tribunal had the chance to deliver its final judgment. As for the prosecutorial discretionary practice of 'plea bargaining', which is common to many legal systems, it generally should not be applied to the ad hoc tribunals where immunity is specifically prohibited. However, neither of the two Statutes nor the Rules of Procedure deny the authority to engage in plea-bargaining, which as an implied power may be 'necessary for completing the investigation and the preparation and conduct of the prosecution'.[42] In order to balance, on the one hand the interests of justice by avoiding impunity, and on the other, the enhancement of its resources, the Office of the Prosecutor has restricted its plea negotiations to lower level officials.[43]

The Rwanda Tribunal, as already explained, was not seriously plagued by problems relating to the absence of accused or lack of State co-operation, since most of the accused were already in Rwanda and, in any event, with the exception of the Republics of Congo and Burundi, no other States had/have any national or other substantial interest in shielding persons in their territory or withholding evidentiary material. Nonetheless, lack of support by the Rwandan Government as well as the Organisation for African Unity (OAU),[44] serious delays in prosecution and poor trial management, coupled with financial and administrative mismanagement, resulted in the resignation of the first ICTR deputy, Prosecutor Honore Rakotomanana, and plunged the by-then beleaguered Tribunal into chaos and uncertainty. The ICTR, however, was faced with overcoming a further obstacle, directly related to its previously elaborated misfortunes. Although its judicial focus was on the highest ranking Hutu officials who had allegedly planned, instigated, incited and executed genocide, more than 75,000 accused were detained since the change of rule in July 1994 under extremely poor conditions in Rwandan prisons, the vast majority without having been formally indicted. The devastated infrastructure of the country and the absence of a criminal justice system as a result of the genocide and the subsequent departure abroad of many educated Hutus, including lawyers, meant that not only were there insufficient local trial chambers to guarantee speedy trials for the multitudes of accused, but there did not exist a single Rwandan lawyer who would be willing to defend them.[45]

42 ICTY Rules, r 39(ii).

Moreover, the retention of the death penalty under Rwandan law, in contrast to its rejection in the ICTR, led to an absurd result whereby the planners and instigators of genocide would, at most, receive life imprisonment sentences by the ICTR, whereas minor executioners were to suffer capital punishment under Rwandan criminal law.[46] The Rwanda Tribunal could do nothing regarding the discrepancy in sentencing, but it has played a seminal role in raising awareness over the need to enhance the Rwandan criminal justice system through international financing and training, so that at least accused persons would not suffer lengthy detention periods. The ICTR seems to have overcome its initial problems and has since concluded a significant number of cases, including one against the former Prime Minister of the Interim Rwandan Government, Jean Kambanda.[47] It has, moreover, made a substantial contribution to the development of international humanitarian law and restoration of peace in Rwanda.

20.2.1 Jurisdiction of the ICTY and ICTR

Although both the ICTY and ICTR enjoy concurrent jurisdiction with other national courts, they are endowed with primacy over all national courts in relation to offences falling within the ambit of their respective Statutes.[48] However, since the ad hoc tribunals were established with the aim of prosecuting the most serious offences, it is natural that a large number of prosecutions dealing with minor offenders be undertaken by national authorities, especially from the countries in the former Yugoslavia. In order to better monitor these prosecutions and assess their relevance to ICTY proceedings, a clause was inserted in an agreement signed in Rome on 18 February 1996 between the presidents of FRY, Croatia and the Republic of Bosnia and Herzegovina. Paragraph 5 of the Rome Agreement requires review by the ICTY before the national authorities of the aforementioned States can arrest individuals suspected of having committed any offences related to the Yugoslav wars. To this end, a set of Procedures and Guidelines for Parties for the Submission of Cases to the ICTY under the Agreed Measures of 18 February 1996 was developed.[49] This procedure simply facilitates the ICTY's work and promotes justice and is in no way a substitute for the international Tribunal's primacy over any national proceedings.

The subject matter jurisdiction of the Yugoslav Tribunal consists of four core offences: grave breaches of the 1949 Geneva Conventions,[50] violations of the laws or customs of war,[51] genocide[52] and crimes against humanity.[53] A detailed analysis of these offences, as well as the significance of the ICTY/ICTR jurisprudence in their development is given in Chapters 5 to 7 of this book. Although the majority of crimes charged took place in Bosnia, the Tribunal enjoys, under Art 1 of its Statute, jurisdiction over offences falling within Arts 2 to 5, as long as these were perpetrated anywhere on the territory of the former Yugoslavia since 1991. This wide jurisdiction both in time and place has enabled the prosecutor to investigate and indict persons for offences committed in Kosovo by FRY forces and Kosovo Liberation Army (KLA) members in 1999, as well as Croat military and police personnel for crimes committed during, and in the aftermath of, operations 'Flash and Storm' in the retaking of Serb-held Krajina. Equally, the ICTY has expanded its jurisdiction to cover events that took place in the Former Yugoslav Republic of Macedonia (FYROM).

In the case of the ICTR, the Security Council was conscious, on the one hand, that there were no international elements to the armed conflict between the Hutu Government and the Rwandan Patriotic Front (RPF) and, on the other, it wished it to be recognised that a well planned campaign of genocide had taken place. This intention is clearly reflected in the Rwanda Tribunal's Statute, whose jurisdiction consists of the crimes of genocide,[54] crimes against humanity[55] and violations of Art 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II to these Conventions.[56] Although one may presume that the temporal jurisdiction of the ICTR, spanning from 1 January until 31 December 1994, is wider than the actual duration of hostilities, since the mass killings commenced on 14 June 1994 and lasted approximately three months, evidence shows that plans to commit genocide existed at least as far back as 1992.

Both statutes penalise participation in the preparatory and execution

50 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (No I), 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Ship-wrecked Members of Armed Forces at Sea (No II), 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (No III), 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (No IV), 75 UNTS

stages of prescribed offences, that is, planning, instigation, ordering, or aiding and abetting in the planning, preparation or execution.[57] However, an accused can only be found guilty if the offence charged was actually completed. This rule does not apply with regard to genocide which, taken verbatim from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), does not require the commission of acts of genocide in order to hold the accused liable. Furthermore, following established principles of customary law, persons incur criminal liability where they fail to either prevent or punish crimes committed by their subordinates in cases they know or had reason to know that subordinates were about to commit such acts or had already done so.[58] This latter form of criminal participation, initially borne for the exigencies of military authorities, is known as the doctrine of command or superior responsibility. The various forms of participation in crime and the different types of liability recognised by the ad hoc tribunals and generally in international law are examined in Chapter 2.

20.2.2 Rape and sexual violence as international offences

Although in the past rape had been explicitly[59] or implicitly[60] prohibited under international humanitarian law, until the establishment of the ICTY it had never been defined in any of the instruments in which it was contained. It was not elucidated even when prosecuted as a war crime at the International Military Tribunal for the Far East or its Charter.[61] Lack of specificity was not a pressing issue to the post-war tribunals because not only did rape not play a significant role in prosecutorial agendas that were then working under severe time constraints, but where reference to rape was made in the Tokyo Trials its elements must have seemed to all parties as self-proven and in no need of further elaboration.[62] There is no doubt that Nazi and Japanese licence to commit rapes and forced prostitution (the so-called practice of 'comfort women') was intended to both encourage soldiers and serve as an instrument of policy.[63] In any event, neither the relevant provisions of the 1949 Geneva Conventions nor of the 1977 Additional Protocols listed rape amongst their grave breaches provisions.

The practice and variety of rape in the conflicts occurring in the former

Yugoslavia was both widespread and deliberate.[64] The special rapporteur of the UN Commission on Human Rights clearly pointed out the purpose of rape therein as constituting an individual attack and a method of ethnic cleansing designed to degrade and terrify the entire ethnic group.[65] Indiscriminate and widespread rape was also practised in the Rwandan genocide. Any assessment of rape must be viewed particularly in the context of gender-based crimes, that is, whereas 'sex' refers to biological differences, 'gender' refers to socially constructed differences, such as power imbalances, socio-economic disparities and culturally reinforced stereotypes.[66]

Rape is a particular offence contained in the list of crimes encompassing crimes against humanity in both the ICTY[67] and ICTR Statutes[68] and as a war crime of internal conflicts under the ICTR.[69] Notwithstanding the absence of explicit reference to rape in the definition of other offences within the jurisdiction of the Tribunals, this egregious violation may also be prosecuted as a war crime or grave breach under 'inhuman treatment' or 'torture', as well as under genocide.[70] Although the two ad hoc tribunals basically agree on the definition of rape as a physical invasion of a sexual nature committed on a person under coercive circumstances,[71] there has been a substantial difference of opinion as to the sources of this definition and its scope. The *Akayesu* judgment viewed rape as a form of aggression and a violation of personal dignity whose central elements could not be captured in a mechanical description of objects and body parts.[72] Variations of rape, the Rwanda Tribunal held, may include acts involving the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. This conceptual and flexible definition of rape, having subsequently been followed by other ICTR Chambers,[73] is in contrast with the *Furundzija* judgment which, in fact, relied on a detailed description of objects and body parts.[74]

64 C Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', 17 *HRQ* (1995), 649.

65 *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, UN Doc A/48/92-S/ 25341, Annex (1993), pp 20, 57; *Kamdzic* decision (11 July 1996), para 64.

66 K D Askin, 'Sexual Violence and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 *AJIL* (1999), 97, p 107.

67 ICTY Statute, Art 5(g).

68 ICTR Statute, Art 3(g).

In inquiring into the precise ambit encompassed by the term 'rape' and, specifically, whether this included 'forced oral penetration', the Trial Chamber in the *Furundzija* case highlighted the lack of a definition in international law, but found that the various relevant international instruments distinguished between 'rape' and 'indecent assault'. Unable to discover any relevant customary law or other definition based on general principles of public international or international criminal law, the judges turned their attention to general principles of criminal law common to the major legal systems. Although they ascertained that the forcible sexual penetration by the penis or similar insertion of any other object into either the vagina or anus is considered as constituting rape in all the examined legal systems, there was still some discrepancy concerning 'oral penetration', as in some countries it was classified as 'rape' while in others as 'sexual assault'.[75] The court ruled, nonetheless, that the principle of respect for human dignity dictated that extremely serious sexual outrage such as forced oral penetration could be classified as rape, amply outweighing any concerns the perpetrator might have of being stigmatised as a rapist rather than as a sexual assailant.[76] Although the *Furundzija* approach purports to be specifically oriented, in reality it does not seem to differ much from the conceptual position adopted in *Akayesu*, especially since it is obliged to employ a non-specific principle to categorise forced oral penetration. The *Furundzija* judgment adopted, therefore, the following definition of the *actus reus* of rape under international law:

(i) the sexual penetration, however slight:

  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.[77]

The *Kunarac* judgment, although agreeing with this definition, argued that element (ii) of the definition is narrower than what is required under international law, since it omits any reference to factors that do not involve some form of coercion or force, especially factors that 'would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim'.[78] Finding that the common denominator underlying general principles of law with regard to the criminalisation of rape is the violation of 'sexual