IN THE EUROPEAN COURT OF HUMAN RIGHTS
FIRST SECTION

APPLICATION Nos. 51111/07 and 42757/07

Between:

MIKHAIL BORISOVICH KHODORKOVSKIY

PLATON LEONIDOVICH LEBEDEV

Applicants

- and -

THE RUSSIAN FEDERATION (No. 3)

Respondent

THE REPLY OF THE APPLICANTS TO THE COURT'S QUESTIONS TO THE PARTIES AND TO THE MEMORANDUM OF THE GOVERNMENT OF THE RUSSIAN FEDERATION ON ADMISSIBILITY AND MERITS

INTRODUCTION

A1. This is the Reply of Mr Mikhail Borisovich Khodorkovskiy and Mr Platon Leonidovich Lebedev ("the applicants") to the Memorandum from the Government of the Russian Federation on Admissibility and Merits dated 22 September 2014 that was served under cover of a letter from the Court dated 29 September 2014. The Government submitted a copy of the translation into English of that Memorandum on 22 November 2014.

A2. In accordance with the Court's request, the applicants have addressed all of the Court's questions as well as the specific points raised in the footnotes to the Statement of Facts prepared by the Registry. Regrettably that cannot be said of the Government's response in which they neglect to answer a number of the Court's questions.

A3. Where the applicants have identified inaccuracies or lacunae in the Statement of Facts the applicants have commented on them too, in the light of the questions formulated by the Court (again, as requested by the Court).

Factual developments since the last pleading by the applicants

A4. As the Court may know, on 20 December 2013 Mr Khodorkovskiy was released from detention. His release followed the signing by President Putin of an Executive Order "*On Granting Pardon to Mikhail Khodorkovskiy"*. The Executive Order stated:

> "In accordance with the principles of humanitarianism, I hereby order: that a pardon be granted to the convicted individual Mikhail Khodorkovskiy, born 1963, Moscow, and that he be released from serving the remainder of his term of imprisonment." [1]

A5. That Pardon in no way involved any admission of guilt on the part of Mr Khodorkovskiy, who strongly maintains his innocence. The release followed over ten years in detention.

A6. On 24 January 2014, following Mr Khodorkovskiy's release, Mr Lebedev was also released from detention. Mr Lebedev's release was consequent upon the ruling of the Presidium of the RF Supreme Court ("the RF Supreme Court") on 23 January 2014 which reduced Mr Lebedev's sentence with the effect that he was immediately released.

A7. Despite Mr Lebedev's release, it is notable that the RF Supreme Court wholly failed to give effect to the Court's judgment in *Khodorkovskiy and Lebedev v. Russia,* nos. 11082/06 and 13772/05, 25 July 2013, (*Khodorkovskiy (no. 2).* It will be recalled that in *Khodorkovskiy (no. 2)* the Court found that it was a breach of Article 1 of Protocol

[1] See copy of the RF President's Decree No. 922, 20 December 2013 at tab 151.

No. 1 for the Meshchanskiy District Court to have found in favour of the tax authority's civil suit and for damages to have been awarded against Mr Khodorkovskiy at the end of the first trial. It will be recalled that in *Khodorkovskiy (no.2)*, the Court said "*imposing civil liability for unpaid company taxes on that company's executives in favour of the Tax Service was made by the Meshchanskiy District Court in an arbitrary fashion and thus contrary to Article 1 of Protocol No. 1 to the Convention.*" The Court said that the Meshchanskiy District Court's judgment "*had no support either in the law or in judicial practice*"[2] and concluded that "*the award of damages in favour of the Tax Service was made by the Meshchanskiy District Court in an arbitrary fashion and thus contrary to Article 1 of Protocol No. 1 to the Convention.*"[3] The RF Supreme Court refused to strike down the enormous damages (over 17 billion rubles) ordered to be collected from the applicants in their first trial[4]. As a consequence Mr Khodorkovskiy is unable to return to Russia since the existence of that debt will be used as a reason to prevent him from leaving it again, whilst Mr Lebedev has been denied a passport to travel abroad and so cannot leave Russia.

A8. Amnesty International had declared the applicants "*prisoners of conscience*" in 2011. Following Mr Lebedev's release, Amnesty International stated:

> " 'Platon Lebedev was confined to prison as a result of a deeply flawed and politically motivated trial. Russia's Supreme Court's decision gives freedom to Platon Lebedev three months early, however it does not quash his conviction or remedy the injustice done to him' said John Dalhuisen, Europe and Central Asia Programme Director at Amnesty International... 'The piecemeal releases of people who were imprisoned for peacefully exercising their right to freedom of expression is no substitute for an effective justice system', said John Dalhuisen.
>
> 'The Russian authorities must release immediately and unconditionally all prisoners of conscience and remove the charges from those already at liberty.' "[5]

A9. Notwithstanding their release from custody, both applicants each wish to maintain their applications before the Court which they see as the only judicial authority in which their rights can finally be vindicated.

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[2] § 883 of the judgment in of *Khodorkovskiy and Lebedev (no.2) v. Russia*, *11082/06* and *13772/05*, 25 July 2013 ("*Khodorkovskiy (no. 2)*").
[3] § 885 of the judgment in *Khodorkovskiy (no. 2).*
[4] See Decree of the Presidium of the RF Supreme Court, Case No. 310-P13, 23 January 2014, copy at tab 156 to the Reply.
[5] See *Amnesty International Media Centre Press Release*, "Russia: Platon Lebedev release welcome but falls short of justice", dated 23 January 2014, at tab 155 to the Reply.

Request for an oral hearing

A10. The applications give rise to important points of principle in relation to the claims under Articles 6, 7, 8 and 18 of the Convention as well as under Article 4 of Protocol No 7. The applicants note in particular that the Court has invited submissions on other international and national legal systems in relation to the claims under Article 18 of the Convention and under Article 4 of Protocol No 7. Moreover, there is very considerable public interest in the circumstances of the cases. Accordingly, the applicants consider that it would be appropriate for there to be an oral hearing and ask for that to be scheduled as soon as possible.

SUMMARY OF THE APPLICANTS' REPLY

A11. **The Government's Memorandum has wholly failed to meet the applicants' case that they have been victims of sustained violations of their rights under the Convention. The bringing of new charges against the applicants in 2007 was deliberately engineered to ensure the applicants' further imprisonment on charges that were entirely without substance. There was global criticism of the authorities' actions by human rights organisations and governments. Thus, the US Senate passed a resolution condemning the further charges as "*a politically motivated case of selective arrest and prosecution*" and called for the withdrawal of the case.**[6]

A12. **The authorities' prosecution of the applicants, from the outset and at every stage thereafter has been consistently motivated by improper purposes and has been characterized by bad faith resulting in the restriction of the applicants' rights under the Convention for improper reasons. Both applicants continue to assert not only their innocence but their consistent case that the prosecution was brought for improper motives. The so-called "second" charges against them, which resulted in a significant increase in the duration of their incarceration,**

[6] See 111th CONGRESS 1st Session S. RES. 189 "*Expressing the sense of the Senate that the trial by the Russian Government of businessmen Mikhail Khodorkovsky and Platon Lebedev constitutes a politically motivated case of selective arrest and prosecution that serves as a test of the rule of law and independence of the judicial system of Russia*." See copy at tab 98 to the Reply.

were entirely without merit and a breach of Article 7 and of Article 4 of Protocol No 7.

A13. **The applicants' trial before the Khamovnicheskiy District Court of the city of Moscow ("the second trial") was observed each day by an observer from the International Bar Association and in its resulting report condemned the trial as being "*fundamentally unfair.*"[7] At the conclusion of the cassational appeal of the verdict, Amnesty International forcefully condemned the violations of the applicants' rights, stating that with the bringing of the second charges the applicants had**

> **"been trapped in a judicial vortex that answers to political not legal considerations. Today's verdict makes it clear that Russia's lower courts are unable, or unwilling, to deliver justice in their cases....The failure of the appeal court to address the fundamental flaws in the second trial and the fact that Mikhail Khodorkovsky and Platon Lebedev have already spent eight years in jail on barely distinguishable charges, points to the conclusion that their second convictions have been sought for political reasons relating purely to who they are."[8]**

A14. **The second trial resulted in what was termed a "*miscarriage of justice*"[9] and "*legal fiction*"[10] by members of the RF Presidential Council of the Russian Federation for Civil Society and Human Rights ("the Presidential Council"). These comments followed a 400-page report published on 21 December 2011. This was based on an exhaustive analysis of the verdict and other materials of the trial. It was prepared with the approval of the (then) President, Mr Medvedev.[11] The report contained opinions provided by distinguished Russian,**

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[7] See *International Bar Association Human Rights Institute*, 'The Khodorkovsky Trial', September 2011, at Volume C, tab C237, of the Memorial submitted on 23 November 2011 ("the November 2011 Memorial").

[8] See *Amnesty International*, "Russian Businessmen Declared Prisoners of Conscience After Convictions are Upheld", 24 May 2011 at Volume C, tab C229, of the November 2011 Memorial.

[9] See Presidential Council Recommendations Based on the Results of a Civic Scholarly Expert Study Conducted with Respect to the Criminal Case of M.B. Khodorkovsky and P.L. Lebedev. A copy of the report was submitted in CD form under cover of a letter from the applicants dated 2 December 2012. To assist the Court a hard copy of the report is submitted at tab 140 to this Reply.

[10] See comment of Tamara Moschakova made upon release of the report *Presidential Council for the Development of Civil Society and Human Rights Press Centre*, "Presidential Council recommends review of Khodorkovsky verdict *RIA NOVOSTI*", at tab 143 to the Reply.

[11] The introduction to the report explains its genesis:

"In January 2011, a decision was adopted by the Presidential Council of the RF for Civil Society and Human Rights to conduct a public legal expert examination (a scholarly legal analysis) of judicial acts with respect to the criminal case of M.B. Khodorkovsky and P.L. Lebedev (known to the general public as the second case charging the named persons) examined by the Khamovnichesky District Court of the city of Moscow with the issuance of a verdict of 27.12.2010. President of the RF D.A. Medvedev was informed of the intention to

European and US experts, each of the experts being tasked to study the matter and submit an expert report entirely independently. None of the experts found any support whatsoever for the allegations of theft or legalization that had led to the applicants' conviction. The experts found numerous violations of the substantive and procedural law of Russia.

A15. **Having considered the expert reports, the Presidential Council issued a series of urgent recommendations in which, amongst other things, it called for the verdict to be repealed and described the case as "*a miscarriage of justice*":**

> **"Having heard and discussed the report on the results of the civic scholarly expert study with respect to the criminal case of M.B. Khodorkovsky and P.L. Lebedev, the Presidential Council of the Russian Federation for Civil Society and Human Rights considers it imperative to present to the country's top leadership recommendations on the adoption of urgent measures of an individual and general character in the sphere of criminal justice.**
>
> **1. Proceeding from the requirements of the Constitution of the RF and the international obligations of the Russian Federation, it is advisable to reconsider the question of remedying <u>the violations of generally accepted principles of criminal prosecution that have been identified by the experts with respect to the given case, which principles do not permit conviction for acts that are not directly prescribed by the criminal law and do not contain features of a *corpus delicti*, as well as without due process</u>.**
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> **In connection with this, taking into account the effective means of legal defence that exist in the system of national justice, it is imperative:**
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> **to raise with the General Prosecutor of the RF the question of lodging a submission in supervisory procedure on the verdict that has entered into force with respect to the given case, with the objective of its repeal;**
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> **to propose to the Investigative Committee of the RF that it resolve the question of initiating proceedings based on newly discovered circumstances and investigating the grounds for the reconsideration of the given criminal case - <u>in connection with fundamental violations in the course of proceedings in the case that testify to a miscarriage of justice committed in its resolution</u>."[12] (Emphasis added).**

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conduct the public expert examination, and he, during a regular meeting with the Council on 1 February 2011 in the city of Yekaterinburg, agreed with the potential significance of an analytical report with respect to the given case, drawn up by an independent public expert group."

[12] A copy of the report was submitted in CD form under cover of a letter from the applicants dated 2 December 2012. To assist the Court a hard copy of the report is submitted at tab 141 to this Reply.

A16. **On 20 July 2012, after examining a huge volume of documents and after a hearing on merits that lasted from 17 to 25 October 2011, the Stockholm Chamber of Commerce delivered the Arbitral Award in *Quasar de Valores SICAV S.A.; Orgor de valores SICAV S.A.; GBI 9000 SICAV S.A.; ALOS 34 S.L. v. The Russian Federation.*[13] The Tribunal examined whether the Russian Federation had acted lawfully in relation to the re-assessments of Yukos' tax liabilities for the years 2000-2003. As such, a central issue was whether the transactions between Yukos and trading companies were "*sham*" transactions and whether the trading companies were themselves "*dummy companies*": a key issue in both the first and second trials faced by the applicants. The Tribunal was entirely unpersuaded by the "*sham*" analysis. It stated that it was:**

> **"unwilling to find that Yukos engaged in sham transactions with its affiliated trading entities. For one thing, the notion of a 'sham' suggests something surreptitious, whereas the tax authorities obviously had access to the tax returns of both Yukos and the affiliated entities in question and would, or should, have had little difficulty in seeing that Yukos was assigning significant revenues to the latter by way of inter-company transfers. […]**
> **The sales transactions were just that: the transfer of title to goods for a certain price. From the ultimate independent purchaser, a legal relationship was created between that purchaser and the intermediate Yukos affiliate. There was no 'fake' transaction."[14]**

A17. **Despite these unequivocal findings, including those made by the Presidential Council, the RF Supreme Court denied all the substantive arguments contained in the applicants' subsequent supervisory appeals and the applicants continued to be denied justice. Meanwhile, the independent experts and individuals responsible for commissioning the reports were subjected to harassment and intimidation by the Russian authorities (see further below in paragraphs J28 – J29 of Section J).**

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[13] The Award has subsequently been referred to as the *Spanish Shareholders Award*, the Claimants all being Spanish corporate shareholders in Yukos. The Arbitral Tribunal consisted of Charles N. Brower, Toby L. Landau and Jan Paulsson, and heard evidence from a number of leading Russian and international experts, including Dr Leon Aron, Prof. Jay Westbrook, Prof. Peter Maggs, Mr Sergey Shapovalov, Prof. Paul Stephen, Mr Oleg Konnov, Mr Mikhail Rozenberg, and Prof. James Dow. A copy of the Award was supplied to the Court in November 2012 but for ease of reference a copy is attached at tab 146 to this Reply.

[14] §§ 67-68 of the *Spanish Shareholders Award* at tab 146 to the Reply. See also §§ 79-82 of the Award.

A18. **On 18 July 2014, a panel of eminent jurists sitting in the Permanent Court of Arbitration in the Hague (The Hon L.Yves Fortier, Dr Charles Poncet and Judge Stephen Schwebel), concluded that the Russian Federation had breached Article 13 of the Energy Charter Treaty in that its actions had been equivalent to the expropriation of Yukos and were not "*carried out under due process of law.*"[15] That conclusion followed a lengthy twenty-one day hearing on merits that had taken place between 10 October and 9 November 2012.[16] In its 579 page decision the Arbitral Tribunal concluded that "*the Russian court proceedings, and most egregiously, the second trial and second sentencing of Messrs. Khodorkovsky and Lebedev on the creative legal theory of their theft of Yukos' oil production, indicate that Russian courts bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State-controlled company, and incarcerate a man who gave signs of becoming a political competitor.*"[17]**

A19. **The applicants strongly believe that the Court was misled in bad faith by the Government in previous proceedings brought by the applicants and by Yukos in this Court, but that issue does not arise for determination in these proceedings. Importantly however, and directly relevant to these applications, the Government not only concealed from the Court binding legal positions that had been expounded by the Russian courts (which are in greater detail discussed in Section G below), but also took a position before the Court that was based on**

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[15] *Hulley Enterprises Ltd v Russian Federation,* 18 July 2014 ("the ECT Decision") §§ 1580 and 1585 at tab 159 to the Reply. See also §§ 698-700 of the ECT Decision where the Arbitral Tribunal considered and rejected this Court's analysis in the *Yukos* case of the VAT issue: "*In the view of this Tribunal however, far from not receiving "any adverse treatment in this respect" as the ECtHR held, Yukos received some thirteen billion dollars worth of adverse treatment by reason of the imposition on it of VAT liabilities earlier excluded by the undisputed export of the oil in question.*" This Court's analysis was also robustly rejected by the Arbitral Tribunal appointed by the Arbitration Institute of the Stockholm Chamber of Commerce in *Rosinvestco UK Ltd v The Russian Federation* at § 452 and by the Arbitral Tribunal in *the Spanish Shareholders Award* at § 82. The Spanish Shareholders Award is at tab 146 to the Reply. The decision of the Arbitral Tribunal in *Rosinvestco UK Ltd v The Russian Federation* is at tab 133 to this Reply.

[16] As the Arbitral Tribunal observed: "*By any standard, and as will be seen, these have been mammoth arbitrations. ...Since February 2005, the Tribunal has held five procedural hearings with the Parties and issued 18 procedural orders. In the fall of 2008, the Tribunal held a ten-day hearing on jurisdiction and admissibility in The Hague and, in November 2009, issued three Interim Awards, each over 200 pages. A twenty-one day Hearing on the Merits (or "Hearing") took place in The Hague from 10 October to 9 November 2012. The written submissions of the Parties span more than 4,000 pages and the transcripts of the hearings more than 2,700 pages. Over 8,800 exhibits have been filed with the Tribunal,*" – see § 4, p.1 of the Award.

[17] §1581 of the ECT Decision at tab 159 to this Reply. See also the previously cited references to §§ 698-700 and §§ 1580 and 1585 of the ECT Decision.

bad faith. Thus, in *OAO Neftyanaya kompaniya YUKOS v. Russia*, no. 14902/04 (merits), 20 September 2011, the Government asserted in respect of these same oil transactions that the oil was being sold by the subsidiary producing companies. This fact was never contested by anybody and it is supported by the Court's final judgment. Currently in the present case, however, the Government are asserting to the Court that the oil sales never took place since the applicants "had stolen" this oil from Yukos' producing entities.

A20. **It is notable that in relation to the Court's Questions in Section G the Government have asserted that the Court is not entitled to ask the "*majority of the questions*" it has asked relating to the "*substance of the charges*". That contention is misconceived and inconsistent with the established case law of the Convention, both in relation to Article 7 and the so-called fourth instance principle. The Court is entitled to review domestic judgments and to make its own findings of fact in instances where it is satisfied that the domestic judgment was arbitrary and/or the product of a flagrant non-observance of the applicable domestic law or otherwise a flagrant denial of justice. The reason why the Government asserts that the Court is not entitled to ask the "*majority of the questions*" in relation to Article 7 is that it wishes to conceal from this Court the true reasons for the prosecution thereby abusing the presumption that states act in good faith.**

A21. **For the reasons set out below, the applicants strongly maintain their complaint of violations of Articles 6, 7, 8, Article 4 of Protocol No 7 and Article 18.**

A. SPLITTING THE CRIMINAL INVESTIGATIONS INTO SEVERAL CASES; BELATED CHARGING OF THE APPLICANTS

Question 1: **Was there a breach of Article 6 §§ 1 and 3 (a) on account of the fact that the charges in case no. 18/325556-04 were formally brought against the applicants only in 2007? What was the reason for not bringing accusations against the applicants earlier? To what extent was the applicants' second case based on the materials collected during the original investigation, which led to their conviction for fraud and tax evasion in 2005? Did the belated bringing of charges disclose elements of "bad faith" on the part of the authorities?**

SUMMARY OF THE GOVERNMENT'S RESPONSE

A22. The Government falsely say that the charges in criminal case no. 18/325556-04 were brought against the applicants prior to 2007 on the basis that the applicants were informed of the "*institution of criminal case no. 18/3255556-04*" in December 2004 (paragraph 2 of the Memorandum) but then go on to say that the applicants were "*charged*" in relation to 18/432766-07 in 2007 (paragraph 6 and 7 of the Memorandum).

A23. The Government do not answer the Court's question as to why the accusations were not brought against the applicants earlier than 2007, using contradictory statements in regard to the date of charging to create a false impression to the Court that there was no delay. Furthermore, they seek, in bad faith, to suggest a four line "notification" of the instigation of a criminal case was sufficient to meet the requirements of the domestic law and the Convention. Additionally, the Government falsely claim in 2007 that "*final*" charges in the "*second*" case were brought against the applicants in 2007, although in fact those charges were subsequently amended and on 30 June 2008 the applicants were charged once again by the GPO.[18]

A24. The Government state that the investigation of the alleged crimes that formed the basis of the charges in 2007 had been underway *"since 2004*" (paragraph 7 of the Memorandum). They make plain that there was a secret parallel investigation taking

[18] The charges brought in 2007 are at Vol. 124, c.f.s. 35-177 of the case materials; the charges brought in 2008 are at Vol. 168, c.f.s. 1-146.

place whilst the applicants were undergoing trial in the ""*first"* criminal case (paragraph 21 of the Memorandum).

A25. The Government state that "*the "second" criminal case (no.18/432766-07) severed into a separate proceeding on 3 February 2007, was largely based on the materials collected during the investigation of main criminal case no.18/41-03*" (paragraph 9 of the Memorandum).

A26. The Government do not answer the Court's question as to whether the belated bringing of charges discloses elements of "*bad faith*" on the part of the authorities; however such bad faith is obvious from the afore-mentioned conduct of the authorities.

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

Was there a breach of Article 6 §§ 1 and 3 (a) on account of the fact that the charges in case no. 18/325556-04 were formally brought against the applicants only in 2007?

(a) Introduction

A27. It is beyond argument that the *"charges"* against the applicants were not brought *"promptly"* as required by the Convention. On the evening of 13 January 2005 the applicants received a notice from the authorities dated 27 December 2004 stating that on 2 December 2004 a criminal case had been "instituted" against them. The letter to Mr Khodorkovskiy simply stated

> "I hereby inform, you that on 2 December 2004 criminal case no. 18/325556-04 was opened against you, P.L.Lebedev, V.V.Moiseyev and persons unidentified by investigation on elements of crime described in Art 174-1 CC RF (as amended by Federal Law No. 121-FZ of 07.08.2001"[19]

A28. Thus the only information the applicants received in that notification was the case number and the article of the Criminal Code under which they were being investigated. That was the sole extent to which the applicants were aware of the

[19] The letter to Mr Khodorkovskiy dated 27 December 2004 is at Volume C, tabs C23 and C24 of the November 2011 Memorial. See Vol. 1, c.f.s. 260-261 of the case materials.

second investigation. There is no conceivable basis for considering that this brief letter met the requirements of Article 6 § 3 (a): as the Grand Chamber stated in *Pélissier and Sassi v France*, application no.25444/94 § 52, ECHR 1999-II: "*The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair*." This is not a question of the form of the charging – as the Government seem to imply incorrectly at paragraph 8 of the Memorandum – but about whether the applicants were told of the "*material facts*" that formed the basis of the accusation against them with "*sufficient information as is necessary to fully understand fully the extent of the charges against [them] with a view to preparing an adequate defence*" (*Mattoccia v Italy* §§ 59-60, ECHR 2000-IX). In addition, and the Government well know, the Russian laws (Article 171 of the RF CCrP) impose specific requirements as far as the contents of a document about a charge being brought, and those requirements are far broader than information contained in a notice about commencement of a case. See further paragraph A63 below.

A29. On 5 July 2005 the lawyers for the applicants were officially notified by Mr R.A. Khatypov that on 7 July 2005 the applicants were to be charged under Article 160(4) and Article 174(4) of the RF Criminal Code.[20] The applicants' lawyers attended but were told by Mr Khatypov that in fact the applicants were <u>not</u> going to be charged but no explanation was provided for that decision. It was not until February 2007 that the charges were in fact brought. Despite the Government's attempts to obfuscate and mislead, that much is clear from the Government's own Memorandum (see paragraph 6 of the Memorandum). These charges were wholly different from the matters referred to in the bare notification received in January 2005 that is referred to in paragraph A27 above.

A30. In fact no charges were <u>ever</u> brought against the applicants in case no. 18/325556-04 and quite what has happened to that case – and, most importantly, to suspicions

[20] See letter to Mr A.V.Drel from Mr R.A.Khatypov dated 5 July 2005 at Volume C, tab C33 of the November 2011 Memorial.

levelled against the applicants – has remained unclear. The Government's response to Question Two (see further below) merely confirms that this case was hidden deep inside *"principal"* case no. 18/41-03. Given the tortuous history of the investigators' manipulation of criminal case file numbers in relation to the charges that formed the subject of the second trial[21], it is hardly surprising that the Court mistakenly refers in its Questions to the Parties to the applicants being charged in case no. 18/325556-04. In fact in February 2007 the applicants were charged in relation to case no. 18-41/03 (see further paragraph A47 below), a point that the Government entirely fail to make clear although there can be no doubt on the matter.[22]

(b) The background to the belated "charging" of the applicants in 2007

A31. Given the Government's contradictory and misleading response to the Court's question, it may be helpful for the applicants to set out in detail the accurate position.

A32. On the evening of 13 January 2005 the applicants were provided with a letter dated 27 December 2003 from Mr S.K. Karimov which informed the applicants[23] that on 2 December 2004[24] criminal case no. 18/325556-04 had been opened against both of them as well as "*V.V. Moiseyev and unidentified persons involved in legalisation (laundering) of monetary funds to conduct preliminary investigation of the new crime described in Art. 174-1 para 3 of the CC RF (as worded by Federal Law No. 121-FZ of 07.08.2001)*". At that point the applicants were being tried in the Meshchanskiy District Court. It was not until December 2006[25] that the applicants became aware that this investigation concerned an allegation of laundering financial assets used by Open Russia.[26]

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[21] The Court may be assisted in this regard by reference to Annexe One of the November 2011 Memorial.

[22] See Order to Bring Charges signed by Mr Lebedev submitted at tab C44 of the November 2011 Memorial. Further copy attached to this Reply at tab 69 of the Reply for ease of reference.

[23] The notification did not conform to the law as the applicants were not provided with a copy of the order opening the criminal case. See letters to Mr Khodorkovskiy and Mr Lebedev dated 27 December 2004 at Volume C, tabs C23 and C24 of the November 2011 Memorial.

[24] See copy of the Order to separate a criminal case by First Deputy Prosecutor General Yu.S. Biryukov and Senior Investigator for Particularly Important Cases S.K. Karimov, dated 2 December 2004 at Volume C, tab C21, of the November 2011 Memorial.

[25] See Vol. 1, c.f.s. 260-261 of the case materials.

[26] In 2001 Mr Khodorkovskiy founded "Open Russia Foundation", a non-profit inter-regional NGO dedicated to the principles of freedom and democracy. This NGO cooperated with other Russian human rights NGOs such as Memorial, the Moscow Helsinki Group, etc., and was involved in a number of humanitarian and educational projects across the country.

A33. This investigation was directly connected to the investigation which was started by Mr Karimov in June 2003 (under case number 18/41-03) and under which the applicants were facing trial. The new case had simply been severed from the principal case number 18/41-03. Despite the brief letter that they received in January 2005, the applicants were not interviewed with respect to these matters, nor were they charged with the offence of which they and others were suspected; they were not able to familiarise themselves with the case materials, and they were not brought before a court promptly with a view to trial on this accusation within a reasonable period of time. Moreover, the applicants were similarly never notified by the authorities that this suspicion against them was removed and the relevant investigation discontinued.

A34. In fact, the applicants were not even provided with a copy of the Order of 2 December 2004 separating the criminal case (and opening a criminal case against them) until 27 December 2006, i.e. two years later, following their transfer to the investigative isolator in Chita (see further below in relation to the appeal they brought in relation to that gross failure in 2007).

A35. On 14 January 2005, the applicants' defence made a statement to the effect that the GPO was conducting a parallel investigation, and that the charges had not been disclosed to the defence, which violated the rights of the defendant:

> "We would like to underline, that in conformity with the European standards that are compulsory for Russia, that the person accused of some crime shall be immediately informed in details about the character and grounds of all the charges against this person, and the person shall have sufficient possibilities to defend himself against such charges. It is rather a proposal of ours, though based on facts. The questioning has been already finished, but yesterday in the evening, after our defence client M.B. Khordorkovsky was already in the isolator prison, he was officially notified that an investigation on one more charge against him and Lebedev is being carried out pursuant to article 174, para 3 of the Criminal Code of the Russian Federation. Nothing else, so far. The charges have not been presented yet, it is not clear what is the essence of the charges, but the fact that an investigation is carried out with regards to him means, at least, what was announced to him, that he is a suspect for an another case. We do not know yet what kind of case it is, and whether it relates to this case in any way."[27]

[27] See extract of the official protocol of the Meshchanskiy District Court dated 14 January 2005 at Volume C, tab C25, of the November 2011 Memorial.

A36. On 2 March 2005, Mr Khodorkovskiy drew the attention of the Meshchanskiy District Court to the fact that "*the GPO's investigators are conducting interrogations of witnesses in parallel with their cross-examinations in court*". Instead of engaging with this serious allegation of unfairness, the court delivered an order in respect of the applicant "*that it is unacceptable to use expressions that demean the authority of the RF judiciary.*"[28]

A37. On 5 July 2005 the lawyers for the applicants were officially notified by Mr R.A. Khatypov that on 7 July 2005 the applicants were to be charged under Article 160(4) and Article 174(4) of the RF Criminal Code.[29] The applicants' lawyers attended but were told by Mr Khatypov that in fact the applicants were not going to be charged but no explanation was provided for that decision. It is notable that the Government neglect to refer the Court to this fact.

A38. In June 2006, the secret trial of Messrs Pereverzin, Malakhovskiy and Valdes-Garcia started in the Basmanniy District Court in Moscow. The charges that they were tried upon were almost identical to the charges subsequently brought against the applicants.[30]

A39. On 1 March 2007 Messrs Pereverzin and Malakhovskiy were found guilty. Mr Valdes-Garcia managed to escape from Russia before the end of the trial. Following his brutal treatment whilst in the custody of the Russian authorities the Spanish Cabinet in 2009 ordered that extradition proceedings against Mr Valdes-Garcia brought by the Russian Government should be stopped.[31]

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[28] See extract of the official protocol of the Meshchanskiy District Court dated 2 March 2005 at Volume C, tab C28, of the November 2011 Memorial.

[29] See letter to Mr A.V.Drel from Mr R.A.Khatypov dated 5 July 2005 at Volume C, tab C33 of the November 2011 Memorial.

[30] Moreover, when Mr Pereverzin was charged with legalisation and theft on 24 December 2004, he was accused of acting as part of an organised group led by Mr Khodorkovskiy and Mr Lebedev as well as Messrs Brudno and Shakhnovskiy, whom he had not even met. In the meantime, despite numerous motions, the applicants were not permitted to testify in that case.

[31] See order of the Central Criminal Investigation Court, Madrid of 6 July 2009, exhibited at tab B4(2) of Mr Valdes-Garcia's statement, at Volume B, tab B4, of the November 2011 Memorial.

A40. In 2009 the PACE Special Rapporteur on "*Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states*"[32] noted:

> "Mr Khodorkovsky and Mr Lebedev complained during their first trial of a parallel investigation taking place by the General Prosecutor's Office. They complained that they should have been notified of all charges against them at the very latest at the start of the first trial in 2004 in accordance with Article 6 of the ECHR. Some three years later, just as they were becoming eligible for parole, they were charged as a consequence of that parallel investigation. The parallel investigation concerning related allegations of impropriety should have been concluded, disclosure made and a decision reached as to whether further charges could or should be brought, before the start of the first trial. Mr Khodorkovsky and Mr Lebedev argue that it was an intolerable abuse of process that the prosecution should seek to conduct more than one investigation into essentially the same alleged misconduct."[33]

(c) The eventual charging of the applicants in 2007

A41. On 14 December 2006, in the context of criminal case no. 18/41-03, Mr S.K. Karimov issued a ruling to transfer the applicants to a pre-trial detention unit in the city of Chita.[34] This ruling was authorised by the RF Deputy General Prosecutor V.Ya. Grin.

A42. On 20 December 2006, on the basis of the above ruling from the investigator, Mr Khodorkovskiy was transferred from the Krasnokamensk penal colony to the pre-trial detention unit in the city of Chita. The following day Mr Lebedev was brought from the Kharp penal colony to the Chita pre-trial investigative isolator that is in the opposite corner of the country from Kharp. On 21 December 2006, Mr Lebedev was brought to the Chita investigative isolator. It should be noted that first he was brought by train from the village of Kharp to the Yaroslavsky Railway Station in Moscow and then from there to the Domodedovo Airport in Moscow. From the Moscow airport he was taken by plane to Irkutsk, and only from Irkutsk was he transported by train to Chita. The purported reason for the transfer to Chita was to render possible investigative actions to be conducted with the applicants as suspects in case no. 18/41-03, despite the fact that the investigative team were based in Moscow throughout the

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[32] *PACE*, "Doc. 11993: Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states", 7 August 2009 at Volume C, tab C111, of the November 2011 Memorial.
[33] See paragraph 101 of the report.
[34] See Order to transfer a convict in respect of Mr Khodorkovskiy, dated 14 December 2006 at Volume C, tab C38, of the November 2011 Memorial and Note of familiarisation signed by Mr Lebedev at Volume C, tab C40, of the November 2011 Memorial. See Vol.124, c.f.s. 1-2 of the case materials.

time since it had been opened on 20 June 2003. In fact, no investigative actions in reality took place in Chita (see further below).

A43. On 22 December 2006, Ms T.B. Rusanova summoned the applicants' lawyers to Chita in relation to the criminal investigation. The lawyers attended but no charges were in fact brought against the applicants. The harassment that the lawyers received is discussed below in response to Court's Question 15.

A44. From 27 December 2006 to 5 February 2007, investigative actions were allegedly conducted in relation to the applicants as suspects in criminal case no. 18/41-03. In reality, they were presented with orders commissioning forensic expert examinations (not only in case no. 18/41-03 but also in other criminal cases investigated previously by the GPO) and with expert reports.[35] The orders to perform expert examinations show that they were issued in Moscow, and the examinations which the experts conducted were also carried out in Moscow.[36]

A45. On 3 February 2007, Mr S.K. Karimov issued a ruling to sever the criminal case against the applicants from criminal case no. 18/41-03 and the severed case was assigned case no. 18/432766-07.[37]

A46. On 3 February 2007, RF Deputy General Prosecutor V.Ya. Grin issued a ruling in which he designated the city of Chita as the location for the conducting of the preliminary investigation in criminal case no. 18/432766-07.[38]

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[35] See the following Orders exhibited to the November 2011 Memorial: Order dated 2 October 2000 at Volume C, tab C6; Order dated 18 October 2000 at Volume C, tab C7; Order dated 15 April 2004 at Volume C, tab C12; Order dated 6 July 2004 at Volume C, tab C14; Order dated 9 July 2004 at Volume C, tab C15; Order dated 5 August 2004 at Volume C, tab C16; Order dated 7 September 2004 at Volume C, tab C17; Order dated 30 November 2004 at Volume C, tab C20; Order dated 13 December 2004 at Volume C, tab C22; Order dated 8 February 2005 at Volume C, tab C27; Order dated 20 April 2005 at Volume C, tab C29; Order dated 25 April 2005 at Volume C, tab C30; Order dated 4 June 2005 at Volume C, tab C32; Order dated 8 February 2006 at Volume C, tab C35; Order dated 18 December 2006 at Volume C, tab C39; Order dated 12 January 2007 at Volume C, tab C41; and Order dated 22 January 2007 at Volume C, tab C42.

[36] Some of the expert reports proffered to the applicants were not subsequently adduced to the criminal case file.

[37] See Order to separate a criminal case dated 3 February 2007 at Volume C, tab C43, of the November 2011 Memorial. It is at Vol. 1., c.f.s. 191-192 of the case materials.

[38] See Order determining a venue for preliminary investigation dated 3 February 2007 at Volume C, tab C45. This is at Vol. 1, c.f.s. 293-294 of the case materials.

A47. On 5 February 2007 Mr Khodorkovskiy and Mr Lebedev were each charged in the context of criminal case no. 18/41-03[39] with the stealing of 350 million tonnes (approximately the equivalent of 2.5 billion barrels) of oil and the legalisation (laundering) of the same.

A48. Having officially brought the charges against the applicants in criminal case no. 18/41-03 on 5 February 2007 in Chita, the investigators from the investigative team continued to present them with reports of expert examinations conducted earlier in Moscow. No other investigative actions involving the applicants were conducted in Chita.

A49. On 16 February 2007, the applicants and their lawyers were notified about the completion of the investigative actions in criminal case no. 18/432766-07. In other words, the *"investigation"* of the *"new case"* against the applicants, for which the city of Chita was designated to be the *"venue"*, took 13 days. The notice informing the applicants of the completion of the investigation was issued by Mr Karimov in Moscow. The same notice said that the familiarisation of the applicants with the case materials would take place in Chita. Thus, the *"investigation"* in Chita included nothing more than the presentation of orders commissioning forensic expert examinations and expert reports issued in Moscow and brought from there to the applicants and the bringing of charges against the applicants. In reality, there was no investigation in Chita: see further the applicants' response to the Court's Question 2 below.

A50. These and other numerous manipulations of case no. 18/41-03, involving severing and consolidating criminal cases, are just some of the indicators of the authorities' bad faith (see further below in relation to this specific Question and throughout this Reply).

A51. It is notable that the domestic courts themselves recognized that the law had been violated in relation to the belated charging of the applicants. On 29 December 2008,

[39] See the order to bring charges dated 3 February 2007, which was handed to the applicants on 5 February 2007. It is at Volume C, tab C44, of the November 2011 Memorial which is found at Vol. 124, c.f.s. 35-177 of the case materials.

the Ingodinsky District Court of the City of Chita partially granted the defence complaint and concluded:

> "The complaint of P.L. Lebedev is granted partially. [The court finds unlawful the following] failures of the investigators to act…
>
> the untimely notification of the complainant, P.L. Lebedev, about the opening of criminal case No. 18/325556-04 and serving of a copy of the order to open the criminal case on him;
>
> interrogation in the capacity of an accused;
>
> explanation of rights provided by Art. 46 CCP RF;
>
> notification of P.L. Lebedev about creation [and] compositions of investigative teams and their changes ; [and]
>
> prolongation of the investigation."[40]

A52. This decision entered into force on 30 April 2009.[41]

(d) Case no. 18/325556-04

A53. The applicants note that the Court in its footnote to paragraph 24 of the Statement of Facts has commented: "*It is unclear what happened to case no. 18/325556-04, whether it still exists or became case no. 18/432766-07, and to what extent the factual scope of the investigation in those two cases was different, identical, or partially overlapping.*"

A54. The Government assert that the answer to this question is that on 3 February 2007, case no.18/432766-07 (the so-called *"second"* criminal case against the applicants) was severed from criminal case no.18/41-03 to form a separate set of proceedings. The basis for its severance was that the investigation authorities "*had obtained sufficient evidence confirming the applicants' guilt in committing crimes*" (paragraph 5 of the Memorandum) which does not answer the Court's question at all.

A55. It is notable that all traces of case no. 18/325556-04, as well as the traces of the allegation of laundering financial assets obtained in the process of committing crimes

[40] See copy of judgment at Volume C, tab C91, of the November 2011 Memorial. Mr Khodorkovskiy joined in the hearing of Mr Lebedev's complaint.
[41] See copy of Cassation Ruling at Volume C, tab C103, of the November 2011 Memorial.

via NGO Open Russia, as noted above, seemed to disappear completely in the depths of the "principal" case no. 18-41/03. Despite numerous information requests and motions by the applicants they never received any information about what happened to the count in regard to which case no. 18/325556-04 was instituted. They were not given information even after the court found the investigation's actions to conceal such information from the applicants was illegal (see above in relation to the judgment of the Ingodinsky District Court).

A56. The refusal to provide such information to the applicants and the consequent refusal to answer this Court's question is telling. In fact there was no proper basis for the case as there had never been any "laundering of moneys" for the benefit of Open Russia. Notwithstanding that fact the authorities sequestered the NGO's bank account (containing approximately US$5 million) and have yet to advise what became of those funds. The entity Open Russia was deprived of the ability to function and was paralysed. The real reasons for the authorities' attack against the NGO Open Russia (established at the initiative of the first applicant and with his active support) were not about any illegal activities of that entity (there were none), but about the very nature of its activities intended to promote civil society and a free press in Russia. The said circumstances constitute indisputable evidence of the Government's bad faith in prosecuting the applicants and of improper motives for such prosecution. To date the applicants, despite repeated inquiries, have not been informed of the decision the investigation made in relation to the given count.

What was the reason for not bringing accusations against the applicants earlier?

A57. The Government argue that the need for such lengthy preliminary investigation prior to charging the applicants was because the investigation was of an "*especially complex nature*" (paragraph 4 of the Memorandum). They do not address how that can be reconciled with the fact that Messrs Pereverzin, Malakhovskiy and Valdes-Garcia were subjected to a secret trial on almost identical facts, having been charged in relation to them in December 2004.

A58. The true reason for such conduct by the prosecuting authorities was bad faith. The applicants were about (in July 2007 in the case of Mr Lebedev and in October 2007 in the case of Mr Khodorkovskiy) to become eligible for parole and the authorities

needed them to remain in prison. That was the view, for example, of the White House spokesman, quoted in *Kommersant*[42], "*the 2008 presidential elections in Russia mean that the Kremlin has to keep Khodorkovsky and Lebedev in jail and to not let them have any chance of early release.*"[43]

To what extent was the applicants' second case based on the materials collected during the original investigation, which led to their conviction for fraud and tax evasion in 2005?

A59. The Government unashamedly acknowledge that "*the "second" criminal case (no.18/432766-07), severed into a separate proceeding on 3 February 2007, was* ***largely*** *based on the materials collected during investigation of main criminal case, no.18/41-03*" (paragraph 9 of the Memorandum, emphasis added). The applicants agree the majority of the central materials were from the "*main criminal case*"- including materials that were obtained in breach of lawyer/client privilege and, as the Court has found, in breach of Article 6 § 3 (b) of the Convention.[44] Moreover, even after the charges were brought against the applicants in February 2007 and thirteen days later when they were informed the investigation was completed, the prosecution repeatedly added "additional evidence" to the case materials which in fact were copies of the evidence in "*main criminal case*" no. 18/41 - 03.

A60. In reality, there was no "*initial*" with a "*subsequent*"[45] completion investigation at all: only numerous manipulations involving artificial and arbitrary severance and joining of criminal cases and equally arbitrary and selective transfer of copies of investigative materials gathered in the *"principal case"* to other cases severed from it.

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[42] See copy of *Kommersant,* 7 February 2007 at tab 73 of Mr Khodorkovskiy's November 2007 application.
[43] The *Washington Post* similarly commented: "*Mikhail Khodorkovsky, once Russia's richest man, is now one of Russia's best-known political prisoners. Having committed the unpardonable sin of considering a political challenge to President Vladimir Putin, Mr. Khodorkovsky has languished in a Siberian prison camp since 2005, and Russian authorities want to keep him there. With a diminished but nevertheless sizeable fortune, not to mention moral capital because of his refusal to bend to Kremlin pressure, the former oil baron might still hope to have some influence after his release, particularly if he is freed before the uncertain 2008 presidential contest. That is one likely reason that he and a business associate face additional charges – just months before they would be eligible for parole. If convicted, he would have to wait out the next presidential election and a lot more."* See copy of editorial at tab 56 of Mr Khodorkovskiy's November 2007 application.
[44] *Khodorkovskiy (no.2)* § 34.
[45] See paragraph 15 of the Government Memorandum

Did the belated bringing of charges disclose elements of "bad faith" on the part of the authorities?

A61. There can be no doubt but that the belated bringing of "*new*" charges in 2007 discloses elements of "*bad faith*" on the part of the authorities. There was no proper reason for the belated bringing of the charges two years after the conclusion of the first trail. The applicants should have known precisely what they were charged with and received all relevant material on which the prosecution relied before their first trial began. Instead, the investigators instigated a series of parallel cases, some of which were tried in secret (as in the trials of Valdes-Garcia, Pereverzin and Malakhovskiy) and then brought the further charges in 2007, immediately before the applicants became eligible to apply for release on parole.

A62. Throughout the entire criminal prosecution of the applicants the principal investigative activities were concentrated specifically within the scope of the "*main*" case, no. 18/41-03, in which the applicants had no formal procedural status that would correspond to their actual positions (initially suspects and then accused). Thus the applicants were deprived of any opportunity to familiarize themselves with the case file and to defend themselves in their exercise of the rights of suspects and accused as provided for by the RF legislation and the Convention. As for the severed case wherein the applicants did have such procedural status, the investigation only performed the procedural formalities necessary to extend custody and further progress of the case. No investigation was in fact conducted in the genuine legal meaning of the word, no gathering of evidence or its evaluation was performed in the severed cases. The reasonable inference to be drawn is that the sole purpose of such actions by the criminal prosecution authorities was to conceal from the applicants the progress of the "investigation" and the substance of their prosecution and to deprive them of the ability to defend themselves against the prosecution.

A63. The contents of the so-called "*second"* charges brought against the applicants in case no. 18-41/03 are, moreover, completely non-compliant with the statutory requirements (because of the interconnected requirements of paragraph 22 of Article 5, of Articles 171 and 73 of the RF CCrP). Thus, they lack a proper description of the imputed act, including the time, place, manner and other features of its commission, do not

describe the specific acts imputed to the applicants, and do not describe the required aspects and characteristics of each of the imputed acts that render the acts criminal. The description of the circumstances that are said to give rise to the criminality is incomplete, vague, and utterly inconsistent (contradictory to the extent of being mutually exclusive). The applicants and their lawyers repeatedly highlighted these irremediable flaws of the charges at all stages of the proceedings in the case, but never received any explanations, let alone any adjustments to the charges.

A64. This was a point noted by the Parliamentary Assembly of the Council of Europe:

> "132. The new charges against Mr Khodorkovsky and Mr Lebedev are also poorly specified: despite the constant exhortations of the defence, the prosecution has so far failed to set out which facts it intends to prove by which evidence, and what their significance shall be in terms of criminal responsibility. Stating that Mr Khodorkovsky and Mr Lebedev embezzled all the oil produced by Yukos over a given period and randomly designating huge volumes of company documentation as "evidence" does not seem to be sufficient."[46]

Question 2: What was the subject-matter of cases nos. 18/432766-07, 18/325556-04 and no. 18/41-03 (the Government are invited to describe briefly the essence of each case and the legal provisions invoked)? Why were they investigated separately, and why was case no. 18/432766-07 investigated in Chita, although the events incriminated to the applicants took place essentially in Moscow? What is the current status of each case (closed, under investigation, etc.)?

SUMMARY OF THE GOVERNMENT'S RESPONSE

A65. The Government assert that the cases were investigated separately because of the "*especially complex nature*" of the preliminary investigation (paragraphs 4 and 15 of the Memorandum). They state that case no. 18/432766-07 was investigated in Chita because that was where the applicants were when they were charged (paragraph 17 of the Memorandum), seemingly overlooking the fact that the applicants were only there because the authorities had unlawfully transferred them to Chita, rather than to Moscow which was where the investigation was taking place.

A66. The Government say that, in the context of case Criminal case no.

[46] PACE Doc. 11993: "*Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states*", 7 August 2009, at Volume C, tab C111, of the November 2011 Memorial.

18/325556-04 *"…the applicants and Mr. V.V. Moiseyev, together with unidentified co-perpetrators, were charged with the actions involving financial transactions between 2000-2001 in Moscow which amounted to more than RUB 15 bin obtained as a result of misappropriation of state funds and the revenue of Russian oil production and oil refining companies under their control; subsequently, the funds were laundered by means of their transfers to the accounts in the foreign banks*" (paragraph 11 of the Memorandum). However no such charges were ever brought against the applicants and, moreover, the allegation regarding theft of revenues of oil-producing companies is mutually exclusive in relation to the charge of theft of oil produced by them; if oil has been stolen, its producer cannot possibly have any proceeds of sale. This is a further demonstration of the underpinning bad faith of the authorities in every aspect of their conduct in these cases.

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

Why was case no. 18/432766-07 investigated in Chita, although the events incriminated to the applicants took place essentially in Moscow?

A67. As indicated above, the decision by RF Deputy Prosecutor General Grin to classify the city of Chita as the place "*to conduct the preliminary investigation*" was an utter sham. It provided the pretext for transporting the applicants to Chita. No investigation in case no. 18/432766-07 was conducted in Chita. The investigative group was actually located and worked in Moscow. All decisions in the case were made by investigative and prosecutorial authorities located in Moscow. All that happened in Chita was that the applicants familiarized themselves with the case files there (files that were brought from Moscow for that purpose) whilst the local courts considered motions for extending the applicants' detention and limiting deadlines for reviewing the case file. The only reasonable inference to be drawn is that Chita was selected in the hope that a trial could take place there out of the glare of publicity of Moscow and to render it difficult for the applicants to prepare for trial thousands of miles from their lawyers in Moscow.

A68. The decision ostensibly to "investigate" the case in Chita was arbitrary and wholly unjustified. That was the conclusion on 20 March 2007[47] of the Basmanniy District Court. That ruling was upheld on 16 April 2007[48] by the Moscow City Court.

A69. In answer to the Court's footnoted question to paragraph 32 of the Statement of Facts, the Basmanniy District Court of Moscow ruled that the order by the Deputy Prosecutor General to determine Chita as the place "*to conduct the preliminary investigation"* was "*unlawful and groundless*" as the prosecutor's office did not provide information as to why it was necessary for the preliminary investigation to be conducted in Chita rather than in Moscow and the grounds upon which his decision had been made[49]. As such the court ruled that the applicants' rights to defence guaranteed by Article 46 (1) of the Russian Constitution had been breached. On 16 April 2007 the Judicial Board for Criminal Cases of the Moscow City Court upheld the Basmanniy District Court decision in a cassational ruling[50], recognising that an arbitrary and unreasoned decision to base the investigation at a place other than where the crime was committed violates the constitutional rights of the applicants.

A70. The Moscow City Court rejected the prosecutor's cassational submission that there was no duty on the part of the prosecutor and the investigator to substantiate the decision regarding where the investigation was to be conducted because:

> "reasoning of a decision allows not only for a better understanding of the essence and lawfulness of the decision but also for a later check of its lawfulness and reasonableness as determined by Arts. 123 and 125 of the CCP RF. In addition, these allegations run counter to the requirements of Art. 7 para 4 of the CCP RF".

A71. The Moscow City Court noted:

> "Whilst an appeal under Art. 125 of the CCP RF is being considered, lawfulness and reasonableness of actions (failures to act) and decisions of an investigator (interrogator) or a prosecutor shall be checked. "Reasonableness" means existence of information

[47] See Judgment dated 20 March 2007 at Volume C, tab C50, of the November 2011 Memorial. It is at Vol.134, c.f.s.139-144 of the case materials.
[48] See Cassation Ruling dated 16 April 2007 at Volume C, tab C53, of the November 2011 Memorial. It is at Vol. 134, c.f.s. 145-150 of the case materials.
[49] See Judgment dated 20 March 2007.
[50] See Cassation Ruling dated 16 April 2007, *op.cit.*

> supporting the necessity for the decisions made and the actions committed in the materials presented, while "lawfulness" should be understood as compliance with all the norms of the CCP regulating the procedure of making the decision or committing the action by the investigator (interrogator) or prosecutor."

A72. The Moscow City Court also rejected the prosecutor's submissions that the Moscow City Court did not have jurisdiction to consider the appeal:

> "As concerns the argument of the cassation appeal about violation of jurisdiction of consideration of the appeal, the prosecutor did not file motions asking to change the jurisdiction during the hearing of the appeal, and this matter was not discussed by the court. The matter of territorial jurisdiction of the appeal is intimately connected with the matter of investigative jurisdiction of this criminal case, which forms the essence of the appeal. As can be seen from the materials presented, for a long time this criminal case has been investigated by the RF Procuracy General, located on the territory falling under jurisdiction of the Basmanny District Court of the City of Moscow. The order of Deputy Prosecutor General of the Russian Federation V.Ya. Green of 03 February 2007 under appeal was delivered on the same territory.
>
> Under these circumstances, the judicial collegium find the argument of the cassation submission about violation of jurisdiction for consideration of the appeal groundless and contradicting the facts."

A73. The RF GPO sought to challenge these judgments by seeking supervisory review. However, as a matter of domestic law, the decision of the Basmanniy Court came into legal force from the dismissal of the GPO cassational submission by the Moscow City Court on 16 April 2007. As such the authorities were required by law to comply with that decision from 16 April 2007. However they made a point of not doing it, demonstrating bad faith and contempt for the law. As the Court has rightly inferred in its Statement of Facts, the applicants should immediately have been transferred to Moscow following the judgment.

Why were the cases investigated separately?

A74. The Government refer to "*particular circumstances*" that rendered it necessary for the separation of cases. However, Russian criminal law provides that criminal cases may be separately investigated only in very specific circumstances. Severance of a criminal case under Article 154 part 2 of RF CCrP in order to complete pre-trial investigation is "*only permissible for the purposes of concluding the preliminary investigation and only in those cases where this is occasioned by the large volume of the criminal case or the large number of counts therein, and also subject to the condition that this will not affect the comprehensiveness and objectivity of the preliminary investigation and*

the resolution of the criminal case" (see Determination no. 458-O-O dated 15 July 2008, the Constitutional Court of the Russian Federation).[51]

A75. This legal requirement is unequivocal, does not provide for any exceptions, exclusions or reservations, and means that, by the time of severance, the criminal event, i.e. the act of crime itself, is to have been proven beyond any doubt as part of the main case (see Article 73 part 1(1) of the RF CCrP).

A76. In fact the "*investigation*" was artificially fragmented among artificially severed cases so as to ensure that the applicants suffered significant disadvantage. They were denied access to materials in the "*main*" case file, no. 18/41-03, and the applicants were tried after a series of related trials so that the judgments from those trials could be – and were – used by the prosecution to the applicant's significant detriment by being used as "*evidence*" against them, contrary to Article 6 § 2: points developed further below in Section D.

Question 3: Had the "second case" against the applicants been tried at the same time as their "first case", how would this have affected the calculation of the overall final sentence, in accordance with the rules then applicable? Was there a breach of Article 7 of the Convention on this account?

SUMMARY OF THE GOVERNMENT'S RESPONSE

A77. The Government set out the series of judgments, appeals and supervisory reviews in which the applicants' terms of imprisonment were set and adjusted. However, the Government do not actually answer the Court's specific question – had the "*second case" against the applicants been tried at the same time as their "first case", how would this have affected the calculation of the overall final sentence, in accordance with the rules then applicable?*" Despite that omission, they make a bald assertion that there was no breach of Article 7 (paragraph 34 of the Memorandum).

[51] See Determination no. 458-O-O dated 15 July 2008, the RF Constitutional Court, at tab 79 of the Reply.

A78. If the charges in the second case had been considered jointly with the first charges, this would have precluded the very possibility of the applicants being simultaneously accused of the acts imputed to them in the second case, because these charges are not only iterative, but are also mutually exclusive with regard to the first charges (see further the response to Questions 32 – 40 in Section G below). Accordingly, no additional term of punishment could have been imposed for the allegedly criminal acts in the second trial as they were entirely without merit. See also the applicants' reply at paragraph G53. Thus, for the reasons set out in Section G, the applicants maintain their case that their conviction was a breach of Article 7.