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The Khodorkovskiy-Case

—

Interpretation and Application of Article 6 ECHR in Russia

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I. Introduction

Does the behaviour of Russian courts regarding the proceeding of Mikhail Khodorkovskiy infringe the principle of fair trial? In this regard the most apparent question seems to be whether the Khodorkovskiy-Case has to be classified as political repression in the broader sense. The assessment of a violation of the principle of fair trial and the assumption of innocence won't answer this query comprehensively, but rather provides a new benchmark and does justice to the European Convention of Human Rights. Not so long ago the world witnessed how Vladimir Putin assumed office as President of the Russian Federation for the third time. This President's election and even more the Duma-election a few months before were accompanied by protests of the Russian people, the new extent of the protests was showing that a growing part of the Russian population was unsatisfied with the conditions dominating the elections. Somehow it comes full circle since it is exactly this presidency which was responsible for Khodorkovskiy's persecution and ultimately for his conviction. Putin used his inaugural address to clarify his position towards the oligarchs and made them clear not to intervene in political matters. Somehow this constitutes, as you can see illustrated below, the starting point of the case of Mikhail Khodorkovskiy.

The following article does not intend to allege the Russian presidency having rigged this year's elections as this would constitute a political debate; it rather wants to be thought-provoking in terms of the Russian approach towards human rights, or to be more precisely, Russia's interpretation of the principle of fair trial. In international affairs it is substantial to differentiate between solely political matters and legal approaches even if there appear to be numerous intersections.

The Khodorkovskiy-Case appears to be predestined to emphasise Russia's approach in dealing with violations of this rule. It is of utmost interest to what extent the case of Mikhail Khodorkovskiy can be taken representatively to investigate whether Russian courts and authorities comply with the rule of law. On the one hand it has to be questioned to what degree the Russian Federation meets the requirements of the European Convention of Human Rights, while on a more specific basis it is crucial to examine whether Russia fulfils the conditions set by the principle of fair trial.

Before the focus can finally be turned to the Khodorkosvkiy-Case, it is indispensable to provide an introduction to the Russian situation on a broader basis. This part will be subdivided into two sections. On a first step the Russian situation within the European Council as well as Russia's statistical behaviour in regard to the European Convention of Human Rights will be examined, before on a second step it has to be exposed to what extent a special conflict between proceedings within the Russian jurisdiction and the European understanding of the principle of fair trial exists.

II. Russia and the ECHR

On 28 February 1996, the Russian Federation was allowed to accede to the Statute of the Council of Europe even though it did not meet all the requirements for member States. The accession followed an extensive debate within the Council of Europe about whether the Russian Federation was a suitable applicant for membership.¹ Russia's acceptance occurred despite the fact of an unfavourable ad hoc Eminent Lawyer's report, which concluded that "the legal order of Russian Federation does not, at the present moment, meet the Council of Europe standards as enshrined in the statute of the Council and developed by the organs of the European Convention on Human Rights".² The Director of the Legal Department of the Russian Ministry for Foreign Affairs, A. Khodakov, in an "Explanatory Note on the Issue of Signing the European Convention for the Protection of Human Rights and Fundamental Freedoms" by the Russian Federation dated 30 January 1996 came to the same evaluation of the Russian legal system. Khodakov stated that "at the present moment Russian legislation, with the exception of the Constitution of the Russian Federation, and law enforcement practice do not comply fully with the Council of Europe's standards".³

Russia's accession is distressing for the future of compliance with Strasbourg law because, inter alia, "given Russia's lack of experience in protecting human rights at the level of municipal law, it is likely that a great many violations of European human rights law will be

¹ Mark Janis, "Russia and the 'Legality' of Strasbourg Law", *European Journal of International Law* 8:1 (1997), 93.

² Rudolf Bernard et al., "Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards", *Human Rights Law Journal*, 15:7 (1994), 287.

³ Georgii Vinokurov, Andrei Rikhter, Vladimir Chernisov, eds., *Evropeiskii Sud' po Pravam Cheloveka i Zashchita Svobody Slova y Rossii: Pretsedenty, Analiz, Rekomendatsii* (Moskva: Institut Problem Informatsionnogo Prava, 2004), 583-584, <http://www.medialaw.ru/article10/7/2.htm> (August 2006)

committed there, and that they will not be remedied domestically”.⁴ However, even though Russian Federation signed the Convention in 1996 and therefore joined the forty-member Council of Europe, it took two more years until Russia’s Upper House of Parliament, the Federation Council, has voted to ratify the European Convention on Human Rights. This ratification process could only start because the communist-led lower house of parliament, the *Duma*, approved the Convention in February 1998. From March 1998 on, Russian citizens are allowed by the Convention the right to appeal to the international European Court of Human Rights in Strasbourg when human rights issues presumably are afflicted.⁵ Art. 15 (4) of the Russian Constitution clearly identifies the Russian Federation as being a monist country, stating that “the international treaties signed by the Russian Federation shall be a component part of its legal system”. Therefore, it is not necessary to transform these treaties into the domestic legal system in order for a judge to fully apply the provisions of international law. Hence, it could be assumed that there will be no bar to the domestic use of the interpretation of the European Convention on Human Rights. The second sentence of Art. 15 (4) of the Russian Constitution sets out the priority of an international treaty over national statutes. This Article states that “if an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.” This shows that the Convention is accordingly placed in between the Constitution on the one side and federal constitutional laws and federal laws on the other side.⁶

A remarkable element of implementing domestic law within the Russian legal system though is the practice of issuing ‘Regulations’ or ‘guiding explanations’ which are to be passed by the Plenum of the Supreme Court and the Plenum of the Supreme Arbitration (Commercial) Court of the Russian Federation. The first Regulation by the Supreme Court ever which was entirely concerned with the implementation of international law was the regulation ‘On the Application by Courts of General Jurisdiction of the Generally-recognized Principles and Norms of International Law and the International Treaties of the Russian Federation’, which was passed in 2003. In this, the Supreme Court again emphasized the direct applicability of the European Convention on Human Rights as well as its priority over national laws. Furthermore, the 2003 Regulation for the first time accentuated that the non-application or the

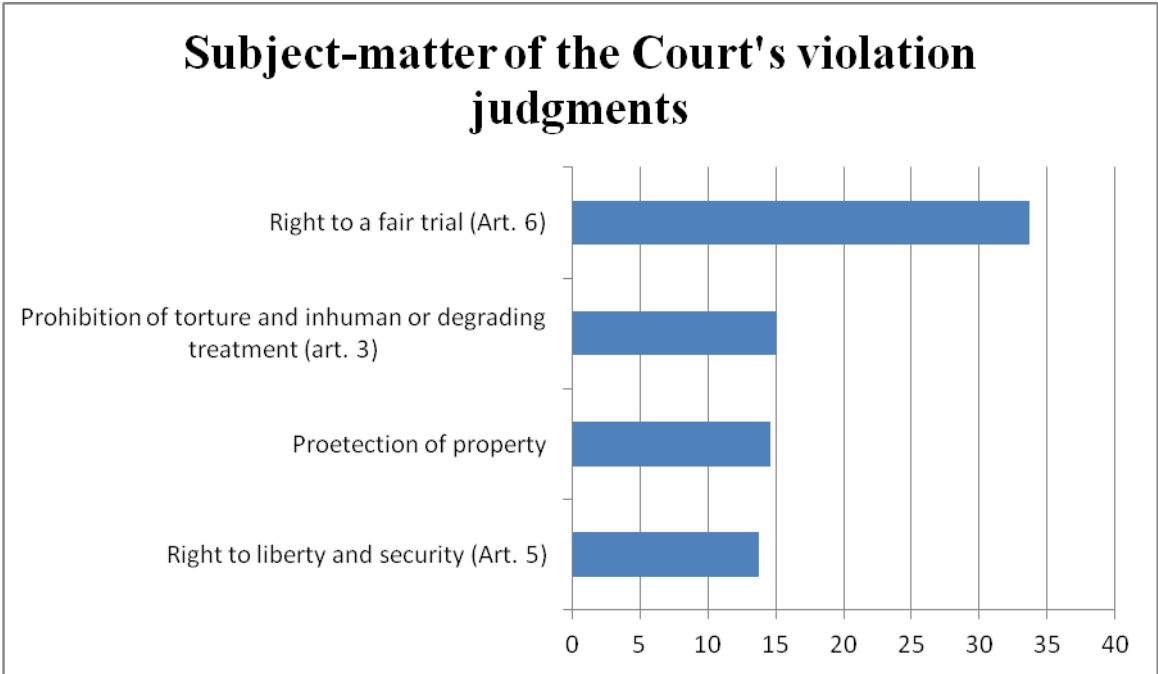
⁴ Mark Janis, „Russia and the ‘Legality of Strasbourg Law’”, *European Journal of International Law* 8:1 (1997), 98.

⁵ BBC News of 13 March 1998, “Russian upper house ratifies rights convention”, <http://news.bbc.co.uk/2/hi/europe/65196.stm>.

⁶ Anton Burkov, “The domestic status of the European Convention on Human Rights in Russian law”, *European Human Rights Advocacy Centre Bulletin*, Issue 8 (2007), 12.

incorrect application of an international treaty can bear the quashing or altering of a judgment which are the same consequences that can occur in cases of non-application of domestic law.⁷

About 30% of the complaints against Russia that are filed at the European Court of Human Rights concern violations of rights, both of the accused and of the victims in relation to the criminal procedural system. The most typical complaints comprise of protracted court proceedings, unjustified and unlawful confinement in custody, the use of torture during the preliminary investigation, conditions of incarceration for prisoners and violations of the rights of victims during initial confinement. Three main areas can be pointed out on which the European Court of Human Rights has detected some major breaches of European Convention on Human Rights. First, the right of the defence to call witnesses; second, the issuing of decisions in the absence of a defendant whose mental capacity is in question; and third, the use of evidence obtained by means of incitement. All these issues elucidate that the Russian criminal process does not respect the requirements of ‘justice’ set down in Art. 6 of the European Convention on Human Rights.⁸ This is also the most occurring violation of the European Convention on Human Rights, the violation of Art. 6, the ‘Right to a fair trial’.⁹



⁷ Section 9 of the 2003 Regulation; Anton Burkov, “The domestic status of the European Convention on Human Rights in Russian law”, *European Human Rights Advocacy Centre Bulletin*, Issue 8 (2007), 12.

⁸ M. R. Voskobitova, “Is the European Court of Human Rights satisfied with the Russian criminal justice system?”, *European Human Rights Advocacy Centre Bulletin*, Issue 8 (2007), 14.

⁹ European Court of Human Rights. Press Country Profile: Russia, January 2012, p. 2.

At the end of 2011 more than 40.000 cases have been pending against Russia before the European Court of Human Rights.¹⁰ Thus, 26 % of all cases, which amount to more than 150.000 cases, affect Russia. Since the Court's establishment it has passed nearly 15.000 judgments, 1.200 of which concerned Russia as a potential violator. Approximately 570 out of these judgments refer to the violation of the right of fair trial.¹¹ 14.000 out of 64.000 applications which were allocated in 2011 to a judicial formation were against Russia. In 2011 the Court delivered 1.157 judgments in total, 133 of which affected Russia. This is the second highest number after the Republic of Turkey. Only in 10 of these cases the Court found no violation of the Convention.¹² As up to 1 January 2011 the European Court of Human Rights had delivered 1079 judgments in respect of Russia, of which more than 1019 found at least one violation of the European Convention on Human Rights, primarily of Article 6, but also of Article 1 of Protocol No. 1 (protection of property) and Article 5 (right to liberty and security), and 39 found none. There were 42.994 inadmissibility decisions and dating 1 January 2011 there were 40.295 pending applications.

The first judgment of the Court in respect of Russia dates from 7 May 2002 in the case *Burdov v. Russia*. Anatoliy Burdov, a Russian national, was called up by the military authorities to take part in emergency operations at the site of Chernobyl nuclear plant disaster on 1 October 1986. He was engaged in the operations until 11 January 1987 and, as a result, suffered from extensive exposure to radioactive emissions. Because the competent State authorities failed to pay these benefits in full and due time, the applicant repeatedly sued them in domestic courts from 1997 onwards. The courts granted the applicants claims but a number of their judgments remained unenforced for various periods of time.¹³ In its judgment, the European Court of Human Rights found violations of Art. 6 of the Convention and of Art. 1 of Protocol No. 1 on account of the authorities' failure for years to take the necessary measures to comply with these decisions. Following the judgment, the amounts awarded to the applicant by the Russian courts were paid to him.

¹⁰ http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf.

¹¹ http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf.

¹² http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf.

¹³ Press release of 15 January 2009, Chamber Judgment *Burdov v. Russia* (No. 2), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=845505&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

Further judgments of the Court concerned the inequality of opportunities for the defence and the prosecution to present their witnesses in Russian criminal proceedings. In the decisions, *Popov v. Russia*¹⁴, *Andandonskiy v. Russia*¹⁵, *Klimentyev v. Russia*¹⁶ and *Zaytsev v. Russia*¹⁷, the Court consistently upheld its well-established position that neither party to the process should be at a disadvantage in relation to the other party.¹⁸

In the very recent case *Ananyev v. Russia* which concerned two applicants' complaints that they had been detained in inhuman and degrading conditions in remand centres awaiting criminal trials against them, the Court ruled that the Russian Government violated Art. 3 and 13 of the Convention and has to improve the material conditions of detention, to change the applicable legal framework, as well as practices and attitudes, to ensure that pre-trial detention is only used in absolutely necessary cases, to establish maximum capacity for each remand prison and to ensure that victims can complain effectively about inadequate conditions of detention and that they obtain appropriate compensation.

In order to achieve the above mentioned and to resolve these inequities, the Russian authorities had to produce, in co-operation with the Committee of Ministers of the Council of Europe, within six months from the date on which the judgment becomes final, a binding time frame for resolving the problems. They also had to provide redress, by granting accelerated settlement to all cases brought by victims of inhuman or degrading conditions of detention in Russian remand prisons, within 12 months from the date on which today's judgment becomes final (for those cases already communicated) or from the date of communication.

III. Russia and the Principle of Fair Trial

While the previous part was mainly focused on the general relation between Russia and the European Council's most vital convention, the following cases can be seen as the most noteworthy judgments relating to a violation of Article 6 of the European Convention of Human Rights by the Russian Federation.¹⁹

¹⁴ Case No. 26853/04, 13.07.06, paras. 175-189.

¹⁵ Case No. 24015/02, 28.09.06, paras. 50-51.

¹⁶ Case No. 46503/99, 16.11.06, paras. 125-126.

¹⁷ Case No. 22644/02, 16.11.06, paras. 25-26.

¹⁸ M. R. Voskobitova, "Is the European Court of Human Rights satisfied with the Russian criminal justice system?", *European Human Rights Advocacy Centre Bulletin*, Issue 8 (2007), 14.

¹⁹ Die Umsetzung der zu Art. 6 Abs. 1 EMRK ergangenen Urteile des EGMR in der Russischen Föderation – Schriftenreihe zum Osteuropäischen Recht, introduction; http://www.echr.coe.int/NR/rdonlyres/7CF42EB0-0481-4ACD-9B49-1B92D396D126/0/PCP_Russia_en.pdf.

The *Sakhnovski v. Russia*-Case dealt with ineffective legal assistance during appeal proceedings in a criminal case.²⁰ Therefore not only the principle of fair trial stipulated in Article 6 (1) of the European Convention of Human Rights but also the right to effective legal assistance of Article 6 (3) of the European Convention of Human Rights has been violated. A case which can be representatively taken for hundreds of situations in which people and entities try to obtain a fair hearing is the *Ryabykh vs. Russia*-Case.²¹ The fact that a fair hearing before a domestic court is not granted to many Russians, makes this case a major issue in terms of applications before the European Court of Human Rights.²²

In the *Shtukaturov vs. Russia*-Case the applicant was mentally ill and has been declared officially disabled. Without his knowledge he was deprived of his legal capacity and send to a psychiatric hospital.²³ The European Court of Human Rights held that the divestment of his legal capacity without his knowledge has to be qualified as violation against Article 6 of the European Convention on Human Rights.

A case which is strongly interrelated with the *Khodorkovskiy*-Case is *Yukos vs. Russia*. This case concerns the tax and enforcement proceedings brought against the oil company Yukos. The Chamber of the Court held by six to one voices that there had been a violation of Article 6 (1) and (3) (b) of the European Convention of Human Rights.²⁴ This conclusion was mainly based upon the fact that the company had insufficient time to prepare its case before the lower courts.

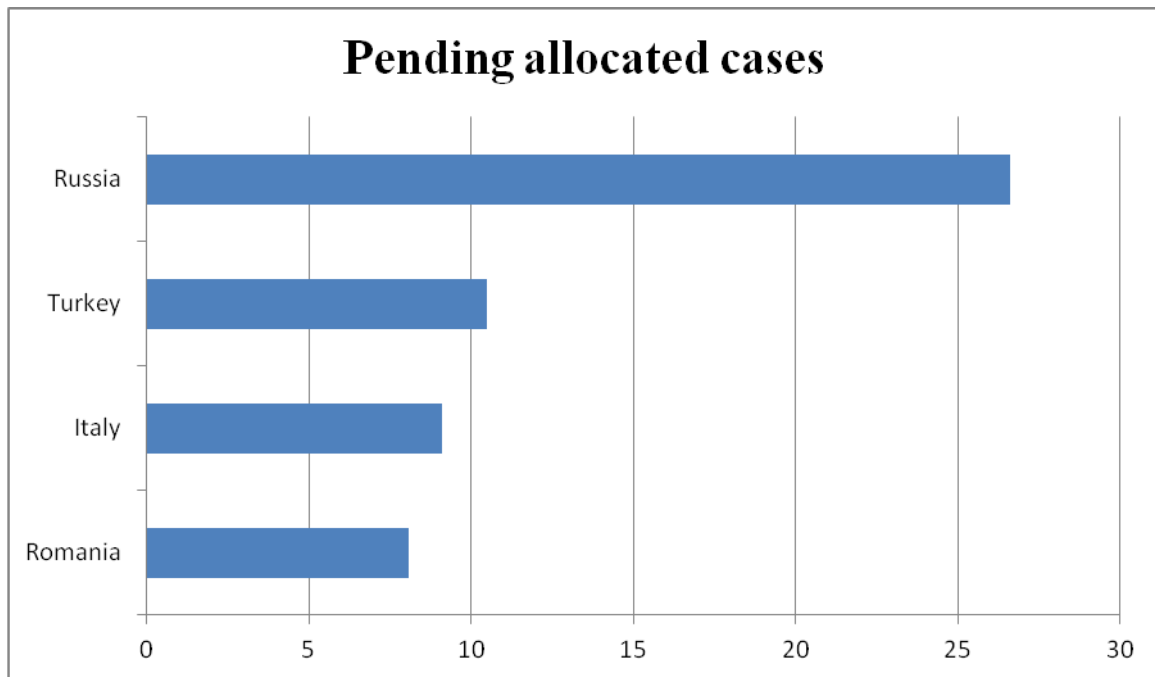
²⁰ *Sakhnovski* ./ Russian Federation, ECHR 02.11.2010, No. 21272/03.

²¹ *Ryabykh* ./ Russian Federation, ECHR 24.07.2003, No. 52854/99.

²² *A Systematic Guide to the Case-Law of the European Court of Human Rights*, Peter Kempees, Volume IV., 1997-1998, p. 255.

²³ *Shtukaturov* ./ Russian Federation, ECHR 27.03.2008, No. 44009/05.

²⁴ *OAO Neftyanaya Kompaniya YUKOS* ./ Russian Federation, ECHR 20.09.2011, No. 14902/04.



The *Burdov (No. 2) vs. Russia*-Case represents very well the recurrent problem of the non-enforcement of domestic court rulings within the Russian Federation.²⁵ Even if someone – be it a private person or from an economic point of view more importantly a large company – receives a positive judgment, it is not worth what it seems to be since the respective ruling gets only infrequently enforced by Russian authorities.. The European Court of Human Rights considers such an omission as a breach of the principle of fair trial. Corresponding with this, the *Military Accommodation-Case* treats the delayed enforcement of final judgments where Russian authorities did not attend their duties to allocate subsidised accommodation for retired military officers.²⁶ The excessive length of court proceedings as well as the fact that there is no remedy against these delays causes another major problem. Therefore the European Court of Human Rights held in its *Kormacheva vs. Russia* decision that Article 6 of the European Convention on Human Rights comprises the right to a trial within a reasonable time.²⁷

Despite a connoting amount of judgments by the European Court of Human Rights there remains a basic problem of the Court's efficiency. It comes clear that the European Court of Human Rights functions as the judicial body of an international organisation in contrast to the

²⁵ *Burdov ./. Russian Federation (no. 2)*, ECHR 15.01.2009, No. 33509/04; http://www.echr.coe.int/NR/rdonlyres/7CF42EB0-0481-4ACD-9B49-1B92D396D126/0/PCP_Russia_en.pdf.

²⁶ *Kravchenko and others ./. Russian Federation*, ECHR 16.09.2010, No. 11609/05, 12516/05, 17393/05, 20214/05, 25724/05, 32953/05, 1953/06, 10908/06, 16101/06, 26696/06, 40417/06, 44437/06, 44977/06, 46544/06, 50835/06, 22635/07, 36662/07, 36951/07, 38501/07, 54307/07, 22723/08, 36406/08, 55990/08.

²⁷ *Kormacheva ./. Russian Federation*, ECHR 29.01.2004, No. 53084/99.

Court of Justice of the European Union which can influence national court rulings and legislation in a direct way. The European Court of Human Rights ascertains that it is in the first place for national authorities to interpret and to resolve problems with domestic law. Thus it appears “[...] impossible to ascertain whether [a Russian] appeal court simply neglected to deal with the applicant’s submission or whether it intends to dismiss it and, if that were its intention, what its reason were for so deciding. The complete silence of the appeal court judgment on the lawfulness of the rejection of the expert report is inconsistent with the concept of fair trial which is the basis of Article 6 [...].”²⁸ “The court reiterates that it is not its task to take place of the domestic courts, which are in best position to assess the evidence before them, establish facts and interpret domestic law. The Court will not, in principle, intervene, unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair as required by Article 6 [...].”²⁹

But what are concrete criteria to measure the behaviour of Russian authorities? Which is the right approach to assure more compliance with the European convention of Human Rights? The European Court of Human Rights has declared in no uncertain terms that domestic courts are held to consider and to assess the respective evidence on the basis of three conditions. According to that it is indispensable to determine whether the respective evidence is (1.) relevant, (2.) reliable and (3.) legally permissible. Evidence can only be treated as irrelevant if there is absolutely no connecting factor to the case. Thus, domestic courts have generally to consider all evidence propounded by the parties showing any relation to the respective case. Moreover, domestic courts are obliged to give reasons for their judgments which includes the justification why or why not certain evidence has been made subject of the proceeding. The European Court of Human Rights applies this rule in a very tangible and realistic manner since it requires on the one hand a comprehensible reasoning but accepts on the other hand a varying application of this rule on a case-to-case basis.³⁰

IV. The Khodorkovskiy-Case

The Russian tycoon Mikhail Khodorkovskiy was one, maybe even the major player in the Russian economy from the 1990s onwards. Before having been arrested in October 2003, his

²⁸ Krasulya ./ Russian Federation, ECHR 22.02.2007, No. 12365/03.

²⁹ Khamidov ./ Russian Federation, ECHR 15.11.2007, No. 72118/01.

³⁰ Kuznetsov ./ Russian Federation, ECHR 11.01.2007, No. 184/02.

oil company *Yukos* had made him one of the richest men worldwide, being listed as number 26 in the 2003 *Forbes Magazine* ranking of the richest people worldwide. Khodorkovskiy was born on 26 June 1963 in Moscow as the son of a Jewish father and a Christian mother who were both engineers. Like his parents, he studied chemistry at the Moscow Mendeleev University, and additionally economics. During that time he was an active member of the Communist Youth League Komsomol and finally became the deputy head of the organisation at Mendeleev University. This involvement gave him the chance to meet important and influential people and thus, brought him useful contacts for his future career. At the time of the great reforms, *Perestroika* and *Glasnost*, Khodorkovskiy and some of his Komsomol friends made use of the new economic-political possibilities and therefore started a business called “Center for Scientific and Technical Creativity of Youth” (NTTM) which primarily focused on import-export activities. Nevertheless, NTTM was owned by the state. In order to gain financial resources for that organisation one of Russia’s first private banks, *Menatep*, was founded in 1989. Khodorkovskiy, one of its founders and major owners, became general director of the bank and in 1991 he advanced to the CEO. *Menatep* was growing quickly in investment volume and influence and finally achieved to take over NTTM. Khodorkovskiy made more and more important contacts, even with the entourage of Russia’s new president Boris Yeltsin. In 1992, he even stepped into the circle of the economic advisors of the Russian prime minister and became deputy secretary of energy in 1993. He supported Yeltsin in his election campaigns.

Within the “loans for shares”-program some of the big state-owned oil companies were privatised from 1995 on. This gave Khodorkovskiy the chance to buy through *Menatep* a majority of the shares of one of its biggest customers: The oil company *Yukos*. Thanks to their mighty contacts Platon Lebedev and Khodorkovskiy, the top managers of *Menatep* and its affiliates paid a price which was situated far below the actual value of *Yukos*, namely 350 million Dollars instead of more than one billion. Those years in which a few men with excellent contacts took the chance the change of economic systems provided to buy the crown jewels of Russia’s economy are nowadays referred to as the “wild nineties”. The men were later on called oligarchs: Besides the acquisition of *Yukos* by Lebedev and Khodorkovskiy, in that time Vladimir Potanin and Mikhail Prokhorov bought the mining giant Norilsk Nickel, Roman Abramovich and Boris Berezovsky took control of the oil giant Sibneft.

In 1996, Khodorkovskiy changed from *Menatep*'s to *Yukos*' executive board. *Yukos* became more than a single company, it became a conglomerate of various undertakings. He helped Yeltsin in the 1996 presidency election and committed himself to more transparency in Russia's economy. This involvement led to the first conflict with the government worth to be mentioned: His concerns about the Secretary of Energy's plans to reform the oil export quotas, namely the danger of loss of control and theft, expressed in a Russian newspaper had (smaller) legal consequences. Khodorkovskiy, holding the majority of *Yukos*' shares, restructured *Yukos* following western examples in order to achieve more transparency. This corporate governance resulted in the lowest costs-per-barrel-quota among Russia's oil companies and made him the richest man in Russia.

Khodorkovskiy started to extend his power from the economic sector to other fields. The *Yukos*-foundation "Open Russia" placed large amounts to the disposal of social and educational organizations, such as the Moscow University. As the European Court of Human Rights describes it, the organization was funded "in order to promote certain political values in Russian society".³¹

In the late 1990s he extended his distance to Russia's political leading circle. Khodorkovskiy started to support different opposition parties with completely opposite goals, *Jabloko*'s liberal party, the "Union of Right Forces" and the Communist Party. He was even said to be a future presidential candidate. Additionally, he made no pretence of his friendly attitude towards the west and was even negotiating a participation of US-American companies in the formerly government owned *Yukos*. In 2002/2003 he announced the merger of *Yukos* with *Sibneft*, another big Russian oil company. The merger finally didn't take place though, due to Khodorkovskiy's arrestment.

Yeltsin had tolerated that a few men had come to enormous wealth during the system change in Russia's economy. With Putin following Yeltsin as president Russia got a new leader who had a stricter opinion about Russia's oligarchs: Generally Putin wouldn't pursue what happened in the nineties, neither in criminal nor in civil courts. But this stood under two conditions: The tycoons had to act according to the interests of Russia's political leaders, or at least how Putin interpreted them to be, and they had to concentrate on the economy.

³¹ Khodorkovskiy v. RUSSIA, Application no. 5829/04.

What happened to economic leaders trying to influence politics can be seen in the example of the Russian media tycoons Gussinskiy and Beresovskiy: Both had gotten involved in opposition politics and had clearly expressed their opinion on the Russian government. Subsequently, both had found themselves in massive trouble: Gussinskiy was arrested, Bewsovskiy flew to the UK. And also what Khodorkovskiy did, must have been two thorns in the eye of Putin: First, his ambitions to sell parts of his business to Russia's former opponents in the cold war, to capitalistic US companies, and second, his political involvement. Mikhail Kasyanov, prime minister during Putin's first presidency from 2000 to 2004, witnessed in Khodorkovskiy's second trial that the president had been angered by Khodorkovskiy's support of opposition parties. Shortly before Khodorkovskiy was arrested he met Putin at a conference. At this conference Putin talks about corruption in private businesses. In this situation Khodorkovskiy didn't play his part as he was expected to and like the other participants were doing it, instead he started talking about the corruption in the public sector. Putin reacted to it with a clear warning: He asked, where Khodorkovskiy got his money from. As a second warning Putin is said to have invited Khodorkovskiy to his summer house, his *Datsha*, and clearly gave him the choice: "Either you make business, or you do politics, with all consequences."

Khodorkovskiy ignored the warnings. A tax law Putin had initiated was blocked by the parliament, thanks to *Yukos*-Lobbyist as some say. The Russian prosecution authorities finally started investigations against *Yukos* and its owners. This led to the arrestment of *Yukos*' second largest shareholder Lebedev in July 2003 on suspicion of illegally acquiring shares in the state-owned firm *Apatit*. Investigators appear at the *Yukos* offices, Khodorkovskiy is asked to come to interrogations to the office of the prosecutor. It seemed like only a question of time until Khodorkovskiy gets arrested. He refused to go to exile like others have done it before: "I will not let anybody make me a political refugee", he said. Three months later, on 25 October 2003, Khodorkovskiy was arrested in Novosibirsk. Following this occasion, he was accused of having caused a damage of more than one billion dollar to the Russian Federation by embezzlement and tax evasion.

During the first trial in the Khodorkovskiy case, Lebedev and Khodorkovskiy had to sit in a cage with thick steel bars. But before Khodorkovskiy was found guilty by the court, he filed a complaint to the European Court of Human Rights saying his prosecution is politically motivated and depicting the conditions of his arrestment in 2004. The complaint was admitted in almost complete extent. The court approved the claim of inhumane treatment in the pre-

trial custody and during the trial, but dismissed the claim of a politically influenced prosecution.³² Nevertheless, Khodorkovskiy considered this judgment to be a big success. Russia was sentenced to pay a sum of 10.000 € for compensation plus 14.500 € for trial expenses to Khodorkovskiy. In May 2005, Khodorkovskiy was convicted guilty in having committed fraud and tax evasion and was sentenced to nine years imprisonment in a penal colony. When reading the sentence, the judge first read the sentence explanation before reading the actual sentence. The explanation has an extent of more than 1000 pages, but the judge refuses to read more than 50 pages a day. Critics considered this an instrument to drive away media's attention to the judgment. Later in 2005, the sentence was reduced to eight years by an appeal court. A couple of months later, the core companies of *Yukos* were sold for prizes far below their estimated value. The *Baikal Finance Group* bought the important *Yukos*-company *Yuganskneftegaz* for 7 Billion Euro in an auction with only two bidders, although its estimated value was between 11.5 and 13.5 Billion Euro. A few days later, *Baikal* was bought by the government controlled oil company *Baikal*. During his arrest Khodorkovskiy started a hunger strike in the beginning of 2008 in order to enforce medical help for his *Yukos* co-board member Alexanjan, and was successful with this action.

In March 2009 Khodorkovskiy and Lebedev were accused for a second time, this time of having embezzled 218 million tons of oil and of money laundering. This amount of oil equals to the whole amount produced by *Yukos* from 1998-2003. Khodorkovskiy's defenders argue that it is not possible to let such an amount disappear. This opinion was shared by former secretary of economics German Gref and Putin's Secretary of Industry and Trade, Viktor Christenko. Nevertheless, Khodorkovskiy and Lebedev were finally found guilty by judge Viktor Danilkin of the Moscow city court. What the two were accused for was that oil extracting companies majorly owned by *Yukos* allegedly had sold all their oil to shell companies *Yukos* owned completely for prizes below market rates. These shell companies with only a few employees had resold the oil to other buyers at usual market prizes. Khodorkovskiy was sentenced to 13 years of imprisonment including the sentence of the first trial. The sentence was later mainly confirmed by an appeal court. Although the penalty was reduced for one year because the appeal court was of the opinion that less than the amount of oil assumed by the city court had been intercepted.

³² Khodorkovskiy v. RUSSIA, Application no. 5829/04.

Primarily, two points caused the suspicion of a Russian trial not meeting the requirements of the European Convention on Human Rights: One of judge Danilkin's assistants, Natalja Wasiljewa, gave an interview in February 2011 claiming that the sentence Danilkin had read was not the one he had written. Instead, the Moscow central court had ordered him to deliver a judgment worked out by others because they were unsatisfied with the conclusions he had come to. Those claims were denied by judge Danilkin and the Moscow central court, but what makes the story remarkable is that Wasiljewa was able to describe in detail how Danilkin and his judgment were directly influenced. The second point is the fact that Putin, at that time prime minister, found Khodorkovskiy guilty in a TV show shortly before the court's judgment was delivered. He said that "each thief has to be imprisoned" and that it can be assumed, that Khodorkovskiy's crimes had been proved in front of the court. Later, President Medvedev criticized Putin's remarks and said: "Neither the president nor any other official has the right to express his opinion on this case or any other before the court's judgment is delivered". These circumstances made Amnesty International pronounce Khodorkovskiy and Lebedev as "prisoners of conscience". Lebedev's and Khodorkovskiy's attorneys announced to file a complaint for a second time to the European Court of Human Rights.

Khodorkovskiy has never confessed himself guilty, but asked – in vain – for exempt from imprisonment after having spent half of the first penalty he was sentenced to. The first request was completely dismissed; a second request in May 2011 was dismissed as formally insufficient. By now his lawyers have handed in a third one. As one of his last actions in duty President Medvedev gave partly way to one of the major demands of the protest movement after the Russian parliament elections in 2011 and gave order to Russia's general prosecutor Tschaika to examine the judgments delivered to 32 persons, including Khodorkovskiy and Lebedev. Opposition leaders had handed out a list of persons they considered to be political prisoners on a meeting before.

Since Putin has repeatedly expressed that in his eyes Khodorkovskiy "has blood on his hands", probably referring to some unsolved death cases of persons being involved in the economical happenings in the nineties, it is not totally clear whether the second trial is not going to be followed by a third one.

V. The Khodorkovskiy-Case in the Light of Article 6 ECHR

Before commenting whether Khodorkovskiy's rights guaranteed in the European Convention on Human Rights were violated by the state of Russia it has to be repeated that the European Court of Human Rights has already investigated and judged on this matter. Summarizing the judgment to one sentence, the court was of the opinion that there were some violations of the European Convention on Human Rights, namely the conditions of his arrestment and the way he had to sit in the court room (behind bars) on one hand, on the other hand according to the European Court there was no sufficient evidence for the trial being politically motivated. In view of the judgment in this place no further comments shall be made regarding the violations already established by the court. Instead, the focus shall be on the second trial, the European Convention on Human Rights has not occupied itself with so far or rather has not given any comment to so far and additionally the reproach of political influence the European judges couldn't find sufficient proof for, although the latter is a question of Art. 18 of the European Convention on Human Rights.

1. Independence of Impartiality of Tribunal

Besides others, Art. 6 (1) of the European Convention on Human Rights guarantees a "fair [...] hearing [...] by an independent and impartial tribunal". As described above the judge in the second trial, Danilkin, was accused by his former assistant to not having read his own sentence but instead has received order to read out a sentence written by others. A sentence not written by the judge being responsible for the trial, no matter who the author was instead, would be a clear violation of the requiring of an independent tribunal of Art. 6 (1) of the European Convention on Human Rights.

The problem we are facing here is that judge Danilkin denies his former assistant's accusations and that these allegations can therefore not be proved. Nevertheless, a country having oneself committed to the European values lying in the European Convention on Human Rights cannot simply ignore such accusations, especially because they are not made by just anybody, but instead made by one of the few witnesses that can be thought of for this case, namely one of the judge's co-workers. In order to prove that the state of Russia is seriously concerned about the implementation of the European Convention on Human Rights and the principles it is based on, the Russian government should make the circumstances in which the sentence was made as transparent as possible and by that to reveal to the public that the accusations are not true.

Besides this, it has to be taken into consideration that both trials were object to major national and international attention. Whether or not the start of the proceedings was politically motivated it was obvious that Putin wanted Khodorkovskiy to be condemned by the court, this can be seen in the public comments he made on the trials. The enormous attention the trials drew and the openly expressed governmental expectations to it made it not easy for the judges on charge to fulfil their utmost duties of being independent and impartial. The unusual reading of the judgment as slowly as possible, like described above, can be seen as another hint of the judges failing to (completely) meet their duties as described in Art. 6 of the European Convention on Human Rights.

2. Assumption of Innocence

Art. 6 (2) of the European Convention on Human Rights guarantees the assumption of innocence. This means that no one can be treated or called guilty of having committed a crime before the guilt is determined by court.³³ Until this moment especially all governmental institutions have to hold back with remarks on ongoing proceedings.³⁴ As described above, Putin, being Russia's prime minister in that time, expressed a clear opinion on Khodorkovskiy in a TV show, in December 2011, a few days before the judgment was delivered. Being asked about his opinion on the Khodorkovskiy proceedings he said that "each thief has to be imprisoned" and that it can be assumed, that Khodorkovskiy's crimes had been proved in front of the court. When saying "each thief has to be imprisoned", Putin was not giving general remarks on criminal politics, these comments were made in the clear context of Khodorkovskiy's trial. What he was actually saying with these words was "*like each other thief, Khodorkovskiy has to be imprisoned.*" This, combined with Putin's remarks on the situation of proof, was a clear violation of the assumption of innocence, especially because he was not expressing his opinion in a private conversation, but was expressing his opinion in his function as the prime minister in a TV show.

³³ ECHR, NJW 2011, 1789 (1789).

³⁴ EGMR ÖJZ 1995, 509, 510.

3. Prosecution being politically influenced

Although the question whether the prosecution was being politically motivated is a question of Art. 18 of the European Convention of Human Rights and was considered to not being provable by the European Court, we want to give a short comment on this question: We believe that the impression western media reports on this subject sometimes give, that Khodorkovskiy was in fact totally innocent, might not be right. We believe that during the acquisition of the government owned oil company *Yukos* in the nineties and also later on laws might have been broken and that Khodorkovskiy was at least moving inside a grey area. We do not have the knowledge and cannot judge whether the law infringements Khodorkovskiy was accused of having committed are true or not. But we do have the impression that the prosecution of the infringements depended on the political behaviour. Infringers who were involved in (oppositional) politics were prosecuted; infringers who were not involved were not prosecuted. In a constitutional state the question whether a law infringement is prosecuted or not cannot depend on the criminal's political involvement. Either all infringements are prosecuted or (e.g. due to an amnesty) none is. In the Khodorkovskiy case there are many indications that one reason besides others³⁵ why Khodorkovskiy's prosecution was started, or at least not politically prevented, was his political involvement.

VI. Summary

From the European Court of Human Rights' point of view, no satisfaction can be stated with the development of the Russian Federation's criminal justice system. It is far away from complying with the rules laid down in the European Convention on Human Rights or the European Court of Human Rights' standards. This instance is made evident and is illustrated by the fact that most complaints to the European Court of Human Rights on breaches of the European Convention on Human Rights are filed by Russians or at least by persons being prosecuted before Russian courts.

A great example to outline the conflict of Russia's prosecution procedures and conditions with regulatory European standards of Human Rights which the Russian Federation devoted itself to comply with in 1998 is the Khodorkovskiy-case since it has been attracting major public attention from the beginning on.

³⁵ Khodorkovskiy himself assumes that there were also economic interests of people close to Putin who got rich on the smashing of Yukos.

The European Court of Human Rights has detected great failures in Russia's judicial system ranging from Russia's state failure to enforce domestic court decisions in *Burdov v. Russia* to the poor implementation of the right to a fair trial for Russian prisoners.

Even though not having ruled in Russian's disfavour when the European Court of Human Rights dealt with the fact whether the Khodorkovskiy-case was politically motivated or not, the reasonable assumption of considering this to be the determining factor to get the ball rolling in this case alone is prove enough for the conclusion that Russia's judicial system is far away from operating independently with the necessary and appropriate objectivity and without being influenced by decisions of mighty Mr. Putin.

For us, it is left to say that we feel a certain discontent and great disappointment when determining Russia's compliance with the European Convention on Human Rights. In our opinion, the Russian Government, especially President Vladimir Putin, is to be summoned to reveal the true cause of Khodorkovskiy's incarceration and conviction to the public and in a further step take actions to disentangle the executive from the legislative powers on the way to ensure the application of the European Convention on Human Rights in the Russian Federation to its full extent.