eurozine

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Legal nihilism in action

The Yukos−Khodorkovsky trial in Moscow

The conviction of Mikhail Khodorkovsky and Platon Lebedev as white−collar criminals will go down in twenty−first−century Russian history as an extraordinary scandal of justice. As accomplices of a now all−powerful presidential administration, the Prosecutor General's Office and the courts fabricated a criminal case, during which basic principles of legality were systematically and cynically violated. Russia's defeat before the European Court of Human Rights in Strasbourg is inevitable.

On Tuesday, 31 May 2005, after almost a year, the trial of Mikhail Khodorkovsky, Platon Lebedev, and Andrei Krainov at Moscow's Meshchansky District Court came to an end.[1] It was the third and most spectacular criminal case in a series of trials directed against shareholders and top managers from the banking and oil conglomerates Menatep and Yukos.[2] Khodorkovsky and Lebedev were each sentenced to nine years imprisonment for fraud, embezzlement, tax evasion, and frustrating the execution of a court judgment, all severe cases, namely by means of organizing a group on a large scale. The sentences are to be served in minimum−security correctional labour facilities. Krainov received a five−and−a−half−year suspended sentence, because he admitted partial guilt and proved "willing to cooperate" within certain limits. The prosecutor's office had called for ten years for Khodorkovsky and Lebedev. The court fell short of the prosecutor's demands by a year, because the ten−year statute of limitations for the allegedly fraudulent acquisition of shares in the fertilizer producer Apatit expired on 8 July 2004 and could no longer be prosecuted (Art. 78, Par. 1, Code of Criminal Procedure of the Russian Federation, CCP RF).[3] As for the rest, the court followed the prosecution's line to a tee.

From the start, the "Yukos trial", of which the Khodorkovsky−Lebedev case was only the most important part, showed all signs of being a scandal of justice. And that is exactly how it will go down in twenty−first century Russian history. That much can already be said without fear of reproach for exaggeration.

As if it had taken place in the legally nihilistic Soviet era, the Yukos case violated practically every basic principle of criminal trial procedure: a fair trial, the assumption of innocence until proven guilty, in *dubio pro reo*, the right to effective council, equality of arms, the principle of commensurability −− all these were systematically violated, even cynically mocked. The verdict corresponded in its maliciousness, disregarding basic principles of criminal law, of law and justice. The true dimension of this provocation becomes fully clear when one considers that Russia's 1993 constitution made a demonstrative break with the Soviet system's hostility toward rule of law and human rights,

and that the Russian parliament, the Duma, on 18 December 2001, after a ten−year struggle between the "proponents of rule of power" and the "proponents of rule of law", passed a liberal code of criminal procedure that was by and large exemplary.[4] Entering into force on 1 July 2002, the code lasted hardly a year before the Prosecutor General's Office, the Federal Security Service (FSB, the successor to the Soviet secret police KGB), the tax authorities, and the courts −− in their slash−and−burn tactics against the Menatep−Yukos conglomerate, its shareholders, and its top managers −− buried the Russian people's hopes for rule of law and a culture of greater respect for the law in a legal field of high symbolic value.

The Yukos−Khodorkovsky trial reveals just how robustly Soviet traditions of hostility toward the rule of law can still affect the practice of criminal law in Russia. The trial provides a grotesque example of a legal culture in which a demonstrative, pedantic, and embarrassing insistence on irrelevant regulations and formalities accompanies a no less demonstrative abuse of basic principles of justice and procedure: The presiding judge, Irina Kolesnikova, refused at first to open the trial, because a page was missing from the indictment, which the prosecutor had to present Mikhail Khodorkovsky; this was done so as "to allow no gross [sic!] violation of the defendant's rights".[5] The prosecutor produced another copy, in which three pages were missing, at which point the session was interrupted for the third time, successfully.

The end phase was both tragicomedy and farce. The reading of the verdict assumed comic dimensions bordering on the grotesque. The Code of Criminal Procedure of the Russian Federation (CCP RF) bares some of the blame for this. In accordance with the best traditions of rule of law, it takes seriously the principle of openness (glasnost') (Art. 241). Article 310 therefore stipulates that the verdict, which consists of an introduction, argument, and a ruling, has to be read aloud in the courtroom −− in full.[6]

Thus the three criminal division judges had the 662 page verdict read aloud over twelve days of hearings.[7] With each day, the public suffered more and more from the procedure. The courtroom selected for the trial was far too small and completely full; because the building was not properly ventilated, the hot and humid air was at times thick enough to slice. The readers made no effort to speak clearly and audibly. Showing little understanding for the text, they read mechanically in low voices so that even the lawyers sitting quite close to them had extreme difficulty in following them. The readers often stumbled, muddled their words, and gave the impression that they were seeing the text for the first time. Such suspicions, oft expressed by listeners, were in no way spitefully plucked from thin air; the verdict actually resembled the indictment over the course of pages right down to the very wording −− including the grammatical mistakes and errors in calculations.

The CCP RF does not provide for reducing the presentation to the essentials. In a landmark decision ("On the Criminal Court Verdict"), Russia's Supreme Court insists on a full reading of the verdict and treats violation of this procedure as grounds for overturning a verdict in a court of appeals (Art. 379, Par. 1, Nr. 2, CCP RF).

Adherence to the letter of the law could have made it worse: the verdict (*prigovor*) actually has to "be heard while standing" −− in full. In praxis, however, officials have had the good sense and courage to limit observation of this rule to the actual decision, the substance (*rezolyutivnaya chast'*).[8]

Observers were agreed: if the court had linked this procedure with the hope or idea that it could convince the Russian public of the severity and the legality of Khodorkovsky and Lebedev's trial by invoking the full authority of the state, then it did not work out that way. Observers of the trial found the reading of the verdict an undignified judicial show, a distorted image of a criminal trial. The judges, each according to their temperament, provoked alternating feelings of sympathy and disdain.

The trail and the verdict are tragic for Khodorkovsky and for Russia as well. For it was in his person that somebody was tried who had put his early days of unscrupulous entrepreneurship behind him and, based on the strength of his personal abilities, analytical intelligence, and entrepreneurial imagination, on the strength of his organizational creativity, initiative, and willingness to take decisions, had taken over the ailing state enterprise Yukos and, within a few years, turned it into a high−powered, extremely modern oil company, one of the most important companies in Russia.[9]

Seeing Khodorkovsky written off as a criminal is also tragic, because he has a social and political vision, a political goal that goes beyond economic business sense and drive for power, namely to modernize Russia economically and politically and to promote structures of civil society. And Khodorkovsky has the personal ambition to take part in this process and "to go into politics".[10]

The Yukos−Khodorkovsky trial was surely a farce, an act of arbitrariness dressed up in the garb of a modern court case. One is hard pressed to find another example of a criminal court acting under a constitution and code of criminal procedure in accordance with the rule of law that offers such a wretched image of incompetence, inability, and lack of character and shows such submissiveness and lack of dignity vis−à−vis an unrestrained presidential administration and its bailiff, the prosecutor's office!

The reading of the verdict got off to a false start. It was scheduled for 27 April, but that morning, the citizens and lawyers who had streamed to the courthouse full of expectation found a laconic announcement that the session had been postponed until 16 May. No reason was given. The law does not require a reason be given, and it is not necessarily standard practice either. Given the suspense, the news went off like a small bomb, and speculation on the reasons for the delay ran rampant. Genrikh Padva, the defence coordinator in the various Yukos−cases, said with some understanding that composing a verdict within 14 days had been unrealistic from the start given the dimensions of the case; the press almost unanimously concluded that Judge Kolesnikova had been informed "from on high" that it would be politically inopportune to issue the verdict just before the celebrations marking the 60th anniversary of the end of the Second World War in the presence of numerous heads of states and governments. In fact, it was no secret that most Western governments −− rarely openly of course, but under their breath −− considered the Yukos affair a political trial and a scandal. After all, just a few weeks earlier, the Parliamentary Assembly of the Council of Europe (Europe's watchdog organization for pluralistic democracy, rule of law, and respect for human rights) formally criticized the Yukos case's many points of incongruity with the rule of law. The censure was passed at the recommendation of the body's human rights committee and its rapporteur in the case, former German Justice Minister Sabine Leutheusser−Schnarrenberger.[11]

The performance of the verdict's reading was fully commensurate with the quality of the verdict: the way criminal law and the code of criminal procedure

were applied led observers used to the standards of a fair trial to shake their heads. The extent of rights violated is so crass and blatant that it forces the question how the directors of this spectacle could have ever been so optimistic as to believe that this verdict could be upheld in what is presumably the final instance, namely the European Court of Human Rights. All previous experience suggests that it will take years until a decision is made in Strasbourg, but there is no doubt that "Moscow" will one day be presented with a bill for this travesty of justice.

The verdict's untenable nature: The main objections

To appreciate the verdict, it is necessary to consider the circumstances of the case in detail. The prosecutor general's indictment against Lebedev and Khodorkovsky and the version of the verdict contained in the protocol for the trial sessions between 16 and 31 May 2005 form the basis of this presentation and the analysis that follows.[12] The indictment and the verdict revolve above all around the following charges:

− The Apatit affair, which concerns, first, the allegedly fraudulent acquisition of a 20 per cent stake in Apatit AG, a giant fertilizer producer in 1994 (Art. 159, Par. 2, Criminal Code of the Russian Federation); second, the allegedly incorrect marketing of the fertilizer at artificially low prices to the detriment of the company's shareholders (Art. 160, Par. 3, and Art. 165, Criminal Code of the Russian Federation); and third, the alleged barring of a ruling by a commercial court in the Apatit affair (Art. 315 in connection with Art. 35., Par. 3, Criminal Code of the Russian Federation);
− the allegedly fraudulent acquisition of a "controlling stake" (44 per cent) in the joint−stock company Samoilov Research Institute for Fertilizers and Pest Control in Moscow and the allegedly concomitant violation of patent law (Art. 147, Par. 3, Criminal Code of the Russian Federation);
− the alleged use of fraud in securing the use of the closed city Lesnoi in the Sverdlovsk Region as a "tax haven" and the tax evasion that is alleged to have resulted from doing so;
− alleged tax evasion by allegedly using fraud to attain the status of "individual entrepreneur without establishing a legal entity" (Art. 199, Par. 2, Criminal Code of the Russian Federation);
− the alleged misappropriation of Yukos money (a charge levelled against Khodorkovsky alone), whereby Khodorkovsky provided around US$ 91 million to the "oligarch" Vladimir Gruzinsky and the Media−Most company he controlled, ostensibly as credit but in fact in exchange for personal advantage after repayment was waived (Art. 160, Criminal Code of the Russian Federation).

The following presentation is limited to the three most important charges: the Apatit affair, the use of a closed city as a tax haven, and the minimization of taxes by using the status of individual entrepreneur. The Apatit affair is addressed in detail because it was used in 2003 to justify prosecutor general's actions against the Menatep−Yukos shareholders and top managers and to this day must be held up as legitimation for the action as a whole. The court may not have considered the Apatit affair, since the charges fell under the statute of limitations, but it did confirm and expressly note the indictment's accusation of guilt in a special decision within the verdict (*opredelenie*).[13]

As this catalogue of criminal offences shows, the proceedings concern almost solely financial offences: fraud, embezzlement, and tax evasion in the realm where commercial law, finance law, and criminal law overlap, in other words

word: commercial criminal law. This is generally seen as a difficult and demanding area of law and rightly so, for achieving a professional level of work in it requires an extensive knowledge of civil and commercial law alongside a mastery of criminal law. Furthermore, the practitioner of commercial criminal law must have a solid knowledge of economics, be able to think in terms of business transactions, have an understanding of how they interact, and be in a situation to draw on this multi−dimensional specialized knowledge optimally in order to fulfil his task, namely the prosecution of criminals. It is almost superfluous to stress that fulfilling such a task effectively and professionally requires an acceptance of market economy relations and strict adherence to the principles of the rule of law. The prosecutor's office and the criminal justice system in Russia find all of this exceedingly difficult to do −− to which the Yukos−Khodorkovsky bears such eloquent witness. And herein lies a fundamental core problem of "culture" in the handling of the Menatep−Yukos cases. At the end of the following appraisal of the verdict, we will come back to this.

The Apatit affair: Fraudulent privatization?

The part of the indictment that goes furthest back in time is participation in the privatization of what is now the Apatit joint−stock company. This dates to 1994, but was drawn out to 2004 as a case in a commercial court.[14] Apatit was the largest producer of mineral fertilizer in the Soviet Union and then, as a joint−stock company, in Russia. Located on the Kola Peninsula, the enterprise gave the town Apatity its name. As in the case of all Soviet industrial giants, Apatit found itself in a severe production and turnover crisis after the collapse of the Soviet Union and its economic system. It was formally privatized by being transformed into a joint−stock company, but the state held the overwhelming majority of the shares. These were administered by the Assets Fund for the Murmansk Region (Fund Imushchestva Murnmanskoi Oblasti).

The enterprise was *de facto* near bankruptcy when in 1994 the assets Fund decided to sell a single package of 20 per cent of Apatit's shares by means of public tender. Difficulties in marketing and sales, strikes, high wages in arrears, back taxes due, and charges for unpaid energy bills had all contributed to the Apatit's high level of indebtedness. The company literally risked being shut down. Due to unpaid wages, the town of Apatity was in turn on the brink of collapse.[15]

It was undisputed that Apatit required a fundamental technological and managerial overhaul, in other words enormous investments. Corresponding plans had been drawn up in Soviet times, but no investor had been found. As a consequence of the company's immensely high level of debt, its aged capital stock, and the acute threat to its existence, there was no serious talk of a "market value" of Apatit shares in 1994. It was indeterminable. One could offer the package of shares on tender merely for its nominal or face value: 415 800 000 (un−depreciated) roubles, or US$ 225 000.

The Murmansk asset fund, however, added a condition: whichever enterprise won the tender had to be willing to sign an investment contract. Such a precondition was at the time both typical and common in state privatization policy; however, it included the risk −− known to all −− that the investor would back out after acquiring the shares or prove not really interested in investing.

The Apatit investment contract foresaw the following primary obligations:

− payment of 59 billion roubles for the stabilization of the company's financial situation;
− payment of 46.7 billion roubles for the development of the company's social basis;
− and payment of 457 billion roubles for the technical renovation of the company.

A total of 563 billion roubles, in other words US$ 280 million, were to be paid within a year. Furthermore, the contract required that, upon acquiring the shares and signing the investment contract, the new shareholder had to pay 30 per cent of the total investment volume to Apatit within a month.

The contract terms suggest that the Murmansk assets Fund was first and foremost interested in getting hold of money and less interested in investment. Further developments were to confirm this. The contract's stipulations on the individual terms of payment were clearly at variance with the clauses concerning the assessment, planning, scale, and implementation of new investment. After all, the investor assumed an obligation of realizing investment not only in consultation with Apatit, which was obvious, but also with the Murmansk asset Fund. Because the contract determined the investment goals only in very general terms ("technical re−equipping for breaking down raw materials; effective increase in productivity; sinking of energy costs"), the need for cooperation and coordination would inevitably grow. Under such conditions, it was clearly unrealistic to insist on payment of US$ 280 million within one year. It must have been clear to all of the participants that Apatit, in its dilapidated state, was neither technically nor organizationally suited to absorb such a significant sum of investment in such a short period −− even if the contract had not insisted on cooperation with the assets Fund and had given the investor free rein. That, however, was not the case.

The Murmansk assets fund appeared to be urgently interested in the quick flow of "fresh money", without truly considering how it could be most effectively used. Suspicions must have hardened given the investor's obligation to pay 30 per cent of the total volume of investment, US$ 90 million, within one month of acquiring the Apatit shares and the signing of the investment contract, which in this case meant by 1 September 1994. Because the investment sum was not linked to a specific purpose, there was the danger, which could not be brushed aside, that the money would disappear in "dark channels". In the best case, it would have been used perhaps to pay off Apatit's most pressing debts and to stabilize the social conditions for the workforce and the citizens of Apatity.

The closed joint−stock company Volna won the tender. It had been established by Dzhoi, a joint−stock company that had emerged at the initiative of a company registered in the Netherlands. All of these firms were ultimately somehow connected with the conglomerate Menatep Bank. In terms of personnel, this was shown by the fact that the general director of Volna, Andrei Krainov, the third defendant in the Khodorkovsky−Lebedev trial, had previously worked for MFO−Menatep (Mezhdunarodnoe finansovoe ob'edinenie−Menatep), a closed joint−stock company and subsidiary of Menatep Bank.

Volna acquired the share package for the aforementioned price. With the payment to the asset fund, it had met its obligations to the state for the time being. When it came to fulfilling the investment contract to Apatit's advantage, however, a row quickly ensued. Shortly after acquiring the shares, Volna presented the assets Fund with an exhaustive investment and development plan, bur it showed no sign of paying 30 per cent of the investment sum up front. After the asset fund issued a reminder −− which went unheeded −− the prosecutor for the Murmansk Region brought action against Volna at the regional commercial court with the aim of annulling and undoing the sale of the shares.

Strangely enough, charges were not brought against Menatep. This was after all the very bank whose president, Platon Lebedev, had drawn up a letter of guarantee presented by Volna during the competition formally vouching Volna's ability to meet the investment contract's terms.

The Moscow Commercial Court, which had jurisdiction in the matter, threw out the case in August 1995 after Volna produced receipts for the payment of about 280 billion roubles to Apatit accounts. Afterwards, Volna sold its package of Apatit shares to several companies within the Menatep group, which in turn succeeded in acquiring a controlling share in Apatit by making acquisitions on the secondary market. On this basis and with the use of considerable investments, these companies then went about modernizing the enterprise −− with considerable success: by 1998, annual production at Apatit had almost doubled to 8.2 million tonnes; turnover was effectively reorganized by a network of firms active inside and outside Russia. Apatit's debts were paid off. And the entire re−development process had been controlled by Menatep.

The sale of the Apatit shares was the main reason why the judgment against Volna won by the prosecutor's office in a Moscow court of appeals on 12 February 1998 came to nothing: it could not be executed, because Volna no longer owned the shares. After some back and forth, a settlement between Volna and the Murmansk assets fund was reached on 19 November 2002 and formally confirmed in line with the Code of Commercial Court Procedure before a Moscow appellate court: Volna paid 478 914 195 roubles (US$ 15.13 million) to the assets fund, and the shares remained in the hands of their new owners.[16]

The prosecutor general's office saw in these proceedings criminal activity: first, fraud in the extreme, because it was carried out by an "organized group" and "on a large scale" (Art. 159, Par. 3, Criminal Code of the Russian Federation), and second, malicious frustration of a civil judgment by deceiving state official (Art. 315, Criminal Code of the Russian Federation). The court agreed with the prosecution in this interpretation. The prosecutor's office and, as far as obstruction was concerned, the court argued: Lebedev, as the chairman ("president") of the Menatep Bank, and Khodorkovsky, as the chairman of supervisory committee ("board of directors"), had combined with other employees from the bank[17] and its diverse subsidiaries to form a group and systematically used their power over Menatep, unlawfully acquired the Apatit shares by malicious deceit, and enriched themselves on a grand scale at the expense of the state. The companies that took part in the competition for the Apatit shares −− although they were founded in accordance with the company law in force at the time and were registered with the responsible authorities −− were branded "bogus companies" and thus illegal; the documents issued by them were forgeries meant to deceive the legal process, and the petitions filed in state organs were illusions and deceptions. Only in

this way had they de facto come to posses the Apatit shares.

The Apatit case raises many questions, which neither the indictment nor the verdict answer. For example, how can it be explained that, on the one hand, Lebedev acquired the Apatit shares on the cheap while never intending to meet the obligations to invest, while on the other hand, as it is correctly noted, he vouched for Volna's ability to meet its obligations with a declaration of security in its favour? And is it permissible for the prosecutor's office and the court to set the value of the Apatit shares not only according to its nominal value at the time of the sale but to include without pausing for consideration the economic value of Volna's investment obligations −− which had yet to be realized, let alone taken effect? Does it show a willingness to acknowledge all the facts relevant to the case if the catastrophic financial and economic situation of Apatit, the company's employees, and the location are not once mentioned and instead the impression is left that a highly attractive enterprise was at issue? And can the prosecutor's office and the court convince with its assessment that the commercial court of appeals approved the settlement between Volna and the Assets Fund of the Murmansk Region, because it was "maliciously" deceived of the shares' value, which was in reality much higher? Was the litigant not involved in the settlement, and did it, the asset fund, not have the greatest interest in a higher valuation of the shares? Would it not have been the fund's business to make its own recommendation as to the value of the shares during the settlement hearings if it did not agree with the estimate? Could not the court have tried to work in that direction? Indeed, did it not have to work in that direction? Did the commercial court and the asset fund then have to accept the estimated value that was prepared by an independent third party and presented by Volna? Was it not in the essence of the settlement that both sides yield, draw closer to one another, and give up some claims?[18] Is it ultimately convincing to accuse Lebedev and Khodorkovsky of frustrating the execution of a civil judgment with the argument that Volna had sold its shares?

The sale of the shares was fully legal, because Volna's rights of ownership were in no way limited. Volna had won the trial in the court of first instance, and the commercial court of appeals had yet to rule on the case. The suit's outcome was therefore completely open. If the sale of the shares was lawful, it could not have been illegal for Lebedev and Khodorkovsky to have arranged their sale −− should they have possibly done so. This is, by the way, something the prosecutor's office and the court merely allege without providing the slightest bit of evidence for such an "arrangement". Conversely, Lebedev and Khodorkovsky were in no way obliged to act to prevent the sale of the shares, not even if they, as Menatep's top managers, had had the power to do so.

Answers to the critical questions partially raised here are absent from the indictment and the verdict. The prosecutor's office and the court were firmly convinced from the start −− ostensibly or actually −− of Lebedev's, Khodorkovsky's, and the additional Menatep managers' guilt. Their conviction rests not on evidence but on assumptions, allegations, and assertions.

Are "closed cities" illegal "tax havens"?

The issue of "tax optimization" by means of domestic "off−shore zones" clearly shows the weak arguments and helplessness of the prosecutor's office and the court in dealing with entrepreneurs and their keen eye for exploiting little observed legal regulations for their own ends. At the heart of the matter here are Russia's closed territorial administrative entities (*zakrytye administrativno−territorial'nye obrazovaniya* −− ZATO), which during Soviet

times existed under strict security regulations. They belonged to the "island empire", the archipelago of the Soviet secret police, first the NKVD, then the KGB. They are not shown on any map, but were proverbial whit spots. Commonly known as "secret cities", they were established after the Second World War in connection with the secret nuclear programme run by NKVD chief Lavrenty Beria. They contained research facilities where military projects were pursued under the highest level of secrecy as well as the production sites, test sites, and everything else connected with them.[19] In all, there were several dozen in the Soviet Union.[20] Mostly located in the Urals and Siberia, they had an average population of 80 000 inhabitants. Their isolation from the civilian outside world was perfect: entry was limited to a restricted circle of people with the highest security clearance and subordinated to a complicated procedure; administration and provisioning were subject to their own regime. The names of the closed cities consisted of a number and the region (*oblast'*) where it was located, for example Tomsk 7. Not only were they not to be found on any map, censors aimed to prevent the very mention of these cities in any publication.

Privileged and highly subsidized during the Soviet era, the closed cities fell into a severe crisis after the downfall of the Soviet Union, the collapse of the planned economy, and the state's ensuing financial emergency. Isolation from the outside world and the lack of integration into the labour market and economic life of the surrounding area made the situation all the more difficult.

Under enormous pressure, reform of the entire complex of closed cities was undertaken in 1992. The secrecy regime was loosened,[21] and the closed cities were put on a formal legal basis.[22] All the same, their social−economic situation remained precarious. The Russian Federation may have committed itself to balancing their budgets with "subventions, subsidies, and endowments" (Art. 5 Par. 1, ZATO Law), but the flow of money into these closed cities remained weak.[23]

Agencies within the closed cities' local administration may have been authorized since December 1991 to grant tax breaks to companies with headquarters in the community's territory, but the closed cities made little use of this right. No improvement in conditions was in sight, but the problem had to be solved. Thus lawmakers in March 1998 expressly empowered closed city administrations to "grant additional reductions in taxes and fees to legal entities that are registered as tax payers with the tax authorities of closed territorial administrative units".[24] A government order regulated the procedure.[25] The ZATO administration could bestow the tax cuts only with agreement from the Finance Ministry of the Russian Federation.[26] To obtain permission, a ZATO administration had to enclose not only the application of the company interested in tax breaks and its own "statement on the usefulness of granting the privileges", but also a series of other documents: certification from the ZATO tax authorities, formal registration of the interested company in the ZATO, a calculation by the ZATO of the additional receipts to be expected as a consequence of the privileges in question, and finally a commitment by the entrepreneur to use "50 per cent of the volume of tax savings for investments and the creation of workplaces" in the closed city (point 3).

Granting tax exemptions was in no way easy, but was instead connected with numerous conditions. The federal finance and tax authorities did not have full regulation authority, but they did have the right to take part in deciding the application of an interested company.

Article 5 of the ZATO Law was again changed in 1999 in a move apparently designed to make getting ZATO tax breaks more difficult. According to these changes, privileges were to be granted only to those companies that put 90 per cent of their fixed assets in the closed city, developed 70 per cent of their activities there, or had 70 per cent of their workforce with their permanent residence in the closed city.[27]

Such was the legal situation ZATO investors, including Yukos, had to assume. In December 1997, Yukos founded a series of subsidiaries for the distribution of oil and oil products in the legal form of limited societies (*obshchestvo s ogranichennoi otvetstvennost'yu* −− OOO). These were Biznes−Oil, Mitra, Val'd−Oil, Forest−Oil, TK Al'khanai, Perspektiva−Optimum, and Invest−Proekt. Several of them registered in the closed city of Lesnoi in Sverdlovsk Region[28] and were recognized by the Lesnoi administration as tax and fee privileged companies. Later, they even fulfilled the stricter prerequisites for recognition passed in 1999. This was expressly confirmed on Biznes−Oil in a note dated 7 March 2000 that was itself based an on−site inspection carried out on 16 December 1999.[29] The confirmation also applied to the period after the ZATO law was tightened in April 1999.

In the indictment, the matter is presented as follows:[30]

> In violation of Art. 5 of Russian Federation Law Nr. 3297−1, "On Closed Territorial Administrative Entities" of 14 July 1992, the OOO Biznes−Oil, which undertook practically no activity in the ZATO territory of the city of Lesnoi, was unlawfully (nepravomerno) registered in 1999 in said city by the city's administration as a tax payer with the right to preferential tax assessment as a result of actions taken by members of a group organized under Lebedev and Khodorkovsky's leadership. Afterwards, the participants of the group organized under Lebedev and Khodorkovsky's leadership submitted in the name of Biznes−Oil OOO via A.V. Spirichev to the inspectorate of the Russian Ministry for Taxes and Fees in the city of Lesnoi, Chapaev St. 2, tax declarations for 1999 knowingly containing false information on the existence of tax privileges for the following types of taxes: value added tax, housing fund tax, road usage tax, fuel tax, and profit tax. As a consequence of said activities, budgets at different levels were paid 1 217 622 799 roubles less in taxes, which is also means tax evasion.

The accusation of tax evasion stands and falls with the answer to the question whether the tax and fee privileges were lawfully granted and, if their granting was unlawful, whether the privileges were obtained deceitfully by means of fraud on the part of officials from the companies in question.

The search for answers to these questions within the indictment and verdict leads nowhere. The unlawfulness of granting the tax privileges to the Yukos subsidiary is merely alleged. There is not even a pretence of justification. In typical fashion, Russian budget legislation goes unmentioned, and the repeated amendment of Art. 5 of the ZATO Law is left in the shadows. The government decree of 1998 is no more acknowledged than the complicated procedure for granting tax privileges. That the federal finance authorities were (and are) involved in this process in a crucial way, above all Russia's Ministry of Finance, is simply swept under the rug. Thus the allegation that bestowing tax

privileges on Biznes−Oil was illegal is baseless in terms of finance and business law. Intentionally or unintentionally, the prosecutor's office and the court end up conveying the impression that the local administration and the central finance authorities were incompetent and subject to manipulation.

Even the alleged fraudulent actions of Menatep−Yukos managers in the ZATO complex are merely an insinuation. No act to support the allegation of deceit and fraud is ever presented. The indictment and verdict are limited to tracing the founding of the subsidiaries. As in the case of the subsidiaries involved in buying Apatit shares on the secondary market, the subsidiaries here are also classified as bogus companies. This allegation in turn appears to somebody somewhere as sufficient grounds for asserting that the activities pursued by the Yukos subsidiary were illegal per se. Considerations that the ZATO legislation by its very nature made possible de facto off−shore zones of a special kind within Russia, that their use for reasons of tax savings corresponded to their legislative purpose of giving enterprises an incentive to moving to closed cities, and that ultimately the subsidiary's strategy of "optimizing taxes" could have been legal are not even hinted at. On the other hand, all references to these circumstances is suppressed in that the legal basis for investing in ZATO areas is not even partially mentioned.

The accused were also convicted of tax evasion according to Art. 198 of the Tax Code, because they allegedly failed to meet their tax obligations properly in the ZATO matter through the payment of money, indulging instead in "payment in kind". Art. 45, Par. 2 of the Tax Code does not allow the obligation to pay taxes to be fulfilled this way.[31]

The Yukos subsidiaries did indeed pay their taxes by payment in kind until the end of the 1999 tax year. However, that was not illegal. Until the first part of the Tax Code went into effect (1 January 1999), the obligation to pay taxes could be met by cash equivalent, or surrogate money.[32] Payment in kind was thoroughly accepted as a means of payment, in fact, it was quite welcomed by the Lesnoi city administration because they brought the city interest, in other words additional income.[33] None of the exchanges "fell through". All were promptly turned in, and alone in 1999, over five billion roubles flowed from the incriminated companies into Lesnoi city coffers. There can be no talk of deceiving the state authorities or inflicting damage at the expense of the state budget.

Evading taxes by obtaining a status deceitfully?

The last charge in the indictment and verdict to be addressed here is the allegation that Khodorkovsky and Lebedev obtained the "status of a legal entity" by deceit and abused it, so as to avoid by illegal means assessment for income tax and payment of compulsory contributions to pension plans (Art. 198, Par. 2, Tax Code of the Russian Federation). What is behind this?

The Constitution of the Russian Federation makes a far more explicit commitment to economic freedom and free enterprise (Art. 8, 34−37, Constitution RF) than does the German Basic Law. The 1994 Civil Code also sets a corresponding tone to encourage and strengthen entrepreneurial activity, private individual initiative in the economy. Art 25 of the Civil Code expressly gives individuals the right to work "as an individual entrepreneur" (*v kachestve individual'nogo predprinimatelia*), in other words without joining others to form a company or by forming a "one−man limited company". This status provides incentive and certain advantages to citizens by exempting them from

income tax and pension contributions. They remain subject to taxation but by a considerably simplified procedure.[34]

A formally recognized individual entrepreneur obtains a licence, valid only for one year, from the responsible inspection of the Ministry for Taxation and Fees and pays a onetime payment, reassessed each year by the authorities according to certain criteria including the kind of business activity in question. The entrepreneur's accounting obligations are extremely simplified.

In 1997, half a dozen top managers at Menatep and Yukos −− among them Khodorkovsky, Lebedev, Leonid Nevzlin, Mikhail Brudno, and Vasily Shakhnovsky −− applied to be recognized as individual entrepreneurs. They each gave the nature of their entrepreneurial activity as "information and consulting services" in finance and in Russian business.

The recognition process (registration) is marked by legal order and a lack of bureaucracy and is not, as is often the case, issued by government order but with the authority of a presidential decree.[35] Registration ensues when a proper application is submitted along with a receipt showing payment of the registration fee. Registration takes place immediately if the individual in question appears personally, three days if the application is filed by mail. Recognition is granted indefinitely.

Extorting bribes by requesting additional documents or some kind of service −− the kind of behaviour common in post−Soviet bureaucratic practice −− is expressly forbidden by the decree (Point 8). The decree does not require any information about the nature and content of entrepreneurial activity. The authorities may only refuse registration on formal grounds should the documents presented fail to correspond to the decreed guidelines. A citizen can legally appeal his or her rejection. If the authorities within a month of registration discover that information provided in the application papers is incorrect, the entrepreneur has one week after reprimand to submit proper papers. As for the rest, the decree gives "any interested person", in other words even tax officials, the right to challenge somebody's recognition within six months. That is the legal situation.

In 1998, Khodorkovsky and Lebedev concluded contracts with the firm Status Services Ltd., headquartered on the Isle of Man, Great Britain, for consulting services in matters of Russia's financial and economic development and the corresponding Duma legislation. Lebedev received a consulting fee of 4 819 350 roubles (US$ 300 000) on 30 September 1998, 2 440 000 roubles (US$ 100 000) on 13 July 1999, 5 360 000 roubles (US$ 200 000) on 16 December 1999, and 7 735 750 roubles (US$ 375 000) on 27 June 2000.

The indictment and verdict view all this as tax evasion on a large scale.[36] The accused had concluded bogus contracts with Status Services Ltd., according to these court documents. Khodorkovsky and Lebedev in fact had provided no consulting services at all. Such services had never been intended from the start; to the contrary, the alleged consulting fees were in fact the salaries the accused received from Yukos in their official functions. The recognition, or registration, as individual entrepreneurs solely served the purpose of keeping their regular salaries from being subjected to income tax and of exempting them from pension contributions due otherwise. Lebedev was said to have cheated the state of 7 269 276 roubles between 1998 and 2000.

The interpretation of events by the prosecutor's office and the court actually does have something to it −− at least at first glance. However, prosecutors could not provide any evidence that the accused had either concluded bogus contracts or failed to provide any consulting services. The accounting clerk responsible for Platon Lebedev at the tax inspector's office in Moscow, M.V. Rodnina, said her office had no means of checking an applicant's information, in other wordsLebedev's as well, for correctness. The office has no budget for official trips abroad, read Ms. Rodnina's laconic statement. Thus the prosecutor's office and the court's allegations rest solely on circumstantial evidence: the fact that an entire group of Yukos and Menatep top functionaries simultaneously concluded such consulting contracts, that they did this together with Status Services Ltd., that fees mounted and reached substantial sums in a relatively short period of time, and that close ties −− allegedly −− existed between Menatep or Yukos and various companies located on the Isle of Man, in particular Status Service Ltd. For the latter, however, the prosecutor's office proved unable to present any conclusive evidence.

Naturally, Lebedev, Khodorkovsky, and the other "individual entrepreneurs" were not obliged to prove that they had provided consulting services. To the contrary, the burden of proof lay with the prosecutor. Art. 49, Par. 2, Constitution RF unmistakeably states the classic basis of criminal rights: "The defendant shall not be obliged to prove his or her innocence." Art. 14, Par. 2, CCP RF adds: "The burden of proof of a charge and the refutation of argumentation presented in the defence of the suspect or the accused lies on the side of the prosecution."[37] In the present case, the court can apparently support its case only with facts that fuel doubts about the seriousness of the consulting contracts. However, the circumstantial evidence brought forward does not provide the degree of certainty needed to silence any reasonable doubt. In any event, doubts remain here (as well) about the prosecutor's version of events.

With that, the classic principle of criminal procedure in *dubio pro reo* comes into play. In Russia, this principle enjoys the status of being anchored in the Constitution RF. There, Art. 49, Par. 3, reads, "The benefit of doubt shall be interpreted in favour of the defendant." According to one of the standard commentaries on the Russian constitution,[38] doubt is considered to remain "if the evidence gathered in a trial does not leave an indisputable conclusion of guilt or innocence and all means of obtaining evidence have been exhausted." Moreover, Art. 14, Par. 4, CCP RF makes it clear that a conviction may "not rest on insinuations". Furthermore, the semi−official commentary on the CCP RF states in addition that "only full proof (*lish' polnotsennaya dokazannost'* −− emphasis in the original) of information about the guilt of one or another individual with regard to a criminal offence can shake the presumption of innocence of a person".[39] Appropriately, the commentary points to the internal link between the principle of in *dubio pro reo* and the presumption of innocence embedded in the constitution (Art. 49, Par. 1).

August principles, golden words: the court ignored them. Acting in concert with the prosecutor's office, the court accepted the allegations, circumstantial evidence, and fabricated and biased evaluations filed against the defendants as "proof". Certainly, the court can invoke its freedom to weight evidence (Art. 17, CCP RF). Doing so, however, presupposes hard evidence. And it is quite obvious that there is a lack of hard evidence. Here, too, the Meshchansky District Court violated all of the rules expressly codified by the Constitution RF and the CCP RF to guarantee a fair criminal trial and to ensure those rules are observed.[40]

The Menatep−Yukos managers: An "organized group" for committing criminal offences?

The indictment and verdict could only demand and impose such unusually harsh sentences for white−collar crime, because both the prosecution and the court were agreed that the alleged criminal activities were committed in an aggravating and qualified form, namely by means of an "organized group".[41] Linked with charges or evidence of large−scale financial damage to the state, this qualifying characteristic raises the possible sentence for each offence by three or more years. The formation of an "organized group" was and is the legal formulation, the prosecution's decisive judicial "trick", to brand Khodorkovsky, Lebedev and other targeted top managers and owners of Menatep and Yukos as criminals.

This of course reflects in full what the broad mass of the population thinks of Russia's super−rich neo−capitalists, the "oligarchs", and it is obvious that it mattered dearly to the criminal justice system to exploit this well−known popular attitude to its own ends.[42] If one cannot rely on legality, on the Constitution and the Code of Criminal Procedure, on commercial and financial law, then at the very least there is the "healthy popular sentiment" of social justice!

According to Art. 35, Par. 3, of the Tax Code RF, an "organized group" is a form of jointly committed a crime. It is located somewhere between "a group acting on the strength of agreement" (Art. 35, Par. 2) and a "criminal organization" (Par. 4). Russia's Supreme Court understands the term to mean "a permanent group of two or more people who are linked to one another by the intent to commit one or more criminal offences."[43] As a rule, an "organized group" is characterized by a high level of organization, planning, and careful preparation of a criminal offence with roles distributed among the participants.

The indictment and the verdict present these criteria as met in the case of the Menatep and Yukos managers. The "organized group" was allegedly founded by Khodorkovsky, chairman of the supervisory board at Menatep Bank. In 1994, Lebedev, the bank's president, is said to have joined. There then followed Natalia V. Chernysheva (the head of the bank's privatization division), Andrei V. Krainov (a co−defendant in the trial and a colleague from the Menatep subsidiary and closed joint−stock company MFO Menatep), Mikhail B. Brudno (deputy chairman of the supervisory board of the closed joint−stock company Yukos PM), Andrei G. Gurev and Aleksandr V. Gorbachev (the respective department heads for mining and chemical industry for the closed joint−stock company Rosprom), and, as it is said in all the relevant documents, "persons who could not be determined during the preliminary investigation".

Khodorkovsky was allegedly the head of the group; Lebedev coordinated the group members employed at Menatep; Krainov was "responsible" for establishing the bogus companies, Chernysheva for counterfeiting documents. The prosecutor's office and the court considered the close personal relations between Khodorkovsky, Lebedev, Nevzlin and other top managers at Menatep and Yukos as evidence; these ties go back to the communist youth organization Komsomol and to the Perestroika era of the late 1980s.[44] The explanation for this lay largely in the lack of effort the prosecutor's office and the court put into presenting concrete facts concerning the details of Khodorkovsky and Lebedev's involvement in the alleged criminal offences. Instead, the authorities abstained from introducing conclusive evidence almost throughout the entire

trial. A thoroughly typical example is the following passage from the indictment:

> To commit criminal offences, various legal entities were established under Lebedev and Khodorkovsky's leadership by employees of Menatep Bank and the MFO Menatep in order to use them to commit fraud and cover up criminal offences.[45]

Perhaps the prosecutor's office and the court believed they were released from the burden of making a concrete argument and providing evidence, because activities would have to be ascribed to the members of the "organized group" (cf. Art. 35, Par. 5, Tax Code). Interpreted this way, assigning the personal contribution made by each person to a deed would seem superfluous; details do not appear to matter at all here.

That is especially the case in the present trial, but such a position is unconvincing. After all, the fact that the Menatep and Yukos managers Khodorkovsky, Lebedev, and others acted in a "organized" manner and worked together in various ways does not prove that they were an "organized group" as defined by Russian criminal law. They were in the end, without exception, managers at Menatep, Yukos, and other companies with interconnecting ties and thus acted without a doubt in an "organized" manner in carrying out their entrepreneurial positions and official duties. As a rule, their activities are not to be ascribed to them personally as members of an imaginary "group" but to those enterprises and companies in whose name they acted, for which they issued statements, filed applications, drew up documents, over whose accounts payments ran, and other transactions followed. The "organizational", "lasting", "systematic" relations between Khodorkovsky, Lebedev, and the other alleged group members can be easily explained by their entrepreneurial functions, their official corporate duties. Why should they have been a special, "organized group" independent of Menatep, Yukos, and other companies, held together by special interests and specific loyalties? The prosecutor's office and court did not ask themselves this question, nor did they address the issue. This would have been imperative, because fulfilling normal management functions and official duties in a company does not and cannot constitute criminal activity *prima vista*. So the suspicion arises: the prosecutor's office and the court decided not only on this construction to justify the stiffer sentence but, apparently, to find a comfortable way around their lack of evidence.

But there are other, deeper, reasons why the prosecutor's office and the court are inclined to perceive certain economic and legal activities from the point of view of criminal law: their understanding of capitalist entrepreneurs, who with enough fantasy act in a difficult, confusing environment of partly absent and partly untried rules to earn as much profit as possible for their enterprises while paying a minimum in taxes. As a result, investigators, prosecutors, and judges view the normal −− or in any event widespread −− use and misuse of instruments of civil and company law, business, finance, and procedural law with suspicion, misunderstanding, and deep−seated, negative stereotypes of capitalism.

Something else to be considered is the socialization of the current generation of jurists. As in the Soviet Union, criminal law still dominates legal training in Russia to the relative detriment of civil and business law. This has had ominous consequences in lawyers' attitudes toward judicial and legal policy during the political, social, and economic transformation process. As a result, it

is not surprising that normal civil and commercial law procedures are measured according to criminal law and appear to be an "abyss" of malicious, criminal intrigues: completely legal subsidiaries established under observance of the regulations contained in company law and recognized ("registered") by the state become "bogus companies", the documents issued by them are "forgeries" are intended to deceive the legal process; economically motivated applications filed with state organs for services, benefits, or privileges foreseen by law are acts of deception and serve to mislead.

As a result, analysis of the charges against Khodorkovsky and Lebedev and their basis show a continuous pattern: as a result of a bias toward the defendants, their business activities, decisions, and transactions are declared illegal without adequate examination under civil, business, and finance law, in other words without grounds, and the defendants suspected of criminal intentions. Based on this assumption, the facts are selected one−sidedly to the detriment of the defendants and interpreted to their disadvantage without exception. The arguments presented by the defence to refute the indictment are also ignored as is exonerating evidence. The Meshchansky District Court in Moscow even ignored evidence (documents, witness statements, etc.) that was introduced by the prosecutor's office but found sufficient to exonerate the defendants or actually did exonerate them. By its biased conduct of the trial, the court *de facto* cast the defence in the demeaning role of extras. By one−sidedly following the motions submitted by the prosecutor's office during the main proceedings, the court systematically and grossly violated almost every basic procedural right of the accused as well as the standardized, constitutional principles of trial conduct in their interest: the right to effective council (Art. 48, Constitution of the Russian Federation; Art. 16, CCP RF); the adversarial and equal basis of the accused and the defence (Art. 123, Art. 3, Constitution of the Russian Federation; Art. 15, CCP RF); the presumption of innocence in favour of the accused and the principle of in *dubio pro reo* connected with it (Art. 49, Constitution of the Russian Federation; Art. 14, CCP RF); the prohibition against prosecuting the innocent (Art. 6, Par. 2, CCP RF); the binding of the courts to the constitution and the law (Art. 7, CCP RF); and the obligation to conduct an impartial and fair trial (Art. 15, CCP RF).

The Prosecutor General's Office during the investigation: Arbitrariness in action

The violations of rights admitted in the trial and in the verdict were comparable in their magnitude and intensity with a provocation, and yet they were no longer really surprising after every thing else the defendants had experienced at the hands of the prosecutor's office: the courtroom prison cell, the infamous Basmannyi prison, and the preliminary proceedings.

Tactical action with strategic goals

The prosecution's methods in pursuing managers from Menatep−Yukos followed a certain pattern from the start: all the stops were pulled. Lebedev, Khodorkovsky, and the others were prosecuted with the full force of the state. And it is no contradiction that in the summer of 2003, when the prosecution of Yukos got underway, the authorities proceeded rather cautiously at first, initially appearing undecided as to whether the persons targeted were only to be called in for questioning as witnesses, immediately arrested and imprisoned as accused, or given time and opportunity to avoid the clutches of the authorities and flee abroad as "oligarch" Boris Berezovsky showed could be done.

The possible alternative −− to take action against Yukos, its main shareholders, and top managers in a head−on attack and "in one blow" −− probably seemed to the presidential administration less advisable for a number of more important political considerations. Russia's greater integration into the world economy and its position in international politics as well as Yukos's rise as a globally significant economic enterprise and Khodorkovsky's high profile in the US and European business world advised caution. As a result, it was decided to act gradually. The "drawn out process" had the great psychological advantage of letting the public in Russia and "the West" get used to the measures being taken against Yukos and its managers; observing the extent of reactions from the business world and political scene; making tactical climb−downs; downplaying the significance of individual procedures over time; and repeatedly nurturing the vague hope in influential circles that the case would come to an amicable, "political" solution, to a "mild end". In short, the "drawn out process" was seen as achieving the political goals of the attack on Yukos in the broadest sense, without inflicting excessive damage on Russia's image in the world.

Although incomparably less information about Russia's internal debates, factional disputes, and decision−making process makes its way into the public domain than in the Yeltsin era, it is quite clear in the Yukos affair that two "schools of thought" stand opposite one another. On one side are the supporters of a diligent, liberal course of Russia's full integration into the world economy. These persons are to be found above all in the economic and financial ministries of the "government", but also in the presidential administration, albeit to a lesser extent. On the other side stand members of the intelligence services, the military, the Interior Ministry, and the Prosecutor General's Office who are guided first and foremost by state power, geo−strategy, and conceptions of security, in short those known as the *siloviki*.[46]

That the presidential administration wanted to make an example of Khodorkovsky and at the same time warn other "oligarchs" still at large within Russia was made unmistakably clear by Deputy Prosecutor General Vladimir Kolesnikov during a press conference on 12 November 2003:

> It is said that Khodorkovsky did not kill. Yes, he did not kill. He did not wield the cudgel. This is in fact so. But in the present case, another logic must be applied. Above all, it must be seen how the majority of Russia's population lives while a considerable part enjoys a top income. The minimum wage is 600 roubles, the minimum pension 160. Now let's convert these billions [dollars are meant, O.L.] into roubles. That the Russians did not receive these additional billions means that 49 166 666 persons were unable to receive their full monthly wage, and 18 437 500 persons were unable to receive a full pension.

And Kolesnikov added threateningly, "Those who aren't yet sitting [in jail] should think about how they are in the end employed."[47]

Although the investigation at this point was far from over, Kolesnikov "predicted" that Khodorkovsky could expect a sentence of ten years. That corresponded exactly to the prosecutor's later motion in the indictment against Khodorkovsky and Lebedev. The scenario was arranged in advance. Towards the end of the trial in April 2005, presidential advisor Igor Shuvalov made it clear to the public where the script had been written:

> The state had recognized that in terms of economics one had to work with what one had. [...] If it hadn't been Yukos, it another company would have had to answer for tax violations.[48]

Hard measures, according to Shuvalov, were necessary, "no matter how it affects the state's image".[49]

The arrest of Platon Lebedev

The assault on the Menatep−Yukos conglomerate began on 19 June 2003, when Aleksei Pichugin was called as a witness in the trial for the murder of Sergei and Olga Gorin, but was then arrested and, on a judge's order from 21 June 2003, imprisoned.[50] The courtroom prison cell was Moscow's Basmannyi District Court, a name that has become a synonym for politically arbitrary justice (Basmannyi sud).[51] In advance, the domestic secret service FSB had tried to convince Pichugin to "cooperate" in a trial against top Yukos managers, in particular against Leonid Nevzlin. Pichugin declined the "offer".[52]

Pichugin's arrest may have already aroused certain fears, however, the public became fully aware that the Kremlin, the presidential administration, the Prosecutor General's Office, and the FSB had Yukos in its sights only when MFO Menatep Chairman Platon Lebedev was arrested on 2 July 2003.[53] On 4 July, Mikhail Khodorkovsky and Leonid Nevzlin were questioned for hours at the Prosecutor General's Office. Earlier, Khodorkovsky had declared publicly that he did not intend to leave Russia and emigrate.

From the start, the event was perceived in Russia for what it turned out to be during the course of events; it remained veiled by soothing language and caution only on the "diplomatic stage" at best. The Kremlin assigned the campaign to the Prosecutor General's Office with two goals in mind. The first was to render Mikhail Khodorkovsky harmless in an election year after he had financially supported political parties opposed to Putin −− Yabloko, Union of Rightwing Forces (Soyuz Pravykh Sil), and the Communist Party of the Russian Federation −− and had announced his move into politics; and second, it was hoped to bring the Yukos conglomerate back under the control of the state, in other wordsthe control of the presidential administration.

The decision to remand Lebedev is highly contestable. It may have been issued by a court and examined by the Moscow City Court in an appeal in October 2003 (review of remand), but it fails to convince. Just how unconvincing prosecutors are on this point is easy to prove.

In Russia's code of criminal procedure, the material and legal prerequisites for ordering a person's detention during an investigation involve two steps: general and special prerequisites must be met. Initially, at least one of these prerequisites as formulated by law has to be submitted before it is at all possible to take action against an accused individual −− in special cases against a suspect as well −− using compulsory measures (*mery presecenija*) to secure the state's prerogative to inflict punishment. Remand is only one, admittedly the most severe one, of seven measures available to choose from under Art. 98, CCP RF. House arrest (Art. 107), bail (Art. 106), bond (Art. 103), or a statement that one will not leave town (Art. 102) are among the other alternatives to be considered.[54] Art. 97, Par. 1, CCP RF stipulates that measures more or less strictly curtailing a person's freedom are only permissible:

> when the accused hides from the investigating agencies or the court, or continues his criminal activity, or if it is possible that he poses a threat to a witness or any others participating in a trial, will destroy evidence, or in some other way impede proceedings.

A special, additional prerequisite for ordering remand contained in Art. 108 requires that, first, punishment for a crime leading to at least two years imprisonment could be imminent, and that, second, it "is impossible to apply another milder means of security connected with restraint".[55]

The decision which preventive means are to be selected and used against an accused individual should therefore apparently be guided by the principle of commensurability. For remand, the most severe means of prevention, this means it may be ordered if, and only if, the prosecution and the securing of evidence cannot be achieved by some other effective and milder means allowed by law, in other words bail or house arrest.

As for the present case, the prosecutor's office justified Lebedev's arrest and subsequent remand by claiming he had tried to evade investigation, that the danger still existed, and that active obstruction of the investigation was to be feared of him. The prosecutor's office was not able to back up these claims convincingly; to the contrary, Lebedev had given no cause for such suspicions. That must have been obvious to the prosecutor's office, for Lebedev on 20 June, after Pichugin's arrest, followed the request for a "talk" with lead investigators Salavat K. Karimov, Mikhail A. Bezuglyi, and Valery A. Lakhtin in the building of the Prosecutor General's Office, although he was not formally called as a witness −− a clear sign of his "willingness to cooperate". On 26 June 2003, Lebedev, in a summons conveyed to him by his lawyer, Anton Drel, was again called as a witness for 27 June. Although this occurred on extremely short notice by telephone, in other words orally and thus in violation of legal process (Art. 188, Par. 1−2, CCP RF),[56] Lebedev said he was willing to appear.[57] That very day, 26 June, the prosecutor's office cancelled the appointment, and Bezuglyi informed Drel that there were no further questions for Lebedev.

Things turned out different −− perhaps because Vladimir Yudin,[58] a Duma representative known for his demagoguery and deputy chairman of the Duma's Committee for Economic Policy and Entrepreneurship, had formally reported Lebedev to the police −− on cue? −− in the Apatit matter (as well as Roman Abramovich, another prominent "oligarch").[59] In the early morning of 2 July, Lebedev checked into the Vishnevsky Hospital with nausea. Several hours later, the prosecutor's office issued Drel a summons for Lebedev to appear as a witness on 3 July at 10 a.m. Instead of sticking to this appointment, Bezuglyi suddenly appeared in the hospital in the company of numerous FSB officials and hospital personnel on 2 July at 4:35 p.m. Lebedev was arrested and led away in handcuffs.

At the Prosecutor General's Office, Lebedev proposed that the various summons of his person as a witness and the resulting exchange of memoranda be presented to the court, and later in Basmannyi District Court, he tried to oblige the Prosecutor General's Office to present this documentation, so as to provide evidence that he at no time intended, let alone attempted, to evade the investigation. To no avail! Instead, the Prosecutor General's Office months later presented for the court records a copy of a legal note (*spravka*) written by Bezuglyi, formally "as a witness"(!) to the fact that the "head of the

investigation Bezuglyi" had acted correctly with regard to Lebedev. The department for internal oversight at the Prosecutor General's Office allegedly notarized the "witness statement" on 4 July 2003.

Although the arbitrariness of the Prosecutor General's Office in dealing with the elementary rules of procedure for questioning witnesses and imprisonment was obvious, Judge Andrei V. Ranovsky rejected out of hand all motions on the part of the defence and adhered unwaveringly to the request for imprisonment filed by the Prosecutor General's Office.

Even inasmuch as the prosecutor's office based the necessity of ordering remand on the fear that Lebedev would try to impede the investigation by influencing witnesses, destroying evidence, etc., it still lacked concrete facts. It not only had to provide facts, but had to make them credible. Art. 99, CCP RF urges the prosecutor's office and the court to take into consideration the following circumstances in particular when applying measures of restraint, in this case, Lebedev's remand: 1) the gravity of the charges; 2) facts that characterize the accused as a personality; 3) age, health, familial relations, nature of professional activity.

Alone, neither the prosecutor's office nor the court allowed such subtleties to influence their decision to remand Lebedev, rather they relied on the abstractly presented fear that Lebedev could and would, once free, exert pressure on witnesses or suppress evidence. Here, we have an extreme violation of Art. 108 in connection with Art. 99, CCP RF. It is also here, however, where both institutions of justice followed a strong, uninterrupted tradition of Soviet−style criminal justice. Surveys from the turn of the 1990s show that, on average, 80 per cent of lead investigators and investigating officials consider providing evidence to justify a person's imprisonment non−essential, something that can be dispensed with.[60] The new CCP RF stands firmly in conflict with this attitude and practice. Russia's Constitutional Court recently emphasized: "On the basis of the constitutional appeal introduced by Lebedev, [the Constitutional Court] noted in a decision of 22 March 2005 the criminal justice system's obligation to produce hard, real evidence for the justification of a decision to remand."[61]

With its behaviour, the Basmannyi District Court has also violated the principle of commensurability, an inherent principle in the remand process, for it failed to show why the judicial end of restraint would not have been just as well fulfilled had Lebedev paid bail or been placed under house arrest. In addition, with its decision to order the most severe restriction of personal freedom, the court also abused the presumption of innocence in Lebedev's favour (Art. 49, Par. 1, Constitution of the Russian Federation). It treated him without question like a criminal.

Mikhail Khodorkovsky's arrest

Khodorkovsky was not to have it any better than Lebedev −− to the contrary. He was arrested at 5 a.m. on 25 October 2003 in dramatic circumstances at the Novosibirsk airport Tolamchevo. Khodorkovsky was on board a Tu−134 chartered by Yukos from the private airline Meridian. The plane had arrived from Nizhny Novgorod. The day before in Samara, Khodorkovsky had informed employees at Samaraneftegaz, a Yukos subsidiary, about the perspectives for Yukos's fusion with Sibneft, visited the regional centre of his foundation Open Russia (Otrkytaya Rossiya), and held confidential talks with the governors Konstantin Titov of Samara and Dmitry Ayatskov of Saratov on

cooperation in the region.[62] Now he was on the way to Irkutsk to open a two−day seminar on "State Power, Business, Society", which was organized by his foundation and attended by 120 politicians and journalists from Siberia.

Khodorkovsky's plane allegedly made a stopover for fuelling, but was in fact forced down on instructions from Moscow, from the "Lubyanka", the building that once housed KGB headquarters. The plane was towed to a position beyond the terminal and surrounded. Several dozen members of the FSB anti−terrorist group Alfa, clad in bullet−proof vests and masks, stormed Khodorkovsky's cabin shouting, "FSB, hands up, sit down, don't move, ID control, weapons on the ground, otherwise we'll shoot!" With the words, "Good, let's go," Khodorkovsky placed himself in the hands of the inevitable.[63]

By law, Khodorkovsky had to be brought before the magistrate of the regional court in Novosibirsk within eight hours, because the respective local court in whose jurisdiction the arrest takes place is responsible for the decision to remand (Art. 108, Par. 4, CCP RF).[64] This did not happen, however. On the contrary, Khodorkovsky was flown to Moscow two hours later in a special Tu−134 used by the FSB. Once there, he was brought before Magistrate Rasnovsky of the Basmannyi District Court, who −− as was to be expected −− approved the petition from the Prosecutor General's Office on the grounds that Khodorkovsky had "wilfully" and without good reason (*bez uvazhitel'nykh prichin*)[65] avoided a summons from the Prosecutor General's Office to appear for questioning as a witness. This was baseless and thus untenable. First of all, the prosecutor's office had scheduled the appointment for questioning at unreasonably short−notice, and second, Khodorkovsky had properly met the obligations of a witness as stated in the CCP RF. This is shown by the following chain of events.

On Thursday, 23 October 2003, Khodorkovsky's lawyer Drel received a summons from the Prosecutor General's Office for Khodorkovsky to appear "as a witness" at 12 p.m. on Friday, 24 October.[66] At that time, Khodorkovsky was already in Saratov on a business trip along the Volga River and to Siberia. Therefore, Khodorkovsky received neither a summons (Art. 188, Par. 2, CCP RF), nor an effective substitute service of writ.

As in Lebedev's case, the Prosecutor General's Office stuck to its practice of issuing summons at extremely short notice. According to the legal commentary, a summons is considered filed in a timely manner (*svoevremenno*) if the person summoned can keep the appointment "without having to make an extraordinary effort".[67] This is clearly such a case. Khodorkovsky would have had to interrupt his long planned business trip −− which was without a doubt known to the Prosecutor General's Office and the FSB −− and return to Moscow. Such a decision, in addition to the resulting damages to his work, was not to be expected of him.

The law even takes this into consideration by expressly allowing a witness to miss the appointment with a "sound", in other words well−founded, excuse. Art. 188, Par. 188, of the CCP RF states that the summoned person appear at the scheduled appointment or (sic!) inform the chief investigator in advance of his reasons for not appearing.

Khodorkovsky did this, for he had Drel immediately inform the Prosecutor General's Office that he could not appear at the appointed time due his business trip and asked that a new appointment be set. The prosecutor's office was not willing to do this. According to the rules of procedure in the CCP RF,

it had to be willing to do so under these circumstances. Only when the reasons given by the witness are not well founded does the prosecutor's office have the right to order to bring him before a court. Khodorkovsky obviously had a well−founded reason for not appearing.

The handling of this case by the Prosecutor General's Office can only be called ruthless and arbitrary. Prosecutors ignored and abused witnesses' legitimate interests as expressly recognized in the CCP RF and structurally integrated into its rules of procedure as well as those of other persons suspected, accused, and indicted in the Yukos complex. Although not yet considered a suspect at the time but summoned as a witness, Khodorkovsky was treated by the FSB as a criminal, as a terrorist. "To judge after the fact how an arrest should follow", noted deputy chairman of Federal Council, Valery Goreglyad, "is clearly an act of intimidation (*aktsiya ustrasheniya*)."[68] Indeed! But the code of criminal procedure does not give the investigating agencies the power to act this way!

Just as with Lebedev, the court order to detain Khodorkovsky for the duration of the remaining investigation was also unjustified. "Sound" reason to detain him could not be produced. The suspicion that Khodorkovsky could or would avoid prosecution by fleeing abroad was obviously unfounded. On 13 October, only days before his arrest, Khodorkovsky returned from a business trip to the United States −− and did so although the searches and confiscations at Yukos carried out by the Prosecutor General's Office on the eve of his departure had reached a new climax and his own imprisonment was "up in the air". Moreover, since the start of the attacks on Menatep−Yukos, Khodorkovsky had repeatedly rejected such a move. The day before his trip to the United States, he said once again in no uncertain terms, "If it is about forcing me out of the country or locking me up, then they will have to lock me up, for I'm not going to be a political emigrant."[69] And not without irony, he then added that "on Saturday", immediately after his return, he would be at the disposal of the prosecutor's office.

The prosecutor's office and court also offered only unsubstantiated, abstract "justification" for the other grounds for Khodorkovsky's remand. One can only wonder whether any of these illegal practices will change after the aforementioned landmark decision of the Russia's Constitutional Court on 22 March 2005.

Acts of intimidation aimed at Yukos lawyers

Among the most malicious and flagrant violations of the law by the Prosecutor General's Office during the investigation (and later) were actions taken against the lawyers for the Menatep−Yukos managers, in particular searches of offices, summons for questioning with regard to legal action against clients, searches and confiscation of files, and detention. Altogether, these constituted gross acts of intimidation and threatened to undermine any chance of an effective defence in the Menatep−Yukos complex; in some specific cases, this had already been rendered impossible.

The legal situation is clear: these kinds of practices in unlimited form are forbidden or tied to very narrow, legal prerequisites. Art. 56, Par. 3, of the CCP RF strictly forbids the prosecutor's office and court from summoning a lawyer as witness: first, in general, regarding circumstances that became known to him in connection with legal consultations (Nr. 3), and second, in particular, regarding circumstances that came to his attention during his activity as a defence attorney for a suspect (Nr. 2). The prosecutor's office ignored these

rules. On the whole, it moved in the days before and after Khodorkovsky's arrest with a ruthlessness and impudence against Yukos lawyers that has not been seen in the new Russia under its rule of law−based constitution.

On Thursday, 9 October 2003, a team of investigators from the Prosecutor General's Office under S.K. Karimov searched Drel's office.[70] They neither informed Drel, as the law envisions, nor did they bother to get the necessary warrant from a judge, as required by Art. 3, Par. 8, of the Law on Attorneys.

They exploited the "opportunity" −− this can only be defined as cynicism −− or the circumstances that Drel at the time was on the way to the Moscow City Court, where the legality of Lebedev's remand was to be heard by the Basmannyi District Court on appeal. Drel, informed by cell phone, drove straight back to his office, but he was prevented from even entering the building. His immediately telegraphed a complaint to Prosecutor Vladimir Ustinov but to no avail.

A week later, on 16 October, while Drel was consulting with Lebedev, an investigator handed him a summons for questioning in the Prosecutor General's Office. Genri Reznik, president of the Moscow Bar Council, was completely taken aback: "The actions of the Prosecutor General's Office are glaringly lawless", he said in outrage.[71] The bar quickly convened for an extraordinary meeting and forbade Drel to heed the summons by threatening to revoke his license to practice law. Drel' obeyed. The Prosecutor General's Office initially left him alone, but then summoned him again for questioning on 27 October 2003. Again, the Moscow Bar Council intervened and was in the end successful.[72] Summons were also received by Yukos lawyers Vasily Aleksanyan and Dmitry Gololobov, but they too were ignored.[73]

Olga Artyukhova, another lawyer on Khodorkovsky's team, fell victim to another scandalous breach of law. As she was leaving Matrosskaya Tishina, a special facility of the Chief Administration for the Execution of Punishments, on 11 November 2003 after a talk with Khodorkovsky about defence strategy, she was asked to turn over everything that did not belong to her (meaning papers from Khodorkovsky). She denied having anything that was not hers. Since the talk with Khodorkovsky took place under permanent observation, this was obviously a provocation and simultaneously an attempt to intimidate her. At that point, Artyukhova's files were searched. Just as her notes from the talk were about to be seized, she managed to grab one of the pages. She ran to the corner of the room so as to tear it up. A scuffle ensued. Upon renewed protest, her files were returned with the exception of one page.[74]

The events require no additional commentary. They scream for themselves.

Concluding remarks

Written versions of the verdict were given to Khodorovsky and Lebedev on 6 June 2005.[75] Since the ten−day period for filing subsequent legal steps −− appeal or cessation −− had already begun ticking with the conclusion of the reading of the verdict on 31 May 2005, their lawyers had in reality only four days to file for appeal. Khodorkovsky filed his appeal at the responsible Moscow court on 9 June 2005.[76] Lebedev refused, saying the written version of the verdict contained passages that the court had not read aloud, and conversely, passages in the written version had been omitted in the reading of the verdict. For reasons of health, he could not and did not intend to take on the foreseeable farce of an appeal; instead, he would save his strength for the

hearings before the Russian Supreme Court and the European Court of Human Rights.[77]

Postscript

After this analysis was completed, the trial against Khodorkovsky and Lebedev came to an unexpectedly abrupt end: the Moscow City Court reached a verdict in appeal late in the evening of 22 September 2005 at the end of a one−day hearing. It rejected Khodorkovsky's complaints, but reduced the sentence by one year to eight years, because the crimes of frustrating the execution of a court judgment had since come under the statute of limitations. The court almost had to reduce the sentence further, since the ten−year deadline for the allegedly criminal acquisition of the controlling package of shares in the fertilizer research institute would have expired the next day as well!

The proceedings at the Moscow City Court corresponded to the cynical dealings practiced in the Meshchansky and Basmannyi district courts, mocking again the most elementary principles of a fair criminal trial! The three judges in the appeal −− Marienko, Tarasov, and Lokhmacheva −− did not hesitate to treat the intricacies of the Khodorkovsky case, which were very difficult in real terms and partially in legal terms, as a banal case of petty theft. How can a court interested in maintaining its authority vis−à−vis the public hear in one day a case involving a "mountain" of 450 binders from the prosecution, 30 binders of courtroom protocol with 6500 pages from the first instance, a 600−page verdict, as well as a 700−page appeal? And how can a court tackle such a wealth of material in deliberations that failed to last an hour? That was not passing judgment, but a "parody of passing judgment", remarked Khodorkovsky lawyer Yury Shmidt bitterly.[78] In his entire career as a lawyer, which goes back to 1961, he said, he had never encountered such abuse and violation of the code of criminal procedure, not even in the Khrushchev and Brezhnev eras.

If anybody still harboured any doubts that the Khodorkovsky−Lebedev case was from the start thoroughly politically motivated, directed and controlled right down to the last detail by the presidential administration, then the rush to judgement in the appeal put those doubts to rest. The hasty end of the appeal almost before it had begun, alongside a final decision ending the trial that went into effect that very day, had only one basis, namely a political one: to prevent Mikhail Khodorkovsky from being registered by the Russian Central Election Commission as an independent candidate in the Moscow University District so that he could take part in the by−election to the Duma in early December 2005. An initiative started by prominent politicians from the democratic camp had been pushing for his candidacy since August. As a citizen whose conviction was not yet legally in force, Khodorkovsky's candidacy was essentially open, and in the event of his election, he would have enjoyed the immunity of a Duma representative. That was the decisive political background of the appeal process; the imminent expiration of the statute of limitations on another charge played a subordinate role.

The city court opened the appeal trial on 14 September, but could not hold hearings on that day, because Khodorkovsky's lawyer, Genrikh Padva, was in the hospital. Khodorovsky did not pass on his brief to another lawyer, and there immediately ensued a series of procedural violations on the part of the court. It was clearly interested only in a rash conclusion. First, Platon Lebedev was forcibly brought into the courthouse although he had expressly refused to file an appeal. The court illegally tried to incorporate him into the trial, but to

no avail. Second, instead of waiting for Padva's return from hospital −− a matter of days at most −− the court tried to convince Khodorkovsky to consent to trial without council. When he refused, the court had two of its lawyers from a lower court come and tried to impose them on Khodorkovsky as assigned council. When he insisted on his right to defence by an attorney of his choice, in this case Genrikh Padva, one judge let fly the memorable remark, "You're not in Strasbourg here!"

In the end, Khodorkovsky got his way. The trial was delayed for a week, Padva returned from hospital, and the court invited Khodorkovsky's St Petersburg−based lawyer Yury Shmidt to participate in the trial. None of them had any idea that they would be anything but extras in an absurd theatre of justice. The day after the ruling, Shmidt was not even allowed to see his client anymore.

While the lawyers got started with their case for the European Court of Human Rights in Strasbourg, Khodorkovsky was sent to penal camp Krasnokamensk in the Transbaikal Region not far from the Mongolian−Chinese border. Lebedev was taken to the penal camp Kharb, near the mouth of the Ob' on the Arctic Ocean.[79] By choosing these places, the presidential administration once again ignored the law. Art. 73 of Russia's code of executing sentences states that a criminal must serve a sentence in the region where he resides or where he was convicted, in other words somewhere in the greater Moscow area. Only in exceptional cases can it be decided differently, but even then, the sentence is supposed to be served in a nearby region. Even the law governing sentences is but shredded paper when it conflicts with political considerations of expediency. This bodes ill for everyday life in Russia's penal system.

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1 Proceedings against Lebedev began on 20 May 2004 and against Khodorkovsky on 28 May. On 16 June 2004, the two cases were merged with the proceedings against Krainov (Art. 153, Code of Criminal Procedure of the Russian Federation), *Izvestiya*, 21 May 2004, 2, and 17 June 2004, 1. See also *Novaya Gazeta*, 38 (2004), 7.

2 Moscow has 34 district courts and, as a court of appeals, or court of appeal, the Moscow City Court. On 6 February 2004, the Meshchanskii District Court sentenced Vasilii Shakhnovskii, the former head of Yukos−Moscow, to a suspended year in prison for large−scale tax evasion, namely 28.5 million roubles. The court showed leniency, because Shakhnovskii paid the sum demanded −− naturally without recognizing the legitimacy of the settlement −− and no longer worked at Yukos, "Skhema nalogovogo prigovora", *Kommersant*, 7 February 2004, 4. On 30 March 2005, the Moscow City Court in a trial by jury sentenced Aleksei Pichugin, the former head of Yukos's Internal Economic Security Division, to 20 years in a high−security penal facility. See summary of the Pichugin Case in "First Verdict in 'Yukos−Complex'", *WGO, Monatshefte für Osteuropäisches Recht*, 1 (2005), p2ff., as well as Resolution 1418 (2005), "The circumstances surrounding the arrest and prosecution of leading Yukos executives", rapporteur Sabine Leutheusser−Schnarrenberger, available online at http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1418.htm. Altogether, criminal proceedings are pending against 30 Yukos employees. An overview is provided at http://khodorkovsy.ru/around/1320.html.

3 "V poiskakh tochki otcheta", *Nezavisimaya gazeta*, 2 July 2004, 8.

4 See *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* (SZRF), Nr. 52, Pos. 4921, with introductory law, Pos. 4922.

5 Quoted from "Sud i nyne tam", *Novaya gazeta*, 38 (2004), 7.

6 The argument section may be excluded from public pronouncement after "closed", in other words secret, trial proceedings and must be announced elsewhere. (Art. 310, Par. 4, CCP RF).

7 See the reporting in Russia's mainstream press, namely *Izvestiya*, *Kommersant*, *Moskovskie novosti*, and *Novaya gazeta*, in their printed and electronic versions between March and July 2005.

8

Kommentarii k ugolovno−protsessual'nomu kodeksu RF (Nauchno−prakticheskoe izdanie), Ministerstvo Vnutrennykh Del RF, Rossiiskaya Akademiya Gosudarstvennoi Sluzhby pri Prezidente RF (Moscow 2003), Art. 310, Note 3, 901f.

9 Roland Götz, "Rußland und seine Unternehmer. Der Fall Chodorkowskij", *SWP−Aktuell*, 45/2003, and Vladimir Milyutenko, "Zur Jagd auf die Oligarchen wird geblasen", *Vostok*, 4/2003, 8ff.

10 See Khodorkovskii's essay, "Krizis liberalizma v Rossii", *Vedomosti*, 29 March 2004, A5, excerpted in *Russlandanalysen* (Bremen 2004) [= *Arbeitspapiere und Materialien der Forschungsstelle Osteuropa, Universität Bremen*, 24], 10ff.

11 See European Parliamentary Assembly, Committee on Legal Affairs and Human Rights, "Circumstances surrounding the Arrest and Prosecution of Leading Yukos Executives", Doc. No. 10368, 29 November 2004, and "Final Report", 18 November 2004, in German at .

12 "Obvinitel'noe zaklyuchenie po obvineniyu Lebedeva Platona Leonidovicha v sovershenii prestuplenii, predusmotrennykh." (a list of offences follow), compiled by senior lead investigator S.K. Karimov, confirmed by Deputy Prosecutor General Yu.S. Biryukov, 26 March 2004, 539 pages. The text is available at www.khodorkovsky.ru/advocacy.

13 Consequently, lawyers are demanding the resolution be corrected accordingly, see the statement of 10 June 2005, on−line at the Web site: www.khodorkovsky.ru/process/daily/2710.html. The author visited the site on 14 June 2005.

14 In spite of a settlement made in this lawsuit, Deputy Prosecutor General Biryukov tried to roll out the case again in December 2003 by employing an extraordinary supervisory procedure in the Supreme Commercial Court in Russia. However −− quite remarkably −− the commercial court ruled against the measure in April 2004, see "Otklonen isk k vladel'tsu aktsii 'Apatita'", *Kommersant*, 16 April 2004, 4.

15 "Temnotu −− strashnaya sila", *Novaya gazeta*, 52 (2003), 9.

16 As of 18 July 2003, in other words the time of Platon Lebedev's arrest, ownership of the shares was distributed as follows: 3 429 393 shares at the public joint−stock company Fosargo; 858 435 shares at Earl Ltd.; 176 980 shares at Anura Holdings Ltd.; and 800 000 shares at Lex−Eaton Holdings Ltd.

17 Those named include N.V. Chernysheva, the head of the privatization department; A.V. Krainov, an employee of the *Menatep* subsidiary *MFO−Menatep*; M.B. Brudno, deputy chairman of the board of supervisors at the closed joint−stock company *Rosprom* and later first vice president of the closed joint−stock company *Yukos*−PM; the heads of the mining and chemical department of the closed joint−stock company *Rosprom*, A.G. Gur'ev und A.V. Gorbachev, respectively; and as it is always said, "persons who could not be identified by the lead investigators".

18 Cf. Art. 396 of the Civil Code of the Russian Federation.

19 Georgi Lappo and Pavel Polyan, "Transformation der Geschlossenen Städte Rußlands", *Berichte des Bundesinstituts für Ostwissenschaftliche und Internationale Studien* (Köln), 6/1997.

20 That has not changed to this day. The order of the Russian Government from 5 July 2001 (SZRF 2002, Nr. 29, Pos. 3019) provides an index with 42 closed cities. Since then, a few have been added.

21 See Pavel Fel'gengauer's watershed research in "Zakrytye goroda Rossii", *NG*, 30 June 1992, 5.

22 Law on the Closed Territorial Administrative Entities (ZATO), 14 July 1992. The text is available in VS VVS RF 1992, Nr. 33, Pos. 1915.

23 Gregory Brock, "Public finance in the ZATO Archipelago", *Europe−Asia−Studies*, 6/1998, 1065-1081.

24 Art. 47 of the Law of 26 March 1998 on the Federal Budget for 1998 (SZRF 1998, Nr. 13, Pos. 1464). Art. 5, Par. 1 of the ZATO law was changed using the same words on 31 July 1998 (SZRF 1998, Nr. 31, Pos. 3822).

25 Order of 15 June 1998 on Implementing the Regulations for Granting Additional Tax and Fee Privileges to the ZATO (SZRF 1998, Nr. 25, Pos. 2912).

26 Until the legal changes went into effect on 30 March 1998, the approval of the Finance Ministry was not necessary by the 1991 law. The Moscow Commercial Court determined this in a ruling on 23 January 2002.

27 ZATO Amendment of 2 April 1999 (SZRF 1999, Nr. 14, Pos. 1665).

28 Lesnoi was formerly known as Sverdlovsk−45 and was located in the Rayon Nizhneturinsk, known for the combine *Elektrokhimpribor*, and specialized in the serial production of nuclear warheads.

29 Evidence, Vol. 72, 42 and Volume 76, 10 in the court records.

30 "Obvinitel'noe zaklyuchenie po obvineniyu" [fn. 12], here, 42.

31 Law of 31 July 1998 with Introductory Law, which went into force on 1 January 1999 (SZRF 1998, Nr. 31, Pos. 3824 and 3825).

32 Letter from the State Tax Service of the RF and Finance Ministry of 1 December 1994, "On the process of registering the paying off of debts toward the budget".

33 This according to the deputy director of the Lesnoi administration responsible for economic affairs, L.V. Myasnikova, in her courtroom testimony.

34 Federal Law on the Simplified System of Tax Assessment, the Registration, and the Reporting of Subjects of Small Entrepreneurship, 29 December 1995 (SZRF 1996, Nr. 1, Pos. 15).

35 Decree of 8 July 1994 "On the New Order of the State Registration of Enterprises and Entrepreneurs on the Territory of the RF" (SZRF 1994, Nr. 11, Pos. 1194).

36 According to Art. 198 of the Criminal Code, "large scale" is to be applied when the taxes owed or evaded amount to over 100 000 roubles three calendar years in a row and at the same time is more than 10 per cent of the total tax debts of the person in question.

37 In essence, this norm was valid even in Soviet law on criminal procedure (cf. Art. 14, Par. 2 of the Foundations of the Code of Criminal Procedure of the Union and the Union Republics, 25 December 1958 −− VVS SSSR 1959, Nr. 1, Pos. 15, and Art. 20, Par. 2, CCP RSFSR 1960), but in practice, it was regularly violated. This practice, which is contradictory to rule of law, more or less continues to affect in the independent post−Soviet states and especially Russia. This is exactly what Art. 49, Par. 2, of the Constitution aims to oppose! Cf. V.V. Lazarev, (ed.), *Nauchno−prakticheskii kommentarii k Konstitutsii RF* (Moskva 2001), 239 (Art. 49 Point 2 −− V.Bozh'ev).

38 V.D. Karpovich, (ed.), *Kommentarii k konstitutsii Rossiiskoi federatsii* (Moskva 2002) (P.E. Kondratov −− Art. 49, Point 3, 352).

39 *Kommentarii k ugolovno−processual'nomu kodeksu RF* [F. 8], 74 (Art. 14 Point 10).

40 The court also violated Art. 15, Par. 4 of the Constitution of the Russian Federation. The article in question declares that those treaties of international law binding for Russia form a "constitutive part of the legal order" in the country. The European Human Rights Convention of 4 November 1950 is such a treaty. Russia has been bound by it −− including Art. 6, Par. 2, which also guarantees the assumption of innocence −− ever since joining the Council of Europe (1996). See the brief commentary on the verdict in Friedrich−Christian Schroeder, "Chodorkowskij und die Menschenrechte", *Frankfurter Allgemeine Zeitung*, 15 June 2005, 8, and Angelika Nussberger and Dmitrii Marenkov, "Quo vadis iustitia?", *Osteuropa*, 7/2005, 38−51.

41 Fraud (Art. 159, Par. 4 Criminal Code), Unterschlagung bzw. Veruntreuung (Art. 160, Par. 4), frustration of a court judgement (Art. 315, Par. 3), Veruntreuung (Art. 165, Par. 3), tax evasion (Art. 198, Par. 2; Art. 199, Par. 2).

42 On this see Lev Gudkov and Boris Dubin, "Der Oligarch als Volksfeind", *Osteuropa*, 7/2005, 52−75.

43 Plenarbeschluß 25 Arpil 1995, Text, Byulleten' Verkhovnogo Suda RF 1995, Nr. 6, 2 (Point 4); V.M. Lebedev (Vorsitzender des Obersten Courts Rußlands), *Kommentarii k ugolovnomu kodeksu RF*, Moskva 2001, 83f. (Art. 35 Point 4).

44 On the origins of Menatep and Khodorkovsky's career, see Olga Kryschtanowskaya, *Anatomie der russischen Elite. Die Militarisierung Rußlands unter Putin* (Köln 2005), 171ff.

45 "Obvinitel'noe zaklyuchenie po obvineniyu" [fn. 12], here, 29.

46 Comprehensive and penetrating analysis on this is provided in Kryschtanowskaya, Anatomie [fn. 44], p125f. Einen vorzüglichen, erhellenden Einblick in die Mentalität der "Organe" vermittelt das Interview, Anonimnyi istochnik, A ne nado v svitere khodit' k prezidentu, *Novaya gazeta*, 85/2003, 4. Zum "vielstimmigen Chor" von Stellungnahmen aus dem Präsidentenlager zum Vorgehen gegen *Yukos* see the overview "Kuda smotret'? Kogo slushat'?", *NG*, 17 November 2003, 2.

47 Quoted from "Prokuror Kolesnikov prigovoril grazhdanina Khodorkovskogo k 10 godam", *Izvestiya*, 13 November 2003, 1, 3.

48 "Kurs na reshenii", *NG*, 14 Arpil 2005, 4.

49 On this occasion, Shuvalov pointed out, perhaps with pride, that estimates from the Finance Ministry showed some 20 per cent of budget inflows in the first quarter of 2005 stemmed from payments resulting from the actions against Yukos. In light of the fact that the steps taken against Yukos simultaneously accelerated capital flows from Russia and in spring 2005 passed the US$ 20 billion mark for the quarter, this success must be qualified as a naive fallacy.

50 Cf. "First Verdict in 'Yukos−Complex'" and Resolution 1418 (2005) [fn. 2].

51 Actually, the Prosecutor General's Office, which is located on Bol'shaya Dmitrovka, falls within the jurisdiction of the Tver' District Court. That Basmannyi District Court serves as court and prison for the investigating authorities came about because the investigating department (*upravlenie po rassledovaniyu*) of the Prosecutor General's Office is located in Basmannyi District, namely at Tekhnicheskii pereulok 2 (Subway Station Baumanskaya).

52 "Za chto sidit Pichugin", NG, 2 July 2004, 8; "Alekseya Pichugina ne puskayut", *Kommersant*, 14 February 2004, 4. Prichugin's trial, which took place in secret under the direction of the FSB, raises many questions. There is strong evidence that Pichugin, who is now fully isolated in the FSB investigative prison *Lefortovo*, was treated with psycho−pharmaceuticals. "Narkozavisimost' rossiiskogo pravosudiya", *Novaya gazeta*, 54/2003, 6. "Pogonya za obvinitel'nym prigovorom", *Novaya gazeta*, 46/2004, 13. "Pervyi poshel", NG, 25 March 2004, 1. "U Pichugina ostalas' otdezhda", NG, 31 March 2004, 1. "Prokuror zaprasil dlya Pichugina pozhiznennoe zaklyuchenie", *Izvestiya*, 28 March 2004, 8.

53 The presentation of the investigation relies primarily on the examination of the newspapers *Nezavisimaya gazeta*, *Izvestiya*, *Novaya gazeta*, *Kommersant* und *Moskovskie novosti* from June 2003 through the present.

54 Art. 98 lists additional, special measures that do not come into consideration in this case.

55 In exceptional cases −− when, for example, the accused has no permanent residence −− remand can be imposed under less restrictive prerequisites (cf. Art. 108, Par. 1, Sentence 3, CCP RF), but this was obviously not such a case.

56 The commentary allows summons to be conveyed electronically, but only in "written" form. Cf. *Kommentarii k ugolovno−processual'nomu kodeksu RF* [fn. 8], Art. 188 Point 3 −− 639f.

57 Excerpts from lawyer Drel's "appeals complaint" in the arrest of Platon Lebedev before the Basmannyi District Court of the city of Moscow to the Moscow Moscow City Court after the review of remand on 28 October 2003, "Kassatsionnaya zhaloba Platona Lebedeva", *Kommersant*, 3 December 2003, 5. (Details regarding the events are also to be found here.)

58 "Vol'shebnyi palec deputata Yudina", *NG*, 5 November 2003, 1 and 6.

59 "Narushitel' 'Matrosskoi tishiny'", *Kommersant*, 3 December 2003, 1, 5.

60 V.A. Mikhailov, *Mery presecheniya v rossiiskom ugolovnom processe* (Moskva 1996), 123ff. The surveys were carried out by the Ministry of the Interior between 1985 and 1990, in other words during Perestroika, and embraced 793 functionaries.

61 "Platon Lebedev oderzhal pervuyu pobedu v sude Konstitutsionnom", *NG*, 23 March 2005, 8. On filing complaints regarding constitutional rights in Russia, see Georg Brunner, "Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum", *Jahrbuch des Öffentlichen Rechts der Gegenwart*. Neue Folge, 50/2002, 191−256 (224).

62 "Khodorkovskyna Volge", *NG*, 24 October 2003, 4.

63 "Prervannyi polet", *NG*, 27 October 2003, 2.

64 Art. 91 und 92 CCP RF establish the rules of arrest.

65 That is how the law is formulated, see Art. 56 Par. 2, 188, Par. 3, 113, Par. 1−5, CCP RF.

66 A copy of the summons issued by chief investigator P.K. Karimov on 23 October 2003 is in the author's possession.

67 *Kommentarii k ugolovno−processual'nomu kodeksu RF* [fn. 8], Art. 113 Point 4 (433f.).

68 "Posadka nakanune vyborov", *NG*, 27 October 2003, 1. Goreglyad harshly criticized the steps taken against Lebedev on 10 July 2003 −− obviously without effect.

69 "Khodorkovskyuezzhaet", *NG*, 7 October 2003, 1.

70 "Advokaty Lebedeva proverili na prochnost'", *Izvestiya*, 10 October 2003, 10; "Kak izbavit'sya ot advokata", *NG*, 10 October 2003, 6; "My vas obyskalis'", *Novaya gazeta*, 76/2003, 7; "Napadenie na zashchitu", *Novaya gazeta*, 79/2003, 3.

71 "Napadenie na zashchitu", *Novaya gazeta*, 79/2003, 3 (Interview).

72 "Samyi bogatyi zaklyuchennyi v mire", *Izvestiya*, 28 October 2003, 3.

73 "Delo Mikhaila Khodorkovskogo okazalos' nepod"emnym", *Kommersant*, 29 November 2003, 3.

74 "Genprokuratura popalas' na chernom piare", *Kommersant*, 25 November 2003, 4; "Advokaty soberut dos'e na sledovatelei", *NG*, 24 November 2003, 2; "'Rasskazhite, kak kasalas' vashego tela'", *Izvestiya*, 10 June 2004, 5. On the especially rude actions directed at Yukos lawyer Svetlana Bakhmina, see "Pytki telefonom", *Novaya gazeta*, 18/2005, 5.

75 "Srok dlya advokatov", *NG*, 8 June 2005, 10.

76 Text is on−line at http://khodorkovsky.ru/advocacy/petitions/2706; statement by Khodorkovsky of 17 June 2005 available at the Web site:

http://khodorkovsky.ru/advocacy/petitions/2745.

77 Statement of 17 June 2005 available on−line at: http://khodorkovsky.ru/advocacy/petitions/2753.html. A taste of what was to be expected from the Moscow City Court under its chairwoman, Ol'ga Egorova, was provided not only by the Pichugin case, but also by the fate of Ol'ga Kudeshkina, a judge at the court who came into conflict with Egorova. "Sud'i uslovno", *Novaya gazeta*, 21/2005, 9.

78 *Novaya gazeta*, 71/2005, 3.

79 *Izvestiya*, 21−23 October 2005, 1, 9.

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