

Separate Opinion of Judge Sang-Hyun Song

1. I agree with the majority of the Appeals Chamber that, in the present case, the Impugned Decision should be confirmed and the Defence's appeal dismissed. However, I respectfully disagree with the following conclusion of the majority:

Turning to the case at hand, the Appeals Chamber notes that the Pre-Trial Chamber correctly recalled that the conduct being investigated must be substantially the same, that the conduct alleged in the current case is set out in the Warrant of Arrest, read with the Article 58 Decision, and that the determination of "substantially the same conduct" must be made based upon the specific facts of the case. The Appeals Chamber notes, however, that the Pre-Trial Chamber found that "no reference to the 'incidents' that are mentioned in the Article 58 Decision is [...] necessary in order to define, and purportedly narrow down, Mr Al-Senussi's conduct as alleged in the proceedings before the Court" (footnote omitted). It stated that it considered it unnecessary that "each of those 'events'" was being investigated at the national level to find that Libya is investigating substantially the same conduct. In sum, the Pre-Trial Chamber found that, as a matter of law, the specific incidents alleged against Mr Al-Senussi did not form part of the comparator in deciding on whether Libya is investigating the same case. The Appeals Chamber recalls that this is not in line with the jurisprudence of the Appeals Chamber just cited, which considers such incidents to play a central role in this comparison. [Footnotes omitted]¹

2. In my view, the Pre-Trial Chamber was correct in finding that the specific incidents alleged against Mr Al-Senussi do not *necessarily* form part of the comparator, alongside the conduct of Mr Al-Senussi himself, in deciding whether Libya is investigating the same case. As I stated in the *Gaddafi* case, I consider that "it is clear that overlap between the incidents is not a relevant factor for the purposes of determining whether the national investigation covers the same conduct as that alleged by the Prosecutor [...] in cases, like the one before us, where there are potentially hundreds of incidents to investigate".² The fact that the Pre-Trial Chamber also found that "all or some of the 'incidents' or 'events' referred to in the Article 58 Decision are encompassed in the national proceedings",³ and that "the evidence provided by Libya indicates that the domestic proceedings cover, at a minimum, those events that are described in the Article 58 Decisions as particularly violent or that

¹ Majority Judgment, para. 101.

² Separate Opinion of Judge Sang-Hyun Song, ICC-01/11-01/11-547-Anx1, 21 May 2014, para. 6.

³ Impugned Decision, para. 79.

appear to be significantly representative of the conduct attributed to Mr Al-Senussi”,⁴
does not change anything in this regard.


Judge Sang-Hyun Song

Dated this 24th day of July 2014

At The Hague, The Netherlands

⁴ Impugned Decision, para. 165.