

Dissenting Opinion of Judge Morrison and Judge Hofmański in respect of the decision on suspensive effect

1. We regret that we cannot join our colleagues in their decision to grant the Prosecutor's request for suspensive effect of her appeal against the Trial Chamber's decision to reject her request to maintain the detention of Mr Gbagbo and Mr Blé Goudé. In our view and for the reasons that follow, the Prosecutor's request should have been dismissed *in limine* because it is inadmissible.

2. If a person is acquitted, article 81(3)(c) of the Statute provides that he or she must be released immediately. This is an automatic consequence of an acquittal and no further decision or order of the Trial Chamber is required. Article 81(3)(c)(i) of the Statute affords the Trial Chamber the power to order, at the request of the Prosecutor, that the detention of an acquitted person be maintained, pending resolution of the appeal against the acquittal. If the Trial Chamber *grants* such a request, the Trial Chamber's decision serves as a new basis for the acquitted person's detention. If, on the other hand, the Trial Chamber *rejects* the Prosecutor's request, this does not in any way modify the detention status of the acquitted person; it merely disposes of the Prosecutor's request. In respect of the detention status, the statutory requirement under article 81(3)(c) to release the acquitted person immediately remains in effect.

3. As previously held by the Appeals Chamber, suspensive effect 'involves the non-enforcement of a decision, the subject of an appeal'.¹ A decision rejecting a request by the Prosecutor to maintain an acquitted person in detention contains no ruling relating to the detention status of the acquitted person that could be enforced – it is simply a negative decision on the request for continued detention. If there is nothing that can be enforced, there is nothing that can be suspended. Suspensive effect in relation to an appeal against a decision rejecting a request by the Prosecutor for continued detention under article 81(3)(c)(i) of the Statute is therefore impossible, as a matter of legal logic. Accordingly, any such request must be dismissed *in limine*.

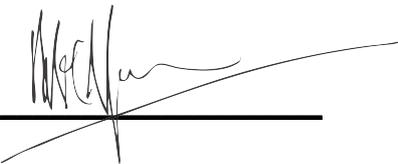
4. The Appeals Chamber sought to overcome this result in the *Ngudjolo* case by noting that, once the Prosecutor has filed a request under article 81(3)(c)(i) of the Statute, the release

¹ *Prosecutor v. Joseph Kony et al.*, 'Decision on the Prosecutor's "Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review"', 13 July 2006, [ICC-02/04-01/05-92](#) (OA), para. 3. Referred to most recently in *Prosecutor v. Mathieu Ngudjolo Chui*, 'Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect', [ICC-01/04-02/12-12](#) (OA) ('*Ngudjolo* Decision on Suspensive Effect'), para. 17.

of the acquitted person is stayed until the Trial Chamber has ruled on it.² We agree that, once the Prosecutor has filed a request before the Trial Chamber, the acquitted person will not be released until the Trial Chamber has ruled upon the request. However, this has no impact on the question of whether the Prosecutor may seek suspensive effect. Ordering suspensive effect does not somehow resurrect the Prosecutor's request before the Trial Chamber; as noted above, suspension leads to the non-enforcement of the decision under appeal. But, as set out above, in respect of a negative decision on a request by a Prosecutor, there is simply nothing to enforce – or suspend. Therefore, we consider that there are strong reasons to reject the unpersuasive approach adopted in the *Ngudjolo* case and find that the Prosecutor cannot request suspensive effect in an appeal under article 81(3)(c)(ii) of the Statute.

5. We note that this result may be considered regrettable by some because it means that the Appeals Chamber cannot stop the release of an acquitted person pending resolution of an appeal by the Prosecutor under article 81(3)(c)(ii) of the Statute. This may also mean that the Prosecutor may be less minded to file an appeal under this provision. Such considerations, however, cannot overrule the clear text of the Statute in respect of a fundamental right – the right to liberty of the acquitted person. And even if there were any doubt in the interpretation of the legal text, it should be resolved in favour of that person.

Done in both English and French, the English version being authoritative.



Judge Howard Morrison



Judge Piotr Hofmański

Dated this 18th day of January 2019

At The Hague, The Netherlands

² [Ngudjolo Decision on Suspensive Effect](#), para. 17.