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# HUNTING A DICTATOR AS A TRANSNATIONAL LEGAL PROCESS: THE INTERNALIZATION PROBLEM AND THE HISSÈNE HABRÉ CASE

Caleb J. Stevens\*

“So if the question is ‘why do nations obey international law?’, my answer would be: Nations obey because of people like us—lawyers and citizens who care about international law, who choose not to leave the law at the water’s edge, who do their utmost to ‘bring international law home.’”<sup>1</sup>

-Harold Hongju Koh

## ABSTRACT

Transnational legal process theory suffers from an internalization problem: it does not adequately explain why international legal norms are internalized. This article addresses the gap by analyzing the *Habré* case in Senegal as an example of transnational legal process. Utilizing speech act and securitization theories, I argue that internalization can be partly explained by three factors of agency: (1) the validity of the claim, (2) linguistic competence, and (3) discursive strategies. Positing that the claim in the *Habré* case is sufficiently valid per se, I find multiple actors commanding linguistic competence and employing a variety of discursive strategies. I conclude that the agents of internalization have been stymied by the linguistic competence and discursive

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<sup>1</sup> Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 679–80 (1998) [hereinafter Koh, *Home*].

strategies of counter-agents of internalization, especially Senegalese religious leaders.

## I. INTRODUCTION

To write this sentence, this introduction, this article is to participate in a transnational process of legal creation and compliance. I am, in a sense, one of the many voices working to both ensure state compliance with international law and its creation, in this case, through the prosecution of Hissène Habré. As suggested by the above quote, for Koh and other transnational legal process theorists, international law is a product of a constructivist, dynamic, non-statist, and highly participatory process requiring an interdisciplinary approach.<sup>2</sup>

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<sup>2</sup> Koh is not alone in articulating an intensely dynamic and non-statist theory of international law. Koh's cohorts are overwhelmingly associated with Yale Law School, an association which caused one scholar to speculate on the appropriateness of labeling them a 'New' New Haven School. See Laura A. Dickinson, *Toward a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 547, 548–49 (2007). This inchoate 'New' New Haven School shares several features with its forbearer, the New Haven School: normative commitments to the rule of law and fundamental human rights, flexibility with respect to non-state actors, and an empirical and interdisciplinary approach to international law. *Id.* at 549–51 ("I would like to suggest . . . that the work of this younger generation of scholars within the orbit of New Haven does, at least, share a number of important features that might qualify it as a new school of thought about international law—and interestingly, these features echo aspects of the original New Haven School."). See also Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 565–71 (2007) [hereinafter Koh, *New Haven*]. For an example of works by possible members of the 'New' New Haven School, see Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1 (2009); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193 (2005); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393 (2007). Thus, the double modifier is a sort of homage to the New Haven School, two of whose founding members, Myers McDougal and Harold Laswell, argued that any accurate international legal theory requires an understanding of two key elements: (1) law as a product of diverse societal, legal, and power processes that (2) should move towards a "universal order of human dignity." Myers S. McDougal & Harold D. Laswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 53 (1959), reprinted in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 122 (Robert J. Beck et al. eds., 1996) [hereinafter APPROACHES]. The New Haven School incorporated extra-legal processes of

Through our collective participation in this process, we give international law its normative shape over time.<sup>3</sup> Put simply, international law is what we make it. In a recent lecture Koh remarked, “[w]e live in an era when anyone with an internet connection can participate in international law-making.”<sup>4</sup> Koh is the great leveler, for international law is no longer the exclusive province of governmental actors and treaty conferences. Through a transnational legal process framework, one sees agents of international law-making and compliance in academics writing blogs, Facebook posts by protesters, activists in Arab states providing the world with news of their governments’ human rights violations, and teams of international lawyers roaming the globe looking for states that harbor former dictators and international criminals. It goes without saying that this view is not shared by everyone.<sup>5</sup>

There are indeed shortcomings to transnational legal process theory. Although Koh has produced a litany of articles on transnational legal process,<sup>6</sup> his notion of the “vertical

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society and power influenced by, and in turn influencing, the process of law-creation. APPROACHES, *supra* at 110. They removed the legal positivist quarantine between law and politics and reframed international law as a dynamic process with a normative end rather than a static object to be identified and labeled. *Id.* at 110–11. Transnational legal process theory is continuing the New Haven School’s work by allowing more and varied actors into international legal theory to help explain state compliance in today’s “fourth era” of international law. Harold Hongju Koh, *A World Transformed*, 20 YALE J. INT’L L. ix, ix (1995).

<sup>3</sup> See Roda Mushkat, *Dissecting International Legal Compliance: An Unfinished Odyssey*, 38 DENVER J. INT’L L. & POL’Y 161, 170 (2009).

<sup>4</sup> Harold Hongju Koh, Legal Advisor, U.S. State Dep’t, Address at the Graduate Institute of International and Development Studies: International Law in the Obama Administration (Nov. 10, 2009).

<sup>5</sup> See, e.g., Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47, 47–48 (2003); Eric A. Posner, *Transnational Legal Process and the Supreme Court’s 2003-2004 Term: Some Skeptical Observations*, 12 TULSA J. COMP. & INT’L L. 23, 25 (2004); Melissa A. Waters, *Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT’L L. 455, 456–57 (2007) (reiterating concerns over the normative commitments of the New Haven School as improperly subordinating law to policy and pointing out that transnational legal process also gives rise to these misgivings).

<sup>6</sup> E.g., Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) [hereinafter Koh, *Litigation*]; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) [hereinafter Koh, *Process*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) [hereinafter Koh, *Nations*]; Harold Hongju Koh, *Is*

internalization”<sup>7</sup> of international law remains incomplete.<sup>8</sup> Specifically, he has not adequately explained why states internalize certain international legal norms.<sup>9</sup> This article addresses the internalization problem by examining a case of transnational legal process at work—the efforts by Reed Brody of Human Rights Watch, who brandishes the moniker “The Dictator Hunter,”<sup>10</sup> and others to prosecute former Chadian President Hissène Habré in Senegal for torture and other international crimes. What does an examination of efforts to hunt the dictator Hissène Habré teach us about transnational legal process as a theory of state compliance? In hazarding an answer to this question, I hope to make a not insignificant contribution to transnational legal process theory and, by extension, the literature on state compliance with international law.

Building on Balzacq’s critique of securitization theory, I claim that the internalization of an international legal norm can be partly explained by three factors of agency: (1) the validity of the claim, (2) the linguistic competence of the agents

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*International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975 (2005) [hereinafter Koh, *Internalization*]; Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN. ST. INT’L L. REV. 745 (2006); Koh, *New Haven*, *supra* note 2.

<sup>7</sup> As will be explained in more detail, Koh distinguishes between vertical and horizontal internalization. *See infra* Part II(2). Horizontal internalization is a classical, uncontested concept, whereas vertical internalization presents a problem. Therefore, when I refer to an unmodified “internalization,” I mean “vertical internalization.”

<sup>8</sup> *See* Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in THE HANDBOOK OF INTERNATIONAL RELATIONS 544 (Walter Carlsnaes et al. eds., 2002).

<sup>9</sup> *Id.* Although Koh has illustrated his theory with several examples, none of these examples are sufficiently in-depth analyses. To support his theory, Koh has discussed several cases, namely, the campaign to ban landmines, the US support for the Contra rebels in Nicaragua, and the US Haitian refugee policy in the early 1990s. Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2006) [hereinafter Koh, *Torturer*]; Harold Hongju Koh, *Transnational Legal Process after September 11th*, 22 BERKELEY J. INT’L L. 337, 340 (2004) [hereinafter Koh, *September*]; Harold Hongju Koh, *Refugees, the Courts, and the New World Order*, 1994 UTAH L. REV. 999, 1013–18 (1994).

<sup>10</sup> This nickname derives from the documentary film eponymously titled, “The Dictator Hunter.” CHASSEUR DE DICTATEURS [THE DICTATOR HUNTER] (Pierre Hazan Film & Video TV 2001).

of internalization, and (3) their discursive strategies. Koh's stated aim is for internalization to explain the "micro-processes of social influence" that induce states to comply with international law.<sup>11</sup> By focusing on the elemental factors of agency, I hope to reveal a kind of nano-process beneath these micro-processes.<sup>12</sup> An elucidation of that nano-process can help explain the internalization of international legal norms.

Having said what this article is about, I will now note what it is not about. As Michael Walzer opined, "[t]ell your readers what you are not going to do; it will relieve their minds, and they will be more inclined to accept what seems a modest project."<sup>13</sup> This article does not argue, as a general proposition, that transnational legal process theory is superior to other compliance theories, even in its explanation of the *Habré* case. Transnational legal process is a powerful theory for explaining the *Habré* case, but I do not contend it is the only one. Nor does it offer a comprehensive application of Balzacq to explain vertical internalization. Rather, this article aims to demonstrate that transnational legal process is a powerful, albeit flawed, theory for explaining the complex realities in which international legal compliance occurs and, more specifically, for understanding the *Habré* case. The flaw lies with the internalization component and linking transnational legal process theory with part of Balzacq's critique of securitization helps correct for this flaw. I also suggest that a more thorough linkage with Balzacq will prove an even better corrective.

This article is organized as follows. Part II briefly touches on competing explanations for international legal compliance and adumbrates transnational legal process theory. Part III lays out the insights provided by speech act and securitization theories as well as why and how these theories can improve our understanding of internalization in a transnational legal

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<sup>11</sup> Koh, *Internalization*, *supra* note 6, at 977.

<sup>12</sup> For an example of another work that looks to a kind of nano-process based on language, see Andrea Bianchi, *The Role of Non-State Actors in the Globalization of Human Rights: An International Lawyer's Perspective*, in GLOBAL LAW WITHOUT THE STATE 193–94 (Gunther Teubner ed., 1997) (arguing that human rights are enforced through discursive practices by the media that "code" actions as legal or illegal).

<sup>13</sup> MICHAEL WALZER, ON TOLERATION 8 (1997).

process. Part IV demonstrates the soundness of the proposition that the *Habré* case exemplifies transnational legal process at work. Part V is the meat of the article, relying on interviews and media reports to support the validity of the claim: linguistic competence and discursive strategies can help explain efforts to induce Senegal to internalize international legal norms in the *Habré* case. Part VI concludes with a review of the article's shortcomings and suggests future lines of inquiry that may address them.

## II. COMPLIANCE AND TRANSNATIONAL LEGAL PROCESS

Writings on international legal compliance are concerned with one overriding question: why do nations obey international law? As Louis Henkin put it, “[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>14</sup> Compliance theories attempt to explain why this is so.

### A. *Why Do States Comply With International Law?*

There are many answers to this question. Realists argue that compliance is merely a coincidence of states' interests being aligned with international law, that international law has a negligible influence on state compliance.<sup>15</sup> Moore and Guzman argue that state compliance with international law “signals” information that is not directly observable to other states.<sup>16</sup> States decide to engage in signaling based on an analysis of the costs and benefits associated with signaling compliance to other states.<sup>17</sup> For Thomas Franck, compliance is induced by the pull of a rule's substantive and procedural fairness.<sup>18</sup> According to Chayes and Chayes, state compliance

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<sup>14</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (emphasis omitted).

<sup>15</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 15, 225 (2005); Goldsmith & Krasner, *supra* note 5; Posner, *supra* note 5, at 25–26.

<sup>16</sup> David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 *NW. U. L. REV.* 879, 882–83 (2003).

<sup>17</sup> *Id.* at 885–87.

<sup>18</sup> THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS*

with treaty regimes, which is their sole focus, results from three factors: efficiency, interests, and norms.<sup>19</sup> These factors operate within a “new sovereignty” state system in which states are bound in a tight web of international connections and transactions that render them susceptible to persuasion.<sup>20</sup>

In a similar vein, transnational network theory addresses the increased influence of transnational advocacy networks and the concomitant altering of state sovereignty. Transnational network theory posits that human rights norms become internalized (Risse and Sikkink prefer the term “socializ[ed]”)<sup>21</sup> in states as a result of transnational advocacy networks connecting with domestic actors who provide information on state non-compliance with international legal norms.<sup>22</sup> Once alerted, transnational advocacy networks link up with international regimes, pressure the norm-violating state, and mobilize international organizations and other states to apply pressure as well.<sup>23</sup>

Another notable contribution to the compliance debate is Goodman and Jinks’ notion of acculturation, defined as “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture.”<sup>24</sup> According to this view, explanations of compliance fixated on coercion or persuasion do not adequately account for the complex social environment in which social and legal norms are transmitted.<sup>25</sup> The effects of acculturation are observable when actors in the target state identify with a particular group and feel cognitive and social pressure to conform to that group.<sup>26</sup>

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7 (1995).

<sup>19</sup> ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 4 (1995).

<sup>20</sup> *Id.* at 25–26.

<sup>21</sup> Thomas Risse and Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 5 (Thomas Risse et al. eds., 1999) (the “process by which international norms are internalized and implemented domestically can be understood as a process of *socialization*.”) (emphasis in original).

<sup>22</sup> *Id.* at 3–6, 15–16.

<sup>23</sup> *Id.* at 3–5, 18–20.

<sup>24</sup> Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 626 (2004).

<sup>25</sup> *Id.* at 625.

<sup>26</sup> *Id.* at 627.

Koh argues that acculturation merely marks a midpoint between persuasion and coercion and is, therefore, in fact incomplete internalization.<sup>27</sup> While Goodman and Jinks consider acculturation to be distinct from coercion and persuasion, Koh views acculturation as one step in an “evolutionary process” in which coercion helps bring about persuasion and incomplete persuasion is acculturation.<sup>28</sup> Once persuasion is complete, the norm is fully internalized<sup>29</sup> in the sense that the state obeys international law because it perceives that the norm is part of its “internal value set.”<sup>30</sup> Koh also criticizes Goodman and Jinks for failing to provide a detailed explanation of the mechanism by which domestic channels influence state compliance.<sup>31</sup> Yet, transnational legal process theory can be criticized because it too suffers from an inability to fully explain how international legal norms are internalized.<sup>32</sup>

### *B. Transnational Legal Process Theory*

Koh defines transnational legal process as “a process whereby public and private actors, including nation states, corporations, international organizations, non-governmental organizations, and individuals interact in a variety of fora to interpret, enforce, and ultimately internalize rules of international law.”<sup>33</sup> Transnational legal process theory describes a “dialectical”<sup>34</sup> and dialogic process whereby interactions between various private and public actors induce state compliance with international law and create international law because these repeated interactions

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<sup>27</sup> Koh, *Internalization*, *supra* note 6, at 980.

<sup>28</sup> *Id.* at 981.

<sup>29</sup> *Id.*

<sup>30</sup> Koh, *Home*, *supra* note 1, at 644.

<sup>31</sup> *Id.*

<sup>32</sup> Moore, *supra* note 16, at 881.

<sup>33</sup> Koh, *September*, *supra* note 9, at 339.

<sup>34</sup> Koh, *New Haven*, *supra* note 2, at 569 (citing Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 *YALE J. INT'L L.* 301, 305 (2007)); *cf.* Melissa A. Waters, *Dialectical Regulation: The Murky Middle Ground*, 38 *CONN. L. REV.* 961, 962 (2006) (“Dialectical regulation . . . involves patterns of institutional interaction resulting from interdependence among regulatory agencies. This interdependence leads to a significant degree of integration in regulatory outputs . . .”).

strengthen and modify international legal norms.<sup>35</sup> In turn, the international law that emerges impacts future noncompliance and, therefore, future interactions.<sup>36</sup> Koh refers to “agents of internalization” in meaning those individuals, international organizations, or governments that provoke these interactions and dialogues aimed at inducing state compliance with international law.<sup>37</sup>

There are four core characteristics of a transnational legal process. The first is nontraditional in that domestic and international law are not distinct categories, but blended.<sup>38</sup> The second is non-statist, as both state and non-state actors are instrumental players in transnational legal processes.<sup>39</sup> The third is dynamic because it “transforms, mutates, and percolates up and down” from the national level to the international level.<sup>40</sup> The fourth is normative; it creates law by inducing states to comply.<sup>41</sup> In addition, there are three phases within these processes: interaction, interpretation, and internalization.<sup>42</sup>

It is important to note that Koh does not disavow other explanations of state compliance. He thinks explanations of power, interest, legitimacy, and communitarianism have their place.<sup>43</sup> Rather, his point is these explanations overlook the critical importance of transnational legal process in inducing state compliance.<sup>44</sup> Specifically, these competing explanations are not entirely accurate because they fail to adequately account for internalization.<sup>45</sup> Internalization is the key. It is also the problem.

The classical view of state compliance focuses on horizontal

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<sup>35</sup> See Eugene C. Lim, *A Long 'TRIP' Home: Intellectual Property Rights, International Law and the Constructivist Challenge*, 4 J. INT'L L. & INT'L REL. 57, 76 (2008).

<sup>36</sup> *Id.*

<sup>37</sup> Koh, *Home*, *supra* note 1, at 646–55.

<sup>38</sup> Koh, *Process*, *supra* note 6, at 184.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Koh, *September*, *supra* note 9, at 339.

<sup>43</sup> *Id.* at 338.

<sup>44</sup> Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1401–06 (1999).

<sup>45</sup> See Koh, *Nations*, *supra* note 6, at 2602–03.

internalization, but, in Koh's view, horizontal models must be combined with vertical models to provide a complete picture of state compliance.<sup>46</sup> Horizontal internalization consists of treaty conferences, summits, and other similar gatherings "where nation-states interact in intergovernmental fora, with the main goal of promoting compliance with international law."<sup>47</sup> What remains murky is the vertical internalization aspect of state compliance. Vertical internalization occurs when agents of internalization, which can be state or non-state actors, interact with a violating state in a variety of domestic and international fora to induce compliance with international law.<sup>48</sup> Through full participation in law-creating processes, states internalize the norms that are the subject of those processes to the point where they become part of the state's "internal value set."<sup>49</sup> This vertical internalization, or "domestication," is the most powerful means of enforcing international law, transmogrifying it from external "their" law into internal "our" law. The tools of this transformation are well known to lawyers: legislation, executive action, and judicial interpretation.<sup>50</sup> Senegal has employed all three of these tools in the *Habré* case, yet complete internalization remains elusive.

Thus far I have been imprecise with my terminology. Koh draws a clear distinction between compliance and obedience. He defines compliance as occurring when "people are both aware of the rule and consciously accept its influence, but do so in order to gain specific rewards (e.g., insurance benefits) or to avoid specific punishments (e.g., traffic tickets)."<sup>51</sup> Obedience

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<sup>46</sup> Koh, *Torturer*, *supra* note 9, at 1146. For an example of an academic in accord with Koh on this point, but who sees even transnational legal process and its cousins as insufficient to capture the complex matrix in which international law operates, see Berman, *supra* note 2, at 490 ("An interdisciplinary study of these processes of international, transnational, and subnational norm development and interpenetration [law and globalization] does not, of course, render either traditional international law or the idea of nation-state sovereignty irrelevant, but it does complicate the picture significantly, prompting the need for a more comprehensive set of inquiries.").

<sup>47</sup> Koh, *September*, *supra* note 9, at 339.

<sup>48</sup> *Id.*

<sup>49</sup> Harold Hongju Koh, *The 2004 Term: Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 2-3 (2004).

<sup>50</sup> *Id.* at 4.

<sup>51</sup> Koh, *Home*, *supra* note 1, at 628.

“occurs when a person or organization adopts rule-induced behavior because the party has internalized the norm and incorporated it into its own internal value system.”<sup>52</sup> For Koh, the goal is not merely compliance, but obedience. He summarizes the relationship between the two as follows: “most compliance comes from obedience; most obedience comes from norm-internalization; and most norm-internalization comes from participation in legal process, particularly transnational legal process.”<sup>53</sup> In other words, obedience is “internalized compliance.”<sup>54</sup> Obedience<sup>55</sup> could thus be considered a fourth phase of transnational legal process proceeding interaction, interpretation, and internalization.<sup>56</sup>

Finally, there are three forms of internalization: social, political, and legal. Social internalization is “when a norm acquires so much public legitimacy that there is widespread general adherence to it.”<sup>57</sup> Political internalization is when “the political elites accept an international norm and advocate its adoption as a matter of governmental policy.”<sup>58</sup> Legal internalization is defined as “when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or some combination of the three.”<sup>59</sup>

The transnational legal process of interaction, interpretation, internalization (social, political, and legal), and obedience may be summarized as follows:

Normally, one or more transnational actors provokes an interaction, or series of interactions, with another in a law-declaring forum. This forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to force the other party to internalize the new interpretation of the

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<sup>52</sup> *Id.*

<sup>53</sup> Koh, *September*, *supra* note 9, at 339.

<sup>54</sup> Koh, *Home*, *supra* note 1, at 629.

<sup>55</sup> To clarify, in sections of this article discussing Koh’s transnational legal process theory the term “compliance” should be read as synonymous with “obedience,” as Koh defines the term.

<sup>56</sup> Koh, *Home*, *supra* note 1, at 644.

<sup>57</sup> *Id.* at 642.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

international norm into its normative system. The provoking actor's aim is to 'bind' the other party to obey the new interpretation as part of its internal value set. The coerced party's perception that it now has an internal obligation to follow the international norm leads it to step four: obedience to the newly interpreted norm.<sup>60</sup>

As will be explained in more detail below, the above description of transnational legal process matches what can be observed in the *Habré* case. The agents of internalization (the "Agents")<sup>61</sup> filed a complaint against the former Chadian President, Hissène Habré, who had been residing in Senegal since 1990 in contravention of Senegal's obligation to extradite or prosecute him under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").<sup>62</sup> The Agents used multiple judicial fora—Senegalese and Belgian courts, the UN Committee against Torture (the "CAT"), and the International Court of Justice, and the African Union—in order to spark interactions with Senegal and force a particular interpretation of universal jurisdiction and the Torture Convention.<sup>63</sup> The interpretation propounded by the Agents was incorporated into Senegal's legal order via amendments to the Penal Code and Constitution.<sup>64</sup> In other words, partial norm internalization (that is, legal internalization) has occurred. This use of multiple judicial fora by lawyers is what Koh refers to as "transnational public law litigation," which is one of the means by which transnational legal process operates.<sup>65</sup> Unfortunately,

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<sup>60</sup> *Id.* at 644.

<sup>61</sup> I use the term Agents as shorthand for agents of internalization. The term encapsulates not only Habré's victims and human rights NGOs, but all actors, including Senegalese governmental actors, seeking to internalize in Senegal universal jurisdiction and the obligation to extradite or prosecute. The composition of the Agents changes as some groups or individuals, for example, participate in Belgian litigation but others do not. I want to avoid getting bogged down in minutia and emphasize the idea that whichever individual or group is striving for internalization in Senegal at any given moment is acting as an agent of internalization. If the individuals or organizations involved at a given moment are important enough I will distinguish them from other Agents.

<sup>62</sup> *See infra* Part IV.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Koh, *Litigation*, *supra* note 6, at 2348.

what is lacking in the *Habré* case is the final step: complete norm internalization and, thus, obedience.

Transnational legal process has been criticized for espousing the use of transnational public law litigation, which uses the courts to induce state compliance with international law. Waters argues transnational legal process suffers from a significant legitimacy problem because of its commitment to furthering fundamental human rights through counter-majoritarian institutions, such as the courts.<sup>66</sup> The riposte to this argument is that the nature of internalization necessitates full acceptance of the norm: socially, politically, and legally.<sup>67</sup> Obedience, as opposed to compliance, by definition, requires a norm to become part of the internal value set of society and its policymakers.<sup>68</sup> Transnational legal process is successful only if the internalized international legal norm possesses a broad base of support outside the courtroom.

Keohane also criticizes Koh for failing to explain the liberal democracy bias in favor of internalization. Koh disregards regime-type as a factor influencing internalization.<sup>69</sup> He prefers to explain internalization as a function of the type of international legal norm being internalized (e.g. human rights versus banking standards).<sup>70</sup> In contrast, Keohane argues liberal states are more likely to internalize international legal norms.<sup>71</sup> He identifies four factors that likely contribute to a successful internalization: (1) transparency of state practice, (2) connections among professionals (e.g., judges), (3) connections between social movements and issue-advocacy networks, and (4) elite accountability to the public.<sup>72</sup> According to Keohane, by excluding regime type from his analysis, Koh only begins to describe the internalization of international legal norms.<sup>73</sup> In

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<sup>66</sup> Waters, *supra* note 5, at 458.

<sup>67</sup> See Chander, *supra* note 2.

<sup>68</sup> *Id.*

<sup>69</sup> Koh, *Home*, *supra* note 1, at 674.

<sup>70</sup> *Id.* at 674–75.

<sup>71</sup> Robert Keohane, *When Does International Law Come Home?*, 35 HOUS. L. REV. 699, 710–11 (1998).

<sup>72</sup> *Id.*

<sup>73</sup> Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 720–21 (2007).

my view, Keohane and Koh's efforts may be misdirected. Rules and regimes are possible proximate causes of internalization, but perhaps not the ultimate causes. The question should not focus on norm-type or regimes, but on agency, audience, and context.

The most incisive criticism to date of transnational legal process theory comes from Raustiala and Slaughter. They argue that Koh has described internalization as both a definition of compliance and its cause.<sup>74</sup> Internalization cannot be both dependent and independent variables. It cannot be cause *and* effect. Consequently, "rather than explaining why and when states follow international rules, Koh instead describes an empirical pathway to obedience—or, more precisely, a pathway to norm incorporation into domestic law—and details the ways in which transnational actors and practices influence this process."<sup>75</sup> To remedy this problem, I want to probe deeper than an explanation centered solely on internalization will allow. By focusing on the elemental factors of agency, we can better understand the variables influencing internalization and begin to separate the causes of internalization from the definition of compliance.

Raustiala and Slaughter have also pointed out that transnational legal process theory suffers from a lack of analyses across cases.<sup>76</sup> As a result, they claim, "Koh cannot say when non-compliance should occur or what the optimal response should be."<sup>77</sup> Indeed, one of the criticisms of "first generation" compliance theorists is that they have not provided adequate empirical evidence of the mechanisms by which states are induced to comply with international law.<sup>78</sup> What follows is an attempt to inch toward a "second generation" approach whereby arguments concerning the mechanics of

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<sup>74</sup> Raustiala & Slaughter, *supra* note 8, at 544.

<sup>75</sup> *Id.*; see also Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*, 4 J. INT'L L. & INT'L REL. 151, 187 (2008) ("[Koh] describes political and legal interactions leading to internalization in fairly mechanistic terms . . . at the endpoint the norm somehow acquired its 'stickiness' and states complied with it because it had been internalized. How this leap takes place . . . is not clear.").

<sup>76</sup> Raustiala & Slaughter, *supra* note 8, at 544.

<sup>77</sup> *Id.*

<sup>78</sup> See Goodman & Jinks, *supra* note 24, at 624.

inducing state compliance are empirically supported.<sup>79</sup> The interviews and media sources relied upon provide strong empirical support for my argument, demonstrating that the three factors of agency can aid our understanding of the internalization of international legal norms. An in-depth examination of a single case may elucidate some of the variables influencing internalization and thus offer insights for more ambitious comparative studies.

### III. SPEECH ACTS AND SECURITIZATION THEORY

Before delving into speech acts and securitization theory, an important question must be answered: why attempt to explain transnational legal process with a seemingly far removed securitization theory and an even further removed linguistic theory on speech acts?<sup>80</sup> The short answer is constructivism. Constructivism, broadly understood, is the intellectual heritage shared by securitization and transnational legal process theories. Transnational legal process theory is partly a product of discourses between international law and international relations, specifically, its constructivist branch.<sup>81</sup> By arguing that agents of internalization can induce international legal compliance through repeated interactions with wayward states, transnational legal process theory plainly adopts constructivist elements. For transnational legal process theory, as for constructivism, state identity and interests are not a rational result of an anarchic international structure, but are the result of a process of interaction between state and non-state actors that endows states with subjective identities and interests.<sup>82</sup> In other words, “constructivists believe that the

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<sup>79</sup> *Id.*

<sup>80</sup> *E.g.*, Nicholas Onuf, *Do Rules Say What They Do? From Ordinary Language to International Law*, 26 HARV. INT'L L. J. 385, 402 (1985) (using speech act theory to create a typology of all social rules). I am not the first to use speech acts to further an understanding of international law but, to my knowledge, I am the first to use speech acts to explain transnational legal process.

<sup>81</sup> *See* Koh, *New Haven*, *supra* note 2, at 570 (“The idea of normativity connects the Transnational Legal Process School to the ‘Constructivist’ School of international relations.”).

<sup>82</sup> *Id.*; *see* Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 395 (1992).

interests of states are created—at least in part—through interaction and can change through interaction.”<sup>83</sup> The same is true for securitization theory, which is the “strongest off-shoot” of constructivism’s contribution to security studies.<sup>84</sup>

Securitization theory has taken an additional step in constructivist thought, reasoning that if agents induce structural change, then the language of those agents should be examined through linguistic theory, specifically, speech acts.<sup>85</sup> Transnational legal process theory could also benefit from taking that additional step by building on its constructivist roots and examining the language of the agents of internalization. Securitization theory and its critics, like Balzacq, are a natural starting point for such an examination because of their extensive use of linguistic theory.

In his seminal work, *How to Do Things with Words*, Austin wrestled with the classical distinction between constatives and performatives. A constative is an utterance which is about the truth or falsity of what it describes or reports (i.e. a statement).<sup>86</sup> A performative is an utterance that performs an action.<sup>87</sup> Austin’s inability to maintain a meaningful distinction between constatives and performatives led to his articulation of speech act theory.<sup>88</sup>

Austin distinguishes between three types of speech acts: locutionary, illocutionary, and perlocutionary. By uttering this very sentence I am doing something; I am in a sense performing an act.<sup>89</sup> This is a locutionary act.<sup>90</sup> An illocutionary act is an utterance “such as informing, ordering,

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<sup>83</sup> David Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L.J. 469, 477 (2001) (quoting ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 128 (1999)).

<sup>84</sup> Thierry Balzacq, *Constructivism and Securitization Studies*, in *THE ROUTLEDGE HANDBOOK OF SECURITY STUDIES* 56 (Myriam Dunn Cavelty & Victor Mauer eds., 2011).

<sup>85</sup> See *id.* (“Securitization theory argues that language is not only concerned with what is ‘out there’ . . . but is also constitutive of that very social reality[, as] . . . securitization is ‘constructivist all the way down.’”).

<sup>86</sup> J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 1 (2d ed. 1989).

<sup>87</sup> *Id.* at 5–7.

<sup>88</sup> John R. Searle, *Austin on Locutionary and Illocutionary Acts*, 77 PHIL. REV. 405, 405 (1968).

<sup>89</sup> AUSTIN, *supra* note 87, at 94.

<sup>90</sup> *Id.* at 101.

warning, undertaking . . . i.e., utterances that have a certain (conventional) force.”<sup>91</sup> The utterance: “I do,” in a marriage ceremony is an illocutionary act because it is the “performance of an act *in* saying something.”<sup>92</sup> Finally, a perlocutionary act is “what we bring about or achieve by saying something, such as convincing, persuading, deterring, even, say, surprising or misleading.”<sup>93</sup> If the norm of universal jurisdiction is fully internalized in Senegal and Habré is eventually tried for his alleged crimes, this will be the perlocutionary act performed by the utterance: “Habré should be fairly tried.” Habermas sums up speech act theory nicely:

Through locutionary acts the speaker expresses states of affairs; he says something. Through illocutionary acts the speaker performs an action in saying something. The illocutionary role establishes the mode of the sentence . . . employed as a . . . promise, command, avowal, or the like . . . Finally, through perlocutionary acts the speaker produces an effect upon the hearer. By carrying out a speech act he brings about something in the world. Thus the three acts that Austin distinguishes can be characterized in the following catchphrases: to say *something*, to act *in* saying something, to bring about something *through* acting in saying something.<sup>94</sup>

Each one of these acts (locutionary, illocutionary, and perlocutionary) are the total speech act.<sup>95</sup> Thus, the Agents want to move immediately beyond the locutionary act of uttering: “Habré should be fairly tried,” and trek to the perlocutionary act of prosecution. The sought after result, or perlocutionary act, is obedience by transforming the utterance: “Habré should be fairly tried,” into a fair trial for Habré.

The Copenhagen School’s (the “CS”) securitization theory seizes on Austin’s notion of an illocutionary act to explain how a policy issue is elevated from normal politics to a matter of national or international security. The CS explains

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<sup>91</sup> *Id.* at 109.

<sup>92</sup> *Id.* at 99.

<sup>93</sup> *Id.* at 109.

<sup>94</sup> JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 288–89 (Thomas McCarthy trans., 1984), *quoted in* Onuf, *supra* note 80, at 397–98 (emphasis in original).

<sup>95</sup> Thierry Balzacq, *The Three Faces of Securitization: Political Agency, Audience and Context*, 11 *EUR. J. INT’L REL.* 171, 175 (2005).

securitization as an illocutionary act:

The process of securitization is what in language theory is called a speech act. It is not interesting as a sign referring to something more real; it is the utterance itself that is the act. By saying the words, something is done (like betting, giving a promise, naming a ship).<sup>96</sup>

When a securitizing actor utters “security” in relation to a referent object (the thing that is threatened) to an audience, the securitizing actor is acting *in* saying something.<sup>97</sup> For CS, uttering “security” is the same as uttering: “I promise.” By saying it, the situation changes, the political becomes a matter of national or international security.<sup>98</sup> The CS thus assumes that “the enunciation of security itself creates a new social order wherein ‘normal politics’ is bracketed.”<sup>99</sup>

One could view the efforts to prosecute Habré in this light. By uttering: “Habré should be fairly tried,” to the Senegalese audience, his stay in Senegal becomes an issue of international concern, implicating universal jurisdiction and the obligation to extradite or prosecute within the Torture Convention. However, this view is unsatisfying. Habré has not been prosecuted, and it has proven an arduous process to convince Senegalese that universal jurisdiction and the Torture Convention’s obligation to extradite or prosecute should apply to him. In the *Habré* case, the situation clearly did not change simply by uttering: “Habré should be fairly tried.” It thus appears the efforts at internalization in the *Habré* case cannot be understood as an illocutionary act, such as: “I promise.” Securitization theory, so understood, is unhelpful in furthering an explanation of internalization.

The CS is unhelpful in understanding internalization because it ignores the perlocutionary act and thus contextual factors. The CS maintains that securitization is a self-referential practice “because it is in this practice [, the illocutionary act,] that the issue becomes a security issue—not necessarily because a real existential threat exists, but because

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<sup>96</sup> BARRY BUZAN, OLE WAEVER & JAAP DE WILDE, *SECURITY: A NEW FRAMEWORK OF ANALYSIS* 26 (1998).

<sup>97</sup> *Id.*

<sup>98</sup> *See id.*

<sup>99</sup> Balzacq, *supra* note 95, at 171.

the issue is presented as such a threat.”<sup>100</sup> Yet, the CS is quite clear that merely uttering security is insufficient: “[a] discourse that takes the form of presenting something as an existential threat to a referent object does not by itself create securitization . . . but the issue is securitized only if and when the audience accepts it as such.”<sup>101</sup> On the one hand, the CS includes the contextual factors of the securitizing agent and the audience into its theory, but on the other, it implicitly dismisses the relevance of context by suggesting only the linguistic rules governing an illocutionary act are relevant in determining a successful securitization.<sup>102</sup> In short, either securitization is self-referential, looking to the utterance per se, or intersubjective, looking outside the utterance to the securitizing agent and the audience.<sup>103</sup>

Balzacq opts for the intersubjective view because of the importance of the perlocutionary act.<sup>104</sup> The goal of securitization is “to prompt a significant response from the other;”<sup>105</sup> this response can only be achieved through the perlocutionary act.<sup>106</sup> As Balzacq puts it, “to study securitization is to unravel the process by which a securitizing actor induces an audience to agree with a given interpretation of an event or a set of events.”<sup>107</sup> This quotation can be refitted to apply to a study of internalization in transnational legal process. Recall that complete persuasion is full internalization—getting the target country to agree to a norm such that it becomes part of its internal value set. Examining internalization in the *Habré* case necessitates an understanding of the process by which the Agents induce the Senegalese audience to agree that Habré should be fairly tried and prosecute him accordingly. In the *Habré* case, success comes with the application of universal jurisdiction and the Torture Convention to prosecute. Amendments to the Constitution and Penal Code permitting Habré to be lawfully

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<sup>100</sup> BUZAN ET AL., *supra* note 96, at 24.

<sup>101</sup> *Id.* at 25.

<sup>102</sup> *See* Balzacq, *supra* note 95, at 177–78.

<sup>103</sup> *Id.* at 177.

<sup>104</sup> *Id.* at 177–78.

<sup>105</sup> *Id.* at 175.

<sup>106</sup> *Id.* at 175–76.

<sup>107</sup> *Id.* at 187.

prosecuted in Senegal are insufficient.

Once the primacy of the perlocutionary act is accepted, one should consider factors of agency, audience, and context.<sup>108</sup> This is because the perlocutionary act is context dependent; it is “specific to the circumstances of issuance, and is therefore not conventionally achieved just by uttering particular utterances, and includes all those effects, intended or unintended, often indeterminate, that some particular utterances in a particular situation may cause.”<sup>109</sup> The perlocutionary act is concerned with *this* securitizing agent’s ability to convince *this* audience, in *this* context, that the issue should be securitized. Securitization, as with internalization, can still be understood through speech act theory, but it must focus on the perlocutionary act. This reorientation allows an analysis of agency (I am excluding context and audience from my analysis)<sup>110</sup> to aid in understanding Balzacq, securitization, and, for us, the internalization phase of transnational legal process.

Balzacq’s discussion of agency’s impact on securitization is intricate and need not be reproduced in full here. Suffice it to say what he means by agency is the ability of the securitizing agent to use discourse to produce agreement among the audience that an issue should be securitized. Agency, thus, “involves the capacity of the securitizing actor to use appropriate words and cogent frames of reference in a given

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<sup>108</sup> *Id.* at 175–76.

<sup>109</sup> AUSTIN, *supra* note 87, at 14–15.

<sup>110</sup> *Id.* at 192. To understand the role of the audience, Balzacq argues three factors must be examined: (1) the “audience’s frame of reference,” (2) “its readiness to be convinced, which depends on whether it perceives the securitizing actor as knowing the issue and as trustworthy,” and (3) “its ability to grant or deny a formal mandate to public officials.” *Id.* An examination of context “concerns contextual effects on the audience’s responsiveness to the securitizing actor’s arguments—relevant aspects of the *Zeitgeist* that influence the listener, and the impact of the immediate situation on the way the securitizing author’s sentences are interpreted by the listener.” *Id.* at 182. Put simply, when securitization is attempted it causes the audience to look around to see if the situation requires securitization of the issue. *Id.* at 182–83. Balzacq illustrates the point with the Popish Plot of 1678. Protestants were more responsive to efforts to securitize the Catholic threat because of the widely held belief among Protestants that Catholics were responsible for the Great Fire of London in 1666, the perceived economic threat from France’s King Louis XIV, and the prospect that the King’s Catholic brother may succeed him. *Id.* at 183.

context, in order to win the support of the target audience for political purposes.”<sup>111</sup> Put simply, agency is the power of words to produce a result.<sup>112</sup> Applied to internalization in the *Habré* case, the Agents are those who attempt to use words to persuade their target audience, the Senegalese public and elites, to agree that Habré should be fairly tried and prosecuted. Concluding the discussion here would not address the problem of inadequately explaining why internalization occurs because the notion of agency, in the form of agents of internalization, is already incorporated into transnational legal process theory’s explanation.

For our purposes, the importance of Balzacq’s work is the factors that he argues influence agency. These factors are: (1) the validity of the claim itself, (2) linguistic competence, and (3) the discursive strategy employed.<sup>113</sup> Concerning the validity of the claim, in order for any claim uttered by an agent (in our case the Agents) to be accepted by the audience (in our case the Senegalese) and subsequently internalized, it must have a sufficient level of validity *per se*. This statement is a rather pedestrian yet important point, for “the determination of evidence for truth claims does not only derive from the authority of the speaker, but emerges also out of the claim itself.”<sup>114</sup> The claim cannot be that Habré should be fairly tried for a host of crimes with no logical or legally valid connection to him, such as the attempt to assassinate U.S. President Reagan in March 1981. Such a ludicrous claim is clearly invalid and would rightly not produce the desired perlocutionary act. The claim that Habré should be fairly tried for torture and other international crimes allegedly committed during his presidency, however, appears to be sufficiently valid *per se*. Therefore, the issue is with the Agents’ linguistic competence and discursive strategies.

Linguistic competence comprises the idea of “who is allowed to speak about a subject matter or who can partake in the debate.”<sup>115</sup> Only some individuals have sufficient linguistic

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<sup>111</sup> *Id.* at 192.

<sup>112</sup> *See id.* at 190.

<sup>113</sup> *Id.* at 190–91.

<sup>114</sup> *Id.* at 191.

<sup>115</sup> *Id.* at 190.

competence and are, therefore, influential with respect to a given issue because of their political and cultural capital, privileged access to the media, or the trust they command from the target audience.<sup>116</sup> Cultural capital is defined as knowledge of the audience and the cultural context in which that audience is situated (e.g., the reverence for Senegalese religious leaders).<sup>117</sup> Political capital means the position of power held by the actor vis-à-vis the audience and the issue.<sup>118</sup> Balzacq does not offer a definition of trust, but we may borrow from Rathburn, for whom trust is “the belief that one’s interests will not be harmed when placed within the hands of another.”<sup>119</sup> When the Agents argue for Habré’s prosecution, they are in essence asking Senegalese to place Senegal’s interests in their hands. The trust dynamics upon which I focus are between the Senegalese and the Agents and the Senegalese and the Counter-Agents—those individuals or groups opposing internalization in the *Habré* case and, thus, his prosecution. Moreover, in my view, because linguistic competence is a function of “the power position of the agent,”<sup>120</sup> then, like the Agent’s power position, it is fluid rather than fixed. Both the Agents and the Counter-Agents have attempted to erode each other’s power positions and, therefore, each other’s linguistic competence.

Finally, the discursive strategy, or “the manner in which the securitizing actor makes the case for the point at stake,” can also impact words’ agency.<sup>121</sup> Discursive strategies are based on logical rigor, emotional intensity, or some combination thereof.<sup>122</sup> Cut-to-the-bone, linguistic competence, the validity of the claim, and discursive strategies explain the perlocutionary act as a consequence of, respectively, who speaks, what he says, and how he says it.

As we will see, the problem with internalization in the *Habré* case is that the Agents have struggled to secure the

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<sup>116</sup> Balzacq, *supra* note 95, at 191.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Brian C. Rathbun, *It Takes All Types: Social Psychology, Trust, and the International Relations Paradigm*, 1 INT’L THEORY 345, 346 (2009).

<sup>120</sup> Balzacq, *supra* note 95, at 190.

<sup>121</sup> *Id.* at 191.

<sup>122</sup> *Id.*

levels of capital and trust necessary to possess the linguistic competence that will bring about the perlocutionary act: agreement that Habré should be fairly tried and his resultant prosecution. The Agents are not the only actors with putative linguistic competence to speak on whether Habré should be prosecuted. There are many competing voices in the cacophony and some of these voices opposing Habré's prosecution command high levels of cultural and political capital as well as trust. It is these actors that the Agents must contend with in order to secure the linguistic competence to produce full norm internalization.

Thus, building on Balzacq's critique of securitization theory to examine the *Habré* case, we can begin to provide a more accurate answer to the question of why internalization occurs. Yet, before moving to this task, I shall demonstrate that the *Habré* case is indeed an example of transnational legal process.

#### IV. THE *HABRÉ* CASE AS A TRANSNATIONAL LEGAL PROCESS

Recall that a transnational legal process has four characteristics: it is (1) nontraditional (a hybrid of international and national), (2) non-statist (non-state actors play instrumental roles), (3) dynamic (moving from national and international venues), and (4) normative (law-creation and compliance with that law are its aims).<sup>123</sup> These four characteristics are visible in three distinct phases: interaction, interpretation, and internalization.<sup>124</sup> The following description of the *Habré* case will largely concentrate on interaction and interpretation, while Part V will provide a more detailed account of the internalization phase. If the *Habré* case exhibits the above four characteristics and three phases, then we may reasonably conclude it is an example of transnational legal process at work.

The first interaction between the Agents and Senegal occurred with the filing of a criminal complaint against Habré in a Dakar court in January 2000 on behalf of some of his victims with the help of both international and domestic

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<sup>123</sup> Koh, *Process*, *supra* note 6, at 184.

<sup>124</sup> Koh, *September*, *supra* note 9, at 339.

NGOs.<sup>125</sup> This complaint sought to interpret the Torture Convention and customary law concerning universal jurisdiction so as to require Habré's prosecution for the following alleged crimes: 97 extra-judicial killings, 142 cases of torture, 100 disappearances, and 736 arbitrary arrests.<sup>126</sup> Initially, the relevant governmental actor concurred with the Agents. Habré was indicted by Judge Demba Kandji for torture and an investigation was opened for crimes against humanity, disappearances, and barbarous acts.<sup>127</sup> The issue then became one of internalization, a phase in the process that has been fiercely contested by Habré and other Counter-Agents. After acceptance of the complaint by Judge Kandji, Habré retaliated by reportedly spending enormous sums of money to convert a once pro-prosecution Senegalese press into a pro-Habré one.<sup>128</sup>

The contested internalization phase continued with the *contretemps* of Abdoulaye Wade's election as President in February 2000. Immediately, the Executive began to interfere in the prosecution.<sup>129</sup> Madické Niang, Habré's lawyer, was appointed special advisor to the President. The Senegalese bar protested this conflict of interest and Wade responded by altering Niang's title to consultant.<sup>130</sup> Indeed, Niang's conflict

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<sup>125</sup> Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1059 (2004).

<sup>126</sup> Reed Brody, *Using Universal Jurisdiction to Combat Impunity*, in JUSTICE FOR CRIMES AGAINST HUMANITY 374, 383 (Mark Lattimer & Philippe Sands eds., 2003); COMMISSION D'ENQUÊTE NATIONALE [NAT'L COMM'N OF INQUIRY], LES CRIMES ET DETOURNEMENTS DE L'EX-PRÉSIDENT HABRÉ ET DE SES COMPLICES [CRIMES AND ABUSES OF THE EX-PRESIDENT HABRÉ AND HIS ACCOMPLICES] 97–99 (1993) (documenting Habré's crimes); see also ÉSAÏE TOÏNGAR, A MEMOIRE OF SURVIVAL, 1982–1986: A TEENAGER IN THE CHAD CIVIL WAR 16 (2006) (providing an eye-witness account of life in southern Chad in the early years of Habré's rule, as follows: "Most of his rebels . . . were quick to kill people. The only language they knew was Gourane, which was spoken by few people in Chad . . . if you answered them in French or Sara (the major dialect of the South), you would be tortured or killed.").

<sup>127</sup> Reed Brody & Helen Duffy, *Prosecuting Torture Universally: Hissène Habré, Africa's Pinochet?*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 823 (Horst Fischer et al. eds., 2001).

<sup>128</sup> Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissène Habré*, 16 HARV. HUM. RTS. J. 147, 169 (2003).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

of interest later worsened, as he was named Senegal's Minister of Justice, an important position for organizing the Habré trial, on April 14, 2008.<sup>131</sup>

After this reshuffling, Senegal rejected the interpretation of the Torture Convention and universal jurisdiction offered by the Agents. In July 2000, the Dakar Court of Appeals reversed Judge Kandji and dismissed the indictment against Habré.<sup>132</sup> Four days before the dismissal, on June 30, 2001, the Superior Council of the Magistracy, presided over by President Wade and the Minister of Justice, decided to transfer Judge Kandji from Chief Investigating Judge of the Dakar Regional Court to Assistant State Prosecutor at the Dakar Court of Appeals.<sup>133</sup> In the same meeting, it was agreed that the President of the Indicting Chamber, Cheikh Tidiane Diakhaté, before whom Habré's appeal was pending, would be promoted to the Council of State.<sup>134</sup> The battle to internalize the Agents' interpretation of the Torture Convention and universal jurisdiction was being lost. On March 20, 2001, the Court of Cassation upheld the Court of Appeals' dismissal of the indictment.<sup>135</sup> At this point, the efforts to prosecute Habré became not only non-statist and normative, but dynamic and nontraditional.

A *hegira* to Belgian courts followed the dismissal of the complaint in Senegal. In November 2000, some victims filed a criminal complaint in Belgian courts under its broad universal jurisdiction law.<sup>136</sup> In September 2005, after a four-year

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<sup>131</sup> Press Release, Human Rights Watch, Chronology of the Habré Case (Feb. 12, 2009) [hereinafter Chronology]; Press Release, Senegal's Foreign Minister Steps Down, AFP (Oct. 2, 2009) (stating that Niang left the Ministry of Justice in October 2009).

<sup>132</sup> Tanaz Moghadam, Note, *Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied To the Case of Hissène Habré*, 39 COLUM. HUM. RTS. L. REV. 471, 500 (2008).

<sup>133</sup> Brody & Duffy, *supra* note 127, at 824.

<sup>134</sup> *Id.* The Council of State has jurisdiction, *inter alia*, over election disputes and auditing of the government finances.

<sup>135</sup> Stephen P. Marks, *The Hissène Habré Case: The Law and Politics of Universal Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 146 (Stephen Macedo ed., 2004).

<sup>136</sup> See Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 892 (2003) (discussing in detail the political and legal issues surrounding Belgium's universal jurisdiction law).

investigation involving a fact-gathering expedition to Chad,<sup>137</sup> Belgian Judge Daniel Fransen charged Habré with genocide, crimes against humanity, torture, and war crimes, issuing an international warrant for his arrest.<sup>138</sup> In interacting with Belgian governmental actors, the Agents were able to successfully advocate for their interpretation of the Torture Convention and universal jurisdiction.

As further evidence of its dynamism and nontraditional nature, the case moved back to Senegal, where the Dakar Court of Appeals ruled that, as a former head of state, Habré enjoyed “immunity of jurisdiction.”<sup>139</sup> President Wade then formally entered the fray by announcing that Habré had one month to leave Senegal.<sup>140</sup> This proclamation triggered protests by the then UN High Commissioner for Human Rights, Mary Robinson, and the then UN Secretary-General, Kofi Annan, both of whom requested that Wade prevent Habré from leaving Senegal.<sup>141</sup> Meanwhile, the Agents sought another favorable international forum, the CAT, to pressure Senegal to adopt its interpretation of the Torture Convention.<sup>142</sup> In May 2006, the CAT ruled Senegal was obligated under the Torture Convention to prosecute or extradite Habré for his alleged acts of torture.<sup>143</sup>

Wade then appealed to the African Union (“AU”) for a resolution of the issue.<sup>144</sup> The AU created a Committee of

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<sup>137</sup> Press Release, Human Rights Watch, Belgian Judge Visits Chad to Probe Crimes of Ex-Dictator Hissène Habré (Feb. 26, 2002).

<sup>138</sup> Moghadam, *supra* note 132, at 504.

<sup>139</sup> *Id.*; Chronology, *supra* note 131 (stating that on *November 25*, “the Indicting Chamber of the Court of Appeals of Dakar rules that it had no jurisdiction to rule on the extradition request); Press Release, Human Rights Watch, L’avis de la Cour d’Appel de Dakar sur la Demande d’Extradition de Hissène Habré (Extraits) [Opinion of the Dakar Court of Appeals on the Request for the Extradition of Hissène Habré (Extract)] (Nov. 25, 2011).

<sup>140</sup> Press Release, Human Rights Watch, Chad: The Victims of Hissène Habré Still Awaiting Justice (July 11, 2005).

<sup>141</sup> *Id.*

<sup>142</sup> Decisions of the Committee Against Torture under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm’n No. 181/2001, CAT/C/36/D/181/2001, ¶¶ 9.6–9.9 (May 19, 2006).

<sup>143</sup> *Id.*

<sup>144</sup> Press Release, Human Rights Watch, Les Crimes de l’Ancien Dictateur Tchadien Entre les Mains de l’Union Africaine [The Crimes of the

Eminent African Jurists mandated to determine the best available means for trying Habré.<sup>145</sup> After reviewing the report of the Committee, the AU issued its decision on July 2, 2006, which “[m]andate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa.”<sup>146</sup> Wade agreed to comply with the AU’s decision.<sup>147</sup>

After Wade’s public agreement to try Habré, legal internalization proceeded. In February 2007, the Senegalese Code of Criminal Procedure was amended, permitting Senegalese courts to exercise universal jurisdiction over crimes against humanity, war crimes, torture, and genocide.<sup>148</sup> In addition, the Senegalese Constitution was amended in July 2008 to permit Senegalese courts to exercise jurisdiction over acts that, “when they were committed, were criminal according to the rules of international law relating to genocide, crimes against humanity and war crimes.”<sup>149</sup> Yet, Senegal has steadfastly refused to proceed with the Habré trial until financial support is forthcoming from the international community.<sup>150</sup> It thus appears that political and social internalization remains incomplete, and the proposed “fourth” phase of transnational legal process, obedience, has not occurred.

Nevertheless, the Agents continue to use national and international fora to interact with Senegal in order to induce

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Ex-Chadian Dictator Are in the Hands of the African Union] (Nov. 27, 2005).

<sup>145</sup> Decision on the Hissene Habre Case and the African Union, Assem./AU/Dec.103 (VI), Doc.Assem./AU/8 (VI) Add.9 (Jan. 23-24, 2006).

<sup>146</sup> Decision on the Hissene Habre Case and the African Union, Assem./AU/Dec.127(VII), Doc. Assem./AU/3 (VII) (Aug. 2, 2006).

<sup>147</sup> Press Release, Human Rights Watch, African Union: Senegal Agrees to Try Hissène Habré (July 2, 2006).

<sup>148</sup> Press Release, Human Rights Watch, Senegal: EU Parliament Calls for Support of Hissène Habré Trial (Apr. 26, 2007).

<sup>149</sup> 2008 CONST. art. 9; Press Release, Human Rights Watch, Senegal: Government Amends Constitution to Pave Way for Hissène Habré Trial (July 23, 2008).

<sup>150</sup> Request for Indication of Provisional Measures Submitted by the Government of the Kingdom of Belgium, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2009 I.C.J. (Feb. 17) (noting President Wade’s statement that if the international community does not provide financial support for the Habré trial, he will revoke Habré’s house arrest); Press Release, Human Rights Watch, Senegal Failing to Act on Trial of Hissène Habré (June 28, 2007).

Senegal to comply with the Torture Convention and prosecute Habré. Availing themselves of the change in Senegalese law, on September 16, 2008, fourteen Chadian victims filed criminal complaints in a Dakar court alleging that Habré is criminally responsible for torture and crimes against humanity.<sup>151</sup> In addition, Belgium filed an application with the ICJ seeking a ruling that Senegal must either prosecute Habré or extradite him to Belgium.<sup>152</sup> Finally, Habré's lawyers filed a petition with the Community Court of Justice of the Economic Community of West African States ("ECOWAS"), which requests the court "to stop all [Senegalese] prosecutions and/or actions against Mr. Hissène Habré."<sup>153</sup> On November 18, 2010, the ECOWAS Community Court of Justice ruled that Habré must be tried by an ad hoc international court.<sup>154</sup> In furtherance of this ruling, the African Union and Senegal recently agreed to establish an international court for the specific purpose of trying Habré.<sup>155</sup>

Based on the foregoing, transnational legal process is an apt theory for analyzing the *Habré* case. The initial interactions with Senegalese governmental actors resulted in a rejection of an interpretation of the Torture Convention and universal jurisdiction that would require Habré's prosecution.

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<sup>151</sup> Chronology, *supra* note 131.

<sup>152</sup> Application Instituting Proceedings, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.) 2009 I.C.J. 1, 15 (Feb. 16).

<sup>153</sup> Decision of The Court of Justice of the Economic Community of States of West Africa (*Hissein Habré v. Republic of Senegal*), No. ECW/CCJ/JUD/06/10 ¶ 1 (Nov. 18, 2010).

<sup>154</sup> *Id.* ("[T]he mandate received by [Senegal] from the African Union confers upon it a mission of conceiving and suggesting all proper modalities to prosecute and judge strictly within the scope of an ad hoc special procedure of an international character as is practiced in international law by all civilized nations."). This ruling has been criticized as mischaracterizing and misquoting the African Union's decision, which called for Habré to be tried in a competent "Senegalese" venue. In referencing the AU's decision the court dropped the word "Senegalese," which allows the Court to claim that its decision for trial before an international court is consistent with the AU's decision. E-mail from Reedy Brody, Counsel & Spokesperson, Human Rights Watch, to Caleb J. Stevens, Carter Ctr. Liberia Law Fellow, Rep. of Liber. Land Comm'n (Nov. 24, 2010, 10:05 PM).

<sup>155</sup> *Senegal, AU to set up court to try Chad ex-leader*, AFP (Mar. 15, 2011), [http://www.google.com/hostednews/afp/article/ALeqM5h3lW\\_qrtuVD6RTXMnShjGZhmORzg?docId=CNG.cf2168ef633c0557172d1154979356d7.d21](http://www.google.com/hostednews/afp/article/ALeqM5h3lW_qrtuVD6RTXMnShjGZhmORzg?docId=CNG.cf2168ef633c0557172d1154979356d7.d21).

This rejection forced the Agents to search for other international and national fora that could trigger interactions with Senegal, namely, to engage in transnational public law litigation.

Thus, the normativity of the campaign to fairly try Habré has been non-traditional (i.e. neither entirely national nor international) and dynamic (consisting of almost tempestuous movements from international to national fora). Those fora have consisted of Belgian courts, the CAT, the AU, the ECOWAS Community Court of Justice, and the ICJ, as well as informal talks with prominent members of the international community. These repeated interactions with Senegal in multiple fora resulted in the successful legal internalization of the interpretation proffered by the Agents. Moreover, the Agents prodded the government to utilize several methods of legal internalization: judicial interpretation, executive action, and legislation. What remains incomplete, however, are the efforts to induce obedience through social and political internalization—i.e., the fair trial of Hissène Habré.

#### V. THE INTERNALIZATION PROBLEM IN THE *HABRÉ* CASE AS A PROBLEM OF AGENCY

This section will draw on interviews and media reports to support my argument that the three factors of agency (claim's validity, linguistic competence, and discursive strategies) can partially explain the inability to induce social and political internalization in the *Habré* case and, thus, obedience (i.e., the perlocutionary act). As noted in Part III, the validity of the claim: "Habré should be fairly tried," is not really an obstacle. The allegations and legal arguments leveled against him appear to warrant a fair trial.<sup>156</sup> Indeed, the amendment to the

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<sup>156</sup> The legal proceedings served as a testing ground for the validity of the Agents' claim that Habré should be fairly tried. The Court of Cassation asserted three premises requiring the dismissal of the indictment against Habré: (1) the Torture Convention is not self-executing and, thus, Senegalese Constitution Article 98 providing that international law is superior to statutory law "does not apply," (2) the Torture Convention requires implementing legislation to satisfy Article 4's "jurisdiction to prescribe" and Article 5's "jurisdiction to adjudicate," and (3) although legislation was passed implementing the "jurisdiction to prescribe" under Article 4, there has been no legislation implementing Article 5's "jurisdiction to adjudicate."

Guengueng v. Habré, Ct. of Cassation (Mar. 20, 2001). Article 5 of the Torture Convention provides, in relevant part, “[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4,” i.e. torture, attempted torture, complicity to commit torture. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment art. 5, *opened for signature* Feb. 4, 1985, 1465 U.N.T.S. 85. The Court of Cassation interpreted Article 4 as requiring State Parties to exercise “jurisdiction to prescribe” (i.e. to make torture criminal) and Article 5 as requiring State Parties to exercise “jurisdiction to adjudicate” (i.e. to vest courts with universal jurisdiction over torture). Guengueng v. Habré, Ct. of Cassation (Mar. 20, 2001). On August 28, 1996 Senegal added Article 295-1 to the Penal Code, which makes torture a criminal offense. CODE PÉNAL art. 295-1. The Court of Cassation agreed with the Court of Appeals that this amendment satisfied Article 4’s jurisdiction to prescribe. Guengueng v. Habré, Ct. of Cassation (Mar. 20, 2001). The problem, according to both the Court of Appeals and the Court of Cassation, lay with Article 5’s jurisdiction to adjudicate. *Id.* Absent legislation granting Senegalese courts universal jurisdiction over torture pursuant to the Torture Convention, Habré could not be prosecuted for alleged torture committed outside Senegal. *Id.* The opinion of the Court of Cassation has been criticized on at least three grounds. First, Constitution Article 98 provides that treaties are superior to domestic law and Senegal is a monist legal system that grants treaties direct effect. 2008 CONST. art. 98 (“Treaties . . . ratified or approved are, upon their publication, authority superior to other laws . . . .”); *see also* Moghadam, *supra* note 132, at 501. Second, the distinction between “jurisdiction to adjudicate” and “jurisdiction to prescribe” in the Torture Convention is fundamentally flawed. The distinction misconstrues the principle of legality. The principle of legality is geared towards ensuring that a person is aware an act is criminalized in the legal system to which they are subject. Brody & Duffy, *supra* note 127, at 834. This is not a jurisdictional issue and, thus, a failure to pass a domestic law vesting Senegalese courts with universal jurisdiction over torture does not implicate the principle of legality. *Id.* Indeed, the Court’s reasoning would permit a failure to pass implementing legislation under Article 5 as an excuse for Senegal’s non-compliance with Article 7’s requirement to extradite or prosecute. *Id.* at 835. This is contrary to the international legal principle that domestic law cannot excuse a state’s non-compliance with its international obligations. *Id.* at 835–36. Third, there is support for the proposition that customary international law requires Senegal to either extradite or prosecute Habré for the acts of torture he allegedly committed. *Id.* at 837; *see also* Regina v. Bartle (Pinochet III), [2000] 1 A.C. 147, 276 (U.K.) (separate opinion of Lord Millet). Article 7’s requirement to extradite or prosecute reflects customary international law and thus does not depend on implementing legislation for legal effect. Brody & Duffy, *supra* note 127, at 835. The Court of Cassation, however, did not address the issue of customary international law. Guengueng v. Habré, Ct. of Cassation (Mar. 20, 2001). Moreover, the CAT found that Senegal has failed to fulfill its obligations under the Torture Convention by refusing to either prosecute Habré for the acts of torture alleged in the initial 2000 complaint or demonstrate insufficient evidence to prosecute. Decisions of the Committee Against Torture under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm’n No. 181/2001,

Senegalese Constitution and Code of Criminal Procedure demonstrate as much. Consequently, I will focus my analysis on linguistic competence and discursive strategies.

A. *Linguistic Competence or Who Says It*

There are multiple actors in the *Habré* case who purportedly possess the linguistic competence to speak on the issue of whether Habré should be fairly tried in Senegal. The Agents must contend with the Counter-Agents. The most prominent of which are the *marabouts* and members of the Senegalese intelligentsia.

The *marabouts* head Muslim Brotherhoods, which command enormous amounts of cultural and political capital and are widely trusted by the Senegalese.<sup>157</sup> There are three Brotherhoods: Mouridiya (16% of Senegalese are members), Tijaniya (37% of Senegalese are members), and Qadiriya (3% of Senegalese are members).<sup>158</sup> In 2000, 85.4% of Senegalese surveyed by Afrobarometer said they had confidence in the Brotherhoods, and they have traditionally “played a very significant role in politics, providing a critical alliance with and support for the ruling party and the government.”<sup>159</sup> Indeed, the Parti Socialiste du Sénégal (“PS”) ascended as the dominant party because Leopold Senghor, the PS founder and first President of Senegal, cultivated a political alliance with the Brotherhoods, especially the Mouridiya Brotherhood.<sup>160</sup>

The tradition of the Brotherhoods overtly participating in politics, however, is on the wane. There has been a decline in the *marabouts* exhorting their followers to vote for a specific candidate.<sup>161</sup> Nevertheless, the Brotherhoods are regarded as the guardians of religious and moral life for millions of

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CAT/C/36/D/181/ 2001, ¶¶ 9.6-9.9 (May 19, 2006).

<sup>157</sup> Richard Vengroff & Michael Magala, *Democratic Reform, Transition, and Consolidation: Evidence from Senegal's 2000 Presidential Election*, 39 J. MOD. AFR. STUD. 129, 149 (2001).

<sup>158</sup> INST. FOR DEMOCRACY IN S. AFR. ET. AL, SUMMARY OF RESULTS: ROUND 4 AFROBAROMETER SURVEY IN SENEGAL 77 (2008).

<sup>159</sup> Vengroff & Magala, *supra* note 157, at 149.

<sup>160</sup> Lucy Creevey et al., *Party Politics and Different Paths to Democratic Transitions: A Comparison of Benin and Senegal*, 11 PARTY POL. 471, 479–80 (2005).

<sup>161</sup> Vengroff & Magala, *supra* note 157, at 149.

Senegalese.<sup>162</sup> Moreover, the *marabouts*, and the Brotherhoods they head, still hold sway over many voters' electoral decisions.<sup>163</sup> In the 2000 Presidential elections the silence of many *marabouts* was interpreted by their supporters as opposition to the incumbent Abdou Diouf.<sup>164</sup> Vengroff argues that the Brotherhoods' "step-by-step disengagement from the PS has played a significant role in the democratic transition in Senegal."<sup>165</sup> The political power of the Brotherhoods, especially the Mouridiya, was highlighted by the fact that, upon election as President, Wade built his vacation home in Touba, the capital of the Mouridiya Brotherhood.<sup>166</sup> Thus, the Brotherhoods are widely regarded as king-makers and trusted civil society organizations with extraordinary political and cultural capital.

Habré has shrewdly strengthened the linguistic competence of the Tijaniya *marabouts* concerning the issue of his prosecution. Habré is a member of the Tijaniya Brotherhood<sup>167</sup> and married to a Senegalese woman from a prominent Tijaniya family, with whom he has had children.<sup>168</sup> Moreover, he is a follower of the recently deceased Tijaniya *marabout*, Thirno Mountaga Tall, a man lionized in Senegal for his resistance to French colonial rule.<sup>169</sup> By aligning himself with Tall's family,<sup>170</sup> Habré secured allies commanding substantial political and cultural capital and trust in Senegal. Mr. Thirno's son, Madani Tall, has expressed an obligation to

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<sup>162</sup> Momar Dieng, *Crises Idrissa Seck et les chefs religieux portés disparus: Le silence des Mara* [*Crises Idrissa Seck and the religious leaders gone missing: The silence of Mara*], LE QUOTIDIEN [THE DAILY] (Sept. 4, 2009), [http://www.africatime.com/Senegal/nouvelle.asp?no\\_nouvelle=478443&no\\_categorie=](http://www.africatime.com/Senegal/nouvelle.asp?no_nouvelle=478443&no_categorie=).

<sup>163</sup> Vengroff & Magala, *supra* note 157, at 149.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 150.

<sup>166</sup> *Id.*

<sup>167</sup> James Copnall, *Moroccan Shrine Unites Africans*, BBC (Feb. 18, 2009; 9:11AM), <http://news.bbc.co.uk/2/hi/africa/7885798.stm>.

<sup>168</sup> Interview with Aboubacry Mbodj, Vice President, Rencontre Africaine pour la Défense des Droits de l'Homme [African Assembly for the Defense of Human Rights] (Sept. 1, 2009) [hereinafter Mbodj Interview].

<sup>169</sup> *Id.*

<sup>170</sup> Cheikh Yérim Seck & Jean-Dominique Geslin, *Habré devant ses juges?*, [*Habré before his judges*] JEUNE AFRIQUE [YOUNG AFR.] (Oct. 9, 2005), <http://www.jeuneafrique.com/Article/LIN09105habrdsegujs0/>.

protect Habré.<sup>171</sup>

The head of the Tijaniya Brotherhood, Serigne Mansour Sy, said he will oppose any attempt to extradite his “disciple.”<sup>172</sup> Other members of the Tijaniya Brotherhood steadfastly refuse to support the prosecution of Habré regardless of his innocence or guilt.<sup>173</sup> Senegalese overwhelmingly trust the Brotherhoods, thus if they assert Habré’s innocence and hypocritical bullying by the West, then many Senegalese accept these assertions. Members of government are also unlikely to defy the Tijaniya Brotherhood because of their political influence. According to Alioune Tine, President of Rencontre Africaine pour la Défense des Droits de l’Homme (“RADDHO”), the only reason Habré has not stood trial is because he is benefiting from the protection of the *lobbies maraboutiques*, or *marabout* lobby.<sup>174</sup> Tine was quoted as saying, “Hissène Habré is well acquainted with the marabout families. Upon arriving in Senegal, he was taken in by the religious leaders.”<sup>175</sup> By closely aligning himself with the Tijaniya Brotherhood, Habré grants the Brotherhood expertise in matters concerning him, such as his prosecution.

The linguistic competence of the *marabouts* is a significant challenge to the Agents. Human Rights Watch and other foreign NGOs command less political and cultural capital and trust than the *marabouts*. The political and social capital and trust commanded by the Brotherhoods is nearly unassailable in Senegal, especially by a foreigner.<sup>176</sup> The *marabouts* have allegedly used this capital and trust to influence the government in exchange for financial support from Habré. When a *marabout* was asked why his Brotherhood protects

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<sup>171</sup> Mbodj Interview, *supra* note 168. Madani conceded to Rencontre Africaine pour la Défense des Droits de l’Homme that if the allegations against Habré are true, then he should be tried. *Id.* The problem with that concession is self-evident: the only means to determine the truth of the allegations is a fair trial, which Madani will not support until the allegations are proven to be true.

<sup>172</sup> Seck & Geslin, *supra* note 170.

<sup>173</sup> Mbodj Interview, *supra* note 168.

<sup>174</sup> Daouda L. Gbaya, *Le dossier Habré est bloqué par Wade [The Habré case is Blocked by Wade]*, LE QUOTIDIEN [THE DAILY], May 14, 2009.

<sup>175</sup> *Id.*

<sup>176</sup> Telephone Interview with Reed Brody, Counsel & Spokesperson, Human Rights Watch (May 22, 2009) [hereinafter May 22 Brody Interview].

Habré, despite the crimes he committed against fellow Muslims in Chad, the *marabout* responded candidly, “What do you want? He has been a strong financial supporter.”<sup>177</sup>

During Wade’s bid for reelection in 2006, those familiar with the *Habré* case suspect the following quid pro quo was offered by at least one of the Brotherhoods: in exchange for our political support in the upcoming presidential election, do not extradite Habré.<sup>178</sup> The Agents, such as Human Rights Watch and Senegalese NGOs, possess limited resources, precluding the possibility of a nation-wide grassroots campaign to erode some of the linguistic competence commanded by the *marabouts*.<sup>179</sup> Moreover, even if the Agents possessed sufficient resources for such a grassroots campaign, it is highly unlikely that it would be able to appreciably undermine the protection granted to Habré by the Tijaniyas.

Members of the intelligentsia (other than those who are Agents) take divergent positions, and, as well-educated Senegalese, members of the intelligentsia necessarily command a certain level of cultural and political capital and trust concerning the *Habré* case. L’Association Sénégalaise pour les Nations-Unies (“ASNU”), takes a moderate position, declaring that Senegal should try Habré in accordance with the AU mandate and with full protection of the defendant’s rights.<sup>180</sup> ASNU, however, condemned all international pressure on Senegal.<sup>181</sup> This criticism of international pressure is an implicit rebuke of the Agents. Other members of the intelligentsia, especially Professor Oumar Sankharé of Cheikh Anta Diop University in Dakar, roundly and passionately condemn the efforts of the Agents to prosecute Habré.<sup>182</sup>

The linguistic competence commanded by Habré himself

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<sup>177</sup> Interview with Source Familiar with the Case. Because of the political sensitivity of the case in Senegal, the source requested to remain anonymous.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Mamadou Diallo, *Jugement de Hissène Habré: L’Asnu contre toute pression sur le Sénégal* [Judgment of Hissène Habré: ASNU Against all Pressure on Senegal], LE QUOTIDIEN [THE DAILY], Aug. 31, 2006.

<sup>181</sup> *Id.*

<sup>182</sup> *E.g.* Oumar Sankharé, *Affaire Hissène Habré ou affaire Me Seye?* [Hissène Habré Affair or Me Seye Affair?], ZOOM TCHAD, Oct. 12, 2008.

must also be considered. Since the original complaint was filed in 2000, Habré has launched an aggressive media campaign.<sup>183</sup> Habré allegedly uses his wealth to influence the Senegalese media.<sup>184</sup> As Reed Brody elliptically put it, “[i]n 2005, there were still significant parts of the press that appeared to respond to outside pressures more than fact.”<sup>185</sup> Upon Habré’s initial arrest by Senegalese authorities in 2005 pursuant to Belgium’s arrest warrant, the Senegalese media possessed a noticeable tenor in Habré’s favor.<sup>186</sup> As a result of his wealth, it appears Habré has secured privileged access to the Senegalese media and, thereby, bolstered his power to speak on the issue of his prosecution and, therefore, his linguistic competence.

*B. Discursive Strategies or How They Say It: Logical Rigor and Emotional Intensity*

The Agents employ three discursive strategies: (1) highlight the venality of the *marabouts* protecting Habré, (2) focus on the Senegalese victims of Habré’s rule, and (3) emphasize that it is in Senegal’s interests as a member of the international community to prosecute Habré. The first is a combination of logical rigor and emotional intensity; the second, is purely of emotional intensity; and the third is purely of logical rigor.

The Agents have attempted to squelch the linguistic competence of the Tijaniya *marabouts* by pointing to the financial support Habré provides them. RADDHO and Human Rights Watch allege the corruption of Habré’s Tijaniya protectors. This allegation appears to be reasonable, given the shocking admission by one *marabout* mentioned above.<sup>187</sup> RADDHO and Human Rights Watch reportedly accused Habré of bribing the Tijaniya *marabouts* with approximately US

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<sup>183</sup> See *supra* Part IV.

<sup>184</sup> See *supra* Part IV.

<sup>185</sup> May 22 Brody Interview, *supra* note 176.

<sup>186</sup> *Id.*

<sup>187</sup> Mbodj contends that the loyalty of the “fanatics” protecting Habré is driven by the wealth he bestows upon them. Mbodj Interview, *supra* note 168.

\$600,000.<sup>188</sup> A political cartoon satirizes Habré's use of the *marabouts*. In the cartoon, Habré is piggybacking a *marabout* who uses a talisman to ward off a Belgian Judge and the skeletons of Habré's victims at the same time that notes of the Senegalese currency, the CFA franc, fall from his pockets<sup>189</sup> and the *marabout* shouts that they should look for others.<sup>190</sup>

In addition, the Agents launched a media campaign intending to show Senegalese that Habré committed crimes against their fellow citizens. Reed Brody admits one of "the reasons that we lost in 2000 and 2001, was because we did not convince the Senegalese public that Hissène Habré is the criminal we say he is."<sup>191</sup> Brody estimates that, currently, about half the media coverage on the *Habré* case is pro-prosecution, whereas, for years, the media coverage favored Habré.<sup>192</sup> The limited resources of Human Rights Watch, RADDHO, and others have been utilized for a media campaign targeting the Senegalese political and intellectual class.<sup>193</sup> They even hired a media consultant to advise them on the most effective use of the media.<sup>194</sup>

Some of the products of these efforts include a series of articles detailing the abuses committed by Habré's regime against the Senegalese. As early as January 2000 an article in a Senegalese paper appeared informing the Senegalese public that two of their fellow citizens were victims of Habré's regime.<sup>195</sup> The two victims were Demba Gaye and Abderamane

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<sup>188</sup> *Human Rights Watch accuse Habré a soudoyé un chef religieux sénégalais avec 300 millions* [*Human Rights Watch Accuses Habré of Having Bribed a Senegalese Leader with 300 million*], L'OBSERVATEUR [THE OBSERVER], Oct. 26, 2005; *Habré "achète" un religieux sénégalais à 350 millions* [*Habré "Buys" a Senegalese Cleric with 350 Million*], LE QUOTIDIEN [THE DAILY], Oct. 26, 2005.

<sup>189</sup> *Pour sa protection Hissène Habré aurait remis plus de 300 millions de Fcfa à un chef religieux sénégalais* [*For his Protection Hissène Habré Would Have Given More Than 300 Million of CFA Francs to a Senegalese Religious Leader*], LE MATIN [THE MORNING], Oct. 26, 2005.

<sup>190</sup> *Id.*

<sup>191</sup> May 22 Brody Interview, *supra* note 176.

<sup>192</sup> *Id.*

<sup>193</sup> Interview with Reed Brody, Counsel & Spokesperson, Human Rights Watch (May 20, 2009) [hereafter May 20 Brody Interview].

<sup>194</sup> May 22 Brody Interview, *supra* note 176.

<sup>195</sup> *Deux Sénégalais parmi les victimes* [*Two Senegalese Among the Victims*], WALF FADJRI, Jan. 26, 2000.

Gaye, arrested in Chad on August 23, 1987.<sup>196</sup> A more recent article detailed the story of Abdou Rahmane Guèye. Upon arriving in Chad, he was accused of espionage, had a substantial amount of money confiscated, was imprisoned, and then tortured.<sup>197</sup> Gueye was only released after the then Senegalese President, Abdou Diouf, intervened on his behalf.<sup>198</sup> An October 2005 news article provided an account of two other Senegalese victims of Habré's regime. One Senegalese victim, Clément Abaifouta, claims that he was imprisoned for alleged membership in the Zaghawa ethnic group, which Habré was targeting at the time.<sup>199</sup> This article was accompanied by an editorial declaring, "[i]t is time for Senegal to correct the error it committed in protecting Habré for 15 years."<sup>200</sup>

By focusing on Habré's Senegalese victims as a discursive strategy, Human Rights Watch and other NGOs hope to overcome the foreign, or "other," stigma that undermines their linguistic competence.<sup>201</sup> Stories, like those above, are reiterated by RADDHO in order to reveal the propinquity between Habré's crimes and Senegal such that Senegalese view them as committed against Senegalese and not just distant Chadians.<sup>202</sup> The Senegalese victims of Habré's rule serve as the "bridge" between the Agents and the Senegalese public, providing "the passion and the determination of the victim."<sup>203</sup>

Finally, the Agents host conferences in Dakar to argue that it is in Senegal's interests to prosecute Habré. One such conference, in May 2010, was organized by l'Association Tchadienne pour la Promotion et la Defense des Droits de l'Homme ("ATPDH"), in order to inform Senegalese and the international community of the latest developments in the

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<sup>196</sup> *Id.*

<sup>197</sup> El Malick Seck, *Abdou Rahmane Gueye Victime de Hissène Habré: Pourquoi j'ai été torture pendant 6 mois en prison* [Abdou Rahmane Gueye Victim of Hissène Habré: Why I was Tortured for Six Months in Prison], EXPRESS NEWS, May 14, 2009.

<sup>198</sup> *Id.*

<sup>199</sup> Moustapha Diop, *Des victimes sénégalaise et tchadiennes racontent l'enfer des geôles d'Habré* [Senegalese and Chadian Victims Tell of the Hell of Habré's Jails], LE POP, Oct. 9, 2005.

<sup>200</sup> *Id.*

<sup>201</sup> May 20 Brody Interview, *supra* note 193.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

*Habré* case.<sup>204</sup> The participants were local Muslim and Christian leaders, a member of parliament, a business owner, and a university professor.<sup>205</sup> Jacqueline Moudeina, a Chadian lawyer for the victims and member of ATPDH, argued Senegal has an undeniable interest in combating impunity: “Our heartfelt plea is for a strong civil society that stands up against impunity in Africa. It is not in a spirit of vengeance that we pursue this; we simply want to eradicate impunity.”<sup>206</sup> The MP who attended the conference, Abdoulaye Babou, vowed to raise the *Habré* issue before the National Assembly.<sup>207</sup> Unfortunately, this vow has not produced a trial.

There is evidence that the interest argument is gaining traction in Senegal. One news article argued the repeated pressure by the international community is damaging Senegal’s reputation and foreign policy goals, that there is no legal reason to prevent *Habré*’s prosecution.<sup>208</sup> However, the author of the editorial professed sympathy for the argument that *Habré* should not be prosecuted in the interests of sovereignty and pan-Africanism.<sup>209</sup>

The discursive strategies employed by the Agents contend with fiery rhetoric from the Counter-Agents. The Counter-Agents use four distinct discursive strategies: (1) pan-African unity against Western injustice, (2) Western hypocrisy in harrying *Habré* while granting impunity to others, (3) the alleged Senegalese victims are lying, and (4) prosecuting *Habré* would be contrary to Senegalese traditional hospitality. The first discursive strategy is steeped in an anti-colonial mentality. Aside from a logical argument presented by *Habré*’s attorneys, that foreign aid for his trial would prejudice the proceedings against him,<sup>210</sup> the Counter-Agents’ discursive

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<sup>204</sup> Bakary Oumarou, *Les dernières évolutions du dossier Hissein Habré* [Recent development in the Hissein Habré case], LE ROSEAU, Nov-Dec. 2009, at 1–2.

<sup>205</sup> *Habré Trial Would Be Blow to Impunity*, IRIN, (June 2, 2010), <http://www.irinnews.org/Report.aspx?ReportId=89327>.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Mbaye Samb, *Reflét: Qu’attend donc le Sénégal pour juger l’ancien dictateur tchadien?* [Reflection: When will Senegal Judge the Former Dictator of Chad?], WALF FADJRI, June 19, 2006.

<sup>209</sup> *Id.*

<sup>210</sup> *Habré Trial Would Be Blow to Impunity*, *supra* note 205.

strategies are unabashedly emotional.

One of the most prominent Counter-Agents is Oumar Sankharé. He has written lengthy, almost sermonic, editorials condemning efforts to prosecute Habré. One article described Habré as the “courageous former Chadian Head of State” and the *Habré* case as “having revealed to the entire world a monstrous image of a state where all the laws are violated, where all violations are legalized.”<sup>211</sup> According to Sankharé, this latter characterization is imposed by “Whites” and Western powers who want to force Senegalese to separate themselves from their traditional valor, morals, and religions.<sup>212</sup> The article continues by denouncing the West as hypocritical in seeking Habré’s prosecution when Europe, especially Belgium, has committed a myriad of crimes against Africa.<sup>213</sup> The pan-African view is aptly captured in the following quotation, also from Sankharé, “Habré is precisely this hero and this African resistor who put an end to the imperialist visions of France . . . .”<sup>214</sup> The article contends that Senegal is succumbing to pressure from the West for euros and petro-dollars, and that Senegal should not aid the West in their attempts to imprison African presidents.<sup>215</sup>

There appears to be no logical consistency between Soukharé’s discursive strategies. In the same editorial in which he exhorts Senegalese to embrace a pan-African defense of Habré, he excoriates former Libyan President, Muammar al-Gaddafi, and Chadian President, Idriss Déby, for their crimes during Habré’s rule.<sup>216</sup> For example, in an open letter sent to Habré, Sankharé proclaims that Habré is a martyr for African resistance.<sup>217</sup> The letter reads more like a manifesto of anti-colonial African resistance, yet the letter condemns the use of

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<sup>211</sup> Sankharé, *supra* note 182.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Oumar Sankharé, *Affaire HH—pour une réconciliation nationale au Tchad [HH Affair—for National Reconciliation in Chad]*, WALF FADJRI, July 21, 2009.

<sup>215</sup> *Id.*

<sup>216</sup> *E.g., id.*

<sup>217</sup> Oumar Sankharé, *Lettre à Hissène Habré: vous êtes un martyr de la résistance africaine [Letter to Hissène Habré: You are a Martyr of African Resistance]*, WALF FADJRI, June 30, 2006.

Gaddafi's money in damaging Senegalese power.<sup>218</sup> Sankharé apparently feels no compunction in calling for Africans to unite against the West in one sentence and, in another, attacking the West for ignoring the role played by Idriss Déby during Habré's rule.<sup>219</sup>

Other Counter-Agents use similar discursive strategies. One article concurs with Sankharé, arguing the hypocrisy of targeting Habré without also prosecuting his accomplices, the United States and Idriss Déby.<sup>220</sup> Habré's lawyers also try to deflect attention towards Gaddafi and Déby. They claim the AU decision mandating that Senegal try Habré was rendered by a committee of pretend jurists and experts corrupted by Gaddafi.<sup>221</sup> They assert the AU decision is merely part of an international plot against Habré, of which Idriss Déby is an architect.<sup>222</sup>

The Counter-Agents also try to discredit the claim that Senegalese were victimized by Habré.<sup>223</sup> One article authored by Sankharé alleges Abdou Rahmane Guèye was not a victim of Habré's regime because he never set foot in Chad.<sup>224</sup> The article goes on to repeat the refrain that Habré is an African hero and the campaign to prosecute him is another Western injustice against Africa.<sup>225</sup>

The final discursive strategy comes from Habré's attorneys, who argue prosecution would be contrary to traditional Senegalese hospitality. The Wolof word *teranga* translates into English as "hospitality."<sup>226</sup> This discursive strategy relies on *teranga* when calling attention to the fact

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<sup>218</sup> See *id.*

<sup>219</sup> See Sankharé, *Affaire, supra* note 182.

<sup>220</sup> Nadjikimo Benoudjita, *Habré, Déby et les autres . . . à la barre!* [*Habré, Déby and Others . . . to the Witness Box!*], LE TEMPS [THE TIMES], Feb. 8, 2000.

<sup>221</sup> *Tchad: Affaire Habré* [*Chad: Habré Affair*], ALWIHDA, June 30, 2006.

<sup>222</sup> *Id.*

<sup>223</sup> See Oumar Sankharé, *Les Justiciers du Président Habré* [*The Avengers of President Habré*], TCHADONLINE, <http://tchadonline.com/les-justiciers-du-president-habre/> (last visited Jan. 17, 2012).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Interview with Djibril Aziz Badiane, Gen. Sec'y, l'Organisation Nationale des Droits de l'Homme [The Nat'l Org. for Human Rights] (Sept. 2, 2009).

that, since he arrived in Senegal, Habré has lived in peace as a good Muslim, married a Senegalese woman from a prominent Tijaniya family, had Senegalese children, and used his wealth to become an important supporter of local businesses.<sup>227</sup> Habré's attorneys argue it would contradict *teranga* to prosecute him.<sup>228</sup>

Several Senegalese whom I interviewed expressed the view that there is a lack of political will to try Habré.<sup>229</sup> By analyzing the efforts to internalize universal jurisdiction and the obligation to extradite or prosecute under the Torture Convention according to the three factors of agency, the reason for this lack of political will becomes clearer. The Agents, especially the foreign NGOs, must contend with the *marabouts*, who command higher levels of cultural and political capital as well as trust. In addition, for most of the period since the original complaint was filed in 2000, Habré has enjoyed privileged access to the Senegalese media. The advantageous linguistic competence of the *marabouts* is coupled with the Counter-Agents' discursive strategies based on emotional intensity, which plays to the fears and prejudices of the Senegalese with apparent effectiveness. Although I cannot say conclusively which has been the greater source of success for the Counter-Agents, linguistic competence or discursive strategy, it is telling that the Agents' more logical discursive strategies have thus far been ineffective.

## VI. CONCLUSION

Approaching the internalization problem via speech act and securitization theories provides a useful analytical framework. This framework can help explain why, after more than ten years, social and political internalization remains elusive in the *Habré* case. There are multiple actors commanding linguistic competence on the issue who adamantly oppose Habré's prosecution. Moreover, the Agents' discursive

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<sup>227</sup> Mbodj Interview, *supra* note 171.

<sup>228</sup> *Id.*

<sup>229</sup> Interview with Bachir Fofana, Journalist, Le Populaire [The Popular] (Sept. 4, 2009); Interview with Assane Ndiaye, President, l'Organisation Nationale des Droits de l'Homme [The Nat'l Org. for Human Rights] (Sept. 7, 2009).

strategies have been countered with other discursive strategies designed to persuade Senegalese that Habré should not be prosecuted. Consequently, political and social internalization and, thus, the perlocutionary act (i.e. agreement to prosecute and prosecution) have not occurred.

The foregoing analysis offers up a previously unexplored approach to transnational legal process' internalization problem. In connecting with speech act theory and Balzacq's critique of securitization theory, I attempted to demonstrate that the question of why internalization occurs can be explained by focusing on the nano-process of agency. Although this paper falls short of conclusively demonstrating the utility of agency in explaining internalization, it opens up some future lines of inquiry. First, future work should provide an analysis of multiple case studies. Second, my article deliberately excludes from its purview an analysis of audience and context, which Balzacq argues contribute to a successful securitization.

My analysis of agency's influence on internalization in the *Habré* case is intended only as a starting point. The context in which Senegalese find themselves may give credence to the discursive strategies of the Counter-Agents. The fact that the trial is sought in Senegal may render Senegalese responsive to discursive strategies of pan-Africanism, Western hypocrisy, and hospitality. This is a bit of a tautology, but the point is the success or failure of discursive strategies (i.e., their ability to elicit supportive responses from the audience) is influenced by the context in which they are employed. Senegal is a former French colony sensitive to French influence over its former colonies, of which Chad is one. Some Senegalese criticize, for example, the decades-long presence of French troops in Senegal as evidence of French domination.<sup>230</sup> The extent to which such contextual factors impact internalization should be investigated.

In addition, the role of the audience should be examined. In order to understand the influence of the audience on internalization, one must discern the ability of the audience (e.g., Senegalese) "to grant or deny a formal mandate to public

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<sup>230</sup> *France Closes Senegal Military Bases*, BBC, (June 9, 2010, 8:38 AM), <http://news.bbc.co.uk/2/hi/world/africa/10273849>.

officials.”<sup>231</sup> Thus, in well-established democracies, the public and elites will be able to transmit their views on the issue to public officials. In a nascent democracy, such as Senegal, this transmission may be corrupt.<sup>232</sup> Indeed, we have seen evidence of corruption in the *Habré* case through Wade’s apparent interference with the judiciary.<sup>233</sup> Keohane’s argument that regime type influences internalization could aid this analysis.

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<sup>231</sup> Balzacq, *supra* 95, at 192.

<sup>232</sup> *Freedom in the World 2010: Senegal Country Report*, FREEDOM HOUSE (May 3, 2010), <http://www.unhcr.org/refworld/country,,FREEHOU,,SEN,456d621e2,4c0cead5b,0.html> (finding that Senegal is partly free and noting President Wade’s consolidation of power at the expense of the rule of law).

<sup>233</sup> See *supra* Part IV.