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The American University in Cairo
School of Global Affairs and Public Policy

**INTERNATIONAL CRIMINAL TRIALS CREATING A DOMINATE NARRATION OF
HISTORY
AND OVERLOOKING HISTORICAL BLIND SPOTS**

Submitted to Professor Thomas Skouteris
in partial fulfillment of the requirements for
the LL.M. Degree in International and Comparative Law

By

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January 2023

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Table of Contents

Introduction:.....	4
I. History and Histography	7
1. The nature of history.	7
1.1 History may be considered literature.	7
1.2 History, Truth and Power.	10
1.3 The Narration of History.	13
2. Legal History.	19
2.1 The paradox of using and creating legal history.	19
2.2 Assumptions about Historical data usage.	22
2.3 Context and historical narration.	24
2.4 Historical Narrative and tribunals.	27
2.5 Impunity and show trials.	29
3 Genocide in Rwanda.	36
3.1 Narrations about Rwanda’s ethnic tension.	36
3.2 Complexity of Rwanda’s genocide.	37
3.3 The historical narration of the ICTR.	39
3.4 Historical narration about the genocide in Rwanda:	39
3.4.1 Blaming colonization and ethnicity,	39
3.4.2 Blaming the coffee crisis.	41
3.5 International criminal tribunal for Rwanda.	43
3.5.2 Legal trials limitations and their historical narrative.	46
4. The Verdicts and the Cases	48
4.1 Cases.	49
4.1.1 First Case, AKAYESU, Jean Paul (ICTR-96-04).	49
4.1.2 Second Case, RUTAGANDA, Georges (ICTR-96-3).	53
4.1.3 Third Case, BAGARAGAZA, Michel (ICTR-05-86).	56
5. Conclusion.	58

Abstract

History is key to developing a better understanding of the world, what has happened in the past helps one understand the present. Understanding and studying history helps one understand the identity of his country and other countries as well. History can be the link to understanding and connecting events. You can understand why Israel is hated by Arabs when you study the history of its creation. The definition and the determination of history itself are complicated. Regardless of how major the event you are learning about, history remains the stories which are narrated about this specific event. Historians support these stories with credible sources, transforming them from stories and tales to history. If this history was narrated from a different source, not a historian but a legal entity a criminal court for instance, there comes the entanglement between history writing and international criminal law. Some historical narratives are created by international criminal tribunals prosecuting mass atrocity and the historical function of these tribunals is then undeniable. At this point, one of the functions of international criminal courts would be producing historical records concerning both the accused and the broader mass atrocity to which they are alleged to have contributed¹. As Fergal Gaynor stated, "Any trial involving top military or political leaders, where the trial record incorporates thousands of documents and the testimony of hundreds of witnesses, can hardly avoid creating a historical record"².

History has several components, features, and characteristics to allow the production of a credible historical narrative, which shall be discussed further in Chapter 1 of this research. Criminal international trials also have several components, features, and characteristics to allow the production of a fair verdict and to ensure the delivery of the rights of the accused. The features and the components of international criminal trials are not constructed to produce a historical narrative about the atrocity. This itself may cause the produced narrative to be flawed and this is argued by many historians and scholars, this produced narrative may be considered bad history. One may then assume that historical narratives produced by international criminal tribunals is a collateral damage and is far from being the objective of these tribunals; accordingly, one would be unjust to criticize these narrations as they are far from being the objective of the tribunals. These narrations

¹ See generally Barrie Sander, 'Unveiling the Historical Function of International Criminal Courts: Between Adjudicative and Sociopolitical Justice' (2018) 12 *International Journal of Transitional Justice* 334.

² Fergal Gaynor, 'Uneasy Partners — Evidence, Truth and History in International Trials' (2012) 10 *Journal of International Criminal Justice* 1257, 1262 (emphasis added).

are then built on the assumption of the existence of a certain mass atrocity, if we take the ICTR as the discussed example in this research, the mere creation of the tribunal was to trial those accused of the genocide in Rwanda. Accordingly, when the tribunal was created it had already assumed that genocide had occurred, but the trial itself was trialing those accused of the genocide; what would have happened if the tribunal hadn't convicted anyone? Would this mean that the genocide has not occurred?

In this research I argue the exact opposite of the assumed bad history, I argue that the produced historical narrative is one of the main objectives of these tribunals because the atrocities that have been committed are too grave that no punishment can be equivalent to the committed genocide, war crimes or crimes against humanity. What can be achieved is producing a historical narrative from the perspective of those controlling the trial, that would be dominant and would uphold the perspective of the victims about the massacre. Even if the produced narration was limited since its produced by a legal tribunal and even if the produced narration and the tribunal limitation were found to be biased, this bias may not be dreadful or unwelcome. The source of this bias, its elements, its effect, and its consequences are what need to be discussed, recognized, and then evaluated.

Introduction:

Everyone, every incident, and every criminal have a history, and history is defined as the study of past events and human affairs. Now what one needs to understand when studying history is that this history is created, narrated, composed, and constructed by its author. It is extremely important to acknowledge and admit that this history carries the author's perspective and insight regardless of how objective the author aims to be. A human-produced narration about a person, an incident, or even a criminal will always carry the narrator's philosophy. Accordingly, the constructed and narrated history is not equivalent to the past nor is it a mirror representation or coverage of what has happened in the past. The past and history are not two faces of the same coin. Keith Jenkins addresses history in his book "Re-thinking history" as simply a literature narrative about the past³, in which the available data was composed to form a narrative by which the historians create a meaning of the past. One should be aware and acknowledge that history is to a great extent

³ Keith Jenkins. Rethinking History, Routledge, 2003.

literature, which will consequently allow us to be aware of the inseparable author's philosophical perspective, that affects the produced narration. History as a produced narration is not an innocent production, and it is not equivalent to the past; the author's presumption of the good and the bad gives this narration an ideological nature. Reflecting on legal history and in particular criminal legal history, one can question the produced narration of history that describes international criminal catastrophes. The produced literature narrative about genocide atrocities carries the philosophical and ideological perspective of the author which is influenced and flourished by the presumption of the good and the bad. Since we are discussing international criminal atrocities, one should bear in mind that all affecting factors are more intense; the bad is represented by war criminals, and genociders, and the good is represented in innocent civilians who were murdered, raped, and exterminated.

Legal trials are usually held to deliver equitable punishment to the perpetrators, however, in international criminal law it is assumed to be broader than just that. Several reasons can be behind conducting trials in international criminal law which might be deterrence, rehabilitation, justice for the victims, and history recording⁴. Since history recording is a literature narrative about the past, the international criminal catastrophes that have taken place throughout history lane have had their share of these produced narrations. The narration I am interested in is the one produced by the international criminal tribunals. Historians argue that the history narration produced by legal personnel may be flawed due to the legal limitations that are embedded in the nature of the trial. But come to think about it, is this narration flawed due to the legal limitations, or is it merely biased? And in the events of mass atrocities, is this biased dreadful or awful? Or is it needed to achieve a greater goal? Should we look at this bias differently and analyze it, then maybe we can understand its need. As stated above these the intensity of these situations is out of normal proportion those being trialed are assumed war criminals, genociders and the victims are innocent civilians who were murdered, raped, and exterminated; so, can we afford the idealistic assumption that bias is bad and that objectivity is the answer?

Accordingly, if one wanted to produce a certain narration about the atrocities that have happened, can these limitations be considered favorable to help achieve this certain narration? Can these limitations be considered a tool even to achieve this certain produced narration? The trial

⁴ Robert Cryer, Darryl Robinson & Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4 ed. 2019).

jurisdiction limits the tribunal to prosecute within the given timeframe indicated in the statute of the tribunal. This is a legal restriction for example, however, can be considered beneficial to the historical narrative that is only interested in the crimes of one side; which can be translated into pure bias. One assumed side of it can be that the West, portrayed by the creators of the tribunal manipulates these flaws of history and the limitations of legal tribunals writing history to customize and construct a narration in which they are the saviors but never the ones to blame. Another side of it can be using this assumed bias to confirm the mere occurrence of the genocide and convict the side that is assumed to be at fault. This is what I aim to study in this research by studying and understanding history in general and legal history in particular. Then I intend to study the ICTR as my example to support my assumption mentioned in this introduction.

Research Question:

Two broad questions are addressed within this research:

1. What is the type of historical narration that is usually produced by international criminal tribunals, especially the ICTR? And what are the legal limitations that may have served the production of this special historical narrative? What were also the factors and surrounding circumstances that were taken out of context to reach the goal of producing the desired narration?
2. If the produced narration was proved to be biased or of special nature, due to the legal limitations discussed, is this biased flawed or is it inevitable? Or do we just need to recognize this bias and how it served the production of the ICTR legal verdicts on the genocide and thus served in the creation of the discussed historical narration?

I. History and Historiography

1. The nature of history.

1.1 History may be considered literature.

To be able to explore the research question of this study, one must start with history and its nature as the starting point. This leads us to question what history is and how can one define it. History as described by Keith Jenkins in his book "Re-thinking history" is different in theory than it is in practice⁵, it is also not equivalent to the past as they both are far apart from each other⁶. The knowledge of history does not have to be equivalent to the knowledge of the past, it is merely however knowledge of narrative representation. The main thought Jenkins emphasizes repeatedly throughout his book is the conclusion that history is not a clear reflection mirroring the past; now this is not due to the poor quality of the labor produced by the historians, nor is it due to a lack of resources. This conclusion is due to the nature of history itself, as explained by Jenkins history is a literature produced labor and is a literary narrative of the past. Jenkins's conclusion condemns the assumption that studying and knowing history and its content, can correspond to the knowledge of the reality of the past. The foolish and innocent theory in which history and the past are equivalent is brought down when the light is shed on the fact that history has a purpose, and that history is always entangled with a power that results in it being an ideological product.

Chapter 1 of Jenkins's book discusses what history is; it starts with examining what history is in theory; which defines history theoretically as "one of a series of disclosure around the world" and this disclosure's object of inquiry is the past.

Jenkins explores the difference between the past and history and emphasizes that the difference that exists between both has numerous consequences. The author then makes a simple yet very clear distinction between both history and the past saying that "the past is the object of historians' attention, historiography is the way historians attend to it"⁷. This means that the past which has occurred with all its events is only told, and brought back by historians through their tools of labor which can be, their produced historical books for example. Discussions about epistemology and what historians know about the past become relevant if we need to evaluate the produced narration;

⁵ Jenkins. *Supra* note 3.

⁶ *Id.*

⁷ *Id.*, at 6,7.

because this narration's founding stone would be the author's knowledge about the incident he is describing. Based on that historian's allegation that their labor is an objective real past can be questionable and doubtful. If one would try to compare the phrase Jenkins mentioned above and reflect it on international criminal tribunals; it would be that the verdicts are the object of the tribunals, the past is the evidence condemning the defendants and historical narrations are nothing but collateral damage. This is ironic as the produced narrations of tribunals are mostly considered very credible despite being of a very special nature.

As previously mentioned in this chapter David Lowenthal makes an admirable differentiation between the past and history and he then sheds the light on why history is considered less than the past⁸, which is kind of similar to Jenkins's argument which was also previously discussed⁹. David Lowenthal states that it is impossible to recover a complete account of the past, what is possible is only to recover friction of the past; accordingly, no historical account can ever correspond equally to the past or to what has happened previously. In addition to that one must admit the difference between the accounts of what has taken place in the past and the actual event that has taken place. Lastly, the inevitable and inescapable bias of the recording of the account of events. Thus, if we can assume that no matter how objective historians aim to be, the produced history will always hold the ideology of the historian and certain biased nature, it is flawed that criminal tribunals use a certain biased historical narration to achieve the objective of its creation. And is it flawed that they produce an even more biased narration due to its legal limitation given the intensity of the factors involved, the atrocity itself, the need for the confirmation of the occurrence of the atrocity, the nature of the defendants, and their assumed crimes? Or can we say that if we consider the intensity of these factors it is only logical that the bias intensity would increase as well? The answer may be that we as researchers just need to recognize this and admit that the idealistic philosophy of utmost subjectivity and a subjective historical narration is simply unachievable due to the nature of the creator of the narration which is the tribunal, the nature of the imposed legal limitations and the nature of the atrocity itself.

Accordingly, if we were able to confirm, prove and discuss the ideological nature of history which may be considered as a type or proportion of bias for the purpose of this research; then we can

⁸ David Lowenthal. *The Past Is a Foreign Country*, Cambridge University Press. 1985.

⁹ Jenkins. *Supra* note 3.

reflect this on the bias detected in the historical narration produced by the tribunals. Affirming or proving the existence of bias in all narrations whether produced by historians or tribunals is the starting point, after which the intensity of the bias shall be discussed while considering the different elements and factors affecting both.

For historians the ideological nature of history does not have to be extreme to reach the level of political bias, although sometimes it does, it can be merely simple and moderate and only concerned with the basic nature of the historian himself; (since it is his literature labor). This means that something as primitive as the historian's definition of wrong or his morals can ideologize history to some extent.

When examining ideology as a component of history, and when examining the very definition of ideology itself, which is "A system of ideas and ideals, especially one which forms the basis of economic or political theory and policy."¹⁰ Since history is a produced labor of historians, the undetachable things historians carry within themselves such as their values, ideologies, beliefs, positions, and perspectives must be taken into consideration; as these inseparable elements will eventually, even if slightly, affect their produced labor.

One can conclude that this component is of an extremely variable nature; as the ideas and beliefs of one person will be different even if slightly than another. With this in mind, one can conclude that the result of such component will have a variable nature, regardless of the endless efforts historians exhaust to deliver the outcome with the utmost objectivity. Accordingly, this conclusion shall be linked and supported by the unavoidable bias of history mentioned and discussed in David Lowenthal book "The Past is a Foreign Country" which will, later on, be examined and discussed in this chapter¹¹.

The above critique of history may have portrayed that historians' produced history is flawed. This is partially true; however, this does not devalue the hard work of historians. Historians "research, analyze, and interpret the past," or as described, "It's the collecting of data, it's the collating of data,

¹⁰ "ideology". Lexico. Archived from the original on 2020-02-11.

¹¹ Lowenthal, *Supra* note 3.

it's thinking about it, piecing it together, trying to extract meaning from it and trying to establish patterns out of thousands of little scraps of information.¹²”

Historians use sources of information that include "government and institutional records, newspapers and other periodicals, photographs, interviews, films, and unpublished manuscripts such as personal diaries and letters." These materials are the primary sources. To improve their analysis and interpretation, they also use secondary sources which are the writings of other historians and scholars in other disciplines, especially in the social sciences, that offer theories and insights to illuminate the object of study. Evidence plus interpretation are the substance of the historical study¹³. The collection of data from both primary and secondary sources, the intense analysis of all the collected data, and the study of the event from different perspectives; have not made historians immune to harsh critique as the one which was discussed earlier in this chapter. Accordingly, what kind of critique would be appropriate to a historical narrative that has further fewer components and features to ensure its objectivity and credibility? A historical narrative that is produced by a legal tribunal that has one source of information, a limited jurisdiction, and a subjective author? Linking this to the previously discussed equation of bias, this would only confirm that if historians who have access to more diverse and credible sources still produce a biased narration, then the tribunal who only have access to limited and rigid sources, and have the legal limitations of the fact that it is a legal tribunal would undoubtedly produce a more bias narration.

1.2 History, Truth and Power.

"I remain surprised not that that there is a continuing debate over the definition of truth in history but that there is a matter of debate at all¹⁴" Munslow among others has rejected the concept of truth in history which is to an extent similar to what Jenkins has explored in his second chapter but in a different sense. The debates about the truth and the calls for rejecting truth have been fought by

¹² Jeffrey G. Barlow, "Historical Research and Electronic Evidence: Problems and Promises," in *Writing, Teaching, and Researching History in the Electronic Age*, ed. Dennis A. Trinkle (Armonk, N.Y.; London: M. E. Sharpe, 1998), 196; historian's quotation from Barbara C. Orbach, "The View from the Researcher's Desk: Historians' Perceptions of Research and Repositories," *American Archivist* 54 (winter 1991): 29; Ross Atkinson, "Humanities Scholarship and the Library," *LRTS* 39 (1995): 82.

¹³ Dalton, Margaret & Charnigo, Laurie. (2004). *Historians and Their Information Sources*. College & Research Libraries. 65. P.400.

¹⁴ Alun Munslow, (2003). *The New History*, (Edinburgh: Pearson, 2003) p.86

historians who believe their produced history's backbone is the concept of truth¹⁵. Jenkins asks several questions that explore the gaps that one might find in the defined history he discussed earlier in his first chapter. He asks a very obvious yet very complicated question which is: "if we cannot ultimately know the truths of the past then why do we keep searching for them?"¹⁶ A Pragmatist philosophy of history, the pragmatism solution is completely different from an idealistic one; accordingly, a pragmatistic history differs from the idealistic one if one may assume. The line between theory and practice is here crucial and inadvisable; "Thus the distinctive move in recent science studies has been the shift from conceiving science as knowledge to conceiving science as practice."¹⁷ The practical approval converted the view of science from knowledge to practice; now can this be reflected in history? Can we convert the view of history from truth to truthful literature or even scientific history? Or do we need history to be equivalent to the truth even if this is not achievable? It is that need for knowledge that keeps us searching for the truth of the past, even if it might not be achievable due to the variable components of history that we have previously discussed.

Power comes in this equation to make it even more complicated; as power is what the truth depends on, someone needs to have this certain power to legalize and make this concept of truth true¹⁸. When Jenkins discussed this issue, he was targeting history in particular and truth in a general sense; however, what I would like to focus on in this research is the truth produced by the criminal trials, and what this narration of truth has depended on, which is power.

M. Foucault discussed the meaning of truth as well, he stated that each society has its own defined standards which accept and verifies the truth¹⁹; these standards can be described as general politics, which enables individuals in this particular society to distinguish truth and false and eventually creates or validates the accepted truths in their society. He then mentioned what I believe is a statement of extreme importance, especially to this research project which is "Truth is linked with systems of power which produce and sustain it." This statement brings truth and power into the same equation again, making them inseparable and undetachable. Admitting that power is the

¹⁵ Marek Tamm, (2014). *Journal of the philosophy of history* 8, p 267

¹⁶ Jenkins. *Supra* note 3 at 34.

¹⁷ J.H. Zammito, "History/philosophy/science: some lessons for philosophy of history", *history and theory*, 50 (2011), 397.

¹⁸ Jenkins. *Supra* note 3 at 38.

¹⁹ M. Foucault, *Power/Knowledge*, New York, Pantheon, 1981, pp. 131–3.

producer of truth, is the first step one needs to acknowledge because if the truth might not be that true after all, how does this reflect on history which is the produced labor of historians and which is affected by their ideology, methodology, and epistemology?

Now applying this theory of truth in history is of extreme benefit to those historians and to those who are in power producing these truths. Truth acts as a censor as stated by Jenkins it enables its creators to exercise control and shut down interpretations that might not be supportive of their version of the truth or their perspective of history²⁰. It might be argued that this perspective of history is too cruel and that there are certain facts that history has documented and one cannot argue against them. To examine this argument, we need to identify the difference between the facts and the interpretations. Facts, the world knows that First World War happened between 1914 and 1918²¹, a fact is also us knowing that the Chernobyl disaster was caused by a nuclear accident that occurred on Saturday 26 April 1986²²; however, it becomes more problematic and complicated when historians try to discover why and how these facts have happened. This is why history can be considered literature because simply what historians do is take these absolute facts and construct explanations and narrations to these facts. Accordingly, these are no longer solid facts but a literature review of what happened when the Chernobyl disaster took place, who was in charge, and who was liable for such a disaster. This is all studied and then narrated by historians to provide us with their version of the truth of these facts. Power comes in influencing which narrative becomes truth and which narrative is accepted in that particular society. Thus, one might have two different narrations of the same fact in two different societies and the one example that comes to my mind is the 6th of October war between Egypt and Israel. If you simply type October War in your google engine you will see that it is written that the result of the war was Israeli military victory and political gains for Egypt and Israel²³²⁴. I, myself was brought up reading history books

²⁰ Jenkins. *Supra* note 3 at 39.

²¹ (Timeline (1914 - 1921) | A World at War | Articles and Essays | Stars and Stripes: The American Soldiers' Newspaper of World War I, 1918-1919 | Digital Collections | Library of Congress, 2021).

²² Chernobyl | Chernobyl Accident | Chernobyl Disaster - World Nuclear Association, World-nuclear.org (2021), <http://www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/chernobyl-accident.aspx> (last visited Dec 24, 2021).

²³ Editors, History.com. "Yom Kippur War." *HISTORY*, <https://www.history.com/topics/middle-east/yom-kippur-war>. Accessed 15 Jan. 2023.

²⁴ Department of State. The Office of Electronic Information, Bureau of Public Affairs. *Arab-Israeli War 1973*. 13 Dec. 2007, <https://2001-2009.state.gov/r/pa/ho/time/dr/97192.htm#:~:text=On%20October%20%2C%201973%2C%20Egypt,to%20supply%20the%20Israeli%20military.>

that state the exact opposite, that states that Egypt had an incomparable military victory and that Anwar El Sadat was the one president who managed to defeat the undefeatable Israeli military which was stationed at Sinai at that time. This remains a simple example of two different, opposing truths and two different narrations which are commonly accepted in two different societies.

Conclusion: After reflecting on the above literature which discusses the nature of history and its relationship with the truth about past events, the best outcome one may aim for is a literature illustration with due diligence connecting the past events, the connection is made by historians trying to construct explanations of these events. It can be concluded that there is no absolute truth in history. In addition to that it is safe to assume that one nation's truth is another's nation lie. For the ICTR, the produced narration confirmed the occurrence of genocide against the Tutsis by the Hutus. Making the Tutsis victims without a doubt and the Hutus the evil predators who performed genocide. This narration may be celebrated and cherished by the Tutsis but for the Hutus that's not the case. However, in such atrocity can we afford aiming for an idealistic subjective narration in which both the Hutus and the Tutsis are war criminals who performed indescribable crimes against one another? Can we afford a narration in which there is no good and evil, but merely two evils and no victims? I argue in this research that for the international community's sanity and stability, there needed to be an evil predator and a virtuous victim. I argue that the genocide that happened in 1994²⁵, needed to be convicted and those convicted needed to atone for this atrocity and accept responsibility and accountability. The world we live in today cannot accept the idealistic philosophy or the idealistic conclusion in which both parties are blamed and in which there is evil to blame and atone or innocent victims that needed to be redeemed and rescued. Thus, the produced biased narration just needs to be acknowledged to be of bias nature, but with all factors, elements, and circumstances considered there can be an alternative option.

1.3 The Narration of History.

Narration is without a doubt an inevitable cornerstone in history writing, this was discussed over and over again by brilliant authors such as Hayden White, Louis Mink, and Chiel van der Akker. As stated by Paul Ricoeur "the humblest narrative is always more than a chronological series of

²⁵ History.com Editors. "Rwandan Genocide." History.com. A&E Television Networks, October 14, 2009.
<https://www.history.com/topics/africa/rwandan-genocide>

events.²⁶" accordingly historians can give a narration of their reality of the past however it may be influenced by values, goals, or even emotions. In different ways, a historical narrative might have a meaning as a whole different than the meaning of its parts separately²⁷. If we examine and analyze the word of Hayden White in "The Historical Text as Literary Artifact" "Historical situations do not have built into them intrinsic meanings in the way that literary texts do. Historical situations are not inherently tragic, comic, or romantic. They may all be inherently ironic, but they need not be emplotted that way.... Properly understood, histories ought never to be read as unambiguous signs of the events they report, but rather as symbolic structures, extended metaphors, that "liken" the events reported in them to some form with which we have already become familiar in our literary culture."²⁸ This however does not change the fact that historians who proceed with writing narrative histories usually would work on producing a fair narration or presentation of their main subject²⁹. . So why is the production of history problematic or what are the flaws of these narrations? Keith Jenkins in his book "At the limits of history" explores the perspective in which the creation of history is viewed as a problematic epistemic enterprise³⁰. Jenkins also examines another important question about history which is the inference of the historians on which history is narrated and created. The historian's assessment of the influencing factors that shaped the event he is narrating is another issue that should be addressed when viewing the nature of history; because none of the historical events had a single cause, it is always multiple numbers of causes that build up and led to the event. Determining the relevant causes usually reflects the author's or the historian's perspective on the event. The context in which the event has taken place is of extreme importance as stated by Jenkins because it proves the arbitrary nature of the produced narration. It also leaves room for other people to challenge this context and come up with different contexts, which would change the produced narration of that particular event. Accordingly, choosing the context that best serves the narration the historian aims to produce is an essential founding stone in his narration, as history is dependent on these contexts and theories. Moving forward from the context and the causes paradox, Jenkins highlights one of history's characteristics, that not all authors are comfortable discussing, which is the fact that history is not

²⁶ Paul Ricoeur, "Narrative Time," in *On Narrative*, ed. W. J. T. Mitchell (Chicago, 1981), 174.

²⁷ McCullagh, C. Behan (1987). *The Truth of Historical Narratives*. _History and Theory: p30.

²⁸ Hayden White, "The Historical Text as Literary Artifact," *Clio* 3 (1974) 282, 291.

²⁹ McCullagh, C. Behan (1987). *The Truth of Historical Narratives*. _History and Theory: p31.

³⁰ Keith Jenkins, *At the Limits of History. Essays on Theory and Practice*, Abingdon, Routledge, 2009.

innocent and is always for "someone". This indicates that the historical narration produced is always loaded and flourished by the author's ideology or the ideology this historical narration is intended to serve³¹.

This concludes that history is a human-produced narration, which is influenced by the author's ideology and the author's decision to choose the relevant context. History is not equivalent to the past, on the contrary, it is far away from it, due to the subjective nature of this produced enterprise. Context, methodology, epistemology, and the author's inference are what create and shape the produced historical narration. Accordingly, the same event that occurred in the past can have several produced narrations if the author uses the previously mentioned tools differently.

Narration is viewed to be the solution of how one translates knowing into telling³². And Historians continue to narrate their perspectives of the events that have taken place. Considering this, one must widen his definition of narration, especially in history telling; as it does not mean its literal meaning of a story being told, rather than simply historians telling their perspective of the events they have perceived, the evidence they have examined.

Histography and its narration which has several sources and several narrations: leading to a need for verification, sometimes more than just the mere check of the corresponding historical reality³³.

This brings us back to the previous chapter which discusses history, truth, and power. It is only logical to assume that power can provide the needed verification. Power can decide which historical narration becomes the dominant narration and which narration is overseen.

The fact that narration is the translation of knowledge and that it means more than just the mere events it is demonstrating brings us back to the earlier part of this chapter. In which events need to be linked and demonstrated to create explanations about these events and produce the narration as an outcome.

If we would conclude the givens discussed in this chapter, one can conclude that the determination of the affecting factors shaping the historical event is crucial. In addition to that, the embedded

³¹ *Id.*

³² White Hayden, *The content of form narrative discourse and historical representation*, P3, 1987.

³³ The main part of the various arguments advanced for this approach can be found in: B. C. McCullagh, *The Truth of History* (London and New York: Routledge, 1998).

ideologies of the author are another important cornerstone; both of them create the produced narration that is being examined. Now if one would want to use these components to produce a certain narrative, one would need to limit the surrounding factors to those serving the aimed narrative. They would also need to choose the authors whose ideologies are concordant with the aimed narrative as well. How can this possibly be done if historians have the free will of choosing the relevant events and surrounding factors; and if the historian's ideology is a variable beyond control? Even if one would hire a historian and dictate the narration they aim for, how can you ensure that this narration is celebrated as the dominant narration of history about this particular event?

What you can do alternatively is build a legal tribunal to prosecute the crimes committed, and dictate their jurisdiction in the statute limiting the admissible surrounding factors. Know for a fact that the judges and the lawyers participating are crime-driven personnel, which will help control their ideology. In events of mass atrocity, producing a desired historical narration is a mission that needs to be completed with precision; because this narration needs to overlook the bias discussed in the previous chapter. Not only that but it also needs to affirm the convictions and celebrate them, it needs to spoon-feed the nations the alleged causes that lead to this mass atrocity and overlook any entanglements of the reasons that may have led to this mass atrocity with those in power and with those controlling the narration and the tribunal. Any sense of involvement of the West needs to be silenced and omitted. The bias of the tribunal and the produced narration cannot be detected or traced.

The need for verification or accreditation of historical narratives can be argued to rely on other tools, such as the fact that international criminal tribunals by their mere creations and by their verdicts and deliberations indirectly promote and validates a certain narration as the given truth. However, it should be noted and highlighted that these trials or the tribunals will throw away all that was discussed above in terms of context, consequences, or surrounding events; the tribunal has one sole job, a verdict. Accordingly, they will take the social, cultural, ethnic, and psychological context and throw it aside. This will probably produce the aimed narration which is automatically given credibility due to the power element which was discussed above. The bias of the tribunal and the produced narration should be discussed and highlighted, not to condemn the tribunal nor the narration, but to understand this bias. What I aim to prove within this research taking the ICTR as the example, is that the tribunal was, in fact, biased, thus the produced narration was biased as well. The bias of the narration can be due to the fact that the West needed to avoid any entanglement with the genocide. But is the bias of the tribunal immoral? Noting that the tribunal aimed to trial the defendants with legal fairness.

Throughout this research I will be discussing the tribunal creation and its course in detail, proving the bias but also proving that they aimed for legal fairness.

Overview of Chapter 1:

History is written by historians which may be viewed as authors producing literature, this produced narration of history may be influenced by the historians' ideological bias and in some extreme cases this may reach political bias. Historians base their work on multiple sources, primary and secondary sources; the diversity of the sources help gives the historian a general view of the event. The determination of the surrounding factors for historians depends on the course of their work, however, they remain free to choose which events best serve their course of work.

Narrations produced by international criminal tribunals are constructed differently. In addition to the above-identified limitations historians face, these narrations are more limited due to the nature of the author which is the tribunal. The surrounding factors are limited by the jurisdiction of the tribunal, and the sources on which the narration is built are limited to the admissible evidence, the witnesses, and the prosecuted crimes. The ideology and the historian's perspective are controlled by the fact that the participants are legal practitioners who are crime-driven personnel.

Historians' objective is to construct explanations connecting past events to form the historical narration they ought to produce. Tribunals and legal practitioners may need to create a similar explanation to support either a verdict or a legal defense. The tribunal's objective is not the creation of this explanation or narration; the tribunal's objective is reaching a legal verdict, and this narration is merely the mean. The nature of the tribunal or any legal court, in general, is limiting because ideally, it should be serving one sole objective which is the prosecution of the defendants. The hybrid objective of international criminal tribunals may result in a biased trial which risks being a show trial. But it also may result in a biased historical narration.

The construction of this narrative will include the historical limitations discussed above, in addition to the limitations that are created as a result of the nature of the court or the judicial process. The determination of the affecting factors of the historical events will be reflected in (1) the jurisdiction of the tribunal itself, (2) available evidence, and (3) the indictment of the prosecution. While constructing or creating these narrations, the tribunal will be limited to focusing

on certain events, timeframes, and personnel. The nature of the tribunal shall exclude exploring any further elements that fall outside its limited jurisdiction and nature.

	Limitation	Used Mean	Advantage
1	Determination of influencing factors.	Jurisdiction of the tribunal + admissible evidence + prosecuted crimes.	With the trial being limited to the prosecuted crimes in a certain jurisdiction or time frame, this will greatly limit the possible surrounding factors that one can choose from.
2	Ideology of the authors.	Legal practitioners only, lawyers and judges.	The ideology of the author is overthrown by the fact that legal practitioners are crimes driven personnel, either to towards a verdict or an acquittal.
3	Sources of history.	Jurisdiction of the tribunal + admissible evidence + witnesses.	The source of information is limited to what is admissible under the tribunal's jurisdiction, and to the admissible evidence and accepted witnesses.

The above table is a simple demonstration of how the limitations of history creation were exploited and combined perfectly with the legal trial limitations that lie within the nature of the author which is the tribunal in this case, to be a tool by which the aimed narration is created.

The creators of the tribunal have abused and manipulated these limitations into tools to achieve their desired narrative. These atrocities could never be linked or traced back to the countries that colonized Africa. Accordingly, the tribunals' objectives were clear. Render justice for the victims and produce a narration in which the genocide is a single-layered act with limited causes. A narration in which the Hutu's are portrayed as crazy Africans, who committed the genocide. No further causes shall be discussed or explored, and no one else to blame but the crazy Africans. And with the power invested in the tribunal by international recognition and with its statutes; they were certain that this relative and biased narration would be the dominant narration about such catastrophes.

But if all history is relative and biased to an extent as explained in this chapter, why is the bias and relative narration produced by the tribunal more problematic than any other historical narrative? This is what I argue in this research, that the bias of this narrative is problematic due to the intensity of the limitations. But what is more problematic is the consequences and the effects that this narrative results in. Not only that but also the blind spots that this narrative omits rather than overlooks.

2. Legal History.

2.1 The paradox of using and creating legal history.

In the previous chapter, we have discussed history, its narrative, the variables that construct and constrain history's production, and the major difference between the past and history. From a more specific angle, we will be discussing legal history which is the main focus of this research. Although the previously discussed problems that exist in the nature of history, in general, are still relevant when we talk about legal history; one must review and study legal history separately. As the stakeholders involved in legal history are different. Despite the assumption that professional historians are the ones intended to write history while legal trials and legal texts are intended to render justice, it can easily be noticed how both of them entwine and overlap. Dr. Thomas Skouteris addresses this issue in his paper "Engaging history in international law" when he discusses the misleading distinction of how professional historians assigned labor is to understand the past and create knowledge about it through their produced labor³⁴. Lawyers assigned labor on the other hand is to use history to build and produce a legal argument. The author argues that the previously mentioned distinction is not accurate and somehow misleading. Because the produced legal work is without a doubt based and built on the past which as a result at least aids in the production of a historical narrative.

The assumed and rationalized forms in which history and law intersect are in two scenarios which are (1) professional legal historiography and (2) legal work proper. Professional legal history is similar to an extent to the history we have discussed in the previous chapter. A historian is designated to study the past, try to make sense of it, and produce his labor literature, which is later on considered as history. Legal history however can be produced by international courts or foreign law firms. In the legal work proper scenario, the roles are reversed as history here is no longer the requested labor from the lawyer but merely a mean. The assigned lawyer is not intended to create explanations about the past or literature history; he is merely assigned to understand the available historical knowledge to enable him to produce a legal argument. What Dr. Skouteris argues in his paper is the founding stone of this research which is that the relationship assumed between history and the legal argument in the proper legal work scenario is misleading, to say the least³⁵. Even if

³⁴ Skouteris, T. (2012), "Engaging History in International Law," in *New Approaches to International Law: The European and American Experiences*, (Jose Maria Beneyto & David Kennedy, Eds.), The Hague, Zuid Holland, The Netherlands: T.M.C. Asser Press, 99-121.

³⁵ *Id.*

the assigned lawyer is to study and acquire the needed knowledge to build and produce his legal argument, the produced legal argument itself creates a narration or history or at the least contributes to its creation. Accordingly, a paradox is created, because the lawyer will study and examine the concerned historical knowledge to enable him to produce a legal argument. This produced legal argument will in itself create new historical knowledge even if the objective and the purpose of the legal argument is not intended to result in that. The risk that is produced from this paradox is that in some events, history can be used as an instrument or a mean to build or serve a legal argument that can demolish the truth or the very least weaken it.

What is even more complicated is the fact that the history chosen by the lawyer or the legal practitioners is itself limited and biased, they choose to use the history that better serves their objective which is either a verdict or an acquittal. In the normal course of courts, lawyers using certain elements to better serve their case is normal it is their job; but in international criminal tribunals, the bias and the limitation of the used history may be problematic not because it led to a verdict or an acquittal but because this verdict or acquittal is being used to produce a historical narration that is beyond the normal bias of history. The paradox of using and creating history is what is problematic; because those same verdicts or legal arguments which were created based on limited resources and history, themselves create a historical narration. And as discussed in chapter 1, history is subjective and to an extent biased, but this produced narration by the tribunal takes this bias and subjectivity out of proportion when it creates this narration based on limited history itself.

Accordingly, the complexity that exists if lawyers use history to produce the legal argument is clear, and as previously stated it may affect the narration or the produced history. The paradox that is created here is dangerous as falsely legal arguments may be produced distorting the narration of history even if for a small portion. So, one can detect the flaw in this paradox and its severity if reflected even by a small portion of history creation.

If this would be reflected in international criminal tribunals, in which not only lawyers use history but also prosecutors. If we would assume that these tribunals were created to produce the narration of history in which the colonizers are the saviors but never the ones to blame. The jurisdiction of the tribunals would limit the legal arguments and the prosecuted crimes to those committed within the acceptable jurisdiction of the tribunal. Accordingly, no previous history would be accepted, and no mention of the colonization for example would be admissible in this court. The lawyers

would be limited to using the history that is related to the jurisdiction of the tribunals and so will the prosecutors. As a result of the restricted jurisdiction, the produced narration of history as well will be restricted. In the previous chapter, the table which discussed how limitations can be used as useful means would logically fit here. The jurisdiction, the ideology, the timeframe, and the evidence will all be the tools used to produce the desired historical narration.

Conclusion: if we would examine the fact that lawyers examine and study history to produce a legal argument, knowing that the lawyer is obliged to defend the accused and attempt to prove his innocence, it would only be safe to assume that the lawyer is biased, his job obliges him to be biased. What was discussed in the previous chapter was that one of history's limitations is the fact that it is a produced narration or literature by authors. Thus, the human element is fundamental, hence subjectivity. The authors of history may be historians or legal personnel, but in this case, it is a biased lawyer working on producing a legal argument to support an extremely biased outcome which is the innocence of the accused. The bias of the lawyers or even the prosecutors is understandable, what is problematic is the fact that these legal practitioners whose jobs dictate them to be biased are also the founding stone in the produced historical narration.

If we build on the assumption that international legal tribunals intentionally produce a historical narration dictated by its creators; it would be clear that this paradox is just another tool. Another tool was used and utilized in their favor as they were able to restrict the history used in the creation of the narration as previously explained. If we take this a step further by reflecting this in the ICTR cases, the tribunal jurisdiction limited the history that can be utilized by the lawyers or the prosecuted to what happened in 1994³⁶. Accordingly, there can be no mention of the colonization effects on Rwanda. By controlling the used history with the tribunal characteristics and creation, the produced narration is neatly engineered to portray the colonizers as the saviors but never the ones to blame for the genocide. Accordingly, the bias of the tribunal may be justified but the out-of-proportion bias of the produced historical narration is what may be problematic and worth discussing. Not because of the relativity of this narration; but because this narration will obstruct and omit any different narration; due to the nature of its author.

³⁶ Rwanda genocide of 1994, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Rwanda-genocide-of-1994>.

2.2 Assumptions about Historical data usage.

In Dr. Skouteris chapter "Engaging history in International law" there are four assumptions about history that are being discussed, two of which I find extremely relevant to the purpose of this research³⁷.

The first of which is the assumption that intentional legal history is designated to search for the truth about the past; because if we view the past as an object that can be discovered this assumption would be considered solid and logical. However, if we understand that the past can never be completely known as stated in the previous chapter of this research; then one can conclude that there would never be a solid truth about the past. That the past would always differ from one narration to another. Accordingly, the produced narration will be influenced by the identity of its author, and the nature and circumstances in which it was created would always influence the produced labor. Accepting and admitting that the whole truth about the past can never be known does not mean that the produced history is not crucial, it only helps understand the nature of history and allows us to embrace its complexity, and enables us to admit that "improving our techniques in discovering the truth about the past seems like the right way ahead" as stated by Dr. Skouteris in his chapter. If we view the legal history produced by legal tribunals as we have been discussing through this research, it would be safe to assume that its objective is not the search for the truth. The objective of legal history produced from legal trials would be portraying the tribunal's creators as the saviors, or to say the least to detach any existing link between the colonizers and the atrocity that is being prosecuted. The produced legal history as discussed will be restricted to all the characteristics of the tribunal in terms of its jurisdiction, its nature, and so on as previously discussed in the previous chapter.

The second assumption is that historical knowledge is different from writing history; this is crucial as it views that some law texts do a clear distinction between using historical data and writing history. This has two very alarming issues, the first of which is that they admit that legal texts do indeed write history. The second of which is that this distinction automatically gives more credibility and validity to the historical data. If examined from the perspective we have been discussing through this research, would be concluded to be questionable. As it assumes objectivity of historical data, which has been challenged and argued in this research not only that but also it

³⁷ Skouteris, *Supra* note 34.

assumes that some data or historical conclusions can be decisive truth. Accordingly, it is not fair by any measurement to use historical data as a solid entry to any legal argument; because it holds all the complexity we have mentioned and holds all the aspects of subjectivity and narration as explained in the previous chapters of this research. The historical data in the production of legal history is controlled, limited, and restricted to specifically produce a certain kind of legal history. The limitation and the restriction controlled by the West in producing legal history results in restricted components of its creation. If the historical data carries the variability of history discussed earlier, and the legal history carries its restricted components also discussed earlier; why would historical data be superior to legal history? The paradox of the legal argument using and producing history is highlighted here again, with the usage of the variable historical data limited and restricted in the manner tribunals force, this shall produce the desired legal history. The control the West has on the selected historical data which is variable in nature and the control the West has on the used variable historical data will have no alternative than producing the desired legal history. With the presumption that the produced narration is indeed controlled or biased; what can be the alternative in these mass atrocities? The bias of the narration and the manipulation of the narration may be questionable but may also be inevitable; because with the assumption that the historical data is variable and with the assumption that history is not an object that can be known completely; this will reflect in the produced legal history and may reflect on the tribunal. Bringing us back to the concern that you cannot have the two sides viewed as victims and you cannot afford the two sides viewed as preparators. For the sanity of the international community; atrocities need to be atoned for and there has to be a preparator that is eventually punished for his/their crimes. What I aim to discuss is that bias may be inevitable, but what we may aim to achieve in terms of understanding this bias is similar to an extent to what was argued for history itself. The past is not an object that can be fully known, history is relative and subjective by nature. This shall allow us to embrace its complexity and enables us to admit that "improving our techniques in discovering the truth about the past seems like the right way ahead" as stated by Dr. Skouteris. Reflecting this understanding of the bias of the tribunals and their produced narration, would not mean that it is completely flawed or without justification; but will help us in understanding the nature of the produced narration. And accordingly, will allow us to understand the complexity of the situation in which this narration was produced. Finally, this may allow us to improve our techniques in studying these narrations; after understanding that maybe bias was inevitable.

Conclusion: The Past and history have been proven to be of extreme complexity throughout the chapters of this research, it is safe to now assume that one cannot know the absolute truth about past events. The produced narration of the past is different from one source to another, accordingly assuming that historical data as a solid non-influenced entry would be flawed. Adding to this paradox, which was mentioned earlier in using and creating history, it should be concluded that it is just more complicated than the one-sided perspective the historical community would like to admit. The limitation imposed on legal history creation as previously discussed and explained would result in the desired result which is an influenced historical narration. This legal history has been dictated by the tribunal's characteristics and all the other factors previously discussed. Understanding how the legal history produced by tribunals is limited would shed the light on the need for context. The need of understanding the surrounding circumstances and the gravity of the atrocity. The need for different narrations that can be more inclusive of the circumstances and the factors affecting the atrocity.

2.3 Context and historical narration.

Context is another angle that should be viewed when examining legal history, as the assumption is that law and legal events are produced in a more general context. Factors such as politics, economy, society, and culture all are components of the produced legal events. Now a simple example was given by Dr. Skouteris³⁸ where the creation of the United Nations was a product of WWII and the adaptation of Article 2(4) of its charter³⁹ as well. If a lawyer would want to interpret the legal meaning of this article, the context of its production would not be taken into consideration and the applicable international laws would apply just like they would apply to any other article of any other treaty. Disarming and excluding the context of an event can be problematic, especially when producing history. Accordingly, if one would assume that legal texts do write history then disregarding the context would be an enormous flaw; as different contexts can result in different conclusions. A simple example would be that if the international community decided to take the United States to trial for dropping nuclear bombs on Japan⁴⁰ if the context is excluded, then it is an obvious war crime. However, if the context was considered, it would be an act of necessity that

³⁸ Skouteris, *Supra* note 34.

³⁹ United Nations charter (Article 2.4), United Nations, <https://www.un.org/en/about-us/un-charter/full-text>

⁴⁰ Atomic bombings of Hiroshima and Nagasaki, Encyclopædia Britannica, <https://www.britannica.com/event/atomic-bombings-of-Hiroshima-and-Nagasaki>

ended the suffering of thousands and ended the most brutal war humanity has experienced. If Germany had managed to win the war, would their war crimes be taken within a different context that would have resulted in a different verdict or ruling for the Nuremberg trials? This is where the "winners write history" phrase comes in place; the dominant players and politics limit the legal trials. Context may be viewed as the variable that controls and determine what is the right way to look at the events taking place.

Liliana states that the majority of the history related to international law is written by lawyers and jurists, which is criticized by historians as bad history. This is equivalent to the "amateur" history addressed in Dr. Skouteris's article⁴¹. The criticism of this produced history is built on the jurist's disregard for methodology.

Obergon⁴² explores the different perspectives from which historians and lawyers view, discuss and write about international law. Now these produced legal narrations of history are also controlled by certain factors which affect the produced narration, such as the choice of stated facts, the methodology of telling the story, and which epistemology and inference the author is going to rely on. The repetition of this produced narration along with other factors creates what George Steiner calls "axiomatic fiction" which is what I am aiming to question in my research; why does a certain narration become axiomatic fiction? Liliana Obergon then states that she views history writing as an important tool that allows for new insights and imaginative space in addition to or despite classical narratives. This can all be related to what has been discussed in the previous chapter, the bad history historian criticizes can be viewed to be bad history not only for its disregard of methodology and the factors stated earlier. Bad history as stated previously can be viewed this way because of the limitations embedded within the creation of the author itself, which is the international criminal tribunals in this particular example. The legal limitations have been utilized as tools to produce this bad history or this desired narration. What is interesting is how the context of the narration is controlled in this particular example. Context is controlled by the jurisdiction of the tribunal; it would be irrelevant to discuss the effects of the colonization of Rwanda in a trial that is prosecuting genocide. Accordingly, by enforcing the jurisdiction of the tribunals the control

⁴¹ Skouteris, *Supra* note 34.

⁴² Liliana Obregón, *Writing International Legal History: An overview* Monde(s) (2015), https://www.academia.edu/85455040/Writing_International_Legal_History_An_Overview?f_ri=4486.

of the context becomes automatic. Context is extremely important when we discuss the crimes of mass atrocity, the example stated above which was related to WW2 reflects the importance of context. Based on that the context of the genocide would make all the difference in the conclusion of the produced narration, if we would review the effects of the colonization and the economic factors that affected Rwanda for example, it would be logical to mention how the colonizers of Rwanda could have been a reason for this genocide. This exact relationship between the genocide and the colonizing countries; is what is meant to be avoided and detached. This is why they have utilized the legal tribunals to produce another narration that is more favorable to their side and to avoid the usage of the context that can incriminate them or even link them to the genocide. The produced narration would always view the tribunals as saviors but never link them as a reason or a cause for the genocide. This produced desired narration is the bad history that was being discussed by Liliana Obergon⁴³.

Conclusion: The context discussed in this chapter is very similar to what was discussed in the first chapter of how historians' decisions on choosing the influencing surrounding factors on a historical event in their trial to create explanations of the event determine the perspective the historian has in general over the historical event. The influencing surrounding factors are considered and examined in legal history and disarming and excluding the context of a historical event can be problematic when producing history or even when constructing a legal argument. This amateur history is the main objective of this research, the ICTR amateur historical narration which was produced by the verdicts written by the judges who were engineered to disregard the context, the surrounding factors, and the accumulation before the genocide and treated the genocide as a surprise that could not have been expected. This is not the only defect or limitation this tribunal had embedded, the impunity which was given to the RPF due to political reasons is another problem. In addition to the acts and crimes of the Hutus that happened before the genocide, within the genocide, and after the genocide which were chosen to turn a blind eye on. This could lead to the question of whether it was a show trial with the sole intention of only establishing criminal liability on the Tutsis and showcasing the tribunal creators as a savior. A tribunal with no possibility of revealing an inclusive narrative or discussing the context of the genocide. A tribunal that is biased and that is producing a biased and marginal historical narrative through its verdicts.

⁴³ Obregón, *Supra* note 42.

In conclusion, the tribunal's disregard for the context of the atrocity may be the biggest limitation of the produced narrative was flawed with.

2.4 Historical Narrative and tribunals.

The creation of international criminal tribunals or international criminal courts is assumed to be an instrument to reach international criminal justice, however, the awaited outcome of these tribunals might not be limited to criminal convictions only. There is another awaited outcome from these trials and tribunals which is the documentation of what has happened historically in relation to the prosecuted incident, which affirms that international criminal tribunals have a historical function. With what has been discussed in the previous chapters about history, its shortcomings, its complexity, and methodology; it would only be fair to question the statutes of this produced history which is produced by the international tribunals. The author in this case, which is an international tribunal, would not the methodologies, the mechanism, or the process of history creation. The fact that this narration is marginal, subjective, or even biased would not be surprising. What is problematic is the status of this narrative, as this particular historical narration can be assumed to be more powerful than the produced narration of historians, due to the nature of its author.

Prior to the foundation of the international court of justice in 1945⁴⁴, international tribunals were usually a result of political tension concerning a certain issue that needed to be addressed, and usually, these trials were established after the political declaration of who was the winning side and who has already lost the trial even before its commencement. The foundation of these tribunals could be considered in how the United Nations security council could respond to these atrocities. In the eyes of the international community, these tribunals would be the answer to the need for punishment, convictions, and atonement. But these tribunals and trials were created with specific characteristics and elements to ensure the production of a certain historical narration. How this narrative is created, has been discussed previously by how these tribunal limitations have been utilized as tools to produce this narration.

⁴⁴ The court: International Court of Justice, The Court | International Court of Justice, <https://www.icj-cij.org/en/court>

These tribunals were intended to produce the narration in which their creators would be portrayed as saviors. Because with the creation of the tribunal, came the embedded limitations that were constructed within the nature of the tribunal and its statute. The limitations were engineered to produce a convenient historical narration. A historical narration that would be so dominant that it would block or at the very least constrain any other discussions or narrations about the atrocity. A narration that would conceal any link or relation between the colonizing countries and the atrocity.

The documentation and affirmation of what has happened historically are related to the macro history of the event. Mark Drumbl divided history into two categories micro history and macro history in his paper *Histories of the Jewish 'Collaborator': Exile, Not Guilt*⁴⁵. The first category is macro history, which focuses on what to remember, what to celebrate but also what to exile, and what to forget. Macro history for me and from the perspective of this research is the historical narration produced by the trials, which signifies and highlights the desired acts and simply omits and overlooks the blind spot of the trial or the opposing side's perspective of this dominant narration. The second category of history mentioned by Drumbl⁴⁶ is micro history, which is who did what and what has happened. Measuring this also from the perspective of my research, this is demonstrated in the limited nature of the trial, where the sole focus on the trial is to decide whether the defendants committed genocide or war crimes or not. Thus, the comparison between what Drumbl⁴⁷ is stating and this research is very relevant. A particular issue is focused on, to conclude who did what, and the context, the cause, and the affecting factors of this event are neglected or overlooked.

Drumbl⁴⁸ then examines and studies two proceedings from the perspective of both the micro and the macro history. The concept or the idea behind these trials in which those who collaborated with the Nazi's were being prosecuted made him think from both the macro and the micro historical perspective. What was interesting was the macro perspective where the state narrative was that collaboration, negotiation, or compromise was not welcomed to be remembered and were targeted to be exiled despite the ironic fact that negotiation and compromise did save some Jewish

⁴⁵ Mark A. Drumbl, *Histories of the Jewish 'Collaborator': Exile, Not Guilt*, in *The New Histories of International Criminal Law: Retrials* 237-252 (Immi Tallgren & Thomas Skouteris eds., Oxford Univ. Press 2019).

⁴⁶ *Id.*

⁴⁷ Drumbl, *Supra* note 36.

⁴⁸ *Id.*

individuals. Unlike the celebrated heroism that failed to save almost anyone. However, the state narration in relation to the Holocaust was very clear: heroism and sacrifice were to be engraved and chronicled and compromise, negotiation, and collaboration were doomed as shameful and criminal acts. A special criminal law titled “the Nazi and Nazi Collaborators Punishment Act”⁴⁹ was passed to prosecute those who were engaged in any of these shameful acts, and that is how the trials Drumbl⁵⁰ is examining were founded.

Conclusion: The complexity of historical narration produced by tribunals is undeniable, there are two types of history discussed in the previous chapter. Macro history is the historical narration produced by the tribunals, focusing on the principal acts "whether the defendant committed genocide or not" omitting and overlooking the context of the catastrophe. Now legal historical narrations omitting the micro history is equivalent to omitting the context of the incident, focusing on the macro history is demining the legal historical narration. Which ensures the relative nature of this narration. The creation of the tribunal was constructed in a manner that would result in the desired historical narration; from the perspective of its creators. This would be equivalent to the macro history previously addressed in this chapter. What is problematic is not only the fact that this narration was crafted by the tribunal creators for political reasons. What is more problematic is the effect this narration would have over other or contradicting narrations. Similarly, to what is mentioned in this chapter the macro history was celebrated dispute its outcome was, and the micro history was eliminated. Thus, the nature of the author of this relative or even biased narration automatically gives it credibility and validation.

2.5 Impunity and show trials.

Daniel Joyce in his article “The historical function of international criminal trials”⁵¹, explores the strabismic of international criminal law where one eye is focused on history creation and the other eye is focused on the required justice through the trial. This dual and hybrid role of the tribunals is being affirmed by its recurrence whether in the ICTR, ICTY or even in the ICC. The courts and the tribunals are being more assertive in claiming their role in the creation of history. Admitting

⁴⁹ Basic laws of Israel: Nazis and Nazi collaborators (punishment) law, Nazis and Nazi Collaborators (Punishment) Law (1950), <https://www.jewishvirtuallibrary.org/nazis-and-nazi-collaborators-punishment-law-1950>.

⁵⁰ Drumbl, *Supra* note 36.

⁵¹ Daniel Joyce. The Historical Function of International Criminal Trials: Re-thinking International Criminal Law. *Nordic Journal of International Law*. 73. 461-484. (2004).

and acknowledging the historical function of tribunals is essential because it allows us to identify the limitations tribunals face when performing their historical function. In addition to that it allows the exploration of both the theory and the ideology of the produced narration. However, the historical function of these tribunals might be more problematic than their embedded limitations or their disregard for methodology. Hannah Arendt raised some of these problematic issues while observing Eichmann's trial⁵². The major state involvement in the trial was alarming and was reflected in the produced historical narration which was conceived and affirmed after the trial⁵³ making it the popular and dominant narration. In Eichmann's trial, the court's claim for its historical function was very obvious. The prosecution's driving motive was history establishment and not rendering justice or reaching a conviction. In addition to that the major state involvement to direct the narration of the produced history was also obvious. The Israeli government arranged for the trial to have significant media coverage, and international broadcasting cooperation was granted the exclusive right to document and film the entire trial. Numerous newspapers from all over the world sent their reporters to cover this historical trial. The Israeli government welcomed the media coverage by conducting the trial in an auditorium in Beit Haam in which 750 seats were added to allow the journalists and the reporters to watch the trial⁵⁴. The number and the nature of the witnesses that were summoned in this trial illustrate how these witnesses were orchestrated to expose the narrative and enable the trial to perform its historical function. Only 14 witnesses out of the 112 witnesses that were summoned had seen Eichman during the war; the witnesses' large number and different stories were not only intended to criminalize Eichmann but it was also intended to produce a comprehensive overview of this catastrophic event. Producing such a strong, comprehensive, and detailed overview would be of extreme dominance and credibility if produced from a trial and not just from the tales and the stories of those survivors⁵⁵. After the execution of Eichman, it was proven that one of the trial's biggest advantages was helping raise awareness about the Holocaust through the media coverage that covered the trial. Taking Eichmann's trial as an example, is it fair to assume that to an extent the produced narration was one of the "axiomatic fictions" George Steiner was talking about. However, the claim here is not that these individuals

⁵² Hannah, Arendt, 1906-1975. *Eichmann in Jerusalem: a Report on the Banality of Evil*. New York, N.Y., U.S.A.: Penguin Books, 1994.

⁵³ *Id.*

⁵⁴ David Cesarani, *Eichmann: His Life and Crimes*, p.249-254 (2005).

⁵⁵ Arendt, *Supra* note 52.

did not get a fair trial from the legal and technical sense, on the contrary as the whole world was focused on most of these trials, the defendants were given all of their legal right to an astonishing extent. A clear example to that was Eichman's, where the Israeli government had to pass a special law to enable a non-Israeli lawyer the ability to represent Eichman in this trial and to ensure that he received his full legal rights⁵⁶. The issue with these trials might be not only the state intervention discussed earlier but also, the violation of the presumption of innocence. The presumption of innocence is considered to be one of the founding stones of legal principles as identified in Article (11) of the United Nation's universal declaration of human rights⁵⁷. As these trials were created in politically charged eras, and due to numerous reasons, the presumption of innocence for the defendants is highly doubted as the mere creation of trials directed to prosecute one side of the war or one side of the fight illustrates a pre-determined collective guilt verdict to this side in general and those individuals being prosecuted from it in particular.

The historical function of international criminal tribunals is alarming as the temptation to produce a certain narration can lead to producing "bad" history as argued by Daniel Joyce in his article "The historical function of international criminal trials"⁵⁸. He then examines and explores other risks of this function. The immediate emergence of these tribunals, and the desperate need to achieve justice after horrible catastrophes have been done against humanity, might hinder the quality of the produced historical narration. The creators of the tribunal, their link or connection to the atrocity whether directly or indirectly, and the political and international pressure; would all result in a tribunal that is more directed to produce a certain historical narrative, rather than render justice or legal verdicts. Thus, the risk of these trials turning into a work of theatre and becoming another part of the state machinery instead of rendering justice exists; and that is what Martti Koskenniemi is discussing in "Between Impunity and show trials"⁵⁹. The question of risk of show trials is addressed; and the question of whether large political catastrophes should be addressed through individual criminal liability is also discussed. In addition to that Koskenniemi questions

⁵⁶ Special publication: *Behind the scenes at the Eichmann Trial*, Israel State Archives, <https://www.archives.gov.il/en/chapter/behind-scenes-eichmann-trial/>

⁵⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html>

⁵⁸ Daniel Joyce. *The Historical Function of International Criminal Trials: Re-thinking International Criminal Law*. Nordic Journal of International Law. 73. 461-484. (2004).

⁵⁹ Martti Koskenniemi, *Between Impunity and Show Trials*, 6: Issue 1, Max Planck Yearbook of United Nations Law Online, (Jan 2002).

the capabilities of these trials to unfold the truth with such major stakeholders being involved. The article mentions several examples of such trials, Milosevic trial as one of these examples⁶⁰. In which the need at that time to punish the responsible individual, is versus the fear that this would eventually result in a show trial with a predetermined verdict. Because trials involving genocide or crimes against humanity might be concerned with establishing the truth, more than the verdict rendered at the defendant. As the crimes committed are beyond human morals and nature that no punishment can be equivalent to these crimes. Now the context of the events of the catastrophe which was discussed earlier in this research becomes crucial, and the issue of prosecuting one side of the equation is undoubtedly as well. In Milosevic case, the narration of "Greater Serbia" if taken into consideration could have changed the international view on the crimes he has committed. Comparing this with the previously mentioned example of the USA bombing Hiroshima and Nagasaki. In which the USA had complete impunity as it was viewed that they were ending the war. This impunity is attached to the fact that the USA has won the war. Accordingly, the narration that is constructed by the tribunal is influenced by the USA being the winner and the creator of the tribunal. This would all be different, if the USA was not on the winning side of the war, and if Hitler has won the war. The ideology, political direction, and nature of the tribunal creator would be different. Thus, the tribunal would have been constructed differently, prosecuting the USA for the war crimes and offering impunity to Germany, and producing a different historical narrative.

The exclusion of context, the influence of the tribunal's creators that is demonstrated in the tribunal's limitations previously discussed is causing these narrations to be very relative, subjective, and marginal.

He then explores how international trials like the Nuremberg trials focused on individuals and disregarded how the German economy and German society may have indirectly participated in these catastrophes, that the individuals are being prosecuted for in these trials. This point is debated and elaborated in detail in Lawrence Douglas chapter called "From the Sentimental Story of the State to Verbercherstaat".⁶¹ Verberchestaat meant criminal state. This does not differ from what

⁶⁰ Prosecutor v. Dragomir Milosevic (Trial Judgment), IT-98-29/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 December 2007, available at: <https://www.refworld.org/cases,ICTY,476100d52.html>

⁶¹ Lawrence Douglas, *From the Sentimental Story of the State to the Verbercherstaat, Or, the Rise of the Atrocity Paradigm*, (Immi Tallgren & Thomas Skouteris eds., Oxford Univ. Press 2019).

Koskenniemi⁶² is trying to discuss in his article which is the state's responsibility through its economy and its society and how this was completely disregarded, and an enormous focus was thrown upon the individuals. This disregard for the Verberchestaat might be the blind spot that was left untold in the Nuremberg trials. This means that without a criminal state whose economy and society supported Hitler and his regime, these crimes would have never been possible. Now the criminal state and the alternative narration of Milosevic⁶³ can all be traced back to the context and the relevant causes Keith Jenkins⁶⁴ was discussing in the earlier section of this paper. In addition to the context of the events, the criminal state dilemma is another overlooked issue that should be noted and addressed. This issue of state criminality is a new addition to the list of flaws of the historical narration produced by the tribunals. If we would reflect this to the ICTR for example. By studying and examining the context of the genocide, can colonization and economic factors be the catalyst for the genocide? In this particular assumption can we consider the colonizing countries who colonized and manipulated the Rwandan people criminally liable? This exact relationship and this exact link are what the creators of the tribunal are determined to eliminate. But promoting a more favorable narration of history that would never include this link or these questions. A narration that already has credibility and validation due to the nature of its author. The acknowledgment and understanding of these blind spots do not have to result in exiling these narrations, but will only help in understanding their complexity and the surrounding circumstances and this is what this research is trying to research and study.

At this moment we have the general limitations of history, which are the effect of the author's ideology, its literature nature, and the choice of certain circumstances surrounding the incident to achieve certain explanations. In addition to that we have the legal historical narrative limitations, which are the overlooked political context, the limitations embedded in the nature of the tribunal being the author, the connection between the tribunal creators and the atrocity whether directly or indirectly, the fact that the predator may be a state and not an individual. Accordingly, we cannot view genocide or any atrocity as an event that was caused by a single cause. The need to understand the complexity of the atrocity and the stakeholders will enable the readers to better understand and

⁶² Koskenniemi, *Supra* note 59.

⁶³ Milosevic tried to build Greater Serbia, trial told, *The Guardian* (2002), <https://www.theguardian.com/world/2002/oct/02/warcrimes.milosevictrial>.

⁶⁴ Jenkins, *Supra* note 30.

evaluate the produced narrative. This should be an eye-opener for the readers and the researchers because understanding the limitations of a certain subject can be the start of improving it, if possible.

Entrusting the tribunals and the courts to produce the historical narration, in addition to their main objective which is the prosecutions of the preparators; will only result in a relative historical narrative that is as rigid as the law, its practitioners, and its court.

International criminal tribunals and history are closely connected as explored by Sofia Stolk in her paper “The record on which history will judge us tomorrow”⁶⁵, as trials always seem to contribute to the history of the incident that is being prosecuted. International criminal trials are usually viewed as “signposts in history” which contribute to a historical record of the past events that are related to the prosecuted crime or the atrocity subject of the trial. The author then states the main criticism of the trial’s historical function which are the selectivity and bias of the produced narration. This has all been discussed previously in this paper but from a different perspective, what is extremely interesting about Stolk’s paper is that she explores another angle of the entanglement of history writing and tribunals⁶⁶. Stolk states that there is another history that is being created and cited in the courtroom which is not only exclusive to the issue subject of the trial. The history Stolk is talking about is related to the trial itself, its legitimacy, and its foundation. This means that as per Stolk’s argument, the history that is being told by the prosecutor also included the purpose of the trial and how it contributes to the development of international criminal tribunals who sometimes struggle for legitimacy⁶⁷. Accordingly, the auto history that is valued in the trials by the prosecution, contributes to the construction of the trial’s identity. Thus, the author argues that history is used in legitimizing the trials and how this is affecting the historical narrative produced by the trials. Reflecting this on the previous arguments made within this research, especially the argument that states that the tribunal creators construct these tribunals to produce a biased, subjective, and relative narration of history. A narration in which the creators of the tribunals are viewed as the saviors but never the ones to blame. A narrative that eliminates any direct or indirect link between the atrocity and the tribunal creators, overlooking the context which

⁶⁵ STOLK, SOFIA. (2015). 'The Record on Which History Will Judge Us Tomorrow': Auto-History in the Opening Statements of International Criminal Trials. *Leiden Journal of International Law*. 28. 993-1012.

⁶⁶ *Id.*

⁶⁷ *Id.*

may condemn colonization. This narration is problematic not because it is subjective or biased, but because it becomes the dominant narration about the atrocity. This narration would obstruct and demolish any different narration, because of the nature of its author. The power element that is invested in the tribunal automatically ensures validation and credibility for this narration. This power is linked to the auto history Stolk's was mentioning⁶⁸. The legitimization of the tribunal within the trial as explained by Stolk's would only support the credibility of the tribunal, thus the author of the narration, thus the narration itself.

⁶⁸ *Id.*

3 Genocide in Rwanda.

3.1 Narrations about Rwanda's ethnic tension.

Rwanda a small country in Africa with one of the highest population's densities in the continent, 85% of the Rwanda's population were Hutus⁶⁹. Just like all African countries, Rwanda was colonized by the West; first by Germany and then after WWI by Belgium. During this colonial period the Tutsis which were the small minority, were favored and empowered by the colonizers. The Tutsis were the governing elite and this empowerment resulted in nurturing the tendency of the few to oppress the many, which ultimately resulted in a legacy of tension between the two clots. When it came to the initial distinction between the Hutus and the Tutsis, most writers trace back this distinction to Belgium⁷⁰. They started this identification through their identification cards and the 10 cows' rule; in which any male who had more than 10 cows was considered a Tutsi and any male who owned less than 10 cows was considered a Hutu⁷¹.

After WWII Rwanda remained under the Belgium colonization; however, an independence movement was starting to gather pace, and the elite Tutsi formed a political party. The Hutu majority also established a rival party⁷². The Hutu's rival political party called for a Hutu uprising and consequently, a number of Tutsis were killed, and King Kigeri V and tens of thousands of Tutsis left Rwanda and flee into exile in Uganda and Burundi. In 1961 the monarchy was abolished, and Rwanda became a republic which meant that they gained their independence from Belgium the following year the leader of the Hutu's political party *Grégoire Kayibanda* became president⁷³. The dominance of the Hutu's political party made more Tutsis flee Rwanda and run into exile. The Tutsis who remained in Rwanda faced unstoppable violence which was sponsored and to an extent governed by the state, and they continued to face hideous discrimination. This clear and undoubtedly discrimination drove the Rwandese in exile to form The Rwandese Alliance for National Unity (RANU) which later became the Rwandese Patriotic Front RPF; to fight the

⁶⁹ History.com Editors, Rwandan genocide History.com (2009), <https://www.history.com/topics/africa/rwandan-genocide#:~:text=By%20the%20early%201990s%2C%20Rwanda,the%20original%20inhabitants%20of%20Rwanda..>

⁷⁰ *Id.*

⁷¹ Magnarella, Paul J. *The Journal of Modern African Studies*, vol. 40, no. 3, 2002, pp. 515–517. *JSTOR*, www.jstor.org/stable/3876055.

⁷² *Supra* note 69.

⁷³ *Id.*

violent acts and the repeated massacres against the Tutsis in Rwanda.⁷⁴ In 1990 the civil war ignited in Rwanda when the RPF launched attacks on the regime; the organization was claiming the right of the Tutsi's refugees to return to Rwanda. On the 4th of August 1993, a settlement agreement was signed between the government of Rwanda and RPF which was supposed to end a civil war that lasted for three years. The agreement, which was known as the Arusha Accords, stated that an interim government that included members of the governing party, members of the opposition party, and members of the RPF should be created within a defined time frame of 37 days. This government should rule and stay in power until free elections are held. The agreement stated that Tutsis refugees should be allowed to return. Unfortunately, the agreement was never implemented.⁷⁵ The genocide was alleged to start on the 6th of April 1994, when the plane carrying president Juvénal Habyarimana was shot down as s incident was used to start the killings of the Tutsis⁷⁶.

With the above arguments that were previously stated in this research, one of which is the link between the tribunal's creators and the atrocity subject of the tribunal, the disregard of context, the characteristics of the tribunal that ought to produce the desired narration; can be proven with the ICTR, which is what I aim to argue in this chapter.

3.2 Complexity of Rwanda's genocide.

The genocide in Rwanda was of complex and unusual nature because the Tutsis were not killed from a distance; the killing of the Tutsis were executed by machetes in street murder. In other mass murders, the strategy and the techniques used allowed a few to kill many. A separation between the perpetrators and the victims is usually done, however, what happened in Rwanda was the opposite. Many hacks of the machetes were required to kill one individual. This made the genocide in Rwanda a very intimate affair between the victims and the perpetrators. The government in

⁷⁴ (<http://www.hydrant.co.uk>), RWANDA: HISTORY RWANDA: HISTORY | THE COMMONWEALTH, <https://thecommonwealth.org/our-member-countries/rwanda/history>.

⁷⁵ *Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, 4 August 1993*, available at: <https://www.refworld.org/docid/3ae6b4fcc.html>

⁷⁶ Human Rights Watch, *Genocide in Rwanda April-May 1994*, 1 May 1994, A604, available at: <https://www.refworld.org/docid/3ae6a7d24.html>

Rwanda prepared the population to execute the genocide and the population directly participated in the genocide and the killings.⁷⁷

This meant that the perpetrators that committed this catastrophe were not a certain limited number of individuals or even the state apparatus specifically but rather a criminal nation that conducted the mass killing of the Tutsis and the moderate Hutus. And this is where part of the complexity of the genocide in Rwanda lies and this is why the after-genocide acts can be different compared to other catastrophes; the popularity of the genocide in Rwanda was both alarming and troubling.

The arms and weapons by which the genocide was committed were allegedly provided by France⁷⁸, which adds a new external factor that aided in the genocide happening. The colonization started the ethnic differentiation from the beginning, the colonizing countries that created the ethnic tension throughout the colonization duration, and finally the accomplice which is France who provided the means to kill and execute the genocide. Thus, limiting the historical narration of the genocide in Rwanda, to the tribunal, the trial, and the convictions is misleading, to say the least. The genocide was a complex atrocity that had several causes, some that were planted hundreds of years before the event itself; others were more recent and more direct. What can be concluded is that genocide that took place in Rwanda is far more complex and has several causes and reasons; which is bigger and beyond the convection of the preparators that executed the killings. The need to punish and the need to atone for the crimes committed may be delivered by the convections of the tribunal; but what is beyond the ability of the tribunal is explaining or even researching the border causes, factors, or participants of this genocide. The tribunal's inability to deliver a more inclusive narrative of the genocide is because of its mere nature, a legal court. It is also because of the dictated statute of the tribunal which controls all the variable factors starting from the tribunal's jurisdiction, authority, timeframe, and many others that were previously explained in this research. The statute of the ICTR was created and annexed to the security council resolution 955⁷⁹. The

⁷⁷ Mamdani, Mahmood. *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*. Princeton, N.J: Princeton University Press, 2002

⁷⁸ Jina Moore, *Rwanda accuses France of complicity in 1994 genocide* *The New York Times* (2017), <https://www.nytimes.com/2017/12/13/world/africa/rwanda-france-genocide.html>

⁷⁹ United Nations Audiovisual Library of International law, United Nations, <https://legal.un.org/avl/ha/ictr/ictr.html> (last visited Jan 14, 2023).

security council, of which France is a permanent member⁸⁰; proves the link between the tribunal's creators and the atrocity previously discussed. Consequentially proving and supporting the other limitations and tools that were constructed to produce a subjective narration that is approved by the tribunal's creators.

3.3 The historical narration of the ICTR.

What is aimed to be achieved in this research and in this chapter in particular, is to support or prove that the previously mentioned limitations of legal history were utilized to create a subjective historical narration. This can be supported by the tribunal's statute and jurisdiction. This specific narration was engineered and crafted indirectly by controlling the tribunal. The power to create, shape and control the tribunal was only accessible to the members of the security council. Because the security council was the entity which created the ICTR, along with its statute. Any probable or possible link between the tribunal creators, other colonizing countries and the genocide, whether directly or indirectly, was not allowed. And with the power vested in the nature of the author of this narration, credibility and validation for this narration was assured.

3.4 Historical narration about the genocide in Rwanda:

3.4.1 Blaming colonization and ethnicity,

Reading about the genocide in Rwanda you can find different historical accounts about the cause of the genocide and the context in which the genocide took place in; one of the narrations accuses colonization as the cause of the genocide. This narration claims that before colonialist government, there was a homogenous society in Rwanda and there was no discrimination against any of the cults; they all shared the same language and religious cult and they also intermarried without territorial distinctions⁸¹. The colonialist agenda was shaped and navigated by the racial difference between the Tutsi and the Hutu. And the Belgian had clear favoritism towards the Tutsi which was clearly proven when a Belgian administrator said "*The Batutsi were meant to reign. Their fine presence is in itself enough to give them a great prestige vis-a-vis the inferior races which surround*"⁸². Accordingly blaming the colonization for the distinction between the cults is a

⁸⁰ Current Members Security Council, United Nations, [https://www.un.org/securitycouncil/content/current-members#:~:text=Five%20permanent%20members%3A%20China%2C%20France,Ecuador%20\(2024\)](https://www.un.org/securitycouncil/content/current-members#:~:text=Five%20permanent%20members%3A%20China%2C%20France,Ecuador%20(2024).).

⁸¹ Karabacak, Emre. (2018). Colonial Regime in Rwanda and Its Effects on the Tutsi-Hutu Relations..

⁸² Gérard Prunier, The Rwanda Crisis, History of a Genocide, July 1997.

narration that exists in the historical accounts. Following up on this narration one needs to focus on power and rather than the ancient hatred⁸³.

European indirect rule was justified using the Hamitic Myth, which asserted that the Tutsi, as Hamites, were naturally superior to the Negroid Hutu⁸⁴. The Hamitic hypothesis was taught to Tutsis in schools and seminaries throughout colonial Rwanda, helping to create a culture of Tutsi superiority. In addition to disseminating and moralizing the Hutu/Tutsi division, the Catholic Church served as a powerful apparatus for the ideological justification of indirect rule. For example, Leon Classe, a German priest influential in advising the Belgian take-over of Rwanda, vocally supported 'medieval-style' land ownership, with a Tutsi aristocracy ruling over the majority of landless Hutus. In 1933 this ideological separation between Hutu and Tutsi was reinforced when the colonial state distributed ethnic identity cards to systematize the restriction of administrative jobs and higher education to Tutsis⁸⁵.

Another historical narration that can be found when researching genocide in Rwanda is that the genocide was initiated and was rooted by the Hutu dominated government, when they clearly declared the Tutsi's to be enemies of the state⁸⁶. The corporate view of ethnicity which made all Tutsi's targets for extermination. The Rwandan revolution in 1959⁸⁷ was also an important element for consideration when studying the Rwandan genocide; in this narration, a different version of the relationship between the cult is stated. Where the Hutus are dominated by the clever Tutsis, who treated and used the Tutsis as servants even prior to the colonization. Based on this narration colonization might have strengthened the ethnic tension, but it was already there prior to the colonization era. Even if ethnic division existed prior to colonization, colonization has strengthened and heightened it. In all versions and in all cases, colonization is a probable root cause for the ethnic tension that led to the genocide. Even if it was not the initiator, it is certainly a catalyst, this creates the link between the colonizing countries and the genocide. This link needed to be eliminated or suppressed by another historical narrative, in which these countries are not blamed or linked. Not only that but also in which these countries are portrayed as the saviors, by

⁸³ Kamola, I. A. (2007). The Global Coffee Economy and the Production of Genocide in Rwanda. *Third World Quarterly*, 28(3).

⁸⁴ *Id.*, at 26.

⁸⁵ *Id.*, at 27.

⁸⁶ Catharine Newbury, Ethnicity and the Politics of History in Rwanda, *Africa Today*, Vol. 45, No. 1 (1998), pp. 7-24

⁸⁷ Hutu revolution, Encyclopædia Britannica, <https://www.britannica.com/topic/Hutu-revolution>.

the creation of the ICTR. This narrative was indeed created by the ICTR, which shall be discussed further in this chapter.

3.4.2 Blaming the coffee crisis.

The popular and dominant narrations about the genocide in Rwanda have been mostly linked to either ethnicity or colonization. However, there was another narration about the genocide in Rwanda that was very interesting for this research. A narration that illustrates how the genocide was a result of highly complex social relations. Focusing on how the coffee economy which is a major stakeholder in this narration interfered with the economic, ideological, and cultural circumstances by which the genocide was produced⁸⁸. In this narrative, the major elements of the genocide productions are still present which are: the tense relationships between the Hutus and the Tutsis, the colonization, the social standards, and the rich and the poor. However, a couple of new elements were added to this narrative which are the coffee producer and coffee consumer. Although many scholars recognize that the genocide catastrophe did occur during the economic crisis caused by the collapse of international coffee prices, they use this information as a simple backdrop. They conclude that even though the genocide may have been sparked by the economic crisis, however, the main catalyst was the political manipulation of the ethnicity card⁸⁹. The fear of Brazil's dominating over the world coffee production pushed the European countries to encourage coffee production in their African colonies⁹⁰. Accordingly, in 1927 the colonials began aggressively promoting the coffee production in Rwanda⁹¹. The Hutus were cornered to work and pay taxes⁹², while the Tutsi's chiefs were supported by the colonial powers which enabled them to take control and dominate labor, lands, revenues, the collected taxes and so much more⁹³. The colonial state itself began enforcing regulations for the coffee cultivations which increased their power over the farmers⁹⁴. The circumstances for the Hutus became unbearable. The Catholic

⁸⁸ Kamola, Isaac. (2007). The global coffee economy and the production of genocide in Rwanda. *Third World Quarterly - THIRD WORLD Q.* 28.

⁸⁹ R Omaar & A de Waal, *Rwanda: Death, Despair, and Defiance*, London: African Rights, August 1995, p 14. See also L Melters, *Conspiracy to Murder: The Rwandan Genocide*, London: Verso, 2004; P Uvin, 'Prejudice, crisis, and genocide in Rwanda', *African Studies Review*, 40 (2), 1997, pp 91-115.

⁹⁰ B Dinham & C Hines, *Agribusiness in Africa*, London: Earth Resource Research, 1983, pp 52-53.

⁹¹ de Graaff, *The Economics of Coffee*, pp 209-210.

⁹² Newbury, *The Cohesion of Oppression*, pp 141-46; and Mamdani, *When Victims Become Killers*, pp 93-98.

⁹³ C Newbury, 'Colonialism, ethnicity, and rural political protest: Rwanda and Zanzibar in comparative perspective', *Comparative Politics*, 15 (3), 1983, p 263.

⁹⁴ D Newbury & C Newbury, 'Bringing the peasant back in', *American Historical Review*, 105 (3), June 2000, p 868.

church donated a piece of land to enable the establishment of the coffee co-operative Trafipro in Gitarama, this was the change the Hutus needed to build a counter-elite. The first president of Rwanda was the head of Trafipro who eventually established an elite circle that later on became the ruling circle at independence⁹⁵. An International Coffee Agreement was signed under the umbrella of the United Nations and the major players in the coffee production industry in 1960. Just like all other economical markets, it had its ups and downs and that affected the economy of Rwanda enormously. There were huge side effects to the dependency of Rwanda's economy on coffee; increased coffee production also traded off with food production and jeopardized Rwanda's food security. In 1989 the falling coffee prices along with the jeopardized food security resulted in 'ruriganiza' famine⁹⁶ which killed hundreds and created thousands of refugees of mainly Tutsis. The fact that the system became increasingly dependent on international coffee prices, allowed the government to buy coffee from farmers at rates high enough to offset lost food production. The famine and the high rates of coffee were contradictions that allowed the elite circle of Rwanda to benefit from the rollercoaster economy⁹⁷. This was followed by the World Bank's recommendation to implement certain regulations one of these major regulations was the devaluation of their currency by 55%. The dramatic drop in the coffee prices that in 1990, Uganda, Rwanda, and Ethiopia alone exceeded the European Union's Stabilisation of Agricultural Exports Receipts System (Stabex) fund by \$847.84 million⁹⁸. It was only natural that the high rates offered by the Rwandan government for the purchase of coffee from the farmers dropped and were no longer sufficient to compensate for the lost food production. The Currency devaluation, a dramatic drop in coffee prices along with the unreasonable continued subsidization of the coffee sector by the government resulted in Rwanda accruing \$1 billion in foreign debt by 1994⁹⁹. These catastrophic economic stresses created the conditions in which health and education services collapsed.

⁹⁵ See I Linden, *Church and Revolution in Rwanda*, Oxford: Manchester University Press, 1977, pp 239, 258; Mamdani, *When Victims Become Killers*, p 118; Newbury, *The Cohesion of Oppression*, pp 184 191; and Prunier, *The Rwanda Crisis*, p 45.

⁹⁶ Philip Verwimp. - Leuven : Katholieke Universiteit, Departement Economie, 2002. - (Discussion paper series ; DPS 02.07 Development economics)

⁹⁷ Newbury & Newbury, 'Bringing the peasant back in', p 873; and Uvin, *Aiding Violence*, p 124.62 M Chossudovsky, 'Human security and economic genocide in Rwanda', in C Thomas & P Wilkin(eds), *Globalization, Human Security and the African Experience*, Boulder, CO: Lynne Rienner, 1999,p 122.

⁹⁸ Under the Lome IV convention between the EU and 66 African, Caribbean and Pacific (ACP) states, Stabex received \$1.8 billion for the period 1990-94 to help stabilize the revenue of those states exporting agricultural goods to Europe. See 'EU/ACP: Court of Auditors criticizes Stabex system', *European Report*, 1 June 1995; and Y Sharma, 'Commodities: record payout from EEC Export

⁹⁹ Kamola, *Supra* note 88.

Governmental enterprises went bankrupt, creating the conditions which resulted in the tension and emergence of the violence initiating the genocide. In one of the ICTR's verdicts, it was stated clearly that the economic and political conflicts were disguised to look more like ethnic conflicts, it was twisted by media propaganda fabricating events to reach the goal of altering the economic and political conflicts into an ethnic one¹⁰⁰. In this narration as well, the colonizers are still associated with the genocide. They were the ones who encouraged coffee production in their African colonies¹⁰¹ including Rwanda. They were the ones who began to promote coffee production in Rwanda insistently. It was the colonizers that linked the economy of Rwanda to the coffee market by all the means that were previously mentioned in this section. Associating Rwanda's economy with the coffee market may have directly led to creating the conditions that resulted in the tension and emergence of violence initiating the genocide when the coffee market collapsed. This narration as well links colonization with genocide. The need to eliminate this link between the colonizing countries and the genocide is what created the need for the subjective historical narrative that was discussed several times throughout this research.

3.5 International criminal tribunal for Rwanda.

The tribunal was established by a Security Council resolution on the 25th of May 1993¹⁰². However, the fate of the tribunal remained vague as the Rwandan unity government voted against the tribunal for several reasons. One of which was the fact that they would not include the death penalty. Even though the prosecuted genocide was launched against the Tutsis, the UN commission investigations found that the RPF themselves have committed war crimes in 1994¹⁰³. Prosecuting and indicting the RPF was not an option for the ICTR for several political reasons¹⁰⁴. This however can be traced back to the presumption of good and evil which was discussed earlier in this research. Based on that presumption prosecuting the good men who faced genocide was not an option. With

¹⁰⁰ The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, page 32, available at: <https://www.refworld.org/cases,ICTR,40278fbb4.html> [accessed 11 October 2021]

¹⁰¹ B Dinham & C Hines, *Agribusiness in Africa*, London: Earth Resource Research, 1983, pp 52-53.

¹⁰² UN Security Council, Security Council resolution 955 (1994) [Establishment of the International Criminal Tribunal for Rwanda], 8 November 1994, S/RES/955 (1994), available at: <https://www.refworld.org/docid/3b00f2742c.html>

¹⁰³ Final report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), paras. 93–100, U.N. Doc. S/1994/1405 (Dec. 9, 1994).

¹⁰⁴ Sadat, Leila N., *The Legacy of the International Criminal Tribunal for Rwanda* (September 10, 2012). Washington University in St. Louis Legal Studies Research Paper No. 12-09-05. Available at SSRN: <https://ssrn.com/abstract=2144848> or <http://dx.doi.org/10.2139/ssrn.2144848>

the ICTR never indicating any members of the RPF, ICTR could be accused of fulfilling “victor’s justice” and this was one of the potential downfalls of the legacy of the ICTR which Leila Nadya Sadat discusses in her paper “The legacy of the International Criminal Tribunal for Rwanda”¹⁰⁵. The author discusses how the one-sided indication could have been a fatal flaw in the ICTR’s legacy. Which can be presumed to result in a trial that indicates a sense of impunity for certain culprits. However, if we apply the historical function of the tribunals on the ICTR; utilizing the tools and limitations of the tribunal to produce a historical narration that is more favorable by the tribunal creators, may be more dangerous than the sense of impunity which was given to the RPF.

What needs to be reflected here are the elements that have been established throughout this research, which are the following:

In political charges eras, the need for a savior or a need for an action to be taken becomes inevitable. This exactly is what happened with the creation of the ICTR. When the genocide in Rwanda took place, the UN could not watch and do anything. The creation of the ICTR came as a solution or consolation to the victims. A punishment needed to be rendered for those who have committed the worse crimes against humanity. However, the colonizing countries were still linked with Rwanda and the genocide. They have shaped its ethnicity, economy, society, and politics. Accordingly, this link or association needed to be eliminated. Thus, came the need to produce a subjective historical narrative exiling any possible link. The tribunal may have been created to render justice for the victims, however, one of its main objectives was to create a subjective historical narration that is favorable for the tribunal creators.

- 1- The jurisdiction of the tribunals limited any reference to colonization and focused on the genocide and 1994. This is natural for a tribunal as they are prosecuting the crimes that have been committed. However, if this tribunal is creating history, it is not natural to have this limited source of information. It would automatically result in the bad history that was previously mentioned in this research. Historians use primary and secondary sources to try and collect all possible data related to the event. With tribunals having this limited source

¹⁰⁵ Leila Nadya, The legacy of the International Criminal Tribunal for Rwanda Washington University (2012), <https://law.wustl.edu/wp-content/uploads/2018/10/ICTRLecture-LegacyAd-HocTribunals9.12.12.pdf>

of information, the narration of the history produced shall also be limited and would overlook the context of the catastrophe.

- 2- One of the flaws that have been previously discussed about history is how the ideology of the historians and their values may influence the produced narration. For the tribunal, the authors of the narration are the lawyers, the prosecutors, and the judges; legal personnel are crime-driven personnel. They do not need to explore unnecessary data or information that does not serve their aim, which is either a verdict or an acquittal. This crime-driven nature can result in influencing the produced narration. Because information that historians may find valuable and important can be disregarded by legal practitioners if it is not directly related to the crime.
- 3- The limited sources of information for the tribunal are not only controlled by the jurisdiction of the tribunal, but also by the fact that admissible legal evidence has certain criteria that need to be met before using it. This automatically narrows the evidence that shall be examined and discussed by the tribunal. All these limitations about the sources of information for the tribunals have led to the disregard for the context of the genocide. Which may successfully lead to the creation of a narration of history that does not include the context of the genocide. The context may include the colonization effects, the economic factors, and the ethnic tension which may link the colonizing countries to the genocide.

3.5.1 The Crime driven Lens.

One of the inevitable limitations of legal trials creating historical narrations is the nature of the authors, who can be the judges, the lawyers, the witnesses, and even the prosecutors. In addition to the political bias of the authors which was previously explained throughout this research, how these authors are programmed can also be problematic. Legal practitioners are programmed to interpret events, facts, and evidence, through a different lens, this specific lens is the crime-driven lens.

Defining the term "Crime Driven Lens" as per Aldo's perspective, it is the narrow specific focus which is narrated by the nature of International Criminal Law, on only the criminal conduct and

its liability¹⁰⁶. This will automatically disregard the surrounding circumstances, any other dimensions of the conflict, and the complexity of the crime and will block any several layered explanations as the answer here would be very straightforward, guilty or not guilty.

"Law's unique conventions, special categories, and exceptional rules imply courts to perceive historical events through a counterintuitive prism, which leads to all manner of unintended consequences and absurd outcomes"¹⁰⁷

Now as stated above in this chapter regarding the specific jurisdiction of the tribunals in terms of the limited timeframe, place, personnel, and subject matter. One must not forget the fact that in addition to all these limitations, an additional limitation is presented as these tribunals focus on an even more narrow and limited area as they examine only the charges presented by the prosecutors and stated in the indictments. As a result, the previously mentioned set of limitations is applied to a narrower version of charges which are selected arbitrarily by the prosecutors.

3.5.2 Legal trials limitations and their historical narrative.

Legal tribunals do produce historical narratives, this was argued and supported in several chapters of this research. Whether these narrations are produced intentionally or not is another issue that has been discussed previously. The link between the tribunal creators and the genocide can be supported by much evidence. The intention of tailoring the historical narration produced by the legal tribunals is again supported by several arguments throughout this research. The historical narration that is produced by the legal tribunals is of special nature and characteristics.

Although all historical narratives are to an extent subjective and biased, the subjectivity of the legal historical narratives produced by tribunals cannot be unnoticed. Nor can it be compared to the subjectivity that may exist in other kinds of historical narratives.

The subjectivity of the tribunal's narration is initially embedded in the identity of the tribunal's creators. The security council creating the tribunal holds several political complications and

¹⁰⁶ Borda Aldo Zammit. 2021. *Histories Written by International Criminal Courts and Tribunals: Developing a Responsible History Framework*. The Hague the Netherlands Berlin Germany: T.M.C. Asser Press: Springer.

¹⁰⁷ Wilson, Richard. (2016). *Expert Evidence on Trial: Social Researchers in the International Criminal Courtroom*. *American Ethnologist*. 43. 10.1111/amet.12387.

several indirect motives for the colonizing countries. The most important one would be erasing any link between these countries and the genocide. The subjectivity of the produced narration is then deepened by the statute of the tribunal which holds all the previously discussed limitations whether legally or politically. The nature of the author of this narration also heightens the limitation of this narration. Aldo Zammit Borda in his book "Histories Written by International Criminal Courts and Tribunals" discusses how criminal tribunals interpret historical facts using their legal constructs and through their own legal prism which as stated by historians deforms history¹⁰⁸. The first concern here is that law is too formal and not flexible, unlike history which can accommodate several layers of explanations and can comprehend the complexity of the scope of the situation unlike law¹⁰⁹. The first concern here is that law is too formal and not flexible, unlike history which can accommodate several layers of The second concern is the fact that criminal tribunals have a specific jurisdiction, with a limited timeframe, place, personnel, and subject matter; accordingly, one cannot expect these tribunals to have a collective general scope of the whole situation due to the nature of the tribunal jurisdiction and the exclusions that are a result of this limited jurisdiction.

The final element or characteristic related to this narration would be its dominance and credibility, due to the nature of its author. Which might be the most problematic limitation of this narration. The credibility of these narrations impedes the possibility of more inclusive narrations that could be created. It demotes all other historical narratives. Narratives that should study the context of the atrocity, study the history of Rwanda, and understand the surrounding factors that may have led to the genocide.

¹⁰⁸ Borda, *Supra* note 106.

¹⁰⁹ *Id.*

4. The Verdicts and the Cases.

Petrovic identifies three possible interactions between law and history. The one that is of great interest for this research is the third kind he identified which is History in Trial, which consists of the usage of historiographical elements in judicial proceedings¹¹⁰. This will mainly focus on historical narratives emerging from criminal proceedings, this narrative may be produced by different participants, lawyers, witnesses, prosecutors, and even the defendants themselves. The chamber of the ICTR stated clearly that they are aware that there is no absolute truth. What is achievable and what is more realistic is the existence of several objective truths about a certain historical event. This means that there are indeed several truths about one historical event. Accordingly, there cannot be one conclusive version of the truth about an armed conflict causing several catastrophic crimes and tragedies. The ICTR again confirmed that in Stakic judgment¹¹¹

“The possibility of divergences from, or even contradictions with, findings in other cases cannot be excluded because they are based on different evidence tendered and admitted”

This simply means that different evidence results in different versions of the truth, even in the same situation which is the genocide in Rwanda in this particular example. If different evidence results in different versions, what will the possible narratives be if we were examining more general findings than legal evidence without legal and judicial restrictions? The plurality of narratives and truths is not the problem itself; the issue is presented when one version of the truth is more credible than the other which is what was stated by the UN secretary in relationship to the ICTY as he stated that ICTY provided “detailed and well-substantiated records of particular incidents and events”¹¹². This represents the power element that is embedded in the nature of the tribunal being an author to a historical narrative, that has been discussed throughout this research. The power element automatically provides credibility and validation for this particular narration, over all other historical narrations. At this point of the research, it is safe to conclude historical narratives produced by tribunals are more subjective and marginal than the narratives produced by historians. These narratives are a construction of explanations embedded with political influence

¹¹⁰ Petrovic, The Emergence of Historical Forensic Expertise: Clio Takes the Stand. P.4-5.

¹¹¹ *Prosecutor v. Milomir Stakic (Trial Judgement)*, IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 July 2003, available at: <https://www.refworld.org/cases,ICTY,41483ab14.html>

¹¹² UN Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-conflict.

with specifically targeted highlights and intentionally missed blind spots¹¹³. They are limited by legal limitations and are influenced by the political ideology of the winner's side. They are also out of context, disregarding major elements and factors that led to the genocide. In addition to that, the main problem remains the power factor that provides credibility and validation to this narration. This is mainly why this type of narration is more problematic than any other historical narration, despite the fact that all historical narrations are subjective to an extent and have their own limitations as well. This concludes how the colonizing countries and the other major political powers as France in this example, managed to use the limitations of the tribunal in producing a dominant historical narration, omitting any link between them and the genocide, and impeding and demoting any alternative narration. Eventually Portraying them as the savior but never the ones to blame.

4.1 Cases.

4.1.1 First Case, AKAYESU, Jean Paul (ICTR-96-04).

The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR).

Brief: Jean Paul Akayesu was appointed bourgmestre of a commune which meant that he was responsible for maintaining law and public order within his commune. The fact that over 2000 Tutsi's were killed in Taba within the time of his appointment, and the fact that the killings were both open and widespread should result in Jean Paul knowledge of these killings¹¹⁴. Jean's legal responsibility was to stop these killings, which he did not do. Not only did he fail to stop these acts he encouraged them when he was present during the commission of the sexual violence, beating, and murders. Jean Paul held a meeting in which he sanctioned the death of Sylvere Karera who was accused of supporting the RPF and planning to kill Hutus. Jean Paul then urged those attending the meeting to eliminate supporters of the RPF which were understood to be the Tutsis. Shortly after this meeting, the widespread killings of the Tutsis started. He then continued his violent journey by conducting house-to-house searches in Taba. These searches resulted in beatings, setting houses on fire, and killings, all of which Jean Paul either participated in or was present at.

¹¹³ Aldo Zammit Borda, *History in International Criminal Trials*, P. 25, The Hague, the Netherlands: T.M.C. Asser Press; Berlin, Germany :Springer,[2021] *International criminal justice series*, v. 26.

¹¹⁴ The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, page 7, available at: <https://www.refworld.org/cases,ICTR,40278fbb4.html> [accessed 11 October 2021]

He then detained men and ordered their killing, and after that incident ordered the locals and the militia to kill intellectual and influential people¹¹⁵.

Charges: The detention of men, the beatings, the killing, and the urge and encouragement to kill can all be considered genocidal acts, crimes against humanity, and a violation of Article 3 of the Geneva convention¹¹⁶.

Several motions submitted by the defense were rejected by the tribunal. Refusing to hear witnesses who were also accused in separate cases under the jurisdiction of this same tribunal for the fear of their prejudice. Requests for a transfer for several witnesses who were detained in Rwanda were also rejected¹¹⁷. An additional defense motion for a new forensic analysis was also rejected. All these limitations are an example of the legal limitations that are embedded within the nature of the tribunal. The fact that it is a legal court creates these limitations which have been discussed within the chapters of this research.

The defense argued that the accused was unable to stop the killings nor was he going to risk his own life to prevent the genocide. He stated that once the massacres were initiated, he was denuded of all his authority and power making it impossible to stop any of the violent acts. The defense then highlighted a very important issue which is how fragile human testimony unlike documentary evidence he then referred to the evidence of Dr. Mathias Ruzindana¹¹⁸, in which Dr Mathias states the problems in relying on witness accounts. In addition to that the defense brought up another crucial issue which is related to the alleged "syndicates of informers", the syndicate of informers is alleged to be a group of Rwandans who collaborated to prepare testimony against certain individuals seeking revenge. The defense then alleged that this may be a show trial in some sense since the tribunal needed to convict Hutus of this genocide and the accused is a perfect scapegoat as he was a Hutu and a bourgmestre through the time of the massacres. Argumentatively maybe these testimonies are not the cornerstone one needs to build a crime as massive as genocide on. It may possible that Akayesu was just a normal man who was not brave enough to act to stop the genocide, maybe he didn't participate in these killings, and maybe the allegations about him urging

¹¹⁵ *Id.*

¹¹⁶ *Id.*, 10.

¹¹⁷ *Ibid*, 15.

¹¹⁸ *Ibid*, 18.

the participants about eliminating those supporting the RPF were not true. Accordingly, the fragility of human testimonies along with the legal limitations of the tribunal can be the tools utilized to produce the favored narration by the West, in which no mention of the West or the colonization can be stated or highlighted.

The following paragraph in the verdict is Akayesu's verdict¹¹⁹ represents every argument I have stated in this research. This paragraph does not look like a legal argument but rather a dominate narration about what has happened in Rwanda. The usage of the historical events which fits the criteria to produce the conclusion stated below which was in the verdict

"Clearly therefore, the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. In any case, the Tutsi children and pregnant women would, naturally, not have been among the fighters. Consequently, the Chamber concludes from all the foregoing that genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group.¹²⁰"

The above paragraph looks more like a historical conclusion stated by a high-ranked international criminal trial rather than a legal verdict. This is where the dual objective of the tribunal is proven. The tribunal should only be considered with the guilty or not guilty verdict. Using the tribunals for the objective of creating history has numerous issues which were all discussed in previous chapters. Also, this particular tribunal had jurisdiction over a very limited timeframe, accordingly, the conclusion of writing history by international legal tribunals is far from being optimum. Especially since this dominant narration suppresses any other historical account that may be created by historians. The fact that the historical narration is written by a celebrated international tribunal automatically demotes and discredits any other author or historian.

Assessment of Evidence: "*Unus Testis, Nullus Testis*" this legal principle is strongly challenged in this verdict as the chamber states in the verdict that certain facts were only supported by one witness. And with the fragile nature of witness testimonies which was discussed earlier in this

¹¹⁹ Ibid, 35.

¹²⁰ Ibid, 38.

chapter, makes it even more alarming. Regardless of the fragility of the witness testimony and regardless of the debate over the *Unus Testis, Nullus Testis* principle; the tribunal decided to still rule based on single testimony¹²¹.

Conclusion: This case is complicated and complex, if one would read the verdict aiming to understand the genocide in Rwanda there would be several conclusions. These conclusions can be divided into both Macro conclusions which are related to the genocide in Rwanda and Micro conclusions which are related to what has happened in the case in particular.

Micro conclusions: within the trial itself there are two narrations of the events that are conflicting with one another, the narration produced by the defendant's lawyer and the narration produced by the prosecution and the tribunals. It is only logical that both narrations conflict are they both have two opposing objectives. The issue in this verdict is that the conviction was based on weak grounds, merely on witness testimonies who were argued to be part of the informers' syndicate, single witness testimonies and almost no forensic evidence. All these factors can lead to legally question the foundation basis of the verdicts.

Macro Conclusions: If one would read this verdict to understand the genocide in Rwanda with no previous historical background about the country or its nation. He would have a completely out-of-context conclusion about the genocide. The verdicts, the prosecution indictments, and even the lawyer's legal argument and defense all fail to mention the previous tension that existed decades before the two nations. The verdicts portray the genocide as a single-caused event. It limits the complexity of the genocide to a simple question of whether the defendants physically committed these crimes or not. Referring back to the historical narrations I have mentioned in this research, none of these causes were mentioned in the verdicts nor the trials, and not a single mention of colonization. No questions were asked about the source of the weapons by which these crimes were committed. Within this context, the genocide that took place in 1994 would be viewed as another terrible mass crime that has been committed in Rwanda renewing the ethnic violence that has been there for decades. This exact conclusion is what is arguably the tribunals' main objective, a historical narration with no link between the genocide and the colonizing countries. A historical

¹²¹ Ibid, 40.

narration that has been driven by the limitations of the tribunal and the crime-driven lens nature of the legal practitioners.

4.1.2 Second Case, RUTAGANDA, Georges (ICTR-96-3).

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, ICTR-96-3-A, International Criminal Tribunal for Rwanda.

Brief: Georges started the violence journey by distributing guns and weapons to Interahamwe¹²². Interahamwe was an organization of Hutus which were the main predators in the Rwandan genocide. He stationed the Interahamwe near his office, who started the ID checking game where they killed all the people with Tutsi cards¹²³. The Tutsis who were stationed in the ETO school were also killed by the Interahamwe a spree killing in which Georges directly participated. Not only that but also, he participated in a house-to-house search looking for Tutsis and their families. Those who were found by Georges and the Interahamwe were ordered to be thrown in the river. He directly killed Emmanuel Kayitare with a strike on the head. He finally ordered people to bury all the bodies resulting from his violent journey hoping to conceal his actions from the international community.

Charges: The killing, the distribution of weapons, and the hiding of the bodies can all be considered genocidal acts, crimes against humanity, and a violation of Article 3 of the Geneva convention his actions in the ETO school can be considered crimes against humanity and a direct violation to Article 3 of the Geneva convention.

Assessment of Evidence: The verdict had a very interesting paragraph in the evidentiary matters which states the following.

"In all pre-trials proceedings and in the admission and evaluation of all evidence and exhibits presented at the trial, the Chamber has applied the Rules in a manner best favoured to a fair

¹²² Reyntjens, Filip (21 October 2014). "Rwanda's Untold Story. A reply to "38 scholars, scientists, researchers, journalists and historians"". African Arguments

¹²³ Georges Anderson Nderubumwe Rutaganda v. The Prosecutor (Appeal Judgement), ICTR-96-3-A, International Criminal Tribunal for Rwanda (ICTR), 26 May 2003, paragraph 11. available at: <https://www.refworld.org/cases,ICTR,415923304.html> [accessed 12 October 2021]

determination of the matter before it, and which is consonant with the spirit of the statute and the general principles of law."

This can be described as arbitrary to say the least, it states that the tribunal shall view the evidence as they seem fit. Which can be interpreted in the manner that serves the objective of the tribunal; a certain verdict that the tribunal have previously concluded in their mind. It was later on stated in the verdict by the tribunal that there was inconsistencies and contradictions between the pre-trials statements and the statements made in trial, which was pointed out by the defense.

The reasoning was already brought up in Akayesu's judgment¹²⁴, the translation, the illiterate witnesses, not having full access of the transcripts, the inaccuracy of the interpretation, the fact that these statements were not taken by judicial offices and the fact that these statements were made years prior to the trial. Now with all these deficiencies in the testimonies and with the fact that the tribunal has a green card to interpret evidence "*in a manner best favoured to a fair determination of the matter*"; it is only safe to assume the arbitrary nature of the interpretation and the possible blind spots and overlooked interpretations.

The defense argued that contrary to what the prosecution has presented and what his witnesses has stated, the accused provided a place where Tutsis sought refuge at which was the Amala garage. He then provided them with food and medicine¹²⁵. With the perspective provided by the defense one can safely assume that if the situation was reversed this same tribunal could be prosecuting the accused for his aid or help to the Tutsis. Now reflecting the defense argument on what was stated before in this research in terms of the context of the trial, which is the fact that prior to the establishment of the ICTR the good and the evil were predetermined. Throughout the trial the tribunal has the predetermined general belief in which the Hutus are the preparators.

Conclusion: The Anderson case focuses on a different weak point in the structure of the tribunals and the verdicts; and if one would read the verdict aiming to understand the genocide in Rwanda there would be several conclusions which can be divided into both Macro conclusions and Micro conclusions.

¹²⁴ *Supra* note 114.

¹²⁵ *Ibid*, para. 123.

Micro conclusions:

The arbitrary determination of the admission and evaluation of evidence is obvious in this case and can be added to the list of limitations we have managed to conclude in these verdicts. However, this arbitrary determination serves a more complex shortcoming, which is the predetermined presumption of the preparators with the mere creation of the tribunal. And one can safely assume that if the presumption of who is the victim and who is the predator were shifted the whole system would fall shifting in a domino effect manner. This supports the argument that tribunal's historical narrations can be previewed as victor's writing history. It also supports the argument that the creators of the tribunals to a great extent can control, the produced narration by the previously discussed limitations, one of which is the predetermined definition of the preparators.

Macro conclusions:

The subjective historical narration about the genocide that can be concluded from this verdict is to a great extent similar to the narration produced from the first verdict. The genocide is unforeseen catastrophe in which the Tutsis are innocent victims, and their crimes are automatically immune to prosecution due to the tribunals jurisdiction and the political factors affecting the tribunal and the trial. Thus, no mention to the crimes done by the RPF. Not only that but also these verdicts preview genocide as being committed by this accused personnel only when one of the most shocking pieces of information about the genocide in Rwanda is the fact that Tutsis were not killed from a distance. The killing of Tutsis was executed by machetes in street murder. So, limiting the complexity of the genocide to the murders committed by those being prosecuted is misleading. The genocide was caused by numerous factors, colonization, ethnic tension, and economic factors; but this narration disregards all these factors and translates the genocide into the mere question of whether the defendant committed these crimes or not. Koskenemi's question about whether large political catastrophes should be addressed through individual criminal liability applies here. Moreover, the idea of a criminal state and the state's responsibility through its economy and its society and how this was completely disregarded, and how an enormous focus was thrown upon the accused through the trials and through their produced historical narration. Again, this was all

disregarded and never mentioned in the trials or the verdicts. Which can be argued to be the objective of the tribunal, omitting the context of the genocide. Disregarding the colonization effects and any possible association between the colonizing countries and the genocide. Which results in a historical narration that is constructed by the creators of the tribunal and achieved by the limitations of the trial.

4.1.3 Third Case, BAGARAGAZA, Michel (ICTR-05-86).

The Prosecutor v. Michel Bagaragaza (Sentencing Judgment), Case No. ICTR-2005-86-S, International Criminal Tribunal for Rwanda (ICTR).

Bagaragaza was charged with conspiracy to commit genocide, the accused agreed to cooperate with the prosecution; he agreed to a guilty plea and provided a statement of admitted facts¹²⁶. What was stated in this sentencing verdict is the fact that the indictment was amended several times in order to reach this plea deal. It is only safe to assume that any kind of negotiation between these criminal preparators and the prosecutors of the tribunals should not be acceptable nor tolerated. However, the plea-bargaining has been introduced in international criminal law. It can be also assumed that this plea-bargaining was introduced out of pressure from the imposed deadline by the UNSC.

In the Bagaragaza 's case he was initially promised to avoid the ICTR and be trialed at a national court. If this would have been the case, Norway's criminal law did not have any provision related to genocide. Accordingly, the plan was that he would be trialed as an accessory to homicide or negligent homicide, accordingly the maximum sentence would be 21 years¹²⁷. The mere possibility of Bagaragaza receiving a sentence of at most 21 years drove the Rwandan government crazy and they opposed this referral.¹⁴⁹⁵ What is ironic is the fact that after the plea deal the tribunal only sentenced Bagaragaza to 8 years¹²⁸.

The question arising out of this case is how can we apply normal legal tools in international criminal law? Since international criminal tribunals participate in writing history, how can we

¹²⁶ The Prosecutor v. Michel Bagaragaza (Sentencing Judgment), Case No. ICTR-2005-86-S, International Criminal Tribunal for Rwanda (ICTR), 17 November 2009, page 4. available at: <https://www.refworld.org/cases,ICTR,4b13c3cf2.html> [accessed 11 October 2021]

¹²⁷ The Prosecutor v. Michel Bagaragaza, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, ICTR, Trial Chamber III, Case no. ICTR-2005-86-R11bis, 19 May 2006, para.8 [The Prosecutor v. Michel Bagaragaza – Decision on Referral to Norway].

¹²⁸ Ibid, para 45.

apply normal legal tools, which would only add more limitations to the previously identified ones. The main objective of the tribunals such as the ICTR should be deterrence and providing justice for the victims; the Rwandan government was more than angry with the mere idea of sentencing Bagaragza to 21 years how will the victims feel with an 8-year verdict?

Conclusion: In this case a new limitation of tribunals writing history is explored. which is the usage of normal legal instruments, in atrocities. A verdict like this one, degrades the gravity of the genocide. The tribunal and the prosecution had to accept this defect in order to be able to render more verdicts and more convictions. The intensity of how the crimes the tribunal is prosecuting was degraded with the usage of normal legal instruments is proven when Bagaragza' sentence was similar to the sentence of someone who is accused of carrying firearm or the imitation firearm in a public place.

5. Conclusion.

Denying that international tribunals produce a historical narration should no longer be a valid assumption. What can be concluded from this research is that one of the main objectives of international tribunals is the production of a certain historical narration. This produced narration has special elements and characteristics; which are determined based on the limitations discussed in this research. The limitations facing international criminal tribunals writing history are divided generally into two categories. The first is the general limitations all history authors are subject to which is discussed in chapter 1, the second is the legal limitations embedded within the nature of the tribunal being a legal court which is discussed in chapter 2. The produced historical narration by the international criminal tribunals is relative, subjective, and biased. This however is not the main defect of this narration. As stated in chapter 1, all historical narratives are subjective and relative to an extent. The intensity of the subjectivity due to the legal limitations is higher in legally narrated historical narration, yet this is not the core defect of this narration. The core and main defect of this narration is its dominant and credible nature, which is automatically assigned to it for no particular reason other than the nature of its author. With the dominance and credibility of this narration, any other historical narration about the atrocity is demoted automatically. This suppresses the possibility of any other credible different narration about the atrocity other than the narration dictated by the tribunal's creators. The credibility of this narration impedes the possibility of more inclusive narrations that could be created.

When analyzing the ICTR as a demonstrating example of the arguments made within this research; several factors should be considered. The fact that the ICTR along with almost all international tribunals linked to atrocities are threatened to be viewed as show trials; due to the previously discussed reasons which are related to the presumption of innocent, the fact that the ICTR was created to prosecute those accused of genocide; yet the tribunal was the one who confirmed the occurrence of genocide. The ICTR was established by the security council to fulfill several objectives; the first of which is the prosecution of the genocide. The second of which is the construction and creation of historical narratives that eliminates any possible link or relationship between the creators of the tribunal and the genocide. France for example was accused of providing the weapons and arms that were used in the genocide. The countries that colonized Rwanda, as colonization may be one of the principal reasons that ultimately led to the genocide.

The political side of these trials could not be unnoticed; because the mere creators of the tribunals were trying to omit any link to these atrocities. The creation of tribunals in a politically heated era will normally support the winner's side. As stated by Koskenniemi "the legal principles have been vigorously contested, the main controversy focusing on to what extent such trials are only political instruments to target former adversaries on the basis of laws that were not in force at the time they were acting"¹²⁹.

The creation of these trials was based on the need to prove the Rule of Law; calling for criminal responsibility for all preparators proving that no one is outside the law and all shall be accountable for their actions. This objective collides directly with the fear of a show trial; to prove that you can trial everyone, tribunals are built with previous knowledge and predetermined definition of who are the preparators. Not only that but also the rule of law is applied on the losing side as explained within this research. This results in a trial that's main objective to an extent is establishing a historical narration explaining the events that occurred; with the tribunals' own biased embedded in the tribunal and the resulting narration.

"Stand outside the pale of what is comprehensible in human and moral terms" and that "something other than law was at stake here, and to address it in legal terms was a mistake" was what Karl Jaspers¹³⁰ wrote on relationship to trials for mass atrocity. One can conclude that the mass atrocity's gravity is greater than a legal trial. Thus, the bias of the tribunal may be justified and has no alternative. In the ICTR the tribunal was biased toward the Tutsis, giving them impunity and predetermining that the Hutus were the preparators. From the tribunals' perspective, this may be justified. A biased tribunal may be better than a tribunal that convicts no one and if the tribunal convicts no one; does this mean that there was no genocide? The trial is also not ideal in legal measurement; several legal principles were challenged, and there were several legal defects which were explained previously in chapter 3. In addition to that the tribunal's dual objective was not ideal. The tribunals' main objective should be rendering justice but for the ICTR there were other objectives like history writing; that may have influenced the trial.

My main issue with this historical narration and with the international criminal tribunals is the fact that the produced narration is not progressive, but rather extremely conservative. The atrocity is

¹²⁹ Koskenniemi, *Supra* note 59.

¹³⁰ On Jaspers, see Lawrence Douglas, *The Memory of Judgement* (Yale University Press, 2001)

portrayed as a single-layer event, which was caused by a single cause. The genocide in Rwanda for example was portrayed to have been executed due to the ethnic tension between the crazy Africans. No consideration, exploration, or even mere mention of any other surrounding factors, historical, social, or economic elements that may have been directly or indirectly the catalyst of the genocide. The fact that this narration is subjective and relative is not a good feature nor a bad defect of this narration. It is only a historical narrative that carries the identified historical limitation in chapter (1). The dominance of this narration is problematic, as it demotes any other historical narration. Supersedes any other explanation or research. Impedes and blocks the possibility of any other credible historical narration that may be built on a different or contradicting explanation of the atrocity. This is disappointing, to say the least, because ideally, international tribunals should be more concerned about this dominant narration. International criminal tribunals should be enabling further research and investigation into atrocities. The tribunals should be enabling and supporting other parties in their investigations and research, rather than blocking them. For example, the UN commission investigations should be empowered and supported by the tribunal and not overlooked, or subjectively selecting the information that supports the intended dominant narration. The genocide was not caused by the crazy Africans, the genocide was a complicated and complex event that may have been building up for years. The tribunal should have allowed the exploration of different theories, causes, and catalysts of the genocide. Which will result in different historical accounts regarding the genocide. But the tribunal's historical narrative impeded this.