
Legal monitoring in Ukraine

Report prepared by Arne Stevns, former Chief Constable, and Erik Merlung, former State Prosecutor, on the charges against former head of government Yulia Tymoshenko for homicide.

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The Danish Helsinki Committee for
Human Rights
Bredgade 36 B
DK-1260 Copenhagen K
Tel. (+45) 3391 8118
main@helsinki-komiteen.dk
www.helsinkicommittee.dk



Concerning the sentence currently being served by Yulia Tymoshenko

The former Ukrainian head of government Yulia Tymoshenko is currently serving the 7-year prison sentence for abusing her position as head of government imposed on 11 October 2011. The criminal proceedings which led to this harsh sentence have been dealt with previously in a number of reports prepared by the Danish Helsinki Committee for Human Rights, viz. the reports of 28 April 2011 and 12 August 2011, in which strong criticism is levelled in a number of respects at the circumstances under which the case was heard. The Committee views this case as altogether politically motivated.

During the hearing of this criminal case at the Ukrainian courts, Tymoshenko was remanded in custody and even filed a general complaint with the European Court of Human Rights (ECHR) against Ukraine's alleged violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with the criminal case. ECHR issued a provisional ruling, in which the pre-trial confinement was ruled to be illegal and politically motivated, i.e. it constitutes a violation of the Human Rights Convention. The court's judgment as to whether violations of the convention also exist in respect of Tymoshenko's other grievances is not yet available but is expected to be so shortly.

In a report of 28 May 2013 the Council of Europe's Committee on Legal Affairs and Human Rights declared that the internationally recognized principles governing the separation of political and criminal liability are deemed to have been violated in the criminal case against Tymoshenko. This report also establishes that the criminal case is not about the exercise of justice, but merely the prevailing majority's wish to single out leaders of the opposition by punishing them for their political actions committed while they held power in government. Yulia Tymoshenko is considered to be a political prisoner.

The new charge pending

In January 2013 the Ukrainian prosecution service pressed fresh charges against Yulia Tymoshenko for embezzlement and homicide. A conviction for homicide can potentially lead to a sentence of lifetime imprisonment and hence to her final exclusion from the politically active arena.

These charges must be regarded as renewed persecution and as the Ukrainian government's attempt to finally "disarm and incapacitate" her politically.

What is the point of this highly surprising and sinister indictment?

The letter of 18 January 2013, in which the charge against her was formulated, states the time of commencement of her criminal acts as: *"around the beginning of 1996"*. At this point in time – together with the then Prime Minister Pavlo Lazarenko – she allegedly decided that Yevgeny Shcherban, a Ukrainian MP active as a businessman in the Donetsk region, was to be murdered.

Furthermore, the charge states that Lazarenko and Tymoshenko arranged for contact to be made with, and payment later made to, the criminals who were supposed to make provision for the homicide to be committed. The charge states that Tymoshenko's motive was allegedly to eliminate a business rival, and Lazarenko's motive to eliminate a political rival. The homicide of Shcherban was committed at Donetsk Airport on 3 November 1996, carried out by a group of several perpetrators.

It is with some amazement that we note that 17 years elapsed from the time of the alleged criminal act until the authorities reacted by charging Tymoshenko. Furthermore, the somewhat imprecise timing of the crime is also noteworthy.

Since January of this year the prosecution service has investigated the case by means of an in-court examination at a court of inquiry in Kiev. Since January 2013 these court inquiries have consisted of examining a number of the witnesses called by the prosecution service, but this has not produced much information to enhance the credibility or relevance of the charge.

What is common to all witness statements—apart from that of one witness, Petro Kyroshenko, about whom more below—is that the thing they explain about Tymoshenko's involvement in the homicide is not based on their own experiences/observations but purely something they have heard from other quarters (hearsay) or something they have conjured up, on their own account, as it were.

Regarding the motive for being involved in the homicide, as claimed in the charge against Tymoshenko (the desire to eliminate a business rival), a number of the witnesses have made representations:

- 1) witness K, who had a seat in parliament for the same political party as the murdered Shcherban: that Tymoshenko had no motive for killing him, that they were not enemies, but on the contrary they socialized privately, and

- 2) witness T, who was a business partner of the murdered Shcherban: that there were no conflicts between his and the murdered person's business undertaking and the company managed by Tymoshenko, and that consequently there was no motive for her to wish for Shcherban to be "taken out".

Witness Kyroshenko attracts particular interest, partly because he gave his deposition to the prosecution service back in 2001 in a case about the homicide of Shcherban and at that point failed to testify anything that could incriminate Tymoshenko or relate her to the homicide.

Now, in April 2013, as part of the investigations currently in progress, this witness has been examined in the court of inquiry in a video conference held at the Ukrainian Consulate in San Francisco, USA. The witness is a US resident. The statement that he has now given differs from his testimony in 2001, but of far greater interest than the substantive shift in his testimony are the following circumstances surrounding the examination:

In reply to a question from Tymoshenko's defence counsel about the reason he now has a different explanation for Tymoshenko's part in the homicide, he says he does not remember what he testified in this respect in 2001; and he says that, with regard to an alleged payment of half a million US dollars from Lazarenko to the killers' immediate contact, about which he stated nothing in 2001, no one asked about this at the time.

During the witness's statement via a video link at the consulate in San Francisco the Ukrainian consul was present in the room where the witness statement took place. The consul interfered in the examination, which can only be regarded as unacceptable.

In reply to the defence counsel's request to the court to show, during the video transmission, the whole room in which the examination took place in order to be able to see who else may or may not have been present in more detail, the investigation judge said that it was not possible for technical reasons. This fact that it was not possible to show whether several people were in the room at the same time must also be considered unacceptable.

Yulia Tymoshenko had refused to take part in the same video examination from the prison where she is serving her sentence; on the contrary, she had demanded to be

present in the courtroom in Kiev. Her defence counsel objected to the fact that, despite this demand, she had not been brought into the courtroom to be present. The judge overruled the objection. This can undoubtedly be viewed as a violation of Tymoshenko's right to a fair trial (cf. Article 6 of the Human Rights Convention).

Moreover, Tymoshenko's defence counsel wished to put questions to witness P.K. about the witness's own criminal activities and about his relationships with the criminal groups involved in the homicide – several of these having been the direct perpetrators. Following the objection by the prosecution service, the judge refused to allow these questions to be put to the witness.

In view of the witness's testimony, this also appears to be unacceptable and constitutes a violation of Tymoshenko's right to a fair trial.

Finally, the court denied Tymoshenko's defence counsel an opportunity to ask witness P.K. questions concerning circumstances connected with the witness's spouse. The latter had been in a remand prison in Ukraine for 2½ months prior to the witness being examined, but had suddenly been released and granted permission to travel home to the USA. Since the circumstances surrounding the spouse's incarceration and subsequent release are of paramount interest to any evaluation of whether the witness has been pressurized by the prosecution service, there is evidence here again of a clear violation of Tymoshenko's right to a fair trial. This opinion is further fuelled by the witness's information that, about a year beforehand, he had had a meeting in the USA with representatives of the supreme Ukrainian prosecution service.

Regarding the consideration of the case by the court of inquiry, it must be stated by way of conclusion that all hearings were held in open court and with extensive transmission of the session proceedings to the world at large via the mass media. Given that what is involved here is legal hearings which are part of an investigation of the case, this would seem to be absurd and in patent contravention of acknowledged standards.

In the court of inquiry no evidence emerged of Tymoshenko's guilt in the homicide of Yevgeny Shcherban. This is surely all the more surprising since the Ukrainian Deputy Attorney-General Renat Kuzmin has publicly declared on a number of occasions that there was safe evidence of Tymoshenko's guilt in the homicide of Yevgeny Shcherban. This presents a violation of article 6.2 of the European Convention on Human Rights, "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

It remains to be seen whether this evidence will see the light of day.

But handling of the investigation remains inconclusive

Nevertheless, this court inquiry has now been stagnant since May of this year, 2013. No hearings have since been held in the case, and the prosecution service has not announced or revealed what else is set to happen.

The purpose of an *investigation* in a criminal case is to generate knowledge and an evidentiary basis to enable the prosecution service to decide whether a charge is to be brought or whether a case has to be dropped.

If the Ukrainian prosecution service simply allows time to pass in this instance without making a decision as to whether to bring a charge as such, the notorious sword of Damocles will have been positioned over Tymoshenko's head. This, too, per se is a violation of her human rights (Article 6 of the European Convention on Human Rights: trial within a reasonable time).

The intention behind the above comments on the progress of the investigation at the Ukrainian court of inquiry is not to express any opinion as to whether the investigation may eventually result in the prosecution service establishing a basis for bringing charges against Tymoshenko for homicide.