J. IMPROPER MOTIVATION FOR THE PROSECUTION

Question 47. Was there a violation of Article 18 in that the restriction of the applicants' rights provided by Articles 5, 6 and 8 was imposed for purposes "other than those for which they have been prescribed"? The applicants criticised the test applied by the Court under Article 18 in their previous cases. In relation to this criticism, the parties are invited to show how allegations of "bad faith" on the part of the authorities are examined in other jurisdictions, both national and international.

SUMMARY OF THE GOVERNMENT'S RESPONSE

J1. The Government assert that "*they believe ...that the restriction on the applicants' rights was due to their being subjected to criminal prosecution in accordance with the lawfully established procedures.*"[1] They claim that no issue arises in relation to Article 18. The Government state that as Article 18 has no equivalent in other international conventions "*it is unlikely that in this matter it is necessary to rely on any international, let alone, domestic practice*."[2] The Government therefore refuse the Court's request to show how allegations of bad faith on the part of the authorities are examined in other jurisdictions.

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

Was there a violation of Article 18 in that the restriction of the applicants' rights provided by Articles 5, 6 and 8 was imposed for purposes "other than those for which they have been prescribed"?

(a) Introduction

J2. The applicants strongly maintain their claim that there was a violation of Article 18 in that the restriction of their rights provided by Articles 5, 6 and 8 was imposed for purposes "*other than those for which they have been prescribed."*

J3. The applicants continue to assert not only their innocence but their consistent case that the prosecution was brought for improper motives. In maintaining their claim the applicants rely upon the entirety of the submissions in this Reply which consistently demonstrate that the Government have acted in bad faith from start to finish resulting

[1] See paragraph 373 of the Government Memorandum.
[2] See paragraph 374 of the Government Memorandum.

in the restriction of the applicants' rights under Articles 5, 6 and 8 of the Convention for improper reasons.

J4. The so-called "second" case against the applicants, which resulted in a significant increase in the duration of their incarceration, was entirely without merit and a breach of Article 7 and of Article 4 of Protocol No 7 for the reasons which have been set out at length in the applicants' replies to the Questions in Sections G and I above. The trial court, endorsed by the cassational court and subsequently by the supervisory courts, has retrospectively characterised the applicants' entire business conduct as criminal. The domestic courts' findings were contrary to the applicable substantive law as well as the previous binding judgments of the superior courts on applicable legal principles and norms. Moreover, at the times the charges were brought against the applicants in the second case (let alone before the verdict was issued) there were final judicial decisions directly relevant and had they been correctly applied the applicants could not have been charged or convicted. The trial court's judgment, and the subsequent endorsement of the judgment[3] in subsequent challenges, were "*arbitrary*", "*manifestly unreasonable*"[4] and issued in "*flagrant denial of justice*"[5].

J5. The verdict[6] is strewn with contradictions and inconsistencies. On pages 72-73 of the verdict the applicants are determined to "*have ensured seizure and taking into possession*" of all of the oil produced by Yukos, and on page 74 to have distributed this "*stolen and legalized property*" amongst the co-conspirators after "*having misappropriated the principal part of the stolen property*". This finding is notwithstanding (1) the physical impossibility of taking into possession and distributing such quantities of oil; (2) proof to the contrary in the records of Transneft, showing that the allegedly stolen oil was in fact sold by Yukos and transported through the state pipeline network; (3) that, as has been said above, the producing entities were paid the prices that had developed during the sale of oil within Russia for the oil subject to inter-company oil sale and purchase agreements, and the proceeds received by them from the sale of the oil fully compensated all their cost for its production and

[3] Subject to minor changes.
[4] See *Ravnsborg v. Sweden*, 23 March 1994, § 33, Series A no. 283-B; *Bulut v. Austria*, 22 February 1996, § 29, Reports *of Judgments and Decisions* 1996-II; and *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII.
[5] See *Stoichkov v. Bulgaria*, no. 9808/02, § 54, 24 March 2005.
[6] A copy of the verdict is at Volume C, tab C213 to the November 2011 Memorial.

brought them a profit; and (4) that not a single incident of oil disappearance or of the applicants taking possession of the oil was presented to the court by prosecutors or otherwise discovered by the judge. The verdict is strewn with contradictions. On page 13 it is stated that Yukos was "*factually not the purchaser of the oil*" from the production subsidiaries, and on page 660 it is stated that the "*oil transferred into the factual ownership of [Yukos]*." Perhaps most remarkably, on page 674 of the verdict the judge states: "*The court concludes that defendant P.L. Lebedev's arguments regarding the making of profit by the producing companies during the period of 2000-2003* ***demonstrate that there was no theft***" (emphasis added): a conclusion that has never been altered by any of the domestic reviewing courts. As the International Bar Association commented, the verdict, contrary to law, is entirely devoid of any references to trial protocols substantiating any of its conclusions.[7]

J6. The applicants' convictions were arbitrary and the product of a flagrant non-observance of the applicable domestic law. The Government's assertions that the Court is not entitled to ask the "*majority of the questions*" it has asked relating to the "*substance of the charges*" 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 assert that the Court is not entitled to ask the "*majority of the questions*" in relation to Article 7 and that the Court's role in examining questions concerning the fairness of the taking and handling of evidence "*must be very limited*"[8] 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. Consequently, for the reasons set out in detail in the applicants' replies to the Court's Questions the presumption that a state acts in good faith is unequivocally rebutted in the instant cases.

[7] See pages 42-43 of the report from the International Bar Association Human Rights Institute: "*The Khodorkovsky trial: A report on the observation of the criminal trial of Mikhail Borisovich Khodorkovsky and Platon Leonidovich Lebedev, March 2009 to December 2010.*" September 2011, at Volume C, tab C237, of the November 2011 Memorial.

[8] Paragraph 233 of the Government Memorandum.

(b) Summary and overview of the basis for the applicants' claim that there was a violation of Article 18

J7. The Court is asked to consider the applicants' case on Article 18 in the context of the findings that the Court has already made of serious violations of the applicants' fundamental rights in their initial arrest, detention and first trial. The Court has found that :

(a) Mr Khodorkovskiy's initial arrest in 2003 was unlawful and for an "*ulterior purpose*";[9]

(b) From the moment of Mr Lebedev's arrest in July 2003 until 28 August 2003 his detention was unlawful and contrary to Article 5 § 3 of the Convention;[10]

(c) Mr Lebedev's detention in March and April 2004 lacked any legal basis and was contrary to Article 5 § 1 of the Convention;[11]

(d) There were numerous breaches of Articles 5 § 3 and 5 § 4 in relation to the applicants' detention and the applicants' continuing detention was not justified by compelling reasons outweighing the presumption of liberty;[12]

(e) During his detention Mr Khodorkovskiy was kept in degrading conditions in the SIZO contrary to Article 3;[13]

(f) The applicants were kept in humiliating conditions throughout their first trial contrary to Article 3;[14]

[9] §§ 143 and 254 of the judgment in *Khodorkovskiy (no.1)*.
[10] § 91 of the judgment in *Lebedev v. Russia*, no. 4493/04, 25 October 2007, *(Lebedev (no.1))*. See also the ensuing judgment of the Presidium of the RF Supreme Court on 23 December 2009, copy at tab 103 to this Reply.
[11] § 59 of the judgment in *Lebedev (no.1)*.
[12] In relation to Mr Lebedev's detention see § 91, § 102, § 108 and § 113 of the judgment in *Lebedev (No.1)* and § 509 and § 524 of *Khodorkovskiy (no.2)*. In relation to Mr Khodorkovskiy's detention see § 202, § 223, § 234 and § 242 of the judgment in *Khodorkovskiy (no.1)*.
[13] § 119 of the judgment in *Khodorkovskiy (no.1)*.
[14] § 126 of the judgment in *Khodorkovskiy (no.1*) and § 486 of *Khodorkovskiy (no.2)*.

(g) During the trial there was "a *violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (c) and (d) on account of the breach of the lawyer-client confidentiality, and unfair taking and examination of evidence by the trial court.*"[15] There were significant breaches in the way in which evidence was taken in the first trial that created a "*disbalance between the defence and the prosecution*" and breached the fundamental requirement that there should be an "*equality of arms.*"[16] Moreover, there were fundamental breaches of lawyer-client confidentiality, for example, the search and seizure of materials from Mr Drel's office was arbitrary and unlawful. The Court found "*that throughout the investigation and the trial the applicants suffered from unnecessary restrictions of their right to confidential communication with their lawyers, and that the secrecy of their communications was interfered with in a manner incompatible with Article 6 § 3 (c) of the Convention*."[17]

(h) There were "*no precedents*" for the tax case that had been brought against the applicants[18] and that *"the applicants may have fallen victim to a novel interpretation of the concept of "tax evasion.""*[19]

(i) There was a violation of Mr Khodorkovskiy's property rights under Article 1 of Protocol No 1. The Court strongly criticised the trial court's order that Mr Khodorkovskiy should pay over 17 billion Rubles (over 510 million euros) to the State. The Court said the decision "*had no support either in the law or in judicial practice.*"[20] and concluded that "*neither the primary legislation then in force nor the case-law allowed for the imposition of civil liability for unpaid company taxes on that company's executives. This leads the Court to the conclusion that the award of damages in favour of the Tax Service*

[15] See § 9 of the operative conclusions, p.203, of the Court in *Khodorkovskiy (no. 2)*.
[16] § 735 of the judgment in *Khodorkovskiy (no. 2)*.
[17] § 648 of the judgment in *Khodorkovskiy (no. 2)*.
[18] § 821 of the judgment in *Khodorkovskiy (no. 2)*.
[19] § 821 of the judgment in *Khodorkovskiy (no. 2)*.
[20] § 883 of the judgment in *Khodorkovskiy (no. 2)*.

was made by the Meshchanskiy District Court in an arbitrary fashion and thus contrary to Article 1 of Protocol No. 1 to the Convention."[21]

(j) There had been a violation of Article 34 as a consequence of the sustained harassment of Mr Khodorkovskiy's lawyers. It found that the "*lawyers in this case were working under immense pressure*"[22] and that they were subjected to measures "*directed primarily, even if not exclusively, at intimidating"* them in working on Mr Khodorkovskiy's case before the Court.[23]

J8. The applicants acknowledge that the Court, applying an inordinately high evidential threshold (which for reasons developed below is inconsistent with the purpose of the Convention and with the approach of other international courts and tribunals), did not find a violation of Article 18 in *Khodorkovskiy (no.2)*. Nonetheless the Court stated that it accepted that "*the circumstances surrounding the applicants' criminal case may be interpreted as supporting the applicants' claim of improper motives. Thus, it is clear that the authorities were trying to reduce political influence of 'oligarchs', that business projects of Yukos ran counter to the petroleum policy of the State, and that the State was one of the main beneficiaries of the dismantlement of Yukos*."[24] The Court said that it did "*not exclude that in…the proceedings [against Khodorkovskiy and Lebedev] some of the authorities or State officials might have had a 'hidden agenda.'*"[25] The Court "*stressed that it did not wish to challenge the findings of the national courts made in the context of the extradition proceedings and other proceedings related to the Yukos case.*"[26] Ultimately, the Court stressed that its finding in this application did not preclude it from examining under Article 18 the subsequent proceedings concerning the conviction in the second criminal case.[27]

[21] § 885 of the judgment in *Khodorkovskiy (no. 2)*.
[22] § 929 of the judgment in *Khodorkovskiy (no. 2)*.
[23] § 933 of the judgment in *Khodorkovskiy (no. 2)*.
[24] § 901 of the judgment in *Khodorkovskiy (no. 2)*.
[25] § 906 of the judgment in *Khodorkovskiy (no. 2)*.
[26] § 900 of the judgment in *Khodorkovskiy (no. 2)*.
[27] § 908 of the judgment in *Khodorkovskiy (no. 2)*.

J9. 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[28] 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, but also itself took a position before the Court that was based on 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. In the present case, however, the Government is asserting to the Court that the oil sales never took place since the applicants had stolen this oil from the producing entities.

J10. Requests to extradite individuals connected with the applicants as well as for mutual legal assistance have consistently been rejected by courts throughout Europe. In the first such case, *Chernysheva and Maruev v. Russian Federation* Senior District Judge Workman concluded that the prosecution of the applicants was politically motivated, stating "*I have reached the inevitable conclusion that President Putin directed that Miss Chernysheva and Mr Khodorkovsky should be prosecuted.*"[29] Subsequently the highest court in Switzerland, the Swiss Federal Tribunal Court, ordered the Swiss government not to co-operate with the Russian authorities after it concluded that the applicant's trial was politically motivated. The Swiss Federal Tribunal concluded that all of the facts, taken together, *"clearly corroborate the suspicion that criminal proceedings have indeed been used as an instrument by the power in place, with the goal of bringing to heel the class of rich "oligarchs" and sidelining potential or declared political adversaries.*"[30] The 2009 report of the Special Rapporteur of the

[28] It is to be noted that the applicants played no role in bringing the proceedings in *Yukos*. Because of the considerable overlap in the issues between the cases the applicants applied (unsuccessfully) to intervene by way of written submissions in the Yukos proceedings: see letter to the Court dated 5 March 2009 and the Court's reply of 27 March 2009. Copies at tabs 86 and 92 to this Reply.

[29] A copy of the judgment of Senior District Judge Workman in *Russian Federation v. Chernysheva and Maruev* 18 March 2005 is at tab 57. See also the subsequent extradition decisions of the Horseferry Road Magistrates Court: *Government of the Russian Federation v. Ramil Bourganov and Alexander Gorbachev,* 17 August 2005, at tab 58 to this reply, and *The Government of the Russian Federation v. Alexander Viktorovich Temerko,* 23 December 2005, at tab 59 to this Reply. See also *Attorney General v. Kartashov*, Civil Appeal No. 124/2008, Supreme Court of Cyprus, 21 January 2011, at Volume C, tab C220 of the November 2011 Memorial.

[30] See *Khodorkovsky v. Ministère public de la Confédération*, Swiss Federal Tribunal, 1st Court of Public Law, judgment 13 August 2007. A copy is at tab 75 to this Reply

Parliamentary Assembly of the Council of Europe on "*Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states*"[31] summarised the extensive number of cases related to the applicants and to Yukos where extradition and legal assistance had been refused on the grounds that the case against the applicants was politically motivated:

> "For example the judgment of the Bow Street Magistrates Court (London) dated 23 December 2005 refusing the extradition of Mr Temerko (successor of M. Khodorkovsky in managing Yukos); judgment of the Czech High Court dated 31 July 2007 upholding the refusal of a lower court to extradite a Russian ex-employee of Yukos (Ms. Vybornova); judgment of the Federal Tribunal of Switzerland dated 13 August 2007 removing freezing orders of Yukos-related assets and releasing seized documents, finding that "*all these elements clearly corroborate the suspicion that this criminal proceeding was orchestrated by the powers that be in order to subordinate the class of rich "oligarchs" and do away with potential or sworn political opponents*"; judgment of the Vilnius Regional Court dated 31 August 2007 refusing the extradition of former Yukos employee Mr Brudno; judgment of the District Court of Amsterdam dated 31 October 2007 refusing to recognise the legitimacy of the bankruptcy proceedings against Yukos due to "*a violation of the fundamental principles of due process of law*"; judgment of the City of Westminster Magistrates' Court dated 19 December 2007 refusing the extradition of Mr Azarov, a shipping executive allegedly linked to Yukos; judgments of the Harju County (Estonia) Court dated 27 February 2008 refusing the extradition of Mr Zabelin (who contended that he had to flee because he refused to give false testimony against the Yukos leadership); Mr Zabelin's extradition from Germany had previously been refused by a court in Brandenburg in December 2007; judgment of the Nicosia District Court dated 10 April 2008 refusing the extradition of Mr Kartashov, a former Yukos employee; judgment of the Supreme Court of Israel dated 14 May 2008 refusing the extradition of Mr Nevzlin, a former senior Yukos executive accused of conspiracy to commit murder; judgment of the United Kingdom High Court dated 3 July 2008 refusing an application to litigate a commercial dispute involving Mr Deripaska in Russia instead of in the United Kingdom, holding that because of the closeness of the link between Mr Deripaska and the Russian State there was a significant risk of improper government interference and that justice would not be done; judgments of the City of Westminster Magistrates Court dated 8 and 22 December 2008 refusing the extradition of four Russian citizens none of whose cases had any links to Yukos but who had business interest in the shipping of oil."[32]

J11. The grave misuse of the law enforcement process in the prosecution of the applicants on further charges is seen in the sharpest possible focus in the cases of Mr Aleksanyan and Mr Valdes-Garcia (both accused of being members of the applicants' "organised criminal group") and the way in which they have each been treated by the RF authorities. It was starkly and cruelly shown in the offers to provide life-saving

[31] *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.
[32] See footnote 163 to her report at Volume C, tab C111 of the November 2011 Memorial.

treatment to the applicants' former lawyer, Mr V.G. Aleksanyan, in return for giving incriminating evidence against the applicants. The first of these extraordinary offers was made by Mr Karimov, the prosecutor who drew up the original order transferring the applicants to Chita and who has played a central role in their prosecution. This Court has concluded that Mr Aleksanyan was subjected to inhuman and degrading treatment contrary to Article 3 whilst in detention and that the authorities prolonged his detention on grounds which could not be regarded as "*relevant*" and "*sufficient*". It took the exceptional step of concluding that in order for the Government to comply with Article 46 of the Convention Mr Aleksanyan should be released from detention.[33] Tragically, Mr Aleksanyan died of HIV related complications on 3 October 2011. He was 39 years old.

J12. In 2009 the RF Government issued a request for Mr Valdes-Garcia's extradition from Spain but extradition proceedings were ordered to be stopped by the Spanish Cabinet after it received medical evidence that Mr Valdes-Garcia had been beaten and tortured whilst in RF custody. In August 2005, Mr Valdes-Garcia was beaten and then thrown from a high window after he had refused to give evidence against the applicants.[34] It is notable that the Government bluntly refuses to answer the Court's Question on page 3 of the Statement of Facts "*What were the reasons for refusing to institute criminal proceedings in relation to the injuries received by Mr Valdes-Garcia while in custody?*" – the Government stating:

> "As regards the reasons for the refusal of institution of the criminal proceedings upon the complaint of Mr Valdes-Garcia (foot-note on page 3 of the Statement of Facts), the Government consider this information to be irrelevant to this case."[35]

J13. Significantly, a number of highly distinguished Arbitral Tribunals, comprising pre-eminent international jurists, have concluded that the actions of the Russian state in relation to the applicants and Yukos were politically and economically motivated. Those conclusions were reached after hearing oral evidence from factual as well as expert witnesses as well as oral argument. See further in particular, the discussion

[33] See *Aleksanyan v. Russia,* no. 46468/06, 22 December 2008. The allegations in relation to the investigators are at §77, §86 and §130 The Court's conclusions on Article 3 is at § 158 and on Article 5 is at § 196. The conclusions on just satisfaction are at §§ 239 - 240.
[34] See further paragraphs 237 – 242 of the November 2011 Memorial.
[35] See footnote 11 of the Government Memorandum.

below of the findings in the *Spanish Shareholders Award* and in the ECT Decision.

J14. There is unchallenged and undisputed evidence before this Court that demonstrates improper motivation on the part of the authorities for the prosecution of the applicants. Mr Kasyanov, the Prime Minister of the Russian Federation at the time of the applicants' initial arrest, has provided a witness statement to the Court in which he gives evidence of conversations with President Putin in which he was left "*in no doubt that by funding the communists Khodorkovskiy had crossed a line so far as Putin was concerned and that the criminal prosecution case of Yukos employees was started exactly because of the funding of political parties not sanctioned by Putin."* See further the summary of Mr Kasyanov's evidence at paragraphs 394-397 of the November 2011 Memorial and his statement which is at Volume B, tab B2 of that Memorial. The Government of the RF has not challenged Mr Kasyanov's evidence.[36] Mr Kasyanov was Prime Minister of the RF at the material time. He gives evidence of what the then President of the RF personally told him about the real reasons for Mr Khodorkovskiy and Mr Lebedev's arrest and the instigation of the case against the applicants. His evidence, especially when considered in conjunction with the public statements of other leading politicians within the Government and Presidential Administration, provide compelling and direct evidence of the restriction of the applicants' rights for "other reasons" than those permitted by the Convention and so contrary to Article 18:

(a) The then Economic Development and Trade Minister for Russia, German Gref[37], publicly acknowledged in an interview with the BBC on 23 June 2004 that the criminal prosecution of the applicants had "*a certain political element.*" He stated that Yukos had been involved in "*political activities*" and was, therefore, viewed as disloyal to President Putin.

[36] It has been served on the Government in the *Khodorkovskiy (no.1),* the *Khodorkovskiy (no.2)* and the *Lebedev (no.2)* proceedings.
[37] He served as a Minister between 2000 and 2007.

(b) In November 2004 Andrei Illarionov, President Putin's Economic Adviser, said that the Yukos case was not only a legal affair, "*it's an economic and political case.*"[38]

(c) Igor Shuvalov, a Presidential Aide to President Putin at the time of his remarks and now a First Deputy Prime Minister of the Russian Federation, said that Mr Khodorkovskiy was in a Siberian prison camp "*for political reasons.*" Mr Shuvalov commented: "*Once you behead someone you give a good example [to Russia's other tycoons] of how to behave.*"[39]

J15. The bringing of further charges against the applicants in 2007 was deliberately engineered to ensure the applicants' 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.[40]

J16. Mr Putin, then Prime Minister and now President of Russia, made a series of gravely prejudicial public statements concerning the applicants during the trial that culminated, in an extraordinary declaration of the applicants' guilt just before the verdict was delivered. On 16 December 2010 Mr Putin was asked about Mr Khodorkovskiy in a question and answer session that was transmitted throughout the Russian Federation on both television and on radio. The questioner asked, "*I have a very simple question. Do you think it fair that Mikhail Khodorkovsky is still in prison?*" Mr Putin replied by saying *"... **pursuant to a court decision,** Khodorkovsky is accused of theft, and quite a large theft. ... We need to proceed from the fact that Mr Khodorkovsky's **crimes have been proven in court**. ... So there is the court – and, as we know, our court is one of the most humane in the world – and it is its job. I am proceeding from **what has been***

[38] See *RIA Novosti*, 11 November 2004, at Volume C, tab C18 of the November 2011 Memorial.
[39] See Special Report on Russia in *The Economist*, 15 July 2006, at Volume C, tab C37 of the November 2011 Memorial.
[40] 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*." A copy is at tab 98 to this Reply.

proven by the court."[41] Significantly, the Government have not disputed the summary of what Mr Putin said that is contained in the Court's Statement of Facts at § 190:

> "On 16 December 2010 in a TV interview Mr Putin was again asked about Mr Khodorkovskiy. In answering the question Mr Putin said that "*the thief should be in jail*", again compared Mr Khodorkovskiy with B. Madoff [convicted of one of the largest financial frauds in US history], and said that Mr Khodorkovskiy's guilt had been proven in court." [Explanation added].

J17. Putin's statements were met by immediate, widespread condemnation. For instance, Freedom House expressed its "*deep concern about the fairness and impartiality of the pending court decision*". It described the remarks as "*utterly irresponsible and make a mockery of the justice system by overtly prejudging a verdict before the court issues its decision*."[42]

J18. The applicants' second trial was observed each day by an observer from the International Bar Association and in its resulting report the International Bar Association condemned the trial as being "*fundamentally unfair.*"[43]

J19. At the conclusion of the cassational appeal following that trial, 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."[44]

[41] See page 1 of Mr Lebedev's initial cassational appeal, 21 January 2011, copy at tab 139 to this Reply.
[42] *Freedom House Press Release*, "Putin's Remarks on Khodorkovsky Show Blatant Disrespect for Rule of Law," 16 December 2010. This was originally provided to the Court at tab 24 of the application concerning Putin's prejudicial comments that was lodged on 13 April 2011. For ease of reference a further copy is at tab 138 to this Reply.
[43] See *International Bar Association Human Rights Institute*, "The Khodorkovsky Trial", September 2011, at Volume C, tab C237 of the November 2011 Memorial.
[44] 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.

J20. The second trial resulted in what was termed a "*miscarriage of justice*"[45] and "*legal fiction*"[46] by members of the Presidential Council. The comments followed a 3 volume, 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.[47] The report contained opinions provided by distinguished Russian, European and US experts, each of the experts being tasked to report entirely independently. None of the experts found any support whatsoever for the allegations of theft or legalisation that had led to the applicants' conviction. The experts found numerous violations of the substantive and procedural law of Russia. See further below at paragraphs J26 to J29 and the various detailed citations of the experts' reports in Sections G and I above.

J21. On 20 July 2012 the Stockholm Chamber of Commerce delivered the Arbitral Award in the *Spanish Shareholders Award*.[48] 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

[45] 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.

[46] See comment of Tamara Moschakova made upon release of the report at tab 143 to this Reply.

[47] 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 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."

[48] 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 *Spanish Shareholders Award* was supplied to the Court in November 2012 but for ease of reference a copy is attached at Tab 146 to this Reply.

> 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."[49]

J22. Despite the unequivocal findings of the Presidential Council, the RF Supreme Court denied in large measure 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).

J23. Subsequent to Mr Khodorkovskiy's release from prison in December 2013 he has continued his outspoken opposition to the prevailing political regime in Russia. In January 2014 the RF Supreme Court refused to give effect to this Court's unequivocal findings of a violation of Article 1 of Protocol No.1 in *Khodorkovskiy (no.2)* referred to above. The RF Supreme Court refused to recognise as illegal the granting of a civil suit to recover 17 bn roubles from the applicants in their first trial. As a consequence Mr Khodorkovskiy is unable to return to Russia whilst Mr Lebedev has been denied a passport to travel abroad.

J24. 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.*"[50] In its 579 - page decision the Arbitral Tribunal concluded that "*the Russian court proceedings, and*

[49] §§67-68 of the *Spanish Shareholders Award* at tab 146 to this Reply. See also §§ 79-82.

[50] The "ECT Decision" §§ 1580 and 1585 at tab 159 to this 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*." A copy of the Award is at tab 159 to this Reply. 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 decision of the Arbitral Tribunal in *Rosinvestco UK Ltd v. The Russian Federation,* SCC Arbitration V (079/2005), 12 September 2010, is at tab 133 to this Reply.

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."[51] See further paragraphs J30 to J34 below.

J25. For these reasons, set out earlier in the Reply and in some instances developed further below, the applicants strongly maintain their complaint of violations of Articles 6, 7, 8, Article 4 of Protocol No 7 and Article 18.

(c) The Presidential Council report

J26. In January 2011, a decision was adopted by the Presidential Council to conduct a public legal expert examination of the second case against the applicants. President Medvedev was informed of the President Council's intention and agreed that such a report should be commissioned. The Presidential Council subsequently commissioned a number of distinguished independent Russian and international legal experts to report. The Presidential Council imposed strict conditions such that none of the experts were permitted to be remunerated for their work and none could have any conflict of interest that would compromise their independence.[52] As indicated above, none of the experts found any support whatsoever for the allegations of theft or legalisation that had led to the applicants' conviction. They did however find numerous violations of the substantive and procedural law of Russia as well as of international norms. Having considered the expert reports, the Presidential Council issued in December 2011 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.*"

J27. 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*:"

[51] § 1581 of the ECT Decision at tab 159 to this Reply. See also §§ 678-700.
[52] See the introduction to the Presidential Council report that set out the ten principles that guided the commissioning of the independent experts – p.4-5 of the Report. A copy of the report is at tab 140 to this Reply.

"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 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.

In connection with this, taking into account the effective means of legal defence that exist in the system of national justice, it is imperative:

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;

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 - in connection with fundamental violations in the course of proceedings in the case that testify to a miscarriage of justice committed in its resolution"[53] (Emphasis added).

J28. Subsequently the independent experts and individuals responsible for commissioning the reports were subjected to harassment and intimidation by the Russian authorities. Professor Tamara Morshchakova, a former Constitutional Court judge and one of the country's most influential lawyers, along with Mr Mikhail Subbotin, a distinguished economist[54] and Professor Sergei Guriev, a similarly distinguished economist[55] as well as Professor Astamur Tedeev, a leading tax academic,[56] and a number of other individuals connected with the Presidential Council were all questioned by the Investigative Committee. Another expert, Anatoliy Naumov, head of the criminal legal disciplines department at the Academy of the General Prosecutor's Office of the Russian Federation, was forced to leave the Academy of the

[53] The report is at tab 140 to this Reply.
[54] At the time of the publication of the report he was the General Director of the "Center for Legal and Economic Studies," general director of the scientific-consulting company "SRP-Expertiza" and a senior research fellow of the Institute of World Economy and International Relations of the RAS.
[55] At the time of the publication of the report he was the Rector of the New Economic School.
[56] At the time of the publication of the report he was the deputy director of the Scientific and Methodological Centre of the "UNESCO Department on Copyright and Other Intellectual Property Rights" at the NRU "Higher school of economics" and Deputy Chair of the Council for Legal Questions under the Presidium of the State Academy of Sciences of the Russian Academy of Education.

General Prosecutor's Office after writing his report. In response to this harassment, the Chairman of the Presidential Council, Mr Mikhail Fedotov, stated:

> "Everything that is happening today in relation to the persecution of the experts who took part in the independent expert analysis for the Council for Human Rights under the president, seems like complete phantasmagoria to me. I feel like I am reading a fantasy novel or watching Alexei German's film "Hard to be a God." This is completely beyond the realm of legal reality."[57]

J29. When Professor Guriev was questioned he was told he had to divulge his last five years of personal e-mails and he fled to France fearing further harassment. In an interview with *Gazetu.Ru*, Professor Guriev explained why he had left Russia:

> "I … believe it was dangerous for me to stay in Russia. Technically, there are no charges against me; I still have the status of a witness. But it has been my experience that the Investigative Committee officers cannot be trusted. Investigators claimed they wished to question me, but came instead with a search warrant and a court order to seize my e-mails (incidentally, the illegality of the search warrant and court order were obvious to anyone who read them). When I told the Investigator he had promised one thing but done another, he did not answer. So I have no reasons to believe the Investigative Committee's activities are in the least bit trustworthy."[58]

(d) The ECT Decision

J30. In a 579 - page Decision, an Arbitral Tribunal comprised of eminent jurists (The Hon L.Yves Fortier, Dr Charles Poncet and Judge Stephen Schwebel), concluded that the Russian Federation had breached Article 13 of the ECT in that its actions had been equivalent to the expropriation of Yukos and its actions did not show due process of law.[59] It did so on the basis of an exhaustive examination of documentary material[60] as well as a ten - day hearing on jurisdiction and admissibility in The Hague in 2008 and a further ten - day hearing on merits in 2011. The Tribunal heard live witness evidence as well as detailed oral submissions. There can be no doubt but that the claimants' case that Yukos was unlawfully expropriated as part of a political campaign against the applicants was subjected to the most considerable scrutiny.

J31. The applicants invite the Court's particular attention to the following:

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[57] See "The experts' case – take two", 3 June 2013, at tab 149 to this Reply.
[58] See report at tab 150 to this Reply.
[59] See §§1580 and 1585 of the ECT Decision. See also §§ 698 - 700 of the Decision. The ECT Decision is at tab 159 to this Reply.
[60] The written submissions of the Parties spanned more than 4,000 pages and the transcripts of the hearings more than 2,700 pages. Over 8,800 exhibits were filed with the Tribunal – see § 4 of the Decision. Tab 159 to the Reply.

(i) The Tribunal's acceptance of the evidence of Dr Andrei Illarionov who served as the Chief Economic Adviser to President Putin from April 2000 until December 2005. The Tribunal

> "145…..asked Dr. Illarionov whether he had ever felt able to discuss with President Putin the arrest of Mr. Khodorkovsky and the measures of the Russian Government in respect of Yukos. He replied:
>
> "the most important conversation that I had with Mr. Putin was several days after Mr. Khodorkovsky had been arrested . . . . Mr. Putin has said that Mr. Khodorkovsky has made mistakes and behaved pretty badly . . . . And for a long time Mr. Putin himself was protecting Mr. Khodorkovsky from these attacks of his friends, of Mr. Putin's friends, but unfortunately Mr. Khodorkovsky continued to behave badly, and not cooperatively... One thing, he said that Mr. Khodorkovsky lied to us because he was in negotiations with American oil company about possible merger. . . .
>
> So he said that after protecting Mr Khodorkovsky for some time—now it's almost a quotation—"I decided and I stepped aside to allow Mr Khodorkovsky to solve his problems with the boys by himself." . . ."so Mr Khodorkovsky has chosen to fight. Okay," said Mr Putin, "if he has chosen to fight, let him to fight and we'll see what will happen."
>
> 146. The Tribunal also asked Dr. Illarionov about the 50-person special unit that, according to paragraph 35 of his statement, was set up at the Russian General Prosecutor's office to work exclusively on "fabricating" evidence against Mr. Khodorkovsky and Yukos and, in particular, whether he could identify the sources on which he relied for that statement. He could not disclose the identity of his source—due to that individual still residing in Moscow and thus facing "serious risks" but his source was a "very high-placed official in the Russian administration at the time" and was very reliable. Dr. Illarionov testified that the official had told him that the targeting of Yukos was "a big mistake … but it is a mistake that would be impossible to stop . . . . This unit has been created to 'zanyatsa' Khodorkovsky, [meaning to]
> 'take care of' Khodorkovsky . . . which means one day . . . security services and officers did receive an order so-called to solve the problem.
> …
>
> 780. In response to a question from a member of the Tribunal, Dr. Illarionov testified about a conversation he had with President Putin shortly after the arrest of Mr. Khodorkovsky. According to Dr. Illarionov, President Putin explained that Mr. Khodorkovsky had "behave[d] badly" and stopped "cooperating," for example by negotiating with an American oil company about a possible merger and supporting the Communist Party in advance of the Duma elections. Following these actions, President Putin decided to "step aside" and allow Mr. Khodorkovsky to fend for himself against "the boys." Dr. Illarianov also recalled that there was wide "public outrage" in the mass media. The then Prime Minister, Mr. Mikhail Kasyanov, publicly disapproved of the arrest. Dr. Illarionov referred to President Putin's order that "I would ask everybody in the Government to shut up on Mr. Khodorkovsky's

arrest," and it was very clear to him that this comment was addressed to Mr. Kasyanov, who was later removed from his position.

….

799. The Tribunal found Dr. Illarionov to be a credible and convincing witness. He offered a satisfactory explanation for protecting the source of his information about the special unit. The Tribunal does not consider his evidence impeached merely because he had not come forward earlier with his evidence about the special unit nor that he stayed for a certain period in his position working for the President."

(ii) The Tribunal's acceptance of the evidence of Mr Nevzlin, one of the applicants' colleagues, who gave evidence before the Tribunal and who was cross-examined by counsel for the Russian Federation:

"800. Similarly, Respondent attacks the credibility of Mr. Nevzlin's testimony on the basis that he had waited until 2010 to disclose certain facts, such as what Mr. Abramovich had told him about Mr. Khodorkovsky being targeted for political reasons. When pressed as to why he had not disclosed the information in the earlier Russian criminal proceedings or the ECtHR proceedings, Mr. Nevzlin gave the following explanations:

[I]f I had spread the information about Abramovich and Putin fairly broadly, and if it had become available to the public, then from the perspective of Khodorkovsky, who is in Russian prison, I would have damaged him. . . . I would have caused him tremendous amounts of harm. . . . in the other corner facing him were Putin, Sechin and others; but I also would have turned Abramovich into an enemy of Khodorkovsky by disclosing this information.

. . .

[After] things moved to a second absurd set of charges and a second trial, Khodorkovsky's position changed radically. He was no longer wary of a political . . . confrontation with Putin's regime because he realised that he was not going to be able to find truth in a Russian court if he tried to defend himself based on the laws . . .

. . .

Russian courts have no interest in my position: it would be either ignored or rejected by them. Because it's not a judge who makes decision on Khodorkovsky and Lebedev; the judge just rubber-stamps decisions that are made by investigative committee and Prosecutor's Office. . . . The fact that I trust this court and tell this court a lot more than I've ever said on the matter, this is a typical position for me, because . . . if we're able to defend our interests, that would be either in courts in free countries or international courts.

801. The Tribunal accepts Mr. Nevzlin's explanations."

(iii) The Tribunal's acceptance of the Claimants' witnesses who testified about a sustained campaign of harassment and intimidation conducted by the Government against Yukos and the acceptance of the "*central submission*" of the Claimants "*that the Russian authorities were conducting a* "*ruthless*

campaign to destroy Yukos, appropriate its assets and eliminate Mr. Khodorkovsky as a political opponent":

> "802. During the Hearing on the Merits, the Chairman of the Tribunal invited Respondent's counsel:
>
> > "to address the allegations of harassment: Rieger being presented by the Prosecutor's Office with a statement, "Just sign here on the bottom line"; the number of Yukos employees who were detained; Misamore, who was told "You shouldn't go back to Russia"; the campaign to make life impossible for Yukos-related officials, officers? That stands uncontradicted on the record right now. And it bothers us, my colleagues and me, and we would like to hear from the Respondent in respect of these matters.
>
> 803. With respect to Mr. Rieger, Respondent's counsel pointed out that the incident had occurred in 2006, several years after the arrest of Mr. Khodorkovsky and that "it's not atypical that an investigatory agency would have an idea of what they think a witness does or doesn't know, and might suggest to that [witness] what that evidence is and then find out from the witness whether they agree with it or disagree with it. Mr. Rieger said he didn't agree, and he didn't sign it." The Chairman recalled: "He was threatened, he was detained at the airport. This is background that speaks about the atmosphere. The Russian authorities are seen as being out to get Yukos." Respondent's counsel explained that: "I think that what you are seeing is the authorities having established that there was quite substantial fraud at many, many different levels of activity within a large company."
>
> 804. The Tribunal accepts the evidence of Claimants' witnesses who testified with respect to the campaign of harassment and intimidation conducted by Respondent against Yukos.
> …
> 811. The Tribunal accepts that the Russian Federation had the power to conduct searches and seizures in Yukos' premises during the ongoing criminal investigations. Nevertheless, having reviewed the record, the Tribunal finds that the investigation of Yukos was carried out by the Russian Federation with excessive harshness. Respondent's counsel acknowledged that in the context of the large-scale fraud investigation "not everything is pretty in those circumstances, and we may each of us have circumstances that we would regret or have done differently." The Tribunal considers "not pretty" to be an understatement in this case. The treatment of Yukos senior executives, mid-level employees, in-house counsel, external lawyers and related entities as described in this chapter support Claimants' central submission that the Russian authorities were conducting a "ruthless campaign to destroy Yukos, appropriate its assets and eliminate Mr. Khodorkovsky as a political opponent".
> …
> 820. Having reviewed the abundant evidence in the record of the intimidation and harassment of Yukos' senior executives, mid-level employees, in-house counsel and external lawyers by the Russian authorities, the Tribunal is convinced that such intimidation and harassment not only disrupted the operations of Yukos but also contributed to its demise and thereby damaged Claimants' investment."

(iv) The Tribunal's conclusion that PWC had been subjected to improper pressure to withdraw their audits of Yukos:

> "1253. ..[T]he pressure mounted by the Russian authorities against Yukos' auditors, which led to PwC's eventual withdrawal of its audits and even to a PwC auditor testifying against Messrs. Khodorkovsky and Lebedev at their second trial, informs the Tribunal's view that Yukos was the object of a series of politically-motivated attacks by the Russian authorities that eventually led to its destruction, as alleged by Claimants."

J32. In reaching its conclusions, the Tribunal observed at § 1581:

> "… whether the destruction of Russia's leading oil company and largest taxpayer was in the public interest is profoundly questionable. It was in the interest of the largest State-owned oil company, Rosneft, which took over the principal assets of Yukos virtually cost-free, but that is not the same as saying that it was in the public interest of the economy, polity and population of the Russian Federation."

J33. Whilst evaluating the actions of the Russian Federation against Yukos Oil and whether those fulfilled the principle of due process of law as established in Article 13(c) of the Energy Charter Treaty, the Tribunal were highly critical of the applicants' prosecution and their treatment in the first and second trials. At §1583 the Tribunal stated:

> "… Yukos was subjected to processes of law, but the Tribunal does not accept that the effective expropriation of Yukos was "carried out under due process of law"... The harsh treatment accorded to Messrs. Khodorkovsky and Lebedev remotely jailed and caged in court, the mistreatment of counsel of Yukos and the difficulties counsel encountered in reading the record and conferring with Messrs. Khodorkovsky and Lebedev, the very pace of the legal proceedings, do not comport with the due process of law. Rather 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."

J34. The applicants submit that the ECT Decision offers very strong support, both in the findings set out above and in the findings set out at § 698-700 of the Decision, for their contention that their Convention rights have been restricted for "other reasons", contrary to Article 18.

(e) The refusal to implement the Court's judgment in Khodorkovskiy (no. 2)

J35. As noted above, in *Khodorkovskiy (no.2)* the Court found that the entirety of the civil damages award made against Mr Khodorkovskiy at the end of the first trial was a breach of Article 1 of Protocol No 1. The Court said the Meshchanskiy District

Court's judgment "*had no support either in the law or in judicial practice*"[61] and concluded that "*neither the primary legislation then in force nor the case-law allowed for the imposition of civil liability for unpaid company taxes on that company's executives. This leads the Court to the conclusion 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.*"[62]

J36. Article 413 (2) (2) and (4) (2) of the RF CCrP provides that a finding by the Court of a breach of the provisions of the Convention is a ground for resuming proceedings in the criminal case. On 25 December 2013 the Chairman of the Supreme Court of the Russian Federation, V.M. Lebedev, filed a submission "*for resuming of proceedings in the criminal case in relation to M.B. Khodorkovskiy and P.L. Lebedev, who were convicted under a verdict of the Meshchanskiy District Court of the city of Moscow of 16 May 2005, in view of new circumstances.*"

J37. On 23 January 2014 the Presidium of the RF Supreme Court considered Chairman Lebedev's submission as well as the supervisory appeals by the defence in relation to the verdict of the Khamovnicheskiy District Court of the city of Moscow of 27 December 2010.

J38. It is to be noted by that time it had become absolutely clear that there was no tax liability to the budget and that the false claim by the tax authorities for RUR 17.4 bn was being intentionally used with improper legal, economic, and political motives in order to cause the most significant damage to the applicants. Similar charges had been brought against other individuals by the investigative and tax authorities and it had been found that all the tax claims made against Yukos and its affiliates in reference to the said period of time had been settled in the course of Arbitrazh proceedings back in 2004 (i.e. before a verdict was issued against the applicants in May of 2005), and criminal cases against the other persons were closed.[63] It is wholly inconsistent for the

[61] § 883 of the judgment in *Khodorkovskiy (no. 2)*.
[62] § 885 of the judgment in *Khodorkovskiy (no. 2)*.
[63] The tax claims against Yukos had been paid back in 2004 in the course of enforcement proceedings as per judgments of Arbitrazh courts that had taken legal effect prior to the issuance of the Meshchanskiy District Court's verdict. This fact was officially and unambiguously confirmed with regard to the applicants in a reply by the Federal Tax Service received in May of 2013 in response to a query from their lawyers see. The complete background may be summarised as follows:

tax authorities to claim that there is an outstanding tax debt in circumstances where they have confirmed that there was no debt outstanding.

J39. The RF Supreme Court's Presidium's findings in relation to this Court's findings of a breach of Article 1 of Protocol No 1 were, with respect, opaque if not incoherent:

> "The European Court of Human Rights found there had been violations of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, having stated in its judgment that neither the Russian legislation then in force nor the case-law allowed for the imposition of civil liability for unpaid legal entity taxes on that legal entity's (organization) executives; therefore, the collection of unpaid legal entity taxes to the state from NK Yukos officials had been arbitrary and could be regarded as interference with the right to respect of one's property.
>
> Meanwhile, special features of the nature of civil liability of M.B. Khodorkovskiy and P.L. Lebedev as applied to the concrete circumstances of this criminal case are predetermined and conditioned, first and foremost, by the fact that the pecuniary damage was caused to the state by the criminal actions of the convicts who committed tax evasion by unlawful inclusion in the tax returns of the information about tax benefits, acting on behalf of sham legal entities OOO Business-Oil, Mitra, Wald-Oil, and Forest-Oil, rather than on behalf of legitimate legal entities, which is an integral part of objective side of the crime M.B. Khodorkovskiy and P.L. Lebedev were convicted for.
>
> In regard to what has been set out above, the Presidium of the Supreme Court of the Russian Federation finds no grounds for repealing the verdict of the Meshchanskiy District Court of the city of Moscow of 16 May 2005 or subsequent court decisions, including as concerns the resolution of the civil suit." [64]

J40. As stated above, the RF Supreme Court's decision has had the consequence that Mr Khodorkovskiy is unable to return to Russia whilst Mr Lebedev has been denied a

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(a) A December 12, 2011 order by V.N. Malyshev, the head of the investigative department for special major cases of the Main Investigative Directorate of the RF Investigative Committee, closed criminal case No. 201/713134-11 and the criminal prosecution against I.Ye. Golub. The order stated that "it was established in the case that in 2000 I.Ye. Golub, while acting by previous concert with M.B. Khodorkovskiy and P.L. Lebedev and other unidentified individuals, had arranged tax evasion". The order goes on, "According to a letter by deputy head of the FTS of Russia dated December 15, 2011, OAO NK YUKOS' arrears in the form of taxes, fines, and penalties for the year 2000, which arose as a result of tax control measures**, were paid in full** by the Federal Bailiffs Service in execution of enforcement order No. 383729 issued by the Arbitrazh Court of the city of Moscow on May 26, 2004." (Emphasis added).

(b) The Zamoskvoretskiy court of the city of Moscow examined a criminal case against former CEO of OOO Business-Oil A.V. Spirichev accused of similar tax evasion to the charges against Mr Khodorkovskiy and Mr Lebedev. The Federal Tax Service of Russia that had been recognised as an injured party in the case against Mr Spirichev but did not pursue a claim for damages against him. RAPSI reported on 16 August 2012, "A representative of the injured party stated at a court session on Monday that 'the FTS does not have any claims against YUKOS or its affiliated entities. The entire YUKOS debt was settled during the company's bankruptcy proceedings."

See http://rapsinews.ru/judicial_news/20120716/263809952.html, copy at 145 to this Reply.

[64] See Decree of the Presidium of the RF Supreme Court of 23 January 2014 at tab 156 to this Reply.

passport to travel abroad. It is yet a further instance of the denial of justice to the applicants by the domestic courts, demonstrating once again the underlying bad faith of the respondent state. Despite all of this, Mr Khodorkovskiy has continued to be an outspoken critic of the political regime in Russia.[65]

What should be the test for a breach of Article 18?

(a) Introduction

J41. Article 18 of the Convention provides:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

J42. It is to be noted that the wording of Article 18 suggests "improper purpose" or "improper motivation" for restricting Convention rights and freedoms. As such the authorities may not necessarily be acting in "bad faith", a phrase which implies dishonesty. An improper purpose is simply a purpose other than the purpose or purposes for which a discretionary power is conferred – see the judgment of the Judicial Committee of the Privy Council in *Municipal Council of Sydney v. Campbell* [1925] AC 338 at 343.

J43. The case law of the Court in relation to Article 18 has established:

(a) Article 18 has a subsidiary character within the Convention: that is to say, Article 18 only operates in conjunction with another Article of the Convention. Thus, there can never be a finding of a breach of Article 18 alone;

(b) Article 18 only operates in conjunction with one of the rights under the Convention that is subject to permissible restrictions.[66] Thus, it can operate in

[65] See examples of the media reporting of Mr Khodorkovskiy's release: the BBC report of 22 December 2013 at tab to this Reply and the "*Q. and A. with Mikhail B. Khodorkovsky*" in the *New York Times*, 22 December 2013 at tab 153 to this Reply. See also Mr Khodorkovskiy's interview with the *Sunday Times* in which he he discussed his "*global campaign to transform Russia into a democracy with an independent judiciary, a viable opposition and free and fair elections.' In a nutshell, 'everything' that Putin, the man who jailed him and has ruled the country with an iron fist for 14 years, 'does not want', he concedes with a wry smile*" (copy at tab 162 to this Reply). See also Mr Khodorkovskiy's interview with Andre Glucksman and Bernard-Henri Levy the *Huffington Post* in which Mr Khodorkovskiy discussed the circumstances of his release from detention (copy at tab 158 to this Reply).

[66] See as authority for the propositions in sub-paragraphs (a) and (b) the Commission's decision in *Kamma v. Netherlands* (Eur. Comm. HR, Rep.14.7.1974, 1 D.R. p. 4): "*Article 18, like Article 14 of the Convention, does*

conjunction with the right to liberty in Article 5 (which is subject to permissible restrictions);[67]

(c) As with Article 14 (the prohibition against discrimination), the right in Article 18, though subsidiary, has been given a particular character in the case law of the Court such that Article 18 can be violated in conjunction with a principal provision of the Convention, even though the latter provision was not violated: as the Court said in *Gusinskiy v. Russia,* no. 70276/01, ECHR 2004-IV, 19 May 2004 at § 73 "*There may, however, be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone;"*

(d) An applicant must adduce at least "*prima facie evidence pointing towards the violation of that provision*" (*Oates v. Poland* (dec.), no. 35036/97, 11 May 2000).

(b) Restriction of Convention rights motivated "in part" by ulterior purposes

J44. In *Gusinskiy* the Court found a violation of Article 18, notwithstanding the fact that it concluded that the applicant's detention was justified by "*reasonable suspicion.*" The issue was whether his detention was ***also*** motivated by a reason not provided for by the Convention:

> "74. The Court has found in paragraphs 52 to 55 above that the applicant's liberty was restricted 'for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence'. However, when considering the allegation under Article 18 of the Convention the Court must ascertain whether the **detention was also, and hence contrary to Article 18, applied for any other purpose than that provided for in Article 5 § 1 (c).**
>
> ….

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not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention. There may, however, be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone. It follows further from the terms of Article 18 that a violation can only arise where the right or freedom concerned is subjected to 'restrictions permitted under this Convention.'"

[67] It could not operate in conjunction with the right to security within Article 5 which is a non-derogable right - see *Kamma v. Netherlands*, *op cit*: *"Article 5 (1) guarantees "the right to liberty and security of person". The "right of security" of person is guaranteed in absolute terms. This means that there can be no violation of Article 18 in conjunction with this right. The "right to liberty" may be restricted in accordance with sub-paras. (a) to (f) of Article 5. There may, therefore, have been violation of Article 18 in conjunction with the applicant's right to liberty under Article 5."*

> 77. In such circumstances the Court cannot but find that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) **was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons.**" (Emphasis added).

J45. Thus it was in *Sisojeva and Others v. Latvia*, no. 60654/00, 15 January 2007, that the Grand Chamber summarised the basis of the positive Article 18 finding in *Gusinskiy* as being made because the applicant's detention was "*motivated **in part** by reasons other than those provided for in the Convention*" (at § 129, emphasis added).

J46. In contradistinction, in *Khodorkovskiy (no. 1)* the Court determined that Mr Khodorkovskiy had to establish that the improper purpose was the sole motivation for the prosecution. In *Khodorkovskiy (no. 2)* the Court appeared to hold that a "mixed" intent in prosecuting the applicants in the second trial did not mean that there had been a breach of Article 18 and that the question was whether the improper motivation was decisive or the "*fundamental aim*"– see § 907-908:

> "The Court reiterates in this respect its approach in the case of *Handyside v. the United Kingdom* (judgment of 7 December 1976, Series A no. 24), where the Court found that although there had been a political element in the decision to ban the distribution of the applicant's book, it was not decisive (see § 52 of the judgment), and that the "fundamental aim" of the conviction was the same as proclaimed by the authorities which was "legitimate" under Article 10 of the Convention.
>
> … Elements of "improper motivation" which may exist in the present case do not make the applicants' prosecution illegitimate "from the beginning to the end."

(c) Standard of proof – the case law thus far

J47. In *Oates v. Poland* (dec.), no. 35036/97, 11 May 2000, the Court declared the applicant's Article 18 complaint inadmissible on the basis "*he has not submitted any prima facie evidence pointing towards the violation of that provision*." In *Khodorkovskiy (no.1*) however the Court rejected the argument that "where a *prima facie* case of improper motive is established, the burden of proof shifts to the respondent Government. The Court considers that the burden of proof in such a context should rest with the applicant."[68]

[68] *Khodorkovskiy (no.1)* § 256.

J48. The requirement that to establish a breach of Article 18 an applicant must adduce "incontrovertible and direct" proof sufficient so as "*to conclude that the whole legal machinery of the respondent State in the present case was ab initio misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention*"[69] was also applied for the first time in the *Khodorkovskiy (no.1)* application. It was then applied subsequently in the *Yukos*[70] application. That formulation is self-evidently of a remarkably high standard – higher than the criminal standard of "beyond reasonable doubt" or of being "sure" as "incontrovertible and direct" indicates evidence that simply cannot be disputed in any way at all. Mr Justice Denning (who later became Lord Denning MR) observed in *Miller v. Minister of Pensions* [1947] 2 All ER 372, 373-374 the criminal standard of proof "need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt."

J49. In reaching its conclusion as to the evidential threshold, the former First Section in *Khodorkovskiy (no.1)* referred to the case of *Gusinskiy*.[71] However, the standard of proof applied in *Gusinskiy* was, on analysis, less exacting than that applied in *Khodorkovskiy*. In finding that there was a breach of Article 18, the Court in *Gusinskiy* held that:

> "The facts that Gazprom asked the applicant to sign the July agreement when he was in prison, that a State minister endorsed such an agreement with his signature and that a State investigating officer later implemented that agreement by dropping the charges strongly suggest that the applicant's prosecution was used to intimidate him." § 76 (Emphasis added).

J50. It is clear from this passage that the Court in *Gusinskiy* was prepared to find a violation of Article 18 on the basis of inferences drawn from the available evidence.

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[69] § 260 of the judgment in *Khodorkovskiy (no.1)*.
[70] *OAO Neftyanaya kompaniya YUKOS v. Russia,* no. 14902/04, § 663, 20 September 2011.
[71] See § 260 of the judgment in *Khodorkovskiy (no.1)*: "The Court admits that the applicant's case may raise a certain suspicion as to the real intent of the authorities, and that this state of suspicion might be sufficient for the domestic courts to refuse extradition, deny legal assistance, issue injunctions against the Russian Government, make pecuniary awards, etc. However, it is not sufficient for this Court to conclude that the whole legal machinery of the respondent State in the present case was *ab intio* misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention. **This is a very serious claim which requires an incontrovertible and direct proof. Such proof, in contrast to the *Gusinskiy* case, cited above, is absent from the case under examination.**" (Emphasis added).

J51. In contradistinction to that approach, the Court said in *Khodorkovskiy (no.1)* that an applicant must establish that the reason for his detention is ***solely*** prompted by reasons other than those provided for in Article 5 of the Convention and, moreover, that his prosecution from "start to finish" was infected with "bad faith and in blatant disregard of the Convention."[72] In no previous case has the Court applied such a test.

J52. Moreover, although *Khodorkovskiy (no.1)* has always been cited in subsequent cases concerning Article 18, it is only in the *Yukos* judgment that the Court has expressly stated that an applicant is required to adduce "*incontrovertible and direct*" evidence. Equally in all subsequent Article 18 cases other than *Khodorkovskiy (no.2)* the Court has considered the Article 18 claim by reference to a discrete phase in the applicant's prosecution rather than determining it on the basis of whether the prosecution from "start to finish" was infected with "bad faith and in blatant disregard of the Convention."[73]

J53. Further, even in *Khodorkovskiy (no.2)* the Court did not explicitly invoke the "*incontrovertible and direct*" evidential test. It stated that it could not "*ignore its own findings in Khodorkovskiy (no.1) and Yukos and will take them into account when assessing the parties' arguments in the present case*" (§ 897 of the judgment) and indicated that because of the scarcity of the Article 18 caselaw it must show "*particular diligence*" in examining "*each new case where allegations of improper motives are made*" (§ 898 of the judgment). The evidential test that the Court seemed to apply in *Khodorkovskiy (no.2)* was of "*convincing*" proof – "*the applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed*" (§ 899 and § 903 of the judgment).

J54. In *Tymoshenko v. Ukraine*, no. 49872/11, § 299, 30 April 2013, the Court adopted the same evidential test that it had applied in *Lutsenko v. Ukraine*. no. 6492/11, §§ 108-09, 3 July 2012, a test which appears to be less exacting than "*incontrovertible and direct proof*." In both of the Ukrainian cases the Court found a violation of Article 18 and said that an applicant "*alleging that his rights and freedoms were limited for an*

[72] § 260 of the judgment.
[73] § 260 of the judgment.

improper reason must ***convincingly*** *show that the real aim of the authorities was not the same as that proclaimed or as can be reasonably inferred from the context*" (paragraph 106 of the *Lutsenko* judgment, emphasis added, and paragraph 294 of the *Tymoshenko* judgment). The evidential threshold appears to be a high one – the need is for "*convincing*" evidence – but it is undoubtedly expressed in far less stringent terms than those used in *Khodorkovskiy (no.1)*.

J55. Finally, in the most recent case concerning Article 18, *Mammadov v. Azerbaijan* no. 15172/13, 22 May 2014, although the Government sought to rely on *Khodorkovskiy (no.1)* by arguing that the applicant's Article 18 allegation required "*incontrovertible and direct proof*" that "*the whole legal machinery of the respondent State in the present case was ab initio misused and that, from the beginning to the end, the authorities were acting in bad faith and in blatant disregard of the Convention*" (§ 135 of the judgment), the Court, once again, did not invoke such an exacting standard. First, as in *Lutsenko* and *Tymoshenko*, it concluded that it was able to examine the Article 18 complaint by reference to a distinct phase in the prosecution of the applicant (pre-trial detention),[74] and secondly, it did not apply the test of "*incontrovertible and direct proof*." Indeed the Court did not explicitly state what test it was applying. It reminded itself that Article 18 required "*a very exacting standard of proof*" (§ 138 of the judgment) and proceeded to examine the allegation first by noting that the Government had not been able to demonstrate that it had acted in good faith as the charges had not been based on "*reasonable suspicion*" (§ 141 of the judgment). The Court observed "*that conclusion in itself is not sufficient to assume that Article 18 was breached, and it remains to be seen whether there is proof that the authorities' actions were actually driven by improper reasons*." The Court then proceeded to conclude that "*case-specific*" factors in relation to the timing of the charges demonstrated "*to a sufficient degree*" that "*the actual purpose of the impugned measures was to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed was the true information that the Government were trying to hide*." (§§ 142-143 of the judgment).

[74] See §§ 139-140 of the judgment.

(d) Construing the evidential test for a breach of Article 18

J56. The applicants submit that the test to be applied by the Court to a claim for a breach of Article 18 must accord with the fundamental principle of the Convention that rights under the Convention should be construed and interpreted so as to give them real effect (as the Convention "*is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive*" (*Artico v. Italy,* no. 6694/74, 13 May 1980, Series A no. 37, § 33)). As the Grand Chamber observed in *Nachova v. Bulgaria,* no. 43577-9/98, judgment of 6 July 2005 at § 147 (in the context of a claim for a breach of Article 14):

> "The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof."

J57. The protection offered by Article 18 represents an important bulwark against political regimes acting in bad faith or for an improper purpose. The *travaux préparatoires*[75] for Article 18 demonstrate that the drafters of this provision were concerned to ensure that an individual is given effective protection from the imposition of restrictions imposed for improper reasons. Whilst it is accepted, as the Court stated in *Khodorkovskiy (no.1)* at § 255, that the "*whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith*", in interpreting and applying the Convention the overriding consideration is that it imposes "*objective obligations*" upon States for the protection of human rights

[75] The *travaux préparatoires* for Article 18 indicate that the drafters of this provision were concerned to ensure thereby that an individual was protected from the imposition of restrictions arising from a desire of the State to protect itself according "*to the political tendency which it represents*" and the desire of the State to act "*against an opposition which it considers dangerous*":

> "It is legitimate and necessary to limit, sometimes even to restrain, individual freedoms, to allow everyone the peaceful exercise of their freedom and to ensure the maintenance of morality, of the general well-being, of the common good and of public need. When the State defines, organises, regulates and limits freedoms for such reasons, in the interest of, and for the better insurance of, the general well-being, it is only fulfilling its duty. That is permissible; that is legitimate. But when it intervenes to suppress, to restrain and to limit these freedoms for, this time, reasons of state; to protect itself according to the political tendency which it represents, against an opposition which it considers dangerous; to destroy fundamental freedoms which it ought to make itself responsible for co-ordinating and guaranteeing, then it is against public interest if it intervenes. Then the laws which it passes are contrary to the principle of the international guarantee" (Speech of Monsieur Teitgen in presenting the report of the Legal Committee. See CDH (75)11).

in Europe that offer real rather than illusory protection. If Article 18 is to be of any value in protecting individuals from the misuse of power (*détournement de pouvoir*) that Article 18 is designed to afford then the Court must adopt an evidential standard that is sufficiently flexible to enable Article 18 to be given real effect.

J58. In *Khodorkovskiy (no.1) and Khodorkovskiy (no.2)* the Court determined that even where a *prima facie* case of a violation of Article 18 is established the evidential burden of "*incontrovertible and direct proof*" remained on the applicant.[76] Such an approach makes it almost impossible for an individual to prove a political motive as the evidence as to the political motive will almost always be held by the Government.

J59. This was a point forcefully expressed in the Concurring Opinion of Judges Jungwiert, Nußberger and Potocki in *Tymoshenko*. Whereas the majority had found that Article 18 was violated because Ms Tymoshenko had been detained as punishment for lack of respect towards the court, the minority argued that the reasoning of the majority did not address Ms Tymoshenko's main complaint, "*namely that her detention has been used by the authorities to exclude her from political life and to prevent her standing in the parliamentary elections of 28 October 2012.*"

J60. In their Concurring Opinion, the three judges considered the assessment of evidence in Article 18 cases. Whilst they agreed that the European Court is right to apply a very exacting standard of proof, they expressed concerns that the evidential hurdle was set too high. In particular, pointing out the difficulties in ever obtaining evidence of a "*hidden agenda*" from the authorities, they call on the Court "*to accept evidence of the authorities' improper motives which relies on inferences drawn from the concrete circumstances and the context of the* case," otherwise "*the protection granted by Article 18 would be ineffective in practice.*"

J61. The three judges argued that there are five factors to be taken into account in Article 18 cases:

> "First, the wording of Article 18 contains the word "purpose", which necessarily refers to a subjective intention which can be revealed only by the person or persons holding it, unless it is – accidentally – documented in some way (compare, for example, the case of

[76] See § 256 of *Khodorkovskiy (no.1)* and §§ 902-903 of *Khodorkovskiy (no.2).*

Gusinskiy, cited above, §§ 73-78, in which the authorities' intention was clear from an agreement signed between the detainee and a federal Minister for Press and Mass Communications). **Generally, knowledge about what the Court calls a "hidden agenda" is within the sphere of the authorities and is thus not accessible to an applicant. It is therefore necessary to accept evidence of the authorities' improper motives which relies on inferences drawn from the concrete circumstances and the context of the case. Otherwise the protection granted by Article 18 would be ineffective in practice.**

Second, when relying on the circumstances and the context of a case the Court must nevertheless not apply double standards and accept more easily a violation of Article 18 in conjunction with Article 5 or 6 in the case of applicants holding specific prominent positions in society. As the Court stated in the case of *Khodorkovskiy v. Russia*, "high political status does not grant immunity" (see *Khodorkovskiy*, cited above, § 258). **At the same time, in interpreting Article 18 of the Convention the direct link between human rights protection and democracy must be taken into account. If the human rights of politically active persons are restricted for the purpose of hindering or making impossible their participation in the political life of a country, democracy is in danger.**

Third, Article 18 refers to the "restrictions permitted under this Convention to the said rights and freedoms". Under this explicit wording, therefore, this provision not only prohibits "misus[ing] the whole legal machinery of the respondent State *ab initio*" and "act[ing] with bad faith and in blatant disregard of the Convention from the beginning to the end" (see *Khodorkovskiy*, cited above, § 260), but also prohibits the use of specific restrictive measures such as pre-trial detention for improper purposes (see *Lutsenko*, cited above, § 109).

Fourth, it is true that the political process and adjudicative process are fundamentally different. In establishing that the authorities had improper motives in restricting a politician's human rights, the Court cannot accept as evidence the opinions and resolutions of political institutions or NGOs, or statements by other public figures (see *Khodorkovskiy*, cited above, § 259). It must base its finding of a violation of Article 18 of the Convention only on the concrete facts of the case.

Fifth, the Court has held that the burden of proof should rest with the applicant even where a prima facie case of improper motive is established (see *Khodorkovskiy*, cited above § 256). **Nevertheless, that cannot mean that in cases where the authorities cannot advance any "proper motive" it would not be possible to consider an "improper motive" to be proven**."

(Emphasis added)

J62. In her Partly Dissenting Opinion in *Georgia v. Russia*, no. 13255/07, 3 July 2014, Judge Tsotsoria endorsed the approach of Judges Jungwiert, Nußberger and Potocki in *Tymoshenko*:

"As was correctly noted in the joint concurring opinion of Judges Jungwiert, Nußberger and Potocki in *Tymoshenko,* cited above, knowledge about a "hidden agenda" is within the sphere of the authorities and is thus not accessible to an applicant, so the Court should accept evidence of the authorities' improper motives which relies on inferences drawn

from the concrete circumstances and the context of the case. Otherwise the protection granted by Article 18 would be ineffective in practice.
In a democracy a State may limit an individual freedom in the interests of the freedom of all.[77] An abuse of rights occurs whenever a State avails itself of its rights in such a way as to inflict an injury on another State which cannot be justified by a legitimate consideration, that is to say, when its actions, although strictly speaking "legal", are coloured by bad faith."[78]

J63. That approach is consistent with the approach taken by the Grand Chamber to Article 14 (prohibition against discrimination) cases. The Grand Chamber recognised in *D.H. and Others v. The Czech Republic,* no. 57325/00, 13 November 2007, that applicants may have difficulty in proving discriminatory treatment and that consequently less strict evidential rules should apply in the Article 14 context in order to guarantee those concerned the "*effective protection of their rights*" (§ 186 of the judgment).

J64. As a result, in *D.H.* the Grand Chamber adopted a flexible approach to the burden of proof:

"179....The Court has also recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation – *Aktaş v. Turkey (extracts)*, no. 24351/94, § 272, ECHR 2003-V). In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Anguelova v. Bulgaria*, no. 38361/97, § 111, ECHR 2002-IV)."

J65. In Article 14 cases the Court is engaged in the "free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions": see the judgment of the Grand Chamber in *Nachova* at § 147:

"It notes in this connection that, in assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions."

[77] The judge cited the collected edition of the "Travaux préparatoires" of the European Convention on Human Rights. Vol. 5/Council of Europe. The Hague; Boston; London; Dordrecht; Lancaster: Martinus Nijhoff, 1979, p. 290.
[78] The judge cited Guy S. Goodwin-Gill, "The Limits of the Power of Expulsion in Public International Law," *British Yearbook of International Law,* Vol. 47, Issue 1, 1975, pp. 79-80, with further references.

J66. Such an approach is consistent with the Court's overall approach to fact finding: see the Grand Chamber's recent statement of principle and approach in *Hassan v United Kingdom*, no. 29750/09, 16 September 2014:

> "48. In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. It reiterates that, in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions the Court's approach to the issues of evidence and proof. In the proceedings before it, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. **It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.** The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see *El Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, § 151, ECHR 2012).
>
> 49. Furthermore, it is to be recalled that Convention proceedings do not in all cases lend themselves to a strict application of the *principle affirmanti incumbit probatio* (the principle, that is, that the burden of proof lies on the person making the allegation in question). The Court reiterates its case-law under Articles 2 and 3 of the Convention to the effect that where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government. The Court has already found that these considerations apply to disappearances examined under Article 5 of the Convention, where, although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she was officially summoned by the authorities, entered a place under their control and has not been seen since. In such circumstances, the onus is on the Government to provide a plausible and satisfactory explanation as to what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty. Furthermore, the Court reiterates that, again in the context of a complaint under Article 5 § 1 of the Convention, it has required proof in the form of concordant inferences before the burden of proof is shifted to the respondent Government (see El Masri, cited above, §§ 152-153)."

(e) Conclusions on the test to be applied for a breach of Article 18

J67. In conclusion, the applicants invite the Court to adopt the following approach to determining whether there has been a breach of Article 18:

(i) The requirement for "*direct and incontrovertible proof*" by the applicants is inconsistent with the purpose of the Convention and the Court's function under Article 19 "*to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention*";

(ii) It is therefore appropriate for the Court to accept evidence of the authorities' improper motives which relies on inferences drawn from the concrete circumstances and the context of the case – see the Concurring Opinion of Judges Jungwiert, Nußberger and Potocki in *Tymoshenko;*

(iii) Contextual evidence and authoritative opinions may be sufficient to provide "*convincing*" evidence that a Convention right has been restricted for reasons not permitted by the Convention – as the Grand Chamber observed in *Nachova* and most recently in *Hassan*, the Court should adopt "*the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions*";

(iv) As the Court observed in *Khodorkovskiy (no.1)* at § 255, the presumption that a State is acting in good faith or for an improper purpose may be rebutted. However, as knowledge about what the Court calls a "*hidden agenda*" is generally within the sphere of the authorities and therefore not accessible to an applicant the Court should depart from the rigorous application of the principle *affirmanti incumbit probatio*. Consequently when a *prima facie* case is demonstrated that an applicant's rights have been restricted for other reasons then it is for the Government to prove the contrary: i.e. the burden of proof passes to the Government. In accordance with common law principles and the approach adopted by the Court in Article 2, 3 and 5 cases, in the

absence of any, or any satisfactory, explanation then the applicant's allegation will be made out.[79]

(v) As with Article 14 (the prohibition against discrimination), the right in Article 18, though subsidiary, has been given a particular character in the case law of the Court such that Article 18 can be violated in conjunction with a principal provision of the Convention, even though the latter provision was not violated: see *Gusinskiy* § 73 "*There may, however, be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone*." Thus a breach of Article 18 may be established where Convention rights are restricted in part for improper reasons – see *Gusinskiy* §§ 74 and 77. There is no requirement under the Convention that the improper reasons are the "*decisive*" motivation for the restriction on the Convention rights (contrary to the Court's judgment in *Khodorkovskiy (no.2)*). Even, if contrary to the foregoing, the Court concludes that there is such a requirement, the applicants submit that the totality of the material before the Court in the present case enables such a conclusion to be reached.

(vi) As Article 18 only operates in conjunction with another Article of the Convention the Court's task is to examine whether an applicant's complaint of improper motivation has been made out by reference to each of the pleaded violations of the Convention in conjunction with Article 18. The Court's insistence in *Khodorkovskiy (no. 1)* and *Yukos* of "*incontrovertible and direct*" evidence that the authorities had acted from "*start to finish*" in "*bad faith and in blatant disregard of the Convention*" should not be followed. It is inconsistent with the case law of the Convention that establishes that there may be a breach of Article 18 where a Convention right is restricted in part by improper reasons. Moreover, even if a prosecution is brought for reasons permitted by the Convention there may be aspects of an applicant's treatment by the authorities that are not permitted by the Convention. See further the applicants' submissions below in relation to Question 48 posed by the Court.

[79] See *R v. Jacobson and Levy* (1931) App D 478.

J68. The foregoing approach would be consistent with the approach taken to examining claims of "*bad faith*" in other international jurisdictions as well as national legal systems.

How are allegations of "bad faith" on the part of the authorities examined in other jurisdictions, both national and international?[80]

(a) International jurisdictions

(i) Introduction

J69. In their submissions responding to Question 47, the Government assert that as Article 18 of the Convention "*has no analogues in such fundamental international human rights instruments as the Universal Declaration of Human Rights and the International Covenant for the protection of Civil and Political Rights ... it is hardly possible to rely in this regard on any international ... practices*" (paragraph 374 of the Memorandum).

J70. The Government's approach to the Court's question is fundamentally misconceived. Recourse to international practice demonstrating how allegations of bad faith are approached by other international courts and tribunals is both necessary and appropriate. Furthermore, the Government are wrong when asserting that there is no similar provision to Article 18 in other international human rights treaties, failing to take into account Article 30 of the American Convention on Human Rights which provides:

> "Scope of Restrictions
>
> The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

J71. As a treaty, the European Convention on Human Rights must be interpreted according to the international law rules on the interpretation of treaties. This means that it must

[80] As noted above at paragraph J41, the applicant's case is put on the basis that their rights were restricted for improper reasons, i.e. for reasons not permitted by the Convention. On that basis a finding of bad faith is not essential to our complaint.

be interpreted in accordance with the *Vienna Convention on the Law of Treaties* 1969.[81] Article 31(3)(c) of that Convention requires that account is to be taken of *"any relevant rules of international law applicable in the relations between the parties*". To this end, the Court increasingly refers to other sources of international human rights standards when interpreting the Convention in its judgments. It frequently refers to other human rights treaties and relevant international instruments[82] as well as the decisions of bodies applying those instruments.[83] In this regard, it is notable that a treaty may be used for guidance in a particular case whether the respondent state is a party to it or not.[84]

J72. The Court also rightly interprets the Convention against the background of public international law more generally.[85] In accordance with this approach, the Court has emphasised on several occasions that "*the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.*"[86] It is therefore entirely appropriate (and ensures a uniformity of approach) for this Court to have regard to how allegations of bad faith are examined in other international jurisdictions for the purpose of determining the correct test to be applied to alleged violations of Article 18.

(ii) Summary of international jurisdictions

J73. The applicants are aware of no international or national jurisdiction that requires "*incontrovertible and direct*" evidence of bad faith to be adduced by a complainant

[81] See for example *Bankovic v. Belgium and others*, no. 52207/99, 12 December 2001, §§ 55-56.
[82] See for examoke *Al-Adsani v. UK* [GC] 2001-XI (reference to UN Torture Convention); *Jersild v Denmark* A 298 (1994) (UN Racial Discrimination Convention); *Siliadin v. France* [GC] 2005-VII (ILO Conventions); and *Vilho Eskelin and Others v. Finland* [GC] 2007-XX (EU Charter on Fundamental Rights); *A v. UK*, no. 25599/94, 23 September 1998, § 22 (UN Convention on the Rights of the Child); *Finucane v. UK*, no. 29178/95, 1 July 2003 (The Minnesota Protocol - Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the effective prevention and investigation of extra-legal, arbitrary and summary executions); *Dogan and Others v. Turkey*, no. 8803-8811/02, 8813/02, 8815-8819/02, 29 July 2004 (UN Guiding Principles on Internal Displacement).
[83] See for example *Iorgov v. Bulgaria*, no. 40653/98, 11 March 2004, § 52 (UN Human Rights Committee decisions); *Timurtas v. Turkey*, no. 33274/96, 13 June 2000, §§ 79-80 (Inter-American Court of Human Rights decision in Velasquez Rodriguez case).
[84] See for example *Marckx v. Belgium,* No. 6833/74, 13 June 1979, (Children born out of wedlock Convention) and *Demir and Baykara v. Turkey,* [GC] no. 34503/97 (European Social Charter).
[85] *Al-Skeini and Others v. UK*, 7 July 2011 [GC], no. 55721/07, GC (jurisdiction) and *Waite and Kennedy v. Germany* 1999-I; (sovereign immunity). For references to non-human rights treaties see *Glass v. UK* 2004-II; and *Taskin v. Turkey* 2004-X. It is also notable that 'international law' is directly incorporated into Article 7 of the Convention: see *Kononov v. Latvia*, 17 May 2010, no. 36376/04.
[86] See for example *Loizidou v. Turkey*, no. 15318/89, 18 December 1996, §43; *Bankovic v. Belgium and Ors* no. 52207/99, 12 December 2001; *Al-Adsani v. United Kingdom*, no. 35763/97, 21 November 2001.

against the authorities. The applicants have analysed the jurisprudence of the major international courts and tribunals as to the appropriate standard of proof to be applied in such cases. This study has involved a review of the case law of the International Court of Justice, the UN Human Rights Committee, the Inter-American Court of Human Rights, the Mixed Claims Commission, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the WTO Dispute Settlement Body and Appellate Body, international investment treaty arbitral tribunals, the Iran-US Claims Tribunal and the Permanent Court of Arbitration. Rather than requiring "*incontrovertible and direct*" evidence of bad faith, these courts actually require a much lower standard of proof to be adduced by a party alleging bad faith against a State.

J74. The summary analysis below, and the full analysis set out in Annexe 4 to this Reply, indicate that although there are a range of evidential standards applied by international courts and tribunals, a general consistency in approach emerges that parties alleging bad faith against other parties must generally do so to the "*prima facie evidenc*e" standard, the "*preponderance of evidence*" / "*balance of probabilities*" standards or the "*clear and convincing evidence*" standard. Less commonly, some members of the International Court of Justice have required proof to a "*sufficient evidence*" standard. In certain exceptionally rare and grave cases it has been considered appropriate for the International Court of Justice to require proof to the standard of "*beyond reasonable doubt*". However it is notable that even before the various international criminal courts and tribunals, this standard of proof is only applicable to allegations of bad faith when they are formally charged as the crime of contempt of court. The most common standard applied by far across all the international courts and tribunals is the *prima facie* evidential threshold: that is, where the claimant adduces prima facie evidence of bad faith the evidential burden shifts to the Respondent to rebut this evidence.[87]

J75. All of these courts and tribunals universally: (a) allow reliance on circumstantial rather than direct evidence; (b) authorise a State to be ordered to produce further information or evidence negating a prima facie assertion of bad faith; and (c) enable

[87] See for example *Bleier v. Uruguay*, Report of the UN Human Rights Committee, Communication number 30/1978, Views Adopted on 29 March 1982, para 13.3.

the drawing of an adverse inference where a State fails to provide such further information / evidence in circumstances where that evidence is solely within that State's possession.[88]

(iii) The International Court of Justice ("the ICJ")

J76. As a general rule, in cases which do not concern the attribution of international responsibility (such as boundary disputes) the ICJ adopts the balance of probabilities / preponderance of evidence standard.[89] Cases where the international responsibility of a State is involved vary (depending upon the widely varying gravity of the subject matter of the underlying alleged breach of treaty / act of bad faith) between a sufficiency standard, balance of probabilities / preponderance of evidence and a convincing standard.[90] Importantly, even cases where a State is attributed with responsibility for launching military attacks against another State fall into this category.[91] Finally, cases regarding the most exceptional and extreme gravity (such as attributing State responsibility for the crime of genocide, or for knowingly laying a

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[88] ICJ: *Nicaragua v. United States of America* [1984] ICJ Rep 323, § 256; *Case concerning Sovereignty over certain frontier lands*, ICJ Reports, 1959 at § 256; *Bosnian Genocide Case*, § 206; *Oil Platforms Case,* Dissenting Opinion of Judge Owada, §§ 46 and 47.
International criminal tribunals: *Prosecutor v. Delalic*, IT-96-21-A, Judgment, ICTY, 20 February 2001, § 611.
WTO: *Argentina – Textiles and Apparel*, DSR 1998-III, 1033, 1159 (PR); *Canada – Aircraft*, DSR 1999-III, 1377, §§ 1431-3, 1433 (ABR).
Arbitral tribunals: *Methanex Corporation v. United States of America* UNCITRAL, Partial Award, 7 August 2002, at 149; *INA Corp Case* (1985) 8 Iran-US CTR at pp. 373, 382. See also: *Foremost Tehran Inc et al case* (1986) 10 Iran-US CTR at p. 228 and *Sedco Inc case* (1987) 15 Iran-US CTR at p. 23. See also Permanent Court of Arbitration: *France v. Greece*, Claim No. 6, PCA (1956), 23 ILR at p. 678.

[89] The "preponderance of evidence" test was applied in the following boundary dispute cases: *Sovereignty over Certain Frontier Land*, Declaration of Judge Spiropoulos, 232; *El Salvador v. Honduras* 506 para 248 (a border dispute); *Kasikili / Sedudu Island (Botswana v Namibia)* Dissenting Opinion of Judge Rezak, 1233.

[90] Sufficient evidence standard applied in: *Case concerning oil platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 189, pp. 57, 61, 76 (this case related to the firing of missiles at US vessels by Iran); *DRC v. Uganda*, ICJ Rep 79 para 173, 208, 246, 250, 298, 334, 342 (this case related to attacks by Uganda against DRC's embassy); *Nicaragua v. United States of America* [1984] ICJ Rep 323, para 110 (this case related to US military support for contra rebels in Nicaragua).
Balance of probabilities standard applied in: *Certain Norwegian Loans* (Separate Opinion Judge Lauterpacht) [1957] ICJ Rep, p. 39-40 (a case relating to Norwegian loans held by French nationals); *Barcelona Traction Case*, Separate Opinion of Judge Fitzmaurice, 65 para 58 (a case regarding reparations following the bankruptcy of a Canadian company).
Convincing evidence standard applied in: *Nicaragua v. United States of America* [1984] ICJ Rep 323, para 24 (this case related to US military support for contra rebels in Nicaragua); *Democratic Republic of the Congo v. Uganda* (*Armed Activities in the territory of the Congo)* [2005] ICJ Rep 168, p. 91, 207, 237 (a case involving Uganda engaging in military attacks against the DRC on DRC territory); *Application of the Convention on the Prevention of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, § 209 (this finding related to an allegation that Serbia had breached the genocide convention by failing to prevent genocide in Bosnia).

[91] For example *Democratic Republic of the Congo v Uganda* (*Armed Activities in the territory of the Congo)* [2005] ICJ Rep 168, p. 91, 207, 237 (a case involving Uganda engaging in military attacks against the DRC on DRC territory)

minefield in order to damage another State's naval vessels or for committing the international crime of aggression) attract the beyond reasonable doubt standard of evidence.[92]

J77. In a recent case relating to the unlawful detention and expulsion of an individual from a State (i.e. a topic which unusually for inter-State cases is analogous with the allegations of bad faith in these application), the ICJ applied a *prima facie* evidential standard, requiring the Respondent Government itself to prove that it had duly guaranteed the detainee's rights since it alone was in a position to do so.[93] This position is a reflection of the Court's recognition of the need for a flexible evidential standard in cases where direct evidence is likely to be in the exclusive possession of the Respondent Government.[94] In the ICJ's most recent ruling to date, the *Whaling case* between Australia and Japan, the Court likewise placed a heavy emphasis on the Respondent Government being obliged to prove that it had acted in good faith and not in breach of a treaty, rather than requiring Australia to prove that Japan had abused its rights by breaching the treaty.[95]

(iv) The International Criminal Court & ad hoc International Criminal Tribunals

J78. Where a party to proceedings before the *ad hoc* international criminal tribunals alleges that the other party has conducted itself in bad faith during the course of proceedings, the party making the allegation is obliged to make out a *prima facie* evidential case before the Chamber considers the issue.[96]

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[92] Beyond reasonable doubt standard applied in: *United Kingdom v Albania (Corfu Channel Case)* [1994] ICJ Rep, p. 17-18, 69 (this case involved the Albanian Government knowingly laying a minefield to attack British naval vessels); *Cameroon v Nigeria*, Dissenting Opinion of Judge Ajibola, 300-1, § 194 (this case involved Nigeria allegedly committing an act of aggression against Cameroon by occupying several Cameroonian localities on the disputed Bakassi peninsula); *Application of the Convention on the Prevention of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, § 422 (this finding related to the imputing of responsibility for the commission of the crime of genocide to Serbia against Bosnia).

[93] *Case concerning Ahmadadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* Judgment of 30 November 2010, at § 55.

[94] *United Kingdom v Albania* [1949] ICJ Rep, p.18; *Colombia v Peru* [1950] ICJ at §§ 326 – 327.

[95] *Whaling in the Antarctic (Australia v Japan),* Judgment, 31 March 2014, §§ 138-139, § 141, § 226.

[96] *Prosecutor v Sesay et al*, Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution moulding of evidence is impermissible, SCSL, 1 August 2006, §§ 16-18; *Prosecutor v. Nyiramasuhuko et al*, ICTR, Decision on the Prosecutor's allegations of contempt, the harmonisation of the witness protection measures and warning to the Prosecutor's counsel, 10 July 2001, § 7, §12; *Prosecutor v. Simic et al*, ICTY, Scheduling Order in the matter of allegations against Milan Simic and his counsel, 7 July 1999.

J79. Similarly, where there is a dispute as to the ICC's jurisdiction and it is argued that a case should be tried before the national courts in the home State, a party alleging that that State is acting in bad faith must show *prima facie* evidence of bad faith.[97] Only once this *prima facie* evidence is provided is the State concerned obliged to disprove such allegations on the balance of probabilities.[98]

J80. Significantly, the only time when the various international criminal courts and tribunals require allegations of bad faith to be proved beyond the "*balance of probabilities*" standard is when a person's actions in bad faith are actually charged as the criminal offence of contempt of court.[99]

(v) The World Trade Organisation Dispute Settlement Panel & Appellate Body

J81. Although there remains a lack of clarity as to the precise standard of proof applicable in all cases before the WTO Dispute Settlement Panel & Appellate body, the areas of real contention are limited only to whether the applicable standard is the "*preponderance of evidence*" standard or the "*prima facie evidence*" standard. At least one dispute settlement panel – that of *Canada – Dairy (Article 21.5 – New Zealand and US II)* - has outright rejected the application of the standard of "*beyond a reasonable doubt.*"[100] In most cases, WTO dispute settlement panels refer expressly to the *prima facie* case standard[101] whereas application of the "*preponderance of evidence*" standard is generally done infrequently and by implication only.[102] There is

[97] *Prosecutor v. Al-Senussi*, Appeals Chamber Decision on Admissibility, ICC-01/11-01/11-OA6-565, 24 July 2014, §§ 162-167.
[98] *Prosecutor v. Al-Senussi*, Appeals Chamber Decision on Admissibility, ICC-01/11-01/11-OA6-565, 24 July 2014, §§ 162-167. Cf. see discussion in Annex regarding *Prosecutor v Bemba*, Decision on admissibility and abuse of process challenges, ICC-01/05-01/08, 24 June 2010, §§ 68, 72-73, 202-204.
[99] *Prosecutor v. Simic et al*, ICTY, Judgment in the matter of contempt allegations against an accused and his counsel, 30 June 2000, §§ 99 and 100.
[100] *Canada – Measures affecting the incorporation of milk and the exportation of dairy products* – second recourse to article 21.5 of the DSU by New Zealand and the United States, Panel Report, WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, § 5.67.
[101] In *European Communities – Measures concerning meat and meat products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135 at para 104 the Appellate Body defined a prima facie case as "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case." See also: *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, Appellate Body Report, adopted 23 October 2002, at § 270; *United States – Measures affecting the cross-border supply of gambling and betting services,* WT/DS285/R, Panel Report, adopted 20 April 2005, at § 6.12; *US – Measures affecting imports of woven wool shirts and blouses from India,* WT/DS33/AB/R and Corr. 1, Appellate Body Report, adopted 23 May 1997, DSR 1997:1, 323 at § 14.
[102] Indirect references have been made in certain cases such as *India – Autos* where the panel noted in one occasion that the European Communities had "not proven on balance" that a certain proposition was true (*India*

at least one more dated dispute settlement panel report in which a "*sufficiency*" of evidence standard is referred to but this reference appears to be out of step with the general practice of the WTO dispute settlement organs to apply a "*prima facie evidence*" standard.[103]

(vi) The International arbitral tribunals

J82. In respect of the specific issue of proving corruption by a respondent State certain investment treaty arbitral tribunals have held that a party charging government officials with corruption must meet a "*clear and convincing standard of proof*" and that in so doing must "*take the utmost care*" to proffer "*truthful and genuine evidence*".[104] More commonly, other investment treaty arbitral tribunals have applied a lower evidential standard to allegations of bad faith. In *Rompetrol v. Romania* the Tribunal considered that investment arbitration was not subject to rigid regulations of proof and that the standard of proof is the balance of probabilities.[105] Similarly, in *Libananco v. Turkey* it was declared that allegations of serious misconduct do not necessarily require a higher standard of proof but merely an accumulation of persuasive evidence.[106]

J83. The Iran-US Claims Tribunal has generally held that allegations of bad faith require "*clear and convincing evidence for such allegations*".[107] However, despite the application of the "*clear and convincing*" evidential standard to allegations of fraud,

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– *Measures affecting the automotive sector*, Panel Report, WT/DS146/R, WT/DS175/R and Corr. 1, adopted 5 April 2002, § 7.233). More recently, in *US – Upland Cotton (Article 21.5 – Brazil),* the Appellate Body noted that "the Panel's finding … provides a sufficient evidentiary basis for the conclusion that it is more likely than not that the revised GSM 102 programme operates at a loss" (*United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, Appellate Body Report, WT/DS267/AB/RW, adopted 20 June 2008, para 321).

[103] In *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Complaint by India (WT/DS58), Complaint by Malaysia (WT/DS58), Complaint by Pakistan (WT/DS58), Complaint by Thailand (WT/DS58)*, Report of the Panel DSR 1998: VII, 2821, the Panel observed at § 7.14 that: "We [therefore] have to assess the evidence before us in the light of the particular circumstances of this case. This implies that we may consider any type of evidence, and also that we may reach our conclusions regarding a particular claim on the basis of the level of evidence that we consider sufficient."

[104] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009 at 221, available at http://icsid.worldbank.org/; see also Procedural Order No 3 of 29 August 2008, at 28, available at: http://ita.law.uvic.ca/documents/EDFP03.pdf; see in addition: *Westinghouse and Burns & Roe (USA) v. National Power Company and the Republic of the Philippines*, Award of 19 December 1991, published in Mealey's Int Arb Rep, January 1992, Doc B-1, Ad hoc arbitration (UNCITRAL), p. 34.

[105] *Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award on 6 May 2013, §§ 182-184.

[106] *Libananco Holdings Co Limited v. Republic of Turkey,* ICSID Case No ARB/06/8, Award on 2 September 2011, § 125.

[107] *Dadras International et al and the Islamic Republic of Iran et al*, Award No 567-213/215-3 (7 November 1995), 31 Iran US CTR 127, para. 162.

the Iran-US Claims Tribunal has clearly stipulated on a variety of occasions that it will adopt the *prima facie* evidential standard in cases where the other party has failed to produce any evidence rebutting the *prima facie* evidence produced by the claimant.[108]

(vii) Conclusions on international jurisdictions

J84. The foregoing analysis indicates that the most common standard applied across all the international courts and tribunals is the *prima facie* evidence standard. The next most frequently cited standard of proof for alleging bad faith by one party against another is the "*balance of probabilities*" test and the "*clear and convincing evidence*" tests. On this basis, the applicants assert that there is no proper basis in international practice for an "*incontrovertible and direct*" standard of proof to be applied in the present case before the European Court of Human Rights. The approach to Article 18 contended for by the applicants in paragraph J67 above is consistent with the practice of other international jurisdictions.

(b) National jurisdictions

J85. The applicants submit examples of approaches from

(i) A common law jurisdiction (England and Wales); and

(ii) The Respondent state.

(i) England and Wales

J86. In England and Wales an allegation of "*bad faith*" may arise in public law challenges brought by way of judicial review or in tortious actions for damages for misfeasance in public office or the somewhat analogous torts of malicious prosecution and for malicious falsehood. It may also arise in extradition proceedings.

J87. In public law and private law instances there is a requirement for allegations of bad faith or use of power for improper reasons to be clearly pleaded and supported by

[108] *Lockheed Corporation v. Iran*, 18 Ir-USCTR 292, 318 (1988); *Time Inc v Iran*, 7 Ir-USCTR 8, 11 (1984); *International Technical Products v. Iran*, 9 Ir-USCTR 10, 28-9 (1985). See also: *Rockwell v. Iran* (1989) 23 Iran –US CTR at p. 188.

"*cogent evidence*". In *R (Amraf Training plc) v. Department for Education and Employment* [2001] EWCA Civ 914 Buxton LJ said "*such a complaint, in public law proceedings as much as in private law proceedings, has to be clearly pleaded and, when clearly pleaded, established by cogent evidence, including, if need be, cross-examination of those who give evidence in a contrary sense.*"

J88. In both instances however it is important to note that once an allegation of bad faith has been pleaded by a complainant the relevant public authority will be required to respond fully to the allegation. In a private law action, that response will be in a defence followed by comprehensive disclosure of documents.

J89. Where such an allegation is made in public law proceedings then the respondent public authority has a "*duty of candour*" to respond in full to the allegation. This has been described as "a *very high duty on central government to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide*." *R (on the application of Al Sweady and others) v. The Secretary of State for Defence* [2009] EWHC 2387 (Admin).

J90. That duty means, as Lord Donaldson MR explained in *R v. Lancashire County Council ex p. Huddleston* [1986] 2 All ER 941, that the litigation must be conducted with "*all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands*":

> "This development [i.e. the remedy of judicial review and the evolution of a specialist administrative or public law court] has created a new relationship between the courts and those who derive their authority from public law, **one of partnership based on a common aim, namely the maintenance of the highest standards of public administration** … The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally **explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities.** It is not discreditable to get it wrong. **What is discreditable is a reluctance to explain fully what has occurred and why…** Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with **all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands" (**emphasis added**).**

J91. Thus, when responding to an application for judicial review, public authorities must be open and honest in disclosing the facts and information needed for the fair

determination of the issue (*Secretary of State for Commonwealth Affairs v. Quark Fishing Ltd* [2002] EWCA Civ 1409).

J92. Similarly in private law actions for damages where "*bad faith*" is pleaded the defendant will have to not only plead its defence but provide disclosure of documents bearing on that issue. The allegation most commonly arises in the tort of misfeasance in a public office, a tort which originated in the electoral corruption cases of the late seventeenth century, was expanded in the nineteenth century to cover the liability of judges of inferior courts for malicious acts within their jurisdiction, and has now been authoritatively defined in the speech of Lord Steyn in *Three Rivers DC v. Bank of England (No.3)* [2003] 2 A.C. 1 Lord Steyn explained that there were two different forms or limbs of the tort:

> "First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful." [2003] 2 A.C. 1 at 191.

J93. The first form is referred to as "*targeted malice*" and the second as the "*untargeted malice*" or "*illegality*" limb. It can be classed as an "*intentional tort*" but the key element is an intention to act for an improper motive. Its rationale, according to Lord Steyn, is that "*in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior or improper purposes*" and hence it was an exception to *"the general rule ... that, if conduct is lawful apart from the motive, a bad motive will not make [the defendant] liable.*"

J94. In both private and public law proceedings allegations of bad faith will be determined on the civil standard of proof, i.e. the balance of probabilities. That civil standard of proof is applied in a manner which reflects the seriousness of an allegation. A claim of bad faith or fraud will therefore be assessed by reference to the fact "*that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability*", as Lord Nicholls explained in *re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 586D-H:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. …
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."[109]

J95. Finally, in extradition proceedings, courts in England and Wales may refuse a request for extradition where a defendant argues that the request has been made in bad faith by the requesting State or otherwise constitutes an abuse of process. Lord Phillips CJ explained in *R (Government of USA) v. Senior District Magistrate Bow Street Magistrates Court* [2007] 1 WLR 1157 that the test in such instances was whether there were "*reasonable grounds*" for concluding that the allegation had been made out:

> "84... Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred.
>
> …
>
> 89. The appropriate course for the judge to take if he has reason to believe that an abuse of process may have occurred is to call upon the judicial authority that has issued the arrest warrant, or the State seeking extradition in a Part 2 case, for whatever information or evidence the judge requires in order to determine whether an abuse of process has occurred or not.

[109] In the later case of *Re B (Children)* [2009] 1 AC 11 the Appellate Committee of the House of Lords emphasised that "*Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities*." See also *Re S-B* [2010] 1 AC 678, the judgment of Baroness Hale in the Supreme Court at paragraphs 2-15.

> 90. The information and evidence obtained should be made available to the party contesting extradition. We agree with Mr Gordon that the standards required by Article 13 of the ECHR should apply to the extradition proceedings. Equality of arms requires that, in normal circumstances, the party contesting extradition should be aware of, and thus able to comment on, the material upon which the court will be basing its decision."

J96. In the extradition cases where the London extradition court has refused the requests for extradition of individuals linked with the applicants[110] the court has applied Section 81(a) of the Extradition Act 2003 which provides:

> "A person's extradition to a category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that:
>
> (a) the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions."

J97. The principles concerning prosecution on the grounds of political opinion were comprehensively reviewed by the Immigration Appeal Tribunal in *Emilia Gomez v. Secretary of State for the Home Department* [2000] INLR 549 and are applied when the extradition court considers whether Section 81(a) of the Extradition Act 2003 is engaged. The principles can be summarised as follows:

> (a) A broad purposive construction should be given to the political opinion ground (para. 21). In particular the word 'political' should be given a broad meaning (para. 27 and 40);
>
> (b) It is not necessary to show the prosecutor's only motive is political persecution: it is sufficient if political reasons form part of his motivation (para. 22);
>
> (c) It is generally the existence of a group of opponents that concerns a government or other persecutor sufficient to provoke oppression (para. 23);

[110] The 2009 report of the Special Rapporteur of the Parliamentary Assembly of the Council of Europe on "*Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states*" summarised the extensive number of cases related to the applicants and to Yukos where extradition and legal assistance had been refused on the grounds that the case against the applicants was politically motivated. A copy of the full report is at Volume C, tab C111 of the November 2011 Memorial. The judgment in *Russian Federation v. Chernysheva and Maruev* 18 March 2005 is at tab 57 to this Reply**;** *Government of the Russian Federation v. Ramil Bourganov and Alexander Gorbachev,* 17 August 2005, at tab 58; and *The Government of the Russian Federation v. Alexander Viktorovich Temerko,* 23 December 2005, is at tab 59 to this Reply.

(d) In order to show persecution on account of political opinion it is not necessary to show political action or activity (para. 24);

(e) Political opinions may be those expressed by the persecuted person or may be those imputed to him by the persecuting government (para. 26);

(f) It is not appropriate to maintain a rigid distinction between political opinions on the one hand and economic opinions on the other (para. 43).

(ii) the Respondent state

J98. Russian law's approach to assessing whether the acts or omissions by the state were done in good faith, and by extension, its approach to determining claims that the state had acted in bad faith, is predetermined by the constitutional principle of the supremacy of human rights and freedoms. In accordance with Articles 2, 17 and 18 of the Constitution of the Russian Federation, human rights and freedoms are the highest value. They are recognised and guaranteed by the state, define the meaning, content and application of the laws, the activities of the legislature and the executive, local government, and are secured by justice. Moreover, in accordance with Article 45 of the Constitution of the Russian Federation, each individual is entitled to defend his rights and freedoms by any means not forbidden by law.

J99. In other words, if there is a general approach in relation to citizens, according to which "anything not expressly forbidden should be presumed to be permissible," then in relation to the state, the approach is the opposite: the state, as represented by all its bodies and officials, can act only within the scope of its powers as directly prescribed in law, it has no right to exceed or abuse them. All the actions and decisions of the state must be lawful, grounded, reasoned and, in accordance with the aforementioned, must be aimed above all at securing human rights and freedoms. If these requirements are disregarded then such acts or omissions are unlawful.

J100. There is no presumption of good faith on the part of the Government in Russian law. The onus is on the Government to prove its good faith when its good faith is challenged. Thus in any dispute over the legality of the state's acts or omissions the

burden of proof of their lawfulness and justification lies specifically with the state. This rule is directly prescribed by Russian law and regulated by civil court proceedings in the sphere of public legal relations (Art.249 of the Civil Procedure Code of the Russian Federation and Art.189 of the Commercial Litigation Procedure Code of the Russian Federation). The position is different in civil law disputes, according to which each of the parties is obliged to prove all the facts upon which it relies.[111]

J101. In criminal and administrative court proceedings against the state, the same principle applies that the state must prove its good faith, further strengthened by the constitutional principle of presumption of innocence.[112] Criminal-procedural law, in particular, requires that all actions and decisions made by judicial authorities (agencies of inquiry, investigators, heads of investigation authorities, prosecutors, courts) be lawful, grounded and reasoned.[113]

J102. The acts or omissions of criminal judicial authorities (acting on behalf of the state), which prejudice the constitutional rights and freedoms of its other participants, and also inhibit their access to justice, are subject to preliminary judicial controls. Thus they may be appealed against in court even before the case is examined on its merits (Art.125 of the RF CCrP). In such instance the burden of proof lies with the officials of the state to prove the lawfulness and the existence of grounds for the acts (or omissions) or decisions appealed against.[114]

J103. In summary therefore, the state is in all cases obliged to prove its good faith, and, in criminal and administrative proceedings, is, additionally, obliged to overcome all doubts and objections lodged in connection with the presumption of innocence. There

[111] See articles 12, 56, and 68 of the Civil Procedure Code of the Russian Federation, Articles 9 and 65 of the Commercial Litigation Procedure Code of the Russian Federation. In civil proceedings both parties are presumed to be acting in good faith (Article 10 (5) of the Civil Code of the Russian Federation). Since the government participates in these relations on the same basis and on equal terms with the other participants this presumption applies to the state to the same extent as it does to any other participants. This presumption, however, only applies to relations regulated by civil law (Art.2 of the Civil Code of the Russian Federation).
[112] Art.49 of the Constitution of the Russian Federation, Article 14 of the RF CCrP, Article 1.5 of the Commercial Litigation Procedure Code of the Russian Federation.
[113] Article 7 (3) and (4) of RF CCrP.
[114] See Ruling no. 1 of the Plenum of the RF Supreme Court dated 10 February 2009 "On the practice of the courts' consideration of complaints under the procedure of Article 125 of the Criminal Procedure Code of the Russian Federation" Copy at tab 84 to this Reply.

is thus no question of a claimant having to demonstrate to an inordinately high standard of proof that his allegation of bad faith is proved: the evidential onus is on the state to demonstrate that it has acted in good faith.

J104. Finally, the applicants cannot but fail to observe that the exposition of the applicable domestic law demonstrates once again that their rights under the Convention in the instant cases have bee violated by a flagrant denial of justice and abuse of law. At no stage could the authorities in fact have demonstrated that they have acted in good faith.

Question 48. If the Court is to find a violation of Article 18 in the cases at hand, does this necessarily lead to a conclusion that the applicants' conviction was invalid?

SUMMARY OF THE GOVERNMENT'S RESPONSE

J105. The Government argue that the finding of a violation of Article 18 would not affect the validity of the applicants' conviction. They also assert that they "*believe*" that nothing in the "'*second*' *criminal case*" case stemmed from anything but the applicants' "*criminal actions*" (paragraph 376 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTION

J106. The applicants submit that on the basis of the totality of the evidence that is before the Court it is both able to and, indeed, should conclude that their convictions are invalid. Such a conclusion accords with that made by the Presidential Council who described the applicants' convictions as "*a miscarriage of justice.*"[115] Moreover, the conclusion that the applicants' convictions were invalid would in any event flow from a finding of a breach of Article 6 and/or Article 7 and/or of Article 4 of Protocol No 7, regardless of any question of whether there had been a breach of Article 18.

J107. As indicated above at paragraph J43, given that Article 18 only operates in conjunction with another Article of the Convention, the Court's task is to examine whether an applicant's complaint of improper motivation has been made out by reference to each of the pleaded violations of the Convention in conjunction with Article 18. The Court's insistence in *Khodorkovskiy (no.1), Khodorkovskiy (no.2)* and

[115] See tab 40 to this reply

Yukos of "*incontrovertibl*e" evidence that the authorities brought the prosecution from "*start to finish*" in "*bad faith and in blatant disregard of the Convention*" should not be followed. As in *Lutsenko*, *Tymoshenko* and *Mammadov*, in the instant cases the Court is able to examine the claim of improper motivation by reference to discrete phases in the prosecution: the unlawful detention in Chita and Moscow that was contrary to Articles 5, 8 and 18 as well as the restrictions imposed on the applicants' rights to a fair trial that were contrary to Articles 6 and 18.

J108. Should the Court conclude that those allegations have been established it would certainly lead to the conclusion that the applicants' convictions should not be allowed to stand. Indeed, regardless of any question of whether there has been a breach of Article 18, it is well established that when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded. In the particular circumstances of these cases, the only just and equitable outcome would be the quashing of their convictions.