FEMALE CRIMINALITY AND INTERNATIONAL CRIMINAL JUSTICE ADMINISTRATION: JURISPRUDENTIAL EVOLUTION THROUGH THE INTERNATIONAL AD HOC CRIMINAL TRIBUNALS

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INTRODUCTION

The notion of female criminality under the Criminal Justice system is still now a single faced issue. Gender factor plays a vital role in sentencing pattern in the judicial system. Though the fundamentals of the Criminal Law are not a gender biased one either in the substantive or the procedural law, the judicial discrimination classifies shows such leniency while awarding the penal sanction. The interpretation of *mens rea* and the *actus reus* should determine the guilt or innocence and not based on any other factors. Most of the domestic criminal justice systems are lenient towards the female criminals even for the graver offence. The dark side of inequality based on gender should be removed. The protection provided to the disadvantaged or vulnerable groups who is none other than women and children is the most celebrated human rights without understanding that sometimes the women gender itself indulging in heinous crimes against women. In the Indian Criminal Justice system, under Indian Penal Code (herein after referred to be as 'IPC'), some offences are exclusively considered to committed against women only.[1] Apart from the protection through the IPC, special laws are also there to protect women[2] rights and safety. On the other hand, the perpetrators of the crimes under any of these provisions or legislatures are gender biased. The Criminal Justice Administration is providing maximum concentration on the commission of the crime rather than the conspiracy or abetment part. Though the offence of rape is committed by male, is there any trace for either conspiracy or abetment of rape by a woman. Only in limited provisions of laws for heinous crimes such as murder, causing miscarriage to an unborn child, bigamy, acid attack women may be charged. Though they charged with, what sort of penal

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[1] Sections 304B-Dowry death; 354-Outraging modesty of women; 354A & B- Sexual harassment; 354B-Voyeurism; 354D- Stalking; 366- Kidnapping women with the intention to compel her to marry; 366A-Procreation of minor girl; 366B- Importation of girl from foreign country; 498A- Harassment to women by husband or relatives of the husband; 509- talking or through gestures insult the modesty of women.

[2] For instances, The Dowry Prohibition Act, 1961, The Medical Termination of Pregnancy Act, 1971, The Protection of Women from Domestic Violence Act, 2005, Indecent Representation of Women (Prevention) Act, 1986, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 etc.

sanction is awarded for them is debatable issue. The notion of application criminological view while deciding a case is either or partly absent in our criminal system. But the study about the criminological behaviour of the perpetrator is being carried out in a systematic way under the International Criminal Justice System. In this paper the author will discuss about the contributions of International Ad Hoc Criminal Tribunals in interpreting every case with specific reference to women criminality.

INTERNATIONAL AD HOC CRIMINAL TRIBUNALS:

International Criminal Tribunal for Former Yugoslavia (herein after referred to as the "ICTY")[3]

Due the massive human rights violation committed within the territory of the Former Yugoslavia, the United Nations Security Council (herein after referred to as the 'UNSC') voiced alarm based on the reports of the permanent representatives of Yugoslavia. The reports alerted UNSC about widespread and methodical violations of international

[3] Bosnia and Herzegovina were a multi-ethnic in the Former Yugoslavian region for more than 400 years. The maximum population belonging to the Muslim religion and owes their own culture and identity. Croats are the third ethnic group lived other than Bosnia and Herzegovina. During Second World War, Yugoslavia faced severe repression and brutal human rights violations. Three distinct forces of Yugoslavia fought each other and Ustasa forces strongly supported the Axis Power. The Ustasa forces are mainly Serb nationalists and monarchrist. They mainly involved in killing non-Christians and converting third group into Christians. During 1946, Marshall Tito took measures to all nationalist tendencies. Under his leadership the country was composed of six republics such as Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Montenegro, Vojvodina and Kosovo. During the multi-party election, the nation heading towards breakup. During 1980's the country's economy was worsened. The internal tension started to spread to Croatia and Bosnia and Herzegovina. On 25th June, Croatia and Slovenia declared independence and in March 1992 Bosnia and Herzegovina declared independence. Though the referendum was objected by Bosnian Serbs, still the European Community and the United States of America recognised the independence in April 1992. During the first free election, the prominent parties of Muslim Party of Democratic Action and the Serbs Democratic Party and Croats Democratic Union contested with each other. The Muslim Party of Democratic Action won the election. Election reflected the ethnic census, ethnic group voting. It leads to disintegration of multi-ethnic federal Yugoslavia and disintegration of multi-ethnic Bosnia and Herzegovina, which ended in internal armed conflict between Muslim dominated party and Croatian Serbs. The practise of ethnic cleansing was adopted during this time. The Yugoslavian National Army (JNA) incurred into Croatia and the Croatian Government declared JNA as invading force. The entry of large JNA forces into Bosnia and Herzegovina from Croatia brought high tension. Out of which the Muslim Party disassociated from administration and independent Serb Government *Republica Srpska* formed. Military took control over the area. The military actions include shelling, sniping, targeting of non-Serbians in that area. This resulted in death of civilians, imprisonment of non-Serbs, they were assaulted and beaten to sing Chetnik songs and their properties were seized. All these activities were accompanied by widespread and systematic destruction of person and property. The historical background of the Former Yugoslavia was discussed in *The Prosecutor v. Dusko Tadic* decision passed on 7 May, 1997 by the Trial Chambers of the ICTY in case no: IT-94-1-T. to view the full text of the decision in www.icty.org/cases (Accessed on 12.09.2019)

humanitarian law (herein after referred to as 'IHL'). Further the report includes the atrocities such as mass killings, organised and systematic detention and rape of women and continuance practise of ethnic cleansing. In this regard, the UNSC to react and bring out the peace decided to establish an international ad hoc criminal tribunal according to Chapter VII of the Charter of the United Nations (herein after referred to as 'the UN'). The decision enables the tribunal to achieve and restoration of peace and to prosecute and punish the perpetrators responsible for such serious violations.[4] International criminologist commented that the establishment of ad hoc international criminal tribunal will address the redressal for serious violations of IHL without any immunities and discretions. Though there was difference of comments and objections arose with respect to such establishment[5], some commenters supported the view with the aid of Art.41 of the Charter of the UN. The International Court of Justice in its Advisory opinion case, "*Effects of Awards of Compensation Made by the United Nations Administrative Tribunals (Advisory Opinion)*[6]approved the powers of the UN organs to entrust their powers to subsidiary bodies including tribunals, which authorises the UNSC under Art.29.

The constitution of the ICTY includes Registry (administrative head of the Tribunal), the Office of the Prosecutor (organ responsible for investigation, framing indictments and conducting trials) and the Chambers (main organ of the Tribunal which includes Trail and Appeal Chambers). The Tribunal had its own Charter with 34 Articles and the jurisdiction of the Tribunal was for Grave Breaches of the Geneva Convention, 1949 (War Crimes), Violations of the laws or customs of war, crime of Genocide and Crimes against Humanity.[7]

[4] According to Chapter VII of the Charter of the UN, the UNSC established the ever first international ad hoc criminal tribunal through the resolution UNSC/Res/827/1993 on 25 May 1993. The Security Council thus affirmed that persons indulging in and responsible for serious violations of international humanitarian law and of the Four Geneva Conventions. For the first time the UNSC adopted that 'ethnic cleansing' as serious violation of IHL. The full text of the UNSC Report is available at www.un.org/en/sc/search/view_doc.asp?sysbol=S/RES (Accessed on 12.9.2019)

[5] Some Commenters opined that the UNSC has applied its powers uncertainly, but commenters like Prof. Willian Schabas supported the view of the UNSC from the point of Art.41 of the Charter of the UN. Art.41 of the UN Charter reads as, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

[6] "*Effects of Awards of Compensation Made by the United Nations Administrative Tribunals (Advisory Opinion)* 1954 ICJ Reports 47, 21 ILR 310, pp.321.

[7] Art.2 of the Statute of the ICTY states as, "Article 2 Grave breaches of the Geneva Conventions of 1949 The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property

The number of cases indicted before the Tribunal for the prosecution of the above crimes were totally 160- 90 were sentenced, 18 were acquitted, 3 pending before the Appeal Tribunal, 13 referred to National jurisdiction and 37 perpetrators indictments were withdrawn and some died. The Tribunal was officially completed its task and closed on 27.12.2017. From the 160 perpetrators indicted before the Tribunal only one women offender was found guilty as many as 20 perpetrators pleaded guilty. The only one women offender was *Biljana Plavsic* who was indicted for the alleging crimes such as crime of genocide, punishable acts under the Crimes against Humanity *inter alia* persecution, extermination and killing, deportation and inhumane acts.[8]She initially refused to plead guilty and on 2 October 2002, pleaded guilty for persecution and Crimes against Humanity. The Tribunal satisfied about the

protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages", Art 3 reads as Violations of the laws or customs of war The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property. Art.4 of the Statute defines crime of Genocide as "1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article. 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. 3. The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide." and Art.5 of the Statute of the ICTY reads as, Crimes against humanity The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts. To view the full text of the Statute visit https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf (Accessed on 20.9.2019)

[8] Biljana Plavsic was a Bosnian Serb familiar politician and holding a senior officer position. During the internal conflict she alleged to have participated in the persecution of Bosnian Muslim, Croat and other non-Serb population. She also aided the campaign of ethnic separation which caused death of thousands of civilians. She also participated in expulsion of thousands from the municipalities and actively participated in inviting paramilitaries from Serbia to Bosnia to effect the ethnic separation. The full text of the Trial Chamber judgement cases no: IT-00-39&40/1-S dated 27 February 2003. The full text of the judgement is available at https://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf (Accessed on 25.9.2019)

voluntariness of the guilty plea and unequivocal consent. Plea agreement was entered on 30 September and based on the guilty plea, the prosecution agreed to withdraw the remaining counts of indictments. But the Tribunal refused. She was sentenced to eleven years of imprisonment.[9]

BILJANA PLAVSIC

Biljana Plavsic was aged about 72 at the time of the trial. The background of the accused was that, she was a distinguished academician, Professor of Natural Science and Dean of Faculty at the University of Sarjevo. She joined the politics in 1990. He joined the Serbian Republic Party ('SDS') and soon became a prominent member of the party. She was elected as a Serbian Representative to the Presidency of the Socialistic Republic of Bosnia and Herzegovina. When the sovereign Bosnia and Herzegovina was created, the SDS party voted against the resolution and the party included the accused also and they voted for the creation of Bosnian Serb Assembly.[10] The accused supported the aim of Bosnian Serb, being a co-President, she supported by maintaining the government and military at local and national level, encourages public announcement that justified that genocide was committed against them by Bosnian Muslim and Bosnian Croats, encouraged and invited paramilitaries from Serbia to assist Bosnian Serb Forces to effect the ethnic separation. The act of persecution includes-killing, cruel and inhumane treatment during and after attack, forcible transfer and deportation, unlawful detention, forced labour and use of human shields, destruction of cultural and sacred objects and plunder of property[11]. Though the accused *Biljana Plavsic* disagree with the allegation of ethnic cleansing but she was aware that she had power to prevent and punish the crime and failed to do so.

In the Plea agreement statement the accused stated that accepting her responsibility and remorse unconditionally. She further offered consolation to the innocent victim. She also insisted other accused to come forward to accept their acts and conduct. She realized and understood the nature and gravity of the crime she participated during the conflict.

[9] *The Prosecutor* v. *Biljana Plavsic* decided on 27 February 2003, Case No: IT-00=39&40/1-S by the Trial Chambers of the ICTY, para.10, p. 2

[10] The SDS Political Council's primary goal was that the Former Yugoslavia shall remain as a one common State. On this strategy, the Council including the accused intended that the separation of the ethnic communities would include the permanent removal of ethnic populations and knew further that any forcible removal of non-Serbs would involve persecution. *Biljana Plavsic* Trail Chamber decision, para.11, pp.3

[11] *Biljana Plavsic* decision, para. 16, p. 5

APPLICABLE LAWS

The Statute of the ICTY and the Rules of Procedure and Evidence (herein after referred to as the 'RPE') are available with the relevant provisions of law. The imposition of penalties shall be in accordance with the prison sentences of the former Yugoslavia and shall be limited to imprisonment. Further the law insists that while awarding sanction the Chamber should consider both aggravating and mitigating factors.[12] The relatable provision for pleading guilty is available under the RPE. If the accused person pleaded guilty the Chamber should satisfies that the guilty was made voluntarily, informed and not equivocal. According the relevant provisions of law, the aggravating factors are gravity of the offence and the individual circumstances of the accused person.[13] The mitigating factors are substantial cooperation with the prosecution.[14] The Trial Chambers (herein after referred to as the 'TC') interpreted the sentencing pattern of this case in comparing with the decision passed in *Delelic*[15]and *Aleksovski*[16] as it was held that retribution and deterrence would be the ultimate objective of the sentencing and the consideration should be from the context of the accused. Further it reiterated that the cardinal principle of sentencing should be based on the gravity of the offence.

GRAVITY OF THE OFFENCE, AGGRAVATING AND MITIGATING FACTORS

The prosecution submitted the aggravating factors of the accused such as crime od persecution (discriminatory intent) was the result of large scale of campaign in which the accused also participated. The campaign was massive and thousands of the civilians were expelled and killed brutally and includes torture and sexual violence.[17]The act includes killing, beating, rapes at Luka Camp of the Muslim, mass killing of nearly 70 Muslin women and children in a crowded bus with only two windows by setting ablaze the bus. This sort of cruel and inhumane treatment was practised in several municipalities. The Trial Chamber considered and satisfied that the repeated occurrence of the above-mentioned events wasenoughto establish the gravity of the offence though the accused was not committed the

[12] Art.24 of the Statute of the ICTY

[13] Rule 62*bis* of the RPE of the ICTY, The detailed study of the Rules of Procedure and Evidence is available at https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf (Accessed on 30.9.2019)

[14] Rule 101 of the RPE

[15] *The Prosecutor v. Delalic et al* Case No. IT-96-21-A dated 20 February 2001, para 806.

[16] *The Prosecutor v. Aleksovski* Case No: IT-94-14/1A dated 24 March 2000, para.185.

[17] *Biljana Plavsic* Trial judgement, para.27, pp.9

offence.[18] The accused in her guilty plea agreement accepted her involvement if the crime of victimisation and persecution. The TC of the ICTY found guilty and accepts the gravity of the offence of massive campaign on ethnic separation which directly resulted in killing of thousands of innocent Bosnian Muslim, Bosnian Serbs and non-Serbs. The findings of the Chambers helps to satisfy the gravity of the offence includes-massive scope and extent of persecution; counts of killings; immense inhumane and cruel treatment and wanton destruction of property and religious building. The aggravating factors of the accused as per the findings of the Trail Chamber were-leadership position of the accused; status of the victims (vulnerability) and depravity of the crime.[19]

Further, the Chamber applied the law evolved in *Krstic* Trial judgement to establish leadership as an aggravating factor.[20] The TC at the same time also found that the accused was not first rank leader as compared to other accused, not involved conspiracy of planning and execution, but only encouraged and supported through her participation. The discussion of sentencing states that in the absence of the guilty plea agreement, the alleged indictment would have been punished with imprisonment for life.

The mitigating factors which helped the accused are-entry of guilty plea; remorse; voluntary surrender; post-conflict conduct; previous good character and age. The Chambers has discretionary powers to consider further factors as mitigating factor as the facts and circumstances of the case differs. The jurisprudence on guilty plea as mitigating factor evolved in varies cases[21]*inter alia* by both the Criminal Tribunal for Former Yugoslavia and Rwanda (the discussion on creation, jurisdiction, Statute and Procedure of the African

[18] The detailed evidence for the gravity of the offence was discussed in paras 31 to 51, pp.9 to 16 of the Trial Chamber judgement, the evidence was for forced expulsion and transfer, widespread killings, cruel and inhumane treatment in detention camps.

[19] *Biljana* judgement paras.52 & 53, pp.18.

[20] *The Prosecutor v. Radislav Krstic*, Case No: IT-9833-T, Trail judgement dated 2 August 2001. The Trail Chamber has consistently opined that leadership position was an aggravating factor. The Chambers interpreted that the accused those who holds the political or military position use that position to commit the crimes. The TC also referred the decision passed by another international criminal tribunal, International Criminal Tribunal for Rwanda in *The Prosecutor v. Jean Kambanda* Trial Judgement ICTR-97-23-S, dated 4 September 1998. In this case, the TC found that Jean Kambanda who was the Prime Minister of Rwanda misused his position.

[21] *The Prosecutor v. Zoran Kupreskic et al* Case No: IT-95-16-A Appeal judgement dated 23 October 2001; *The Prosecutor v. Dragoljub Kunarac et al* Trial judgement IT-96-23-T & IT-96-23/1-T dated 22 February 2001; *The Prosecutor v. Goran Jelisic* Appeal judgement IT-95-10-A dated 5 July 2001; *The Prosecutor v. Ducko Sikirica et al* Trial Judgement IT-95-8-S dated 13 November 2001; *The Prosecutor v. Draen Erdemovic et al* Trial judgement IT-96-22-T*bis* dated 5 May 1998; *The Prosecutor v. Milorad Krnojelac* Trail judgement IT-97-25 dated 15 March 2002; *The Prosecutor v. Zlatko Aleksovski* Trial judgement IT-95-14/1-T dated 25 June 1999. To view the full judgements, Available at: www.icty.org/cases.

Criminal Tribunal will be discussed in the next part of the article). The evolution of jurisprudence on guilty plea as a mitigating factor justified as demonstration of honesty, to assists the Tribunal to achieve the ultimate objective of its creation, it plays a vital role as a fact-finding tool which contributes for the peace-building process, it may reduce the cost and time of the Tribunal and some time it might relieve the stress of the victim witnesses. Further the prosecution in its argument stated that the guilty plea is two folded principles, expression of remorse and steps towards reconciliation. In this case, the accused expressed her remorse "fully and unconditionally". Though the guilty would lead to discount in the sentencing, the significant circumstance of the same is establishment of truth and reconciliation. This was made by the *Biljana Plavsic* in her guilty plea statement as follows;

"…*There is a justice which demands a life for each innocent life, a death for each wrongful death. It is, of course, not possible for me to meet the demands of such justice. I can only do what is in my power and hope that it will be of some benefit, that having come to the truth, to speak it, and to accept responsibility. This will, I hope, help the Muslim, Croat, and even Serb innocent victims not to be overtaken with bitterness, which often becomes hatred and is in the end self-destructive. To achieve any reconciliation or lasting peace in Bosnia and Herzegovina, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility—regardless of their ethnic group. This acknowledgement is an essential first step*"[22]

The guilty plea statement was acknowledged by an expert witness Dr. Alex Boraine, an expert on reconciliation and accountability issues. Another witness Mr.Mirsad Tokaca, noted that refusing or failure to speak up about the crime impedes the establishment of the truth and reconciliatory process and the courageous move of the accused by admitting the allegation was,

"…*an extremely courageous, brave and important gesture and that it represents support to what is the ultimate aim of all of us […]; that at one-point normal conditions of life should be resumed in Bosnia-Herzegovina […and] in the entire region as well*"[23]

The object expressed by the UNSC in its Resolution 827 while creating the ICTY stressed the importance of the ICTY to achieve the process of reconciliation and maintenance of

[22] *Biljana Plavsic* Trial judgement para.74, pp.24, the full text of the guilty plea statement is available at https://www.icty.org/en/sid/221 (Accessed on 30.9.2019)
[23] *Biljana* Trial judgement para.78

international peace and security. The other mitigating factors other than guilty plea agreement are voluntary surrender, Post-Conflict conduct, age factor. With respect to age factor, the Trial Chamber referred the decision passed by the European Court on Human Rights (herein after referred to as 'ECHR'). In *Papon v. France*[24]case the appellant was 90 years old who found guilty of abetting and aiding of crimes against humanity by the French Court. The court referred Art.3 of the European Convention for the Protection of Human Rights and Fundamental Rights regarding rights against torture or inhumane or degrading treatment or punishment. The ECHR observed that,

"*...advanced age is not a bar to sentence…However, age in conjunction with other factors, such as health, may be taken into account either when sentence is passed or while sentence is being served…"*

With the advancement of the argument, the Chamber expressed that the accused who was 72 at the time of the trial proceedings, any imprisonment imposed on her, must considered of her age. The Defence has submitted several other countries sentencing pattern and consideration of age as a mitigating factor. The decision passed by the Trial Chamber in *Erdemovic* case the penalty was imposed in confirmation with the minimum principle of humanity, dignity which was guaranteed by various human right instruments. Though the Prosecution agreed with the contention of the Defence regarding age as a mitigating factor but disagree with the fact that in the referred decision of *Erdemovic* case, though the TC considered age as a mitigating circumstance, what is the deciding factor of "advanced age" was not evolved in the said case. So, the TC moves outside the jurisdiction of the ICTY and applied jurisprudence evolved by ECHR in *Popan* case and an English case *R. v. C.*[25]. From the above discussion of the decisions, the TC considered advanced of age as a mitigating factor.

JURISPRUDENTIAL EVOLUTION:

The gravity of offence was established from the participation of the accused and misuse of her status. The Chamber opined that the leadership position should either prevent the crime or mitigate its gravity. But the accused supported and encouraged the crime. This will act as an

[24] *Papon v. French,* European Court of Human Rights, Application No:64666/01, dated 7 June 2001. Reference of this case is at *Biljana Plavsic* Trial Judgement para.95, pp.30.

[25] *R. v. C.* (1993) 14 Cr. App.R.(S.) 562, at 564. In this case, the appellant who was 79 years old, filled an appeal against the conviction of sentence of 7 years of imprisonment for the alleged charges of serious offence of sexual harassment against his five grandchildren-Footnotes 181, *Biljana* Trial Judgement pp. 32.

aggravating factor. The TC appreciated the mitigating factor such as acknowledgement of crime, acceptance of responsibility; remorse and repentance were balanced against the aggravating factor. The Prosecution submitted appropriate sentence for the alleged indictment against the accused as imprisonment not less than 15 years, but which may not more than 25 years. The Chamber considered both mitigating and aggravating circumstances along with the principle of retribution and deterrence. The TC preferred guilty plea as a prominent mitigating factor rather than the advanced age. The point to be noted from the above discussion, nowhere either the accused nor the defence or the Chamber raised any arguments based on gender. The Trial Chamber sentenced the accused to undergo eleven years of imprisonment.[26]

International Criminal Tribunal for Rwanda (herein after referred to as the 'ICTR')

Historical background of Rwanda:

Rwanda is a hill country in Central Africa and occupied by Tutsi, Hutu and Twa ethnic groups. Tutsi ethnic group occupied the higher strata and the Hutu's the lower. Rwanda became the colony of Germany and Belgium. The colonies favoured Tutsis due to their height, colour and intelligence. Belgium introduced the distinction between Hutu, Tutsi and Twa based on the population percentage as Hutu with 84%, Tutsi with 15% and Twa 1% and identity cards were issued. During decolonisation, the Tutsi was aware of independence and due to this the colonies turned their favour towards Hutus. Due to the pressure of the United Nations (herein after referred to as 'UN') Belgium conducted the election and Hutu obtained the majority. For the first time ethnicity based political parties were formed-*Movement Democratique republician Paramehutu* ("MDR") identified for Hutus, *Union Nationale Rwandaise* ("UNAR") identified for Tutsis, *Rassemblement Democratique Rwandaise* identified for moderate Hutu and Tutsis. On 1.7.1962, Rwanda got independence and Mr. Gregorie Kayibanda became the 1st President of Republic of Rwanda.

After the raise of Hutus, Tutsis moved to the neighbouring countries and evacuation started. The term '*Inyenzi*'[27] came to usage to refer Tutsis. The situation becomes very worst and

[26] *The Prosecutor v. Biljana Plavsic* Trial Judgement Case No.IT-00-39&40/1-S dated 27 February 2003, paras.120 to 132, pp.41.

[27] It means cockroach in the language of Rwandese, Kinyarwanda. It referred to denote that how cockroach comes during night time and vanished during day time, the Tutsis those who shifted to the neighbouring countries comes during night time and left before sunrise.

everywhere there was conflict between Tutsis and Hutus. The President could not control the situation and General Juvenal Habyarimana seized the power and introduced single party system and discrimination against Tutsis confirmed. The exiled Tutsi formed *Rwandan Patriotic Force* ("RPF") in Uganda. They started to attack the Hutus from Uganda and their primary object was to return Rwanda. The *Radio Televiosion Libre des Milles Collines* "RTLM" which belonged to the Hutu governed Radio Station spread hate propaganda against the Tutsis. Many Tutsis were killed, tortured, gender based crimes were committed against the women and children. Rwanda government entered into the final Peace Accord (Arusha Accord) by the continuous pressure of the UN. After signing the accord, while returning to Rwanda, the President Habyarimana along with Prime Minister of Brundi and other ministers were killed by a missile attack near Kigali Airport (Kigali is the Capital of Rwanda).

The assassination leads to severe chaos in Rwanda which leads to road blocks, military attack and other human rights violations. Hutus started killing of Tutsis and moderate Hutus. As they killed the members of UN Peace keeping force which resulted in reduction of peace keeping force in Rwanda. From 12th to 14th of April, killing was at peak. In the span of three months, nearly 8-10 lakhs Tutsis were annihilated.[28]

CREATION OF ICTR

The UNSC received letters from the permanent representatives of Rwanda regarding the situation at Rwanda and serious violations of international humanitarian laws (herein after referred to as the 'IHL'). The UNSC has took measures to stop the violations *inter alia* cease fire, return of displaced person etc [29] on 8 November 1994 the UNSC declared the establishment of the International Criminal Tribunal for Rwanda through the UNSC/Res/955/1993 to prosecute and punish the persons responsible for genocide and other serious violations of the IHL. The Criminal Tribunal is vested with individual criminal responsibility without any immunity. The seat of the ICTR was in Arusha, Tanzania. Totally

[28] The historical background of Rwanda was discussed in detail in the decision passed by the Trail Chambers of the ICTR in *The Prosecutor v. Jean Paul Akayesu* Case No: ICTR-96-4-T dated 2 September 1998, pp.47-66.

[29] The UNSC in its resolution UNSC/Res/912/1993 expressed regret for the large scale of violence which includes killing of women and children at large and expressed their concern over the safety and security of the peace keeping force personnels. On 17 May 1994, the UNSC/Res/918/1993 for the first time condemned the systematic and widespread attack, killing, spreading of ethnic hatered message through mass media and through the resolution UNSC/Res/925/1993 dated 8 June declared that genocide have occurred in Rwanda. The full texts of the Resolution is available at https://www.un.org/securitycouncil/content/resolutions-adopted-security-council-1993 (Accessed on 30.10.2019)

93 persons were indicted under various indictments, 80 cases got concluded, 5 cases were transferred to the National Jurisdiction and 8 were recorded as Fugitives.[30] On 20th October the Tribunal passed orders on its final case before the Trial Chambers and completed the strategy. The Appeal cases are only pending before the Appellate Chambers. The jurisdiction of the ICTR was drafted by the UNSC while establishing it, the Statute of the ICTR includes the substantive elements and the Rules of Procedure and Evidence includes the procedural part. Arts.2, 3 and 4 of the statute defines the punishable offences under the Tribunal as Crime of Genocide, Crimes against Humanity (herein after referred to as the 'CAH') and Violations of Art 3 Common to the Geneva Convention and of the Additional Protocol II.[31]

The jurisprudence evolved before the ICTR was phenomenal. After 50 years of the Convention on the Prevention and Punishment of Crime of Genocide, 1948.[32] The Trail

[30] The key figure of the ICTR cases is available at http://www.unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf the site was updated on October 2019. (Accessed on 25.10.19)

[31] Art.2 defines crime of genocide as, "The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article. 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. 3. The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide", Art.3 defines Crimes Against Humanity as, The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts and Art. 4 speaks about the Violations of Art.3 Common to the Geneva Convention and of the Additional Protocol II as, The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples; (h) Threats to commit any of the foregoing acts. The detailed study of the Statute of the ICTR is available at https://unictr.irmct.org/en/documents/statute-and-creation (Accessed on 25.10.2019)

[32] Prof Rafael Lemkin in the year 1944 introduced the term 'Genocide' to the international community. It is the combination of two terms *genos* from the Greek term which means race or tribe and *cide* from the Latin term means killing. He first introduced the crime in his work titled *Axis Rule in Occupied Europe: Laws of Occupation-Analysis of Government-Proposal for Redressal*. His contribution was recognised by the UN

Chambers of the ICTR has developed the international criminal justice system jurisprudentially. The contribution of the ICTR for the development of legal foundation on the crime of genocide is remarkable. The first decision on punishing the international crime of genocide was passed by the Trail Chambers of the ICTR. The elements of the crime was thoroughly analysed and interpretation on the plain reading of the crime is a source of international crimes. The landmark decisions passed by the ICTR include, *Jean Paul Akayesu, Jean Bosco Baraygwiza, Ferdinand Nahimana and Hassan Ngeze, Jean Kambanda Clement Kayishema, Juvenal Kajelijeli, Musema, Muvunyi* and *Nyiramasuhuko*. The only women accused under the ICTR were *Nyiramasuhuko*.

NYIRAMASUHUKO DECISION AND EVOLUTION OF JURISPRUDENCE

The first case which convicted a women perpetrator for international crime of genocide was *Pauline Nyiramasuhuko*.[33] She was indicted with crime of genocide, conspiracy to commit genocide, extermination as CAH, rape as CAH, persecution as CAH and other serious violations of 1949 Geneva Convention. She was sentenced to undergo life imprisonment for all the counts. The role of the accused in committing the crime of genocide from the feministic view created substantial legal implications under the international criminal law (herein after referred to as 'ICL'). *Nyiramasuhuko* was a Minister of Family and Women Development during the interim government in Rwanda which is headed by another accused *Jean Kambanda* as Prime Minister. She helped to formulate the plan to annihilate Tutsis at Butare region. Butare is an intellectual capital of Rwanda and most prominent institutions are situated there. The attacks against Tutsis started at Butare sometimes later after other places. But the accused utilised these times to properly coordinate and analyse the plan to commit genocide.

The findings against the accused person by the Trial Chamber satisfied that the circumstantial evidence against the accused person to prove the special intent *dolus specialis* to commit the crime of genocide was established by the prosecution beyond the reasonable doubt. Her participation, involvement, orders to commit genocide is recorded properly. The *mens rea* of the crime of genocide was established through proving the meetings at Butare region was on

General Assembly in 1998 by passing a resolution to draft a convention on crime of genocide UNGA/Res/260A (III) dated 9 December 1948.

[33] *The Prosecutor v. Pauline Nyiramasuhuko, Arsene Shalom Ntahaboli, Sylvian Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje* Case No: ICTR-98-42-T dated 24 January 2011.

the agreement made between the Prime Minister and Ministers of the interim government of Rwanda. The plan to commit genocide includes spreading of hatered and ethnic violence, agreement between identified groups, choosing the victims and preparing the list, training the military personnels and finally executing the above.

The mental element was supported and proved through the material element such as, Butare Agreement, entries in diary of the accused regarding events and fulfilment of the planning's, her participation in the meetings and hate speeches.[34] The accused challenged the decision of the Trail Chambers by stating that distribution of safety devices will not attract the *dolus specialis*. But the Appeal Chambers created jurisprudence by opined that distribution of safety devices and ordering of continuous rapes will satisfy the element of '...causing serious bodily or mental harm...' The condoms were not distributed to everyone but only for the selected rapes. The accused had a list of names of the girls and women and by calling them out, ordering the military men including her son to use them to rape Tutsi women so as to prevent and protect themselves from AIDS/HIV[35] and after repeated rape kill them. The Appeal Chambers strongly interpreted that distribution of condoms, and the statement made by the accused shows and recognises her intent.

The ICTR Trail Chambers anywhere does not show any consideration on the accused being a woman. The jurisprudence that the ICL has no gender discrimination was evolved through this decision. The comparative analysis of the decisions of *Akayesu* and *Nyiramasuhuko* was, though both the decisions created jurisprudence over interpreting the mental and material elements of the crime of genocide, the jurisprudence in the *Nyiramasuhko* case is transcend one. She trashed the image that women can not commit brutal and inhuman crimes against women. Some of the commenter's stated that her act changed the dimension of view about women. Renowned author Mark A. Drumbl stated that '*...she makes me ashamed to be a*

[34] The Trail Chamber's findings regarding circumstantial evidence to satisfy the *dolus specialis* of the crime of genocide through her presence established the jurisprudence on '...to destroy in whole or in part...' Trail judgement paras. 4847, 5656, 5663, 5666, 5669, 5671, 6014. Further the Trial Chambers indicated that during the swearing-in Ceremony, the accused approved the hate speech of the President and the Prime Minister, her act of distributing condoms to the soldiers and ordered them to rape Tutsi women are the substantial evidence to prove the special intent to commit genocide.

[35] The Appeal Chambers inferred that the accused was aware that the targeted Tutsi women were already tortured and raped by the Hutu men and by having this knowledge only she distributed the safety devices to the military men to rape them again and to protect them from any infectious viruses. *Nyiramasuhuko* Appeal Judgement dated 14 December 2015, paras. 1027 to 1030.

woman..."[36] Several authors exclaimed that the dichotomy on gender through this decision was shuttled. The acts of the accused reversed the perception about women gender can not commit atrocities against women in particular sexual violence against women.

CONCLUSION

The ICL now reaches its uniqueness by way of creation of International Criminal Court (herein after referred to as the 'ICC') through Rome Statute 2002. The two ad hoc international criminal tribunals are the main sources of the establishment of ICL substantially and procedurally. The jurisprudence evolved through the IHL and International Human Rights Law is the foundations of the ICC. The decisions passed by the Trial and Appeal Chambers of the ICTY and the ICTR created jurisprudence over the interpretations of the international crimes. The ICC has inherited the laws from the ad hoc tribunals. The discussion about the two decisions passed by the Yugoslavian and the Rwandan Tribunal passing the message to the national criminal justice system regarding consideration of gender. Female criminality should not be viewed with any leniency. The factor of gender should not be taken into consideration for even the mitigating factor. From the above discussion it is evident that in *Biljana Plavsic* case, the accused showed remorse, repentance and accepted her responsibility. She invited other accused to come forward and accept the serious violations committed by them. But in *Nyiramasuhuko* decision, the accused not only shows any remorse or repentance but she challenged the indictment made against her. She has encouraged her son who is one of the accused along with her in the said case, to commit rape and other serious violations against women. The Trial Chambers of both the Tribunal was very clear in their view that gender has no role in any legal findings of the case.

The data about the severe sentence on women offender for heinous crime is very less in Indian Criminal Justice system. The judiciary should not be predetermined or judgemental when they are presiding over any cases relating to female criminality. The application law should be as the same if the offence would have been committed by a male. Any abetment, attempt, conspiracy to commit any graver offence by a women also treated as same.

[36] Mark A. Drumbl, 2013 "She makes me Ashamed to be a Woman. The Genocide Conviction on Pauline Nyiramasuhuko 2011", *Michigan State Journal of International Law*, pp.593 and 594. Carrie Sperling 2011, "Mother of Atrocities: Pauline Nyiramasuhuko's Role in Rwandan Genocide:, *Fordham Urban Law Journal* Vol.33, pp.101-127, the author discussed about the involvement of women perpetrators in Rwandan Genocide such as Agathe Habyarimana, wife of the assassinated PM and friend of the accused, two nun sisters who faced trial in Belgium for their involvement in killing of thousands of Tutsis at their convent in Rwanda.

Feminism and protection of women rights includes punishing the women perpetrators also. Let the modern crimes and criminal law is genderless.