

Q&A With Darryl Robinson: A Landmark ICC Appeals Chamber Hearing on Head of State Immunity

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Joseph Rikhof, a member of our editorial board, interviewed Professor Darryl Robinson of Queen's University about his involvement in a hearing at the ICC Appeals Chamber on the immunity of Sudanese President Al-Bashir.

JR: The ICC Appeals Chamber held a five-day hearing, from September 10-14, on highly controversial questions concerning the immunity of Sudan's head of state. How did events in Sudan resulting in the immunity question come before the ICC?

DR: In 2005, the UN Security Council referred the situation in Darfur, Sudan, to the International Criminal Court (ICC). The crimes in Darfur were particularly grave: over 300,000 people were killed. Following its investigation, the ICC issued arrest warrants against various persons, including President Omar-Al Bashir, who is charged with genocide and crimes against humanity.

JR: This hearing drew considerable attention among international criminal lawyers. What was it about?

DR: Despite the ICC warrants for his arrest, President Al-Bashir has travelled to many countries on official business, including to ICC States Parties. There is considerable controversy as to whether he has head of state immunity that can be raised against the ICC, given the Security Council resolution. Various ICC Pre-Trial Chambers have held that ICC States Parties are obliged to arrest Al-Bashir and that his immunities were removed. In 2017, President Al-Bashir visited Jordan. A Pre-Trial Chamber found Jordan to be in breach of its duties under the ICC Statute for failing to arrest him. Jordan appealed the matter to the ICC Appeals Chamber, which is now seized of the question.

JR: You mentioned to me that the question is controversial. What are some of the controversies?

DR: The African Union has adopted the position that the Security Council resolution did not remove immunity. Academic opinion is fragmented: there are at least a dozen points of divergence, for example, on the powers of the Security Council, the wording of the resolution, and the interpretation of the ICC Statute. There are plausible competing arguments and all possible views are subject to decent counter-arguments. The ICC Pre-Trial Chambers have all consistently held that immunity was removed, but they advance different analyses, and that inconsistency has also been criticized. However, such inconsistencies are also common between national courts, especially on a topic as intricate as this one.

JR: How were you involved in the hearing?

DR: The Appeals Chamber invited scholars who are expert in the field to intervene as *amici curiae* ("friends of the Court"). I asked a group of well-known scholars to work together – including Fannie Lafontaine and Valerie Oosterveld, Robert Cryer, Margaret deGuzman, and Carsten Stahn. Fannie, Valerie and I are members of Canadian academic partnership on international justice. Our group was granted leave by the Appeals Chamber to submit a written brief in June of this year. We were then invited to participate in the hearing. I went on behalf of this group of experts.

JR: How did the hearing unfold?

DR: The hearing took 5 days, because the issues are so involved. The main parties are the Office of the Prosecutor and Jordan, with the African Union and the Arab League as interveners, as well as several *amici curiae*. The *amici* had very significant involvement. In Canada, an intervener speaks once briefly; by contrast, in this hearing, the intervenors participated each day, speaking on the major issues and answering questions from the bench. I think the academic intervenors were valuable, as they are not just partisan voices but trying to offer expert assistance in a candid way. The hearing was exceptionally interesting. There were excellent lawyers on all sides, including the Prosecution, Jordan and the African Union. The arguments on all sides were greatly refined thanks to the scrutiny.

JR: What legal position did you take?

DR: My group of scholars believes that the Pre-Trial Chamber in this case gave the correct analysis, when it concluded that the Security Council had removed immunities. All views can be criticized, but the Pre-Trial Chamber's analysis is the most convincing reconciliation of the UN Charter, Resolution 1593 and the ICC Statute. When the Security Council orders a state to 'cooperate fully', it imposes obligations analogous to the cooperation obligations in the Statute. These obligations include the stripping of immunity under Article 27 of the ICC Statute. That's a simplified version of the argument in our brief.

However, we also sought to find a 'middle path'. There are some points on which Jordan and others have raised legitimate concerns. Perhaps there needs to be some room for limited contacts with indicted heads of state. We also thought it was not necessary to refer Jordan's non-compliance to the Security Council or the Assembly of States Parties, given the legal uncertainty at the time of the request. Arresting a serving head of state is a momentous act and states would understandably want great legal clarity. The best remedy could be for the Appeals Chamber to simply clarify the law for the future.

JR: You mentioned a Canadian academic partnership. Can you tell us more about that?

DR: It is a five-year partnership, bringing together academics and non-governmental actors on various projects to strengthen international justice. It is led by Fannie Lafontaine at Laval University, and includes around 22 academics as well as NGO partners from 12 organizations – most significantly the Canadian Centre for International Justice. The partnership has $2.5 million in funding from the Social Science and Humanities Research Council of Canada. We've carried out various initiatives like this *amicus* intervention.

JR: What will happen next?

DR: The Appeals Chamber will issue a decision in the coming months. Given how controversial these issues are, and the incredible variety of intenselyheld views, there will doubtlessly be criticism of whatever the Chamber decides. However, hopefully, a clear and carefully-reasoned decision will partly quell the controversies. In addition, the UN General Assembly may seek an advisory opinion from the ICJ on immunities issues as well. A solidly-developed judgment of the ICC Appeals Chamber will likely get respectful attention from the ICJ.

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Darryl Robinson **About Darryl Robinson**

Darryl Robinson is a professor at Queen's University Faculty of Law (Canada), writing primarily about international criminal justice. He previously served as a Legal Officer at Global Affairs Canada, where he was involved in the negotiation of the ICC Statute, and he later served as an adviser at the International Criminal Court. He was awarded the Antonio Cassese Prize for International Criminal Legal Studies in 2013.