

THE IMMUNITY OF THE ICC LAWYERS AND STAFF DETAINED IN LIBYA

– Dapo Akande¹

Readers will be aware that four staff of the International Criminal Court have been detained in Libya after meeting with Saif Gaddafi over a week ago. The visit to Saif Gaddafi was organized by the ICC's Office of the Public Counsel for Defence which has been appointed to represent Saif Gaddafi in the ICC proceedings against him. One of the persons detained is Melinda Taylor, an Australian defence lawyer at the ICC. She has been accused of spying, and of passing on to Saif a letter from Saif's former right hand man, Mohammed Ismaili, who is wanted by the Libyan authorities. Taylor and the other ICC staff were detained by a militia in Zintan, the town where Saif Gaddafi is being held. Since their detention, they have been visited by an ICC delegation together with the Ambassadors of Australian, Russia, Lebanon and Spain. Thankfully, an ICC Press Release reports that the detained staff indicated that they are in good health and being well treated.

Since the incident first began, there have been assertions that these ICC staff are entitled to immunity from arrest and detention in Libya. This claim has been made by the ICC President, Judge Sang-Hyun Song, by the Australian Foreign Minister, Bob Carr, by Mark Kersten on his blog *Justice in Conflict*, and by Kevin Jon Heller on *Opinio Juris*. I agree with the view that these staff are immune and think it is useful, and interesting, to set out the basis on which that immunity exists.

The most straightforward argument for the immunity is that it is provided for in Article 48 of the ICC Statute and that this provision is binding on Libya as a result of UN Security Council Resolution 1970. Article 48 provides that:

“(3) The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

“(4) Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.”

Before getting on to which immunities this provision grants to ICC staff, one ought to begin by explaining why Art. 48 is binding on Libya. That provision is binding on Libya because the UN Security Council, in referring the Libyan situation to the Court, has imposed the Statute on Libya. In SC Res 1970, the SC decided that Libya shall cooperate with the ICC. That resolution

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does not make it explicit that this is an obligation to cooperate in accordance with the Statute. However, as I have argued in a recent article, and as the ICC has accepted in the recent decision regarding postponement of the obligation to surrender Saif Gaddafi (see para. 28), the obligation to cooperate under SC Res 1970 is an obligation to cooperate in accordance with the Statute. It is the Rome Statute that defines and sets out the boundaries of Libya's obligation to cooperate. Art. 48 is part of that obligation of cooperation. Just as ICC parties have an obligation to accord immunities to ICC personnel, so does Libya. Indeed, this provision is absolutely crucial to the cooperation obligation. Were Libya not obliged to provide immunity to ICC personnel working on the situation referred to by the Security Council, the obligation to cooperate would be rendered meaningless. Libya would be able to frustrate ICC investigation simply by using its national law and legal processes to harass ICC staff.

Indeed, the very referral of the Libyan situation to the ICC implies an imposition of the ICC Statute on Libya. I made this argument in my 2009 *Journal of International Criminal Justice* article on Al Bashir's immunities with the relevant bits extracted in this previous EJIL:Talk! post.

Libya can hardly complain that the provisions of the Statute are regarded as binding on it. After all, Libya itself has just argued, in the context of its application to postpone the surrender of Saif Gaddafi, that it is the Statute that defines its cooperation obligations. In its May 26 submission on that issue, Libya stated that:

“The nature of such obligations [to cooperate] must be determined by the ICC Statute. There is nothing in the Resolution that purports to – or could – depart from the ordinary meaning and effect to be given to the Statute.”

So, Libya is bound by Article 48 of the Rome Statute to accord immunities to ICC staff as are necessary for the performance of their functions, and also to accord such treatment to counsel as is necessary for the proper functioning of the court. But what does this mean? First of all it should be noted that the ICC staff detained in Libya fall within the scope of Article 48. As I understand it, Melinda Taylor is a lawyer in the Office of the Public Counsel for Defence. That office was created as a part (though an independent part) of the ICC Registry (see ICC Regulation 77). This means that members of that office are to be regarded as Registry Staff. Since that is the case, Melinda Taylor (and I assume her colleagues also have this status) are covered by Art. 48(3). Even if not covered by Art. 48(3), they would be covered by Art. 48(4) which was specifically designed to cover defence counsel and those assisting the defence.

The wording of Art. 48 should be sufficient to indicate that ICC staff, defence counsel and those working for the defence are immune from legal process in Libya. In order to perform their functions they must be free from arrest and from legal process in the country where they are carrying out their work. This point is clarified by the 2002 Agreement on the Privileges and Immunities of the International Criminal Court, which spells out the immunities granted to the ICC, its judges, Prosecutor, Registrar and staff as well as to defence counsel. Just as Libya is not a

party to the ICC Statute, it is not a party to this 2002 agreement. However, the fact that Libya is not a party that agreement is not material. That Agreement simply spells out the immunities that are covered by Art. 48. [There is an interesting question as to whether all ICC State parties are bound by the 2002 Agreement even if they have not ratified it. I think there is a good argument that they are. A similar question may be asked with respect to the interaction between Art. 105 of the UN Charter and the subsequent General Convention on UN Privileges and Immunities] Article 16 of the 2002 ICC Immunity Agreement is clear in according immunity to staff of the Registry immunity from arrest or detention as well immunity from any legal process in respect of acts performed in their official capacity. In addition, defence counsel and person assisting defence counsel are accorded similar immunity under Article 18 of the same agreement.

However, one need not refer to the 2002 Agreement to come to these conclusions. Both the ICTY and ICTR have had cases in which they have considered whether Croatia and Rwanda (respectively) acted unlawfully by arresting defence counsel and those assisting the defence. Interpreting similar wording to those found in Art. 48(3) and (4), both the ICTY Appeals Chamber and the ICTR have held that defence counsel (and those working with them) are entitled to immunity with respect to acts performed in the exercise of their functions in cases before those tribunals. In *Prosecutor v Gotovina* (Feb. 2011), the ICTY Appeals Chamber held that:

“members of the defence, including defence investigators, enjoy functional immunity under Article 30(4) of the [ICTY] Statute with regard to acts that fall within the fulfilment of their official functions before the Tribunal due to their functions being ‘necessary for the proper functioning of the [...] Tribunal’. Failure to accord functional immunity to defence investigators could impact upon the independence of defence investigations, as investigators may fear legal process for actions related to their official Tribunal functions.”

Therefore, quite apart from the fact that Melinda Taylor (and I think her colleagues too) are members of the Registry staff and covered by Art. 48(3), the provisions of Art. 48(4) would also apply to them. Indeed Art. 48(4) is more explicit than the equivalent provision of the ICTY Statute (Art. 30(4)) in referring to counsel. Moreover that reference to counsel is a clear reference to defence counsel.