

REPORT
PREPARED FOR THE
PRESIDENTIAL COUNCIL OF THE RUSSIAN FEDERATION
FOR CIVIL SOCIETY AND HUMAN RIGHTS
REGARDING THE VERDICT OF THE
KHAMOVNICHESKY DISTRICT COURT OF THE CITY OF MOSCOW
AGAINST M.B. KHODORKOVSKY AND P. L. LEBEDEV
CRIMINAL CASE N 1-23/10, 27 DECEMBER 2010

JEFFREY KAHN
ASSOCIATE PROFESSOR OF LAW
SOUTHERN METHODIST UNIVERSITY

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I. SUMMARY OF CONCLUSIONS

An evaluation of the verdict in this case reveals violations of the defendants' human rights protected under Articles 3, 6, and 7 of the European Convention on Human Rights. In addition, other Convention rights also may have been violated. The materials provided for use in this report, and the time allotted to complete it, were not sufficient to undertake a thorough analysis of these other issues. Sacrificing breadth for depth, and in keeping with the request of the Presidential Council of the Russian Federation for Civil Society and Human Rights, this report examines selected violations of the Convention that are most clearly identifiable in the verdict itself and in the conduct of the trial described in it.

The conclusions of this report are as follows:

- 1) The defendants' detention in the courtroom and the conditions of their confinement on remand during the trial court proceedings constituted inhuman or degrading treatment (**Article 3**).
- 2) The proceedings exceeded a reasonable time (**Article 6**).
- 3) The tribunal lacked independence and impartiality (**Article 6**).
- 4) The verdict lacked indicia of a reasoned judgment (**Article 6**).
- 5) The defendants were deprived of the presumption of innocence (**Article 6**).
- 6) The defendants were deprived of their right to equality of arms (**Article 6**).
- 7) The charge of embezzlement lacked foreseeability (**Article 7**).

II. REPORT BACKGROUND

On 1 April 2011, an invitation was received via e-mail from the Presidential Council of the Russian Federation for Civil Society and Human Rights “to participate in an independent public expert analysis of official documents and proceedings in the recent criminal case concerning M.B. Khodorkovsky and P.L. Lebedev, who were convicted by a judgment announced on December 27, 2010.” The invitation stated that “[t]he Council hopes to obtain from you a written opinion with a focus on issues within your area(s) of expertise, although you would also be free to express your opinion on any other legal question which you believe to be pertinent within judicial practice in connection with the case at hand.” A response was requested by 30 April 2011.

On 30 April 2011, the invitation of the Council was accepted via e-mail reply. In the letter of acceptance, an indication was made that the legal analysis of the report would concern the case law of the European Court of Human Rights.

On 2 May 2011, the Council acknowledged via e-mail the receipt of this reply. A copy of the verdict was sent as an attachment to that e-mail and the website www.Khodorkovsky.ru was recommended as a useful resource from which to obtain other legal documents necessary for this expert report. A copy of the expert report was requested by September.

On 1 October 2011, this report was submitted to the Council. The report was submitted in English.

III. READER'S NOTE

The European Court of Human Rights is not a court of appeal in the final instance from the decisions of domestic courts. The Court's jurisdiction "shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it[.]" See Article 32 ECHR. The Court's function is to identify violations of the Convention and, if necessary, to establish just satisfaction for them. The Court has repeatedly observed that "it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention." *Khan v. United Kingdom*, App. No. 35394/97 (12 May 2000), at ¶ 34 (internal citations omitted).

Given the diversity among member states party to the Convention, the Court has also adopted a doctrine that provides a margin of appreciation to national practices. This report takes no position regarding Russian law other than to assess its conformity to the requirements set forth by the Convention.

This report selectively identifies several violations of the Convention. Under each heading, the report first sets forth the relevant provisions of the Constitution and Code of Criminal Procedure of the Russian Federation. Second, the relevant provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights are provided. Finally, the report analyzes this law in light of the facts of the defendants' case and concludes whether the Convention could be said to have been violated. Not every potential violation has been subject to the same degree of scrutiny or, in some cases, evaluated at all. No judgment as to the merits of such claims is intended to be conveyed by, and none should be ascribed to, these choices.

IV. FACTUAL BACKGROUND¹

Following various tax inspections that began in November 2002, the Tax Ministry of the Russian Federation concluded that the Yukos oil company had avoided the payment of a variety of taxes. The Ministry found that this tax avoidance had been accomplished by the use of various subsidiary, trading, and holding companies that, although controlled and owned by Yukos, served to obscure Yukos's real business activity. The Ministry also found that the trading companies served as intermediaries between oil production companies and oil processing and storage companies, all of which belonged to Yukos.

On 20 June 2003, the first criminal investigation was opened concerning the Yukos oil company and its top management, who were suspected of fraud during the 1994 privatization of Apatit, a mining company. As the European Court summarized the matter:

In 2003-2004 the General Prosecutor's Office opened an investigation into the activities of several of the company's senior executives, including Mr Khodorkovskiy, Mr Lebedev, ... and others. Some of them were arrested in 2003-2004 on suspicion of having committed large-scale fraud and

¹ These facts are drawn primarily from the verdict of 27 December 2010 by Judge V.N. Danilkin, presiding judge of the Khamovnichesky District Court of the City of Moscow; the judgments of the European Court of Human Rights arising out of applications by Mikhail Khodorkovsky (App. No. 5829/04 decided 31 May 2011), Platon Lebedev (App. No. 4493/04 decided 25 October 2007), Vasilii Aleksanyan (App. No. 46468/06 decided 8 December 2008), and OAO Neftyanaya Kompaniya Yukos (App. No. 14902/04 decided 20 September 2011); and the admissibility decision of the European Court of Human Rights arising out of the application by Platon Lebedev (App. No. 13772/05 declared partly admissible 27 May 2010). Discrepancies between these sources and the use of any other sources are noted.

embezzlement of the shares of several Siberian oil refineries, including *Tomskneft PLC*. In particular, Ms S.B., one of the company's lawyers, was arrested. According to the Government, in her statement of 8 December 2004, confirmed in March-April 2006, she testified that the applicant, as her manager, had instructed her in relation to the illegal operations with the *Tomskneft PLC* shares, qualified by the prosecution authorities as embezzlement.

Aleksanyan v. Russia, App. No. 46468/06 (22 Dec. 2008), at ¶ 8.

On 2 July 2003, Platon Leonidovich Lebedev was arrested while in hospital and sent to a pre-trial detention center. The next day, he was remanded to a detention facility by court order made without the participation of Lebedev's lawyers.

On 20 August 2003, the criminal investigation, which had been initiated on 20 June 2003, ended. The case file contained 162 volumes.

On 25 October 2003, Mikhail Borisovich Khodorkovsky was arrested in Novosibirsk and sent to Moscow.

On 8 January 2004, a separate criminal investigation was opened on suspicion of fraud, embezzlement, and misappropriation by Yukos executives of the shares of several oil companies, including Tomskneft.

On 15 April 2004, the Tax Ministry served Yukos with a tax assessment. The Ministry found that Yukos had failed to pay certain taxes and ordered payment of over €2.8 billion in tax arrears, default interest, and penalty payments. The order gave Yukos until 16 April 2004 to pay this amount. However, by a decision of the Moscow City Commercial Court rendered on the same day that Yukos was served with a copy of the Tax Ministry's decision, judicial proceedings were begun against Yukos to obtain

this amount and the company was enjoined from disposing of certain assets in anticipation of a judgment by the court.

On 16 July 2004, the defendants' trial began in the Meshchanskiy District Court of the City of Moscow. On 16 May 2005², Khodorkovsky and Lebedev were convicted of fraud (Article 147 of the RSFSR Criminal Code and Article 159 of the RF Criminal Code), causing property damage by deceit or breach of trust (Article 165 CC RF), and tax evasion (Article 198 and Article 199 CC RF) by a verdict of the Meshchanskiy District Court. They were sentenced to nine years in prison.

On 22 September 2005, the verdict was upheld on cassational appeal but the sentences were reduced to eight years in prison.

On 29 March 2006, prosecutors sought authorization from the Simonovskiy District Court in the City of Moscow to initiate the prosecution of Vasilii Aleksanyan, then head of the legal department of the Yukos oil company. According to the description found in the judgment of his application by the European Court of Human Rights:

On 29 March 2006 the Deputy Prosecutor General requested the Simonovskiy District Court of Moscow to authorise criminal prosecution of the applicant in connection with his alleged participation in the embezzlement of the property and shares of several oil companies and refineries in 1998-1999 (*Tomskneft, Achinsk refinery, Eastern Oil Company*, etc). The GPO [General Procurator's Office] claimed that in 1998-1999, when the applicant had been the head of the legal department

² In *Khodorkovskiy v. Russia*, App. No. 5829/04 (31 May 2011) at ¶ 69, the European Court of Human Rights dates this conviction as 31 May 2005.

of *Yukos*, he had advised the company's executives and thus participated in their criminal activities. The shares in these companies had subsequently been "legalised" through a chain of financial operations. In their request the GPO referred to the materials from the criminal case, without, however, identifying them.

Aleksanyan, supra at ¶ 15.

On 4 and 5 April 2006, the court authorized searches of Aleksanyan's homes in connection with this request. On 6 April 2006, the court authorized the prosecution.

On 4 August 2006, the commercial court of Moscow declared Yukos to be bankrupt and, with the consent of the leading creditor, Rosneft, a state-owned oil company, appointed a trustee to manage Yukos. This decision was upheld by the 9th Commercial Court of Appeal on 26 September 2006.

On 12 December 2006, the criminal investigation, which had been initiated on 8 January 2004, ended. The case file contained 113 volumes.

On 5 February 2007, a second indictment, alleging embezzlement (Article 160 CC RF) and money-laundering (Articles 174 and 174.1 CC RF) by the defendants, was announced.³ The final version of the indictment lodged with the court and dated 14 February 2009 comprises fourteen volumes (3460 pages). The crimes alleged in the indictment span roughly

³ See e.g. BBC News, *New fraud charges in Yukos case*, 5 February 2007; RIA-Novosti, *Security tightened as ex-Yukos head returns to court*, 5 February 2007. The indictment («обвинительное заключение») made available to the author of this report is dated 14 February 2009. The discrepancy in date may reflect the final version of the indictment filed with the court pursuant to Article 215 of the Criminal Procedure Code.

the same time period as the crimes for which the defendants were arrested in 2003 and convicted in 2005. Both sets of crimes concern the defendants' conduct as executives of the Yukos oil company.

On 25 October 2007, the European Court of Human Rights released its judgment concerning an application Lebedev filed about his detention and access to a lawyer. The Court found that Lebedev's detention, in various ways, violated Article 5 § 1(c), § 3, and § 4 of the European Convention on Human Rights.

On 12 November 2007, bankruptcy proceedings concerning Yukos concluded, at which time it ceased to have corporate existence.

At a hearing held on 22 January 2008, Aleksanyan, who had been gravely ill with AIDS-related diseases, alleged that, on 28 December 2006, investigator Karimov, who was in charge of the cases against Khodorkovsky and Lebedev, had "offered him a deal: if he testified against Mr Khodorkovskiy and Mr Lebedev he would be released. Mr Karimov had allegedly told the applicant that the General Prosecutor's Office had been aware of his health situation, and that it would be advisable for the applicant to receive appropriate treatment, perhaps in a foreign hospital." Aleksanyan further alleged that, in April 2007 and November 2008, investigators had offered him release in return for his confession and cooperation in these cases. *Aleksanyan v. Russia*, App. No. 46468/06 (22 December 2008) at ¶ 86.⁴

⁴ According to Aleksanyan's submissions to the European Court, at a hearing before the Russian Supreme Court on 22 January 2008, "which was widely covered in the Russian media, the applicant disclosed that the prosecution had made several offers of release on health grounds in exchange for false testimony, confirming that his lawyer had been present and had witnessed those incidents. Immediately thereafter the Federal Penitentiary Service threatened the applicant's lawyer with a defamation suit, as the Government had moreover acknowledged in their observations." *Id.* at ¶ 227.

On 22 December 2008, the European Court of Human Rights released its unanimous judgment of an application Aleksanyan filed concerning his detention and the search of his premises. The Court held that there had been a violation of Article 3 due to inadequate medical care while in detention, a violation of Article 5 § 3 due to the unreasonable length of his detention, and a violation of Article 8 due to the vagueness of warrants issued for, and overbreadth of investigative searches conducted of, his premises. The Court further held that the Russian Government had failed to comply with interim measures that had been indicated by the Court under Article 39 and held that Aleksanyan should be released from detention.⁵ Following the Court's judgment, Aleksanyan was released on bail. In June 2010, it was reported that the criminal charges against him were dropped due to the expiry of the relevant statute of limitations.⁶

The second trial of Khodorkovsky and Lebedev began on 31 March 2009.

A verdict was expected on 15 December 2010.⁷ Without explanation, the announcement of the verdict was postponed on that date until 27 December 2010.

⁵ Although the European Court found that Russia had failed to comply with interim measures to protect Aleksanyan's health, in violation of Article 34 of the Convention, the Court concluded that Aleksanyan had not presented sufficient evidence to support his allegations about undue pressure "in connection with the proceedings in Strasbourg," *Aleksanyan v. Russia*, App. No. 46468/06 (22 December 2008) at ¶ 233, and held that Aleksanyan's complaint that his prosecution had been pursued for ulterior purposes (a violation of Article 18 of the Convention) was admissible but unnecessary to examine separately from the Court's findings of other violations. *Id.* at ¶¶ 219-220.

⁶ Alexandra Odynova, *Charges Dropped Against Yukos' Aleksanyan*, Moscow Times (25 June 2010).

⁷ See, e.g., Alexandra Odynova, *Khodorkovsky Verdict is Postponed*, Moscow Times (16 Dec. 2010); CNN Wire Staff, *Verdict in Khodorkovsky's 2nd Trial Postponed*, CNN (15 Dec. 2010); RIA-Novosti, *Announcement of Khodorkovsky Verdict Postponed til Dec. 27* (15 Dec. 2010).

On 16 December 2010, during a nationwide television program, Prime Minister Vladimir Putin responded at length to a question about Khodorkovsky by saying, *inter alia*, that “a thief should sit in jail.”⁸

On 27 December 2010, the verdict was read out. Khodorkovsky and Lebedev were found guilty of embezzlement and money laundering and sentenced to fourteen years imprisonment.

On 15 April 2011, the judicial collegium for criminal cases of the Supreme Court of the Russian Federation released its supervisory determination («определение суда надзорной инстанции») concerning various rulings about the defendants’ detention made by the Khamovnichesky District Court and the Moscow City Court in 2010 and 2011.⁹ The Supreme Court concluded that the defendants’ custody in a pre-trial detention facility (rather than in the less severe custodial conditions to which they were previously sentenced) from 17 August to 17 November 2010 was unlawful.

On 17 May 2011, the Moscow City Court was scheduled to hear the defendants’ appeal from the verdict of the Khamovnicheskiy court.¹⁰ Without explanation, the hearing was postponed.

⁸ See *infra* at Section(B)(2)(c) of Part V of this report.

⁹ See *Opredelenie* ot 15.04.11. Sudebnaya kollegiya po ugovolnym delam, kassatsiya (Dokladchik: Shamov Aleksei Viktorovich) (№ 5-Д11-29). This determination was the result of a new law, No. 60-FZ from 7 April 2010, which amended Article 108 of the Criminal Procedure Code to exclude those suspected or accused of certain crimes (including those of which the defendants were accused) from the harsher confinement conditions of pre-trial detention in the absence of certain exceptional circumstances.

¹⁰ Thomas Grove, Khodorkovsky appeal set for May 17: Russian court, *Reuters* (27 Apr. 2011); Tom Balmforth, *Moscow Court Upholds Convictions Of Khodorkovsky, Lebedev*, *Radio Free Europe/Radio Liberty* (24 May 2011).

On 18 May 2011, President Dmitrii Medvedev responded to a question about Khodorkovsky at a press conference in Skolkovo, saying that there would be “no danger” to society if Khodorkovsky were to be released from prison.¹¹

On 24 May 2011, the defendants’ appeal was heard and decided. The Khamovnichesky court’s verdict was upheld with a modest reduction in the original sentence.

On 31 May 2011, the European Court of Human Rights released its judgment of an application Khodorkovsky filed concerning his arrest, detention, and first trial. The Court found that Khodorkovsky’s arrest violated Article 5 § 1 (b) of the European Convention on Human Rights; that the conditions of his detention in court and in a remand prison during his first trial violated Article 3 of the Convention; that the length of his continuous detention pending investigation and during that trial violated Article 5 § 3 of the Convention; and that various procedural irregularities concerning his detention resulted in multiple violations of Article 5 § 4 of the Convention. The Court also found that Khodorkovsky’s initial detention following his arrest did not violate Articles 3 or 5 § 4, nor had there been any violation of Article 5 § 1 (c) of the Convention (which concerned whether his detention pending investigation and trial “had been imposed and extended in accordance with a procedure prescribed by law”).¹²

¹¹ Press Conference of the President of Russia, 18 May 2011, “Skolkovo” School of Management, <http://news.kremlin.ru/transcripts/11259>. See *infra* at Section(B)(2)(c) of Part V of this report.

¹² In addition, the Court also found that the procedure extending his detention on 8 June 2004 did not violate Article 5 § 4 (distinguishing that instance with procedures that did violate that provision of the Convention on two prior occasions and one subsequent occasion).

On 13 September 2011, the judicial collegium for criminal cases of the Supreme Court of the Russian Federation released its supervisory determination («надзорное определение») concerning various rulings about the defendants' detention made by the Khamovnichesky District Court and the Moscow City Court in 2010 and 2011.¹³ The Supreme Court concluded that the defendants' custody in a pre-trial detention facility (rather than in the less severe custodial conditions to which they were previously sentenced) from 17 May to 17 August 2010 was unlawful.

On 20 September 2011, the European Court of Human Rights released its judgment of an application filed by OAO Neftyanaya Kompaniya Yukos concerning its treatment. In a judgment that is not yet final, the Court held by majority votes that Yukos had not been afforded adequate time to prepare for hearings concerning certain tax assessments, in violation of Article 6 §§ 1 and 3(b), and that Article 1 of Protocol No. 1 to the Convention had been violated both by the imposition of certain tax penalties and by the disproportionate nature of the enforcement proceedings. The Court also found that there had been no violation of Article 1 of Protocol No. 1 of the Convention concerning other tax assessments and no violation of Article 14 or Article 18 taken in conjunction with Article 1 of Protocol No. 1.¹⁴ The Court reserved to a later date the issue of just satisfaction for these violations of the Convention.

¹³ See *Opreделение ot 13.09.11. Sudebnaya kollegiya po ugovnym delam, kassatsiya (Dokladchik: Kamenev Nikolai Dmitrievich) (№ 5-Д11-63)*.

¹⁴ The Court also held that examination of the case under Articles 7 and 13 of the Convention was not necessary.

V. VIOLATIONS**A. ARTICLE 3****1. RELEVANT RUSSIAN LAW AND PRACTICE**

The Constitution of the Russian Federation states, in relevant part:

Article 21

1. The dignity of the individual shall be protected by the state. Nothing may serve as a justification for its diminution.
2. No one shall be subjected to torture, violence or other cruel or degrading treatment or punishment. No one may be subjected to medical, scientific or other experiments without his free consent.

The relevant provisions of the Code of Criminal Procedure of the Russian Federation are as follows:

Article 9

1. In the course of criminal proceedings, any action or decision that demeans the honor of any participant in criminal proceedings is prohibited, as is any treatment of such person that lessens his worth as a human being or endangers his life or health.
2. No participant in criminal proceedings may be subjected to violence, torture, or any other treatment that is cruel or demeans human dignity.

2. RELEVANT ECHR PROVISIONS AND CASE LAW

Article 3 of the Convention states:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The European Court has frequently characterized treatment “to be both ‘inhuman’ because it was premeditated, was applied for hours at a stretch and caused, if not actual bodily injury, at least intense physical and mental suffering, and also ‘degrading’ because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.” *Soering v. United Kingdom*, App. No. 14038/88 (7 July 1989), at ¶ 100 (internal citation and quotation marks omitted).

The Court’s case law concerning conditions of detention on remand in Russia is extensive and need not be repeated here. It is worth noting, however, that Russian violations of Article 3 have been frequent and egregious.¹⁵ See, e.g., *Kondratishko and others v. Russia*, App. No. 3937/03 (19 July 2011). In the year 2010

¹⁵ The second judgment against Russia concerned, *inter alia*, conditions of detention. *Kalashnikov v. Russia*, App. No. 47095/99 (15 July 2002). Russia pled for a margin of appreciation due to economic difficulties alleged to hinder prison reform. The Russian representative before the Court argued that Kalashnikov’s conditions of confinement could not amount to torture, inhuman, or degrading treatment because they “did not differ from, or at least were no worse than those of most detainees in Russia.” A Russian expert who appeared in Strasbourg on behalf of the Russian Government in that case later summarized this argument as a plea that “the conditions of confinement were Russian.” See William Burnham & Jeffrey Kahn, *Russia’s Criminal Procedure Code Five Years Out*, 33 *Review of Central & E. Eur. Law* 24 (2008). The Court routinely rejects such arguments. See, e.g., *Mamedova v. Russia*, App. No. 7064/05 (1 June 2006) at ¶ 63.

alone, the Court found a violation of Article 3's right to be free of inhuman or degrading treatment or punishment in 102 judgments, more than any other member state by a factor of three and amounting to half of all violations found against Russia that year. See Registry of the European Court of Human Rights, Annual Report 2010 150-151 (2011).

a. Conditions of Detention on Remand

During the defendants' first trial, the defendants were held at a remand facility informally known as Matrosskaya Tishina. Lebedev was held in the main section, IZ-77/1, while Khodorkovsky was held in IZ-99/1, a special-purpose block. For two days in October 2003, and then again after the trial but before departure to serve his sentence in a penal colony, Khodorkovsky was confined in IZ-77/1.

The conditions at IZ-77/1, as well as the particular conditions of confinement in an isolation cell and the deprivation of opportunities for exercise and hot food due to his nearly daily attendance at trial (but available to other detainees) were the subject of Lebedev's second application to the European Court of Human Rights. See Lebedev v. Russia (Lebedev No. 2), App. No. 13772/05 (27 May 2010), at ¶¶ 195-201. At the time of the writing of this report, a judgment on the merits of this application, declared admissible by a majority of the Court, had not occurred.

The conditions at IZ-99/1 were the subject, *inter alia*, of Khodorkovsky's application to the European Court of Human Rights. On 31 May 2011, the Court held that neither the detention in October 2003 in IZ-77/1 (due to its brevity) nor detention in IZ-99/1 during the trial (due to the ameliorative nature of food and medicine received from relatives, frequent absence from the cells

due to courtroom appearances, the use of fee-based extra services such as a fitness facility, and other benefits not accorded the general prison population) constituted a violation of Article 3. However, the Court did find that the detention in IZ-77/1 for two months after his conviction, when Khodorkovsky's treatment returned to that provided by the standard prison regime, violated Article 3. *Khodorkovskiy v. Russia*, App. No. 5829/04 (31 May 2011), at ¶ 117-118.

In making this assessment, the Court considered it appropriate to shift the burden of proof to the Russian Government regarding the conditions of Khodorkovsky's confinement. *Id.* at ¶ 108. This decision was based on the consistency of Khodorkovsky's submissions with those of a large number of petitioners to the Court regarding these same facilities, the large number of judgments against Russia in this regard, the practical difficulties inherent in a prisoner collecting evidence about the conditions of his detention, and the refusal of the authorities to allow independent observers to visit Khodorkovsky during his detention.¹⁶

¹⁶ The Court categorized the following judgments as presenting "very similar complaints" as Khodorkovsky, mostly concerning IZ-77/1: *Andreyevskiy v. Russia*, App. No. 1750/03 (29 Jan. 2009); *Gubin v. Russia*, App. No. 8217/04 (17 June 2010); *Starokadomskiy v. Russia*, App. No. 42239/02 (31 July 2008); *Popov v. Russia*, App. No. 26853/04 (13 July 2006); *Denisenko and Bogdanchikov v. Russia*, App. No. 3811/02 (12 Feb. 2009); *Sudarkov v. Russia*, App. No. 3130/03 (10 July 2008); *Belashev v. Russia*, App. No. 28617/03 (4 Dec. 2008); *Trepashkin v. Russia (No. 2)*, App. No. 14248/05 (Dec.), (22 Jan. 2009); *Vlasov v. Russia*, App. No. 78146/01, (12 June 2008) (concerning IZ-99/1).

b. Conditions in the Courtroom

Ordinarily, the measure of restraint adopted during trial for use in the courtroom has not been considered under the heading of Article 3 if it has been “imposed in connection with a lawful detention and does not entail a use of force, or public exposure, exceeding that which is reasonably considered necessary.” *Ramishvili & Kokhreidze v. Georgia*, App. No. 1704/06 (27 Jan. 2009), at ¶ 96. “Even in the absence of publicity, a given treatment may still be degrading if the victim could be humiliated in his or her own eyes.” *Id.* Risk of flight and threat of violence are countervailing factors that have been considered. *Id.*

During their first criminal trial, in the Meshchanskiy District Court from 16 July 2004 to 16 May 2005, the defendants were confined in a metal cage. It is, perhaps, enough to note that the European Court found the conditions of Khodorkovsky’s confinement in the courtroom during this first trial to violate Article 3 of the Convention. *Khodorkovskiy v. Russia*, App. No. 5829/04 (31 May 2011), at ¶ 125-126. The Court noted that the applicant’s non-violent offense, lack of a criminal record, and lack of evidence of any predisposition to violence made the Government authorities’ claim of security risks a specious one, especially given that the cage appeared to be a permanent court fixture unrelated to any specific concerns about the defendant. The Court found that “such a harsh appearance of judicial proceedings could lead an average observer to believe that an extremely dangerous criminal was on trial. Furthermore, the Court agrees with the applicant that such a form of public exposure humiliated him in his own eyes, if not in those of the public, and aroused in him feelings of inferiority.” *Id.* at ¶ 125.

This confinement was also a subject included in Lebedev's second application to the European Court of Human Rights. See *Lebedev v. Russia (Lebedev No. 2)*, App. No. 13772/05 (27 May 2010), at ¶¶ 179-183. As in Khodorkovsky's application to the Court, the precise conditions were disputed. The Government authorities submitted that the cage was an appropriate restraint necessary to preserve courtroom order and safety and to prevent the intimidation of witnesses. In any event, it did not rise to a level of severity sufficient to implicate the protections of Article 3 of the Convention. Lebedev submitted that he was confined for up to nine hours a day without water or acceptable food, an unnecessary humiliation for a non-violent defendant that also interfered with his access to counsel. The concerns of the court could easily have been alleviated by placing a guard next to him.

At the time of the writing of this report, the European Court of Human Rights had not rendered a judgment on the merits of Lebedev's application. On 27 May 2010, however, a majority of the European Court declared the allegation of a violation of Article 3 admissible for a hearing on the merits. Given that the European Court held that the same conditions in the courtroom described in Khodorkovsky's application constituted a violation of Article 3, it is likely that Lebedev's essentially identical application, concerning the same trial conditions, will also be held to present a violation of Article 3.

3. ANALYSIS

a. Conditions of Detention on Remand

During the trial, the defendants were again held at Matrosskaya Tishina.

Sufficient information about what improvements, if any, have been made to conditions of detention at Matrosskaya Tishina following the defendants' detention there during their first trial was not available for the drafting of this report. Given the large number of judgments against Russia regarding violations of Article 3 for conditions of detention – from the second judgment issued against Russia (*Kalashnikov v. Russia*, App. No. 47095/99 (15 July 2002)) to its most recent judgment (*Ilyadi v. Russia*, App. No. 6642/05 (5 May 2011) – another such judgment regarding the defendants' conditions of detention is entirely possible.

b. Conditions in the Courtroom

During the second trial, press reports and photographs indicate that the defendants were confined inside a glass compartment.¹⁷ Guards are seen in these photographs standing alongside the compartment. On 3 March 2009, Khodorkovsky's attorneys filed a motion with the Khamovnichesky Court requesting that Khodorkovsky "be found alongside the lawyers, and not in an aquarium." According to the Khodorkovsky and Lebedev Communications Center, the motion was denied the same day.¹⁸

It is difficult to say whether, under the factual circumstances of this case, the Court will consider the use of a glass compartment to be as degrading a form of treatment as the use of a metal cage. On the one hand, a glass compartment may be considered to lack the stigma of a cage. On the other hand, it remains a physical barrier

¹⁷ As noted below, the use of glass compartments to detain defendants during trial has sometimes been analyzed by the European Court under the heading of Article 6 of the Convention, concerning the presumption of innocence.

¹⁸ Khodorkovsky and Lebedev Communications Center, *Defense Files Two Pleas*, 3 March 2009, <http://www.khodorkovskycenter.com/news-resources/stories/defense-files-two-pleas>.

between the defendant and all others. The European Court will ask whether its use could have been “reasonably considered necessary.”

Evaluation of the factors that the Court has considered in the past suggests that its answer will be negative. The defendants were not accused of crimes of violence. Although at the time of the trial they had criminal records, these were not for violent offenses. Given their incarcerated status and national media attention, they were unlikely risks of flight. Indeed, Khodorkovsky had made considerable show of his refusal to leave Russia when other individuals suspected of the same crimes had fled.

B. ARTICLE 6 § 1

1. RIGHT TO PROCEEDINGS WITHIN A REASONABLE TIME

a. Relevant Russian Law and Practice

The relevant provisions of the Code of Criminal Procedure of the Russian Federation are as follows:

Article 6.1¹⁹

1. Criminal proceedings are carried out in a reasonable time.
2. Criminal proceedings are carried out in the time periods established by this Code. Extension of these

¹⁹ This article was added to the Criminal Procedure Code by Federal Law of 30 April 2010 (No. 69-FZ). With regard to this amendment, as with all other amendments to the Code identified in this report, Article 4 of the Code provides that: “The law on criminal procedure in effect at the time of the performance of an appropriate procedural action or the making of a procedural decision shall apply in proceedings in a criminal case, unless otherwise provided by this Code.”

time periods is permitted in cases and in the manner foreseen by this Code, but criminal prosecution, imposition of a sentence and termination of a criminal prosecution should be carried out within a reasonable time.

3. In determining a reasonable time period for criminal proceedings, which includes the period from the start of the criminal prosecution until the termination of the criminal prosecution or pronouncement of a judgment of conviction, such factors as the legal and factual complexity of the criminal case, the conduct of the participants of the criminal proceedings, the sufficiency and effectiveness of the actions of the court, the prosecutor, the head of the investigative body, investigator, head of the inquiry subdivision, the inquiry agency, inquiry officer, which are conducted to the ends of the timely accomplishment of the criminal proceedings or examination of a criminal case, as well as the total length of criminal proceedings are taken into account.

4. The circumstances related to the organization of the work of inquiry agencies, the investigation agencies, the procurator's office and court, as well as the examination of the criminal case by different levels of authority may not be taken into account as a basis for exceeding the reasonable time period for the accomplishment of criminal proceedings.

5. If after submission of a criminal case to the court, the case is not tried for a long period of time and the judicial process is delayed, the interested

parties have the right to recourse to the court chairman with a motion on acceleration of the examination of the case.

6. The motion on the acceleration of the examination of a criminal case is considered by the court chairman no later than 5 days from the day the motion was filed with the court. As a result of the examination of the motion, the court chairman issues a reasoned decision, in which a period for the conduct of a court's session on the case may be established and (or) other procedural actions to accelerate the examination of the case may be accepted.

Article 121

A motion shall be heard and disposed of as soon as possible after it is made. When a motion made in the course of a preliminary investigation cannot be disposed of immediately, it shall be decided no later than three days after it was made.

Article 129 § 2

A time period may be extended only in situations and in accordance with the procedures specified in this Code.

Article 144 §§ 1 & 3

1. An inquiry officer, inquiry agency, investigator, head of the investigating body must accept and investigate every report of the commission of a crime or of preparation to commit one, and shall

make a decision on such report within the scope of his duties as defined by this Code no later than 3 days after the filing of such a report. ...

3. A head of the investigating body, head of an investigative unit or head of an inquiry agency, on the official, reasoned request of an investigator or inquiry officer, may extend the time period specified by part one of this Article up to 10 days. When the production of documentary verification, audits, research of documents, objects or bodies is necessary, the head of the investigative body at the request of the investigator or prosecutor at the request of the investigator may extend this period to 30 days on concrete, factual circumstances giving rise to such extension with a binding instruction.

Article 146 § 4²⁰

4. The order initiating the criminal case shall be forwarded to a procurator without delay. ... Upon

²⁰ Paragraph 4 of this article was amended during the pendency of this case, see Federal Law from 2 December 2008 (No. 226-FZ), which shifted authority to initiate a criminal case from a prosecutor to the head of the relevant federal investigative committee, a newly created body. The unamended version is provided above because the case was initiated in February 2007, prior to the coming into effect of this amendment. The amended version, in relevant part, is as follows: “A copy of the order of the head of the investigating body, investigator, or inquiry officer initiating the criminal case shall be forwarded to a procurator without delay. ... If a procurator recognizes an order initiating a criminal case as unlawful or unfounded, he has the right within 24 hours from the receipt of the materials serving as the basis for the criminal case to cancel the order initiating the criminal case, about which he gives a reasoned decision, a copy of which is provided without delay to the official who initiated the criminal case. The head of the investigative body, the investigator, or the inquiry officer shall without delay notify the complainant and the person against whom a criminal case has been initiated about the decision.”

receiving the order, the procurator shall give his consent, without delay, to the initiation of a criminal case or issue an order withholding consent for the initiation of a criminal case or sending the materials back for an additional verification, which must be conducted within a period of no more than 5 days. The investigator or inquiry officer shall notify the complainant and the person against whom the criminal case was initiated of the procurator's decision on the same day.

Article 162²¹

1. A preliminary investigation in a criminal case shall be completed within a time period not exceeding two months after the criminal case is initiated.
2. The preliminary investigation time period runs from the date the criminal case is initiated until the date it is forwarded to the procurator recommending an indictment, the date it is ordered to be forwarded to a court for consideration of whether to order involuntary medical treatment, or the date when an order dismissing proceedings in the criminal case is issued.

²¹ Paragraph 7 of this article was amended once and paragraphs 4 and 5 were amended twice during the pendency of this case, see Federal Laws from 5 June 2007 (No. 87-FZ) and 3 December 2007 (No. 323-FZ). With regard to paragraph 4, the amendment reduces the permitted period of extension from six to three months and requires the assent of the corresponding head of the investigative body. With regard to paragraphs 5 and 7, the amendment shifts authority from the procuracy to the (then) new Investigative Committee.

3. The preliminary investigation time period shall not include any time during which the preliminary investigation was suspended on the grounds specified by this Code.
4. The procurator of a district, the procurator of a city, and equal-status military procurators and their deputies, may extend the preliminary investigation time limit up to 6 months.
5. In a criminal case in which the investigation is especially complex, the time limit on the preliminary investigation may be extended up to twelve months by the procurator of a subject of the Russian Federation, and equal-status military procurators and their deputies. Any further extension of the preliminary investigation time limit may be made only in exceptional cases and may be effected solely by the Russian Federation Procurator General or his deputies.
6. When a procurator returns a criminal case for a supplementary investigation and also when a suspended or dismissed criminal case is reopened, the time period for such supplemental investigation, which shall be set by the procurator, may not exceed one month following the date such criminal case was filed with the investigator. Any further extensions of the preliminary investigation time limit may be effected on the general grounds and in accordance with the general procedures established by this Article.
7. Whenever it becomes necessary to extend the time limit on the preliminary investigation, the

investigator shall issue an appropriate order to that effect and submit it to the procurator no later than 5 days before the expiration of the preliminary investigation time limit.

8. The investigator shall notify in writing the accused and his defense counsel, as well as the victim and his representative, of the extension of the preliminary investigation time limit.

Article 217 § 1

After fulfilling the requirements of Article 216 of this Code the investigator shall present bound and numbered volumes of the criminal case file to the accused and to his defense counsel ...

Article 221 § 1²²

A procurator shall review the criminal case file with an indictment that was forwarded by the investigator and within 10 days shall make one of the following decisions:

1) approving the indictment and forwarding the criminal case to court. ...

Article 227 §§ 1 & 3

1. When a criminal case is filed in court, the judge shall make one of the following decisions: ...

3) setting a trial date. ...

²² This article was amended during the pendency of this case, see Federal Law from 5 June 2007 (No. 87-FZ), which increased the time period above from 5 days to 10 days.

3. The decision shall be made within 30 days after the criminal case is filed with the court. ...

Article 233 § 1

1. Trial of a criminal case in court shall commence no later than 14 days after the order setting a trial date is issued

Article 295 § 2

2. Before the court retires to the deliberation room, trial participants shall be informed of the time when the judgment is to be announced.

b. Relevant ECHR Provisions and Case Law

Article 6 § 1 of the Convention states, in relevant part, that:

In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time... .

In judgments dating back decades, “the Convention institutions have consistently taken the view that Article 6 is, in criminal matters, ‘designed to avoid that a person charged should remain too long in a state of uncertainty about his fate’[.]” *Nakhmanovich v. Russia*, App. No. 55669/00 (2 March 2006) at ¶ 89 (citing *Stögmüller v. Austria*, App. No. 1602/62 (10 November 1969) at ¶ 5). The European Court has held that the “the duty to administer justice expeditiously [is] incumbent in the first place” on the member state. *Kudla v. Poland*, App. No. 30210/96 (26 October 2000) at ¶ 130. It is the responsibility of “the State authorities to

organise the investigation in such a way so as to comply with time-limits, without prejudicing the rights of defence.” *Panchenko v. Russia*, App. No. 45100/98 (8 February 2005) at ¶ 134.

The word “charge” has autonomous substantive meaning within the context of the Convention. *Rokhlina v. Russia*, App. No. 54071/00 (7 April 2005) at ¶ 81. This is because “the prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a ‘substantive’, rather than a ‘formal’, conception of the ‘charge’ contemplated by Article 6 par. 1 (art. 6-1). The Court is compelled to look behind the appearances and investigate the realities of the procedure in question.” *Deweers v. Belgium*, App. No. 6903/75 (27 February 1980) at ¶ 44 (internal citations omitted). The unchanging key to the European Court’s jurisprudence in this regard appears to be linked to notice given the accused. Thus, while arrest is conventionally accepted as one common indicia of the start of criminal proceedings for purposes of determining their length, see e.g. *Moiseyev v. Russia*, App. No. 62936/00 (6 Apr. 2009) at ¶ 190, the Court explained that the measure of the length of proceedings starts

from an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence or some from [sic] other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect. According to the Court’s constant case-law, a person has been found to be subject to a “charge”, inter alia, when a preliminary investigation has been opened in his case and, although not under arrest, the applicant

has officially learned of the investigation or has begun to be affected by it.

Kangasluoma v. Finland, App. No. 48339/99 (20 January 2004) at ¶ 26 (internal citation omitted). Likewise, “the period to be taken into consideration in determining the length of criminal proceedings normally ends with the day on which a charge is finally determined or the proceedings are discontinued[.]” *Nakhmanovich, supra*, at ¶ 88.

Whether the length of criminal proceedings is reasonable “must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities [.]” *Sutyagin v. Russia*, App. No. 30024/02 (3 May 2011) at ¶ 150. In addition, a fourth factor – the importance of the proceedings for the accused – has also been adopted by the Court. In particular, “where a person is kept in detention pending the determination of a criminal charge against him, the fact of his detention is a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met.” *Abdoella v. the Netherlands*, App. No. 12728/87 (25 November 1992) at ¶ 24.

Although “dilatatory conduct” and behavior by the defendant intended to “otherwise upset the proper conduct of the trial” will be held against the applicant, *Kudla, supra*, at ¶ 130, delays attributable to the defendant asserting his rights will not be held against him. *Moiseyev, supra*, at ¶ 192. On the other hand, “substantial periods of inactivity, for which the Government have not submitted any satisfactory explanation, are attributable to the domestic authorities.” *Skorobogatova v. Russia*, App. No. 33914/02 (1 December 2005) at ¶ 49.

c. Analysis

The determination of the length of proceedings – let alone the reasonableness of this period – is likely to be a point of contention between the parties. The Government authorities may view February 2007, the date of the indictment, as the starting point, the first trial proceedings having concluded with the defendants' conviction in 2005. The defendants may view July and October 2003 (the dates of their initial arrests) or even shortly earlier (the point in time when they became aware that a criminal investigation had been opened) as the starting point. The defendants may be inclined to argue that the 2007 indictment was artificially separated from the indictment leading to their first convictions, notwithstanding their common facts, parties, and legal issues. Indeed, these considerable common features between the two trials would seem to lend support to the defendants' view.

The European Court's case law is unclear in this respect. The Court has sometimes considered the finality of a criminal conviction to be a reliable marker. Thus, in *Löffler v. Austria*, App. No. 30546/96 (3 October 2000) at ¶ 19, the applicant was convicted of murder but sought to reopen his criminal case on the basis of DNA evidence, which ultimately led to his acquittal. In measuring the length of the criminal proceedings for purposes of evaluating his claim of a violation of Article 6, the European Court held that the relevant start was the reopening of the case, not the date when a criminal investigation was first initiated against the applicant. The Court observed that the first proceedings had become final at the time of the applicant's conviction; he could have complained about their length at that time. *Id.*

On the other hand, a different conclusion was reached in *Stoianova & Nedelcu v. Romania*, App. Nos. 77517/01 and

77722/01 (4 August 2005). In that case, the applicants were charged with robbery and held in custody for eight months in 1993 before being acquitted. The prosecution successfully appealed. The case was reopened for investigation in 1994, then discontinued in 1997, reopened again in 1999 with the addition of a new charge (inciting witnesses to give false evidence), then discontinued in 2005 as time-barred. The Court measured the length of the proceedings from the original arrest in 1993 (rather than having begun with the reopening of the case in 1999) because the prosecutor's discontinuance of the inquiry "was not a final decision" *Id.* at ¶ 21. By this was meant the fact that "it was open to the prosecution to reopen the criminal investigation without having to seek leave from any domestic court that would have been obliged to consider the application according to certain criteria, including the fairness of reopening the case and whether an excessive period had passed since the decision discontinuing the investigation." *Id.*

The present case fits more naturally within the analysis of the *Stoianova* case. There, as here, the power in question is prosecutorial discretion, which rests in the hands of the Government authorities. As in the *Stoianova* case, a complaint about the unreasonableness of the length of proceedings would be based on the decisions of prosecutors concerning the timing of their seriatim investigations and prosecutions for related acts. The *Löffler* case is thus distinguishable in this respect. In *Löffler*, the applicant himself sought to undo the finality of the proceedings and was stymied by delays attributable both to the prosecuting authorities and to the tribunal. In the *Stoianova* case, on the other hand, the applicants sought repose from criminal proceedings repeatedly opened and closed by an irresolute prosecuting authority. As the Court noted in that case, "[t]he applicants were

not responsible for those shortcomings on the part of the authorities and should not therefore be put at a disadvantage as a result of them.” *Stoianova, supra*, at ¶ 21.

The European Court and scholarly observers of its work have frequently linked the guarantees of Article 6 to the rule of law. If the Government authorities are unable to adequately explain why the defendants were charged in serial fashion, rather than investigated and charged for all offenses concerning their actions as heads of Yukos, it would be difficult not to conclude that the relevant starting point to determine the reasonableness of the length of proceedings was the initial arrest of the defendants. As noted, “substantial periods of inactivity, for which the Government have not submitted any satisfactory explanation, are attributable to the domestic authorities.” *Skorobogatova v. Russia*, App. No. 33914/02 (1 December 2005) at ¶ 49.

The materials provided for use in this report are inadequate to reach a conclusion as to the credibility of an official explanation in this regard. In this respect, however, it is worth noting that pursuant to Article 79(3)(b) of the Criminal Code, the defendants were eligible for conditional-early relief from their sentences after having served at least half of the term of their punishment. The announcement of a new criminal case was made in February 2007, shortly before the defendants were eligible for parole. Although beyond the scope of this analysis to confirm, it is also worth considering the conclusion of the rapporteur of the Parliamentary Assembly of the Council of Europe, who personally observed both the first and second trial of the defendants:

Mr Khodorkovsky and Mr Lebedev complained during their first trial of a parallel investigation taking place by the general prosecutor’s office. They complained that they should have been

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

Document 11993, Report of the Committee on Legal Affairs and Human Rights (Rapporteur Mrs. Sabine Leutheusser-Schnarrenberger) (7 August 2009), at ¶ 101.

If the proceedings are judged to have begun with the defendants' arrest in 2003, than they have lasted approximately 7½ years; if measured from the date of the second indictment, they have lasted roughly four years. The case law of the European Court is highly variable in its assessment of such time periods, cases appearing on either side of the question of their reasonableness. Thus, the Court has relied on case-by-case evaluations of different factors. These factors are as follows.

(1) Complexity of the Case

There is likely to be a dispute between the parties regarding this factor. The authorities will likely note that the case file amounted to 188 volumes of evidence in a highly complex

financial scheme of oil embezzlement and money laundering involving multiple unindicted co-conspirators and numerous corporate entities and structures in different national jurisdictions. The defendants will likely assert that this complexity has been manufactured by the novel theory of embezzlement proposed by the prosecution in the first place. It should be noted, however, that a finding of complexity – whether real or contrived – is not necessarily determinative. The European Court found a violation of Article 6 in *Yagci & Sargin v. Turkey*, App. No. 6/1994/453/533-534 (23 May 1995), notwithstanding the existence in that case of 40 volumes of files concerning 16 defendants represented by 400 lawyers over the course of 48 hearings. *Id.*, at ¶¶ 11 & 60.

As Professor Trechsel has observed from the evolution of the Court's case law, "[t]he *only* decisive element is, in fact, the way in which the authorities dealt with the case. Whether the case is complex or not is in essence entirely irrelevant – a violation will only be found when there have been periods during the proceedings where no action was taken, although something could and should have been done." Stefan Trechsel, Human Rights in Criminal Proceedings 143 (2005).

Thus, much depends on the determination of the starting point of the proceedings. If the defendants' separate trials are judged to have been artificially bifurcated, the European Court's assessment of the state's delay in commencing the second prosecution may well be determinative.

(2) The Applicant's Conduct

The defendants maintained a vigorous defense, asserting their rights and filing motions concerning the investigation and trial

throughout the course of the proceedings. Any delays that may have resulted from these actions, however, cannot be tolled against the defendants. *Moiseyev, supra*, at ¶ 192. The Court has made very clear that defendants are not to be blamed for delays associated with the good-faith assertion of their rights, as Article 6 “does not require a person charged with a criminal offence to cooperate actively with the judicial authorities[.]” *Yagci & Sargin v. Turkey*, App. No. 6/1994/453/533-534 (23 May 1995) at ¶ 66.

(3) Conduct of the Authorities

As already noted, this factor is often the determinative issue in evaluating whether the length of the proceedings is unreasonable as understood in the Court’s Article 6 case law.

The failure to respect time limits established by the member state’s domestic law is often taken by the Court as *prima facie* evidence that the length of the proceedings was unreasonable. The materials provided for this report, and the time allotted to analyze them, were not sufficient to undertake a complete analysis of the compliance of the parties to the deadlines established by the RF Code of Criminal Procedure.

Unexplained delays are often grounds for a finding of a violation of Article 6 under this heading. As noted above, the investigation of the defendants appears to have been conducted in a staccato and serialized fashion. The first criminal investigation preceded and immediately followed the arrest of the defendants in 2003. The preliminary investigation continued up to the defendants’ trial, which commenced in June 2004 (but was immediately adjourned and resumed the next month) and concluded with the defendants’ conviction in May 2005. It is unclear what, if any, investigation occurred in the roughly two

years intervening between the defendants' first conviction in May 2005 and the announcement of a new indictment in February 2007. The indictment was not finally submitted to the Khamovnichesky court until 14 February 2009; the trial began on 31 March 2009. The materials available for the completion of this report do not identify any stated reason for this delay of more than five years between the defendants' arrests and the start of their second criminal trial.

While the defendants remained in detention since July and October 2003, their activities at Yukos were subject to extensive investigation. Thus, the authorities' decision to prosecute the defendants in seriatim proceedings several years apart is hard to explain. Furthermore, as noted below, both the Government authorities and the Khamovnichesky court in its verdict, frequently categorized the defendants as having engaged in illegal but uncharged activities, including fraud, bribery, deceit, and breach of trust. By the time of the trial, however, these crimes (if they were committed) were effectively time-barred. It is unclear whether the more straightforward crimes noted above were left uncharged because of lack of evidence (in which case their assertion without evidence in the verdict may be evidence of violations of other rights protected by the Convention) or because they were time-barred as a result of the delay in issuing the indictment in this delayed fashion. This outcome is reminiscent of *Panchenko v. Russia*, App. No. 45100/98 (8 February 2005) at ¶¶ 10-73, in which eight years passed between the initiation of a criminal case against the defendant (in custody for most of this time) and the dismissal of charges due to the expiration of the statute of limitations. The European Court had no difficulty finding a violation of Article 6 in the *Panchenko* case, observing that it is "incumbent on the State authorities to organise the investigation in

such a way so as to comply with time-limits, without prejudicing the rights of defence.” *Id.* at ¶ 134.

(4) Importance of the Proceedings for the Accused

It cannot be gainsaid that the proceedings, on the outcome of which their liberty depended, were of the utmost importance to the accused. At the time that the new charges were made, as noted above, the defendants were eligible for conditional-early relief from their sentences after having served at least half of the term of their punishment. Aside from this fact, the defendants’ sentences in the original case would have been satisfied in 2011, just as the new sentences for these new convictions began. Thus the effect of seriatim prosecution was to leave the defendants in a “state of uncertainty about [their] fate.” *Nakhmanovich v. Russia*, App. No. 55669/00 (2 March 2006) at ¶ 89.

2. RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

a. Relevant Russian Law and Practice

The Constitution of the Russian Federation states, in relevant part:

Article 118 § 1

Justice in the Russian Federation shall be administered only by courts of law.

Article 120 § 1

Judges shall be independent and shall obey only the Constitution of the Russian Federation and federal law.

The relevant provisions of the Code of Criminal Procedure of the Russian Federation are as follows:

Article 8 § 1

Justice in a criminal case in the Russian Federation shall be administered solely by courts.

Article 15 § 3

3. A court is not an organ of criminal prosecution and shall not take the prosecution or defense side in a case. The court shall create the conditions necessary for the parties to perform their procedural duties and to exercise the rights granted to them.

b. Relevant ECHR Provisions and Case Law

Article 6 § 1 of the Convention states, in relevant part, that:

In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal

It has long been established in the European Court's case law that the word "impartial" carries both a subjective and objective component. Under the heading of subjective impartiality is understood the requirement that "no member of the tribunal should

hold any personal prejudice or bias” against the accused. *Daktaras v. Lithuania*, App. No. 42095/98 (10 October 2000) at ¶ 30. There exists a rebuttable presumption of subjective impartiality.

Under the heading of objective impartiality is understood the requirement that the tribunal “must offer sufficient guarantees to exclude any legitimate doubt in this respect.” *Id.* (internal citation omitted). As to the objective component, “quite apart from the judge’s personal conduct,” the issue is:

whether, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.

Sigurdsson v. Iceland, App. No. 39731/98 (10 April 2003) at ¶ 37. In the *Sigurdsson* case, for example, the European Court considered whether a supreme court justice should have recused herself from a case involving a bank in which her husband was simultaneously involved in certain financial negotiations. The Court unanimously found a violation of the right to an impartial tribunal notwithstanding its refusal to speculate “as to whether [the justice] derived any personal benefit from the operation and finds

no reason to believe that either she or her husband had any direct interest in the outcome in the case between the applicant and the National Bank.” *Sigurdsson, supra*, at ¶ 45. The standard of objective impartiality is therefore a high one: there must be “sufficient guarantees to exclude any legitimate doubt as to the absence of inappropriate pressure.” *Daktaras, supra*, at ¶ 36.

c. Analysis

As to the evaluation of the subjective impartiality of the Khamovnichesky court, the resources available to prepare this report were insufficient to determine the existence, or assess the merits, of allegations of bias held personally by Judge Danilkin against the defendants. Likewise, the time allotted to complete this report was not adequate to examine all of the relevant sources by which to evaluate the objective component of the court’s impartiality.²³ There is sufficient information surrounding a few events close in time to the reading of the verdict, however, to call into question the existence of suitable safeguards to guarantee the objective component of the impartiality of the Khamovnichesky court.

On 15 December 2010, a previously scheduled hearing to announce the verdict of the court was postponed until 27 December 2010. The Court provided no explanation for this delay. The following day, Prime Minister Vladimir Putin, responding to a

²³ For example, a defense motion dated 20 September 2010 referenced accusations made by witness Pereverzin at the August 31, 2010 hearing that he was offered a suspended sentence if he would testify against Khodorkovsky. This motion makes other assertions of pressure concerning lawyer Aleksanyan, witness Valdes Garcia, and others. It is simply not possible to evaluate these claims with the materials and time available for this report.

question about Khodorkovsky during a nationally-televised program, said:

As to Khodorkovsky, I have already spoken out many times on this account. If you consider that I should say something else on this question, I may do so. I, as well as the well-known character of Vladimir Vysotsky, consider that a thief should sit in jail. And in conformity with the decision of the court, Khodorkovsky is charged with theft, a rather large theft. It's about the non-payment of taxes and fraud, and the account there goes to billions of rubles. True, there is also the non-payment of personal taxes, that is very important.

But the charge against him now goes to hundreds of billions of rubles: 900 in one case, in a second case - 800 billion rubles, also theft.

If we look at the practice in other countries, Mr. Madoff in the U.S.A. received for an analogous crime, yes and the money is roughly also the same, 150 years imprisonment. In my opinion, it looks like everything we have is much more liberal. Nevertheless, we should proceed from the fact that the crimes of Mr. Khodorkovsky have been proven in court.

Yes, and in addition, you well know, I want to repeat once more, I am not speaking about him personally, I would like to remind that the head of the security service of Yukos sits in prison for murder. They didn't like the mayor of Nefteyugansk, Petukhov – they murdered him. A

woman here in Moscow did not give them her small room, which they wanted to take – they murdered her. A killer whom they hired, they murdered him. Only the brains were found in a garage. Did the head of the security service himself, on his own initiative, carry out all of these crimes?

So, there is a court, we have, as is well-known, one of the most humane in the world, this is its job. I proceed from what was proven by the court.²⁴

The Prime Minister's comments appeared to mix observations about both the first, completed trial, and the second, then unfinished one. Nevertheless, commentators and media in Russia and elsewhere immediately interpreted his words as instructions to the court in the still uncompleted second trial.²⁵ The Prime Minister first spoke about the first conviction, and then about the second one. Then he said: "Nevertheless, we should proceed from the fact that the crimes of Mr. Khodorkovsky have been proven in court." At this point it wasn't clear whether he was talking about the first conviction or the second one. One might plausibly argue that the reference to crimes that "have been proven in court" unequivocally meant only the first conviction. On the other hand, one can read the sentence as an expression of Putin's opinion: "the crimes of Mr. Khodorkovsky" – both cases having been referenced – "have been proven in the court." By simple clarification, the Prime Minister could have avoided this effect.

²⁴ Transcript of program "A Conversation with Vladimir Putin. Continuation." The program aired on television channels "Rossiya" and "Rossiya 24," and radio stations "Mayak," "Vesti FM," and "Radio Rossiya." 16 December 2010, available at: <http://premier.gov.ru/events/news/13427/>.

²⁵ See, e.g., Catherine Belton, *Putin Remarks Dash Hopes for Khodorkovsky*, *Financial Times* (16 Dec. 2010).

That the Prime Minister was aware of the effect his words could have is suggested by his qualification of Khodorkovsky's connection to underworld figures and various murders: the Premier noted that he was not speaking about Khodorkovsky "personally." This caveat, of course, would have been unnecessary had the Prime Minister not insinuated that Khodorkovsky, well-known as the head of Yukos and whose relationships to other Yukos executives was the basis for the charge that he was part of an "organized criminal group," was in that way connected to murders that "they" committed. Lest the point be lost, the Prime Minister asked, "Did the head of the security service himself, on his own initiative, carry out all of these crimes?" The question, in context, clearly implied a negative answer.

The Premier mixed into his remarks several references to popular culture. The first reference, that "a thief should sit in jail," is to the well-known 1979 Soviet mini-series, *The Meeting Place Cannot be Changed* ("Mesto vstrechi izmenit' nel'zya").²⁶ The quotation is from the tough detective played by Vladimir Vysotsky and was clearly chosen because of its familiarity. The continuation of that quote would be equally familiar to listeners: "... and people don't care how I put him away."²⁷ In the context of the Yukos case, these comments take on a sinister tone, especially given that the Premier had been President at the time of the defendants' arrest and first conviction. The timing of these remarks, after the defendants' last word in the case sent the matter to the court's

²⁶ Ellen Barry, *Putin Speaks his Mind, and Then Some, on Television*, N.Y. Times (16 Dec. 2010).

²⁷ The second reference, that the court is "one of the most humane in the world," is a quote from a 1967 Soviet comedy film, *The Prisoner of the Caucasus, or the New Adventures of Shurik* ("Kavkazskaya plennitsa, ili Novye prikliucheniya Shurika").

deliberation chamber but before the announcement of an inexplicably postponed verdict, was particularly chilling.

Although they were far less disturbing in content, President Medvedev likewise made remarks about the Khodorkovsky case the day after the scheduled hearing on the defendants' appeal of their conviction was postponed, again without any explanation. In response to a questioner at a press conference at the Moscow School of Management "Skolkovo," the following exchange occurred:

Y.Matsarskii: I represent radio station "Kommersant"-FM," my name is Yuri Matsarskii. Dmitri Anatol'evich, tell me, please, whether Khodorkovsky's release would be a danger for society?

D. Medvedev: The question is short and the answer is also short: there would be absolutely no danger.²⁸

Although this statement would appear to cast the defendant in a favorable light, it remains an extrajudicial comment on a pending case. Indeed, the surprise postponement of yet another scheduled hearing, followed by the widely disseminated comment of the President, naturally led to speculation about the signals sent by this protracted, public exchange about the defendants' fate between the head of state and the head of the government.²⁹

In light of these facts, it is easy to understand why the European Court has emphasized that "even appearances may be of

²⁸ Press Conference of the President of Russia, 18 May 2011, "Skolkovo" School of Management (<http://news.kremlin.ru/transcripts/11259>).

²⁹ Interfax, *Russian Activists Welcome President's Comments About Khodorkovskiy* (18 May 2011) (<http://www.cdi.org/russia/johnson/russia-activists-welcome-medvedev-comments-about-khodorkovsky-935.cfm>).

a certain importance” in setting a high standard for member states to ensure the objective impartiality of the courts with “sufficient guarantees to exclude any legitimate doubt as to the absence of inappropriate pressure.” *Daktaras v. Lithuania, supra*, at ¶¶ 32, 36. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings.” *Id.* at ¶ 32 (internal citation omitted).³⁰

³⁰ Shortly after the defendants’ conviction, several court officials alleged that government officials had interfered in the drafting of the Khamovnichesky Court’s verdict. Most prominently, Natal’ya Vasil’eva, the Court’s press secretary, alleged that Judge Danilkin frequently received instructions with regard to his supervision of the trial, including his verdict, from superiors in the Moscow City Court. *See* Roman Badanin & Svetlana Bocharova, *Prigovor byl privezen iz Mosgorsuda, ya tochno znaiu*, [Gazeta.ru](#), 14 Feb. 2011. Igor’ Kravchenko, a co-worker at the Khamovnichesky Court, subsequently gave interviews in which he endorsed Vasil’eva’s claims. *See* Svetlana Bocharova, *Interv’iu Vasil’evoi – Pravda*, [Gazeta.ru](#), 15 Apr. 2011. On 20 June 2011, the Investigative Committee declined to open an investigation, rejecting the credibility of these witnesses and the authenticity of their evidence. *See* Svetlana Bocharova, *Danilkinu ne nashli sostava*, [Gazeta.ru](#), 20 June 2011. It is unlikely that the European Court of Human Rights would disturb this finding absent an allegation of serious procedural irregularities in the Investigative Committee’s decision-making process: Article 13 of the Convention protects the right to an effective remedy.

Another fruitful area of inquiry from the perspective of Article 6 § 1 concerns the legal authority of the Chairwoman of the Moscow City Court over a particular judge. A lack of “structural independence” could establish a violation of the Convention. *See, e.g., Whitfield and others v. United Kingdom*, App. No. 46387/99 (12 Apr. 2005) at ¶¶ 42-46. The Parliamentary Assembly, at the behest of two of its committees, expressed its concern in this regard with particular attention to the informal practice of “telephone justice” and the power of court chairpersons. *See* Resolution 1685 (2009), adopted by the Parliamentary Assembly of the Council of Europe on 30 September 2009 (32nd sitting); *see also* Document 12038, Opinion of the Committee on Economic Affairs and Development (29 September 2009); *and* Document 11993, Report of the Committee on Legal Affairs and Human Rights (7 August 2009).

It is beyond the resources available for the writing of this report to investigate the facts necessary to establish such violations.

3. RIGHT TO A REASONED JUDGMENT

a. Relevant Russian Law and Practice

The relevant provisions of the Constitution of the Russian Federation are as follows:

Article 47 § 1

No one may be deprived of the right to have his case examined by the court and judge to whose jurisdiction it is assigned by law.

Article 49 § 1

Everyone accused of committing a crime shall be presumed innocent until his guilt has been proved in accordance with the procedure specified by federal law and established by final judgment of a court.

The relevant provisions of the Code of Criminal Procedure of the Russian Federation are as follows:

Article 7 § 4

Rulings by a court and orders by a judge, procurator, investigator, or inquiry officer must be legally correct, well-founded, and well-reasoned.

Article 297

1. The judgment of the court must be lawful, well-founded and fair.
2. A judgment is deemed to be lawful, well-founded and fair, if it is determined in compliance with the requirements of this Code and is based on the proper application of the criminal law.

Article 299

1. When determining a judgment in the deliberation room, the court shall decide the following issues:

1) whether it has been proven that the act the defendant is charged with occurred;

2) whether it has been proven that the act was committed by the defendant;

3) whether the act constitutes a crime and by what Point, Paragraph and Article of the Criminal Code of the Russian Federation it is punishable;

4) whether the defendant is guilty of committing the crime;

5) whether the defendant should be punished for committing the crime;

6) whether there are circumstances that mitigate or aggravate the punishment;

7) what sentence should be imposed on the defendant;

8) whether there are grounds for a judgment of guilty without sentence or for granting an exemption from punishment; ***

Article 302 § 4

A judgment of conviction may not rest upon speculation and such a judgment shall be rendered only if the guilt of the defendant in committing the crime is confirmed by the totality of the evidence examined by the court.

Article 303 § 1

Upon deciding the issues referred to in Article 299 of this Code, the court shall proceed to write the judgment. It shall be written in the language in which the trial was conducted and consist of an introductory part, a narrative-rationale part, and an operative part.

Article 307

The narrative-rationale part of a judgment of conviction must contain:

- 1) a description of the criminal act which the court determined was proven, with reference to the place, time and mode of its commission, the nature of the guilt involved in and the motives, objectives and consequences of the crime;
- 2) the evidence on which the court's findings regarding the defendant are based and the reasons the court rejected other evidence;
- 3) references to any circumstances mitigating or aggravating punishment, and reference to the grounds and reasons for modifying the charge if some part of the charge was found not to be well-founded or there was an erroneous classification of the crime;
- 4) the reasons for the court's decision on all the issues relevant to the sentence, any exemption from imposition of a sentence or from serving it, and for the application of other measures;
- 5) the grounds for any decisions made with respect to other issues referred to in Article 299 of this Code.

b. Relevant ECHR Provisions and Case Law

Article 6 § 1 of the Convention states, in relevant part, that:

In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal

This provision has been interpreted to require that courts give reasons for their judgments. *See Van de Hurk v. The Netherlands*, App. No. 16034/90 (19 Apr. 1994) at ¶ 61. In particular, courts must “indicate with sufficient clarity the grounds on which they based their decision.” *Hadjianastassiou v. Greece*, App. No. 12945/87 (16 Dec. 1992) at ¶ 33. The court is “under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision[.]” *Kraska v. Switzerland*, App. No. 13942/88 (19 Apr. 1993) at ¶ 30.

On the other hand, the European Court has held that Article 6 “cannot be understood as requiring a detailed answer to every argument.” *Van de Hurk, supra*, at ¶ 61. “Nor is the European Court called upon to examine whether arguments are adequately met.” *Id.* It is not the task of the European Court, but for the national courts, to determine whether a submission by a party is well-founded. *Hiro Balani v. Spain*, App. No. 18064/91 (9 Dec. 1994) at ¶ 28; *Ruiz Torija v. Spain*, App. No. 18390/91 (9 Dec. 1994) at ¶¶ 29-30.

The determination of a violation of the right to a reasoned judgment can only be made on a case-by-case basis “in the light of the circumstances of the case.” *Helle v. Finland*, App. No. 157/1996/776/977 (19 Dec. 1997) at ¶ 55. This is because “the

extent to which the duty to give reasons applies may vary according to the nature of the decision at issue. It is moreover necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments.” *Id.* A margin of appreciation is accorded to national law and practice. *Hadjianastassiou v. Greece*, App. No. 12945/87 (16 Dec. 1992) at ¶ 33.

Professor Trechsel has elaborated on the importance of this requirement from the perspective of legal theory:

The only possibility to verify a hypothesis in law lies in the reasons given. They must be complete and logical. Without reasons, a decision cannot claim to have legal character, let alone to be correct. Thus, without reasoning it would not be possible to distinguish a correct judgment from an arbitrary one. In other words, a judgment which does not give reasons may not be, but certainly appears to be arbitrary.

Stefan Trechsel, Human Rights in Criminal Proceedings 103-4 (2005). In addition, the requirement of reasoned judgments has numerous “instrumental and intrinsic virtues” for the pursuit of justice in a democratic society that have been widely recognized, including the value that inheres in the guarantee that a person is “being treated with dignity as a person, a sovereign agent, and not merely as an object who can be manipulated at the will of the authorities.” Paul Roberts, *Does Article 6 of the European*

Convention on Human Rights Require Reasoned Verdicts in Criminal Trials? 11 Human Rights Law Review 213, 215 (2011).

c. Analysis of the Verdict

At first glance, it may seem counterintuitive to suggest that a verdict of 689 pages may violate the right to a reasoned judgment guaranteed under Article 6 of the Convention. The verdict's volume, however, should not be confused with its mass. The verdict is indeed voluminous. Its concentration of legal reasoning, however, is slight. Under the European Court's standards, its failings violate the right to a reasoned judgment protected by Article 6.

(1) Pages 3-130

The narrative-rationale part of the verdict, required by Article 303 of the Code of Criminal Procedure, begins on page 3 under the heading "Established" («Установил»). The court appears to have complied with the Code's requirements in the most hyper-literal fashion. On pages 3-130, the court presents its "description of the criminal act which the court determined was proven," as required by Art. 307(1). On pages 130-132, the court summarizes the defendants' separate arguments and testimony in their defense. On pages 133-615, the court presents "the evidence on which the court's findings regarding the defendant[s] are based and the reasons the court rejected other evidence" as required by Art. 307(2).

With regard to pages 3-130 of the narrative-rationale part of the verdict, these cannot be understood to have "established" anything at all because no evidence is cited from any source. The assertions

and conclusions in this section might be described as a summary of the court's findings were this section not so long (especially as compared to the summary of the defendants' responses to these charges on pages 130-132, which is less than 2% of this amount). There is no attribution of any particular assertion of fact to any piece of evidence in the record. Nor is there any evaluation (or even acknowledgment of the existence) of conflicting evidence. Nor is there legal analysis that would apply evidence to law. Thus, this section reads more like a prosecutor's indictment than a court's reasoned judgment. Indeed, as noted below, that appears to be its provenance. It cannot be described as a reasoned evaluation of the evidence.

The artificial division of the court's conclusions from the evidentiary basis for them obscures instances where the court fails to provide any reason, in law or evidence, for its verdict. Thus, on page 4, the court concludes: "The given contract was wrongful and contradicted the fundamental principles of civil law under Art. 1 of the RF Civil Code, since OAO NK Yukos as a legal entity was placed from the outset in such conditions under which it exercised its civil rights not by its own will, but by the will of a group of its core shareholders – which by this time had become M.B. Khodorkovsky, P.L. Lebedev and the members of the organised group acting jointly with them – and not in its own interests, but in the interests of the given organised group."³¹ However, neither in this section nor later in the verdict are the "fundamental principles of civil law" identified or an explanation given as to how the contract was "wrongful" or "contradicted" them.

Additional evidence of the lack of reasoning in this section of the verdict manifests itself in its drafting. Multiple pages and paragraphs of text are duplicated, as if cut-and-pasted from one

³¹ On page 89, the court makes a similar assertion.

part of this section to another. Thus, the seventy-six lines of text on pages 7 through 9 are identical to the text on pages 75 through 77 with the exception of seven lines of text added to page 8 and a few other very minor differences.³² Likewise, the last two paragraphs on page 12 are, with the exception of the last ten words, identical to the last two paragraphs on page 13. Twenty-two lines on pages 18 and 19 are virtually identical (save for one new sentence, one name, and assorted typographical errors) to lines found on pages 104 and 105.³³ One hundred fourteen lines on pages 20 through 22 are virtually identical to lines found on pages 105 through 107.³⁴ The last two paragraphs on page 30, amounting to seventeen lines of text, are identical to the first two paragraphs on page 31. The 56 lines on pages 74 and 75 are virtually identical to lines found on pages 105 and 106.³⁵

³² The differences are that Khordokovsky's name appears twice and the names of two companies are added on pages 75-77, which references do not appear on pages 7-9. In addition, one preposition («В» on page 7 becomes «Причем» on page 75) and one noun («сущности» on page 7 becomes «сути» on page 76) are changed and the phrase «иных/е лиц(а)» is added in three places on page 76.

³³ The differences are that Lebedev's name appears on page 19 but is omitted from the same text on page 104; the word «указанным» on page 19 becomes «этим» on page 104.

³⁴ The differences are that in the latter version, Khodorkovsky's name and the name of an additional company are added to text on page 105, the order of two paragraphs is inverted, the characterization «находящиеся в розыске» has been added to the paragraphs describing five individuals, the words «успешной преступной» on page 20 have been deleted from their corresponding place on page 105, the words «распоряжались» and «вопреки их интересам» on page 21 have been deleted from their corresponding places on page 106, and the words «иное» and «указанного иное» on page 22 have been changed to «указанное» and «данного» on page 107. There are also a number of minor typographical and punctuation errors found in these pages.

³⁵ The differences are that the word «Через» on page 74 becomes «по» and the name of a company is added on page 105, and ten lines of text are inserted on page 106 along with the word «затем». A comma is also omitted on page 105 from the text that appears on page 74.

Perhaps the most revealing aspect of the verdict's composition in this regard is its extensive duplication of the indictment («Обвинительное заключение по уголовному делу №18/432766-07»). The indictment, of course, is composed by a criminal investigator pursuant to Article 220 and approved and forwarded to the court by the prosecutor pursuant to Article 221(1)(1) of the Criminal Procedure Code, both of whom are participants in the criminal proceedings on the prosecution side, as indicated in Articles 37 and 38 of the Criminal Procedure Code. By law, the indictment must indicate, *inter alia*, “the nature of the charges, the place and the time of the commission of the crime, how it was committed, the motives, goals and consequences involved and other circumstances that are relevant to the criminal case; a statement of the charges brought, citing the Point, Paragraph and Article of the Criminal Code of the Russian Federation that specifies liability for the crime; a list of the evidence supporting the charges made; [and] a list of the evidence relied on by the defense”.³⁶

In this case, the indictment consists of fourteen-volumes containing 3460 pages. Astonishingly, the first 130 pages of the verdict (and, quite possibly, much more) is a near exact copy of the indictment. An annotated copy of those pages, indicating all differences and identifying the source of the material in the indictment, is attached to this report as an appendix. The vast majority of differences between the two documents are not substantive differences. Thus, the indictment frequently identifies by name individuals to whom the verdict refers in general terms as “members of the organized group” or “other persons.” Similarly, the verdict tends to include the initials of Khodorkovsky's first name and patronymic (omitted from the indictment) and often adds

³⁶ Article 220(1)(3)-(6) RF Code of Criminal Procedure.

Lebedev's name alongside that of Khodorkovsky. Abbreviations may be spelled out, spaces added, or symbols changed into words (as, for example, "%" to "per cent"). Occasionally, the name of a company listed alongside many others in the indictment is omitted from the verdict, although this is rare. Otherwise, the texts are identical. This perhaps explains the odd duplications identified in the text accompanying footnotes 22 through 25 of this report: they were simply carried over from the same duplication in the indictment.

Such brazen copying is compelling circumstantial evidence that the court has not engaged in its own process of reasoned decisionmaking to reach its judgment. It is also persuasive support for a finding that the court has violated other rights held by the accused under the European Convention, including the right to an independent and impartial tribunal and the right to equality of arms.

(2) Pages 133-615

Even if this cutting-and-pasting between indictment and verdict were to be disregarded as insufficient proof, *eo ipso*, that the court failed to engage in reasoned decisionmaking, the manner in which the remainder of the verdict relates the evidence to the charges draws the court's reasoning process into serious question. In short, the court frequently *identifies* evidence but rarely *reasons* from it to a legal conclusion. In this way, the verdict mimics what was observed at trial by a rapporteur of the Parliamentary Assembly of the Council of Europe:

The trial itself, so far, consists in reading out, apparently at random, short passages of corporate and other documents without any discussion of their significance, even from the point of view of the

accusation. The demand of Mr. Lebedev “that the prosecutors explain which evidence corresponded to which episode and charge” seems reasonable to me, as does the insistence of the defence lawyers that “the documents should be not only read out but also examined.” To me, this should go without saying in any trial.

Document 11993, Report of the Committee on Legal Affairs and Human Rights (Rapporteur Mrs. Sabine Leutheusser-Schnarrenberger) (7 August 2009) at ¶ 99.

The verdict makes its first citation to any piece of evidence in the record on page 133. From that page to page 615, the court provides lists of evidence from identified portions of the record. Each list is headed by a paragraph (sometimes) set in boldface type. The boldface paragraph is written in a standard form that states a conclusion and then provides a list of evidence (with citation to the case file or trial record) as support for that conclusion. This section appears to be organized to conform with the literal requirement of Article 307(2) of the Criminal Procedure Code to “contain ... the evidence on which the court’s findings regarding the defendant are based”

However, the *listing* of documents under a conclusory heading is not equivalent to *reasoning* from this evidence to conclude that the elements of the charged offenses have been proven. For example, the court’s first boldface heading appears at page 140:

The court links building of a vertically-integrated structure of management of OAO NK Yukos with the [criminal] intent of the defendants aimed at creating conditions for oil theft. Creation with the involvement of M.B. Khodorkovsky and P.L.

Lebedev of the executive bodies for the oil producing companies represented by ZAO Yukos EP turned out to be one of such conditions.

The verdict then states that “This circumstance is corroborated by:” and follows this phrase with a list of nine pieces of evidence from the case file, including five sets of minutes of shareholders meetings, three contracts, and a corporate order, all of which are described as concerning the transfer of powers between different companies. No part of any document is quoted to support its conclusory description by the court. No analysis of this evidence is provided nor an explanation offered to support the conclusion asserted in the boldface heading. Nor is the concept of establishing a “link” between the Yukos corporate structure and the defendants’ criminal intent explicated in terms of Russian law.

As another example, the boldface heading on page 143 states:

The guilt of the defendants in building of the vertically-integrated structure of management as a mechanism of management of the process of theft and realization of the stolen oil by means of establishing ZAO Yukos RM and transfer to it of the required powers is corroborated by:

Twenty-four items of evidence are then listed with brief summaries of their contents: the testimony of two witnesses, eight sets or extracts of corporate minutes, a corporate charter, seven contracts, three corporate orders, a power of attorney, an extract from a share registry, and an “information statement.” No analysis is conducted. Nor is any interpretation of these materials – on their faces, ordinary business documents – provided to explain how the

court concluded from them that they indicate any form of “guilt” or intent to organize these entities for the “management of the process of theft and realization of the stolen oil.” Indeed, Khodorkovsky is mentioned in only two of these documents, in both cases extracts of minutes from general shareholders meetings at which he appeared as chairman of the board of ZAO Yukos RM.

Sometimes the court asserts to have established facts and legal positions that in fact have not been established. On page 147, the court asserts that “[i]t has been established” that the corporate structure it has described in the preceding pages “was an abuse of right.” But no such legal analysis was attempted in the preceding section of the verdict, nor was the particular right the court states to have been abused even identified in Russian law. The court continues that these structures “entailed violation of equality of its participants since, as legal entities, the oil producing companies were intentionally put at a disadvantage when they were unable to exercise their rights at their own will and to achieve the major goal of their activity – generating profit.” But no evidence appears in the preceding section concerning any profit at all. Finally, the court continues that “The management of the oil producing enterprises was performed exclusively in the interests of the group of the main shareholders which, by that time, already included M.B. Khodorkovsky and P.L. Lebedev, as well as other members of the organized group acting together with them.” On the contrary, no evidence concerning the “interests” of anyone is presented. The minutes, charters, and other corporate documents merely describe the basic organizational structures of these companies, and their relationships with other companies.

Another example of a conclusory heading unsubstantiated by the evidence listed in support of it is found on pages 155-157. In this section, the court states that “the following pieces of evidence”

established the defendants' "purpose of facilitating and concealment of the commitment of the theft of oil from the oil producing companies[.]" The documents that follow are the 1996 charters for Yuganskneftegas, Samaraneftegas and Tomskneft VNK, contracts establishing terms for the future conclusion of oil purchase and sale contracts, an amendment to one of those contracts, and an undated document that the court asserts was approved by Khodorkovsky and that states "... responsibility of officers and Board members to shareholders for decisions that should have definitely lead to losses for the entity (trading transactions are unequivocally such since they formally lead to understatement of the plant's profit) provided for by the law is also a factor that would be desirable to be avoided." Other than the bare description of these items, nothing more is said. There is no legal analysis applying the relevant Russian law to these documents or explaining how they demonstrate the intent of anyone to steal oil, which on their face they do not.

This technique continues through page 615 of the verdict. A heading (usually in boldface type) asserts the establishment of some fact or legal conclusion. Documents from the case file or testimony from the trial record are then listed. But the conclusion or fact is not apparent on the face of the listed evidence and no attempt is made by the court to explain how it reached such a conclusion.

In other parts of the verdict, the court reaches conclusions about the defendants' intent that are not only unsupported by the evidence it references, but contradicted by it. On page 157, the verdict presents one of its boldface conclusions:

The guilt of the defendants in the arrangement of conditions for stealing of the oil under the guise of

concluding of the economically unfounded general agreements is also corroborated by the pieces of evidence examined by the court in the course of the trial:

There then follows one piece of evidence entitled “Draft decisions of the Board of Directors of OAO Tomskneft VNK of 22 January 1999, including the following records”. On the basis of this document, the verdict states:

The court presumes that this document corroborates the intent of the defendants to embezzle the oil produced at the price of RUB 250 per tonne, while they were aware of the fact that its market price was RUB 1,665.61 [per tonne] which also corroborates their intent to embezzle someone else’s property by means of clearly nonequivalent payment of its value.

On the contrary, the document as described in the verdict does nothing more than indicate that two different markets were in operation, a domestic market and a foreign market for oil. The document indicates the relative values at which the oil traded in both markets. But the verdict, while identifying two prices, refers to only one market. By eliding this fact of two separate markets, the court creates the false impression that only one market was in operation with only one price set for the sale of oil.

The very next piece of evidence cited in the verdict, at page 159-160, in fact confirms the very opposite of this assertion. The court cites the minutes of a shareholders meeting for OAO Tomskneft of 16-29 March 1999 at which the oil purchases

referenced in the previous document are approved. This document, as described in the verdict, makes clear that sales will occur at the different prices determined by the relevant markets:

As a result of the voting, the majority made the following decision: since the production and the sale of oil produced has for a long time been regular business activities of OAO Tomskneft VNK, to declare the production and the sale of oil to be the core activities of OAO Tomskneft VNK in future as well, and, to this end, to conduct transactions on purchase and sale of the oil and/or oil-well fluid on behalf of OAO Tomskneft VNK in compliance with the following set conditions: sale of the oil produced by OAO Tomskneft VNK, to the following companies: OAO NK Yukos, OAO VNK, Total International Limited, Behles Petroleum S.A., ROSCO S.A. in the amount of 50 million tonnes over the period of 3 years at the current market price of RUB 250.08 per tonne in the domestic market and RUB 1,665.61 per tonne in the foreign market of the RF;

Although the verdict states that this document corroborates its statement that the defendants intended to embezzle oil by using a lower price than “its market price,” the evidence that the court cites in fact reveals two markets, not one, and for sales to both domestic and foreign companies.

*(3) Responsiveness of the Verdict
to Defense Arguments*

The above analysis of the verdict's composition and substance suggests a lack of reasoning that would violate Article 6. However, the European Court typically gives a margin of appreciation to the practices of member states. Unless the critiques made of this verdict were particularly unusual or egregious compared to other Russian verdicts – an analysis in which the European Court may decline to engage – an application to the Court alleging a violation of Article 6 on these grounds may meet with a cool reception. On the other hand, the Court may find a violation that would require systemic change in judicial practice. Predicting either course is very difficult.

More commonly, individual applications complaining of a violation of this section of the Convention allege failures of the court to respond to particular evidence or arguments by a party, rather than to a critique of the quality of the reasoning process within the judgment itself. In this regard, the record may well reveal lacunae where responses to motions and arguments by the defendants should appear.

Regretfully, this report cannot engage in that analysis with any certainty. It has not been possible to verify whether the record of materials to which the author of this report was directed, www.khodorkovsky.ru, contains a complete collection of defense motions and judicial responses to them. Thus, in a summarizing statement delivered toward the end of the defendants' presentation of their case, defense attorney Elena Liptser and others stated that "in the course of the pre-trial proceedings there were numerous occasions when the investigators refused to admit exculpatory evidence in relation to our clients, concealed documents substantial

for the case, falsified circumstances and arguments set out to substantiate procedural decisions, and ignored provisions of law.”³⁷ Although some of the issues to which Liptser alluded concerning the admission of exculpatory evidence will be discussed under the heading of Article 6 § 3, *infra*, it has simply not been possible to isolate and examine discrete instances of the actions she describes. Nor has there been a sufficient opportunity to peruse with care the transcript of the trial proceedings. The issue can only be flagged for the potential violation that may sit within it.

C. ARTICLE 6 § 2 – THE PRESUMPTION OF INNOCENCE

1. RELEVANT RUSSIAN LAW AND PRACTICE

The Constitution of the Russian Federation states, in relevant part:

Article 49

1. Everyone accused of committing a crime shall be presumed innocent until his guilt has been proved in accordance with the procedure specified by federal law and established by final judgment of a court.
2. The defendant shall not be obliged to prove his innocence.
3. Any remaining doubts about guilt shall be resolved in favor of the defendant.

The relevant provisions of the Code of Criminal Procedure of the Russian Federation are as follows:

³⁷<http://www.khodorkovskycenter.com/sites/khodorkovskycenter.com/files/20%20September%202010%20Liptser%20Statement.pdf>.

Article 14

1. An accused is presumed innocent until proven guilty of a crime in accordance with the procedures specified in this Code and determined by a final court judgment.
2. A suspect or accused is not required to prove his innocence. The burden of proof of the charges and negation of defense arguments rests on the prosecution.
3. All doubts as to the guilt of an accused that cannot be dispelled by means of the procedures established by this Code shall be resolved in favor of the accused.
4. A judgment of conviction may not be based on supposition.

Article 74

1. The evidence in a criminal case is any information that provides a basis for a court, procurator, investigator, or inquiry officer to determine, in accordance with the procedures established by this Code, whether circumstances that are subject to proof in proceedings in a criminal case, or other circumstances relevant to the case, exist.
2. The following are admissible as evidence:
 - 1) testimony given by a suspect or accused;
 - 2) testimony given by a victim or witness;
 - 3) report and testimony of an expert;
 - 3.1) report and testimony of a specialist;

- 4) physical evidence;
- 5) official records of investigative and judicial actions;
- 6) other documents.

Article 79

1. Witness testimony consists of information communicated by a witness during questioning conducted in the course of pre-trial proceedings or in court in accordance with the requirements of Articles 187-191 and 278 of this Code.
2. A witness may be questioned about any circumstances relevant to the criminal case, including the character of the accused or the victim, and about the relationship between them and other witnesses.

Article 87

Verification of evidence shall be undertaken by an inquiry officer, investigator, procurator, or court by means of comparing it to other evidence available in the criminal case file and also by identifying its source and obtaining other evidence that corroborates or contradicts the evidence being reviewed.

Article 217 § 1

After fulfilling the requirements of Article 216 of this Code the investigator shall present bound and numbered volumes of the criminal case file to the accused and to his defense counsel, except in the situations specified by Article 166(9) of this Code. ...

2. RELEVANT ECHR PROVISIONS AND CASE LAW

Article 6 § 2 of the Convention states, in relevant part, that:

Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

Professor Trechsel has distinguished the “outcome-related aspect” of the presumption of innocence from its “reputation-related” aspect. The former regards

the psychological climate in which proceedings ought to unfold and it requires that the prosecutor and the judge adopt a particular attitude. Even though, deep down in their hearts, they may be convinced of the accused’s guilt, they must remain open to a change of opinion in view of the result of the evidence. They are prohibited from doing or saying anything, before the judgment has been delivered, which implies that the defendant has already been convicted.

Stefan Trechsel, Human Rights in Criminal Proceedings 163 (2005). The latter regards the treatment of the accused by state officials other than the prosecutor and judge. The accused “who has not been convicted in criminal proceedings must not be treated or referred to by persons acting for the state as guilty of an offence.” *Id.* at 164.

As the European Court has frequently stated, the presumption of innocence is “violated if a statement of a public official

concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. In this regard the Court emphasises the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence.” *Daktaras v. Lithuania*, App. No. 42095/98 (10 October 2000), at ¶ 41 (internal citation omitted).

It should be noted that “the presumption of innocence may be infringed not only by a judge or court but also by other public authorities.” *Alenet de Ribemont v. France*, App. No. (15175/89), at ¶ 36. In that foundational case, the European Court found that remarks by high-ranking officials at a press conference two weeks prior to the formal charging of the accused violated his right to be presumed innocent: “some of the highest-ranking officers in the French police referred to [the applicant], without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder This was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.” *Id.* at ¶ 41.

Conditions of detention during judicial proceedings have also been considered under the heading of the principle of the presumption of innocence. This may represent a transition in the Court’s interpretation of the Convention, as the case law is mixed. In a Commission Report that does not reveal the factual circumstances of the application beyond the complaint that the applicant had been held in a “glass cage” during his trial, a majority of the Commission found no violation of Article 6 § 2. *Auguste v. France*, App. No. 11837/85 (13 February 1991). More

recently, the Court held that the use of a metal cage in an appellate courtroom did not violate the applicant's presumption of innocence (although it did work a violation of Article 3) because it was "a permanent security measure used for all criminal cases" and therefore "the imposition of this measure does not suggest that the Court of Appeal regarded the applicant as guilty." *Harutyunyan v. Armenia*, App. No. 34334/04 (15 June 2010), at ¶ 138. The Court did not address concerns it has expressed about what Judge Trechsel has termed the "reputation-related" aspect of the presumption of innocence.

However, in another case concerning a metal cage, the Court expressed concern that "a harsh and hostile appearance of judicial proceedings could lead an average observer to believe that extremely dangerous criminals were on trial" when in fact the defendants could not be so characterized. *Ramishvili & Kokhraidze v. Georgia*, App. No. 1704/06 (27 January 2009), at ¶ 100. The Court observed that this could be seen as "undermining the principle of the presumption of innocence." *Id.* In this context, the Court has noted that "[s]uch harsh treatment could easily have had an impact on the applicants' powers of concentration and mental alertness during the proceedings bearing on such an important issue as their physical liberty, thus calling for very close scrutiny by the Court." *Id.*

3. ANALYSIS

Many different bases may be suggested for a violation of the presumption of innocence, but three are identified with particularity here. One basis for a violation may be the detention of the defendants in the courtroom in a glass and metal cage flanked by guards. A second may be statements made by officials

concerning the guilt of the defendants prior to the deliberation on their guilt by the court. These officials may be associated with the trial (e.g. statements by prosecutors at press conferences) or not (e.g. high government officials). A third basis for a violation of the presumption of innocence is worked by a strange feature of Russian criminal procedure that results from its contradictory merging of inquisitorial and adversarial principles of justice.

(a) Conditions of Detention in the Courtroom

The national and international media frequently reported that the defendants were detained in glass and metal containers during all courtroom proceedings. The defense filed an (unsuccessful) motion to allow Khodorkovsky to sit with his lawyers, rather than in the “aquarium.” This container was also guarded by several police. It has been reported that these police were armed, but the author of this report lacks any official records by which to corroborate these journalistic descriptions. Based on the finding of a violation of Article 3 in regard to Khodorkovsky’s detention in the courtroom during his first trial, however, such reports seem *prima facie* credible.

As noted above, the case law of the European Court is mixed on this question and may be in a state of transition. In at least one case, the Court has declined to find a violation of Article 6 § 2 even when it has found a violation of Article 3 under the same facts. *Harutyunyan v. Armenia*, App. No. 34334/04 (15 June 2010), at ¶ 139.

(b) Extra-judicial statements of guilt

In this regard, the analysis, *supra*, of the Prime Minister's remarks during a nationally broadcast television program immediately following the unexplained cancellation of the hearing at which the verdict was expected to be announced, is also relevant to the issue of their perceived impact on the court's independence and impartiality.

As noted above, the European Court has been categorical in finding that the presumption of innocence "will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law." *Butkevicius v. Lithuania*, App. No. 48297/99 (26 March 2002), at ¶ 49. The facts of that case are instructive. The Lithuanian Minister of Defense was caught *in flagrante delicto* receiving an envelope full of money alleged to be a bribe. A few days after his arrest, the national press quoted the Prosecutor General as saying that he had "sound evidence of the guilt" of the minister and the Chairman of the Seimas called the minister a "bribe-taker," saying he "entertain[ed] no doubt" that the minister took a bribe. The parliament stripped the minister of his parliamentary immunity and he was subsequently charged with obtaining property by deception, a crime different than accepting a bribe.

The European Court was unpersuaded by the Government authorities' argument to consider the evidentiary context (the minister was caught red-handed), the purpose of the impugned statements (explaining the need to deny parliamentary immunity), and the fact that the officials' statements concerned a crime with which the minister had not been charged. The Court noted that the statements were made to the national press and "amounted to

declarations by a public official of the applicant's guilt, which served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority." *Id.* at ¶ 53.

In the present case, the circumstances are even more extreme. On the very day announced for the rendering of its verdict, the court postponed the proceedings with a perfunctory note on the door of the court. No reason was provided. The Prime Minister's strong words, implying not just guilt of theft but also implicating the defendants in uncharged violent crimes, carried exceptional force. This is especially the case given the controlled environment – a nationally broadcast call-in program – in which the Prime Minister elected to make them. It is because of the power of such statements, magnified by national news media, that the Court has emphasized "the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence." *Daktaras v. Lithuania*, App. No. 42095/98 (10 October 2000), at ¶ 41 (internal citation omitted).

**(c) Evidentiary Presumptions favoring
the Prosecution Side³⁸**

Legal presumptions affect several aspects of the right to a fair trial, implicating as they do the guarantee of an impartial tribunal and their effect on the fundamental presumption of innocence. Article 6 § 2 "does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires

³⁸ This section draws on Jeffrey Kahn, *Adversarial Principles and the Case File in Russian Criminal Procedure*, in *Russia and the Council of Europe: Ten Years After* (Katlijn Malfliet & Stephen Parmentier, eds. 2010), and William Burnham and Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33 *Review of Central & East European Law* (2008).

States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.” *Salabiaku v. France*, App. No. 10519/83 (7 October 1988), at ¶ 28.

Although Russian law has embraced the concept of adversarial proceedings, and purports to place the defence on an equal footing with the prosecution, the law retains certain provisions from its past, decidedly non-adversarial approach to criminal justice. This hybrid of inquisitorial and adversarial principles results in legal presumptions in favor of the evidence collected by the state. This is a violation both of the equality of arms protected by Article 6 § 3 (discussed below) and the presumption of innocence.

The Russian Code of Criminal Procedure departs from the previous (Soviet) criminal procedure codes by identifying the investigator as a participant on the prosecution side and by granting the defense the right to gather and present evidence. In other words, the Code departs from the civil-law tradition that the investigator is a neutral state official who conducts a “complete and objective investigation,” a phrase used in the previous code of criminal procedure that was almost completely eliminated from the current one.³⁹ This would seem to be in keeping with adversarial principles, established in the Code, that provide for the right of the defense “to gather and present evidence as is necessary to provide legal representation.” Such a right would appear to establish the requisite equality of arms with the prosecution side.

However, although Russian criminal procedure foresees the possibility of dual pre-trial investigations by partisan parties to the case in search of evidence, it still primarily relies on the case file.

³⁹ Article 152(4) of the Code, for example, a venue provision, states that: “The preliminary investigation may be conducted where the accused or the majority of witnesses are located, in order to secure its completeness, objectivity and compliance with procedural time limits.”

And although that case file has ostensibly been stripped of the imprimatur of officialdom, it remains the dynamo that drives non-jury criminal cases. Indeed, under Article 217 of the Code, the case file is not to be presented to the accused and to his defense counsel until its volumes have been “bound and numbered.” Although this would seem to be a reasonable precaution against *post hoc* additions to the case file, it also has the effect of preventing evidence obtained by the accused from being accorded an equal place in the records on which the court relies so heavily during the proceedings.

Furthermore, the Code gives the contents of the case file a presumptively special status as evidence. Article 74 defines evidence and then lists all the items that are considered to be “admissible evidence,” among them “testimony” given by a victim, witness, or expert. But testimony of a witness is itself defined in a specific way by Article 79 as “information communicated by a witness during questioning conducted in the course of the pretrial process in the criminal case or in court in accordance with the requirements of Articles 187-191.” These cited articles govern procedures for questioning of witnesses by the criminal investigator during the preliminary investigation. None of them foresee the participation of the defense.⁴⁰

The quasi-judicial screening and verification functions the investigator performs are emphasized in the Code’s provisions on “verification of evidence.” These provisions require the investigator not only to collect but also to verify whatever information is obtained. This presumably is what turns the

⁴⁰ Art. 190(2) provides that the official record must indicate questions that “were excluded by the investigator,” presumably questions submitted by defense counsel. However, as noted, *infra*, defense counsel may not be present or otherwise participate in the interrogation absent the investigator’s consent. Stefan Trechsel, Human Rights in Criminal Proceedings 295 (2005).

information into “admissible evidence.” According to Article 87, verification is performed “by comparing it to other evidence available in the criminal case file and also by identifying its source and obtaining other evidence that corroborates or contradicts the evidence being reviewed.” Based on the foregoing, witness statements – having been “verified” and converted into “evidence” by the criminal investigator during the preliminary investigation – would seem to be sufficient alone to convict the defendant at trial.

At least under circumstances in which such evidence is the main basis for a conviction, such a practice would seem to violate Art. 6 § 3(d) because this testimony may be used to convict the defendant without the opportunity for the defendant to confront the witness. This violation is discussed in more detail below.

Such a presumption also violates Article 6 § 2. When the products of the non-adversarial investigation – by reason of their having been processed by the investigator – can be used at trial as evidence of guilt, that “investigation” process becomes more than just a vehicle for finding out information. It serves an “early trial” function by transforming the information compiled in the case file into “pre-admitted” evidence ready for use at trial. In other words, because of the continuing privileges accorded by law to the investigator (remnants of the presumption of objectivity and neutrality accorded the investigator under inquisitorial principles now ostensibly foresworn by the Russian Constitution and Code of Criminal Procedure, as noted below), the evidence is presumed to be authenticated (“verified”), a judicial function assumed by a party in the proceedings. No such legal presumption is accorded to evidence obtained by the defense, rendering its evidence, in Bulgakov’s famous words, “of the second freshness.”⁴¹

⁴¹ MIKHAIL BULGAKOV, *THE MASTER AND MARGARITA* 222 (Mirra Ginsburg, Trans. 1967) (“‘They sent us sturgeon of the second freshness,’ said the bar

D. ARTICLE 6 § 3 – THE RIGHT TO EQUALITY OF ARMS**1. Relevant Russian Law and Practice**

The Constitution of the Russian Federation states, in relevant part:

Article 123 § 3

Judicial proceedings shall be conducted based on adversarial principles and equality of the parties.

The relevant provisions of the Code of Criminal Procedure of the Russian Federation are as follows:

Article 15

1. Judicial proceedings in criminal cases shall be conducted in accordance with adversarial principles.
2. The functions of prosecution, defense, and adjudication of a criminal case shall be separate from each other and those functions may not be allocated to any single agency or official.
3. A court is not an organ of criminal prosecution and shall not take the prosecution or defense side in a case. The court shall create the conditions necessary for the parties to perform their procedural duties and to exercise the rights granted to them.
4. The prosecution and the defense shall have equal rights before the court.

manager. 'My good man, that's nonsense!' 'What's nonsense?' 'Second freshness – that's nonsense! There is only one kind of freshness – first. And that's the last, too. And if the sturgeon is of the second freshness, that means it is rancid.'")?

Article 53 § 1(2)

From the time when defense counsel is permitted to participate in a criminal case, he has the right ... to gather and present such evidence as is necessary to provide legal representation, in accordance with the procedures specified in Article 86(3) of this Code;

Article 240⁴²

1. All evidence in the trial of a criminal case shall be subjected to first-hand examination, except as specified in Section X of this Code. The court must hear the testimony of the defendant, the victim and witnesses, and opinions of any expert, must inspect the physical evidence, must read aloud official records and other documents, and must conduct other judicial actions to examine the evidence.
2. Testimony given during the preliminary investigation may be read aloud only in the situations specified in Articles 276 and 281 of this Code.
3. A court judgment may be based solely on the evidence examined at the trial.

Article 281

1. Reading testimony aloud that was previously given by a victim or witness during the preliminary investigation or at trial, showing photographic negatives and prints or slides made in the course of the questioning or playing back audio and/or video

⁴² A fourth section to this article was introduced by Federal Law № 39-FZ of 20 March 2011 (after the conclusion of the defendants' trial).

recordings or showing film of the questioning is allowed, with the consent of the parties, in the event of the victim's or witness' failure to appear in court, with the exception of the situations specified in part two of this Article.

2. In the event of the victim's or witness's failure to appear for trial and on motion of a party or on its own initiative, the court makes a decision to read their previous testimony aloud in cases when there is a:

- 1) death of the victim or witness;
- 2) severe illness precluding appearance in court;
- 3) refusal of the foreign national victim or witness to appear pursuant to a court subpoena;
- 4) natural disaster or other exceptional circumstances precluding the appearance in court.

3. On motion of a party, the court may make a decision to read testimony aloud that was previously given by a victim or witness during the preliminary investigation or at trial, if there are substantial contradictions between the testimony given previously and the one given in court.

4. The refusal of a witness or victim to testify in court shall not preclude the reading of his preliminary investigation testimony aloud, if the testimony was obtained in accord with the requirements of Article 11(2) of this Code.

5. Showing negatives and photographs, or slides made in the course of questioning, playing back audio and/or video recordings or showing film of the questioning shall not be permitted without first

reading aloud the testimony included in the appropriate official record of the questioning or the official record of the trial.

Article 285

1. Official records of investigative actions, an expert's opinion given in the course of a preliminary investigation, as well as other documents included in the criminal case file or presented at a trial may be read aloud in full or in part, pursuant to a ruling or order of the court, if they set forth or certify circumstances that are relevant to the criminal case.
2. Official records of investigative actions, an expert's opinion, and other documents shall be read aloud by the party who requested such reading or by the court.

2. Relevant ECHR Provisions and Case Law

Article 6 § 3 of the Convention states, in relevant part, that:

Everyone charged with a criminal offence has the following minimum rights: ... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

“While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such,

which is therefore primarily a matter for regulation under national law.” *Khan v. United Kingdom*, App. No. 35394/97 (12 May 2000), at ¶ 34 (internal citations omitted). The Court has emphasized its distinct role, which is not “to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not,” but rather “whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.” *Id.* By this is meant the observance of the obligation to ensure the right to a fair trial undertaken by the member states to the Convention. In light of that distinction, “[t]he Court may overlook minor infringements provided that overall the proceedings were fair and, conversely, unfairness may still arise even though the relevant formal requirements may have been complied with.” Philip Leach, Taking a Case to the European Court of Human Rights 253 (2d ed. 2005).

Although neither of the phrases “adversarial principles” nor “equality of arms” appears in the Convention, both terms have been held to be incorporated into the right to a fair hearing protected by Article 6. See Nuala Mole & Catharina Harby, The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights 46 (2006); Clare Ovey & Robin C. A. White, The European Convention on Human Rights 176 (2006). The language of Article 6 § 3 reflects the fact that, although civil-law and common-law countries are both represented in the member states party to the Convention, their approaches to criminal justice are not the same. Russian criminal procedure has drawn from both approaches, although it has been more heavily influenced by the former, civil-law tradition. Whether to adopt common law or continental approaches to the admissibility of evidence has repeatedly been held to be a matter of discretion of

national law. See, e.g., *Schenk v. Switzerland*, App. No. 10862/84 (12 July 1988), at ¶ 46; *Windisch v. Austria*, App. No. 12489/86 (27 September 1990), at ¶ 25.

The European Court has interpreted the right to adversarial proceedings primarily as “the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.” *Rowe & Davis v. United Kingdom*, App. No. 28901/95 (16 Feb. 2000) at ¶ 60. This does not necessarily translate into a right to confront live witnesses at trial. Indeed, were it otherwise, such a conclusion would render a court’s reliance on the case file (*delo*) a *per se* violation. *Delta v. France*, App. No. 11444/85 (19 Dec. 1990), at ¶ 36. The use at trial of witness statements obtained during the preliminary investigation will not contravene either § 1 or § 3(d) of Article 6 of the Convention “provided the rights of the defence have been respected.” *Id.* In the Court’s words, “[a]s a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings.” *Id.* Similarly, the Strasbourg Court has interpreted equality of arms to require that “each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent.” *Bulut v. Austria*, App. No. 59/1994/506/588 (22 Feb. 1996), at ¶ 47.

Among the first cases before the European Court on this right to confrontation in adversarial proceedings was *Unterpertinger v. Austria*, App. No. 9120/80 (24 Nov. 1986) at ¶ 33.⁴³ The applicant

⁴³ A contemporaneous case, *Asch v. Austria*, reached the conclusion on similar facts that no violation occurred. Professor Trechsel has described this judgment as “an exceptionally weak point in the Court’s jurisprudence” that “must be

was convicted of assaulting two family members who gave statements to the police but refused to testify. Under the relevant domestic law, the applicant had no opportunity to confront them, although their statements were read out in court. The Court unanimously found a violation of Article 6. The rule established by the Court is:

If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.

Luca v. Italy, App. No. 33354/96 (27 Feb. 2001), at ¶ 40 (citations omitted). In short, a conviction based “either solely or to a decisive extent” on testimony that the defense is not given the opportunity to confront violates the Convention, a conclusion that the Court has reiterated many times. See, e.g., *A.M. v. Italy*, App. No. 37019/97 (14 Dec. 1999) at ¶ 25; *P.S. v. Germany*, App. No. 33900/96 (20 Dec. 2001), at ¶ 24; *Al-Khawaja & Tahery v. United Kingdom*, App. Nos. 26766/05 & 22228/06 (20 Jan. 2009), at ¶¶

regarded as an unfortunate mistake.” Stefan Trechsel, Human Rights in Criminal Proceedings 295 (2005).

34-36.⁴⁴ As Judge Trechsel has observed, “For the domestic courts, the lesson is simple enough: the judgment should not refer to the untested statement. ... If the remaining evidence is insufficient, it will have to acquit.” Stefan Trechsel, Human Rights in Criminal Proceedings 298 (2005).⁴⁵

One of the Court’s most recent judgments against Russia, the Ilyadi case, highlights this problem. Yuriy Ilyadi was convicted of selling a forged promissory note. The primary evidence against him was the testimony of a Captain P., who testified that he was a Russian law enforcement officer who posed as the purchaser of the note. Captain P.’s testimony took the form of a written record of an interview given to an investigator during the pre-trial investigation. Captain P. did not appear at trial; rather, the pre-trial statement was read out in his absence. The defense did not object to the reading of this record, although Ilyadi later grew suspicious enough of P.’s absence to engage in independent efforts to obtain information about Captain P.’s whereabouts or even his existence, which were rebuffed. The failure of P. to testify in person was the basis for Ilyadi’s appeal, which the court summarily rejected.

The European Court found a violation of the general requirement of fairness found in Article 6 § 1 of the Convention. The Court specifically noted that “the applicant did not have an opportunity to examine or to have examined Captain P. at any stage of the proceedings. During the investigation, the investigator took down Captain P.’s statement but did not arrange for a

⁴⁴ This judgment has been referred to the Grand Chamber, before which a hearing was held on 19 May 2010. Its judgment remained pending at the time this report was submitted.

⁴⁵ Judge Trechsel notes, as a general matter, that there is “a tendency of increasingly allowing courts to rely on the file rather than live evidence. It is my view that this is not compatible with the spirit of the various international human-rights instruments and, more particularly, with the case-law of the Court.” *Id.* at 306.

confrontation between him and the applicant.” *Ilyadi v. Russia*, App. No. 6642/05 (5 May 2011), at ¶ 41. Because the evidence leading to concrete suspicions about Captain P.’s existence was not finally obtained by the defense until after Ilyadi’s conviction, the Court found a violation of Article 6 in the appellate court’s failure to give “a sufficiently specific and explicit reply” to Ilyadi’s appeal on this point.

This case illustrates the potential for a confrontation issue to present both a violation of the general fairness guarantees of Article 6 § 1 and the right to equality of arms guaranteed by Article 6 § 3.

It should be noted that in at least one Russian case before the Strasbourg Court, defense counsel’s willingness to begin a judicial proceeding in the absence of a witness whose testimony was then read from the case file, and subsequent failure to object to concluding the proceeding despite the witness’s continued absence, was deemed to constitute waiver of the defendant’s right to confront a live witness. *Andandonskiy v. Russia*, App. No. 24015/02 (Eur. Ct. H.R. 28 Sept. 2006), at ¶ 54. The Court concluded that there was no violation of Article 6 of the Convention. It is not possible to determine from the materials provided and in the time allotted whether such a waiver would apply to this case.

3. Analysis

In the present case, the use of numerous witness statements found only in the case file, if not subject to confrontation by the defendants, likely violates the Convention, even though under Russian law they are considered to be admissible evidence by virtue of the privileged position of the investigator in control of the

case file. Thus, the Khamovnichesky Court relies in its verdict on the following:

(a) Testimony of Douglas Miller

Douglas Miller, an employee of PriceWaterhouseCoopers, was described by the court as “the main auditor” of the company for the consolidated financial reporting of OAO NK Yukos. His testimony is described as “read out in the course of the court hearing pursuant to Article 281” on pages 136, 184, 185, 345, 347, 464, 545-572, 563, 565, 573, 580-582, and 601 of the verdict.⁴⁶ This testimony was also used by the court to reject the testimony of another PriceWaterhouseCoopers witness, Stephen Wilson (see Verdict, p. 624-25) and the testimony of the defendants (see p. 668 & 669). Documentary evidence was also obtained during Miller’s examination (see p. 599).

In its objections to a motion filed by the prosecution on 11 December 2009, the defense averred that Miller was a “principal prosecution witness,” as evidenced by his frequent mention (56 times according to the defense) in the indictment. According to the same defense document, the investigator denied a request by the defense to conduct a confrontation between Khodorkovsky and Miller. This document further asserted that four interrogations of this witness were omitted from the case file in the defendants’ case, notwithstanding their relevance.⁴⁷

⁴⁶ On page 441, the court refers to the “testimony of the auditor Douglas Miller,” and, on page 597, the court refers to “testimony by witness D.R. Miller,” suggesting that Miller appeared in open court to give evidence. Likewise, at page 614, the court refers to “the evidence produced during court hearing (vol. 132 c.f.s. 20-24) by witness D.R. Miller.” As noted in the text accompanying footnote 38, *infra*, this does not appear to have been the case.

⁴⁷ It is difficult to assess this document, obtained on the website recommended by the Council, because it is not linked to any response by the Khamovnichesky court. According to a press release by the defendants, the court denied the

According to a press release by the defendants, “Before Miller left Russia, he was interrogated no less than four times by prosecution investigators between May 2007 and January 2008 without Khodorkovsky, Lebedev or their defense lawyers being informed and without any opportunity to question Miller or to attend the interrogations. Subsequently, the prosecution unjustifiably rejected Khodorkovsky's request to confront Miller through a Russian procedure whereby a defendant agrees to answer questions put to both the defendant and the witness.”⁴⁸

(b) Testimony of Alla Karaseva

Alla Karaseva was described by the court variously as an employee of JV RTT, OOO Yukos Invest, OOO YuFK, Director General of OOO Forest oil, OOO Virtus, and OOO Grace. Her testimony is referenced as “given by her in the course of the pre-trial investigation and read out in the court hearing pursuant to Article 281” on pages 173-175, 321-323 of the verdict. In addition, the court references inculpatory statements about the defendants made in the verdict of the Basmany District Court of the City of Moscow, which found Ms. Karaseva guilty of fraud and tax evasion (see p. 323).⁴⁹

prosecution's motion. See Courtroom update: December 11, 2009, Khodorkovsky and Lebedev Communications Center, 14 December 2009, <http://www.khodorkovskycenter.com/content/courtroom-report-december-11-2009>. The verdict of the Khamovnichesky court does not appear to distinguish any transcripts obtained through the defense team's efforts.

⁴⁸ See *Mikhail Khodorkovsky and Platon Lebedev Defense Team Seeks Testimony*, Khodorkovsky and Lebedev Communications Center, 14 December 2009, <http://www.khodorkovskycenter.com/news-resources/stories/mikhail-khodorkovsky-and-platon-lebedev-defense-team-seeks-testimony>.

⁴⁹ Similarly, although V.G. Malakhovsky, whom the court found to be a member of the organized criminal group, was examined in court (see p. 261), the verdict references a wide variety of court records of Malakhovsky's criminal case before the the Basmany District Court of the city of Moscow for various

According to a press release by the defendants, the court indicated receipt of a letter from Ms. Karaseva stating that she could not attend the trial due to medical reasons. The court then admitted the transcripts of her pre-trial examination over the objections of the defense, who averred no opportunity to confront the witness, whose interrogation occurred as part of a different case after the conclusion of the preliminary investigation in the defendants' case.⁵⁰

(c) Testimony of N. N. Logachev

N.N. Logachev is described by the court as the Director General and Manager of OAO Tomskneft VNK. This testimony is referenced as “given during preliminary investigation ... and read out in court session in accordance with Article 281” on pages 288-289, and 621 of the verdict. This testimony was also used by the court to reject the testimony given by defence witnesses T.R. Gilmanov and P.A. Anisimov, who are described as former executives of OAO Yuganskneftegas and OAO Samaraneftegas (see p. 620). This testimony was also used to reject arguments made by the defendants (see p. 651, 674, 675 (where it is described only as “testimony”)). This testimony is also used to conclude that the defendants committed the crimes alleged in the indictment as part of an organized group, which under the Criminal Code augmented the punishment (see p. 679).

inculpatory statements (see p. 269, 270, 277, 298, 317, 433, 505, 506, 507, 510, 512, 517), and to reject arguments made by the defence (see p. 630).

⁵⁰ See *Courtroom Report: February 4, 2010*, Khodorkovsky and Lebedev Communications Center, 5 February 2010, <http://www.khodorkovskycenter.com/news-resources/stories/courtroom-report-february-4-2010>.

(d) Testimony of N. I. Vlasova

N.I. Vlasova was described by the court as “working in the tax department of OOO Yukos-Moscow”. Her testimony is referenced as “made public in the court session in line with Article 281 of the CCP of the RF, which she gave during the preliminary investigation,” on pages 355-356 of the verdict. According to a press release by the defendants, the prosecution indicated receipt of a letter from Ms. Vlasova in which she declined to attend the court hearing due to health reasons. The defense did not object to the transcript of her interrogation, but did note that the transcript came from a different case, obtained after the preliminary investigation of the defendants had ended. The prosecution’s motion to add the material to the case file was granted.⁵¹

(e) Testimony of Antonio Valdes Garcia

Antonio Valdes Garcia is described by the court as a defendant “in regard to whom the proceedings on the criminal case have been suspended”. His testimony was relied upon by the court on pages 229-230, 257-258, 317-318, 433-434, 505, and 512 of the verdict. Valdes Garcia was subsequently found guilty *in absentia* by the Basmanny District Court of the City of Moscow on 18 July 2011.⁵² The court omits mention of the fact that Valdes Garcia suffered serious physical injuries while in the custody of Russian authorities in 2005 and fled Russia during his trial in 2007.⁵³

⁵¹ See *Courtroom Report: February 17, 2010*, Khodorkovsky and Lebedev Communications Center, 18 February 2010, <http://www.khodorkovskycenter.com/news-resources/stories/courtroom-report-february-17-2010>.

⁵² See *Spanish citizen pronounced a new guilty party in YUKOS case*, ITAR-TASS, 19 July 2011, http://www.itar-tass.com/en/c142/188420_print.html.

⁵³ See Ekaterina Zapodinskaya, *Khodorkovsky Accomplice Makes a Break*, Kommersant”, 16 January 2007, www.kommersant.com/p734216/r_1/Antonio?Valdez-Garcia_YUKOS/.

(f) Other Witness Testimony

In addition to these witnesses, the Khamovnichesky court read out from the case file the written testimony of a number of other important witnesses. For example, the testimony of A.A. Shavrin and O.K. Yegorova, lawyers with the firm ALM Feldmans, was read from the 2006 court records of the Basmany District Court in the criminal case against Valdes Garcia, Malakhovsky, and Pereverzin. See Verdict, pages 270 and 510-511.

Similarly, the court refers to “the evidence produced by witness S.I. Vorobyeva, given during court hearing at the Basmany District Court” in the same case. See Verdict, page 506. The court refers to “evidence produced by witness E.V. Agranovskaya” in the same way. See Verdict, page 507-508.

The Khamovnichesky court’s verdict records that “[r]ead out during court hearing was the testimony produced by the P.P. Ivlev, a Deputy Managing Partner of ALM Feldmans,” but does not refer to any source from which this testimony was obtained. See Verdict, page 508.

Citing Article 281, the Khamovnichesky court also “read out at the court session” the testimony given during the pre-trial investigation by witness N. M. Petrosian. See Verdict, pages 466-467, 508-509, 512-513.

* * *

In its many references to Article 281, the verdict never identifies which of the four relevant circumstances envisioned by that article the court intends to support its use of testimony from persons who did not appear at trial. In the case of Antonio Valdes Garcia, for example, it may be that the court concluded that § 2(3) of Article 281 applied: Valdes Garcia is a foreign national who

was called as a witness, or perhaps ordered to appear pursuant to a court subpoena. On the other hand, § 2(4) of that article may have been applied. Under an interpretation of the Russian Supreme Court, the need of a witness to travel a long distance was accepted as an “exceptional circumstance[] precluding the appearance in court” of the witness and therefore permitting the use of his previously obtained written testimony under § 2(4) of Article 281. See *Opredelenie ot 10.11.06. Sudebnaya kollegiya po ugolovnym delam, kassatsiya (Dokladchik: Yakovlev Vyacheslav Ksenofontovich)* (“With account for the remoteness of the location of the witnesses and the adoption of all possible means to transport them, the court found exceptional circumstances prevented their appearance in court, which in accordance with paragraph 4 of part 2 of Article 281 UPK RF is the foundation for the reading out of their testimony by motion of the prosecution.”). The Khamovnichesky court does not indicate – neither for Valdes Garcia nor for any other witness – the specific reason it invokes that article.

Sometimes, the verdict references testimony read out pursuant to Article 281, when the only possible basis could be found in § 3 of that article: by the motion of a party on the grounds of substantial contradictions between the testimony given previously and the one given in court. Thus, the verdict references “the testimony of witness A.D. Golubovich examined at the court session, as well as from the records of 09.04.2008 and 05.05.2008 of him being examined as a witness during the pre-trial investigation read out at the court session under Article 281 of the RF Code of Criminal Procedure” (see p. 402).⁵⁴ No indication is

⁵⁴ Sections 2 and 4 would not seem to apply since the verdict indicates that Golubovich appeared at the court session as a witness.

made as to the “substantial contradictions” that would permit this reading under Russian law.

It is difficult for this report to make categorical conclusions as to these potential violations on the basis of the verdict alone. It would appear, however, that the testimony read out from the case file alone comprises a substantial portion of the evidence used to convict the defendants. This is especially so given the key nature of the positions held by the individuals on whose testimony the verdict relies to establish the defendants’ guilt. The one-sided use of this evidence constitutes a violation of equality of arms under the Convention.

E. ARTICLE 7

1. RELEVANT RUSSIAN LAW AND PRACTICE

The Defendants were convicted, *inter alia*, of violating Article 160(3)(a) & (b) of the Criminal Code of the Russian Federation, as amended by Federal Law No. 63-FZ of 13.06.1996, which provides:

Article 160

1. Misappropriation or Embezzlement is the theft of another’s property that has been entrusted to the perpetrator – * * *
3. Acts, foreseen in the first or second parts of this article, if they are committed:
 - (a) by an organized group;
 - (b) on a large scale;

Theft is defined in the Criminal Code as follows:

Article 158, Note 1

By theft [хищение] in the articles of the present Code is understood the self-interested, unlawful, uncompensated withdrawal and (or) conversion of someone else's property to the benefit of the perpetrator or other persons, which causes damage to the owner or other possessor of this property.

The elements of embezzlement were the subject of a decision of the Plenum of the Supreme Court, "On judicial practice in cases of fraud, misappropriation and embezzlement," No. 51 (27 December 2007), the relevant portions of which provide:

1. Courts should pay attention to the fact that, unlike other forms of theft foreseen in chapter 21 of the Criminal Code of the Russian Federation, fraud [мошенничество – the crime defined in Article 159 of the Criminal Code] is accomplished by way of deception or breach of trust, under the influence of which the owner of the property or another person or authority conveys the property or the right to it to other persons or does not impede the withdrawal of this property or acquisition of rights to it by other persons. * * *

6. Theft of another's property or the acquisition of the right to it by way of deception or breach of trust, which is accomplished with the use by this person of forged official documents that concede a right or free from responsibility qualifies as an aggregate crime, as foreseen by part one of Article 327 CC RF

and the corresponding part of Article 159 CC RF. *
* *

8. In the case of the creation of a commercial enterprise without the intention to actually conduct business or banking activity, which has the aim of theft of another's property or the acquisition of the right to it, its commission is completely covered by fraud [мошенничество]. The given act should additionally be qualified under Article 173 CC RF as a false private enterprise only in the case of the real aggregate of the named crime, when the person receives something else, which is not connected with the theft of the property benefit (e.g. when the false private enterprise is created by the person not only for the completion of the theft of another's property, but also with the aim of a tax shelter or cover for prohibited activity, if as a result of the given activity, which is not connected to the theft of another's property, there was caused a large-scale damage to citizens, organizations or the state, as foreseen in Article 173 CC RF). * * *

18. The wrongful free conversion of property that has been entrusted to a person to his own advantage or the advantage of another person, which has caused damage to the owner or other lawful possessor of this property, should be qualified by judges as misappropriation or embezzlement [under Article 160 of the Criminal Code], provided that the stolen property was in the lawful possession or authority of this person, who by virtue of his office or official position, contract or special commission

exercised power by order, administration, delivery, use or custody in relation to someone's property.

Deciding a question about the outer boundaries of the make-up of misappropriation or embezzlement from theft, courts should establish the presence of a person with the above named powers. The accomplishment of a secret theft of another person's property by a person who does not possess such powers, but who has access to the stolen property by virtue of the carrying out of his work or other circumstances, should be qualified under Article 158 CC RF.

19. In the examination of cases about crimes foreseen in Article 160 CC RF, courts should bear in mind that misappropriation consists in the uncompensated, self-interested completion of the wrongful conversion by a person of property entrusted to him to his benefit against the will of the owner.

The crime of misappropriation is considered to be completed from the moment when the lawful possession of the property entrusted to the person becomes wrongful and the person begins to carry out acts that are directed toward conversion of the given property to his benefit (e.g., from the moment when the person by way of forgery hides the presence with him of the entrusted property, or from the moment of the non-performance of the person's duty to place monetary resources of this person in the owner's bank account).

As embezzlement should be qualified wrongful acts of a person who out of self-interest expends property entrusted to him against the will of the owner by use of this property, its expenditure, or transfer to another person. * * *

20. Deciding the question about the presence in actions composing a theft in the form of misappropriation or embezzlement, the court should establish the circumstances that confirm that the intent of the person enveloped the wrongful, uncompensated character of the actions that were accomplished with the aim to turn the property entrusted to him to his own benefit or that of another.

The purposefulness of the intent in each such case must be determined by a court out of concrete circumstances of the case, for example, the presence for a person of the real possibility to return property to its owner, the completion by him of attempts by way of forgery, or other ways to hide his actions.

In this, courts must take into account that the partial reimbursement of damage to the victim by itself is not evidence of the absence of the person's intent for misappropriation or embezzlement of the property entrusted to him.

2. RELEVANT ECHR PROVISIONS AND CASE LAW

Article 7 § 1 of the Convention states, in relevant part, that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

The protection provided by this article is understood to be “an essential element of the rule of law, ... as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.” *S.W. v. United Kingdom*, App. No. 47/1994/494/576 (27 Oct. 1995), at ¶ 34.

Article 7 embodies the principle “that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy”. *Kokkinakis v. Greece*, App. No. 14307/88 (25 May 1993), at ¶ 52. The European Court also understands this right to include the principle that the offence “must be clearly defined in law.” *Id.*; see also *Moiseyev v. Russia*, App. No. 62936/00 (6 Apr. 2009), at ¶ 233. An offence is clearly defined in law under circumstances “where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable.” *Id.*

It follows from these principles that the criminal law must possess the quality of foreseeability. This means that although the judicial authority might engage in the case-by-case clarification of an offence in response to changing social circumstances, the resulting interpretation must be “consistent with the essence of the offence and could reasonably be foreseen.” *Moiseyev v. Russia*,

App. No. 62936/00 (6 Apr. 2009), at ¶ 234. The European Court will ask “whether the applicant’s acts, at the time when they were committed, constituted criminal offences defined with sufficient accessibility and foreseeability by Russian or international law.” *Id.* at ¶ 235.

The evolution of judicial interpretation of the criminal law has been found to be reasonably foreseeable when “consistent with the very essence of the offence” and the conduct in question is generally “within the scope of the offence.” *S.W. v. United Kingdom*, App. No. 47/1994/494/576 (27 Oct. 1995), at ¶ 43. This exception, however, was made in a case in which only the existence of an affirmative defense, not the essential elements of the crime, were in doubt. In that case, the European Court found no violation of Article 7 in the denial to the applicant of the marital immunity defense to the charge of raping his wife because the “essentially debasing character of rape is so manifest” regardless of the marital relationship and, thus, the conviction of the applicant could not “be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment”. *Id.*, at ¶ 43-44.

The European Court has found that a criminal law “may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” *Cantoni v. France*, App. No. 45/1995/551/637 (22 Oct. 1996), at ¶ 35. The European Court noted, in particular, that “persons carrying on a professional activity” may “be expected to take special care in assessing the risks that such activity entails.” *Id.* In that case, however, the Court noted “one decisive consideration”: the fact that for almost

thirty years the relevant domestic cassational court “had adopted a clear position on this matter, which with the passing of time became even more firmly established.” *Id.* at ¶ 34.

3. ANALYSIS

The Court convicted Khodorkovsky and Lebedev, as part of an “organized criminal group,” for the crime of embezzlement under Article 160 CC RF. Embezzlement is defined in that article as “the theft of another’s property that has been entrusted to the perpetrator.” Theft, in turn, is defined to be “the self-interested, unlawful, uncompensated withdrawal and (or) conversion of someone else’s property to the benefit of the perpetrator or other persons, which causes damage to the owner or other possessor of this property.” According to the RF Supreme Court, a conviction for embezzlement under Article 160 requires the “uncompensated, self-interested completion of the wrongful conversion by a person of property entrusted to him to his benefit against the will of the owner.”

The property Khodorkovsky and Lebedev were convicted of embezzling was oil. (Verdict, p. 3) The victims of this theft were three oil-producing companies, OAO Yuganskneftegas, OAO Samaraneftegas, and OAO Tomskneft VNK. (Verdict, p. 6)

The court’s description of the defendants’ *modus operandi* may be summarized as follows:

- 1) The defendants, through OAO NK Yukos, became majority shareholders in the three oil companies, which consequently became subsidiaries in Yukos’s complex corporate structure under the external administration of one of Yukos’s management companies (Verdict, p. 6, 10);

- 2) Having “acquired the right to the strategic management of OAO NK Yukos,” the defendants then persuaded the relevant boards of directors and shareholders of the three oil companies to enter into contracts for the sale of their oil to Yukos (Verdict, p. 9). The court found that the defendants had paid off various participants in these meetings to “secure the adoption of the indicated unlawful and groundless decisions” (p. 11);
- 3) The contracts indicated “that the transfer of the right of ownership to the output, extracted as part of the oil-well fluid, from the oil production companies, appearing in the capacity of the seller, to OAO NK Yukos, appearing in the capacity of the purchaser, shall take place at the head of each concrete well promptly after its extraction from under the ground.” (Verdict, p. 10)

This theory of the defendants’ criminal liability under Article 160 was unforeseeable, and thus a violation of Article 7 of the Convention. First, the theory is premised on the omission or admitted non-existence of the traditional elements of the crime:

- 1) **The element of “another’s property.”** As noted, the defendants, through Yukos, were alleged to have obtained by a series of contracts “the transfer of the right of ownership” to the oil companies’ production. A person cannot embezzle from himself. In order to satisfy this element, *i.e.* to show that the oil belonged to someone other than the defendants, the verdict concludes that although “the oil passed on into *de facto* ownership of OAO

NK Yukos; however, it was not the oil owner *de jure*. In reality, the oil belonged to its producing subsidiaries,” i.e. the victims of the embezzlement. See Verdict, p. 660. The verdict refers to two legal sources in support of this legal conclusion: the judgment of 26 May 2004 by the Moscow City Commercial Court against Yukos, and a decision of the Russian Federation Constitutional Court, No. 138-O (25 July 2001) mentioned in that judgment.

Neither legal source supports this bifurcated concept of simultaneous *de facto/de jure* ownership. During the 2004 tax proceedings, the Moscow City Commercial Court rejected the defendant’s argument that the victims and other companies were the true owners of the oil because those organizations “never acquired any rights of ownership, use and disposal in respect of oil and oil products.”⁵⁵ These are the rights that define ownership under Article 209 of the Civil Code. Likewise, the Constitutional Court determination [«определение»] nowhere references this distinction. Rather, that determination concerned whether a previously rendered ruling [«постановление»] about tax charges against the checking accounts of *bona fide* taxpayers could be applied to non-*bona fide* taxpayers.

It could not be said to be foreseeable that a contract for the sale of oil would be interpreted to

⁵⁵ This quotation is taken from the extensive citation to that judgment found in OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04 (20 Sept. 2011), at ¶ 48.

establish only *de facto* ownership of the object of these completed transactions in the defendants, but not the *de jure* ownership that the Khamovnichesky Court asserts to remain with the oil production companies.

2) **The element of “entrusted to the perpetrator.”**

By definition, a person cannot be “entrusted” with a thing over which he is the owner. The verdict twice asserts that some contracts were procured in a manner rendering them void *ab initio* [«ничтожен»] under Russian law. See verdict, pp. 90, 648. The court’s theory seems to be that the void contracts did not transfer ownership; thus, the defendants were entrusted with oil that actually belonged to the victims. Neither of these two assertions in the verdict is sound.

The first reference is to contracts implicated in the money-laundering charges, not the embezzlement charges, and thus is not relevant.⁵⁶ The second reference could refer to embezzlement, although the verdict is unclear. The verdict states on the preceding page that the defendants are guilty of embezzlement “by way of execution of numerous wrongful transactions in violation of Art. 179 of the Civil Code.”⁵⁷ See verdict, p. 647. But Article 179 does not state that such contracts are void, only that

⁵⁶ The Court cites Article 170 of the Civil Code, under which “a fictitious transaction, that is, a transaction concluded only for form, without the intention to create legal consequences corresponding to it, shall be void.”

⁵⁷ A similar conclusion is also stated on page 12, also citing Art. 179. Article 179 of the *Criminal* Code establishes the crime of coercing a transaction through violence or blackmail, but the defendants were not charged with that offense.

they are voidable by a court upon the suit of the victim [«может быть признана судом недействительной по иску потерпевшего»]. If such a suit was not brought (and there is no mention of one in these sections of the verdict), one would now appear to be time-barred.⁵⁸ The verdict makes several references to Article 10 of the Civil Code, but these are equally unavailing.⁵⁹

By the court's own conclusion, therefore, ownership of the oil was transferred by these contracts. If indeed ownership was transferred, the defendants could not have been "entrusted" with the property of another and this element of the crime

⁵⁸Article 181(2) provides that "A suit to deem a contested transaction to be invalid and concerning the application of the consequences of its invalidity may be brought within a year from the date of the termination of the coercion or threat under whose influence the transaction was concluded (Article 179[1]), or from the date when the plaintiff knew or should have known about other circumstances which are the grounds for deeming the transaction to be invalid."

⁵⁹ The verdict frequently asserts that Article 10 of the Civil Code has been contravened by the defendants' actions. *See* Verdict, pp. 12, 35, 543, 659, 665. Article 10 states in relevant part that "The actions of citizens and juridical persons effectuated exclusively with the intention to cause harm to another person, and also abuse of right in other forms, shall not be permitted."

The court's legal analysis, when conducted at all, is perfunctory and inconsistent with the requirements of the Code. Although Article 10 of the Code states that actions "effectuated *exclusively* with the intent to cause harm" [in Russian: «осуществляемые исключительно с намерением причинить вред другому лицу»] are prohibited, the verdict concludes only that the defendants "were *simultaneously* acting with intent to cause harm to another person" (p. 12) and "acted *concurrently* with the intent to cause harm to another person in violation of Article 10" (p. 665) [in both cases «одновременно действовали»] (the italicization of these adverbs has been added for emphasis). The verdict's conclusion that any intent to cause harm was not exclusive acknowledges that this limitation has not been met. This limitation would appear to serve a very important purpose. Without it, virtually any contract would be susceptible to allegations of improper motive.

was lacking. If ownership did not transfer because of the Khamovnichesky Court's conclusion, years after the fact, that the contracts were void under Article 179, that conclusion would appear to be a misreading of that provision of the Code, under which contracts are voidable upon the successful suit of the victim, but not void by order of the court *sua sponte*.

But even were the court to have concluded that it did have the power to declare these contracts void under Article 10, a power in no way specified there, it can hardly be claimed to have been foreseeable that the oil would then be deemed to have been entrusted to the defendants, especially given that the payment rendered under the contracts does not appear to have been returned.⁶⁰ The relevant conduct, an exchange of oil for money, simply cannot be characterized as an entrustment to one of the property of another.

- 3) **The element of “theft.”** The court states that the contracts between Yukos and the three oil companies “obviously contradicted the interests of the latter” (p. 9), were procured by the defendants’ misleading statements to the companies’ shareholders and boards of directors (p. 9), and were “economically disadvantageous for them right from the start” (p. 10). Even if true, the court notes

⁶⁰ Indeed, Article 10(2) states only that a court “may refuse to defend the right belonging to the person” who acted exclusively with the intention to cause harm to another, not that such conduct may serve as an element of the crime of misappropriation. To the contrary, Article 10(3) establishes a legal presumption of reasonableness and good faith of all participants in civil law relations.

that each contract established prices that were, in fact, paid for the oil. It thus cannot be claimed that the defendants' actions amounted to the "uncompensated withdrawal and (or) conversion of someone else's property to the benefit of the perpetrator or other persons, which causes damage to the owner or other possessor of this property."

The court's theory appears to be that, using a variety of sham companies, the theft was accomplished "by means of the deliberate underestimation of the prices of oil" owned by the oil companies (p. 242). The Court describes the defendants' "intent to embezzle someone else's property by means of clearly nonequivalent payment of its value." (p. 159) The court makes frequent reference to its conclusion that the contracts "did not involve exchange for value" (e.g. p. 164, 167). Because the court's theory of liability does not even track the elements of the offense, it cannot be held that it is "consistent with the essence of the offence and could reasonably be foreseen" by the defendants. *Moiseyev v. Russia*, App. No. 62936/00 (6 Apr. 2009), at ¶ 234. Indeed, it is hard to imagine a crime more unforeseeable than one that depends on a court's *post hoc* conclusions that the agreed contract price was not of quite the right amount.

A second indication that this theory of embezzlement was unforeseeable is its sharp inconsistency with the decision of the Supreme Court interpreting these provisions of the Criminal Code. That decision not only upheld the importance of the elements that the court disregards but noted that an alternative provision of the Code was better suited to the court's conclusions of fraud. As the Supreme Court noted in paragraph 6 of its decision, "[t]heft of another's property or the acquisition of the right to it by way of deception or breach of trust, which is accomplished with the use by

this person of forged official documents that concede a right or free from responsibility qualifies as an aggregate crime, as foreseen by part one of Article 327 CC RF and the corresponding part of Article 159 CC RF.” The Supreme Court, in paragraph 8, further explained that, “[i]n the case of the creation of a commercial enterprise without the intention to actually conduct business or banking activity, which has the aim of theft of another’s property or the acquisition of the right to it, its commission is completely covered by fraud [мошенничество].” With regard to embezzlement, on the other hand, the Supreme Court reiterated the traditional statutory elements of the crime. See paragraphs 18-20, Supreme Court decision, *supra*.

Perhaps the Khamovnichesky Court sought guidance (although it does not say so) in the Supreme Court’s decision interpreting embezzlement, which noted that “the partial reimbursement of damage to the victim by itself is not evidence of the absence of the person’s intent for misappropriation or embezzlement of the property entrusted to him.” (Para. 20, Supreme Court decision.) This, however, would be more weight than this short reference could bear. It cannot be considered a foreseeable interpretation of either the statute or the Supreme Court’s interpretation of it to equate poor business judgment about (or even fraudulently induced or ill-intentioned agreement to) a contract for the sale and purchase of oil with a partial reimbursement of damage due to embezzlement.

In this regard, it is interesting to note that while the Khamovnichesky court sought such a novel theory under which to convict the defendants for embezzlement, it eschewed more straightforward applications of the Criminal Code. The court frequently characterized the defendants’ conduct in terms suggesting criminal liability under a number of provisions in the

Criminal Code: Article 165 (causing damage to property by fraud or breach of trust), Article 173 (creating a false business organization), Article 201 (abuse of authority), Article 204 (commercial bribery), and Article 327 (forgery).⁶¹ However, the defendants were not indicted for these crimes and the court neither references these articles nor makes any concerted effort to show that their elements have been satisfied. This may well be due to the fact that the statute of limitations for these crimes had passed.⁶² The indictment also did not charge crimes for which the statute of limitations had not completely passed, e.g. the crimes of theft by an organized group [кража] under Article 158(3)(a) and fraud [мошенничество] by an organized group under Article 159(3)(a). Indeed, the Supreme Court made clear that “[i]n the case of the creation of a commercial enterprise without the intention to actually conduct business or banking activity, which has the aim of

⁶¹ For example, the Khamovnichesky court states that the contracts with the oil producing companies “bore a fictitious character, inasmuch as they included within themselves knowingly false information” about both the price and the purchaser of the oil (p. 12). The court concludes, “[i]n such a manner, by way of organizing the signing of the general agreements, M.B. Khodorkovsky, acting in coordination with P.L. Lebedev, did factually deprive the management of OAO Samaraneftegaz, OAO Yuganskneftegas and OAO Tomskneft VNK of the opportunity to dispose of the oil produced by these companies on their own.” (p. 13).

⁶² Under Article 78 CC RF, the statute of limitations for these crimes is six years, calculated from the date of the offense to the entry into legal force of the judgment. If, as the court states, the defendants committed a “continuous crime” (see verdict, pp. 72, 678), this period would be calculated from 2003, the last alleged act of embezzlement. It should be noted, however, that although an earlier version of the Criminal Code included “repeatedly” («неоднократно») as a possible element of the offense of embezzlement, see Article 160(2)(b) of the Criminal Code in its 7 July 2003 edition, the current Code omits any mention of this quality of the offense, and the Code itself does not provide for the concept of a continuing violation. Article 16 of the Criminal Code, which governed the repeatedness of crimes («неоднократность преступлений»), was removed from the Criminal Code on 8 December 2003 by Federal Law 162-FZ.

theft of another's property or the acquisition of the right to it, its commission is completely covered by fraud." Nevertheless, no such charge was made against the defendants and the court makes no attempt to establish its elements other than to assert, in conclusory language, that the defendants indeed committed both theft and fraud.⁶³

A third indication that the application of embezzlement to the defendants' business activities could not have been foreseeable may be the array of judgments by Russian courts to the contrary. This section of the verdict is difficult to assess. According to the verdict, the defendants identified sixty-one judgments of the RF arbitration courts (p. 660). Only two judgments are cited with particularity, both apparently including statements about oil owned by Yukos. In addition to typographical errors in the Khamovnichesky court's references to them,⁶⁴ it is impossible to know from the court's description whether the ownership in question refers to the contracts that are the basis of the charges against the defendants. In any event, the Khamovnichesky court's verdict summarily dismisses the bulk of these unspecified judgments with the following conclusion:

⁶³ The court similarly asserts that the defendants' actions variously violated Article 1 of the RF Civil Code (p. 4), Article 10 of the RF Civil Code (p. 12), Article 83 para 3 of Federal Law No. 308-FZ On Joint-Stock Companies of 26 December 1995 (as amended by Federal Law No. 65-FZ of 13 June 1996) (p. 10), and Article 6 paragraphs 2 and 4 of the Law of the RSFSR No. 948-1, "On Competition and the Restriction of Monopolistic Activity on Commodities Markets" of 22.03.91 (as amended by Federal Law No. 83-FZ of 25 May 1995) (p. 11). The language of these statutes is not quoted, and no legal analysis is provided that applies facts proven in court to the relevant law.

⁶⁴ The quotations made in the verdict from these commercial court judgments, as well as the quotation from the Constitutional Court judgment that appears on page 660 of the verdict, do not use complete quotation marks, making evaluation of the material referenced difficult.

Thus, it follows from those commercial court judgments that the oil passed on into *de facto* ownership of OAO NK Yukos; however, it was not the oil owner *de jure*. In reality, the oil belonged to its producing subsidiaries. In such circumstances, the court concludes that the commercial court judgments do not refute and do not affect in any way the establishment of the circumstances of commission of crimes in this case or the court's conclusions regarding the defendants' guilt and classification of their actions. (p. 660)

The Khamovnichesky court also distinguishes these judgments by asserting that "As of the moment of issuance of the judgments mentioned by M.B. Khodorkovsky, the courts did not know the mechanism of theft of oil of OAO NK Yukos's oil-producing enterprises developed by M.B. Khodorkovsky, P.L. Lebedev, and other organized group participants." (p. 660-61) It is impossible to assess the validity of this assertion, however, without evaluating the arbitration court judgments in question. Such an evaluation, if completed, might further bolster the evidence of a violation of Article 7 in these proceedings.

VI. OTHER POTENTIAL VIOLATIONS

Per the instructions communicated by the Council, this report focused its analysis on the verdict of the Khamovnichesky District Court and the official trial documents available via the website that the Council recommended. On the basis of these documents, and primarily among these the verdict, it is possible to identify a number of potential violations of the European Convention on

Human Rights. Violations of Articles 3, 6, and 7 of the Convention have been analyzed in detail.

Nevertheless, it must be emphasized that this report cannot be taken to provide an exhaustive list of violations arising out of the proceedings. Because a proper examination of those other potential violations would require access to additional materials that have not been made accessible, and/or would require additional time that was not available, it is beyond the scope of this report to do more than note their existence in summary form. To do so should not be taken as a sign of their lesser importance. Rather, this approach simply reflects the limitations identified above.

Were resources available to conduct a thorough examination of the trial proceedings that are not accessible through an analysis of the verdict, several other articles would raise potential areas of inquiry. For example, the court's decisions concerning the defendants' pre-trial detention raise issues under Article 5, which provides an array of procedural protections applicable to that stage of the proceedings but which are not susceptible to evaluation on the basis of the materials available. Likewise, the right to respect for private and family life guaranteed by Article 8 may also be implicated by the treatment of the defendants.

Similarly, Article 4 of Protocol 7 provides that "[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State." It is beyond the scope of this report to analyze the facts of the first case in sufficient

detail to evaluate the possibility of a violation of this provision of the Convention.⁶⁵

In addition, several articles of the Convention contain multiple sub-parts. Thus, Article 6 § 3 (b) guarantees the right to adequate time and facilities for a defence. Evaluation of a claim that this right was violated in the defendants' trial would require access to substantially more materials than were available for the completion of this report.

In addition to these core rights and freedoms guaranteed by the Convention, other articles of the Convention raise issues that are worth noting in conclusion.

A. ARTICLE 18

Article 18 of the Convention provides:

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

The European Court has noted more than once that Article 18 “does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention.” *Gusinskiy v. Russia*, App. No. 70276/01, at ¶ 73. That case concerned the

⁶⁵ Such a violation might be considered to manifest itself in “attaching a different legal qualification to the same facts rather than prosecuting the accused for a different set of facts.” Rapporteur Mrs. Sabine Leutheusser-Schnarrenberger, Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states, Report to the Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, Doc. 11993 (7 Aug. 2009), at ¶ 105.

detention of the owner of ZAO Media Most (the holding company for the Russian television channel NTV) at least in part to compel the transfer of his company to a state-controlled company. *Id.* at ¶¶ 75-76. Perhaps because the violation in that case was so blatant, and because the Russian Government did not dispute the central facts around which the violation centered (the detention of the applicant in order to coerce the sale of his company to the state),⁶⁶ the Court's description of the elements of a successful complaint under Article 18 were spare: "when considering the allegation under Article 18 of the Convention the Court must ascertain whether the detention was also, and hence contrary to Article 18, applied for any other purpose than that provided for in Article 5 § 1 (c)." *Id.* at ¶ 74.

This bare description deceptively suggests a low threshold to find a violation. In prior applications to the European Court, the defendants and other parties associated with the defendants have asserted claims under Article 18. *See Aleksanyan v. Russia*, App. No. 46468/06 (22 Dec. 2008) at ¶¶ 219-220; *Khodorkovskiy v. Russia*, App. No. 5829/04 (31 May 2011) at ¶¶ 249-261; *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04 (20 Sept. 2011) at ¶¶ 663-666. These claims all failed to attract the support of a majority on the Court. In the first judgment, the Court concluded that although the complaint under Article 18 should be declared admissible, the disposition of the claims to which it was

⁶⁶ *See id.* at ¶ 75 ("The Government did not dispute that the July agreement, in particular Annex 6 to it, linked the termination of the Russian Video investigation with the sale of the applicant's media to Gazprom, a company controlled by the State. The Government did not dispute either that Annex 6 was signed by the Acting Minister for Press and Mass Communications. Lastly, the Government did not deny that one of the reasons for which Mr Nikolayev closed the proceedings against the applicant on 26 July 2000 was that the applicant had compensated for the harm caused by the alleged fraud by transferring Media Most shares to a company controlled by the State.").

connected rendered its separate examination unnecessary. See Aleksanyan v. Russia, App. No. 46468/06 (22 Dec. 2008) at ¶ 220.

In *Khodorkovskiy v. Russia*, on the other hand, the Court made a determination on the merits. The Court noted widespread suspicion of the motives of the Russian Government in prosecuting the defendants found in the resolutions of a variety of public and private institutions. Included among these, and described as “probably the strongest argument in favour of the applicant’s complaint under Article 18,” were the findings of a number of European Courts in cases concerning the Yukos oil company and its leadership. *Khodorkovskiy v. Russia*, App. No. 5829/04 (31 May 2011) at ¶ 260. Nevertheless, the Court found no breach of Article 18.

In so doing, the Court set a high bar for complaints under Article 18. First, the Court articulated a rebuttable presumption of good faith for all government action. This translated into a requirement that the applicant “must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context).” *Id.* at ¶ 255. Second, the Court stated that it would apply “a very exacting standard of proof” and that the burden of proof would remain with the applicant, notwithstanding the establishment of a *prima facie* case of improper motive. *Id.* at ¶ 256. Third, the Court characterized the applicant’s claim to be that “the whole legal machinery of the respondent State in the present case was *ab initio* misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention.” *Id.* at ¶ 260. Such a claim, the Court stated, “requires an incontrovertible and direct proof.” *Id.*

This last requirement, of “incontrovertible and direct proof,” was reiterated in the most recent judgment, *Neftyanaya Kompaniya*

Yukos v. Russia, App. No. 14902/04 (20 Sept. 2011) at ¶ 663. The Court acknowledged in a generic fashion the “massive public attention” and comments by “various bodies and individuals” concerning the proceedings against Yukos. These, however, the Court found to be of “little evidentiary value.” *Id.* at ¶ 665. The Court stated that it could not find (apart from its previous findings of violations of the Convention earlier in the judgment) “any further issues or defects in the proceedings ... [that] would enable it [to] conclude that there has been a breach of Article 18 of the Convention on account of the applicant company’s claim that the State had misused those proceedings with a view to destroying the company and taking control of its assets.” *Id.* This part of the judgment was unanimous, perhaps reflecting the Court’s holding (also unanimous) that at least some of the tax assessments did not violate Article 1 of Protocol No. 1 of the Convention.

In the past, the Court has noted that a violation of Article 18 was theoretically possible even in the absence of a finding of a free-standing violation of a right protected by the Convention (a statement omitted from the Court’s judgment, but found elsewhere, *e.g. Gusinskiy v. Russia*, App. No. 70276/01 (19 May 2004) at ¶ 73 (“There may, however, be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone.”)). These judgments concerning the defendants and Yukos, however, suggest that the Court is not inclined to find a violation of Article 18 in association with complaints made under other articles of the Convention.

B. ARTICLE 34

Article 34 of the Convention states:

The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

A number of circumstances could give rise to a violation of Article 34. With regard to his first conviction, Khodorkovsky has filed two separate applications with the European Court. In his first application, Khodorkovsky alleged that prison officials had interfered with his attorney's attempt to pass him a blank application form and other papers for use in perfecting his application to the Court. See the admissibility decision in *Khodorkovsky v. Russia*, App. No. 5829/04 (7 May 2009), at ¶ 9. The Court, while holding the application partly admissible, unanimously held this part of the application inadmissible. *Id.*

Khodorkovsky appears to have alleged a violation of Article 34 in his second application to the Court, lodged on 16 March 2006, concerning the first trial. The decision to communicate this application to the Russian Government was made on 15 November 2007. No decision has yet been announced regarding its admissibility in whole or in part. The application alleged:

access to the applicant's lawyers was especially restricted in the period leading up to the expiry of the six-month deadline for submitting his claim with regard to violation of his right to a fair trial; the authorities had refused to implement a Supreme Court decision allowing the applicant access to lawyers during working hours; it had not been

possible to provide a copy of the present application in draft to the applicant to consider in his own time; four of the five lawyers instructed by the applicant to advise him in relation to his ECHR claim had been hindered in obtaining access to the applicant; and the applicant's two Russian lawyers, Mr Drel and Ms Moskalenko, had been subject to intimidatory actions by the State. Both had been threatened with disbarment and the International Protection Centre, which Ms Moskalenko founded, had been subjected to a tax audit of the entirety of its work.

See Statement of Facts and Questions for the Parties compiled by the Registry of the Court in *Khodorkovskiy v. Russia* (No. 2) (App. No. 11082/06 communicated 3 December 2007) at § G.

Additional information would be needed to determine whether such an allegation could be made with regard to the second trial.

VII. CONCLUSION

It is the conclusion of this report that the verdict in this case evidences the violation of the defendants' human rights protected under Articles 3, 6, and 7 of the European Convention on Human Rights. Other violations of the Convention are possible, including but not limited to violations of Articles 3, 5, 6, 8, 18, 34, and Article 4 of Protocol 7. However, evaluation of complaints raised under these parts of the Convention would require access to additional resources that were not available for this report.

Respectfully submitted,

