E. TIME AND FACILITIES FOR THE PREPARATION OF THE DEFENCE; CONTACTS WITH THE LAWYERS

Question 9. Did the applicants have adequate time and facilities to prepare for their trial, as required by Article 6 § 3 (b) of the Convention?

SUMMARY OF THE GOVERNMENT'S RESPONSE

E1. The Government assert that the applicants had sufficient time and facilities to prepare an effective defence in accordance with Article 6 § 1 of the Convention (paragraph 70 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

E2. The applicants' ability to defend themselves was hindered in a number of respects both before and during the trial. The Government have not disputed the factual basis of the core complaints made by the applicants in relation to Article 6 § 3 (b) and (c) that were set out in their November 2011 Memorial:

(a) Both before and during the trial the applicants were only permitted to have discussions with their lawyers in special rooms at the pre-trial investigative isolators where there was constant video surveillance. In the courtroom, communications took place during the breaks and in restrictive conditions that did not provide confidentiality. The applicants had to speak to their lawyers through openings in the armoured glass cage (the "aquarium") and the consultations were always in the presence of guards (see further paragraph E2 (d) below);

(b) Before the trial, when the applicants were familiarising themselves with the case file, they were only allowed to review the original case file in the presence of the investigator. When the applicants wished to discuss the case materials in private with their lawyers the investigator removed the documents. Thus the applicants were unable to discuss the original case file confidentially with their lawyers;

(c) It was not possible for the applicants to keep the case file in their cells. They were only able to keep a small number of documents in their cell because of the limited amount of space in their cells. Given the enormous size of the case file this was clearly inadequate;

(d) The applicants were detained throughout the trial in the "aquarium". All conversations with their lawyers in the court room were within the earshot of the guards and consequently were not confidential. The Government has stated in its Memorandum that the trial court required that documents which their lawyers wished to pass to them had to be inspected first by the trial judge. Had the applicants been permitted to sit alongside their lawyers (as they unsuccessfully requested at the preliminary hearing[1]) they would not only have been able to have discussions with a greater degree of privacy but they would also have been able to review the lawyers' documents.

E3. All of these restrictions impeded the applicants' ability to defend themselves and were a fundamental breach of the basic principle guaranteed by Article 6 of lawyer-client privilege.

E4. The Convention case-law clearly supports the foregoing submission.

E5. "*Facilities*" provided to an accused include consultation with his lawyer (*Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, § 99, 28 June 1984, Series A no. 80; *Goddi v. Italy*, no. 8966/80, § 31, 9 April 1984, Series A no. 76). The opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence (*Bonzi v. Switzerland* no. 7854/77, Commission decision of 12 July 1978, DR 12, p.188; *Can v. Austria*, no. 9300/81, § 52, Commission's report of 12 July 1984, Series A no. 96). Thus Article 6 § 3(b) overlaps with a right to legal assistance in Article 6 § 3(c) of the Convention (see, for example, *Lanz v. Austria*, no. 24430/94, §§ 50-53, 31 January 2002; *Öcalan v. Turkey* [GC], no. 46221/99, § 148,

[1] See Motion dated 3 March 2009, at Volume C, tab C95, of the November 2011 Memorial.

ECHR 2005-IV; *Trepashkin v. Russia (no. 2),* no. 14248/05, §§ 159-168, 16 December 2010).

E6. The Court has consistently recognised that lawyer-client confidentiality is very important in the context of Article 6 (see for example *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 97, 2 November 2010). 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. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, "*his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective*" (see *S. v. Switzerland*, 28 November 1991, § 48, Series A no. 220). Any interference with privileged material should be exceptional, be justified by a pressing need and will always be subjected to the strictest scrutiny by this Court (see *Khodorkovskiy (no.1)*, § 198).

E7. As such the applicants submit that they were denied adequate "facilities" for their defence and that there was a violation of Article 6 § 3 (b) and (c) of the Convention.

Question 10. How many pages of prosecution materials were the applicants required to study (a) before; (b) during the trial; and (c) during the appeal proceedings, and how much time, at each stage, were they given?

SUMMARY OF THE GOVERNMENT'S RESPONSE

E8. The Government state at paragraph 71 of the Memorandum that:

> "The whole criminal case file no.18/432766-07 against the applicants contained 279 volumes, of which:
>
> - 188 volumes - preliminary investigation files, including the bill of indictment and its annexes (volumes 1-188 totalling 51,467 sheets);
>
> - 91 volumes – trial and higher court records (volumes 189-279 totalling 26,394 pages);
>
> - appeal court records (vol. 279, pages 62-407)."[2]

[2] This information is also relevant to question no.1 in the footnote on page 7 of the Statement of Facts.

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

E9. The applicants confirm that the information provided by the Government in paragraph 71 of the Memorandum is correct.

Question 11. While working with the case file, did the applicants have a possibility to:
(a) copy parts of the prosecution file;
(b) make handwritten notes on the case, and show them to the defence lawyers;
(c) keep the notes and copies of documents in their cells; and,
(d) bring those copies and notes to the courtroom and use them at the trial?

SUMMARY OF THE GOVERNMENT'S RESPONSE

E10. The Government state that the applicants were able to apply to the SIZO authorities for documents to be copied (paragraph 84 of the Memorandum). They assert that the applicants were able to use documents during the trial and to make notes on them and to pass those notes to their lawyers (paragraph 83 of the Memorandum). The Government do not directly answer the Court's question as to whether the applicants could keep notes and copies of documents in their cells.

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

E11. The Government's response overlooks two important points.

E12. First, and as noted above, the applicants were able to keep only a small number of copies of the case materials in their cells which in the circumstances of preparing for a trial where there was such a huge amount of documentary material was wholly inadequate. Bearing in mind the enormous volume of materials that they were required to study, both in preparation for the trial itself and then during the lengthy trial, their restricted ability to receive photocopies and to keep them in their cells significantly impeded their ability to prepare adequately for trial.

E13. Secondly, because of the fact that the applicants were detained in the courtroom in the "aquarium", their ability to pass notes confidentially to their lawyers during the trial was severely restricted (see further below in response to the Court's Questions 15 and 16).

Question 12. **Did the applicants' lawyers have the possibility to copy parts of the case file and take them to their office, or bring copies to the meetings with their clients? Did the applicants' lawyers have the possibility to show the applicants drafts of procedural documents or documentary evidence they had obtained? Did the applicants' lawyers have the possibility to study the case file separately from the applicants (i.e. on different days and without the applicants being present), or was it possible for the defence to split up, so that one lawyer worked with one volume while another worked, in parallel, with another volume?**

SUMMARY OF THE GOVERNMENT'S RESPONSE

E14. The Government explain that the defence lawyers had the opportunity to copy documents and to take them to their office and to bring copies to meetings with the applicants (paragraphs 85 and 86 of the Memorandum).

E15. The Government accept that the confidentiality of lawyer-client communication was not respected: the presiding judge demanded the "*prior submission of the documents transferred to the applicants to the judge in order to determine whether a particular document was relevant to the instant case because the court could not allow the transfer of personal notes and other documents not related to the case*" (paragraph 87 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

E16. The applicants accept that their lawyers had adequate access to the case materials. However the gravamen of the applicants' complaint is in relation to their inability to have confidential discussions with their lawyers in the SIZO and in the court room. In the SIZO all consultations took place in a room that was subject to CCTV monitoring whilst in the court room any communications between the applicants and their lawyers were monitored by the guards. Furthermore, the Government have stated that the judge stipulated that documents should be passed to him for inspection (see citation from paragraph 87 of the Memorandum above). In *Khodorkovskiy (no.2)* such a requirement was found to be a breach of Article 6 – see in particular § 643.

E17. The factual circumstances in the second trial were not materially different and it is notable that the Government have not offered any credible explanation for why the trial judge found it was necessary for this significant restriction on lawyer-client

confidentiality to be imposed (see further below the applicants' response to Question 16). Accordingly, there is no reason for the Court to reach any other conclusion than that reached by the Court in *Khodorkovskiy (no.2)* on the similar complaint.

Question 13. More generally, what other form [of] opportunity to work with the case file was accessible to the applicants, other than studying the original copy in a meeting room in the presence of an investigator, where a confidential exchange could only take place on condition that the original copy of the case file was removed?

SUMMARY OF THE GOVERNMENT'S RESPONSE

E18. The Government explain that the defence lawyers had a full electronic copy of the case materials and assert that "*[t]he applicants had an unrestricted opportunity to familiarise themselves with copies of the criminal case file transferred to them by their defence counsels, as well as to keep the necessary records.*" (paragraph 89 of the Memorandum). They also state that the applicants and their lawyers were "*able to work with the copies of the documents during private meetings without the participation of the investigator, outside the remand prisons and cells.*" (paragraph 90 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

E19. The Government's response does not address the two fundamental complaints raised by the applicants:

(a) First, that when consulting the original case materials an investigator had to be present throughout. As such, during consultations when the original case file was being reviewed there was an undoubted violation of lawyer-client confidentiality;

(b) Secondly, that all consultations took place in a room which was subject to CCTV monitoring: a fact referred to in the Registry's Statement of Facts (§ 50) and one which has not been disputed by the Government.

E20. In this regard there is, as noted earlier, a significant overlap between Article 6 § 3 (b) and (c).

E21. In addition, in answering the Court's question about other opportunities to work with the case file, the applicants would like to draw the Court's attention to the fact that, while preparing to submit defence evidence and whilst preparing for closing oral arguments, they did not have an opportunity to use case file material from the trial stage, namely the trial record, since the latter was prepared and provided by the court only after a very significant delay. This is discussed in greater detail in paragraphs E23 - E25 below.

Question 14. Were the applicants hindered in the preparation of their appeal, in particular in view of their allegation that they received access to the full copy of the trial record only on 16 March 2010? The applicants also complained about inaccuracies in the trial record; were those inaccuracies such as to prevent the applicants from challenging their conviction before the court of appeal? If the trial record indeed contained serious inaccuracies, the applicants are invited to refer to them and to give the "correct" version. The applicants are invited to refer only to those inaccuracies which seriously distorted the witnesses' testimony and could have influenced the material conclusions of the court. The applicants are asked not to refer to minor omissions or errors in the trial record which could not have influenced the outcome of the trial.

SUMMARY OF THE GOVERNMENT'S RESPONSE

E22. The Government assert that the applicants were not hindered in the preparation of their appeal and that their comments on the trial record were considered appropriately (paragraphs 91-105 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

E23. The gravamen of the applicants' complaint in this regard relates to the fact that all of the trial protocols were not available to them when they were preparing for the appeal rather than to the inaccuracies in the trial protocols that were available.

E24. It will be recalled that the applicants complained in the November 2011 Memorial that the defence had requested on repeated occasions that the court prepare daily records of proceedings and to provide those to them with sufficient regularity. Under domestic

law[3] the protocol is the only official document of evidential significance that reflects the course and contents of a trial. Consequently the defence asked that they be given sufficient opportunity to familiarise itself with them and make comments.[4] However, when Judge Danilkin retired to the retiring room to consider his verdict on 2 November 2011, the court had only prepared and provided to the defence trial records for the period from the start of the trial up until 17 January 2010. As a consequence Judge Danilkin was unable to refer in his verdict to the official protocols for a very significant part of the trial, including the part of the trial where evidence was produced specifically by the defence. That is why the verdict does not have references to the trial record, which significantly hindered the defence's ability to make an effective appeal to the cassation instance. Similarly, while drafting the appeal, the defence was unable to refer to official trial records to that extent.

E25. The International Bar Association condemned this failure in its report following its observation of the trial:

> "[T]he [RF CCrP] obliges a judge to cite the evidence in his/ her judgment. Danilkin's judgment makes frequent reference to key testimony and other evidence presented in Court, which is crucial in a case of this complexity. Most references should logically be to the official protocols, yet there was an incomplete set as of the date the judgment was read in court. In fact, the judgment did not contain a single citation to any protocols at all[5].
>
> …
> "Despite some disingenuous prosecution arguments to the contrary, this was a major procedural irregularity and a further breach of the [RF CCrP]. This could not only be said to prejudice the proceedings for both parties, but it may also **eviscerate any claim to fairness and rationality in the result of the trial**. This is particularly so in a trial which involved complicated evidence of financial and accounting matters. There were no references to the protocols in the judgment (even to those from 2009 which did exist). **With so many defence motions deferred or ruled against, in striking contrast to the proportion of prosecution motions granted, and the lack of timely protocols, the judgment could only draw overwhelmingly for its conclusions on what was presented by the prosecution at the start of the trial**. What evidence had, or might have, been established in the courtroom did not have as much bearing on the outcome of the trial as it should have."[6]

[3] See Article 259 of the RF CCrP which is set out in full at tab 13 to this Reply.
[4] See the documents submitted with the November 2011 Memorial: the Motion of 9 July 2009 at Volume C, tab C106; Motion of 29 March 2010 at Volume C, tab C131; Trial Record of 5 April 2010 at Volume C, tab C132; Motion of 20 September 2010 at Volume C, tab C203.
[5] Page 37 International Bar Association Human Rights Institute "*The Khodorkovsky trial: A report on the observation of the criminal trial of Mikhail Borisovich Khodorkovsky and Platon Leonidovich Lebedev, March 2009 to December 2010*". September 2011, at Volume C, tab C237 of the November 2011 Memorial
[6] Page 42-43 *op.cit.*

(Emphasis added)

Question 15. Did the applicants have the possibility to have confidential contacts with their lawyers during the investigation, as required by Article 6 § 3 (c) of the Convention? In particular, the Government are invited to comment on the episode in February 2007 when the applicants' lawyers' documents were examined in a Moscow airport. Why did the airport security order that search? How many people from the airport security team participated in the search, and who they were? What sort of "privileged material" did the lawyers have in their possession at that moment, and could that search have influenced the further proceedings? Did a domestic legal remedy exist to complain about that search and when did the applicants complain about this episode before the Court for the first time?

SUMMARY OF THE GOVERNMENT'S RESPONSE

E26. The Government do not answer the first of the Court's questions in Question 15.

E27. In relation to the episode in February 2007, the Government argue (by implication at least) that this complaint is inadmissible as they assert that the applicants' lawyers should have brought a complaint under Article 256 of the RF Civil Procedure Code (paragraph 110 of the Memorandum). The Government do not answer the Court's questions "*Why did the airport security order that search? How many people from the airport security team participated in the search, and who they were? What sort of "privileged material" did the lawyers have in their possession at that moment?"*

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

E28. For the reasons set out above, the applicants maintain their complaint that the applicants did not have the possibility to have confidential contacts with their lawyers during the investigation, as required by Article 6 § 3 (c) of the Convention. All consultations took place in a room which was subject to CCTV recording. Some consultations necessarily had to take place in the presence of the investigator.

E29. Equally the applicants maintain their complaint in respect of the February 2007 episode. The Government has offered no explanation at all as to why "*additional checks*" were necessary, failing to answer, as noted above, a number of important questions posed by the Court about this episode. The now undisputed facts before the Court are "*that in the course of the searches, confidential and legally privileged*

papers from lawyers' files, lawyers' documents and letters were meticulously examined and carefully video-recorded. Since the contents of lawyers' files were recorded on video camera, and since such procedures are not necessary for the carrying out of pre-flight searches, it would appear that the video-film recording was made on behalf of the prosecution in the criminal case against the [a]pplicant[s]."[7] The search was overseen by a woman who produced an identification card indicating that she was the Senior Investigator for Particularly Important Cases, Colonel of Justice Irina Valentinovna Moshnina – see further the statement of Mr Rivkin, one of the defence lawyers, that was submitted with Mr Khodorkovskiy's original application in November 2007.[8]

E30. The harassment and intimidation of the applicants' lawyers came at a critical stage. It will be recalled that it occurred at Domodedovo airport, Moscow, when a number of lawyers (the late Mr. Schmidt, Mr Ye.Baru, Mr K.Rivkin, Mr L.Saikin, and Mrs K.Moskalenko) were flying out at the request of the RF General Prosecutor to Chita to see their clients who had just been transferred there as part of the "second" case. Moreover, the Court will recall its findings in *Khodorkovskiy (no.2)* that it found that the "*lawyers in this case were working under immense pressure.*"[9] Furthermore, the Court found that the earlier disbarment proceedings brought against the applicants' lawyers were measures "*directed primarily, even if not exclusively, at intimidating*" them.

E31. The Government's implied argument on inadmissibility is misconceived. The applicants' lawyers did bring a number of complaints in relation to the authorities' illegal actions in February 2007 – those are set out in detail in Mr Khodorkovskiy's original application in this case which was submitted to the Court in November 2007 – see in particular paragraphs 26-36 of that application and Annexe 2 of the November 2011 Memorial, paragraphs 6 and 7. Since those illegal actions, first, were performed in regard to the lawyers who represented the applicants in the criminal case specifically in their capacity as such, and, secondly, comprised elements of criminal abuse of office by officials, such complaints took place in the context of criminal

[7] Paragraph 26 (d) of the November 2007 original application by Mr Khodorkovskiy.
[8] See the statement of Mr Rivkin at Volume D, tab D1, of the November 2011 Memorial.
[9] § 929 of the judgment in *Khodorkovskiy (no. 2).*

proceedings. Article 256 of the RF Civil Procedure Code, referred to by the Government, is intended for other situations, where officials' decisions and actions are appealed other than in connection with criminal proceedings or in respect of participants therein.

E32. In summary:

(a) On 8 February 2007 and 15 February 2007 Mrs Moskalenko requested the GPO to instigate a criminal investigation into the harassment and intimidation of the applicants' lawyers. The GPO did not even respond to that formal request (although it was legally obliged at the very least to respond). Instead the GPO sought Mrs Moskalenko's disbarment; and

(b) The applicants cited and relied upon this episode in support of their applications for the proceedings to be terminated as an abuse of process by the prosecution (see paragraphs 64-71 of Mr Khodorkovskiy's originating November 2007 application). The cassational judgment dismissing that application was issued on 19 September 2007 and thus the issue was brought to this Court within the six-month time limit.

Question 16. Did the applicants have the possibility to have confidential contacts with their lawyers during the trial, in view of the conditions in which they were detained in the courtroom? What other opportunities for confidential contact between the applicants and their lawyers existed (a) during the hearing; (b) during the breaks in the hearings; (c) on the days when there were no hearings; or (d) in the mornings before the start of the hearing, or in the evenings after the hearing? In view of the conditions in which the defence lawyers had to communicate with the applicants, was the applicants' right to legal assistance under Article 6 § 3 (c) respected?

SUMMARY OF THE GOVERNMENT'S RESPONSE

E33. The Government assert that the applicants' rights under Article 6 § 3 (c) were "*fully respected*" (paragraph 119 of the Memorandum).

E34. They argue that as the applicants' detention "*inevitably involved a certain arrangement of the applicants' contacts with their lawyers in the remand prison and*

in the courtroom, in particular, the requirement that the court must study the documents in advance. Such requirements are intended not to limit the lawyers' contacts with their clients, but to ensure the maintenance of order in the courtroom while persons in custody are placed under guard. In addition, this requirement applies to the procedure for the transfer of documents; the verbal communication between the applicants and their lawyers was not, in its turn, limited and was carried out to the extent that was possible under the conditions of the trial." (paragraph 114 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

E35. The Government do not challenge the applicants' case that confidential communications between the applicants and their lawyers were always significantly restricted and were frequently impossible.

E36. The restrictions in the court room were especially severe given

(a) The Government make the extraordinary assertion that all documents had to be inspected so as "*to ensure the maintenance of order in the courtroom while persons in custody are placed under guard.*" However, neither the judge nor – even – the guards ever offered such an explanation, and it is barely credible that a trial judge needs to inspect confidential lawyer-client communications "*ensure the maintenance of order in the courtroom*", including in view of the fact that the defendants were accused of economic offences and had never been involved in any form of disorder or violence whatsoever. This is yet another example of the bad faith of the Government throughout these proceedings; and

(b) The fact is that the applicants were detained in the "aquarium" in the court room in the presence of guards. That is why their oral communications with the lawyers were never confidential.

E37. The applicants accept that they had opportunities to speak with their lawyers when the court was not sitting although such communications were not confidential. However, communication with their lawyers during the trial itself was of the highest importance.

There is no dispute but that such communication was significantly compromised. Accordingly, the applicants maintain their claim that there was a violation of Article 6 § 3 (c) of the Convention.