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The European Court of Human Rights— Reflections of a Past President

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I. SOME INTRODUCTORY COMMENTS ON THE HISTORY OF HUMAN RIGHTS

If we look at the history of human rights, two things are striking. First of all, when certain human rights were proclaimed, these proclamations were not always immediately executed or implemented. It sometimes took centuries for them either to become realities or to be accepted in a wider sense. Secondly, while claims for the protection of human rights were addressed to nation-states, the formulation of these claims often had a universalist or self-evident ring that transcended nation-states.

The two points I am making might appear contradictory: if it took so long for human rights to be fully realized and implemented, then they were apparently less than self-evident. Perhaps we might summarise

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matters by saying that human rights, once proclaimed, may over time become symbols or programmes. Whether the proclamations will additionally become binding norms or lived reality will depend on a multitude of legal, political, sociological, and economic factors.

Let me illustrate more concretely.¹ The political theory of the Enlightenment was the first to associate the idea of a democracy bound up in a constitution with that of overriding or supranational freedoms.² Prior to this, the contractual guarantees of the mediaeval corporate state—such as the king's agreement with the Cortes of Leon of 1188,³ the Magna Carta of 1215,⁴ and the *Joyeuse Entrée* of Brabant in 1356⁵—had been less like universally valid human rights packages than lists of corporate rights wrung from their kings by individual groups of subjects.⁶ Four centuries later, Sir Edward Coke claimed that the Magna Carta protected every free Englishman, not only the barons of the thirteenth century, and ultimately his view prevailed.⁷

The magnificent declarations of human rights devised in the United States and France at the end of the eighteenth century had undoubtedly a lasting influence. Yet when the American Declaration of Independence stated in 1776 that “[w]e hold these truths to be self-evident, that all men are created equal,” only some six percent of white male landowners were free and equal.⁸ The rights of women, Indians, slaves, and white men who were not landowners had to be achieved in struggles, some of which lasted decades or centuries.⁹ France's situation was similar at the time of the Declaration of the Rights of Man and Citizen in 1789.¹⁰ In addition, in 1794, France got rid of slavery in its colonies, only to reinstate it under Napoleon;¹¹ Britain abolished the slave trade in 1807, and in 1833 it also

1. As to the following paragraphs, see LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 112-204 (2007); CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* (2002); LUZIUS WILDHABER, *MENSCHEN- UND MINDERHEITENRECHTE IN DER MODERNEN DEMOKRATIE* [HUMAN AND MINORITY RIGHTS IN MODERN DEMOCRACY] (1992).

2. HUNT, *supra* note 1, at 60, 113, 115-16.

3. WILLIAM C. ATKINSON, *A HISTORY OF SPAIN & PORTUGAL* 84 (1960).

4. HUNT, *supra* note 1, at 114.

5. PAUL ARBLASTER, *A HISTORY OF LOW COUNTRIES* 93 (2006).

6. HUNT, *supra* note 1, at 114.

7. *Id.*

8. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

9. See HUNT, *supra* note 1, at 205.

10. *Id.* at 133-35.

11. *Id.* at 160, 166.

abolished slavery in its colonies;¹² the American Emancipation Proclamation came only in 1863.¹³

II. STAGES OF THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The internationalisation of human rights protection began only after the Second World War. Taking the Universal Declaration of Human Rights of 1948 one decisive step closer to reality, the European Convention on Human Rights (Convention) was an innovative, perhaps even revolutionary, reaction to the mass murders, atrocities, and inhumanities of the Second World War and the preceding period.¹⁴ There was also a need, for protective purposes, to make a preemptive strike against the menace of new tyrants after the fall of the Iron Curtain.¹⁵ This is how the founders of the Convention talked of the seven, eight, or ten freedoms that had to be guaranteed to ensure a democratic lifestyle—a kind of international law insurance policy or early warning system to prevent democracies from relapsing into dictatorship.¹⁶ Pierre-Henri Teitgen talked movingly of his imprisonment by the Gestapo while one of his brothers was in Dachau and his brother-in-law was meeting his death in Mauthausen: “I think we can now unanimously confront ‘reasons of State’ with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded—the sovereignty of justice and of law.”¹⁷ The preamble to the Convention asserted a “profound belief” in the fundamental freedoms to be guaranteed and upheld a “common heritage of political traditions, ideals, freedom and the rule of law.”¹⁸

However, the Western European Governments of the post-war period did not take matters too far too quickly. They rejected proposals

12. *Id.* at 160.

13. MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 32 (2001).

14. *Cf.* THOMAS BURGENTHAL, DINAH SHELTON & DAVID STEWART, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 136-44 (3d ed. 2003); STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 40, 55-56 (2006); LUZIUS WILDHABER, *THE EUROPEAN COURT OF HUMAN RIGHTS: 1998-2006 HISTORY, ACHIEVEMENTS, REFORM* (2006).

15. 1 Collected Edition of the “Travaux Préparatoires” [Preparatory Works, Official Record of a Negotiation] 44, 48-50, 114-24 (1975).

16. *Id.* at 44.

17. *Id.* at 48-50.

18. Convention for the Protection of Human Rights and Fundamental Freedoms, Pmb., Nov. 4, 1950, 212 U.N.T.S. 221-24.

to let the European Court of Human Rights (Court) quash national court judgments violating the Convention or to let it review national legislation for compatibility with the Convention. Not only did the ratification and amendment of the Convention remain under Member States' control, but the right of individual petition to the Commission and the Court's jurisdiction were governed by merely optional procedures. The supervision of the execution of judgments was a matter for the Committee of Ministers.¹⁹ The idealistic beliefs of the Convention's drafters had no effect on governments' wishes to keep important parts of the control mechanism within their own power. The intention of the fathers of the Convention was thus to establish a standard-setting protection and an early warning system to avert the danger of tyranny. This was to be based on just a few cases, supervised to a large degree by national governments, and mainly operate on a voluntary basis or at the prompting of public opinion or of other states.²⁰

The early years of the Convention mechanism saw a careful, steady process of consolidation. Not until 1953 was the Convention ratified by ten Western European states.²¹ The Commission began work in 1954 and the Court in 1959.²² Many states chose to start just by ratifying the Convention, then waited years, or even decades, before allowing individual applications.²³

The *Greek Case*, which led to the withdrawal of Greece from the Council of Europe and the Convention during the regime of the military junta of 1969-1974, was practically the only case where it could be claimed that what was in play was a conflict between democracy and dictatorship.²⁴ Instead, most of the cases that came to Strasbourg were of the type that a constitutional or supreme court would be expected to deal with in a pluralist democracy.

To take a well-known example, in the *Belgian Linguistic Case* of 1968, the Court was confronted with national legislation that divided the

19. BUERGENTHAL, SHELTON & STEWART, *supra* note 14, at 140.

20. *Cf. id.* at 140-44.

21. *Id.* at 136.

22. J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 1 (2d ed. 1993).

23. There were long intervals between ratification and the decision to allow individual applications: United Kingdom 1951-1966, Turkey 1954-1987, Italy 1955-1973, Cyprus 1962-1989, Malta 1967-1987, Greece 1974-1985, France 1974-1981.

24. LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1059-90 (1973); Georg Nolte & Stefan Oeter, *European Commission and Court of Human Rights, Inter-State Applications*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW at 144, 146-48 (R. Bernhardt ed., 1995).

country into four linguistic regions.²⁵ Except in the region of Brussels, each region had its own language, and education had to be given in the territorial language of the region. Parents could send their children to schools of a different linguistic region or to private schools within the same region where education was given in a language other than that of the region. However, only those private schools which gave instruction in the language of the region were subsidized by the State. The graduation certificates of private schools in which instruction was given in a language other than that of the region were not recognised by the State; only a difficult additional examination gave access to higher studies.²⁶ The Court decided that article 2 of the First Additional Protocol to the Convention, guaranteeing a “right to education,” contained in itself no linguistic requirement.²⁷ Ultimately, the Court found fault with only one very specific aspect of the Belgian linguistic legislation. It considered as discriminatory the residence requirement for sixteen heads of family who, if living in a community of the Greater Brussels Area, could ask that school classes be conducted in French.²⁸ The *Belgian Linguistic Case* touched on a highly emotional aspect of Belgian politics. Yet it was hardly an issue of democracy versus dictatorship.

The subsequent years can be described as a period of slow but steady consolidation and expansion. The idea of a continuing development of the Court’s case law gained acceptance. The Commission and the Court interpreted Convention concepts autonomously and insisted that the Convention guarantees were something more than illusory and empty rhetoric and had to be made effective and tangible.²⁹

By 1989, the Convention was widely established in Western and Southern Europe. After individual applications had been allowed by France (1981), Greece (1985), Turkey (1987), Malta (1987), and Cyprus (1989), the Convention mechanism was part of the system of the whole

25. Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,” 6 Eur. Ct. H.R. (Ser. A) (1968) [hereinafter *Belgian Linguistic*]; see also Luzius Wildhaber, *Right to Education and Parental Rights*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 531, 539 (R.St.J. Macdonald, F. Matscher & H. Petzold eds., 1993).

26. Wildhaber, *supra* note 25.

27. *Belgian Linguistic*, *supra* note 25, at 55-56.

28. *Id.*

29. On the interpretation of the Convention, see GREER, *supra* note 14, at 193-230; Franz Matscher, *Quarante ans d’activités de la Cour Européenne des Droits de l’homme*, 270 RECUEIL DES COURS COLLECTED COURSES HAGUE ACAD. OF INT’L L. 237, 273-311, 338-62 (1997); MERRILLS, *supra* note 22, at 69-124, 151-76.

of Europe west of the Iron Curtain.³⁰ After the lifting of the Iron Curtain in 1989, the Convention spread to the “new democracies” of Central and Eastern Europe. These countries were allowed to join the Council of Europe relatively quickly, raising the number of Member States to forty-seven (in 2007) compared to twenty-two at the time of joining.³¹ Ratification of the Convention seemed to be like a confirmation of the newly acquired democratic character of the new Member States. The new members were all required to ratify the Convention within the first two years, then within one year of joining the Council of Europe.³²

In 1998, Protocol No. 11 “judicialised” the whole Convention system. The Commission and Court were merged into a single, full-time European Court of Human Rights. The right of individual petition and the jurisdiction of the Court, which had been optional, now became compulsory. The non-binding, somewhat more political aspects of the system (e.g., the power of the Committee of Ministers to approve reports by the Commission) were abolished. However, the extent of this “judicialisation” should not be overestimated either, for the Committee of Ministers still takes decisions on the Court’s budget and the execution of judgments, and the Convention system is still just as reliant on co-operation in good faith by the national authorities.

As a consequence of the accession of the new Member States and the comprehensive judicialisation of the Convention system, from 1998 onwards the number of applications increased each year by an average of fifteen percent. In 2006, some 50,000 applications were submitted to the Court. The shift in the balance toward the new Member States became obvious. In 1999, some 36% of all applications came from Central, Balkan, Eastern, Baltic, and Caucasian Europe, with 56% in 2001 and 63% in 2004. In 2006, 22% of the pending petitions were from Russia, 12% from Rumania, 10% from Turkey, 8% from Ukraine, and 6% from Poland. As a result of continuous rationalisation and streamlining, the Court managed to increase its productivity substantially. Nevertheless, the number of applications is expanding inexorably and soon there will be 100,000 pending applications.

30. WILDHABER, *supra* note 14, at 139-40.

31. *Id.* at 141-42.

32. On the effects of this expansion of the Convention system, see Rait Maruste, *The Impact of the Accession of Eastern Block Countries on the Convention Machinery and Its Case-Law*, in LIBER AMICORUM LUZIUS WILDHABER: HUMAN RIGHTS—STRASBOURG VIEWS 285-308 (N.P. Engel ed., 2007); Eliška Wagnerova, *Judges and the Law in Different Political Systems*, in LIBER AMICORUM LUZIUS WILDHABER: HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW 1579, 1579-98 (Stephan Breitenmoser et al. eds., 2007).

III. ORIGINALITY, PROBLEMS, AND LIMITATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

The description of the Convention's history since 1949 was the first part of my considerations. I now move to the second part and shall describe the special character of the Convention and also some of its problems and limits.

Looking back over the periods since 1949 and since 1998, the importance and relevance of the Court has continued to grow. In its own way, it is more than just another European institution: it is a symbol. It harmonises law and justice and tries to secure—as impartially and as objectively as is humanly possible—fundamental rights, democracy, and the rule of law so as to guarantee long-lasting international stability, peace, and prosperity. It strives to establish the kind of good governance which Ambrogio Lorenzetti depicted in his frescos on walls of the town hall of Siena some 665 years ago. The Convention has brought into being the most effective international system of human rights protection ever developed. As the most successful attempt to implement the United Nations' Universal Declaration of Human Rights of 1948 in a legally binding way, it is part of the heritage of international law. It constitutes a shining example in those parts of the world where human rights protection, whether national or international, remains an aspiration rather than a reality. It is both a symbol of, and a catalyst for, the victory of democracy over totalitarian government; it is the ultimate expression of the capacity, indeed the necessity, for democracy and the rule of law to transcend frontiers.³³

Now this passage was more or less an official speech of the departing Court President, trying to explain to the Member States, and the public opinion in those States and beyond, the benefits and the successes of an international human rights protection system based on binding court judgments. But I am, of course, keenly aware of the fragility of this system and its imperfections. So let me add a few remarks, this time more in the role of a critical observer.

There is a lack of stability built into the Convention system. The workload continues to rise inexorably. The Court has become a sort of quasi-Constitutional Court for each of the Member States, a sort of wailing wall for applicants irrespective of priorities in European human rights protection, and a sort of incarnation of a truly independent tribunal that must legitimise national judicial systems that still lack credibility.

33. WILDHABER, *supra* note 14, at 63.

Despite the very remarkable and laudable gains in productivity, it is difficult for the Court to cope. The Court is in danger of losing its credibility if it violates more and more the length-of-proceedings standards that it imposes on domestic courts. Of course, that leads to the question of whether and to what extent the States and their Governments really want the Court to guarantee the right of individual application and the execution of the Court's judgments fully and comprehensively. And this is why the Convention system has an element of fragility.

To this second set of considerations I wish to add a third passage, which comes from a philosophical, somewhat distant observer. I believe in Alexis de Tocqueville's maxim that each principle, carried to its extreme, carries in it the roots of its own destruction.³⁴ That maxim, I think, applies to principles such as democracy, which, as the history of the last century has amply proved, if limitless, allows the election of dictators; the suppression, ethnic cleansing, and killing of minorities; or the aggression of neighbouring states.

De Tocqueville's maxim equally applies to the rule of law. This is a fundamental and—if one wishes to avoid arbitrariness—indispensable principle. But we must be sure not to let it degenerate into empty formalism. Indeed, speaking of the situation of the new Member States of Central and Eastern Europe, some writers discern what they call "post-Stalinistic formalism," which expresses an unwillingness and/or incapacity to explore to the fullest extent the real contemporary meaning of human rights protection clauses.³⁵

Finally, de Tocqueville's warning against carrying matters to their extreme also applies to human rights. A human rights court is not always helped by the thought that the guarantee of a human right is the rule, to be interpreted extensively, whereas the limits of human rights should be interpreted restrictively. Nor would it be correct to state that the limits of human rights, constituting *lex specialis*, should necessarily prevail. I rather believe that what is characteristic of the Court is the constant pondering and balancing of all sorts of public and private interests, taking into account a hugely complex, pan-European context at the same time as the very specific circumstances of each case.

34. See 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 411-16 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago 2000) (1835).

35. Zdenek Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, 52 AM. J. COMP. L. 531, 549-67 (2004).

IV. SOME RECENT CASES

The last part of my presentation consists of an endeavour to illustrate the enormous variety of applications that reach the Court by discussing a few recent cases. The case of *Streletz, Kessler and Krenz v. Germany* concerned the applicants' conviction for their part in the border-policing policy followed in the former German Democratic Republic (GDR) and the shooting of at least 264 persons who had intended to cross the border and flee the GDR.³⁶ The applicants had argued that their actions had not constituted offences under the applicable GDR criminal law at the time when they were carried out, and therefore, their conviction was a breach of the prohibition of the retrospective application of criminal law under article 7 of the Convention.³⁷ They further maintained that the acts in question did not constitute offences under international law.³⁸ However, the relevant provisions of GDR legislation expressly proclaimed the principle that human life must be preserved and provided for the application of the principle of proportionality with respect to the use of force.³⁹ The fact that a practice was grafted onto legislation that effectively emptied the provisions concerned of their substance could not help the applicants.⁴⁰ Such a practice, which flagrantly infringed human rights and, above all, the right to life, could not attract the protection of article 7, section 1, of the Convention.⁴¹ The applicants had created the appearance of legality, but then implemented a practice disregarding those principles.⁴² The purpose of article 7 was to prevent arbitrary prosecution, conviction, or punishment, not to protect those who flouted fundamental rights under a cloak of legality.⁴³ The GDR border-policing policy also disregarded the need to preserve life enshrined in the relevant international instruments.⁴⁴

The *Leyla Şahin v. Turkey* case concerned the prohibition against wearing Islamic headscarves at the Faculty of Medicine of Istanbul

36. *Streletz, Kessler & Krenz v. F.R.G.*, 2001-II Eur. Ct. H.R. 409, 417-18.

37. *Id.* at 436-37.

38. *Id.*

39. *Id.* at 444.

40. *Id.* at 447.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 448-49.

University.⁴⁵ The applicant alleged a violation of her freedom of religion under article 9 of the Convention.⁴⁶

The Court noted that the impugned interference was based, in particular, on the principles of secularism and equality.⁴⁷ The Turkish Constitutional Court, in rejecting the applicant's arguments,

stated that secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the state but from external pressure from extremist movements.⁴⁸

The Court accepted that such a notion of secularism was consistent with the values underpinning the Convention.⁴⁹ Upholding that principle could be considered necessary to protect the democratic system in Turkey.⁵⁰ After reiterating that pluralism and tolerance were among the fundamental principles of any democratic society, the Court said that it also had to take into account the need for the public authorities to protect the rights and freedoms of others, to preserve public order, and to secure civil peace and true religious pluralism—which was vital to the survival of democratic society.⁵¹ In this case, the Court found that in a context in which the values of pluralism and respect for the rights of others and, in particular, equality of men and women before the law were being taught and applied, it was understandable that the relevant authorities should wish to preserve the secular nature of the institutions concerned. Therefore, the authorities would consider it contrary to such values to allow religious attire, including the Islamic headscarf, to be worn.⁵² As a result, no violation of the Convention was found.⁵³

In the case of *Nachova v. Bulgaria*, the Court applied article 14 of the Convention, which prohibits discrimination in the enjoyment of Convention rights, in conjunction with article 2, which protects the right

45. *Şahin v. Turkey*, 44 Eur. H.R. Rep. 99 (2007).

46. *Id.* at 106.

47. *Id.* at 127.

48. *Id.* at 127-28.

49. *Id.* at 128.

50. *Id.*

51. *Id.* at 128-29.

52. *Id.* at 129.

53. *Id.* at 130.

to life.⁵⁴ The case originated in a military operation in which two young deserters of Roma origin were shot and killed by members of the military police who had received orders to track them down.⁵⁵ The applicants, who were members of the victims' families, alleged that prejudice and hostile attitudes of a racist nature had played a role in the deaths.⁵⁶ The Court found that it had not been established that the men had been killed as a result of racism.⁵⁷ However, it went on to find that the domestic authorities should have examined, in the course of their investigation, whether racist motives had played a role in the men's death and if so, brought those responsible to justice.⁵⁸

In the case of *Mamatkulov and Askarov v. Turkey*, the two applicants had been extradited by the Turkish Government to Uzbekistan, although the Court had indicated in an interim measure that the applicants should not be extradited.⁵⁹ The Court reviewed its earlier case-law in the light of developments in international law concerning interim measures.⁶⁰ Referring to recent decisions of other international tribunals, such as the International Court of Justice, the Inter-American Court of Human Rights, and the Human Rights Committee of the United Nations, it stated that, henceforth, "[a] failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Art. 34 of the Convention."⁶¹

In the case of *Bosphorus v. Ireland*, the Court made an important and much-awaited contribution to the clarification of the relationship between the Convention and European Community (EC) law.⁶² It found that the protection of fundamental rights by EC law, unless manifestly deficient, could be considered equivalent to that of the Convention system.⁶³ Consequently, there was a presumption that a State would not depart from the requirements of the Convention when it was merely implementing legal obligations flowing from its EC membership.⁶⁴

54. *Nachova v. Bulgaria*, 42 Eur. H.R. Rep. 933 (2006).

55. *Id.* at 938-40.

56. *Id.* at 933-34.

57. *Id.* at 965.

58. *Id.* at 965-67.

59. *Mamatkulov & Askarov v. Turkey*, 41 Eur. H.R. Rep. 494 (2005).

60. *Id.* at 524-26.

61. *Id.* at 530.

62. *Bosphorus v. Ireland*, 42 Eur. H.R. Rep. 1 (2006).

63. *Id.* at 45.

64. *Id.*

The last case that I wish to mention is *Hutten-Czapska v. Poland*.⁶⁵ The applicant owned a house and a plot of land in Gdynia, Poland.⁶⁶ She complained that Polish law imposed tenancy agreements on her and set an inadequate level of rent.⁶⁷ She was not only unable to derive any income from her property but also, owing to restrictions on the termination of leases of flats subject to the rent-control scheme, she could not regain the possession and use of her property.⁶⁸ The Court found for her and held that there had been a violation of article 1 of Protocol No. 1 to the Convention. Since some 100,000 landlords were similarly affected by the Polish legislation, the Court decided to adopt the so-called “pilot-judgment” procedure.⁶⁹ It held that the Convention “ha[d] originated in a systemic problem connected with the malfunctioning of domestic legislation” and ordered “that, in order to put an end to the systemic violation identified in the present case, the respondent State must, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention.”⁷⁰

V. CONCLUSION

The European Court of Human Rights has been, and is, a very special, original, ambitious, and successful institution, constantly facing new challenges, responding to individual complaints and systemic malfunctionings, neglects, and discriminations. It has been a privilege to be connected with, and to shape, such an exceptional institution.

65. *Hutten-Czapska v. Poland*, 45 Eur. H.R. Rep. 52 (2007).

66. *Id.* at 58.

67. *Id.* at 104.

68. *Id.*

69. *Id.* at 104-05.

70. *Id.* at 137.