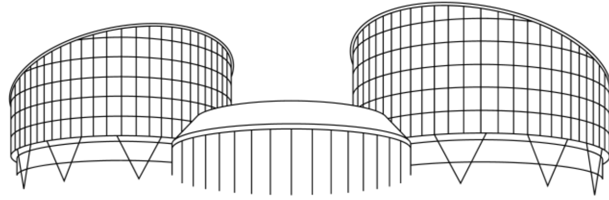

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF WALLISHAUSER v. AUSTRIA (No. 2)

(Application no. 14497/06)

JUDGMENT

STRASBOURG

20 June 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

In the case of Wallishauser v. Austria (No. 2),

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 28 May 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 14497/06) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mrs Roswitha Wallishauser (“the applicant”), on 24 March 2006.

2. The applicant was represented by Mr M. Celar, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that the imposition on her, as an employee of the United States embassy in Vienna, of the entire amount of social security contributions, including the employer’s contributions due in respect of her salary for a given period, placed a disproportionate burden on her and thus violated her right to peaceful enjoyment of her possessions.

4. On 14 April 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1941 and lives in Vienna.

A. Background

6. The applicant had been an employee of the embassy of the United States of America in Vienna since March 1978. From January 1981 onwards she had a contract of indefinite duration and worked as a photographer at the embassy. Following an accident in 1983, the competent authority issued a decision stating that she qualified for protection under the Disabled Persons (Employment) Act (*Invalideneinstellungsgesetz*). The embassy dismissed her in September 1987, following a further accident in March of that year which was classified as work-related.

7. While the applicant was employed by the US embassy in Vienna, she registered herself as an employee under the social security system pursuant to section 35(4)(a) of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz*). She paid both the employer's and employee's contributions to the social security system to the Vienna Health Insurance Board (*Gebietskrankenkasse,* "the Health Insurance Board") until August 1988. In accordance with her contract of employment, the United States reimbursed the applicant the employer's contribution, which amounted to 53% of the total social security contributions until November 1983. Subsequently, on the basis of administrative notices of the US embassy in Vienna of 21 April 1982 and 13 January 1984, the United States undertook to refund its employees the employer's contributions in the amount of 55% of the total social security contributions, upon timely submission of the relevant statements of the Health Insurance Board. According to the applicant, the United States did so in her case until March 1987; however, according to the Government, the relevant date was August 1988.

8. The applicant's dismissal was declared void by the Vienna Labour and Social Court (*Arbeits- und Sozialgericht*) on the grounds that it required the prior agreement of the competent authority under the Disabled Persons (Employment) Act. The court dismissed the argument submitted by the United States that it lacked jurisdiction on account of the country's immunity. It found that, while foreign States enjoyed immunity with regard to *acta iure imperii*, they came within the jurisdiction of the domestic courts with regard to *acta iure gestionis*. The conclusion and performance of an employment contract fell within the latter category. The Supreme Court (*Oberster Gerichthof*) upheld that judgment on 21 November 1990, noting that the United States had not maintained the objection of State immunity in the further course of the proceedings.

9. As a result of the above proceedings, the applicant continued to have a valid employment contract with the Unites States' embassy in Vienna. However, the latter refused to make use of her services.

10. The applicant brought proceedings against the United States requesting payment of her salary. In a first set of proceedings, concerning salary payments from 1 September 1988 to 30 June 1995, the United States

unsuccessfully raised the objection of jurisdictional immunity. In compliance with a judgment of the Vienna Labour and Social Court of 14 July 1995, the United States paid the applicant a total amount of 3.7 million Austrian schillings (ATS – approximately 269,000 euros (EUR)), composed of some ATS 3 million (approximately EUR 224,000) for salary arrears plus staggered interest. As before, the salary payment corresponded to the applicant's gross salary, including the employee's contributions to the social security system, which she had to pay to the Health Insurance Board. On the occasion of the payment, the lawyer who had represented the United States in the proceedings informed the applicant by a letter of 16 October 1996 that the payment did not imply any acceptance of the Austrian courts' judgments, that the United States considered her employment contract to be terminated and would, if she raised any further claims, "make use of its diplomatic rights and immunities".

11. Further proceedings relating to the payment of salary from July 1995 to August 1996 led to a final default judgment by the Vienna Labour and Social Court. However, the United States did not pay the amount awarded to the applicant.

12. The applicant brought proceedings relating to salary payments from September 1996 onwards but they were also unsuccessful, as the US Department of State had refused to serve the relevant summons on the Department of Justice, which was competent to represent the United States in civil litigation. The Austrian courts held that the refusal to serve summons fell within the category of *acta iure imperii*. They concluded that the defendant had not been duly summoned and that they could not proceed with the applicant's case. The Supreme Court confirmed that position in judgments delivered on 5 September 2001 and 7 May 2003. Those proceedings were the subject of application no. 156/04, *Wallishauser v. Austria*. In its judgment of 17 July 2012, the Court held that by accepting the United States' refusal to serve the summonses in the applicant's case as a sovereign act and by refusing, consequently, to proceed with the applicant's case, the Austrian courts had impaired the very essence of the applicant's right of access to court and had thus violated Article 6 § 1 of the Convention.

B. Proceedings giving rise to the present application

13. On 17 March 1999 the Federal Ministry for Labour, Health and Social Security (*Bundesministerium für Arbeit, Gesundheit und Soziales)* issued a declaratory decision, holding that the applicant continued to be an employee within the meaning of section 4 of the General Social Security Act on account of her valid employment contract with the US embassy in

Vienna (see paragraphs 8 and 9 above). Consequently, she was affiliated to the social security system.

14. Subsequently, the Health Insurance Board ordered the applicant to pay the employer's and employee's social security contributions for the period from 1 September 1988 to 30 June 1995, that is to say the period for which she had received salary payments (see paragraph 10 above). The applicant raised objections. As the Health Insurance Board failed to decide on them within the statutory time-limit, the applicant filed an application for transfer of jurisdiction (*Devolutionsantrag*).

15. In a decision of 7 June 2000 the Vienna Regional Governor ordered the applicant to pay the employer's and employee's social security contributions amounting to ATS 1,088,676.76 (EUR 79,117.22) in total, which were due for her employment at the US embassy in Vienna for the above-mentioned period. The decision relied on section 53(3)(a) of the General Social Security Act, noting that the United States was an employer enjoying extraterritorial status and had not paid any social security contributions for the applicant during the period at issue. Finally, the Regional Governor found that in the circumstances of the case, no default interest was to be charged.

16. The applicant paid the employee's contributions of ATS 502,631.67 (EUR 36,527.70). However, she appealed against the decision. In her appeal of 6 July 2000 she argued, in particular, that the US embassy had undertaken to pay the employer's social security contributions and had laid down its obligation to do so in an administrative notice of 21 April 1982. In the applicant's view, section 53(3)(a) of the General Social Security Act did not apply, as her employer had agreed to pay the employer's contribution. Instead the general rules should have been applied, namely section 51(3) of the said Act, which provided that social security contributions were to be borne in part by the employer and in part by the employee, and section 58(2), which provided that the employer was the contribution debtor for the entire amount of social security contributions *vis-à-vis* the Health Insurance Board. In the alternative, the applicant submitted that section 53(3)(a) of the General Social Security Act violated the principle of equality before the law guaranteed by Article 7 of the Federal Constitution. Under public international law as it stood, the fulfilment of employment contracts fell within the category of *acta iure gestionis* and was thus not exempt from domestic jurisdiction. There was thus no objective reason for treating employees of an employer having extraterritorial status differently from other employees.

17. On 18 June 2001 the Federal Ministry for Social Security and Generations (*Bundesministerium für soziale Sicherheit und Generationen*) allowed the applicant's appeal, holding that she did not have to pay the employer's social security contributions for the period from 1 September 1988 to 30 June 1995. It noted, in particular, that the US embassy in

Vienna, on the basis of an administrative notice of 21 April 1982, had concluded an agreement with its employees to reimburse the employer's social security contributions amounting to 55% of the total contributions. It had constantly complied with that agreement, but had refused to reimburse the applicant following her accident in 1987. The Ministry found that the US embassy was obliged to pay the employer's contributions for the applicant's employment.

18. On 3 October 2001 the Constitutional Court refused to deal with the applicant's complaint for lack of prospects of success and transferred the complaint to the Administrative Court (*Verwaltungsgerichtshof*).

19. In her complaint to the Administrative Court, the applicant maintained that section 53(3)(a) of the General Social Security Act should not have been applied in her case. Instead the general rule of section 58(2) should have been applied, which provided that the employer was the contribution debtor for the entire amount of social security contributions. Consequently, she should not have been treated as the contribution debtor for the employee's contributions either.

20. The Health Insurance Board also lodged a complaint with the Administrative Court, asserting that under section 53(3)(a) the applicant was obliged to pay both the employer's and employee's contributions.

21. On 15 March 2005 the Administrative Court, having joined both cases, upheld the Health Insurance Board's complaint and quashed the Federal Ministry's decision. It held that section 53(3)(a) of the General Social Security Act applied in the present case, as the applicant's employer enjoyed extraterritorial status and did not pay social security contributions. Referring to its case-law, the Administrative Court noted that section 53(3)(a), which required the employee to pay the entire amount of social security contributions, provided, firstly, for an exception from the rule laid down in section 51(3) of the General Social Security Act which provided that the contribution burden was to be shared between the employer and the employee. As a consequence, it also made the employee liable to pay the entire amount of contributions. The application of section 53(3)(a) was not excluded on account of the fact that the US embassy had given an undertaking to its employees to reimburse the employers' contributions provided that certain requirements were met.

22. In a decision of 10 June 2005 the Federal Ministry for Social Security, Generations and Consumer Protection (*Bundesministerium für soziale Sicherheit, Generationen und Konsumentenschutz*) ordered the applicant to pay both the employee's and employer's social security contributions, in a total amount of EUR 79,177.22 for the period from 1 September 1988 to 30 June 1995. It relied on section 53(3)(a) of the General Social Security Act, noting that the provision had been introduced in 1962. The legislature's intention had been to regulate the rare cases in which extraterritorial employers refused to pay the relevant employer's

social security contributions. As such employers could not be forced to comply with Austrian law, the legislature had considered that there was no other solution than to require the entire amount of social security contributions to be paid by the employee.

23. Regarding the applicant's submissions that section 53(3)(a) of the General Social Security Act was unconstitutional for being discriminatory, the Ministry noted that it was not called upon to examine the constitutionality of the provision at issue. It had to apply the law in force, with the exception of cases in which provisions of EU law had precedence over Austrian law.

24. In her complaint to the Constitutional Court (*Verfassungsgerichtshof*), the applicant claimed that the Ministry's decision had violated her right to property and her right not to be discriminated against as well as her right to social security and to a fair trial. She maintained her argument that under current public international law there was no objective reason for the distinction made by section 53(3)(a) of the General Social Security Act between employees of an extraterritorial employer and any other employees. Moreover, the case-law of the Court of Justice of the European Communities (ECJ) provided that the rights guaranteed by the European Convention on Human Rights formed part of the basic principles of community law. The ECJ had also held in a number of cases that a difference in treatment had to be objectively justified. However, the Ministry had failed to obtain a preliminary ruling on whether section 53(3)(a) violated EU law. In conclusion, the applicant requested the Constitutional Court to quash the Ministry's decision or, if need be, to examine the constitutionality of the said provision or to request the ECJ to give a preliminary ruling.

25. On 27 September 2005 the Constitutional Court refused to deal with the applicant's complaint for lack of prospects of success. Referring, *inter alia*, to Article 29 of the 1972 European Convention on State Immunity (which exempts proceedings concerning social security from the application of that Convention), the Constitutional Court noted that due to the practical consequences of the employer's extraterritorial status there was no appearance of a violation of constitutional law by section 53(3)(a) of the General Social Security Act. The decision was served on the applicant's counsel on 7 October 2005.

C. Other proceedings and further developments

26. While the above proceedings were pending, the applicant brought proceedings against the United States claiming reimbursement of the employer's part of the social security contributions which she had been ordered to pay to the Health Insurance Board. In those proceedings, the US Department of State had refused to serve the summons on the Department of

Justice, which was competent to represent the United States in civil litigation. The Austrian courts held that the refusal to serve the summons fell within the category of *acta jure imperii*. They dismissed the applicant's request for a judgment in default. Their position was confirmed by the Supreme Court's judgment of 11 June 2001.

27. In a decision of 3 June 2002 the proceedings were stayed, pending the Administrative Court's decision in the proceedings between the applicant and the Health Insurance Board. Following the Administrative Court's judgment of 15 March 2005 (see paragraph 21 above), they were resumed by the Vienna Labour and Social Court on 27 December 2005, which noted, however, that service of the summons was not possible.

28. In April 2002 the applicant reached pensionable age. She gave the US embassy in Vienna notice of termination of her employment and applied to the competent Pension Insurance Office for an old-age pension from 1 May 2002.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Domestic law

29. The General Social Security Act encompasses Austria's health and accident insurance and old-age pension schemes. Austrian social security law is based on the contributory principle.

30. Section 4 of the General Social Security Act regulates compulsory affiliation to the social security system. Pursuant to section 4(1)(1), employees are affiliated to the health and accident insurance and old-age pension schemes. Section 4(2) defines an employee as any person working in consideration of remuneration in a relationship of personal and economic dependency.

31. As a general rule, an employer is obliged to register its employees with the social security system (section 33 of the General Social Security Act).

32. Section 35(4) of the General Social Security Act lays down exceptions to that rule:

Section 35(4) of the General Social Security Act

"The employee shall be responsible for his or her own registration as provided in sections 33 and 34

(a) if the employer enjoys the privileges of extraterritoriality or has been granted special privileges or immunities by virtue of an intergovernmental treaty or Austria's membership of an international organisation, or

(b) if the employer (contracting entity) has no permanent business establishment (branch, office, agency) in Austria . ..."

33. Section 51(3) of the General Social Security Act provides that for an employee affiliated to the social security system, compulsory contributions have to be borne in part by the employer and in part by the employee unless section 53 applies.

34. As a general rule, the employer is the contribution debtor (*Beitragsschuldner*) for the entire amount of social security contributions due (section 58(2) of the General Social Security Act). That means in practice that the employer pays the entire amount of social security contributions (namely the employer's and employee's share) directly to the competent social security board, and pays the employee a salary from which his or her social security contributions have already been deducted.

35. Section 53 of the General Social Security Act, so far as material, provides as follows:

Section 53 of the General Social Security Act

"(3) The employee shall pay the full amount of the contributions

(a) if contributions are not paid by an employer that enjoys the privileges of extraterritoriality or has been granted special privileges and immunities by virtue of an intergovernmental agreement or Austria's membership of an international organisation;

(b) if the employer has no permanent business establishment (branch, office, agency) in Austria . ..."

B. International law

1. The 1972 European Convention on State Immunity

36. The 1972 European Convention on State Immunity ("the Basle Convention") entered into force on 11 June 1976 after its ratification by three States. It has been ratified by eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) and signed by one State (Portugal). On 11 June 1976 it entered into force in respect of Austria, which had ratified it on 10 July 1974.

37. For the text of Article 5 of the Convention, concerning the limits of jurisdictional immunity in respect of employment contracts, see *Wallishauser*, cited above, § 29.

38. The following Article is relevant in the context of the present case:

Article 29

"The present Convention shall not apply to proceedings concerning:

a) social security;

b) damage or injury in nuclear matters;

c) customs duties, taxes or penalties."

2. The 2004 United Nations Convention on Jurisdictional Immunities of States and their Property

39. State immunity from jurisdiction is governed by customary international law, the codification of which is enshrined in the United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004 ("the 2004 Convention"). The principle is based on the distinction between acts of sovereignty or authority (*acta jure imperii*) and acts of commerce and administration (*acta jure gestionis*) (see *Cudak v. Lithuania* [GC], no. 15869/02, §§ 25-33, ECHR 2010; *Sabeh El Leil v. France* [GC], no. 34869/05, §§ 18-23, 29 June 2011; and *Wallishauser*, cited above, § 30).

40. The 2004 Convention was opened for signature on 17 January 2005 and has not yet entered into force. Austria signed the Convention on 17 January 2005 and ratified it on 14 September 2006. The United States has not ratified the 2004 Convention, but did not vote against it when it was adopted by the United Nations General Assembly.

41. The draft text of the Convention was prepared by the United Nations International Law Commission (ILC) which, in 1979, was given the task of codifying and gradually developing international law in matters of jurisdictional immunities of States and their property. It produced a number of drafts that were submitted to States for comment. The Draft Articles that were used as the basis for the text adopted in 2004 dated back to 1991 ("the 1991 Draft Articles"). They were subsequently further revised by the Sixth Committee of the United Nations General Assembly. States were again given an opportunity to comment.

42. For the text of Article 11 of the 2004 Convention and of Article 11 of the 1991 Draft Articles concerning the limits of jurisdictional immunity in respect of employment contracts, see *Wallishauser*, cited above, §§ 33 and 35, respectively.

43.The 2004 Convention (Part IV) contains a number of provisions on State immunity from measures of constraint in connection with proceedings before a court.

Article 18 (State immunity from pre-judgment measures of constraint) reads as follows:

> "No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
>
> *(a)* the State has expressly consented to the taking of such measures as indicated:
>
> (i) by international agreement;
>
> (ii) by an arbitration agreement or in a written contract; or
>
> (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding."

Article 19 (State immunity from post-judgment measures of constraint) reads as follows:

"No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."

Article 20 (effect of consent to jurisdiction to measures of constraint) reads as follows:

"Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint."

Article 21 (specific categories of property) reads as follows:

"1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph *(c)*:

(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use in the performance of military functions;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs *(a)* and *(b)*."

44. The 1991 Draft Articles of the International Law Commission already contained a Part IV on State immunity from measures of constraint in connection with proceedings before a court:

Article 18 (State immunity from measures of constraint) of the 1991 Draft Articles provided as follows:

> "1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
>
> *(a)* the State has expressly consented to the taking of such measures as indicated:
>
> (i) by international agreement;
>
> (ii) by an arbitration agreement or in a written contract; or
>
> (iii) by a declaration before a court or by a written communication after a dispute between the parties has arisen;
>
> *(b)* the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
>
> *(c)* the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.
>
> 2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary."

The International Law Commission's commentary, on Article 18, in so far as relevant, reads as follows:

> "(1) Article 18 concerns immunity from measures of constraint only to the extent that they are linked to a judicial proceeding. Theoretically, immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation. Article 18 clearly defines the rule of State immunity in its second phase, concerning property, particularly measures of execution as a separate procedure from the original proceeding.
>
> (2) The practice of States has evidenced several theories in support of the immunity from execution as separate from and not interconnected with immunity from jurisdiction. Whatever the theories, for the purposes of this article, the question of immunity from execution does not arise until after the question of jurisdictional immunity has been decided in the negative and until there is a judgment in favour of the plaintiff. Immunity from execution may be viewed, therefore, as the last bastion of State immunity. If it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State (*par in parem imperium non habet*), it follows *a fortiori* that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property.

Such a possibility does not exist even in international litigation, whether by judicial settlement or arbitration."

Article 19 (Specific categories of property) of the 1991 Draft Articles provided as follows:

"1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under paragraph 1 (c) of article 18:

(a) property, including any bank account, which is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to paragraph 1 *(a)* and *(b)* of article 18."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

45. The applicant complained that section 53(3)(a) of the General Social Security Act imposed a disproportionate burden on her, in that she was obliged to pay both the employee's and employer's social security contributions. She relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

46. The Government contested that argument.

A. Admissibility

47. The Government observed that the applicant complained that she had been obliged to pay both the employer's and employee's social security contributions. However, in so far as her obligation to pay the employee's contributions was concerned, she could not be regarded as a victim of the alleged violation within the meaning of Article 34 of the Convention. For the relevant period, namely September 1988 to June 1995, the contributions had been included in the amount paid by the United States in compliance with the Vienna Labour and Social Court's judgment of 14 July 1995 (see paragraph 10 above).

48. The applicant confirmed that she not only complained that she had been obliged to pay her employer's social security contributions under section 53(3)(a) of the General Social Security Act, but that she had been the contribution debtor for both the employer's and employee's contributions. In her view, as the US embassy had undertaken to pay the employer's contribution, section 51(3) of the General Social Security Act applied in respect of the distribution of the contribution burden. Consequently, section 58(2) applied, which provided that the employer was the contribution debtor for the entire amount of contributions. In her view, there was no room for the application of section 53(3)(a), which made her the contribution debtor for the entire amount of contributions.

49. While conceding that the payment awarded to her by the Vienna Labour and Social Court's judgment of 14 July 1995 had been her gross salary and thus had included the employee's social security contributions, she asserted that the contributions had been calculated as average monthly amounts, and that owing to increases to the contributions during the proceedings, the amount awarded did not cover the entire amount she had to pay.

50. The Court reiterates that the word "victim" in Article 34 of the Convention denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice, which is only relevant in the context of Article 41 (see, as a recent authority, *Nada v. Switzerland* [GC], no. 10593/08, § 128, ECHR 2012).

51. The Court observes that the applicant was directly affected by the decisions complained of, in that she was ordered to pay both the employer's and employee's social security contributions. The Government pointed out that, as far as the employee's contributions were concerned, the applicant had not suffered any damage, as the contributions had been included in the salary payment she had received from her employer for the period at issue. For her part, the applicant asserted that she had suffered at least some damage in respect of the employee's contributions. At this stage, the Court finds it sufficient to reiterate that the absence of prejudice does not remove

the applicant's victim status. The Court therefore dismisses the Government's objection.

52. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

53. The applicant claimed that the application of section 53(3)(a) of the General Social Security Act imposed a disproportionate burden on her. She maintained that a rule which made the employee liable for paying the extraterritorial employer's social security contributions was no longer justified under public international law. The provision was still based on the consideration that compliance with Austrian law could not be enforced as regards employers enjoying extraterritorial status. However under current international law, obligations resulting from employment contracts with a foreign State's diplomatic missions were no longer exempt from jurisdiction on account of State immunity. Consequently, the provision at issue was not necessary in the interests of securing the payment of social security contributions.

54. In that connection, the applicant contested the Government's argument that the imposition on her of the employer's contributions was the result of a correct balancing of public and individual interests. Even if it were to be accepted that the United States' undertaking to reimburse the employer's social security contributions were a private-law arrangement – which she explicitly contested – she could have expected that any claims resulting from that arrangement would be examined and eventually enforced by the Austrian courts, as they were not covered by jurisdictional immunity. Hence there was no risk in being an employee of an extraterritorial employer which she could legitimately be expected to bear.

55. In the alternative, the applicant asserted that section 53(3)(a) of the General Social Security Act should not have been applied in her case. She argued that the US embassy had guaranteed to refund all its employees, including the applicant, the employer's contributions to the social security system. She contested the Government's view that it was a private-law arrangement between the United States and its employees, and claimed that the social security institutions had been involved in and aware of the arrangements. The fact that the United States had only refused to comply with their duty to refund contributions in the applicant's case did not remove the principle of sharing social security contributions between employer and employee which they had previously accepted. There was

thus no room for the application of section 53(3)(a) and for imposing on her the burden of paying both the employee's and employer's contributions.

56. Furthermore, the rule as such was disproportionate, as contributions became due irrespective of whether or not a salary had actually been paid. Lastly, if the employee failed to pay the contributions, the social security board was entitled to set off its claims against cash benefits due to the insured person.

57. For their part, the Government accepted that the application of section 53(3)(a) of the General Social Security Act interfered with the applicant's right to property. However, they argued that the interference was justified as being necessary to secure the payment of contributions within the meaning of the second paragraph of Article 1 of Protocol No. 1. They emphasised that States enjoyed a wide margin of appreciation in matters of social and economic policy.

58. The Government explained that for the purposes of the General Social Security Act, which covered the health and accident insurance and old-age pension schemes, all employees were considered as one risk group. The social security system was financed by way of a pay-as-you-go system. Furthermore, it was based on the underlying consideration that obligations were shared between the employer and the employee. As a general rule, the employer was obliged to register the employee with the social security system. Regarding the payment of contributions, they had to be borne in part by the employer and in part by the employee. However, as a general rule laid down in section 58(2) of the General Social Security Act, the employer was obliged to withhold the part due as the employee's contributions and to pay that part together with the employer's contributions directly to the competent social security board.

59. In specific cases where employers enjoyed extraterritorial status, the General Social Security Act provided a number of exceptions from those general rules. It was for the employee to register with the social security system pursuant to section 35(4) of the said Act. Moreover, pursuant to section 53(3)(a), in cases where the employer did not do so, it was for the employee to pay the entire amount of social security contributions to the Health Insurance Board. In the Government's view, that rule served the public interest in ensuring that social security contributions were actually paid, which was necessary to keep the pay-as-you-go system functioning. The legislature had considered the contested rule as a last resort for the rare cases in which an extraterritorial employer refused to pay social security contributions. The contested rule was based on the consideration that the obligation to pay social security contributions could not be enforced against an employer enjoying extraterritorial status. The Government added that the same rules applied in the case of employers which did not have a permanent business establishment in Austria.

60. The Government asserted that a reasonable balance between general and individual interests had been struck in the applicant's case. By accepting that in such a case the employer's contributions remained unpaid would undermine one of the leading principles of social security law, namely the principle of solidarity of all insured persons. It was rather for the employee to bear the risk that the extraterritorial employer may refuse to pay its part of the social security contributions.

61. In that context, the Government pointed out that section 53(3)(a) of the General Social Security Act was already in force when the applicant had entered into the employment contract with the US embassy in Vienna. She had been aware of the legal situation in that she registered herself with the Vienna Health Insurance Board and paid both the employer's and employee's contributions until August 1988. The mere fact that the embassy, in accordance with a private-law agreement, reimbursed the part due as employer's contributions until that time, but refused to do so thereafter, did not change the nature of the applicant's relationship with the Health Insurance Board.

62. Lastly, the decisions at issue in the present case only obliged her to pay social security contributions for the period from September 1988 to June 1995 for which her salary (including the sum due as the employee's social security contribution) had been paid by the United States. In summary, the application of the contested provision did not place a disproportionate burden on her.

2. The Court's assessment

63. The Court considers, and this is not in dispute between the parties, that the obligation to pay social security contributions for the period from 1 September 1988 to 30 June 1995 constituted an interference with the applicant's right to the peaceful enjoyment of her possessions. It falls under the second paragraph of Article 1 of Protocol No. 1, which recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions (see, for instance, *Frátrik v. Slovakia* (dec.), no. 51224/99, 25 May 2004 relating to the levying of social security contributions).

64. According to the Court's well-established case-law, an interference including one resulting from a measure to secure the payment of taxes or other contributions, must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The desire to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued (see *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A

no. 98, and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, *Reports of Judgments and Decisions* 1997-VII).

65. Furthermore, a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (*National & Provincial Building Society*, cited above, § 80, and *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI).

66. In the present case, the applicant's obligation to pay social security contributions was based on section 53(3)(a) of the General Social Security Act. The applicant argued before the domestic authorities, as she does before the Court, that the provision should not have been applied in her case. However, the Administrative Court, giving detailed reasons, confirmed that the requirements for applying section 53(3)(a) of the General Social Security Act were fulfilled, as her employer enjoyed extraterritorial status and did not pay social security contributions. It explicitly noted that the undertaking given by the US embassy to its employees to reimburse them the employer's contributions could not change that assessment. The Court does not consider this interpretation to be arbitrary. In this connection, the Court reiterates that it is firstly for the domestic authorities, notably the courts, to interpret and apply the domestic law (see, for instance, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 86, ECHR 2005-VI). It is therefore satisfied that the interference had a basis in domestic law.

67. The Court observes that the provision at issue is designed to ensure the good functioning of the social security system. As the Government explained, the financing of the health and accident insurance and old-age pension schemes covered by the General Social Security Act is based on a pay-as-you-go system, it was therefore vital to ensure that social security contributions were actually being made. The Court thus accepts that the interference with the applicant's property rights pursued a legitimate aim "in accordance with the general interest".

68. The Court will now turn to the question whether the interference was proportionate to the legitimate aim pursued. The applicant argues that the exception provided for in section 53(3)(a) of the General Social Security Act was no longer necessary, as under current international law, obligations resulting from employment contracts with a foreign State's diplomatic missions where no longer exempt from jurisdiction on account of State immunity.

69. As the Court has already noted, there is a development in international law towards limiting jurisdictional immunity in respect of employment-related disputes: that development is reflected in Article 5 of the 1972 European Convention on State Immunity and in Article 11 of the International Law Commission's 1991 Draft Articles, and is now enshrined in Article 11 of the 2004 Convention (see *Wallishauser*, cited above, § 65; as well as *Cudak v. Lithuania* [GC], no. 15869/02, § 63, ECHR 2010; and *Sabeh El Leil v. France* [GC], no. 34869/05, § 53, 29 June 2011).

70. However, the present case concerns proceedings relating to social security and raises the question whether the assumption on which section 53(3)(a) of the General Social Security Act is based, namely that it is not possible to enforce the obligation to pay social security contributions against an employer enjoying extraterritorial status, is still valid under international law.

71. The Court observes that the 1972 Convention does not lend any support to the applicant's position, as proceedings relating to social security are as such excluded from its application (see paragraph 38 above). Turning to the 2004 Convention, the Court notes that it has not yet entered into force. Austria ratified it in 2006, when the proceedings at issue had already been terminated. The United States have not ratified the 2004 Convention. Nevertheless, the Court has already held that it is a well-established principle of international law that a rule enshrined in a treaty could be binding on a State as a rule of customary international law even if the State in question has not ratified the treaty, provided that it has not opposed it either (see *Wallishauser*, cited above, § 66, with references to *Cudak*, cited above, § 66, and *Sabeh El Leil*, cited above, §§ 54 and 57). However, under the 2004 Convention the possibilities to enforce a judgment against a foreign State are narrowly limited, as follows from Articles 18 to 21 of that Convention (see paragraph 43 above). Articles 18 and 19 of the 1991 Draft Articles contained similar provisions. The International Law Commission's commentary on Article 18 of the 1991 Draft Articles set out clearly that immunity from execution is "separate from and not interconnected with immunity from jurisdiction" (see paragraph 44 above).

72. Consequently, even if it were established that the content of Articles 18 to 21 of the 2004 Convention were applicable as rules of customary international law at the material time, that would not support the applicant's position. In short, the fact that a State cannot rely on jurisdictional immunity for certain categories of employment contracts does not mean that a judgment against a foreign State can be enforced in the same way as against an ordinary employer. The rationale underlying section 53(3)(a) of the General Social Security Act, namely that obligations under social security law cannot be enforced against an employer enjoying extraterritorial status, or at least not in the same way as against an ordinary employer, is therefore still valid.

73. In the light of these considerations, it cannot be said that the legislature's choice to maintain section 53(3)(a) of the General Social Security Act in force was "manifestly unreasonable". It remains to be examined whether in the circumstances of the case a disproportionate burden was placed on the applicant.

74. The Court notes in the first place, that in the proceedings at issue the applicant was ordered to pay social security contributions for the period from 1 September 1988 to 30 June 1995 for which she had received payment of her salary plus staggered interest from the US embassy in compliance with the Vienna Labour and Social Court's judgment of 14 July 1995. Therefore her argument that, in principle, social security contributions become due even for periods for which no payment has been received is not relevant in the context of the present case.

75. As far as the applicant's obligation to pay the employee's share of the social security contributions is concerned, the Court notes that these shares had been included in the above-mentioned salary payment. Their payment did therefore not impose a burden on her. In so far as she claims that in her action before the Vienna Labour and Social Court these contributions had been calculated as average monthly amounts, and that owing to increases of these contributions during the proceedings the amount awarded did not cover the whole amount due, the Court considers that she could and should have raised the issue in the proceedings at issue.

76. As far as the applicant's obligation to pay the employer's share of the social security contributions is concerned, the Court notes that the applicant has not claimed that her employer ever directly paid the employer's share of social security contributions to the Health Insurance Board. On the contrary, when taking up her employment with the US embassy, the applicant registered herself with the social security system pursuant to section 35(4)(a) of the General Social Security Act, the specific provision for employees of employers enjoying extraterritorial status. Subsequently, her employer the US embassy in Vienna, in accordance with her employment contract and the undertaking given to its employees, reimbursed her the employer's social security contributions upon timely submission of the relevant statements of the Health Insurance Board. The applicant claims that the social security authorities were aware of and involved in that arrangement. Be that as it may, there is nothing to show that the applicant's employer accepted an obligation to pay social security contributions to the Health Insurance Board. On the contrary, it follows clearly from that arrangement that it was the applicant who paid the employer's social security contributions to the Health Insurance Board and was subsequently reimbursed by her employer.

77. When the dispute with her employer, the US embassy in Vienna, arose, the latter refused to reimburse her. However, this did not change the nature of the applicant's relationship with the Health Insurance Board. Her

obligation *vis-à-vis* the Vienna Health Insurance Board was based on the specific rules which had already applied when she had entered into the employment contract with the American embassy, including section 53(3)(a), which made her the contribution debtor for the entire amount of social security contributions. In the Court's view, there is force in the Government's argument that the applicant who had accepted the system described above, rather than the community of insured persons, could be expected to bear the risk arising out of the United States' refusal to comply with its contractual obligations towards her. In view of the limited possibilities to enforce a claim against a foreign State as set out above, the Court is not convinced by the applicant's argument that no foreseeable risk existed.

78. Lastly, as regards the amount of the employer's contributions due for the period of 1 September 1988 to 30 June 1995, namely approximately EUR 42,600, the Court finds that it was not disproportionate to the overall amount of EUR 269,000 received by the applicant as salary payment for that period.

79. In conclusion, the Court finds that the obligation to pay the social security contributions at issue did not impose an excessive burden on the applicant, and is therefore not to be considered contrary to Article 1 of Protocol No. 1.

There has accordingly been no violation of Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

80. The applicant complained of a violation of Article 14 taken either in conjunction with Article 1 of Protocol No. 1 or taken in conjunction with Article 6 of the Convention. She maintained that the reasoning underlying section 53(3)(a) of the General Social Security Act, namely that claims against employers enjoying extraterritorial status could not be enforced, was no longer justified under public international law. The ensuing distinction between employees of extraterritorial employers and other employees was therefore not justified.

81. The Court notes that these complaints are linked to the one examined above and must therefore likewise be declared admissible.

82. Having regard to the finding relating to Article 1 of Protocol No. 1, the Court considers that the factors to be weighed in the balance when assessing the proportionality of the measure under Article 14 of the Convention would be similar and that, therefore, there is no basis on which it can find a violation of this provision, regardless of it being read in conjunction with Article 6 of the Convention or with Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

83. The applicant further complained under Article 6 of the Convention that both the Federal Ministry for Social Security, Generations and Consumer Protection and the Constitutional Court had failed to request the ECJ to give a preliminary ruling on the question whether section 53(3)(a) of the General Social Security Act violated EU law.

84. The Court reiterates that the Convention does not guarantee, as such, any right to have a case referred to the ECJ for a preliminary ruling under Article 234 of the EC Treaty (which has become Article 267 of the Treaty on the Functioning of the EU since 1 December 2009). Nevertheless, refusal of a request for such a referral may infringe the fairness of proceedings if it appears to be arbitrary (see, for instance, *Herma v. Germany* (dec.), no. 54193/07, 8 December 2009; *John v. Germany* (dec.), no. 15073/03, 13 February 2007; *Bakker v. Austria* (dec.), no. 43454/98, 13 June 2002; and *Canela v. Spain* (dec.), no. 60350/00, 4 October 2001).

85. In the present case the applicant did not submit any argument regarding a possible conflict between section 53(3)(a) of the General Social Security Act and community law in her appeal to the Ministry. In her complaint to the Constitutional Court, she requested it in general terms to obtain a preliminary ruling by the ECJ. While arguing that the ECJ's case-law provided that the rights guaranteed by the Convention formed part of the basic principles of community law, she did not specify which provisions of community law would be relevant for her case. In these circumstances the fact the Constitutional Court dismissed the applicant's case for lack of prospects of success without dealing explicitly with her request for a preliminary ruling does not disclose any arbitrariness.

86. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning Article 1 of Protocol No. 1 and concerning Article 14 taken either in conjunction with Article 1 of Protocol No. 1 or taken in conjunction with Article 6 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 1 of Protocol No. 1 of the Convention;

3. *Holds* that there has been no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 or Article 6 of the Convention.

Done in English, and notified in writing on 20 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President