1. INTRODUCTION

This review aims to give a general account of the case-law produced in 2007 by the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), by the International Criminal Court (ICC) and by the so-called “Hybrid” Criminal Tribunals, in particular the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL). Only major issues are reported. Cases are included and discussed if and to the extent that they (i) confirmed (or did not confirm) customary international law, (ii) introduced a new legal solution as compared to the previous case-law, or (iii) clarified the meaning and content to be given to legal solutions previously followed. Mere confirmations of previous decisions are succinctly referred to in either the footnotes or the accompanying text.

2. AD HOC CRIMINAL TRIBUNALS

2.1. Temporal and Territorial Jurisdiction

In the Prosecutor v. Đorđević Decision of 6 December 2007, the ICTY Trial Chamber considered its settled jurisprudence that the ICTY’s temporal jurisdiction extends past 14 December 1995, and that its jurisdiction is open-ended absent a termination date determined by the UN Security Council. With respect to territorial jurisdiction, the Chamber affirmed that the ICTY’s jurisprudence unequivocally reaches the territory of Kosovo, this being a part of the territory of the former Yugoslavia at the relevant time. The Chamber concluded that it had both temporal and territorial jurisdiction over the crimes allegedly committed in Kosovo in 1999.

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1 Judgments and decisions of the ICTY and of the ICTR are available at: <http://www.un.org/icty/index.html> and <http://www.ictr.org/>, respectively.
2 Prosecutor v. Đorđević, Case No. IT-05-87/1-PT, Trial Decision on Vlastimir Đorđević’s Preliminary Motion on Jurisdiction of 6 December 2007, para. 10, p. 5.
3 Ibid., para. 11, p. 6.
4 Ibid., para. 12, p. 6.
2.2. International Crimes

2.2.1. Grave Breaches of the Geneva Conventions of 12 August 1949 (Article 2 ICTY)

In the Prosecutor v. Brđanin Judgment of 3 April 2007, the ICTY Appeals Chamber held that the definition of the crime of torture, as set out in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, may be considered to reflect customary international law.\(^5\) According to this definition, an act “must cause severe pain or suffering, whether physical or mental” in order for it to be characterised as torture.\(^6\) The Appeals Chamber examined the accused’s plea whereby current customary international law calls for a greater amount of pain than the Trial Chamber required. In this regard, the Chamber ruled that the so-called Bybee Memorandum, which was adopted in the United States in 2002 and was relied upon by the accused, according to which the inflicted pain must be equivalent in intensity “to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death”, could not be ipso facto viewed as reflecting customary international law. Interestingly, the Appeals Chamber stated that “no matter how powerful or influential a country is, its practice does not automatically become customary international law”.\(^7\) In the Appeals Chamber’s opinion the memorandum simply displays the way the US Department of Justice interpreted the criminal prohibition on torture found in US federal law.\(^8\) It is a fact, according to the Appeals Chamber, that the Bybee Memorandum was superseded by the Levin Memorandum, whereby the criminal prohibition on torture found in US federal law is not intended “to reach only conduct involving excruciating and agonizing pain or suffering” and covers “some acts that cause severe physical suffering even if the acts do not also cause severe physical pain”.\(^9\) The Appeals Chamber also pointed out that during negotiations over the text of the Convention against Torture, the United Kingdom’s proposal to include a narrower notion of torture was rejected and that, as a consequence, under customary international law physical torture can include acts inflicting physical pain or suffering less severe than those referred to in the Bybee Memorandum.\(^10\)

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\(^7\) Prosecutor v. Brđanin, cit. supra note 5, para. 247, p. 72.

\(^8\) Ibid.

\(^9\) Ibid., para. 248, p. 73.

\(^10\) Ibid., para. 249, pp. 73-74.