

**CONSTITUTIONAL AND DUE PROCESS
VIOLATIONS IN THE
KHODORKOVSKY/YUKOS CASE**

**A WHITE PAPER PREPARED BY DEFENSE
LAWYERS ON BEHALF OF
MIKHAIL KHODORKOVSKY
PLATON LEBEDEV
ALEXEI PICHUGIN**

For further information, please contact either:

Robert Amsterdam, Amsterdam & Peroff at office tel: +1 416 367 41 00

or cell: +1 416 827 4111

Charles Krause at office tel: +1 202 778 10 49 or cell +1 202 412 23 24

TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	1-4
Overview.....	1
Summary of Specific Violations.....	2
Why this Case is Important to the West.....	4
LEGAL ANALYSIS.....	6-20
Russian Courts Lack Independence.....	6
Inequality of Arms.....	7
Arbitrary Detention.....	8
Inhumane Treatment by the FSB.....	11
Denial of Effective Legal Counsel.....	14
Pressured to Incriminate Themselves.....	15
Court Secrecy and Closed Hearings.....	16
Search of Defence Attorney's Office.....	17
Invasion of Privacy.....	19
CONCLUSION.....	20-23

EXECUTIVE SUMMARY: OVERVIEW

In June of this year, the Procuracy General of the Russian Federation launched a series of carefully timed and politically motivated criminal investigations aimed at crushing Russia's wealthiest and most progressive business leader, Mikhail Khodorkovsky, whose success turning YUKOS into Russia's most efficient and successful business enterprise, and whose vision for Russia's future, is threatening to the growing power of conservative, authoritarian forces within the Kremlin.

Many associated with Mr. Khodorkovsky, and YUKOS itself, have fallen victim to the Procuracy's campaign. As matters now stand, Platon Lebedev, one of Mr. Khodorkovsky's business partners, Alexei Pichugin, a YUKOS security official, and Mr. Khodorkovsky himself have been arrested and are being held in custody. Others have fled the country, fearing that they too will be thrown into prison, interrogated and even tortured as part of this widening campaign.

Since July, the arrests and continuing threats of further charges have created growing economic and political instability. Senior officials of the Russian Government have resigned and there has been a steep sell-off of Russian stocks. Serious concerns have been raised about Russia's economic and political future. The freeze of YUKOS stock, worth billions of dollars, has further shaken business confidence in Russia's economy because it appears the Government may intend to reverse the earlier privatization of YUKOS, and possibly other companies, in favour of state-owned companies controlled by the Kremlin.

The YUKOS case is viewed as a watershed event that has taken on universal and historic significance. This is reflected in the fact that virtually every newspaper in the world has reported widely on the matter and world attention has been focused on every stage of the proceedings.

To date, Mr. Khodorkovsky, and those caught up in the campaign against him, have been denied due process in every sense of the word. By international standards—indeed, by Russian standards—the criminal investigations and prosecutions have so far been a travesty of justice. From closed court hearings reminiscent of other eras in Russian history to the recent outrageous search of the law offices of Mr. Lebedev's lead defense attorney to Mr. Khodorkovsky's arrest by armed commandos, the Procuracy has violated numerous fundamental rights guaranteed by the Russian Constitution and the Russian Criminal Procedure Code ("**Russian Code**") in its rush to prepare a series of political show trials timed to coincide with upcoming parliamentary and presidential elections.

This White Paper, prepared by a Russo-Canadian team of lawyers on the defendants' behalf, is an urgent appeal to the international community. Mr. Khodorkovsky is clearly imprisoned because of his determination to change Russian society; he and his colleagues have been systematically denied the benefit of the protections due them under the Russian Constitution, Russian Code and the European Convention on Human Rights ("**European Convention**").

Mr. Khodorkovsky is well known for his positions on corporate governance and transparency and he is recognized for implementing these practices at YUKOS. It is public knowledge that the company is audited by PriceWaterhouseCoopers, and it is the largest taxpayer in Russian society. YUKOS is in constant communication with the Russian tax authorities regarding its liabilities and payments. It defies credulity that the Russian government suddenly recognized in the summer of 2003 that YUKOS owed amounts from several years prior.

However, one need not develop the particulars of the charges in order to appreciate the extent of the violations of procedural due process and fundamental legal principles that have already occurred in this case. It is deeply troubling that a businessman who has elected to operate his company in the open is now prosecuted in secret by a self-styled "Rule of Law" government. As this White Paper will clearly demonstrate, the defendants' most fundamental legal rights have been violated and their ability to receive a fair and impartial judgment from Russia's government-controlled court system is virtually non-existent.

SUMMARY: SPECIFIC VIOLATIONS OF RUSSIAN AND INTERNATIONAL LAW

The Procuracy General and the FSB have already seriously violated the procedural due process rights of the defendants. In summary, the violations include:

Breach of Rules on Advocacy

Anton Drel, lead defence attorney for Mr. Platon Lebedev and counsel to Mr. Khodorkovsky, was summoned for questioning by the Prosecutor General on October 17. The summons was in direct violation of Article 8 of the law on the rights and duties of lawyers, which states that an attorney for the defence cannot be either subjected to questioning or summoned to give evidence related to an on-going case, and Article 56 of the Russian Code.

Breach of Attorney-Client Privilege

On Friday, October 9, law enforcement officials searched offices connected with YUKOS and affiliated companies, including the offices of attorney Anton Drel. Documents associated with the defence of his clients, Platon Lebedev and Mikhail Khodorkovsky, were confiscated in a clear violation of attorney-client privilege, which exists in Russia. The defence team also believes lawyer-client communications have been intercepted at

the Lefortovo prison facility where Lebedev was held and where Alexei Pichugin, a YUKOS manager, remains.

Denial of Open Court Proceedings

Most of the court hearings for Mr. Khodorkovsky, Mr. Lebedev and Mr. Pichugin have been closed sessions, raising concerns that any eventual trials will similarly be held in secret, denying the defendants a fair trial and the proper scrutiny of proceedings by appropriate impartial observers.

Denial of the Right to Effective Assistance of Counsel

Both Platon Lebedev and Alexei Pichugin have been denied the right to effective counsel. For example, for six days after his initial detention, Lebedev was denied access to legal counsel and during the July 3 hearing to sanction his arrest, the defence team was denied entry to the hearing. Defence attorneys have been hampered in other ways, including having reason to believe that some of their conversations have been recorded.

Arbitrary Detention

Despite offers by 7 members of the Duma to act as personal “sureties” or guarantors on his behalf, Platon Lebedev has repeatedly been denied bail. As a prominent businessman, he poses no threat to society and, as such, is a victim of arbitrary detention. Mr. Khodorkovsky has similarly been denied bail.

Torture

Alexei Pichugin has been subject to torture through the injection of psychotropic drugs, part of an attempt to extract information from him. Pichugin’s wife saw the needle marks on the plaintiff’s arms. Human rights activists in Russia have actively condemned his treatment by authorities and called for an independent medical examination.

Improper Search

Numerous “raids” of YUKOS’ and affiliated companies’ offices have taken place, often lacking a proper search warrant, without proper inventory of property confiscated and in the absence of any representative of the party or parties subject to the search. Authorities have repeatedly confiscated materials and information totally unrelated to the case and their actions, therefore, seem to constitute a series of “fishing expeditions” in an attempt to find *any* information that will justify their attacks on the company and its shareholders. Masked gunmen also conducted searches of a boarding school, in the presence of the pupils, that is supported financially by YUKOS.

Biased Court System

The courts in question are closely aligned with the Prosecutor General and the State and, because of these political connections, are susceptible to political influence. The judiciary in Russia, in general, is far from independent—as minimal separation of

power and the fact its compensation is still dependent on the executive branch, the courts are captive to the Government and enforcement agencies.

Denial of Freedom of Speech

The underlying reason for the criminal proceedings brought against Mr. Khodorkovsky and the other defendants is an attempt to subjugate Mr. Khodorkovsky's freedom of speech and political rights under the Russian Constitution. The campaign, therefore, is an assault on his right to express himself on political matters and to associate with a political party of his choice.

Direct Attacks on the Democratic Process

Authorities in Russia raided the offices of the Agency for Strategic Communications—a consultancy firm providing campaign strategy and communications advice to the opposition Yabloko party. This is a serious breach of campaign laws and a direct attack on free and open democratic elections in Russia.

WHY THIS CASE IS IMPORTANT TO EUROPE AND THE UNITED STATES

Europe and the United States have a vested interest in seeing democracy, a market economy and the Rule of Law take firm hold in Russia. An authoritarian Russia hostile to the west, on the other hand, could destabilize U.S. and Western European security, leading to a resumption of hostilities that ended with the Cold War.

In recent years, Russia has made strides in moving towards democracy. The country has gone through the process of guaranteeing fundamental freedoms in the Russian Constitution that was adopted in 1993. The Constitution contains a charter of rights that rivals that of any Western democracy. In fact, the Constitution goes beyond the U.S. Bill of Rights. It makes internationally recognized norms for the protection of human rights part of Russian domestic law and gives these international norms priority over domestic law. The most important norms in this regard are those contained in the European Convention. Russia took the bold step of ratifying this convention in 1998.

While Russia has become a democracy *in theory and on paper*, the YUKOS case has raised serious doubts as to whether Russia is a democracy *in practice and in fact*. In the recent past, the Russian Government seized control of Russia's television networks together with Russia's most respected and impartial public opinion research institute. Now, publicity surrounding the YUKOS case has exposed Russia's criminal justice system to world-view. Seamy stories have emerged about tainted judges subject to executive control and the role Russia's secret service, the FSB, has in directing and manipulating the criminal process from the Kremlin.

This exposure of the Russian criminal justice system has prompted the international community to ask compelling questions. What does the performance of the criminal

justice system in the *YUKOS* case say about the performance of the system at large? What does the performance of the system at large say about Russia's status as a democracy? Are the authorities in Russia complying with the international norms that the nation has voluntarily imposed on itself or are they merely paying lip service to these laws and honouring them in the breach? Is Russia's so-called democracy legitimate or is it an illusion—something that exists in name only? Is the Kremlin's use of the term "managed democracy" in truth nothing more than a euphemism for a return to authoritarian rule?

In the eyes of the international community, the case is a measure as to whether Russia is moving toward—or away from—its goal of existing as a government based on the rule of law. Unfortunately, the *YUKOS* matter already has been punctuated with many serious violations of Russian and international law and there is no evidence that the Procuracy will stop this course of conduct.

In the *YUKOS* case, the Russian government is manipulating the criminal justice system to serve its own political ends because Mr. Khodorkovsky has become a high-profile supporter of educational, cultural and other civil society institutions viewed as a threat to the interests of those in Russia who wish to maintain authoritarian control over the Government and larger Russian society. Simultaneously, Mr. Khodorkovsky has been openly critical of the Government; he has advocated controversial legislative reforms; he has become influential in the Duma, the lower house of Parliament; he has financed liberal reform parties that will compete against the ruling party in an upcoming Duma election; and he has supported other programs designed to strengthen civil society in Russia and foster democratic values. In response, the Government is using the criminal justice system to silence Mr. Khodorkovsky by jailing him and attacking his associates and financial resources.

The mechanism of purging through abuse of process is far more subtle and sophisticated than the use of force—the purging mechanism that predominated during the Soviet era.¹

¹ The tendency of the Putin team to purge through abuse of process is insightfully noted in Lilia Shetsova's new work entitled *Putin's Russia*:

The new team's [Putin's team] invention was that the shutting down [purging] was done not by force or pressure but often through the courts. The Russian judiciary continued to be amazingly flexible and understanding—that is to say, it understood what the executive branch wanted. Judges received their salaries and apartments from the authorities, and being dependent on the executive branch, they became the instruments for purging politicians and business people the authorities did not want around. That the rules of the game continued undefined in Russia make it possible to turn almost anyone into a defendant, rendering him tractable and free of excessive ambition or criticism.

RUSSIAN COURTS LACK INDEPENDENCE

The Russian judiciary “is amazingly flexible and understanding” –it knows what the executive branch wants and stands ready to carry out its orders. In other words, the Russian Courts are “captive” to the executive, especially in “political” cases. The Basmany Court of Moscow is particularly infamous and specializes in politically sensitive cases. The Basmany Court has a close association with the Procuracy –the successor to the notorious official of the same name that served as the prosecutorial arm of the Soviet regime and wielded enormous power over the judiciary. Therefore, it is not surprising the Basmany Court has been where all of the YUKOS proceedings have been conducted to date.

The reputation of the Basmany Court, among Russian advocates that appear before it, is captured in a simple, but all too familiar, saying: “Basmany means karmanniy”. In the Russian language, “karmanniy” means “pocket”!

As reported recently in the Moscow Times on October 28, 2003²:

I do believe that the Basmany court is biased, mainly because it considers most of the cases investigated by the Prosecutor General’s Office”, lawyer Vladimir Levin said.

Levin said cases investigated by the investigative department of the Prosecutor General’s Office supposedly end up at the court because they are in the same district, but in reality the prosecutors simply find it convenient to work with what he described as “loyal” judges.

“The judges have repeatedly rejected all demands of the defense counsel and have been seen conferring with the prosecutors ahead of the hearings,” Levin said in a telephone interview Monday.

The Prosecutor General’s Office and the Basmany court officials declined to comment on allegations of bias when contacted Monday. [October 27, 2003]

The Basmany Court has denied Mr. Khodorkovsky and the other YUKOS defendants the right to a fair hearing in at least two basic respects. They have allowed the Procuracy to confront the defendants without the assistance of counsel and they have permitted pre-trial detention in contravention of the clear requirements of Chapter 13 of the Russian Code.

The Basmany Court has demonstrated time and again that it is prepared to allow the Procuracy to function without regard to the Constitution or the Criminal Justice Code.

² Moscow Times, Tuesday, October 28, 2003 edition: “*Detention Spotlights Basmany Court*”

One of the judges of the Basmany Court, who has presided over the *YUKOS* case, has, in the view of defence counsel, altered court records to assist the prosecution in responding to a compelling procedural argument raised by the defence. The outraged defence team immediately denounced this judicial conduct and forwarded a formal complaint to the entire bench of the Basmany Court—a body that is known as the Collegium of Judges. To date, the Collegium of Judges has not responded to the complaint and has been absolutely silent on the matter.

The defence team tried to challenge the partiality of one of presiding judges. It filed a motion requesting that this judge remove, or recuse, herself from further participation in the *YUKOS* controversy. To date, the judge has not responded to the motion for recusal and has been otherwise silent on the matter. In the face of the motion, however, this judge sat on a recent critical appeal launched by Alexei Pichugin in regard to his extreme mistreatment at the hands of the FSB.

The conduct of the Russian Courts contravenes Article 6(1) of the European Convention. Article 6(1) guarantees the right to a fair hearing “by an independent and impartial tribunal”. An independent tribunal must be independent “of the executive and of the parties to the case”. It should be free from “outside pressures”.³ An impartial tribunal must be “free of personal prejudice or bias” in favour of the prosecution or the defence.⁴

The tribunal should not only *be* independent and impartial; it should *appear* to be so. In other words, the tribunal’s independence and impartiality must prevail from an objective, as well as, a subjective standpoint.⁵

The requirements of independence and impartiality are intended to “inspire confidence” in the courts. “It is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused”.⁶ Unfortunately, the grossly unfair behaviour of the judiciary has seriously undermined the credibility of the Russian Courts.

INEQUALITY OF ARMS FAVOURS THE PROSECUTION AND PREJUDICES THE DEFENCE

³ *Campbell and Fell v. The United Kingdom*, June 28, 1984, para. 78; *McGonnell v. The United Kingdom* February 8, 2000, para. 48 to 51. Any reference in this White Paper to any decision by the European Court of Human Rights is taken from the version of the decision posted on the Court’s web site:

⁴ *McGonnell v. The United Kingdom*, February 8, 2000, para. 48 to 51.

⁵ *McGonnell v. The United Kingdom*, February 8, 2000, para. 48 to 51.

⁶ *Sander v. The United Kingdom*, May 9, 2000, para. 22.

Article 6(1) of the European Convention guarantees the right to equality of arms, an equal opportunity for the prosecution and the defence to present a case to the court under conditions that do not put either party at a disadvantage⁷:

It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings, which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.

The Russian Courts have denied the right to equality of arms. Given the control by the executive of the Russian Courts, and the consequential bias of the Russian Courts in favour of the prosecution, the YUKOS Group has been put at a substantial disadvantage relative to the prosecution. Consequently, the defence has been placed on an unequal footing vis-à-vis the prosecution in all proceedings before the Russian judiciary.

**THE CRIMINAL JUSTICE SYSTEM HAS PRESUMED GUILT
AND ARBITRARILY DETAINED MESSRS. KHODORKOVSKY,
LEBEDEV AND PICHUGIN**

Article 6(2) guarantees the right to be presumed innocent until proved guilty in a fair hearing. The provision requires all participants in the criminal justice system to start with the preconceived idea that the accused is innocent of the offence charged⁸:

The presumption of innocence enshrined in paragraph 2 of Article 6 (art. 6-2) is one of the elements of the fair criminal trial that is required by paragraph 1 (art. 6-1)...It will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty.

All participants in the criminal justice system—the police, the prosecution and the judiciary – are obliged to presume innocence while they carry out their responsibilities⁹:

The Court [EUROPEAN COURT of Human Rights] considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities.

The Procuracy and the judiciary have denied the right to be presumed innocent.

⁷ *Rowe and Davis v. UK*, February 16, 2000, para. 60.

⁸ *Alenet De Ribemont v. France*, February 10, 1995, para. 35.

⁹ *Alenet De Ribemont v. France*, February 10, 1995, para. 36.

The decision of the Basmanny Court to maintain Mr. Khodorkovsky and Mr. Lebedev in custody is completely contrary to Russian Constitutional guarantees and specifically the Russian Code. Articles 97 to 110 of the Russian Code outline, in detail, the factors to be dealt with in assessing whether the “exceptional” sanction of pre-trial detention should be considered. The Procuracy has the onus of showing that there are “sufficient grounds” for continued detention. It is obliged to present specific evidence in support of these grounds. At the closed-door bail hearing for Mr. Lebedev, the Procuracy failed to tender any supporting evidence. Furthermore, the hearing took place without Mr. Lebedev’s counsel in attendance, thereby violating Mr. Lebedev’s right to counsel. Ominously, as in the earlier Pichugin hearing, Judge Dudar closed the courtroom without even providing any possible legal justification as to this additional deprivation of Mr. Lebedev’s constitutional and procedural rights.

There can be little precedent for this continued incarceration in a situation where there is no risk to the health and safety of members of the community; where there are no prior offences; and, significantly under the Russian Code, where 7 members of the State Duma personally vouched for the performance by the accused of the obligations stipulated regarding bail.

It is to be noted that, when Mr. Khodorkovsky was arrested with the characteristic overwhelming force in Novosibirsk, he was not brought before a local judge. Instead, he was flown to Moscow so that the Procuracy could be guaranteed a closed hearing before the captive Basmanny Court and, therefore, detention contrary to the governing norms of both Russian and international law.

Both of these men are charged with economic crimes. There is no basis to assert that they will not appear for trial, pose a threat to commit ongoing crimes, will destroy evidence or will obstruct the judicial process. Both men have family in Russia and have demonstrated their commitment to vindicate their reputations. Mr. Khodorkovsky in particular has demonstrated his determination in this regard. He left the country numerous times as the Procuracy attacked his associates, and each time he returned. Each of these men can satisfy any condition the Court might impose from the alternatives set forth in Chapter 13 of the Russian Code to assure their appearance. Continuing to hold these gentlemen only serves to hinder their ability to assist in the preparation of their defence.

At first glance there may appear to be a basis to detain Mr. Pichugin because of the nature of the allegations against him, murder and attempted murder. However, whatever rationale existed when he was first detained in June is undermined by the Procuracy’s failure to move forward with its case. It appears that the Procuracy is holding Mr. Pichugin in the hopes that it can construct a case rather than because they have evidence on which to proceed. The use of drugs during his detention

demonstrates that the reason to detain him is not one provided for in the Russian Code, but rather to elicit incriminatory statements against himself and others.

Article 5(1) and 5(3) of the European Convention guarantee “release pending trial” that is “conditioned on guarantees to appear for trial.” The provision establishes a presumption in favour of bail that is ultimately grounded on the presumption of innocence. Since an accused is presumed innocent until he has been given a fair hearing, the prosecution has the onus of rebutting this presumption and proving that the accused should be detained:

It is essentially the object of Article 5(3)... to require provisional release once detention ceases to be reasonable. ...This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons.¹⁰

Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention...¹¹

Under Article 5(1) of the European Convention, detention and release pending trial must be “lawful” and “in accordance with a procedure prescribed by law”. The Russian Code contains a procedure for release pending trial and the Russian Courts have a duty to apply these provisions. Failure to comply with these Criminal Code provisions constitutes a breach of the European Convention:

While it is normal in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5(1), failure to comply with that law entails a breach of the Convention¹².

The Russian Courts have denied Mr. Pichugin, Mr. Lebedev and Mr. Khodorkovsky the right to be released from detention pending trial. This denial inevitably results from the denial of the right to a fair hearing. The bail hearings that have been held to date for Mr. Pichugin and Mr. Lebedev have been a farce given the captivity and partiality of the judiciary and the inequality of arms as between the prosecution and the defence.

The police, the prosecution and the judiciary have ignored the presumption of innocence and the presumption in favour of bail. To rationalize continued detention, they have relied on unfounded allegations about the gravity of the offences in question,

¹⁰ *Aquilina v. Malta*, April 29, 1999, para. 47.

¹¹ *Kalashnikov v. Russia*, July 15, 2002, para. 114; *I.A. v. France*, September 23, 1998, para. 102.

¹² *Baranowski v. Poland*, March 28, 2000, para. 50.

the risk that the accused will abscond and the risk that the accused will interfere with the ongoing criminal investigation.

It follows that the Russian Courts have failed to comply with the law of pre-trial release under the Russian Code. The judiciary has gone through the pretext of citing the relevant grounds for detention under the Russian Code (i.e., the risk of absconding) but it has not required the prosecution to prove the facts in support of these grounds. There is a clear parallel between the failure of the Russian judiciary to require strict proof of the supporting facts in this matter and the similar failure of the Russian judiciary as reported in a recent decision of the European Court of Human Rights (“**European Court**”) involving Russia:¹³

116. The Court recalls that the existence of a strong suspicion of the involvement of a person in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention. As regards the other ground relied on...in prolonging the applicant’s detention, namely the danger of obstructing the examination of the case, the Court notes that...the City Court did not mention any factual circumstances underpinning its conclusions.. There is no reference in its rulings to any factor capable of showing that the risk relied on actually persisted during the relevant period.

117. The Court accepts that the interference with the investigation, along with the suspicion that the applicant had committed the offence with which he was charged, could initially suffice to warrant the applicant’s detention. However, as the proceedings progressed and the collection of the evidence became complete that ground inevitably became less relevant.

MR PICHUGIN & MR LEBEDEV HAVE BEEN INHUMANELY TREATED WHILE IN FSB CUSTODY

Since the criminal proceedings began, Mr. Pichugin has been held in custody at Lefortovo Penal Institution. Initially, Mr. Lebedev was incarcerated in the same facility, but has recently been transferred. The past detention of Mr. Lebedev, and the continued detention of Mr. Pichugin, in an FSB penal institution in itself contravenes Russia’s commitments under international treaties.

Both Mr. Lebedev and Mr. Pichugin have been treated inhumanely during the pre-trial detention phase. Mr. Lebedev was actually in the hospital when he was arrested and taken into custody. He was seized from a hospital room in a manner that reflected a complete disregard for his physical condition. While he has been held in custody, Mr. Lebedev has been denied proper medical attention.

¹³ *Kalashnikov v. Russia*, July 15, 2002, para 115-117.

The FSB has also employed cruel treatment as a means of obtaining information. Taking advantage of its dual role as investigator and jailer, the FSB has tortured Mr. Pichugin and injected him with psychotropic drugs. The FSB's obvious goal is to extract a confession, or other information, from Mr. Pichugin that might serve as a legal pretext for laying additional charges against the YUKOS principals. In other words, the FSB is brutalising Mr. Pichugin with a view to turning him into a witness who will testify against the principals.

The FSB's conduct fits into the general practice of law enforcement agencies throughout Russia. These public authorities regularly use inhumane treatment as a means of extorting information. This constitutes one of the most serious human rights problems in Russia according to the Alternative NGO Report on Observance of ICCPR by the Russian Federation ("**Alternative NGO Report**")¹⁴:

Subjection to torture, as well as cruel and degrading treatment continues to remain one of the most serious problems in the Russian Federation as far as ensuring of human rights is concerned. ...

...Torture, cruel and degrading treatment are used as means of crime disclosure. Most frequently, they are used prior to the beginning of criminal proceedings....the latter [law enforcement agencies] can subject an individual to torture in order to obtain information on accomplices and possible traces of the crime, location of property appropriated in an unlawful fashion, etc. Having thus received the necessary information, law enforcement officers then conduct investigative actions (searches, interrogations, etc.) in compliance with all the requirements of the procedural law and eventually obtain proofs for legal proceedings.

Like all misconduct on the part of the law enforcement agencies, use of inhuman treatment as a means of crime disclosure is due, in part, to the fact that the judiciary is captive to the Government and rarely controls the conduct of the law enforcement agencies. In particular, the judiciary rarely enforces the right to security of the person by excluding illegally obtained evidence¹⁵:

Subjection to torture with the aim of extorting information is accounted for by the fact that the testimony obtained under torture continues to be accepted by courts even if during the court proceedings the defendant or the witness declares his testimony to have been obtained under torture....

Such cases are numerous. Although courts have the right to suspend proceedings and demand that a testimony be examined on the account of whether it has been obtained under torture, it happens very rarely since Russian justice retains its punitive traditions. In the majority of cases registered by human rights organization, courts never examined

¹⁴ Alternative NGO Report On Observance of ICCPR by the Russian Federation at page 28 and 29.

¹⁵ Alternative NGO Report at page 30.

statements of defendants and witnesses on account of whether they had been obtained under torture and regarded such declarations as attempts to escape responsibility for the crime.

Article 3 of the European Convention guarantees the right to be free from “inhuman or degrading treatment or punishment”. This right is one of the most fundamental and, for this reason, is absolute. It is not subject to any other right¹⁶:

The Court [EUROPEAN COURT] reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention..., Article 3 makes no provision for exceptions and no derogation from it is permissible ...

“Torture”, within the meaning of Article 3, has two distinguishing characteristics. Firstly, it involves the intentional infliction of severe pain. Secondly, it is carried out for the purpose of obtaining information, punishment and intimidation.

...it appears that it was the intention that the Convention should ... attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering....In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment...which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations convention).¹⁷

In the case of an accused held in detention, torture is used for the purposes of intimidating and obtaining information. The pain or suffering is inflicted for the purpose of “making...[the accused] confess to the offence which he...[is] suspected of having committed.”¹⁸

The FSB has violated Article 3 by torturing Mr. Pichugin and inhumanely treating Mr. Lebedev while they have been kept in police custody. Mr. Lebedev has been deprived of much needed medical treatment and Mr. Pichugin has been injected with drugs. Both of them have been kept in the intimidating FSB detention facilities and have been subjected to sustained questioning over a lengthy time period. The FSB’s obvious purpose is to break down Mr. Pichugin and Mr. Lebedev and make them confess to the charges against them.

¹⁶ *Selmouni v. France*, July 28, 1999, para. 95.

¹⁷ *Salman v. Turkey*, June 27, 2000, para. 114.

¹⁸ *Selmouni v. France*, July 28, 1999, para. 98.

**MR. LEBEDEV & MR. PICHUGIN HAVE NOT BEEN PERMITTED
TO COMMUNICATE IN CONFIDENCE WITH COUNSEL &
HAVE BEEN INTERROGATED IN THE ABSENCE OF LEGAL COUNSEL**

While in custody, Mr. Lebedev and Mr. Pichugin have at times been prevented from communicating freely with legal counsel. The FSB has kept attorney-client discussions under surveillance, thereby making it extremely difficult for the defence team to properly develop its case.

Articles 6 (1) and 6(3)(c) of the European Convention, together with Article 14(3)(d) of the ICCPR, guarantee the right to “legal assistance”.

The right to legal assistance entails the right to communicate with an attorney in absolute confidence, in a private manner that preserves the attorney-client privilege. The right to legal assistance is ineffective if the police or prosecution prevent an imprisoned accused from communicating with an attorney in confidence¹⁹:

The Court [EUROPEAN COURT] considers that an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3(c) (art. 6-3-c) of the Convention [guarantee of the right to legal assistance]. If a lawyer were unable to confer with his client and receive confidential instructions from his without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.

The right to legal assistance also entails the right to have an attorney present when the police or the prosecution are interrogating an accused who is in custody. Police or prosecutorial interrogation in the absence of defence counsel not only compromises the right to legal assistance; it also compromises the right to a fair hearing²⁰:

The Court [EUROPEAN COURT] observes that it has not been disputed by the Government [of the United Kingdom] that Article 6 (art. 6) [right to a fair hearing] applies even at the stage of the preliminary investigation into an offence by the police. In this respect it recalls its finding in the *Imbrioscia v. Switzerland* judgment of 24 November 1993 that Article 6 (art. 6) – especially paragraph 3 (art. 6-3) – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions...

...the concept of fairness enshrined in Article 6 (art. 6) requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of the police

¹⁹ *S v. Switzerland*, November 28, 1991, para. 48.

²⁰ *John Murray v. The United Kingdom*, February 2, 1996, para. 62 and 66; *Magee v. The United Kingdom*, June 6, 2000, para. 41 and 44; *Averill v. The United Kingdom*, June 6, 2000, para. 60 and 61.

interrogation. To deny access to a lawyer...in a situation where the rights of the defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6 (art. 6)

The right to legal assistance, while in custody and undergoing police interrogation, is paramount when the conditions of detention are designed to compel an accused to give up his right to remain silent. In a case in which an accused was detained in such “coercive” and “intimidating” conditions, the EUROPEAN COURT held that he should have been granted access to defence counsel²¹:

The austerity of his [the accused’s] detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he [the accused] may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the Court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will make him confess to his interrogators.

The FSB and the Procuracy have denied the right to legal assistance and a fair trial. Mr. Lebedev and Mr. Pichugin have been unable to freely confer with defence counsel while they have been in custody. The police have regularly monitored their attorney-client communications.

MR. PICHUGIN & MR. LEBEDEV HAVE BEEN UNDER CONSTANT COMPULSION TO INCRIMINATE THEMSELVES

Article 6 of the European Convention guarantees the right to remain silent and the privilege against self-incrimination²²

Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6).

There are at least two purposes behind the privilege against self-incrimination. The first is to prevent the police or the prosecution from using coercion and oppression to obtain evidence from the accused. The second is to respect the will of the accused²³:

Their [the right to remain silent and the privilege against self-incrimination] rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the

²¹ *Magee v. The United Kingdom*, June 6, 2000, para 43.

²² *John Murray v. The United Kingdom*, August 2, 1996, para. 45.

²³ *Saunders v. The United Kingdom*, 1996, para. 68 and 69.

authorities thereby contributing to the avoidance of the miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6)...The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention...

The right not to incriminate oneself is primarily concerned, however with respecting the will of an accused person to remain silent.²⁴

The FSB and the Procuracy have infringed on the privilege against self-incrimination. They have been engaged in a campaign to coerce and oppress Mr. Pichugin and Mr. Lebedev so that they incriminate themselves and others. The campaign of coercion and oppression involves arbitrary detention at the FSB's infamous Lefortovo Prison, torture while in detention, relentless rounds of interrogation and, at times, denial of access to defence counsel when under police questioning.

THE PRE-TRIAL DETENTION & COURT SESSIONS HAVE BEEN SHROUDED IN SECRECY

Not surprisingly, the FSB interrogation by torture was conducted in secrecy. It was carried out while Mr. Pichugin has been in FSB custody and while his attorney has been absent. This secretive approach is in keeping with the habitual way in which the law enforcement agencies proceed. As the Alternative NGO Report notes, secrecy is a hallmark of such behaviour:

It is worth noting that operative-investigative activity [interrogations by torture] are conducted secretly. Methods of such activity are never disclosed and are practically outside of court control.

Secrecy has prevailed throughout the pre-trial detention. Mr. Pichugin and Mr. Lebedev have been kept in virtual isolation at the FSB prison. They have had extremely limited access to their attorneys.

The extreme secrecy has even extended to the pre-trial court proceedings. Mr. Lebedev's lead attorneys were not allowed to attend the court session on July 3 when the Basmanny Court of Moscow sanctioned Mr. Lebedev's arrest. The session was closed to the press and the general public. Without consulting Mr. Lebedev or his attorneys, the court ordered the police to bar entrance to the court.

More recently, Judge Dudar of the Basmanny Court called for a pre-trial session and then proceeded to close the courtroom to the public. Even though she initiated the

24

session, the judge did not have the confidence to subject her own conduct to public scrutiny.

Article 6 of the European Convention and Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”) guarantee the right to a “public hearing”. As noted by the UN Human Rights Committee, the right extends to all segments of society and is for the benefit of both the accused and the public at large:

The publicity of hearings is an important safeguard in the interest of individual and of society at large. ...a hearing must be generally open to the public, including the press, and must not be accessible only by certain categories of persons.

The Russian Courts have denied the right to a public hearing. They have conducted most sessions in secrecy and have maintained silence in the face of legal challenges by the defence team.

THE SEARCH OF ANTON DREL’S LAW OFFICE WAS AN UNPRECEDENTED ATTACK ON ATTORNEY-CLIENT PRIVILEGE AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

On October 9, FSB agents searched the law offices of Anton Drel, the attorney representing Mr. Lebedev and Mr. Khordorkovsy. Mr. Drel is the leader of the legal team set up to defend Platon Lebedev and Mr. Khodorkovsky. Mr. Drel’s role as lead counsel is well known to the FSB and the Procuracy.

The FSB deliberately carried out the search when, to the FSB’s knowledge, Mr. Drel was attending a court hearing on behalf of Mr. Lebedev. The FSB conducted the search during Mr. Drel’s absence to avoid any legal challenge by Mr. Drel and to avoid the necessity of complying with the appropriate procedures under the Russian law. Since the search was carried out without Mr. Drel in attendance, no steps were taken to prevent seizure of documents subject to attorney-client privilege.

Approximately two dozen officers ransacked Mr. Drel’s offices in the Moscow suburb of Zhukovka. Crowbars were used to pry open filing cabinets, documents were strewn all over the floor and Mr. Drel’s office was left in a shambles. The investigators confiscated hundreds of files, three safes, Mr. Drel’s personal computer, Mr. Drel’s cell phone, confidential personal material, such as tax declarations and files regarding the strategy for the defence of the Lebedev case.

The investigators also seized detailed notes made by Mr. Drel and other defence counsel concerning the review of 140 thick volumes of evidence and discussions of this

evidence with their client. In other words, highly sensitive and privileged information concerning the Lebedev trial is now in the hands of the Procuracy.

When Mr. Drel returned to his offices after his court appearance, the FSB denied him entry. The investigators told Mr. Drel that a valid search warrant existed but they refused to produce the warrant to him.

Article 165 of the Russian Code imposes a duty on the investigators to obtain prior judicial authorization before engaging in a search except in exigent circumstances. Article 182 of the Russian Code sets out a step-by-step process for conducting a search. The person searched, counsel for the defence and the lawyer for the person being searched all have the right to be present when the investigation is carried out. A search should be preceded by a request for voluntary compliance. The investigators should ask those entitled to be present at the search whether they will comply with the investigative process.

The search of Mr. Drel's office is a flagrant contravention of the applicable Russian law and international law for the following reasons:

1) The investigators did not produce any evidence that they had obtained, and were acting pursuant to, a valid search warrant.

2) The protocol followed by the investigators does not disclose the reasons for, or the purpose of, the search. Without such disclosure it is impossible to define the limits of the search.

3) Those entitled to be present during the search were denied access to the premises.

4) No request was made for voluntary compliance. Had such a request been made, Mr. Drel might have been able to agree with the FSB on a procedure whereby the search could be conducted without compromising attorney-client privilege.

5) And, most significantly, the search was an affront to the right to legal assistance and the corollary right to communicate with an attorney in absolute confidence.

The seizure of lead defence counsel's pre-trial notes and records regarding criminal proceedings before the Russian Courts clearly violates both the right to legal assistance and the attorney-client privilege. The search of Mr. Drel's offices also violates the Basic Principles on the Role of Lawyers, principles that have been adopted by the UN.

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within

their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

Russian violation of this treaty is emblematic of the desperation of the FSB and the Procuracy. They will stop at nothing to undermine the ability of Mr. Lebedev to bring forward a strong and vigorous defence against whatever charges may be brought. Consequently, the right of "equality of arms" stands in ruins. The defence has been completely compromised by the activities of the FSB.

As if this grave violation of the rights of Mr. Drel and the fundamental rights of a defence to Mr. Lebedev were not serious enough, within one week of the illegal search of his office Mr. Drel himself was summoned for questioning.

According to Article 56 (para. 3) of the Russian Code it is absolutely forbidden for an advocate to be interrogated as a witness of the facts he is aware of because of his participation in criminal proceedings.

Pursuant to Article 8 (para. 2) of the federal law "On the Advocacy and the Bar in the Russian Federation" it is statute-barred to appear before an investigator when called for the interrogation and furthermore to act as a witness as to information obtained during the course of the retainer on the Lebedev case.

On the advice of the Moscow Bar Association, Mr. Drel has not complied with the summons and, while the Procuracy has, to date, taken no further action, his fate at the hands of the Procuracy still remains uncertain.

THE CRIMINAL INVESTIGATION HAS BEEN A GROSS INVASION OF PRIVACY

Article 8 of the European Convention and Article 17 of the ICCPR guarantee that any search, seizure or other interference with the right to privacy be:

- (a) in accordance with the law;
- (b) in pursuit of a legitimate aim; and

(c) necessary in a democratic society.

A search or seizure must be “in accordance with the law” just as a detention pending trial must be “in accordance with a procedure prescribed by law”. The Russian Code contains a procedure for conducting a search just as it contains a procedure for release pending trial. The Russian police have a duty to comply with these provisions governing criminal investigation. The failure to do so constitutes a breach of the European Convention.

The search must also be “necessary in a democratic society” which means that the degree of interference should be in proportion to the crime that is under investigation. This is known as the “proportionality principle”²⁵:

Under the Court’s [EUROPEAN COURT] settled case-law, the notion of “necessity’ implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued....

...the Court must consider the particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued.

The European Court will be “particularly vigilant”²⁶ when it is reviewing the necessity of a search that has been conducted without a search warrant or other form of prior judicial authorization.

The FSB and the Procuracy have unjustifiably invaded the right to privacy. They have disregarded the procedures for conducting a search in the same way that the Russian Courts have disregarded the code procedure for release pending trial.

Consequently, the FSB and the Procuracy have failed to comply with the law of search and seizure under the Russian Code. They have also failed to adhere to the proportionality principle. The police and the prosecution have never disclosed the reasons for the searches and nor have they demonstrated why the searches are necessary.

CONCLUSION

There was never any question, when Mr. Pichugin and then Mr. Lebedev were detained in June and July of this year, that a politically motivated campaign had been launched by the siloviki with one target in mind: Mikhail Khodorkovsky.

²⁵ *Camenzind v. Switzerland*, December 16, 1997, para. 44 and 45.

²⁶ *Camenzind v. Switzerland*, December 16, 1997, para. 45.

There were many theories about why Mr. Khodorkovsky had become a target, among them his public questioning of a corrupt business transaction involving a state-owned oil company; his support for opposition political parties vying for seats in the State Duma; his supposed intention of running for president of Russia; his criticism of Russia's policies in Iraq; and his close ties with Western business and political leaders, especially in the United States.

Throughout the summer, while the Procuracy General kept Mr. Pichugin and Mr. Lebedev in jail and continued its searches of offices belonging to YUKOS and its holding company, Group Menatep, the campaign of intimidation and political extortion continued. Many observers said Mr. Khodorkovsky deserved to be punished for supposedly breaking an agreement with President Putin: that the Kremlin would not harm the interests of Russia's wealthiest businessmen if they would stay out of politics.

But the truth of the matter was different. First of all, the Kremlin sanctioned the political contributions which Mr. Khodorkovsky made from his personal funds—not from corporate accounts. Contrary to conventional wisdom, Mr. Khodorkovsky and other wealthy businessmen were expected by the Kremlin to make political contributions ahead of this year's Duma elections, not prohibited from doing so as has been reported. Secondly, whatever agreement might have been tacitly reached with Mr. Putin, Mr. Khodorkovsky never promised to give up his right to interact freely with Western leaders—nor to give up his vision of, and support for, Russia becoming a free and open country with a robust and active civil society.

Indeed, it may well have been that vision—more than any other single factor—that brought Mr. Khodorkovsky into the sights of the intelligence operatives who are responsible for his persecution. Trained for service in the KGB during the Soviet period, these intelligence operatives have become increasingly powerful within the Kremlin and now, with the resignation of Mr. Putin's chief of staff, seem to be predominant. Their xenophobic, militaristic and authoritarian vision, encapsulated by the term “managed democracy”, is clearly hostile to Mr. Khodorkovsky's vision and hostile to the West.

Any doubts about the political motivation of the investigation were clearly dispelled on October 23, just two days before Mr. Khodorkovsky's arrest, when FSB agents raided the offices of the Agency for Strategic Communications, a Moscow political consultancy that had been hired by the democratic Yabloko Party to help its candidates in the upcoming Duma elections. Mr. Khodorkovsky had publicly acknowledged that he had provided financial support to Yabloko, a small but influential and entirely legal political party, shortly before the campaign against him began in June.

Mr. Khodorkovsky described his reasons for supporting political parties—and his vision for creating a robust civil society—during a speech at the Carnegie Endowment

for International Peace in Washington on Oct. 9, the very day that his lawyer's office was being unconstitutionally and illegally searched in a suburb near Moscow.

You have no doubt often heard that one of the reasons for all this happening in the first place may have been political activism. I propose to you that you view this subject in two separate parts. The first part is lobbying activity by YUKOS as a corporation. Indeed, we, along with our business colleagues, together defend our interests before the parliament. We do this in public, we do this openly, and we feel this is a perfectly normal thing to do...

"But the company does not take part in political battles. We don't, as a company, support individual deputies in the parliament. We don't support political parties. As a company we don't take any part in any election, and this is natural. At the same time, neither the shareholders of the company nor I personally have ever renounced our civil rights as citizens. Some of the employees support some political parties, others support other political parties...And that's normal.

"Russia has made its choice in the question between private ownership and state ownership of property, and the choice was private property. This choice has already been made...The question right now is a much more difficult choice. Are we going to become a democratic Russia for the first time in our thousand-year history, or are we going to continue along our thousand-year path of authoritarianism? This is not a simple choice. But modern civilization gives Russia no hope of becoming a modern society in the economic sense without becoming the same in the democratic sense.

Mr. Khodorkovsky has not only spoken about the need for a strong civil society in Russia, he has spent at least \$100 million a year for the past several years on philanthropies designed to make his vision a reality. Those philanthropies include foundations in both Russia and the West that pay for internet education, student exchange programs, cultural projects and institutes where Western political ideas and free market economic theories are taught. It is perhaps for this reason that after his arrest, *The Wall Street Journal* called Mr. Khodorkovsky a political prisoner.

Finally, what must be understood is that Mr. Khodorkovsky is now in jail because he chose to remain in Russia rather than flee into exile. He had met with the lawyers who prepared this White Paper on many occasions, most recently on Monday, Oct. 20, just five days before he was dragged off a plane by armed commandos in the Russian city of Novosibirsk. He understood perfectly well that Mr. Lebedev and Mr. Pichugin had been arrested as a warning and a message aimed directly at him. He knew that if he remained in Russia he would be arrested. And he knew that once in jail, there was almost no possibility of a fair hearing or a fair trial...unless the world demanded that the politically motivated, selective attack on him and his colleagues was such a grave affront to the conscience of the world that it could not stand.

Indeed, Mr. Khodorkovsky –having been outraged by the violations of the rule of law surrounding the arrests of Mr. Pichugin and Mr. Lebedev and the company that he and they had built –personally approved the preparation of this White Paper before his arrest and detention so that the world could better understand the illegalities that have taken place and the quality of justice to which all Russians are subject.

It should never be forgotten by those who read this White Paper that Mikhail Khodorkovsky had the time, the money and the opportunity to leave Russia long before his arrest. Instead of being in jail, he could just as surely be in Switzerland or Great Britain living an extremely comfortable life in other circumstances. If he believed he were guilty of any of the vague accusations of which he has been accused, why would he have remained in Russia?

His decision to remain in Russia and subject himself to the judgment of the Russian court system is part of the fight he has chosen to wage on behalf of the country where he was born and which he intends to see transformed into a country where fundamental human and political rights are respected.

Hopefully the world will understand that this case is not about a single man or a set of specific allegations; that indeed it is a case that is meant to throw light on and test the Rule of Law in Russia, a test that may well help determine the future course of Russia's economic, social and political development.