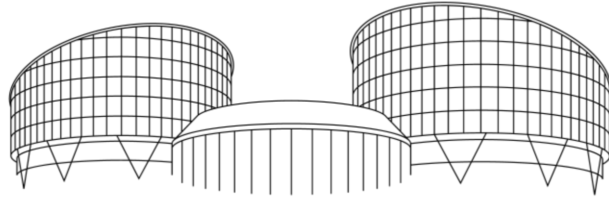

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF CUDAK v. LITHUANIA

(Application no. 15869/02)

JUDGMENT

STRASBOURG

23 March 2010

In the case of Cudak v. Lithuania,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Corneliu Bîrsan,
Vladimiro Zagrebelsky,
Davíd Thór Björgvinsson,
Dragoljub Popović,
Ineta Ziemele,
Mark Villiger,
Giorgio Malinverni,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 1 July 2009 and on 24 February 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 15869/02) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Ms Alicija Cudak ("the applicant"), on 4 December 2001.

2. The applicant, who had been granted legal aid, was represented by Mr K. Uczkiewicz, a lawyer practising in Wroclaw. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant alleged that there had been a violation of her right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 2 March 2006 it was declared admissible by a Chamber of that Section, composed of Boštjan M. Zupančič, John Hedigan, Lucius Caflisch, Corneliu Bîrsan, Alvina

Gyulumyan, Renate Jaeger and Egbert Myjer, judges, and Vincent Berger, Section Registrar. On 27 January 2009 a Chamber of the Second Section, composed of Françoise Tulkens, Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Dragoljub Popović, András Sajó, Işıl Karakaş and Ineta Ziemele, judges, and Sally Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

6. Following the departure of Mr John Hedigan, an elected judge appointed by the Government to sit in respect of Lithuania in the present case, the Government appointed Ms Ineta Ziemele to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

7. The applicant and the Government each filed observations on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 July 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms E. BALTUTYTĖ, Government Agent, *Agent*,
Ms K. BUBNYTĖ-MONVYDIENĖ, Head of the Division of the Representation at the European Court of Human Rights, *Counsel*;

(b) *for the applicant*

Mr K. UCZKIEWICZ, lawyer, *Counsel*,
Ms B. SLUPSKA-UCZKIEWICZ, lawyer, *Adviser.*

The Court heard addresses by Mr Uczkiewicz and Ms Baltutytė.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1961 and lives in Vilnius.

10. On 1 November 1997 the applicant was recruited by the embassy of the Republic of Poland in Vilnius (“the embassy” or “the Polish embassy”), to the post of secretary and switchboard operator (*korespondentė-telefonistė*).

11. The contract of employment provided in Article 1 that the applicant's responsibilities and tasks were limited by the scope of her (secretarial and switchboard-related) duties. If the applicant agreed, she could be assigned other tasks not covered by this agreement. In such circumstances, a new contract would have to be signed. According to Article 6 of the contract, the applicant had to comply with Lithuanian laws, was liable for any damage she might cause to her employer and could be subjected to disciplinary action for failing to fulfil her professional obligations or to observe safety regulations at work. In return for extra work, the applicant could receive remuneration, bonuses, discretionary benefits or compensatory leave. Article 8 provided that any disputes arising under the contract were to be settled in accordance with the laws of Lithuania: the Constitution, the Employment Contracts Act, the Labour Remuneration Act, the Leave Act and the Employees' Social Security Act. Lastly, the contract could be terminated in accordance with sections 26, 27, 29 and 30 of the Employment Contracts Act (enacted on 28 November 1991 with a number of subsequent amendments).

12. The applicant's duties – as set out in a schedule to her employment contract – included the following:

> "1. Operating the switchboard of the embassy and Consulate-General and recording international telephone conversations.
>
> 2. Typing texts in Lithuanian and Polish.
>
> 3. Operating the fax machine.
>
> 4. Providing information in Polish, Lithuanian and Russian.
>
> 5. Helping to organise small receptions and cocktail parties.
>
> 6. Photocopying documents.
>
> 7. Performing other work at the request of the head of the mission."

13. In 1999 the applicant lodged a complaint before the Equal Opportunities Ombudsman, alleging sexual harassment by one of her male colleagues, a member of the diplomatic staff of the embassy. Following an inquiry, the Ombudsman reported that the applicant was indeed a victim of sexual harassment. The applicant alleged that she had fallen ill because of the tension she was experiencing at work.

14. The applicant was on sick leave from 1 September to 29 October 1999. On 29 October 1999 she went to work but was not authorised to enter the embassy building. On 22 November 1999 the applicant was again refused entry when she arrived for work. The same thing occurred again on 23 November 1999.

15. On 26 November 1999 the applicant wrote a letter to the ambassador, informing her about the incidents. On 2 December 1999 the applicant was notified that she had been dismissed on the ground of her failure to come to work from 22 to 29 November 1999.

16. The applicant brought a civil claim, requesting compensation for unlawful dismissal. She did not claim reinstatement. The Polish Minister for Foreign Affairs issued a *note verbale* claiming immunity from the jurisdiction of the Lithuanian courts. On 2 August 2000 the Vilnius Regional Court discontinued the proceedings for lack of jurisdiction. On 14 September 2000 the Court of Appeal upheld the decision. The final decision was taken by the Supreme Court on 25 June 2001.

17. The Supreme Court established, *inter alia*, that the 1993 agreement on legal assistance between Lithuania and Poland had not resolved the question of State immunity, that Lithuania had no laws on the question, and that the domestic case-law in this area was only just being developed. The Supreme Court therefore considered it appropriate to decide the case in the light of the general principles of international law, in particular the 1972 European Convention on State Immunity.

18. The Supreme Court observed that Article 479 of the Lithuanian Code of Civil Procedure, as then in force, established the principle of absolute State immunity, but that that provision had become inapplicable in practice. It noted that the prevailing international practice was to adopt a restrictive interpretation of State immunity, granting such immunity only for acts of sovereign authority (*acta jure imperii*), as opposed to acts of a commercial or private-law nature (*acta jure gestionis*). The Supreme Court further held, in particular, as follows:

> "... in the Supreme Court's view, it is possible to apply the principle of restrictive immunity to the Republic of Poland. Having regard to the fact that Lithuania recognises that foreign nationals may bring actions in respect of private-law disputes, it must be accepted that, in order to defend their rights, individuals or entities from the Republic of Lithuania are entitled to take proceedings against foreign States.
>
> It is thus necessary to establish in the present case whether the relationship between the claimant and the Republic of Poland was one of a public-law nature (*acta jure imperii*) or a private-law nature (*acta jure gestionis*). Besides that, other criteria are applicable and should allow [the court] to determine whether the State concerned enjoys immunity ... in employment disputes. These criteria include, in particular, the nature of the workplace, the status of the employee, the territorial connection between the country of employment and the country of the court, and the nature of the claim.
>
> Regard being had to the plea of immunity by the Ministry of Foreign Affairs of the Republic of Poland ... it is possible to conclude that there was a public-service relationship governed by public law (*acta jure imperii*) between the claimant and the embassy of the Republic of Poland, and that the Republic of Poland may lay claim to immunity from the jurisdiction of foreign courts. This conclusion is supported by other criteria. With regard to the nature of the workplace, it should be noted that the main function of the embassy ... is directly related to the exercise of sovereignty of the

Republic of Poland. With respect to the status of [the] employee ... while the parties had entered into a contract of employment, the very fact that the employee was a switchboard operator implies that the parties developed a relationship akin to that which characterises a public-service function ... The court was unable to obtain any information allowing it to establish the scope of the claimant's actual duties. Thus, merely from the title of her position, it can be concluded that the duties entrusted to her facilitated, to a certain degree, the exercise by the Republic of Poland of its sovereign functions. ... It must also be established whether the country of employment is the country of the court, since a court in the country of employment is best placed to resolve a dispute that has arisen in that country. In this respect, it is to be recognised that the exercise of the sovereign powers of the forum State is severely restricted with regard to an embassy, even though it is not a foreign territory as such (section 11(2) of the Status of Diplomatic Missions of Foreign States Act). As to the nature of the claim ... it should be noted that a claim for recognition of unlawful dismissal and for compensation cannot be regarded as violating the sovereignty of [another] State, since such a claim pertains solely to the economic aspect of the impugned legal relationship[;] there is no claim for reinstatement ... However, by reason of this criterion alone, it cannot be unconditionally asserted that the Republic of Poland cannot invoke State immunity in this case. ... [The claimant] has submitted no [other] evidence to confirm the inability for the Republic of Poland to enjoy State immunity (Article 58 of the Code of Civil Procedure).

Against the background of the above criteria, [in view of] the aspiration of Lithuania and Poland to maintain good bilateral relations ... and respect the principle of sovereign equality between States ..., the chamber concludes that the courts [below] properly decided that they had no jurisdiction to entertain this case.

...

The Supreme Court notes that both the Regional Court of Vilnius and the Court of Appeal based the decision to apply jurisdictional immunity to the Republic of Poland merely on the fact that the latter had refused to appear in the proceedings. Those courts did not examine the question of the application of restrictive jurisdictional immunity in the light of the criteria developed by the Supreme Court. However, this breach of procedural rules does not constitute, in the Supreme Court's view, a ground for quashing the decisions of the courts below. ...

The application of jurisdictional immunity by the courts of the Republic of Lithuania does not prevent the claimant from taking proceedings before the Polish courts."

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. There is no special legislation governing the issue of State immunity in Lithuania. The question is usually resolved by the courts on a case-by-case basis, with reference to the provisions of various bilateral and multilateral treaties.

20. Article 479 § 1 of the 1964 Code of Civil Procedure (applicable at the material time and in force until 1 January 2003) established the rule of absolute State immunity:

> “Adjudication of actions against foreign States, and adoption of measures of constraint and execution against the property of a foreign State, shall be allowed only with the consent of the competent institutions of the foreign State.”

21. On 5 January 1998 the Supreme Court gave a decision in the case of *Stukonis v. United States embassy*, regarding an action for unlawful dismissal against the United States embassy in Vilnius. Article 479 § 1 of the 1964 Code of Civil Procedure was considered by the court to be inappropriate in the light of the changing reality of international relations and public international law. The Supreme Court noted the trend in international legal opinion to restrict the categories of cases in which a foreign State could invoke immunity from the jurisdiction of forum courts. It held that Lithuanian legal practice should follow the doctrine of restrictive State immunity. It found, *inter alia*, as follows:

> “State immunity does not mean immunity from institution of civil proceedings, but immunity from jurisdiction of courts. The Constitution establishes the right to apply to a court (Article 30) ... However, the ability of a court to defend the rights of a claimant, where the defendant is a foreign State, will depend on whether that foreign State requests the application of the State immunity doctrine ... In order to determine whether or not the dispute should give rise to immunity ... it is necessary to determine the nature of the legal relations between the parties ...”

22. On 21 December 2000 the plenary of the Supreme Court adopted a decision regarding “Judicial Practice in the Republic of Lithuania in Applying Rules of Private International Law” (*Teismų Praktika* 2001, no. 14). It stated that while Article 479 of the Code of Civil Procedure established a norm whereby “foreign States [and] diplomatic and consular representatives and diplomats of foreign States enjoy[ed] immunity from the jurisdiction of Lithuanian courts”, that rule guaranteed State immunity only for “legal relations governed by public law”. The Supreme Court pointed out that when deciding whether or not a case containing an international element fell within the jurisdiction of Lithuanian courts, the court in question had to consider whether its judgment would be recognised and enforced in the foreign State concerned or whether it would refuse to do so. If the case also fell within the jurisdiction of a foreign court, the forum court would be entitled to relinquish jurisdiction and instruct the claimant to take proceedings in the court of the foreign State where the judgment should be enforced.

This interpretation by the Supreme Court had to be followed by the lower courts.

23. On 6 April 2007 the Supreme Court delivered a judgment in a case that was very similar to that of the applicant, namely *S.N. v. the embassy of the Kingdom of Sweden*. It found that “despite the fact that the Kingdom of Sweden had not enacted any legislation on State immunity, it could nevertheless be seen from the case-law of the domestic courts that Sweden recognised the doctrine of restrictive State immunity”. In that case it was

considered that the provisions of the United Nations Convention on Jurisdictional Immunities of States and their Property, adopted on 2 December 2004, could be taken into account, even though they were not binding, since they reflected a certain trend in international law in matters of State immunity. The Supreme Court further observed that the case-law of the courts of both States – Lithuania and Sweden – being based on common practice in international relations, confirmed that they had been adhering to a restrictive approach to State immunity, whereby a State could not claim immunity from jurisdiction if the dispute was of a private-law nature. In such cases Sweden could not therefore object to the case being heard by the Lithuanian courts. However, the Supreme Court held that the dispute between the parties had arisen from a public-law relationship and was not an employment relationship under private law.

24. The Supreme Court further observed that there was no uniform international practice of States whereby the members of staff of foreign States' diplomatic missions who participated in the exercise of the public authority of the States they represented could be distinguished from other members of staff. As there were no legally binding international rules, it was for each State to take its own decisions in such matters.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

25. The relevant provisions of the 1972 European Convention on State Immunity ("the Basle Convention") read as follows:

Article 5

"1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.

2. Paragraph 1 shall not apply where:

(a) the individual is a national of the employing State at the time when the proceedings are brought;

(b) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or

(c) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject matter. ... "

26. The Convention's Explanatory Report indicates that "[a]s regards contracts of employment with diplomatic missions or consular posts,

Article 32 shall also be taken into account”. That Article provides as follows:

Article 32

“Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them.”

27. Neither Lithuania nor Poland are parties to the Basle Convention.

28. In 1979 the United Nations International Law Commission (ILC) 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. Lithuania never made any negative observation on those drafts. The Draft Articles that were used as the basis for the text adopted in 2004 dated back to 1991. The relevant part of the text then read as follows:

Article 11 – Contracts of employment

“1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform functions closely related to the exercise of governmental authority;

(b) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(d) the employee is a national of the employer State at the time when the proceeding is instituted; or

(e) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject matter of the proceeding.”

29. In the commentary on the ILC’s Draft Articles of 1991, it was stated that the rules formulated in Article 11 appeared to be consistent with the trend in the legislative and treaty practice of a growing number of States (ILC Yearbook, 1991, Vol. II, Part 2, p. 44, paragraph 14).

30. In December 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property. It

was opened for signature on 17 January 2005. One of the major issues that had arisen during the codification work by the ILC related to the exception from State immunity in so far as it related to employment contracts. The final version of Article 11, as set out in the Convention, reads as follows:

Article 11 – Contracts of employment

> "1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.
>
> 2. Paragraph 1 does not apply if:
>
> (a) the employee has been recruited to perform particular functions in the exercise of governmental authority;
>
> (b) the employee is:
>
> (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;
>
> (ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;
>
> (iii) a member of the diplomatic staff of a permanent mission to an international organisation or of a special mission, or is recruited to represent a State at an international conference; or
>
> (iv) any other person enjoying diplomatic immunity;
>
> (c) the subject matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
>
> (d) the subject matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;
>
> (e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or
>
> (f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject matter of the proceeding."

31. Lithuania did not vote against the adoption of this text but has not ratified it either.

32. The understandings with respect to Article 11 in the Annex to the United Nations Convention explain that the reference to the “security interests” of the employer State, in paragraph 2 (d), “is intended primarily to address matters of national security and the security of diplomatic missions and consular posts”.

33. Article 1 of the 1961 Vienna Convention on Diplomatic Relations, which is appended to the Lithuanian Diplomatic Privileges Act 1964, provides the following definitions:

Article 1

“...

(a) the ‘head of the mission’ is the person charged by the sending State with the duty of acting in that capacity;

(b) the ‘members of the mission’ are the head of the mission and the members of the staff of the mission;

(c) the ‘members of the staff of the mission’ are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) the ‘members of the diplomatic staff’ are the members of the staff of the mission having diplomatic rank;

(e) a ‘diplomatic agent’ is the head of the mission or a member of the diplomatic staff of the mission;

(f) the ‘members of the administrative and technical staff’ are the members of the staff of the mission employed in the administrative and technical service of the mission;

...”

THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTION

34. The Government argued that, both in theory and in practice, the applicant could have taken proceedings in the Polish courts to complain about the termination of her contract with the Polish embassy in Vilnius, as the Lithuanian Supreme Court had in fact suggested. The Polish courts had jurisdiction to hear her case and would have applied Lithuanian substantive law. The applicant’s contract of employment actually contained a clause providing that any dispute arising under the contract was to be settled in

accordance with the laws of Lithuania. Since Article 479 § 1 of the Code of Civil Procedure and the relevant case-law excluded the jurisdiction of the Lithuanian courts, following the Republic of Poland's request to be granted State immunity, that clause covered the application only of the substantive provisions of Lithuanian law. Furthermore, by virtue of Lithuanian law, the applicant was not time-barred from taking proceedings in the Polish courts, which still had jurisdiction to examine her claims concerning the termination of her contract of employment.

35. The Court observes that the present application was declared admissible on 2 March 2006. Even supposing that the above argument is to be regarded as an objection that the applicant failed to exhaust domestic remedies and that the Government are not estopped from raising it, the Court notes that Article 35 § 1 of the Convention refers in principle only to remedies that are made available by the respondent State. It does not therefore cover, in the present case, remedies available in Poland.

36. Moreover, the Court notes that Article 8 of the contract of employment between the applicant and the Polish embassy provided that any disputes arising under it were to be settled in accordance with the laws of Lithuania, more specifically the Constitution, the Employment Contracts Act, the Labour Remuneration Act, the Leave Act and the Employees' Social Security Act. It could therefore be argued that, if the applicant had submitted her complaints to the Polish courts, they would have applied the substantive law chosen by the parties, that is to say Lithuanian law. However, the Court finds that such a remedy, even supposing that it was theoretically available, was not a particularly realistic one in the circumstances of the case. If the applicant had been required to use such a remedy she would have encountered serious practical difficulties which would have been incompatible with her right of access to a court, which, like all other rights in the Convention, must be interpreted so as to make it practical and effective, not theoretical or illusory (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, *Reports of Judgments and Decisions* 1998-I). The applicant was a Lithuanian national, recruited in Lithuania under a contract that was governed by Lithuanian law, and the Republic of Poland had itself agreed on this choice of law in the contract.

37. Accordingly, the submission of the applicant's complaint to the Polish courts cannot be regarded, in the circumstances of the present case, as an accessible or effective remedy.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

38. The applicant contended that, by granting the Polish government's objection, the Lithuanian courts had deprived her of her right of access to a

court, within the meaning of Article 6 of the Convention, of which the relevant part reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Applicability of Article 6 § 1

39. Referring to the judgment given by the Court in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, § 62, ECHR 2007-II), and in particular to the two conditions that have to be fulfilled for Article 6 to be applicable in this type of case, the Government submitted that the application should be declared incompatible *ratione materiae* with the provisions of the Convention.

40. In the Government's view, it appeared from the case-law of the Lithuanian Supreme Court, and in particular from its judgments of 5 January 1998 and 6 April 2007, together with the judgment of 25 June 2001 in the applicant's case, that all persons employed in the diplomatic mission of a foreign State, including staff in administrative and technical departments, had to be regarded as contributing in one way or another to the performance of duties relating to sovereign acts of authority by the State concerned and therefore as serving the public interests of that State. The type of duties that the applicant performed at the Polish embassy in Vilnius justified the application of State immunity in her case. She had actually had direct access to all official documents and activities of the embassy. Therefore, she had been much more than simply a member of the service staff.

41. The applicant stated, for her part, that by bringing an action before the Lithuanian courts she had sought to challenge the legal basis for her dismissal in order to obtain compensation. She took the view that both her employment contract and her claim for wrongful dismissal were of a predominantly private-law nature.

42. The Court reiterates its finding from the *Vilho Eskelinen and Others* judgment (cited above, § 62) that two conditions must be fulfilled in order for the respondent State to be able to rely before the Court on an applicant's status as a civil servant in excluding him or her from the protection embodied in Article 6. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest.

43. It should nevertheless be pointed out that the above-mentioned judgment concerned the relationship between a State and its own civil servants, whereas that is not the situation in the present case: the applicant, a Lithuanian national, was employed in the Polish embassy on the basis of a

contractual relationship between her and, ultimately, the Republic of Poland. She could not therefore be regarded, before the Lithuanian courts, as a civil servant of Lithuania.

44. However, even supposing that the *Vilho Eskelinen and Others* case-law is applicable, *mutatis mutandis*, to the present case, it could not reasonably be argued that the second condition has been fulfilled in the applicant's case. It appears from the schedule to her employment contract that her duties at the Polish embassy consisted of operating the switchboard of the embassy and Consulate-General and of recording international telephone conversations; typing up texts in Lithuanian and Polish; sending and receiving faxes; providing information in Polish, Lithuanian and Russian; helping to organise small receptions and cocktail parties; and photocopying documents (see paragraph 12 above). In the Court's view, the performance of such duties can hardly give rise to "objective grounds [for exclusion] in the State's interest" within the meaning of the above-cited *Vilho Eskelinen and Others* judgment.

45. It therefore remains for the Court to examine whether the dispute in question concerned a civil right within the meaning of Article 6 § 1 of the Convention. In this connection, the Court reiterates that Article 6 § 1 extends to "disputes" ("*contestations*") over civil "rights"("*droits*") which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether they are also protected under the Convention (see, among other authorities, *Editions Périscope v. France*, 26 March 1992, § 35, Series A no. 234-B, and *Zander v. Sweden*, 25 November 1993, § 22, Series A no. 279-B). Such dispute may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, lastly, the result of the proceedings must be directly decisive for the right in question (see *Vilho Eskelinen and Others*, cited above, § 40).

46. The Court finds that these conditions are fulfilled in the present case, as the applicant's action before the Lithuanian Supreme Court concerned a compensation claim for wrongful dismissal.

47. Article 6 § 1 of the Convention was therefore applicable to the proceedings before the Lithuanian courts.

B. Compliance with Article 6 § 1

1. *The parties' submissions*

(a) The applicant

48. The applicant submitted that no description of her official duties had ever been appended to her employment contract. The low-level post that she occupied did not include any tasks or functions which could justify

considering the application of State immunity within the meaning of the relevant provisions of the Basle Convention or the United Nations Convention on Jurisdictional Immunities of States and their Property.

(b) The Government

49. The Government argued that the limitation imposed on the applicant's right of access to a court pursued a legitimate aim, namely to promote respect for the independence and sovereign equality of States in accordance with domestic and public international law.

50. As regards the proportionality of the restriction, the Government observed that international legal instruments and the case-law of a certain number of States considered that, in employment-related disputes, State immunity was not limited when the employer was a foreign embassy. Both in Lithuania and Poland, questions of State immunity were governed by customary international law, such questions not having been resolved by any bilateral agreements. In support of their argument, the Government relied on Article 32 of the Basle Convention, Article 38 § 2 of the Vienna Convention on Diplomatic Relations and Article 11 § 2 (c) of the United Nations Convention on Jurisdictional Immunities of States and their Property. They contended that States enjoyed a discretionary power of appointment to official posts. The same applied to the "dismissal" or "termination of contract" of civil servants after an inquiry or an investigation as part of the supervisory or disciplinary powers exercised by the employer State.

51. In the present case, the reason why the Polish embassy had requested the application of State immunity in the applicant's case was, in the Government's submission, partly to do with the origin of the dispute – allegations of sexual harassment involving a member of the embassy's diplomatic staff – that the Lithuanian courts could not have properly examined without questioning persons enjoying diplomatic immunity.

52. Thus, the subject matter of the applicant's claim before the courts would have involved investigation into the public and sovereign sphere of Poland. The Lithuanian Supreme Court had reached a reasonable conclusion, taking into consideration, *inter alia*, the fact that Poland, in invoking State immunity, considered that the dispute between the applicant and the Polish embassy was not an ordinary employment dispute.

53. In any event, even if the Lithuanian courts had assumed jurisdiction to hear the applicant's case and had dealt with it on the merits (for example, finding that the dismissal had been unlawful and awarding the applicant compensation), it would have been impossible to enforce the decision against the respondent State, namely Poland, which had indicated, by means of a diplomatic note, its formal refusal to appear in the proceedings as defendant.

2. *The Court's assessment*

(a) General principles emerging from the Court's case-law

54. The Court reiterates that the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX). Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 43, ECHR 2001-VIII).

55. However, the right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, 10 May 2001; and *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 33, 21 November 2001).

56. Moreover, the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account, including those relating to the grant of State immunity (see *Fogarty*, cited above, § 35).

57. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate

restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity (see *Kalogeropoulou and Others v. Greece and Germany* (dec.), no. 59021/00, ECHR 2002-X, and *Fogarty*, cited above, § 36).

58. Furthermore, it should be remembered that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Aït-Mouhoub v. France*, 28 October 1998, § 52, *Reports* 1998-VIII). It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons (see *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

59. Therefore, in cases where the application of the principle of State immunity from jurisdiction restricts the exercise of the right of access to a court, the Court must ascertain whether the circumstances of the case justify such restriction.

(b) Application to the present case

60. The Court must first examine whether the limitation pursued a legitimate aim. In this connection, it observes that State immunity was developed in international law out of the principle *par in parem non habet imperium*, by virtue of which one State could not be subject to the jurisdiction of another. The Court considers that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

61. In the *Fogarty* case (cited above), the applicant had successfully brought an initial action against the United States for sex discrimination after her dismissal from a post of administrative assistant at the United States embassy in London. Following a number of subsequent and unsuccessful applications for other employment at the embassy, the applicant had then commenced fresh proceedings before the United Kingdom courts claiming sex discrimination, but those proceedings were discontinued because the United States government claimed immunity from jurisdiction. It was this second set of proceedings that gave rise to the application to the Court and ultimately to the *Fogarty* judgment.

62. The Court notes that the present case can be distinguished from that of *Fogarty* in that it does not concern recruitment but rather the dismissal of a member of the local staff of an embassy. In spite of that difference, the Court takes the view that its finding that the restrictions in the *Fogarty* case pursued a legitimate aim similarly applies to the present case. It should therefore now be examined whether the impugned restriction to the applicant's right of access was proportionate to the aim pursued.

63. The Court found, already in the *Fogarty* judgment, that there was a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes, with the exception, however, of those concerning the recruitment of staff in embassies (§§ 37-38).

64. In this connection, the Court notes that the application of absolute State immunity has, for many years, clearly been eroded. In 1979 the International Law Commission (ILC) was given the task of codifying and gradually developing international law in the area of jurisdictional immunities of States and their property. It produced a number of drafts that were submitted to States for comment. The Draft Articles it adopted in 1991 included one – Article 11 – on contracts of employment (see paragraph 28 above). In 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property (see paragraph 30 above).

65. The 1991 Draft Articles, on which the 2004 United Nations Convention (and Article 11 in particular) was based, created a significant exception in matters of State immunity by, in principle, removing from the application of the immunity rule a State's employment contracts with the staff of its diplomatic missions abroad. However, that exception was itself subject to exceptions whereby, in substance, immunity still applied to diplomatic and consular staff in cases where: the subject of the dispute was the recruitment, renewal of employment or reinstatement of an individual; the employee was a national of the employer State; or, lastly, the employer State and the employee had otherwise agreed in writing.

66. The report appended to the 1991 Draft Articles stated that the rules formulated in Article 11 appeared to be consistent with the emerging trend in the legislative and treaty practice of a growing number of States (ILC Yearbook, 1991, Vol. II, Part 2, p. 44, paragraph 14). This must also hold true for the 2004 United Nations Convention. Furthermore, it is a well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law, either "codifying" it or forming a new customary rule (see the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, *ICJ Reports* 1969, p. 41, § 71). Moreover, there were no particular objections by States to the wording of Article 11 of the ILC's Draft Articles, at least not by the respondent State.

As to the 2004 United Nations Convention, Lithuania has admittedly not ratified it but did not vote against its adoption either.

67. Consequently, it is possible to affirm that Article 11 of the ILC's 1991 Draft Articles, on which the 2004 United Nations Convention was based, applies to the respondent State under customary international law. The Court must take this into consideration in examining whether the right of access to a court, within the meaning of Article 6 § 1, was respected.

68. The above finding is in fact confirmed by Lithuanian domestic law. Admittedly, Article 479 of the Code of Civil Procedure, as in force at the relevant time, enshrined the so-called absolute State immunity rule. However, on 21 December 2000 the plenary of the Lithuanian Supreme Court adopted a decision (no. 28) regarding "Judicial Practice in the Republic of Lithuania in Applying Rules of Private International Law". It stated that while Article 479 of the Code of Civil Procedure established a norm whereby "foreign States [and] diplomatic and consular representatives and diplomats of foreign States enjoy[ed] immunity from the jurisdiction of Lithuanian courts", that rule guaranteed State immunity only for "legal relations governed by public law". *A contrario*, that immunity rule did not apply to relations governed by private law. This conclusion confirmed the practice of the Supreme Court, which has abandoned the concept of absolute State immunity (see paragraph 22 above).

69. The Court further notes that the applicant was not covered by any of the exceptions enumerated in Article 11 of the ILC's Draft Articles: she did not perform any particular functions closely related to the exercise of governmental authority. In addition, she was not a diplomatic agent or consular officer, nor was she a national of the employer State. Lastly, the subject matter of the dispute was linked to the applicant's dismissal.

70. The Court observes in particular that the applicant was a switchboard operator at the Polish embassy whose main duties were: recording international telephone conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events. Neither the Lithuanian Supreme Court nor the respondent Government have shown how these duties could objectively have been related to the sovereign interests of the Polish government. While the schedule to the employment contract stated that the applicant could have been called upon to do other work at the request of the head of mission, it does not appear from the case file – nor have the Government provided any details in this connection – that she actually performed any functions related to the exercise of sovereignty by the Polish State.

71. In its judgment of 25 June 2001, the Supreme Court stated that, in order to determine whether or not it had jurisdiction to hear employment disputes involving a foreign mission or embassy, it was necessary to establish in each case whether the employment relationship in question was one of a public-law nature (*acta jure imperii*) or of a private-law nature

(*acta jure gestionis*). In the present case, however, the Supreme Court found that it had been unable to obtain any information allowing it to establish the scope of the applicant's "actual duties". It therefore referred solely to the title of her position, and to the fact that Poland had invoked immunity from jurisdiction, in concluding that the duties entrusted to her had "facilitated, to a certain degree, the exercise by the Republic of Poland of its sovereign functions" (see paragraph 18 above).

72. As to whether the duties in question were of importance for Poland's security interests – a criterion subsequently enshrined in Article 11 § 2 (d) of the 2004 United Nations Convention – the mere allegation that the applicant could have had access to certain documents or could have been privy to confidential telephone conversations in the course of her duties is not sufficient. On this point it should not be overlooked that the applicant's dismissal and the ensuing proceedings arose originally from acts of sexual harassment that had been established by the Lithuanian Equal Opportunities Ombudsman, with whom the applicant had filed her complaint. Such acts can hardly be regarded as undermining Poland's security interests.

73. Lastly, as to any difficulties that the Lithuanian authorities may encounter in enforcing against Poland a Lithuanian judgment in favour of the applicant, such considerations cannot frustrate the proper application of the Convention.

74. In conclusion, by upholding in the present case an objection based on State immunity and by declining jurisdiction to hear the applicant's claim, the Lithuanian courts, in failing to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and thus impaired the very essence of the applicant's right of access to a court.

75. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

77. The applicant claimed 327,978.30 Lithuanian litai (LTL) (approximately 94,988 euros (EUR)) in respect of the pecuniary damage she had allegedly sustained between 22 November 1999 and 30 June 2009. For

non-pecuniary damage she sought LTL 350,000 (approximately EUR 101,367).

78. The Government argued that the applicant's claims, for both pecuniary and non-pecuniary damage, were excessive and had no causal connection with the alleged violation of the Convention.

79. The Court first considers that, where, as in the instant case, an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if he or she so requests, represents in principle an appropriate way of redressing the violation (see *Sejdovic v. Italy* [GC], no. 56581/00, § 126, ECHR 2006-II; see also, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV). The Court further notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6. While the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicant as having been deprived of a real opportunity (see *Colozza v. Italy*, 12 February 1985, § 38, Series A no. 89, and *Pélissier and Sassi v. France* [GC], no. 25444/94, § 80, ECHR 1999-II). In addition, the applicant has sustained non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy. Ruling on an equitable basis, as required by Article 41, the Court awards the applicant EUR 10,000 for all heads of damage combined.

B. Costs and expenses

80. The applicant sought an "appropriate sum", without evaluating it, to cover the costs and expenses incurred in to the proceedings before the Court.

81. The Government argued that, as there had been no violation of Article 6 in the present case, the applicant's claim should be dismissed.

82. The Court notes that the applicant was granted legal aid for the proceedings before it. Her claim was not accompanied by any supporting documents showing that the sum paid to her by the Council of Europe by way of legal aid had not adequately covered all the costs and expenses incurred in connection with the proceedings before the Court.

83. The Court therefore dismisses the applicant's claim under this head.

C. Default interest

84. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that Article 6 § 1 of the Convention is applicable in the present case and has been breached;

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros) in respect of pecuniary and non-pecuniary damage, to be converted into Lithuanian litai at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 March 2010.

Johan Callewaert Jean-Paul Costa
Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Judge Cabral Barreto joined by Judge Popović;
(b) concurring opinion of Judge Malinverni joined by Judges Casadevall, Cabral Barreto, Zagrebelsky and Popović.

J.-P.C.
J.C.

CONCURRING OPINION OF JUDGE CABRAL BARRETO JOINED BY JUDGE POPOVIĆ

(Translation)

I agree with the majority on all the operative provisions of the judgment.

However, as regards the reasoning, I am unable to endorse the findings in paragraph 66, “even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law”, and in paragraph 67, “Article 11 of the ILC’s [International Law Commission’s] 1991 Draft Articles, on which the 2004 United Nations Convention was based, applies to the respondent State under customary international law”.

In my opinion, a State can never be bound by the provisions of an international treaty that it has not ratified; ratification is necessary for those provisions to become binding.

It is the customary international law that is binding, whether or not it has been codified.

I find that paragraphs 66 and 67 should have been worded so as to reflect this idea and thus to avoid any ambiguity.

CONCURRING OPINION OF JUDGE MALINVERNI JOINED BY JUDGES CASADEVALL, CABRAL BARRETO, ZAGREBELSKY AND POPOVIĆ

(Translation)

1. In paragraph 79 the judgment states that “where, as in the instant case, an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if he or she so requests, represents in principle an appropriate way of redressing the violation”.

2. I regret that this principle is not reflected in the operative part of the judgment, which simply states that the respondent State is to pay the applicant 10,000 euros in respect of pecuniary and non-pecuniary damage[1].

3. It is important to emphasise this point, because it must not be overlooked that the amounts which the Court orders to be paid to victims of a violation of the Convention are, according to the terms and the spirit of Article 41, of a subsidiary nature[2]. Wherever possible, the Court should seek to restore the *status quo ante*. What the Court states in paragraph 79 is, in my view, of the utmost importance. It reiterates the fundamental principle that the best way to redress a violation of Article 6 is to reopen the proceedings, whenever that is possible and if the applicant so wishes.

4. Moreover, it is common knowledge that while the reasoning of a judgment allows the Contracting States to ascertain the grounds on which the Court found a violation or no violation of the Convention, and is thus of decisive importance for the interpretation of the Convention, it is the operative provisions that are binding on the parties for the purposes of Article 46 § 1 of the Convention. It is therefore a matter of some significance, from a legal standpoint, for certain considerations of the Court to be stated again in the operative part of the judgment[3].

5. Furthermore, under Article 46 § 2 of the Convention, supervision of the execution of the Court’s judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures

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1. See the concurring opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska appended to the judgment in *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008).
2. See my joint concurring opinions with Judge Spielmann appended to the judgments in *Vladimir Romanov v. Russia* (no. 41461/02, 24 July 2008), and *Ilatovskiy v. Russia* (no. 6945/04, 9 July 2009).
3. See my joint concurring opinions with Judge Spielmann appended to the judgments in *Fakiridou and Schina v. Greece* (no. 6789/06, 14 November 2008), *Lesjak v. Croatia* (no. 25904/06, 18 February 2010), and *Prežec v. Croatia* (no. 48185/07, 15 October 2009).

designed to facilitate the Committee of Ministers' task in discharging these functions. To that end, it is essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also, in the operative provisions, indicate to the State concerned the measures it considers the most appropriate to redress the violation.

6. An award of compensation is not always an appropriate way to redress the damage caused to the victim. In the present case, the origin of the dispute lies in the fact that the applicant complained to the Equal Opportunities Ombudsman about sexual harassment by one of her male colleagues, who was a member of the embassy's diplomatic staff. Following an inquiry, the Ombudsman reported that the applicant was indeed a victim of sexual harassment (see paragraph 13 of the judgment). She fell ill because of the tension she was experiencing at work and was on sick leave for about two months, after which she was dismissed for being absent from work (see paragraphs 14 and 15). It was then that the applicant brought a claim of unlawful dismissal before the courts, but did not, however, request reinstatement to her post at the embassy (see paragraph 16). As noted in the judgment "it should not be overlooked that the applicant's dismissal and the ensuing proceedings arose originally from acts of sexual harassment" (see paragraph 72).

7. It may be inferred from the foregoing that while the applicant admittedly claimed compensation (see paragraph 16), she was above all seeking a court decision to the effect that her dismissal had been unlawful (see paragraph 41). She probably still has an interest in obtaining such a decision. In these circumstances, I am of the opinion that only the reopening of the proceedings would enable the applicant to obtain full satisfaction.

8. In the present case, as Lithuanian law provides for the possibility of having domestic proceedings reopened following a finding of a violation by the Court, this form of redress is, in my view, preferable to an award of compensation to the victim. For this reason, it would have been desirable to include an operative provision covering the applicant's right to seek the reopening (or rather, in this case, the opening) of domestic proceedings.