status and then through the invitation of the Conference on Trade and Employment to comment on the preliminary meetings of ITO creation. Since the ICC had been a vocal global business organization on free trade it made sense that it would have been given a platform to express its thoughts on the ITO. However, the negotiations also highlighted the hybrid nature of the ICC by limiting its access during the talks in the various meetings on the draft Charter. Some pushback led to the creation of a separate committee for ICC input, but by this time it was clear that the ICC was not part of the same club as the government representatives. When time came to work through the U.S. Congress, however, access opened up on multiple fronts: the traditional lobbying route where members of Congress were swayed by the perfectionist critiques of the U.S. Associates; and the protectionists who found it convenient to align and present a somewhat united business opposition to the ITO.

What do the politics of ITO non-ratification tell us about institutional hybridity? On the surface, the ITO negotiations represent a classic instance of lobbying and state capture. Certain business interests did not want the U.S. to ratify the ITO Charter and the government did not put up a fight. But the classic narrative is complicated by practices of sovereign hybridity. The ICC embedded itself in formal and informal networks of commerce with medium publicity. The ICC did not have formal contractual relations with governments nor was it highly publicized outside commercial circles. On the transnational level, the ITO Charter negotiations and the varying roles of the ICC were not about capturing a state but about swaying the consensus on the rights and responsibilities of world trade. The ICC had already promoted a brand as the voice of global business in its institutional networks before Bretton Woods and was able to gain access to the ITO drafting process because of its comparative longevity. When the multilateral network provided obstacles, the ICC switched to national networks, and here the strength and coalition building of its national committees drove the eventual outcome. However, even on the national level, the American state was not settled, is never settled, one way or another on how to govern international trade. Its preferences and interests were and remain empty vessels in need of substantive content from actors like business groups among others.

The ITO controversy also shows different tenors of networked power relations within institutional hybridity: a friendship between the ICC’s U.S. Associates, American protectionists, and particular lawmakers; a rivalry between the ICC and the Charter negotiators in Geneva and Havana who saw their proposals as alternatives without stakes (at the time); and enmity between the ICC and the developing countries pushing for loopholes and exceptions from the basic ITO free trade principles. That the ICC got some of its way in the end does not make one
of the relations truer over others or demonstrate the supremacy of domestic politics over international organizations. Instead, the configurations show the sheer variety of relations it takes to create and manage rules for the world – relations that are fragile and contextual and yet endure enough to move policy. The next section presents another dynamic of institutional hybridity through self-regulation.

IV. SELF-REGULATING THE GLOBAL MARKET

The ICC participates in multiple networks in institutional hybridity. The previous section showed its intended influence on national policy through lobbying and reciprocal networks. This section will show its influence on transnational policy through its aim to self-regulate the global market for commerce. The ostensible difference is in the role of governments. Its lobbying networks aim to move governments whereas its self-regulation aims to move beyond governments.

The ICC aims to set the agenda for global business regulation through its policy commissions. There are thirteen commissions under three umbrella themes: Rules-Writing for Business; Trade, Investment and Globalization; and, Business in Society Issues. Table 1 provides an overview of the commissions. The commissions consist of business experts drawn from ICC membership that write ICC policy on major issues that affect business globally. Liberalizing trade and markets permeates most of the commissions as does technical work requiring business expertise. For instance, the Taxation commission aims to “promote an international tax system that eliminates tax obstacles to cross-border trade and investment.” The Trade and Investment Policy commission intends to “break down barriers to international trade and investment so that all countries can benefit.” Meanwhile on expertise, the Commercial Law and
Practice commission wants to “set global business standards for international commercial contracts,” and the Electronic Business, Information Technology, and Telecoms commission hopes to “promote electronic business development through policies, standards of practice and guidelines to encourage growth and integration.” However, the most salient theme is that of self-regulation and the ICC’s contributions to the creation of a global business society. In particular, the Business in Society commissions have implemented a “selfless business man” branding. Environmental self-regulation is a hot topic as is e-business and anti-corruption regulatory guidelines for transnational private governance.

Table 1: ICC Policy Commissions⁵⁰

<table>
<thead>
<tr>
<th>COMMISSION</th>
<th>PURPOSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arbitration</td>
<td>Pool ideas on issues relating to international arbitration and other forms of dispute resolution</td>
</tr>
<tr>
<td>Banking Technique and Practice</td>
<td>Serve as a global forum and rule-making body for the international trade finance community</td>
</tr>
<tr>
<td>Commercial Law and Practice</td>
<td>Set global business standards for international commercial contracts and provide a business viewpoint on commercial rules developed by intergovernmental organizations.</td>
</tr>
<tr>
<td>Marketing and Advertising</td>
<td>Promote high ethical standards in marketing through ICC codes and guidelines, and provide business comments on government actions</td>
</tr>
<tr>
<td>Competition</td>
<td>Ensure that modern business needs are taken into account when in the formulation and implementation of competition laws and policies</td>
</tr>
<tr>
<td>Financial Services and Insurance</td>
<td>Contribute to the elaboration of sound supervisory and self-regulatory frameworks, and promote liberalization of trade in financial services and insurance</td>
</tr>
</tbody>
</table>

Through the various policy commissions, the ICC takes on a rule-writing function for global commerce. At the heart of international trade are rules, norms, standards and tools that help facilitate the daily flow of global commerce, the life-support system of cross-border trade and investment. In its rule-writing function, the ICC has developed a large array of voluntary rules, guidelines and codes to facilitate business and spread best practices. Table 2 displays a sample of ICC rules and standards. These rules help reinforce business self-regulation and are used in billions of dollars’ worth of transactions every year. As aforementioned, the ICC’s first global rule was the 1933 Uniform Customs and Practices for Documentary Credits (UCP), which is written into virtually every letter of credit in the world to transfer a trillion dollars yearly.
from buyers to sellers in payment for goods and services. Other than payment, commerce also requires clarification for insurance and liability, for instance where the seller’s responsibility ends when shipping a delivery – on the docks, at customs, or at the warehouse? The 1936 INCOTERMS standardized trade definitions for shipping liability used worldwide in international sales contracts to reduce differing local variations. In the 1940s, the ICC was also an early mover in model contracts for Double Taxation Treaties, which established that businesses would not pay taxes twice to the host state (where it did business) and origin state (where it is registered). In the late 1960s, the ICC began formulating model investment contracts for Bilateral Investment Treaties (BITs), which are the primary legal basis for protecting foreign investment assets in the absence of a multilateral investment treaty. Along with the rise of e-commerce, the 1997 General Usage in Digitally Ensured Commerce set the early standard for secure transactions for online sales and exchanges. In Internet governance, “the ICC is very active and publishes lengthy reports, participates in all relevant policy dialogues, and functions as the main business coordinator and partner in UN summits and in relation to the various UN agencies.”

Table 2: Sample ICC Rules and Standards

<table>
<thead>
<tr>
<th>YEAR</th>
<th>RULE</th>
<th>PURPOSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1933</td>
<td>Uniform Customs and Practices for Documentary Credits</td>
<td>Written into virtually every letter of credit, the UCP are accepted throughout the world to transfer billions of dollars yearly from buyers to sellers in payment for goods and services.</td>
</tr>
<tr>
<td>1936</td>
<td>INCOTERMS</td>
<td>Standard trade definitions used worldwide in international sales contracts to reduce</td>
</tr>
</tbody>
</table>

51 Bislev and Flyverbom 2008: 135.
<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1937</td>
<td>International Code of Advertising Practice</td>
<td>Used throughout the world as a self-regulatory guideline for practicing advertising by setting universal standards for responsible and ethical advertising. Code has special emphasis on advertising aimed at children and health claims.</td>
</tr>
<tr>
<td>1958</td>
<td>ATA Carnet</td>
<td>International customs document that permits duty-free and tax-free temporary import of goods such as commercial samples, professional equipment, goods for presentation for up to one year.</td>
</tr>
<tr>
<td>Late-1960s</td>
<td>Model Contracts (Various)</td>
<td>Provide a legal basis upon which parties to international contracts can quickly establish an even-handed agreement acceptable to both sides. They are meant to protect the interests of all parties, combining a single framework of rules with flexible provisions.</td>
</tr>
<tr>
<td>1977</td>
<td>Rules of Conduct to Combat Extortion and Bribery</td>
<td>To provide a basis for corporate self-regulatory action barring extortion and bribery for any purpose, covering judicial proceedings, tax matters, environmental and other regulatory cases, or legislative proceedings.</td>
</tr>
<tr>
<td>1991</td>
<td>Business Charter for Sustainable Development</td>
<td>For companies to establish their integrated environmental management systems. Referenced at the UN Earth Summit in 1992, the charter was also a foundation for the Global Compact of UN Secretary General Kofi Annan.</td>
</tr>
<tr>
<td>1992</td>
<td>ICC/UNCTAD Rules for Multimodal Transport Documents</td>
<td>The rules set the only globally accepted standard for multimodal transport documents. They are intended to avoid the problems that would arise for transporters from having to cope with a multiplicity of different regimes when drawing up contracts.</td>
</tr>
</tbody>
</table>
1997  GUIDEC- General Usage in Digitally Ensured Commerce

Establish trust between parties to an online deal and the security of information exchanged. A 2001 update took into account the increases in information-carrying power and flexibility of electronic messages for e-business usage.

Rules often need enforcement. The ICC created the first international commercial arbitration body in 1923 through its International Court of Arbitration. The court has seen almost 20,000 cases and is perhaps the most publicized part of the ICC. Along with the Comité Maritime International (CMI), in 1978 the ICC created the International Maritime Arbitration Organization to deal specially with maritime trade arbitration. Arbitration proceeds through invoking an arbitration clause in trade and investment contracts (which the ICC includes in its model contracts). The ICC court supervises the arbitration by selecting arbitrators, monitoring the arbitral process, and approving all arbitral awards, but does not issue any formal judgments itself. In addition, all ICC arbitration proceedings are confidential and the reasons for the Court’s judicial supervisory decisions are not communicated to the arbitrators or parties. While international commercial arbitration generally involves corporations, the ICC court, along with arbitration in general, now also includes investor-state arbitration where corporations take governments to private arbitration. One of the earliest cases was of Argentina following its 2001 financial crisis and subsequent expropriation of foreign natural gas companies. Argentina faces 60 cases in the International Centre for Settlement of Investment Disputes (ICSID) and in 2013 set precedent by agreeing to pay five ICSID arbitration awards. According to the ICC, approximately ten percent of its arbitrations now involve states.\footnote{ICC Commission Report, “States, State Entities, and ICC Arbitration,” 2012: 2.} BITs prefer ICSID as the arbitral venue for investment treaties as only 18% of BITs allow for the possibility of using the
However, commercial contracts, especially relating to construction, maintenance and the operation of facilities or systems, predominantly use ICC Rules.

Other than creating and enforcing global business rules, the ICC’s governance functions have also evolved to include privatizing protection of property. The ICC claims that the scope and variety of criminal threats facing businesses grow ever larger, with the methods of commercial criminals becoming increasingly sophisticated. Its Commercial Crime Services (CSS) aims to provide the world business community with a centralized crime-fighting body—one with a global network and a dependable reputation. It draws on the worldwide resources of its members in the fight against commercial crime. Based in London and comprising three distinct crime-fighting divisions, the CSS operates according to two basic precepts: to prevent commercial crime and to investigate and help prosecute commercial criminals. CSS works closely with international law enforcement officials, including Interpol, and directs its expertise and network of members to “remain one step ahead of the criminals.”

For the ICC, international commercial crime includes trade finance fraud, piracy on the high seas, banking fraud, and counterfeiting goods. Table 3 lists the CSS specialized divisions.

Table 3: Divisions of the ICC Commercial Crime Services

<table>
<thead>
<tr>
<th>CSS DIVISIONS</th>
<th>PURPOSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Maritime Bureau (IMB)</td>
<td>Uses expertise and access to a large number of contacts around the world in seeking out fraud and malpractice in international trade. 24-hour IMB Piracy Reporting Centre (PRC) assists seafarers when their ships are attacked, robbed or hijacked either in port or out at sea.</td>
</tr>
<tr>
<td>Bureau Name</td>
<td>Description</td>
</tr>
<tr>
<td>-------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Financial Investigation Bureau (FIB)</td>
<td>Conducts inquiries and investigations into money laundering, suspect documents and all forms of fraud including Financial Instrument and Document Analysis, Comprehensive Background Checks, Specialized Sanctions and Embargo Checks, and International Financial Crime and Fraud Investigations.</td>
</tr>
<tr>
<td>Counterfeiting Intelligence Bureau (CIB)</td>
<td>Conducts investigations on counterfeiting by gathering intelligence, making undercover inquiries, organizing the seizure of counterfeits, and providing expert advice and training. Also hosts the International Hologram Image Register and publishes the International Anti-Counterfeiting Directory annually.</td>
</tr>
<tr>
<td>FraudNet</td>
<td>Specialist network of fraud lawyers providing fraud victims with a first local-point-of-contact. Uses to investigate and take action against fraudsters in foreign jurisdictions to increase the chances of recovering losses.</td>
</tr>
</tbody>
</table>

The International Maritime Bureau (IMB) is the oldest division and works on fraud and malpractice in international trade. The IMB is known worldwide for creating and managing the first database of international pirate attacks through its Piracy Reporting Centre. The Financial Investigation Bureau (FIB) conducts inquiries into money laundering and other forms of financial fraud through document analysis, background checks, and international sanctions checks. The Counterfeiting Intelligence Bureau (CIB) directs counterfeiting investigations by gathering intelligence, making undercover inquiries, and organizing the seizure of counterfeits. Finally, FraudNet is a specialist network of fraud lawyers who locally investigate fraud in foreign jurisdictions for fraud victims. The IMB has recently played a key role in campaigning for a unique private-public partnership between navies of various countries and the maritime industry. As a result, the ICC claims, the number of successful maritime hijackings in the Gulf
of Aden dropped.\(^{57}\) This is despite a 39% rise in the number of attacks worldwide, largely due to the situation off the horn of Africa and the Northern Indian Ocean. In addition, IMB used information obtained from its trade finance studies to develop mechanisms to identify suspect trade finance transactions against banks around the world. To further this objective, CSS is developing risk models for identifying trade finance frauds for the use of banks. It also aims to more extensively deploy the FraudNet network of response agents in complex international frauds. Also in development is a system of structured reports for members to identify suspect financial and money laundering schemes and develop a fraud risk information sharing system for shipping companies.

\textit{Regulation and Network Power}

Taken as a whole, the rule-making, enforcement, and CSS investigations project a strong self-regulatory stance where the ICC governs global commercial networks as an alternative to government regulation. Such self-regulation raise two related questions: Does the ICC represent a unique transnational authority? If so, how does the ICC legitimate this authority?

As a unique transnational authority, the ICC may be a case of a “market authority”\(^{58}\) that straddles between a business association and private regime.\(^{59}\) This approach to authority identifies three conditions for effective transnational private governance requiring: “(i) an explicit or implicit recognition by the state, (ii) the consent of actors subject to the rules without having been involved in their making, and (iii) a high degree of compliance to the rules so as to be able to clearly differentiate between private power or influence in general and the

\(^{57}\) IMB News, 2015.
\(^{58}\) Hall and Biersteker 2002: 5.
\(^{59}\) Cutler et al. 1999: 13.
more specific category of private governance."\textsuperscript{520} With regards to the first condition, state recognition amounts to "the delegation of regulatory authority from governments to a single international private-sector body that, for its area of expertise, is viewed by both public and private actors as the obvious forum for global regulation."\textsuperscript{521} The ICC governs market interactions which governments recognize as authoritative, for instance by adopting rules for Letters of Credit. In terms of the second condition, corporations and chambers of commerce also agree to the ICC’s authoritative standing even when the large majority of them are not represented in the policy commissions or executive committee. For the third condition, compliance is already a complicated measure of effectiveness in international law. A full audit of the ICC’s rules would reveal that for every one widely adopted and followed rule, there might be several that did not catch on. However, a requisite of high compliance is a limited view of what counts as “private power” versus “private governance.” Indeed, “the power of business in transnational private governance should not be viewed only in the narrow sense of rule setting and self-regulation, but also in a broader sense encompassing the ability of business to influence the demand for and design of private and public governance institutions.”\textsuperscript{522}

The broader reality of legitimating transnational authority includes effectiveness of not just individual rules but the structural integrity of commercial regimes like the ICC. Janet Levit conceptualizes the ICC as “bottom-up, transnational lawmakering, practice-based norms [that] enter official legal structures.”\textsuperscript{523} Levit examines Letters of Credit and the UCP maintained by the ICC’s Banking Commission which is both “a rulemaking group” and “an interpretive body,”

\textsuperscript{520} Graz and Nölke 2008: 14, citing Cutler et al. 1999: 19.
\textsuperscript{521} Büthe and Mattli 2011: 5.
\textsuperscript{522} Graz and Nölke 2008: 14, paraphrasing Fuchs 2008.
\textsuperscript{523} Levit 2008: 1151.
issuing “over 600 advisory ‘opinions’ in response to on-the-ground, UCP-related questions from bankers, freight forwarders, exporters, and importers.” For Levit, the bottom-up lawmakering is rooted in the practices of ICC membership and its authority rests on coherence more than compliance. In other words, “acutely aware that the UCP does not and, given the scope of Letters of Credit practice, could not offer Letters of Credit users a true closed legal system, the Banking Commission seeks validation from official lawmakers and, in turn, assurance that any domestic or international regulatory efforts will coincide with, rather than undermine, Banking Commission norms.” The ICC’s authority as a bottom-up transnational lawmaker then avoids the explicit discussions of state delegation and compliance required by transnational private governance.

Aiming for coherence, the ICC also constructs a transnational legal order where its unique authority is legitimated through a transnationalizing process rather than a distinct transnational entity. The ICC then could be a site of transnational legal ordering rather than a legal order in itself. On the one hand, “most legal studies that use the term transnational law refer to law that targets transnational events and activities – that is transnational situations

524 “The Banking Commission issues a hierarchy of interpretive material. On top are Banking Commission-approved documents with Commission-wide ratification. The Banking Commission also issues 'recommendations,' which are practical, educational guides for those, principally the document checkers, whose core business is UCP compliance. These 'recommendations' are for 'educational purposes only' because they are not ratified by the Banking Commission as a whole and therefore are not 'binding.' The Banking Commission is also a prolific publisher of guides, studies, and handbooks that do not bear any official Banking Commission approval (other than publication) but nonetheless are instructive.” Levit 2008: 1174, fn. 70.
525 Levit 2008: 1174. “While Banking Commission opinions are advisory, Documentary Instruments Dispute Resolution Expertise (DOCDEX) draws the Banking Commission into a more traditional dispute resolution practice. DOCDEX is a relatively new, specialized arbitral tribunal, allegedly born from bankers' complaints 'that many judges, arbitrators and lawyers have difficulty understanding the intricacies of everyday letter of credit practice.” Levit 2008: 1175-1176.
526 Levit 2008: 1165.
that involve more than one national jurisdiction,” calling this “transnational law applying to transnational situations.”528 On the other hand, “sociolegal studies conceive of transnational law and legal norms in terms of the source of legal change within a national legal system,” calling this “transnational law as transnational legal ordering.”529 There are three key differences. First, transnational legal ordering is a process while transnational law applying to transnational situations is a distinct body of law. Second, transnational legal ordering can apply to domestic or transnational activities whereas transnational law applying to transnational situations is by definition restricted only to transnational activities. Third, transnational legal ordering is a method of how legal assemblages are put together across local, national, and transnational levels of analysis while transnational law applying to transnational situations is concerned with particular issue domains and fields of law.

The ICC’s self-regulatory authority then is best conceived as bottom-up lawmaking while embedded in a wider networked process of institutional hybridity. These regulatory efforts parallel the network power in lobbying but also reflect a different mechanism of engaging with other regulators. When discussing the ICC’s rule-making on Internet governance, some scholars contrast a lobbying versus learning approach as the ICC seeks influence through discursive means by presenting its material as a “helping hand” to those seeking to understand the Internet and its surrounding technologies, and as “roadmaps” and “matrices” for the kinds of political (non-)decisions that will ensure the future growth and smooth operation of the Internet. [...] This may be described as a learning approach – as opposed to a lobbying approach – to political influence, where business exemplifies the merits of particular policy approaches and shows its expertise, rather than demanding concessions from governments and regulatory bodies. Increasingly, business works through involvement: it informs government officials about the possibilities and needs of the information and communication technology sectors and convinces them about the willingness of companies

528 Shaffer 2013: 5.
529 Shaffer 2013: 5.
such as H-P, Cisco, and ICC to provide relevant resources. Together – as partners – they develop a discourse about the way things can and must be done in the field.  

The two differences between network power in lobbying and self-regulation for rule-making are who moves first and the constituency. In lobbying, governments typically move first by identifying potential rules or problems to regulate. In self-regulation, the ICC moves first to define problems and potential rules. Moreover, in lobbying, the ICC’s constituency are local, national, and international regulators whereas in self-regulation the ICC’s constituency are its member corporations and global business. The use of networked power is equally important for both lobbying and self-regulation, facing the same dilemmas of exclusivity and access. In other words, the ICC’s institutional hybridity reflects various uses of formal and informal network power through lobbying channels and corporate clubs.

V. PUBLIC AND PRIVATE RELATIONS IN INSTITUTIONAL HYBRIDITY

Thinking about business and state relations, the ICC’s self-regulatory moves might signal a shift where “business associations promote a reorientation of responsibility from state to nonstate institutions. They have been used by business to place limits on the role of the state in the economy. They have assumed governance functions previously assumed by the state. Business associations are thus closely linked to a changing balance of power between the state and the society.”

For some, states may be independent of the “new global rulers” who in turn represent a broader neoliberalization of world politics. For others, however, business associations defer to governments in “market-supporting” activities to “push underperforming

530 Bislev and Flyverbom 2008: 137-140; emphasis original.
532 Büthe and Mattli 2011.
533 Cutler 2009; Graz and Nölke 2008.
states to provide the public goods only states can provide: property rights, uncorrupt administration, and infrastructure,” or take the lead in “market-complementing” activities to “overcome market failures of various sorts including imperfect and costly information, low investment in training, and the lack of coordination in investments in upgrading.” These views harken back to zero-sum thinking where governments bear the primary public functions which “only states can provide.”

The limited zero sum perspective leads otherwise perceptive researchers who on the one hand observe that “global private regulation should be understood and analyzed as an intensely political process, even if the politics may be hidden beneath a veneer of technical rhetoric,” to on the other hand fall into unsustainable binaries, for instance when creating “a typology of global regulation, which differentiates the institutional setting for rule-making, which is either public or private, from the global selection process, which is either market-based or nonmarket-based.” The growing role of business associations in institutional hybridity does not reflect weak states or a “changing balance of power,” but rather a recomposition of what it means to govern dynamic markets. Businesses govern by providing

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534 Doner and Schneider 2000: 262.
535 Büthe and Mattli 2011: 11-12.
536 Büthe and Mattli 2011: 14. “The first type, which we label "public" (governmental) nonmarket standard-setting,” involves collaboration through traditional intergovernmental organizations (IGOs) or transgovernmental cooperation among domestic regulators. It has a long tradition and has been the focus of most of the political science literature on global regulation. Another type is market-based private regulation. It entails rule-making by firms or other bodies competing, individually or in groups, to establish their preferred technologies or practices as the de facto standard through market dominance or other strategies. This type of global regulation has also attracted substantial analytical attention, especially from economists. A third type of global regulation--private yet nonmarket-based--is the focus of our book. Largely overlooked in the literature, regulation by focal private bodies, such as the International Accounting Standards Board or International Organization for Standardization/International Electrotechnical Commission, is the predominant type for major parts of the international political economy today. Finally, a fourth type of regulation results from market-like international competition between public regulatory agencies.” Büthe and Mattli 2011: 14.
public goods and taking on collective obligations. When business associations are engaged in sovereign governance, they should not be seen as apart from sovereign power. In hybrid sovereignty, the construction of separate business and state interests, rather than mutually re-enforcing politics, is suspect. Not only is the state working with transnational forces, but also the resulting interactions of public and private authority constitute state power and opportunities for recomposition.

A nascent research program in sociolegal studies promotes this version of institutional hybridity in ordering markets where “business invests in law, both to shape law to support business interests and to legitimize business conduct, as well as to thwart law’s potential constraints.”\textsuperscript{537} For instance, business to publicly made law:

First, businesses can create their own private legal ordering regimes, which, if accepted as legitimate, can displace the demand for publicly-made law. This approach involves a privately-made alternative that is relatively centralized. Second, businesses can ignore existing public law, even that in their favor, because of other concerns such as long-term client relations and reputation. This market-oriented alternative, in which business focuses on partner and customer relations and social norms, is decentralized. Third, businesses can implement public law requirements through internal organizational policies and procedures in which they translate and potentially transform the meaning of publicly-made law. This internal organizational business alternative, in turn, may be diffused through customary business practice to entire business sectors and thus lies between the first two alternatives.\textsuperscript{538}

Centralized and decentralized private legal orders fall in the same trap as “market-complementing” activities of separating business from politics. However, the internal organizational order, “rather than being viewed as distinct, public law and business internal policies are interpenetrated, reciprocally and dynamically affecting each other.”\textsuperscript{539}

\textsuperscript{538} Shaffer 2009: 162.
\textsuperscript{539} Shaffer 2009: 163.
difference between the three business and law relations then revolve around the same question as business and politics: are they a zero sum balance of power struggle or are they mutually constitutive?

Another way of contextualizing public and private relations in institutional hybridity is to consider the debate on the Law Merchant, thought of as the *ad hoc* custom of merchants getting together in guilds and fairs to create rules for their trade. “By the end of the 11th century, the Law Merchant came to govern most commercial transactions in Europe, providing a uniform set of standards across large numbers of locations.”

The Law Merchant as a body of customary law refers to “the commercial law rules—contractual, customary, and statutory—that govern transactions among merchants. It includes the rules governing sale, credit, insurance, transportation, and, probably, partnership.” Within international law, the Law Merchant has special status because of its influence on the growth of international commerce, its ties to a long legal history, and its contentious debates about public and private authority:

The modern *lex mercatoria* is unlike any other field of law. People never tire of asking whether it exists. Debates over its existence and over its nature hinge largely on its supposed autonomy and, in particular, on its purported independence of national law on the one hand and of international law on the other. It is consistently presented as a third legal system, neither national nor international, whose claim to autonomy is anchored in historical precedent and founded on necessity.

There are at least three questions of importance to private authority in the Law Merchant. First, can the Law Merchant exist as private law? Second, did the Law Merchant exist in medieval

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541 Epstein 2004: 1
history? Third, to what extent can the medieval Law Merchant be connected to its current iteration? I will address these in turn.

The traditional account in favor of the Law Merchant has at least five claims about the Law Merchant: it was coherent; it was accepted across Europe; it was spontaneously created by merchants; its custom set the stage for domestic law; and it was commercial law. 543 The challenges to the existence of the law merchant adopt, often implicitly, some version of the Austinian theory that marks law as a general command of the sovereign. Those who support it tend to take a different view of law, which looks at it as a set of immanent principles that is so powerful that all sovereigns feel obliged to adopt it. 544 Thus, one of the main divisive issues concern the definition of law. Sovereign command is important for law because law is not only the ability to make rules but also to enforce them. Such enforcement capacity, some Law Merchant skeptics argue, only resides in public state authority. 545 However, “proponents point out that lex mercatoria is not only law in every relevant sense but is even superior to national laws because of its transnational character.” 546 These arguments point to the limitations of thinking about state power as strictly public since it inevitably leads to excluding influential and important private forms of power simply because scholars do not associate private authority as constitutive of the state. Therefore, “norms of lex mercatoria are law only insofar as they cease to be elements of lex mercatoria and become part

of the law of the state.” In this view, one challenge to the existence of Law Merchant disputes on definitional contestation about law.

Another challenge takes on the historical claims of Law Merchant proponents to argue: “The law merchant was not a systematic law; it was not standardized across Europe; it was not synonymous with commercial law; it was not merely a creation of merchants without vital input from governments and princes.” The historical refutation primarily depends on merchant autonomy from public authority. It is important to keep in mind that medieval merchants were not synonymous with traders more generally. Instead, “the critical characteristic of merchant law arguably lay in the fact that merchants either did business outside the jurisdiction of their native law or did business with other merchants who lived under different laws.” Given the lack of recourse to local law, foreign traders might have needed to develop their own legal regimes in order to conduct business securely. However, “the entire framework within which commerce took place very early depended upon—and often was restrained by—government authority.” Examples of governmental intervention in

549 Kadens 2004: 40-41.
550 Kadens 2004: 46.
merchant courts and supra-local legislation suggest that “medieval merchants did participate in the operation of courts that dealt with mercantile matters, but they rarely, if ever, did it totally independently of local political power.” In addition to dispelling the autonomy myth, it may be incorrect to assume that “governments got involved only after the law merchant had become a customary legal system. Governments were intertwined with commerce from the beginning of the commercial revolution of the high Middle Ages. Consequently, when nations began to write codes in the seventeenth century, they were not innovating, they were merely expanding on earlier practices.” Much like the illusion of free markets today, the easy separation of public and private authority seems untenable in the medieval law merchant context.

If the medieval law merchant does not have sound historical backing, why does the myth persist? Some regard the merchant motive since “even after the Great War, the social position of the man of commerce was insecure; he had to be endowed with romance, given a history to match that of the lord or the knight or the country gentleman.”

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553 Merchant courts certainly did exist, but they do not appear to have preceded the lord or town’s grant of jurisdiction; “Even at the fairs of Champagne, the epitome of the medieval merchant identity, the fair wardens did not become the dominant adjudicative body until the mid-thirteenth century;” “Over the course of the thirteenth century, some towns and lords began to establish commercial courts with jurisdiction over merchant disputes, although the granting authority often retained some degree of control;” “Merchants did not need to rely on their own resources alone because if they brought suit before a municipal court, the town authorities ensured enforcement of the judgment.” Kadens 2004: 52-55.
554 Princes across Europe granted safe-conduct privileges and did so under very similar terms. Towns north and south regulated their merchant guilds, made rules about registering agreements, prevented fraud in weighing, and ensured that goods were manufactured to certain standards. Foreign merchants always faced some restrictions on when and where they could sell their merchandise but also always received some special protections from the local authorities.” Kadens 2004: 55-56.
555 Donahue 2004: 36.
556 Kadens 2004: 56.
557 Harcourt 2011.
558 Donahue 2004: 23.
practitioners, academics are also enchanted because “the story simply holds too much symbolic
color for modern advocates of private ordering looking to give the underpinning of historical
legitimacy to their political and economic theories about how law is and should be made.”
Perhaps, “the key to understanding the vitality of the Law Merchant lies precisely in the fact
that no one can be confident whether it had a separate and autonomous existence.”

We may extend the myth of the medieval Law Merchant relates to contemporary
commercial regimes like the ICC by foregrounding that “business has long created its own
private legal systems, in particular to govern commercial transactions under merchant law.”
There is some reassurance to claiming, “business has long created...” that speaks to history
conferring legitimacy on phenomena today (especially of the globalization scholars who argue
“We have been here before”). Others pick up on the autonomous myth for commercial self-
regulatory regimes “deprivileging the state's role in the lawmaking project.” Scholars also
contrast the medieval Law Merchant and contemporary commercial regimes to argue that
public authority is far more involved in the latter. For instance, “in the medieval period, private

559 Kadens 2012: 1156-57.
560 Epstein 2004: 4. Interestingly, one of the strongest opponents of the Law Merchant, Emily Kadens, also
has somewhat divergent views on its existence. Compare the nuance in her 2004 assessment with a blunter
declaration in 2012:
“The historical lex mercatoria was not a single, uniform, essentially private legal system, but rather iura
mercatorum, the laws of merchants: bundles of public privileges and private practices, public statutes and
private customs sheltered under the umbrella concept of merchant law by their association with a particular
sort of supra-local trade and the people who carried it out.” Kadens 2004: 41.
“But if the historical law merchant, to the extent that it is said to be composed of special uniform and universal
transnational rules, was nothing more than express form contracts that everyone used, then it is an empty
concept. We do not need a special phrase to describe the fact that merchants historically used contracts any
more than we need one to describe the same fact now.” Kadens 2012: 1176.
Also, compare Trakman 1983 and Trakman 2003 for an increased skepticism.
561 For the new lex mercatoria, see especially Klaus-Peter Berger, The Creeping Codification of the Lex
562 Shaffer 2009: 163.
563 Leit 2008: 1152.
authority operated by virtue of the absence of political authorities desirous or capable of
disciplining international commerce, whereas in the modern period private authority operates
with the full support of state authorities. 564 Another seconds this distinction: “The modern law
merchant varies from its medieval precursor in important ways that suggest commercial actors
can get off an established path when more efficient default rules become apparent. In the
historical law merchant, the state conceded to market participants both the function of
formulating commercial law and of enforcing it.” 565 Both assessments build on the myth of an
autonomous self-regulating merchant community. However, the purpose of the contrast with
the Law Merchant is to place contemporary commercial relations in a version of global capital
that is perpetuated by the state. In this story, however, the constitutive relations between
public and private actors are disregarded to instead use the logic of state as interventionist. For
instance, “private arrangements are not only influenced by politics, including the threat of state
intervention, but also by the market which is sustained through rules emerging from the
competition between producers.” 566 The contemporary appropriation of the lex mercatoria
forwards a mythologized history where state non-intervention was possible once (and therefore
may be possible again). However, in institutional hybridity, global market relations have always
been co-produced in elite networks that are indifferent to the state and business divide.

This chapter showed that the International Chamber of Commerce’s institutional
hybridity allows it to construct rules for global trade. These rules are made through informal
lobbying with governments and international organizations and through more formal self-

564 Cutler 2003: 51.
566 Ronit and Schnieder 1999: 262.
regulatory channels with corporations and key stakeholders of global commerce. While the ICC focuses on organizing markets, it should not be seen as an economic or market power going it alone. Instead, it represents sovereign power ordering markets for transnational advantage that boosts the power of others in its elite network, including governments.
Chapter Six

SHADOW HYBRIDITY IN AMNESTY INTERNATIONAL

I. SHADOWING FOR HUMAN RIGHTS

II. GROWING PAINS

III. DUAL NARRATIVES: MORALIZING AND POLITICIZING AMNESTY

IV. “NON-POLITICAL” POSTURING

The Company We Keep

Follow the Money

Skirting from Violence

V. PUBLIC AND PRIVATE RELATIONS IN SHADOW HYBRIDITY
I. SHADOWING FOR HUMAN RIGHTS

Amnesty is non-political and yet it is in the heart of politics.  

A man sat in a London underground train in November 1960 reading *The Daily Telegraph*. He came upon a small news item about two Portuguese students who had been arrested and sentenced to a seven-years imprisonment for raising their glasses and drinking to liberty in a Lisbon restaurant. The man found this troubling because he was fond of liberty but also a glass of wine, “and the two combined seemed very harmless.” He got out at Trafalgar Square and half an hour later thought that something must be done. World Refugee Year had just concluded and he decided there should be a year for political prisoners. The man was Peter Benenson, and he sparked a campaign for armistice, which became an Appeal for Amnesty, which in turn became Amnesty International. Amnesty International is now one of the foremost human rights international non-governmental organizations (INGOs) because of its longevity and capacity to shape the global human rights agenda. Amnesty focused on campaigns to release political prisoners and helped pass the 1984 UN Convention Against Torture. Until 2001, Amnesty’s operational mandate remained narrowly focused on this

568 Amnesty Oral History Archives, A1, Benenson interview, AI 983.
particular segment of human rights, while recent efforts focus on a broader branding of human rights to include other kinds of repression.\textsuperscript{571}

Perhaps more than violence and markets, rights are explicitly tied to sovereign power. The status is visible in the treatment of foreigners. While “governments have long understood that it is sensible to attenuate otherwise valid laws to encourage the entry of desirable outsiders,”\textsuperscript{572} who count as foreign with what rights has been a contested process. Humanitarian law is partially a response to this issue by considering the status of various foreigners such as merchants, soldiers, prisoners, or refugees. The 1948 signing of the Universal Declaration of Human Rights marked both the end of a process involving many diverse actors, while opening the door for larger discussions about the status of humans and rights in the post-World War II world.\textsuperscript{573} IR scholars have paid attention to the process of human rights articulation and advocacy, especially following the Cold War.\textsuperscript{574} However, there is less attention on the problem of globalizing a state-based rights regime.

Historically, in the lead up to the Early Modern era, merchants were the primary subjects of “alien” laws. For instance, English law ensured certain “minimum standards” in the

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treatment of merchants like renting property, purchasing goods and money, trading freely, and bringing legal actions.\textsuperscript{575} The early European merchant courts also helped set up the \textit{Lex Mercatoria} or the disputed Law Merchant international regime discussed in the previous chapter. Here, “merchants were ultimately allowed to govern themselves, autonomously administering their own laws within the territory of foreign sovereigns.”\textsuperscript{576} Passports in the form of safe passage letters began to develop in the Middle Ages. Safe passage letters were not like the modern passports of today but were more like a visa where the document was only valid for set journeys.\textsuperscript{577} However, merchants were able to acquire longer-term letters that were not journey-specific.

The status of foreigners gained increased protections through late-18\textsuperscript{th} century bilateral treaties of friendship and commerce that “typically granted to foreigners rights of entry, commercial establishment, protection of property, access to courts, and recognition of foreign legal persons.”\textsuperscript{578} The United States formalized many key bilateral commercial treaties following its independence, and these were the foremost American foreign policy tools in the late eighteenth and early nineteenth century. The American bilateral treaties established a state obligation for assisting shipwrecked foreigners,\textsuperscript{579} created a grace period or safe haven for

\textsuperscript{576} Hathaway 2005: 76.
\textsuperscript{579} “If any Ship belonging to either of the Parties their People or Subjects, shall, within the Coasts or Dominions of the other, stick upon the Sands or be wrecked or suffer any other Damage, all friendly Assistance and Relief shall be given to the Persons shipwrecked or such as shall be in danger thereof.” 1778 Treaty of Amity and Commerce Between The United States and France, Art. 20.
merchants to wrap up their business following a declaration of war between states,\textsuperscript{580} allowed freedom of religion,\textsuperscript{581} and guaranteed a foreigner’s right to fair trials in criminal proceedings and the right to sue for damages and debt in civil proceedings.\textsuperscript{582} By the end of the nineteenth century, a network of friendship and commerce treaties “consistently guaranteed certain critical aspects of human dignity to aliens admitted to most trading states. Because these agreements were previously implemented in the domestic laws of state parties, certain human rights universally guaranteed to aliens were identified as general principles of law.”\textsuperscript{583}

While some foreigners were afforded greater protections in domestic law, the basis of rights was a reciprocal state-based process where states secured minimum standards of protections for their own citizens abroad. The state-sponsored promotion does not work for all human rights, though. Sean MacBride, early Amnesty participant, former Irish foreign minister and Nobel Peace Prize winner, lays out the problem:

It is all very well talking about human rights, but unless the individual had rights and had a way of enforcing his rights, it wasn’t very much use. So from that then the whole concept of human rights developed very rapidly from 1945 to 1948 when we had the Universal Declaration of Human Rights. [...] Then there was the realisation that that wasn’t sufficient, that governments would not recognize human rights, and were beginning to gang up with each other to suppress human rights very often, or not protect them as they should. It was then I realised

\textsuperscript{580} “For the better promoting of Commerce on both Sides, it is agreed that if a War shall break out between the said two Nations, six Months after the Proclamation of War shall be allowed to the Merchants in the Cities and Towns, where they live, for selling and transporting their Goods and Merchandizes.” 1778 Treaty of Amity and Commerce Between The United States and France, Art. 22.

\textsuperscript{581} “The most perfect freedom of conscience & of worship, is granted to the citizens or subjects of either party, within the jurisdiction of the other, without being liable to molestation in that respect, for any cause other than an insult on the religion of others.” 1785 Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America, Art. 11.

\textsuperscript{582} “The Citizens and Subjects of both Parties shall be allowed to employ such Advocates, Solicitors, Notaries, Agents, and Factors, as they may judge proper in all their affairs and in all their trials at law in which they may be concerned before the tribunals of the other Party, and such Agents shall have free access to be present at the proceedings in such causes, and at the taking of all examinations and evidence which may be exhibited in the said trials.” 1795 Treaty of Friendship, Limits, and Navigation Between Spain and The United States, Art. 7.

\textsuperscript{583} Hathaway 2005: 76.
the importance of having a non-governmental organization that would not be tied to governments and that could investigate the situation and that could report on them and draw public attention to them.\textsuperscript{584}

The enduring challenge of globalizing human rights is to figure out who guarantees the rights of the transnational and the stateless.

Consider refugees. The status of refugees as a particular type of foreigner is especially precarious since refugees are without a sovereign advocate. In a very broad sense, “a refugee is a person who flees [their] habitual place of residence and seeks refuge elsewhere.”\textsuperscript{585} The 1951 UN Refugee Convention “specifies that a person qualifies as a refugee if (1) the person has already been considered a refugee under prior treaty arrangements or (2) the person is outside the country of his nationality (or not having a nationality) and is unable or unwilling to avail himself of the protection of that country due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion.”\textsuperscript{586} The fragility of refugees comes from “the absence of nationality or of protection by the government of the state of nationality.”\textsuperscript{587} In other words, “refugees are unlikely to derive even indirect protection from the general principles of aliens law because they lack the relationship with a state of nationality legally empowered to advance a claim to protection.”\textsuperscript{588}

Amnesty aimed to offer a transnational alternative for making the case for protecting individual human rights. For MacBride, Amnesty’s stance “was an outgrowth of first of all the

\textsuperscript{584} Amnesty Oral History Archives, A1, MacBride interview, AI 987.
\textsuperscript{588} Hathaway 2005: 79.
recognition that there was such a thing as international human rights, of governmental recognition of this, governmental enforcement of this, the realisation that governmental protection of human rights was inadequate and that it had to be done at the non-governmental level, and that to fulfill this it needed an equivalent to the Red Cross for the protection of human rights.\textsuperscript{589} Amnesty did not just see itself as promoting human rights but creating a social movement of belonging:

To me the whole purpose of AMNESTY (using the movement in its broadest sense) is to rekindle a fire in the minds of men. It is to give to him who feels cut off from God a sense of belonging to something much greater than himself, of being a small part of the entire human race. If, God willing, this fire stays alight, then each one with the spark burning inside of him will use it in his own way . . . my work consists of trying to hand on the spark in many different shapes, in altered ways, to divers people. What they do next, they must decide themselves . . . if the spark of AMNESTY has any power, it is to convince each of us that everything is in his power.\textsuperscript{590}

In the religiously inflected language, it appears that “Amnesty has not only never been an NGO, it has not really been a human rights organization either. [...] Historically the social institution it most resembles is a chapel or a meeting house.”\textsuperscript{591} Indeed, Benenson “believed that the world could be changed, and he had seen Amnesty as the vehicle.”\textsuperscript{592} However, thinking of Amnesty as not just an INGO leads some to highlight Amnesty as a sentinel of moral authority as opposed to political authority. For instance, Hopgood treats Amnesty staffers’ dedication to its principles over themselves as being inherently moral and “felt the weight of moral inferiority just watching staff members go in and out of the security doors that protect the [International Secretariat] inner sanctum. Were these not the good people with the good hearts?”\textsuperscript{593}

\textsuperscript{589} Amnesty Oral History Archives, A1, MacBride interview, AI 987.
\textsuperscript{591} Hopgood 2006: 3.
\textsuperscript{592} Buchanan 2002: 595.
\textsuperscript{593} Hopgood 2006: 17.
The epigraph quotes from one of the interviewers of Amnesty’s Oral History Project, Andrew Blane, who observes how Amnesty is both non-political and in the middle of politics. Importantly, Amnesty requires a moralizing power to combat the challenge of globalizing human rights, however even that moralizing power is situated in political authority. Nor is this unique to Amnesty as an organization. For instance, MacBride reflected on the European Convention for Human Rights as “the first international body for receiving complains of any individual, even against his own government,” which was important “because you can’t depend on governments; you can’t rely on governments. It is essential that an individual should have recourse not only against another government but against his own government.”

Governments and politics are the problem. However, when McBride recounted how he negotiated the U.K. signing on to the Convention, governments and politics were essential to the solution:

I got the British support for the European Convention largely because Ernie Bevin, then Foreign Secretary, was terribly jealous of Churchill and Churchill was running a pro-European campaign, and Ernie Bevin was looking for some counterblast. I think I persuaded Ernie Bevin that the European Convention on Human Rights was the obvious answer to that. That he was not only talking about European unity, but he was doing something useful for human rights, for European unity, and so forth.

This was an instance of leveraging domestic politics for securing a human rights agenda in a “ politicization” of moral authority.

In the broader INGO landscape, scholars try to pin down political authority: “Are INGOs powerful actors that are able to transform global politics, noisy interest groups whose influence is severely constrained by increasingly complex global structures, or epiphenomenal

594 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
595 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
representations of an increasingly illiberal world order? This chapter answers: none of the above. Instead, Amnesty represents shadow hybridity to mobilize sovereign governance in rights and is configured in informal and non-publicized public and private relations. Amnesty projects a human rights agenda as oppositional to governments. However, Amnesty also often needs the support of various governments in order to function. This balancing act is understudied and yet is a formative component of global politics. When scholars do mention hybridity in Amnesty, it is of a different sort: “Amnesty International in fact evolved into a peculiar hybrid, being a highly specialized inner circle of political experts and a mass organization of lay activists at the same time.” Indeed, while Amnesty derives its authority from claiming independent status vis-à-vis governments, archival evidence suggests that relations between Amnesty and governments are more complicated and interlinked than previously acknowledged. This hybridity is surprising because Amnesty International represents a global human rights agenda that is oppositional to governments. This chapter introduces the context of Amnesty’s founding, sets up dual narratives of moralizing and politicizing Amnesty, before engaging with how these narratives are in productive tensions between public and private in shadow hybridity.

II. GROWING PAINS

Amnesty isn’t so much an extraordinary idea as an extraordinary achievement.598

On May 28, 1961, The Observer published a full-page feature on “The Forgotten Prisoners” by Benenson with the following editorial note:

On both sides of the Iron Curtain, thousands of men and women are being held in gaol without trial because their political or religious views differ from those of their Governments. Peter Benenson, a London lawyer, conceived the idea of a world campaign, APPEAL FOR AMNESTY, 1961, to urge Governments to release these people or at least give them a fair trial. The campaign opens to-day, and “The Observer” is glad to offer it a platform.599

Benenson’s feature had two purposes. The first purpose was to introduce “Prisoners of Conscience,” defined as: “Any person who is physically restrained (by imprisonment or otherwise) from expressing (in any form of words or symbols) any opinion which he honestly holds and which does not advocate or condone personal violence. We also exclude those people who have conspired with a foreign government to overthrow their own.”600 The second purpose was to launch a one-year publicity campaign on Prisoners of Conscience (POCs) where “an office has been set up in London to collect and publish information about Prisoners of Conscience all over the world.”601 While Benenson’s appeal included a contextual reference to the 1948 Universal Declaration of Human Rights (UDHR), for some “it did not do so as foundation but as corroboration. It was saying ‘and history is with us’ not ‘the UDHR is why Amnesty exists.’”602

Benenson was a lawyer who had been active as a defense counsel for political trials and was a founding member of “JUSTICE,” an organization of British lawyers formed after the

598 Amnesty Oral History Archives, A1, Astor interview, AI 979.
Scholars often connect Benenson's faith to the founding of Amnesty, for instance, “after his conversion to Catholicism, he wanted to find something secular that would help others experience that sort of profound change, and he thought political activism was one of the vectors by which to do so.”

Benenson devised the newspaper appeal alongside Louis Blom-Cooper, a renowned attorney and columnist for The Observer, and Eric Baker, a Quaker academic and secretary of the National Peace Council. Benenson also contacted Peter Archer, a future Labour Member of Parliament (MP) and Solicitor-General. Margaret Benenson, the wife of Peter Benenson, was also involved in the early recruitment efforts by entertaining guests that included “the Society of Labour lawyers” up to “three times a week” at their London home.

The “forgotten prisoners” appeal was published in many other newspapers including Le Monde, The New York Herald Tribune, and Die Welt. David Astor, the editor of The Observer, published the appeal but “thought the idea was a bit far-fetched. I didn’t see how you could possibly hope to influence foreign governments to let out political prisoners just by making a noise here. It seemed to me an extraordinary notion.” Peter Archer agreed with Astor: “My immediate reaction was, ‘This is not going to get popular support.’ We just had an International Refugee Year, you know, and everybody knows what a refugee is, and if you talk about starving kids everybody knows what a hungry child is. I didn't think we could get over to the public the

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604 Wong 2012: 90.
606 Amnesty Oral History Archives, A1, M. Benenson interview, AI 981. Margaret Benenson also highlights the hidden gendered roles of social movements: “To be honest, Peter could never have done it if I hadn’t been very strong. Because if I had collapsed on the job of running the house and the children and so on, he would have had to stop. It’s a fact.”
607 Amnesty Oral History Archives, A1, Astor interview, AI 979.
concept of a political prisoner.” However, the public response was swift and overwhelming. In numerous letters and phone calls, the response to “forgotten prisoners” was a greater agitation to do something beyond a temporary year designation for prisoners of conscience. The movement had begun.

Benenson decided to place respondents in groups based on location and asked them to adopt prisoners of conscience and coordinate writing letters of support. Andrew Blane, summarized Amnesty’s Groups of Three strategy as follows: “first of all you concentrate on individuals, secondly, that you get as much hard empirical information about them, thirdly, that you root that into an injustice that is fairly universally recognized, and fourthly you turn it over to other people to do something about it, and they take on a personal interest.” These groups of three, in turn, became the foundation of the grassroots movement eventually formalizing into an organization. Meanwhile, “Benenson himself engaged in tours of European countries to rile up support for the young movement.” For Astor, “that Amnesty actually began to collect support, raise money, and employ staff, and finally become a serious organization was very surprising.” A couple of months after the newspaper appeal, a meeting in Luxembourg in July 1961 established a “permanent international movement in defense of freedom of opinion and religion” in Amnesty International. By 1962, Amnesty “published its first annual report, and tallied seventy prisoner adoption groups meeting in local communities in six countries, with a total of 210 active Prisoner of Conscience cases.”

608 Amnesty Oral History Archives, A1, Archer interview, AI 978.
609 Amnesty Oral History Archives, A1, Benenson interview, AI 982.
611 Amnesty Oral History Archives, A1, Astor interview, AI 979.
For many, Amnesty represented the first organization of its kind. Astor calls Amnesty a coalition for “an international voluntary political action, non-government action. It’s very hard to think of another thing like it.” Blane hypothesized that “Amnesty also has propagandised the value of public opinion and has propagandised the notion that the individual can make a difference.” In order to fully mobilize public opinion, “high-quality research was an essential part of Amnesty’s political capital, providing credibility as well as informational advantage. It is correct, therefore, to consider the Research Department the organization’s hidden center—directly or indirectly, Amnesty’s international influence depended on the Department’s work.” Amnesty’s success was wrapped up in a few core strategies:

There are some things that strike me as fundamental. One is that it has tended to focus on specific human beings who are in trouble, and the particular trouble which they have is the kind acknowledged by the Universal Declaration of Human Rights, so it has a sort of imprimatur of accepted world standard. Then you ask other people to care about these particular people, and ask them to try to get information and something about it. These are just a few techniques... and they worked these out very early, all of which it seems to me are transferrable to a larger international context. Also the impartiality is critical, so the organization seems able to stay at the heart of one of the most sensitive political issues, what you do with opponents, and yet be accepted.

The last point about maintaining impartiality resonated as a mandate for the organization’s success but also becomes mythologized as a reason for its political authority. The tension between trying and succeeding, mandate and myth, is wrapped up in dual narratives of how Amnesty is perceived. The narratives include a push and pull between moralizing Amnesty as a unique moral authority and politicizing Amnesty as a political operation like any other trying to survive and be politically effective.

613 Amnesty Oral History Archives, A1, Astor interview, AI 979.
614 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
615 Eckel 2013: 195.
616 Amnesty Oral History Archives, A1, Astor interview, AI 979.
III. DUAL NARRATIVES: MORALIZING AND POLITICIZING AMNESTY

In the most prominent examinations of Amnesty’s authority in IR, the default approach has been one of moralizing the organization.\(^{617}\) For instance, “Amnesty relies on a very different kind of authority, derived from principled ideas or beliefs about right and wrong.”\(^{618}\) IR scholars are not alone in regarding Amnesty this way, as “non-governmental organizations are generally perceived by the public as trustworthy and benign actors, particularly in comparison with political institutions and the corporate sector.”\(^{619}\) However, the Amnesty discourse differs by creating a dichotomy between moral versus political authority:

> In an era of tumultuous social change, [Amnesty] had no special affection for the historical authority of states or the established church, about whose power it was skeptical. It sought resurrection of the idea of a more profound authority than that embraced by these temporal and spiritual institutions. In this endeavor, it encompassed both ecumenical Christianity and those, especially on the Left, who would form the new social movements of the 1960s and beyond. Both of these were responses to the erosion of traditional authority, one seeking a renewal in moral (that is secular) terms, the other thriving on the new freedom that the opening up of postwar Western societies seemed to promise.\(^{620}\)

Hopgood contrasts a “temporal and spiritual-” based traditional political authority with the “more profound” “secular” moral authority. For Hopgood, moral authority is more profound than political authority because the former “convinces us it is more than merely a veiled attempt to promote the subjective preferences or advantages of some. It must claim a certain objectivity in speaking for the truth.”\(^{621}\)

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\(^{617}\) Clark 2001; Hopgood 2006; Wong 2012.

\(^{618}\) Clark 2001: 21.


\(^{620}\) Hopgood 2006: 9.

\(^{621}\) Hopgood 2006: 4.
Keeping in mind that Amnesty’s logo is of a flame in barbed wire, Hopgood’s name for staffers echoes in the title of his book: keepers of the flame. Correspondingly, the main role of the keepers of the flame is to maintain the division between moral and political authority where a “sacred core, monitored from London, was kept safe from pollutants such as money, interests, and politics by its border guards, the intermediaries between the source itself (suffering Prisoners of Conscience) and those who sought knowledge and understanding of it.”

MacBride also articulates the importance of keeping the appearance of being “above politics” as “obviously one of the first things we had to consider was how to prevent Amnesty from being used politically by different groups and think that it was in that course of events that we certainly decided no national section should adopt their own prisoners.” Here, Amnesty aims to reflect a profound moral authority in global politics and its representatives become moral agents themselves incapable of dirty politics of the sort evident in political authority.

This moralizing narrative weaves through other accounts that focus on Amnesty’s impartiality as the basis for its authority. In one uncritical summary, Amnesty’s “basic principles” are of “a strict impartial and apolitical stance that blended volunteerism and professionalism” where “government funding was avoided.” There are three main sources of Amnesty’s supposed impartiality. The first source is impartial case selection, for instance, in the “rule of threes” for prisoner adoption where it was stated that “each group of Amnesty supporters would adopt three prisoners and work for their release. One would be from a communist-bloc country, one from the West, and one from the Third World.”

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623 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
624 Wong 2012: 88.
impartial case selection appealed to many volunteers and members, who “felt attracted by what they regarded as Amnesty’s nonideological or even apolitical character. [...] The problem of political prisoners and of torture crosses political boundaries. The issue here is not one of ideology; it is one of human dignity.”626 The second source is impartial research expertise, where “high-quality research was an essential part of Amnesty’s political capital, providing credibility as well as informational advantage.”627 Hopgood interviewed a senior Amnesty staffer who stated:

For me, what was special about it was what it purported to try and deliver. Which was objective information about individuals in particular parlous situations vis-à-vis their governments. That it was accurate, it was careful, it was not grinding political axes. It was providing the information that others could grind political axes with if they wanted to. That’s fine. But that it was just simply a voice of cool, calm documentation to prevent history being written by the victors.628

The third source is impartial funding where Amnesty “carved its niche by relying on small donors, many of whom had first been inspired by Benenson’s article and responded with cash, time, and in-kind gifts.”629 It is imperative that “Amnesty makes it clear today that it does not bargain with governments.”630 The standard narrative of Amnesty’s self-sufficiency asserts that “the organization accepts no monies from national governments.”631

However, Amnesty’s operations betrayed all three moral imperatives for impartiality. Along with the imperative to be impartial and maintaining moral authority, Amnesty faces the contrasting pressure of publicizing its work through political networks. Thus, “hand in hand with the meticulous research went constant efforts to publicize human rights violations,

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626 Eckel 2013: 199.
627 Eckel 2013: 195.
629 Wong 2012: 88.
630 Clark 2001: 33.
631 Clark 2001: 15.
constituting another core element of Amnesty’s information politics.\textsuperscript{632} The politicizing Amnesty narrative then looks for traces of partiality where “if moral authority is enhanced, classically, when the speaker does not possess marks of belonging (he or she is seen as an honest broker who has no interest and therefore acts morally), political authority is only possible when someone possesses those very marks.”\textsuperscript{633} For instance, in its early years Amnesty lacked the access to large regions in Africa and Asia for conducting research and lacked sufficient contacts with isolated dictatorships where its work was needed the most. Moreover, Amnesty began publishing more detailed country survey reports, which attracted both positive and negative attention. Neville Vincent was the first treasurer of Amnesty, and remembers being sent back by Portuguese authorities after a damning report was made public: “I went again to do a follow-up on what their people had said. Well, then I got to Portugal and I got through the customs and I was just about to hail a taxi when two men came up to me and asked me my name, or they knew my name, and I was rather flattered, and said that I wasn’t welcome in their country. And they shoved me back on the same plane that I’d just landed on.”\textsuperscript{634} Amnesty thus learned early on to make concessions with governments to gain access while also building maximum impact through its case selection. Consider, for instance, how Amnesty arranged access for and release of its first Prisoner of Conscience:

\begin{quote}
We decided to send our first mission on behalf of a Prisoner of Conscience. Perhaps with an eye to publicity we selected Archbishop Beran, later Cardinal, who had for eight years been imprisoned away from his archdiocese at Prague. An Irish Catholic seemed as a good a choice as we could find for the mission, and who else was available and willing but Sean MacBride himself. Although he came back with a reasonably favourable published report on the situation
\end{quote}

\begin{flushleft}
\textsuperscript{632} Eckel 2013: 195.
\textsuperscript{633} Hopgood 2006: 14.
\textsuperscript{634} Amnesty Oral History Archives, A1, Vincent interview, AI 993.
\end{flushleft}
of Catholics in Czecho-Slovakia, this was presumably the price he had to pay for securing a loosening of the Archbishop’s bonds. 635

The key piece of course is how MacBride returned with “a reasonably favorable” report as “a price he had to pay” for access. This was not the last time Amnesty made such side-deals for the sake of publicity.

Therefore, the imperatives for publicizing and pressuring governments proved especially difficult and “only in a prolonged process of trial and error did the Secretariat manage to build up the institutional strength necessary for Amnesty to wage forceful public “campaigns.” 636

The trial and error involved asking government representatives for access into their political networks, something even Clark recognizes, but ultimately glosses over: “At the organization’s second annual meeting in 1963, Sean MacBride, referring to the practices of the International Committee of the Red Cross, stressed the importance of confidential negotiations with governments when circumstances warranted.” 637

One of the biggest investments for publicity occurred when Amnesty opened an “office in Washington, D.C., providing the U.S. section with systematic access to policymakers in the nation’s capital.” 638

Against the standard moralizing narrative, then, politicizing Amnesty focuses on the practical realities of operating a global organization aiming to govern human rights. Key to managing the optics of moral impartiality against the practicality of politics was posturing as neutral.

635 Amnesty Oral History Archives, A1, Benenson interview.
636 Eckel 2013: 196.
638 Eckel 2013: 194.
IV. “NON-POLITICAL” POSTURING

Amnesty’s authority is based on posturing as neutral and “non-political.” Yet its relations of public and private shadow hybridity show how this neutrality was carefully constructed from its many non-neutral and political associations, financings, and policy positions such as supporting violent prisoners. The neutralized posturing was supposed to respond to “a need for a centralized organization [that] would be non-political. A humanitarian organization that would do for political prisoners what the Red Cross did for prisoners of war.”639 Members “felt attracted by what they regarded as Amnesty’s nonideological or even apolitical character. “I liked it because it was non-political. It was strictly a matter of human rights,” a psychotherapist explained.640 For Amnesty being non-political meant “trying, genuinely trying, to relieve the conditions of prisoners, but they would arise out of a given situation and to that extent they would have been political.”641 Again, Amnesty was explicitly about political prisoners, and yet there was a tremendous pressure to not be seen as political, as Astor reaffirms:

Interviewer: Would you see, or would you think, that people in Britain at the time it started saw, Amnesty as a political organization, or a political expression?
Astor: No, not in the sense of left or right. I think it avoided that.
Interviewer: But politically concerned?
Astor: It was about politics because it was all about political prisoners. But it managed to be even-handed and to be in favour of all political prisoners, not just the ones favoured.642

For Amnesty, a non-political stance was about being “even-handed” and impartial, rather than apolitical. When Blane observed how “Amnesty is non-political and yet it is in the heart of

639 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
640 Eckel 2013: 199.
641 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
642 Amnesty Oral History Archives, A1, Astor interview, AI 979.
politics,” MacBride concurred “yes, that’s right. Only that Amnesty at least is more balanced; objectively balanced. The balance, however, was a constant negotiation.

*The Company We Keep*

You always find the NGOs at the center of the group at the hotel having a drink with all the national delegates hanging on to their every word.

It was clear from the beginning that Amnesty had to be careful about the company it kept. MacBride asserts, “one of Amnesty’s challenges all along has been whom it allies with and whom it doesn’t ally with; what issues it allies with and which it doesn’t, because the organization is constantly being pulled.” Associations were particularly important to attract initial funding. Amnesty did not begin with a membership-based subscription scheme but depended on ad hoc donations based on appeals from an eclectic bunch of donors that included church groups, lawyers, and art smugglers. One particularly amusing benefactor was an American in Rome: “Now this fellow not only gave us $500, but kept on getting letters from me because I thought he was a rich American, and he gave us more dollars in the course of the year, turned out to be a sculpture smuggler. He got in awful trouble, selling stuff to the Met or something, that was smuggled out of Italy. (Laughs.) The Italian police were after him.” MacBride recalled this contact and others as ones Benenson cultivated against the wishes of others at Amnesty:

Peter met this man on the plane. I don’t know where he picked him up first but he said “Oh, what a marvelous man. Now he’s going to organize Amnesty in the States and so on.” I didn’t think probably to question Peter as to how he got to know him; I just assumed he had some contacts with him or had found out about him. But he turned out to be with an undercover organization, an arms dealer or something like that! So we had to get rid of him and then

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643 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
644 Amnesty Oral History Archives, A1, Archer interview, AI 978.
645 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
646 Amnesty Oral History Archives, A1, Benenson interview, AI 983.
[Benenson] got his cousin in America who I think is still linked with the American gun lobby. [...] We had terrible trouble trying to keep him down.\textsuperscript{647}

Internal conflicts in the early years between Benenson, MacBride, and Eric Baker, another important co-director of Amnesty, often revolved around Benenson’s various contacts. Benenson found them mostly harmless but necessary to spread the movement, whereas MacBride and Baker were much more circumspect about these affiliations for Amnesty’s non-political posture.

Other than staff and donors, the other main alliance was between Amnesty and governments. When asked how the British government responded to the Appeal, Astor replied: “I wouldn’t have thought that that would have come into it. I can’t even imagine anybody asking them.”\textsuperscript{648} However, Benenson did ask the government. Benenson already had close relations with the British government and worked for British Intelligence during World War II: “I have enjoyed friendly relations with H.M. Foreign Service for a very long time, and, in fact, worked in the Foreign Office on intelligence duties from 1943–46.”\textsuperscript{649} Moreover, Benenson was “educated at Summer Fields, Eton and Balliol College, Oxford, and this elite background stood him in good stead when launching the Amnesty appeal.”\textsuperscript{650} In a 1961 letter to the Prime Minister, Harold Macmillan, Benenson mentioned that they shared a past as a “Colleger and Balliolman,” making Macmillan’s support for the amnesty appeal “understandable.”\textsuperscript{651} However, MacMillan responded by using the moralizing narrative:

pointing out that the value of movements such as Amnesty lay precisely in their not having any direct links with governments. Benenson replied that this should not prevent the campaign ‘from having private understandings, or for its ultimate objectives from being those of Her

\textsuperscript{647} Amnesty Oral History Archives, A1, MacBride interview, AI 987.
\textsuperscript{648} Amnesty Oral History Archives, A1, Astor interview, AI 979.
\textsuperscript{649} Amnesty Oral History Archives, 9 January 1967, Benenson to Hoare & Co.
\textsuperscript{650} Buchanan 2002: 577-578.
\textsuperscript{651} Amnesty Oral History Archives, B6, Benenson to Philip Woodfield, 4 June 1961.
Majesty's Governments'. Interestingly, Benenson also acknowledged his 'friendly contacts' with the 'Research Information Department' of the Foreign Office prior to the launch of the appeal (presumably a reference to the Information Research Department (IRD), the anti-communist propaganda unit set up during the early stages of the Cold War.).

Benenson pushed for “private understandings” between Amnesty and the British government, signaling the non-publicized and informal relations of shadow hybridity.

Despite the early warning for diluting Amnesty’s moral authority, Amnesty did form and maintain support from the British government. For instance, on how Amnesty very quickly obtaining UN consultative status in 1962, within a year of its formation, Benenson revealed a governmental side deal where “the British delegation to the UN were very helpful in organizing sponsorship of this new fledgling organization, and they rounded up a number of Western delegations. And the Russians weren’t very pleased with the idea, as you might expect. And in the end a deal was done, and some iron curtain organization was simultaneously admitted to consultative status, unfortunately I can’t tell you which, but it was the result of a negotiated deal.”

Managing government relations behind the scenes became crucial for Amnesty’s authority. One way to circumvent negative attention was to make the case for access. For instance, in the initial appeal Benenson raises the question:

How can we discover the state of freedom in the world to-day? The American philosopher, John Dewey, once said, “If you want to establish some conception of a society, go find out who is in gaol.” This is hard advice to follow, because there are few governments which welcome inquiries about the number of Prisoners of Conscience they hold in prison.

Benenson rightly acknowledges that most governments do not widely distribute numbers or the status of their political prisoners. However, towards the end of the piece, Benenson

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653 Amnesty Oral History Archives, A1, Benenson interview, AI 983.
promotes a news conference the next day related to the campaign “where speakers will include three M.P.s, John Foster, Q.C. (Con.), F. Elwyn Jones, Q.C. (Lab.), and Jeremy Thorpe (Lib.).”\(^{655}\)

Benenson realized the impact of aligning with certain government figures. Over time, these decisions to align will compound and create tensions for Amnesty’s overall government relations strategy. Notice also how the three MPs represent the major parties. In doing so, Benenson remains attentive to the optics of impartiality, which he also emphasizes in the article: “The force of opinion, to be effective, should be broadly based, international, non-sectarian and all-party. Campaigns in favour of freedom brought by one country, or party, against another, often achieve nothing but an intensification of persecution.”\(^{656}\) The dual imperatives of impartiality and publicity led Amnesty from the beginning to build an international coalition which included government representatives but also aimed to set itself apart from government influence.

The initial cozy relations soon proved problematic. In 1966 Amnesty published a report documenting the British government’s torture of prisoners in occupied Aden (now part of Yemen). Peter Archer, the Labour MP, disclosed: “We formed a relationship with the Foreign Office, too, to some extent. In those early years we’d got on quite well with the Foreign Office, but this was predominantly a British organization criticizing foreigners, and the British Foreign Office thought that was fine. And we really fouled up our relationship when we criticized the British government over Aden.”\(^{657}\) In another incident involving the appointment of the Liberal MP Jeremy Thorpe for heading the British Section of Amnesty, Astor commented: “Well, for


\(^{657}\) Amnesty Oral History Archives, A1, Archer interview, AI 978.
Amnesty one has got to be absolutely above all reproach, and [Thorpe] wasn't in that position. He was a man under a slight shadow and wasn't suitable to run a job which depended entirely on its meticulous respect for truth. Its absolute reliability must be above any suspicion, and he wasn't, you see." Astor reflects Hopgood's moralizing language of Amnesty's authority "depended entirely on its meticulous respect for truth." However, their contacts with the British government in particular evaded the simple distinctions of the moralizing narrative.

Amnesty grew alongside its government relations, which extended beyond the U.K. in somewhat unexpected places. Amnesty was often "accused of being harder on the Communist countries than on the right-wing dictatorships." Yet, MacBride recalled Amnesty being particularly receptive with government officials in Communist Romania:

I remember one interview with the Romanians; we had a lot of prisoners in Romania at the time. I was in Romania not about Amnesty, but some kind of lawyers' conference, I think, to give a lecture on international law. Some of the government officials were having dinner with me and one of them said to me, one of the organizations we have the greatest respect for is Amnesty. He hadn't linked me with Amnesty. I asked why. Well, he said, we are officials working in the Department of Justice, and we have a lot of people in prison here and they should not have been kept so long, and until Amnesty came along they were forgotten. Amnesty came along and it was a godsend: it forced the government to change. We were getting these letters and postcards and so on and we used to analyse them - what countries they came from, and we saw a lot coming from Sweden, and from countries that were very friendly countries, and that enabled us to force the government to release them.

Similarly, Blane remembered that in the mid-1970s, "Ambassador Kikiya - of Libya - who had been at the anti-torture conference as a lawyer, that Amnesty organized in Paris. He was one of the very few lawyers who was there and he was then the Permanent Representative to the United Nations for Libya and he took us around and introduced us to a number of the Arab

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658 Amnesty Oral History Archives, A1, Astor interview, AI 979.
659 Amnesty Oral History Archives, A1, Astor interview, AI 979.
660 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
diplomats and said ‘I advise you to know these people - you may need them some day!’ So it was quite interesting that he was supporting us." Not all governments were receptive to Amnesty, however. Benenson recalls: "the Foreign Office or the British Embassy got me an interview with the [U.S.] State Department. The State Department was extremely suspicious. It was only when they learned that I was a Catholic that they would pursue the conversation at all. (Laughs.) Very negative about the whole scheme." Keeping the company of government for influence and access, to varying degrees of success, generated some controversy. However, these debates paled in comparison to the position on taking money from governments.

Follow the Money

If you really want the crux of the history of early Amnesty, I just say: "look at the accounts." In order to be effectively impartial and successful, Amnesty first had to survive. Benenson points to this fact above by urging researchers to look at the Amnesty accounts and follow the money to know the crux of its early history. In its initial set-up, Amnesty relied on ad-hoc donations where “nothing was more difficult than to raise money for Amnesty. Not like the [National Society for the Prevention of Cruelty to Children] for children, or seeing pictures of a starving child as Oxfam show. We couldn’t do that too easily. We did eventually, we had people behind bars and so on.” Before the subscription style financing took off, the initial seed money for arranging conferences, printing and posting reports, and paying for field trips came from a variety of sources, including governments.

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661 Amnesty Oral History Archives, A1, MacBride interview, AI 987.
662 Amnesty Oral History Archives, A1, Benenson interview, AI 983.
663 Amnesty Oral History Archives, A1, Benenson interview, AI 983.
664 Amnesty Oral History Archives, A1, Vincent interview, AI 993.
While associating with governments for lobbying and access purposes may have been seen as a necessary evil, accepting money from governments were contentiously disputed as even necessary. Neville Vincent, Amnesty's first treasurer, summarized: “As I remember it there was the odd occasion, it wouldn't actually be said to be from the government, but we had reason to think it would and we felt that would have swayed our judgement, anyway made us... and it would have been wrong in every way to accept it. I don't know of any occasion when I was there that we knowingly received any government funds of any kind.” However, Benenson had a more easy-going attitude:

Interviewer: But did you feel that funding coming from a government source was of itself negative? Or potentially so?
Benenson: No... not open funding from a government source, I think that’s perfectly acceptable. I know Amnesty's always set against it, but...

Benenson qualifies his acceptance for “open funding” meaning funding that is disclosed in reports. Disclosed or not, while Vincent denied that Amnesty ever received direct government funding, as it would be “wrong in every way,” Benenson admitted that he did in fact receive “help from the Information Research Department (IRD), the anti-Communist propaganda section of the Foreign Office, while setting up Amnesty, and this relationship continued after 1961. For instance, the IRD supported Benenson when he established the Human Rights Advisory Service (HRAS) in 1964. In 1967 he admitted having received substantial sums of money from the British government two years previously to spend as he saw fit on various projects—£5000 for the HRAS and £2000 for JUSTICE.” The anti-Communist directed

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666 Amnesty Oral History Archives, A1, Benenson interview, AI 982.
funding would be a recurrent theme in Amnesty and government relations throughout the 1960s and early 1970s.

Benenson’s attitude to receiving financial assistance from governments reflects how he saw other organizations survive. For instance, he recalled how MacBride’s International Commission for Jurists received funding from the U.S. Central Intelligence Agency:

“JUSTICE” was all very well in its way, but being composed only of lawyers it would always be excessively cautious and would never catch the public imagination. The International Commission of Jurists was largely under the same inhibitions, but being American-directed a little more brash. However, putting two and two together I was unable to come to any other conclusion than that its copious finance must derive, not from the New York Bar, as was claimed, but from some organ of the American Government; it turned out to be the C.I.A. because you can’t get that sort of money out of the ordinary giving public. And also the policy of the International Commission of Jurists, which was largely dictated by the Fund for Free Jurists in New York, was distinctly anti-Communist.  

It is an easy conspiratorial charge to claim the CIA’s support for various anti-government causes. Whether or not the claim was accurate it is still telling that Benenson believed it to be so and normalized these funding relations as a cost of staying alive. Over time, the funding diversified beyond anti-Communist agencies, and the broader associations set the stage for future tensions. The debate continued into the following decades, seemingly unsettled. Blane set the context of the 1970s:

There’s been a great debate in the movement in my time about whether you receive or don’t receive any government monies, and it was finally resolved with the principle that you don’t basically accept, however, that there are exceptions of two kinds. One major kind and that is we can accept direct subsidies from government for the specific purpose of relief. The other is that we accept indirect subsidies in the form of conscientious objectors allowed by the governments to work in the Amnesty office during their time of conscientious objection service, or in the form of charity status, or sometimes lower rent on property.

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668 Amnesty Oral History Archives, A1, Benenson interview, AI 982.
669 Amnesty Oral History Archives, A1, Vincent interview, AI 993.
The two exceptions to taking government funding then came as Amnesty expanded beyond prisoner advocacy to prisoner relief, especially in the Prisoners of Conscience Fund for helping the families of prisoners. The argument for in-kind donations or “indirect subsidies,” like rent, tax status, and labor, aims to make a finer distinction of real money and its influencing effects, meaning Amnesty was loosening the moralizing restrictions that Vincent has originally envisioned. However, one area where government influence interfered its operations were in Amnesty’s policy stance on how it defines prisoners of conscience and in particular the role of violence.

*Skirting from Violence*

In 1962, Nelson Mandela was arrested and charged in South Africa for inciting workers to strike and traveling without valid passports. Amnesty sent lawyer Luis Blom-Cooper, an early supporter, to his trial as an observer. Mandela was sentenced to five-years imprisonment and Amnesty decided to adopt him as a prisoner of conscience. In November 1962, Mandela wrote a letter to Amnesty thanking them for support:

> We are most grateful to your organization for sending Mr. Luis Blom-Cooper to attend the trial. His mere presence, as well as the assistance he gave, were source of tremendous inspiration and encouragement to us. The fact that he sat next to us furnished yet another proof that honest and upright men, and admirable organizations, throughout the civilized world are on our side of the struggle for a democratic South Africa. Finally, I must ask you to accept this note as a very firm, warm and heavy handshake from me.\(^670\)

Following the adoption, Mandela faced additional charges of violent struggle with eight others against the apartheid government, which Mandela defended in his own defense, and was convicted in 1964. Amnesty’s definition of “Prisoners of Conscience” excluded those who used various forms of violence:

\(^{670}\) Amnesty Oral History Archives Documents, AI 1033.
Persons reasonably suspected of having committed the following offences shall not, save in very special circumstances, be considered as "Prisoners of Conscience" ranking for adoption.

(a) Homicide.
(b) Armed Assault.
(c) The detonation of explosives or firearms.
(d) Robbery with or without violence.
(e) Betrayal of military information to a foreign power.
(f) Disruption of transport in circumstances reasonably likely to cause physical injury.
(g) Arson.
(h) Kidnapping.
(i) Poisoning of water, food or animals.671

Mandela’s conviction and defense of the use of violence presented Amnesty with a choice to maintain or withdraw the adoption, sparking the “first major split in the movement,” which some speculate also resulted in Benenson leaving the organization five years later.672

The third international assembly meeting of 1964 in Canterbury posed the following question: “Whether Amnesty International should seek to secure the release of those who, being denied normal political redress, feel themselves obliged to resort to violence in the defense of freedom.”673 There was a split in the membership, with some advocating continuing to support Mandela and work for his release and others wanting Amnesty to adhere to its original definition of prisoners of conscience presupposing nonviolence. Mandela’s supporters or “those who condone violence, do so reluctantly but feel that we must condone violence when all normal means of political redress are denied to the oppressed and when the regime in power has clearly shown itself contemptuous of the Rule of Law and impervious to non-violent persuasion. This raises the question of whether there is such a thing as The Just Revolution.”674

671 Amnesty International Council Meeting Minutes, ICM 5.
672 Amnesty Oral History Archives, A1, Archer interview, AI 978.
673 Amnesty International Council Meeting Minutes, ICM 5.
674 Amnesty International Council Meeting Minutes, ICM 5.
An equally impassioned group opposed extending the Prisoner of Conscience adoption to Mandela and

against the condonation of violence do so on what might be called 'fundamentalist' grounds. Whilst most of the individual members feel personal sympathy for Nelson Mandela, and while some say that they would privately be prepared to help men like him, the consensus of opinion in this group is that:

(i) Amnesty International’s moral strength and peculiar appeal and status depend upon it limiting itself to espousing only non-violent Prisoners of Conscience;
(ii) that if violence is condoned under any circumstances we launch ourselves on a slippery slope having no clear dividing lines of degree or intent, with abuse inevitable;
(iii) that condonation would lead us to political bias and would open the movement to take-over bids by various partisan groups, thus removing the common ground which now unites us; and finally
(iv) that condonation of violence in the struggle against racial oppression must logically lead us to condone violence in the struggle for freedom of thought and religion.

In arguing for limiting the definition to nonviolence, Amnesty members directly invoked the moralizing narrative of impartiality as the necessary condition to maintain its “moral strength” against “political bias” against “partisan groups."

The clashes extended beyond the general membership to the founders. Benenson was in favor of an inclusive definition that did not make fine-grain distinctions of violence and nonviolence. Before the initial appeal, Baker wrote a letter to Benenson in April 1961 on the aims of Amnesty “with a more explicit repudiation of violence, [which] was politely questioned by Benenson who commented that Baker’s draft suggested that ‘. . . we deny anyone the right to express a view which is intended to stir up violence or antagonism? We don’t go so far as that, do we? All we mean to say is that we see no reason to rub the flesh off our knuckles getting a man out of gaol, when his purpose is to put other people into gaol.’ However, Baker’s tougher
view prevailed.” The position clearly bothered Benenson throughout his tenure as he reflected in 1984: “I personally deprecated the development in Amnesty of this very fine toothcomb through which every poor wretched human being is forced to pass. And the time it takes, it seems to me, is very bureaucratic and inhumane. And I believe that the whole essence of Amnesty is its great sweeping benevolence that carries it forward, and treats every human being as a deserving case.” Meanwhile Archer and others wanted to maintain the existing limited definition: “I tended to be rather narrower than most, for example, although I wasn’t suggesting we condemn people who advocated violence. That depends on the circumstances. They could hardly be surprised if they found themselves in prison, and therefore we were dealing with people who were imprisoned for their political opinions, and we were going to get into difficulties if we included people who advocated violence.” Deciding on Mandela’s status was a wrenching decision which included

the great argument in South Africa that dogs were set onto [Mandela] at one particular moment and what was he to do. He would be violent in self-defense. Was that the same? And all those terrible academic but very real arguments took place. [...] And it was very sharply divided about whether people advocating force, practiced in self-defense, and not always, when did it merge, should they be called prisoners of conscience, could they be helped? Because we’ve been advocating peace, on the Gandhian lines. That was a major battle.

In the end, the definition remained unchanged and Mandela was no longer adopted as a prisoner of conscience.

The members who advocated for keeping the nonviolent provision for prisoners of conscience were probably driven in part by the stated Gandhian appeals to claim moral

675 Buchanan 2002: 585.
676 Amnesty Oral History Archives, A1, Benenson interview, AI 983.
677 Amnesty Oral History Archives, A1, Archer interview, AI 978.
678 Amnesty Oral History Archives, A1, Vincent interview, AI 993.
authority. But there was also an underlying sense that supporting violence was a harder sell that early on in the organization’s history when it was still strapped for cash and trying to survive. However, even later in its course, Amnesty did not change course on skirting violence. It did, however, “take up the general conditions of imprisonment of those who were arrested, whether or not they were prisoners of conscience or not.”679 Ultimately, Benenson put out the following statement:

We recognize, with great sympathy, that where a Government has shown itself contemptuous of the Rule of Law and impervious to peaceful persuasion, that those to whom it has denied full human rights as set out in the United Nations Declaration, may feel or find themselves forced into a position in which the only road to freedom is violence. Such people, though they cannot qualify for adoption as Prisoners of Conscience within the definition of Amnesty International, can be, and often are, our active concern on humanitarian grounds.680

Amnesty would struggle to reconcile the decision to not adopt Mandela. Benenson would leave Amnesty in late 1967 after the internal clashes surrounding his continued agenda for a more politically relevant organization were rebuffed by those aiming for a higher moral ground.

V. PUBLIC AND PRIVATE RELATIONS IN SHADOW HYBRIDITY

Amnesty is at its most successful projecting moral authority when it maintains impartiality in its operations. Recall MacBride on “the importance of having a non-governmental organization that would not be tied to governments.”681 This follows the conventional wisdom that “the degree to which NGOs are linked to principle rather than political interests enhances the legitimacy and moral force of their arguments.”682 However, Amnesty is at its most successful delivering results when it conducts politically motivated deals.

679 Amnesty Oral History Archives, A1, Benenson interview, Al 983.
680 Amnesty International Council Meeting Minutes, ICM 5.
681 Amnesty Oral History Archives, A1, MacBride interview, Al 987.
682 Clark 2001: 36.
for its operations. “Inevitably, Amnesty’s impartial advocacy of human rights principles led it to criticize governments publicly, at the same time that it wished to gain the ear of authorities regarding individual cases of abuse.”\textsuperscript{683} Amnesty’s political authority, thus, comes into tension with its moral authority. The politics of sovereign responsibility is evident when Amnesty is caught between the moral and political imperatives to uphold the value of its independence and public trust against its realities of maintaining success and survival. This is a twist on the usual connection between sovereignty and human rights, which assumes that human rights obligations, as promoted by Amnesty and others, “challenges governments to change their behavior, against their sovereign prerogatives.”\textsuperscript{684}

Many see Amnesty’s authority as weakening the state and undermining national sovereignty. IR scholars often depict the imagined version of sovereignty under threat: “The principle of sovereignty and the norm of noninterference are examples of practices said to emerge from and maintain a situation of international anarchy. Because human rights norms call for international accountability as to how states treat their citizens, the norms potentially modify sovereign practices in important ways.”\textsuperscript{685} However, Amnesty does not just raise anxiety about state sovereignty but it also spends a majority of its time discussing how to uphold its own sovereign independence from states. This anxiety is picked up by scholars outside of IR, especially in non-profit studies where “recent years have witnessed several NGO scandals related to corruption or the mismanagement and misappropriation of funds.”\textsuperscript{686} NGO scandals threaten their “moral capital,” where moral capital is “a resource that can be employed for

\textsuperscript{683} Clark 2001: 12-13.  
\textsuperscript{684} Clark 2001: 21.  
\textsuperscript{685} Clark 2001: 23.  
\textsuperscript{686} Hielscher et al. 2017: 3.
legitimating some persons, positions and offices and for delegitimating others, for mobilizing support and for disarming opposition, for creating and exploiting political opportunities that otherwise would not exist." In other words, moral authority yields moral capital.

NGO accountability ensures adequate moral capital through a “process by which an NGO holds itself openly responsible for what it believes, what it does and what it does not do in a way which shows it involving all concerned parties and actively responding to what it learns.” NGO accountability is further divided into three types:

"agency," "representative," and "mutual accountability." In a relationship defined under agency, the organization is accountable to traditional notions of stakeholders, and expected to produce specific outputs. Representative accountability requires an organization to be accountable to constituents and thus requires constituents to have an effective voice and prolonged interest. Mutual accountability is defined as accountability among autonomous actors that is grounded in shared values and visions and in relationships of mutual trust and influence.

Within this tripartite framework, Amnesty’s agency accountability is to its donors and clients, its representative accountability is to its human rights-demanding public, and its mutual accountability is to its coalition partners including other NGOs and governments. Again, the dual narratives of impartiality and publicity produce conflicting obligations where “[NGOs] had long recognized that to be credible and legitimate they were required to meet two main requirements. First, they had to justify the voice with which they spoke in their campaign materials, press conferences and private lobbying. Secondly, they had to prove the effectiveness of the things they actually did in slums, villages and refugee camps around the world.”

Ultimately, these tensions arise from the unique position of NGOs like Amnesty where “as

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690 Slim 2002: 5.
independent organizations that sometimes act as issue advocates and public service providers, some NGOs occupy an uncomfortable space between state forces, the global governance system, and the private sector.”

One solution to the crisis in moral capital is to regulate NGOs for accountability. “Currently, there are as many as 320 self-regulation initiatives worldwide, concentrated in the United States, Canada and Western Europe, but increasingly extant in the Global South and internationally. Under these schemes, accountability is generally based on a framework including loyalty to a mission statement, transparency, good governance, monitoring, reporting, evaluation, and the existence of a mechanism to receive complaints and issue sanctions if an organization is found to be behaving improperly.” However, calls for a global comprehensive regulation to address NGO advocacy remained and in 2006 Amnesty, Greenpeace, Oxfam, and Save the Children created an alliance and announced the NGO accountability charter. Amnesty’s then secretary-general, Irene Khan, launched the Charter by stating:

The legitimacy of international NGOs to act is based on universally-recognised freedoms of speech, assembly and association on the trust people place upon us, and on the values we seek to promote. NGOs are playing an increasingly prominent role in setting the agenda in today’s globalised world. This places a clear responsibility on us to act with transparency and accountability. The Accountability Charter clearly shows that NGOs are willing to adhere to a code of conduct, lead by example, and encourage others to follow.

In terms of government relations, two sections of the Charter are most relevant. In the Principles section, the Charter refers to advocacy: “We will ensure that our advocacy is

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691 Hortsch 2010: 129.
693 Irene Khan, Secretary General of Amnesty International, on the launching of International NGO Accountability Charter, June 6, 2006
consistent with our mission, grounded in our work and advances defined public interests. We will have clear processes for adopting public policy positions, (including for partners where appropriate,) explicit ethical policies that guide choices of advocacy strategy, and ways of identifying and managing potential conflicts of interest among various stakeholders.” Secondly, the Charter also asks for NGOs to commit to a set of “clear processes for adopting public policy positions, (including for partners where appropriate).” While the exact procedures have yet to be confirmed, the move toward formalizing and making public how Amnesty interacts with government partners reflects the serious problems with maintaining credibility and effectiveness in shadow hybridity.

This chapter showed how Amnesty International’s shadow hybridity allowed it to order transnational human rights while also ensuring its survival. However, its shadow relations with governments threaten public trust in its mandate. This issue has been central to most of the organization’s debates on cultivating contacts, funding, and policy positions. However, that the shadow relations still persist speak to the challenges of globalizing a state-based system of human rights. Amnesty’s hybridity provides a test of what should be the least likely scenario of hybridity: a government watchdog organization that depends on its impartiality for claiming the moral high ground and bolstering its political authority. Nevertheless, hybridity persists even in this high stakes case, showing the pervasiveness of hybrid sovereignty in global politics.
Chapter Seven

CONCLUSIONS ON HYBRIDITY AND SOVEREIGN POLITICS

I. RECONSIDERING POWER

II. NEW DIRECTIONS
I. RECONSIDERING POWER

Let us neither admire nor ignore the orrery of errors, but let us instead fracture the orbs, crack them open, shake them, and see what possibilities they have enclosed. And then, when we are done, let us not cast away the residue. Let us instead sweep it into a jar, shine up the glass, and place it high on the bookshelf with other specimens of past mistakes.\textsuperscript{694}

Hybrid sovereignty reconsiders power in world politics in four new ways. First, it broadens our understanding of sovereignty and sovereign power to clarify their relational nature. Second, it foregrounds public and private hybridity as the foundational source of sovereign relations to maintain and mobilize sovereign power. Third, it explores the power of public and private hybridity to change political distinctions of other kind. Fourth, it empowers us to critically evaluate these newly visible relations of power for sovereign responsibility.

Sovereignty and sovereign power are central to the study of politics. Sovereignty is particularly important for international politics, especially as scholars debate whether certain actions bear favorably on a state’s sovereignty, understood crudely as autonomy from outside interference. Sovereign power is generally featured in some guise in all facets of politics – theorizing what it is and its history, comparing its features across different national contexts, highlighting its different manifestations in American politics, or exploring the international dimension of projecting sovereign power abroad. Yet, the purpose and form of sovereign authority is far from self-evident. Through tracing hybrid relations, we are allowed a rare glimpse into the behind-the-scenes of producing political power. If we focus only on \textit{Imagined Sovereignty}, the absolute indivisible political fiction served as the product of political power,

then we miss most of the power politics. By shifting our attention to *Lived Sovereignty*, the relational divisible and diverse process of producing political power, we are much closer to the action of politics.

Hybrid sovereignty takes on a foundational myth in IR, which argues that the holders of sovereign power are governments. The public is the sovereign and the state. The private, thus, is the nonsovereign and the nonstate. This myth holds three assumptions. First, it relies on the public and private as mutually exclusive poles. Second, it places the private outside the state and outside politics. Third, it assumes sovereign power as a finished project. This myth is problematic because it has difficulty accommodating public and private hybridity without invoking dilemmas on whether the sovereign state is disappearing. The myth also perpetuates the view that hybridity is just now interfering in sovereign power, that it is unique to our current world historical moment. However, most politics happens in the middle of things. The middle is where armies meet in the battleground, where contests happen. The middle is the space of politics and yet has been mostly ignored by political scientists. This study introduced a new framework of sovereign politics that focused on the space between public and private. I challenge the foundational myth by stating that public and private are interdependent, that the private is deeply political, and that sovereign power is a work in progress. I move beyond the separation of the private from the state and re-conceive of sovereign power as public and private hybridity where it becomes difficult to imagine where one begins and the other ends.

Foregrounding public and private hybridity reckons with one of the most enduring problems in political science generally and IR specifically, which in structuring how we conceive of the boundaries that shape individual, collective, and institutional identity, agency and responsibility, the public/private construct in international relations is intrinsic to how we conceive of other highlighted distinctions in the discipline,
between the national and the international, citizen and noncitizen, the particular and the universal. By studying the public/private distinction we are embarking on an intellectual journey into the very heart of the ‘dividing discipline.’

I draw from cases of public and private hybridity in violence, markets, and rights in historical and contemporary contexts. I reclassify them as a part of, not apart from, sovereign politics. Such reclassification has downstream effects for other distinctions that the public and private makes possible. Ultimately, distinctions are about hierarchy and power: “There are a series of parallel distinctions and in each case the distinction allocated prestige to the first category – man, public, international – over the second – woman, private, domestic.” Hybridity in public and private also has the power to opens up the dualisms to hybridization in international/domestic, legal/illegal, internal/external, citizen/noncitizen, and particular/universal. Other than public and private hybridity spilling over to other distinctions in politics, the hybridity can also spill outside of politics to other areas. The generality of configurations of hybridity introduced in chapter two means that contractual, institutional, and shadow hybridity are not only applicable to sovereign relations. These types can travel to depict public and private hybridity in many social dynamics like families or organizations and cultural dynamics like art and identity based communities. We must pay constant attention to both the contingency and power of distinctions. “The reasons why certain conceptions of women, war, etc., prevail at any one moment cannot be reduced to a single cause, whether it be misogyny or human nature.” The power of hybridity begets more hybridity.

Finally, hybrid sovereignty also reveals the power to confront sovereign responsibility. Anxiety often accompanies hybridity, whether it is in the current particular conditions of living through an American presidency that appears too hybrid or in a generalized sense that the world is becoming less comprehensible in its interconnected hybridity. This “form of global hybrid authority prompts increasing concerns about the scope of this new type of influence and the opacity of the means involved.” The concern is about responsibility, which under a more conventional sovereign politics had been of holding the people in power, i.e. governments, accountable. For instance, in international law, “the concept of state responsibility rests upon distinguishing acts and omissions that can be attributed to the state from those that cannot for it is axiomatic that ‘private conduct is not in principle attributable to the state.’” Hybridity complicates these obligations, which may open the door for abuse. Some worry that “the delegation of sovereign citizens’ rights to non-elected bodies corresponds to a reinvention of corporatism: private interest groups and other private organisations are gaining public status and direct access to the political system in order to supposedly secure a stronger consensus.” Others are interested in what hybridity privileges, like “the reproduction of transnational capitalism by generating legal forms that both create and legitimate capitalist productive relations on a transnational scale.” Following the U.S. Supreme Court *Citizens United* ruling, “while feminists rallied around the notion that the

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700 Graz and Nölke 2008: 22.

private is the public, large corporate interests were quietly insisting that the public is the private.”702 One implication may be that “as more governmental functions are transferred from the public to the private side of the boundary, government’s influence and effectiveness are diminished and private sector power is augmented. As corporations grow in size and wealth, they overwhelm the family and the public sphere.”703

If there is a new sovereign politics, should there be new sovereign responsibility? The dissertation began with the harrowing account of Blackwater in Iraq, harrowing because the contracting firm seemed to get away with impunity in the new battlefield. Chapter four depicted more examples of accountability gaps into which Blackwater slipped through to find advantage. Chapter five showed the workings of the International Chamber of Commerce writing rules for global commerce as a small elite with specific agendas to protect free capital. Chapter six portrayed how even those with a stated mandate to protect and promote sovereign responsibility, like Amnesty International, can fall prey to the shadow dynamics of producing sovereign power. While these contemporary cases highlight the problems of hybridity for accountability, they do not offer a blueprint for new kinds of sovereign responsibility. The best clues for sovereign responsibility lie in chapter three’s deeper historical study of the English East India Company, whose experience with diverse forms of hybridity suggests a different management of responsibility. Instead of creating a new set of sovereign responsibilities to accompany a new sovereign politics, perhaps hybridity itself offers a more longitudinal response to our anxieties where we are afforded different types of rights and obligations under

703 Cohen and O’Byrne 2013: 51.
different types of hybridity. The lines between public and private matter for settling sovereign obligations. Standardizing sovereign responsibility would re-draw the public and private distinction, making moot the efforts to reveal hybridity in this work. Since we cannot escape hybridity in the new sovereign politics, we must conceive of other ways to live with it, responsibly and otherwise, in the next urgent task for international relations.

II. NEW DIRECTIONS

The dissertation promised to build a new world where hybridity is more visible in sovereign politics. It delivered on this promise by creating a new concept of hybrid sovereignty, outlining an architecture where it could thrive, and showed it in action through various detailed political histories. Moving forward, the world-building done here offers new directions for research in international politics and beyond.

An important research opening is in following sovereign power unencumbered by the traditional dichotomies of public/private and state/nonstate. Hybridity allows researchers to focus on the powerful effects of various constellations in world politics without discrimination over the unit type. It relaxes the foundational supposition that the most powerful actions in the world are done by unitary states. Or more specifically, hybridity zooms in on the production of unitary statehood to show the multitudes within what appears to be a unity. The multitudes are not simply “sub-state” groups or pre-social individuals, traditionally conceived as the origins of state preferences, but rather reflect hybrids across space and time. These multitudes have a strong bearing on what sovereign power is and does in the world. Our future research should begin to explore how these effects occur and whether particular constellations make a difference in authorizing particular manifestations of sovereign power.
Another productive line of inquiry would be populating the new world with more varied types and fine tuning the existing varieties. For instance, institutional hybridity features an encompassing definition of “institution” where it may be formal networks or informal associations. Disaggregating this hybridity further may be helpful for teasing out unique payoffs for formal and informal institutional relations. In addition, the types can cross-pollinate in interesting combinations, like contractual-shadow, institutional-shadow, contractual-institutional, etc. These combined types of hybridity may reflect forms in transition or new forms altogether. We have about two centuries of lead time to theorize different types of states from political science. There is some catching up to do to match this diversity in knowledge for hybrid sovereignty.

Finally, beyond exploring the new empirical possibilities of hybridity, the dissertation also raises unique challenges to thinking about our place in the world and how we should structure political relations. As aforementioned, establishing sovereign responsibility while taking hybridity seriously is the next big normative puzzle for international ethics. The question deserves insights from across ethical commitments – democratic theorists, anarchists, Marxists, feminists, cosmopolitans, and some combination of the above. It would mean theorizing about the various constituents of hybridity – who is it for? – and the varying demands placed on it – what is it supposed to do? – from a range of harmonious and conflictual ethical positions on politics. The work would call for new thinking about old theories and newer thinking about future theories. Hybridity is demanding, but so are relations in world politics.
...the end is simply the beginning of an even longer story.

- Zadie Smith, *White Teeth*
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English East India Company, Court of Directors Meeting Minutes, 1650-1780. [The British Library, London]


Secondary Works Cited


Table A1. Examples of Inherently Governmental Functions per Policy Letter 11-01

1. The direct conduct of criminal investigation.
2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).
3. The command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role.
5. Security provided under any of the circumstances set out below. This provision should not be interpreted to preclude contractors taking action in self-defense or defense of others against the imminent threat of death or serious injury.
   (a) Security operations performed in direct support of combat as part of a larger integrated armed force.
   (b) Security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat. Where the U.S. military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat.
   (c) Security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat.
6. The conduct of foreign relations and the determination of foreign policy.
7. The determination of agency policy, such as determining the content and application of regulations.
8. The determination of budget policy, guidance, and strategy.
9. The determination of Federal program priorities or budget requests.
10. The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.
11. The direction and control of Federal employees.
12. The direction and control of intelligence and counter-intelligence operations.
14. The determination of what government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices with specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
15. In Federal procurement activities with respect to prime contracts:
   (a) determining what supplies or services are to be acquired by the government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
   (b) participating as a voting member on any source selection boards;
   (c) approving of any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;
   (d) determining that prices are fair and reasonable;

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(e) awarding contracts;
(f) administering contracts (including ordering changes in contract performance or contract quantities, making final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and accepting or rejecting contractor products or services);
(g) terminating contracts;
(h) determining whether contract costs are reasonable, allocable, and allowable; and
(i) participating as a voting member on performance evaluation boards.

16. The selection of grant and cooperative agreement recipients including: (a) approval of agreement activities, (b) negotiating the scope of work to be conducted under grants/ cooperative agreements, (c) approval of modifications to grant/cooperative agreement budgets and activities, and (d) performance monitoring.

17. The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

18. The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in government programs.

19. The approval of Federal licensing actions and inspections.

20. The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, such as title 31 U.S.C. 952 (relating to private collection contractors) and title 31 U.S.C. 3718 (relating to private attorney collection services), but not including: (a) collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is predetermined or can be readily calculated and the funds collected can be readily controlled using standard cash management techniques, and (b) routine voucher and invoice examination.

21. The control of the Treasury accounts.

22. The administration of public trusts.

23. The drafting of official agency proposals for legislation, Congressional testimony, responses to Congressional correspondence, or responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity.

24. Representation of the government before administrative and judicial tribunals, unless a statute expressly authorizes the use of attorneys whose services are procured through contract.
Table A2. Examples of Functions Closely Associated with Inherently Governmental Functions per Policy Letter 11-01

1. Services in support of inherently governmental functions, including, but not limited to the following:
   (a) performing budget preparation activities, such as workload modeling, fact finding, efficiency studies, and should-cost analyses.
   (b) undertaking activities to support agency planning and reorganization.
   (c) providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options.
   (d) providing services to support the development of regulations and legislative proposals pursuant to specific policy direction.
   (e) supporting acquisition, including in the areas of:
      i) acquisition planning, such as by— I) conducting market research, II) developing inputs for government cost estimates, and III) drafting statements of work and other pre-award documents;
      ii) source selection, such as by— I) preparing a technical evaluation and associated documentation; II) participating as a technical advisor to a source selection board or as a nonvoting member of a source selection evaluation board; and III) drafting the price negotiations memorandum; and
      iii) contract management, such as by— I) assisting in the evaluation of a contractor's performance (e.g., by collecting information performing an analysis, or making a recommendation for a proposed performance rating), and II) providing support for assessing contract claims and preparing termination settlement documents.
   (f) Preparation of responses to Freedom of Information Act requests.
2. Work in a situation that permits or might permit access to confidential business information or other sensitive information (other than situations covered by the National Industrial Security Program described in FAR 4.402(b)).
3. Dissemination of information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses.
4. Participation in a situation where it might be assumed that participants are agency employees or representatives, such as attending conferences on behalf of an agency.
5. Service as arbitrators or provision of alternative dispute resolution (ADR) services.
6. Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.
7. Provision of inspection services.
8. Provision of legal advice and interpretations of regulations and statutes to government officials.
9. Provision of non-law-enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.