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The Khodorkovsky trial

A report on the observation of the criminal trial of Mikhail Borisovich Khodorkovsky and Platon Leonidovich Lebedev, March 2009 to December 2010

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An International Bar Association's Human Rights Institute (IBAHRI) Report

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List of Acronyms

ECtHR	European Court of Human Rights
IBAHRI	International Bar Association's Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
PwC	PricewaterhouseCoopers
RCCP	Russian Code of Criminal Procedure
RCC	Russian Criminal Code
SPEs	Special purpose entities
UNHRC	United Nations Human Rights Committee

Chapter One – Introduction

A. The principles underpinning trial observations

The underpinning principle of trial observations is the right to a fair and public trial, as guaranteed by international and regional human rights instruments, including Article 10 of the Universal Declaration of Human Rights and Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The Russian Federation has been a State Party to the ICCPR since 1973 – without any reservation relevant to this report. The right to trial observation is specifically provided for in Article 9(b) of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted by the United Nations General Assembly in December 1998.

The practice of sending trial observers is well established and accepted within the international community. The International Bar Association's Human Rights Institute (IBAHRI), together with other international, regional and national legal organisations, commonly sends representatives to observe trials. Trial observation aids in the conduct of fair trials, as the very presence of an observer increases accountability and encourages the proper functioning of the court process.

B. The IBAHRI observer at the *Khodorkovsky-Lebedev* trial

This report deals with the second criminal trial of Mikhail Borisovich Khodorkovsky ('Khodorkovsky') and Platon Leonidovich Lebedev ('Lebedev'), which ran from 3 March 2009 to 30 December 2010. It does not address the first trial, conviction and respective appeals by Khodorkovsky and Lebedev; nor does it evaluate their applications[1] to the European Court of Human Rights (ECtHR); nor any legal proceedings to which the accused are connected – financially or otherwise – in Armenia, the Netherlands, Sweden, the United Kingdom and the United States.[2] Over more than a decade, several Russian governmental organs have conducted numerous civil and criminal investigations of persons formerly connected with OAO NK Yukos.[3] The details of these investigations[4] are not part of this observation, nor are the investigations leading up to the February 2007 indictments for the second trial.

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1 Lebedev has had two applications (Nos 4493/04 and 13773/05) granted, one of which has been decided substantially in his favour. Khodorkovsky has had two applications granted (Nos 5829/04 and 11082/06) and the court held that the conditions of imprisonment in one facility, as well as the conditions of security in the courtroom, amounted to inhuman and degrading treatment, but that there was insufficient evidence to find that the trial was politically motivated. See, respectively, *Lebedev v Russia*, Application No 4493/04, decided 25 October 2007, No 13772/05, decided 27 May 2010, and *Khodorkovsky v Russia*, Application No 5829/04, decided 20 May 2009.

2 Interested private parties have a website with information about some of these legal proceedings: **www.theyukoslibrary.com**.

3 The Russian acronym for the company's name literally translates as 'Open Joint Stock Company Oil Company Yukos'. It is referred to in this report as 'Yukos'. This prosecution was criminal Case No 18-432766-07 with at least eight other associated cases including Nos 18-230252-02; 18-253-545-04; 18-325501-04; 18-325531-04; 18-325543-04; 18-41-03; 18-41-06; and 19-09-11.

4 Regarding the process of criminal investigation and prosecution see generally WE Butler, *Russian Law* paras 6.84–6.120 (3rd edn, Oxford, 2009), W Burnham, P Maggs and G Danilenko, *Law and Legal System of the Russian Federation*, Chapters XI and XII, 'Criminal Procedure' and 'Criminal Law,' pp 487–632 (4th edn, Juris, 2009). The relevant law is the Code of Criminal Procedure of the Russian Federation: Chapters 3 (Criminal Prosecution), 4 (Grounds for Declining to Initiate a Criminal Case and for Dismissing a Criminal Case or Criminal Prosecution), 19 (Grounds and Bases for Initiating a Criminal Case), 20 (Procedure for Initiating a Criminal Case), 21 (General Conditions for Conducting a Preliminary Investigation), 22 (Preliminary Investigation), 23 (Charging an Accused; Presenting the Charges), 24 (Inspection, Visual Body Inspection; Investigative Experiment), 25 (Search, Seizure, Interception of Postal and Telegraph Correspondence; Monitoring and Recording Communications), 26 (Questioning; Confrontation; Identification; Verification of Testimony), 27 (Forensic Expert Analysis), 28 (Suspension and Reopening of a Preliminary Investigation), 29 (Dismissal of a Criminal Case), 30 (Referring a Criminal Case to the Procurator with an Indictment), 31 (Actions and Decisions of the Procurator Upon Receipt of a Criminal Case with an Indictment), and 32 (Inquiry), which are available in Russian and English at **http://legislationline.org** and in English in WE Butler, *Russia and the Republics – Legal Materials*, Vols 3 and 4 (Juris, 2010).

The IBAHRI observer at the trial was Robert Teets. Mr Teets is a US citizen with academic degrees and qualifications to practise law in Russia,[5] the State of California and before the US Supreme Court. He was engaged from the time of the commencement of the trial's closed preliminary hearing and was present in the courtroom from the start of open hearings on 31 March 2009 through to the trial's conclusion in December 2010.

Mr Teets produced a letter advising the presiding judge, Judge Viktor Nikolayevich Danilkin ('Judge Danilkin' or 'the Judge'), of the IBAHRI's wish to attend and requesting his consent. Following a meeting with the judge's staff, consent was granted with the caveat that it carried no formal imprimatur.

A trial observer is de facto and de jure no different from a member of the general public attending a major criminal trial. Other than having copies of the indictments, plus a limited selection of court orders and defence pleadings, and ultimately the court's final judgment and verdict, the observer's records are limited mainly to what can be heard and seen in open session. Nevertheless, the observer thoroughly reviewed the prosecution's indictment and the court's final judgment and verdict along with the limited number of pleadings and other trial-related motions and court orders available. It should be noted that most of these materials are available on the defence's website. However, the court's decisions and other posted documents are only a portion of a larger whole. There has been incomplete disclosure reflecting selective choices made by the parties, each for their own purposes.

The IBAHRI has focused on the quality of procedural justice displayed and practised as opposed to the substantive merits of the charges, judgment and verdict. It still must be acknowledged that the observer had no access to the 200-volume-plus 'case file' and daily courtroom protocols,[6] which together constitute the bulk of the written and electronic record in this trial. (The absence of protocols during most of the trial is an issue of fair process addressed in this report).

The observer attempted to meet with both the defence and prosecution, and it was decided to speak with the prosecution counsel first, in order to obtain a clear understanding of the charges before meeting the defence. Despite repeated written requests from the IBAHRI office in London to the prosecution team, a meeting was never granted. When it became apparent such a meeting would not occur, the observer met with defence counsel Vadim Klyuvgant and Konstantin Rivkin on 23 November 2010.

C. The progress of the trial

Public access to the trial began after the closed preliminary hearing when Judge Danilkin ruled that there was a case for the prosecution to try the accused on the charges in the indictments.

From 7–16 April 2009, the prosecution read aloud the two indictments. The principle of orality is fundamental to the Russian legal system (and to many civil law systems) and is discussed in greater detail later in this report. Between 20–27 April, in a medley of de facto pre-trial motions regarding alleged as

5 As is the case in the UK, but not in the US, Russia recognises two principal types of lawyers – jurists (analogous to solicitors in the UK) and advocates (analogous to barristers in the UK). In fact, in Russia, there is also a third type of lawyer, that is, notaries. See generally WE Butler, *Russian Law,* paras 5.01–5.58 and 6.129–6.155 (3rd edn, Oxford, 2009). The IBAHRI's observer is qualified as a Russian jurist.

6 Article 259 of the RCCP defines what constitutes the official record of a trial. In Russian, the term for 'record' is «протокол» or as is transliterated phonetically, 'protocol'. That article does not provide verbatim transcript, but rather, a written summary – inclusive of some 16 distinct elements, plus several other items that are compiled by the judge and his staff and submitted to the parties for their review. Among the elements to be included are: the applications, objections and petitions made (Article 259(3)(6)); a detailed content of the evidence (Article 259(3)(10)); and the questions put to witnesses and their answers (Article 259(3)(11)).

well as patent errors in the case files and indictments (eg, 'the 38th of December'), Khodorkovsky and Lebedev contended that the charges against them had neither been explained to them, nor were they intelligible, leading to their declaration that it was impossible to plead either not guilty or guilty.

On 27 April, the prosecution, without making any opening statement, began reading aloud documents from the case file that it deemed demonstrable of the accused's criminal wrongdoing and guilt. On 28 September 2009 the prosecution called its first witness. On 29 March 2010, the prosecution finished with its last witness and rested its case. All told, the prosecution presented 58 witnesses either in person or via investigatory interrogation transcripts read into the record.

Preceded by a day and a half of motion practice, the defence began presenting its case on 6 April 2010 with the reading aloud of documents together with witness testimony. Khodorkovsky and Lebedev themselves made frequent submissions to the court. Defence testimony closed on 24 September, though motions carried over into the next week. In the aggregate, the defence presented 30 witnesses.

Closing arguments were made by legal counsel beginning with the prosecution on 14 October and concluding with the defence on 28 October. As provided by the Russian Code of Criminal Procedure (RCCP), the prosecution was afforded a rebuttal and, on 2 November 2010, the trial ended with the closing words of Khodorkovsky. Lebedev explicitly waived his right to offer closing words.

Judge Danilkin read aloud his 878-page verdict in the course of four court sessions between 27–30 December 2010.

D. The 'fair trial' element of the 'rule of law'

Under the ICCPR, to which the Russian Federation is a party, a fair trial requires equality before the court; a public hearing by a competent, independent and impartial tribunal established by law; and, at the conclusion of the hearing, a publicly-rendered judgment.[7] In particular, with respect to criminal trials, the accused must be presumed innocent until proven guilty; be informed promptly and in detail, in a language which he or she understands, of the nature and cause of the charge; have adequate time and facilities to prepare a defence and communicate with counsel; be tried without undue delay and in his or her presence; and to examine or cross-examine witnesses.[8]

In 2009, the Chairman of the Russian Constitutional Court, Valery Dmitrievich Zorkin, and three Constitutional Court judges (Tamara Georgievna Morschakova (retired), Victor Martenianovich Zhuikov (retired), and Vladimir Grigorievich Yaroslavtsev) joined with other legal scholars and practitioners to consider at length the current state of the rule of law in Russia.[9] In 2010, the volume of these deliberations was translated into English with commentary by, among others, the President of the Moscow City Chamber of Advocates, Genri Markovich Reznik.[10] Mr Zorkin set the work's firm tone:

7 Article 14.

8 Article 14(2)(3).

9 Верховенство Права И Проблемы Его Обеспечения В Правоприменительной Практике (Статут, 2009).

10 *The Rule of Law in Russia: Issues of Implementation, Enforcement and Practice* 20–26 (Statut, 2010). Both volumes are products of the Center for Legal and Economic Studies **www.lecs-center.org**, which also produced Conceptions for the Modernization of Criminal Legislation in the Sphere of Economics. The latter was published in August 2010 at the order (28 November 2009, № ПР-3169) of President Medvedev and is now being debated in the Duma; Верховенство Концепция Модернизации Уголовного Законодательства В Экономической Сфере (на основании Поручения Президента Российской Федерации от 28.11.2009 № ПР-3169).

> 'The principle of the rule of law is fundamental and system-forming in the system of legal principles. The refusal to be subordinate to the law in any sphere of state and governmental activity in essence signifies the authorities' forgetting of society's interests, their striving to stand above society, to view the citizen as an object of their activity and not as a fully equal subject in relations with the state. This does not comply with the rule of law, leads to the danger of arbitrariness, excludes the possibility of legal reforms, including judicial reform, and potentially carries the threat of the destruction of the state itself. One of the main contradictions of contemporary social development consists in the fact that having declared the state to be governed by law *de jure*, but refusing to be subordinate to the law de facto, the state will develop along a vector leading to its demise.
>
> Such a development contradicts the goals of the current Russian Constitution which, despite all its deficiencies and far from adequate implementation, is ideal in the sense of being normative: it prescribes that power must be divided on the basis of the law, declares human rights as having inherent worth and presumes the rule of the people on the basis of competitive democracy. Without these three components, constitutional legal principles cannot be realized.
>
> No legal principle lives a life of its own. It is realized and defended with the aid of a multitude of public and state institutions and, first of all, with the assistance of the judicial branch. The practice of applying the law gives rise, on a daily basis, to a multitude of complex problems related to its interpretation and application. It is extremely important that the judicial system acts through a process whereby its errors are corrected by the courts themselves. The judicial system thereby shows itself to be self-regulating. Since the judicial branch is an autonomous power, this principle was instilled into the very idea of its autonomy in relation to other branches of power and other state and public institutions from the very beginning. However, from the beginning this also presumed the inadmissibility of the deviations and errors in judicial practice which would have produced an interpretation which does not comply with the constitutional meaning of a rule of law and which violates the principles of the law. This is provided for by the institutions of constitutional judicial control.
>
> Based upon the professional and moral responsibility of judges, on their feelings as a person and as a citizen, a court cannot become a servile weapon serving the realization of the subjective preferences of the bureaucratic apparatus, even if those find expression in the law.'

The multiple contributions to the volume prominently feature uniformity in the application of laws and predictability of the judicial system; parity of the parties; and non-selectivity and non-political bases for prosecution.[11]

11 Defence declamations have been made alleging the selectivity of the charges made against Khodorkovsky and Lebedev. They applied for relief to the ECtHR claiming 'political prosecution'. Judgment in the case brought by Khodorkovsky with respect to his first trial was brought down on 31 May 2011 (Application No. 5829/04). The court held that there was insufficient evidence to prove this allegation (para 260). The IBAHRI notes that such claims have been upheld when sufficient evidence was presented: *Gusinskiy v Russia* (Application No 70276/01) decided on 10 November 2004.

Chapter Two – Background: Khodorkovsky and Yukos Petroleum

Mikhail Borisovich Khodorkovsky was born in Moscow in 1963 and raised in a communal apartment by factory-worker parents. Before the end of the Communist regime, he appears to have been a loyal member of the Communist Party[12] and was deputy head of the Communist Youth League (Komsomol) at university. Reportedly clever and ambitious, he started a cooperative selling computers and designing software. Having made a considerable amount of money by the late 1980s, he founded Menatep Bank.[13] Menatep was arguably Russia's first private commercial bank since 1917. When the old order collapsed, Khodorkovsky's connections helped to place Menatep as the credit provider for state enterprises waiting on financing from the new government.[14] This catapulted the bank into prominence, delivering an extensive network of clients[15] and enhanced Khodorkovsky's own connections and influence. In 1992 Khodorkovsky was appointed to the Ministry of Fuel and Energy.

In the mid-1990s, the state-owned petroleum company, Yukos, faced serious production problems. Under the 'loans for shares' privatisation programme, the State decided to sell its shares in the oil company at auction.[16] This was and remains controversial because, at the time, the cash-strapped State was allegedly selling valuable organisations at huge discounts to members of the Russian elite.[17] Menatep led a group that bid for and successfully gained control of Yukos for US$300m in 1995.

Menatep collapsed in the 1998 Russian financial crisis, defaulting on a US$236m loan from Western banks. Despite damage to depositors and creditors, Khodorkovsky reputedly managed to protect himself. The following year he moved a Yukos shareholders' meeting 160 miles from Moscow without advance notice to minority shareholders, allegedly depriving them of the opportunity to vote against the sale of Yukos' assets to an offshore company.[18] The same year, a large issue of new Yukos shares was prepared, allegedly diluting the stake of some large investors.[19] Despite the crisis, by 2001 Yukos was the leader of the Russian oil industry. With an output of 1.1 million barrels of oil per day, it was also one of the top oil producers in the world.[20] Its market capitalisation had grown to US$21bn by 2003 and rocketed to US$36bn the following year.[21]

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12 'Profile: Mikhail Khodorkovsky' *BBC News*: **http://news.bbc.co.uk/1/hi/business/3213505.stm** (accessed 6 January 2011).

13 Andrew Meier, 'Who Fears a Free Mikhail Khodorkovsky' *NY Times*, 18 November 2009: **www.nytimes.com/2009/11/22/magazine/22khodorkovsky-t.html** (accessed 6 January 2011).

14 *Ibid.*

15 'Russian Banks, Who's Who?' **http://home.swipnet.se/~w-10652/whobank.html** (accessed 6 January 2011).

16 *The Times*, 'He Got Rich in Wild East but Rules of the Game Changed' 28 December 2010, at p 7.

17 Dmitry Gololobov, 'The Yukos War: The Five Year Anniversary' (2008): **http://works.bepress.com/dmitry_gololobov/6** (accessed 6 January 2011).

18 **www.how-to-make-million-dollars.com/russian-billionaires/khodorkovsky.html** (accessed 8 April 2011).

19 *Ibid.*

20 Malcolm Salter, 'Oao Yukos Oil Company' (2001) Harvard Business Review 5: **http://hbr.org/product/oao-yukos-oil-co/an/902021-PDF-ENG** (accessed 6 January 2011).

21 See note 17, above.

Khodorkovsky was widely viewed as a reformer.[22] In 2000, Yukos adopted a management approach that included Western-style disclosure, an independent board of directors and a corporate governance charter.[23] It has been suggested that the motivation for these changes was principally to increase Yukos' share value and, consequently, Khodorkovsky's own wealth.[24] However, Khodorkovsky also set up the Open Russia Foundation in 2001 to lead the way in corporate philanthropy.[25] Henry Kissinger was a Foundation trustee. Open Russia was dedicated to the principles of freedom and democracy. In 2003 it assigned US$100m to community programmes. Furthermore, Khodorkovsky gave US$1m to the US Library of Congress and financed human rights activists in Russia.

As CEO of Yukos and a man with a diverse portfolio, Khodorkovsky became a multibillionaire. In 2004 he was the wealthiest man in Russia and, with a purported net worth of US$15.2bn, ranked 16th in the Forbes' *World's Richest People* 2004.[26] He sought to expand his influence by dealing with American firms and meeting with American politicians such as the George Bush Sr and Dick Cheney.

Despite an informal pact with then-President, Vladimir Putin ('Putin') – whereby Russian oligarchs essentially agreed to stay out of politics – Khodorkovsky became increasingly involved in political matters and began financing opposition parties, upsetting Putin's dominance of the Russian Parliament. Khodorkovsky also acquired publishing rights to the newspaper *Moskovskiye Novosti* and hired an editor who was highly critical of Putin.[27]

Besides making his support for the liberal opposition plain, he also heavily criticised Putin in interviews and writings.[28] In February 2003, Khodorkovsky publicly challenged Putin during a live televised debate. He questioned the state-owned oil company Rosneft's controversial acquisition of Severnaya Neft. Khodorkovsky claimed that parties close to the Kremlin had improperly benefited from the agreement.[29]

Before his arrest, Khodorkovsky travelled to seven or eight regions, delivering over 35 lectures on democracy and calling on students to vote for the liberal opposition parties SPS and Yabloko.[30] Three days before his arrest, Khodorkovsky argued in an interview with the German publication *Die Welt* that the Kremlin sought to create a 'managed democracy';[31] in other words, that Russia was an authoritarian state with a liberalised economy.

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22 Andrew Meier, 'Who Fears a Free Mikhail Khodorkovsky' *NY Times*, 18 November 2009: **www.nytimes.com/2009/11/22/magazine/22khodorkovsky-t.html** (accessed 6 January 2011).

23 See note 17, above.

24 See note 16, above.

25 **www.old.khodorkovsky.info/openrussia** (accessed 6 January 2011).

26 **www.forbes.com/finance/lists/10/2004/LIR.jhtml?passListId=10&passYear=2004&passListType=Person&uniqueId=M1IF&datatype=Person** (accessed 6 January 2011).

27 Jeremy Scott-Joynt, 'Khodorkovsky: an oligarch undone' *BBC News,* 31 May 2005: **http://news.bbc.co.uk/1/hi/business/4482203.stm** (accessed 6 January 2011).

28 Tom Reilly, 'Newsmaker: Mikhail Khodorkovsky' *Daily Liberal*, 1 January 2011: **www.dailyliberal.com.au/news/world/world/general/newsmaker-mikhail-khodorkovsky/2037603.aspx** (accessed 6 Jan 2011).

29 'Timeline of the Yukos Affair' *Khodorkovsky & Lebedev Communications Center*: **www.khodorkovskycenter.com/media-center/timeline-yukos-affair** (accessed 7 January 2011).

30 Grigory Chkhartishvili, 'Esquire Interview with Mikhail Khodorkovsky: Part 3 of 5' *Esquire*, 8 October 2008: **www.robertamsterdam.com/2008/10/esquire_interview_with_mikhail_3.htm** (accessed 6 January 2011).

31 See note 29, above.

On 25 October 2003, masked Special Purpose Forces ('Spetsnaz') with automatic weapons surrounded Khodorkovsky's private jet on Novosibirsk runway. He was arrested and charged with tax evasion and corruption.

Khodorkovsky's arrest was not the first in connection with Yukos. In July 2003, the former Menatep director, Platon Leonidovich Lebedev, was arrested for fraud in relation to the 1994 privatisation of Apatit, a company engaged in the extraction of raw materials for the manufacture of chemicals and fertilisers. Lebedev was the second-largest shareholder in Yukos and held senior executive positions in the company. At the time of his arrest, Lebedev was in hospital. In 2009, the Russian Supreme Court ruled that his arrest was illegal.[32] Two years earlier the ECtHR had come to the same conclusion.[33]

Upon his arrest, Khodorkovsky was immediately flown to and presented before the Basmanny Court. The court ordered that he be detained pending trial.[34] The criminal charges against him read, in part, as follows:

> 'In 1994, while chairman of the board of the Menatep commercial bank in Moscow, MB Khodorkovsky created an organised group of individuals with the intention of taking control of the shares in Russian companies during the privatisation process through deceit and in the process of committing this crime, managed the activities of this company.'

Khodorkovsky had been arrested in relation to the privatisation of Apatit in 1994. At that trial, the prosecution contended that Khodorkovsky controlled all the companies that participated in the tender of Apatit stock, and the sale itself was designed only to give the illusion of competition. AOZT Volna ('Volna') was the successful bidder but failed to invest the money in Apatit that was required by a term in the bid. Instead, it was maintained that Volna sold off Apatit's stock to various smaller companies owned by Khodorkovsky. Even though Apatit later settled the lawsuit with Volna, the prosecution alleged that the settlement amount was not enough.[35]

At the conclusion of Khodorkovsky and Lebedev's (first) trial on 31 May 2005, which had lasted 11 months, the judges at Moscow's Meshchansky Court found both men guilty on six charges. The judges read the verdict aloud, a process which took 15 days. They were each sentenced to nine years in prison.[36] Khodorkovsky appealed the verdict. However, this was rejected in September 2005.[37] It took the appeal judges less than a day to dismiss all elements of Khodorkovsky's appeal, apart from the sentence, which was reduced to eight years.

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32 Miriam Elder, 'Arrest of Mikhail Khodorkovsky partner illegal, court rules' *The Guardian*, 23 December 2009: **www.guardian.co.uk/world/2009/dec/23/arrest-mikhail-khodorkovsky-partner-illegal** (accessed 7 January 2011).

33 *Lebedev v Russia* (Application No 4493/04) decision of 25 October 2007.

34 'Mikhail Khodorkovsky' *Biographicon*: **www.biographicon.com/view/jfpfn** (accessed 7 January 2011).

35 *Ibid.*

36 See note 29, above.

37 'Court rejects Khodorkovsky appeal' *The Times*, 22 September 2005: **http://news.bbc.co.uk/1/hi/business/4270718.stm** (accessed 7 January 2011).

In October 2005, Khodorkovsky was moved from a Moscow prison to a prison camp in Krasnokamensk, Siberia. Lebedev was transferred to Kharp penal colony, situated above the Arctic Circle. In December 2006, both Khodorkovsky and Lebedev were transferred to the Chita pre-trial detention facility, close to the Mongolian border.

In July 2006, Yukos creditors, including Russian tax authorities and Rosneft,[38] voted to liquidate the company. A week before the vote, CEO Steven Theede resigned – claiming that the creditors' meeting was a sham. In August 2006, the Moscow Arbitration Court formally declared Yukos bankrupt. It can be noted that in October 2007, a Dutch court declared the bankruptcy invalid in relation to Yukos' Dutch assets because it was not declared in line with Dutch principles of law.[39]

In December 2006, Russian authorities accused the accounting firm, PricewaterhouseCoopers (PwC) of producing 'distorted' audit reports for Yukos between 2002 and 2004.[40] PwC rejected these claims, maintaining that the audits had been conducted 'according to the highest professional and ethical standards'. The company was taken to court, but in June 2007, PwC suddenly withdrew its defence. Instead, it claimed that material brought to its attention by Russian authorities led it to believe that Yukos may actually have provided inaccurate information.[41] In October 2008, the Moscow Region Federal Arbitrazh Court exonerated PwC, overturning earlier rulings against it.[42]

In October 2007, the ECtHR awarded Lebedev damages, having found that the prosecution violated international human rights law. The Court said, inter alia, that he had been detained illegally and denied access to lawyers; that hearings took place without his attorneys present; and the appeal process had been continually obstructed.[43]

Khodorkovsky became eligible for parole in 2007, having served half of his sentence. In August 2008, ten months later, the Ingodinsky regional court, in Chita, rejected his parole request. The reasons given were that Khodorkovsky had refused to take part in sewing practice and had failed to put his hands behind his back during a prison walk the year before.[44] Khodorkovsky disputed this, maintaining that he had been ordered to do up his buttons at the same time. In October 2008, his appeal of the initial parole decision was refused.[45]

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38 'Creditors vote to bankrupt Yukos' *BBC News*, 25 July 2006: **http://news.bbc.co.uk/1/hi/business/5212570.stm** (accessed 10 January 2011).

39 'Dutch court voids Yukos bankruptcy in Netherlands' *Reuters*, 31 October 2007: **http://uk.reuters.com/article/idUKL3131955920071031** (accessed 10 January 2011).

40 Elizabeth Judge and Tony Halpin, 'PwC faces court action in Russia over Yukos audits' *The Times*, 28 December 2006: **http://business.timesonline.co.uk/tol/business/law/article1264576.ece** (accessed 10 January 2011).

41 'Auditor withdraws Yukos reports' *BBC News*, 25 June 2007: **http://news.bbc.co.uk/1/hi/business/6236064.stm** (accessed 10 January 2011).

42 David Jetuah, 'PwC wins Yukos appeal' *Accountancy Age*, 28 October 2008: **www.accountancyage.com/aa/news/1751509/pwc-wins-yukos-appeal** (accessed 10 January 2011).

43 *Lebedev v Russia*, ECtHR, Application No 4493/04, Judgment 25 October 2007.

44 Catrina Stewart, 'Russian court turns down Khodorkovsky parole bid' *Seattle Times*, 22 August 2008: **http://seattletimes.nwsource.com/html/nationworld/2008129186_aprussiakhodorkovsky.html** (accessed 10 January 2011).

45 Guy Faulconbridge, 'Russian court denies Khodorkovsky parole appeal' *Reuters*, 16 October 2008: **http://uk.reuters.com/article/idUKLG56146920081016** (accessed 10 January 2011).

In March 2008, Dmitry Medvedev was elected President of Russia. He alleged that Russia was a country of 'legal nihilism' and that 'no other European state has a similar level of disregard for the law'.[46] Yukos, which had been served with a succession of tax bills from 2004 amounting to US$42bn, brought an action in the ECtHR, claiming that it had been taxed unlawfully for liabilities which did not exist and were not claimed against anyone else, and that this amounted to discrimination and a disguised expropriation of the company's assets.[47] In January 2009, the ECtHR found the complaints by Yukos to be admissible for further examination[48] and the case started in March 2010. Yukos is claiming US$98bn in compensation from the Russian Government.

Meanwhile, in February 2007, new charges of money laundering and embezzlement were filed.[49] It was alleged that oil produced by Yukos subsidiaries was embezzled; shares held by a Yukos subsidiary were embezzled; and money from the sale of embezzled oil had been laundered. It was alleged that 350 million tonnes of oil, valued at US$25bn, had been illegally obtained. Khodorkovsky, Lebedev and their lawyers have consistently asserted that the real motivation for the new charges was to ensure that Khodorkovsky remained in jail beyond the next presidential election in 2012, which Putin is widely rumoured to want to contest.

Initially, the trial was to be held in Chita. Khodorkovsky argued that he and Lebedev should be transferred to a pre-trial detention centre in Moscow – as that is where the alleged crime took place. While the Moscow Basmanny Court initially rejected this request, this decision was later reversed.[50]

Just before the start of preliminary hearings, Khodorkovsky and Lebedev were transferred to Matrosskaya Tishina detention centre. The preliminary hearing for the new charges of embezzlement and money laundering started in Moscow on 3 March 2009.

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46 Anna Nemtsova, 'Rite of Passage' *Newsweek*, 21 February 2008: **http://www.newsweek.com/2008/02/20/rite-of-passage.html** (accessed 10 January 2011).

47 See note 29, above (accessed 10 January 2011).

48 *OAO Neftyanaya Kompaniya Yukos v Russia* (Application No 14902/04), First Section Decision as to Admissibility.

49 'New fraud charges in Yukos case' *BBC News*, 5 February 2007: **http://news.bbc.co.uk/1/hi/world/europe/6330411.stm** (accessed 10 January 2011).

50 'Moscow court rules probe against Khodorkovsky in Chita illegal' *Ria Novosti,* 16 April 2007: **http://en.rian.ru/russia/20070416/63735751.html** (accessed 13 January 2011).

Chapter Three – The Trial Setting

A. Physical arrangements

The Khamovnicheskiy federal courthouse is one of a number of such government facilities in Moscow. It is a three-story brick structure on the crest of a Moscow River embankment, west of the Kremlin. It is used for both civil and criminal matters.[51]

A double-door entry opens onto a guard station with a metal detector. Except for members of the media, camera equipment is prohibited. Briefcases, handbags and other packages are subject to inspection. Photo identification is required and a notation is made of each person's entry and declared destination.

Courtroom No 7, being approximately 80 square metres, is the largest in the building and is used by its President, Presiding Judge Victor Nikolayevich Danilkin ('Judge Danilkin'). For this trial, the dock was a modern, metal structure with an open iron-bar ceiling; a glass-windowed front with a door and open floor-to-ceiling vents on the sides and front to allow papers to be passed, as well as for ventilation. This structure is often metaphorically and pejoratively referred to as an 'aquarium'.

The respective legal teams faced one another across the courtroom. The defence tables, with capacity for ten in a pinch, was to the judge's right while the prosecution, with a team of four-plus civil complainants – who occasionally attended – was to the judge's left. Video cameras were trained on all participants.

Nearly 50 people could be accommodated in the gallery benches. Occasionally, extra seating was provided for family members or special attendees, for example, for former Prime Minister Kasyanov who attended Khodorkovsky's closing words.

Even before the closed preliminary hearing began, work was nearing completion to adapt a courtroom on the second floor for use by the media with live, closed-circuit video and sound from Courtroom No 7 transmitted to three large-screen monitors. There were benches to seat approximately two dozen. Journalists were free to come and go from this room as they pleased.

When court was in session, there were bailiffs (at least two) on hand to keep order, as well as guards (usually four) from the SIZO 'Matrosskaya Tishina'[52] who stood on either side of the holding cell, plus conspicuously armed Spetsnaz or OMON[53] (usually two inside and two outside the courtroom). This entourage marched the two accused from their holding cell in the basement up one staircase (on the north side of the building) to the top floor, down the corridor to the southern side of the building, down a staircase and into the third-floor courtroom at least four times every day. The defence and others criticised this procedure as being unnecessary and cruel.

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51 Built on a relatively steep hillside, the courthouse has a lower level with windows and entry on two sides. This level includes space to accommodate prisoners and their guards before and after court sessions as well as while awaiting transport back to their place of incarceration.

52 The name literally means 'seaman's silence' because of the name of the street where the detention facility is located. Formally, it is denominated as Federal Budget Agency IZ-77/1, Office of the Federal Penitentiary Service of the Russian Federation in the City of Moscow and has operated as a prison since 1945.

53 Both of these are special purpose, military-like forces within the Russian Ministry for Interior Affairs (MVD) ie, the Войска специального назначения (Spetsnaz) and the Отряд милиции особого назначения (OMON). During this trial, they were not seen to be involved in the handling of the accused.

B. Access to the courtroom and the regulation of behaviour

Courtroom No 7 was open to the public, albeit on a first come, first served basis (with special consideration for members of the families of the accused). Once Judge Danilkin took the bench,[54] one was free to leave but not to re-enter until a formal break occurred (court personnel and lawyers were free to come and go as the need arose and as they saw fit).

The prevailing daily routine was the exclusion of the public (crowded together on the staircase between the second and third floors) from the courtroom until after the two accused had been brought down the staircase from the fourth floor into the courtroom, had their handcuffs removed and been secured inside their metal-framed, glass enclosure. The order observed by the occasional crowds was poor and devoid of most common social courtesies.

A notice was posted and the bailiffs reminded attendees that cellular telephones were allowed with their sound off. Laptops were also allowed. Thus, during the entirety of the trial, legal counsel as well as individuals in the gallery had internet and SMS access.[55]

The degree of grimness and hassle inherent in trial attendance was regularly observed to be alleviated by the demeanour of both the accused. They were seen consistently to smile and were quite animated in their interactions not only with their legal defence team members, the prosecutors and the judge, but also with those whom they recognised and acknowledged in the gallery. However, this cannot be said to be demonstrative of a lack of appreciation of the seriousness of the charges against them. The impression of the IBAHRI observer was that Khodorkovsky and Lebedev were an object lesson in putting on a brave face.

Apart from translators or persons being aided by a translator, whispering or talking in the gallery was prohibited. Occasionally, there were breaches and individuals were ordered to leave, although they could and often did return.

C. The contending legal teams

Nineteen advocates are said to have been formally empowered to act on behalf of the accused (twelve for Khodorkovsky and seven for Lebedev), seven to nine of whom regularly attended the trial. The accused's counsel[56] hailed from several different law firms. Some had also been counsel of record in the first trial, for example, Yuri Markovich Schmidt and Konstantin Yevgenievich Rivkin. The large number of advocates was unusual, and included some of the best-regarded legal practitioners in Russia. The names given here are of those who appeared in person. More are found on the official website, and more were and are working on the accused's cases either in Russia or abroad.

54 For most of the trial, the court sat three, often four, and sometimes five days per week. Its sessions usually were from 10:00 to 18:00 with an hour for lunch plus a 15-minute break, generally once in the morning and again in the afternoon.

55 During the trial, Judge Danilkin did not appear to have internet access. In contrast, the prosecution was seen surfing the web as well as chatting with co-counsel not present in the courtroom. At least a couple of times, they were seen to be looking at the accused's website.

56 There have been claims of abuse and pressures being brought against various defence advocates, eg, Ms Moskalenko, that have been beyond the scope of the IBAHRI's monitoring of this trial.

Counsel present at trial were:

- for Khodorkovsky – Vadim Vladimirovich Klyuvgant; Yuri Markovich Schmidt; Leonid Romualdovich Saikin; Boris Borisovich Gruzd; Karinna Akopovna Moskalenko; Nataliya Yurevna Terekhova; Elena L Levina; Denis M Dyatlev; and
- for Lebedev – Konstantin Yevgenievich Rivkin; Elena Leovna Lipster; Vladimir Nikolayevich Krasnov; Aleksey Yevgenievich Miroshnichenko; and Sergey V Kupreichenko.

The prosecution team included lawyers from both the Moscow and federal Procuracy offices. The lead prosecutor/procurator[57] was Valery Alekseyevich Lakhtin ('Lakhtin' or 'Prosecutor Lakhtin'), a senior prosecutor in the Second Section for Supervision over Investigation of Criminal Cases, Investigative Committee for Supervision over Investigation of Particularly Important Cases, Procuracy General of the Russian Federation. As may be gleaned from his title, Lakhtin was in charge of the investigation that formed the basis of the trial.

He was teamed with the procurator who led the first trial, Dmitry E Shokhin, who is now the head of the Organisational and Analytical Section, Main Department of the Procuracy General of the Russian Federation for Ensuring Participation of Prosecutors in Criminal Trials. Lakhtin was the dominant force in this prosecution although Mr Shokhin and Ms Gyulchekhra B Ibragimova also had major roles. Ms Ibragimova was a senior prosecutor in the Section for Supporting the State Prosecution of the Main Department of the Procuracy General of the Russian Federation for Ensuring the Participation of Prosecutors in Criminal Trials. She had successfully prosecuted, inter alia, two mayors from some of the domestic special economic and tax treatment zones where Yukos had special purpose entities (SPEs) and conducted at least paper transactions.

In a supporting role was Valentina M Kovalikhina, a senior prosecutor in the Section of State Prosecutors of the Department of the Procuracy of the City of Moscow for Ensuring the Participation of Prosecutors in Criminal Trials. During the course of the trial she became eligible for and took her retirement, being replaced by Vyacheslav N Smirnov.

Under Russian civil and criminal procedure,[58] civil complainants may and often do join in criminal prosecutions with their complaints for civil damages. In the course of this criminal trial, albeit without clear and complete explanation to the gallery, a couple of governmental as well as individual plaintiffs appeared, testified, and sometimes provided argument.

D. Judge Danilkin's courtroom management and demeanor

During all phases of the trial – the reading of the charges/indictments; the reading of and objections to materials in the case file; witness examination; motion practice (including evidentiary matters, the crucial question of the Court's record and circumstances of the accused's detention); and closing

57 The prosecution lawyers, who are formally spoken of as 'procurators' as opposed to the Western term 'prosecutors,' (see WE Butler, *Russian Law*, paras 6.103–6.104 (3rd edn, Oxford, 2009) and Article 37 of the RCCP) wore the uniforms of their office, while defence counsel wore business attire.

58 Articles 54 and 55 of the RCCP.

arguments – the Judge was extremely indulgent in allowing the parties to make frequent motions,[59] objections and statements that often consumed the better part of a court day.

The courtroom atmosphere was generally civil, if not cordial. Judge Danilkin and the respective legal teams were courteous and maintained a professional courtroom demeanor. Sometimes emotions surged and tempers rose. On such occasions, the Court called 'five-minute' cool-down breaks. Occasionally the Court reprimanded counsel or the accused, who invariably apologised.

The trial was lengthy. However, given the volume of evidence, in the IBAHRI observer's experience it was not unduly long.

E. The defence's public relations campaign and coverage by the media

The two lead defence advocates in this trial asserted in their meeting with the IBAHRI observer in November 2010 that 'the' reason their clients were still alive was owing to an assiduous public relations campaign dating back to their initial arrests; the defence spared neither cost nor effort to establish sympathy and keep the plight of both accused in the public eye.[60]

Nearly everyone present in the courtroom gallery had some affinity to the accused, for example, parents, siblings, children, in-laws of siblings, former as well as current spouses, former employees and family friends. Foreign embassies in Moscow occasionally sent representatives; members of the German Bundestag (Parliament) and the Bundesregierung (federal Government) attended several times, members of the European Parliament and the Parliamentary Assembly of the Council of Europe attended occasionally and prominent members of Russian society such as Lyudmila Mikhailovna Alekseyeva and Gary Kimovich Kasparov attended from time to time.

The trial received comprehensive attention from camera crews but was remarkably poorly attended by print journalists. It is possible that the defence team's efforts to compile, organise, and present public relations material and commentary as ready copy had some bearing on this.

The pressroom was set up in an unused courtroom, with the adjacent judge's chambers designated for use by the prosecution. This created a situation in which members of the prosecution were frequently asked questions by journalists as they walked through the rooms. It also created the prospect of prosecution witnesses being exposed to journalists or to the video feed in the pressroom. Article 264 of the RCCP expressly bars witnesses from the courtroom until the start of their testimony. To ensure that witnesses, still waiting to be called, could not see what was transpiring in the courtroom, Judge Danilkin granted a motion to turn off the video feed.

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59 The prosecution, the defence and accused had two formal forms of input: 'statements' «заявление» that do not require any response or action by the judge (but may evoke feedback and/or action) and 'petitions/motions' «ходатайство» that must be responded to by the court (see Articles 120 and 121 of the RCCP) and may in fact prompt a written decision. Thus, on the one hand, when defence counsel or their clients protest what the court has or has not done, it is not an abridgment of the process for the court to remain silent. On the other hand, when petitions/motions are made, their denial, their not being granted on grounds of prematurity and their grant, are of considerable procedural as well as substantive moment. The matter of the many motions made in this trial is taken up in greater detail below.

60 In a remarkable move toward transparency, the Court provided front-row seating, including a small table for two laptops next to an electrical outlet, to two people – a full-time reporter for *Novaya Gazeta* and a representative (the individuals varied) from the Khodorkovsky & Lebedev Press Centre – who prepared virtually simultaneous Russian language summaries that were posted daily on the Centre's Russian language website. During much of the trial, the same Press Centre had a native Russian-speaking, American-trained lawyer on hand who was responsible for preparing daily English-language summaries that likewise were posted on the English-language website.

F. The terms of the accused's detention

As this trial began Khodorkovsky and Lebedev were still serving terms of detention for the crimes of which they were convicted in 2005. Transferred from Siberia – where they were serving their sentences – to Moscow, the two spent the entire period of the trial at the Matrosskaya Tishina facility. Although the centre has a special block for inmates who are serving time for other crimes but facing trial in Moscow, Khodorkovsky and Lebedev were held in pre-trial detention units where conditions are more onerous. Persons in such units are subject to strict rules and regulations governing things such as exercise and showers, and visits with legal counsel, family and friends.

The terms of an accused's detention are subject to mandatory periodic review. A reconsideration of terms requires that a variety of factors be assessed.[61] A three-month limitation established by Article 255(3) of the RCCP made this a repetitive motion by the prosecution that became all the more contentious because of intervening federal legislation amending Article 108 which many argued was intended to ameliorate the rigor of detention for so-called economic crimes.

The Russian federal court in Chita did the initial evaluation and imposed relatively strong terms. The accused were to be kept in separate cells in separate buildings, with significant restrictions on family visits, meetings with legal counsel, and access to computers and electronic devices, among other things. They were also to have a security detail when travelling to and from court.

Judge Danilkin first addressed the terms of detention during the closed preliminary hearing. It is not possible to know how the prosecution and defence addressed the relevant factors at that hearing. Later, each time the prosecution moved for another three-month extension, there were new matters that colored the arguments and influenced the result, but one fact which particularly struck the IBAHRI observer was the paucity of facts assembled and argued by the defence. The defence noted provisions of the RCCP, but had no argument, for example, about such things as the accused's state of health, their diets and opportunities for exercise and fresh air, nor did they state the actual record of meetings and visits during recent months. Other pertinent issues might have been their opportunities to prepare a defence, to meet and confer with counsel, to access partial or complete

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61 See generally Chapter 13 'Pre-trial Restraint Measures,' Articles 97–110, RCCP. The final Article, 110, empowers the accused and their counsel to initiate this review process. In fact, the accused never exercised that right.

Articles 97 and 99 set forth factors that a court is to weigh in making its decision ie, (1) risk of flight, (2) risk of continued criminal activities, (3) risks of witness intimidation, evidence destruction, or other obstructive actions, (4) seriousness of the charges that have been brought, (5) the accused's circumstances including his or her character, age, health, family status and occupation.

Article 108, 'Detention in custody' states in pertinent part:

(1) Detention as a pre-trial restraint measure shall be imposed by court order on a person suspected of or an accused charged with a crime punishable by imprisonment for a term exceeding two years if it is impossible to use a different, less-restrictive pre-trial restraint measure.

…

(2) Whenever detention is deemed necessary as a pre-trial restraint measure, a procurator or an investigator or inquiry officer, acting with the consent of a procurator, shall file an appropriate motion with the court. Any order that the motion be filed shall state the reasons for the motion and the grounds that demonstrate the need to detain the suspect or accused and render other pre-trial restraint measures impossible. Materials supporting the grounds for the motion shall be attached to the order.

Article 255 addresses making decisions about pre-trial restraint measures:

(1) During trial, the court may impose, modify, or revoke a pre-trial restraint measure upon the accused.

(2) If detention as a pre-trial restraint measure is imposed on an accused, the time period of his pre-trial detention shall not exceed six months from the date the criminal case is filed in court to the date a judgment is rendered, with the exception of the situations specified in (3) of this Article.

(3) The court handling the criminal case may extend the time period for holding an accused in custody upon the expiration of six months after the criminal case is filed in the court. However, such an order of extension shall be permissible only with respect to criminal cases of serious and very serious crimes and no single extension may exceed three months.

copies of the prosecution's case file and have a secure place to keep documents and notes. Some allowance was made by the court, however, when it agreed to a defence request that there be a break in the proceedings on at least one weekday to allow the accused and their counsel to meet. On several occasions the courtroom itself was made available to facilitate this.

Following several instances of Russian business people being accused of entrepreneurial/economic crimes and being harshly treated while in pre-trial custody, there have been significant calls for legislative reforms.[62] One year into the trial, legislation was enacted and signed into law amending this chapter of the RCCP. Specifically, federal law dated 7 April 2010, No 60-FZ, 'On the introduction of changes to legislative acts of the Russian Federation'[63] made important changes to the criteria to be applied in making determinations about the terms of an accused's detention.

In late May 2010, Khordokovsky went on a hunger strike for two days to protest Judge Danilkin's granting of the prosecution's motion for another extension of the original terms of detention. His principal impetus was the Court's nominal failure to give appropriate consideration to the April enactment of the new federal law. Judge Danilkin grew conspicuously solicitous and more than once, during the balance of that day's and the next day's proceedings, he queried Khodorkovsky about his well-being and ability to participate fully.

The defence took a cassation appeal from Judge Danilkin's 14 May 2010 order granting the prosecution's motion. The Moscow City Court gave it seemingly expedited consideration. On 21 May it affirmed the trial court decision. Those judges reasoned that the totality of the crimes imputed to the accused did not belong to the sphere of entrepreneurial activity as that term was used by the legislators in amending Article 108 of the Code.

While neither supervisory nor Supreme Court review was sought, the Russian civil law system gives advisory guidance as well as renders review of specific cases. Thus, on 10 June, the plenum of the Russian Supreme Court issued a «постановление» or 'ruling' of generic effect. Specifically it revised Ruling No 22 that it had rendered on 29 October 2009 on the subject of court practices regarding the preventive measures that are appropriate in questions of detention, bail and house arrest to be applied to persons accused of crimes. This revision was made in light of the zakon amending, inter alia, Article 108 of the RCCP. However, being advisory, it had no direct impact on the 14 May ruling by Judge Danilkin or its 21 May affirmance by a cassation panel of the Moscow City Court.

62 In 2008, the Russian Government and President Medvedev set up a Public Oversight Commission to investigate how human rights were being observed in Moscow's detention centers (Общественной Наблюдательной Комиссии По Осуществлению Общественного Контроля За Обеспечением Прав Человека В Местах Принудительного Содержания Г. Москвы.). Its report was issued, poignantly in the wake of the Magnitsky tragedy, on 28 December 2009: **www.onk-moskva.hrworld.ru**.

It has detailed and vivid descriptions of the process involved in the transport and delivery of prisoners to Moscow courts (including both Khodorkovsky and Lebedev) – ie, cramped conditions, lack of access to toilet facilities, missing regular meals, cold cereal rather than hot food, followed by interminable waiting, missing exercise opportunities. These tribulations are wholly independent of the much-touted one of the number of guards that accompanied Khodorkovsky and Lebedev in their daily rounds. In comparison, the number or degree of weaponry carried by such guards can be a less significant issue beside the troublesome and worse processes of being transported to and from courthouses.

63 Federal zakon от 7 апреля 2010 г. № 60-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации».

That «постановление» figured prominently in the defence's opposition to the prosecution's August 2010 renewal motion. Judge Danilkin ruled for the prosecution and on cassation review, in September, the Moscow City Court sustained Judge Danilkin's order granting the prosecution's motion. The defence once again appealed, but it was not until the trial was formally completed that the Supreme Court finally expressed itself on the merits.

Thus it was at the end of December, in a highly unusual intervention, that the Russian Supreme Court issued a procedural order to the Presidium of the Moscow City Court to conduct supervisory review of Judge Danilkin's 16 August order and of the 2 September decision of a three-judge cassation panel to sustain Judge Danilkin's order.

The hearing on that supervisory review on remand was not held until 18 February 2011, and the Presidium of the Moscow City Court sustained the earlier cassation panel decision and Judge Danilkin's order. It was during the oral argument in that hearing that, for the very first time in the hearing of the IBAHRI observer, Ms Lipster (one of Lebedev's lawyers) brought up the highly-germane fact, under the statutory criteria, of how the longstanding terms of detention had impeded the ability of Lebedev's family, friends and others to see him.

A supervisory appeal then lay to the Russian Supreme Court. That appeal was decided in April 2011[64] and was favourable for Khodorkovsky and Lebedev in that it invalidated the original trial court order of 16 August 2010, which had extended the original detention (which had been much objected to) for another three months. This was held to be inconsistent with federal law of 7 April 2010 № 60-ФЗ/ No 60-f2 from that date.

64 **www.supcourt.ru/stor_pdf.php?id=438396**.

Chapter Four – The Indictments

A. Reading them (and everything else) aloud

The basis for the indictments was the case file resulting from the prosecution's investigation of the charges. This initially ran to 188 volumes. During the course of the trial it became apparent, and was acknowledged, that materials were still being added to the case file. This is permissible under the RCCP.[65] By the end of the trial the case file comprised 275 volumes and over 69,000 pages.

The public trial of Khodorkovsky and Lebedev began with a reading aloud[66] of the complete text of the indictments. The charges had initially been issued in February 2007 and were subject to some revision in June 2008. Later, indeed even up to the closing arguments, the prosecution made further corrections, deletions and other revisions to the charges.

These revisions were more than instances of fine-tuning and minor correction. But the prosecution's actions, while embarrassing, were the professional and proper thing for it to do. Since these changes reduced the magnitude and particulars of the charges, this belated action did not prejudice the accused in that way. However, it confirmed a number of their complaints about the charges as well as some errors in the prosecution's presentation of the case. It also meant that the defence was frequently 'on the back foot', contending with the moving goalposts set up by the prosecution. This confusion was exacerbated by the complicated facts of the case. A clear understanding of the facts and the charges relating to them was crucial to a fair trial.

Following the principle of orality, after 20 months of trial, neither party filed written briefs memorialising their legal arguments or compiling and analysing in detail the great volume of evidence adduced in these protracted proceedings. Nor did either side do more than orally highlight and summarise their perspectives in their closing arguments.[67]

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65 Under Article 215, when the investigation is completed and submitted to the Procuracy for review, the cumulative record is compiled as a 'case file,' which the accused (Article 217) and other parties (Article 216) are entitled to review and to request the inclusion of additional materials (Article 219). See also Articles 166 and 167.

66 The orality element in the Russian and other civil law legal systems has its roots in the belief that the spoken word and face-to-face contact can elicit truth. See S Thaman, *Comparative Criminal Procedure*, 16, 125–126, and 181–182 (2nd edn, Carolina Academic Press, 2008). A number of civil law legal systems, including Russia, still give primacy to what is termed the principle of orality as a means to alleviate the formalistic presentation of evidence in largely written form where trials are not held with a jury. Its contemporary embodiment is in Article 240 of its RCCP that provides:

'(1) During judicial proceedings, all proof on the criminal case shall be subject to direct study, with the exception of the cases envisaged in Section X of the present Code. The court shall hear out loud the testimony of the accused, of the victim, and of the witnesses, as well as the expert's conclusion, shall examine the demonstrative proof and read aloud the protocols and the other documents; it shall also perform such other judicial examination as may be required in a study of the evidence.

(2) Reading aloud the evidence, given during the proceedings of the preliminary inquisition, shall be permitted only in the cases envisaged in Articles 276 and 281 of the present Code.

(3) The court's sentence may be based only on proof, which has been studied in a court session.'

Under the orality principle, and Russian Code Article, the requisites for the proper presentation of evidence are: (a) directness «непосредственность»; and (b) orality «устность».

67 It is roughly and conservatively estimated that the reading aloud of documentary materials from the 'case file' consumed perhaps six of the twenty months spent in this trial.

B. Everything, including the 'kitchen sink'

The indictments filed against Khodorkovsky and Lebedev are each just shy of 150 pages in single-spaced, A4 format. They reflect a style of legal pleading that in the Western context is sometimes referred to as 'kitchen sink' because they are an ill-organised mélange of facts often introduced with the intention to obfuscate. The RCCP admonishes against the latter in Article 220(2) stating:

> 'The indictment shall contain references to the volumes and the pages of the criminal case file.'

Neither does.

The two indictments parallel one another. Since several Articles of the Russian Criminal Code (RCC) are cited and legislative amendments were enacted during the period of time covered by these charges, versions that were applicable at different times are cited as appropriate.

There are four Articles cited at the head of these criminal charges:

- Article 160(3)(a) and (b) as it was in effect from 1996–2003;
- Article 174(3) as it was in effect from 1996–2003;
- Article 160(4) as in effect from 2003; and
- Article 174.1(4) as in effect from 2003.

Later in the body of the indictments, reference is made to two further Articles:159(3) and 285(2). Cumulatively, these crimes are those of embezzlement (Article 160), money laundering (Article 174), swindling (Article 159) and the abuse of official governmental power (Article 285). The creation of an 'organised group' that the accused were charged with leading, is not itself a crime; rather, it is an element in these charges that, when present, requires harsher penalties and sanctions.

In addition to the 'kitchen sink' character of the indictments, they contain multiple and contradictory allegations. Most widely mooted are allegations, on the one hand, that the accused's embezzlement involved the physical theft of crude oil. On the other hand, the allegations also state that it was the proceeds of crude and refined oil sales that were embezzled. At numerous points during the trial both the accused and their legal counsel mocked the prosecution for such contradictory allegations. In many legal regimes, inconsistent pleading as well as argument is not only allowed[68] but ubiquitous. However, it was not only the inconsistencies, but the huge amounts of oil allegedly involved, which tested credulity and ultimately would need convincing proof.

While these indictments are poorly organised and lack markers to guide the reader, including case file volume references, they merit close scrutiny as they are the formal compendium of specific criminal charges with voluminous factual counts against which the Court's final judgment and verdict can, in the first instance, be analysed and critically evaluated.

68 For example, in the US, Rule 8(d), Federal Rules of Civil Procedure, allows inconsistent pleading. In the criminal context, the mandate for prosecutors is historically and legally wide – see K Kszywienski, 'Roadblocks in the Search of Truth' (2006) 37 University of Toledo LR 1111.

The indictments are rich with references to the myriad of domestic and foreign special purpose entities (SPEs) that were within and without the 'consolidation perimeter' of control as planned and directed by the accused.[69] These SPEs, combined with the large cast of individuals who allegedly comprised the nominal 'organised criminal group,' are among the crucial factual elements in the prosecution's recital of hundreds of criminal counts – based on the broadly defined crimes of embezzlement and money laundering in the RCC.

C. A rudimentary but unclear structure

Despite the run-on structure and lack of any captions, headings or sections – much less a table of contents – the indictments do make reference to articles of the RCC that correspond to the underlying charges. The document recites hundreds of transactions and events concerning:

- embezzlement relating to swapping of shares of stock between Yukos and Tomskneft (to p 18);
- 'laundering' of the Tomskneft shares (pp 18–32);
- embezzlement of crude oil and/or the proceeds from the sale of that crude oil (pp 32–93); and
- laundering of that immense quantity of crude oil and/or the proceeds from its sale (pp 93–146).

These convoluted recitals were tediously read from the indictments. When the prosecution then read pages of documents from its own 200-plus volume case file, it did not provide any connective commentary linking it to the transactions recited in the indictments; for those in the gallery straining to listen it was difficult to understand how these fit with the criminal charges. The proceedings regularly involved readings and testimony describing legal structures of great complexity; when the defence rose to speak, they often employed organograms that they projected from slides on the rear wall of the courtroom.[70]

The Russian 'matroushka' (wooden nesting dolls) most vividly captures the image evoked when reading the 147 pages of fine-print criminal counts. Again and again the three principal crude oil production units – Yuganskneftegaz, Samaraneftegaz and Tomskneft – enter into commission sales agreements, futures contracts, sales contracts and securities deals of some complexity with domestic middlemen, especially in special economic zones, but more often than not with foreign middlemen in tax havens remote from the routes taken by crude oil or refined oil products via pipeline or tanker vessels.

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69 The former general counsel of Yukos, Dmitry Vladimirovich Gololobov has written a two-part article that speaks to the core of this prosecution. Entitled 'Sham SPEs: Part 1 – The Legal Issues of International Accounting Standards on the Consolidation of Special Purpose Entities' and 'Part 2 – The Regulatory Gaps in International Accounting Standards Concerning the Consolidation of Special Purpose Entities' [2006] *International Company and Commercial Law Review*, 304–317 and 369–380 (Sweet & Maxwell, 2006). It dissects the lacuna in accounting standards and law that these business entities have afforded the savvy as well as the unscrupulous to the prejudice of the unsophisticated and insufficiently vigilant. These however, are allowed by the accounting profession along with their professional standards and ethics organisations (see generally, L Spedding, *Due Diligence Handbook* (Elsevier, 2009); RW McGee and GG Preobragenskaya, *Accounting and Financial System Reform in a Transition Economy: A Case Study of Russia* (Springer, 2005)) to be hidden from the balance and liability sheets of investors unless they are formally deemed to be within those investors' 'consolidation perimeters'. In the trial the prosecutors pressed a relatively straightforward theory of embezzlement in the context of this highly complex set of business transactions.

70 Dmitry Gololobov in his article 'The Yukos Money Laundering Case: A Never-Ending Story' 28 Mich J Int'l Law 711–764 (2007), depicts in Figure 1 on p 713 what he says was the 'general structure of the Yukos Group' and presents a diagram that shows Yukos-Moscow as the managing company that has immediately under it Yukos 'EP' (short for exploration and production) and Yukos 'RM' (short for refining and marketing). In his 'Figure V', Gololobov draws what he says was the 'Business Operations & Cash Flow of the Company' and in a chart on the middle of the right hand side of the page has what he states is an 'SPV (operational company)' in a 'Russian Tax Benefit Zone'. For example, U-Mordovia was just such an SPV (operational company) and obtained a tax benefit status being located as it was in the Mordovian Republic. Notwithstanding these publications, Gololobov proposed to testify for the defence via video conference from London.

For example, it was charged[71] that domestic legal entities ZAO Yukos-M, ZAO Yukos EP, plus the special economic zone OOO U-Mordovia,[72] purchased crude oil from Tomskneft, Samaraneftegaz and Yuganskneftegaz. Contract numbers are given for purchases of crude oil that were refined domestically and then sold. Sales prices are quoted for those contracts that are presented as being at variance from 'real market prices'. The page concludes with two summations of (i) the quantities (expressed in metric tonnes with a total ruble value – without a calculation of how that value was arrived at) of crude oil 'stolen' from these three production subsidiaries in calendar year 2000; and (ii) the quantities (again expressed in metric tonnes with a total ruble value – without a calculation of how that value was arrived at) of crude oil 'stolen' from these three production subsidiaries during the period 1998–2000. Later,[73] more criminal counts are detailed, including ones regarding the export of refined oil products of OAO NK Yukos via Baltic Petroleum (with contract numbers and stated values);[74] and two further special economic taxation zones and Yukos-related entities based there (that is, the closed cities (ZATO)[75] of Lesnoi and Tryokhgorny) are referred to in transactions of refined oil products via Baltic Petroleum among other foreign entities.

It is only upon the IBAHRI observer making a close examination, and going to external sources, that there is moderate intelligibility in the hundreds of counts contained within the prosecution's criminal charges. But it was like 'seeing through a glass darkly'.[76] The prosecution's case file was available only to the Court and the parties, and the prosecution's reading and translations were a near 'Gordian Knot' to catch, much less unravel and fully understand. The defence was often equally obscure. For example, when they filed 212 pages of corrections to the Court's protocols, suggesting rather substantial errors on the part of the Court in fulfilling its duty to create an accurate record, they omitted (as they regularly did) posting on their website the substance of their motions (that is, only conclusory summaries were made available).

D. The intelligibility of the indictments

From the beginning of the investigation leading to the second set of charges against him, Khodorkovsky consistently demanded his rights under Article 172(5) of the RCCP. It provides:

> 'Upon ascertaining the identity of the accused, the investigator shall present the order charging the person as an accused to such person and to any defense counsel taking part in the criminal case. In the process of doing so, the investigator shall advise the accused of the nature of the charges brought and of his rights specified in Article 47 of this Code, which advice shall be attested to by the signatures of the accused, defense counsel and the investigator on the order, with an indication of the date and time the charges were presented.'

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71 On p 55.

72 A 'ZAO' is a Russian language acronym for a closed joint stock company. See WE Butler, *Russian Law* (3rd edn, 2009), Chapter 11, 'Entrepreneurial Law,' paras 11.01–11.145 and specifically paras 11.50–11.71. An 'OOO' is a limited responsibility society, *ibid*, paras 11.72–11.79. The Yukos family of legal entities was phenomenally large and 'Byzantine'.

73 On pp 99–100.

74 During the trial, the prosecution buttressed its criminal charges using PwC's June 2007 finding of civil wrongdoing by Yukos management. In short, the entire 10-year corpus of PwC's audits were formally and definitively withdrawn for, among other reasons, putative misrepresentations made regarding the status of the SPEs – Behles, Baltic and South Petroleum as being 'outside' of OAO NK Yukos' 'consolidation perimeter'. See **http://online.wsj.com/article/SB10001424052748704095704575473630120957538.html?mod=WSJEUROPE_hpp_LEFTTopWhatNews#printMode**; **http://online.wsj.com/public/resources/documents/0906yukos01.pdf**; **http://online.wsj.com/public/resources/documents/0906yukos02.pdf**; **http://online.wsj.com/public/resources/documents/0906yukos03.pdf**; **http://online.wsj.com/public/resources/documents/0906yukos04.pdf**; and **http://online.wsj.com/public/resources/documents/0906yukos05.pdf**.

75 That is, a closed administrative and territorial district.

76 King James Bible 1st Corinthians 13:12.

The operative provision in Article 47(4) states that:

> 'An accused has the right: (1) to know what he is charged with'.

The operative verb in Russian in the former is разъяснять ('razyacnyat'), which means to advise, explain and make clear. The operative verb in the latter is знать ('znat'), which means to know. Together these Articles impose upon investigators and prosecutors an obligation to explain to an accused the crimes that he or she is alleged to have committed.

Khodorkovsky contended that there was a requirement not only to explain the terms of the generic crimes set forth in the RCC but also to explain the facts in the indictment that manifest the specific crimes with which he and his co-accused were being charged, that is, connecting the facts at hand with a clear definition of the alleged crimes and description of what is prohibited. In various written pleadings and proffered materials (in translation) he argued that:

- 'I cannot begin to express myself about my guilt of the theft of I know not what exactly'; and
- 'I cannot express my attitude towards the charge until they clarify to me where is the actual fact of the seizure of the oil from the physical control of the owner.'

Judge Danilkin gave the defence free rein to present lengthy motions as they saw fit[77] and he agreed to hear and rule upon them separately. He listened to the accused (each of whom argued different parts), their counsel, the prosecution, and also a representative of the Federal Agency for State Property Management ('Rosimushchestvo') who participated as a civil complainant.

The accused lost on all of their motions. Thus, these Articles of the RCCP, while creating an obligation to explain the crime, were held not to impose a burden upon the State to make an accused understand his or her guilt based upon the factual allegations regarding the criminal indictment. With the badly written indictments and ever-changing case files, the issue of clarity was crucial in this trial. Judge Danilkin's rulings did not promote this necessary clarity. They promoted the letter rather than the spirit of the law.

77 Several of these motions focused upon the semantic ambiguities that arise when the same terms are used, for example, in the RCCP as well as the RCC. Other motions targeted the elements of the crimes of embezzlement and money laundering when combined with otherwise innocuous verbs: eg, to direct and to manage. More terminological issues arise owing to the specialised vocabulary of the oil industry; as petroleum is extracted, processed, refined and changed into a variety of end products.

Chapter Five – The Trial Process

A. The Court's order following the closed preliminary hearing

An order following the closed preliminary hearing addressed numerous motions by the prosecution and defence, including: (1) extension of the terms of detention under which the accused were being held; (2) the choice of the Khamovnicheskiy Court as the venue for the trial; (3) remand of the case to the Procuracy owing to various flaws in the indictments including the failure of investigators to include the list of defence witnesses; (4) dismissal of the charges owing to fundamental flaws including the inadequacy of the evidence in the case file as well as the expiration of statutes of limitation; (5) discovery of exculpatory evidence in the case file and other sources; and (6) the inadmissibility of and need to suppress various evidentiary documents, materials and recordings. Only the first-mentioned was a prosecution motion; the other five were defence motions. All motions were specifically based on Articles in the RCCP.

Judge Danilkin allowed the prosecution motion,[78] denied all defence motions and set the trial to begin in public session on 31 March.

Although the propriety of holding the trial at Khamovnicheskiy Court ('the Court') is a procedural question, it also turns upon facts regarding criminal charges detailed in the voluminous case file that was available neither to the public nor to the IBAHRI observer.

The process of preparing the case file or «дела» contemplates the inclusion of materials and contributions from the accused and their legal counsel.[79] However, the list of proposed defence witnesses was rejected. This created a potential imbalance in the presentation of evidence, comparing, at this point of the trial, the number of proposed prosecution witnesses and a lack of any defence witnesses. Judge Danilkin might have remedied that. Instead, he said that when the time came (as it turned out, a year later), he would rule upon them one by one.

Defects in both the indictments and the case file – as asserted by the defence – had been the basis for petitioning the Procuracy at the time of the investigation. During the trial proper, as documents and testimony came to the fore, the defence counsel and the accused themselves were assiduous in objecting to evidence, seeking to correct the record, and even renewing their original motions to dismiss charges and exclude evidence. The defence firmly and continually expressed its view that the Court acted cynically and neglected to consider defence evidence and arguments. On balance, over two years, it seems to the IBAHRI that the documentary evidence was not sufficiently interrogated in court. This may have been because of problems with the defence, but it was also because of rulings by the court. This raises the question of what lay behind the apparent neglect.

78 Judge Danilkin deferred to the initial judgment by the court in Chita. However, because there was legislation to ameliorate its rigour in the spring of 2010, renewal motions by the prosecution became a matter of repeated and considerable controversy during the course of the trial, as discussed above.

79 See Articles 215–220, especially Articles 217(4) and 219 of the RCCP, under which an investigator has broad discretion to grant or deny such requests.

B. The ordering of evidence

Judge Danilkin began the trial with a degree of care indicative either of anxiety or great thoroughness. He repeatedly ruled to postpone motions, declaring that it was premature to make a decision.[80]

The Judge's pre-trial order of 17 March 2009 failed to address when and how documentary as well as testimonial evidence would be tested for materiality and relevancy, and subjected to: objections[81] by the defence; rebuttal by the prosecution; and judicial ruling. On 21 April 2009, the defence moved to have the Court order an examination of the prosecution's presentation of evidence from the case file to address this. By that time, the prosecution had not yet begun but was imminently due to begin reading its exhibits and evidence. The defence recited chapter and verse of the law but apparently failed to connect the law with the facts adduced as evidence in the courtroom, which was needed to understand the defence's disadvantage if the prosecution is not held to the words of the Procedural Code. The defence motion was denied on 27 April, the day the case file began to be read aloud. The prosecution was allowed to read virtually everything into the record. (As it turned out, Judge Danilkin relied mainly on the documentary evidence to produce his judgment because of the lack of protocols.)

From late-April to late-September 2009, the Court heard the reading by the prosecution of documents that, at the trial's start, were stated to amount to 188 volumes. The defence made many objections, the vast majority of which were acknowledged by the Judge but did not receive a ruling. This disposition inevitably raised confusion on the part of all parties as to the status of the evidence: what had been admitted, admitted with qualification, or rejected?

The disposition of evidence left a disturbing impression of the quality of justice being served in this trial. The test would be in the clarity and substance of Judge Danilkin's reasoning given in two places – first, in the daily courtroom protocols and secondly, in his final judgment and verdict.

C. Evidence: percipient and character witnesses

At the trial's start both the prosecution and defence originally had long witness lists,[82] which, for a trial such as this, is not unusual. The lists included former business colleagues and employees, as well as individuals who were also charged, tried and convicted in the complex investigations and prosecutions pursued in connection with Yukos in the late 1990s and the early 2000s.

A controversy quickly arose and continued throughout the trial over the power and latitude exercised by Judge Danilkin in allowing the participation of witnesses whom the parties wished to call.[83] The defence pressed hard and repeatedly for the Court to employ the provisions in international

80 Along with the list of defence witnesses, a decision on suppression motions had also been postponed. The defencee promptly responded by renewing their motion to have their list of witnesses added on 31 March 2009, the first day of open court proceedings.

81 These objections included but were not limited to those as to: (a) form eg, missing dates, seals and signatures; and (b) substance eg, missing or wrong pages, and erroneous translations, numbers and dates.

82 The prosecution's witness list had 250 individuals plus 15 experts. The defence had an even larger list of 478 witnesses. In the first trial, 80 witnesses appeared for the prosecution and only seven for the defencee.

83 Professors Burnham and Kahn highlight, in 'Russia's Criminal Procedure Code Five Years Out', the contrast between Soviet era and the contemporary responsiveness of individuals called to appear as witnesses (33 *Review of Central and Eastern European Law* at 32) ie, the 'high frequency of [their] non-appearance…'; *ibid.*

Articles 56 and 187–191 of the RCCP establish how witnesses are called and it bears noting that Article 57(7) does provide the remedy of arrest '[i]f a witness fails to appear without a valid reason.' Article 188 that makes the subpoena «повестка» the instrument for giving notice and includes the collection of a signature acknowledging the subpoena's receipt. That said, from the data cited by Burnham and Kahn, the failure of witnesses to appear at the appointed time and place is not uncommon. It seems a rational surmise that pursuing a recalcitrant witness is often eschewed as compelling their attendance and inevitably creates a psychological mindset adverse to the party calling the witness.

conventions and treaties that allow for assistance between the judicial branches of different countries.[84] Defence requests to examine several witnesses by video link were refused. However, they released statements from several foreigners – each having a nominal personal acquaintance with, and knowledge of the accused – in which unexamined facts were presented about the criminal charges being tried.[85]

A very large number of witnesses called by the prosecution were lower-level former Yukos employees who testified about the authenticity of documents in the case file bearing their signature. The pattern of testimony was that they had, as part of their job responsibilities, the authority to sign documents under power of attorney issued from higher levels in the Yukos management. Albeit empowered to execute a broad range of agreements, contracts, acknowledgements of acceptance, delivery orders, etc, none of them apparently had discretion to reject the terms in these transactions (for example, prices) and none had been involved in their negotiation. Rather, they received instructions to sign, and they did.

Judge Danilkin provided both sides with reasonable opportunity to conduct their respective direct and cross-examination.

During the late spring and early summer, the defence called numerous witnesses who were associated with documents and transactions in the case file. But they also asked, and were allowed to call several witnesses whose knowledge was at a greater remove. These included a former Russian prime minister, a former Russian cabinet member, a former Russian Central Bank chairman, a current Russian cabinet member and the present editor-in-chief of *Vedomosti*.[86] With respect to witnesses sought by the defence but refused by the Court, a conspicuous example is that of former-President and current Prime Minister, Vladimir Putin. There are many examples that indicate resistance and limited ability of courts to command the attendance of national executives during their service in office.[87] However, examination of others not in executive office was also refused.

These witnesses were not presented in the witness box with case file materials or audits; rather they were examined based on their status as percipient or character witnesses.[88] Nevertheless the Court allowed them to be questioned about their knowledge of the alleged theft, embezzlement or other acts for which Khodorkovsky and Lebedev were charged. They were consistent in stating that

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84 Judicial assistance between American, European and Russian courts is done under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters **http://untreaty.un.org/unts/1_60000/24/26/00047259.pdf**, plus the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters **http://www.hcch.net/upload/conventions/txt14en.pdf**. Among European Countries, see European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959 (and the additional protocol of 17 March 1978) **http://conventions.coe.int/treaty/en/treaties/html/030.htm**.

85 Their doing so was consistent with the prosecution's practice as allowed under the RCCP during the investigatory phase of a criminal case. Under Articles 150–207, a team of investigators conducts inspections, searches and analysis but especially questioning (Articles 187–194) under which an official record is made (Article 190). Cumulatively, these provisions give investigators and prosecutors quite broad authority in their interrogation of individuals about alleged criminal activity, including the use of leading questions. Although those being questioned are permitted to be accompanied by counsel (see Article 189(5)), this practice is generally the exception rather than the rule.

86 MM Kasyanov was Prime Minister from May 2000 to February 2004; TG Lysova is editor of a major Russian business newspaper that is a joint project of the Russian publishing house Independent Media with the London *Financial Times* and *The Wall Street Journal* and earlier covered the Russian oil and gas sectors; VV Gerashchenko was twice head of the Central Bank (1992–1994 and 1998–2002) who later served as Board Chair of OAO NK Yukos from 2004–2007; GO Gref previously was Minister of Economic Development and Trade between May 2000 to September 2007 and currently is president of Sberbank; VB Khristenko was previously a Deputy Minister of Finance as well as a Deputy Prime Minister and since May 2004 he has been Minister of Industry.

87 See *Clinton v Jones*, 520 US 681 (1997); K Oellers-Frahm, 'Italy and France: Immunity for the prime minister of Italy and the president of the French Republic' 3 Int J Constitutional Law 107 (2005).

88 For example, Kasyanov was repeatedly asked about 'hot-button' subjects such as tax evasion by the accused (of which they were convicted and which was not deemed an admissible claim by the ECtHR) and the withholding of essential information by the accused (of which they had been found guilty in 2007). His response to these queries was to plead ignorance but to assert that had such circumstances existed or occurred in fact, he would have been informed. There was little detailing of the how and why of this opinion.

they never saw any criminal wrongdoing and they unanimously declaimed the absence of sense in the prosecution's contention that crude oil was physically stolen. Each of them, with the probable exception of Ms Lysova, held positions where arguably they had access and were on de facto notice of balance sheets, data and other reports that could have alerted them to the facts of the case.

Given the substantial number of witnesses being called by the prosecution in the autumn of 2009 and winter of 2010, it was often difficult for the IBAHRI observer to connect the proverbial dots in the prosecution's chain of reasoning.[89] Sitting in the gallery, however, meant that even when case file volume numbers and page citations were given, the documents were almost never sufficiently discussed or explained to the degree that one could elicit their significance.

This situation was in fact somewhat alleviated by the defence's use of technology. From virtually the first days of open trial proceedings, they did three things:

(a) They scanned the entirety of the case file so that the defence advocates could, with a few key strokes on their computers, go to any volume and page mentioned by their opponents, the judge or a witness;

(b) For the benefit of the accused, a moderately large monitor was put on a chair at the defence tables so that the accused could enjoy the same dividend; and

(c) For the benefit of the judge (with the gallery as third-party beneficiaries), they projected a substantial number of charts, spreadsheets and tables onto the back wall of the courtroom.

However, after testimony from several dozen prosecution witnesses there were approximately 100 'I don't remember' answers during cross-examination. The bulk of the cross-examination was conducted by the accused themselves. In reaction to these 'I don't remember' responses, the long table of defence counsel was silent and the questioner moved on to another subject. It might be regarded as unusual that a response of 'I don't remember' would be accepted by a trial attorney as either a conclusive or final answer. It is true that this case challenged the memory skills of all witnesses with so many of the crucial documents and events being literally ten – or more – years in the past. However, it has been argued that the 'I don't remember' reply is one often made owing to personal disinclination rather than frank and truthful reality.[90] The defence attorneys could have followed up on the 'I don't remember' answers, but appeared to acquiesce to their strong-minded clients.

The factual complexity of the trial militated against counsel for either side shining. Both the prosecution and the defence failed to follow through in instances where this could have been possible and might have been decisive.

89 The prosecution having chosen not to provide the kind of narrative where the court would be told with regard to, eg, the embezzlement charge (Article 160) that the next witness would be shown documents, eg, purchase order 'A' and delivery receipt 'B' from volume X of the case file at pages W to Z. Further, that these documents would show that at the accused's direction, the witness entered into nominally disadvantageous transactions with a certain SPE or other entity, causing losses of some amount.

90 See JW McElhaney, *McElhaney's Trial Notebook*, Chapters 52 'Evasive Witnesses', 53 'The Witness Doesn't Remember', 54 'Make Something Out Of It', (4th edn, 2005).

D. Evidence: expert witnesses and the contested economic and financial aspects of the trial

The RCCP provides (Article 57) that:

> '[a]n expert is a person who possesses special knowledge who has been appointed in accordance with the procedures established by this Code to conduct a forensic expert analysis and to submit an expert's report.'

The matter of expert witnesses was particularly contentious. An early battle over experts arose in this trial regarding the embezzlement charges involved an exchange of shares of stock made between Yukos and the Eastern Oil Company (VNK)[91] in 1999. Although this charge was later withdrawn by the prosecution and dismissed by the court owing to the lapse of the applicable statute of limitations, it is illustrative of the procedural justice practised in this trial. The battle of experts began with Yukos having used the ZAO MCO «МЦО»[92] to make valuations of both it and VNK. The prosecution countered by employing the ZAO «Национальное агентство оценки и консалтинга» (NAVC)[93] to challenge the MCO valuation report. This was an important and difficult issue as it involved ascertaining the validity of the share valuations in the complicating context of the 1999 recession and wild fluctuations in the stock market.

Four of the NAVC staff arrived to give testimony. Entering the courtroom together, the initial procedural challenge they presented was under Articles 264 and 278 of the RCCP.[94] When the bailiffs carried in a bench allowing all the witnesses to sit behind the witness podium, it gave the impression that Prosecutor Lakhtin had, before the start of the day's session, apprised Judge Danilkin of the prosecution's intention to call them together. When the Court was called to order, Lakhtin stood up and called the four witnesses. This prompted surprise and outraged objection by defence counsel and the accused. Judge Danilkin listened to a rapid-fire point counterpoint, and then without taking a break to deliberate, held that all the experts could not be brought forward simultaneously.[95]

Also pertinent for this observation was the process by which the prosecution moved Judge Danilkin to 'appoint' the NAVC team as experts. The prosecution's putative expert, Yuri Shkolnikov, did not provide the Court with his curriculum vitae (the production of which is a well-established method of determining expert status) and when asked about his diploma in valuation, he could not recall when he had received it. Similarly, the NAVC report did not contain copies of licences and like documentation confirming Mr Shkolnikov's credentials or the CVs of the other members of the expert team.

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91 Which is the Roman alphabet transliteration of the Russian acronym for «Восточной Нефтяной Компании». VNK was a holding company with controlling interests in a number of crude oil production companies, including Tomskneft.

92 The International Center for Valuation (MCO), which is a closed joint stock company, see **www.valuation.ru**.

93 The National Agency for Valuation and Consulting (NAVC), which is also a closed joint stock company, see **www.naa.ru**.

94 Article 264(2) of the RCCP provides:

> 'The bailiff of the court shall take action to assure that witnesses whom the court has not yet examined do not communicate either with persons who have been examined or with other persons present in the courtroom.'

Article 278(1) provides:

> '1. Witnesses shall be questioned separately in the absence of witnesses not yet questioned.'

95 Thereupon the obviously agitated Prosecutor Lakhtin announced that Mr Shkolnikov alone would be and was, in fact, called to explain the NAVC's 2004 report and its criticism of the 1999 MCO appraisal.

Mr Shkolnikov's explanation for the flaws in the MCO valuation and the 'fair market cost' approach used by NAVC in its nominal repudiation of the MCO valuation report were not impressive to the IBAHRI observer. The defence moved to strike and exclude his testimony and report, but only *after* Mr Shkolnikov finished almost three days on the witness stand. The prosecution responded to that motion and the judge ruled orally to deny the defence motion.

The prosecution presented no other expert financial witnesses, nor did Judge Danilkin seek to call economic and financial experts on the court's own initiative. The IBAHRI observer anticipated hearing and was disappointed by the absence of expert financial and international business testimony in this case. It was clear that the defence considered such expertise to be valuable, if not indispensable. However, the prosecution had the burden of proof and this judge, apparently, was ultimately satisfied by the accounting and international business testimony provided by percipient witnesses, together with the contents of the voluminous case file.

The defence undertook to present numerous experts, many of whom were rejected by the Court. An example was Professor Natalia Alexandrovna Lopashenko of the Saratov State Academy of Law. Her nominal role was, as a law professor, to proffer expertise in the law rather than on the facts. Professor Lopashenko has a wealth of knowledge about Russian legislation regarding economic crimes. Judge Danilkin rejected the defence's proffer of this expert because the final arbiter of the law would be the Court.

The defence also proffered a putative forensic economic expert, Kevin Dages, who is Senior Vice-President of Compass Lexecon. He is a Certified Public Accountant with extensive testimonial experience before state and federal courts regarding securities fraud, valuation, mergers and acquisitions disputes, shareholder/management fraud, accounting and general damages issues. He had been engaged in an analysis of the amounts of crude oil sold and proceeds received in the light of the allegations of criminality. However, the defence did not make a factually concrete proffer. Instead their presentation was generalised and, in particular, did not counter the compromising admission elicited by the prosecution that he was not knowledgeable about Russian legislation regarding legal entities or the requirements for keeping financial accounts, books and records. When the prosecution moved to deny expert status to Mr Dages, the two sides again traded generalised arguments without the flesh of facts, such as what questions were actually asked, which documents were examined and what specific conclusions were reached.

Judge Danilkin granted[96] the prosecution's motion to deny Mr Dages' expert status. This was, in large part, due to the paucity of supportive facts given by the defence for the judge to consider.

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96 In a six-page ruling Judge Danilkin reasoned:

'State prosecutor V.A. Lakhtin believes that specialist K.Dages, who was invited to the trial upon a motion from defense lawyer K.Ye. Rivkin, is [not] competent because in the court hearing on 03 June 2010 he explained to the court that he was not a specialist in civil, business or corporate law of the Russian Federation, had not worked for organisations related to oil production industry, and was not familiar with matters of oil production, refining, sale and purchase or accounting matters or matters of Russian law regulating operations of joint-stock companies. In addition, state prosecutor V.A. Lakhtin draws the court's attention to the fact that specialist K.Dages is not acquainted with the Russian accounting system, has not rendered services to Russian companies, has no scientific publications, has not participated in Russian court hearings as an expert or a specialist, and has not studied and assessed the criminal case file under consideration in its entirety. Specialist K.Dages is equally not familiar with the Russian law on the basis and on account of which charges had been brought against the accused M.B. Khodorkovsky and P.L. Lebedev. State prosecutor V.A. Lakhtin notes that specialist K.Dages is unable to give objective evidence to the court because he was present at the court hearing at the Khamovnicheskiy District Court of the City of Moscow during the testimony of specialist W.Haun. State prosecutor V.A. Lakhtin also submits that specialist K.Dages was invited to the court hearing by defense lawyer K.Ye. Rivkin, who hired him, paid for his work from unclear sources, worded questions for him, and corrected the conclusions that specialist K.Dages intends to articulate in his testimony; this demonstrates clear dependence of the specialist on the party of the defense.'

Without testimony from Compass Lexecon, the Court, the prosecution and the gallery were 'left in the dark' not only about the questions that were asked and the conclusions that Mr Dages had reached, but also about the appropriate evidentiary weight to be given to them.

It was only after this episode that the defence began to release to the public some of the analyses and outputs created by Compass Lexecon.[97]

The next day, the defence entered a motion for reconsideration. Judge Danilkin denied it. The outcome was the elimination of the only defence expert to look at any of the complex accounting in this case. This seems to have been a self-inflicted wound.[98] It further contributed to the imbalance between prosecution and defence evidence in the trial when permission to call many defence witnesses had been denied.[99]

There appeared to be a disconnection of law from facts and substance in the submissions put forward by counsel for both sides. This was crucial because understanding the charges against the accused rested in large part on financial accounts and audits described in the case file. These would also be significant in Judge Danilkin's assignment of appropriate evidentiary weight to the huge quantities and sums being reported, expended, shipped and transferred.

Throughout this trial, there were, in addition, numerous specialised accounting terms that were important in rendering intelligible the charges as well as the evidence proffered in their support, but probably none was more significant than the term 'consolidation perimeter'. The notion is the relatively straightforward one of characterising and separating entities, in which, a large vertically integrated and diverse enterprise like OAO NK Yukos had a financial interest.[100] However, the Russian Accounting Standards do not recognise the obfuscation afforded by 'consolidation perimeters'. Yet talking about 'consolidation perimeters' was necessary because of the support to the prosecution's theory provided by PwC's 15 June 2007 withdrawal of all of its US-GAAP audits of Yukos for the period 1995–2004.

PwC's withdrawal letter has four independent grounds for sanctions.[101] But, it does not give the particulars of where and when PwC was deceived by Yukos' alleged actions; it does not state that camouflaging or complete withholding of information breached either Yukos' contractual or good corporate governance responsibilities to PwC; and it does not suggest why or how – given its

97 In October 2010, the defence released what it had prepared but never entered into evidence ie, a two-volume report in English and Russian of Mr Dages' and Mrs Sekhar's 'Conclusions' with apostils. Volume One has a six-page conclusion, plus 44 pages of exhibits, assembled in answer to a single question:

'Are the inferences made in the charges corroborated by the data cited therein concerning the amount of crude oil sold and the proceeds received by the companies referred to therein, including Fargoil, Ratibor, and Yu-Mordovia?'

98 Judge Danilkin's ruling in granting the prosecution's recusal motion is more reasoned than many others he rendered. It questions how Mr Dages could claim special knowledge when he had neither experience nor familiarity with the oil industry and other parameters involved in the evidence of this case. After the defence released on their website copies of their materials regarding Dages and his report, it appeared that a co-author of the Compass Lexecon analysis was Mrs Laura Sekhar. Mrs Sekhar, who was born and educated in Kazakhstan, is a native Russian speaker with a diploma in international economic relations from the Kazakh State Academy of Management. She has lived and worked in Moscow as the country manager for the Russian ZAO Siamed. She would have first-hand experience working with Russian legislation on legal entities, taxation and accounting. It is baffling that the defence did not put her forward as an expert witness.

99 A defence motion to obtain records from Transneft that would be relevant to the charges of embezzlement was also denied.

100 That is, this concept makes a delineation between entities where financial interest affords the investor either effective or legal control; in which case, the liabilities as well as assets are to be included and counted.

101 Such as: lack of genuine authority and power over a legal entity's operations in its nominal management; making covert payments to satisfy 'obligations owed to AKB Bank Menatep by companies beneficially owned and controlled by Group Menatep,' which were to the obvious material prejudice of those Group Menatep companies; making of covert payments 'by shareholders of Group Menatep to certain individuals who had been part of the Company's senior management during the time of the Company's privatization,' which were to the material prejudice of those Group Menatep shareholders.

procrustean withdrawal of the parent entity's audits – those remedies did not also apply to, and result in, the later consequential withdrawal of the many subsidiary audits that PwC had also prepared.

On these issues, the trial appeared to be overly simplistic and superficial, particularly in teasing out those connected with Yukos' consolidated financial statements and the several so-called perimeters.[102] The trial could have gone deeper into complex issues of disclosure and duties to auditors, clients, government and shareholders.

While the prosecution team was clever at managing the court process, little effort was made to dissect, analyse and expose the remarkably deep business and financial savvy that had been marshalled to create a byzantine structure of domestic and international deals involving interlocking, nested and affiliated legal entities that were engaged in oil extraction, processing, refining, transport, sale and financing. With the exception of the stock valuation experts heard regarding the controverted VNK-OAO NK Yukos share swap in 1999, the prosecution avoided calling other experts to explain the panoply of accounting schemes reflected in the case file documents.

On the other hand, the depth and breadth of the self-representation practiced by Khodorkovsky and Lebedev in addressing the Court, making objections to the prosecution's proffers of documentary evidence from the case file, cross-examining the prosecution witnesses, direct-examining the defence witnesses, testifying on their own behalf, making statements to the Court and arguing for defence motions as well as against prosecution motions, greatly exceeded the total amount of time spent by all of their 19 legal advocates.[103]

E. The quality of the judicial process

Judge Danilkin was diligent. Apart from eight formally recognised public holidays, he took no days for either his governmentally sanctioned vacation or for illness. He held himself above the fray and was taciturn despite widespread press criticism and public demonstrations of protest. He endured and ignored frequent, even occasionally heated, criticism from counsel (for example, regarding his rulings on motions). He showed considerable indulgence to a courtroom gallery that held a clear pro-defence bias: verbal and other gestures of solidarity with and toward the accused and their lawyers were common and by and large tolerated. Moreover, he made efforts to accommodate the accused's family and friends, as well as news reporters and the IBAHRI observer.

On the one hand, Judge Danilkin was generous and patient in allowing the defence opportunity and time to: electronically record the proceedings; object to the prosecution's evidence as it was read into the record as well as to read into the record documents that they deemed apt; move to obtain other documents and materials not found in the case file; cross-examine the prosecution's witnesses; call numerous defence witnesses; and present lengthy, if sometimes rambling, testimony.

102 Internal PwC working papers produced during this time discuss and distinguish between a 'Dutch and UK' perimeter, a 'trade' perimeter, a 'treasury' perimeter, a 'dividend' perimeter and a so-called 'other' perimeter.

103 The full complement were never in attendance at the same time but there were regularly eight to ten advocates on hand at the sessions of the trial court.

On the other hand, the pre-trial order issuing from the preliminary hearing was incomplete, at least regarding an initial list of defence witnesses to be called. This prejudiced the prosecution and defence, but the latter much more so. Moreover, at least some of the Court's rulings on defence objections to what the prosecution read into the record could have been either made or hinted at in the courtroom protocols. Owing to the international practice of judges in bench trials disclosing rulings on such evidentiary questions, the question of procedural justice arises together with demonstrated harm to either side.

The accused take Judge Danilkin to task for the large proportion of his rulings on motions granted in favour of the prosecution. The defence and the prosecution might have proffered a tabulation of cumulative motions and rulings. Neither did so. The impression was that many more prosecution motions than those of the defence were granted.

The defence complained that there were several important witnesses residing abroad who did not attend but for whom the defence offered declarations, for example, statements not under the penalty of perjury and without affording the prosecution an opportunity for cross-examination. Their attendance was neither facilitated (for example, with assurances of immunity) nor were those declarations accepted into the trial record. In contrast, the typically one-sided statements given to the prosecution in the course of investigatory interrogations were consistently allowed. The balance of these factors left the impression, despite some fumbling on both sides, of greatly favouring the prosecution.

There have been troubling post-trial claims regarding supposed behind-the-scenes conduct during the trial[104] – leading the defence to allege a charade rather than a trial.

F. The system of daily courtroom protocols

Numerous countries and their court systems do not allocate resources for either electronic or hard copy transcriptions of their proceedings. Rather, many employ a written summary, sometimes termed a 'daily protocol', as the record of what transpired. Russia is not alone in its use of protocols to fulfil the function of an official record of a trial's proceedings.

Formally, Judge Danilkin's secretaries were on hand each day to take notes that became the primary basis for the daily protocol. In reality, Judge Danilkin also took his own handwritten notes, which were used by the prosecution on a number of occasions to confirm which documents had and which had not already been read. The defence was meticulous in recording and transcribing a verbatim transcript (using it to correct the protocols). During the first few months of the trial, Judge Danilkin was quite methodical and preparation of the daily protocols as well as their emendation by the parties was observed to be timely and efficient. However, by late June 2009, Judge Danilkin began to fall behind and hear expressions of concern from the defence. In September 2009, as the prosecution completed the documentary portion of its case, the defence suggested completely replacing the daily protocols with defence-produced transcripts. When that was rejected, they used their transcription of cumulative audio recordings to file a pleading of more than 100 pages for changes and corrections to the protocols.

104 On 14 February 2011, Natalya Vasilyeva, an assistant to Judge Danilkin, alleged that Danilkin's superiors monitored him, dictated his major rulings and pressured him to deliver a harsh sentence. Judge Danilkin denied this and labelled the comments slanderous. See Clifford J Levy, 'Russian Tycoon's Trial was Rigged, Assistant Says' *New York Times*, 15 February 2011.

Once witnesses began to appear, the weaknesses of a system of hand-written notes became obvious as the pace of witness questioning and their answers frequently exceeded the diligent efforts of the Judge and his secretary to keep up with them. This was an unsatisfactory state of affairs as witnesses' probative and relevant answers may become muddled or completely lost in this process of recording.

The Russian system of daily court protocols is grounded in Articles 259 and 260 of the RCCP, with the former defining them as the record and the latter establishing a process for the parties to make comments.[105] However, the requirements of these provisions are not entirely clear. For example, Prosecutor Lakhtin made the argument that the deadline for signing off the protocols ('within three days after the end of the trial session') needed to be read with the second sentence of Article 259(6) that contemplates protocols being prepared periodically during a trial and, he argued, strongly suggests that the intent of the time limit was to impose a deadline of three days after the very end of a trial.

The defence, perhaps relying on the audio recording that they transcribed, did not immediately challenge the Court's failure to keep pace with its daily protocols.

However, this awkward situation became clearer when the prosecution opposed defence motions for Judge Danilkin to produce what, by then, was a deficit of seven months' worth of protocols. On 6 April 2010, Judge Danilkin granted the motions, which had been presented as seven[106] seriatim motions, month by month. In so doing he acceded to the defence's reasoning that these protocols, with their summation of documentary and testimonial factual evidence, were the primary record of essential details indicating whether the statutory elements of hundreds of criminal counts were – or were not – being established.

When the prosecution read aloud the many documents in the case file, there came into view a broad variety of legal issues and factual defects to which the defence and accused vociferously objected. These included but were not limited to flaws in authentication (for example, lacking dates, seals and/or signatures), completeness (for example, missing pages) and in the investigatory interrogation transcripts (for example, search and seizure challenges). What was procedurally important was how Judge Danilkin responded to these defects (for example, completely excluding the evidence or simply diminishing its weight). He rarely ruled on objections and made few explicit rulings on evidence. His reasoning would only become apparent in the daily courtroom protocols and/or his final judgment and verdict. When the protocols were not available on a timely basis, the prosecution and defence both remained uncertain, or completely in the dark, about material, probative and relevant

105 Article 259 – The official record of the trial:

6. An official record shall be made and signed by the presiding judge and by the court reporter within three days after the completion of the trial session. An official record may also be made in parts during the trial, which parts, like the entire official record, shall be signed by the presiding judge and the secretary. The parties, on motion, shall be given the opportunity to review the portions of the official record as they are being prepared.

Article 260 – Comments on the official record of the trial:

1. Within three days after reviewing the official record of the trial, the parties may submit their comments.
2. The presiding judge shall review these comments on official records without delay. If necessary, the presiding judge may summon the persons who submitted comments for the clarification of the contents of those comments.
3. Upon reviewing those comments, the presiding judge shall issue an order certifying their accuracy or rejecting them. The comments made upon the official records and the presiding judge's order shall be attached to the official record of the trial.

106 At that point in time these were daily courtroom protocols for September, October, November and December 2009, plus January, February and March 2010.

evidentiary points that had been either scored or missed. But the parties eventually rested their respective cases,[107] notwithstanding this enormous procedural gap.

The state of missing protocols in this trial was and is substantively devastating. Of course, both parties had their own recordings of what actually occurred, but the reality of judicial appeal through the Russian court system and even to the ECtHR is grounded on the daily courtroom protocols. They are the fundamental source of testimony offered to establish the truth. The protocol preparation process under the RCCP affords the parties a right to review them[108] for changes or comments before any protocol becomes final. It is doubtful that a judgment and verdict could be properly prepared, reached and read aloud before the official record of protocols are completed and finalised.

The protocols are essential for both the prosecution and the defence. It is only through their painstaking and meticulous scrutiny that the parties can be in position to see and understand, for example:

- what elements of which crimes have or have not been proffered and accepted into evidence;
- what facts regarding the hundreds of counts in the two indictments before this Court have been confirmed, clarified, controverted, corrected, corroborated, denied and/or disputed;
- what weight has been given to the documents and testimony; and
- how that evidence was linked with the legal premises of the prosecution's case.

In fact, Judge Danilkin did produce a full set of protocols by late March 2011, a full three months after delivering his judgment and verdict. The defence and prosecution were given until 25 April to file their comments and corrections. It was only on the brink of the cassation appeal in mid-May that Judge Danilkin produced and transmitted to the Moscow City Court a final set of protocols. However, the duty of a Russian judge is to prepare, distribute and revise daily courtroom protocols during the course of a trial so that the parties know what evidence has been accepted and what rejected. Moreover, the judge should have at hand a final set of protocols to cite in support of the facts and reasoning contained in his judgment. This did not occur in this trial.

It has been argued that Russian courts frequently ignore this 'nominally procedural' requirement, especially in cases of economic crimes.[109] But the RCCP obliges a judge to cite the evidence in his/her judgment.[110] Danilkin's judgment makes frequent reference to key testimony and other evidence presented in Court, which is crucial in a case of this complexity. Most references should logically be to the official protocols, yet there was an incomplete set as of the date the judgment was read in court. In fact, the judgment did not contain a single citation to any protocols at all.

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107 Their having done so effectively confirms the practical reality that this is not an unheard of state of affairs in contemporary Russian trials, but in a criminal proceeding of this length, with this complexity and with this visibility, it was a curious step.

108 Specifically, Article 259(6) RCCP.

109 Yuri Petrovich Gervis, cited in *Vedomosti:* **www.vedomosti.ru/newspaper/article/259952/a_byl_li_sud**.

110 Article 307(2).

Chapter Six – A Summary of the Court's 878-page Judgment

The trial was held over 288 days – from March 2009 to December 2010 – when, pursuant to Articles 304 and 307–309 of the RCCP, Judge Danilkin delivered his judgment. He read this aloud over the course of four days. He held Khodorkovsky and Lebedev guilty, imposing sentences of fourteen years' incarceration for each, to be counted from 2003. In effect, Khodorkovsky and Lebedev were found guilty of stealing approximately two-thirds of the total output of Yukos and its associated companies, and of laundering proceeds in excess of US$16bn.

The written judgment has the virtue of providing greater clarity than was offered by the prosecution's 'kitchen sink' indictments. However, like the prosecution, Judge Danilkin eschewed using an outline structure, or even numbered paragraphs, so it is cumbersome.

Judge Danilkin found that Khodorkovsky and Lebedev had embezzled[111] funds, committed the crime of laundering money and other unlawfully acquired property and created conditions allowing the physical theft of oil via ZAO Yukos R&M. It was also found that the use of ZAO Yukos E&P violated Russia's anti-competition and monopoly laws. It was found that the rights of minority shareholders of OAO Tomskneft VNK had been violated, and that bribery was used in the purchase and sale of assets of the latter, as well as of OAO Yuganskneftegaz and OAO Samaraneftegaz. It was also found that oil was illegally transferred via other Yukos subsidiaries and, under Khodorkovsky's and Lebedev's direction in 1998, stolen oil and oil products were laundered.[112]

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111 That is, the–

[a] 'theft of another's property' that had been

[b] 'entrusted to the convicted party,' including the

[c] 'use' of–

[i] an 'official governmental position' plus with an

[ii] an 'organized criminal group' and

[iii] 'conducted on a large scale.'

(Article 160(a) and (b) of the RCC).

112 That is, the–

(a) commission of financial operations or other transactions involving money or other property that was acquired through criminal acts and the use of such proceeds in business development or other economic activities

(b) on a large scale

(c) involving an organised criminal group plus

(d) being led by someone in their capacity as an employer

(Article 174.1(3) of the RCC).

The judgment is not devoid of reasoning. Also, with some frequency, it refers to the testimony of witnesses. However, these, at best, have only case file citations – there are no references to any of the daily courtroom protocols.[113] Despite the abundance of findings and conclusions in support of its verdict, sentence and damage awards, these findings are explicitly grounded in that portion of the trial record contained in the case file – interrogation transcripts, court decisions and other documentary materials galore – but the legally prescribed foundation for those references (the protocols) is absent.

113 One of the most important and damning prosecution witnesses was the former colleague and partner of the accused, Aleksey Dmitrievich Golubovich, who was the prosecution's 45th witness. For example, at p 545, the Court's judgment explicitly refers to his courtroom testimony, but without any reference to the daily courtroom protocol that would focus in upon when he spoke, what objections, if any, were made, and what summarising plus corroborating facts Judge Danilkin used to confirm Khodorkovsky's control over, inter alia, 'all of the assets of Group Menatep'.

Chapter Seven – Conclusions

In criminal proceedings in any legal system, as recognised in international human rights,[114] the quintessential procedural norms for a fair trial include:

(i) a public hearing;

(ii) reasonable advance notice being given of that hearing and being tried without undue delay;

(iii) being able to understand the nature and cause of the charges;

(iv) a hearing held before an independent and unbiased decision-maker;

(v) the presumption of innocence;

(vi) the reasonable opportunity to prepare a defence and communicate with counsel;

(vii) a fair opportunity to be heard;

(viii) a fair opportunity to confront one's accusers, rebut incriminatory evidence, offer exculpatory evidence and counter the prosecution's legal arguments;

(ix) a reasoned judgment being made with verifiable references to law and the record of the trial.

In addition, there is an overriding requirement of equality before the court. What is sometimes translated as 'equality of arms' in a criminal proceeding requires that each side be given the opportunity to contest the arguments and evidence adduced by the other party.[115]

As the United Nations Human Rights Committee (UNHRC) has made clear, these are guarantees which States must respect, regardless of their legal traditions and their domestic law.[116] Russian law does expressly provide for guarantees of equality.[117] The IBAHRI recognises that some internationally accepted indicia of fair trial procedure have been complied with in this trial. The trial was certainly public and the judgment was publicly pronounced. Although the trial itself was lengthy, the accused were tried without undue delay. The time afforded for in-court presentation of the respective cases was reasonable and even generous. The accused were allowed lawyers of their own choosing.

However, there are other aspects of the trial with which the IBAHRI has specific concerns.

A. The Indictments

One clear aspect of a fair criminal trial is that the accused be informed in detail of the charge against him or her. In this regard, the indictments are problematic. They were long, chaotic, mistake-ridden and self-contradictory. They explicitly breach the requirements of Article 220(2) of the RCCP as no

114 ICCPR, Article 14.

115 UNHRC, General Comment No 32, CCPR/C/GC/32, 23 August 2007, para 13.

116 *Ibid*, para 4.

117 Article 244 of the RCCP in part provides:

> 'the prosecution and the defense shall enjoy equal rights to [1] exercise challenges and [2] file motions, [3] present evidence and [4] take part in the examination thereof, [5] take part in closing arguments, [6] submit written questions to the court on the issues referred to in … this Code and [7] take part in the examination of all other issues that arise during the trial.'

references to the case file are contained in them. They were being amended throughout the course of the trial. The defence raised motions complaining about this, and Judge Danilkin considered the issue on several occasions, but did not rule that the indictments were in any way untoward. The accused were represented by experienced counsel who marshalled the complicated facts and charges made against their clients to such an extent that they were able to produce PowerPoint overheads to illustrate and explain the intricate corporate-fact situation underlying the charges. Nevertheless, the state of the indictments meant that the defence had to work under added pressure in an effort to sustain a fair trial. It is also a reasonable inference that the accused (as they frequently complained) were not *adequately* informed of the charges against them, particularly in light of the complicated fact situation on which the charges were based and that the huge amounts of oil and money allegedly involved stretched credibility.

B. The difficulties for the defence in being able to develop and present its case

The court's order at the preliminary hearing did not include a witness list for the defence. Rather it was stated that the defence could move for the granting of a right to call its witnesses one-by-one at some later time. This meant that the defence was left uncertain throughout the trial as to which witnesses it would eventually be able to call, unlike the prosecution for whom this matter was clear from the start. The UNHRC has stated that the conditions of witness examination is an application of the principle of equality of arms and is important in ensuring an effective defence.[118] Even though the defence was given the opportunity to cross-examine prosecution witnesses and to call its own witnesses, the refusal of the court to approve the list of defence witnesses at the start of the trial, and the decision to resolve the matter only later on a case-by-case basis – when the list of the prosecution witnesses was accepted– is regarded by the IBAHRI as a breach of the spirit of this essential principle.

The issue of the accused's detention during the trial is of concern as it had the propensity to adversely affect their ability to mount a proper defence. The rules at Matrosskaya Tishina detention facility could affect the accused's ability to receive visits from their legal counsel, limit their access to the prosecution's case file and deny them a secure place to keep documents and notes. It must be noted that, at the request of the accused, the court permitted at least one weekday as a break in order to allow the accused and their counsel to meet. The court also made the courtroom itself available on days when the trial was not in session so that the accused and their counsel could meet there. The matter of the detention was raised as a court motion several times during the trial, due to the limitation period imposed by Article 255 of the RCCP. However, each application was unsuccessful. The Supreme Court hearing on the matter was only concluded more than four months after the Court delivered its judgment and verdict, and too late to be of any practical effect. The ECtHR, considering the detention at the time of the first trial, came to equivocal findings.[119] As the relevant facts relate to a situation outside the courtroom which it could not observe, the IBAHRI has no evidence to be able to conclude definitively on this point. However, a serious question must be raised in a trial involving such complicated evidence as to how conducive to mounting a reasonable defence such conditions were.

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118 UNHRC, General Comment No 32, CCPR/C/GC/32, 23 August 2007, para 39.

119 *Khodorkovsky v Russia,* (Application No 5829/04), 31 May 2011, para 126, para 119. The Court held that some of the detention breached Article 3 of the European Convention on Human Rights and some did not. This relates to whether the treatment was inhuman or degrading and not specifically to issues such as access to counsel while in detention.

The courtroom facilities in themselves were adequate. However, defence counsel complained that the heavily-guarded entrance and exit routine up and down the stairs was unnecessary and even cruel. The ECtHR, judging the courtroom security arrangements in Khodorkovsky's first trial, held that their cumulative effect was excessive and reasonably perceived to be humiliating, amounting to a breach of Article 3 of the European Convention on Human Rights.[120] The circumstances in the second trial were similar to those in the first. The accused were charged with economic crimes, had no prior criminal record or history of violence, yet were brought into the courtroom handcuffed, were heavily guarded and placed in a cage. Despite both the accused's jovial demeanor at most times, this can be attributed to putting on a brave face in the circumstances.[121] It could be reasonably inferred that the circumstances of the second trial also amounted to degrading treatment and were a breach of the accused's human rights. However, while this impugned the accused's dignity, it was not observed to interfere with the conduct of the trial itself. It had, nevertheless, a potentially devastating effect on the accused personally, thus making the job of their defence counsel that much more difficult.

C. The weighing of the evidence

During the prosecution's reading of documentary evidence, objections by the defence were acknowledged by the judge but not ruled upon (decisions on many motions were postponed) so that the status of the evidence – what had been admitted and what had not – was not clear. This created a cloud of uncertainty for the defence who would be less able to appreciate how the prosecution case was (or was not) building. The prosecution in its recitation did not clearly set out which facts it intended to prove by which evidence and the court exacerbated the problem by deferring rulings on motions. The significant link between allegations and evidence in terms of criminal responsibility was at best unclear.

The evidence that was heard was frequently not tested rigorously. The players in the courtroom are human, which makes all legal institutions fallible. In this case, the defence counsel acquiesced to their strong-minded clients and did not follow up on the 'I don't remember' answers by prosecution witnesses in cross-examination, rendering the defence less effective that it might otherwise have been.[122] Counsel for the prosecution similarly jeopardised the effectiveness of their arguments when they crudely applied the elements of crimes to the complex structures and transactions of international accounting and business, around which this case turned.[123] This was further exacerbated in the process of granting or withholding expert witness status to some potential witnesses. Although part of the problem with respect to the latter may have been the result of imperfect presentation by counsel, the IBAHRI questions whether the Court did, or would even have been able to, consider balanced evidence from both sides. The Court did not correct the problem itself by calling experts *sua sponte* – of its own accord – although it might have done.

Some clarification might have been provided and some of these problems might have been alleviated by the daily courtroom protocols, but this did not happen because a complete set of protocols was not produced during the course of the trial. Despite some disingenuous prosecution arguments to the

120 *Ibid.*

121 See Chapter Three, B above.

122 See Chapter Five, C above.

123 See Chapter Five, D above.

contrary, this was a major procedural irregularity and a further breach of the RCCP. This could not only be said to prejudice the proceedings for both parties, but it may also eviscerate any claim to fairness and rationality in the result of the trial. This is particularly so in a trial which involved complicated evidence of financial and accounting matters. There were no references to the protocols in the judgment (even to those from 2009 which did exist). With so many defence motions deferred or ruled against, in striking contrast to the proportion of prosecution motions granted, and the lack of timely protocols, the judgment could only draw overwhelmingly for its conclusions on what was presented by the prosecution at the start of the trial. What evidence had, or might have, been established in the courtroom did not have as much bearing on the outcome of the trial as it should have.

D. The political background not conducive to fairness

Of grave concern to the IBAHRI are the allegations of political interference in the trial, both with respect to the selectivity in targeting Khodorkovsky and Lebedev for prosecution, and in the allegations of political interference directly with Judge Danilkin.[124] As the IBAHRI has no evidence of these extra-curial circumstances, it can make no conclusion on the matter, other than to say that, if true, this trial would unquestionably be a travesty of justice. However, on a related circumstance clearly within the public domain, Prime Minister Vladimir Putin, in a television phone-in on 16 December, several days before the verdict was handed down, in response to the question: 'Do you think it fair that Mikhail Khodorkovsky is still in prison?', replied that thieves belonged in jail.[125] In that, he appeared to say that the accused's guilt had already been proven, this conduct was manifestly improper and flies in the face of the presumption of innocence and the separation of powers. The UNHRC has stated that fairness in trial proceedings entails the absence of any direct or indirect influence, pressure or intimidation from whatever side and from whatever motive.[126] The ECtHR found that, with respect to Khodorkovsky's first arrest and trial, there was *insufficient evidence* to sustain a claim that the trial was politically motivated.[127] The IBAHRI observed the trial itself and so is not in a position to deduce any firm conclusions regarding political interference with the second trial.

E. Conclusion

The IBAHRI, considering the cumulation of the concerns mentioned above, is of the opinion that there is evidence that both the letter and spirit of the law were not promoted in this trial. There were failures to abide by the RCCP and, in the wider sense, the fundamentals of procedural justice. The huge amounts of oil (two-thirds of the total output of Yukos) and money allegedly stolen and/or embezzled required convincing proof for a conviction to be obtained within recognised domestic and international legal standards. The observed evidence and procedure leads the IBAHRI to conclude that this trial's process was overall incapable of producing that proof.

On balance, the IBAHRI concludes that this trial was not fair.

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124 See the allegations of Judge Danilkin's assistant in footnote 104, above.

125 Catherine Belton, 'Putin Remarks Dash Hopes for Khodorkovsky' *FT.com*, 16 December 2010: **www.ft.com/cms/s/0/b109377c-092e-11e0-ada6-00144feabdc0.html**.

126 UNHRC, General Comment No 32, CCPR/C/GC/32, 23 August 2007, para 25.

127 *Khodorkovsky v Russia* (Application No 5829/04), judgment of 31 May 2011, at paras 255–60.

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