THE ICTY AND IRREGULAR RENDITION OF SUSPECTS

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I. INTRODUCTION

International criminal justice faces critical questions about legitimate methods of apprehending, questioning and detaining those accused of international crimes. Irregular rendition involves apprehension of an accused against his/her free will by coercive or covert means, such as abduction and luring, and without the consent of the State in which he/she is present. In the aftermath of the September 11, 2001 terrorist attacks in the USA and the war in Afghanistan, there is even suggestion of introducing a “torture law” at the national level to legalise use of “non-lethal” torture methods in the interrogation of terrorist suspects. Should methods previously considered irregular and illegal be acceptable under certain circumstances today? What has caused betrayal of principles – inadmissibility of evidence obtained under duress or torture, due process, prohibition of abduction – underpinning international criminal justice? These questions should concern the International Criminal Tribunal for the Former Yugoslavia (ICTY) which exercises jurisdiction over perpetrators of serious violations of international humanitarian law but lacks enforcement powers and is reliant on State cooperation.

Under international criminal law, the apprehension and transfer of the accused from one jurisdiction to another is a matter of “horizontal cooperation”, namely bilateral extradition treaties between States. Treaty law also establishes a duty of States to prosecute or extradite perpetrators of international crimes. Although customary international law prohibits

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abduction and the Security Council has condemned such action. States have resorted to irregular rendition when there is refusal to extradite on the basis of guarantees (double criminality, doctrine of specialty, non-discrimination, political offence exception), and where the requested State is unwilling or unable to extradite.

The ICTY Statute introduces “vertical cooperation” whereby States are obliged to apprehend and transfer indictees (persons charged with crimes under ICTY jurisdiction in an indictment containing a statement of facts and alleged crimes) to the Tribunal. Once a judge confirms an indictment he/she may issue orders for the arrest and transfer of the indictees. These orders are binding decisions on requested States since the Tribunal is established by virtue of Security Council resolutions. Unlike “horizontal cooperation” where law enforcement bodies such as the police routinely apprehend the accused, the system of “vertical cooperation” is vague on identification of enforcement competence and the means of enforcement. Lack of State cooperation in the arrest and transfer of indictees hinders the adjudicative process and leaves enforcement susceptible to irregular rendition. Recent ICTY cases point to a tension between ensuring prosecution of perpetrators of crimes and preventing abuse of powers by international bodies undertaking law enforcement operations. At times the enforcement competence of an international body has been tainted by the illegal conduct of private individuals in the apprehension process.

This paper considers the following issues: the entities obliged to cooperate with the ICTY under Article 29 of its Statute, the entities possessing law enforcement competence to apprehend and transfer indictees, the forms of irregular rendition dealt with by the Tribunal, and the consequences of irregular rendition on ICTY jurisdiction.

II. ASPECTS OF VERTICAL COOPERATION

General features of “vertical cooperation” include: no extradition treaties, the ICTY as a judicial body, and ICTY orders being binding decisions. The ICTY Statute derives its authority from Security Council Resolution 827 (25 May 1993). Decisions by the Tribunal are considered binding

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4 SCR 138 (23 June 1960) condemned the abduction of Eichmann and SCR 579 (18 December 1985) refered to abductions as “offences of grave concern to the international community”.

5 Under Article 19(1) of the ICTY Statute, the standard for confirmation is that there must be a “prima facie case”.