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Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018****Opinion No. 89/2018 concerning Alexey Pichugin (Russian Federation)*, ****

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30 of 30 September 2016.
2. In accordance with its methods of work (A/HRC/36/38), on 17 August 2018 the Working Group transmitted to the Government of the Russian Federation a communication concerning Alexey Pichugin. The Government replied to the communication on 1 November 2018. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability,

* An individual opinion of Sètondji Roland Adjovi (dissenting) is contained in annex I. Additional reasoning of the majority of the Working Group, notably Seong-Phil Hong, Leigh Toomey, Elina Steinerte and José Guevara Bermúdez, is contained in annex II.

** The annexes to the present document are reproduced as received, in the language of submission only.

or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Alexey Pichugin, born in 1962, is a national of the Russian Federation. At the time of his arrest, he was married with three young sons. He had no criminal history. His usual place of residence was in Moscow, Russian Federation. He was the manager of the Economic Security Division of the Security Department of Yukos Oil Company.

a. Background

5. According to the source, Mr. Pichugin graduated from a military academy in 1983 and spent a decade working for government security units, including the Ministry of Internal Affairs and the Committee for State Security. In 1994, he transitioned into private security and assumed a position with Menatep Bank. When the bank obtained a controlling stake in Yukos in 1995, he began to work in Yukos's security division.

6. The source submits that at the time of his arrest, Mr. Pichugin was employed as a mid-level security manager at Yukos, which was controlled by Mikhail Khodorkovsky. By the early 2000s, Yukos had become the second-largest and fastest-growing oil company in the Russian Federation, threatening the power of State-controlled companies such as Gazprom. Simultaneously, Mr. Khodorkovsky became increasingly critical of the Government and began to actively fund opposition parties.

7. Reportedly, in 2003, alleging that Yukos had abused the tax scheme and paid insufficient taxes for the past several years, the Government demanded over US\$40 billion from the company.¹ Ultimately, Yukos was broken up and sold to State-controlled energy firms. In 2014, in the largest arbitration award in history, \$50 billion was awarded by the Permanent Court of Arbitration to former Yukos shareholders, based on the panel's conclusion from the evidence that Yukos had been unlawfully expropriated by the State. While that award was later overturned on the grounds that the Permanent Court of Arbitration did not have jurisdiction to rule in the Yukos case, it was not overturned on the substance of the ruling.

8. According to the source, while Mr. Pichugin himself is apolitical, the political nature of his case has been evident from the moment of his arrest. The source submits that Mr. Pichugin has been the victim of an extended conspiracy to frame him for crimes he did not commit. Serious violations of due process have marred his detention and trials. Moreover, Mr. Pichugin was repeatedly pressured in interrogations to give testimony against Mr. Khodorkovsky and against Platon Lebedev, despite the fact that he had not been charged with any economic crimes nor with any crime related to Messrs. Khodorkovsky or Lebedev. Critically, the European Court of Human Rights found in two separate cases that the treatment of Mr. Pichugin by the Russian Federation had violated various articles of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), to which the Russian Federation is a State party. In both decisions, the European Court of Human Rights called for Mr. Pichugin's case to be retried.²

¹ *Hulley Enterprises Limited v. Russian Federation*, Permanent Court of Arbitration, 18 July 2014, pp. 174–177, available at www.pccases.com/web/sendAttach/418; and *Government of the Russian Federation v. Dmitry Maruev and Natalya Chernysheva*, 18 March 2005 (Bow Street Magistrates' Court (United Kingdom of Great Britain and Northern Ireland)), available at https://pichugin.org/wp-content/uploads/2018/02/BowStreet_Maruev_et_al.pdf (see p. 6 of the PDF).

² European Court of Human Rights, *Pichugin v. Russia* (application No. 38623/03), judgment of 23 October 2012, para. 219; and European Court of Human Rights, *Pichugin v. Russia* (application No. 38958/07), judgment of 6 June 2017, para. 47.

b. Arrest and detention

9. The source submits that on 19 June 2003, at approximately 8 a.m., Mr. Pichugin was arrested at his Moscow apartment before leaving for work. He was arrested by 22 armed men, including a colonel from the Prosecutor General's Office, three representatives of the Moscow Region Federal Security Service and 18 "Alpha Unit" armed Federal Security Service agents. His residence and workplace were searched.

10. Reportedly, Mr. Pichugin was not told why he was being detained, nor that he was in fact under arrest. He was taken to a facility of the Prosecutor General's Office for interrogation. Once there, he was told that he was a suspect in the disappearance of a couple. After the initial interrogation, he was informed that he was suspected of having murdered the couple. He was then held in pretrial detention at Lefortovo Prison, which is run by the Federal Security Service. No explanation was provided as to why he was being detained by the intelligence service.

11. On 26 June 2003, Mr. Pichugin was formally charged under article 105 (on murder) of the Criminal Code. He was also charged with crimes under article 30 (on preparations for crimes and attempted crimes) and as an accomplice under article 33 (on the types of accomplices to crimes).

i. Repeated extensions of pretrial detention

12. The source reports that on 21 June 2003, Basmany District Court in Moscow chose to place Mr. Pichugin in preventative detention, declaring that he was accused of particularly serious crimes and therefore might abscond, interfere with the investigative proceedings or commit another crime, if released on bail. No particularized evidence was presented to the Court about any risk posed by Mr. Pichugin in relation to any of these claims. Over the next year, nearly a dozen renewed requests for bail and appeals were rejected, even when Mr. Pichugin was suffering from serious medical issues, including diabetes.

ii. Conditions of pretrial detention

13. The source submits that while held at the Federal Security Service-controlled Lefortovo Prison throughout October 2004, Mr. Pichugin was repeatedly administered unlabelled medications that caused him to sleep almost constantly. On 14 July 2003, without the presence of his legal counsel, Mr. Pichugin was interrogated for approximately five hours by two Federal Security Service agents who refused to reveal their full names but informed him that they investigated "economic offences". Mr. Pichugin was told that he should confess to the crimes, which he refused to do. After Mr. Pichugin drank a cup of coffee that the agents had offered him, he lost feeling in his legs and felt a pounding in his head, and has no memory of the next several hours. When returned to his cell that evening, he discovered two injection marks, on his right hand and on his left elbow. Eight days later, Mr. Pichugin finally received a superficial medical examination, lasting only a few minutes. His legal counsel filed appeals asking for an investigation into the potential use of unlawful interrogation methods, but they were denied.

14. The source notes that Mr. Pichugin was also questioned approximately 10 to 15 times about Yukos without the presence of his lawyers and was pressured to give testimony against Mr. Khodorkovsky and also against Leonid Nevzlin. He was told that his lawyers did not know what was in his best interests and that he should implicate Messrs. Khodorkovsky and Nevzlin. Mr. Pichugin consistently maintained his innocence and said he had no information to provide about Messrs. Khodorkovsky or Nevzlin or anybody else. In January 2004, the investigation was finally completed and his legal counsel was permitted to study the case file of more than 7,000 documents. Mr. Pichugin and his counsel were allowed to study the materials for only a few hours per day and, on at least one occasion, they were not permitted to make copies or excerpts of the documents, even at their own expense. This slowed down the review process substantially. On 21 May 2004, the Court set a deadline of 4 June 2004 for the defence to complete the document review. On 11 June 2004, Mr. Pichugin and his co-defendant were committed for trial, and Mr. Pichugin requested a trial by jury.

c. Trial proceedings

i. First criminal case of Mr. Pichugin

15. The source recalls that the first criminal case of Mr. Pichugin focused on the charges that he had murdered a couple and had attempted to murder two other individuals. The preliminary hearings were held in June and July 2004 before Moscow City Court. During those hearings, his counsel requested a public trial by jury. The lawyers also complained that they had been denied access to a number of documents from the case file on the grounds that those documents contained “State secrets”. They requested an explanation of why those materials had been classified secret, and argued that the secret documents should not be admitted as evidence. In response, the judge asked counsel to sign a non-disclosure agreement promising not to disclose the secret documents. Counsel refused, stating that they had not been informed which documents were secret and for what reason.

16. The source submits that on 30 July 2004, the judge ordered that Mr. Pichugin be tried by a jury in camera, as the “secret” documents would be discussed in the course of the trial. The Court refused his counsel’s request for a copy of the decision classifying the documents. Notably, only approximately 60 of the more than 7,000 documents in the case file were classified as “secret”. Regardless, on 2 September 2004, counsel asked the Court to make the majority of the trial public, with just a small portion of the trial involving the allegedly “secret” documents closed. This request was dismissed by the Court. On 4 October 2004, the questioning of witnesses began. Mr. Pichugin adamantly denied his involvement in any of the crimes and exercised his right not to testify. There was no physical or direct evidence presented at the trial linking him to any of the crimes with which he had been charged. Instead, the decisive evidence at the trial turned on the hearsay and double-hearsay testimony of Mr. Pichugin’s co-defendant and of other previously convicted felons.

17. Reportedly, when Mr. Pichugin’s counsel attempted to cross-examine the witness Mr. K., the latter refused to answer a series of their questions. When they reminded him that witnesses could be prosecuted for refusing to testify, the judge contradicted them and stated that the witness could refuse to answer questions. The judge also denied Mr. Pichugin’s counsel the ability to question Mr. K. on his character and background, claiming that such questions were “not relevant”.

18. The source submits that on 9 December 2004, the judge dismissed the jury, claiming that seven jurors had refused to participate in the proceedings. The source submits that the judge did this because she expected that the jury was going to acquit Mr. Pichugin. On 25 January 2005, a new jury was appointed and the trial restarted. The key problems of the trial were repeated during the retrial. The judge denied the request for a public trial and the Court refused to allow Mr. Pichugin’s counsel to question Mr. K. on his criminal record. Furthermore, during closing arguments, the prosecutor referred to information contained in pretrial statements by a witness who had testified at the first trial but not at the second trial. On 24 March 2005, the new jury found Mr. Pichugin and his co-defendant guilty on two counts of murder and two counts of attempted murder. On 30 March 2005, Mr. Pichugin was sentenced to 20 years in prison. On 14 July 2005, the Supreme Court of the Russian Federation upheld the conviction.

ii. Second criminal case of Mr. Pichugin

19. The source submits that on 14 April 2005, following the verdict in the first criminal case, Mr. Pichugin was charged, in a separate case, with two counts of murder and four counts of attempted murder. On 4 July 2005, Mr. Pichugin was further charged with one additional count each of murder and attempted murder. It was alleged, inter alia, that he had organized others at the behest of Mr. Nevzlin and other unidentified Menatep Bank and Yukos officials to murder three individuals who were claimed to have had business conflicts with Yukos.

20. The source submits that on 6 July 2005, the Deputy Prosecutor General appeared on multiple television news channels declaring Messrs. Pichugin and Nevzlin's guilt.³ This forced Mr. Pichugin to abandon his desire for a jury trial, because this statement had severely tainted the jury pool. Although Mr. Pichugin made repeated complaints to the judge and appellate courts about this statement, claiming that it violated his right to the presumption of innocence, all his complaints were rejected. Just two months later, on 11 September 2005, the investigator claimed the evidence of Mr. Pichugin's guilt was irrefutable, during an interview with a news channel.⁴ Again, repeated complaints to the judge and appellate courts about that statement were rejected.

21. Reportedly, on 17 February 2006, Mr. Pichugin's defence completed its review of the criminal case file and filed motions under article 217 of the Criminal Procedure Code "to summon to court witnesses and experts, and to familiarize Mr. Pichugin and his defence counsel with the search and detective files". These motions to access this key evidence were all denied. The trial began on 20 March 2006 and ended on 17 August 2006.

22. The source submits that over the course of the trial, Moscow City Court heard evidence from Mr. Pichugin and four other co-defendants, six victims, fifty-six witnesses, one specialist and four experts. The Court also considered various documents from the criminal case file. As in Mr. Pichugin's first trial, there was no physical or other substantive evidence linking him to the underlying crimes. Instead, each charge was based on hearsay statements by co-defendants who had confessed to the crimes during the investigation but had claimed they had been hired by an individual who had allegedly told them, directly or through others, that Mr. Pichugin and ultimately Mr. Nevzlin had directed the crimes. Mr. Pichugin pleaded not guilty to all the charges against him and strenuously insisted that he did not know any of the co-defendants. Critically, all four co-defendants ultimately recanted their pretrial statements to investigators implicating Mr. Pichugin.⁵

23. Reportedly, the Court denied Mr. Pichugin's counsel the right to cross-examine the co-defendants, which meant that the defence could not uncover the details of the conspiracy to implicate Messrs. Pichugin and Nevzlin during his trial. The Court also denied all the requests by the defence to introduce its own exculpatory evidence to refute the prosecution's allegations. One especially egregious decision related to a handwritten note. The prosecution had ordered two expert reports to assert that the note was written in Pichugin's handwriting, hoping to prove that he was part of an alleged plan to commit a murder. But the expert reports were not conclusive. Mr. Pichugin's defence presented its own expert to the Court. Despite having allowed this expert to testify, the Court then inexplicably set aside the testimony as invalid, refusing to consider it entirely.

24. The source reports that on 17 August 2006, the judge convicted Mr. Pichugin and sentenced him to 21 years in prison. But on 21 February 2007, the Supreme Court reversed that conviction and ordered a new trial before a new judge. The Supreme Court specifically found that Mr. Pichugin's conviction was unfounded and was based on conjecture. The Supreme Court further stated that if Mr. Pichugin were found guilty on retrial, the trial court should consider imposing a harsher sentence. Mr. Pichugin's new trial ran from 17 April 2007 to 6 August 2007. As in the first trial, the Court prevented the defence from accessing critical information, denying all but one of the defence's motions requesting the discovery of information. Despite the inconsistencies in the testimonies of the four co-defendants – who were re-examined in the new trial as witnesses – and in the other documents presented as evidence, including the handwritten note mentioned above, the Court denied the defence

³ Segodnya, "The Prosecutor General of the Russian Federation declared Nevzlin the organizer of the killers", 6 July 2005, available at www.segodnya.ua/oldarchive/c2256713004f33f5c225703500509f04.html.

⁴ Vladimir Perekrest (Izvestiya), "Pichugin's lawyers sued the Prosecutor General's Office", 3 November 2005, available at <https://iz.ru/445396/vladimir-perekrest/advokaty-pichugina-podali-v-sud-na-genprokuraturu>.

⁵ Vera Chelishcheva (Novaya Gazeta), "I decided to change the situation", 10 April 2018, available at www.novayagazeta.ru/articles/2018/04/11/76138-reshil-smenit-obstanovku. See also Sergei Orlov, "The FSB has got involved in the Alexei Pichugin case: one of its colonels spent an hour interrogating the former Yukos employee on 13 July", 26 July 2016, available at www.khodorkovsky.com/the-pichugin-case/.

motions to discover information or submit additional expert evidence. Critically, Mr. Pichugin was retried on the exact evidence that the Supreme Court had previously found conjectural and inadequate. He was convicted again. This time, Moscow City Court sentenced Mr. Pichugin to life in prison, consistent with the instructions of the Supreme Court. His defence again appealed the verdict, but on 31 January 2008 the Supreme Court denied the appeal and affirmed the conviction, despite its prior decision invalidating Mr. Pichugin's conviction on the very same evidence.

25. The source submits that Mr. Pichugin remains in detention and has been transferred to various detention centres across the Russian Federation. His final appeals before the Supreme Court of the Russian Federation have all been exhausted. He has repeatedly applied for a pardon. These applications have been summarily rejected. Most recently, on 27 March 2017, it was made public that Mr. Pichugin had been disappeared from Lefortovo Prison and that his family and lawyers did not know where he had been taken. He later resurfaced in Black Dolphin Prison, one of the most notorious and difficult prisons in the Russian Federation, where he remains today.

d. Legal analysis

26. The source submits that for the reasons set forth below, the deprivation of liberty of Mr. Pichugin is arbitrary, falling under category III applicable to the consideration of cases by the Working Group.

i. Category III

27. According to the source, the Government has violated numerous procedural requirements under both international and domestic law in the present case. The ongoing detention of Mr. Pichugin is arbitrary under category III.

ii. Arrest without a warrant

28. According to the source, on the morning of 19 June 2003, Mr. Pichugin was confronted at his home by a Russian Federation colonel accompanied by three Federal Security Service staff members and 18 "Alpha Unit" armed Federal Security Service agents. They searched his home for four hours and then led him away in handcuffs without providing any written authorization for the arrest. The source recalls that the Working Group has repeatedly stated that an arrest without a warrant is only permissible when the arrest is *in flagrante delicto* or carried out under emergency powers that satisfy all other procedural safeguards,⁶ neither of which apply here. Therefore, the source submits that in the first criminal case of Mr. Pichugin, he was taken into custody without an arrest warrant in violation of article 9 (2) of the Covenant and principle 12 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

iii. Extended pretrial detention in violation of the presumption of bail

29. The source notes that article 9 (3) of the Covenant contains a presumption against pretrial detention. The Human Rights Committee has interpreted this provision to require an individualized determination of a person's status.⁷ The Working Group has repeatedly applied these general principles in reiterating that pretrial detention must be an individualized exception rather than a default mechanism.⁸ Under the Criminal Procedure Code of the Russian Federation, a judge is supposed to, in particular, take into account "the gravity of the crime, information on the suspect's or accused's personality, and his or her age, state of health, marital status, occupation and other circumstances" and may adjust the measures of restriction on the basis of a determination of whether the defendant may flee from the court,

⁶ See opinion No. 30/1993 and E/CN.4/1994/27.

⁷ See the Committee's general comment No. 35 (2014) on liberty and security of person, para. 38.

⁸ See, for example, opinions No. 24/2015 and No. 62/2017.

may continue the criminal activity, or may threaten witnesses or other participants in the criminal proceeding.⁹

30. The source notes that in the first criminal case of Mr. Pichugin, he was arrested on 19 June 2003. In his first hearing before a judge, on 21 June 2003, as later recounted by the European Court of Human Rights: “Counsel... asked the prosecutor to submit to the court the materials showing the existence of a reasonable suspicion against the applicant. The prosecutor refused, referring to the confidentiality of the investigation.”¹⁰

31. The source reports that between that initial hearing and 11 June 2004, when the case was committed to trial, Mr. Pichugin renewed his request for bail and appealed against the denials of those requests nearly a dozen times. All the requests were summarily dismissed, with the judges relying exclusively on the severity of the alleged charges. There was no individualized determination as to his status. Adding to the very unusual way in which this case was handled, Mr. Pichugin was detained during this time in a Federal Security Service prison overseen by the intelligence service of the Russian Federation, rather than in a prison run by the Ministry of Justice. This led the European Court of Human Rights to find a violation of Mr. Pichugin’s right to release pending trial under article 5 (3) of the European Convention on Human Rights. The Court concluded, in relation to Mr. Pichugin’s pretrial detention, that “by failing to address specific facts or consider alternative ‘preventive measures’ and by relying essentially on the gravity of the charges, the authorities extended the applicant’s detention on grounds which, although ‘relevant’, cannot be regarded as ‘sufficient’ for the entire period of detention”.¹¹

32. Therefore, the source argues that during Mr. Pichugin’s first criminal case, he was detained in pretrial detention in violation of his right under article 9 (3) of the Covenant to have an individualized determination about whether he could be released on bail, and if so, under what conditions.

iv. Right to a public hearing

33. The source submits that from the outset of the Mr. Pichugin’s first criminal case, authorities claimed that his case involved “State secrets”, which justified holding a closed trial. It was later learned that only 60 out of some 7,000 documents in the case were “secret”, however repeated requests by Mr. Pichugin’s counsel for a public trial by jury – where the trial could be closed for any hearing relating to the “secret” documents – were denied. Instead, despite the fact that the charges in Mr. Pichugin’s first criminal case involved only routine street crimes, the entire set of pretrial hearings, the first trial and the retrial were all held in secret, between July 2004 and July 2005.

34. The source notes that in its judgment on the first criminal case of Mr. Pichugin, the European Court of Human Rights reiterated that “the administration of justice, including trials, derives legitimacy from being conducted in public”.¹² It observed that there were exceptions to holding a hearing in public under the European Convention on Human Rights, which included “morals”, “public order” and “national security”, but it concluded that, in Mr. Pichugin’s case, there was “no evidence to suggest that these conditions were satisfied”.¹³ In fact, it explained specifically that Moscow City Court “did not elaborate on the reasons for holding the trial in camera. It did not indicate which documents in the case file were considered to contain State secrets or how they were related to the nature and character of the charges”, and “nor did Moscow City Court respond to the applicant’s request to hold the trial publicly subject to clearing the courtroom for a single or, if need be, a number of secret sessions...”¹⁴ The European Court of Human Rights thus found a violation of article 6 (1) of the European Convention on Human Rights.¹⁵

⁹ Criminal Procedure Code, arts. 97 and 99.

¹⁰ European Court of Human Rights, *Pichugin v. Russia* (application No. 38623/03), para. 9.

¹¹ *Ibid.*, paras. 142–143.

¹² *Ibid.*, para. 185.

¹³ *Ibid.*, paras. 186 and 188.

¹⁴ *Ibid.*, para. 188.

¹⁵ *Ibid.*, para. 192.

35. Therefore, the source argues that in the first criminal case of Mr. Pichugin, his right to a public hearing under article 14 (1) of the Covenant was also violated.

v. Right to access to counsel and to have adequate time and facilities to prepare defence

36. The source submits that on numerous occasions during Mr. Pichugin's first criminal case, beginning on the very day he was detained, Mr. Pichugin was denied access to counsel. He was repeatedly interrogated during his pretrial detention without the presence of his lawyers and was pressed by Federal Security Service interrogators to give false testimony against Yukos executives Messrs. Khodorkovsky and Nevzlin. In addition, his lawyers' requests to the authorities of the Russian Federation to have access to their client were repeatedly denied, including on but not limited to 19 June, 14 July and 21 July 2003 and 19 March 2004.

37. The source further recalls that the investigation was only completed on 30 January 2004, at which time his counsel was finally permitted access to the case file for his first criminal case. Mr. Pichugin and his counsel were required to physically go to a small, poorly lit room at the court to study the documents, which included many handwritten notes from interrogations. They were limited as to how often and for how many hours they were given access to the materials and, on at least one occasion, were prohibited from photocopying documents, even at their own expense, further slowing their review of the materials. On 24 May 2004, at the request of the prosecution, the court ordered the defence to complete its review by 4 June 2004, against the strong objections of the defence. The trial began one week later, on 11 June 2004.

38. The source submits that during Mr. Pichugin's second criminal case, Moscow City Court repeatedly denied his counsel access to the criminal case file, which included the police files on the victims of the murder and attempted murder, whom he was charged with having killed or having tried to kill, respectively.

39. The source notes that Mr. Pichugin's right to access counsel in his first criminal case was also violated repeatedly. By arbitrarily and unnecessarily limiting his counsel's access to the documents relating to the case, authorities interfered with his right to have adequate time and facilities to prepare his defence.

40. According to the source, collectively, Mr. Pichugin's right to have access to counsel and his right to have his counsel have adequate time and facilities to prepare his defence under article 14 (3) (b) of the Covenant were violated in both his first and second criminal cases.

vi. Right to cross-examine and present key witnesses

41. The source submits that there was no physical or direct evidence at trial linking Mr. Pichugin to any of the incidents for which he was charged, and none was presented at trial – either in his first criminal case or his second criminal case.

42. According to the source, in Mr. Pichugin's first criminal case, the only alleged first-hand testimony against Mr. Pichugin came from Mr. K, a serial rapist and murderer already serving a life sentence in a maximum security prison. Mr. K claimed that he had witnessed an individual speaking to Mr. Pichugin about instructions concerning one of the other victims in the case. Mr. K did not claim to have actually heard this discussion. Moreover, while Mr. K claimed to have met Mr. Pichugin in 1999, he was not able to pick him out of a lineup. Mr. K also changed his testimony on various occasions while being interrogated.

43. The source reports that when Mr. Pichugin's legal counsel sought to cross-examine Mr. K on the stand, he refused to answer a number of critical questions. When the defence counsel reminded him that witnesses could be prosecuted for refusing to testify, the judge contradicted the defence counsel, stating that a witness could refuse to answer questions. Moreover, when the defence counsel tried to cross-examine Mr. K about his criminal background and what he might be getting in exchange for his testimony from prosecutors (for example, a reduction in his life sentence), the judge cut the defence counsel off, saying that questions about Mr. K's character and motivation were "not relevant".

44. The source notes that, examining this issue in Mr. Pichugin's first criminal case, the European Court of Human Rights found that Mr. K.'s testimony had been the only first-hand testimony, given under oath, of the applicant's involvement in the imputed murders. It had obviously been evidence of great weight, and without it the chances of a conviction would have significantly receded. For that reason, it may be considered the decisive evidence against the applicant.¹⁶ The European Court of Human Rights further observed that no reasons had been advanced by Mr. K. for his refusal to answer the questions. In particular, he had not invoked his privilege against self-incrimination. When the presiding judge had been asked, by counsel for the applicant, to remind Mr. K. of his statutory duty to answer questions and his possible criminal liability for refusing to do so, she had replied that Mr. K. had been entitled not to answer. The European Court of Human Rights could not but find that as a result of the gratuitous permission given by the presiding judge to Mr. K. not to answer certain questions of the defence, the applicant's right to challenge and question that witness had been significantly restricted, which had been further aggravated by the fact that he had not been permitted to question Mr. K. about certain factors that might have undermined his credibility. The European Court of Human Rights found that it followed that there had been a violation of article 6 (1) (right to fair trial] and article (3) (d) (right to cross-examine witnesses).¹⁷

45. The source submits that these violations occurred both in the first trial and, after the jury was dismissed in December 2004, in the second trial, which began in January 2005. Again, Mr. K. testified and the judge refused to order him to answer questions from the defence, and the defence was denied the right to question his character and his motivation for testifying.

46. Furthermore, the source reports that in the second criminal case of Mr. Pichugin, Moscow City Court completely denied defence counsel the right to cross-examine Mr. Pichugin's four co-defendants. The importance of this denial was revealed when all four co-defendants later recanted their testimony implicating Mr. Pichugin in the murders and attempted murders, stating that investigators had told them to name Mr. Pichugin and Mr. Nevzlin, whom the co-defendants later said they did not know at all. Furthermore, although the Court initially allowed the defence's handwriting expert to testify that Mr. Pichugin did not write the note purportedly implicating him in the attempted murder, the Court then inexplicably set aside her testimony and refused to consider its substance.

47. The source notes that when the second criminal case of Mr. Pichugin was examined by the European Court of Human Rights, that Court explained that "the domestic courts' refusals to admit reports prepared by 'specialists' as evidence breached an equality of arms principle".¹⁸ It then noted that "expert reports submitted by the prosecution in order to prove a particular point before the court were obtained without any participation of the defence. The defence was unable to formulate questions to the experts, challenge the experts or propose their own experts for inclusion in the team".¹⁹ The Court reiterated that "to realize that right effectively the defence must have the same opportunity to introduce their own 'expert evidence'".²⁰ As a result, the Court found violations of articles 6 (1) and (3) (d) of the European Convention on Human Rights.²¹

48. The source submits that the courts in both Mr. Pichugin's first and second criminal cases interfered with his rights under article 14 (3) (e) of the Covenant to present and cross-examine witnesses.

vii. Right to the presumption of innocence

49. The source recalls that in the second criminal case of Mr. Pichugin, on 5 July 2005, the Deputy Prosecutor General appeared on multiple television news channels declaring that Mr. Pichugin had been instructed by Mr. Nevzlin to commit a murder. Similarly, on

¹⁶ Ibid., para. 200.

¹⁷ Ibid., paras. 203–206 and 213.

¹⁸ European Court of Human Rights, *Pichugin v. Russia* (application No. 38958/07), para. 33.

¹⁹ Ibid., para. 34.

²⁰ Ibid., para. 35.

²¹ Ibid., para. 38.

11 September 2005, the investigator claimed in a television interview that Mr. Pichugin had conducted the attempted murders and murders, which had been organized and paid for by Mr. Nevzlin.

50. The source notes that when the second criminal case of Mr. Pichugin was examined by the European Court of Human Rights, the Court began its analysis on this issue by observing that the two interviews had been conducted by officials of the Government of the Russian Federation. It explained: “The Court takes note of the Government’s assertion that the purpose of the impugned statements was to inform the public about the developments in the applicant’s case. However, the Court considers that the statements, assessed as a whole, were not made with necessary discretion and circumspection.”²² It then concluded: “The Court considers that those statements by the public officials amounted to a declaration of the applicant’s guilt and prejudged the assessment of the facts by the competent judicial authority... The Court finds that they could not but have encouraged the public to believe the applicant guilty before he had been proved guilty according to law. Accordingly, the Court finds that there was a breach of the... presumption of innocence”, under article 6 (2) of the European Convention on Human Rights.²³

51. The source submits that in the second criminal case of Mr. Pichugin, government officials violated his right to the presumption of innocence protected by article 14 (2) of the Covenant.

Response from the Government

52. On 17 August 2018, the Working Group transmitted the source’s allegations to the Government under its regular communication procedure, requesting the Government to provide detailed information by 17 October 2018 concerning the current situation of Mr. Pichugin and any comment on the source’s allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying his continued detention and to provide details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular the norms of international human rights law, that bind the Russian Federation. Moreover, the Working Group called upon the Government to ensure Mr. Pichugin’s physical and mental integrity.

53. On 11 October 2018, the Government sought an extension of the deadline to submit its response. In conformity with paragraph 16 of its methods of work, the Working Group granted an extension for the Government to submit its response by 1 November 2018. The Government submitted its response to the regular communication on 1 November 2018.

54. According to the Government, Mr. Pichugin was convicted by a Moscow City Court jury on 30 March 2005 under article 33 (3), article 162 (2), article 30 (3) and article 105 (2) of the Criminal Code, and was sentenced to 20 years in a high-security prison in accordance with article 69 (3) thereof for organizing: (a) the 5 October 1998 assault and robbery, with aggravating circumstances, of V. L. Kolesov; (b) the 28 November 1998 attempted murder, with aggravating circumstances, of O. N. Kostina; and (c) the 20 November 2002 murder, with aggravating circumstances, of a married couple named Gorin. The verdict was upheld by the cassation panel of the Federal Supreme Court on 14 July 2005.

55. Also, Mr. Pichugin was convicted by Moscow City Court on 6 August 2007 under article 33 (3), article 105 (2) and article 30 (3) of the Criminal Code, and was sentenced to life imprisonment in a maximum security prison in accordance with article 69 (3) and (5) thereof for organizing: (a) the 21 January 1998 murder of V.A. Korneyeva and attempted murder of her husband D.N. Korneyev; (b) the 26 June 1998 murder of Nefteyugansk mayor V.A. Petukhov; (c) the attempted murder of East Petroleum Handelsges Mbh manager E.L. Rybin and his companions A.Yu. Ivanov and E.L. Filippov, on 24 November 1998 and 5 March 1999; and (d) the murder of N.V. Fedotov on 5 March 1999. The verdict was upheld by the cassation panel of Moscow City Court on appeal on 15 July 2007.

²² European Court of Human Rights, *Pichugin v. Russia* (application No. 38958/07), para. 41.

²³ *Ibid.*

56. In the first criminal case, Mr. Pichugin was detained on 19 June 2003 on suspicion of committing a crime under article 33 and article 105 (2) (a) of the Criminal Code. On 21 June 2003, Basmany District Court in Moscow selected custody as his measure of restraint. This decision was upheld by the cassation panel of Moscow City Court on 15 July 2003. Basmany District Court subsequently extended his custody. His lawyers appealed these decisions, but they were upheld on appeal. On 13 May 2005, the cassation panel of the Supreme Court terminated the cassation proceedings on appeal because by then Mr. Pichugin had been convicted, on 30 March 2005.

57. In addition, the Government submits that Mr. Pichugin's fair trial rights have not been violated in connection with his two criminal trials. In support of this claim, the Government cites decisions by the Presidium of the Supreme Court.

58. The Government submits that Mr. Pichugin was sentenced to imprisonment lawfully, taking into account the exceptional danger to society of the acts committed. The time that he spent in pretrial custody was fully credited to his sentence. In view of the foregoing, the allegations that Mr. Pichugin's criminal prosecution was commissioned, that his lawful rights were violated, and that his arrest was arbitrary, are untenable.

Further comments from the source

59. The response from the Government was transmitted to the source for its further comments on 2 November 2018. In its response of 7 November 2018, the source submits that contrary to the Government's claims, Mr. Pichugin's arrest, trial, conviction, sentencing and ongoing detention are arbitrary and in violation of international law. This has been recognized by international tribunals and other credible intergovernmental bodies and human rights groups. For example, the European Court of Human Rights ruled (in two separate cases) that Mr. Pichugin's trials were fundamentally unfair; the Parliamentary Assembly of the Council of Europe adopted a resolution noting the "serious procedural violations" in Mr. Pichugin's case; and the Memorial Human Rights Centre, Freedom House and the Raoul Wallenberg Centre for Human Rights designated him either a political prisoner or a prisoner of conscience. In its response, the Government asks the Working Group to disbelieve not only what Mr. Pichugin and his counsel have stated, but also all the above-mentioned independent international tribunals and institutions.

60. The source first contends that, in many instances, the Government's response does not address the specific claims made or the clear evidence presented in the source's original submission. Secondly, the source argues that the Government makes general denials but fails to respond specifically to the allegations in the submission or to present any evidence in rebuttal. Thirdly, the source adds that even where the Government provides a specific and substantive response, it makes several false claims, contradicted by clear evidence, which undermine its credibility. Fourthly, the Government cites decisions by the Presidium of the Supreme Court in support of its claim that Mr. Pichugin's rights have not been violated. However, the source submits that these decisions are irrelevant to the Working Group's assessment of whether the Government has violated Mr. Pichugin's rights under international law. In fact, the Supreme Court decisions cited by the Government directly conflict with decisions by the European Court of Human Rights.

61. Finally, the source disputes the Government's argument that Mr. Pichugin is actually guilty of the crimes at issue. As stated in the initial submission, the allegations against Mr. Pichugin are politically motivated. The source recalls that the Working Group's role is not to substitute itself for a domestic tribunal but rather to determine whether a person's deprivation of liberty is arbitrary and in violation of international law. As explained in detail in the original submission, Mr. Pichugin's detention is clearly arbitrary and unlawful.

Discussion

62. The Working Group thanks the source and the Government for their timely and extensive engagement and submissions in relation to the deprivation of liberty of Mr. Pichugin.

63. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of

international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). The Working Group recalls that where it is alleged that a person has not been afforded by a public authority certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.²⁴

64. As a preliminary matter, the Working Group considers whether Mr. Pichugin's two prior applications to the European Court of Human Rights, which rendered its judgments in the first case (application No. 38623/03) on 23 October 2012 and in the second case (application No. 38958/07) on 6 June 2017, precludes the Working Group's consideration of his submission in the present case.²⁵

65. The competence of the Working Group is defined in the relevant resolutions of the Human Rights Council (formerly the Commission on Human Rights, until 2006) and the Working Group's methods of work. As such, the Working Group has a duty to process communications relating to the issues that fall within the mandate conferred upon it by the Human Rights Council, and which have been submitted in accordance with its methods of work. The applicable procedural rules do not stipulate that the Working Group should refrain from considering matters that are being or have been examined under other regional human rights protection systems. In this context, it should be recalled that, for instance, the Working Group has declared itself competent to deal with cases that had also been considered by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.²⁶

66. The Working Group sees no reason why it should depart from its precedents and treat the prior judgments of the European Court of Human Rights any differently from those of the Inter-American Court of Human Rights. Even assuming *arguendo* that the Working Group is under a legal obligation to do so, the Working Group is far from convinced that the three essential factors of identical persons, subject matter and case, which could lead to conflicting decisions, apply in the present case. Although the Working Group, as well as the European Court of Human Rights, addressed the complaints by Mr. Pichugin against the Russian Federation, the similarities end there, while the following distinguishing features separate them:

(a) The Working Group investigates the international obligations under the Universal Declaration of Human Rights and the Covenant, while the European Court of Human Rights decides solely upon the European Convention on Human Rights. The differences, especially between articles 9 and 14 of the Covenant and articles 5 and 6 of the European Convention upon which Mr. Pichugin made his claims before the European Court of Human Rights, are not merely semantic: for instance, article 5 (1) of the European Convention on Human Rights provides an exhaustive list of justifications for the deprivation of personal liberty, but stipulates no comprehensive ban on "arbitrary" detention;²⁷

(b) The two cases before the European Court of Human Rights narrowly concerned Mr. Pichugin's first and second trial in courts of the Russian Federation, but the Working Group will address a full range of alleged violations that arose in the broader context of the Yukos dispute;

²⁴ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, at pp. 660–661, para. 55; and opinions Nos. 41/2013, para. 27, and 59/2016, para. 61.

²⁵ See the Working Group's previous discussion in opinion No. 52/2011, paras. 25–38.

²⁶ See, for example, opinions Nos. 9/2005, 52/2011, 21/2013, 16/2016, 57/2016 and 53/2018.

²⁷ The Working Group notes that the European Court of Human Rights has interpreted the provision to weigh elements of arbitrariness of detention in its jurisprudence; however, the same Court eliminated the independent legal significance of the right to personal security by subsuming it under the right to personal liberty. See *Saadi v. United Kingdom* (application No. 13229/03), judgment of 29 January 2008, para. 67.

(c) While the European Court of Human Rights can order monetary compensation for pecuniary and non-pecuniary damages in the dispositive part of the judgment, and often “reiterates” that the most appropriate form of redress for an applicant convicted despite a potential infringement of fair trial rights would, in principle, be trial de novo or the reopening of the proceedings, and “notes” the domestic legal provision providing for the reopening of the criminal proceedings if the European Court of Human Rights finds a violation, as it has done in the two cases brought before it by Mr. Pichugin,²⁸ it does not require immediate release, a full and independent investigation and appropriate measures against those responsible or dissemination of the opinion through all available means – all standard remedies in the cases considered by the Working Group;

(d) The two European Court of Human Rights cases cannot and do not address the additional violations arising from the later developments in the Russian Federation, such as the failure of the judicial authorities of the Russian Federation to grant Mr. Pichugin’s request for a new trial despite its obligations under the European Convention on Human Rights and the domestic code of criminal procedure.

67. Throughout its activities, the Working Group adheres to its methods of work and to practices consistently used and accepted by the parties to the proceedings. For these reasons, the Working Group considers itself fully competent and obliged to consider the present case, in the interests of justice and human rights.

Category I

68. The Working Group proceeds to consider whether there have been violations under category I, which concerns deprivation of liberty without any legal basis being invoked.

69. The Working Group notes that the authorities failed to present a valid warrant for Mr. Pichugin’s arrest, to inform him of the reasons for his arrest and to inform him promptly of the charges against him, which means that his deprivation of liberty lacked any legal basis. Their failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant. As stated in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, deprivation of liberty is regarded as unlawful when it is not on such grounds and is not in accordance with procedures established by law.²⁹ By doing so, the authorities have also deprived him of his right to challenge the legality of his detention, in further violation of article 8 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (4) of the Covenant.³⁰

70. Moreover, the Working Group expresses its grave concern at the source’s allegations of incommunicado detention during which Mr. Pichugin’s fate and whereabouts were unknown to his family and lawyers for a certain period during March 2017, until his later appearance in Black Dolphin Prison, where he remains to date. The Working Group notes that the concealment of his fate or whereabouts placed him outside the protection of the law, which undermined his right to life, his right to liberty and security of person, his right not to be subjected to torture and his right to recognition as a person before the law while in detention.³¹ It is the Working Group’s view that there can be no valid legal basis for this type of deprivation of liberty that places detainees outside the protection of the law, under any circumstances, particularly because it deprives them of their rights to challenge the legality of their detention in violation of article 8 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (4) of the Covenant.

71. In view of the above, the Working Group considers that Mr. Pichugin’s deprivation of liberty was without a legal basis, and is thus arbitrary, falling within category I.

²⁸ European Court of Human Rights, *Pichugin v. Russia* (application No. 38623/03), para. 219; and European Court of Human Rights, *Pichugin v. Russia* (application No. 38958/07), para. 47.

²⁹ See A/HRC/30/37, para. 12.

³⁰ See also articles 5 (4) and 6 (1) of the European Convention on Human Rights.

³¹ *Yrusta v. Argentina* (CED/C/10/D/1/2013), paras. 10.3–10.4.

Category III

72. The Working Group now proceeds to consider whether the alleged violations of the right to a fair trial and due process suffered by Mr. Pichugin were of such gravity as to give his deprivation of liberty an arbitrary character, thus falling within category III.

73. The Working Group notes that Mr. Pichugin was subjected to extended pretrial detention without being granted bail. While the reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, in this instance the Government failed to provide, on the basis of the principles of legitimacy, necessity and proportionality, any justification for his extended pretrial detention. In the present case, particularly given that the court summarily dismissed Mr. Pichugin's repeated requests for bail, the Working Group finds that the Government neither tried Mr. Pichugin within a reasonable time nor released him, in violation of article 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the Covenant.

74. The Working Group wishes to point out that the Government has failed to respect Mr. Pichugin's right to legal assistance at all times, in violation of article 9 of the Universal Declaration of Human Rights and article 14 (3) (b) and (d) of the Covenant. Firstly, the interrogation without the presence of his lawyer, on the very first day of his detention, placed him outside the protection of the law. Secondly, Mr. Pichugin was deprived of his right to legal counsel at the critical stage of the criminal proceedings, at which time authorities repeatedly attempted to coerce him to confess. Thirdly, his counsel was not given full access to the case files in time to adequately prepare his defence.

75. The Working Group also expresses its concern regarding the allegation that the authorities administered psychotropic drugs to Mr. Pichugin during his pretrial detention, in violation of articles 5 and 25 of the Universal Declaration of Human Rights and articles 7 and 10 of the Covenant, as well as principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Such an action also violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Not only is such forced medication a grave violation of human rights per se but it seriously undermines Mr. Pichugin's ability to defend himself and hinders his exercise of the right to a fair trial, especially in light of the right against self-incrimination under article 14 (3) (g) of the Covenant.

76. During his trial, Mr. Pichugin was not given an adequate chance to confront the witnesses or the evidence against him and to present his witnesses and evidence before the court, in violation of article 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (d) of the Covenant.

77. The Working Group notes with concern that Mr. Pichugin's trial was closed due to "State secrets", for which the Government failed to provide any explanation. This further violated his right to a public hearing under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

78. The Working Group considers that such lopsided proceedings raise doubts about the equality of arms, the fairness of the proceedings, and the competence, independence and impartiality of the tribunal as per article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

79. The Government also failed to respect Mr. Pichugin's presumption of innocence, in violation of article 11 (1) of the Universal Declaration of Human Rights, article 14 (2) of the Covenant and principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group is deeply concerned that, appearing on multiple news channels, the Deputy Prosecutor General declared Mr. Pichugin's guilt. This was followed two months later by the investigator claiming irrefutable evidence of Mr. Pichugin's guilt on television on 11 September 2005. The Working Group recalls that all public officials have a duty to refrain from prejudging the

outcome of trials, for example by abstaining from making public statements affirming the guilt of the accused.³²

80. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give the deprivation of liberty of Mr. Pichugin an arbitrary character that falls within category III.

Category V

81. The Working Group now proceeds to examine whether Mr. Pichugin's deprivation of liberty constitutes discrimination under international law that falls within category V.

82. The Working Group notes that Mr. Pichugin is a former employee of Yukos, which has been targeted by the Government for many years. Mr. Pichugin's treatment fits the pattern of abuse endured by other managers and staff of that company. In this regard, the Working Group also considers that Mr. Pichugin has been arbitrarily deprived of his liberty because of his failure to cooperate with the authorities in the Government's open persecution of Yukos. The Working Group is thus of the view that the discrimination against Mr. Pichugin by the Government on the basis of his association with the Yukos company is the only plausible explanation for his arrest, detention and imprisonment. For those reasons, the Working Group considers that the deprivation of liberty of Mr. Pichugin constitutes a violation of article 2 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant on the grounds of discrimination based on political or other opinion aimed at and resulting in ignoring the equality of human beings, and that it therefore falls within category V.

Disposition

83. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Alexey Pichugin, being in contravention of articles 2, 5, 7, 9, 10, 11 and 25 of the Universal Declaration of Human Rights and articles 2, 7, 9, 10, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

84. The Working Group requests the Government of the Russian Federation to take the steps necessary to remedy the situation of Mr. Pichugin without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

85. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Pichugin immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

86. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Pichugin and to take appropriate measures against those responsible for the violation of his rights.

87. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

88. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Pichugin has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Pichugin;

³² See opinions No. 26/2018, para. 64; No. 83/2017, para. 79; and No. 33/2017, para. 86 (e).

(c) Whether an investigation has been conducted into the violation of Mr. Pichugin's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Russian Federation with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

89. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

90. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

91. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.³³

[Adopted on 23 November 2018]

³³ See Human Rights Council resolution 33/30, paras. 3 and 7.

Annex I

Individual opinion of Sètondji Roland Adjovi (dissenting)

1. I regret that I could not join the opinion of the Working Group in the present case concerning Alexey Pichugin. In my view, the Working Group has no jurisdiction as there is no dispute to be resolved between Mr. Alexey Pichugin and the Russian Federation. As a result, the Working Group should have simply dismissed the request.

2. Indeed, the Working Group is a body for the resolution of disputes related to detention, a special procedure of the Human Rights Council. The proceedings before the Working Group involve an individual (or a group of individuals) against a Member State of the United Nations, and are conducted in accordance with the mandate and rules set out in the Working Methods of the Group. Even if the texts that govern its mandate in this area do not mention the criteria of admissibility and jurisdiction, the question cannot be avoided because it is self-evident and constitutes an essential prerequisite for the ability of the Working Group to consider the merits of the case. It is therefore for the Working Group, both *de jure* and on a preliminary basis, to raise this question of admissibility and jurisdiction, even if, as in this case, the parties have not raised it.

3. Secondly, I understood that all the factual conclusions reached by the majority of the Working Group had already been taken into account by the European Court of Human Rights on the two occasions when it was seized by the applicant.¹ The Court has concluded for the most part, in favour of the applicant so that the dispute related to arbitrariness of the detention is resolved and therefore no longer exists. For issues on which the applicant has not been successful, the dispute also does not exist unless the applicant challenges the Court's decision through an appeal. The Working Group is not the competent body for such an appeal procedure.

4. The existence of a dispute is well established as a condition of jurisdiction under international law. As established by the Permanent Court of International Justice in the *Mavrommatis Concessions in Palestine* Case: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."² The International Court of Justice has deepened this definition of legal dispute as a situation in which two parties have opposing views, with similar conclusions where the absence of dispute has led to the rejection of the application.³

¹ Case No 1. Pichugin v. Russia, Application No. 38623/03, Judgment (Merits and Just Satisfaction), Court (First Section), 23 October 2012 (<http://hudoc.echr.coe.int/eng?i=001-114074>). Case No 2. Pichugin v. Russia, Application No. 38958/07, Judgment (Merits and Just Satisfaction), Court (Third Section Committee), 6 June 2017 (<http://hudoc.echr.coe.int/eng?i=001-174061>).

² Permanent Court of International Justice, Case of the Mavrommatis Palestine Concessions, Judgement No. 2, Serie A, No. 2, 30 August 1924, p. 11.

³ Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950, p. 65, esp. p. 74. See also: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70, esp. paras. 23-114 ; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, esp. paras. 44-55 ; Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017, p. 289, p. 3 ; Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Order of 9 July 2015, I.C.J. Reports 2015, p. 589, esp. paras. 25-55 ; Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 833, esp. paras. 26-58; Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, p. 104, esp. paras. 22-39; ICJ, Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgement of 6 June 2018.

5. That being said, the Russian Federation has not yet implemented the Court's decisions. This leads to a dispute of a different nature: the enforcement of the Court's decisions. This dispute, like the possible appeal mentioned above, is not within the jurisdiction of the Working Group, and it is worth noting that it is pending before the Ministerial Committee of the Council of Europe.⁴

6. In conclusion, the Working Group, in my opinion, should have dismissed the request on the ground that it does not present a detention dispute that would fall within its jurisdiction.

⁴ Information on the execution of the Court's decisions before the Committee of Ministers is available online (<http://hudoc.exec.coe.int/ENG?i=004-14064>). The Pichugin case is discussed as part of a global case with the Klyakhin case as the main one (Application No. 46082/99). See the decision of the Ministerial Committee CM/Del/Dec(2018)1318/H46-20.

Annex II

Additional reasoning of the majority of the Working Group, notably Seong-Phil Hong, Leigh Toomey, Elina Steinerte and José Guevara Bermúdez

1. We wish to offer the following additional reasons. We consider that these reasons are important to the Working Group's jurisdiction to consider matters that have been heard by other regional human rights mechanisms, and we have therefore chosen to elaborate further on this issue.

2. The competence of the Working Group is defined in the resolutions of the Human Rights Council (formerly the Commission on Human Rights until 2006) and the Working Group's Methods of Work.¹ The law of these instruments is decisive, and binding upon the Working Group. Where it is silent, the Working Group's jurisprudential acquis, accumulated over the past quarter century, has filled the lacunae.

3. The rules governing the Working Group naturally differs from those regulating other sister human-rights bodies. For instance, the Working Group, as a special procedure of the Human Rights Council deriving its ultimate authority and powers from the Charter of the United Nations, does not require the source to exhaust domestic remedies before making submissions to it unlike the Human Rights Committee and other treaty bodies whose founding instruments makes explicit reference to it as a condition of admissibility.² In its Deliberation 02 (E/CN.4/1993/24, 12 January 1993, pp. 9-13) on admissibility of the communications, national legislation, and documents of a declaratory nature adopted at its third session (23 to 27 March 1992), the Working Group clarified that "if an admissibility procedure requires the prior exhaustion of local remedies, that condition is expressly provided for in the instrument or rule concerned as borne out, for instance, by article 41 (1) (c) of the International Covenant on Civil and Political Rights" and since "there is no such provision in resolution 1991/42 which lays down the Working Group's mandate ... it is not within its mandate to require local remedies to be exhausted in order for a communication to be declared admissible" (paras. 6-8).³ The Working Group's consistent interpretation and application in its case-law leaves no room for doubt on this matter.⁴

4. The Working Group would like to stress that the procedural rules for handling communications from sources and responses of Governments are contained in its methods of work and in no other international instrument that the parties might consider applicable.⁵ The

¹ A/HRC/36/38.

² See article 11 (3) and 14 (7) (a) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; article 41 (1) (c) of the 1966 International Covenant on Civil and Political Rights and article 5 (2) (b) of the 1966 Optional Protocol thereto; articles 21 (1) (c) and 22 (4) (b) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; articles 76 (1) (c) and 77 (3) (b) of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; article 4 (1) of the 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; article 2 (d) of the 2006 Optional Protocol to the Convention on the Rights of Persons with Disabilities; article 31 (2) (d) of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance; and article 3 (1) of the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; article 7 (5) of the 2011 Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

³ See also E/CN.4/2006/7 (12 December 2015), paras. 10-14.

⁴ See opinions Nos. 44/2018, para. 71; 43/2018, para. 63; 42/2018, para. 67; No. 11/2018, para. 66; No. 8/2018, para. 30; No. 41/2017, para. 73; No. 38/2017, para. 67; No. 33/2015, para. 108; No. 19/2013, para. 28; No. 31/2006, para. 19; and No. 11/2000, para. 13. See also the unsuccessful resort by the Government of the Russian Federation to this false rule in opinion No. 14/2016, para. 51.

⁵ Opinion No. 44/2018, para. 71; No. 43/2018, para. 63; No. 42/2018, para. 67; No. 8/2018, para. 30.

relevant procedural rule in the Working Group's methods of work can be found in part VII (Coordination with other human rights mechanisms) therein, which provides as follows:

VII. Coordination with other human rights mechanisms

33. In order to strengthen the good coordination that already exists between the various United Nations bodies working in the field of human rights (see Commission on Human Rights resolution 1997/50, para. 1 (b)), the Working Group takes action as follows:

(a) If the Working Group, while examining allegations of violations of human rights, considers that the allegations could be more appropriately dealt with by another working group or special rapporteur, it will refer the allegations to the relevant working group or special rapporteur within whose competence they fall, for appropriate action;

(b) If the Working Group receives allegations of violations of human rights that fall within its competence as well as within the competence of another thematic mechanism, it may consider taking appropriate action jointly with the working group or special rapporteur concerned;

(c) If communications concerning a country for which the Human Rights Council has appointed a special rapporteur, or another appropriate mechanism with reference to that country, are referred to the Working Group, the latter, in consultation with the rapporteur or the person responsible, shall decide on the action to be taken;

(d) If a communication addressed to the Working Group is concerned with a situation that has already been referred to another body, action shall be taken as follows:

(i) If the function of the body to which the matter has been referred is to deal with the general development of human rights within its area of competence (e.g. most of the special rapporteurs, representatives of the Secretary-General, independent experts), the Working Group shall retain competence to deal with the matter;

(ii) However, if the body to which the matter has already been referred has the function of dealing with individual cases (e.g. the Human Rights Committee and other treaty bodies), the Working Group shall transmit the case to that other body if the person and facts involved are the same.

34. The Working Group shall not make visits to countries for which the Human Rights Council has already appointed a country rapporteur or another appropriate mechanism with reference to that country, unless the special rapporteur or the person responsible considers the visit by the Working Group to be useful.

5. It is evident from the ordinary meaning to be given to the terms in their context that Part VII concerns the Working Group's possible overlapping competence with other "United Nations bodies working in the field of human rights" in processing individual cases and country visits. Clearly, the European Court of Human Rights is not a subsidiary body of the United Nations Organization but a distinct regional judicial organ established by the member governments of the Council of Europe by means of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (commonly known as the European Convention on Human Rights). The Council of Europe, created by the 1949 Statute of the Council of Europe and accorded legal personality and capacity as well as privileges and immunities by the 1949 General Agreement on Privileges and Immunities of the Council of Europe, also has its own independent existence. In juridical terms, the United Nations and the European Court of Human Rights are two separate entities. The plain reading of the text alone should dispel any concern that the Working Group would be breaching its own methods of work by taking up Mr. Pichugin's case.

6. The legislative history of Part VII suggests likewise. In its first annual report (E/CN.4/1992/20, 21 January 1992), the Working Group reported to the then-Commission on Human Rights that during its second session (16 to 20 December 1991): "The Working Group decided that, in considering the cases submitted to it, in a spirit of cooperation and

coordination, it would seek, whenever necessary, information from other relevant United Nations bodies and, in particular, Special Rapporteurs of the Commission and the Sub-Commission and the treaty monitoring bodies. The Working Group likewise expressed its willingness to share the information at its disposal with any United Nations organ wishing to have such information” (para. 20). In its second annual report (E/CN.4/1993/24, 12 January 1993), the Working Group reiterated intra-UN cooperation and coordination stating specifically that it “further continued to exchange views, when it deemed it to be necessary, with members of the secretariat servicing treaty monitoring bodies, in particular the Human Rights Committee, or studying other areas relevant to the Working Group’s mandate” (paras. 6-7).

7. In paragraph 7 of its resolution 1993/36 of 5 March 1993 (E/CN.4/RES/1993/36), the then-Commission on Human Rights “[w]elcome[d] the importance that the Working Group attaches to coordination with other mechanisms of the Commission as well as with treaty-monitoring bodies, and invite[d] it to take a position in its next report on the issue of the admissibility of cases submitted to the Working Group when they are under consideration by other bodies”. To meet the Commission’s concerns, the Working Group in its third annual report (E/CN.4/1994/27, 17 December 1993) distinguished between two categories of situations, depending on whether the body seized of the matter other than the Working Group “deals either with developments in the human rights situation or with individual cases of violations alleged by persons”: the *non bis in idem* principle does not apply to the first category (working groups, special rapporteurs or representatives, independent experts) whereas it could apply to the second category (Human Rights Committee in the context of the First Optional Protocol to the International Covenant on Civil and Political Rights, on the one hand, the confidential procedure under Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970, on the other) (paras. 64-70). The Working Group also added paragraph 18 to its revised methods of work: “The Working Group shall also communicate any decision it adopts to the Commission on Human Rights body, whether thematic or country-oriented, or to the body set up by the appropriate treaty for the purpose of proper coordination between all organs of the system” (Annex I: Revised methods of work as of December 1993).

8. In paragraph 1 (b) of its resolution 1997/50 of 15 April 1997, the Commission took note of “the importance that the Working Group attaches to coordination with other mechanisms of the Commission on Human Rights and other relevant United Nations bodies and treaty-monitoring bodies, as well as to strengthening the role of the High Commissioner/Centre for Human Rights in such coordination” and “encourage[d] the Working Group to take all the necessary steps to avoid duplication with those mechanisms, in particular regarding the treatment of the communications it receives and field visits”.⁶ The Working Group dully complied by adding Part V (Coordination with other human rights mechanisms) to the revised methods of work which has remained substantively unchanged since then (E/CN.4/1998/44, 19 December 1997, Annex I).⁷

9. It is clear from the above that Part VII (Coordination with other human rights mechanisms) of the Working Group’s methods of work aims to avoid conflicting decisions in individual quasi-judicial cases between the Working Group, on one hand, and the special procedures of the Human Rights Council or the Human Rights Committee and other international treaty bodies serviced by the UN Secretariat’s staff and facilities, on the other. The European Court of Human Rights, a non-UN regional judicial organ of the Council of Europe, does not fit the bill.

⁶ Prior to resolution 1997/50, the Commission repeatedly took note of the importance that the Working Group attached to coordination with other mechanisms of the Commission and with the treaty-monitoring bodies as well as to the strengthening of the role of the Centre for Human Rights in such coordination, and encouraged the Working Group to avoid unnecessary duplication in paragraph 5 of its resolution 59/1995 of 7 March 1995 and paragraph 8 of resolution 28/1996 of 19 April 1996.

⁷ The entire Part V was moved to Part VII in the following revision of 2010. A/HRC/16/47, 19 January 2011, Annex: Revised methods of work of the Working Group.

10. With respect to the Human Rights Committee, the Working Group in opinion No. 4/2000 concerning Sybila Arredondo Guevara (Peru), adopted on 16 May 2000, decided to transmit, pursuant to paragraph 25 (d) [which moved to paragraph 33 (d) in 2010] of its methods of work, Ms. Arredondo's case to the Human Rights Committee without expressing an opinion on the arbitrary nature of the detention, after ascertaining that the case was being considered by the Human Rights Committee, on the basis of the same facts and allegations as the communication received by the Group (para. 10). The Committee three months later adopted its view after noting the Working Group's referral of the case.⁸

11. Referring to the Arredondo case, it was suggested by one veteran observer that attempts were being made by the Secretariat to process a case where domestic remedies have been exhausted under the Optional Protocol, while one where they have not may be processed for the attention of the Working Group.⁹ Indeed, the Working Group and the Committee appear to have settled on this new *modus vivendi* of complementary division of labour in opinions No. 28/2001 (adopted on 3 December 2001),¹⁰ No. 27/2005 (adopted on 30 August 2005),¹¹ No. 10/2009 (adopted on 1 September 2009)¹² and No. 39/2012 (adopted on 31 August 2012).¹³ Because article 5 (2) (a) of the Optional Protocol to the Covenant merely requires that the same matter "is not being examined" under another procedure of international investigation or settlement, the Committee need not refrain itself from passing judgment on cases where the Working Group has finished examination. The Committee expressed its view in cases that have been filed without opinion by the Working Group¹⁴ or, as in opinion No. 15/2001 (adopted on 13 September 2001), where the detention has been declared not arbitrary.¹⁵

12. By contrast, the Working Group has evinced no awareness that it is legally bound to coordinate or avoid duplication with regional judicial organs. The Working Group has declared itself competent to deal with cases which had also been considered by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, rather explicitly in opinion No. 9/2005 concerning Alfonso Martín del Campo Dodd (adopted on 25 May 2005) on the ground that "the complaint is related to the specific tasks set forth in resolution 1991/42 of the Commission on Human Rights" (para. 7).¹⁶ The Working Group further elaborated its position on the matter in depth in opinion No. 52/2011 (adopted on 17 November 2011), stressing the essential difference between the UN special procedures, on the one hand, and both international and regional treaty bodies, on the other (paras. 25–38). In opinion No. 21/2013 (adopted on 27 August 2013), the Working Group proceeded to render its decision even though the two detainees in question had been released upon recommendation by the Inter-American Commission on Human Rights and their case was pending before the Inter-American Court (paras. 26–29).

⁸ Arredondo v. Peru, Communication No. 688, adopted on 14 August 2000, CCPR/C/69/D/688/1996, paras. 10.2.

⁹ Nigel Rodley, "United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights: Complementarity or Competition?", *Human Rights Quarterly* Vol. 25, No. 4 (Nov., 2003), pp. 882–908, at p. 896.

¹⁰ Madani v. Algeria, Communication No. 1172/2003, adopted on 28 March 2007, CCPR/C/89/D/1172/2003, paras. 2.7 and 7.2.

¹¹ Al-Rabassi v. Libya, Communication No. 1860/2009, adopted on 18 July 2014, CCPR/C/111/D/1860/2009, para. 6.2.

¹² Eligio Cedeño v. Bolivarian Republic of Venezuela, Communication No. 1940/2010, adopted on 29 October 2012, CCPR/C/106/D/1940/2010, para. 6.2.

¹³ Belyatsky v. Belarus, Communication No. 2165/2012, adopted on 24 October 2014, CCPR/C/112/D/2165/2012, para. 7.2.

¹⁴ Aboufaied v. Libya, Communication No. 1782/2008, adopted on 21 March 2012, CCPR/C/104/D/1782/2008, para. 6.2.

¹⁵ Cabal and Pasini v. Australia, Communication No. 1020/2001, adopted on 7 August 2003, CCPR/C/78/D/1020/2001, paras. 4.2 and 5.2.

¹⁶ The Working Group also cited its precedents of opinions No. 16/1998 and No. 28/1998, both adopted on 3 December 1998.

13. The Working Group sees no reason why it should depart from its precedents and treat the prior judgments of the European Court of Human Rights any differently from those of the Inter-American Court. Even assuming *arguendo* that the Working Group is under legal obligation to do so, the Working Group is far from convinced that the three essential factors of identical persons, subject-matter and case, which could lead to conflicting decisions, apply in the present case. While the Working Group, as well as the European Court, addressed the complaints by Mr. Pichugin against the Russian Federation, the similarities end there while the following distinguishing features separate them:

(a) The Working Group investigates the international obligations under the Universal Declaration and the Covenant while the European Court decides solely upon the European Convention. The differences, especially between articles 9 and 14 of the Covenant and articles 5 and 6 of the European Convention upon which Mr. Pichugin made his claims before the European Court, are not merely semantic: for instance, article 5 (1) of the European Convention provides an exhaustive list of justifications for the deprivation of personal liberty, but stipulates no comprehensive ban on “arbitrary” detention;¹⁷

(b) The two cases before the European Court narrowly concerned Mr. Pichugin’s first and second trial in the Russian courts, but the Working Group will address a full range of alleged violations that arose in the broader context of the Yukos dispute;

(c) While the European Court can order monetary compensation for pecuniary and non-pecuniary damages in the dispositive part of the judgment, and often “reiterates” that the most appropriate form of redress for an applicant convicted despite a potential infringement of fair trial rights would, in principle, be trial *de novo* or the reopening of the proceedings, and “notes” the domestic legal provision providing for the reopening of the criminal proceedings if the European Court finds a violation, as it has done in the two cases brought before it by Mr. Pichugin,¹⁸ it does not require immediate release, a full and independent investigation and appropriate measures against those responsible or dissemination of the Opinion through all available means, all standard remedies in the cases considered by the Working Group;

(d) The two European Court cases cannot and do not address the additional violations arising from the later developments in the Russian Federation, such as the failure of the Russian judicial authorities to grant Mr. Pichugin’s request for a new trial despite its obligations under the European Convention and the domestic code of criminal procedure.

14. For these reasons, the Working Group considers itself wholly competent and obliged to hear Mr. Pichugin’s complaints in the interest of justice and human rights.

¹⁷ The Working Group notes that the European Court has interpreted the provision to weigh elements of arbitrariness of detention in its jurisprudence; however, the same Court eliminated the independent legal significance of the right to personal security by subsuming it under the right to personal liberty. *Saadi v. United Kingdom*, Application no. 13229/03 (29 January 2008), para. 67.

¹⁸ *Pichugin v. Russia*, Application no. 38623/03 (23 October 2012), para. 219; *Pichugin v. Russia*, Application no. 38958/07 (6 June 2017), para. 47.