

#### **D. PRESUMPTION OF INNOCENCE**

**Question 7.** The judgment in the applicants' case extensively cited from judicial findings in other cases related to Yukos employees and partners, such as Mr Pereverzin, Mr Malakhovskiy, Ms Karaseva, Mr Lubenets, Mr Ivannikov and Mr Velichko. What was the status of the courts' findings in those other cases? Did they constitute *res judicata*? In other words, did the Khamovnicheskiy District Court consider that those facts could be taken as "proven" for the purposes of the applicants' case and that they did not need to be proven in an ordinary manner at the applicants' second trial? If not, why did the court need to cite those other judgments at all? Was that situation compatible with the principle of "presumption of innocence" established in Article 6 § 2 of the Convention? How did the reliance on those judgments affect the overall fairness of the proceedings under Article 6 § 1 of the Convention?

#### **SUMMARY OF THE GOVERNMENT'S RESPONSE**

D1. The Government state that the trial court recognised eight different judgments in other cases as having the effect of *res judicata* directly proving the applicants' guilt (paragraph 60 of the Memorandum). The Government assert that "*The prejudicing effect of these decisions was acknowledged because the facts established by the courts in the course of examining the epy [sic] respective cases were significant for the resolution of the "second" criminal case against the applicants, and, at the same time, they were not contested in the course of examining this criminal case.*" (paragraph 61 of the Memorandum). They nonetheless assert that there was no breach of the principle of the presumption of innocence enshrined in Article 6 § 2 of the Convention (paragraph 62 of the Memorandum).

#### **APPLICANTS' REPLY TO THE COURT'S QUESTIONS**

D2. The prosecutor added verdicts in the following related cases to the case materials in the trial: Karaseva, Lubenets, Ivannikov, Velichko, Malakhovskiy and Pereverzin. The trial court was thus provided with a series of judicial decisions which reflected "*an opinion that [the applicants are] guilty before his guilt has been proven according to law*" (to use the language of the Court in *Nešťák v. Slovakia*, no. 65559/01, 27 February 2007, § 88). All of the verdicts are cited in the verdict of the Khamovnicheskiy District Court as "proof of the guilt" of the applicants. By doing so the court gave *res judicata* status to circumstances established therein, however it did

so extremely selectively – only to the extent that it benefitted the prosecution. The trial court’s approach is inconsistent with the Government’s assertion that “*the facts established in the aforesaid judicial decisions referred to by the court in the “second” criminal case against the applicants in themselves did not speak of the applicants’ guilt in the crimes imputed to them*” (paragraph 62 of the Memorandum) and, moreover, fundamentally inconsistent with the principle of the presumption of innocence.

- D3. In its verdict, the Khamovnicheskiy District Court directly relied upon those verdicts to reject the defence case:

**“The unsustainability of the defence counsel’s arguments is also corroborated by the verdict of the Basmanny District Court of the City of Moscow of 01.03.2007 regarding V.G. Malakhovsky and V.I. Pereverzin** (vol. 152 c.f.s.125-176), which became final based on the ruling of the Judicial Collegium for Criminal Cases of the Moscow City Court of 21.06.2007 (vol. 152 c.f.s.177-196), from which one can see that (vol. 152 c.f.s. 89-90) defendants V.G. Malakhovsky’s and V.I. Pereverzin’s guilt of the deeds imputed to them is corroborated by copies of reports of seizures and searches conducted, in particular, at OAO Kommerchesky Bank Menatep SPb [Menatep SPb Commercial Bank] (new name OAO Natsionalny Bank Trust [Trust National Bank]), OAO Investitsionny Bank Trust [Trust Investment Bank] (formerly ACB Doveritelny i Investitsionny Bank [Trust and Investment Bank]), etc. and copies of the documents seized.

**As per provision of Art. 90 CCP RF, circumstances established in a verdict which became final shall be recognized by the court without additional verification.”**<sup>1</sup> (Emphasis added).

- D4. That was the only occasion upon which the trial court cited Article 90 of the RF CCrP and it is telling that in doing so its citation was selective, interpreting Article 90 as permitting the facts found in the trial of Malakhovskiy and Pereverzin to be established “*without additional verification.*” The trial court neglected to consider the full provisions of Article 90 of the RF CCrP which provides (emphasis added):

“Article 90. Res judicata

Circumstances that have been established by a verdict or by another court decision which was issued within the framework of civil, arbitration or administrative court proceedings and which has come into legal force, shall be recognised by the court, by the prosecutor, by the investigator and by the inquirer without additional verification. **However, such verdict or decision cannot determine the guilt of persons who have not previously**

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<sup>1</sup> pp. 631-632 of the verdict which is at Volume C, tab C213, to the November 2011 Memorial.

**been involved in the criminal case under consideration.”<sup>2</sup>** (Emphasis added).

- D5. The combined effect therefore of related cases being tried ahead of the applicants (in some instances in secret, as in the Pereverzin *et al* trial) and the admission to the case file of the verdicts from those trials breached the applicants’ rights to be presumed innocent. As the Government make plain in their response, those verdicts were determined by the trial court to have the status of *res judicata*. That determination was inconsistent with the applicants’ rights under Article 6 § 1 and Article 6 § 2: as the Court noted in *Huseyn and others v. Azerbaijan*, nos. 35485/05, 45553/05, 35680/05 and 36085/05, 26 July 2011, § 212, “*in the light of the principle of presumption of innocence and a defendant’s right to challenge any evidence against him or her, a criminal court must conduct a full, independent and comprehensive examination and assessment of the admissibility and reliability of evidence pertaining to the determination of the defendant’s guilt, irrespective of how the same evidence may have been assessed in any other proceedings concerning other defendants.*”
- D6. Finally, it is to be noted that the Khamovnicheskiy District Court adopted a distinctly biased approach to the provisions of Article 90 of the RF CCrP. The circumstances supporting the prosecution case in the verdicts added by the prosecution were all unquestioningly relied upon by the Khamovnicheskiy District Court in the verdict on the applicants. In contradistinction, the Khamovnicheskiy District Court ignored or rejected all of the circumstances contained in commercial court judgments that had concluded that OAO NK Yukos was the owner of the oil – see further the applicants’ response to Question 38 below. The Khamovnicheskiy District Court’s partial approach to the provisions of Article 90 of the RF CCrP was one of the many features criticised by the experts appointed by the RF Presidential Council of the Russian Federation for Civil Society and Human Rights – see for example the report of Professor A.D. Proshlyakov at pp.290-291.<sup>3</sup>

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<sup>2</sup> See Article 90 of the RF CCrP as amended by Federal Law N 383-FZ dated 29 December 2009.

<sup>3</sup> See tab 140 to this Reply.

**Question 8. According to the applicants, Mr Putin on four occasions made public statements which breached the applicants' presumption of innocence. Did those statements relate to the applicants' second trial, and, if so, were they compatible with the applicants' rights under Article 6 § 2 of the Convention? The Government are particularly invited to comment on a phrase allegedly uttered by Mr Putin in October 2010 at a meeting with foreign investors in VTB Capital, when he implied that the applicants were guilty of a murder.**

**SUMMARY OF THE GOVERNMENT'S RESPONSE**

- D7. The Government do not deny that President Putin made comments in which he implied that the applicants were guilty of murder. However, the Government argue that as *"the applicants were not accused of committing murder"* they *"may not be considered as "accused of committing a crime" within the meaning of Article 6 § 2 of the Convention. Consequently, this complaint is rationae materiae incompatible"* (paragraph 63 of the Memorandum).
- D8. As well as accepting that Mr Putin made comments in which he implied that the applicants were guilty of murder it is of note that the Government also do not deny that Mr Putin:
- (a) compared the applicants with Al Capone and Bernard Madoff; and
  - (b) stated, in a programme relayed throughout the Russian Federation on both television and radio on 16 December 2010 (whilst the judge was deliberating in his chambers on the verdict), that Mr Khodorkovskiy's guilt had been *"proven in court"* and that *"the thief should be in jail"* (see § 188-190 of the Statement of Facts prepared by the Registry).
- D9. In response to the Court's request concerning Putin's comments in October 2010 at the VTB Capital Investment Forum on *"Russia Calling"*, *"to produce the original record and a translation of the question and of Mr Putin's answer in respect of the applicants"*, the Government reply, *"As regards the questions in the footnote on page 35 of the Statement of Facts, it should be noted that the Government dispose of no such trustworthy information regarding with respect to the status and format of such events, quantity of participants and access for mass media. The Government*

*do not have in their possession any records of the participants' speeches either."*

Given the circumstances of the VTB Capital Investment Forum which was attended by a number of world leaders and by over 1900 delegates it is extraordinary that the Government has no record of what was said.<sup>4</sup> In any event it is to be noted that the Government do not challenge the accuracy of the report of the VTB conference.

- D10. The Government argue that judges cannot be influenced by external sources (paragraph 64 of the Memorandum). They go on to state that *"prosecution of the applicants in the "first" and the "second" cases and any other proceedings somehow related to Yukos Oil Company attracted and still attract massive public response and inevitably stir public discussions at any, including, high standing levels"* (paragraph 65 of the Memorandum).

#### **APPLICANTS' REPLY TO THE COURT'S QUESTIONS**

- D11. The evidence before the Court (that has not been challenged by the RF Government) is that Mr Putin, then the Prime Minister of the Russian Federation,<sup>5</sup> made four profoundly prejudicial sets of comments about the applicants. Equally it is not disputed by the Government that all the comments were made in public, including those made at the Valdai club. As to that latter point, the Government's implied concession that the comments at the Valdai club were in public is hardly surprising given that the meetings of that club are widely reported, as occurred in this instance.
- D12. The only challenges by the Government to the applicants' complaints in this regard are whether comments implying that the applicants were guilty of murder can be

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<sup>4</sup> See the description of the Forum on the website of VTB Capital:

*"The VTB Capital "RUSSIA CALLING!" Investment Forum in Moscow, 5-7 October 2010, reached a successful close.*

*The event drew 1900 delegates, including some 500 investors, 46 speakers took part in plenary sessions and panel discussions, over 1000 meetings took place between members of the Russian and international business elite and investors. ...*

*Russia's Prime Minister Vladimir Putin spoke at the opening day of the Forum. The first plenary session was also joined by Deputy Prime Minister – Minister of Finance of the Russian Federation Alexey Kudrin, Aide to the President of the Russian Federation Arkady Dvorkovich, Ukraine's Vice Prime Minister for Economy Sergei Tigipko, Minister of Economic Affairs, Industry and Employment of France Christine Lagarde, First Deputy Chairman of the Central Bank of the Russian Federation Alexey Ulyukaev, VTB Bank President and Chairman of the Management Board Andrei Kostin, VTB Capital President Yuri Soloviev."* (Emphasis added). A copy of the website page is at tab 106 to this Reply. It is publicly available at <http://vtbcapital.com/events/2010/moscow/about/>: (last downloaded 11 February 2015).

<sup>5</sup> Mr Putin was also the President of the RF at the time of the applicants' arrest in 2003 and their first trial. He resumed the Presidency in 2012.

found to be in breach of Article 6 § 2 of the Convention and whether comments by the head of the government could be said to influence the trial court. The applicants will examine each of those points by reference to the Court's questions.

***Did Mr Putin's statements relate to the applicants' second trial?***

- D13. Mr Putin's statements were all variously related to the applicants' second trial inasmuch as they were made in response to indirect or direct questions about the trial and whether the applicants should be released from detention. Thus, for example, the reports of the Mr Putin's comments at the Valdai club demonstrate that Mr Putin was being questioned in the context of whether the applicants' cases were an example of the "*legal nihilism*" that had been condemned by the then President, Mr Medvedev.<sup>6</sup> Moreover, it is to be recalled that the Parliamentary Assembly of the Council of Europe had expressly cited the second trial as an example of such "*legal nihilism*."<sup>7</sup>
- D14. Similarly, in his television and radio interview on 16 December 2010, Mr Putin was being questioned the day after it had been announced that the reading of the verdict was to be delayed for undisclosed reasons. The verdict had been due to be read on 15 December 2010, however on 15 December 2010 a delay was announced in the reading of the verdict until 27 December 2010. No reasons were given for this decision. Mr Khodorkovskiy's father responded to the delay by expressing his fear

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<sup>6</sup> Adam Michnik, the chief editor of Polish newspaper *Gazeta Wyborcza*, recorded the questioning as follows: "I quoted what Medvedev had said about legal nihilism reigning in Russia. And in this context I asked two questions. Firstly about Khimki. Because before this I had managed to meet with Evgenia Chirikova, I learned the details of this whole story from her, then I read Luzhkov's article, and I wanted to hear what the Russian prime minister thought about all of this. **And my second question to Putin was as follows: if Khodorkovsky is released would that not be a sign that this 'legal nihilism' had been overcome? I was struck by how the expression on his face changed in an instant. He started to say passionately: "The head of his security department killed people! How could he not have known about that! He has blood on his hands!"** (Emphasis as per original).

See *Novaya Gazeta*, "The meeting with Putin was a true spectacle", 10 September 2010 at Volume C, tab C196 of the November 2011 Memorial. See also the other widespread media reporting of Putin's comments at the Valdai club which was submitted with the applicants' original complaint concerning on 13 April 2011: *Interfax*, 'Khodorkovsky and Lebedev Smiled', 14 October 2010, at tab 18; *The Moscow Times*, 'Foreign Money In, Khodorkovsky Still Out', 8 September 2010, at tab 14; and *Petroleumworld.com*, 'Putin accuses jailed oil tycoon of organising murders' 7 September 2010, at tab 13 of the Application of 14 April 2011.

<sup>7</sup> See paragraph 4.3.8 of PACE Resolution 1685 (2009) at Volume C, tab C114, of the November 2011 Memorial: "*a number of high-profile cases, such as the second trial of M. Khodorkovsky and P. Lebedev, the proceedings against the managers and lawyers of HSBC/Hermitage, the investigation into the murder of A. Politkovskaya, the prosecution of Y. Samodurov and the dismissal of Judge Kudeshkina and several other judges, give rise to concerns that the fight against "legal nihilism" launched by President Medvedev is still far from won.*"

that it would allow Mr Putin to put additional pressure on the court during his annual televised call-in show the following day.<sup>8</sup> Those comments proved to be prescient as the following day Mr Putin was indeed asked about whether it was fair that Mr Khodorkovskiy was in prison and responded 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 proven by the court**.” (Emphasis added).<sup>9</sup> At the same time Mr Putin compared Mr Khodorkovskiy with Bernard Madoff, the convicted US fraudster, and said that “*the thief should be in jail*.”<sup>10</sup> The International Bar Association rightly observed Mr Putin’s “*conduct was manifestly improper and flies in the face of the presumption of innocence and the separation of powers*.”<sup>11</sup>

***Were Mr Putin’s comments compatible with the applicants’ rights under Article 6 § 2 of the Convention?***

- D15. The Government’s assertion that the complaint should be rejected as the trial judge was independent, accountable to no-one and incapable of being influenced is misconceived and inconsistent with the Convention case-law.
- D16. It has been the Court’s consistent approach that the presumption of innocence will be violated if a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. The Court has consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see *Khuzhin and Others v. Russia*, no. 13470/02, § 94, 23 October 2008). The principle of presumption of innocence does not prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection

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<sup>8</sup> *Associated Press*, “Verdict Delayed In Oil Tycoon Khodorkovsky’s Case”, 15 December 2010, at Volume C, tab C211, of the November 2011 Memorial.

<sup>9</sup> See page 1 of Mr Lebedev’s initial cassational appeal, 21 January 2011, copy at tab 139 to this Reply.

<sup>10</sup> See §§ 188 - 190 of the Court’s Statement of Facts that the Government have not disputed.

<sup>11</sup> See page 43 of *International Bar Association Human Rights Institute*, ‘The Khodorkovsky Trial’ September 2011, at Volume C, tab C237, of the November 2011 Memorial.

necessary if the presumption of innocence is to be respected (*Fatullayev v. Azerbaijan*, 40984/07, 22 April 2010 § 159; *Alenet de Ribemont v. France*, no. 15175/89, 10 February 1995, Series A no. 308§ 38; *Garycki v. Poland*, no. 14348/02, 6 February 2007, § 69 and *Daktaras v. Lithuania*, no. 42095/98, §§ 41-42, ECHR 2000-X). What Justice Trechsel has called the “*reputation-related aspect*” of the presumption of innocence is firmly established in the Convention case-law.<sup>12</sup>

- D17. The Court has applied these principles in a number of subsequent cases. In *Alenet de Ribemont* the applicant complained that the comments of the French Interior Minister and a number of senior police officers given shortly after his arrest in which they named him as one of the instigators of the murder of a French MP, violated Article 6 § 2. In *Butkevicius v. Lithuania*, no. 48297/99, ECHR 2002-II, § 53 the Court found a violation arising from remarks made regarding the applicant’s case by the Chairman of the Seimas, the Lithuanian Parliament “*which served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority.*” In *Pesa v Croatia*, no. 40523/08, 8 April 2010, § 148 *et seq*, the Court found violations of Article 6 § 2 arising from comments made by the Prime Minister, the President, the Head of Police and the State Attorney; in *Aliyev v. Azerbaijan*, no. 37138/06, 9 November 2010, the Court found that remarks by the Prosecutor’s Office and the Ministry of Internal Affairs breached Article 6 § 2; and in *Mokhov v. Russia*, no. 28245/04, §§ 31-33, 4 March 2010, the Court found that an investigator’s comment that the applicant “*had committed ...a murder, connected to the robbery and attack*” violated Article 6 § 2. Finally, in *Huseyn* § 230 (cited above), the Court found that an article by the Deputy Minister of Internal Affairs in which he had “*clearly mentioned all of the applicants by name as persons who had overseen the “actions of criminal character” committed by the “radical”, “reactionary” and “destructive” opposition and aimed at usurping State power by unlawful means*” violated Article 6 § 2 of the Convention.

- D18. The Government’s assertion that the complaint concerning Mr Putin’s comments that

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<sup>12</sup> *Human Rights in Criminal Proceedings*, Trechsel S, OUP, 2005, pp. 178-191.



Mr Khodorkovskiy “*had blood on his hands*”<sup>13</sup> and that “*they have bodies linked to them*”<sup>14</sup> was not a breach of Article 6 § 2 because the applicants were not charged with murder is equally misconceived. Whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see *Butkevičius v. Lithuania*, § 49). As explained above, the comments were all made in the context of the applicants’ second trial. The comments were made by the Head of the Government and so were of particularly authoritative weight. The comments indicated that Mr Putin believed that the applicants were guilty of theft as well as of violent crimes. The fact that the applicants were not charged with violent crimes does not mean that the comments did not breach the fundamental principle of the presumption of innocence. As the Commission stated in *P, RH and LL v. Austria*, no 15776/89, 5 December 1989: the right to be presumed innocent “*is not only a procedural guarantee in criminal proceedings, but requires all State organs to refrain from statements of the guilt of the accused before that guilt has been established by the competent Court.*”

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<sup>13</sup> The comments Mr Putin made at the Valdai club. See the media reports cited at footnote 6 above.

<sup>14</sup> The comments made by Mr Putin at the VTB Capital Investment Forum: *Pravo.ru*, “Putin: The YUKOS affair is a special case”, 5 October 2010, copy at Volume C, tab C208 of the November 2011 Memorial.