# 9 International Law at the European Court of Justice: A Self-Contained Regime or an Escher Triangle

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The relation between international law and domestic law has long troubled lawyers, who ever had to investigate such questions. When the law of the European Communities and subsequently that of the Union entered the scene, a new layer of this old problem appeared. Regardless of the monist or dualist approach, followed by the member states in relation to international law, European law has been afforded special treatment in most national constitutions. EU law text books usually explain this special character of Union law along the lines of the *Van Gend en Loos* case, where the Court ruled, that "the Community constitutes a new legal order of international law".[1]

In the spotlight of the general media, the Court was repeatedly faced with the problem stemming from the conflict between fundamental EU norms and practically intransgressible international norms (UNSC resolutions) in the series of the *Kadi* and *Al Barakat* cases.[2] Recently, the Court handed down a judgment in a case involving a failed visit of the then incumbent President of Hungary to Slovakia.[3] It is very likely, that this event – causing a temporary tension between two small Eastern-Central European countries – will long be forgotten, when this judgment may still be cited as a reference on the relationship between European and international law, since in this case the Court ruled, 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".[4]

Together, the *Van Gend en Loos* and the *Sólyom* Judgments not only strengthen the self-contained nature of EU law,[5] but also unfold to a picture resembling the fascinating works

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1 Judgment of 5 February 1963 *in Case 26/52, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1, at p. 12.

2 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.

3 Judgment of the Court (Grand Chamber) of 16 October 2012 in C-364/10, *Hungary v. Slovakia,* not yet published [hereinafter: Judgment C-364/10].

4 Emphasis added, Judgment C-364/10, rec. 44 .

5 *Fragmentation of International Law: Difficulties Arising From The Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Martti Koskenniemi, UNGA, A/CN.4/L.682 13 April 2006, p. 68 para. 129.

of Maurits Cornelis Escher: EU law is a new legal order, a *lex specialis* of international law, yet international law is part of this "new legal order", and must be taken into account in the course of the interpretation thereof. Against this backdrop, it is hard to decide, whether European or international rules should be followed in case of a collision between the two systems. In this respect, it is futile and meaningless to expect a decision on the question, whether the EU follows a monist or dualist approach *vis-à-vis* international law, mainly because today this doctrinal dichotomy seems somewhat outdated and more practical perspectives are emerging. Nevertheless, the identification of at least a rule of thumb would have been indispensable for national courts, on what to do when they face a collision between an international and a European legal obligation of their state.

Following a decade-long debate, the *Kadi* cases clarified that the EU protects its fundamental rights even against interferences stemming from international law. Some authors claimed that the question to be decided in the *Sólyom* case should have been whether the free movement of persons is such a fundamental right or not.[6] In its recent decision, the ECJ (European Court of Justice) relied on a long-standing international custom, identifying an implicit exception to the free movement of persons and stating that this freedom does not include heads of states on official visits.

This article argues that although a similar delimitation between regulatory fields of international law and those of EU law would be desirable, in the present case the ECJ made a mistake, when it relied on the existence of an international (customary) regulation on the entry of heads of states to other states' territories. Proving the non-existence of a rule is nigh impossible, therefore it is attempted here to identify the rules of international law relevant to the facts of the present case, starting from the treaty-based law cited by the parties, while also examining certain elements of international customary law.

## 9.1 Treaty-Based International Law

The first head of the Hungarian complaint in the *Sólyom* case was rejected as unfounded, mainly because "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 internationally, such as that person's presence in another State, comes under that law, in particular the law governing diplomatic relations."[7] This assumption remains a hypothesis in the judgment, as the ECJ judgment has not elaborated on the content of this relevant rule of international law, however it contented, that by its very

6 N. Nic Shuibhne, 'And those who look only to the past or the present are certain to miss the future', 37 *European Law Review*, 2012, pp. 115-116.

7 Judgment C-364/10, 49.

existence it forms an exception to the rule of free movement of persons as outlined in the Treaty on the European Union:[8]

> Accordingly, 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, on the exercise of the right of free movement conferred on that person by Article 21 TFEU.[9]

Although the judgment implies that several multilateral treaties and customary rules are applicable to the case, the Court only referred to the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents as an example thereof.[10] Seeking other possible examples, it becomes obvious that this finding of the Court correlates with the argument of the Slovak Republic maintaining that the diplomatic relations of the member states of the European Union are still governed by international law, and that this law applies to the movement of Heads of States within the Union.[11] This argument was also mentioned by the Advocate General, whose opinion also offers some further examples cited by Slovakia.[12] The rules relevant in that regard would be "the Vienna Convention of 18 April 1961 on Diplomatic Relations ('the Vienna Convention'), the Vienna Convention of 24 April 1963 on Consular Relations, the Vienna Convention of 14 March 1975 on the Representation of States in their Relations with International Organisations of a Universal Character, the Convention on Special Missions adopted by the United Nations General Assembly on 8 December 1969 ('the Convention on Special Missions') and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, attached to General Assembly Resolution 3166 (XXVIII) of 14 December 1973".[13] While these instruments of international law undoubtedly stand out as valid and relevant rules on diplomatic (and consular) relations, relevant also in the relationship between the member states of the European Union, a deeper look reveals that the applicability of this law to every visit conducted by Heads of States remains more than questionable.

It is possibly for this reason that the Court did not reiterate several elements of this list in the final judgment. The 1961 Vienna Convention is applicable to permanent missions

8 There are a few principles accepted also in EU law that could support this conclusion, from good faith performance of obligations to the principle of loyalty; however, these would also not offer a comforting solution to the dilemma emerging from a conflict between international and EU law.

9 Judgment C-364/10, 51.

10 Judgment C-364/10, 47.

11 Judgment C-364/10, 34.

12 Advocate General Yves Bot in C-364/10, *Hungary v. Slovakia,* not yet published. [Hereinafter: Opinion C-364/10], 34, n. 6.

13 *Ibid.*

only,[14] therefore it can only remotely be related to the facts of the present case;[15] the nature and characteristics of consular relations are so very different from head of state visits, that any serious connection between the 1963 Convention and the present case seems utterly impossible; and, since no international organization of universal character has ever been involved in the events or even in the dispute resolution, the examination of the 1975 Convention seems unavailing as well.

The applicability and the actual application of the remaining two elements of the list – the 1969 Convention on Special Missions and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons – demand far more attention.

Based on the subject matter and the actual events, the most important convention for the evaluation of the case could be the 1969 Convention on Special Missions. However, at the time of the events only one of the two states concerned (Hungary) had consented to be bound by this instrument.[16] Consequently – as a treaty – it would not be applicable; nevertheless, as a working hypothesis it is presumed here that it is of customary character.[17] This way, the application of its rules to the present case might be possible, yet not as a treaty, but as customary law, and shall therefore be discussed below in the respective section.

Therefore, the 1973 New York Convention remains the only applicable international treaty from the impressive list above. The focus and objective of this convention is clearly explained by the preamble: first it reiterates, that the general goal of diplomatic relations corresponds to the objectives of the UN Charter, namely "maintenance of international peace and the promotion of friendly relations and cooperation among States". This convention is designed to respond to the challenge, "that crimes against diplomatic agents and other internationally protected persons jeopardizing the safety of these persons create a serious threat to the maintenance of normal international relations which are necessary for cooperation among States". Consequently, this instrument regulates neither immunities, diplomatic relations *per se,* nor the commencement of such missions, but is much rather an important safeguard for the safe and secure administration of inter-state cooperation.

Against this background, the convention imposes an obligation on states to protect a "Head of State, [. . .] a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany

14 Art. 1 (a)-(b) of the 1969 UN Convention on Special Missions, United Nations Treaty Series, 1984, p. 231. Sir I. Roberts (ed.), *Satow's, Diplomatic Practice*, 9th edition, Oxford University Press, Oxford 2009, p. 188, section 13.4 [Hereinafter: Satow's Diplomatic Practice].

15 Satow's Diplomatic Practice, p. 175, Section 12.1.

16 *See* UNTC website at <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-9&chapter=3&lang=en>.

17 *See* M.A. Summers, 'Diplomatic Immunity Ratione Personae', 16 *Michigan State Journal of International Law* 2007-2008, pp. 469-470.

him";[18] or any other representative or official of a state or an international organization,[19] from certain criminal activities, as set out by Article 2 of the convention, which must be made punishable by the state parties. Article 2(3), however, makes it clear, that beyond these acts, an international obligation of states exists to prevent any other attacks on the person, freedom or dignity of an internationally protected individual.

It seems, that the "Big Three" (Head of State, Head of Government and Minister of Foreign Affairs) enjoy a somewhat wider protection, covering their family members as well. It is also noteworthy, that the fact or level of protection is independent from the nature of the visit: as there is no restriction in the text of the convention regarding official, private or other visits, it seems that protection must be granted in any case when an internationally protected person happens to be abroad.

According to treaty-based law, the conclusion for the present case can only be that a Head of State is entitled to *be protected*, and the territorial state is under an obligation to *protect* such person, regardless of the nature of the visit. This protection is owed to the person, the liberty and also the dignity of the protected persons, and demands taking every appropriate measure to that end. Appropriate measures in the view of this author must be sufficient to actually safeguard the person, the liberty *and* the dignity of foreign state officials. Considering the threats this convention is to respond to, it seems rather obvious that in some cases an appropriate measure protecting the person may to some extent adversely affect the liberty or the dignity of such person (*e.g.* when shots are fired in a room, where the protected person is also threatened, the retreat is possibly better if it is quick, than slow, but dignified). Sometimes, therefore, a measure can be appropriate, in case it protects the person, yet somewhat hampers the dignity of a visiting Head of State. Nevertheless, as a main rule, the duty of the host state is to seek the protection of all three values, *i.e.* the person, *including* his or her liberty and dignity. Although the existence of some margin of appreciation would be reasonable in the realization of the appropriate protection, direct deprivation of liberty or dignity is clearly unacceptable.

However, this question was not raised by the parties in the present dispute, therefore it was not thoroughly examined, how rescinding an entry permit from a Head of State already *en route* to the country affects the dignity of that person and whether it is an appropriate measure or not.

The 1973 Convention remains silent on a number of issues debated in the present case: it makes no mention of immunities of visiting state officials, nor does it regulate the commencement or termination of such missions.

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18 Art. 1(1) a) of the 1973 UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, United Nations Treaty Series, 1989, p. 473.

19 Art. 1(1) b) of the 1973 UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, United Nations Treaty Series, 1989, p. 473.

Some reference had been made during the case also to the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. This convention has not yet entered into force, and its application as customary law to the present case is highly doubtful, although it is also a product of a lengthy codification effort of the International Law Commission. The preparatory materials of the convention reveal that the ILC (International Law Commission) had found a divided state practice regarding the general principles of state immunity:

> "In undertaking the second reading of the draft articles, the Commission agreed with the Special Rapporteur, that it should avoid entering yet again into a doctrinal debate on the general principles of State immunity, which had been extensively debated in the Commission and on which the views of members remained divided. Instead, the Commission should concentrate its discussion on individual articles, so as to arrive at a consensus as to what kind of activities of the State should enjoy immunity and what kind of activities should not enjoy immunity from the jurisdiction of another State. This, in the view of the Commission, was the only pragmatic way "to prepare a convention which would command wide support by the international community."[20]

Thus failing to establish a single position even within the ILC, it had focused on immunities for certain acts since 1989.[21] As for the relevance of the contents, the commentaries attached to the final ILC draft of the convention highlight that the text primarily refers to jurisdictional immunities involving foreign judicial proceedings,[22] which was not a factual element in the recent debate between Hungary and Slovakia. Furthermore, the convention expressly excludes its application regarding the personal immunities of heads of states.[23]

### 9.2 Customary International Law on the Entry of Diplomatic Missions

The evolution of a customary rule of international law is based on a long-standing and consequent state practice. As some authors have rightly expressed, in case of head of state visits that practice is relatively scarce, firstly because there are only about 200 persons at a time posing as possible subjects to that practice worldwide, and the vast majority of their foreign travels – private or public – are conducted without any legal dispute arising therefrom.[24] The author of the present work has no knowledge of any previous case, where the entry of a special mission was denied and the head of the mission could have relied on other grounds granting him entry, such as the free movement of European citizens. The

20 *Yearbook of the International Law Commission* [*YILC*], 1989 Vol. II, Part 2, p. 98, para. 406.
21 *YILC* 1989, Vol. II, Part 2, para. 406.
22 *YILC* 1991, p. 13. paras 2-3.
23 Art. 3(2) of 2004 Convention on Jurisdictional Immunities of States and Their Property, A/59/508.
24 A. Watts, *The Legal Position of Heads of States, Heads of Governments and Foreign Ministers*, *in Recueil des cours*, Hague Academy of International Law, Vol. 247, 1994. p. 19.

existence of a well-established customary law on the entry of non-permanent diplomatic missions to the territory of the host state can be contested, because such a scarce international practice is not sufficient to evidence a long-standing, consistent universal practice, not to mention doubts related to the necessary *opinio iuris*. Notably, this only holds true for the denial of entry: customary law is commonly and widely discussed for the period when the mission already sojourns on the territory of the host state.

In spite of the above concerns, there are several traces of a tendency towards an evolving international customary law in this field.[25] The customary law of head of state visits can be found in the form of codified rules in certain conventions, not consented to by the parties to the present dispute; a private codification is also available from the Institute de Droit International; furthermore, international legal doctrine and the judicial practice can also be relied on as evidence for the existence of such customary rules.

As noted above, the most important instrument regulating non-permanent diplomatic missions between states is the 1969 New York Convention on Special Diplomatic Missions. The convention follows closely the respective draft issued by the International Law Commission; however, it enjoys limited support by states.[26] For the purposes of this paper, its customary character is provisionally accepted, in order to have an opportunity to discuss the contents of this convention, which would otherwise be inapplicable to both Slovakia and Hungary.

The temporary nature of these special missions result in major differences compared with permanent missions, as regulated by the 1961 Vienna Convention. As the opinion of the Advocate General rightly stated, both types of missions are based on a consensus between two states to send and – respectively – to host the mission: "This reference to 'consent' is found in a number of international conventions, in particular in Article 2 of the 1961 Vienna Convention, Article 2(1) and (2) of the Vienna Convention of 24 April 1963 on Consular Relations and Articles 1(a), 2 to 6 and 18 of the Convention on Special Missions."[27]

The initiative is usually taken by the sending state and the host state gives its consent to the mission in both cases. The opinion of the Advocate General however fails to take notice of the fact that the actual form (and to some extent the content) of such consent by the host state is profoundly different in case of a special mission. In case of permanent missions, the host state agrees to the members of the mission,[28] while in the case of special missions such regulation cannot be found in the relevant legal materials. On the contrary, the commentaries to the 1969 Convention by the International Law Commission expressly mention, that the members of a special mission are appointed by the sending state,[29] subject

25 Watts 1994, p. 36.

26 Satow's Diplomatic Practice, p. 188.

27 C-364/10 Opinion, 57, n. 16.

28 *See* Arts. 2 and 4 of the 1961 Vienna Convention on Diplomatic Relations, United Nations Treaty Series, 1964, p. 95.

29 *YILC*, 1967, Vol. II, pp. 350-351, para. (1) (Commentary to Art. 8).

to a *tacit consent* by the host state. (Although the commentaries uphold that more formal procedures can also be instated.)[30] This leads us to the conclusion that in the case of special missions, the host state agrees to the fact of the mission, and objections regarding the personnel of these missions must be expressed explicitly.

The Institute of International Law accepted a resolution at its 2001 Vancouver Session on the "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law". The rationale behind this resolution was the increasing number of cases, where courts intended to exercise jurisdiction over foreign heads of states.[31] The policy of the drafters originally sought "to facilitate and protect international communication between governments and to that end to provide for the Head of State, as the principal representative of the state, such special treatment as necessary for the exercise of the functions and the fulfilment of the responsibilities of a Head of State in an independent and effective manner; and secondly, to restrict such immunities to the minimum necessary to that representative role so as to leave the Head of State subject to private law in the same way as a private person and so as not to deprive creditors and other private persons of legal remedies against the holder of the office of Head of State".[32]

The text of the resolution contains both *de lege lata* and *de lege ferenda* elements.[33] Even though the resolution is purportedly aimed at the development of law in some aspects, it still excludes its application in relation to the entry to the territory of another state, when it specifies, that "nothing in this Resolution affects any right of, or obligation incumbent upon, a State to grant or refuse to the Head of a foreign State access to, or sojourn on, its territory."[34] This regulation means firstly, that international law does not impose a right to entry for heads of states to enter the territories of other countries. Second, the wording of the resolution mentions possible obligations incumbent upon states. In this latter context, this rule of the resolution intends to secure that such obligations remain unaffected. This declaration further strengthens the opening assumption of this section, namely, that international customary law on head of state visits does not regulate at a universal level how states allow entry into their territory. Meanwhile, it also supports that customary international law of head of state visits intended to leave a field of action for states to undertake obligations to grant access to or sojourn on their territory for foreign nationals, including

30 While a formal procedure is also possible. *See*, *YILC*, 1967, Vol. II, p. 349, para. (2).

31 H. Fox, ' The Resolution of the Institute of International Law on the Immunities of Heads of State and Government', 51 *International and Comparative Law Quarterly* 1, 2002 p. 119.

32 13th Commission, Preliminary Report of Rapporteur, para. 16, ADI 2001, I-Vancouver, cited by Fox 2002, p. 119. A third head of policy regarding assets was also accepted during the work, but that aspect of the resolution can be disregarded here. *See ibid.*

33 Fox 2002, pp. 124-125.

34 Institute of International Law, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Art. 10. published at <www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF>.

heads of states. Clearly, the free movement of persons within the European Union is a manifest example of such obligations.

Previous international judicial practice is available, but only *mutatis mutandis*. If one looks for cases involving actions or accountability of state officials abroad, including heads of states, the practice of international courts and various national forums is relatively well established: decisions regarding *Augosto Pinochet*[35] or *Charles Taylor*[36] have all had to rule on actions of foreign heads of states. The position of foreign officials was discussed more widely in the *Lotus*,[37] the *Tellini*[38] or in the *Yerodia*[39] cases. None of these decisions or judgments had to deal with the entry of the head of state to a foreign territory, neither of the involved heads of states were European citizens, who would have enjoyed the free movement of persons, if not for their special position. International judicial practice yet again supports the stay of foreign state officials, and not their entry to the territory.

## 9.3 Decisive Elements of the Position of Heads of States Abroad: Acts or Visits?

Many authors agree that heads of states can pay different visits to foreign countries, but their concurrence ends here. Instead of a centuries old, long-standing single state practice, even a few decades ago, it was upheld, that the regulation in this field is divided, and therefore allows for several possible conclusions.[40]

In an attempt to establish a clear-cut typology, the first impression one gets is the apparent lack of a profound mainstream opinion, despite certain widely accepted cornerstones. Although virtually every legal instrument and scholar applies different classifications – sometimes even the categories applied are distinct – in most cases, at least an implicit distinction between official and private visits is made. International legal instruments fail to offer a definition of private visits.

35 *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others*, *ex parte Pinochet Ugarte*; *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others*, *ex parte Pinochet Ugarte* (No. 3) [1999] All ER 97.

36 *The Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I. Heads of States immunities are also discussed in the *amicus curiae* opinions of Diane F. Orentlicher. (SCSL-2003-01-1 1643-1668) and Phillipe Sands (SCSL-2003-01-1 1669-1717).

37 The *S.S.* Lotus *Case P. C.I.J.* Ser. A, No. 10, p. 4 (1927).

38 Interpretation of certain Articles of the Covenant and other Questions of International Law, Report of the Special Commission of Jurists, *League of Nations Official Journal*, 5th Year, No. 4 (April 1924) p. 523.

39 *Case of the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* ICJ Reports, 2002, p. 3.

40 F. Przetacznik, *Protection of officials of foreign states according to international law,* Martinus Nijhoff, The Hague, 1983, p. 3.

Undoubtedly, the right to send diplomatic missions does not create any obligation on states to actually host such missions; therefore diplomatic missions are based on mutual consent, however different the content and form of such consent may be. Still, there is no evidence, that every visit of a state official abroad would be a diplomatic visit. A difference between diplomatic visits and other official visits is mentioned in the 1969 UN Convention on Special Missions.[41] It may be presumed, that in some cases the territorial state – where the visit takes place – does not become a *stricto sensu* host state.[42] In such cases the visiting official does not meet the territorial sovereign more than any other visiting national of his country would. As well regulated examples, commonplace visits to cities serving as seats of international organizations can be mentioned.

This means that there is a 'gray zone' in the black and white picture of diplomatic/official versus private visits, but even the terms describing this gray zone vary from one source to another.

A point of confusion can be that according to the League of Nations report in the *Tellini* case, the obligation of the host state to protect is rooted in the public character of the visiting head of state: "The recognised public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf."[43]

Whatever the reasons may be for the foreign head of state to visit another country, today it cannot be doubted, that this right to be protected remains intact.[44] For reasons of common sense, in order to secure this protection, arrangements are usually made with the host state, and these arrangements are normally made using existing diplomatic channels: such agreements however do not necessarily render a visit 'diplomatic'. The special public character is permanently borne by the head of a state while in office; therefore the right to be protected does not evaporate even during absolutely private visits, such as holidays or medical treatments.

It is therefore reasonable, that the nature of the visit is not determined by the official character of the visiting head of state. The decisive factor for the nature of the visit can be much rather the attitude or involvement of the territorial state: if a representative of a sovereign meets the representative of another sovereign, the visit is undoubtedly diplomatic, arranged and consented to accordingly. However, if the host sovereign is missing, because

41 *YILC*, 1967, Vol. II, p. 348, para. (3) (i).

42 *Ibid.,* para. (3) (ii).

43 Interpretation of certain Articles of the Covenant and other Questions of International Law, Report of the Special Commission of Jurists, *League of Nations Official Journal*, No. 4 (April 1924), p. 524 .

44 *See* "whenever [a head of state] is in a foreign State": Art. 1(1) a) of the 1973 UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, United Nations Treaty Series, 1989, p. 473, emphasis added.

the host of the visit is an international organisation, an NGO or a business association, the visit must fall within a different category, coming closer to the category of private visits.
There are three possible conclusions that may be drawn at this point: either there are more categories of head of state visits than mere "official or private"; or official visits equal diplomatic visits, where both the visiting and the host state meet in equally sovereign capacities, or there are two types of visits, and if not expressively mentioned differently, it is an official visit, due to the function of the head of state. The ECJ seemed to accept this third conclusion, while for the author of the present paper the examined international materials suggest, that the first conclusion must be correct. Thus a head of state may visit another state in the course of

- a diplomatic visit, where to equal sovereigns meet;
- an official visit, where the head of state acts in an official capacity in a foreign territory, without meeting the host sovereign;
- a private visit, where the sovereigns involved from both states deal with the protection of the visiting head of state only.

Interestingly enough, this controversial typology is bypassed in international customary law. As it has been noted above several times, most cases refer to situations when the visiting Head of State already stays in foreign territory, therefore the relevant questions for most international legal instruments and academic work are those in connection with immunities enjoyed in relation to certain *acts*.
From this perspective, the relevance of the nature of the visit is considerably lowered: it remains an important, yet definitely not exclusive element for the classification of the particular acts.[45] Affairs of the home state may demand immediate official acts of a head of state, spending his or her holiday abroad;[46] furthermore, even during an official visit, some private programmes may be arranged or private measures may be taken.[47] In compliance with the inherent logic of the law on diplomatic relations, the rules therefore focus on the procedural immunities enjoyed in relation to certain acts, instead of establishing a dogmatically clear terminology on official, private or other visits.

45 Przetacznik 1983, pp. 15-16.

46 Watts 1994, p. 73.

47 Xi Jinping, at that time Vice President of China, in February visited the United States, where he met President Barack Obama, visited a business forum in Los Angeles and also Muscatine, a small town in Iowa, where he briefly stayed with the family in 1985. *See* Profile: Xi Jinping, BBC News, 7 November 2012 (<www.bbc.co.uk/news/world-asia-pacific-11551399)>. In 2012, the Duke and Duchess of Cambridge were touring South Asia on occasion of the Diamond Jubilee, while through legal counsel they started to take private legal actions against a French magazine for a blatant intrusion of their privacy. *See* K.Willsher, 'Kate and William take legal action against Closer over topless photos', at Guardian.co.uk, 17 September 2012 <www.guardian.co.uk/uk/2012/sep/17/topless-kate-photos-legal-action>.

Satow's Diplomatic Practice distinguishes between personal and functional immunities of the head of state: "the head of state acting *ratione materiae*, as part of a legal entity, the state, and the head of state acting as an individual, *ratione persona* to whom a high degree of personal privilege and immunity is granted."[48] This dichotomy is the reason for the 2004 Convention not mentioning acts of a head of state not of a public character. The typology applied in this treatise defines official and non-official visits:

> Broadly all states recognize an obligation to ensure due respect towards and the protection, inviolability and immunity of the head of state when in office, with compliance particularly rigorous on the occasion of an official visit of a head of state to another State.[49]

Therefore, the right to enjoy protection is without prejudice to the nature of the visit – although protection of visiting heads of states is an obligation of the organs of the host state, this involvement does not automatically render a visit official, contrary to the implicit conclusion of the opinion of the Advocate General:

> Moreover, that is a view that ignores the specific character of the position of Heads of State, which lies essentially in their capacity as the supreme organ of the State, representing, personifying and committing the State at international level. In other words, that special position implies that, when a Head of State travels on a public visit, he can never do so on an entirely personal basis in so far as it is primarily the community he represents that is welcomed by the State receiving him.[50]

Although there is an independent title in Satow's Diplomatic Practice called "Official Visits in the Territory of Another State", it contains of only one paragraph, and it does not define official visits of heads of states.
The position of heads of states under international law is more thoroughly discussed in the work of Sir Arthur Watts, published by the Hague Academy of International Law in 1994. For the purposes of discussing state practice on procedural immunities of heads of states, various acts are classified as either

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48 Satow's Diplomatic Practice, p. 176. This distinction of the various grounds of immunity persist in international literature. For another example *see* S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium Case*', 13 *European Journal of International Law*, 2002, p. 4. In his views *ratione materiae* immunities cover only official acts, but these are due also after leaving the office, while *ratione personae* immunities cover every act, but it is only enjoyed by the highest ranking officials of a state, and only during the period they remain in such functions.

49 Satow's Diplomatic Practice, p. 178.

50 Opinion C-364/10 54.

– official and sovereign acts;
– official, but non-sovereign acts;
– or non-official (private) acts.

Official and sovereign acts correspond to situations subject to immunities prescribed by international law.[51] Official, but non-sovereign acts refer to "commercial" acts – where "commercial" is a modifier used out of convenience, since other acts of a non-commercial character may fall within this category. These semi-official acts could cover those actions of heads of states abroad, where they exercise their domestic official functions abroad, without actually meeting the sovereign of the territorial state. This 1994 work conceived a tendency of international law towards a situation, where states (and heads of states) would not enjoy immunities in such cases, yet a long-standing custom has not yet evolved in this regard.[52]
The work of Sir Arthur Watts is a rare example, where the right to entry is also considered. As for a head of state on a private visit, he wrote: "His position in international law is in such circumstances at best uncertain. When on a private visit the Head of State will, by definition, not be acting as the official representative of a sovereign State or performing official duties on its behalf. He may, indeed, be refused entry at the outset"[53] It is also noteworthy, that some extent of official character remains with a head of a foreign state, even when on a private visit: "[. . .] the generally representative character of a Head of State means that he is at all times to some extent representing his State."[54] Advocate General Bot argued, that a private visit equals an *incognito* visit, however Sir Arthur Watts classified incognito visits as a special case within private visits,[55] mentioning that even an official visit can remain incognito.
In agreement with this latter position, the conclusion must be that the incognito character of the visit is insufficient and irrelevant for the decision regarding the general character of the visit; this may be the reason why the judgment of the court in the end did not rely on this argument of the Advocate General.
Widely discussed international case law also focuses on certain acts, and not necessarily on the nature of the visits. In this context, apparent similarities present themselves with diplomatic immunities, since the widely discussed examples of previous years are mostly related to certain criminal acts, where immunity is considered absolute, subject to rare

51 Watts 1994, p. 58.
52 *Ibid.* p. 61.
53 *Ibid.* p. 73.
54 *Ibid.*
55 *Ibid.*, p. 75: "A particular problem which sometimes arises occurs when a Head of State visits another State not only privately but also incognito – a possibility which, indeed, may also occur when a Head of State is on official business, as recent events involving secret diplomacy have shown."

exceptions foreseen under international law.[56] The mainstream position today upholds that Heads of States enjoy full immunity from the criminal jurisdiction of other states, while civil or administrative immunities do exhibit some differences. In this regard it is the character of certain acts that becomes more relevant, and not the nature of the visit.
Theoretically speaking, the question of jurisdiction or immunity may sometimes even emerge without an actual visit. Immunity in this aspect is understood as an exception from jurisdiction.[57] Generally, this means that in lack of jurisdiction, the question of immunities is not perceivable.

## 9.4 Conclusions

The ECJ worked for decades towards enhancing the application of EU law and widening the competence of the institutions of European integration – from this perspective, the Judgment in the *Sólyom* case may become a silent landmark. It is clear, that the judges found that the facts of the case should not be dealt with within the framework of the European Union, that this dispute between Hungary and Slovakia marks a frontier, which EU law does not intend to cross.[58] In the deliberation of the case, the ECJ satisfied itself, that standing international law is applicable to the facts of the case,[59] based on the long-standing customary character of the law of diplomatic relations. The mistake made in this regard is a mistake in the actual application of international law.
Undoubtedly, the law of diplomatic relations is still applicable between two member states of the European Union: nevertheless, all but one instrument cited in the present case are either irrelevant (the 1961 or the 1963 Vienna Conventions) or inapplicable (1969 UN Convention on Special Missions). The single international convention, that can be applied – the 1973 UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents – has no rule on the right to entry. The reason for this mistake was the ECJ and the parties examined the wrong questions of international law, because the facts of the case never involved immunities. Immunities are regulated under customary law, but they can be interpreted only in relation to certain

56 In case of an international criminal, tribunal launches a proceeding against a head of state.
57 *See also, YILC*, 1979, Vol II, p. 238, para. (53): "jurisdictional immunities" presupposes the existence of valid or competent jurisdiction.
58 N. Nic Shuibhne, 'And those who look only to the past or the present are certain to miss the future', 37 *European Law Review*, 2012, pp. 115-116.
59 "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 internationally, such as that person's presence in another State, comes under that law, in particular the law governing diplomatic relations." Judgment C-364/10 49 and 51.

acts; and no such acts were subject to the debate. The right to entry, the nature of visits are hardly mentioned in contemporary international law or even by legal doctrine.

Furthermore, the conclusion reached by the court, that the special position of heads of states under international law results in a situation where they enjoy less rights[60] than any other Union citizen is also mistaken. Diplomatic immunities are added to the position enjoyed by the holder of such offices. The preparatory materials of the UN Convention on Special Missions confirm, that "[. . .] rank may confer on the person holding it exceptional facilities, privileges and immunities which he retains on becoming a member of a special mission."[61]

The general reference to international law as part of the legal order of the European Union can lead to some absurd future interpretations of this judgment: the recent wording even seems to allow member states to opt out from EU obligations in the form of bilateral treaties with third parties. Instead of international law as such, the Court probably meant to refer to "common international obligations of member states".

The general reception of international law within the European Union can also mean that mistaken application thereof may be repeated in the future. Judges of member states, untrained in the monist tradition may face difficulties in the direct application of international law without due transformation. It may even be argued, that the ECJ forced the European judiciary to apply international law directly in the future. Absurd interpretations of this judgment can and must be filtered in the future by the ECJ. Nevertheless, the question remains, whether the international law-based argumentation – with its dubious validity – behind the decision was necessary at all? If the position of heads of states is regulated by international law, and Slovakia did not apply EU law, as the Court finally ruled, would it not have been better, if the Court had found the case inadmissible at the outset?

60 Judgment C-364/10 50.

61 *YILC*, 1967, Vol. 2, p. 359, para. (1) .