Impunity or Accountability: International Norms and the Trial of Hissène Habré

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Introduction

Throughout history there are individuals who stand out as some of the most despicable humans to ever walk the planet. Men such as Hitler, Pol Pot, Stalin, and Mao were responsible for the deaths of millions of their own people, and yet not a single one ever answered for these crimes. This state of affairs, where "the strong do what they will, and the weak suffer what they must," has been the case for millennia and is generally referred to as a "norm of impunity."[1] However, this norm, that presidents and high-ranking state officials will face no liability for crimes committed, was challenged in 2016 when former Chadian President Hissène Habré was sentenced to life in prison for grievous breaches of human rights, including torture of 200,000, and murder of 40,000 of his own citizens.

This paper will question why Habré was convicted for his crimes when so many other leaders, many of whom committed far more serious crimes, were never charged or called upon to account for their actions. This paper hypothesizes that the primary reason that Habré, unlike these other individuals, was charged and convicted, is the development of an anti-impunity or accountability norm in International Law and International Relations.

The theory behind this idea argues that the development of an international body of human rights law has brought about a new "Age of Accountability." Given this appellation in 2012 by the UN Secretary General Ban Ki-Moon, in this Age of Accountability it is "the responsibility of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes and other egregious crimes."[2] Such a change, which would prescribe a *responsibility* for states to prosecute international crimes, would be a revolution in how international relations is conducted. However, thus far, despite the Secretary General's bold words, this Age of Accountability has been largely titular. Such a shift would require the development of a clear *norm of accountability* to oppose the *norm of impunity* which has existed for centuries.

There are reasons to believe that an accountability norm may be developing, including the prosecution of Hissène Habré, but other evidence, including the collapse of several high-

[1] This classic quote from Thucydides' Melian dialogue exemplifies the political power dynamic of impunity.
[2] (Ban Ki-moon 2016).

profile cases before the International Criminal Court (ICC or the Court) also challenges this notion. This paper will seek to test two ideas. The first is whether or not there can be said to be a developing norm of accountability in international relations and international law. This paper argues that the norm can be traced through the rapid development of *jurisprudence* and legal mechanisms for promoting accountability in the 1990s such as: universal jurisdiction, the obligation to prosecute or extradite, and the creation of the ICC. These mechanisms are evidence that there is indeed a growing international norm which favors accountability over impunity. However, this paper also acknowledges that the norm is still developing, and is not accepted by a majority of states – as it will demonstrate with a brief survey of African State's resistance to these mechanisms.

The second idea the paper will test is whether the completion of the trial of Hissène Habré can be attributed to this norm of accountability. The paper will use a method of process tracing to demonstrate how the norm of accountability instigated and supported the process of bringing Habré to trial. This paper will argue that without this norm, the trial never would have come to pass. However, it will also demonstrate that there were many other political factors at play, and the norm of accountability may have been only one of many elements which led to the trial.

Literature Review

As this paper will concern the development of a norm of accountability, it would be illustrative to begin with the theory which demonstrates how the power of international norms can alter the realities of domestic politics.

A norm consists of a set of rules agreed upon that define appropriate actions, and which are applicable to the political life of communities, within states, between nations, and in the international community.[3] Norms can be unspoken or formally codified. The more strictly actors adhered to a norm, the stronger the norm becomes. As there is no international authority to regulate norms, it is often the case that international norms which are logically contradictory will

[3] Hurrell and Macdonald, 2013, 69.

compete for adherence within the international system.[4] Yet this is not to say that anything goes; the majority of states do adhere to the most respected international norms. There is no agreement among scholars as to how much influence norms have on international relations. Realists and Neorealists have argued that norms only matter to the extent they are backed by powerful actors, while Liberals have suggested that norms matter to the degree they affect actors' strategies by reducing transaction costs; by identifying focal points for coordinated behavior; and by providing frameworks for productive issue linkage.[5] However, since the 1990s, every school of International Relations has acknowledged that norms play an important role in shaping the international political order.

As norms are patterns of agreed upon behavior, they can be difficult to identify. The scholar Mark Amstutz observes that there are generally two separate ways to determine what norms exist: the first is to consider *what ought to be*, and the second is to consider *what is*.[6] This first tradition, considering *what ought to be*, is concerned with morality and ethics.[7] John Rawls, the most cited scholar of the first method, argues that crafting norms behind a "veil of ignorance" is the best method to ordain how a society should be ordered in the most moral way.[8] Of course, this veil has no corollary in the practical world, and therefore, some scholars have argued that such methods focusing on morality are impractical for analyzing society. [9] The alternative to Rawls' method, which Amstuz describes, relies upon determining norms through observations of what *is*. If in practice, certain rules are often followed, it can be agreed that these are norms. However, the downfall of this method is that it can never provide a basis for understanding

[4] Krasner, 1999, 3.
[5] Hurrell and Macdonald, 71.
[6] Amstutz 2013, 37.
[7] Amstutz asserts that morality is the differentiation between what is good or bad, what is right or wrong, or what is just or unjust; while ethics are the rules crafted based upon the particular morals of a society. The ethics which stem from morality, Amstutz defines as universal, impartial, self-enforcing rules which allow for the examination, justification, and critical analysis of morality. However, there is much debate within the field as to whether a universal morality can exist.
[8] This veil would block a person from seeing the distribution of resources in a society. Without this knowledge, the individual would endeavor to create the fairest system they could to ensure their own well-being, regardless of their position within the society. Rawls, 1999, 118.
[9] Sen, 2011, 7.

morality, as "it is impossible to develop a theory of moral obligation from existing facts, that is, to derive 'ought' from 'is.'"[10]

This paper will for the most part choose the second method, and will rely on an understanding of the current "is," rather than on what "ought" to be. This means that there will be no evaluation of the morality of the norm of accountability, but only of an analysis of its existence.

In their excellent article, *International Norm Dynamics and Political Change*, Kathryn Sikkink and Martha Finnemore analyze the way norms and ideas can shape international affairs and domestic politics.[11] Their model of norm diffusion will offer the theoretical frame work for this paper. They argue that idea shifts and thus norm shifts are actually the *main* vehicle for change within the international system. Norms shape international relations by constraining states' exercise of power. [12] For example, it was shifts in understandings about the morality of slavery in some places (namely England) which led to the abolition of slavery in the West.[13] The system of slavery had on relied normative understandings of racial superiority for support. Prioritizing the rights of lighter skinned individuals and highlighting their superiority and rank in society was seen as morally good and correct. However, since the 19th century these ideas have been recognized as reprehensible, and today most societies consider these to have been immoral, wrong, and unjust. States began to perceive an alternative expected behavior, and so changed the way they exercised their power. This dynamic underlines the crucial point that most norms are not inherently moral. Morality is shaped by the place and time it is perceived; therefore, what is considered moral is not fixed. Thus, an analysis of a shift in what *is* normative must not be conflated with an analysis of what "ought" to be normative, nor what is good or bad, right or wrong, just or unjust, moral or immoral.

Finnemore and Sikkink argue that norms become a part of international and domestic politics and decision-making processes through a process they term the "life-cycle" of norms.[14] This life cycle has three parts. In the first, a norm is created by "norm entrepreneurs" who

[10] Amstutz, 37.
[11] Finnemore and Sikkink, 1998, 887–917.
[12] March and Olsen, 2006, 675.
[13] Finnemore and Sikkink, 891
[14] Ibid. 895.

attempt to convince a critical mass of states (norm leaders) to embrace new norm. Norm entrepreneurs can often be organizational platforms (such as NGOs, or UN Organs) which have been created specifically to promote certain norms. They lobby influential individuals or organizations to support and accept their norm. This may be as far through the life cycle as a norm ever travels. However, should a norm become accepted by enough norm leaders, this can trigger a "norm cascade." During the norm cascade, "norm leaders attempt to socialize other states to become norm followers," until a "tipping point" is reached where "countries begin to adopt [the] new norm more rapidly, even without domestic pressure for such change."[15] The authors theorize that the motivation for the sudden rush to conform to a new norm may include a combination of pressure for conformity, desire to enhance international legitimation, and the desire of state leaders to enhance their self-esteem.[16] This effect was most notable in the rush during the 1980s for states to sign and ratify human rights laws – sometimes called the "Human Rights Revolution."[17] This cascade occurred to the extent that many states with historically terrible records of human rights abuse were ratifying international bans which it was fairly evident they did not intend to keep.[18] However, it has been theorized that these states ratified these treaties, not because they believed in them, but because they felt pressure to conform to how a majority of other states where behaving. This dynamic, called "tipping point logic," would mean that once a cascade of norm acceptance begins, states can be swept along unless they actively fight against the tide.[19]

The final stage of this proposed norm life cycle is "internalization." This refers to when norms have been adopted domestically within enough states that the norm is accepted as essential and it is no longer a matter of public debate.[20] This stage is crucial for a norm to become concretely embedded in society. For instance, many of the states that signed treaties in support of human rights did not actually incorporate the policies within their own domestic laws.

[15] Ibid, 899.
[16] Ibid.
[17] Cmiel, 2012, 27–34.
[18] Hathaway in 2002 conducted a broad based qualitative study and found that human rights treaty "ratification is not infrequently associated with worse human rights ratings than otherwise expected." She points out that costs of noncompliance are low to nonexistent with human rights law, and so perhaps it was easy for states to gain international legitimacy through ratification with little concern for ramifications. Hathaway, 2002, 1940.
[19] Gladwell, 2002, 9.
[20] Finnemore and Sikkink, 904.

If a state has signed an agreement to prevent climate change – but has refused to pass domestic legislation to combat climate change in any way, then their original signature on the international accord was evidently not true acceptance of the norm. Words must be matched with deeds for a norm to become concrete.

In her book, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, Kathryn Sikkink argues that prosecutions which have accompanied transitional justice procedures around the world in the previous three decades are a part of a "dramatic new trend in world politics [of]… holding individual state officials, including heads of state, criminally accountable for human rights violations."[21] This dramatic new trend which she discusses is a directly link between the norm life cycle phenomenon and the development of a norm of accountability. It is the process of norm entrepreneurs pushing for trials which has the effect of creating jurisprudence of accountability which strengthens the norm of accountability.

The norm of accountability is one part of several much larger precepts including justice, sovereignty, and human rights. Though there are many types of accountability, in this sense accountability refers only to legal accountability for crimes where some actors hold other actors to a set of standards and impose sanctions if these standards are not met.[22] Sikkink is quick to clarify that the existence of a norm of accountability "does not mean that all state officials who have committed crimes will be sent to prison…simply … that the norm that state officials should be held accountable for human rights violations has gained new strength and legitimacy."[23]

There are three principles which underpin this norm of accountability. The first is associated the idea that the accused is an individual with rights, and that, even if they have committed genocide, they deserve to have those rights protected in a fair trial.[24] This largely means they must be provided with a rigorous defense and right to appeal. This is to prevent kangaroo courts where the verdict of guilty is a foregone conclusion. Politically driven trials have been common occurrences throughout history. Even as recently 1989, the trial of former Romanian President Nicolae Ceaușescu and his wife for genocide, lasted only an hour and ended

[21] Ibid. 5.
[22] Sikkink, 2011, 13.
[23] Ibid. 12.
[24] Ibid.

in a foregone guilty verdict. The couple was executed that afternoon, with no opportunity to appeal.[25] Inevitable guilty verdicts do not create trust in the fairness of a norm of accountability, and so proponents of strengthening the norm want to ensure fair trials for the accused.

The other two principles that underpin the norm of accountability are that: violations of human rights *cannot* be acts of state but *must* be seen as crimes committed by an individual; and that any individuals who commits these crimes can be, and should be, prosecuted. These last two ideas might seem straightforward and undeniable by today's standards, but these concepts as they emerged brought about the overthrow of centuries of international law guaranteeing immunity to state officials under nearly all circumstances, similar to the necessary principle of diplomatic immunity.[26]

To clarify, there are two types of legal immunity given to state officials. [27] The first is *immunity ratione personae*, immunity which is attached to certain state offices. *Immunity ratione personae* is afforded to specific individuals as long as they hold the office. These positions include senior state officials, heads of state, heads of government, foreign ministers, and diplomats. This immunity is considered absolutely necessary to peaceful relations between states, as being arrested and detained would most certainly hinder one's ability to perform one's function. These officials are, under customary international law, immune from all criminal charges for public or private acts. It does not matter if the act was committed before or during the period when the person assumed the office; they may not be charged, so long as they hold the office. The second type of immunity is *immunity ratione materiae*, or immunity attaching to official acts. It is this immunity which protects former senior officials from prosecution for any official acts they made while they were in power.[28] This immunity is still attached to these acts even after the individual has left office. This immunity is also considered necessary for the functioning of a country, because it prevents new political regimes from arresting and prosecuting older regimes for purely political purposes.

[25] Laughland, 2008, 185.
[26] For an in-depth history of sovereign immunity see: Pugh, 1953, 476–94.
[27] Akande, 2004, 409-10.
[28] Ibid. 412.

However, when these immunities are used to shield individuals who have committed grievous crimes, such as genocide or crimes against humanity, then it is called impunity. Impunity, when it is derived from sovereign immunity in this way, is not exactly unlawful, because it is protected by centuries of customary international norms.[29] However, it is considered unjust, which is why many activists and international actors are pushing to create a norm of accountability. The developing accountability norm offers mechanisms to counteract the entrenched protection which has shielded certain individuals from being brought to justice. One of the most substantial barriers to accountability is immunity. This is why the principles underpinning the norm of accountability require that acts which are considered international crimes *cannot* be considered official acts of state, because if they were, then they would be protected by immunity.

The primary obstacle to ending impunity stem from questions of jurisdiction related to the principle of non-intervention which is derived from the principle of state sovereignty.[30] The concept of jurisdiction can be complex. Jurisdiction can refer to the territory over which a court has control, but most frequently it refers to the powers exercised by a state over persons, property, or events. Moreover, there are differentiations between the jurisdiction to try and jurisdiction to arrest, especially internationally. Internationally, jurisdiction has been traditionally limited by sovereign borders since "No state has the authority to infringe the territorial sovereignty of another state in order to apprehend an alleged criminal, even if the suspect is charged with an international crime," – which is referred to as the principle of non-intervention.[31] Thus, traditional jurisdiction does not cross state lines. Every state claims jurisdiction over crimes committed within its territory even by foreigners. Additionally, states may claim jurisdiction due to what is referred to as the nationality principle.[32] This two-part principle refers to the right of a state to, firstly, claim jurisdiction to prosecute one of its own nationals for crimes committed elsewhere in the world, and, secondly, claim jurisdiction to try an alien for crimes committed abroad, but affecting one of the state's nationals.

[29] Akehurst and Malanczuk, 1997, 39.
[30] Jackson, 2007, 31-45.
[31] Akehurst and Malanczuk, 1997, 110.
[32] Ibid. 113.

The types of jurisdiction described above are needed and commonly accepted, but this paper will also focus on a type of jurisdiction outside this traditional definition which is derived from the universality principle of jurisdiction. When heinous crimes are committed, international law allows states to exercise universal jurisdiction, i.e. jurisdiction even with no national or territorial connection to the crime. This universal jurisdiction includes only the most heinous of crimes, such as war crimes, piracy, hijacking, international terrorism, and severe violations of human rights. The idea of universal jurisdiction for some acts, especially piracy, has existed for centuries, but only since WWII has universal jurisdiction for crimes against humanity been an acceptable idea.[33] The development of an actual practice of universal jurisdiction, which came about in the 1990s, will be discussed in greater depth further in this paper.

Another interesting upheaval in the last quarter century is the idea that individuals can being put on trial for international acts. Until recently, if there was any acknowledgement of such acts as being unacceptable at all, it was the state which was deemed to be at fault, never individuals.[34] However, this model did not work well with the burgeoning international human rights laws which developed after WWII. Throughout the 1970s, if a state refused to comply with a specific principle, for example climate protection or labor or prison standards, the only recourse available to fight for accountability was the "name and shame" model pioneered by NGOs like Amnesty International and Green Peace.[35] Holding accountable the individuals who were behind the contravention of these laws was impossible, and the idea ludicrous.[36] Even now, state accountability is still the most common form of accountability for most enforcement bodies, but for the enforcement certain crimes – namely genocide and crimes against humanity, this has changed to individual accountability.

Following on from the concept of the norms cascade, Kathryn Sikkink argues that all of these changes in international law are part of the process which she refers to as the "justice cascade." This process of increasing the ability of the international system to hold individuals who have committed crimes against humanity and other heinous crimes accountable was not

[33] Ibid. 109-115.
[34] Sikkink, 2011, 14.
[35] Which does appear to have had an effect, though perhaps not a very strong one, Hafner-Burton, (2008), 689.
[36] Sikkink, 20011, 15.

spontaneous. It developed due to "the concerted efforts of small groups of public interest lawyers, jurists, and activist who pioneered strategies, developed legal arguments recruited plaintiffs and witnesses, marshaled evidence, and persevered through years of legal challenges."[37] These individuals were the norm entrepreneurs who pushed forward their justice agenda. This process has been decentralized in that no particular institution is leading the charge, and so evidence of acceptance of the norm – through prosecutions – is hard to see. Enforcement of accountability has been uneven based on the acceptance of the norm in the particular location – Sikkink points to data the overwhelming number of cases and courts concerning human rights have been in Europe where the acceptance of the norm is the highest.[38]

There are three venues within which international criminal trials which fall under this topic can take place. Firstly, within the country where the crime occurred. Such in-country trials can be instrumental in creating a sense of societal healing from whatever traumatic event has occurred; therefore, this is often the ideal option as it allows the victims to be involved in the trial and there are the fewest barriers to adjudication. However sometimes it is impossible to have such a trial within the country where the crimes occurred. Perhaps the country is still embroiled in chaos, or the judicial system is not strong enough, or the means do not exist to make such a trial happen. Considering these things, there are two other venues. The second venue is an international, permanent or ad hoc, court. These were employed in the instances of the ICTY and ICTR after the Yugoslav and Rwandan genocides in the 1990s, and again at the Special Tribunal for Sierra Leone. They can be effective, but they tend to be very expensive, and as the location of the trial is not where the crimes occurred, such tribunals can feel distant from the victims and provide no sense of closure. A third option is for a trial to take place in a national court of a foreign country. This option, though it holds great potential, has not been employed frequently. Indeed, the trial of Habré in Senegal was the first instance ever of a head of state being tried for crimes against humanity in the court of a foreign nation. Such a trial can be a middle ground between the international and national options. It can be located closer to the victims but overcome the problem of chaos in the country where the crimes occurred. It can have

[37] Ibid. 23.
[38] Ibid. 21.

legitimacy through regional organizations. In time, this may become the favored method for such trials.

The Justice Cascade won the prestigious Robert F. Kennedy book prize for an outstanding academic contribution to human rights.[39] Sikkink's theory of "agentic constructivism," where agents push for change within a system based on ideas, as opposed to the alternative theory of "structural constructivism," where actors merely behave based on their perception of logics of appropriateness, has been a key factor in recent theoretical developments in the constructivist field.[40] Certainly, her theory fits well to understand how the norm of accountability was able to rise so quickly in the 1990s, and as such Sikkink's model of dynamic norm diffusion will be central to this thesis.

Methods

Research Design

This paper seeks to answer the question of why Hissène Habré was tried for committing crimes against humanity when most of those throughout history who have committed similarly vile crimes, were not. It hypothesizes that this divergence can be attributed to a norm of accountability which is rising to challenge the long-standing norm of impunity. The paper will conduct two tests on this hypothesis. The first test use process tracing to discern whether it can be seen that a norm of accountability is replacing a norm of impunity. To do this it will employ process tracing to determine what specific mechanisms have emerged to support this norm. As a norm of accountability demands that it is the responsibility of states to prosecute those responsible for genocide, crimes against humanity, war crimes and other egregious crimes, then for the norm to be employed there *must* be mechanism to support this responsibility. This paper will examine specifically universal jurisdiction, the end of amnesty as a practice, and the obligation to extradite or prosecute. If universally accepted, these three mechanisms would

[39] Hein, 2015, 193.
[40] Kim, 2012, 281. And Subotic, 2012, 296.

compel every state to comply with a norm of accountability. This section will examine the extent to which there is compliance or resistance with these mechanisms in a specifically African context to test whether accountability is replacing impunity. The choice of the African context is to provide a macro scale framework for the case study employed in the second test.

The second test of this hypothesis will be to analyze whether the norm of accountability was at play in the Habré trial. This section will use process tracing as well. This paper will use process tracing by providing a detailed but selective narrative of events to highlight certain variables to explain this as a macro historical phenomenon, as well as an individual case study.[41] It will attempt to demonstrate the causal link between the interrelated variables of the norm of accountability and the trial of Habré.

Critical Review of Sources

This paper attempts reduce source bias by drawing on a variety of sources including academic articles, periodicals, and reports from human rights organizations. The last section will rely heavily on the writings of Reed Brody. Reed Brody worked for Human Rights Watch in the 1990s and was one of the driving forces behind the continuation of the case against Habré. He, along with Henri Thulliez and Olivier Bercault, have produced most of the written works concerning how the trial came to pass. Certainly, these are not unbiased sources as these men were deeply involved with the case. However, their expertise on the trial is also a benefit as it adds personal experience to their writings. Additional source such as news articles have been added to corroborate their narratives for the purpose of triangulation.

Contribution to the Field

This paper seeks to add to the field of international relations by tracing the link between norm of accountability and the trial of Hissène Habré. Such a link has been made by other authors concerning other trials, but none have made this connection with the trial of Hissène Habré before. There is significant scholarship on the potential for a norm of accountability to change international relations; and there is a small amount of scholarship on this particular trial –

[41] George and Bennett, 2005, 210.

mostly written by Reed Brody, the man discussed above. By connecting these two topics, the author of this paper hopes to add to the literature demonstrating how a norm of accountability is developing in international relations, as well as to highlight a very important legal victory over impunity which has largely been overlooked in the field thus far.

Chapter One: A Norm of Accountability?

The development of this a norm of accountability began with the internationalization of justice which occurred in the 20th century and signaled a significant break from the past. Traditionally, jurisdiction, which simplistically is the right to judge, was derived territorially. States established laws and had the jurisdiction to arrest and try individuals who broke those laws within their own territory. However, a norm of accountability is only possible if there is a switch from domestic to international justice. This switch required two distinct changes to the international system. Firstly, the creation of international laws, and secondly, the development of international enforcement mechanisms. However, as will be evident in the case study of the trial of Hissène Habré, the move from domestic-only to international justice and enforcement is so recent, that the international community is still grappling with thorny questions concerning accountability and jurisdiction over international crimes. This section will trace the development of the international norm of accountability and then try to determine whether this new norm is replacing a norm of impunity.

This section will demonstrate that in the 1990s the norm of accountability developed very rapidly. Within this decade the possibility to hold high ranking state official accountable developed from an impossibility, to a feasible practice supported by distinct legal mechanisms and jurisprudence. This section will examine accession and resistance to three specific mechanism support the norm of accountability: the rejection of amnesty, universal jurisdiction, and a duty prosecute or extradite. The rapid development of these mechanisms can be credited to individual norm entrepreneurs who used legal measures and justice systems as a part of their crusade to end the norm of impunity. Their efforts to achieve this, as well as the results, will be collectively referred to as the "project of international criminal justice."

The Development of a Norm of Accountability

Today it is enshrined in the UN Charter that all people are equally deserving of the same human rights and protections, but until the end of the Second World War, states were generally allowed to operate with impunity, even in the case of genocide. Even as recently as 1915, the Western states averted their eyes as the Turkish government slaughtered thousands of Armenians

and other ethnicities within their territory. Some Western leaders wanted to hold the Turkish government accountable for the genocide.[42] However, the political divisions between the Allied countries, and their unwillingness to challenge the reigning conception of territorial jurisdiction proved insurmountable obstacles.[43] Impunity for this genocide is still the state of affairs concerning this genocide as Turkey refuses to acknowledge it as a such.

However, after the Second World War, the Western powers were so shocked by the acts of the Nazis, that they were willing to override the traditional definition of territorial jurisdiction and setting up an international tribunal to hold accountable those responsible for the 'crimes against humanity' which had been committed.[44]

This led to the Nuremburg Tribunals in Germany and the analogous Tokyo War Tribunals in Japan. These tribunals were monumental. Though both their virtues and flaws have been thoroughly studied and criticized elsewhere, it is essential to note that the tribunals following WWII served to completely shatter the previous precedent of territorial jurisdiction. The Allies' willingness to impose international laws on the internal affairs of states set a groundbreaking precedent: if states perpetuate heinous crimes against individuals, their sovereignty is forfeit. No longer would sovereign borders mean inviolable sovereignty. No more would impunity be the norm. Instead governments would be held accountable to their citizens by other states, if need be.

The half century since the end of WWII has seen unprecedented growth of human rights treaties and covenants, all with the intention of forging a global agreement about the responsibilities of states and the international community in relation to the rights of individuals.[45] Treaties, including the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, and the updated Geneva Convention and

[42] On May 24th 1915, the French Foreign Office sent a telegram to the Ottoman Government with a Joint Declaration, stating, "In view of those new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime-Porte [Ottoman Government] that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated [involved] in such massacres." "France, Great Britain, and Russia Joint Declaration, 1915," *Facing History and Ourselves*, accessed June 6, 2017, https://www.facinghistory.org/resource-library/totally-unofficial-raphael-lemkin-and-genocide/france-great-britain-and-russia-joint-declaration-1915.
[43] Dadrian, 1989, 225.
[44] Akehurst and Malanczuk, 1997, 353.
[45] Cmiel, 2012, 27–34.

subsequent protocols, were designed to codify and protect the rights of individuals. Laws were passed by nearly every state banning many other forms of ill treatment towards citizens and especially vulnerable populations like children.[46] These laws created an international regime of constraints on state behavior. Though these constraints were entirely voluntary, they did create a set of expected behaviors for even those states which did not sign these treaties.[47] Thus the international community donned a mantle of responsibility to ensure that no state would abuse its power over its citizens.[48]

Though these international laws concerning the rights of citizens developed quickly after WWII, there was little movement towards the development of international enforcement mechanisms until several decades later. The introduction of enforcement mechanisms began for the most part with creation of the field of Transitional Justice in the 1970s and 80s. During this period, for various reasons, several authoritarian regimes in South America and Eastern Europe lost power, and the countries became democratic. The scholars and activists who took part in the process of creating new governments in these countries also believed that something had to be done to hold the past regime accountable for crimes committed against the citizens.[49] These individuals began to develop mechanisms, such as truth commissions and ad hoc tribunals, as a means to uncover the crimes of the previous governments, and hold them accountable. Transitional justice was the first instance since the end of the Second World War, of human rights laws enforcement. However, once the trend of enforcement and accountability began, it did not reverse. In 1989 there were only nine international courts, but by 2011 there were "at least twenty-five permanent [international courts] and well over one hundred quasi-legal and ad

[46] For a long list of these conventions, which number over one hundred, an extended list is available on the website of the of United Nations Office of the High Commissioner for Human Rights.
"OHCHR | Universal Human Rights Instruments," 2017.
[47] As the International Court of Justice ruled in 1927, "the rules of law binding upon states...emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law. The Case of the S.S. Lotus, 1927, 31.
[48] This responsibility was codified in the 2001 Responsibility to Protect Doctrine which was affirmed by the General Assembly of the UN in 2005. "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity … The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."
"Resolution Adopted by the General Assembly: 60/1 2005 World Summit Outcome, 2005, 30.
[49] For a more complete history of the field of transitional justice see: Teitel, 2009, 321.

hoc systems that interpret international rules and assess compliance with international law."[50] This huge expansion of international enforcement mechanisms is central to the creation of a clear norm of accountability, because it expanded the possibility, as well as the likelihood, that human rights laws can be enforced.

The Flourishing of a Norm of Accountability

Three particular mechanisms supported the development of an international norm of accountability: the rejection of amnesty; the duty to prosecute or extradite; and the precedent for universal jurisdiction.

Central to the field of transitional justice was a hotly contested debate about the place for amnesty within transitional processes when heinous crimes had been committed. Through the 1990s there was a growing clamor of international lawyers and activists around the question of the use of amnesty. Some argued that if peace was to be the central goal of a transition, and amnesty could be used as a bargaining tool to achieve peace, then offering amnesty was a legitimate recourse. However, critics viewed amnesty as, effectively, a form of impunity offered to those who had broken international human rights law, and they declared there could be "no peace without justice."[51]

Until the 1990s, amnesty was often part of political settlements to end conflicts.[52] Respected international law scholar M. Cherif Bassiouni in 1996 wrote "justice is all too frequently bartered away for political settlements …the practice of impunity has become the political price paid to secure an end to the violence of ongoing conflicts or as a means to ensure tyrannical regime changes… the victims' rights become the objects of political trade-offs, and justice becomes…the victim of the means of Realpolitik."[53] Bassiouni was one of this growing

[50] Though not all of these are courts of international criminal justice, this figure does demonstrate the rapid growth of international judiciary organs. Alter, 2011, 388.
[51] Orentlicher, 1990, 2537.
[52] For examples see the cases of Columbia, Argentina, and Chile where exiting governments all passed self-amnesty laws. Some of these laws were struck down by the new government.
See: Roht-Arriaza, 2005, 67-96. Allier, 2015, 20.
[53] Bassiouni, 1996, 10-11.

contingent of human rights advocates and scholars within the international community who advocated that violators of human rights law should be held accountable for their actions, and that to fail to do so was itself a violation of international laws. They argued that certain conventions such as those against torture and genocide were of a *jus cogens* nature and created an *erga omnes* "duty to prosecute or extradite" any individual accused of such malfeasance.[54] As this debate continued through the 1990s, the tide began to turn to favor the anti-amnesty activists.

These arguments were realized in the emergence of the precedent for universal jurisdiction which came about in 1998 with the Pinochet affair in London. Though universal jurisdiction as a concept had existed for centuries, no judge had ever dared invoke it for human rights offences until the 1990s. In 1998, Baltasar Garzón a Spanish judge issued an arrest warrant for Augusto Pinochet, the former president of Chile, for the alleged torture and murder of Spanish citizens in Chile during his presidency. This arrest warrant relied on the nationality principle of jurisdiction, but the British government's decision to honor the warrant and arrest Pinochet in London was under the auspices of universal jurisdiction.[55] Though Pinochet was not ultimately extradited to Spain, his arrest sent shockwaves through the world of international criminal justice. The norm of accountability was growing teeth.

These three mechanisms, the rejection of amnesty, the development of the "obligation to extradite or prosecute," and universal jurisdiction were just starting to develop in the 1990s, but all contributed to the acceptance of the reality of a norm of accountability.

Universal jurisdiction was expanded in certain states, but the most notable example is the law which was adopted by Belgium in 1993 and allowed "courts to try persons accused of genocide, crimes against humanity and war crimes, regardless of whether there was any link between Belgium and the criminal act, the perpetrator or the victim."[56] Wielding the Belgian law like a magic talisman, NGOs and individuals around the world began filing complaints against what they saw as gross violations of human rights committed by the untouchable powerful elite –

[54]See: Brown, 2000, 390. And Orentlicher, 1990, 2537–2618.
[55] Roht-Arriaza, 2005, 67-96.
[56] Halberstam, 2003, 248.

prime ministers and presidents – including Ariel Sharon, George W. Bush and Dick Cheney; Fidel Castro; and Saddam Hussein.[57] The power of international justice seemed unstoppable.

This potential norm of accountability seemed to reach a critical moment in 2001 with the creation of the Rome Statute which allowed for the creation of an International Criminal Court. The Court would have jurisdiction above states (after the states had ratified) in matters pertaining to crimes against humanity, war crimes, and genocide.[58] The jurisdiction of the ICC was derived from states ratifying the treaty, so it was a complementary extension of territorial jurisdiction, rather than universal jurisdiction. The principle of positive complementarity, which is the basis of the Court's jurisdiction, was supposed to inspire states to prosecute these more grievous crimes within their own court systems, but allow the ICC to step in as a court of last resort should states be unwilling or unable to fulfill their duties.[59] Thus, it seemed like the norm of accountability had been written into international law; however, very quickly there was resistance to the rapid development of the norm of accountability.

Pushback Against a Norm of Accountability

In the early 2000s, the project of international criminal justice faced large obstacles and numerous setbacks. The universal jurisdiction laws which had shaken the walls of powerful elites around the world overreached their ability and became politicized. After a battle concerning the place of immunity within universal jurisdiction laws at the International Court of Justice, and direct threats from the government of the United States, the Belgian government drastically limited the scope of their universal jurisdiction law. The ICC, which had become the standard-bearer for the project, faced staunch opposition from various parties from the beginning. Powerful nations on the Security Council such as Russia and China refused to back the project, but the most vocal dissenter was the United States.[60] Early in the first decade of the new century, the US took measures to actively limit the jurisdiction of the ICC over American citizens,

[57] Ratner, 2003, 890.
[58] "Rome Statute of the International Criminal Court," 2002.
[59] For more on the specific mechanisms of the ICC and complementarity see Schabas, 2011, 98.
[60] Jianping and Zhixiang, 2005.

especially soldiers, by passing bi-lateral non-extradition agreements with various other countries to circumvent the ICC's jurisdiction.[61] Not only were stumbling blocks coming from these detractors, but as the politicization of justice continued, discontentment began to foment among the proponents of international criminal justice as well.[62] Stagnation and polarization within the project of international criminal justice threatened to drown the movement completely. Some even predicted that the human rights revolution would recede into unpopularity for several decades.[63]

African States and the Norm of Accountability

Many of these setbacks, or reevaluations of the scope of the project of international justice, have been connected to trials that have concerned Africa. In each instance where international criminal justice has interacted with an African state, the circumstances have been completely individual. While each African state is unique, and it would be a mistake to simply lump them together, there are, however, commonalities between African states in terms of general historical experience of colonialism and underdevelopment.[64] African states are also joined by many regional projects which foster strong ties between the countries and their heads of state. Furthermore, it is the African Union which has raised the loudest objections to certain aspects of the norm of accountability – specifically the question of head of state immunity. The experience of international criminal justice has been unique within the African context as opposed to say Latin America or Europe where there are equally strong unique traditions of international criminal justice. Demonstrating the particular context is important to understanding the Habré case, as it is interconnected with many of the other issues concerning international criminal justice in Africa.

[61] Hafner, (2005), 324.
[62] See Schabas, 2013, 547.
[63] Moyn, 2016, 308.
[64] Herbst 2014, 12-30.

The African experience of Justice.

Blatant human rights violations perpetrated by European colonizers against African in the 19th and 20th centuries indelibly marked the modern African understanding of justice. The history of the continent has molded a specific understanding of human rights.[65] The norms which govern international criminal justice in African states appear to be different from the norms in Europe. There are particular trends which characterize international criminal justice in African States which include a focus on independence (sovereignty) and the importance of the head of state.

First, within African states there is a heavy emphasis on the importance of independence and sovereignty as a right. This developed from the oppression experienced under colonialism. The desire for independence led to the campaign for a "right to self-determination" which was waged in the 1960s by leaders of the de-colonization movement.[66] They framed the idea of African independence from colonial powers as a matter of human rights, because it was the right of a people to determine their own governance.[67] Some have argued that the leaders of the African independence movements never actually saw self-determination as a human right, but rather as a convenient way to use the popular 'buzz-word' vocabulary of human rights to advocate for independence; and yet the fundamental importance of self-determination and freedom from imperialism has remained a vital part of the discussion of human rights in Africa.[68] Equally important to political sovereignty was the push for the right to economic sovereignty or independence. This fundamental aspect of justice in African states clearly arose from its colonial past as well. The inability of native African peoples to control their own land or make economic decisions under the colonial rule system was not quickly forgotten.[69] The 1981 African Charter on Human and Peoples' Rights provides: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people….States … shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced

[65] Herbst 2014, 98.
[66] Simpson, 2013, 245.
[67] Burke, 2011, 37.
[68] Simpson, 245.
[69] Okere, 1984, 145.

by international."[70] The signatories desired to ensure that African States experienced no political or economic interference from western states or businesses. Since ratification of the charter, one of the greatest objections raised by certain African leaders to attempts to enforce an international norm of accountability has been that it constitutes political interference. This is especially true in relation to a disagreement which has developed over the idea of head of state immunity.

Because of this colonial legacy and recent independence, the position and power of an African head of state is unique. This paradigm of political arrangement, recognized since the time of Machiavelli as "personal rule," is central to how most politics is conducted in African states. Personal rule is a type of leadership shaped by the person in power, and not by institutional structures:

> Personal rule is a distinctive type of political system in which the rivalries and struggles of powerful and willful men, rather than impersonal institutions, ideologies, public policies, or class interests, are fundamental in shaping political life Indicators of personal regimes. Indicators of personal regimes in sub-Saharan Africa are coups, plots, factionalism, purges, rehabilitations, clientelism, corruption, succession maneuvers, and similar activities which have been significant and recurring features of political life during the past two decades. [71]

This paradigm of personal rule has been a central part of African history and politics since decolonization;[72] albeit, Daniel Posner and Daniel Young argue that this personal rule aspect of African politics is decreasing based on the declining number of coups and increasing number of elections.[73] Whether or not this is the case, the fact remains that personal rule has been, and continues to be, a large part of African politics. The importance of the president has been cemented over and over by coups and foreign relations and even the African union itself.[74] In African states, there is not much that the president cannot do, which is very different from

[70] "African Charter on Human and Peoples' Rights," 1981.
[71] Jackson and Rosberg, 1984, 421.
[72] Herbst 2014, 109.
[73] Posner and Young, 2007, 127.
[74] Herbst, 2014, 110.

other states. Thus, the issue became publicized when international criminal justice started challenging the immunity of African heads of states.

There are certain regional groups within Africa which are very proud and strong defenders of human rights, such as ECOWAS or the African Court of Human and People's rights. However, both these groups, as well as the African Union (AU), place very strong importance on sovereignty (meaning independence). They also have repeatedly reiterated the importance of ensuring head of state immunity is upheld. The African Charter on Human and Peoples Rights, the document which formed the African Court of Human and People's Rights guarantees head of state immunity, which many activists and lawyers have strongly objected to as "a huge slap in the face of international criminal justice" and the accountability norm.[75] The norms surrounding justice and international law are unique because of the history of colonialism and the recent rise to independence. There is a much greater emphasis on sovereignty and head of state immunity that in other states.

However for seminal reasons, many African activists were very interested in the potential of the movement towards international criminal justice and a norm of accountability. Since independence, continued underdevelopment has left African states reliant on the international community for economic support. As a result, African states feel a lack of agency, and often as though they have been taken advantage of or left behind in the rapid moving, globalized, post-WWII world. Thus, when new options for international criminal justice were presented, many African states and activists sprang on it as the solution to many of Africa's problems. As William Schabas explains, African activists were "Frustrated by the inability of other international organizations to address the concerns of their troubled continent, [so] they turned to a new experiment in global justice that did not seem to be characterized by the traditional dialectic of north and south, rich and poor, first world and third world, Great Powers and everyone else." [76]

Throughout the 1990s and early 2000s, African states employed various transitional justice mechanism in post conflict situations, including the 1994 International Criminal Tribunal for Rwanda, the 1994 South African Truth and Reconciliation Commission, the 2001 Special

[75] Agwu, 2014, 39.
[76] Schabas, 548.

Court for Sierra Leone, and the concurrent Sierra Leone Truth and Reconciliation Commission. Each of these mechanisms was created as a means to process the horrific events that happened within these countries. Some focused on accountability, while others allowed for amnesty.

African States' support for using international criminal justice led them to be early signers and the lead supporters of the International Criminal Court. They appreciated that the Court appeared "genuinely egalitarian in structure and profoundly fair in conception."[77] This was a court which African states could actively shape, which would place them on equal footing with Western powers, and which would allow them to tackle corruption un-politically. Due to this optimism, a third of the first sixty ratifications to the Rome Statute, which were necessary to enable the creation of the Court, came from African states.[78] However, it quickly became clear that underlying questions of jurisdiction, sovereignty, and sovereign immunity had not been adequately addressed.

Conflict over Universal Jurisdiction

The first indication of this came when Belgium, under the auspices of their universal jurisdiction law, arrested Abdoulaye Yerodia Ndombasi, the foreign minister of The Democratic Republic of the Congo (the DRC) in 2000.[79] Belgium argued that as Mr. Ndombasi was accused of breaches of international human rights law and crimes against humanity; his immunity (*immunity ratione materiae)* did not prohibit the arrest. However, The Congo vehemently disagreed and filed a complaint against Belgium in the International Court of Justice (ICJ).[80] The International Court of Justice sided with the DRC. The reasoning for this opinion was that states breaking the rule of immunity would do more to harm interstate relations and possibly disturb the peace, than these actions would do for the benefit of human rights.[81] The judgement also

[77] Ibid.
[78] Ibid.
[79] Application Instituting Proceedings, 2002, 3.
[80] *Immunity ratione personae* is immunity that comes with certain state offices and the person possesses this immunity as long as they hold the office. This includes senior state officials, heads of state, heads of government, foreign ministers, and diplomats. This immunity is considered absolutely necessary to peaceful relations between states, as being arrested and detained would most certainly hinder their ability to perform their function. These officials are, under customary international law, immune from all criminal charges for public or private acts. It does not matter if the act was committed before or during the person assuming the office. Akande, 409-410.
[81] Akande, 411.

stated that the court was "unable to deduce...that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction...[for] current ministers for foreign affairs, where they are suspected of having committed war crimes or crimes against humanity."[82] The Court found that there was no exception to this immunity in regard to a foreign national court. However, immunity would not be a bar to prosecution, in certain select cases, such as an international tribunal with jurisdiction, or if the home country waived the individual's immunity.[83]

This case, called *Arrest Warrant*, changed the course of how the norm of accountability operated. It limited the power of universal jurisdiction, and reaffirmed the importance of immunities awarded to state officials. But the ICJ was quick to clarify that immunity from jurisdiction is not equivalent to impunity. "Jurisdictional immunity," the judges wrote, "may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."[84] Thus *Arrest Warrant* may have done more to support the norm of accountability than to derail it. This case created a distinct set of rules for when universal jurisdiction could apply, and activists took this new playbook and ran with it.

Conflict over Head of State Immunity

However, this case left the issue of immunities far from settled. In 2008 the International Criminal Court challenged the issue of head of state immunity and issued an arrest warrant for Omar al-Bashir, the sitting president of Sudan for crimes against humanity and genocide.[85] However, the Court was badly prepared for the resulting outcry concerning indicting a sitting head of state. In 2013, a similar situation arose in Kenya, as the ICC pressed for the arrest of recently elected president Uhuru Kenyatta and deputy-president William Ruto.[86] This seeming disrespect for the immunity and sovereignty of African States led to led to a crisis of confidence and something of a collapse in the previous support for the Court on the African continent.[87] These moves by the ICC were interpreted as threatening by the heads of state of several other

[82] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2011, 25.
[83] Ibid.
[84] Ibid. 26.
[85] "Warrant of Arrest for Omar Hassan Ahmad Al Bashir," 2008.
[86] "The Prosecutor v. Uhuru Muigai Kenyatta," 2014.
[87] Cambell, 2016.

African countries. These antagonized leaders used the regional platform of the African Union to launch a public relations campaign against the ICC, decrying it as "anti-Africa."[88] A resolution to refuse to arrest Omar al-Bashir, complete non-compliance from the Kenyan government, and the announced withdrawal of three states from the ICC, shook the standing of the Court.

This falling out between the African Union and the ICC was significant. It demonstrated a growing distaste for international tribunals and in Africa, a desire to create viable alternatives under the banner "African Solutions to African Problems."[89] No longer would the norm of accountability be left in the hands of European powers to control. If African states were to subscribe to a norm of accountability, they would do it on their own terms, and on their own soil. Ultimately this does not represent a disagreement about the need for accountability, but rather about the method to achieve accountability.

Conflict over the Obligation to Extradite or Prosecute

The largest standing conflict with the norm of accountability has been in relation to the arrest warrant issued by the ICC for the President of Sudan, Omar al-Bashir. This high-profile case has caused significant problems in assuring the standing of the ICC. The warrant was issued in 2008, and since then Bashir has traveled to several states which are ICC members including South Africa, Kenya, Uganda among others. These African states have an obligation to the ICC to arrest Bashir, but they have continually refused to do so, citing the immunity owed to Bashir as a head of state.[90] To summarize the complicated legal principle, the concern is whether the act of arresting a foreign head of state would be a violation of the diplomatic duties owed to that head of state. The African states claim it would, but the ICC argues that the state's obligation towards accountability is far more pressing. In 2017, the ICC summoned South Africa to explain why it failed to arrest Bashir, and at the time of writing, has not yet delivered a verdict concerning whether South Africa failed to comply with international law.[91] It is likely that this issue will continue to be contentious, no matter which way the ICC decides.

[88] Allison, 2016.
[89] Ferim 2017, 1.
[90] Kersten, 2015. "Sudan's Bashir Defies Arrest Warrant with Trip to Uganda," 2016. "Kenyan Ambassadors Summoned over Omar Al-Bashir's Visit," 2010.
[91] Maliti, 2017.

Results of Test One

One of the problems of writing about international norms is that they don't come with capital letters, which is to say they are not self-evident. Perceiving whether or not a norm exists is a tricky process, and it is often only in retrospect that the pattern of norm creation is clear. However, Sikkink's theory that norms are created through a dynamic process of advocacy and opposition, is the best explanation of how to identify developing norms within current International Relations scholarship. Ultimately one cannot know whether states truly agree with and will behave consistently with a norm. However, in the case of the norm of accountability, its growing strength is evident in the acceptance of certain principles and structures which accompany the norm, including the rejection of amnesty, the precedent for universal jurisdiction, the legal arguments for an obligation to prosecute or extradite, and the creation of the ICC. As this section has demonstrated, these ideas came about as part of the push for greater accountability in the 1990s, but faced a good deal of push back from some states, especially the US, and within the African continent. There are many norm entrepreneurs and some norm leaders who appear to have accepted the norm, and to be pushing for its accession in the rest of the international community. Because of this it is evident that though the norm has gained significant momentum, it has not reached a tipping point.

With this understanding of the norm, it's history, and its development, we can proceed to an examination of the case study – the connection between the norm of accountability and the trial of Hissène Habré.

Chapter Two: The Norm of Accountability and the Trial of Hissène Habré

The Trial of Hissène Habré is in some ways a generic story of a villainous head of state. His apparent complete disregard for the lives of his citizens and megalomaniacal thirst for power are equal to some of the worst dictators in history. However, unlike most of these other vile individuals, Habré was forced to stand before a judge and hear his victims raise their voices and sing the litany of his sins. Thus, the question must be asked – what extraordinary circumstances led to this alternative outcome? Why did Habré have to face legal consequences for his actions but not Pol Pot or Joseph Stalin or Omar al-Bashir? Was there something extraordinary about Habré's victims? Where they more willing to push for justice than any other victims in the past have ever been? As this seems unlikely, this paper hypothesizes that, although Habré's victims did work tirelessly to ensure his trial would occur, it was the recently developed structure and mechanisms of the norm of accountability which allowed this trial to succeed. Had such mechanisms been available to the victims of those earlier criminals, they too might have faced accountability for their crimes. This next section will describe Habré's assent to power, his exile to Senegal, and the process of ensuring his trial. It will then proceed to analyze the connections between the international norm of accountability and the process of bringing Habré to justice. Ultimately, this section will conclude that the connections between the norm and the case are not as clear cut as initially expected.

Habré Comes to Power

Before Hissène Habré became the president of Chad, he was the leader of a particularly violent armed rebel group which opposed both Goukouni Oueddeï, the President at the time, and the Libyan incursion into the The Aouzou Strip.[92] During the Cold War, the US, under the Regan Administration, was concerned about the potential influence Gaddafi's socialism in Libya could have on the surrounding countries, and so decided to covertly fund and arm rebel groups in Chad to push out the Libyans, and overthrow President Oueddeï's pro-Gaddafi government.[93] They

[92] Brody, 2016, 13.
[93] Ibid, 14.

wanted to install Hissène Habré. France, the former colonial power in Chad, supported the idea of changing the Chadian leadership, but was opposed to the selection of Habré (there were several other armed militia leaders who they could have backed) as he was responsible for the kidnapping and murder of a prominent French archeologist, as well as and the murder of a general sent to negotiate her release. However, after his successful coup in 1982, France agreed join the United States' support for Habré's presidency.[94]

With the backing of these foreign states, Habré became the most violent and murderous president in the Chad's history. Habré's penchant for violence was known before he became President, but with the power of the state as his disposal, this predisposition became deadlier.[95] His secret police, the Documentation and Security Directorate (DDS), became the tool he used to maintain his power. The DDS's mandate included "the suppression, through the creation of files, concerning individuals, groups, collectives, suspected of activities contrary to or merely detrimental to the national interest;"[96] to collect this information, the organization employed horrendous torture and inhumane treatment.

The DDS was largely funded by international sources such as the US, France, and Iraq.[97] The US provided a budget of 5 million Francs CFA, the Chadian currency, per month, an amount that grew to 10 million in 1988. They also provided weapons, trainings, surveillance equipment, and numerous other services to the DDS. According to the reports collected after Habré was deposed, individuals from the US embassy were often visitors at the offices of the DDS or at the director's home. The information sharing between the DDS and US as well as other foreign information agencies continued until the downfall of Habré.[98] The DDS was funded by these foreign sources to be a mechanism for information-gathering to thwart the plans of Gaddafi in Libya; however, under the control of Habré, it quickly became an instrument of terror and oppression.[99]

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[94] Thulliez, 2016.
[95] It was well known that his rebel groups would murder their enimies with no reserve. Once, over one-hundred bodies were discovered on the banks of the river where Habre's troops had camped the night before. Ibid. 28.
[96] Décret du 26 janvier 1983, art. 4 quoted in Ibid. 21.
[97] Commission d'Enquête Nationale du Ministère Tchadien de la Justice,1992, 28.
[98] Ibid.
[99] Ibid. 30.

In Mahamat-Saleh Haroun's documentary, *A Chadian Tragedy,* victims speak about the fear that ran through their communities, fear that they would be paid a visit or arrested by the DDS.[100] Often when people were arrested they were given no opportunity to prove their innocence. Instead, they were tossed into overcrowded prisons with no hygiene facilities, and were regularly tortured for information about their neighbors and friends. In this documentary, which is not even the most graphic recounting of the crimes of the DDS, victims show deep scars, burns, missing limbs, and other poorly healed injuries sustained from DDS agents. It is documented that during the eight years of his presidency, Habré and his DDS agents were responsible for the deaths of over 3,780 people and the torture of over 30,000; but the Truth Commission Report published in 1993, after Habré had fled the country, calculated that these confirmed deaths and instances of torture represented only about 10% of the actual amount.[101] Thus, the total number of deaths attributed to Habré and the DDS is often listed as about 40,000, and total number of individuals tortured as 200,000.[102]

The Truth Commission Report sums up Habré's particular approach, saying, "Hissène Habré is a man determined to exterminate all who do not share his opinions: according to Habré, those who do not think like him are against him, and all who are against him do not have the right to live."[103] He used the DDS as a weapon with the single purpose to bring all Chadians into total obedience through subjugation and terror.

Habré was ousted from power when his second in command, Idriss Deby, overthrew him in a coup in 1990. He fled to Senegal after emptying the state's coffers, believing himself set-up to live the rest of his life in comfortable exile with impunity.[104]

The Process of Justice

Indeed, it is likely that no one would have ever considered the name Hissène Habré again after this coup, except for two crucial factors: the determination of his victims to ensure he was put on trial for his crimes against them, and the mechanisms of the international norm of

[100] Haroun, Documentary, 2016.
[101] Ministère Tchadien de la Justice, 1992, 68.
[102] Brody, 2016, 3.
[103] Ministère Tchadien de la Justice, 1992, 31. Translation by author.
[104] Brody, 2015, 209.

accountability. The story of Habré's trial is both very individual and very international. It was only because of fascinating combination of forces pushing for Habré to be arrested and tried, that the trial ever came to fruition.

The process began with a man named Souleymane Guengueng. He was held captive in one of the of worst of Habré's prison camps for two and a half years – La Piscine. He recounts that the depravity of his situation caused him to lose hope many times, but he swore that if he left the prison alive, he would bend his entire will towards seeing Habré brought to justice for the atrocities for which he was responsible.[105] Guengueng was freed in 1990 when Habré was ousted, and, true to his word, he began compiling evidence against Habré. He formed the Association of Victims of the Crimes of Hissène Habré's Regime, began interviewing Habré's victims to gather evidence against him, and petitioned the President Deby's government to create a Truth Commission to investigate the extent of Habré's crimes. Already we see here the influence of the norm of accountability in this case. Truth Commissions, by 1991, were already established mechanisms of transitional justice. There had been truth commissions as a part of the transition process in several Latin American countries including Chile and Argentina, and within Africa there had been one in Uganda and Zimbabwe.[106] Truth Commissions can act as an essential part of a transition within a country to bring about reconciliation and peace. However, they can also "be set up by a government to manipulate the public perception of its own tarnished image, in order to promote a more favorable view of the country's human rights policies and practices," which is exactly how Idriss Deby sought to use the truth Commission in Chad. Deby sought to manipulate this tool of the human rights movement to ensure that Habré was highlighted as the antagonist, and to whitewash his own (Deby's) misdeeds.[107]

Though the Truth Commission was plagued with issues of funding, disappearing investigators, and violent resistance from Habré supporters, it was able to locate files detailing the murder of 40,000 and torture of 200,000 people at the hands of the DDS, as well as

[105] Haroun, Documentary 2016.
[106] Hayner,1994, 601. The South African Truth Commissions, which is considered the most famous was not created until 1994.
[107] Ibid, 608.

incriminating handwritten notes from Habré himself.[108] Beyond Habré, the report accused several other high-profile individuals, many of whom still worked in the Chadian government. For this reason, the Chadian government was not at all willing to pursue the matter, and resisted indicting Habré or pursuing his extradition from Senegal.[109] Deby also ensured that the files from the Truth Commission were sealed in 1992, so they would be unavailable to be used as evidence. However, the Guengueng and his Associaton had kept copies secretly, and these cached files became the evidence which was used against Habré in Court.[110]

Grassroots organizers within Chad were pushing hard for accountability. However, this pressure alone would not have been enough to accomplish the feat of bringing Habré to court. Seeing a lack of response from his own government, Guengueng reached out the international organization Human Rights Watch (HRW) to ask for their assistance to take the case to trial in 1999, seven years after the completion of the Truth Commission Report. In 1999, Human Rights Watch expressed great interest in bringing about the trial of Hissène Habré. Internationally, in the first instance of universal jurisdiction being used to arrest a head of state in history, Pinochet had just been arrested in London, HRW was actively searching for cases to take on which could be "the next Pinochet."[111] In other words, they were looking to create *jurisprudence* to support the burgeoning norm of accountability. This case against Habré appealed to HWR because: documented evidence was already in place; there were minimal legal barriers which could impede prosecution; Senegal, where Habré was living, was a country with an independent judiciary and respect for human rights; and the Chadian Association for the Promotion and Defense of Human Rights, the grassroots organization pursuing the case, had a strong and dedicated network of witnesses ready to testify. With all of these elements in place the international NGOs felt that there was a good likelihood of success.[112]

Thus, the International Committee for the Fair Trial of Hissène Habré was assembled, composed of victims and human rights groups in Chad and Senegal, HRW, and the International Federation for Human Rights (FIDH). United in their resolve to see justice done, this group filed

[108] Ibid. 625.
[109] Brody, 2000, 323.
[110] Ibid. 324.
[111] Brody, 2015, 209.
[112] Ibid. 210.

a criminal complaint in Dakar against Habré in January 2000. Within a month, Judge Demba Kandji, who Henri Thulliez described as "very brave" for this act, indicted Habré on charges of torture, crimes against humanity, and other barbaric acts.[113] However, after an election which shifted power to a new political party. It quickly became clear that new President Wade of Senegal did not favor a trial of Hissène Habré in Senegal. After the election the charges against Habré were promptly dismissed on the grounds that the courts lacked jurisdiction to try the alleged crimes. Whether or not this was true was unclear, as legal arguments were never heard. It is believed that Habré supporters spent large sums of money to block the case, and that, possibly, the new president intervened as well. Articles ran in local Senegalese papers attacking the groups which were bringing the case against Habré, and alleging the charges were a part of a French and American imperialist plot.[114] For this reason, those who were working to ensure Habré would be held accountable speculated that the dismissal of the case was more political than legal.[115]

After their first attempt failed, the Committee for the Fair Trial of Hissène Habré began pushing in many directions simultaneously. They helped three Belgian citizens of Chadian origin file a case against Habré in Belgium under their universal jurisdiction law, using the nationality principle of jurisdiction.[116] Other victims lodged a complaint against Senegal with the UN Committee Against Torture (CAT), the body that monitors the implementation of the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Senegal ratified this treaty in 1986, but did not implement as domestic legislation within Senegalese law until 1996.[117] The Committee used these international instruments to bypass the domestic politics in Senegal and appeal directly to the International level. Within the international community there were many who were friendly to the cause of this Committee. The groundwork had been laid internationally, and the Committee was able to take advantage of this, by circumventing the unfavorable political climate within Senegal, and appealing to a higher

[113] Thullies, Lecture, 2017.
[114] Brody, 2000, 327.
[115] Brody, 2015, 210.
[116] Brody, 2015," 211.
[117] Which was an argument repeatedly used by President Wade to back the claim that Senegal could not try Habré. The logic here is that as the laws which Habré broke were not inexistence until after Habré had ceased to break them, Senegal could not retroactively hold Habré accountable to those laws. OHCHR, "Country Profile for Senegal -- Status of Ratifications" 2014.

power on the international level. They used the structures of the international norm to propel the case onwards, after they had been denied on the domestic level.

Despite the multiple efforts on an international level to bring Habré to justice, Abdoulaye Wade, who remained the President of Senegal from 2000 until 2012, was not eager to contend with whatever international forces the Committee might be capable of bringing to bear. Fearing that Habré's asylum in Senegal was about to become politically problematic, in April 2001 Wade announced that Habré had one month to leave Senegal. However, the UN and the CAT immediately asked that President Wade take all necessary measures to prevent Habré from leaving Senegal, as they were concerned he could flee to a state where he would be politically untouchable, and as a result, he might never be held accountable for his actions. [118] The risk of contravening the will of these organizations was too great, and Wade retracted his demand. Thus, the Committee's play to the international community had been successful, and one can see that the normative process was at work in this dynamic, increasing the expectation that accountability be sustained. Clearly there were norm leaders beyond Senegal who were willing to put pressure on Senegal to ensure that Senegal would not directly contravene the norm.

Efforts to bring Habré to justice, meanwhile, continued on often overlapping labyrinthine paths. In 2001 the ICJ knocked down the Belgian universal jurisdiction law in the *Arrest Warrant* case, as has been discussed previously. The *Arrest Warrant* decision even suggested that former heads of state enjoyed immunity for all acts committed during their period in office except private acts, and so the Committee lobbied the Chadian government to waive Habré's immunity – so that it would not bar prosecution, which Chad did in 2002.[119] This is an interesting instance of the norm of accountability being narrowed, but not halted. In truth, adding definite legal parameters to the norm may have made the trial more feasible, as it resolved one of the many complex questions which involve head of state immunity and jurisdiction. Furthermore, with the strength of the ruling of the ICJ, and Chad acquiescence to the Committee's request to waive Habré's immunity, there could be no legal argument made that Habré was immune to criminal prosecution due to head of state immunity. The removal of this legal impediment was of monumental importance to the advancement of the case. However, in a legal sense it meant that

[118] "United Nations Asks Senegal to Hold Ex-Chad Dictator," 2001.
[119] "Chad Lifts Immunity of Ex-Dictator," 2002.

it is still unclear whether head of state immunity serves as a bar to prosecution for even crime against humanity – however, there is not space to explore such questions in this paper.

Though the Belgian universal jurisdiction law was reduced after the *Arrest Warrant* case, the Belgians did investigate the Habré for four years. In 2005, Belgium indicted Habré for crimes against humanity, war crimes and torture, and requested Habré's immediate extradition from Senegal to face prosecution for these crimes.[120] Senegalese President Wade was still wary of political fallout from the Habré case. Thus, after a court within Senegal ruled that it did not have the proper authority to decide whether to honor the extradition request, he referred the situation to the African Union.[121] The question here, concerns the previously discussed "duty to prosecute or extradite." Did international law compel Senegal to comply with Belgium's request? If a responsibility did exist, as a part of the norm of accountability, then Senegal could not continue to ignore the accusations against Habré without facing repercussions from the international community.

To advise them in the matter, the African Union created a Committee of Eminent African Jurists in January 2006 to "consider all aspects and implications of the Hissène Habré case as well as the options available for his trial." This Committee met after the CAT the same year, determined that Senegal had indeed violated the Convention against Torture by failing to prosecute Habré – a serious denunciation. The recommendation from the AU's commission, as discussed above, was based on the loose principle 'African Solutions to African Problems." The AU offered the opinion that an "African option should be adopted," and that "Habré should be tried by an African member State - Senegal or Chad in the first instance, or by any other African country."[122] Senegal accepted the ruling and this responsibility, which seemed to be a victory for the "duty to prosecute or extradite." However, it quickly became clear that a mere recommendation would not compel Senegal to fulfill this responsibility. Wade maintained that a trial for Habré would "'require substantial funds which Senegal cannot mobilize without the assistance of the International community.'" [123] The lack of funds, he said, was the *only* obstacle

[120] Simons, 2005.
[121] Brody, 2015, 212.
[122] Camara et al. 2006.
[123] Shah, 2013, 355.

to Habré's prosecution within Senegal. However, many speculated that for his own political reasons, Wade wanted to ensure Habré never saw his day in court.

Belgium apparently disbelieved Senegal's account that funding was the only impediment, and "initiated proceedings at the ICJ regarding Senegal's failure to prosecute Habré or extradite him."[124] This move was very significant as it was the first time that the ICJ would ever rule on whether or not this obligation did indeed exist in international law. If the court sided with Belgium, it would be an important victory for those seeking to create *jurisprudence* to support the accountability norm. In 2012, two years later, the ICJ did rule that "Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him."[125] Thus the "obligation to prosecute or extradite" which the scholars of the 1990s had written about, became part of international law.

It would seem that Belgium's inference that Senegal had been stalling was well reasoned. Back in 2010, the negotiations over a budget for the trial were dragging on, and becoming what Bishop Desmond Tutu referred to as an "interminable political juridical soap-opera."[126] By late in the year, an agreement had nearly been brokered for the funding of an "extraordinary" court which would exist inside the Senegalese judicial system, but have the competency to try Hissène Habré. However, after an ECOWAS court ruled that the trial would have to be of an "international nature," the process stalled out, as it was unclear what this ruling meant.[127] Was an international tribunal necessary? Or could a tribunal within the Senegalese legal system be crafted to have an "international nature." President Wade withdrew Senegal from these negotiations, saying he would expel Habré from his country; but he again quickly retracted the statement after objections from international organizations.[128]

To most observers at this point, expectation of the trial seemed moribund. Jacqueline Moudeina, the attorney for the Chadian Association for the Promotion and Defense of Human

[124] Brody, 2015, 213.
[125] "Summary of the Judgement of 20 July 2012 Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)," 2012, 16.
[126] "Au lieu de voir leur cause entendue, les victimes ont eu droit à un interminable feuilleton politico-judiciaire." Desmond Tutu et al., 2010.
[127] This decision has been lauded by some and critiqued by others. William Schabbas, the foremost scholar on the ICC called it "bizarre." Schabas, 2017.
[128] "Le Sénégal suspend l'expulsion d'Hissène Habré au Tchad," 2011.

Rights lamented that “"We would have liked to see Habré tried in Africa …[but] the idea that Senegal would try Habré was just an illusion." [129] All hope of ever exacting accountability for Habré appeared to be vanishing.

This would seem to contradict this paper’s hypothesis that the international norm of accountability was the reason the trial occurred. At this point in time there were clearly many influential international actors, norm entrepreneurs, who were pushing very strongly for the case to proceed. Their influence ensured that Wade prevented Habré from fleeing to a different country. However, the pressure they were placing on Senegal was apparently not sufficient to ensure that the trial would occur. This is a moment which exemplifies the importance of understanding the norm cascade. Had the international norm of accountability not existed, at all, or been weaker, the process could not have proceeded even this far. Yet the norm, or the expectation for behavior, could not force Senegal to comply, so long as Wade refused. Yet the norm did create some political repercussions for refusal. Wade’s international credibility was damaged. Ultimately, what is demonstrated here is that, though the norm cascade had not passed a tipping point where compliance would be easier than resistance, there is an undeniable dynamic created by the norm of accountability which Senegal was forced to interact with.

Of course, Habré was eventually held accountable for his actions, but it was actually a domestic development within Senegal, another election, which changed Senegal’s tone towards the trial and let it move forward at last. In March 2012, Macky Sall defeated President Wade in the Presidential election. President Sall was much more willing to pursue prosecution, and after the election he immediately announced his intention to see Habré tried in Senegal.[130] There has been speculation that this was a move to curry international favor as a new President. After these events, the AU and Senegal re-entered talks to create an Extraordinary African Chambers for Habré’s trial, and they quickly reached an agreement for the creation of the tribunal. The Chamber’s mandate was to prosecute the person or persons most responsible for international crimes committed in Chad between 1982 and 1990, including genocide, crimes against

[129] “Senegal: Habré Trial an ‘Illusion,’ 2011.
[130]Brody, 2015, 212.

humanity, war crimes and torture.[131] In accord with the request of the Chadian Association, victims would be permitted to participate in the criminal proceedings as civil parties. They would be represented by Jacqueline Moudeina and they would seek reparations.[132]

Habré's trial commenced in 2015, but was delayed Habré's refusal to cooperate. The first day, he and his lawyers disrupted the court, and had to be physically dragged from the Chambers, shouting all the way.[133] When the trial resumed the next day, Habré refused to speak to defend himself or recognize the authority of the Court. The court decided to appoint three attorneys to defend him "in order to 'defend the interests of justice,' both the chief prosecutor and one of the lawyers explained."[134] However, even after the trial resumed with new lawyers, Habré refused to cooperate. He ignored the proceedings and covered his face so his expressions were not visible – as was in his interest.[135] However his victims felt that his actions made it clear that he felt no remorse. One of the victims who testified later stated that Habré's refusal to speak or to apologize or to acknowledge the suffering of his victims felt like the "wounds were being torn open anew."[136] Yet, the court did offer his victims the opportunity to speak against him in public, which they had desperately desired for twenty-five years.

On May 30th, 2016, the Extraordinary African Chambers found Hissène Habré guilty of crimes against humanity.[137] His lawyer appealed, but he was found guilty again in April 2017. The Appeals Chamber ruled that Habré would serve life in prison for his crimes and that a $136 million trust fund should be created to pay remunerations to the thousands of victims of his crimes.[138] This fund would be run by the African Union, but as Habré's money has not been located, the fund stands empty. Jaqueline Moudeina, lawyer for the victims, has stated that the work of the Chadian Association for the Promotion and Defense of Human Rights will not be

[131] "Statute of the Extraordinary African Chambers within the Senegalese Judicial System for the Prosecution of International Crimes Committed on the Territory of the Republic of Chad during the Period from 7 June 1982 to 1 December 1990," 2014.
[132] Brody, 2015, 213.
[133] Hicks, 2015.
[134] Cruvellier, 2015.
[135] Haroun, Documentary, (2016).
[136] Abaïfouta, Discussion, 2017.
[137] Maclean, 2016.
[138] Barry and Searcey, 2017.

complete until the victims are paid what they are owed.[139] However in the eyes of the rest of the world, this marks the end of the Hissène Habré affair.

Results of Test Two

The purpose of the case study was to test the hypothesis that it was the norm of accountability which led to Habré's trial taking place. To some extent this has been proved true. It is evident that there are many connections between the norm of accountability and this trial. First there are the norm leaders on the international level, including Belgium, the CAT, the UN, and the ICJ; each in some way influenced Senegal and the African Union by pushing for a trial to take place, pushing for accountability rather than impunity. Without this international pressure, the process would clearly have faltered much sooner. Norm entrepreneurs and norm leaders who favored accountability supported the case at many stages.

Furthermore, specific mechanisms such as universal jurisdiction and the "duty to prosecute or extradite" pushed the case forward as well. Beyond utilizing the mechanisms of the norm of accountability, the case itself also furthered the jurisprudence supporting the norm of accountability. By taking advantage of the international structures available, the twenty five years of commitment from individuals who pushed for this case resulted in furthering the project of international justice. To some extent it can be said that these activists forged a path through a thicket of international legal norms, and the techniques and advances they made will surely be copied by the next group who will need again to clear away obstacles from accountability and fight against impunity. In saying this, it is important to point out that this fight is about far more than merely creating international legal precedents. The victims of the crimes of leaders like Habré deserve more than to be seen as merely a means to an end for the project of international criminal justice. It would, indeed, be preferable, if justice and human rights were truly observed, and such a fight did not have to continue. Effective prevention mechanisms would be preferable to a legal crusade to punish criminals after the fact. And yet the sad truth is that there will most likely be another similar case and its victims and all of humanity should be grateful for the

[139] Moudeina, Lecture, 2017.

dedication which was given to the pursuit of accountability for Habré, as the precedent will ease their fight to do the same.

But despite these advances, ultimately it appears that this test has proved the original hypothesis wrong. Although the norm of accountability was deeply connected with and supportive of this case, it was not enough to compel the case to proceed. Rather it was a change in the domestic politics within Senegal that was the key to Habré's trial and conviction. This conclusion demonstrates that the power of an international norm of accountability is still less than the power of an individual state. The norm has not passed a tipping point where states are willing to comply with the norm consistently. The consequences of disregarding the norm are low enough that Senegal are willing to risk contravening the norm despite pressure from several very strong international bodies.

Whether accountability will ever become more common than impunity is unclear. However, if the norm life cycle theory is correct, then with every instance where norm entrepreneurs and norm leaders act in support of the norm, it will grow stronger, which may ultimately lead to a tipping point and a "justice cascade" towards a very clear and strong norm of accountability.

Conclusion

This thesis ultimately demonstrates two things. First that within the international realm, a norm of accountability is developing which challenges the longstanding norm of impunity. Cases such as the trial of Hissène Habré are adding to the strength of this norm. However, it is also clear that there is significant distance to cover until the norm passes the axiomatic "tipping point" when a "justice cascade" might begin. Until a significant number of states are willing to enforce accountability over impunity without additional prompting from other international actors, then the norm will continue to be an ideal to be lived up to. Politically, it is understandable that many states would be reluctant to enforce such a norm unequivocally and universally. Many states or individuals would be disinclined to set up a system to which they themselves could ultimately fall prey – as was seen with the United States' reluctance to lend credence to the ICC. Yet the project of international criminal justice will continue, as those who crusade against the norm of impunity will not be satisfied until there is a clear and enforceable norm of accountability in international law and international relations.

Suggestions for further research: the problem of accountability

One major problem with the Habré case is that it is evident that there were more parties responsible for the atrocities which took place than just Habré himself, and yet he is the only high-ranking individual who has been put on trial. What about the DDS agents who conducted the torture? About twenty-five former agents of the organization were convicted for torture, yet President Deby himself has faced no such accountability for his crimes under Habré, or those he is accused of in connection to Darfur.[140] What about the Americans and French who funded and trained the DDS agents? They will never face public censure for their involvement in the deaths of 40,000 Chadians. At what point would the demands of victims be satisfied? Are legal trials really enough to engender a sense of reconciliation and healing after the trauma of events like genocide or mass torture? Should those activists who are certain that there is no "peace without

[140]"Chad: Habré-Era Agents Convicted of Torture" 2015.

justice" stop to consider that justice is a deeply personal value which no cookie-cutter trial and accountability formula experience can ever hope to achieve perfectly?

These questions enter the moralistic area that this paper has sought to avoid. Nevertheless, these are questions that warrant further study. In a world where smaller states serve as proxies doing the bidding of larger states, and where the will and the needs of citizens are overlooked or trampled on, who is accountable and how is justice served when human rights are violated? As powerful countries are still given license to act with impunity on the global stage, perhaps a better characterization of the developing norm would be: "the strong do what they will, the weak suffer what they must, and sometimes those in the middle will be held accountable."

Yet, this disparity should not detract from the very real success which was achieved in Darkar in 2016. The development of a norm of accountability is one of the most revolutionary advancements in international relations in the last century. Though we many not yet live in an Age of Accountability, perhaps it is around the corner.

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