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No.: **ICC-01/04-01/07 OA 4**
Date: **9 June 2008**

THE APPEALS CHAMBER

Before: **Judge Georghios M. Pikis, Presiding Judge**
Judge Philippe Kirsch
Judge Navanethem Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI

Public document

Judgment

In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release

Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for Mr Katanga
Mr David Hooper
Mr Goran Sluiter

Counsel for Mr Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

REGISTRY

Registrar
Ms. Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr. Mathieu Ngudjolo Chui pursuant to the decision of Pre-Trial Chamber I of 27 March 2008, entitled "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui" 27 March 2008 (ICC-01/04-01/07-344-Conf[1]),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The appeal is dismissed.

2. The decision of Pre-Trial Chamber I for the continued detention of the appellant under article 58 (1) (b) (i) is confirmed.

REASONS

1. The appeal is directed against the decision of the Pre-Trial Chamber[2] (its jurisdiction on the matter being exercised by a Single Judge) denying the application of the appellant for interim release. The Chamber issued a warrant for his arrest on 6 July 2007[3], executed long after, resulting in the surrender of the appellant to the Court on 7 February 2008. On his appearance, the Chamber informed him, as required by article 60 (1) of the Rome Statute[4], of his right to apply for interim release, a right he exercised soon after by filing an application to that end on 13 February 2008[5]. After hearing the two sides, the Chamber concluded that the "conditions for the pre-trial detention of Mathieu Ngudjolo Chui set

[1] A public redacted version of this decision was filed under the number ICC-01/04-01/07-345.
[2] *Prosecutor v. Katanga and Ngudjolo Chui* "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui" 27 March 2008 (ICC-01/04-01/07-345).
[3] *Prosecutor v Ngudjolo Chui* "Warrant of arrest for Mathieu Ngudjolo Chui" 6 July 2007 (ICC-01/04-02/07-1-tENG).
[4] Hereinafter referred to as "the Statute".
[5] *Prosecutor v Ngudjolo Chui* "Application for Interim Release" 13 February 2008 (ICC-01/04-01/07-280-tENG).

forth in article 58 (1) of the Statute continue to be met..."[6], whereupon she sanctioned the continuation of the detention.

2. Following the dismissal of his application, the appellant mounted the appeal under consideration, as he had a right to do under the provisions of article 82 (1) (b) of the Statute. Three grounds were propounded in support of the appeal:

> Ground One: Violation of article 58 (1) (a) (b) (i, ii and iii) of the Statute.
>
> Ground Two: Violation of the judge's duty to base his or her decision on reliable evidence previously disclosed to the Defence.
>
> Ground Three: Violation of article 67 (1) (i) and article 66 of the Statute.[7]

3. The principle submission in support of ground one is that article 58 (1) (b) (i) of the Statute, upon which the impugned decision was founded, was irrelevant to the determination of the issue before the Pre-Trial Chamber. On the face of it, one might argue that it is difficult to reconcile this proposition with article 60 (2) of the Statute, specifically providing that the Pre-Trial Chamber may order the continuation of detention if the conditions of article 58 of the Statute are satisfied. If not, the release of the person may be ordered either unconditionally or upon such conditions as the Chamber may approve. Alternatively, the appellant argued that the Chamber failed to consider the possibility of issuing a summons inviting the appellant to appear instead of ordering his arrest, an option allegedly open to the Chamber by virtue of the provisions of article 58 (7) of the Statute.

4. In the submission of the appellant, article 58 (1) (b) (i) of the Statute is irrelevant to the issue facing the Pre-Trial Chamber because authority to detain, in virtue of a warrant of arrest, is limited to producing the arrestee before the Court. No authority vests in the Chamber to detain the person at any time thereafter before the confirmation of the charges. The right to detain, it is submitted, is limited to securing the attendance of the person before the Pre-Trial Chamber. Power resides with the Chamber to order his

[6] *Prosecutor v Katanga and Ngudjolo Chui* "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui" 27 March 2008 (ICC-01/04-01/07-345), page 10.
[7] *Prosecutor v Katanga and Ngudjolo Chui* "Acte d'appel de la défense contre la décision de la Chambre Préliminaire I du 27 Mars 2008 intitulée 'Decision on the Application for Interim release of Mathieu Ngudjolo Chui'" (ICC-01/04-01/07-367), page 5.

detention only after the confirmation of the charges, when he becomes "the accused," awaiting trial. The core of the argument of the appellant is that the right to detain imported by a warrant of arrest expires with the surrender of the person to the Court. From that point onwards, the person is a free agent, unconstrained in his or her movements, as any person not charged with the commission of a crime must be.

5. Irrespective of the validity of the arguments advanced above, and additionally thereto, it was suggested that the issuance of a summons to appear is an alternative to a warrant of arrest, an option to which the Pre-Trial Chamber erroneously paid no heed. The availability of this alternative is envisaged, as submitted, by international human rights norms.

6. Moreover, the appellant disputed the finding of the Single Judge that the material before her revealed a risk of the appellant absconding or interfering with witnesses. He also contested the Chamber's finding that he was apprised of the information and material founding the issuance of the warrant of arrest. The certification of the Pre-Trial Chamber "that the 'Decision on the Evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui' has been notified to the Duty Counsel of Mr. Mathieu Ngudjolo Chui on 9 February 2008"[8] is not readily reconcilable with this assertion.

7. The appellant challenged the findings of the Pre-Trial Chamber, upon which its decision rests. Reference was made, in this connection, to the evidence, information and material relied upon by the Single Judge in finding that the risk of the appellant not submitting to the jurisdiction was present and real.

8. Ground three is founded on the provisions of article 67 (1) (i) of the Statute, guaranteeing the fundamental right of the accused or a person under arrest to the non-reversal of the burden of proof cast, in accordance with article 66 of the Statute, on the Prosecutor, and the right, as alleged, to the non-imposition of "any onus of rebuttal".

[8] *Prosecutor v Katanga and Ngudjolo Chui* "Information to the Chamber Concerning the Notification of the Decision on Evidence and Information dated 6 July 2007" 19 March 2008 (ICC-01/04-01/07-331), page 3.

Notwithstanding the label enveloping ground three, the arguments raised are exclusively directed towards establishing lack of impartiality on the part of the Chamber, arising from the fact that the same Chamber dealt with both the warrant of arrest and the application of the appellant for release. As a matter of fact the warrant of arrest had been issued by the Pre-Trial Chamber en banc, whereas the sub judice decision was taken by one of its members. The appellant argued, in such circumstances, that the appearance of impartiality is absent.

9. In his response[9], the Prosecutor denied the validity of each and every ground of appeal. Many of the arguments advanced, he submitted, are based on a misconception of the principles relevant to arrest and pre-trial detention as laid down in the Statute. The facts founding the sub judice decision provided a firm basis, in his view, for the continuation of the detention of the appellant, citing in support a previous decision of the Appeals Chamber[10] identifying the criteria governing the exercise of the power of the Pre-Trial Chamber under article 60 (2) of the Statute.

I. MERITS

10. In logical order, the first issue to be addressed is that of bias. The aphorism "justice must not only be done but must appear to be done" is deeply rooted in the norms of justice; in fact it is a prerequisite for ministering justice. The absence of bias, real or apparent, is what legitimises a judicial body to administer justice. The power of the Pre-Trial Chamber is not conditioned by its previous decision to direct the issuance of a warrant of arrest. The Pre-Trial Chamber must inquire anew into the existence of facts justifying detention. The person participates in the proceedings and is at liberty to put before the Chamber facts bearing on the legitimacy of his detention. There is nothing to suggest that the earlier decision of the Pre-Trial Chamber involving the issuance of a warrant of arrest played any part in the discharge of the Single Judge's duties. She

[9] *Prosecutor v Katanga and Ngudjolo Chui* "Prosecution Response to Defence Document in Support of Appeal against 'Decision on the Application for Interim Release of Mathieu Ngudjolo Chui'" 14 April 2008 (ICC-01/04-01/07-393).
[10] *Prosecutor v Lubanga Dyilo* "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" 13 February 2007 (ICC-01/04-01/06-824).

assumed jurisdiction in the context of the assignment of the case against the appellant to Pre-Trial Chamber I, invested with jurisdiction to deal with every issue relating to the case up to and including the confirmation hearing. It is implicit in the provisions of articles 58 (1), 60 (1) and 60 (2) of the Statute that the same Pre-Trial Chamber is vested with jurisdiction to deal with: a) the issuance of a warrant of arrest, b) receiving the arrestee on his first appearance before the Chamber, and c) any application for interim release. All three provisions of the law refer to "the Pre-Trial Chamber," signifying thereby the Pre-Trial Chamber assigned to deal with the case concerning the arrested person. A reasonable onlooker acquainted with these facts could not discern or perceive bias on the part of the Chamber that dealt with the application of the appellant for interim release.

11. The suggestion that the remit of a warrant of arrest, as authority for detention, is limited to the surrender of the person, can find no justification in the Statute. The warrant of arrest provides authority for the confinement of the person arrested up to his trial. This is confirmed by the decision of the Appeals Chamber of 13 February 2007, noted above. The passage cited below bears this out:

> "At the outset, the Appeals Chamber deems it appropriate to clarify that the decision on continued detention or release pursuant to article 60 (2) read with article 58(1) of the Statute is not of a discretionary nature. Depending upon whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person *shall* continue to be detained or *shall* be released. Therefore, the Appeals Chamber is not persuaded by the submissions of the Prosecution as to the purported discretionary character of the decision under article 60 (2) of the Statute".[11]

12. Article 60 (2) of the Statute aims to provide the detainee with an early opportunity to contest his or her arrest and sequential detention. This he may do by reference to article 58 of the Statute, which defines the legal framework within which justification of his detention may be examined. Thereupon, the Chamber must address anew the issue of detention in light of the material placed before it. The Pre-Trial Chamber concluded that the prerequisites for detention, set out in article 58 (1) of the Statute, were satisfied, warranting the continued detention of the appellant.

[11] *Ibid*, para. 134.

13. A summons to appear is not at issue in proceedings for the arrest of the person. Nor is a summons to appear an alternative open to the Chamber, upon application of the Prosecutor, for the issuance of a warrant of arrest. A summons to appear is an alternative only when the Prosecutor seeks to secure the attendance of the person before the Court through that process. A summons to appear can only be issued on the application of the Prosecutor before the Pre-Trial Chamber, as provided for in article 58 (7) of the Statute; such a measure may be authorised if the Pre-Trial Chamber is satisfied that this is "sufficient to ensure the person's appearance". In proceedings for the issuance of a warrant of arrest, the question the Chamber has to address is whether arrest is necessary for any of the reasons specified in article 58 (1) (b) of the Statute.

14. The Statute provides safeguards against the undue prolongation of the period of detention. Article 60 (3) of the Statute binds the Pre-Trial Chamber to review periodically (at the latest within 120 days[12]) any previous ruling on the release or detention of a person in order to ascertain whether the circumstances bearing on the subject have changed, and if so, whether they warrant the termination of detention. The object of the law is to ensure that detention is not extended beyond what is necessary to secure the ends of justice. Moreover, paragraph 4 of article 60 of the Statute casts a duty upon the Pre-Trial Chamber to make certain that the detention of a person is not prolonged for an unreasonable period of time owing to inexcusable delay on the part of the Prosecutor; delay in this context signifies a failure to take timely steps to move the judicial process forward, as the ends of justice may demand. If such delay is noticed, the Chamber is empowered to release the person, conditionally or unconditionally.

15. The provisions of the Statute relevant to detention, like every other provision of it, must be interpreted and applied in accordance with "internationally recognized human rights"[13]. This is underlined in *Prosecutor v. Mr. Thomas Lubanga Dyilo*[14]: "Human

[12] Rule 118 (2) of the Rules of Procedure and Evidence.
[13] Article 21 (3) of the Statute
[14] *Prosecutor v. Lubanga Dyilo* "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006" 14 December 2006 (ICC-01/04-01/06-772), para. 36.

rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court"[15].

16. The issuance of a warrant of arrest paves the way for the commencement of proceedings with regard to the crimes the person is believed to have committed. The Pre-Trial Chamber is required to hold a hearing on the confirmation of the charges within "a reasonable time" after the person's appearance before the Court.[16] The presence of the person is stipulated to be necessary at the confirmation hearing[17] and a pre-requisite for the holding of the trial.[18]

17. The appellant submitted that the decision under appeal, founded on the premise that authority for the detention of a person confers power to detain him or her until the trial, violates human rights norms, especially the rights of the person investigated. The Appeals Chamber addressed a similar issue in *The Prosecutor v. Thomas Lubanga Dyilo*[19]. The submission is at odds with the following extract from the aforesaid decision:

> "The human right of a person to have recourse to judicial review of a decision affecting his liberty is entrenched in article 60 of the Statute. The review of any ruling on the release or detention of a person may be undertaken at any time at the request of the Prosecutor or the person (article 60 (3) of the Statute). Moreover, provision is made for the periodic review by the Pre-Trial Chamber of any ruling on the release or detention of a person (article 60 (3) of the Statute); whereas article 60 (4) of the Statute makes it incumbent upon the Pre-Trial Chamber to "ensure that a person is not detained for an unreasonable period prior to trial due to the inexcusable delay of the Prosecutor". The breadth of the provisions of article 60 of the Statute is explored in the judgment of the Appeals Chamber in the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled " Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo". The Statute not only safeguards the human right to judicial review of a decision restricting the liberty of a

[15] *Ibid*, para. 37.
[16] Article 61 (1) of the Statute.
[17] Article 61 (1) of the Statute.
[18] Article 63 (1) of the Statute. Exceptionally, the appearance of the person may be dispensed with in the circumstances envisaged in article 61 (2) of the Statute.
[19] *Prosecutor v Lubanga Dyilo* "Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la confirmation des charges' of 29 January 2007" 13 June 2007 (ICC-01/04-01/06-926).

person, but also assures a right to appeal decisions emanating from such review."[20]

18. In evaluating the justification for the continued detention of the arrestee, the first element to which regard must be had is the crimes attributed to him. A pre-requisite for the issuance of a warrant of arrest is that the Chamber must be satisfied that there are reasonable grounds to believe that the person committed the crimes in question. The same applies in proceedings for interim release under article 60 (2) of the Statute. The belief must be founded upon grounds such as to warrant its reasonableness. Suspicion simpliciter is not enough. Belief denotes, in this context, acceptance of a fact.[21] The facts placed before the Chamber must be cogent to the extent of creating a reasonable belief that the person committed the crimes.

19. The appellant's objections to the findings of the Pre-Trial Chamber that there are reasonable grounds to believe that he committed the offences attributed to him is based on the assertion that "he had already been tried for the same acts in Bunia"[22]. Nothing was placed before the Chamber to substantiate this allegation. The decision of the Pre-Trial Chamber on the existence of grounds supporting a reasonable belief that the crimes under consideration had been committed by the accused cannot be faulted.

20. The existence of reasonable grounds to believe that the person did commit the offences lays the ground for inquiring into the need for his or her detention. The arrest of a person, in accordance with article 58 (1) (b) of the Statute, may be ordered if it appears that it is necessary for any one or more of the three grounds specified thereunder: "(i) To ensure the person's appearance at trial, (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances."[23] As stated by the Appeals Chamber in "Judgment on the appeal of Mr. Thomas Lubanga

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[20] *Ibid*, para. 13
[21] See Concise Oxford Dictionary, Eighth Edition, Clarendon Press, Oxford 1990.
[22] *Prosecutor v Katanga and Ngudjolo Chui* "Acte d'appel de la défense contre la décision de la Chambre Préliminaire I du 27 Mars 2008 intitulée 'Decision on the Application for Interim release of Mathieu Ngudjolo Chui'" 04 April 2008 (ICC-01/04-01/07-367), para. 22.
[23] Article 58 (1) (b) of the Statute.

Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", "...the reasons for detention pursuant to article 58 (1) (b) (i) to (iii) of the Statute are in the alternative..."[24].

21. What may justify arrest (and, in this context, continued detention) under article 58 (1) (b) of the Statute is that it must "appear" to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence. In this case, the Single Judge held, in the first place, that the crimes attributed to the appellant are serious, a factor importing in itself the possibility of a long prison sentence. Evading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportion to the consequences that conviction may entail. In the last mentioned decision of the Appeals Chamber, the Chamber endorsed the proposition that "If a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond"[25]. The appellant does not dispute the gravity of the offences with which he is accused. They are summarised in the decision of the Pre-Trial Chamber leading to the issuance of the warrant of arrest, noted below:

> "CONSIDERING that there are reasonable grounds to believe that the attack directed against the village of Bogoro was indiscriminate, and that during, and in the aftermath of, the attack, members of the FNI and FRPI committed several criminal acts against civilians primarily of Hema ethnicity, namely i) the murder of about 200 civilians; ii) causing serious bodily harm to civilians; iii) arresting, threatening with weapons and imprisoning civilians in a room filled with corpses; iv) pillaging and v) the sexual enslavement of several women and girls."[26]

22. Another reason lending support to the belief that the appellant might attempt to evade his trial is set down in the following extract of the sub judice decision:

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[24] *Prosecutor v Lubanga Dyilo* "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" 13 February 2007 (ICC-01/04-01/06-824), para. 139.
[25] *Ibid*, para. 136.
[26] *Prosecutor v Ngudjolo Chui* "Warrant of Arrest for Mathieu Ngudjolo Chui" 6 July 2007 (ICC-01/04-02/07), page 4

> "CONSIDERING that there are also reasonable grounds to believe that Mathieu Ngudjolo Chui was the highest ranking commander of the FNI in the Zumbe area during the relevant period; and that it appears that MNC (i) still weilds influence as a powerful figure within the DRC; and (ii) in this capacity, has established numerous contacts nationally and internationally, which can provide him with the connections and means to flee."[27]

23. A third source of information derives from an NGO report, recording that the appellant escaped from lawful custody in his country before the verdict of a criminal tribunal before which he was tried was given. This ground was strongly contested by the appellant. Reports from the same origin, it was submitted, were rejected by the International Court of Justice in the case of armed activities on the territory of the Congo. He also denies the allegation that he was the highest ranking FNI commander in the Zumbe area, or that he wields influence in those quarters.

24. The possibility of his absconding remains visible. No material was placed before the Pre-Trial Chamber revealing such a possibility as imaginary. The gravity of the offences, as acknowledged in OA 7[28], is a distinct consideration bearing on detention. And the crimes attributed to the appellant are grave, as any objective observer would notice. The other two grounds lending support to the same possibility are also relevant to the issue; there is nothing to demonstrate that the Pre-Trial Chamber attached to them greater weight than they deserved.

25. Appraisal of the evidence relevant to continued detention lies, in the first place, with the Pre-Trial Chamber. The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues. The finding of the Pre-Trial Chamber that the arrest of the appellant was warranted under article 58 (1) (b) (i) of the Statute is not liable to be set aside on any of the above grounds.

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[27] *Prosecutor v Katanga and Ngudjolo Chui* "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui" 27 March 2008 (ICC-01/04-01/07-345), page 8.
[28] *Prosecutor v Lubanga Dyilo* "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" 13 February 2007 (ICC-01/04-01/06-824), para. 136.

26. The foundation of the second ground in respect of which detention was ordered, namely the possibility of the appellant obstructing or endangering the investigations or the court proceedings, is not well-founded. It is based on the appreciation of facts, be it facts relevant to the issue before the Pre-Trial Chamber, made by another member of the Pre-Trial Chamber acting as a Single Judge in proceedings unrelated to the warrant of arrest of the appellant.[29] The Single Judge in that case found that from the facts laid before her, it appeared that the appellant had the capacity to interfere with ongoing or further investigations, or Prosecution witnesses, victims, or members of their families.[30] What these facts are is not explained. What is missing is the evaluation of the relevant facts by the Single Judge in the present proceedings. In this case the Single Judge adopted the findings made by another Single Judge in other proceedings; this is impermissible. A judge, the Single Judge in this case, is duty-bound to appraise facts bearing on sub judice matters, determine their cogency and weight and come to his/her findings, as the Single Judge was bound to do in this case but failed to do.

27. The Single Judge was not relieved of that duty because another judge within the context of the proceedings made an appraisal of the facts, nor was any evaluation made in such proceedings binding on the Chamber charged with the determination of a sub judice issue. It was the responsibility of the judge in this case to assess the facts pertinent to her decision, and found her judgment thereupon. The decision of the Pre-Trial Chamber to the effect that article 58 (1) (b) (ii) provides an additional reason for the detention of the appellant is ill-founded, and for that reason it must be disregarded as a ground validating the appellant's detention, otherwise warranted, as the Appeals Chamber has determined, under article 58 (1) (b) (i).

28. In the result, the appeal is dismissed. The decision of the Pre-Trial Chamber that the continued detention of the appellant is justified, pursuant to the provisions of article 58 (1) (b) (i), is confirmed.

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[29] *Prosecutor v. Katanga* "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 7 December 2007 (ICC-01/04-01/07-224).
[30] *Ibid*, para. 22.

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

Judge Georghios M. Pikis
Presiding Judge

Dated this 9th day of June 2008

At The Hague, The Netherlands