

# POLITICAL PROSECUTIONS IN UKRAINE: THE CASE OF YULIA TYMOSHENKO

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## I. INTRODUCTION

The winter of 2013 to 2014 made a mark in the history of Ukraine. It was a time of mourning for the heroes killed during the Revolution of Dignity, and a time of joy from the victory.<sup>1</sup> It was a time when the Ukrainian nation was particularly angry and, at the same time, endlessly kind to one another. Our nation's palette of feelings and emotions was as bright as ever. It was a time when a new Ukraine—a country of free people—was born. These events have once again proven that it is worth fighting for justice.

The Revolution of Dignity was preceded by the events of 2010 to 2013 (the presidency of Viktor Yanukovich).<sup>2</sup> The illegality of authorities' actions during this period could be qualified as a threat to the rule of law in Ukraine.

## II. THE CASE AGAINST YULIA TYMOSHENKO AS EVIDENCE OF THE REGIME'S FLAWS

One example is widely known: the criminal cases against Yulia Tymoshenko, the most authoritative leader.<sup>3</sup> The most important one is the case concerning the gas contract with Russia of January 19, 2009. In March 2011, at the initiative of the pro-presidential Party of Regions, an ad hoc commission was set up in the Verkhovna Rada (the Ukrainian

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1. See Neil Buckley & Roman Olearchyk, *Yanukovich Toppled in New Ukrainian Revolution*, FIN. TIMES (Feb. 22, 2014), <https://www.ft.com/content/8faf984a-9bda-11e3-afe3-00144feab7de>.

2. *Ukraine Profile—Timeline*, BBC NEWS (Oct. 27, 2015), <http://www.bbc.com/news/world-europe-18010123>.

3. *Ukraine: Tymoshenko on Trial in Kiev for Abuse of Power*, BBC NEWS (June 24, 2011), <http://www.bbc.com/news/world-europe-13899740>.

Parliament) to investigate the circumstances under which the 2009 gas contract was signed between Naftogaz and Gazprom.<sup>4</sup> The commission reported that Tymoshenko forged the Cabinet of Ministers' directives for the contract negotiations with the Russian Federation.<sup>5</sup> In April 2011, the Prosecutor General's Office ("GPU") brought criminal charges against Tymoshenko for the abuse of authority in concluding the gas contract with Russia in 2009.<sup>6</sup> Two months later, she was charged under article 365 of the Criminal Code of Ukraine for acting in "[e]xcess of authority or official powers" causing "grave consequences," namely "substantial damage to the legally protected . . . state . . . interest[.]" estimated at UAH 1.5 billion (the equivalent of USD 194.6 million).<sup>7</sup> The respective rules of the Criminal Code of Ukraine envisage imprisonment for a term of seven to ten years.<sup>8</sup>

The indictment maintained that, in negotiating and concluding the gas contracts on behalf of Ukraine's state-owned gas company Naftogaz and Russia's counterpart gas company Gazprom, Ukrainian Prime Minister Tymoshenko, by agreeing to terms that were "economically profitless and unacceptable" for Ukraine, committed a willful act for personal gain, being fully aware of the restrictions of the Memorandum on Gas Cooperation between the Russian Federation and the Ukrainian Cabinet of Ministers.<sup>9</sup>

The case was brought to a large extent through the testimony of Viktor Yushchenko, the former President of Ukraine and political opponent of Tymoshenko, who claimed that the latter was "driven by political gain when she signed [the] gas deal with Russia in 2009 and betrayed Ukraine's national interests."<sup>10</sup> Yushchenko claimed Tymoshenko wanted to be portrayed as a "saviour" who brought a

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4. Interfax-Ukraine, *Naftogaz Ex-Chief Dubyna Signed Gas Contracts Under Threat of Dismissal*, KYIV POST (May 29, 2011, 1:50 PM), <https://www.kyivpost.com/article/content/ukraine-politics/naftogaz-ex-chief-dubyna-signed-gas-contracts-unde-104767.html>.

5. Inters, *Party of Regions Statement: What Is Tymoshenko Accused of and Tried for?*, KYIV POST (Aug. 10, 2011, 8:15 AM), <https://www.kyivpost.com/article/content/ukraine-politics/party-of-regions-statement-what-is-tymoshenko-accu-110502.html>.

6. *Tymoshenko poddelala hazovye dyrektyvy* [Tymoshenko Forged the Gas Directive], MYNPROM (Apr. 21, 2011, 10:58 AM) (Ukr.), <http://minprom.ua/digest/66456.html>.

7. *Postanova pro prytiahnennia Tymoshenko v iakosti obvynuvachenoï* [Decision to Prosecute an Accused Tymoshenko], UKRAÏNS'KA PRAVDA (July 4, 2011, 4:57 PM) (Ukr.), <http://www.pravda.com.ua/articles/2011/07/4/6355821>; see also SKADDEN ARPS SLATE MEAGHER & FLOM LLP, THE TYMOSHENKO CASE 40 (2012), <https://www.minjust.gov.ua/file/24353>.

8. *Decision to Prosecute an Accused Tymoshenko*, *supra* note 7.

9. SKADDEN ARPS SLATE MEAGHER & FLOM LLP, *supra* note 7, at 8, 42-43.

10. Associated Press in Kiev, *Viktor Yushchenko Testifies Against Yulia Tymoshenko*, GUARDIAN (Aug. 17, 2011, 10:34 AM), <https://www.theguardian.com/world/2011/aug/17/viktor-yushchenko-testifies-against-yulia-tymoshenko>.

“bitter pricing dispute” to an end.<sup>11</sup> He was assured Tymoshenko traded Ukrainian interests for special relations with the Russian leaders.<sup>12</sup>

However, the criminal charges against Tymoshenko were untenable. The political gas deal between the two Prime Ministers, Vladimir Putin and Tymoshenko, was reached against the background of a severe crisis, with Putin deciding to cut the gas supplies to Ukraine and through Ukraine to Western Europe on January 5, 2009.<sup>13</sup> On January 17, 2009, with the European Union’s principal figures breathing down her neck to push through the solution, Tymoshenko reached an agreement in principle with Putin, in Moscow.<sup>14</sup> On January 19, 2009, Naftogaz and Gazprom signed the contract.<sup>15</sup> After Tymoshenko’s return, on January 21, 2009, the Cabinet of Ministers confirmed the contracts (it was a collective decision of the members of the government).<sup>16</sup> And, on January 22, 2009, the flow of Russian gas to Ukraine and to Western Europe was “fully restored.”<sup>17</sup>

The GPU of Ukraine involved the Koretzky Institution of State and Law (“Institution”), the Ukrainian state expert organization, at the investigation stage of the gas case. On August 15, 2011, Deputy Director of the Institution, Vladimir Nagrebely, presented at trial her expert conclusion that Tymoshenko’s gas directives did not exceed her authority,<sup>18</sup> and that these directives were the means necessary for the implementation of her duties as the Prime Minister.<sup>19</sup>

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11. *Id.*

12. *Id.*

13. ARIEL COHEN & OWEN GRAHAM, HERITAGE FOUND., NO. 2194, EUROPEAN SECURITY AND RUSSIA’S NATURAL GAS SUPPLY DISRUPTION 1 (2009), [http://s3.amazonaws.com/thf\\_media/2009/pdf/wm2194.pdf](http://s3.amazonaws.com/thf_media/2009/pdf/wm2194.pdf).

14. *Gas Charges “Absurd,” Says Tymoshenko*, UPI (Apr. 12, 2011, 10:25 AM), <http://www.upi.com/Gas-charges-absurd-says-Tymoshenko/76601302618333>; “*Gas to Flow*” After Moscow Deal, BBC NEWS (Jan. 18, 2009), <http://news.bbc.co.uk/2/hi/europe/7834796.stm>.

15. David R. Marples, *The New Gas Deal: Threats and Risks for Ukraine*, WORD PRESS: CURRENT POL. UKR. (Feb. 1, 2009), <https://ukraineanalysis.wordpress.com/2009/02/01/the-new-gas-deal-threats-and-risks-for-ukraine>.

16. *Tymoshenko: Parliament Confirmed Legality of Gas Contracts with Russia*, UNIAN (Sept. 7, 2011), <http://www.unian.info/politics/539068-tymoshenko-parliament-confirmed-legality-of-gas-contracts-with-russia.html>.

17. Eur. Consult. Ass., *Keeping Political and Criminal Responsibility Separate*, 3d Sess., Doc. No. 13214, ¶ 48, at 12 (2013).

18. *Svidetel’: Tymoshenko ne prevyshala polnomochiia* [Witness: Tymoshenko Did Not Exceed the Powers], LB.UA (Aug. 15, 2011, 10:43 AM) (Russ.), [https://translate.google.com/translate?hl=en&sl=ru&u=http://lb.ua/news/2011/08/15/110464\\_svidetel\\_tymoshenko\\_ne\\_previshal.html&prev=search](https://translate.google.com/translate?hl=en&sl=ru&u=http://lb.ua/news/2011/08/15/110464_svidetel_tymoshenko_ne_previshal.html&prev=search).

19. *Lechenye Tymoshenko za hranytsei: V Ynstitute hosudarstva y prava ne uvydely prestupleniya Tymoshenko* [Tymoshenko Treatment Abroad: The Institute of State and Law Did Not See the Crime in the Tymoshenko Directives], FOCUS, <https://focus.ua/country/196862> (Ukr.) (last visited Dec. 31, 2016).

Even prosecution witnesses were testifying in favor of Tymoshenko. Oleg Dubina, former head of Naftogaz (2007 to 2009), confirmed that the agreement with Russia was based on the standard formula—the price of gas was calculated according to the price of oil.<sup>20</sup> Almost all the witnesses claimed that it was President Yushchenko who had ruined the price of gas with his purchase of eleven billion cubic meters in 2009;<sup>21</sup> he allegedly had recalled Dubina from Moscow (without being duly authorized).<sup>22</sup> Alexey Miller, head of Gazprom, acknowledged these facts.

The important point in Dubina's testimony was his statement that the gas agreement of January 19, 2009, was reached with the provision that Ukraine could at any moment terminate the agreement without penalty.<sup>23</sup>

### III. A MOCK TRIAL?

The whole trial had nothing in common with legality or the rule of law. Judge Kireyev explicitly violated the laws of Ukraine. For example, Kireyev denied all but two of Tymoshenko's witness requests (out of thirty-five claimed).<sup>24</sup> Kireyev "systematically refused procedural requests of Ms. Tymoshenko's lawyers, including requests for postponements of hearings due to her health problems, and requests for taking evidence."<sup>25</sup> He even rejected, without giving any reasons, the request to add to the case file "such a fundamental document as the litigious gas contract itself, the main corpus delicti."<sup>26</sup> Additionally, the judge "placed Tymoshenko in pretrial detention on apparently spurious grounds (because [she] once arrived seven minutes late for a court hearing)."<sup>27</sup>

Tymoshenko's right to effective assistance of counsel was restricted by the "revocation of [Serhiy] Vlasenko's power of attorney by the trial

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20. See *Ukraina mozhets bezboleznennno rastorgnut' kontrakt s Gazpromom* [Did Ukraine Safely Terminate the Contract with Gazprom?], URA-INFORM (July 29, 2011) (Russ.), [https://translate.googleusercontent.com/translate\\_c?anno=2&depth=1&hl=en&rurl=translate.google.com&sl=ru&sp=nmt4&tl=en&u=http://ura-inform.com/ru/politics/2011/07/29/kontrakt&usg=ALkJrhhRSEoETukgjuBf2FaVm41wb26mg](https://translate.googleusercontent.com/translate_c?anno=2&depth=1&hl=en&rurl=translate.google.com&sl=ru&sp=nmt4&tl=en&u=http://ura-inform.com/ru/politics/2011/07/29/kontrakt&usg=ALkJrhhRSEoETukgjuBf2FaVm41wb26mg).

21. *Prosecution Witness Confirms Links Between Yushchenko and RosUkrEnergo*, TYMOSHENKO.UA (July 29, 2011, 2:40 PM), <https://web.archive.org/web/20131215231540/http://www.tymoshenko.ua/en/article/9758x75e>.

22. See *id.*

23. *Ukraine Safely Terminate the Contract with Gazprom?*, *supra* note 20.

24. SKADDEN ARPS SLATE MEAGHER & FLOM LLP, *supra* note 7, at 161, 163 n.718, 166.

25. *Keeping Political and Criminal Responsibility Separate*, *supra* note 17, ¶ 52, at 13.

26. *Id.*

27. *Id.*

judge” on July 18, 2011.<sup>28</sup> Consequently, in the absence of any legal representative, the court interrogated twenty-five out of forty prosecution witnesses for four full days.<sup>29</sup> It is important to note that Judge Kireyev had only practiced for two years and was still in his probationary period when hearing the case.<sup>30</sup>

The presumption of innocence was apparently violated by numerous public statements by senior political and judicial authorities, including the Ukrainian President (Yanukovich suggested that Tymoshenko should “prove her innocence in court”),<sup>31</sup> Prime Minister, Vice-Prime Minister, the Prosecutor General, his First Deputy, and members of the Verkhovna Rada belonging to the ruling party, the Party of Regions.<sup>32</sup>

As the European Court of Human Rights (“ECtHR”) put it in the case of *Witold Litwa v. Poland*,<sup>33</sup> “it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances.”<sup>34</sup> Thus, Tymoshenko’s pretrial detention ordered by Kireyev was in breach of both domestic legislation and international law.<sup>35</sup>

On October 11, 2011, Tymoshenko was sentenced to seven years in prison.<sup>36</sup> The conditions of her imprisonment were inhumane, and even after her health worsened critically she was deprived of proper medical care and subjected to degrading treatment.<sup>37</sup> Tymoshenko’s lawyer and family members were persecuted as well. Her husband, Oleksander Tymoshenko, had to seek asylum abroad; it was granted by the Czech Republic in January 2012.<sup>38</sup> It was not until late February 2014 that he was able to return to Ukraine.<sup>39</sup> In January 2013, Tymoshenko’s lawyer,

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28. *Id.* ¶ 54, at 13.

29. *Id.*

30. *Id.* ¶ 52, at 13.

31. *Id.* ¶ 51, at 12-13.

32. *Id.*

33. 2000-III Eur. Ct. H.R. 289.

34. *Id.* ¶ 78, at 310.

35. H. Tokaryev, *On the Court Ruling Changing the Restraint Measure Against Yulia Tymoshenko*, KHARKIV HUM. RTS. PROTECTION GROUP (Aug. 28, 2011), <http://khpg.org/en/index.php?id=1314487990&w=tymoshenko+measure>.

36. Ellen Barry, *Former Ukraine Premier Is Jailed for Seven Years*, N.Y. TIMES, Oct. 12, 2011, at A4.

37. Daryl Lindsey, “*There Is No Doubt Tymoshenko Is Seriously Ill*,” SPIEGEL ONLINE (Apr. 25, 2012, 4:06 PM) (Ger.), <http://www.spiegel.de/international/europe/german-press-review-on-julia-tymoshenko-s-prison-conditions-a-829711.html>.

38. Tom Parfitt, *Yulia Tymoshenko’s Husband Granted Asylum in the Czech Republic*, GUARDIAN (Jan. 6, 2012, 3:32 PM), <https://www.theguardian.com/world/2012/jan/06/yulia-tymoshenko-husband-asylum-czech>.

39. *Tymoshenko Family Reunited in Dnipropetrovsk*, INTERFAX-UKR. (Feb. 24, 2014,

Serhiy Vlasenko, was “accused of car theft, robbery and failing to obey a court ruling stemming from his divorce several years ago.”<sup>40</sup>

#### IV. MORE CASES AGAINST TYMOSHENKO: WHEN ENOUGH IS NOT ENOUGH

Several new cases were opened against Tymoshenko, and some old ones, reopened;<sup>41</sup> including, for example, cases involving the United Energy Systems of Ukraine,<sup>42</sup> “Kyoto money,”<sup>43</sup> ambulances for rural areas,<sup>44</sup> and the murder of Donetsk oligarch Yevgeny Shcherban.<sup>45</sup>

In July 2011, the Ukrainian Security Service (“SBU”) opened a criminal investigation concerning United Energy Systems’ non-delivery of goods to Russia for USD 405 million during the mid-1990s; SBU maintained that the Russian Federation could claim this sum to the state budget of Ukraine.<sup>46</sup> The accusations had no legal grounds; and, this criminal case had already been closed in 2005 in Ukraine and in Russia due to lack of evidence.<sup>47</sup> Lieutenant-General Leonid Ivashov (former official of the Russian Ministry of Defense) indicated that the Russian

1:46 PM) (Ukr.), <http://en.interfax.com.ua/news/general/192390.html>.

40. Associated Press in Kiev, *Lawyer of Former Ukraine PM Yulia Tymoshenko “Faces Criminal Charges,”* GUARDIAN (Jan. 21, 2013, 1:25 PM), <https://www.theguardian.com/world/2013/jan/21/ukraine-tymoshenko-lawyer-criminal-charges>.

41. *New Criminal Case Is Filed Against Tymoshenko*, UNIAN (Oct. 13, 2011, 4:21 PM), <http://www.unian.info/politics/554288-new-criminal-case-is-filed-against-tymoshenko.html>; *Tymoshenko Case Reopened*, IRISH TIMES (May 12, 2010), <http://www.irishtimes.com/news/tymoshenko-case-reopened-1.857839>.

42. *See Interns, Tymoshenko Faces Yet Another Investigation*, KYIV POST (July 5, 2011, 10:48 PM), <http://www.kyivpost.com/article/content/ukraine-politics/tymoshenko-faces-yet-another-investigation-108074.html>.

43. Elena Arkhipova, *Slidchi dii shchodo “kiots’kykh hroshei” budut’ provedeni—advokat Tymoshenko [The Investigative Actions to “Kyoto Money” Will Be Held—The Lawyer Tymoshenko]*, UNN (Oct. 14, 2013, 8:20 PM) (Ukr.), <https://translate.google.com/translate?hl=en&sl=uk&u=http://www.unn.com.ua/uk/news/1260786-slidchi-diyi-pro-yaki-zayavlyala-zakhist-provedut-advokat-tymoshenko&prev=search>.

44. Resolution on Ukraine: The Cases of Yulia Tymoshenko and Other Members of the Former Government, EUR. PARL. DOC. P7\_TA-PROV 0272 (2011) [hereinafter Resolution on Ukraine: Other Members], <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0272&format=XML&language=EN>.

45. Daria Taraday, *Tymoshenko y “delo Shcherbania” v voprosakh y otvetakh [Tymoshenko and “Case Shcherban” Questions and Answers]*, BBC UKRAINA (Apr. 2, 2013) (Ukr.).

46. *New Criminal Case Is Filed Against Tymoshenko*, *supra* note 41; *Rosiia davno probachyla borh korporatsii IEESU [Russia Has Long Forgiven Debt the Corporation Were Directed]*, OBOZREVATEL (Oct. 14, 2011) (Ukr.), <http://obozrevatel.com/news/rosiya-davno-probachila-dolg-korporatsii-esu.htm>; Interns, *supra* note 42.

47. Helen Fawkes, *Ukraine Ex-PM Warrant Cancelled*, BBC NEWS (Sept. 26, 2005), <http://news.bbc.co.uk/2/hi/europe/4283844.stm>; Reuters, *Ukraine Revives Old Case Against Tymoshenko*, KYIV POST (Oct. 24, 2011), <https://www.kyivpost.com/article/content/ukraine-politics/ukraine-revives-old-case-against-tymoshenko-115597.html>.

Federation had long since forgiven this debt and had closed the case against Tymoshenko: “The new [criminal case]—[it is] a deception.”<sup>48</sup>

In June 2011, Ukrainian prosecutors accused Tymoshenko of the “misuse of public finances in 2009—criminal cases involving ‘ambulances for rural medicine’ and ‘Kyoto money’ (funds that Ukraine received for selling their quotas under the Kyoto Protocol).”<sup>49</sup> As for the first case, Tymoshenko was charged with crimes under articles 210, 364, and 365 of the Criminal Code of Ukraine (“violation of budget legislation,” “abuse of power that led to serious consequences,” and “abuse of power,” respectively).<sup>50</sup> According to American auditors from Covington & Burling LLP, documents have shown that the agreement between the Austrian firm VAMED and the Ukrainian state enterprise Ukrmedpostach was signed without any mediators.<sup>51</sup> The price paid for the Opel ambulances did not exceed that of the market.<sup>52</sup>

Besides, the GPU maintained that the EUR 380 million received by Ukraine from Japan under the Kyoto Protocol in 2009 (the period of the world economic crisis) was transferred to the Pension Fund of Ukraine, although by law the money could only be used for environmental purposes.<sup>53</sup> On December 20, 2010, the GPU brought charges against Tymoshenko for “[a]cting intentionally, out of personal interest,” as the Prime Minister, when she decided to “use [the] funds received from the sale of quotas for greenhouse gases . . . to cover the expenses of the state budget of Ukraine, first of all [the] obligation[] to pay pensions,” which constitutes a crime under article 365 of the Criminal Code of Ukraine.<sup>54</sup>

The charges were baseless. It was absurd to claim personal interest in both cases. It is important to note that the decisions in the cases of “Kyoto money” and “ambulances for rural medicine” were not made by the Prime Minister on an individual basis; they were considered to be the

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48. *Russia Has Long Forgiven Debt the Corporation Were Directed*, *supra* note 46.

49. *Yanukovich Back in Ukraine to Rally Supporters as Russia Gains Control of the Crimea*, WORLD WATCH (Jan. 3, 2014), <https://worldwatch.is/?p=3842>; see *Ukraine: Tymoshenko on Trial in Kiev for Abuse of Power*, *supra* note 3.

50. Helen Ged, *Dela ob'edinilis' vokrug Iulii Timoshenko [Things Came Together Around Yulia Tymoshenko]*, KOMMERSANT (Feb. 22, 2011) (Russ.), <http://www.kommersant.ru/doc/1590074>.

51. Tymoshenko.ua, *Charges Against Tymoshenko Appear to Be Politically Motivated*, YOUTUBE (June 18, 2011), <https://www.youtube.com/watch?v=7FmST9w0-b4>.

52. *Id.*

53. Arkhipova, *supra* note 43; Interfax-Ukraine, *Prosecutors: Tymoshenko Did Not Spend Kyoto Money on Pensions*, KYIV POST (June 1, 2011, 3:06 PM), <http://www.kyivpost.com/article/content/ukraine-politics/prosecutors-tymoshenko-did-not-spend-kyoto-money-o-105771.html>.

54. Arkhipova, *supra* note 43.

decisions of a collective body—the Cabinet of Ministers of Ukraine.<sup>55</sup> Finally, in June 2011, following the press conference of Covington & Burling LLP and the British financial audit company BDO USA, LLP, in which the accusations were denied, the cases of “Kyoto money” and “ambulances for rural medicine” were suspended by Ukrainian state prosecutors.<sup>56</sup>

The charges concerning Shcherban’s murder at Donetsk Airport on November 3, 1996, alleged that Tymoshenko commissioned the murder of the businessman and politician, through a chain of intermediaries, which ultimately led to the conviction of Russian gangster, Vadim Bolotskiy.<sup>57</sup> The allegations against Tymoshenko were essentially based on the hearsay of long-deceased criminal, Igor Marinka, transmitted by another notorious gangster killed ten years earlier.<sup>58</sup> Also, the testimony reportedly differed from that given by the same witness between 1999 and 2002, and during the interrogation conducted between May 4 and 7, 2012.<sup>59</sup> Other prosecution witnesses also relied mainly on hearsay and could have testified “under pressure from the authorities in various forms.”<sup>60</sup> Former President Leonid Kuchma (1994 to 2005) and former Prosecutor-General of Ukraine Mykhailo Potybenko (1998 to 2002) claimed there had been no grounds to prosecute Tymoshenko in the Shcherban case during these periods.<sup>61</sup> The witnesses were heard at a court sitting in the absence of the accused Tymoshenko, despite her requests to be allowed to participate.<sup>62</sup>

It is worth mentioning that, in June 2016, the court in Kyiv sentenced Igor Marinka to three years in prison for perjury during Tymoshenko’s trial.<sup>63</sup>

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55. *See id.* (establishing that Tymoshenko was not the sole decisionmaker, insofar as a body of government collectively made such decisions).

56. *See* Gorshenin Weekly, *Court Starts Hearing “Gas Case” Against Tymoshenko*, EUR.GEOPOLITICAL F. (June 29, 2011), <http://gpf-europe.com/context/publications/?id=16273>.

57. *See* Taraday, *supra* note 45.

58. *See id.*

59. *See* Svidka u spravi Tymoshenko zasudyly do umovnoho terminu za nepravdyvi svidchennia [Witness in the Tymoshenko Case Was Sentenced to Probation for Perjury], LB.UA (June 14, 2016, 3:26 PM) (Ukr.), [http://ukr.lb.ua/news/2016/06/14/337756\\_svidka\\_spravi\\_tymoshenko\\_zasudili.html](http://ukr.lb.ua/news/2016/06/14/337756_svidka_spravi_tymoshenko_zasudili.html).

60. *Keeping Political and Criminal Responsibility Separate*, *supra* note 17, ¶ 67, at 16.

61. Interfax-Ukraine, *Kuchma Says There Were No Grounds to Prosecute Tymoshenko in Scherban Case During His Presidency*, KYIV POST (Jan. 25, 2013, 11:23 AM), <https://www.kyivpost.com/article/content/yulia-tymoshenko/kuchma-says-there-were-no-grounds-to-prosecute-tymoshenko-in-scherban-case-during-his-presidency-319337.html>.

62. *Keeping Political and Criminal Responsibility Separate*, *supra* note 17, ¶ 67, at 16.

63. *Witness in the Tymoshenko Case Was Sentenced to Probation for Perjury*, *supra* note 59.

## V. POLITICALLY MOTIVATED PROSECUTION?

It is important to determine whether criminal proceedings and other cases against Tymoshenko were politically motivated prosecutions (and thus political repression). Generally, “repression” can be defined as the use of force or violence to control a group of people.<sup>64</sup> According to Christian Davenport, political repression is the persecution of an individual or group within society for political reasons, particularly for the purpose of restricting or preventing their ability to take part in the political life of a society, thereby reducing their standing among their fellow citizens.<sup>65</sup> Nicholas Kittrie states that political repression is often manifested through discriminatory policies, such as human rights violations—surveillance abuse, police brutality, imprisonment, involuntary settlement, stripping of citizen’s rights, lustration—and violent action or terror—murder, summary executions, torture, forced disappearance, and other extrajudicial punishment.<sup>66</sup>

Tymoshenko finished second in the Ukrainian presidential runoff election of 2010, losing to Yanukovich by 3.5 percentage points.<sup>67</sup> During the presidency of Yanukovich, the social welfare was particularly hard hit by the deteriorating economic situation, resulting in the Party of Regions’ loss of popularity.<sup>68</sup> Tymoshenko was the most popular politician in Ukraine and the most vocal opponent of the Yanukovich regime. Moreover, she was the personal enemy of the regime; and, when the latter, under pressure from the West, granted freedom to the majority of its political prisoners, she remained in prison.<sup>69</sup> The fear of Tymoshenko as a political opponent encouraged the authorities to act illegally. Untenable charges against Tymoshenko prove this point.

In general, there is an impression that the Yanukovich regime did not really care about the truth and facts. The purpose was to open as

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64. *Repression*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/dictionary/english/repression> (last visited Dec. 31, 2016).

65. See CHRISTIAN DAVENPORT, STATE REPRESSION AND THE DOMESTIC DEMOCRATIC PEACE 33 (2007); Clark McPhail & John D. McCarthy, *Protest Mobilization, Protest Repression, and Their Interaction*, in REPRESSION AND MOBILIZATION 3, 3-4 (Christian Davenport et al. eds., 2005).

66. See generally NICHOLAS N. KITTRIE, THE WAR AGAINST AUTHORITY: FROM THE CRISIS OF LEGITIMACY TO A NEW SOCIAL CONTRACT (1995).

67. Clifford J. Levy, *Prime Minister Drops Ukraine Vote Challenge*, N.Y. TIMES, Feb. 21, 2010, at A8.

68. See *Ukrainian President Orders Social Reforms*, RADIO FREE EUROPE/RADIO LIBERTY (Mar. 7, 2012), [http://www.rferl.org/a/ukraine\\_yanukovich\\_orders\\_social\\_reforms/24508111.html](http://www.rferl.org/a/ukraine_yanukovich_orders_social_reforms/24508111.html).

69. Andrew E. Kramer, *Ukraine President Frees a Rival’s Allies, but Leaves Her in Prison*, N.Y. TIMES, Apr. 8, 2013, at A6.

many criminal proceedings as possible and to keep Tymoshenko in jail by all means. Therefore, there is nothing left but to claim it was persecution for political reasons, in order to prevent Tymoshenko from taking part in the political life of society and to reduce her standing among the citizens of Ukraine.

Nearly the entire international community recognized the criminal cases against Tymoshenko as political persecutions. In August 2012, the ECtHR embarked upon public hearings in the Tymoshenko case. However, in April 2013, the ECtHR found the detention and arrest of Tymoshenko in the so-called “gas case” illegal but not, however, politically motivated.<sup>70</sup> International human rights organizations, such as Transparency International, Freedom House, and Amnesty International, condemned the criminal cases against Tymoshenko, and her arrest and detention.<sup>71</sup> They emphasized that the political persecution meant the end of democracy in Ukraine.<sup>72</sup>

The official statement of the European Union reported that “[t]he verdict comes after a trial which did not respect the international standards as regards fair, transparent and independent legal process.”<sup>73</sup> The European Parliament adopted a number of resolutions that condemned the political persecution against Tymoshenko; the United Nations Secretary-General, heads of the United States, the European Union, the Council of Europe, and the majority of European countries expressed concern and disappointment regarding the illegal sentence of the leader of the Ukrainian opposition.<sup>74</sup>

The European Commission shelved the European Union Association Agreement and the Deep and Comprehensive Free Trade Agreement with Ukraine over the issue.<sup>75</sup> The U.S. Senate passed

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70. European Court of Human Rights Press Release ECHR136, Former Prime Minister of Ukraine Was Arbitrarily Detained (Apr. 30, 2013), <http://www.echr.coe.int> (follow “Press releases” hyperlink; then follow “Recent press releases” hyperlink; then follow “Date: Last 5 Years” hyperlink); Tadeusz A. Olszański, *The European Court of Human Rights’ Verdict on the Tymoshenko Case*, OSW (May 8, 2013), <https://www.osw.waw.pl/en/publikacje/analyses/2013-05-08/european-court-human-rights-verdict-tymoshenko-case>.

71. Piotr Pogorzelski, *The Unmasking of Yulia Tymoshenko*, NEW E. EUR. (Jan. 12, 2012), <http://www.neweasterneurope.eu/interviews/106-the-unmasking-of-yulia-tymoshenko>.

72. *Id.*

73. European Union Press Release 15394/1/11 REV 1 PRESSE 364, Declaration by the High Representative Catherine Ashton on Behalf of the European Union on the Verdict in the Case of Ms. Yulia Tymoshenko (Oct. 11, 2011).

74. S. Res. 165, 113th Cong. (2013); Resolution on Situation in Ukraine, Case of Yulia Tymoshenko, EUR. PARL. DOC. P7\_TA 0221 (2012), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0221+0+DOC+PDF+V0//EN>; Resolution on Ukraine: Other Members, *supra* note 44.

75. Interfax-Ukraine, *EU Leaders: Ratification of Association Agreement and DCFTA Depends on Settlement of Tymoshenko-Lutsenko Issue*, KYIV POST (July 20, 2012), <https://www>.

two resolutions calling for the release of Tymoshenko. The first, adopted in 2012, condemned the politically motivated prosecution and imprisonment of the former Prime Minister of Ukraine.<sup>76</sup> The second, passed on November 18, 2013, called for Tymoshenko's release in light of the recent ECtHR ruling.<sup>77</sup> The White House stated that the charges and prosecution overshadowed Ukraine's commitment to democracy and the rule of law, and urged Ukraine to release Tymoshenko.<sup>78</sup> On January 22, 2012, the U.S. Secretary of State, Hillary Clinton, "reaffirm[ed] that the United States [called for Tymoshenko's] immediate release."<sup>79</sup>

However, the Commission on Clemency of Ukraine found no grounds for granting clemency to the opposition leader.<sup>80</sup> Despite an elaborate and large-scale information war launched against the opposition leader by the ruling regime in Ukraine, opinion polls still showed that Ukrainians considered Tymoshenko's case to be politically motivated.<sup>81</sup> Every court session was accompanied by protests of Tymoshenko's supporters.<sup>82</sup> When Maidan began, the release of political prisoners became its imperative requirement.<sup>83</sup> The authorities realized Tymoshenko would be freed if the Revolution of Dignity was successful.<sup>84</sup>

Maidan did win. On February 22, 2014, the Verkhovna Rada adopted a resolution providing for the immediate release of Tymoshenko

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kyivpost.com/article/content/ukraine-politics/eu-leaders-ratification-of-association-agreement-a-310272.html.

76. S. Res. 466, 112th Cong. (2012).

77. S. Res. 165.

78. Press Release, Press Sec'y, White House, On Ukraine (Oct. 11, 2011) (on file with author).

79. Richard Balmforth, *Clinton Sends Jailed Ukrainian Ex-PM Message of Support*, REUTERS (Jan. 22, 2013), <http://www.reuters.com/article/us-ukraine-tymoshenko-idUSBRE90L0OQ20130122>.

80. Oleksiy Tumanov, *Pytannia pro pomyluvann' Tymoshenko peredchasno—Komisi' prezidenta [The Issue of Clemency for Tymoshenko Is Premature—the Commission of the President]*, UNN (Apr. 27, 2013) (Ukr.), <http://www.unn.com.ua/en/news/1208941-pitannya-promopiluvannya-yu-tymoshenko-ye-peredchasnim-komisiya-pri-prezidentovi>.

81. *The Tymoshenko Case: Don't Confuse the People and the Government*, EURACTIV, <http://www.euractiv.com/section/europe-s-east/opinion/the-tymoshenko-case-don-t-confuse-the-people-and-the-government> (last updated Oct. 24, 2011).

82. See, e.g., Jan van der Made, *Tymoshenko Supporters Protest at Jail Sentence*, RFI (Dec. 10, 2011), <http://en.rfi.fr/europe/20111012-yulia-tymoshenko-jail>.

83. Nadia Diuk, *Euromaidan: Ukraine's Self-Organizing Revolution*, WORLD AFF., Mar./Apr. 2014, at 9, 13.

84. Maria Danilova & Yuras Karmanau, *Ukraine Votes to Free Imprisoned Former PM Yulia Tymoshenko as Protesters Call for President to Resign*, NAT'L POST (Feb. 21, 2014), <http://news.nationalpost.com/news/ukraine-votes-to-free-imprisoned-former-pm-yulia-tymoshenko-as-protesters-call-for-embattled-president-to-resign>.

by the State Penitentiary Service of Ukraine.<sup>85</sup> This resolution referred to the politically motivated criminal prosecution and imprisonment of Tymoshenko, which was confirmed by the ECtHR on April 30, 2013,<sup>86</sup> and by the decision of the Committee of Ministers of the Council of Europe, adopted at the 1186th meeting held on December 3 through 5, 2013, wherein the need for the immediate release of Tymoshenko was seen as part of Ukraine's obligations to implement the judgment of the ECtHR.<sup>87</sup>

On February 28, 2014, the Verkhovna Rada adopted the Law of Ukraine.<sup>88</sup> On April 14, 2014, the Supreme Court of Ukraine, during the joint meeting of all chambers by means of the decision of forty-two out of forty-eight judges, put an end to the "gas case" against Tymoshenko.<sup>89</sup> On June 24, 2014, the full text of the decision was published.

## VI. THE LEGALITY OF UKRAINE'S REVOLT

Another important issue is whether there were legal grounds for the revolt against the Yanukovich regime. The right of the people to rebel is directly enshrined in the constitutions of many countries (in particular, France, Germany, Portugal, Greece, Lithuania, Estonia, and the Czech Republic). The right to revolution is implicitly provided for in Ukraine's constitution as well. In accordance with article 3 of the Constitution of Ukraine, the state shall be responsible to the individual for its activities.<sup>90</sup> Article 5 provides *inter alia* that the right to determine and change the constitutional order in Ukraine shall belong exclusively to the people and shall not be usurped by the state, its organs, or its public servants,<sup>91</sup> and no one shall usurp state power.<sup>92</sup> Additionally, article 55

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85. COAL. OF HUMAN RIGHTS ORGS., INTERIM STAKEHOLDERS' REPORT: FOR THE INTERIM REPORTING OF UKRAINE: ON THE STATUS OF IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 41 (2016), [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/UKR/INT\\_CCPR\\_NGS\\_UKR\\_24422\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/UKR/INT_CCPR_NGS_UKR_24422_E.pdf).

86. *Tymoshenko v. Ukraine* (No. 49872/11), Eur. Ct. H.R. 41-42 (2013).

87. See Eur. Consult. Ass., *Action Plan of the Comm. of Ministers*, 1186th Meeting, Doc. No. DH-DD 1282 (2013).

88. ZAKON UKRAINY [LAW OF UKRAINE], NO. 839-VII, PRO REABILITATSIIU OSIB NA VYKONANNIA RISHEN' IEVROPEIS'KOHO SUDU Z PRAV LIUDYNY [ON THE REHABILITATION OF PERSONS IN EXECUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS] (2014).

89. Verkhovnyi Sud Ukrainy u skladi [VSU] [Supreme Court of Ukraine] Apr. 14, 2014, POSTANOVA TYMOSHENKO [TYMOSHENKO RESOLUTION] (Ukr.), [http://protokol.com.ua/postanova\\_verhovnogo\\_sudu\\_ukraini\\_u\\_gazoviy\\_spravi\\_yu\\_tymoshenko](http://protokol.com.ua/postanova_verhovnogo_sudu_ukraini_u_gazoviy_spravi_yu_tymoshenko).

90. KONSTYTUTSIIA [CONSTITUTION] Dec. 8, 2004, N 2222-IV, § I, art. 3 (Ukr.), [https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/constitution\\_14.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/constitution_14.pdf).

91. *Id.* § I, art. 5.

92. *Id.*

guarantees everyone the right to defend his or her rights and freedoms from violations and illegal encroachments by all lawful means.<sup>93</sup>

Therefore, the Ukrainian people are entitled to (1) protect the state power from usurpation;<sup>94</sup> (2) ownership rights over natural resources;<sup>95</sup> (3) rights and freedoms of man and citizen;<sup>96</sup> and (4) the freedom of political activities.<sup>97</sup> The Ukrainian people have the freedom to exercise these rights through (1) participation in government elections;<sup>98</sup> (2) assembling peacefully without arms and holding rallies, meetings, processions, and demonstrations;<sup>99</sup> (3) strikes in order to protect economic and social rights and interests;<sup>100</sup> (4) challenging the constitutionality of an illegitimate regime;<sup>101</sup> and (5) the right to protect their rights and freedoms from violations and illegal encroachments by any lawful means.<sup>102</sup>

Provisions of international instruments play an important role in this regard. Under the Universal Declaration of Human Rights, “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”<sup>103</sup> One should also be reminded of a soft law provision, namely article 28 of the Universal Declaration of the Rights of Peoples: “Any people whose fundamental rights are seriously disregarded has the right to enforce them, specially by political or trade union struggle and even, in the last resort by the use [of] force.”<sup>104</sup>

To answer the question whether the Ukrainian people had genuine grounds for a revolt, one also needs to consider the developments triggering and surrounding the Revolution of Dignity and preceding the change of the Ukrainian government in February 2014:

- (1) The usurpation of power by the Yanukovich regime by establishing the coalition in the Verkhovna Rada in an illegal manner,<sup>105</sup> accompanied by depriving the Supreme Court

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93. *Id.* § II, art. 55.

94. *Id.* § I, art. 5.

95. *Id.* § I, art. 13.

96. *Id.* § II, art. 22.

97. *Id.* § II, art. 36.

98. *Id.* § III, arts. 69–74.

99. *Id.* § II, art. 39.

100. *Id.* § II, art. 44.

101. *See id.* § I, art. 5.

102. *Id.* § II, art. 55.

103. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at pmb1. (Dec. 10, 1948).

104. Universal Declaration of the Rights of Peoples art. 28 (July 4, 1976), [http://www.algerie-tpp.org/tpp/en/declaration\\_algiers.htm](http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm).

105. *Prosto zibraty 226 pidpysiv—antikonstytutsiina diia— Musiyaka [Just Collect 226 Signatures—Anti-Constitutional Action—Musiyaka]*, HART (Mar. 5, 2010) (Ukr.), <http://gart.org>.

of Ukraine of its main functions,<sup>106</sup> and pressuring the Constitutional Court to reverse the constitutional reform of 2004 (2010).<sup>107</sup>

- (2) Political persecutions, and arrests of opposition politicians and representatives of civil society (2010 to 2014).
- (3) Numerous violations of the constitution and the laws of Ukraine beginning with the conclusion of the Kharkiv Agreement (2010)<sup>108</sup> and ending with the clandestine arrangements with Putin (December 2013), followed by an unexpected Russian loan worth USD 15 billion.<sup>109</sup>
- (4) Corruption scandals involving Yanukovich himself, members of his family, his surrounding allies, and the majority of senior state officials against the background of a degrading quality of life for the population and its decreasing possibilities to legally protect its rights<sup>110</sup> (Yanukovich himself acknowledged that officials had embezzled USD 7 billion through state procurement abuses;<sup>111</sup> yearly losses caused by illegal takeovers of businesses were estimated at about USD 3 to 5 billion,

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ua/?lang=ua&page\_id=2&news\_type=5&element\_id=26929; Dmytro Shurkhalo, *Pid "rozdrubnu" koalitsiiu pochaly perepysuvaty Rehlament [The "Retail" Coalition Began Rewriting Regulation]*, RADIO SVOBODA (Mar. 4, 2010) (Ukr.), <http://www.radiosvoboda.org/a/1974816.html>.

106. Interfax-Ukraine, *SBU rozkryla plan Ianukovycha uzurpuvaty vladu [Yanukovich SBU Uncovered a Plan to Usurp Power]*, ZN.UA (Apr. 9, 2015) (Ukr.), [https://translate.google.com/translate?hl=en&sl=uk&tl=en&u=http%3A%2F%2Fdt.ua%2FUKRAINE%2Fsbu-rozkryla-plan-yanukovycha-uzurpuvati-vladu-169383\\_.html](https://translate.google.com/translate?hl=en&sl=uk&tl=en&u=http%3A%2F%2Fdt.ua%2FUKRAINE%2Fsbu-rozkryla-plan-yanukovycha-uzurpuvati-vladu-169383_.html); see also ZAKON UKRAINY [LAW OF UKRAINE], NO. 2453-VI, PRO SUDOUSTRII I STATUS SUDDIV [ON THE JUDICIAL SYSTEM AND STATUS OF JUDGES] (2010). <http://zakon3.rada.gov.ua/laws/show/2453-17>.

107. Interfax-Ukraine, *supra* note 106.

108. *Uhoda mizh Ukraïnoiu ta Rosiis'koïu federatsiieu z pytan' perebuvannia Chornomors'koho Flotu Rosiis'koï federatsii na terytorii Ukraïny [Agreement Between Ukraine and the Russian Federation on the Black Sea Fleet Russian Federation in Ukraine]*, No. 32, st. 1154 (2010) (Ukr.), [http://zakon4.rada.gov.ua/laws/show/643\\_359](http://zakon4.rada.gov.ua/laws/show/643_359); see also M. Mishchenko, O. Klymonchuk & A. Iashchenko, *Chy potriben "neïtral'niï" Ukraïni rosiis'kyi flot shche na 25 rokiv? [Is a "Neutral" Ukraine Russian Fleet for Another 25 Years?]*, UNIAN (Apr. 21, 2010) (Ukr.), <https://translate.google.com/translate?hl=en&sl=uk&u=http://www.unian.ua/politics/349992-chi-potriben-neytralniy-ukrajini-rosiyskiy-flot-sche-na-25-rokiv.html&prev=search>.

109. Daryna Krasnolutska, Kateryna Choursina & Olga Tanas, *Yanukovich Meets Putin for Loan Talks Amid Protests*, BLOOMBERG (Dec. 17, 2013), <http://www.bloomberg.com/news/articles/2013-12-17/yanukovich-preparing-to-meet-putin-for-loan-amid-protests>.

110. Benjamin Bidder, *Profiting from Power? The Dubious Business of the Yanukovich Clan*, SPIEGEL ONLINE (May 16, 2012), <http://www.spiegel.de/international/world/the-dubious-business-of-ukraine-president-yanukovich-and-his-clan-a-833127.html>; *Ukrainian Revolution Against Corruption*, TRANSPARENCY INT'L UKR. (Feb. 27, 2014), [http://ti-ukraine.org/en/system/files/docs/news/urac\\_3\\_en.pdf](http://ti-ukraine.org/en/system/files/docs/news/urac_3_en.pdf).

111. *Nazvahy summy, kotorye prokhodiat cherez goszakupki v Ukraine [The Amount of Money Which Pass Through the Public Procurement in Ukraine]*, KONTRAKTY (May 12, 2012) (Russ.), <https://translate.google.com/translate?hl=en&sl=ru&u=http://kontrakty.ua/article/47537&prev=search>.

whereas the success rate of illegal takeover attempts, many of which benefited the President's family, was ninety percent).<sup>112</sup>

- (5) A steep increase in the number of victims of illegal police violence, from 1.32 million people in 2005 through 2009 to 790,000 in 2010 alone and 980,000 in 2011,<sup>113</sup> whereas the GPU investigated only one percent of the notifications about torture by the police<sup>114</sup> (in 2013, only one percent of the population “[f]ully” trusted the police).<sup>115</sup>
- (6) The one-man decision on the actual discontinuation of Ukraine's European integration, and the refusal to sign the Association Agreement with the European Union shortly before this historic event for the Ukrainian state was scheduled for the Vilnius summit in November 2013.<sup>116</sup>
- (7) The creeping limitations upon the freedom of assembly enshrined in article 39 of the Constitution of Ukraine<sup>117</sup> and upheld by the Constitutional Court in a number of judgments,<sup>118</sup> exercised through prohibitions to gather, issued by executive and judicial authorities,<sup>119</sup> and impediments to the exercise of this freedom actuated in 2010 through 2014 by the Ministry of Interior by illegal detentions and physical violence against participants.<sup>120</sup>

112. A.I. Dichek, *Reiderstvo v Ukraine: realii rynochnoi zkonomiki ili zkonomicheskii terrorism?* [*Raiding in Ukraine: Realities of the Market Economy or Economic Terrorism?*], PRIZ (Nov. 21, 2012) (Russ.), <http://pr-z.com.ua/node/6630>.

113. Yevhen Zakharov, *Prava liudyny v Ukraini—2011: porushen' vse bil'she . . .* [*Human Rights in Ukraine—2011: More and More Violations . . .*], KHARIV HUM. RTS. PROTECTION GROUP (Sept. 12, 2011) (Ukr.), <http://khpg.org/index.php?id=1323435074>.

114. *Prokuratura rozhladaie lyshe 1 vidsotok skarh na katuvannia v militsii* [*Prosecutor Considers Only 1 Percent of Complaints of Torture by the Police*], KONFLYKT Y ZAKON (May 23, 2013) (Ukr.), <http://www.k-z.com.ua/pravovoiaktsent/26232-prokuratura-rozglyadaelische-1-vidsotokskarg-na-katuvannia-v-militsiji>.

115. SHUL'HA MYKOLA OLEKSANDROVYCH ET AL., EFEKTYVNIST' ROBOTY INSTYTUTU DIL'NYCHNOHO MILITSIONERA V SUCHASNYKH UMOVAKH [THE EFFECTIVENESS OF THE INSTITUTION OF THE DISTRICT POLICE OFFICER IN MODERN CONDITIONS] 2 (2013), [http://i-soc.com.ua/uploads/p-r\\_1.1.pdf](http://i-soc.com.ua/uploads/p-r_1.1.pdf).

116. Ian Traynor & Oksana Grytsenko, *Ukraine Aligns with Moscow as EU Summit Fails*, GUARDIAN (Nov. 28, 2013), <https://www.theguardian.com/world/2013/nov/29/ukraine-yanukovych-moscow-eu-summit>.

117. See KONSTYTUTSIIA [CONSTITUTION] Dec. 8, 2004, N 2222-IV, § II, art. 39 (Ukr.), [https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/constitution\\_14.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/constitution_14.pdf).

118. See, e.g., Konstytytsinii Sud Ukrainy [Constitutional Court of Ukraine] Case N 1-30/2001 (Apr. 19, 2001), <http://zakon3.rada.gov.ua/laws/show/v004p710-01>.

119. *Complete Restriction to Fundamental Rights in Ukraine*, HUM. RTS. HOUSE FOUND. (Jan. 17, 2014), <http://humanrightshouse.org/Articles/19918.html>.

120. A. MYROSLAVA ET AL., UKRAYINS'KA REVOLYUTSIYA HIDNOSTI, AHRESIYA RF I MIZHNARODNE PRAVO: MONOHRAFIYA [UKRAINIAN REVOLUTION OF DIGNITY, RUSSIAN AGGRESSION AND INTERNATIONAL LAW: MONOGRAPH] 17-31 (2014).

- (8) Systematic use of physical violence against participants of peaceful assemblies, beginning with the mass bludgeoning of students on the night of November 30, 2013.<sup>121</sup>
- (9) The under-pressure adoption of laws by the Verkhovna Rada with a view to limit the freedom of expression and a number of fundamental human rights, abolish the freedom of assembly, and impede the work of non-governmental organizations in violation of procedures, known as the Dictatorship Laws of January 16, 2014, orchestrated by Yanukovich and his allies.<sup>122</sup>
- (10) The discarding of the compromise-based agreements with the opposition leaders representing Maidan, the resumption and escalation of the conflict, and the use of force, which resulted in the killings of the “Heavenly Hundred” and injured more than 2000 people from January to February 2014.<sup>123</sup>

The above facts clearly define the Yanukovich regime. Fabricated cases, other forms of political persecution of politicians, particularly of Tymoshenko, indicate exactly how Yanukovich managed to retain power. Yanukovich and his henchmen, whose purpose was total

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121. Laura Smith-Spark & Ray Sanchez, *Ukraine Police Accused of Violent Crackdown on Pro-EU Protests*, CNN (Nov. 30, 2013), <http://www.cnn.com/2013/11/30/world/europe/ukraine-eu-protests>.

122. ZAKON UKRAÏNY [LAW OF UKRAINE], No. 721-VII, PRO VNESENNA ZMIN DO ZAKONU UKRAÏNI PRO SUDOUSTRIJ I STATUS SUDDIV TA PROCESUAL'NIH ZAKONIV SHHODO DODATKOVIH ZAHODIV ZAHISTU BEZPEKI GROMADJAN [ON AMENDMENTS TO THE LAW OF UKRAINE ON THE JUDICIAL SYSTEM AND STATUS OF JUDGES AND PROCEDURAL LAWS REGARDING ADDITIONAL MEASURES TO PROTECT THE SAFETY OF CITIZENS] (2014) (repealed); ZAKON UKRAÏNY [LAW OF UKRAINE], No. 722-VII, PRO VNESENNA ZMIN DO DEJAKIH ZAKONODAVCHIH AKTIV UKRAÏNI SHHODO VIDPOVIDAL'NOSTI ZA VCHINENNA ADMINISTRATIVNIH PRAVOPORUSHEN' PID CHAS PROVEDENNA FUTBOL'NIH MATCHIV [ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE CONCERNING LIABILITY FOR COMMITTING ADMINISTRATIVE OFFENSES DURING FOOTBALL MATCHES] (2014) (repealed); ZAKON UKRAÏNY [LAW OF UKRAINE], No. 723-VII, PRO VNESENNA ZMIN DO DEJAKIH ZAKONODAVCHIH AKTIV UKRAÏNI SHHODO VIDPOVIDAL'NOSTI ZA ADMINISTRATIVNI PRAVOPORUSHENNA U SFERI ZABEZPECHENNA BEZPEKI DOROZHNOGO RUHU, ZAFIKSOVANI V AVTOMATICHNOMU REZHIMI [ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE CONCERNING LIABILITY FOR ADMINISTRATIVE VIOLATIONS IN THE FIELD OF ROAD SAFETY, RECORDED IN AUTOMATIC MODE], (2014) (repealed); ZAKON UKRAÏNY [LAW OF UKRAINE], No. 724-VII, PRO VNESENNA ZMIN DO REGLAMENTU VERHOVNOÏ RADI UKRAÏNI [ON AMENDMENTS TO THE RULES OF PROCEDURE OF THE VERKHOVNA RADA OF UKRAINE] (2014) (repealed); ZAKON UKRAÏNY [LAW OF UKRAINE], No. 725-VII, PRO VNESENNA ZMIN DO KRIMINAL'NOGO PROCESUAL'NOGO KODEKSU UKRAÏNI SHHODO ZAOCHNOGO KRIMINAL'NOGO PROVADZHENNA [ON AMENDMENTS TO THE CRIMINAL PROCEDURAL CODE OF UKRAINE ON CRIMINAL PROCEEDINGS IN ABSENTIA] (2014) (repealed).

123. Ministerstvo Okhorony Zdorovia Ukraïny, *Informatsiia pro postrazhdalykh pid chas masovykh aktsii u Kyievi ta u rehionakh Ukraïny* [Information About the Victims of the Mass Rallies in Kyiv and in the Regions of Ukraine], MOZ.GOV (Apr. 16, 2014) (Ukr.), [http://www.moz.gov.ua/portal/pre\\_20140416\\_c.html](http://www.moz.gov.ua/portal/pre_20140416_c.html).

usurpation of power in Ukraine, were watching out for Tymoshenko.<sup>124</sup> The opposition leader was dangerous for the regime. She proved it was possible to resist, which made her a number one target of the regime. The citizens were frightened to go into the streets, because no one could feel safe. The initiation of criminal cases based on political grounds and the wrongful conviction of Tymoshenko were aimed at removing any substantial political competition within the state. On the other hand, the Yanukovych regime nullified the European perspective of Ukraine, as the immediate release of political prisoners and the cessation of politically motivated criminal prosecutions against political opponents were one of the fundamental requirements of the European Union on the way to signing the Association Agreement with Ukraine.

The above facts prove that the actions of the Ukrainian government before and in the course of the Revolution of Dignity created sufficient legal grounds for a revolt against the regime, as the ultimate remedy when other forms of protection had been exhausted. There were good reasons for a revolt, namely, the usurpation of state power; systematic and grave violations of human rights and the rights of the people; the use of force against peaceful protesters; political persecution; the phenomenon, which was gradually becoming commonplace of political prisoners; and the exhaustion of other protective measures.

The moment peaceful protest transformed into a rebellion, the Yanukovych regime lost even marginal popular support and legitimacy. The regime could only be claimed as a tyranny refusing to seek social consensus, violently suppressing the peaceful protest and killing the participants.

Moreover, the Ukrainian government ignored the will of its own people and turned its back on the European future of Ukraine. The criminal regime of oligarchs and officials involved in corruption set out not only to steal the material wealth of Ukraine but also to steal Ukraine's prosperous future in the European family. The state's independence was in fact sold to the Russian Federation, who had always challenged Ukraine's sovereignty.<sup>125</sup>

The author emphasizes that the change of government, which took place in Ukraine in February 2014, was in line with the principles of

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124. Geoffrey Robertson, *Yulia Tymoshenko's Trial Was a Travesty of Justice*, GUARDIAN (Feb. 23, 2014), <https://www.theguardian.com/commentisfree/2014/feb/23/ukraine-yulia-tymoshenko-travesty-justice-trail>.

125. See Kenneth Rapoza, *IMF Says Russia Right About Ukraine \$3 Billion Loan*, FORBES (Dec. 16, 2015), <http://www.forbes.com/sites/kenrapoza/2015/12/16/imf-says-russia-right-about-ukraine-3-billion-loan/#4d6e6ced11cc>.

both national and international law. People exercised their natural right to revolt; and, the decision of the Ukrainian Parliament on self-withdrawal from the power of Yanukovich was based on the violation of the agreements reached in the course of international negotiations, committed by Yanukovich, and his fleeing from the country. The international community has recognized a new Ukrainian government.<sup>126</sup> Ukraine, in its turn, has returned to the European and democratic path of development.

It should be stressed that political persecution is considered a violation of human rights and brings with it international sanctions. It is nowadays a point of general recognition that obligations of states to respect human rights are *erga omnes* that is owed to the whole international community.<sup>127</sup> The issue of human rights is not confined to the exclusive sphere of domestic jurisdiction. The Parliamentary Assembly of the Council of Europe observed that, where a state has entered into treaty commitments in respect to human rights and democracy, “violations . . . [of those commitments] can . . . not be considered domestic affairs *sensu stricto* and are legitimate areas for concern or criticism from other countries.”<sup>128</sup> Acting individually or collectively, other states have the right (a duty, as some would argue) to apply “diplomatic, economic and other measures” to any state that violates its obligations to respect human rights (these obligations are *erga omnes*), with the proviso that “such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations.”<sup>129</sup> Such action cannot be regarded as an “unlawful intervention” in the internal affairs of such a state or any other breach of international law.<sup>130</sup>

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126. Ian Traynor, *Ukraine Opposition Leaders Sign Deal with Government*, GUARDIAN (Feb. 21, 2014), <https://www.theguardian.com/world/2014/feb/21/ukraine-president-says-deal-has-been-reached-opposition-bloodshed>.

127. Enrico Milano, *The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question*, QIL (May 11, 2014), <http://www.qil-qdi.org/the-non-recognition-of-russias-annexation-of-crimea-three-different-legal-approaches-and-one-unanswered-question>.

128. Eur. Consult. Ass., *The Functioning of Democratic Institutions in Ukraine*, 7th Sess., Doc. No. 13405, ¶ 5 (2014), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20488&lang=en>.

129. The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States, 63 Institut de Droit International Annuaire 338, art. 2 (1989).

130. *Id.*; see also Comm'n on Sec. & Cooperation in Eur. [CSCE], *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, § II, ¶ 17, at 36 (Oct. 4, 1991), <http://www.osce.org/odihr/elections/14310>.

## VII. CONCLUSION

The criminal case against Tymoshenko is argued to be a political persecution. The above examples together with many others show that politically motivated criminal prosecution pursues two principal goals: (1) to suppress popular resistance to dictatorship and (2) to neutralize the individuals that pose a major threat to the system.

Politically motivated prosecution is fraught with grave consequences for the state that acts in breach of its own international legal commitments. As a result, the state faces international sanctions for the violations of human rights, which are international legal obligations *erga omnes*.

The termination of cooperation with several international partners, reduced level of confidence in the judicial system, deterioration of the investment climate, and economic slowdown may take place in the economic sphere. However, political persecutions can have even more serious consequences—they may trigger social unrest.

Illegal arrests of activists with opposing views became one of the causes of the Revolution of Dignity. Moreover, the release of all political prisoners, including Tymoshenko, was one of the requirements of Maidan. Thus, the imprisonment of Tymoshenko proves that political persecutions are not only contrary to both national and international law; they can also provoke the protests of people. And, accordingly, such persecutions not only fail to achieve their goal to protect the regime but may have the opposite effect.

Two years have passed from the time of Maidan, but Ukraine still needs significant changes. The judicial system is still not reformed; cases of selective justice often take place. Under these conditions, the necessity of fundamental changes of the entire state system is as relevant as ever.

Given the Russian aggression against Ukraine, which began with the occupation and illegal annexation of Crimea and continued in the east of Ukraine,<sup>131</sup> combating the “internal enemy”—corruption and a clan-oligarchic system—is still crucial. This is the only way for Ukraine to tackle complex threats and problems.

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131. *Ukrainian Revolution Against Corruption*, *supra* note 110.