



The Court of Criminal Appeal

His Honour the Chief Justice Mark Chetcuti

The Hon. Judge Edwina Grima

The Hon. Judge Giovanni Grixti

Today the 22nd day of January 2025

Bill of Indictment No : 49/2023

The Republic of Malta

vs.

Abdalla Bari

Amara Krumak

The Court:

1. Having seen the Bill of Indictment bearing number 49 of the year 2023 filed against Abdalla Bari and Amara Krumak, wherein they were charged by the Attorney General in the name of the Republic of Malta:

In the First Count, of having on the 28th of March 2019, on board the ship ELHIBLU 1 bearing registration number IMO9753258, while in the territorial waters of Malta, wilfully, which may seriously damage a country or an international organization, committed an act of terrorism, when with the aim to unduly compel the Government or an International Organisation to perform or abstain from performing any act, seized the ELHIBLU 1 ship bearing registration number IMO-9753258, in breach of Articles 328A(1)(b) and 328A(2)(e) of the Criminal Code, Chapter 9 of the Laws of Malta.

In the Second Count of having on the 28th of March 2019, on board the ship ELHIBLU 1 bearing registration number IMO9753258, while in the territorial waters of Malta, wilfully, committed an act of terrorism, when with the aim of unduly compelling the Government or an International Organisation to perform or abstain from performing any act, threatened to cause extensive destruction to private property of the ship ELHIBLU 1 bearing registration number IMO-9753258, likely to endanger the life or to cause serious injury to the property of any other person or to result in serious economic loss in breach of Articles 328A(1)(b) and 328A(2)(d) of the Criminal Code, Chapter 9 of the Laws of Malta.

In the Third Count of having on the 28th of March 2019, on board the ship ELHIBLU 1 bearing registration number IMO9753258, while in the territorial waters of Malta, wilfully, committed terrorist activities, when unlawfully and intentionally seized or exercised control over the ship ELHIBLU 1 bearing registration number IMO-9753258 by use of force or threats thereof, or by any form of intimidation, in breach of Article 328A(4)(i) of the Criminal Code, Chapter 9 of the Laws of Malta.

In the Fourth Count of having on the 28th of March 2019, on board the ship ELHIBLU 1 bearing registration number IMO9753258, while in the territorial waters of Malta, wilfully, committed the offence of illegal arrest, detention and confinement, when without a lawful order from the competent authorities, and saving the cases where the law authorises private individuals to apprehend offenders, arrested, detained or confined the Captain of the ship ELHIBLU 1 bearing registration number IMO-9753258, Mr Turgut Mahno, holder of Turkish passport number S00214995, Chief Officer Mr. Nader Ali Mohammed Alhiblu, holder of Libyan passport number JZJ202Y6 and the crew Mr Ramanan Ramanathan, holder of Indian passport number L5170359, Mr Bhaskara Behera Gaya, holder of Indian passport number N9541760, Mr Raja Babu Chidapana, holder of Indian passport number N7492780 and Mr Arfin Ansari, holder of Indian passport number R3420940 against their will with the objective of compelling a state, an international organisation or person to do or to abstain from doing an act in breach of Articles 86 and 87(2) of the Criminal Code, Chapter 9 of the Laws of Malta.

In the Fifth Count of having on the 28th of March 2019, on board the ship ELHIBLU 1 bearing registration number IMO9753258, while in the territorial waters of Malta, wilfully, committed the offence of illegal arrest, detention and

confinement, when without a lawful order from the competent authorities, and saving the cases where the law authorises private individuals to apprehend offenders, arrested, detained or confined of the ship ELHIBLU 1 bearing registration number IMO-9753258, Mr Turgut Mahno, holder of Turkish passport number S00214995, Chief Officer Mr. Nader Ali Mohammed Alhiblu, holder of Libyan Passport number JZJ202Y6 and the crew Mr Ramanan Ramanathan, holder of Indian passport number L5170359, Mr Bhaskara Behera Gaya, holder of Indian passport number N9541760, Mr Raja Babu Chidapana, holder of Indian passport number N7492780 and Mr Arfin Ansari, holder of Indian passport number R3420940 against their will with the purpose of forcing them to do or to omit an act, which if voluntary done or omitted, would be a crime, in breach of Articles 86 and 87(1)(f) of the Criminal Code, Chapter 9 of the Laws of Malta.

In the Sixth Count of having on the 28th of March 2019, on board the ship ELHIBLU 1 bearing registration number IMO9753258, while in the territorial waters of Malta, wilfully, committed the offence of unlawful and forcibly remove a person to any other country, when they unlawfully and forcibly removed the Captain of the ship ELHIBLU 1 bearing registration number 23 IMO-9753258, Mr Turgut Mahno, holder of Turkish passport number S00214995, Chief Officer Mr Nader Ali Mohammed Alhiblu, holder of Libyan passport number JZJ202Y6 and the crew Mr Ramanan Ramanathan, holder of Indian passport number L5170359, Mr Bhaskara Behera Gaya, holder of Indian passport number N9541760, Mr Raja Babu Chidapana, holder of Indian passport number N7492780 and Mr Arfin Ansari, holder of Indian passport number R3420940 in breach of article 90 of the Criminal Code, Chapter 9 of the Laws of Malta.

In the Seventh Count of having on the 28th of March 2019, on board the ship ELHIBLU 1 bearing registration number IMO9753258, while in the territorial waters of Malta, wilfully committed the offence of 26 private violence, when they used violence including moral, and/or psychological violence, and/or coercion, in order to compel the Captain of the ship ELHIBLU 1 bearing registration number IMO-9753258, Mr Turgut Mahno, holder of Turkish passport number S00214995, Chief Officer Mr Nader Ali Mohammed Alhiblu, holder of Libyan Passport number JZJ202Y6 and the crew Mr Ramanan Ramanathan, holder of Indian passport number L5170359, Mr Bhaskara Behera Gaya, holder of Indian passport number N9541760, Mr Chidapana Raja Babu, holder of Indian passport number N7492780 and Mr Arfin Ansari, holder of Indian passport number R3420940, to do, suffer or omit anything or to diminish their abilities or to isolate the in breach of Articles 251(1)(2), 250(1)(2) of the Criminal Code, Chapter 9 of the Laws of Malta.

In the Eighth Count of having on the 28th of March 2019, on board the ship ELHIBLU 1 bearing registration number IMO-29 9753258, while in the territorial waters of Malta, caused fear that violence will be used against the Captain of the Ship Captain of the ship ELHIBLU 1 bearing registration number

IMO-9753258, Mr Turgut Mahno, holder of Turkish passport number S00214995, Chief Officer Mr Nader Ali Mohammed Alhiblu, holder of Libyan passport number JZJ202Y6 and the crew Mr Ramanan Ramanathan, holder of Indian passport number L5170359, Mr Bhaskara Behera Gaya, holder of Indian passport number N9541760, Mr Raja Babu Chidapana, holder of Indian passport number N7492780 and Mr Arfin Ansari, holder of Indian passport number R3420940, or their property or against the person or property of any of their ascendants, descendants, brothers and sisters, in breach of Articles 251(3) and 250(1)(2) of the Criminal Code, Chapter 9 of the Laws of Malta.

In the Ninth Count of having on the 28th of March 2019, on board the ship ELHIBLU 1 bearing registration number IMO9753258, while in the territorial waters of Malta, with their course of conduct caused fear and/or knew or ought to know that their course of conduct will cause fear that violence will be used against the Captain of the Ship ELHIBLU 1 bearing registration number IMO-9753258, Mr Turgut Mahno, holder of Turkish passport number S00214995, Chief Officer Mr Nader Ali Mohammed Alhiblu, holder of Libyan passport number JZJ202Y6 and the crew Mr Ramanan Ramanathan, holder of Indian passport number L5170359, Mr Bhaskara Behera Gaya, holder of Indian passport number N9541760, Mr Raja Babu Chidapana, holder of Indian passport number N7492780 and Mr Arfin Ansari, holder of Indian passport number R3420940, or their property or against the person or property of any of their ascendants, descendants, brothers and sisters, when they knew that their course of conduct will cause the other to fear on each of those occasions, in breach of Article 251B of the Criminal Code, Chapter 9 of the Laws of Malta.

2. Having seen the note of preliminary pleas of the accused filed in the registry of the Criminal Court on the 28th of November 2023.
3. Having seen the judgment of the Criminal Court of the 24th of January 2023, wherein the first (1), second (2nd), third (3rd) and fourth (4th) preliminary pleas brought forward by the accused were determined.
4. Having seen the minutes of the sitting of the 13th of March 2024, wherein it was agreed to by the parties that the Criminal Court would proceed to give judgment limitedly with regard to the first plea raised by the accused.
5. Having seen the judgment of the Criminal Court of the 30th of May 2024 wherein the first preliminary plea relating to the jurisdiction of the court was rejected.
6. Having seen the appeal application filed by the accused Abdalla Bari and Amara Krumak of the 6th of June 2024 wherein the Court was requested to:

i. Revoke the decision of the Criminal Court whereby it rejected the first preliminary plea brought forward by the accused and consequently ordered the continuation of the case.

ii. Accept the first preliminary plea and to order the nullity of the bill of indictment *in toto* on the basis of lack of jurisdiction.

7. Having seen the reply filed by the Attorney General on the 9th of August 2024 where she requested that this Court reject all the grounds of appeal filed by the accused and to confirm the judgment delivered by the Criminal Court on the 30th of May 2024 in its entirety.

8. Having seen all the acts of the case.

9. Having heard submissions by the parties.

Considers:

10. Accused Abdalla Bari and Amara Krumak in their first preliminary plea are relying on the dispositions of article 449(1)(a) of the Criminal Code which speaks about the “**plea to the jurisdiction of the court**”, by means of which they are contesting the territorial jurisdiction of the Maltese Court, alleging that, contrary to what the Attorney General has indicated in the Bill of Indictment, the offences with which they are being charged did not take place within the Maltese territorial seas, meaning that the Maltese Court lacks the necessary jurisdiction to try the case, even more so since none of the persons involved, being either perpetrators or victims are of Maltese nationality, and the vessel allegedly seized does not fly a Maltese flag, thus excluding jurisdiction on other grounds besides territoriality.

11. The Attorney General insists that the offences emanating from an alleged act of terrorism, although initiated outside territorial waters, in Libya, were consummated finally once the vessel reached Maltese territorial waters, since appellants’ intention was to divert the ship’s course from Libya towards Malta such that these facts establish jurisdiction in the Maltese Courts, and thus appellant’s plea is completely unfounded.

12. The Criminal Court decided this plea in the following manner:

This Court opines that the legislator wanted to impede crimes such as terrorism from their commencement, that is from when the aggressor initiates the criminal offence until the point that they are finally executed. Hence, the seizing of a ship cannot be considered as an instantaneous offence but rather a continuing one. The same goes for the crime of illegal arrest as specifically stated by Professor Anthony Mamo himself. Furthermore, if a crime as stipulated under Article 328A(2)(e) or Article 86 of the Criminal Code is to be considered as a continuing offence, then it can be stated that the criminal act partially took place in Maltese territorial waters. Moreover, if the criminal act partially took place in Maltese territorial waters, then Malta enjoys jurisdiction to try this case both under Article 5 and Article 328M of the Criminal Code

13. Now, this Court is of the opinion that in considering this plea, both parties to the case, meaning both the Defence and the Prosecution, as well as the Criminal Court itself, entered into the arena of an assessment of the evidence of the case, which task should fall solely within the remit of the jury and cannot be tackled at this preliminary stage of the proceedings. It is evident both from the manner in which the plea has been put forward as well as to the rebuttals of the Attorney General to this plea, that reference is being amply made to the evidence found in the compilation of evidence, with appellants presenting a note before the Criminal Court, attached to which note are extensive copies of evidence heard before the Court of Criminal Inquiry.

14. Appellants are making reference to the following facts:

- i. That the vessel seized during the act of terrorism does not fly a Maltese flag.
- ii. That there were no Maltese citizens aboard the ship.
- iii. That the offences occurred in Libyan territorial waters including the alleged acts of violence with which they stand charged.
- iv. That the moment the vessel entered Maltese territorial waters the vessel was under the control of the captain and crew of the ship, and thus the material element of the crime had ceased to exist.

v. That entry into Maltese territorial waters occurred solely upon the instructions given by the Maltese authorities, and this after it was established that the people on board did not have food, and the vessel was without fuel.

Now all these facts allegedly emerge from the compilation of evidence.

15. The Attorney General, however begs to differ, and insists that the effects of most of the offences contained in the Bill of Indictment were carried into the Maltese territorial waters, and others were consummated and executed in Malta although initiated outside territorial waters. The Attorney General thus relies on article 19 of European Directive 2017/541 of the European Parliament and of the Council of the 15th of March 2017 regarding terrorism which stipulates that:

“Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 to 12 and 14 where:

- (a) the offence is committed in whole or in part in its territory;**
- (b) the offence is committed on board a vessel flying its flag or an aircraft registered there;**
- (c) the offender is one of its nationals or residents;**
- (d) the offence is committed for the benefit of a legal person established in its territory;**
- (e) the offence is committed against the institutions or people of the Member State in question or against an institution, body, office or agency of the Union based in that Member State.**

Each Member State may extend its jurisdiction if the offence is committed in the territory of another Member State.”

And insists that from the evidence gathered before the Court of Criminal Inquiry, the circumstances listed in sub-articles (a) and (e) subsist since the offences were definitely committed in part in the Maltese territory, and against the Maltese state, thus establishing jurisdiction in the Maltese courts.

16. The Attorney General is also of the opinion that jurisdiction is established in accordance with article 27 of the United Nations Convention on the Law of the Sea of 1982 which provides that:

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
 - (a) if the consequences of the crime extend to the coastal State;
 - (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
 - (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
 - (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances

Considers,

17. That prior to considering the grievances brought forward by appellant, the Court is of the opinion that it should deal primarily with the plea of nullity of the appeal application raised by the Attorney General in his final submissions and which is briefly mentioned towards the end of the reply filed in the acts to the appeal application. The Attorney General contends that the remedy demanded by appellants in their final request asking for the nullity of the Bill of Indictment, should their plea relating to the lack of jurisdiction be upheld, does not fall within the parameters of article 449(6) of the Criminal Code.

18. Now, it is true that the remedy afforded to the accused when the plea of lack of jurisdiction is raised does not lead to the nullity of the Bill of Indictment since article 449(6) of the Criminal Code expressly provides that:

Where it is decided that the court has no jurisdiction or that the indictment is null, the accused shall be placed again in the condition in which he stood previously to the filing of the indictment.¹

This contrasts with the remaining part of this disposition of the law regarding the remedy afforded to the accused when the pleas indicated in article 449(1)(c)(d) are upheld, in which latter case the Court shall pass on to an acquittal.

¹ The Maltese version reads: **Meta tiġi iddikjarata l-inkompetenza tal-qorti jew in-nullità tal-att tal-akkuża, l-akkużat jarġa' jiġi mqiegħed fl-istess stat li kien qabel ma ġie ipprezentat l-att tal-akkuża.**

Thus, a plea dealing with the jurisdiction of the court, if upheld, would put the accused in the same position he was in, prior to the filing of the Bill of Indictment meaning that the case would be remitted back to the Attorney General who would then decide on the manner in which to proceed according to the powers vested in him by the Law.

19. The learned Professor Mamo himself makes a distinction in his Notes on Criminal Law when considering the different pleas which may be raised before the Criminal Court, although at the time of his writings, the Criminal Court was presided over by three judges with regards to the more serious offences and the determination of certain pleas, and in other cases by one judge. He says:

Some of such pleas are “peremptory” i.e. such that if successful bar completely or extinguish the action (e.g. plea of extinguishment of action of previous conviction or previous acquittal). Others are “dilatory” i.e. such that merely suspend the proceedings (e.g. plea to the jurisdiction, of nullity of the indictment). This distinction is reflected in the provision of subsection 7 of section 461² which lays down that “where it is decided that the Court has no jurisdiction or that the indictment is null, the accused shall be placed in the condition in which he stood previously to the filing of the indictment. But where the plea of extinguishment of action of the plea of autre fois convict or autre fois acquit is allowed, the accused shall be acquitted.”

He further points out that all pleas which of their nature enter into the merits of the case will have to be determined by the jury, and he brings forward the example of the plea of insanity, since such pleas “are rolled up with the general defence on the merits”. In fact the law also stipulates that certain pleas mentioned in sub-section (1) to section 449, which depend on a finding of fact by the jury, may also be raised after the verdict is read out³.

20. The Court is dealing with this plea prior to delving into the grievances put forward by appellants since it is true that were the Court to uphold these grievances it then cannot pass on to afford the remedy requested by appellant and order the nullity of the Indictment. However, the powers vested in this Court when determining appeals

² Today section 449(6)

³ Article 449(3) and (4)

in terms of article 499 of the Criminal Code are those laid out in sub-article 6 to this disposition of the Law wherein it is provided that:

“On any appeal under this article, the Court of Criminal Appeal shall, if it allows the appeal, set aside the decision appealed from and make such order for the discharge of the accused or the further prosecution of the proceedings or make such other orders including orders for the re-arrest or custody of the person accused or give such other directions as the case may require.”

21. Consequently, the Court cannot uphold the nullity lamented by the Attorney General since it is within its powers to grant any remedy indicated in this provision of the Law, although not being that requested by appellant, such that it may give any direction it considers necessary according to Law. This plea is, therefore, being dismissed.

Considers further,

22. In their first grievance appellants insist that jurisdiction in terms of Article 5 and/or Article 328M of Chapter 9 of the Laws of Malta does not subsist, and although the Criminal Court concluded that jurisdiction for terrorism offences is established, even when the offence is committed even if only in part in the territory of Malta, or on the sea in any place within the territorial jurisdiction of Malta, however the indication of place, in all counts to the Bill of Indictment by the Attorney General, where the offences were allegedly committed, refers to the territorial waters of Malta, thus signifying that all the material elements of the said offences were carried out within the Maltese jurisdiction. Appellants insist that the circumstances indicated in article 328M of the Criminal Code, which establish jurisdiction in the Court, are not reflected in the facts indicated by the Attorney General in the narrative part of the Indictment, since these were committed on the high seas or in Libyan territorial waters, and not as indicated in the charges listed in the accusatorial part of the various Counts, that these offences were committed within the Maltese territory. They insist that the sequence of events shows that they did not commit any offences, that led the vessel *El Hiblu 1* to forcibly enter the Maltese territorial waters, in Malta, and ask the Court to refer to the evidence found in the acts of the compilation of evidence, including the logbook of the vessel, from where it is evident that the Maltese authorities gave precise co-

ordinates for the vessel to enter Maltese territorial waters, which orders were followed to the letter by the captain of the ship. Appellants also make reference to the testimony of witnesses who testified before the Court of Criminal Inquiry and the Inquiring Magistrate, namely that of Lieutenant James Grech who confirmed that the *El Hiblu 1* was given the co-ordinates to enter the Maltese territorial waters, the vessel thus entering Malta upon instructions given by the Maltese authorities and not through the unilateral will of appellants. They refer also to the testimony of Captain Papa Pasquale who stated that at 12.5 nautical miles off the coast of Malta the master of the vessel was in charge and here the vessel was authorised to enter territorial waters. Appellants further contend that the Captain of the *El Hiblu 1* confirms also that at this point he was in full control of the vessel. Appellants, thus, insist that such a declaration signifies that no offences were committed by them once they entered Maltese territorial waters, and if any offence had been committed on the high seas these ceased to exist once they entered Maltese jurisdiction. Therefore, none of the offences indicated in the Bill of Indictment took place or subsisted whilst in the territorial waters of Malta.

23. Appellants also criticise the decision of the Criminal Court when it reached the conclusion that the offences with which appellants stand charged are continuing in nature and this within the context of alleged cross-border terrorism charges. They contend that the application of article 328M implies the committal of continuous offences rather than continuing offences and in fact the Attorney General has, in the Indictment, indicated article 18 of the Criminal Code which contemplates the continuous nature of the offence. Appellants allege that neither do their actions fall within the parameters of this disposition of the law, since at no point is it alleged that they committed several actions which constitute the violation of the same provision of the law in terms of the said article 18.

24. As rightly pointed out by the Criminal Court, a continuing offence presupposes a violation of the law which leads to an uninterrupted state of things which prolongs, over a protracted period of time. The Attorney General points out that the facts laid out in the narrative part of the Bill of Indictment indicate that although the acts of

commission of the offences were initiated outside territorial waters, however their execution took place upon entry into Maltese territorial seas since it was upon coercion by appellants, throughout the whole voyage, that the vessel changed its course towards Malta and was compelled to enter Maltese territorial waters. Thus, this falls within the scope of article 328M(a) and (f) of the Criminal Code.

25. Now, although article 449(1)(a) of the Criminal Code lists the plea of lack of jurisdiction as one of the preliminary dilatory pleas which an accused person has to bring forward after he is notified with the Bill of Indictment, however it is evident from the manner in which the plea, and now the grievance, of appellants are put forward that they are asking the Court to delve into an assessment of the facts of the case, which exercise is outside the competence of this Court and which according to law is to be entrusted to the hands of the jury being the Judges of Fact, and into which assessment the Court cannot interfere. In fact, appellant themselves in their grievance invite the Court to carry out a test of the law of jurisdiction on the basis of Article 5 and article 328M of the Criminal Code in order *“to determine, at the point of entry, what actions took place, that would constitute the offences indicated in the charges listed in the Bill of Indictment”*, an exercise which may not be carried out at this stage of the proceedings by this Court. In their second grievance, they further lament that at the point of entry into Maltese territorial waters circumstances were beyond their control, also referring to a questions of fact and not law.

26. It is undoubted that the principle of territorial jurisdiction applies to all the offences with which appellants stand charge, and this in terms of article 5 and 328M of the Criminal Code, which latter disposition of the Law implements the European Directive 2017/541 of the European Parliament and of the Council of the 15th of March 2017. Thus, it is also uncontested that the actions carried out by appellants outside Maltese territorial waters fall outside the jurisdiction of these courts. However, this Court cannot establish at this stage which of these actions were committed in Malta and this even more so since there is a contestation on the facts in issue between the parties, and thus whether the offences, although initiated outside territorial waters were ultimately executed by appellants upon entry into the said territorial waters, and that

consequently the acts of terrorism, illegal arrest and the fear of violence committed on the victims to these acts could have found their final consummation within the Maltese jurisdiction, and this on the date indicated in the Bill of Indictment.

27. Also, contrary to what appellants state in their appeal application, it was not necessary for the Attorney General to indicate article 328M of the Criminal Code in the accusations, since this article of law does not refer to the offences with which appellants are being charged, or the punishment to be inflicted upon a finding of guilt. Thus the Attorney General adhered fully with the requisites established in article 589 of the Criminal Code when filing the Bill of Indictment.

28. At this stage of the proceedings the Court has to reach its decision solely on the facts as narrated by the Attorney General in the Bill of Indictment, unless a nullity results on the face of it for one of the reasons listed by the Law. So far, although appellant has put forward other pleas relating to the nullity of the Bill of Indictment, however these have yet to be determined by the Criminal Court. Consequently, the Court has to rely on the facts as therein narrated, and although these may be subject to contestation, however such contestation will have to be addressed before the appropriate forum and that is during the trial by jury, as already pointed out, where questions of fact have to be determined solely by the jurors during the trial.

29. From the narrative to the Bill of Indictment the following facts emerge:

- i. The *El Hiblu 1* is called by an Italian military aircraft to assist a rubber boat in distress on the high seas containing over a hundred people including the appellants. The Captain is told that these persons would be picked up by another vessel at a rendezvous point indicated by the said military aircraft.
- ii. Upon rescue, and whilst the rescued persons were asleep on board the *El Hiblu 1*, since no boat arrived as promised by the military aircraft at the rendezvous point indicated, the Captain decides to head towards Libya.
- iii. When the persons on board realise that they are heading towards Libya they threaten mutiny and the Captain and crew lock themselves in a cabin with appellants intervening to speak on behalf of these people and passing on to

order the Captain and the crew under threats and duress to change course and sail to Malta at full speed.

- iv. The Captain and crew follow these instructions and head to Malta amid threats by appellants to keep in this direction, as otherwise they would instruct the rescued people on board to damage and destroy the ship.
- v. When the Captain is close to Maltese territorial waters he gets in touch with the Maltese authorities, who, from their part, instruct the Captain to call the Libyan coast guards for help.
- vi. The Captain informs the Maltese authorities that he has lost control of the ship and is being threatened by appellants to keep sailing at full throttle towards Malta, and that the ship was seized by appellants, and under these circumstances the Maltese authorities intervene and allow the vessel to sail towards the coast of Malta.

30. The Court at this stage has to rely on these facts as elucidated in this narrative to the Bill of Indictment, which so far stands as being valid, from which narrative the Attorney General has then laid out the charges in the accusatorial part to the said Indictment. It is reiterated that neither this Court, nor the Criminal Court, may at this stage of the proceedings carry out an exercise into the merits more than this, as appellants are inviting them to do, since such an assessment, as already pointed out is within the remit of the jury.

31. Thus, from this narrative, the circumstances mentioned in article 5 and article 328M of the Criminal Code, subsist since even if the Court were to establish that the offences relating to acts of terrorism were carried out even in part in Maltese territorial waters, as the Attorney General indicates in the above-cited narrative, then the Maltese Court would have jurisdiction to try the offences with which appellants stand charged. From the said narrative to the Bill of Indictment which is to date considered as valid, with the other pleas relating to the nullity of the same still to be determined by the Criminal Court, the facts as laid out by the Attorney General establish jurisdiction in the Maltese courts. Now, whether these facts are well-founded or whether the facts occurred as indicated by appellants in their grievances, is an exercise that falls within the remit of

the jurors being the Judges of fact during the trial, with this Court precluded, at this stage of the proceedings, to delve into the merits of the case. Neither can the Court, therefore, carry out the exercise it is directed to do by appellants in their fifth grievance, and assess the individual charges brought against them in order to establish whether the courts in Malta have jurisdiction to try each and every offence brought against them in the said charges, since such an exercise again would necessarily entail an assessment of the facts of the case thus usurping the role of the jurors during the trial.

32. To conclude, it is evident, thus, that there is no agreement between the Prosecution and the Defence as to which acts were committed by appellants upon entering territorial waters and whether these constitute the elements of the offences with which they are being charged in the nine counts to the Bill of Indictment, and this within the time frame indicated. These facts, however, can only be decided by the jury during the trial, and neither this Court, nor the Criminal Court can delve into an appreciation of the facts of the case and try to establish whether in the first place, these facts constitute the elements of the offences with which appellants stand charged, whether the same are continuing or continuous offences, and secondly establish the time and place where they have been committed. The determination of these facts can only be carried out by the jurors during the trial and this after being properly directed by the trial judge.

33. The only possible forum which could have delved into the merits, prior to this stage of the proceedings would have been the Court of Criminal Inquiry when deciding whether there was *prima facie* evidence for the indictment of appellants. In the case *Mark Charles Kenneth Stephens vs Avukat Generali* decided by the Constitutional Court on the 14th of February 2006, it was stated:

e. F'gheluq il-kumpilazzjoni - u ghalhekk meta issa kienu nstemghu l-provi mressqa mill-prosekuzzjoni kontra l-imsemmi Stephens - dik il-Qorti waslet fl-istadju li tiddeciedi jekk hemmx jew le "ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza" (Art. 401(2), Kap. 9). Ghalkemm, kif gustament josserva l-Avukat Generali, u kif anke, sa certu punt gustament osservat l-istess Qorti Istruttorja fid-digriet taghha tad-29 ta' Settembru 2005, il-Qorti Istruttorja m'ghandhiex tuzurpa l-funzjoni ta' Qrati ohra ta'

Gustizzja Kriminali, madanakollu wiehed irid jara ezattament u fir-realta` x`kienet timplika il-kontestazzjoni ta' l-imputat li l-Qorti ta' Gustizzja Kriminali ta' Malta ma kellhomx gurdizzjoni jiehdu konjizzjoni tal-kaz tieghu, cioe` ta' dak li gie akkuzat bih.

f. Stephens ma kienx qed jissolleva l-kwistjoni tal-gurdizzjoni fis-sens ta' kompetenza bejn il-Qorti tal-Magistrati ta' Malta u l-Qorti tal-Magistrati ta' Ghawdex - Artikolu 372(1) tal-Kodici Kriminali - kompetenza li fit-test Ingliz tal-ligi hija tradotta bhala "jurisdiction". Anqas dik il-"jurisdiction" bejn il-Qorti Istruttoria u l-Qorti ta' Gudikatura Kriminali - Artikolu 371(1) - jew il-kompetenza (ukoll tradotta fit-test Ingliz bhala "jurisdiction") bejn il-Qorti Kriminali u l-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali - Artikolu 449(1)(a)(6). Dak li huwa kien qed jitlob li l-Qorti Istruttoria tiddeciedi fl-istadju kontemplat fl-Artikolu 401(2) kien jekk kienx hemm il-presupposti fattwali li a bazi taghhom jista' jinghad li hemm "ragunijiet bizzejjed" biex huwa jitqieghed taht att ta' akkuza.

g. Ghalkemm generalment jinghad li l-Qorti Istruttoria, fl-istadju kontemplat fl-imsemmi Artikolu 401(2), tiddeciedi fuq bazi prima facie, dan ma jfissirx li d-decizjoni hija wahda "superficjali". Ifisser biss li, jekk ikun hemm provi mressqa mill-prosekuzzjoni li a bazi taghhom l-imputat jista' jinstab hati ta' reat fil-kompetenza tal-Qorti Kriminali, anke jekk hemm provi ohra li jistghu igibu fix-xejn daww il-provi, il-Qorti Istruttoria ghandha xorta wahda tiddeciedi li hemm ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza- ghax altrimenti l-Qorti Istruttoria tkun qed taghmel apprezzament tal-provi li jispetta biss lill-Qorti Kriminali jew lill-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali. Pero` huwa certament fil-kompetenza tal-Qorti Istruttoria li tara jekk hemmx il-presupposti fattwali kollha tar-reat addebitat (jew ta' xi reat kompriz u involut f'dak addebitat), cioe` li l-elementi kollha tar-reat ikunu jirrizultaw imqar fuq bazi ta' probabbilita`. L-ezempju klassiku huwa ta' persuna li tigi akkuzata bir-ricettazzjoni ta' oggett allegatament misruq: jekk fi tmiem il-kompilazzjoni, minkejja kull prova dwar il-prezz irrizzorju li bih l-oggett ikun inxtara mill-imputat, jew dwar xi jkun haseb l-imputat fir-rigward tal-provenjenza tal-oggett li jkun xtara, ma jkunx hemm prova li l-oggett kien fil-fatt misruq, il-Qorti Istruttoria tkun altru milli gustifikata li tiddeciedi li ma hemmx ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza. Il-presupposti fattwali jigu nieqsa wkoll jekk il-fatti li jkunu rrizultaw matul il-kompilazzjoni ma jkunux jammontaw ghar-reat addebitat, jew, bhalma qed jigi allegat f'dan il-kaz, ma jkunux jammontaw ghal reat taht il-ligi penali ta' Malta. Hekk, per ezempju, jekk l-imputat jigi akkuzat li seraq karozza, izda mill-provi jkun irrizultat li huwa veru seraq karozza, izda li s-serqa giet imwettqa f'pajjiz barra minn Malta u mhux f'Malta, il-Qorti Istruttoria tkun gustifikata tiddeciedi li ma hemmx ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta' akkuza. (sottolinjar tal-qorti).

34. From an examination of the detailed decree *prima facie* found in the acts of the compilation of evidence⁴, in which decree the Court of Criminal Inquiry cites the case referred to by the Court of Mark Charles Kenneth Stephens, the facts of the case as detailed in the said decree led that Court to establish that there were sufficient grounds to commit the accused for trial on Indictment, and this although some of the offences did not fall within the competence of the Criminal Court, and also in spite of the fact that the commencement of the terrorist acts began outside Maltese territorial waters. The Court of Criminal Inquiry stated thus in its decree:

23. The reasons given by the Ship's Captain and Crew leading to their loss of command of the vessel ceased when the vessel was inside Maltese territorial waters. Until that stage the ship's Captain and Crew confirm that they were compelled to change their original intended destination. They did not change that destination out of their own free will and they could not change the ship's course according to their own free will and volition.

"24. The reasons giving rise to this state of compulsion started beyond Maltese territorial waters. But *prima facie* they result to have continued and persisted uninterruptedly even when the vessel was in Maltese territorial waters. It was only after that the vessel reached Maltese territorial waters and the Armed Forces of Malta were about to come along ship's side to board the vessel that the ship's Captain and First officer declared that the vessel was under command.

25. *Prima facie* it transpires that the *motive* of the persons charged to do their above-mentioned actions was to make sure that they were not returned to Libya shores. However, *prima facie*, it also transpires that they developed the intention necessary to achieve their motive by the ways and means used and described above, which persisted until the moment (or at least very shortly before) the Maltese Armed Forces came alongside the ship and stormed the said ship when it was within Maltese territorial waters."

35. It is abundantly clear that the plea of jurisdiction raised by appellants is intrinsically linked to an assessment on the merits, a fact which the jury will have to establish as to whether the offences which appellants stand charged with were ultimately committed in Maltese territorial waters or otherwise, an exercise which falls outside the powers of this Court at this stage of the proceedings.

⁴ Volume 2 page 551 et seq.

For the above mentioned reasons the appeal is being denied and the judgment of the Criminal Court wherein the first preliminary plea was rejected is being confirmed.

The Court orders that the acts be remitted before the Criminal Court so that the case may proceed according to law.

The Chief Justice Mark Chetcuti.

Judge Edwina Grima.

Judge Giovanni Gixti