B. JURISDICTION OVER THE CASE WITHIN THE SECOND TRIAL

Question 4. **Were the applicants tried by a "tribunal established by law", as required by Article 6 § 1 of the Convention? In particular, did the Khamovnicheskiy District Court have territorial jurisdiction to examine the applicants' second criminal case? As follows from Article 32 of the CCrP, a criminal case must be heard in the place "where the crime has been committed". There are alternative rules which provide that where several crimes were committed in different places the case should be tried by the court in the place "where most of the crimes were committed" or "where the most serious of them was committed". Which rule was applied in the present cases and how do the courts decide what amounts to "most of the crimes" or to "the most serious crime"?**

SUMMARY OF THE GOVERNMENT'S RESPONSE

B1. The Government state that during the preliminary hearing the trial judge rejected the defence's arguments challenging the jurisdiction of the court because it found "*no ground to forward the criminal case to other court (sic)*" (paragraph 35 of the Memorandum). They refer to the cassational ruling which upheld the trial judge's decision and argue that jurisdiction was identified according to where the most severe offence was alleged to have been committed by the applicants: "*i.e. in accordance with the location of the law firm ALM Feldmans, along with that, other crimes committed at these place, were also taken into account*" (paragraph 37 of the Memorandum). They argue that this complaint is inadmissible, relying on the decisions in *Khodorkovskiy (no.2*) and *Lebedev (no.2)* and *Zand v. Austria* (paragraphs 38-41 of the Memorandum). They nonetheless admit to "*some uncertainties in relation to the territorial jurisdiction over the case*" (paragraph 40 of the Memorandum).

B2. The Government do not answer the Court's questions in relation to the alternative rules to be applied and "*which rule was applied in the present cases and how do the courts decide what amounts to* "*most of the crimes*" *or to* "*the most serious crime*"?" The Government cannot answer those questions as the decisions of the domestic courts are devoid of any reasoning on these critical points.

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

The applicable domestic law

B3. Article 47 of the RF Constitution guarantees the right of everyone to be tried in a court of competent jurisdiction:

> "1.Nobody may be deprived of their right to have their case heard by a court and judge that have the legal jurisdiction to try their case."[1]

B4. Article 32 (1) of the RF Code of Criminal Procedure (the RF CCrP) explicitly establishes the territorial jurisdiction principles for criminal cases – a criminal case is to be tried in a court at the location where the crime was committed. In addition, this article contains rules for determining territorial jurisdiction in cases where this may prove to be a complicated task: "*If the crimes were committed in different locations, the criminal case is tried by the court whose jurisdiction extends to the location where most of the crimes investigated in connection with that criminal case were committed or where the gravest one of them was committed*" (Article 32 (3) of the CCrP). The place where the criminal act was committed is deemed to be the place where the act or omission constituting its *actus reus* was completed.

B5. Article 389.15 (2) and 389.17 of the RF CCrP provide that examination of a case by an unlawfully composed court provides an unconditional basis for quashing a verdict. In light of the above-mentioned Constitutional guarantee (Article 47 of the RF Constitution), a court's lack of jurisdiction to resolve a case means that the composition of the court was illegal.[2]

How is "the gravest crime" defined?

B6. Article 15 of the RF Criminal Code indicates that the gravity of a crime is determined by the nature and degree of its threat to society. Based on this criterion, a crime provided for by RF criminal law is assigned to one of four categories according to its gravity.[3]

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[1] See extract of the RF Constitution at Volume C, tab C3, of the November 2011 Memorial.
[2] See Article 389.15 (2) and 389.17 of the RF CCrP at tab 14 to this Reply.
[3] Article 15 of the RF Criminal Code provides:
"1. Depending on the nature and degree of social danger, the deeds provided for by this Code shall be divided into crimes of little gravity, crimes of average gravity, grave crimes, and especially grave crimes.
2. Intentional and careless acts, for the commission of which the maximum penalty stipulated by this Code does not exceed two years deprivation of liberty, shall be recognized as crimes of little gravity.

What is the definition of "most of the crimes"?

B7. Article 32 (3) of the RF CCrP refers to "*most of the crimes investigated in connection with that criminal case.*" That issue is determined by the number of the crimes committed in the territory covered by the jurisdiction of a specific court. Thus, the RF Supreme Court stated:

> "Under Article 32(3) of the RF CCrP, if the crimes were committed in different locations, the criminal case is referred to the court whose jurisdiction extends to the location where most of the crimes investigated in connection with that criminal case were committed or where the gravest one of them was committed.
>
> The accused are charged with organizing a criminal group (Article 210 of the RF Criminal Code), as well as with committing 218 crimes categorized as grave and medium-gravity crimes of which 43 were committed in the territory of the Novgorod Region, including 3 grave and 40 medium-gravity crimes; 2 crimes were committed in the territory of Moscow, one of which was grave and the other was of medium gravity; 39 grave crimes were committed in St. Petersburg, and 67 grave crimes were committed in the Moscow Region; the location where 66 crimes were committed was never established.
>
> In this connection, the point made in the ruling has to be accepted as valid, namely that the court whose jurisdiction extends to the location where most of the investigated crimes were committed is the Moscow Region Court."[4]

What happened in the applicants' case?

B8. In the course of the preliminary hearing, the defence argued that the Khamovnicheskiy District Court of the City of Moscow did not have territorial jurisdiction.[5] In challenging jurisdiction, the defence, in particular, referred to the fact that criminal cases against persons directly mentioned in the charges against the applicants as being their "accomplices" had been tried by or were pending before other Moscow courts, namely:

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3. Qualified as the medium-gravity crimes shall be deliberate offences for whose commitment the maximum punishment stipulated by the present Code does not exceed five years of the deprivation of freedom, and careless crimes for whose commitment the maximum punishment stipulated by the present Code exceeds two years of the deprivation of freedom.
4. Intentional acts, for the commission of which the maximum penalty stipulated by this Code does not exceed 10 years deprivation of liberty, shall be recognized as grave crimes.
5. Intentional acts, for the commission of which this Code provides a penalty in the form of deprivation of liberty for a term exceeding 10 years, or a more severe punishment, shall be recognized as especially grave crimes."

[4] See Ruling no. 84-O09-53 of the RF Supreme Court, dated 14 September 2009, at tab 101 of the Reply.
[5] See Motion dated 5 March 2009 at Volume C, tab C96, of the November 2011 Memorial, see also trial record of 5 March 2009, Vol. 189, c.f.s. 265-288 of the case materials, copy at tab 87 of the Reply.

(a) The criminal case against Mr V.G. Malakhovskiy and Mr V.I. Pereverzin had been tried by the Basmanniy District Court of the City of Moscow (judgment of 1 March 2007); it is of note that the Bill of Indictment and Verdict in those cases also refer to the involvement of employees of the law firm ALM Feldmans in the same alleged criminality and yet it was not suggested by either the court or the prosecution that as a consequence the territorial jurisdiction of the case should be altered;

(b) The criminal case against Mr Antonio Valdes-Garcia was being tried (in absentia) by the Basmanniy District Court of the City of Moscow; and

(c) The criminal case against Mr V.G. Aleksanyan was being tried by the Simonovskiy District Court of the City of Moscow.

B9. The principal argument of the defence was that none of the criteria for determining territorial jurisdiction provided any basis for the judge who tried the applicants' case to conclude that the case was subject to the Khamovnicheskiy District Court's jurisdiction since none of the actions listed in the Bill of Indictment were committed in the territory over which that court has jurisdiction.

B10. The court denied the defence motion challenging jurisdiction without making any attempt to respond to the defence's arguments as to why the Khamovnicheskiy District Court did not have jurisdiction to try the case. The court simply stated:

> "Having heard the opinions of the participants of the trial, the court is of the opinion that the motion filed by the defence should not be granted since the prosecutorial agencies have referred this case under Art. 32 CCP RF for trial to the Khamovnichesky District Court of the City of Moscow, and no grounds for referral of this criminal case to another court are discerned."[6]

B11. In the verdict the trial court (and subsequently the cassational court) asserted that the jurisdiction rules had not been violated because the law firm ALM Feldmans

[6] See Court Ruling to Schedule a Court Hearing Based on the Outcome of the Pre-Trial Hearing of 17 March, 2009 at tab 91 to this Reply.

mentioned in the Bill of Indictment is located in the territory over which the Khamovnicheskiy District Court has jurisdiction. That reasoning is erroneous and misconceived:

(a) Neither the Bill of Indictment nor the Verdict state that any of the acts imputed to the applicants were committed, let alone completed, on the premises of the said law firm; and

(b) None of the employees of that firm have been tried in the applicants' case.

Conclusions on this Question

B12. Contrary to the Government's argument that this complaint is inadmissible *ratione materiae,* it is well established that a violation of the domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6 § 1. The Court is therefore competent to examine whether the national law has been complied with in this respect.

B13. A court not established according to the legislation would be deprived of the legitimacy required, in a democratic society, to hear individual complaints (*Lavents v. Latvia*, no. 58442/00, 28 November 2002 § 114; *Gorgiladze v. Georgia*, no. 4313/04, 20 October 2009 § 67; *Kontalexis v. Greece*, no. 59000/08, 31 May 2011, § 38). Accordingly, if a "*tribunal*" does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not "*established by law*" within the meaning of Article 6 § 1 (*Richert v. Poland*, no. 54809/07, 25 October 2011 § 41; *Jorgic v. Germany*, no. 74613/01, 12 July 2007, ECHR 2007-III, § 64).

B14. It is accepted that the Court's task is limited to examining whether reasonable grounds existed for the authorities to establish jurisdiction (see, *inter alia*, *Jorgic v. Germany*, § 65). However, in the instant case, it is quite clear that there were no reasonable grounds for the authorities to establish that the Khamovnicheskiy District Court had jurisdiction.

B15. Furthermore, and once again contrary to the Government's misconceived submissions on the applicable Convention case-law[7], where there is a violation of the jurisdiction requirements of Article 6 § 1, it is not necessary to show that the defect had any impact on the outcome of the proceedings: *Bohmer v. Germany*, no. 37568/97, 3 October 2002, at § 67.

B16. In the instant cases it is submitted that (a) it is clear beyond doubt that the applicants were not tried before a "tribunal established by law" contrary to Article 6 § 1 as the Khamovnicheskiy District Court did not possess territorial jurisdiction; and (b) the Government was well aware that the Khamovnicheskiy District Court lacked jurisdiction; however, demonstrating bad faith and driven by improper motives, the Government knowingly failed to comply with the requirements of the law and referred the case to a specially selected court.

Question 5. **The accusations against the applicants related to acts committed by them in their capacity as *de jure* and *de facto* bosses of Yukos. Where were those crimes committed – at the Yukos headquarters or elsewhere? Which particular acts (the Government are invited to refer to the relevant parts of the bill of indictment) imputed to the applicants were committed on the territory under the jurisdiction of the Khamovnicheskiy District Court? Where these acts committed by the applicants themselves or by any of the "unidentified co-perpetrators"? Did those acts amount to a separate count (episode, head) in the accusations or they were part of a chain of operations which have been characterised, in their entirety, as "embezzlement" or "money laundering"?[8] Why were the cases closely related to that under examination (namely the cases of Mr Pereverzin, Mr Malakhovskiy, Mr Aleksanyan, and the applicants' first case) examined by other courts, in particular the Basmanniy District Court, the Simonovskiy District Court and the Meshchanskiy District Court in Moscow?**

SUMMARY OF THE GOVERNMENT'S RESPONSE

B17. The Government argue that the alleged "*crimes*" were committed by members of the "*organised group*", among others, on the territory subject to the jurisdiction of the

[7] See paragraph 40 of the Government Memorandum.

[8] The applicants were in fact convicted of theft by way of misappropriation of oil and legalisation of what was stolen. It is incorrect therefore to speak of convictions for embezzlement and money laundering. See further the applicants' discussion of the applicable domestic law below in Section G below.

Khamovnicheskiy District Court. They assert this on the basis that the first applicant was alleged to give instructions in relation to the "*legalisation (laundering) of the monetary funds collected as a result of the embezzlement*" to lawyers of ALM Feldmans but do not state that the instruction was given specifically at the offices of the said firm in the territory of the Khamovnicheskiy district of the city of Moscow. In addition, the Government state that the "*crimes*" were "*not committed by the applicants themselves but by the organised group members, including unidentified co-perpetrators, acting under the applicants' instructions. These acts, in conjunction with other organised group members' actions, constituted actus reus of the legalisation (laundering)*" (paragraphs 42-45 of the Memorandum). The Government do not support those assertions by reference to the Bill of Indictment although the Court had expressly asked them to do so.

B18. The Government assert that the criminal case against Mr Malakhovsky and Mr Pereverzin was tried before the Basmanniy District Court because they were accused of accumulating funds from the sale of stolen oil in DIB bank which is within that court's jurisdiction (paragraph 47 of the Memorandum). The Government state that the criminal case against the late Mr Aleksanyan was being tried in the Simonovskiy District Court because his workplace was within the territory of that court (paragraph 48 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

B19. First, the applicants state unequivocally that the charges that were brought against them did not contain a sufficiently clear description, in compliance with the requirements of the law, of any actions constituting crimes according to the criminal legislation of the Russian Federation. Moreover, some of the information in the charges is false while other data therein are inconsistent to the point of being mutually exclusive: see the arguments set out in detail in Section A above and in Section G below.

B20. Secondly, the location at which each of the actions that are alleged in the charges was carried out is not identified in the charges. As a consequence it is not possible to give an answer to the Court's Questions. Furthermore, because the charges and verdict contain no proper, clear, and detailed description of the specific actions of the

applicants and other persons that the state considers to constitute crimes, it is not possible to provide a clear answer to the question of who specifically, in the opinion of the prosecution and court, carried out specific actions. This deliberate lack of content and clarity in the narrative part of the charges, which deprived the applicants of the opportunity to understand them and, as a consequence, to mount a full defence to them, as well as to determine the correct territorial jurisdiction of the case, was a further manifestation of the state's bad faith.

B21. Thirdly, the applicants note that the charges that were brought against them were to all intents and purposes exactly the same as those brought against Messrs Malakhovskiy and Pereverzin.[9] Nonetheless, the Government assert that those individuals were properly tried by the Basmanniy District Court, demonstrating clearly the arbitrariness of the authorities' selection of the courts to try the applicants and the defendants in the related cases.

B22. Finally, the applicants call the Court's attention to the fact (as indisputably established in the case[10] but ignored by the court and by the Government) that the second applicant could not be viewed either *de jure* or *de facto* as "boss" of OAO NK Yukos as, since September of 1999, he did not work at any of the companies within the Yukos group. The second applicant was the director of the GML company, the principal shareholder of OAO NK Yukos, but he had not held any positions either in Yukos itself or in its subsidiaries since September 1999. Since that date he did not have a working space in any of the offices of Yukos or its subsidiaries. The second applicant was unable to issue any instructions whatsoever to Yukos employees.

[9] The only difference is that the period of time of the alleged criminality lasted longer with respect to the applicants: a difference which does not affect the jurisdiction of the case in any way.

[10] See OOO YUKOS-Moscow Order to terminate P.L. Lebedev's employment as of 30 September 1999, Vol. 155, c.f.s. 113, 114 at tab 34 to this Reply and a copy of a page from P.L. Lebedev's employment record book containing the termination of employment record at tab 35 to this Reply.