Strasbourg, 13 July 2001

Consult/ICC (2001) 18

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY LIECHTENSTEIN

Ratification of the Rome Statute in the Principality of Liechtenstein:

General Considerations and Constitutional Questions

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Liechtenstein is a small country. It is, in fact, a very small country: a population of around 32,000 inhabits 11 municipalities in a territory of 160 square kilometres. Subtracting foreigners and minors, the voting population of Liechtenstein is about 14,000. The executive branch of government consists of five members, one of whom works part-time. 25 part-time legislators sit in the unicameral parliament. 17 diplomats represent Liechtenstein's interests in Vaduz (the capital) and abroad. The size of Liechtenstein has consequences not only for its economy, its politics, and its international relations. It also has consequences for the ratification and implementation of the Rome Statute of the International Criminal Court: Resource constraints dictate the process and, to some extent, the substance of the country's ratification efforts.

Liechtenstein is a unique country not only due to its size. It is ruled by a dual sovereign: the prince and the people. Much of Liechtenstein politics revolves around the balance of power between these two sovereigns, mediated by the parliament and the government. While the government may propose and the parliament may adopt legislation, all laws, treaties, constitutional amendments and major financial expenditures must be approved, explicitly or implicitly, by both the prince and the people: The prince exercises his right of sanction, or endorsement, of legislation (the refusal of which constitutes an absolute veto); the people may (and, in some instances, must) exercise their right of initiative and referendum. This constitutional structure of Liechtenstein again constrains both the process and substance of the country's implementation of the Rome Statute.

This paper will first discuss the process by which Liechtenstein is ratifying and implementing the Rome Statute. In particular, it will examine the challenges Liechtenstein faces as a small state ratifying a complex treaty. The paper will then examine how Liechtenstein's implementation may choose to address the compatibility of the Rome Statute with the constitutional immunity of the prince.[2]

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[2] Note that (competing) amendments to the Liechtenstein constitution recently proposed by both the prince and the constitutional committee of the parliament may affect both the numbering of certain articles as well as the substance of this analysis. This paper will proceed on the basis of the existing constitution of 1921.

A. The ratification and implementation process

I. Constitutional procedure for ratification and implementation

1. Ratification of treaties

The constitutional process by which treaties such as the Rome Statute are ratified in Liechtenstein is at least partially familiar from other systems. On behalf of the prince, the government ratifies treaties, subject to the consent of parliament in the case of important treaties, such as those, like the Rome Statute, imposing obligations on Liechtenstein citizens.[3] A simple majority of members of parliament, given a two-thirds quorum, is necessary for consent to ratification.[4] Unlike the practice in many other countries, treaties subject to the consent of parliament are also subject to a popular referendum, if 1500 citizens or four municipalities request such a referendum within 30 days of parliamentary consent to ratification, or if the parliament so decides.[5] If a referendum is called, the government may only ratify the treaty if an absolute majority of voters consents to ratification.[6] The ratification process is completed by the sanction of the prince, which requires the countersignature of the head of government.[7] This countersignature places the political responsibility for ratification on the government, since, under article 7(2) of the Liechtenstein constitution, the prince cannot be held politically responsible for his actions. The prince does wield real political power, however: If the prince refuses to sanction the treaty, the treaty will not be ratified.

2. Passage of implementing legislation

If implementing legislation is necessary to honour the provisions of a treaty, as is the case with the Rome Statute, a procedure analogous to ratification of treaties applies to passage of the legislation. Referenda on legislation may, however, be called upon the request of only 1000 citizens or three communities.[8] Since the threshold for calling referenda on the passage of implementing legislation is lower than that for calling referenda on the ratification of treaties, treaties are not, as a general rule, ratified before adoption of relevant implementing legislation is assured. Implementing legislation is thus generally developed in parallel with preparations for ratification.

3. Adoption of constitutional amendments

Constitutional amendments, including those implementing a treaty, are subject to a difficult procedural obstacle. Constitutional amendments must be adopted by a unanimous vote of parliament, given a quorum of two-thirds, or by a three-quarters majority in two consecutive sessions of parliament.[9] Amendments are subject to a popular referendum, upon the request of 1500 citizens or four communities[10], and require the sanction of the prince. Hence,

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3 Art. 8(2) of the Liechtenstein constitution [hereinafter LV].
4 Art. 58(1) LV.
5 Art. 66bis(1) LV.
6 Art. 66bis(2) LV.
7 Art. 65(1) LV.
8 Art. 66(1) LV.
9 Art. 111(2) LV.
10 Art. 66(2) LV.

constitutional amendments are procedurally more difficult to realize than either treaty ratification or passage of ordinary implementing legislation.

II. Practical aspects of ratification and implementation

1. Consultations

Given the real possibility of a popular referendum, proposed legislation, including treaties proposed for ratification, is generally circulated to the greater public for the purpose of consultation prior to discussion by the parliament. As a general rule, the government will present draft legislation to relevant government offices and other interested groups for comments. After the consultation period, which may last a few weeks to a few months, the government will submit a revised legislative proposal to parliament. This consultation process minimizes the danger that a referendum against proposed legislation will be successful after adoption by parliament.

2. Outsourcing

Given the constraints on availability of human resources in the Liechtenstein government, in particular in the foreign ministry and the legal office, outsourcing a comprehensive project such as the development of implementing legislation for the Rome Statute makes logistic and financial sense. In this case, the author was retained by the Liechtenstein government as an external consultant to develop, in consultation with officials in the foreign ministry, legal office, and the judiciary, a proposal on draft implementing legislation for the Rome Statute.

3. Relationship with cooperation legislation for the ICTY and ICTR

Early in 1998, the government of Liechtenstein set out to implement its obligations to cooperate with the International Criminal Tribunals for the former Yugoslavia and Rwanda under Security Council Resolutions 827 (1993) and 955 (1994), respectively. The first draft of domestic legislation giving effect to these obligations was circulated for consultations[11], after consideration of which a revised draft was developed in the fall of 1998.

Having signed the Rome Statute of the International Criminal Court on 18 July 1998, the government of Liechtenstein expressed its intent to ratify and implement the Rome Statute as quickly as possible. In this context, the decision was made to investigate whether the obligations under the Rome Statute could be integrated with the obligations under Security Council Resolutions 827 and 955 into a single piece of legislation. Given the complexity of treaty ratification and passage of legislation in Liechtenstein, it is currently recommended that the tasks indeed be combined, creating a unitary law providing for cooperation with the international tribunals and the International Criminal Court. Although the details of cooperation are distinct, in particular with regard to the differing admissibility standards, it is recognized that combining the legislative bases for cooperation with the tribunals and the ICC is likely to result in swifter and more efficient ratification of the Rome Statute and passage of the relevant legislation. The resulting law will contain a general part relating to cooperation

[11] Vernehmlassungsbericht der Regierung betreffend die Schaffung eines Gesetzes über die Zusammenarbeit mit den Internationalen Gerichten zur Verfolgung von schwerwiegenden Verletzungen des humanitären Völkerrechts, RA 97/3282, 3 February 1998.

with both the tribunals and the ICC, and special parts relating to the particularities of cooperation with each of these institutions.

4. Foreign models

Given Liechtenstein's limited availability of human resources, it has a tradition of economizing its legislative work by using relevant legislation of foreign states as models, adapting them to the situation in Liechtenstein. In particular, Liechtenstein is interested in legislation developed in its neighbouring countries, Switzerland and Austria, with which it shares varying degrees of social, economic, legal, and linguistic ties. The use of foreign examples has been true in the case of Liechtenstein's judicial assistance legislation, which has in the past been modelled on equivalent Swiss legislation. Similarly, Liechtenstein's criminal code draws inspiration from the Austrian equivalent.

The use of Swiss judicial assistance legislation as a model for Liechtenstein likewise led the government to look west when originally developing its proposed cooperation legislation for the International Criminal Tribunals for the former Yugoslavia and Rwanda, which was modelled to some extent on the Swiss example[12]. A similar approach was first taken with respect to implementing legislation for the Rome Statute, drawing from the concurrent experiences of the Swiss implementation process. Although the legislation allowing for cooperation with the ICTY/ICTR and the ICC will stand alone and not be directly linked to existing judicial assistance legislation, lucidity requires that the new legislation cohere with the form and spirit of the existing legislation. Hence, a Swiss approach to cooperation with the international tribunals and the ICC appeared obvious.

In the early spring of 2000, the Liechtenstein government proposed a revision of its judicial assistance legislation that would be modelled on the Austrian, rather than the Swiss, equivalent. The decision to shift from a Swiss to an Austrian model for judicial assistance had repercussions both for the cooperation legislation for the ICTY and ICTR as well as for implementation of the Rome Statute. The Liechtenstein ratification process faced a dilemma: Like Switzerland, but unlike Austria, Liechtenstein used to develop implementing legislation prior to ratification of the Rome Statute. Shifting from a Swiss model to an Austrian model for implementation of the Rome Statute significantly complicated and delayed Liechtenstein's ratification efforts, both due to the evolving nature of Liechtenstein's newly proposed, Austrian-inspired judicial assistance legislation, and due to the lesser urgency of Austria's development of implementing legislation compared to Switzerland.

Instead of entirely abandoning the previous Swiss orientation of the cooperation legislation, the draft legislation submitted by the author to the Liechtenstein government will be neutral in orientation, continuing to draw from the inspiration of the substantially complete Swiss legislation, while taking into consideration the form and spirit of the newly proposed Liechtenstein judicial assistance legislation, as well as of existing Austrian legislation on cooperation with the ICTY and ICTR and of ongoing Austrian efforts to implement the Rome Statute. While reminiscent of both the Swiss and Austrian approaches to implementation, the result will doubtlessly constitute a uniquely Liechtenstein solution.

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[12] Bundesbeschluss über die Zusammenarbeit mit den Internationalen Gerichten zur Verfolgung von schwerwiegenden Verletzungen des humanitären Völkerrechts, SR 351.20, 21 December 1995.

5. Implementation of crimes

Initially, the author intended to propose a legislative package implementing the Rome Statute that would include harmonization of the Liechtenstein criminal code with the definitions of crimes, general principles of criminal law, and defences contained in the Rome Statute. Upon consultation with officials from relevant Liechtenstein government offices, it was decided that simultaneous implementation of the Rome Statute crimes would significantly complicate and delay Liechtenstein ratification efforts. Instead, it is now proposed that after ratification of the Rome Statute and implementation of the international obligations under the Statute are complete, the Liechtenstein criminal code be examined separately with a view to harmonization with international criminal norms, including but not limited to the Rome Statute.

B. Constitutional immunity of the prince

I. Compatibility of the Rome Statue with the Liechtenstein constitution

Many of the constitutional questions relating to ratification discussed in this volume, including constitutional bars to extradition of nationals and limitations on terms of imprisonment, do not apply in the case of Liechtenstein. Either the Liechtenstein legal order is not in tension with the Rome Statute in these areas, or the tension arises at the level of ordinary legislation rather than the constitution, in which case it can be alleviated by ordinary implementing legislation.[13]

Potential questions with regard to compatibility of the Liechtenstein constitution with the Rome Statute do, however, arise in the area of immunities. Like the constitutions of many other states, the Liechtenstein constitution provides for the specific immunity of members of parliament in respect of votes or statements made in parliament.[14] Similarly, a broad immunity applies to members of parliament barring their arrest, unless the arrest is made *in flagrante delicto*.[15] This immunity can, however, be waived by a majority decision of parliament. Recent experience has shown that the Liechtenstein parliament is in fact willing to waive immunity where the necessity arises.

This paper will focus on the immunity issue that is more particular to Liechtenstein: the absolute immunity of the prince.

II. Legal basis of the immunity question

1. in the Liechtenstein constitution

Article 7(2) of the Liechtenstein constitution provides that the person of the prince is "sacred and inviolable". While the scope of application of this article is the subject of considerable debate, it is clear that the provision disallows criminal prosecution of the prince in Liechtenstein courts. It also disallows the arrest of the prince by Liechtenstein authorities.

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13 Extradition of Liechtenstein nationals, for instance, is prohibited by the (existing) Liechtenstein judicial assistance legislation; the prohibition does not rise to the constitutional level.

14 Art. 57(1) LV.

15 Art. 56(1) LV.

2. in the Rome Statute

Article 27(1) of the Rome Statute provides that the Statute "shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State… shall in no case exempt a person from criminal responsibility under this Statute…" In the same vein, article 27(2) continues: "Immunities… which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." These provisions indicate that the inviolability of the prince under article 7(2) of the Liechtenstein constitution does not constitute a bar to prosecution in the International Criminal Court.

Article 86 of the Rome Statute requires states parties to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". One such obligation includes the arrest and surrender of a person upon request by the Court under article 89 of the Rome Statute. Given the inapplicability of immunities spelled out in article 27 of the Rome Statute, the Court may indeed request the arrest and surrender of a person otherwise protected by constitutional immunities.

3. Narrowing the question

The Rome Statute itself does not require Liechtenstein to investigate and prosecute crimes domestically. Although the Preamble of the Rome Statute asserts a pre-existing such obligation, the question of the compatibility of the constitutional immunity of the prince with this obligation does not arise in the context of ratification of the Rome Statute, but rather in the examination of the compatibility of the Liechtenstein constitution with international law in general, and with customary international law pertaining to international crimes in particular. Domestic prosecution of international crimes and the relevance of article 7(2) to such prosecution may be investigated in connection with the general review of the Liechtenstein criminal code discussed in section A.II.5 above, but need not be addressed here.

A potential conflict between constitutional immunity provisions and the Rome Statute might, however, arise if the Court were to request the arrest and surrender of the prince under article 89, requiring Liechtenstein to act inconsistently with article 7(2) of its constitution. The following discussion will examine ways to address this potential conflict between article 7(2) of the Liechtenstein constitution and Liechtenstein's obligations under the Rome Statute.

III. Possible solutions

1. Constitutional amendment

A constitutional amendment explicitly subordinating article 7(2) of the Liechtenstein constitution to the obligations under the Rome Statute would provide legal clarity and certainty with regard to the potential conflict between the constitutional norms and the provisions of the Rome Statute. Such a constitutional amendment need not touch the issue of domestic prosecution; rather, it would only need to allow cooperation with the Court, in particular the honouring of a request for arrest and surrender, even if such cooperation would otherwise conflict with constitutional provisions specifying the absolute immunity of the prince.

However, such an amendment would likely face considerable political and procedural obstacles. The hurdle for constitutional amendments in Liechtenstein is high, particularly compared with the hurdles for treaty ratification and the passage of ordinary legislation. As outlined above in section A.I.3, constitutional amendment requires not only the explicit consent of the prince and at least the implicit consent of the people, but also unanimity or sustained near-unanimity of the parliament. An amendment touching the immunity of the prince, affecting a constitutional provision that has generated considerable debate in other contexts, might very well encounter strong opposition from any of the powers whose consent is necessary for constitutional amendment.

2. Constitutional interpretation

If a constitutional amendment is not feasible politically or procedurally, the potential conflict between the obligations to cooperate under the Rome Statute and the constitutional immunity provisions may be resolved by reading the immunity provisions in conformity with the Statute. Such a reading would uphold the absolute immunity of the prince in cases of domestic prosecution and would continue to bar arrest of the prince, unless such arrest is requested by the International Criminal Court. The immunity provision in article 7(2) of the Liechtenstein constitution would thus continue to apply to domestic prosecutions and to domestically initiated actions of Liechtenstein authorities, but would not apply to international arrest warrants issued by the Court. This reading of the constitution would uphold the domestic legal order of Liechtenstein, while allowing Liechtenstein to fulfil its obligations under the international instrument of the Rome Statute.

Although the precise relationship between constitutional law and treaty law in Liechtenstein is unclear, the jurisprudence of the Staatsgerichtshof (the constitutional court of Liechtenstein) and subsequent practice lend support to such a reading of the constitution in conformity with an international treaty. The Staatsgerichtshof has held that treaties concluded in conformity with constitutional procedures may deviate from rights otherwise guaranteed by the constitution.[16] Furthermore, while the Liechtenstein constitution grants the Staatsgerichtshof the competence to adjudicate the constitutionality of ordinary legislation, it does not grant it the competence to adjudicate the constitutionality of treaties that have been adopted in accordance with constitutional procedures.[17] The government of Liechtenstein has largely endorsed this opinion of the Staatsgerichtshof, but points out that treaties ratified by Liechtenstein should only be allowed to deviate from constitutional norms in exceptional or emergency situations. The government further holds that actual deviations from the constitution are rarely necessary, since as a general rule, the constitution may be interpreted in conformity with the treaty. Criteria for determining whether such an interpretation is permissible include whether the power concluding the treaty is affected by the interpretation.[18] In the case of interpretation of the constitution in conformity with the Rome Statute, the prince, who is the sole object of the interpretation, must himself endorse the treaty. Hence, if the prince sanctions ratification of the treaty in accordance with the

[16] Decision of 30 January 1947, Entscheidungen der Liechtensteinischen Gerichtshöfe von 1947-1954, p. 191-207.

[17] Art. 104(2) LV.

[18] Bericht der Fürstlichen Regierung an den Hohen Landtag zum Postulat betreffend die Überprüfung der Anwendbarkeit des Völkerrechts im Fürstentum Liechtenstein, 17 November 1981, p. 12.

constitutional procedure outlined above in section A.I.1, an interpretation of his constitutional immunity in conformity with the Rome Statute is readily available.

The government also indicates that interpretations of the constitution in conformity with treaties should not undermine the constitutional structure, but rather should support it.[19] While article 7(2) of the constitution shields the prince from criminal responsibility, article 7(1) provides that he shall exercise his powers in conformity with the constitution and the law. Since commission of the crimes under the jurisdiction of the International Criminal Court is not compatible with the constitution and the laws of Liechtenstein, including customary international law applicable to Liechtenstein, ratification of the Rome Statute and interpretation of article 7(2) in conformity with the Statute serve to strengthen the constitutional principle spelled out in article 7(1).

Finally, the government has held that treaties granting membership in international organizations call for particularly flexible constitutional interpretation.[20] Such treaties regularly transfer certain prerogatives of state sovereignty to international organizations, whose organs may then develop norms that impact the interpretation of constitutional provisions of the organization's member states. The government explicitly cites the possibility of international courts, whose decisions may affect the interpretation of constitutionally guaranteed rights of individuals.

In light of this discussion, it appears that an interpretation of article 7(2) of the Liechtenstein constitution allowing for arrest and surrender of the prince pursuant to a request by the International Criminal Court is compatible with the applicable constitutional jurisprudence of Liechtenstein courts and the practice of the Liechtenstein government. While an explicit constitutional amendment may trigger political difficulties that are incommensurate given the general importance of the Statute, an interpretation of the constitution in conformity with the Statute may be politically more palatable, constitutionally more appropriate, and equally effective.

3. Probabilities and rationality

As a final note, it should be mentioned that it may not, in the final analysis, be necessary to find a legal solution to the constitutional obstacles facing Liechtenstein. Although, unlike many European monarchies, the prince wields real political power, the particular situation of Liechtenstein, including its lack of armed forces, indicate that an actual scenario involving the commission of crimes under the jurisdiction of the International Criminal Court by the prince is highly improbable. Although article 88 of the Rome Statute requires states parties to "ensure that there are procedures available under their national law" for all the relevant forms of cooperation, including the obligation to arrest and surrender under article 89, article 88 does not specify the precise form these procedures must take, nor does it require that the procedures be available in all conceivable scenarios, however improbable.

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19 Id.

20 Id., p. 13.

By failing to provide explicit legal mechanisms allowing for arrest and surrender of the prince, Liechtenstein would assume a certain risk of violation of the Statute. However, since both the probability that a situation requiring such arrest and surrender would arise and the probability that Liechtenstein would fail to respond appropriately even in such a scenario are extremely small compared to the probability that an explicit legal arrangement would lead to incommensurate difficulties in ratification, it is recommended that common sense prevail over legalism.