8 Is László Sólyom a European Citizen? Hungary versus Slovak Republic

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In its judgment delivered on 16 October 2012,[1] the Court of Justice of the European Union ruled that, in barring the President of Hungary from entering Slovakian territory three years earlier, Slovakia had in fact acted without breaching any European Union laws.
From the viewpoint of the evolution of EU law, the decision itself was far less interesting than the legal reasoning attached to it. From the Court's arguments we can, directly or indirectly, conjure a number of conclusions. It seems that a hierarchical order exists between fundamental rights, international law and fundamental freedoms. In addition, we can draw some conclusions not only about the present stage of advancement in European integration but also about the Court's self-imposed limitation of its powers in light of its own definition of the level of integration.
At the same time, however, the logic of the legal reasoning seems to falter at several points, with the Court leaving important questions unanswered while opening others without good reason. This, however, should not automatically imply that the outcome is not correct. The Hungarian application could have been rejected on various other grounds, some of which would have allowed for positions that are easier to defend from a legal point of view. In the following I shall present the facts, procedural history and the judgment itself, followed by conclusions implied by and derived from the reasoning relevant for the future development of EU law, and finally I shall offer positions I find more valid than those presented by the Court.[2]

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1 Case C-364/10, *Hungary v. Slovak Republic* 16 October 2012. (hereinafter referred to as "Judgment")

2 I owe special thanks to Dr. Gábor Attila Tóth, President of the Hungarian Civil Liberties Union, Professor László Valki from ELTE School of Law and Dr. László Venczl, Hungarian Member of Eurojust for their comments on earlier drafts. I also thank Dr. Balázs Rátai for his provoking questions and Ervin Dunay for his great help.

8.1 The Facts of the Dispute

On 21 August 2009, László Sólyom was on his way to the Slovakian town of Komarno. The purpose of his visit was to speak at the ceremonial unveiling of the statue of St. Stephen. The invitation to attend had been issued by a civil organization, the Committee of the Statue of St. Stephen, and the President had no scheduled meetings with other politicians. The ceremonial unveiling had been set to take place on 21 August, the day after St. Stephen's Day. However, 21 August is a sensitive date in Slovakian history: it was on this day in 1968 that the armed forces of the Warsaw Treaty – including hundreds of Hungarian troops – marched into Czechoslovakia to stifle the Prague Spring.

Prior to the scheduled visit of the President, there had been an exchange of diplomatic notes between the two countries, and the organization went ahead as planned right until the 19 August. Two days before the ceremony, the three major elected officials of Slovakia – President Ivan Gašparovič, Prime Minister Robert Fico and Speaker of the House Pavol Paška, issued a joint statement, in which they described the timing of the visit as insensitive. On the day of the ceremonial unveiling, the Slovak President emphatically stated that he would appreciate it if László Sólyom gave serious consideration to the Slovak concerns. In his reply, László Sólyom indicated that he still wished to attend the ceremony; as for the charge of showing a lack of empathy, he reminded his Slovakian partners that a year earlier, on the occasion of the 40th anniversary of the military aggression against Czechoslovakia, he had expressed his deep regrets over the incident. A few hours prior to the unveiling of the statue, Robert Fico declared that he regarded the visit as a provocation and denied the Hungarian President the right of entry to Slovakia. In accordance with this, the Slovakian Ministry of Foreign Affairs presented Hungary's Ambassador to Slovakia with a diplomatic note, in which László Sólyom's entry into Slovakia was formally prohibited. After having been informed of the content of the note, the President decided not to cross into Slovakia through the Elisabeth Bridge across the Danube: instead, he walked as far as the midpoint of the bridge and then turned back. "I will turn back now, because they cannot push me into committing a deliberate legal violation, with me being a legal scholar and a President," he commented.[3]

8.2 Procedural History

Naturally, between the incident and the start of the legal procedure, a number of diplomatic steps had been taken to settle the dispute. There was a continual exchange of diplomatic

3 In original: "Visszafordulok, mert nem tudnak engem egy tudatos jogsértésbe belehajszolni, hiszen jogász vagyok, államelnök vagyok." <www.solyomlaszlo.hu/kozlemenyek20090821_sajtonyilatkozat_komarom.html>.

memoranda between the two countries; parallel with that, the Hungarian Prime Minister Gordon Bajnai and his Slovak counterpart Robert Fico met in the Hungarian town Szécsény near the border on 10 September 2009, when they signed a rather cautiously worded statement, in which the politicians expressed their regrets over the unfortunate circumstances of László Sólyom's visit to Slovakia. Still on the same day, in response to an earlier Hungarian letter, the Vice President of the European Commission, Jacques Barrot, admitted that the right to free movement can only be limited proportionally, and any restrictions or limitations must be based exclusively on the personal conduct of the individual concerned. At the same time, he was of the opinion that the enforcement of Directive 2004/38/EC[4] should primarily be the concern of the national courts of law. Hungary resorted to a legal remedy only after exhausting these possibilities. Following the diplomatic incident, the Hungarian state filed a case with the Commission, requesting it to determine that the incident established a failure to fulfil an obligation under EU law. This was rejected by the Commission in December 2009, on the grounds that "official visits by the head of one Member State to the territory of another Member State do not come under EU law and […] Member States retain full control of their bilateral diplomatic relations." For this reason, Hungary filed a case against Slovakia on its own. The Commission intervened in support of the form of order sought by Slovakia.

A judgment unfavourable for Hungary could be anticipated in light of the opinion submitted in March 2012 by Advocate General Yves Bot, who recommended the rejection of the application.[5] While admitting that the EU citizens' movement between member states was controlled by EU law, he held that the same did not apply to the foreign visits of heads of state, as the competence in that regard had not been conferred upon the EU by the member states. Under the principle of conferral[6] the Union could only act within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein. All other competences should remain with the member states. From the fact that the Treaties do not regulate the issue of the heads of states' entry into the territories of the member states, the Advocate General drew the conclusion that this competence was reserved for the member countries. The Advocate General himself recognized the logical snag in the argument, whereby the Treaties had no separate provisions for heads of states, whereas they were very clear about the rights of Union citizens – and

4 Directive 2004/38/EC of the European Parliament and of 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.

5 Opinion of Advocate General Bot delivered on 6 March 2012, Case C-364/10, *Hungary v. Slovak Republic* (hereinafter referred to as "Opinion").

6 According to Art. 5 Section (2) TEU "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

the heads of states obviously also fell into that category. For this reason, AG Yves Bot also backed up his case using a different instrument, the Court's case law based on an earlier judgment, *i.e.* the ruling in the *Commission v. Belgium*[7] case, which established that the member states retain the right to regulate their diplomatic relations even after joining the European Union.[8]

At the same time, the Advocate General emphasized that the member states should not exercise their competences – including their diplomatic competence – in such a manner that might lead to a lasting break in diplomatic relations between two member states, because such a break would, in fact, be incompatible with the idea of "an ever closer union among the peoples of Europe", as declared in the Preamble of the Treaty on the European Union (hereinafter referred to as "TEU"), and could jeopardize the attainment of the Union's objectives as set out in Article 4(3) TEU.[9] Thus AG Bot recommended that the application be dismissed on the grounds of lack of conferral.

8.3 The Judgment

In its decision delivered on 16 October 2012, the Court declared that in his capacity as a Hungarian citizen, László Sólyom unquestionably qualified as a Union citizen, which guaranteed him the right to reside and to move freely within the territory of the European Union. Naturally, freedom of movement is not a right without possible limitations, as seen in the case of the Directive 2004/38/EC formulated on the freedom of movement, which itself permits the limitation of that right on the grounds of public policy, public security and public health. In the case under consideration none of the above risks applied. The Court allowed the possibility of limitations on other grounds. According to the reasoning, the legal status of heads of states was regulated under international law, and in its earlier rulings the Court had already declared that EU law had to be interpreted together with international law, since international law formed part of the EU *acquis*.

According to the Court, in cases where EU law cannot be interpreted in accordance with international law, on account of a clear conflict between the two sets of laws, international law must be given precedence. International law, particularly a country's right, guaranteed under international law, to deny a foreign head of state the right of entry to its territory, therefore enjoys precedence over EU law and, in relation to heads of state, overrides the right guaranteed to all Union citizens to enjoy freedom of movement, which had been

7 Case C-437/04, *Commission v. Belgium*, 22 March 2007.

8 Opinion, *supra* note 3, paras 50-52. Interestingly the Court failed to mention Art. 45 of the Charter of Fundamental Rights on freedom of movement and of residence.

9 Opinion, *supra* note 7, paras 58-60.

enshrined as a fundamental freedom under Directive 2004/38/EC and was incorporated in the Lisbon Treaty, most notably in Article 21 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU)[10] on Union citizenship.[11]

The Court also rejected the Hungarian argument which claimed that Slovakia's denial of the Hungarian President's entry to the territory of the Slovak Republic itself constituted an abuse of right, as developed in the jurisprudence of the Court,[12] in the sense that the Slovak party used EU law to express political hostility, and referred to the stipulations about public policy and public security in Directive 2004/38/EC merely to achieve a political objective.

The Court held that evidence of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules had not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the European Union rules by creating artificially the conditions laid down for obtaining it. The Court then held that in the case at hand the objective condition was not satisfied, in other words, the Slovak party was saved, paradoxically, by the fact that it violated EU law not indirectly but directly, as it formally disregarded EU law, because, according to the Directive, the competent national authorities should have passed a decision on the limitation of the right to free movement, of which they then would have had to notify László Sólyom in the appropriate form. Nor has the subjective condition been fulfilled, since a mere reference to the Directive will not make it applicable to a factual situation which is not regulated by law. Therefore, since any reference to the Directive is completely nonsensical, it is unsuitable for the perpetration of an abuse – if we are allowed to borrow a term from the field of criminal law.[13] The Court also rejected Hungary's claim that a danger of future, repeated violations of EU law exists. The Court's rejection of the Hungarian claim was based on the grounds that, according to Article 259 TFEU as clarified by the case law of the Court,[14] the purpose of investigating a failure to fulfil an obligation was not to adjudicate in abstract, hypothetical situations, but to determine and to eliminate an infringement of EU law by a member state. Since the potential danger of a future violation of EU law does not in itself constitute an infringement of EU law, the Court turned down Hungary's request to deal with the issue.[15]

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10 According to Art. 21 TFEU (ex Art. 18 TEC) Section (1) "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

11 *See* Judgment, *supra* note 3, paras 40-52.

12 Case C-110/99, *Emsland-Stärke*, 14 December 2000.

13 *See* judgment, *supra* note 3, paras 56-61.

14 For the first time the European Court of Justice stated this in Joined Cases 15/76 and 16/76, *France v. Commission*, 7 February 1979.

15 *See* judgment, *supra* note 3, paras 62-69.

Finally, the Court also rejected Hungary's request to specify, in the eventuality of a ruling against Hungary, the categories of EU citizens to whom the limitations of the freedom of movement apply under international law: this complaint was rejected on the grounds that a procedure under Article 259 TFEU is not meant to provide an interpretation of EU law, nor is it designed to assess the extent to which EU law can be applied to factual situations at variance with the case under discussion. Since the dispute between Hungary and the Slovak Republic concerned the President of Hungary only, and not any other categories of Union citizens, the Court was unwilling to examine what other groups of EU citizens could have their rights curtailed by possible references to international law in a future, hypothetical legal procedure.[16]

8.4 The Essential Conclusions from the Viewpoint of the Evolution of European Law

8.4.1 The Hierarchy of Laws

In its reasoning, the Court referred to its earlier case law, where it had found that EU law should be interpreted together with international law, since the latter forms part of the *acquis communautaire*. With regard to the *Sólyom* incident, this obligation was interpreted by the Court to mean that in the case of a conflict between international and EU laws, the former shall take precedence. However, in *Kadi versus EU Council and the Commission of the European Communities*,[17] which was cited as a precedent, the Court had reached a contrary conclusion on the conflict of EU law and international law. The *Kadi* case was filed by persons suspected of financially supporting terrorism. Their names were added to a list of suspected terrorists, which was to be maintained and updated by the Sanctions Committee, a body set up under the UN Security Council. The EU executed the respective UN Security Council Resolutions *inter alia* in Regulations, which provided for the freezing of the funds of those natural and legal persons that appeared in a list annexed to the respective Regulation repeating the list of the UN Security Council Resolutions However, there was no possibility of judicial review to contest the validity of the list. Reflecting on the subject of the hierarchy of laws and the relationship between EU and international law, Advocate General Miguel Poiares Maduro commented that the autonomy of the former shall not mean that "the Community's municipal legal order and the international legal order pass by each other like ships in the night. […] Yet, in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by

16 *See* judgment, *supra* note 3, paras 70-71.

17 Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 3 September 2008.

reference to conditions set by Community law."[18] Although the language used in the judgment is by definition less literary, the European Court reached the same conclusion[19] – in disagreement with the judgment of the Court of First Instance[20] – when it stated that the UN Security Council Resolution was created without providing a statement of grounds to be included to the list or without giving the possibility of hearing to the persons concerned. As a result, in the course of the procedure that led to the adoption of the Regulation, not only was the appellants' right to defence violated, but – in this context – the principle of their right to effective judicial protection[21] was also ignored, along with their right to property due to the freezing of their funds.[22] The Court stated, in accordance with the proposition of the Advocate General, that the EU's international obligations must be in violation of neither the constitutional principles of the Community nor the rule of law nor any of the fundamental rights, including the effective judicial protection or the right to a defence.

Since by giving precedence to international law, the Court came to an adverse decision in László Sólyom's case, we have to presume that the right to free movement, which is one of the fundamental freedoms, does not fall under the category of fundamental rights but creates a weaker entitlement. In this respect, it is rather telling that the Court failed to construe the case as a fundamental rights problem by referring to free movement as enshrined in the Charter of Fundamental Rights.[23]

This was in fact in line with the earlier rulings of the Court's case law,[24] which stated that fundamental freedoms, that is to say the free movement of persons, goods, services and capital, are weaker than fundamental rights, and whenever there is a conflict, the former is to be limited to the advancement of the latter. After examining the differences between the judgment of the *Kadi* and the *Sólyom* cases, we have to conclude that international law is wedged between fundamental rights and fundamental freedoms, and it while cannot lead to the degradation of the fundamental rights, whereas it can trump fundamental freedoms.

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18 Opinion of Advocate General Poiares Maduro delivered on 16 January 2008 in Case C-402/05 *P, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, paras 22-23.

19 *Supra* note 17.

20 Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 21 September 2005.

21 *Ibid.,* para. 352.

22 *Ibid.,* paras 354-371.

23 *Supra* note 8.

24 Case C-36/02, *Omega* [2004] ECR I-9609, and C-112/00, *Eugen Schmidberger Internationale Transporte Planzüge v. Republik Österreich* [2003] ECR I-565. On the relation between fundamental rights and fundamental freedoms *see* Alberto Alemanno, "A la recherche d'un juste e'quilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur. Quelques reflexions à propos des arrêts 'Schmidberger' et 'Omega'" (2004) *Revue du droit de l'Union européenne*, 4; C-112/00, Eugen Schmidberger, *Internationale Transporte und Planzüge kontra Republik Österreich*, 12 June 2003.

8.4.2 Other Instruments for the Court's Self-Limitation

8.4.2.1 Phantom International Law

In order to paint a fuller picture, we must point out that in comparison to László Sólyom's case, the Court in some sense had an easier job adjudicating on the *Kadi* case, where the judicial review only concerned an EU act executing international law, and resulted in a judgment unequivocally confirming that the determination of an infringement of law could not be used to question the precedence of international law.[25] By contrast, László Sólyom's case produced no implementing "internal" Union norm whatsoever, and therefore the Court found itself in direct conflict with international law.

The only question is what international law? This is the point at which the edifice of the legal reasoning seems to be crumbling. The truth is that none of the documents invoked by either Slovakia or the Court addresses the issue of a head of state's entry to another country's territory. The diplomatic note barring László Sólyom from entering Slovak territory on 21 August 2009 is a telling one in this regard, insofar as the Slovak Foreign Ministry also failed to invoke any document of international law in support of its actions and, unable to produce any instrument of international law of relevance, it finally relied on Directive 2004/38/EC – erroneously, as it turned out, even by Slovakia's own admission, because László Sólyom obviously never posed any risk to the public policy, public security or public health of Slovakia.

The only international norm mentioned by the judges, the New York Convention of 1973,[26] has nothing to say about the movement of heads of state, either. For the Convention to have any relevance at all, Slovakia would have had to argue that in view of the rising tension prompted by the timing of the visit, the state was unable to guarantee its obligation under the New York Convention, *i.e.* it could not vouch for the safety of the Hungarian President, or more specifically, it was unable to prevent the commission of a crime against an internationally protected person, László Sólyom. Nevertheless, neither Slovakia nor the Court invoked, or were in the position to invoke, the same Convention, since the Slovak police issued a communiqué[27] on the morning of 21 August 2009, assuring the world that if László Sólyom chose to cross the border, they would be able to guarantee his personal safety.

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25 Since the regulation annulled transposed the international norm literally, the Court of course at the same time expressed its opinion on the latter as well. This however does not have any direct legal consequences, only perhaps informally. Mr. Kadi has most probably been removed from the Sanction list on October 2012 partly due to the European pressure confirming the opinion of AG Maduro that the EU and the international legal orders do not pass by each other unnoticed. *Supra* note 18.

26 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973.

27 "Ráno pred komárňanskými udalosťami však slovenská polícia prijala vyhlásenie, že pre prípad, že by sa prezident Sólyom rozhodol nerešpektovať diplomatickú nótu MZV a prekročil slovenské hranice, bola, pripravená poskytnúť mu počas pobytu na Slovensku ochranu'. Tento kľúčový fakt sa však do pondelňajšieho rozhodnutia nedostal." ("In the morning before the Komarno case the Slovak police issued a communiqué

Furthermore, the judgment also refers to certain customary international law, which allegedly regulates the legal status of the heads of state, but beyond the mere mentioning of the existence of these customary law rules, the judgment said nothing explicit about the associated rules, sources and contents.

Naturally, if any such legal instrument of international law or any regulation of customary law did exist, then in view of the hierarchical relationship of international law and European Union law the former would override the latter. To put it differently, the rights deriving from Union citizenship, as well as the limitations to the free movement of individuals, could be determined not only by EU law, but also by the provisions of international law. For example, the armed forces of a member state cannot vindicate the right to hold a military exercise in the territory of another member state by invoking the right to free movement, since international law has precedence over EU law and it is the former that has the competence to regulate the issue.[28] In such cases, therefore, international law overrides the rights deriving from EU citizenship, including the individuals' right to free

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according to which they 'will be ready to grant him protection during his stay in Slovakia', should László Sólyom decide not to respect the diplomatic note of the Ministry of Foreign Affairs and chose to cross Slovakian borders") 'Kubo Mačák: Verdikt v kauze Sólyom: tri chyby krásy', *SME* <www.komentare.sme.sk/c/6573595/verdikt-v-kauze-solyom-tri-chyby-krasy.html>.

According to the similar Statement of 20 August of the Ministry of Foreign Affairs: "Na bezpečnosť maďarského prezidenta Lászlóa Sólyoma počas jeho súkromnej návštevy Komárna, ktorú ostro kritizovali viacerí politici na Slovensku, bude dohliadať aj slovenská strana. Zabezpečenie návštevy patrí k bežnej diplomatickej praxi a vyplýva z medzinárodných konvencií, informoval hovorca ministerstva zahraničných vecí Peter Stano. O poriadok v Komárne sa budú starať aj mestskí policajti, vedenie mesta údajne požiadalo o spoluprácu aj štátnu políciu. (…) 'Ministerstvo zahraničných vecí, rovnako ako pri každej inej návšteve zahraničného hosťa bez ohľadu na úroveň návštevy, technicky zabezpečuje pobyt danej osoby na slovenskom území,' uviedol Stano. Poznamenal, že povinnú ochranu má na starosti Úrad pre ochranu ústavných činiteľov."

("The Slovakian authorities will also supervize the safety of the Hungarian head of state, László Sólyom during his visit harshly criticized by several Slovak politicians. Securing the visit is part of the traditional diplomatic practices and flows from international conventions, informed us Peter Stano, the spokesperson of the Minisry of Foregn Affairs. The Komarno municipal police will also guarantee security, and the leaders of the town allegedly requested the cooperation of the state police. (…) 'A Külügyminisztérium, ugyanúgy mint minden más külföldi vendég látogatása során, függetlenül a látogatás szintjétől, technikailag biztosítja az adott személy tartózkodását Szlovákia területén,' said Stano. He also noted that the Office for the protection of the public figures and diplomatic missions of the Ministry of the Interior is responsible for the protection of the head of state.") The Statement appeared in various newspapers and the world wide web. It can be accessed electronically through for example: <www.pluska.sk/old/aktuality/o-bezpecnost-solyoma-postara-aj-slovenska-strana.html>; <www.topky.sk/cl/10/540156/sekcia.html>; <www.cas.sk/clanok/128207/na-bezpecnost-solyoma-bude-dohliadat-aj-slovenska-strana.html>.

I owe special thanks to Edina Tóth for translating the Slovak originals.

28 The NATO SOFA Convention for example talks about "sending" and "receiving" state, *i.e.* at least two state acts are needed for the border crossing of troops. *See e.g.,* Art. II of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces: **"**It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the *receiving* State. It is also the duty of the *sending* State to take necessary of measures to that end." (emphasis by author)

movement, insofar as a Union citizen serving in the army of a member state cannot cross the inter-state borders freely in his or her capacity as a soldier.

The lack of relevant references in the Judgment of *Hungary v. Slovak Republic* almost gives the illusion that the Court invoked a "phantom" international law and then combined it with the precedence of international law over EU law in order to allow for the possibility of limiting the fundamental freedoms, rather than taking a definite stance in a conflict between member states.[29]

Naturally, the Court was also aware of the problem and it came up with a solution that was a stroke of genius in logical reasoning: it avoided to write down that the entry of heads of state was regulated by international law, because no such norm existed. Instead it used the following argumentation: since according to the New York Convention the heads of states are entitled to protection while visiting foreign countries, therefore the status of a head of state is a special one. As a consequence of this special status, the conduct of heads of states in an international setting, such as a foreign visit, for example, is governed by international law, and more specifically by the rules of diplomatic relations.

Such a chain of logic inevitably poses the question – and immediately leaves it unanswered – that can be phrased as follows: How closely should international law fit the facts before we can declare that the case is governed by international law? With regard to László Sólyom's case, this fit is rather loose – with some exaggeration we can say: the mere existence of any international treaty mentioning heads of states in any context allows for the limitation of EU law. A further question that needs to be addressed is this: Do heads of states, upon entering office, cede all their rights deriving from EU citizenship or do they need to relinquish only some of the privileges, such as free movement, for example?

8.4.2.2 From Front Runners to Last Ones to Finish

If one interprets the judgment with the benefit of doubt, the Court seems to address the above questions in a half-sentence, or a hint between the lines. In addition to declaring that the status of heads of states are regulated by international law – that would have provided sufficient legal grounds for the judgment – the Court in fact also added that international customary law and international treaties, most notably the New York Convention, confer "privileges and immunities" on the heads of states.

Since the Court failed to follow up on this line of reasoning, we can only surmise that it implicitly adapted the Slovak argument whereby, if it were to be accepted that both international law and EU law applied to the heads of states, then

> "the Head of State of one Member State would enjoy privileges [meaning the freedom of movement based on, and guaranteed under, EU law, which is a

29 Interestingly Advocate General Bot acknowledges the lack of international norms, nevertheless comes to the conclusion that the status of the heads of states is regulated by international law and customs. *See* Opinion, *Ibid.* note 5, paras 55-56.

> privilege in comparison to the general provisions of international law] 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 [meaning that heads of states cannot be expelled]. 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."[30]

Therefore, in arguing for the legal possibility of limiting the heads of states' right to free movement, the Slovak side referred to a rather narrow category of cases, those involving expelling a Union citizen, or the impossibility thereof, rather. Under EU law, however, expelling an EU citizen is only possible in an exceptionally small number of cases, which require precisely defined conditions and must be carried out according to a well-defined procedure. Therefore, the basis of this legal reasoning entails a possible scenario, under which the risks of public policy, public security or public health did not exist at the time of the Hungarian President's entry into Slovakia (if they had existed, his entry could have been denied on the basis of EU law), and these risks only materialized during his stay in the foreign country; in addition, some other, very strict conditions of EU law – not to be discussed here – were also fulfilled, the simultaneous coexistence of which would make it possible to expel any EU citizens but heads of states. It is not the aim of the present study to evaluate the *Sólyom-incident* from the viewpoint of diplomatic relations, but since it constitutes the cornerstone of the Court's reasoning, it is worth pointing out that the basis of the Slovak argument, which the Luxembourg forum seems to have adopted, is a highly improbable scenario, one that is anything but constructive from the viewpoint of diplomatic relations, involving a head of state who, during the few hours of his visit, commits crimes, for which an ordinary EU citizen would be expelled.

Therefore, a contrary reading of the judgment will leave us with the conclusion that neither customary law nor the New York Convention, *i.e.* the two legal sources that form the basis of the Court's reasoning, has any relevance regarding the movement of heads of states (phantom international law), while if we give the judgment a sympathetic reading and assign significance to the invocation of "privileges and immunities", we shall conclude that the increased protection offered to heads of states (under international law), coupled with the theoretical possibility of the materialization of a highly unlikely scenario, provides the grounds for a serious limitation of rights (under EU law).

A President Day-and-Night

The Court emphasized that the obligation under international law to provide protection to a visiting head of state is independent of the capacity in which he or she stays in the

30 *See* judgment, *supra* note 1, para. 37.

host state. The only way to interpret this is to say that a head of state can never travel as a "civilian", as he is entitled to the privileges regardless of the capacity in which he is travelling. In this way, the Court has managed to steer clear of the controversy about whether the President was on an official visit or a private trip by declaring that making such a distinction simply made no sense.

I find the Hungarian President's argument, in which he pointed out that he had been on a private trip, a rather weak one. The nature of the visit was obviously not determined by the President's way of looking at it subjectively. From an objective viewpoint, it would be hard to imagine a visit more official than one which takes place during a country's national holiday, or the day after it, prompts an exchange of diplomatic notes, and entails an incumbent President hoping to attend the ceremonial unveiling of a statue representing the founder of his own country.[31]

Nevertheless, I hold the view that is implied by the Court's judgment, whereby a head of state can never travel as a private citizen while in office, not even when he or she goes on a family holiday or attends a family wedding or funeral.

8.4.2.3 Privileged Individuals Deprived of Their Rights

The judgment leaves the question unanswered how those individuals – beyond heads of states – can be identified who are deprived of their rights derived from Union citizenship due to their heightened protection by international law. The Convention does not offer any guidance in this regard either, since its formulation is rather vague: apart from the heads of states, the text acknowledges the head of government, the minister for foreign affairs, whenever any such person is in a foreign state, any representative or official of a state, any official or other agent of an international organization of an intergovernmental character, as well as members of their family who accompany them as "internationally protected persons".[32]

We cannot derive from the text with certainty whether they are protected "night and day" just like heads of states, or in case they are not, it is extremely difficult to determine when they are granted protection and when they are private person Union citizens. The Court did not offer any guidance in this respect despite the fact that the Hungarian government expressly requested the judges to do so in its action brought against the Slovak Republic.[33]

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31 Taking all circumstances of the case into account, AG Yves Bot also comes to the conclusion that the planned visit was of an official nature. Opinion, *supra* note 5, paras 48-49.

32 New York Convention, *Ibid.,* note 26, Art. 1 Section (1).

33 "If in the case of the entry of a citizen of a Member State to another Member State a provision of international law could restrict the personal scope of Directive 2004/38, it would be necessary for the Court of Justice to define the extent of that restriction plainly, in view of the fact that Directive 2004/38 does not contain such an exception or derogation." Action brought on 8 July 2010 – *Republic of Hungary v. Slovak Republic* (Case C-364/10), *Official Journal,* 2004 L 158, 77.

Certainly, the infringement procedure under Articles 258-259 TFEU is not designed for abstract review, nevertheless one has to acknowledge that the Court left a *lacunae* with regard to the personal scope of the exceptions. The Court could have prevented this criticism along with all the above ones, had it decided to follow a different line of argumentation. In the next chapter, I will describe three possible reasoning, the second and third of which would have been viable in my view, and the first being an interesting game of mind only.

8.5 'Concurring Opinions'

The Court renders collegiate judgements, therefore there are naturally no minority opinions. In a scholarly article, however, one has the freedom to think of alternative ways of reasoning. In the following I will offer three possible lines of argumentation and explore whether they might have been followed in order to reach the same outcome the judges in the actual case arrived at. I will not offer however any "dissenting opinions", as I do not wish to take a stance on the wisdom of the operative part. The importance of the case lies in the fact that it rendered an opportunity for the Court to draw the boundaries of the powers of the EU lawmaker and the contours of Union citizenship, and to determine the depth of integration. From the viewpoint of the development of EU law the decision which state party to the case was at fault is less relevant. The Court had a free hand, since black letter Union law did not provide clear guidance, and at the same time banning the entry of a member state's head of state into another EU country was unprecedented, therefore there was no case law on the matter either. In light of this it is more than regrettable that the reasoning of the judgment is crumbling all over, numerous questions are left unanswered, and what is more, new questions have been created that are also left open by the Court.

The Court was absolutely not forced to invoke a judgment where only a sentence underpinned its stance,[34] but the spirit of which went against the outcome of the decision in *Hungary versus the Slovak Republic*. Had the Court followed a different line of reasoning, the question would not have emerged what it meant for a subject matter to be regulated by international law, *i.e.* how remote or how relevant the international norm had to be in order to be able to conclude that the facts of a case were covered by international law. Since the international norm cited by the Court is hardly applicable to the facts of the case under scrutiny, nevertheless still overwrites free movement rights as derived from Union citizenship, it is legitimate to ask which other elements of Union citizenship can be limited based on the cited international laws or customs or perhaps other such norms.

34 *Kadi*, *see* note 17, para. 291: "In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers"

A further issue where the Court left us in the dark is the personal scope of those individuals privileged and therefore deprived of the rights flowing from Union citizenship. Finally, neither would there have been any need for the Court to indirectly adopt the extremely hypothetical and, from a diplomatic viewpoint, less than helpful argument based on the claim that if during his stay in Slovakia László Sólyom had committed some crimes for which an ordinary EU citizen would have been expelled from Slovakia, then the application of EU law to his case would have implied that he would be getting a twofold – and therefore impermissible – protection.

As is so often the case, a little less would have been more. The same outcome that was eventually reached, could also have been achieved without the Court ever considering the merits of the case, and no logical snags would have been produced, either. There were several options to do that. In the following we shall outline a few parallel, but professionally more valid approaches to rejecting the Hungarian application.

8.5.1 The No-Case Scenario

In a Cassandraic newspaper article written three weeks after the incident, Mátyás Eörsi seriously warned against taking any legal action in the matter, while pondering over the likelihood of losing the case. In his opinion, the Court could have short-circuited the case, had it refused to consider its merits on the grounds that the President never attempted to cross the border and, therefore, no infringement of law had taken place.[35] There would have been no need for the Court to debate the legal aspects of the case right until the next – and hopefully very distant – incident, when a member state actually intervenes in order to prevent the head of state of another EU country from entering its territory.

While the observation is unquestionably a pointed one, in my opinion it is not quite accurate, because in EU law the lack of "case or controversy" in itself does not necessarily establish a case for dismissing an application. While it is true that according to Article 259 TEU the objective of a legal proceeding filed for failure to fulfil an obligation is to determine and to stop[36] a breach of EU law by a member state, we have seen that in some cases even the mere existence of a national law implemented improperly or beyond due time, or in conflict with an EU law, can constitute an infringement of EU law. Therefore, we should examine whether the decision to ban the Hungarian President from crossing the border between Slovakia and Hungary itself is a breach of EU law, regardless of whether or not László Sólyom actually attempted to cross the border in the concrete case. If we find that

35 Mátyás Eörsi, 'A Bajnai-Fico találkozó elé' [Notes on the Bajnai-Fico meeting] 10 September 2009, <http://nol.hu/velemeny/20090910-a_bajnai-fico_talalkozo_ele>.

36 *See* note 14 *supra*.

it does not constitute an infringement, then the "no case" argument will hold water, and had the Court resorted to this course originally, all the problems described above could have been avoided.

First of all, it is worth making a list of all the possible forms that the prohibition of entry can take. For the sake of argument, let us assume that Slovakia passes a law, which prohibits the incumbent President of Hungary from crossing her borders on the 21 August of the given year. If a member state wanted to have its own domestic laws upheld, would it be possible for that state to argue that the issue had been regulated under international law? In other words, could that country refer to the fact that diplomatic relations are regulated under international law, and that international law takes precedence over EU legislation, even if it tried to use non-diplomatic means – *i.e.* legislative acts – to solve a diplomatic problem? Regardless of how we answer this question, from the viewpoint of the present study all that must be remembered is that the authority to interpret the range of areas where EU law is applicable clearly belongs to the Court, with the result that Luxembourg would have no option but to consider the merits of the case.[37]

The concrete situation, is, of course, much simpler than the hypothetical scenario outlined above, since Slovakia actually used diplomatic channels to settle a diplomatic dispute. The second question arises as to whether the Court can look upon the diplomatic note prohibiting the Hungarian President's entry into Slovakia (or more generally, upon any exchanges of diplomatic messages) as a legally inconsequential "correspondence" between states, thus finding an excuse to avoid discussing the merits of the case? I am of the opinion that it is not the form of regulation that elevates a case to the level of a diplomatic incident, thus rendering it to be the subject of regulation under international law. For example, even if Slovakia was to argue that the entry of Hungarian citizens in general offended both the sensitivity of the Slovak public and the dignity of the commemorations of 1968, the Slovak state could still not prohibit the entry of Hungarian citizens to Slovakia through diplomatic channels. The fact that the action of banning took place in the form of a diplomatic note would not save the member state from the judicial scrutiny of the Luxembourg court. I believe that the simple fact that the member states choose to limit the rights of EU citizens in a form other than that of a legislative act, will not exempt them from judicial review by Luxembourg. If, for example, the free movement of EU citizens were to be limited by an internal police order, that would be just as problematic (even more problematic, I should say) as it would be had it been done by a member state in a legislative act. Therefore, Luxembourg would definitely have to address the question whether the content of the note came under the regulation of international law, which would, once again, take us to back to the Court's obligation – apparently a difficult and a painful one – to consider the merits of the case.

37 *See* judgment, note 1, paras 24-26.

Can the above reasoning still be salvaged somehow? Would it not be possible to argue that the diplomatic note is legally irrelevant and, as such, must be dismissed from a judicial review, with reference to the fact that even the Slovak partner did not assign any legal consequence to the note prohibiting the entry? This is also supported by Robert Fico's comment, who publicly said that if László Sólyom had nevertheless decided to cross the border, Slovak law enforcement would have made no attempt to stop him by physical force.[38] Could Luxembourg argue that the Slovak partner, too, interpreted the note as a symbolic message without legal consequences, and therefore a real conflict between the rights flowing from EU citizenship and international law could not have arisen even if the Hungarian President decided to cross the border in the face of the diplomatic note?[39] If we arrived at that conclusion, we would, indeed, be entitled to claim not only that there had been a "no case or controversy", because László Sólyom turned back just in time, but also that the diplomatic note could not have formed the basis of judicial review, and therefore it truly would have been a 'no case' scenario. My view is that the fact that Robert Fico practically asked the authorities to ignore the existence of the diplomatic note, does not save the situation, since there was always a theoretical possibility that he could change his mind in the last moment and stand by the content of the note.

For this reason, I think that the Court was not in the position to invoke the "no case" option by saying that there had been no border crossing and no new norms had been presented for Luxembourg to review. In the light of the above, the latter would be impossible to prove anyway. There were, however, two alternative courses, which would have enabled the Court to elegantly bypass the need to rule in the dispute, while also making it possible to steer well clear of the snags described in the first chapter.

8.5.2 The Missing Conferral of Competences

It was the Advocate General, Yves Bot, himself who came up with a workable solution to the problem in his cleverly worded Opinion. He started out from the fact that, according to the principle of the conferral of competences laid down in the Treaty of Lisbon, the Union was only empowered to regulate issues for which the member states had conferred

38 <http://en.wikipedia.org/wiki/2009_ban_of_Hungarian_President_from_Slovakia#cite_ref-15>.

39 The situation would have been different, had the legislator decided to codify the ban into law, for example by passing an act prohibiting the Hungarian head of state to cross the borders on 21 August and other dates sensitive from the point of view of Slovakian history. In this case it would probably have been insufficient to refer to the fact that the prime minister or other leading statesperson called for non-execution of the law. In such cases the potentiality of the threat would have been sufficient for the determination of a breach of EU law – unless of course the Court found some other ways out instead of going into the merits. Alternatives are discussed *infra*.

the competence.[40] Since, however, the member states do not regulate the issue of the heads of states' entry to the territories of other member states, this competence stays with the member countries. Unlike the Court, the Advocate General made a distinction between an official visit and a private trip: if László Sólyom had wished to go to Révkomárom as an EU citizen, the situation would have been different, but since according to the Advocate General he travelled in the official capacity of the head of the Hungarian state, he was bound by the rules of diplomatic relations, which were outside the competences of the EU. According to his incisive reasoning, this case was about diplomatic relations, rather than the free movement of individuals, and therefore the EU did not have the competence to settle it. However, the Advocate General's opinion also has the potential of opening up a Pandora's box. How many more areas could there be still, where the instance of an EU citizen crossing one of the EU's internal borders, or even a Schengen border, cannot be construed as an issue of the EU citizens' freedom of movement?

The Court's judgment did not adopt the Advocate General's argument, perhaps because he had taken a very firm line on a politically highly charged issue, that is to say, on the question whether the law of diplomatic relations, which is at the core of the member states' national sovereignty, can be overwritten by EU law, thus also reviving the debate on the extent, to which the law is a suitable tool for settling diplomatic disputes, or in the final analysis, political controversies.[41]

8.5.3 The Political Question

Even the unpleasantness arising from the announcement of the lack of conferral of competences could have been avoided, had the Court stated openly what this case was really about: the Court was in fact unwilling to render a diplomatic conflict between two member states subject to EU law. Luxembourg could have taken inspiration from the US "political question doctrine",[42] according to which the US courts agree to show self-restraint by not questioning sensitive issues in the areas of foreign politics and international relations. In the Union legal order, it is the institutional balance between the European Parliament, the Council and the Commission that ensures that three distinct, potentially conflicting interests are taken into account: that of individual Union citizens, the sovereign member states and the supranational *sui generis* entity, the European Union. Judicial scrutiny is capable of adding to one or the other dimension, but most importantly for the present

40 TEU, Art. 5 Section (2), *see* note 6.

41 N. Nic Shuibhne, "Editorial: 'And those who look only to the past or the present are certain to miss the future", 2 *European Law Review*, 2012, pp. 115-116.

42 US Supreme Court, *Marbury v. Madison*, 5 U.S. 137 (1803), *Baker v. Carr*, 369 U.S. 186 (1962).

analysis, it is the ultimate safeguard of rights, including rights flowing from Union citizenship. As the development of European citizenship has shown, the Court as "one of the main engines of European integration",[43] was able to turn "citizenship lite"[44] into a concept that came closer to the ideal of being the "fundamental status of nationals of the Member States"[45] which may indeed reflect the shared values of a European demos.[46] One shall also trust the Court to be able to recognize once a subject matter is ill-suited to judicial review. As to what it is precisely that turns a problem that constitutes the basis of a legal procedure into a "political question", we must see that it is something for the Court to determine; the US experiences show that it requires a system of criteria broad enough to provide sufficient manoeuvring space for the courts. At the same time, the judges can view this room of manoeuvre as an opportunity to avoid ruling in difficult cases with even a hint of political sensitivity. The Luxembourg Court may have tried to dodge the very possibility of such an accusation, but the European solution they opted for is hardly less problematic: on the contrary, it uses a questionable legal argument and risks undermining the consistent European Union legal order with a dubious reasoning just to conceal the underlying motive for the judgment,[47] which is none other than a desire to avoid considering the merit of cases that involve diplomatic conflicts between member states, or "political questions" in the language of the US doctrine.

43 J. Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', *in* P. Craig & G. de Búrca (eds.), *Evolution of EU Law*, Oxford University Press, Oxford, 2011, pp. 575-609, at p. 581.

44 *Ibid.,* p. 581.

45 As desired in *Grzelczyk* first: "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for." (Case C-184/99, *Grzelczyk* (2001), para. 31) In a recent set of case law the Court diverted European citizenship towards a "Grundfreiheit ohne Markt" to some extent detaching Union citizenship from the exercise of free movement as far as genuine enjoyment of the substance of citizenship rights would be hampered. Case C-135/08, *Janko Rottmann*, Case C-34/09 *Ruiz Zambrano*, Case C-434/09, *McCarthy*, Case C-256/11, *Dereci See also,* F. Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration', 1 *European Law Journal* 17, 2011, pp. 1-34 or the article by Laura Gyeney in the present volume.

46 J.H.H Weiler, 'To be a European citizen – Eros and civilization', 4 *Journal of European Public Policy* 4, 1997, pp. 459-519.

47 For another recent example, when the Court's "attention is devoted to one particular hazard [and too easily] falls into another", *see* J. Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy', 14 *German Law Journal* 2013, pp. 169-190.