7 Hungary versus Slovakia – EU Membership versus Sovereign Statehood

*Ernő Várnay**

7.1 Introduction

On 21 August 2009, a unique incident occurred in the history of the European Communities (European Union – hereinafter 'EU'). A member state – the Slovak Republic – prohibited the entry of the Head of State of another member state (Republic of Hungary) to its territory. Hungary considered that this measure was in breach of EU law regarding the free movement of Union citizens, and brought an action before the Court of Justice of the European Union seeking the declaration of infringement.[1] This action added to the very short list of cases brought under Article 259 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU').[2] The Court was bound to make a choice between the two qualities of President Sólyom, that of the Head of State – representative of a sovereign state in international relations – and that of a Union citizen – a status which is intended to be the fundamental status of nationals of the member states. The Court, without further hesitation, opted for the former, placing the relevant rules of the customary international law above the relevant Treaty provision. It seems obvious that the Commission and the Court do not wish to encourage the member states to bring their disputes of strong historical and political flavour to the EU judicial instances.

The present article will present the facts of the case following the Opinion of the Advocate General (AG) and the judgment. (1) Next, it will summarize the arguments of the parties, the Advocate General and the Court concerning the first head of complaint (*i.e.* the alleged violation of the right to free movement of Union citizens) which actually regards

* Head of Department of European and International Law, University of Debrecen, Chair Jean Monnet in European Law, Graduated in Law (Szeged), Economics (Budapest) and European Studies (Nancy).

1 Judgment of 16 October 2012 in Case C-364/10, *Hungary v. Slovakia* (not yet published), hereinafter referred to as judgment.

2 Art. 259(1) TFEU provides: "A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union." Under this article before bringing action, the member state shall bring the matter before the Commission, which shall deliver a reasoned opinion after each state had the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

the possible conflict of international law and EU primary and secondary law. (2) The third section offers some comments on the possible motives and consequences of the case.

7.2 Facts of the Dispute

Upon the invitation of an association based in Slovakia, Mr László Sólyom, the President of Hungary, was scheduled to visit Komárno (Slovakia) on 21 August 2009 to participate in the unveiling ceremony of a statue of Saint Stephen, the founder and first king of the Hungarian state.

Following several diplomatic exchanges between the two member states regarding the planned visit, the highest representatives of the Slovak Republic, the President of the Republic, the Prime Minister and the President of the Parliament adopted a joint declaration in which they indicated that President Sólyom's visit was considered inappropriate, having regard in particular to the fact that he had not expressed any desire to meet Slovak dignitaries and that the date of the planned visit, 21 August was particularly sensitive.[3]

Following further diplomatic contact, President Sólyom stated that he wished the visit to go ahead.

By *note verbale* of 21 August 2009, the Ministry of Foreign Affairs of the Slovak Republic informed the Ambassador of Hungary in Bratislava (Slovakia) that the Slovak authorities had decided to refuse President Sólyom entry into the territory of the Slovak Republic on that date for security reasons, on the basis of Directive 2004/38[4] as well as provisions of domestic law regarding the stay of foreign nationals and the national police.[5]

President Sólyom was informed of the terms of that note while *en route* to Slovakia; he acknowledged receipt at the border and refrained from entering Slovak territory.

By note of 24 August 2009, the Hungarian authorities argued that Directive 2004/38 could not form a valid legal basis for justifying the refusal. They also found that insufficient reasons were given for the decision to refuse access, therefore, the measure was in breach of EU law.

The Slovak authorities answered the note, stating that the application of Directive 2004/38 was the 'last chance' to stop President Sólyom entering the territory of the Slovak Republic, and that the Slovak authorities did not contravene EU law in any way.

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3 On 21 August 1968, the Warsaw Pact troops, which included Hungarian troops, invaded Czechoslovakia. Perhaps it is worth noting at the time in question Hungary formed part of the Soviet bloc with extremely limited freedom of action in military affairs. We do not think that the invasion left any serious effect on the Slovak-Hungarian relations.

4 EP and Council Directive of 29 April 2004, OJ 2004 L 158/77.

5 Opinion of Advocate General Bot delivered on 6 March 2012 (Hereinafter Opinion), para. 7.

The Hungarian Minister for Foreign Affairs sent a letter to Mr Barrot, Vice President of the European Commission, seeking the Commission's opinion on the possible breach of EU law by the Slovak Republic.

In his reply Mr Barrot acknowledged that, in accordance with Directive 2004/38, any restriction of the freedom of movement must observe the principle of proportionality, must be based on the personal conduct of the individual concerned, and that the person concerned must be notified of that restriction and given a full, precise explanation of the reasons. He also stated that it was for the national courts in the first place to consider whether the rules of Directive 2004/38 had been properly applied. He emphasized that all possible steps must be taken in order to avoid the recurrence of such situations and stated that he was confident that a constructive bilateral dialogue between the two member states could resolve the dispute.

On 12 October 2009, the Hungarian Minister for Foreign Affairs, acting on behalf of Hungary, sent a complaint to the President of the Commission, requesting that the Commission examine whether it was appropriate to initiate infringement proceedings against the Slovak Republic under Article 258 TFEU for violation of Article 21 TFEU and Directive 2004/38.

By letter of 11 December 2009, the Commission confirmed that "Union citizens are entitled to move and reside freely within the territory of the Member States pursuant to Article 21 TFEU and Directive 2004/38". However, the Commission pointed out that "under international law, the Member States reserve the right to control the access of a foreign Head of State to their territory, regardless of whether that Head of State is a Union citizen". In its opinion, the member states of the European Union continue to arrange official visits through bilateral political channels, thus, this is not an area where EU law applies. In the Commission's opinion, while a Head of State may indeed decide to visit another member state as a private individual under Article 21 TFEU and Directive 2004/38, it is evident from the documents attached to the complaint of the Hungarian Minister for Foreign Affairs that Hungary and the Slovak Republic disagree regarding the private or official nature of the proposed visit. The Commission considered, therefore, that it was not in a position to find that the Slovak Republic had failed to observe the provisions of EU law on the free movement of Union citizens, even if the Slovak Republic had been wrong, in its *note verbale* of 21 August 2009, to rely on Directive 2004/38 and the legislation adopted for its implementation under national law.

On 30 March 2010, Hungary brought the matter before the Commission in accordance with Article 259 TFEU. In its reasoned opinion the Commission considered that Article 21(1) TFEU and Directive 2004/38 do not apply to visits made by the head of one member state to the territory of another member state and that, under those circumstances, the alleged infringement is unfounded.

On 8 July 2010, Hungary brought action seeking the declaration of the infringement of EU law by the Slovak Republic.

7.3 Before the Court . . .

7.3.1 The Application

By its application, Hungary requested the Court to:
(1) find that the Slovak Republic failed to fulfil its obligations under Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, as well as Article 21(1) TFEU in that, relying on that directive, but failing to respect its provisions, it did not allow the President of Hungary, Mr Sólyom, to enter its territory;
(2) declare that the position of the Slovak Republic, which it still maintained at the time the action was brought, namely, that it is entitled under Directive 2004/38 to prohibit the entry to the territory of the Slovak Republic of a representative of Hungary, such as the President of the latter State, thereby confirming that such an unlawful attitude may recur, conflicts with the law of the European Union, in particular Article 3(2) of the Treaty on the European Union (hereinafter 'TEU') and Article 21(1) TFEU;
(3) declare that the Slovak Republic applied European Union law wrongfully in that its authorities did not allow President Sólyom access to its territory on 21 August 2009; and
(4) in the event that a specific provision of international law may restrict the personal scope of Directive 2004/38, to define the extent and scope of such derogations.

The Slovak Republic contended that the Court should dismiss the action. The Commission was given leave to intervene in support of the form of order sought by the Slovak Republic.
The Slovak Republic first of all questioned the Court's jurisdiction to rule on the action. The Court – concurring with the position advanced by the appellant, the Commission and the Advocate General – rejected this plea.[6]
The second and the fourth heads of complaint were rejected by the Court – also in line with the Opinion of the Advocate General – as inadmissible in the framework of the procedure at hand.[7]

6 Judgment paras 24-26.
7 Judgment paras 67-71.

The third head of complaint was also deemed unfounded on the basis of a rather formalistic reasoning.[8] The legal reasoning of the parties, the Advocate General and the Court were opposed actually only regarding the first head of complaint. Due to the fact that the most important questions were raised by this complaint, in the following we will limit ourselves to the analysis of this complaint.

7.3.2 The Law Applicable to the Case – EU Law or International Law?

7.3.2.1 Arguments of Hungary

Since the main argument of the Commission – followed by Slovakia – was that the Slovak reliance on Directive 2004/38 was an 'error' 'unfortunate wording', 'wrong' 'inappropriate', 'pure reference'[9]) and that the law applicable to the case was not EU law but international law, the legal reasoning focused on this point.

The Hungarian Government claimed that Directive 2004/38 applies to all citizens of the Union, including Heads of State, and to all kinds of visits, that is to say, both official and private.

There are no rules of international law providing for restrictions on the entering of Heads of States into a foreign state. In view of the case law of the Court according to which the Union legislature must respect international law,[10] if such rules existed, Directive 2004/38 would have taken them into account, as the EU legislator did, for example, in Article 3(2)(f) of Council Directive 2003/109/EC concerning the status of third country nationals who are long-term residents.[11] In any event, even assuming that such rules exist, Hungary considers that their application cannot compromise the effectiveness of EU legislation, such as Directive 2004/38, by introducing a derogation with regard to its personal scope. The Court declared that "the provisions of an agreement concluded prior to the entry into force of the Treaty or prior to a Member State's accession cannot be relied on in intra-Community relations".[12] That opinion is equally valid with regard to the rules of customary international law. The right of every citizen of the Union to move freely within the European Union may be made subject only to the limitations specified by Directive 2004/38. Those limitations may be applied only when the substantive and procedural conditions laid down in said directive have been satisfied. The restrictive measures – invoked by Slovakia – based on public policy

8 Judgment paras 58-61.

9 Wording used by the Commission, Slovakia and the AG and the Court respectively.

10 In this connection Hungary cited Case C-286/90, *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9 and Case C-162/96, *Racke* [1998] ECR I-3655, para. 45.

11 Council Directive of 25 November 2003, OJ 2004 L 16/44.

12 Hungary relied on Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* [1995] ECR I-743, para. 84 and Case C-301/08, *Bogiatzi* [2009] ECR I-10185, para. 19.

or public security may be applied only when based exclusively on the personal conduct of the individual concerned and if the conduct of the person concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The defendant failed to satisfy both the substantive and the procedural conditions set forth in Directive 2004/38. Mr Sólyom did not represent any threat to any fundamental interest of society and, in any event, it was disproportionate to refuse access.[13] No notification was sent to Mr Sólyom to inform him of the grounds for the decision in question and of the remedies available to him.

7.3.2.2 Arguments of Slovakia

The Slovak Republic first of all states that the Hungarian President's planned visit was not a private visit of a Union citizen but the visit of a Head of State to the territory of another member state. Consequently, the question is whether EU law, and in particular Article 21 TFEU and Directive 2004/38 are applicable to Heads of State of the member states.

In view of the role of Heads of State, their movements within the European Union fall within the sphere of diplomatic relations between the member states, as governed by customary international law and by international conventions. The principle of the conferral of competences under Article 3 TEU, Article 4(1) TEU and Article 5 TEU excludes bilateral diplomatic relations between member states from the ambit of EU law. That, Slovakia argues, is confirmed, first of all, by the judgment rendered in *Commission v. Belgium,*[14] according to which the member states retain the right to regulate their diplomatic relations even after joining the European Union. Moreover, there is no provision in the Treaties that expressly confers competence on the European Union to regulate diplomatic relations between member states.[15]

As the sovereignty of the state which he represents is vested in the Head of State, he may enter another sovereign state only with the latter's knowledge and consent. In that regard, the Slovak Republic points out that Article 4(2) TEU provides that "the Union shall respect the equality of Member States before the Treaties as well as their national identities" and that the principle of free movement may not, under any circumstances, alter the scope of the founding treaty or the provisions of secondary legislation.

The fact that Directive 2004/38 does not provide for any derogation concerning the movement of Heads of State does not mean that that directive applies to them, the application of EU law to Heads of State being excluded by the Treaties themselves. The comparison

13 This is supported by the declarations of the Slovak Ministry of Foreign Affairs and the Slovak police according to which they will ensure the personal safety of Mr Sólyom. <www.pluska.sk/old/aktuality/o-bezpecnost-solyoma-postara-aj-slovenska-strana.html>.

14 Case C-437/04, *Commission v. Belgium* [2007] ECR I-2513.

15 Judgment paras 33-34.

drawn between Directive 2004/38 and Directive 2003/109 cannot be upheld, in so far as those two texts deal with different subjects, the latter related to the better integration of immigrants lawfully present in a state. The judgments in *Poulsen and Diva Navigation* and *Racke*[16] do not give rise to any obligation requiring the Union legislature to indicate, for any act of secondary legislation, the material and personal scope of the Treaties in the context of international law. The judgments referred to by Hungary concerning the inapplicability of the customary law in relations between member states[17] are relevant only in case the competence of the Union is not contested, and that is precisely what is happening here.

If it were to be accepted that EU law applied under circumstances such as those of the present case, the Head of State of one member state would enjoy privileges based on that law in another member state, while at the same time being protected by the immunity provided for by international law against the applicability of administrative decisions taken by that state under EU law. The consequence would be that a member state could neither deny such a person entry into its territory nor, in view of his immunities, subsequently expel him.

Even assuming that EU law is applicable under the circumstances of the present case, the Slovak Republic denies having applied that law, and in particular Directive 2004/38. In this connection, it takes the view that the *note verbale* of 21 August 2009 containing the reference to Directive 2004/38 formed part of the diplomatic exchanges, and did not therefore constitute a 'decision' within the meaning of that directive. Moreover, the note in question was not written by a police officer in the border control service, but by the Ministry of Foreign Affairs, that is to say, a body which clearly does not have the power to adopt a decision. The note was not addressed to Mr Sólyom, it was sent by diplomatic channels to Hungary. The unfortunate wording and the reference to Directive 2004/38 in that note do not determine the *ratione materiae* of that directive for the present case.

7.3.3 Opinion of Advocate General Yves Bot

Basically, the Advocate General shares the view of the Slovak Republic (and the Commission).

First he deems the planned visit as 'public in nature',[18] falling within the scope of diplomatic relations. As the Treaties are silent on the question of access for Heads of State

16 Case C-286/90, *Poulsen and Diva Navigation* [1992] ECR I-6019 and in Case C-162/96, *Racke* [1998] ECR I-3655.

17 Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* [1995] ECR I-743 and Case C-301/08, *Bogiatzi* [2009] ECR I-10185.

18 Opinion para. 48. We note that the justification of this qualification "the Slovak authorities had been notified several times of this visit through diplomatic channels" is not particularly convincing because the host state may be notified in diplomatic channels even in case of a private visit planned incognito. A. Watts, *The legal position in international law of the heads of states, heads of governments and foreign ministers*, Vol. 247, Martinus Nijhoff 1994, Heads of States pp. 21-96, at p. 75.

to the territory of member states, in accordance with the principle of conferral this is a competence reserved for the member states. The judgment in *Commission v. Belgium*[19] also supports the view that the bilateral relations between member states remain within the purview of the member states, in accordance with international law. His conclusion:

> [. . .] the status of the highest representative of the State, which is that of Head of State, and the principle of the sovereign equality of States militate in favour of the opposite proposition to that supported by Hungary, namely, that visits by Heads of State within the Member States of the Union depend on the consent of the host State and the detailed conditions defined by the latter within the framework of its competence, and cannot be understood in terms of freedom of movement.[20]

A unique element of the Advocate General's argumentation is that it does not exclude the possibility of exercising diplomatic competence in a manner incompatible with the Treaties. Nevertheless, in his view

> only a situation of persistent paralysis in diplomatic relations between two Member States, contrary to their commitment to maintain good-neighbourly relations consubstantial with their decision to join the Union, would be covered by EU law.[21]

7.3.4 The Judgment

The Court remains silent on the principle of conferral. It does not deal with the question of the public or private nature of the planned visit. First, it recalls that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States", and Article 20 TFEU, which confers the status of citizen of the Union on every person holding the nationality of a member state. Since Mr Sólyom is of Hungarian nationality, he unquestionably enjoys that status.[22] The primary and individual right to move and reside

19 Case C-437/04, *Commission v. Belgium* [2007] ECR I -2513.

20 Opinion para. 57. Concerning the necessary consent of the host state the Advocate General refers to Art. 2 of the 1961 Vienna Convention, Art. 2(1) and (2) of the Vienna Convention of 24 April 1963 on Consular Relations and Arts. 1(a), 2 to 6 and 18 of the Convention on Special Missions.

21 The AG refers to the preamble of the TEU "an ever closer union among the peoples of Europe". For him would constitute a barrier to the attainment of the essential objectives of the Union, including the aim of promoting peace and to the loyalty clause (last para. of Art. 4(3) TEU), according to which the member states must refrain from any measure that could jeopardize the attainment of the Union's objectives.

22 Judgment paras 40-42.

freely within the territory of the member states conferred on each citizen of the Union under Article 21 TFEU is subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation.[23]
After these 'required elements', in the decisive paragraph 44 of its judgment the Court turns to the real starting point of its argumentation:
Referring to its own case law in *Racke*[24] and *Kadi*,[25] it states that

> EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the European Union legal order and is binding on the institutions.

Consequently the fundamental question is

> whether, as the Slovak Republic claims, the fact that Mr Sólyom, while a Union citizen, was carrying out, at the material time, the duties of the Hungarian Head of State is liable to constitute a limitation, on the basis of international law, on the application of the right of free movement conferred on him by Article 21 TFEU.[26]

The answer is 'yes' without any qualification.
The argumentation is very close to that of Slovakia and the Advocate General. On the basis of customary rules of general international law and those of multilateral agreements,[27] the Head of State enjoys a particular status in international relations which entails, *inter alia*, privileges and immunities. The presence of a Head of State on the territory of another state imposes on that latter state the obligation to guarantee the protection of the person who carries out that duty, irrespective of the capacity in which his stay is effected. The status of Head of State therefore has a specific character, resulting from the fact that it is governed by international law, with the consequence that the conduct of such a person, such as that person's presence in another state, comes under that law, in particular the law governing diplomatic relations. Such a specific character is capable of distinguishing the person who

23 The Court refers to its recent judgments in *Lassal* and in *McCarthy*: Case C-162/09, *Lassal* [2010] ECR I-9217, para. 29, and Case C-434/09 *McCarthy* [2011] Not yet published.
24 Cited *supra* note 15.
25 *Racke*, paras 45-46, and Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351, para. 291.
26 Judgment para. 45.
27 As rule of multilateral agreement the Court refers to Art. 1 of the New York Convention of 14 December 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, states, *inter alia*, that every Head of State, while on the territory of a foreign state, enjoys that protection. Judgment para. 47.

enjoys that status from all other Union citizens, with the result that person's access to the territory of another member state is not governed by the same conditions as those applicable to other citizens. The fact that a Union citizen performs the duties of a Head of State is such as to justify a limitation, based on international law, to the exercise of the right of free movement conferred on that person by Article 21 TFEU.

The conclusion: In the circumstances of the present case, neither Article 21 TFEU nor, *a fortiori*, Directive 2004/38 obliged the Slovak Republic to guarantee access to its territory to the President of Hungary.[28]

This argumentation does not touch – even incidentally – upon the relationship with the EU Treaties or the secondary law of the EU. The status of Head of State excludes the applicability of the law governing the citizenship of the Union.

Consequently the Court rejected the first head of complaint as unfounded. As none of the heads of complaint raised by Hungary had been upheld, the action was dismissed in its entirety.

7.4 Comments

7.4.1 A Lost Case from the Outset?

The case was *génant* for the Union and for the Court of Justice in particular. One member state of the European Union prohibits the entry of the Head of State of another. It is a strange and unforeseen event. The parties in a contradictory procedure before the Court are member states. This would suffice to qualify the case as unusual. The Court delivered a judgment under the Article 259 TFEU procedure – "vestige des 'racines internationales' de la Communauté"[29] – only three times as of yet.[30] The highly political nature of the case is evident from the facts presented in the framework of the procedure (several politicians made statements before and after the incident) and was clear from the arguments presented in the action.[31]

Such a case occurred only once before the Court of Justice, namely in *Spain v. United Kingdom*.[32] The origins of the conflict went back to the three hundred year old dispute

28 Judgment paras 46-52.

29 L. Burgorgue-Larsen, 'L'identité de l'Union européenne au coeur d'une controverse territoriale tricentenaire Quand le statut de Gibraltar réapparaît sur la scène judiciaire européenne', 43 *Revue trimestrielle de droit européen* 1 2007, pp. 25-45, pp. 25-26.

30 Case 141/78, *France v. United Kingdom* [1979] ECR 2923, Case C-388/95, *Belgium v. Spain* [2000] ECR I-3123, Case C-145/04, *Spain v. United Kingdom* [2006] ECR I-7917.

31 In its third head of complaint Hungary claimed that the Slovak Republic invoked the directive in order to pursue political aims and wished to express political hostility. Opinion paras 41-42, Judgment paras 53-54.

32 Case C-145/04, *Spain v. United Kingdom* [2006] ECR I-7917.

between the British Crown and Spain on the (international) status of Gibraltar. The United Kingdom – executing the judgment of the European Court of Human Rights in *Matthews v. United Kingdom* – granted voting rights in the election of the members of the European Parliament to qualifying Commonwealth citizens (QCC), persons resident in Gibraltar but not holding the citizenship of the United Kingdom. According to Spain this was in breach of the treaty which confers the right to vote only to citizens of the member states (in their capacity as Unions citizen). The United Kingdom violated EU law by attaching Gibraltar to one of the existing electoral regions in England and Wales, thereby extending its territorial sovereignty to Gibraltar.

The European Commission – while expressing the view that the United Kingdom had not violated EU law – invited the parties to find an amicable solution. Spain brought an action, and the Commission intervened in support of the United Kingdom. The Court – with a somewhat controversial reasoning – dismissed the action of the 'troublemaker' Spain. One of the messages of the judgment was: the member states should avoid turning to the Court with their historico-political disputes.

The historical roots of the case *Hungary v. Slovakia* go back to over a thousand years. (Saint) Stephen I – the unveiling of the statue of whom Mr Sólyom was to honour with an inaugural speech – founded the Kingdom of Hungary in 1000. Until the changes to its borders were effected by the Treaty of Trianon, the territory of the Kingdom of Hungary included the territory on which now lies the Republic of Slovakia. The majority of the inhabitants of this territory were of Slovak nationality. As a result of the new borders set by the Treaty of Trianon and the Treaty of Paris,[33] a significant Hungarian minority emerged in the neighbouring Czechoslovakia.[34] This situation was inherited by Slovakia after the split of Czechoslovakia in 1993. The hostility against Hungarians was present in the political discourse in Slovakia from the very beginning. Reluctance towards granting collective minority rights was also perceptible.

In Hungary, following the change of the political system in 1989/90, the reunification of the Hungarian nation without questioning the borders became part of the political ideology and government policy.[35] This is reflected in the new Constitution of 1989 and also in

33 Treaty of Peace between the Allied and Associated Powers and Hungary signed at Trianon, 4 June 1920, in force 26 July 1921, 6 League of Nations Treaty Series Treaty of Peace with Hungary, Paris, 10 February 1947, No. 41, United Nations Treaty Series, p. 166.

34 The census of 1921 recorded 637,000 Hungarians. The census of 2011 in Slovakia recorded 458, 467 Hungarians (8.5 % of total population).

35 For the Hungarian governmental policy in this regard *see* N. Bárdi, 'The Policy of Budapest Governments towards Hungarian Communities Abroad', *in:* N. Bárdi, Cs. Fedinec & L. Szarka (Eds.), *Minority Hungarian Communities in the Twentieth Century*, Social Science Monographs, Boulder, Colorado, Atlantic Research and Publications, Inc, Highland Lakes, New Jersey, New York, 2011, pp. 456-467.

the Fundamental Law adopted in 2011.[36] During the Convention preparing the proposal for a Constitution for Europe, the Hungarian members put several – mostly unsuccessful – initiatives on the table in order to include the recognition and protection of collective rights of national and ethnic minorities in the Constitutional Treaty.[37]

We suggest that Mr László Sólyom planned his visit in the spirit of solidarity with the Hungarian minority living in Slovakia, perhaps to enhance their sense of belonging to the 'mother country'. Perhaps he considered the visit an 'intra-national' business, maybe that is the reason why he refused to meet the representatives of the Slovak state. Arguably this was the main cause for the prohibition of entering the territory of the Slovak Republic.[38]

After the humiliation of its Head of State,[39] Hungary could not remain inert. Given that the Slovak measure referred to an EU directive it seemed appropriate to initiate an infringement procedure against the Slovak Republic. The Commission tried to dissuade Hungary. In spite of the warning signals, Hungary followed through with the procedure. The outcome is well known.[40]

7.4.2 The Hidden Sovereignty – Heads of State in International Law

From the very beginning, the European integration restricted the sovereignty of the member states. Examples are the custom union, the monetary union, or the prohibitions of member states to restrict market freedoms. Just after the promotion of peace and the well-being of its peoples, the Treaty on the European Union sets forth the objective of offering

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36 Constitution of Hungary of 1949 as amended by Act XXI of 1989. Art. D of the Basic Law (constitution) of Hungary (entered into force on first of January 2012) provides: "Hungary, guided by the notion of a single Hungarian nation, shall bear a sense of responsibility for the fate of Hungarians living outside her borders, shall foster the survival and development of their communities, shall support their efforts to preserve their Hungarian identity, and shall promote their cooperation with each other and with Hungary."

37 *E.g.*, Contribution by Mr. József Szájer, member of the Convention, delegated by the Hungarian National Assembly, "Unity in diversity" Proposal for the representation of national and ethnic minorities in the institutional system of the European Union Committee of National and Ethnic Minorities (CONEM) <http://european-convention.eu.int/pdf/reg/en/03/cv00/cv00580.en03.pdf> (last accessed 7 December 2012).

38 One can come to the same conclusion on the grounds of the statement of Mr Robert Fico, the Slovak Prime Minister on 15 March 2010, responding to an opinion expressed by President Sólyom on the teaching of languages in primary school: "(in) these circumstances, refusing to allow Mr Sólyom to enter the country on 21 August 2009 was completely justified in our view. In our opinion, it is even more so now than it was then". Opinion, para. 17.

39 The prohibition put Mr Sólyom into the company of Kurt Waldheim (president of Austria) and Mobutu (President of Zaire, notorious for corruption, nepotism and human rights violations). The former as a private person was barred from entry into the United States because of his activity during the World War II, the latter was refused permission to enter France in 1993. Watts, 1994, p. 73.

40 The possible political considerations behind the decision of the Court are indicated by Ambrus: "[. . .] the fact that the Court remained so obscure and unclear about the nature of the conflict of law and the way to solve it gives the judgment a very political tin". M. Ambrus, 'The Sólyom case: fragmentation and conflict of laws', <http://blog.eur.nl/esl/pil/2012/12/11/the-solyom-case-fragmentation-and-conflict-of-laws/>.

its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.[41]

This objective requires a number of restrictions on the external and internal sovereignty of the member states.[42] International law allows for the (self-)limitation of state sovereignty on the basis of an international agreement. This is exactly what the member states of the European Union undertook in the founding treaties. One can formulate the basic question of *Hungary v. Slovakia* as follows: Did the member states confer the power to restrict the crossing of their borders by their citizens – a power attributed to sovereign states under international law – or not?

Hungary's answer was 'yes', this was agreed under Article 21 TEU. The member states also prescribed the exceptions to such conferral (*i.e.* the remaining sovereignty in this matter). Slovakia and the Advocate General took the opposite view. The member states retain their sovereignty in the European Union, the Head of States are the representatives of state sovereignty in international relations, consequently their entry in another state is governed by international (diplomatic) law. According to international law such entry requires the consent of the host state.[43] The member states did not confer competence upon the Union concerning the regulation of diplomatic relations between them. Under the principle of conferral[44] this competence remains with the member states.[45]

It is submitted that the Court's perception is essentially the same. Unlike the respondent member state and the AG, the Court's judgment entirely avoided the use of expressions such as 'sovereign state' or 'sovereign equality of states'. It makes considerable effort to conceal the sovereign state status of the member states, which actually serves as the veritable foundation of its reasoning.[46] While Slovakia and the AG detected the special status of member states in international law rules on sovereign statehood, the Court remains silent on this matter. Understandably, the Court does not refer to the equality of member states

41 Art. 3(2) TEU.

42 As it was stated by the Court of Justice in the seminal Judgment *Van Gend and Loos*: "The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals." Case 26/62, *Van Gend and Loos* ECR [1963] 3.

43 Opinion, paras 34 and 57.

44 Art. 5(2) TEU.

45 For the Slovak reasoning, *see* Opinion, para. 34, and for the argumentation of the Advocate General, *see* Opinion para. 51.

46 This attitude is not new. As Jakab puts it, "Bodin, Hobbes and Pufendorf had invented the big gun (*i.e.* national sovereignty), and in the next centuries a series of philosophers, politicians and lawyers worked on the problem of where to hide it, so nobody gets hurt." A. Jakab, 'Neutralizing the Sovereignty Question Compromise Strategies in Constitutional Argumentations about the Concept of Sovereignty for the European Integration', *European Constitutional Law Review* 2, 2006, pp. 375-397.

before the Treaty or to the obligation of the Union to respect the constitutional identity of the member states. These Treaty provisions might be read as the expressions of the sovereign statehood of the member states. The same is true for the principle of conferral – equally unmentioned in the judgment – the meaning of which is that the member states remain the 'masters of the Treaty', in other words they remain sovereign.
The Court failed to indicate the concrete source of customary international law concerning the special status of the Heads of State in international relations[47] and answer the question, why it is governed exclusively in international law. In the light of the effort to sidestep the sovereignty question, this is more than understandable. The special status is closely related to the state sovereignty. As Sir Arthur Watts writes in his authoritative study:[48]

> Over the past half century in particular [. . .] attitudes towards State sovereignty generally and towards Heads of States have changed; the mystique of sovereignty, whether of States or their Heads, is much diminished. Nevertheless, the earlier close identity of the law governing the position of States with that of Heads of States, with both aspects being informed by notions of "sovereignty", has left its mark on current legal ideas relating to the position of Heads of States. [. . .]. Heads of States *are* still in a special position as the supreme representative of, and in some respects the personal manifestations of, their States.[49]

In practice, the state being visited may be expected to grant the visiting Head of State ceremonial courtesies and special measures of protection, and understandings – or even – an agreement – to that effect may be reached through diplomatic channels.[50]
Sir Watts quotes Oppenheim who says:

> the basis for the special treatment accorded to heads of States is variously ascribed, inter alia, [. . .] the respect due to them as representatives of sovereign states; [. . .] the implied licence of the state being visited.[51]

Maybe the Court avoided making explicit the direct relationship between the special treatment of Heads of State under customary international law and state sovereignty because it

47 One reason for that that the sources and substance of the customary international law as such are far from being certain. The International Law Commission recently adopted a working plan on the formation and evidence of customary international law. International Law Commission, Report on the work of its sixty-third session (26 April to 3 June and 4 July to 12 August 2011) General Assembly Official Records Sixty-sixth Session Supplement No. 10, Annex A Formation and evidence of customary international law.
48 Watts 1994.
49 *Ibid.,* p. 36.
50 *Ibid.,* p. 73.
51 *Ibid.,* p. 36, note 34.

did not wish to surrender a trump card to the hands of sovereignists or to tie its own hand when arguing for its own sovereignty.[52]

The fact that the Court finds the regulation of the status of Heads of State exclusively within the ambit of international law (in the mysterious 'customary rules of general international law' as well as multilateral agreements) clarified its position on several points. Perhaps the most important of which is that the member states did not confer implicit competence upon the Union concerning the regulation of the status of Heads of State of the member states. Read together with the absence of the principle of conferral, the judgment also claims that the member states cannot confer this competence upon anyone unless they lose their sovereign statehood.

As the Court relies exclusively on international law, it can avoid making a final decision on the private or public nature of the planned visit since international law does not make a distinction between the two when it comes to offer Heads of State special treatment by the host state.[53] (The Heads of State may 'get rid of' this special treatment only in case they maintain their incognito.[54]) This way the Court excluded the interpretation – left open by Slovakia, the Commission and the AG – according to which the private visit of the Heads of State might come under the EU law.[55]

Another possible interpretation also remained outside the Court's focus. The Court totally ignored the fact that the incident occurred between two member states of the European Union.[56] This approach discerned in the Opinion of the AG, who is of the opinion that the member states are not totally free in their diplomatic relations, they are obliged to maintain good neighbourly relations in order to comply with the objectives of the Treaties. It would be probably contrary not only to a necessarily higher standard of comity between member states than in the case of ordinary diplomatic relations, but also to the normal

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52 G. De Burca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice', *in* N. Walker (Ed.), *Sovereignty in Transition*, Hart, Oxford, 2003, pp. 449-460.

53 "The International Law Commission has expressed the view that 'A Head of State [. . .] is entitled to special protection whenever he is in a foreign State and whatever may be the nature of his visit – official, unofficial or private', and under Art. 1 (a) of the Convention on the Prevention and Punishment of Crimes against Internationally protected Persons, including Diplomatic Agents, 1973, a Head of State is an internationally protected person "whenever he is in a foreign State." Watts 1994, p. 73 : "S'agissant de l'inviolabilité, il est incontesté qu'elle est accordée sur le territoire étranger non seulement en cas de visite officielle, mais aussi en cas de visite privée pourvue que la qualité de chef d'Etat soit connue" J. Salmon, 'Representativité internationale et chef d'Etat', *in:* A. Pedone (Ed.), *Colloque de Clemont-Ferrand, Le chef d'Etat et le droit international*, Paris, 2002 pp. 155-172, at p. 165.

54 "So long as the Head of State maintains his incognito there is no option but to treat him (on a private visit in another State) as an ordinary private person, and he may be regarded as having waived any claims to special treatment." Watts 1994, p. 75.

55 We note that under the hearings, the questions addressed to the Hungarian agents were related to the public or private nature of the visit. Visibly on that point of the procedure this question had have some importance, at least for some judges.

56 This aspect is pointed out in the editorial comments of the *Common Market Law Review*, 'Editorial comments, Hungary's new constitutional order and "European unity"' 3, 2012, pp. 871-883, at p. 883.

functioning of the Union if the Heads of State of the member states wishing enter Belgium in order participate to European Council meeting were treated exclusively under the rules of public international law.

7.4.3 Customary International Law and the European Union Legal Order

In its argumentation, the Hungarian Government claimed that there are no rules of international law governing the entry of a Head of State into the territory of another state. In any case, even assuming that such rules exist, their application must not compromise the effectiveness of EU legislation, such as Directive 2004/38, by introducing a derogation regarding its personal scope.[57] Relying on two cases[58] in which the Court ruled that "the provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State's accession cannot be relied on in intra-Community relations", Hungary contended that opinion is equally valid with regard to the rules of customary international law.[59]
In the meaning of this interpretation, customary international law does not, in its entirety, form part of the European Union legal order.
As we have seen earlier, the Court took the opposite view. 'International law is part of the European Union legal order.' How are we to understand this strong statement? Ambrus suggests that

> this position would essentially mean that there is no fragmentation between EU law and international law, as the latter is part of the former, *i.e.* they constitute the same legal regime or they live on the same island. Arguably, what the Court probably meant to say was, however, that they are part of the same regime, or more precisely that EU law forms part of general international law.

Both of these two suggestions seem to simplify the relationship between international law and the EU legal system.
Traditionally, the law of the EU contains primary law and secondary law. Primary law consists of the founding treaties (TEU and TFEU),[60] the EU Charter of Fundamental Rights[61] and the general principles of law (including fundamental rights).[62] Secondary law

57 Opinion para. 28.
58 Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* [1995] ECR I-743, para. 84, and Case C-301/08, *Bogiatzi* [2009] ECR I-10185, para. 19.
59 Opinion, note 5.
60 Art. 1(3) TEU.
61 Art. 6(1) TEU.
62 As AG Trstenjak puts in his opinion in *Audiolux*: "The general principles are distinguished by the fact that they embody fundamental principles of the Community and of its Member States, which explains their status as primary law within the hierarchy of rules in the Community legal order." Case C-101/08, *Audiolux* [2009] I-9823, para. 70. "The general principles of Community law have constitutional status." *Audiolux* Judgment, para. 63.

comprises the legal acts of the institutions of the EU. Provisions of agreements concluded by an institution of the EU form integral part of Community law once they enter into force. They do not prevail over primary law, but rank between primary and secondary law.[63] In accordance with the principles of international law, the application of the Treaty does not affect the commitment of the member state concerned to respect the rights of non-member states under an earlier agreement and its compliance with corresponding obligations.[64] (The Court rejected the proposition of the General Court according to which the Charter of the United Nations has primacy over EU primary law.[65]) In other words, according to the principle of *pacta sunt servanda*, these international treaties have primacy over the Treaties. EU law is thus considered to be more than a simple sum of legal acts. It is an autonomous legal order. The EU legal order protects this relative autonomy also *vis-à -vis* the international legal order.[66]

We suggest that the statement 'international law forms part of the EU legal order' understood as the 'law of the land' in the EU comprises not only the primary and secondary law of the EU, but also the relevant principles and rules of international law. This situation reminds us not only of the incorporation of fundamental rights into the Community legal order by the Court of Justice,[67] but also of the relationship between EU law and the member states' legal order[68] or that of the national legal orders and public international law.[69] Their cohabitation is of a dialectical nature.

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63 Case 181/73, *Haegeman* [1974] ECR 449, para. 5, *Kadi*, paras 306-308.

64 Art. 351 TFEU, Case C-124/95, *Centro Com* [1997] ECR I-81, para. 56.

65 Case T- 306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, paras 231-241, Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649, paras 181-188, *Kadi*, paras 307-308, n. 84.

66 It is also to be recalled that *an international agreement cannot affect* the allocation of powers fixed by the Treaties or, consequently, *the autonomy of the Community legal system* … (*see*, Opinion 1/91 [1991] ECR I-6079, paras 35 and 71, and Case C-459/03, *Commission v. Ireland [2006]* ECR I-4635, para. 123 and case law cited.*)* Joined cases C-402/05 P and C-415/05 P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351, para. 282 (emphasis added).

67 "In fact, respect for *fundamental rights forms an integral part of the general principles of law protected by the Court of Justice*. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which *must be ensured in the Community legal system*." (emphasis added). Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 4.

68 "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply." Case 6/64, *Flaminio Costa v. Enel* [English 1964] 585, 593.

69 *E.g.,* Art. Q Fundamental Law of Hungary provides:

"(2) Hungary shall ensure that Hungarian law is in harmony with international law, in order to comply with its obligations under international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall be incorporated into Hungarian law upon their publication as rules of law."

We suppose that the place and legal nature of the international law in the EU legal order (in the 'law of the land' sense) is not homogenous.

Given that in the *Hungary v. Slovakia* case the 'customary rules of general international law' are directly concerned, we will focus on this issue.

Undoubtedly, some rules of customary international law[70] and some of the general principles of international law[71] found their way into the EU legal order. These rules and principles are binding upon the EU and its institutions. The exercise of the law-making powers of the institutions is limited by the relevant rules of international law. The acts of the institutions are to be interpreted, and their scope is restricted according to international law.[72] Unfortunately, serious questions remain unanswered. Which rules and principles of customary international law form part of the EU legal order? Where is their place in the hierarchy of norms (principles) of EU law (in its narrow sense)?

The first question seems to be even more relevant as the sources of international customary law are numerous and the value of these varies and much depends on the individual circumstances.[73]

According to von Bogdandy and Smrkolj, in *Racke* the Court integrated only "fundamental rules of customary international law" into the EU legal order, and because of the 'complexity of the rules', the Court further restricted its review to the question "whether, by adopting the suspending [act], the [institution] made manifest errors of assessment concerning the conditions for applying those rules" (para. 52.). Their conclusion is that "customary international law and general principles play only a minor role."[74]

In *Hungary v. Slovakia* the Court integrated into the EU legal order the customary rules of general international law and multilateral agreements related to the Heads of States.

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70 Case T-115/94, *Opel Austria v. Council* [1997] ECR II-39, para. 90. "The Court holds in this connection, first, that the principle of good faith is a rule of customary international law whose existence is recognized by the International Court of Justice (*see* the Judgment of 25 May 1926, German interests in Polish Upper Silesia, CPJI, Series A, No. 7, pp. 30 and 39) and is therefore binding on the Community". Case C-162/96, *Racke* [1998] ECR I-3655, para. 46. "It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order."

71 "In order to interpret that provision, account must be taken of the purpose of the IDA, the context of Article 6 and the general rule of international law requiring the parties to any agreement to show good faith in its performance (*see*, the judgment in *Kupferberg*, paragraph 1)" Case C-61/94, *Commission v. Germany* [1996] ECR I-3989. para. 30. In *Wood Pulp,* the Court admitted that "[A]ccordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law." Joined cases 89, 104, 114, 116, 117 and 125 to 129/85. *A. Ahlström Osakeyhtiö and others v. Commission* [1988] ECR 5193, para. 18.

72 Case C-286/90, *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9.

73 I. Brownlie, *Principles of Public International Law*, 7th edn, Oxford University Press, Oxford 2008, pp. 6-7.

74 A. von Bogdandy & M. Smrkolj, 'European Community and Union Law and International Law', *Max Planck Encyclopedia of Public International Law* <www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e620&recno=9&> (last accessed 24 January 2012).

Unlike in *Poulsen and Diva Navigation*[75] *Racke, Air Transport Association of America and Others*[76] or in *Opel Austria,* there is no reference to the material source of the relevant rules. As admitted by the Advocate General,[77] rules of customary international law and multilateral agreements concern the particular treatment (especially regarding privileges and immunities) of the Heads of State during their presence in a foreign state, not their entry.[78] The Court implied in these rules the rules on their entry, the essence of which is here the consent of the host state.[79] This can be regarded as an important contribution to the formation of the customary international law.

In *Hungary v. Slovakia,* the Court declared that the rules of customary international law preclude the application of Article 21 TFEU, a provision of primary law.

It is not the first time this appears in the case law of the Court. The *Van Duyn*[80] can be seen as an antecedent of *Hungary v. Slovakia* in different ways. It was also a case related to a member state's measure: British authorities prohibited the entry of another member states' citizen, thereby restricting the free movement of persons (workers at that time) and violating the Treaty provision concerning non-discrimination based on nationality. The Court found that the United Kingdom – under the principle of international law – was precluded from applying the principle of non-discrimination. In its judgment, the Court declared

> [. . .] it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence.[81]

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75 *Poulsen and Diva Navigation*, para. 10. (Geneva Conventions on international sea law "in so far as they codify general rules recognized by international custom", and judgments of the International Court of Justice as justification of the existence of customary international rules.) *Opel Austria,* para. 90 (reference to the judgment of the International Court of Justice), *Racke* para. 49. (Vienna Convention) para. 50 (judgment of the International Court of Justice).

76 Case C-366/10 , *Air Transport Association of America and Others*, para. 104. (reference to the Chicago Convention, the judgments of the International Court of Justice and that of the Permanent Court of International Justice (not yet reported).

77 Opinion, para. 55.

78 In this connection Bárd is talking about "phantom international law". P. Bárd, 'Uniós polgár-e Sólyom László?' (Is Sólyom László EU citizen?), *Szuverén*, 8 November 2012. <http://szuveren.hu/jog/unios-polgar-e-solyom-laszlo>.

79 Judgment para. 50, Opinion, para. 57. Concerning the 'consent' requirement the AG refers to Art. 2 of the 1961 Vienna Convention, Art. 2(1) and (2) of the Vienna Convention of 24 April 1963 on Consular Relations and Arts. 1(a), 2 to 6 and 18 of the Convention on Special Missions.

80 Case 41/74 , *Van Duyn v. Home Office* [1974] ECR 1337

81 *Van Duyn*, para. 22. The Court referred to this principle again repeatedly. Joined Cases C-65/95 and C-111/95, *Shingara and Radiom* [1997] ECR I-3343, para. 28; Case C-171/96, *Pereira Roque* [1998] ECR I-4607, para. 38; Case C-348/96, *Calfa* [1999] ECR I-11, para. 20; Case C-416/96, *El-Yassini* [1999] ECR I-1209, para. 45; Case C-235/99, *Kondova* [2001]ECR I-6427, para. 84; Case C-63/99, *Gloszczuk* [2001] ECR I-6369, para. 79; Case C-257/99, *Barkoci and Malik* [2001] ECR I-6557, para. 81.

This means that the Court – delimiting the powers of the Community and the member state[82] – gave primacy to international law over a Treaty provision in relations between member states.

7.4.3.1 Primacy or Supremacy?

The rules of conflict of laws determine which rule has primacy over the other, which rule is applicable for the case at hand. The principle *lex specialis derogat legi generali* is a rule of conflict of laws giving primacy on the basis of the substance of the conflicting rules. The principle *lex posteriori derogat legi priori* accords primacy to the rule established later in time. Each of these two rules of conflict of laws can be relied on concerning rules placed on the same level in the hierarchy of norms. The principle of supremacy gives primacy to the rule which is in a higher position in the hierarchy of norms. Ambrus suggests that in *Hungary v. Slovakia* the Court gave primacy on the basis of the principle of *lex specialis derogat legi generali*.[83]

The Court does not use the term 'primacy' in the meaning asserted above. In *Kadi*, for example, the term 'primacy' is clearly employed as an equivalent of supremacy.[84]

We submit that due to the fact that in *Hungary v. Slovakia* primacy was accorded to rules of another legal order (*i.e.* the international legal order),[85] the rule of conflict of laws is the principle of supremacy. This means that the Court finds that there are rules of general international law which are of higher rank in the hierarchy of norms than a rule of primary EU law. The Court did not apply the relevant rule of customary international law, it simply stated that the rule applicable to the case is not the Treaty, but the rule of international law.[86] It remained silent on the lawfulness of the Slovak measure under international law. It had no other choice, as under Article 259 TFEU the Court can only interpret the Treaty (as well as secondary law), in order to establish the existence of a violation of EU law. According to the judgment the Slovak authorities must set aside the relevant Treaty provision as inapplicable, and the Hungarian authorities cannot rely on it. Is this not the formula the Court employed when establishing the supremacy of EU law over the member states'

82 J. Wouters & D. Van Eeckhoutte, 'Giving Effect to Customary International law Through European Community Law', K.U. Leuven Faculty of Law Institute for International Law *Working Paper* No. 25 – June 2002, pp. 6-11.

83 Ambrus 2012.

84 "Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law (*see*, to that effect, Case C-308/06, *Intertanko and Others* [2008] ECR I-0000, para. 42 and case law cited). That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part." *Kadi*, paras 307-308.

85 In *Racke,* the Court admitted the co-existence of the European legal order and the international legal order. *Racke*, paras 45 and 49.

86 For opposite view *see* Ambrus 2012.

legal system for the use of national courts?[87] This is the same perception of the relationship between the general international law (the Charter of the UN) and the primary EU law what the General Court admitted in *Yusuf* [88] and *Kadi* and what the Court did not accept.[89] The supremacy thesis might also be supported by the (legal) fact that the Court ruled the provision of primary law inapplicable, since the relevant rules of international law are directly related to the sovereign statehood of the member states, which is certainly a quality that is 'supreme' to their EU membership.[90] The member states "permanently remain the masters of the Treaties".[91] The Head of State represents the member state as the proprietor of the complete sovereignty. Legally the member states are more than just members of the European Union.

It follows from the foregoing, that we do not have to try and place the rules of customary international law concerning the Heads of States as representatives of sovereign states in the hierarchy of norms of the European legal order in its narrow sense. By contrast, in the 'law of the land' of the European Union (and its member states) these rules enjoy supremacy over the primary and secondary law of the EU.

7.5 Conclusion

In *Hungary v. Slovakia,* the Court rejected the main argument of the appellant member state that the entry of the President of the Republic of Hungary into Slovakia is governed by the Treaty on the European Union (and relevant secondary law).

The Court, essentially in line with the arguments of the respondent member state, the Commission as intervener in support of the respondent and the Advocate General, stated that the entry of the Head of State of a member state into another member state must be

87 Case 6/64, *Flaminio Costa v. Enel* [1964] ECR 585.

88 Case T-306/01, *Yusuf and Al Barakaat Foundation v. Council*
240 It also follows from the foregoing that, pursuant both to the rules of general international law and to the specific provisions of the Treaty, member states may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations.

89 Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649, paras 181-188.

90 As Brownlie puts it: "If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law." Brownlie 2008, p. 289.

91 "The empowerment to transfer sovereign powers to the European Union or other intergovernmental institution permits a shift of political rule to international organizations. The empowerment to exercise supranational powers, however, comes from the Member States of such institution. They therefore permanently remain the masters of the Treaties… . The 'Constitution of Europe', international treaty law or primary law, remains a derived fundamental order." Lisbon judgment of the German Federal Constitutional Court, para. 231, cc), <www.bverfg.de/en/decisions/es20090630_2bve000208en.html>.

deduced from the customary rules of general international law and multilateral agreements. The Court highlighted that international law forms part of the European Union legal order.

In the conflict of rules of customary international law and Article 21 TEU the judgment gave primacy to the former. The judgment does not contain the concrete material source of the relevant rule of customary international law. It remains silent on the direct relationship between the rules of international law related to the Heads of State as representatives of the states in question and sovereign statehood. One might formulate this as follows: Given that the member states remain sovereign in the European Union, the founding treaties cannot regulate, even implicitly, the particular treatment accorded to the Heads of State in international relations.

We submit that the EU legal order in its narrow sense (primary and secondary law) keeps its relative autonomy *vis-à-vis* international law. Consequently, the primacy accorded to customary international law in the case at hand was on the basis of the principle of supremacy. We also suggest that we may arrive at the same conclusion if we consider the direct relationship of the relevant rules with state sovereignty, which is the supreme legal quality of the member states.

As far as the place of the relevant rules of international law in the hierarchy of the European Union legal order are concerned, we suggest that they do not form part of EU law in its narrow sense, but are placed in the highest rank of the 'law of the land' of the European Union (the EU legal order in its wider sense).

As a 'side effect' of the case, the Court repeated its message: The member states must avoid the Court as the arbiter of their historico-political affairs.