COURT OF MAGISTRATES (MALTA)

AS A COURT OF COMMITTAL

MAGISTRATE

DR. AARON M. BUGEJA

Sitting of the 7th April, 2017

The Police (Inspector Christopher Galea Scannura)

vs.

Alberto Samuel Chang Rajii

The Court,

Having seen the "Authority to Proceed"[1] issued by the Honourable Minister for Justice, Culture and Local Government of the Republic of Malta (hereinafter referred to as "Malta") on the 14th November 2016 which states that the Government of the Republic of Chile (hereinafter referred to as "Chile") is requesting the extradition of Alberto Samuel Chang Rajii (hereinafter referred to as the "Chang") for crimes described therein;

Having seen the Schedule marked "X"[2] attached to the abovementioned document;

Having seen the Red Notice issued by Interpol on the 29th April 2016;[3]

Having seen the warrant of arrest issued by Magistrate Dr. Marse-ann Farrugia on the 7th December 2016;[4]

Having seen that on the 8th December 2016 Chang was arraigned before this Court presided by Magistrate Dr. Caroline Farrugia Frendo, where he declared that he was English Speaking in terms of Article 7 of Chapter 189 of the Laws of Malta and hence the Court ordered that these proceedings be held in the English Language;

Having seen that Inspector Christopher Galea Scannura testified on oath

[1] Fol 4
[2] Fol 5
[3] Fol 10
[4] Fol 14

and requested the Court to proceed against Chang in accordance with Chapter 276 of the Laws of Malta;

Having seen the examination of Chang for identification purposes;[5]

Having heard the testimony of Dr. Vincienne Vella from the Office of the Attorney General;

Having seen all the documents and acts exhibited during these proceedings;

Having heard the witnesses produced, including Chang and other witnesses produced by the Defence;

Having seen the request for the extension of the statutory time limit for the conclusion of these proceedings which was duly granted by the President of the Republic;

Having heard the oral submissions;

Considers the following: -

This is an extradition procedure (henceforth referred to as the

[5] Fol 15

"extradition") in terms of Chapter 276 of the Laws of Malta. Unlike the procedure applicable to European Arrest Warrants (EAW) implemented within the European Union area of freedom, security and justice,[6] this extradition procedure is regulated by the strict "traditional" extradition laws where the powers of the Courts are relatively limited and where the Executive branch of Government as represented by the Minister responsible for justice retains very wide powers and discretion. This procedure is more complex also because Chile and Malta hail from different legal backgrounds and traditions.

Both the Chilean Authorities as well as the Maltese Minister for Justice resorted to the United Nations Convention against Transnational Organised Crime of the 15th November 2000 (the "Palermo Convention" or the "Convention" as the case may be) as legal basis for this extradition procedure. The Palermo Convention was the only arrangement mentioned by the Minister in his Authority to Proceed and this Court must determine to what extent this extradition procedure can proceed based on this Convention, in terms of Maltese Law.

In view of this complexity, this Court gave the Prosecution and the Defence

[6] that is governed by the principles of mutual trust and mutual recognition of judicial instruments within the European Union where the EAW procedure is administered by the judicial authorities themselves,

sufficient time to produce all the evidence they deemed fit as well as to debate their case as fully and as comprehensively as possible. In so doing this Court resorted to an extraordinary extension of the statutory time frame for the conclusion of this extradition. This Court must now decide this case based on the evidence presented and the documents filed in the record of the proceedings according to their current factual and legal status.

1. Identity of the Requested Person

During the sitting of the 8th December 2016 the Court proceeded with the examination of the Requested Person for identification purposes. The Court asked some questions to the Requested Person regarding his identity. Chang did not contest that he was the same person requested by Chile in pursuance of these extradition proceedings.

This Court is satisfied that the Person brought before it, referred to as Alberto Samuel Chang Rajii, is the same Person whose extradition is being demanded by Chile.

2. The Authority to Proceed

Defence contends that the Authority to Proceed exhibited at folio 4 is defective as it does not satisfy the legal requirements established by the Extradition Act and that it lacks the necessary statutory details.

This Court begs to differ. The Authority to Proceed issued in this case cannot be read in isolation but it must be read in conjunction with the documents accompanying it. The Authority to Proceed is a complex document that is not simply made up of the document at fol. 5, which bears the Minister's signature, but is also composed of :

(a) the written request lodged to the Minister by the Attorney General[7] which contains the essential details about the extradition proceedings (hereinafter referred to as "extradition") and on which the Minister's ultimate decision would have to be based;

(b) the document entitled "Authority to Proceed" which contains the decision of the Minister to order that the extradition proceed before this Court; this document is based on the Attorney General's written request;

[7] Folio 2, which is however not signed by the Attorney General or his representative (though the Authority to Proceed bears the Minister's signature).

(c) the schedule annexed to the Authority to Proceed which shows the factual and legal grounds on which the Minister's decision to proceed with the extradition would be based.

3. The existence of a valid extradition treaty between Chile and Malta (Articles 6, 7 and 30A of the Extradition Act)

The Authority to Proceed specifies that the Legal Basis for this extradition is the Palermo Convention. Both Chile and Malta are signatories to this Convention. The Minister has the ultimate discretion to determine whether there is a special arrangement applicable between the Requesting State and Malta (Article 30A of the Extradition Act) and whether a country is to be deemed a Designated Foreign Country (Article 7 of the Extradition Act). The Minister considered the Palermo Convention as the special arrangement applicable between Chile and Malta to regulate this extradition. There being no other treaty or arrangement between Chile and Malta mentioned by the Minister in the Authority to Proceed, this Court can only make its legal assessment based on the provisions of this Convention.

The Extradition Act does not specify the form that documents mentioned in Articles 7, 13 and 30A are to follow. It does not state whether the "Order" in terms of Article 7, the "Authority to Proceed" in terms of Article 13 and the "Certificate" in terms of Article 30A of the Extradition Act are to be issued in three separate and distinct documents or whether they can be issued in two or one single document. In this case, the Minister amalgamated the provisions of Articles 6, 7, 13 and 30A of the Extradition Act into one document, entitled "Authority to Proceed".

This document shows the intention of the Minister to proceed with the extradition (in terms of Article 6) by considering Chile as a Designated Foreign Country (in the constructive manner as per the provisions of Article 30A(3) of the Extradition Act, apart from Article 7) and that the valid treaty governing the extradition is to be deemed to be the Palermo Convention (based on Articles 30A of the Extradition Act and on Article 16 of this Convention).

This Court concludes that an Authority to Proceed was issued by the Minister signifying his authority for this extradition to take place against Chang, based on a special arrangement existing between Chile and Malta, being The United Nations Convention against Transnational Organised

Crime of the 15th November 2000 (Palermo Convention).

4. Extraditability of the offences mentioned in the Minister's Authority to Proceed (Article 8 of the Extradition Act)

According to Article 8 of the Extradition Act (as applied to this case) this Court must be satisfied that:

(a) the offences on which Chile basis this extradition are offences for which Chang may be returned to Chile in accordance with the arrangement, that is the Palermo Convention;
(b) these offences are punishable with a term of imprisonment of twelve months or greater punishment; and
(c) the act or omission constituting the offence or the equivalent act or omission would constitute an offence against the law of Malta if it took place within Malta or, in case of an extra-territorial offence, in corresponding circumstances outside Malta.

According to Article 15 of the Extradition Act, the Court may also ascertain if the offence which the requesting State refers to in its extradition request is an extraditable offence, after hearing any evidence tendered in support

of the request for the return of the requested person or on behalf of that person. This is a stage that precedes the Court's analysis of probable cause, where the Court can also hear evidence in support of the request or on behalf of the requested person.

Article 8 of the Extradition Act obliges this Court to analyse whether the offences claimed by the Chilean Authorities are extraditable **in accordance with** the arrangement. The arrangement, the Palermo Convention, contains specific extradition requirements. Both countries must be satisfied that the extradition requirements of the Palermo Convention are fulfilled in accordance and in compliance with their respective laws and procedures. Otherwise there would be no legal basis for this extradition. The Court must also be satisfied that the offences mentioned in the extradition request are crimes punishable under Chilean Law with imprisonment for a term of twelve months or a greater punishment. And finally, this Court must be satisfied that the dual criminality rule is fulfilled.

According to the Minister's Authority to Proceed, Chile is requesting Chang for –

(a) The offence of fraud in breach of articles 467 (final paragraph) and 468 of the Chilean Criminal Code;

(b) The public offering of securities without meeting the requirements of registration in the Securities Registry in breach of article 60(a) of the Securities Market Act (no. 18,045) of Chile;

(c) Money laundering in terms of article 27(a)(b) of the Chilean Money Laundering Act (no. 19,913)

(d) The engagement in a business that corresponds to banking institutions in breach of Article 39 of the General Banking Law.

The extraditability requirements of Article 8 of the Extradition Act are directly linked and dependent on the fulfilment of the extraditability criteria of that Convention mentioned in Article 16 of the Convention. This requirement is *sine qua non*. Therefore these offences are deemed extraditable if they satisfy the extraditability criteria set out in Article 16 of the Convention, that says:

> 1. This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 *(a)* or *(b),* involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

These provisions must be read in line with Article 3 of the Convention. This emerges clearly not only from the text of the Convention but also

from:

(a) the *Traveaux Préparatoires* to the Convention,[8]

(b) the Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions and, particularly, the Interpretative notes for the official records (*Travaux Préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto;[9]

(c) as well as the Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto.[10]

The Convention obliges State Parties to criminalize acts of participation in an organized criminal group, money-laundering, corruption and obstruction of justice. It also promotes criminalization of "serious crimes" (described by reference to the length of the punishment of imprisonment that these crimes might attract).

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[8] Traveaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, UNODC, UN, New York, 2006.

[9] United Nations General Assembly, 3rd November 2000, Document A/55/383/Add.1.

[10] UNODC, UN, New York, 2004.

According to Article 3 of the Convention: -

1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:

(a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and

(b) Serious crime as defined in article 2 of this Convention;

where the offence is transnational in nature and involves an organized criminal group.

2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

(a) It is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.

According to the Legislative Interpretation Guidelines: -

30. Under article 3, the Convention can be invoked for the following types of crime:

(a) Offences established at the domestic level under the requirements of articles 5, 6, 8 and 23 of the Convention (that is, offences relative to participation in an organized criminal group, money-laundering, corruption and obstruction of

justice, if they are transnational in nature and involve an organized criminal group (art. 2, subparas. *(a)* and *(b),* and art. 3, subpara. 1 *(a)*);

(b) Serious crimes as defined above, if they are transnational in nature and involve an organized criminal group (art. 2, subparas. *(a)* and *(b),* and art. 3, para. 1 *(b)*). What crime is serious varies across time and place, but for the purposes of the Convention it is defined in article 2 to be any offence carrying a maximum penalty of four years deprivation of liberty or more; [11]

The Legislative Guidelines add the following:

18. **It must be strongly emphasized that, while offences must involve transnationality and organized criminal groups for the Convention and its international cooperation provisions to apply, neither of these must be made elements of the domestic offence** (art. 34, para. 2). An interpretative note (A/55/383/Add.1, para. 59) indicates that the purpose of this paragraph is, without altering the scope of application of the Convention as described in article 3, to indicate unequivocally that the transnational element and the involvement of an organized criminal group are not to be considered elements of those offences for criminalization purposes. The paragraph is intended to indicate to States parties that, when implementing the Convention, they do not have to include in their criminalization of laundering of criminal proceeds (art. 6), corruption (art. 8) or obstruction of justice (art. 23), the elements of transnationality and involvement of an organized criminal group, nor in the criminalization in an organized criminal group (art. 5), the element of transnationality. This provision is furthermore intended to ensure clarity for States parties in connection with their compliance with the criminalization articles of the Convention and is not intended to have any impact on the interpretation of the cooperation articles of the Convention (arts. 16, 18 and 27). In other words, **in domestic law**, the offences established in accordance with the Convention of participation in an organized criminal group, corruption, money-laundering and obstruction of justice and the Protocol offences of trafficking in persons, smuggling of migrants and trafficking in firearms must apply equally, regardless of whether the case involves transnational elements or is purely domestic. It should also be noted that if dual-criminality is present, offenders can be extradited for one of the four offences or for a serious crime, even

[11] Part One, Chapter Two, Page 15.

> if the offence is not transnational in nature (art. 16, para. 1).
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> 19. The same principle applies to the involvement of organized criminal groups. **Authorities will need to establish such involvement to the satisfaction of another State party in order to invoke the obligations for international assistance and extradition, but should not have to prove the involvement of an organized criminal group as an element of a domestic prosecution**. Thus, for example, the offences relating to money-laundering or obstruction of justice should apply equally, regardless of whether the offence was committed by an individual or by individuals associated with an organized criminal group and regardless of whether this can be proved or not.[12]

The Convention makes a difference between the elaboration of these crimes at the domestic level criminalization and the different qualification requirements that must be proved when States resort to international co-operation and extradition for these crimes based on the Convention. While the Convention does not require transnationality and organized criminal group involvement qualifications to be included by State Parties as elements of their domestic law crimes of money laundering and the other serious crimes it still requires the establishment of these qualifications of transnationality and organized criminal group involvement to be proven to the satisfaction of the Requested State when any State Parties invoke the Palermo Convention as the basis for the obligations of international assistance and extradition, though as the Guide states in case where money laundering or serious crimes satisfy the dual criminality rule then the offender may still be extradited even if the transnational element is not

[12] Emphasis added.

present – though the requesting State must still prove to the satisfaction of the requested State that the offence is committed in an organized criminal group participation context. This is further explained in the same Legislative Guide dealing with the mandatary requirements for Extradition: -

> 414. Article 16, paragraph 1, establishes the scope of the obligation to provide extradition. Extradition is to be provided with respect to the offences covered by the Convention or in cases where an offence referred to in article 3, paragraph 1 *(a)* or *(b)*, involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State party and the requested State party. While this articulation appears complex, it consists of several key components that can be readily differentiated.
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> 415. First of all, the extradition obligation applies to the offences covered by the Convention, which, by application of article 3 (Scope of application), means:
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> *(a)* Offences established in accordance with articles 5, 6, 8 and 23 of the Convention **that are transnational** (defined in art. 3, para. 2) **and involve an organized criminal group** (defined in art. 2, subpara. *(a)*);
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> *(b)* Serious crimes (defined in art. 2, subpara. *(b)*) **that are transnational and involve an organized criminal group**;
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> *(c)* Offences established in accordance with the Protocols, which are considered as offences established in accordance with the Convention under article 1, paragraph 3, of each Protocol.
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> 416. The extradition obligation **also** applies where an offence referred to in article 3, paragraph 1 *(a)* or *(b)*, **involves an organized criminal group** and the person who is the subject of the request for extradition is located in the territory of the requested State party, meaning:
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> *(a)* Offences established in accordance with articles 5, 6, 8 and 23 of the Convention, where the person who is to be extradited is located in the territory of the requested party **and** which involve an organized criminal group; and

(b) Serious crime, where the person who is to be extradited is located in the territory of the requested party **and** where the offence involves an organized criminal group.

417. Finally, the extradition obligation applies provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State party and the requested State party. This dual criminality requirement will automatically be satisfied with respect to the offences established in articles 6, 8 and 23 of the Convention, since all States parties are obligated to criminalize such conduct. However, with respect to requests relating to offences established in accordance with article 5 or to serious crime, where States parties are not required to criminalize the same conduct, no obligation to extradite arises unless this dual criminality requirement is fulfilled.[13]

This Court must be satisfied that the extradition request fulfils the Convention requirements set out by Articles 3 and 16 relating to:

1. The Nature of the Crimes (Convention or Serious Crimes as per Articles 6 and Article 2 of the Convention);
2. The transnationality and organized criminal group involvement qualification;
3. The dual criminality rule (for "serious crimes");

1. The Nature of the crimes: -

[13] Emphasis added.

The Criteria to determine the nature of these crimes are provided in Articles 2, 3, 6 and 16 of the Convention. The Chilean Authorities are requesting the extradition of Chang for: -

(a) The offence of fraud in breach of articles 467 (final paragraph) and 468 of the Chilean Criminal Code;
(b) The public offering of securities without meeting the requirements of registration in the Securities Registry in breach of article 60(a) of the Securities Market Act (no. 18,045) of Chile;
(c) Money laundering in terms of article 27(a)(b) of the Chilean Money Laundering Act (no. 19,913)
(d) The engagement in a business that corresponds to banking institutions in breach of Article 39 of the General Banking Law.

Article 6 of this Convention obliges State Parties to criminalise laundering of proceeds of crime, thus elevating Money Laundering to a Convention Crime. For **domestic criminalization purposes**, the crime of money laundering does not require the transnationality and organized criminal group involvement qualifications **as elements** of the domestic offence. This Court is satisfied that the crime of money laundering in Article 27 of Act 19,913 of Chile and the Convention crime of laundering of proceeds of crime in Article 6 of the Convention are substantially the same. Moreover,

Chilean Law punishes the crime of money laundering with up to fifteen years' imprisonment together with a fine of up to one thousand monthly tax units (*unidades tributaries mensuales*).

The other three offences proffered by the Chilean Authorities in the extradition request are "serious crimes" in terms of the Palermo Convention. According to Article 2 of the Convention: -

> *(b)* "Serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

The "punishment" means the punishment that may be awarded by the domestic Court *in abstracto* and not *in concreto*. This Court does not engage in an analysis as to how the Chilean Courts interpret and implement their punishments *in concreto*. It will then be up to the domestic Courts of Chile to implement the appropriate nature and level of punishment in line with Chilean Law criteria on an eventual conviction. According to the text of Chilean Law the maximum punishment that may be meted out in case of reiterated fraud is ten years' imprisonment together with a fine ranging from twenty-one to thirty monthly tax units (*unidades tributaries mensuales*). The offence against the General Banking Law is punishable by a maximum of five years' imprisonment. The offence against the Securities Market Act

is punishable by a maximum sentence of five years' imprisonment.

The Court is satisfied that the offences mentioned by the Chilean Authorities in their extradition request satisfy the criteria of the Palermo Convention relating to the **nature** of the crimes involved. They also satisfy the criteria set in the second leg of Article 8(1)(a) of the Extradition Act in so far as they are punishable with twelve months' imprisonment or a greater punishment.

2. **The transnationality and organized criminal group involvement qualifications**

The Convention obliges the Authorities of the requesting State to satisfy the requested State that the alleged offences mentioned in the extradition request were qualified by the organized criminal group involvement and/or transnationality qualifications. The Chilean Authorities "**need to establish such involvement to the satisfaction of another State party**" (Malta in this case) "**in order to invoke the obligations for international assistance and extradition…**". This requirement is specified by Paragraphs 18 and 19, as well as paragraphs 414 to 417 of the Legislative Guide. This

Court must analyse the meaning of the transnationality and/or organized criminal group involvement in line with the definitions set in the Palermo Convention itself. According to Article 3(2) of the Convention, an offence is deemed to be transnational in nature if:

> *(a)* It is committed in more than one State;
>
> *(b)* It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
>
> *(c)* It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
>
> *(d)* It is committed in one State but has substantial effects in another State.

On the other hand, an "organized criminal group":

> *(a)* …shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

The Court can only verify the existence of these qualifications based on admissible evidence that may be presented to it. In concrete terms, this Court must determine whether:

(a) Chang committed the alleged crimes mentioned in the request for extradition in a transnational context; and / or

(b) through a structured group;

(c) of three or more persons;

(d) that existed for a period of time;

(e) that these three or more persons acted in concert;

(f) with the aim of committing one or more convention crimes or other serious offences;

(g) so that they obtain direct or indirect financial or other material benefit.

This analysis is necessary to ascertain the extraditability of the offences in terms of Article 8(1)(a) of the Maltese Extradition Act. In so doing, the Court must analyse the evidence and documents that were submitted to it in line with Maltese Law of Criminal Procedure and the Extradition Act. This is also permitted by Article 16.8 of the Convention which states that States Parties shall, **subject to their domestic law**, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies. Any evidence tendered and documents submitted by the parties, either for determining the extraditability of the offences mentioned in the extradition request, or for the establishment of probable cause, must be in line with the Maltese legal requirements governing admissibility of evidence[14] and *lex fori* rules

[14] Which, according to the judgment delivered by this Court as differently presided on the 16th July 1981 in the case ***The Police vs Alfred John Gaul*** is regulated by in terms of Article 22 of the Extradition Act

of criminal procedure.[15]

Prosecution and Defence produced witness statements, documents and Defence produced viva voce testimony. Maltese criminal proceedings are based on viva voce trials. That is the default position. However this rule is suffering certain exceptions. Article 22 of the Extradition Act deals with one such exception. This Article provides special rules relating to the presentation of documents as evidence before a court of criminal jurisdiction. It aims to expedite extradition proceedings and simplify the evidentiary requirements in these cases.

Article 22(1) provides that documents, duly authenticated, may be received in evidence. These may be documents purporting to set out evidence given on oath (witness testimony) as well as documents purporting to have been received in evidence or a copy thereof in any proceeding in the foreign country (documentary evidence). Article 22(2) explains the certification requirements and procedures to be followed for any such document to be deemed to have been duly authenticated, including the need of authentication of such document by the oath of a witness or by the Official

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(then Article 12) and "in terms of the Private International Law rule that in such matters it is the lex fori which has to be applied".

[15] Vide also **British Extradition Law and Procedure**, Volume 1, V.E. Hartley Booth, Sijthoff and Noordhoff, The Netherlands, 1980 page 51 et seq.

seal of the Minister in or of the requesting country.

By means of Act VII of 2010, Article 22 of the Extradition Act, was amended to simplify even further the production of documents in evidence even if such documents were not authenticated in terms of Article 22(1) or (2) of the said Act. In virtue of these amendments, in extradition proceedings, the Court may receive in evidence any document if:

(a) it purports to be signed by a judge, magistrate or officer of the requesting country;
(b) it purports to be certified whether by seal or otherwise by the Ministry, department or other authority responsible for justice or for foreign affairs of the requesting country; or
(c) it purports to be authenticated by the oath, declaration or affirmation of a witness.

According to Article 22(4) of the Extradition Act, an "oath" includes affirmation or declaration; and nothing in Article 22 can be construed as prejudicing the admission in evidence of any document which is admissible in evidence apart from this Article.

The Prosecution contends that all the witness statements produced and all the documents submitted are to be deemed as valid and admissible evidence since they are authenticated in terms of Article 22(2A) et seq. Defence takes exception to this.

This Court holds that these amendments were aimed to expedite extradition proceedings by simplifying the authentication process. However, this Court cannot concede that these amendments operate as a general derogation from the basic principles governing the law of evidence and criminal procedure in this country. If the Prosecution's contention were upheld it would mean that the Maltese Courts would become a simple depository of foreign documents with very limited power of scrutiny, if any at all, over whatever documents the parties decide to produce. They would be forced to take those documents as evidence and proof of their contents simply because they purport to be signed, certified or authenticated as mentioned in Article 22(2C) mentioned above. With all due respect this Court does not agree with the Prosecution's interpretation of this Article. Maltese Courts have upheld the principle that the rules regarding the admissibility of evidence in extradition proceedings are regulated by the general principles of law of the *lex fori*[16] as well as the principle that Maltese Law operates to define the essential requirements of

[16] In re ***Gaul***.

what makes a valid oath, and hence valid testimony[17] or when documentary evidence can constitute proof of its contents.

In formal extradition proceedings, the Court can accept a document that purports to be certified by a judge, magistrate or officer of the requesting country as authentic; but that does not mean that the Court will endorse that document without first making its own independent analysis on its admissibility and content in terms of its own law. The Court can accept a document that purports to be certified by seal or otherwise of the Ministry, department or other authority responsible for justice or foreign affairs of the requesting country as authentic; but that does not diminish its duty first to analyse if and to what extent that document in its essence and substance can be deemed to be admissible or contain valid evidence in terms of Maltese Law. The Court can accept a document if it purports to be authenticated by the oath of a witness; but it must first see that essentially the statement was delivered on oath or subject to a declaration that satisfies Maltese Law for sworn document.

If the Court were to accept the Prosecution's arguments it would mean that evidence produced in formal extradition proceedings would be subject to a

[17] ***Il-Pulizija vs Andiy Petrovych Pashkov,*** Court of Criminal Appeal, 10th September 2009

lower level of judicial scrutiny in relation to admissibility of evidence than that accorded to domestic cases. The substantial admissibility requirements remain there for the Court to scrutinize and this before seeing if a document or witness statement is duly authenticated. What makes a valid witness statement or a valid document remains governed by ordinary Maltese law of evidence and criminal procedure. An example would be the following: – Prosecution produced a set of original documents in the Spanish language together with a translation of these documents in English. While the translations of the documents exhibited were carried out by personnel of the Requesting State or other translators, and their signatures have been duly authenticated (in terms of the wide criteria set in Article 22(2C) above), the Court notes that the relative translations were not confirmed on oath by the translators engaged in their translation. The Court is satisfied that the translations were carried out by the persons mentioned in the relative authenticated documents; but translations of documents *per se* are deemed to be **matters of fact**, and as such, they should be verified on oath by the persons making these translations. Maltese extradition law is based on English law on this matter. According to Hartley Booth, commenting on English extradition law:

> In all cases when documents are in a foreign language the meaning must be determined as a matter of fact and the court will ensure that the translation is competent and satisfactory. The translation will therefore be verified on oath. The

Court will not have regard to an untranslated bundle of documents.[18]

Article 27 of the Extradition Act does not expressly mention that the translated copies be confirmed on oath.[19] But this Court agrees with the English pronouncement that the meaning of the original documents as duly translated is a **matter of fact**, and therefore who makes the translation must confirm that he performed the translation honestly and faithfully such that the meaning of the original documents can be understood properly and correctly by the Court. This is also in line with Maltese general principles of law.[20]

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[18] Ibid.

[19] Any document which is to be produced in connection with a request for the return of a person according to the provisions of the Act shall be in either the Maltese or the English language, and, when any such document is in neither of these languages, the Minister may ask for its translation into the English language.

[20] According to the Maltese Criminal Code witnesses – be they ordinary witnesses or expert witnesses are expected to take the oath, or otherwise to make a solemn affirmation:-

> 631. (1) A witness professing the Roman Catholic faith shall be sworn according to the custom of those who belong to that faith; and a witness not professing that faith shall be sworn in the manner which he considers most binding on his conscience.
> (2) The provisions of this article shall apply in all cases in which an oath is administered.

The form of the oath or solemn affirmation varies, the requirement to take any one of them stands. While ordinary witnesses swear or solemnly affirm that the evidence which they shall give shall be the truth, the whole truth and nothing but the truth (So help them God), expert witnesses swear or solemnly affirm that they shall perform faithfully and honestly the duties assigned to them.

According to Maltese Law, a translator performing his duties as such is not (necessarily) an ordinary witness but an expert witness given that he would be exercising a special knowledge or skill in performing the translation services. This is also in line with the provisions of Article 516(2) of the Criminal Code which provides that where the person charged does not understand the language of the

The translators' confirmation of these documents on oath is a measure that ensures the correctness and precision of the translations, while it establishes the meaning of the document drawn up in the foreign language in the translated language as a matter of fact. If such a requirement is necessary in civil proceedings, it is even more impelling in criminal proceedings – where the liberty of persons is many times at stake. In this case, the translations exhibited in these proceedings were not confirmed on oath or solemn affirmation or declaration by the persons making them.

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proceedings (being either Maltese or English) the proceedings or the evidence shall be interpreted to him either by the Court or by a **sworn** interpreter.

It is also true that Article 520 of the Criminal Code does not render Article 21 of the Code of Organisation and Civil Procedure applicable. Article 21(3) of the said Code provides that

> Any evidence submitted by affidavit shall be drawn up in the language normally used by the person taking such affidavit. The affidavit, when not in Maltese is to be filed together with a translation in Maltese, which translation is furthermore to be
> confirmed on oath by the translator.

The reason for this is that Maltese Criminal Procedure is based on the viva voce trials. However nowadays the Criminal Code provides for the possibility of affidavits being accepted as admissible evidence even in criminal trials (vide Articles 360A and 646(7) of the Criminal Code). The Criminal Code does not define what an affidavit is, neither in Book First nor in Book Second. However, it is evident also from the provisions of the Code of Organisation and Civil Procedure that an affidavit must be sworn before a judicial assistant or a person authorised by Law to administer oaths.

Furthermore, according to Article 520(d) of the Criminal Code, the provisions of Article 622A of the Code of Organisation and Civil Procedure are applicable. Article 622A provides for the

> Notwithstanding the provisions of articles 613 to 622, where the evidence of a witness residing outside Malta is required, and such person has made an affidavit about facts within his knowledge before an authority or other person who is by the law of the country where the witness resides empowered to administer oaths, or before a consular officer of Malta serving in the country where the witness resides, such affidavit duly authenticated may be produced in evidence before a court in Malta; and the provisions of articles 623, 624 and 625 shall apply to such affidavits.

These provisions apply also to Courts of Criminal Jurisdiction.

Accepting these translations as evidence in these proceedings would mean adopting a lower admissibility threshold for **formal extradition proceedings** than that established for domestic cases.[21]

Without prejudice to the above, the Prosecution has submitted various documents, including a report by the Crime Prevention Undersecretary, various Police and other Investigation reports, a reserved official letter by the Securities and Investment Commission, an Order by the Border Control Department, Court minutes of various proceedings and "statements" released to Public Attorneys by Jorge Andres Hurtado **Ureta**, Ana Paola Gonzales Llanos, Niccole Jacqueline Soumastre **Dreiman**, David Gregorio Senerman **Finkelstein**, Veronika Rajii **Krebs**, Anahir Paloma Calderon Alvarez, Gonzalo Anibal Hurtado Morales, Patricio Orlando Castro Gonzales, James Smith Ibarra. There are also other statements released to investigating Police Officers by Dreiman, Finkelstein, Chang, Rajii Krebs, Paulo Cesar Brignardello Rodriguez, Gladys Alejandra Romero Sanchez, Jose Ernesto Vallet-Cendre, Lius Carlos Burgos Plaza, Ruby Alejandra Paz Fuentes, Mauricio Rodrigo Paez Silva, Barbara Ines Ruiz Alvarado, Sebastian Laranaga Guzman and Matias Canessa Lueje. Other documents relating to proceedings taking place in Chile and abroad, together with requests for mutual legal assistance with other countries were also

[21] The Court notes that Defence have submitted translated documents too.

presented. The Prosecution argues that these documents aim to set out evidence based on Article 22 of the Extradition Act. It argues that all these persons qualify as ordinary witnesses at Maltese Law. They are witnesses in these criminal proceedings. They gave testimony and produced documents. The Court must accept them as valid evidence. In point of fact even the Defence exhibited similar witness statement.

This Court does not fully agree with the Prosecution. As will be seen in due course, according to Maltese Law, at this stage of these proceedings not all of them may be deemed to be competent witnesses. And more than that those who released witness statements did not do so under oath. Maltese Law requires witness statements to be confirmed on oath. According to Article 22(4) of the Extradition Act, "oath" includes a declaration or affirmation (and henceforth the word "oath" will be used for all three). Contrary to what Prosecution argues, not every declaration or affirmation, even if duly authenticated in terms of Article 22(2C) of the Extradition Act can be deemed to constitute valid testimony. Valid testimony requires a valid oath.

None of the statements released to Public Attorneys and Police Officers and none of the reports made by Police and other Investigating Authorities

specifying the results of their investigations result to have been confirmed on oath by the persons making them; or at least purport to be authenticated by the oath of the "witness". A Maltese Court, acting in line with the *lex fori*, cannot accept as valid testimony a declaration of a person that does not in essence satisfy the requirement of an oath in terms of Maltese Law. The meaning of "oath" at Maltese Law is found in the judgment delivered by the Court of Criminal Appeal in the case ***Il-Pulizija vs Andiy Petrovych Pashkov*** decided on the 10th September 2009, wherein it was held that:

> **9.** Kwantu ghax-xiehda tad-diversi nies li jinsabu fil-faxxikolu ezibit mill-Avukata Dott. Donatella Frendo Dimech fil-kors tad-deposizzjoni taghha tas-27 ta' Marzu 2009 (fol. 49) -- liema xiehda giet ezibita sabiex il-prosekuzzjoni tistabilixxi kaz *prima facie* ghall-finijiet tal-Artikolu 15(3)(a) tal-Att -- ma hemmx dubbju li dawn id- deposizzjonijiet ittiehdu skond il-procedura investigattiva tal-Ukrajina. Dan il-fatt wahdu pero`, u cioe` li ttiehdu skond il-procedura tal-Ukrajina, ma jezentax lill-pajjiz rikjedent milli jottempera ruhhu ma' dak li huwa l-minimu rikjest skond l-Artikolu 22 tal-Att sabiex il-prova tkun ammissibbli quddiem il-Qorti Rimandanti, u cioe` li x-xiehda titwettaq bil-gurament jew b'affermazzjoni jew dikjarazzjoni, u li tkun awtentikata kif aktar 'l fuq spjegat. Din il-Qorti ma tistax taccetta t-tezi tal-prosekuzzjoni li l-ewwel wiehed minn dawn ir-rekwiziti (it-twettiq bil-gurament jew b'affermazzjoni jew dikjarazzjoni) gie sodisfatt. Ezami akkurat ta' dawn id-dokumenti kollha juri li d-diversi persuni li stqarrew dak li kienu jafu dwar il-fatti meritu tal-investigazzjoni li kienet qed tigi kondotta imkien u f'ebda kaz ma wettqu dak li kienu qalu bil-gurament jew b'dikjarazzjoni jew affermazzjoni. Huwa minnu li l-formula tal-gurament jew tad-dikjarazzjoni jew affermazzjoni tista' tvarja minn pajjiz ghal iehor, izda jibqa' l-fatt li, kif intqal fil-kaz **R. v. Governor of Pentonville Prison, *ex parte* Harmohan Singh** [1981] 1 WLR 1031 a fol. 1038: *"Documents put forward as an affirmation must contain, or show on its face, a solemn declaration by the witness before a judicial authority that its contents are true."* (sottolinear ta' din il-Qorti). Hija proprju din l-affermazzjoni pozittiva da parti ta' min ikun qed jirrelata l-fatti, u cioe` li dak li qed ighid huwa l-verita`, li tiddistingwi semplici "stqarrija" minn "prova" ghall-finijiet tal-Artikolu 22 tal-Att. U din l-affermazzjoni pozittiva trid tirrizulta, b'xi mod, mid-dokument innifsu. Id-dikjarazzjonijiet f'dawn id-diversi dokumenti li "The records have been read by

> me, they were written from my words correctly", jew "The record was read by me, it was written down right", jew "The testimony by my words is written down correctly", u varjazzjonijiet ohra ta' dawn l-espressjonijiet li wiehed isib fid-dokumenti in kwistjoni, ma jammontawx ghal affermazzjoni pozittiva li dak li nghad huwa veru, izda biss li dak li nghad mid-diversi xhieda tnizzel, mill-investigatur li kien qed jinterrogah, korrettement. Fi kliem iehor, dawn id-dikjarazzjonijiet juru biss li dak li hemm imnizzel veru nghad, izda mhux li dak li nghad huwa l-verita`. Ghalhekk ma jistax jinghad li gie sodisfatt ir-rekwizit tal-Art. 22(1)(a) tal-Att. Isegwi ghalhekk li l-imsemmija dokumenti ma kienux ammissibbli bhala prova, u kwindi t-tieni aggravju tal-appellant ghandu jintlaqa'. Din il-Qorti m'ghandhiex ghalfejn tidhol fil-kwistjoni tal-awtentikazzjoni (Art. 22(2)(a) tal-Att).

The Court of Criminal Appeal held firm the requirement that a document purporting to set out evidence on oath in the requesting country must still satisfy the basic Maltese Law of evidence – namely that the declarant makes the declaration subject to a positive affirmation that what is stated is the truth. That Court distinguished this basic evidentiary requirement from the criteria set by law for its authentication on the other. This judgment irrefutably shows that the rules governing admissibility of evidence take precedence over the formal requirements of authentication of such documents; such that if evidence is not admissible for Maltese Law then the Court does not need to examine whether the document was properly authenticated. This is exactly what that Court did in its analysis of the depositions submitted in that case.

Despite the 2010 amendments, this rule did not change. Admittedly the criteria of how documents are deemed authenticated have been eased. But before analysing authentication requirements, the Court must analyse whether the admissibility criteria are met. Neither did the 2010 amendments alter the meaning of "oath" at Maltese Law. Therefore, for a statement to qualify as valid witness statement containing valid testimony it must satisfy the requirement of confirmation by **a positive affirmation that what was stated is the truth or an equivalent phrase**. If this is not satisfied, the declaration or affirmation cannot be held to be admissible evidence, not even for the purposes of Article 22(4) of the Extradition Act. Maltese case law requires a positive and explicit declaration that the declarants' statement amounts to the truth and a Court cannot assume that a person is saying the truth from the circumstances of the declarant, from the good motives, from his capacity or from the context. Moreover the Court cannot accept as admissible documentary evidence any document produced by any such person who presented any document while releasing a statement not confirmed on oath.

Admittedly, the Public Attorneys preceded the statements by a varied list of cautions and explanations of legal and procedural rights given to the persons making the statements before and after the statements were released. These Officers declared to have explained in detail the facts of the

case for which the declarants would have been approached, the background information that was being prepared against the declarants as well as the circumstances of place, time and manner relevant to the case. Many of them explained to the declarants the facts under investigation, how they were "committed" and the applicable legal regulations. Most of them explain the procedural rights to the declarants, including the right to remain silent without an adverse legal consequence as well as the fact that whatever they state could be used against them as well as the right to legal assistance. Many were also advised that they were not obliged to answer those questions which could incriminate their spouses, partners, parents or children or collateral relatives etc. On the other hand, the declarants stated also to have read and understood these rights and that the declarations were made voluntarily. In many cases, the declarants end the statement by stating that they completely read and ratified all the parts and voluntarily signed the act.

However, despite these cautions and explanations of procedural rights, these statements lack a positive affirmation by the declarants that what was being stated **was the truth**. As the ***Pashkov*** case states, the fact that declarants state that they have read and understood their rights and/or that the declaration was voluntarily made, or that the declarant read and ratified all the parts and voluntarily signed the declaration is not enough to

satisfy this Maltese requirement. It is not even enough to for the declarant to state that he confirms or ratifies the statement. "***Ratificado***" in the Spanish text,[22] has been translated to "ratify" in English. "Ratify" means to accept, acknowledge, agree with, confirm, to corroborate or to approve.[23] This means that the declarant is accepting, acknowledging, agreeing with, confirming, etc. what he stated and what was written in his statement. However, confirming or agreeing or approving or ratifying etc. what is stated does not necessarily mean that what was stated is positively being confirmed as corresponding to the truth. These statements are just statements that are released to Police or Investigating Officers and that cannot be deemed to constitute valid testimony by a Maltese Court.

Another point that militates against considering these statements as valid testimony for Maltese Law transpires from one of the various declarations made in case of the statements made subject to Articles 93 and 94 of the Code of Criminal Procedure of Chile invoked by the Public Prosecutors (particularly, those released by Hurtado, Dreiman, Finkelstein, Rodriguez and Rajii Krebs) where it transpires that Article 93(g) of the said Chilean Code gives the right to the declarant to:

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[22] if the translation submitted is to be admitted as a valid, and if it is an accurate translation in English,

[23] http://www.thesaurus.com/browse/ratified; http://dictionary.cambridge.org/us/topics/expressing-agreement-and-support/accepting-and-agreeing/

> maintain silence or, **in the case of consenting to give a statement, not do so under oath**.[24] Notwithstanding that stated in articles 91 and 102 of the Code of Criminal Procedure, the exercising of this right will not cause any adverse legal consequence whatsoever; however, if waived, anything mentioned may be used against them;

This declaration implies that once the statement was released by the declarant it was made **not** under oath. That is exactly the opposite of what Maltese Law and case law requires from a witness in criminal proceedings. The Court understands the *raison d'etre* behind this provision in relation to, for example, persons suspected or accused of criminal offences who are interrogated by investigating officers. But this is indeed a double-edged sword in these proceedings as these persons who released such statements clearly did so **not** under oath. The Court cannot accept these statements as being tantamount to valid testimony in terms of Maltese Law.

To conclude on this point, unless these statements satisfy the minimum requirements set by Maltese Law and case-law, they cannot be deemed to be documents purporting to be authenticated by the oath, declaration or affirmation of a witness. To be admissible as evidence the statement must be shown to have been made by the declarant on oath or at least in a context that shows that while making the statement :

[24] emphasis added.

(a) he was **bound by law to say the truth** before an Officer authorised by law to receive such the declaration, **and**

(b) by ratifying or confirming that the facts mentioned in his statement are true.

At most, if these documents purported to be statements can have any probatory value whatsoever, being statements made by the persons involved to the Police, Investigating or Public Prosecution Authorities etc. not on oath, these statements would still have little impact on this extradition in view of the provisions of Article 661 of the Criminal Code which says that:-

> A confession shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other person.

This means that even if, for the argument's sake, these statements had any probative value, they cannot be taken as evidence except against the person making them and they cannot operate to prejudice any other person. All those statements, except for the one released by Chang himself, cannot be taken as evidence against him.

Furthermore, the Prosecution exhibited a number of reports filed by Police

and other Investigating Officers, as well as Reports filed by the Security Report Program Officer, Securities and Insurance Commission, Police Border Control, and the Public Prosecutor's Office. These show the extensive and complex investigations that were carried out by the Chilean Authorities. These Officers can be produced as witnesses before a Maltese Court; but their testimony must again be confirmed on oath, the report of their findings must be confirmed on oath and they may also present documents in support of their findings that must be confirmed on oath. The exclusionary rule of hearsay evidence would operate too. Given that most of the documents submitted were produced from investigations carried out with private entities, these documents do not qualify as documents that require no proof of authenticity other than that which they bear on the face of them and unless the contrary is proved be evidence of their contents. So they have to support their testimony with proper procedures ensuring chain of custody.

Apart from the above investigation reports, the Court also received other documents that were issued by the Courts of Chile or the Public Attorney of Chile. These documents, even if taken as requiring no proof of their authenticity other than that which they bear on the face of them and unless the contrary is proved be evidence of their contents, are still documents that show what legal action was being taken in Chile leading to the request

for the extradition of Chang, as well as other legal actions and measures taken in relation to other persons that the Chilean Authorities are prosecuting.

Unlike Defence Counsel, this Court has no reason to doubt the good faith of the Courts and the Public Prosecuting Authorities of Chile. But in these formal extradition proceedings the Maltese Court is duty bound to make its own independent assessment of the Convention criteria irrespective of the lines of action, analysis of documents and assessment of witnesses and eventual conclusions that was reached by these Authorities acting properly in line with their domestic substantive criminal and procedural laws. This Court is bound by its formal rules of extradition law and it must make its own assessment of the documents and statements filed by the Prosecution based on its own procedural laws.

This is also being stated because, as already highlighted, a distinction must be drawn between the domestic procedures that are being taken against Chang based on Chilean Law on reiterated fraud, money laundering, banking and market securities breaches on the one hand and the extradition proceedings involving these same crimes on the other. From a Chilean Law and Judicial perspective, the matter is clearly illustrated in the judgment of the Honourable Court of Appeal of Santiago that authorised

the request for extradition in respect of Chang. The Law of Evidence and Criminal Procedure in Chile clearly allows that Court to order the request for extradition based on the evidence submitted to it, as otherwise it would not have authorised it. This Court, on the other hand, in these formal extradition proceedings cannot simply accept the Chilean Court's conclusions, no matter how just, accurate and well founded in Chilean Law they must have been. This Court must analyse this case from the perspective of its own laws of evidence and procedure, which may be different from that of the Chilean Court, despite the same set of facts and documents being available to both Courts may have been the same. Based on its own rules of procedure, unlike the Court of Chile, for the reasons abovementioned, this Court cannot accept the witness statements, accompanying documents and other Police or Investigation or Department's Reports as valid admissible evidence, on account of the fact that they do not satisfy the minimum requirements of Maltese Law.

Now if, only for the sake of argument, this Court were to admit the declarations of the various "witnesses" interviewed by the Public Attorneys or the Police Officers as well as the documents delivered to them by these same "witnesses", and if it were to consider them as valid and duly authenticated testimony admissible as evidence in these proceedings, there would still be another basic principle of Maltese criminal procedure

that negatively affects the "testimony" of the abovementioned main "witnesses" and which directly affects the admissibility of the "testimony" of these most important witnesses for Prosecution, and on whose testimony and documentary support (as supplied by them to the investigators) the basis of this extradition lies.

Chang and Veronica Rajii Krebs are deemed to be co-principals, or at least accomplices, with respect to the criminal offences for which Chang is being requested, except for money laundering, while Chang and Jose Andres Hurtado Ureta, Niccole Jacqueline Soumastre Dreiman, David Gregorio Senerman Finkelstein, Paulo Cesar Brignardello Rodriguez and Santiago Andres Ruiz De La Fuente, are for the purposes of Maltese Law deemed to be co-principals, or at least accomplices, with respect to the criminal offences for which Chang is being requested, except for fraud and money laundering. The Prosecution produced the statements of these same alleged co-principals or accomplices as evidence against co-principal or accomplice Chang in support of his extradition. The Prosecution informed the Court that criminal prosecution is still pending before the Chilean Courts against these persons. According to Article 636(b) of the Criminal Code, and judicial interpretation of this Article a *contrario sensu*, this is again not in line with Maltese Law of criminal procedure. Article 636(b) of the Criminal Code reads: -

> No objection to the competence of any witness shall be admitted on the ground –
>
> (b) that he was charged with the same offence in respect of which his deposition is required, when impunity was promised or granted to him by the Government for the purpose of such deposition;

According to the judgment delivered by the Court of Criminal Appeal in its Superior Jurisdiction in the case ***Repubblika ta' Malta vs. Domenic Zammit et*** decided on the 31st July 1998 it was held that when a person is accused, whether as co-principal or as an accomplice with the same criminal offence proffered against the other accused, this co-principal or accomplice cannot be produced to testify in favour or against that same accused unless and until the case against the co-principal or accomplice is *res judicata*. That Court in fact declared as follows:

> Persuna li tkun akkużata, kemm bħala kompliċi kif ukoll bħala ko-awtur, bl-istess reat miġjub kontra akkuzat ieħor ma tistax tinġieb bħala xhud favur jew kontra dak l-akkużat l-ieħor sakemm il-każ tagħha ma jkunx ġie definittivament deċiż. Dan il-prinċipju japplika sia jekk dik il-persuna tkun akkużata fl-istess kawża tal-akkużat l-ieħor – b'mod li jkun hemm "ko-akkużat" fil-veru sens tal-kelma – u sia jekk tkun ġiet akkużata fi proċeduri separati. Fi kliem il-kompjant Imħallef William Harding: "*Maltese Law, in fact, in section 632, Chapter 12 (*illum 636, Kap. 9*), considers as incompetent to give evidence (except of course, on his own behalf) anyone charged with the same offence in respect of which his deposition is required, unless the proceedings against him are put to an end to. Maltese law does not make any distinction as to whether the evidence of the co-defendant is required by the prosecution or by another defendant"* (P. *vs* Alfred W. Luck *et*, App. Krim., 25/4/1949);
>
> Il-Qorti tagħmel riferena ukoll għas-segwenti deċiżjonijiet: **R.** ***vs*** **Filippo Pace**, Qorti Kriminali, 14/11/1890, **R.** ***vs*** **Carmelo Cutajar** ***ed altri***, Qorti Kriminali, 18/1/1927, **P.** ***vs*** **Toni Pisani**, App. Krim. 11/11/1944, **R.** ***vs*** **Karmnu Vella**, Qorti Kriminali, 3/12/1947.

This principle has been reiterated more recently in the case : ***Ir-Repubblika ta' Malta vs. Ramon Fenech*** decided by the Court of Criminal Appeal in its Superior Jurisdiction on the 23rd February 2017 where it reiterated the principles enunciated in the ***Zammit et*** case, however it went on to add the following : -

> 18. Issa, fil-każ odjern, meta x-xhud Simon Linton Sancto xehed fl-Istruttorja, il-proċeduri kontra tiegħu kienu għadhom ma ġewx terminati. Jirriżulta li huwa mhux biss xehed fl-Inkjesta Maġisterjali iżda xehed anke minn rajh quddiem il-Qorti Istruttorja wara li ngħata twissija minn dik il-Qorti u l-akkużat kellu l-opportunita` li jikkontroeżaminah iżda minflok għażel li jirriserva (ara fol. 138 ta' l-atti ta' l-Istruttorja). Pero` din il-Qorti tirreferi għal dak li ntqal f'digriet mogħti mill-Qorti Kriminali fit-22 ta' Diċembru 1998 fil-kawża fl-ismijiet Ir- Repubblika ta' Malta v. Ian Farrugia dwar talba li saret biex jixhed ċertu Carmel Attard:
>
> "L-Avukat Generali ... qed jeccepixxi l-inammissibilita` f'dana l-istadju ta' Carmel Attard, u cioe` sakemm il-kaz tal-imsemmi Attard ma jkunx gie definittivament deciz billi jghaddi in gudikat. L-Avukat Generali fuq dan il- punt ghandu ragun. Il-gurisprudenza hi cara fuq dan il-punt: persuna li tkun akkuzata, kemm bhala komplici kif ukoll bhala ko-awtur, bl-istess reat migjub kontra akkuzat iehor ma tistax tingieb bhala xhud favur jew kontra dak l-akkuzat l-iehor sakemm il-kaz taghha ma jkunx gie definittivament deciz. Dan il-principju japplika sia jekk dik il-persuna tkun giet akkuzata fl- istess kawza tal-akkuzat l-iehor – b'mod li jkun hemm 'ko-akkuzati' fil-veru sens tal-kelma – u sia jekk tkun akkuzata fi proceduri separati. Il-bazi ta' dan il-principju hu argument a contrario sensu li jitnissel mill-paragrafu (b) tal-Artikolu 636 tal-Kodici Kriminali,
>
> " '...[la] quale disposizione non pone alcuna distinzione circa il grado in cui il teste fosse stato imputato, se, cioe`, come autore o coautore del delitto o come complice, essendo solo importante per i fini della ammissibilita` della sua deposizione che egli, non avendo a temere alcuna azione criminale per quanto va a deporre, non abbia l'interesse di scagionarsi e di incriminare altri' (R. v. Carmelo Cutajar ed altri, 18/1/1927, Kollezz Deciz XXVI iv 758, 760).

> "Il-Qorti taghmel referenza wkoll ghas-segwenti decizzjonijiet: R. v. Filippo Pace, Qorti Kriminali, 14/11/1890, Kollezz. Deciz. XII.531; P. v. Toni Pisani, App. Krim, 11/11/1944, Kollezz Deciz XXXII.iv.792; R v Karmnu Vella, Qorti Kriminali, 3/12/47, Kollezz Deciz XXXIII.iv.547; P v Alfred W Luck et, App. Krim., 25/4/1949, Kollezz. Deciz. XXXIII.iv.870; u Rep. v. Domenic Zammit et, Qorti Kriminali, 15/12/1997 kif integrata bid-decizzjoni tal-Qorti ta' l-Appell Kriminali fl-istess ismijiet tal-31/7/1998.
>
> "Ghalhekk mhix kwistjoni, kif donnu qed jippretendi l-akkuzat odjern, li Carmel Attard ghandu xi ghazla li jixhed jew ma jixhedx ghax jista' jinkrimina ruhu. Carmel Attard, li kien akkuzat bhala ko-awtur bl-istess reat li bih l-akkuzat odjern jinsab akkuzat, ma hux kompetenti li jixhed (sia bhala xhud tal-prosekuzzjoni sia bhala xhud tad-difiza) qabel ma l-kaz tieghu ighaddi in gudikat. Sa ma jintlahaq dak l-istadju, Carmel Attard hu inammissibbli bhala xhud indipendentement minn jekk huwa stess iridx jixhed; wara li l-kaz tieghu jghaddi in gudikat, hu jsir ammissibbli bhala xhud u jkollu jixhed anke jekk ma jridx."

Therefore, if these witness statements released by most of these co-principals or accomplices were to be admitted as evidence by this Court, this Court would still face a problem accepting them as valid testimony against Chang. This position still holds in this case despite that the criminal proceedings against Chang are being held in Malta and the criminal proceedings against the alleged co-principals or accomplices are being held in Chile since the above judgments do not distinguish between jurisdictions. Moreover, it is clear from these judgments that "witnesses" that are deemed to be co-principals or accomplices are **not competent** and therefore not able to testify in Chang's case even if they are **willing** to testify against him unless and until the proceedings against them are determined in a final and absolute manner.

Unlike these co-principals or accomplices in the banking and market securities offences, Chang is also being requested for fraud and money laundering. This Court will not delve in the reasons why the Chilean Authorities, once convinced that Rajii Krebs, Hurtado Ureta, Soumastre Dreiman, Senerman Finkelstein, Brignardello Rodriguez and Ruiz De La Fuente are the persons who acted in concert with Chang in his commission of all the crimes he is requested for, failed to prosecute them at least as accomplices in the crime of reiterated fraud (though Rajii Krebs seems to have been investigated on this too) and money laundering for which Chang is requested and this because this is beyond its jurisdiction. However, the Prosecution contends that Chang committed a series of acts amounting to fraud, banking law infringements and securities law infringements in execution of his criminal intention to commit the more serious crime of money laundering by placing, layering and eventually integrating the fruits of his mentioned criminal activities in Chile and abroad at the expense of the victims of these crimes. This Prosecution's argument logically means that for the purposes of this extradition, Chang carried out the said predicate offences for money laundering through his structured group of three or more persons consisting of Rajii Krebs, Hurtado Ureta, Soumastre Dreiman, Senerman Finkelstein, Brignardello Rodriguez and Ruiz De La Fuente, who together, with one criminal

resolve, concerted with each other with the aim of committing one or more convention crimes or other serious offences in order to obtain direct or indirect financial or other material benefit. This thesis would consolidate an inseparable link between these alleged acts fraud, banking law infringements and securities law infringement and money laundering. So much so that the Prosecution contends that the serious crimes act as predicate offences for the crime of money laundering. This would therefore render inadmissible the testimony of these "witnesses" even in relation to the predicate offences with which, strangely, they do not stand charged.

Considers further that: -

From the remaining admissible evidence in the record of these proceedings, at least at this current stage, there is *prima faciae* proof that Chang carried out various business ventures of a transnational character through a structured set up. There are matters that raise suspicion, that much is true. But based on the admissible evidence that this Court may rely upon at this stage, it cannot state that there is enough evidence to prove on a ***prima faciae*** level showing that Chang acted together in a structured group made up of at least three persons who together developed the same resolve and intention and acted in concert with each other with the aim of committing money laundering, fraud, banking offences or security market offences to obtain direct or indirect financial

gain. In particular, at this stage, the Prosecution failed to prove ***prima faciae*** that Chang acted in concert with Rajii Krebs and Hurtado Ureta, or Soumastre Dreiman, or Senerman Finkelstein, or Brignardello Rodriguez or Ruiz De La Fuente to commit these offences for which he is requested.

Decide: -

That at this specific moment in time, based on the documents submitted to this Court in their current state and form, and at the current stage of the criminal proceedings in Malta and those undertaken in Chile, for the reasons abovementioned, and in particular due to the lack of **admissible** evidence that satisfies this Court that the extraditability criteria in terms of Article 16 of the Palermo Convention have been fulfilled in relation to the offences for which Chang is requested by the Chilean Authorities and as proffered in the Minister's Authority to Proceed, in terms of Article 8 of the Extradition Act this Court concludes that the Prosecution failed to sufficiently prove that the offences with which Chang is accused in Chile are extraditable offences in accordance with the Palermo Convention.

Consequently, at this stage of these proceedings, this Court dismisses the request for the extradition and orders the discharge of Alberto Samuel Chang Rajii from custody. The Court orders service of the record of the proceedings together with this decision to the requested person as well as the Attorney General within twenty-four hours in terms of Law.

Delivered today the 7th April 2017 at the Courts of Justice, Valletta.

Aaron M. Bugeja