Liechtenstein Files Lawsuit in the I C J Against Germany In Respect Of Seized Property

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Suggested Citation: Malcolm MacLaren, *Liechtenstein Files Lawsuit in the I C J Against Germany In Respect Of Seized Property*, 2 German Law Journal (2001), *available at*
http://www.germanlawjournal.com/index.php?pageID=11&artID=27

[1] On 1 June 2001, Liechtenstein instituted proceedings in the International Court of Justice against Germany concerning, in the words of its Application, "decisions of Germany ... to treat property of Liechtenstein nationals as German assets ... seized for the purposes of reparation or restitution as a consequence of World War II ... without ensuring any compensation." Liechtenstein is seeking not only an unspecified amount of reparation for the damage and prejudice suffered but also a ruling by the court in The Hague, The Netherlands, that Germany violated public international law and the principality's sovereignty in its treatment of the seized property.(*)

[2] How Germany finds itself for the first time being sued alone in the International Court of Justice and being sued by such a tiny state as Liechtenstein at that is a politically sensitive and involved matter. The dispute between Liechtenstein and Germany is at the same time of considerable legal interest and importance. The way in which the dispute is resolved will contribute to the ever-evolving history of WW II and the future of public international law, beyond its consequences for the matter itself and relations between the parties.

[3] The first section of the following article will explain the background to the dispute, outlining the controversial measures regarding seized property taken by Czechoslovakia and Germany at the end of WW II giving rise to the dispute. The second section will identify how Liechtenstein's interests were implicated by these measures. The third section will review the allegations contained in Liechtenstein's Application. The fourth section will set out counter-arguments likely to be advanced by Germany and weigh their chances of convincing the International Court of Justice. The fifth and concluding section will set the newly instituted proceedings in the broader context of the on-going, prominent debate over the return of assets stolen or seized as a consequence of WW II.

I) The Battleground - The legal aftermath of WW II

[4] The dispute between Liechtenstein and Germany arises ultimately out of measures adopted by the then Czechoslovakia at the end of WW II. In the so-called Benes Decrees, the eponymous President of Czechslovakia declared, *inter alia*, that the German (and less relevantly here, Hungarian) minorities in the country lost their Czechoslovak citizenship (unless they could prove that during the War they had officially registered themselves as Czechs or Slovaks, had remained faithful to the republic, had themselves suffered under the fascist regime or had taken an active part in the resistance). Czechoslovakia had fought with the Allies against Germany (and Hungary). An estimated 2.5 million Germans were expelled from Czechoslovakia as a result. At the same time as they were stripped of their citizenship rights, the minorities were stripped of their property rights by the Decrees. All movable and immovable property (including agricultural property) belonging to them was confiscated immediately and without compensation.

[5] As part of the 1952 Convention on the Settlement of Matters arising out of the War and the Occupation, Germany agreed, *inter alia*, that it would "in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war" (Article 3, paragraph 1). Germany also agreed with the United States, Great Britain and France to bar claims relating to such property from consideration by German courts (Article 3, paragraph 3).

II) Caught in the cross-fire Liechtenstein, the Benes Decrees and the Settlement Convention

[6] In its Application before the International Court of Justice, Liechtenstein alleges that the Benes Decrees of 1945 were applied not only to German (and Hungarian) nationals in Czechoslovakia but also to other persons that the Benes government believed to be of German (or Hungarian) origin or ethnicity. Liechenstein thereby alleges that its nationals were treated as German nationals and deprived of their property rights without compensation in Czechoslovakia.

[7] The application of the Benes Decrees to the Liechtenstein property remains an unresolved issue as between Liechtenstein and the Czech Republic, as it is did between Liechtenstein and the former Czechoslovakia. Liechtenstein has vehemently complained to successive governments to no avail, with the Czech Republic refusing to

https://doi.org/10.1017/S2071832200003588 Published online by Cambridge University Press

recognize Liechtenstein as a state, let alone to accede to negotiations with it. The seized Liechtenstein property has accordingly never been returned to its owners nor has compensation been offered or paid.

[8] In Liechtenstein's view, the Settlement Convention of 1952 concerns only German property per se, *i.e.* property of the German State or its nationals; it does not apply to any Liechtenstein property. Liechtenstein was neutral during WW II and had no part in the events leading up to or the conduct of the war by Germany. Accordingly, any of its property located abroad affected by Allied measures could not rightly be considered as "seized for the purpose of reparation or restitution, or as a result of the state of war", regardless if it had previously been seized by Germany during the Occupation. Moreover, Liechtenstein alleges that it reached a subsequent understanding with Germany that such Liechtenstein property did not fall within the definition set out in Art. 3(1) and therefore that Germany would regard such property as unlawfully seized and would not bar related claims from consideration by German courts per Art. 3(3).

III) The fighting continues - How Germany has allegedly failed to respect the rights of Liechtenstein and its nationals, breached international law and incurred international legal responsibility

[9] The dispute between Liechtenstein and Germany arises more immediately out of a 1998 Ruling of the *Bundesverfassungsgericht* (BVerfG [German Federal Constitutional Court]). The Application to the International Court of Justice represents, however, an escalation of the dispute. Hitherto litigation had concerned a private lawsuit in Germany by Liechtenstein's Reigning Prince, Hans-Adam II, to regain ownership of a 17th-century oil-painting, which was in the possession of the Czech Republic but had been brought to Germany for exhibition in 1991. The Prince claimed that the painting belonged to his family, and that it, like other Liechtenstein property seized under the Benes Decrees, had been seized by the Czechoslovakian government on the basis of its owner's imputed German nationality and not of his/her citizenship.

[10] The lawsuit was eventually decided by the Federal Constitutional Court in a judgment on 28 January 1998 (BVerfG, 2 BvR 1981/97). The court in Karlsruhe held that the German courts were required by Art. 3 to treat the painting as German property in the sense of the Settlement Convention. It reasoned that the Settlement Convention's bar to claims still applied after the 1990 'Two-Plus-Four Treaty' concerning German reunification; that the Settlement Convention did not impermissibly impose a contractual duty ("*ein Vertrag zu Lasten*") on Liechtenstein; and that the Settlement Convention did not infringe constitutional property rights. Moreover, the German courts were not to pass judgment on the substantive legality of the designation of the painting as 'German property abroad'; it sufficed for the court's purposes that the property had been seized as such by the Czechoslovakian government. The arguments of the Reigning Prince that, under the general rules of public international law property of citizens of a neutral state cannot be seized by the victors of war and that the citizenship of a natural person is exclusively determined by the law of the state conferring citizenship, were deemed to concern the propriety of the seizure itself and therefore to be inadmissible. Accordingly, the lawsuit was rejected and the painting was allowed to return to the Czech Republic. (An application challenging this ruling has been accepted, with consideration of all its grounds, by the European Court of Human Rights in Strasbourg, and a decision by the Grand Chamber is expected later this year.)

[11] In contrast to the previous litigation, the current litigation concerns all seized Liechtenstein property (land, houses and other property as well as artwork) and is being brought before the International Court of Justice by Liechtenstein as a state party. More fundamentally, the dispute now revolves around the position of the Federal Republic of Germany in respect of the property in question. Liechtenstein alleges that the decision of the Constitutional Court, which is domestically unappealable, is binding upon Germany and is attributable to it as a matter of international law. In turn, Germany's rejection of Liechtenstein's official protests during the past two years of consultations, though in keeping with the decision of its highest court, allegedly ignores and undermines the rights of Liechtenstein and its nationals in respect of the seized property. Liechtenstein believes that Germany now views all the property in question as "seized for the purpose of reparation or restitution, or as a result of the state of war" in the sense of the Settlement Convention.

[12] With all diplomatic means exhausted and economic or military means clearly unavailable, Liechtenstein has taken the dispute to The Hague. Liechtenstein's Application requests the International Court of Justice to declare that "(a) by its conduct with respect to the Liechtenstein property, in and since 1998, Germany has failed to respect the rights of Liechtenstein with respect to that property; (b) by its failure to make compensation for losses suffered by Liechtenstein and/or its nationals, Germany is in breach of the rules of international law". Liechtenstein also requests the Court to declare that Germany has thereby "incurred international legal responsibility and is bound to make appropriate reparation to Liechtenstein for the damage and prejudice suffered". According to the principality's Düsseldorf-based lawyer, Alexander Goepfert, Liechtenstein's main purpose in instituting proceedings is not to be compensated. (Indeed, its Foreign Minister admits that the full extent of Liechtenstein's assets in the former

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Czechoslovakia is unknown.) "We would like to win the whole case," said Mr. Goepfert, "but the most important point is that the court rules that Germany violated our sovereignty" (FRANKFURTER ALLGEMEINE ZEITUNG (english edition), 2 June 2001, p. 1). (It should be noted here that Liechtenstein has not raised any claims under the German Constitution at the International Court of Justice, as it did in the previous litigation, as such claims would fall outside the jurisdiction of the International Court of Justice, being matters of domestic not international law.)

IV) Picking the wrong target -- How Germany will likely attempt to rebut Liechtenstein's allegations

[13] Germany has reacted calmly to the filing of Liechtenstein's Application. The Foreign Office in Berlin stated that the Application comes as no surprise as aspects of it have already been handled in the German Courts. Liechtenstein's Application will apparently be examined and then rebutted (FRANKFURTER ALLGEMEINE ZEITUNG (english edition), 2 June 2001, p. 5). Some of the procedural and substantive counter-arguments that Germany will advance in its response may be predicted. Ultimately, the success or failure of Germany (or Liechtenstein's) arguments will hinge upon each party's ability to characterize the dispute in their favour, that is to say, to convince the International Court of Justice that their description of the facts and not so much the law underlying the dispute is the fitting one.

[14] The following are only two of the procedural counter-arguments to be expected from Germany. First, Germany is likely to argue that the International Court of Justice lacks jurisdiction here. Liechtenstein relies on Article 1 of the European Convention for the Peaceful Settlement of Disputes of 1957, which Germany in 1961 and it in 1980 have each ratified, as a basis for the International Court of Justice's jurisdiction. Article 27(a) of the European Convention provides that it is not applicable to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute." Accordingly, Germany may assert that the dispute relates to facts or situations arising before the European Convention entered into force as between the parties in this case (1980), i.e. back to the 1952 Settlement Convention or earlier. It is presumably in anticipation of this counter-argument that Liechtenstein has emphatically alleged a recent change of position by Germany in respect of the property in question. The 1998 Constitutional Court ruling and Germany's rejection of Liechtenstein's official protests during the past two years of consultations have been advanced as evidence that Germany now views all the property in question as "seized for the purpose of reparation or restitution, or as a result of the state of war" in the sense of the Settlement Convention. On this characterization, the facts or situations that form the subject matter of the dispute arose after the relevant date of the European Convention's entry into force.

[15] Determinative of Liechtenstein's chances of convincing the International Court of Justice to adopt this latter characterization of the dispute would be its ability to demonstrate that there exists between it and Germany a permissible, binding and enduring understanding that Germany would regard the Liechtenstein property in question as unlawfully seized and amenable to claims in German courts. Without the existence of such an understanding the dispute would not be able to escape the prohibition on retroactivity found in Article 27(a) of the European Convention. So far, however, Liechtenstein has not, to the author's knowledge, adduced evidence of - nor Germany has acknowledged - the existence of the alleged understanding. The existence of such an understanding seems doubtful if for no other reason than it would expressly conflict with the fulfillment of Germany's duties under the prior Settlement Convention, assuming, that is, Art. 3(3) is interpreted purposively to include all claims challenging the ownership of property seized by Czechoslovakia under the Benes Decrees (*see* infra).

[16] A second possible response from Germany is also typical in so-called involuntary cases (i.e. cases brought unilaterally by claimant states), Germany may be expected to argue that Liechtenstein's Application is inadmissible. One ground for dismissal of which Germany might seek to avail itself is the International Court of Justice's "necessary third party" rule. According to its jurisprudence, this rule requires a showing that the International Court of Justice's decision in a given case would necessarily involve an absent third party. Not only would the third party's rights and duties be thereby determined, but they would also form the very subject matter of a decision on the merits. Germany could well assert that the Czech Republic is the absent third party in this case: the Czech Republic has not consented to these proceedings, but its legal interests are directly implicated. It is presumably in anticipation of this argument that Liechtenstein has also emphatically alleged that the claim only concerns the jurisprudential and legal position of Germany in respect of its seized property and not the propriety of the seizure by Czechoslovakia itself. As Liechtenstein's Foreign Minister, Ernst Joseph Walch, described the disputed events on the day that the Principality instituted proceedings: "Germany used other people's money, namely that of Liechtenstein citizens, to pay part of its war debts" (FRANKFURTER ALLGEMEINE ZEITUNG (english edition), 2 June 2001, p. 1).

[17] As noted, it was essentially for this reason that the German Constitutional Court rejected the Reigning Prince of Liechtenstein's claim. (The German courts were not to pass judgment on the substantive legality of the designation of the painting as 'German property abroad' by the Czechoslovakian government; it sufficed for the court's purposes that the property had been seized as such under the Benes Decrees.) The International Court of Justice, however, may

https://doi.org/10.1017/S2071832200003588 Published online by Cambridge University Press

not feel so circumscribed in its ability to deal with the Settlement Convention as the German Federal Constitutional Court evidently did. The International Court of Justice is not a domestic court, obliged to apply internally effective international law and respect the comity of nations, but is the principal judicial organ of the United Nations, expert in the interpretation of international treaties and generally entrusted with settling legal disputes between sovereign states. The court in The Hague may accordingly take it upon itself to find a third way of settling the dispute between Liechtenstein and Germany. Rather than dismissing the Application outright, the International Court of Justice may allow argument to proceed over the correct interpretation of the terms of the Settlement Convention so as to determine precisely which property claims Germany could have agreed to bar from consideration by its courts but at the same time may forbid argument over the propriety of the seizure of the property in question so as not to directly implicate the interests of the Czech Republic.

[18] If Liechtenstein prevails on jurisdiction and admissibility and the International Court of Justice were to allow argument to proceed over the correct interpretation of the terms of the Settlement Convention, various counter-arguments on the merits may then be advanced by Germany. Germany could not contest its international responsibility for the 1998 Constitutional Court ruling. (It is a well-established and variously recognized by the International Court of Justice doctrine of public international law that the international responsibility of a state is engaged by the action of its competent organs and authorities - including its courts - and that such bodies are obligated to act in conformity with the international obligations - including treaties - undertaken by that state.) Germany could, however, counter Liechtenstein's substantive allegations on the basis of reasoning found in the Constitutional Court ruling. As also observed at the Higher Regional Court in Köln (22 U 215/95 - VIZ 1998, 213, decision of July 9, 1996), a cogent argument may be made for the inclusion on a purposive interpretation of all would-be claims in Germany impugning the ownership of property conditionally seized by Czechoslovakia under Art. 3(3). The contracting states may alone on the basis of the Convention's title be presumed to have intended to bring about a final and effective settlement of the matters arising out of the war and occupation, which object would be furthered by a comprehensive bar. A contextual reading supports this conclusion: neither Germany itself per Art. 3(1) nor its courts per Art. 3(3) were to be the means by which objections were raised in future against measures seizing property for the purposes of reparation or restitution. Against an argument by Liechtenstein that under the general rules of public international law an international treaty may not impose a contractual duty on a third state that is not a signatory to the treaty, Germany could assert that the bar to property claims in the Settlement Convention imposes only a duty on Germany and its courts and not on Liechtenstein.

[19] In the unlikely event, however, that the International Court of Justice is convinced of the existence of a permissible, binding and enduring understanding between Germany and Liechtenstein entered into subsequent to the Settlement Convention, the chances of Liechtenstein prevailing on the merits appear high. Again, the success or failure of Liechtenstein's arguments would hinge upon its ability to characterize the dispute in its favor, for Liechtenstein could make a strong case that its sovereignty had been violated by Germany's legal position. As noted, Liechtenstein was neutral during WW II and had no part in the events leading up to or the conduct of the war by Germany. More than that, Liechtenstein, though an alpine Principality of a mere 160 km2 and 32,000 citizens, has been an autonomous, free and sovereign state since 1806 and is signatory to numerous international treaties and a member of important international and European organizations. As its Foreign Minister put it bluntly, "Liechtenstein is a neutral and sovereign state. Our citizens are not German and never have been" (FRANKFURTER ALLGEMEINE ZEITUNG (english edition), 2 June 2001, p. 5).

V) The ricochet - The possible legal and political ramifications of the dispute

[20] The outcome of the lawsuit possesses a significance beyond the matter of German compensation for an alleged violation of Liechtenstein's sovereignty. Liechtenstein and its nationals were not alone among those affected by the Benes Decrees' stripping of property rights. German (and Hungarian) minorities lost their land, houses, artwork and other property in Czechoslovakia and are following the proceedings with interest. They would like to see the International Court of Justice make a fundamental statement on expropriation law, specifically declaring the Benes Decrees to have been contrary to international law. More reasonably, they are hopeful that a restrictive reading of the terms of the Settlement Convention will lift the bar on claims in Germany in respect of the seized property. Failing all that, they believe that if the seizure of Liechtenstein's property is deemed by the International Court of Justice to have been in discharge of German war debts, theirs would effectively be so deemed also, and a claim for compensation from the German state thereby grounded.

[21] Given the slow and not always full working of justice, however, the resolution of the other property claims arising from the application of the Benes Decrees may finally come through political and not legal channels. A political resolution may at all events be preferable, in light of the plethora of interests (state, business, personal etc.) and the sensitivity of issues (ethnicity, nationalism etc.) involved, not to speak of the long-forgone possibility of approximate material reparation. Switzerland's success in achieving a political resolution may be salutory: Switzerland was able to

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exact a measure of compensation for its citizens whose property in Czechoslovakia was unlawfully seized. In Germany, the federal opposition has taken up the cause of the expelled Sudeten Germans, promising to work toward resolution of their claims. (Federal government policy since the signing of a German-Czech Declaration in 1997 has been to respect the Czech Republic's obligation to its legal order and to avoid encumbering their relations with historical questions.) For his part, the Austria's premier spoke in the last weeks of making the settlement of the Benes issue a condition to the Czech Republic being admitted to the European Union. From this political perspective, Liechtenstein's Application before the International Court of Justice should, even if it is rejected, serve to add to the debate over the return of stolen or seized assets. It thereby may indirectly increase pressure on the Czech Republic to face up to its WW II crimes, as its European neighbors have done or are doing.

For more information:

Decision of German Constitutional Court in Prince of Liechtenstein lawsuit (German) on-line: http://www.bundesverfassungsgericht.de/entscheidungen

Filings in International Court of Justice in Liechtenstein-Germany case (English/French) on-line: http://www.icj-cij.org
(*) This report was written before the International Court of Justice posted the application of Liechtenstein on its web-site.

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