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**COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW
(CAHDI)**

**28th meeting
Lausanne, 13-14 September 2004**

**DECISIONS BY THE COMMITTEE OF MINISTERS CONCERNING THE CAHDI AND
REQUESTS FOR CAHDI'S OPINION**

Secretariat Memorandum
prepared by the Directorate General of Legal Affairs

Foreword

At its 837th meeting on 16 April 2003, the Committee of Ministers at Deputies' level decided to communicate Recommendation 1602(2003) on immunities of Members of the Parliamentary Assembly (reproduced in Appendix I) to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments by 31 July 2003 (decision in Appendix II). This deadline was subsequently extended so as to allow the CAHDI to formally consider the matter at its 26th meeting, 18-19 September 2003. At this meeting, the CAHDI adopted a preliminary opinion on Recommendation 1602 (2003) (reproduced in Appendix A to Appendix III) and decided to revert to some issues dealt with by the Recommendation at its 27th meeting, in the light of further information.

At its 869th meeting on 21 January 2004, the Committee of Ministers at Deputies' level took note of the preliminary opinion of the CAHDI, invited the CAHDI to continue its consideration of the issues raised in the Assembly recommendation, and of the appropriateness and necessity of adopting a position concerning the interpretation of the General Agreement on Privileges and Immunities of the Council of Europe, and adopted an interim reply to the Parliamentary Assembly (see decision and reply in Appendix III).

Further to its preliminary opinion on Recommendation 1602 (2003) on immunities of the Members of the Parliamentary Assembly adopted at its 26th meeting, the CAHDI pursued its consideration of this Recommendation at its 27th meeting on 18-19 March 2004. The CAHDI asked the Dutch delegate, Mr Lammers, to coordinate the preparation of a possible supplementary draft opinion which will be examined at the 28th meeting of the CAHDI, and to this end delegations were invited to submit any comment to the Secretariat.

The contributions submitted by delegations of:

- Czech Republic
- Georgia
- Greece
- Italy
- Russian Federation
- Turkey
- United Kingdom

(in the language in which they were submitted) appear in Appendix IV.

Action required

Members of the CAHDI are invited to take note of the compilation of informative documents on the practice followed by the Parliamentary Assembly as regards immunity of its members (CAHDI (2004) Inf 2 and addendum) and pursue consideration of the issue with a view to a possible further opinion of the CAHDI.

APPENDIX I

**Recommendation 1602 (2003)¹ of the Parliamentary Assembly
on Immunities of members of the Parliamentary Assembly**

1. The Parliamentary Assembly refers to its Resolution 1325 (2003) on immunities of members of the Parliamentary Assembly.
2. It recalls that in the light of the ongoing work of the Assembly and its bodies throughout the year and the concept of European parliamentary immunity developed by the European Parliament, the notion "during the sessions of the Assembly" covers the entire parliamentary year.
3. The Assembly points out that according to Article 15.b of the General Agreement on Privileges and Immunities of the Council of Europe, members of the Parliamentary Assembly enjoy, on the territory of all member states other than their own state, exemption from arrest and prosecution. This immunity may only be lifted by the Parliamentary Assembly following a request submitted to it by a competent national authority.
4. The Assembly further recalls that under Article 15 of the general agreement, Representatives to the Assembly and their Substitutes continue to enjoy the immunities secured by this provision when they are no longer members of their national parliament, and do so until their replacement as members of the Assembly.
5. It recommends that the Committee of Ministers invite member states:
 - i. to interpret the immunities accorded under Article 14 of the general agreement in such a way as to include the opinions expressed by Assembly members within the framework of official functions they carry out in the member states on the basis of a decision taken by an Assembly body and with the approval of the competent national authorities;
 - ii. where they have a system of parliamentary inviolability and wish to waive the immunity of a national parliamentarian, who is at the same time a member of the Parliamentary Assembly, to remind the competent authorities that they should also request the Assembly to waive the European immunity of that member which is granted to him or her under Article 15.a of the general agreement;
 - iii. to also remind their authorities that at all stages when parliamentary immunity is waived the presumption of innocence must be maintained;
 - iv. to ask their competent authorities to notify the President of the Parliamentary Assembly in the event of measures taken to detain or prosecute a member of that Assembly.
6. Furthermore, the Assembly invites the Committee of Ministers:
 - i. to inform it of the follow-up given to the measures it has proposed to the governments of the member states as a consequence of the adoption of Assembly Recommendation 1373 (1998) on freedom of movement of and the issue of visas to members of the Parliamentary Assembly of the Council of Europe;

¹ Assembly debate on 2 April 2003 (13th Sitting) (see Doc. 9718 rev., report of the Committee on Rules of Procedure and Immunities, rapporteur: Mr Olteanu).
Text adopted by the Assembly on 2 April 2003 (13th Sitting).

ii. to recommend again, if necessary, that governments take all appropriate measures to provide members of the Parliamentary Assembly with unimpeded entrance to the member states for official journeys;

iii. to ask member states to acknowledge unilaterally as an official document the laissez-passer issued by the competent Council of Europe authorities to the members of the Parliamentary Assembly and containing details of the holder (name, date and place of birth, nationality, address, photograph), the date of issue and the validity, as well as the relevant extracts from the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2, 1949) and its Additional Protocol (ETS No. 10, 1952), together with other pertinent information.

APPENDIX II

**Decision by the Committee of Ministers at Deputies' level
837th meeting – 16 April 2003 Item 3.1****Parliamentary Assembly - 2nd Part of the 2003 Session
(Strasbourg, 31 March – 4 April 2003)****Texts adopted**

(CM/Del/Dec(2003)835/3.1, 2003 Session (Provisional compendium of texts adopted),
CM/AS(2003)1600prov.)

9. concerning Recommendation 1602 (2003) on immunities of Members of the Parliamentary Assembly

- a. decided to bring it to the attention of their governments;
- b. decided to communicate it to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments by 31 July 2003;
- c. decided to communicate it to the Commission for Democracy through Law (Venice Commission) for information and possible comments by 31 July 2003;
- d. invited their Rapporteur Group GR-J to prepare a draft reply for adoption at one of their forthcoming meetings;

APPENDIX III

**Decision by the Committee of Ministers at Deputies' level
869th meeting – 21 January 2004 Item 10.1****Immunities of Members of the Parliamentary Assembly
Recommendation 1602 (2003) of the Parliamentary Assembly
Texts adopted
(Rec_1602(2003) and CM/AS(2004)Rec1602 final)***Decision*

The Deputies adopted the reply to Parliamentary Assembly Recommendation 1602 (2003) on "Immunities of Members of the Parliamentary Assembly", as it appears in Appendix 13 to the present volume of Decisions².

² See also CM/AS(2004)Rec1602 final.

Parliamentary Assembly Recommendation 1602 (2003)

(Reply adopted by the Committee of Ministers on 21 January 2004 at the 869th meeting of the Ministers' Deputies)

1. The Committee of Ministers takes note of Parliamentary Assembly Recommendation 1602 (2003) on the immunities of members of the Parliamentary Assembly. It has brought it to the attention of the governments of the member states.
2. The Committee of Ministers recognises the importance of the issues referred to in the recommendation. It considers the parliamentary immunity as one of the important guarantees of the independence of the legislative power.
3. The Committee of Ministers has communicated the Assembly Recommendation *inter alia* to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments. It has received the appended preliminary opinion from CAHDI.
4. In its preliminary opinion, the CAHDI considered that the issues dealt with by the Recommendation, in particular paragraphs 2 and 5.i required an in-depth analysis. It reserved its consideration of these issues which it wished to return to at its next meeting in the light of further information. Nevertheless, without prejudice to the further consideration of the substantive points referred to above, the CAHDI noted that, from a procedural point of view, the Committee of Ministers could, if considered appropriate, adopt unanimously a position concerning the interpretation of the General Agreement on Privileges and Immunities of the Council of Europe. It referred to the Vienna Convention on the Law of the Treaties (Articles 31-33).
5. The CAHDI stressed that, in accordance with Article 6, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, at all stages when parliamentary immunity is waived the presumption of innocence must be maintained. The Committee of Ministers totally supports this view expressed in subparagraph 5.iii of the Assembly recommendation. In this context, it also stresses the importance of the independence of the judiciary.
6. The CAHDI will continue its consideration of the issues raised in the Assembly recommendation and of the appropriateness and necessity of adopting a position concerning the interpretation of the General Agreement on Privileges and Immunities of the Council of Europe. The Committee of Ministers will keep the Assembly informed of future developments in this area, and in case of adoption of any further decision on the matter it will be communicated to the Assembly without delay. For this purpose it will elaborate a supplementary reply.
7. Concerning paragraph 6 of the Recommendation, the Committee of Ministers wishes to recall the measures it invited the governments of member States to consider taking in its reply to Assembly Recommendation 1373 (1998) on freedom of movement of and the issue of visas to members of the Parliamentary Assembly of the Council of Europe (see Appendix II). Since problems mentioned in the said Recommendation have not been totally overcome, it has reiterated this invitation to member states and also the request for information on measures taken.

Appendix A

Preliminary opinion of the Committee of Legal Advisers on Public International Law (CAHDI) on Parliamentary Assembly Recommendation 1602 (2003) on immunities of members of the Parliamentary Assembly

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 26th session in Strasbourg, 18-19 September 2003. The agenda included an item on « Decisions of the Committee of Ministers concerning the CAHDI and request for CAHDI's opinion».

2. In the framework of this item, pursuant to the Committee of Ministers' decision at their 837th meeting (Strasbourg, 16 April 2003), the CAHDI examined Parliamentary Assembly Recommendation 1602 (2003) on immunities of Members of the Parliamentary Assembly.

3. In accordance with its specific terms of reference, the CAHDI concentrated on what it considered to be issues of public international law.

4. The CAHDI considered that the issues dealt with by this Recommendation, in particular paragraphs 2 and 5.i required an in depth analysis which it could not carry out during the present meeting, and therefore it reserved its consideration of these issues and to return to them at its next meeting in the light of further information.

5. However, in order to meet the request of the Committee of Ministers, the CAHDI wished to provide it with the following preliminary considerations.

6. The CAHDI recalls the relevant provisions of the Vienna Convention on the Law of the Treaties, including Articles 31-33 and in particular Article 31 that provides that

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[...]

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

7. Without prejudice to the further consideration of the substantive points referred to in paragraph 4 above, the CAHDI notes that, from a procedural point of view, the Committee of Ministers could, if considered appropriate, adopt unanimously a position concerning the interpretation of the General Agreement on Privileges and Immunities of the Council of Europe. The effect of such a position would have to be seen in the light of the above-mentioned provisions.

8. Concerning paragraph 5, iii of the Recommendation, the CAHDI stresses that, in accordance with Article 6, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, at all stages when parliamentary immunity is waived the presumption of innocence must be maintained.

*Appendix B***Reply to Parliamentary Assembly Recommendation 1373 (1998)
Freedom of movement of and the issue of visas to the members of the Parliamentary Assembly***Decisions*

The Deputies

1. took note of the possible difficulties encountered by members of the Parliamentary Assembly in obtaining visas speedily to enable them to carry out their duties on official journeys to the territories of member States;
2. invited the governments of member States to consider taking one or more of the following measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit by full entry facilities on the territory of member States:
 - i. according priority to or at least speedy treatment of requests for visas from members of the Parliamentary Assembly in connection with their official duties, in particular when supported by a Council of Europe service card;
 - ii. granting long-term multiple entry visas whenever possible;
 - iii. when the granting of long-term multiple visas is not possible, according priority to the speedy processing of requests for single entry visas;
 - iv. authorising authorities at ports of entry, in cases of urgency when it has not been possible for the member of the Parliamentary Assembly to obtain a visa prior to departing on an official journey, and when notified of such impossibility by the appropriate domestic authorities, to grant the appropriate visa exceptionally at the port of entry;
 - v. granting visas free of charge wherever possible;
3. asked the Secretary General to transmit the present decision to member States and to inform the Committee of Ministers in due course of the measures taken to implement it;
4. informed the Parliamentary Assembly of the above decisions, taken in reply to its Recommendation 1373 (1998).

APPENDIX IV

National Contributions**CZECH REPUBLIC*****Comments submitted for the 28th meeting of the CAHDI***

The International Law Department of the Ministry of Foreign Affairs of the Czech Republic was asked by the Committee of Legal Advisers on Public International Law (CAHDI) for its position on the extent of privileges and immunities of members of the Council of Europe Parliamentary Assembly (PA). The question is the result of an initiative of several PA members concerning the waiving of immunity of PA members by their national parliaments. The relevant documents (draft Resolution 9439/2002 and PA Recommendation 1620/2003) show that when waiving immunity of PA members, their national parliaments would also have to ask for immunity waiver the Parliamentary Assembly of the Council of Europe.

The following is our position on the issue:

The General Agreement on Privileges and Immunities of the Council of Europe does not provide for such a wide interpretation of immunities: The immunities of members of the Parliamentary Assembly are limited in terms of matter only to words spoken or votes cast in the Parliamentary Assembly (Article 14) and in terms of time only to the periods of sessions of the Parliamentary Assembly and its Committees including during travelling to and from the place of meeting (Article 15 of the General Agreement and Article 3 of the Protocol to the General Agreement).

Arguments against the obligation of the national (Czech) parliament intending to waive the immunity of its member who is also a member of the PA to ask for the waiver of immunity also the Council of Europe Parliamentary Assembly can be found in national law. As a member of parliament (deputy, senator) is elected to the Parliament on the basis of Czech legislation he/she enjoys immunities on the basis of this legislation (Article 27 of the Constitution of the Czech Republic). His/her immunity can therefore be basically waived only by the Mandatory and Immunities Committee of the Chamber of Deputies or of the Senate. In our opinion, tying the waiver of a deputy's or senator's immunity to his/her membership of an international organization and immunities arising from it would be a gross interference in the sovereignty of the Czech Republic which is, inter alia, executed also by the legislative power. Moreover, the Council of Europe Parliamentary Assembly would in this respect get into the position superior to the Parliament of the Czech Republic for which there are no reasons, with a view to the nature of this international organization, if we take into consideration the fact that the Parliamentary Assembly is not a legislative but only a consultative body and its members are nominated or elected by national parliaments.

The nomination of deputies or senators to the Council of Europe Parliamentary Assembly is in fact not direct but on the basis of their election to the duly elected legislative body. From the viewpoint of the theory of law of international organizations, the position of members of the PA does not differ from that of delegates sent to an international organization to participate in specific talks. As a rule, in such cases the delegates cannot claim from the sending institution privileges (Czech Parliament), immunities or other advantages provided by the international organization.

From the legal point of view, the latest initiative of some PA members seeking the very opposite can therefore be not supported.

GEORGIA***Comments submitted for the 27th meeting of the CAHDI***

In reply to your message, I have the pleasure to inform you that the Georgian Delegation has no objections concerning the Recommendation 1602(2003) of the Parliamentary Assembly of the CoE.

The only issue, which we believe has to be clarified concerns point ii of paragraph 5 of the Recommendation. According to our interpretation of Article 15 of the General Agreement on Privileges and Immunities of the Council of Europe, regime established under Article 15 (a) is to be applied "During the sessions of the Consultative Assembly". In our opinion it would be appropriate to reflect (in case of agreement with our interpretation) the above-stated. We believe it would be of help for the further implementation of the provisions of the Recommendation.

GREECE

Comments submitted for the 28th meeting of the CAHDI

With regard to Recommendation 1602 (2003) of the Parliamentary Assembly, Greece has the following observations:

As regards article 14 of the General Agreement on Privileges and Immunities of the Council of Europe, Greece would be inclined to accept an interpretation of the provisions of this article in a way that would include 'opinions expressed by Assembly members' into 'words spoken', as the Assembly contends. This view seems to be supported by the French (equally authentic) text of the General Agreement.³ It seems indeed that there exists a certain difference between the two authentic (English and French) texts, in this respect

In our view since there does not seem to be relevant practice on the matter which would help to further clarify the meaning of the authentic texts, the provisions of Article 33 paragraph 4 of the Vienna Convention on the Law of Treaties apply. In this respect an interpretation of the English text that would also include 'opinions expressed' into 'words spoken' would better reconcile the two texts. Furthermore, Greece retains certain doubts as to the conditions contained in the Recommendation concerning the exercise of the functions of the members of the Assembly. Such conditions do not find a basis in the General Agreement.

In relation to article 15 paragraph a , we are of the view that there is no obligation of States Parties to the Agreement to request the Parliamentary Assembly to waive the immunity of a national parliamentarian whose immunity has been waived by the national Parliament. Furthermore, the Parliamentary Assembly is not required to issue a waiver of immunity in such cases. To this extent it would seem that paragraph 5 ii of the Recommendation goes further than the actual wording of article 15 of the General Agreement.

ITALIE

Comments submitted for the 27th meeting of the CAHDI

1) Il n'y a pas d'observations sur le point 5-o) relatif à une interprétation extensive de l'article 14 de l'Accord, de manière à inclure sous les immunités les opinions émises par les membres de l'Assemblée Parlementaire dans le cadre de fonctions officielles qu'ils exécutent dans les Etats membres sur la décision prise par un organe de l'Assemblée et en accord avec les autorités nationales compétentes; il s'agit, en effet, de confirmer les immunités en présence des activités accomplies toujours dans l'exercice de fonctions officielles.

2) Il n'y a pas d'observations sur le point 5 (ii) relatif à la levée de l'immunité au niveau national et européen parce qu'il s'agit de considérer, en présence des deux statuts des membres comme parlementaires de l'Assemblée et des parlements nationaux, l'autonomie des deux ordres juridiques en matière;

3) Il y a accord sur le point 5(iii) e (iv).

³ The French text of Article 14 reads as follows: 'Les représentants à l'Assemblée Consultative et leurs suppléants ne peuvent être recherchés, détenus ou poursuivis en raison des opinions ou votes émis par eux dans l'exercice de leurs fonctions.'

RUSSIAN FEDERATION***Comments submitted for the 28th meeting of the CAHDI***

Upon the request for comments on Recommendation 1602 (2003) on immunities of the members of the Parliamentary Assembly we would like to submit the following.

1. Paragraph 5 (i) of the Recommendation.

In our understanding article 14 of the General Agreement on Privileges and Immunities of the Council of Europe assumes that the privileges and immunities of Representatives to the Consultative Assembly have effect in respect of words spoken or votes cast in the exercise of their official functions, which means in the period and in the place of their action in the course of corresponding session of the Assembly. The proposed interpretation actually leads to the assumption that the sessions are non-stop, and the privileges and immunities cover opinions not limited by time and place of their expression. In this form the Recommendation in fact expands, rather than interprets the article 14. If the Council of Europe decides that it's feasible to widen territorial and time limits of the privileges and immunities granted under article 14 of the General Agreement, in our opinion it should be done in the form of an amendment to the article rather than in form of interpretation by the Committee of Ministers.

2. Paragraph. 5 (ii)) of the Recommendation.

In our understanding the privileges and immunities of the deputies of the national parliaments and the privileges and immunities of the Assembly members are two parallel systems, which have effective formal autonomy.

3. Paragraph 6 (iii) of the Recommendation.

In the Russian Federation it would be possible to acknowledge as an official document the laissez-passer issued by the competent Council of Europe authorities to the members of the Parliamentary Assembly only after introduction of amendments to the national legislation, or through the introduction of the new article to the General Agreement, similar to article 7 of the Convention on the privileges and immunities of the United Nations, which comes into force for the Russian Federation after certain formal procedures are completed. We would propose therefore to add to the paragraph 6 (iii) of the Recommendation in the appropriate place the following: "where it is possible" or "where national legislation permits". If the Committee of Ministers so decides it could be possible on a later stage to consider the corresponding amendment to the General Agreement, which could lead to universal acknowledgement of these documents.

TURKEY***Comments submitted for the 27th meeting of the CAHDI***

With reference to your e-mail dated 24 April 2003, concerning the Recommendation 1602(2003) on immunities of Members of the Parliamentary Assembly, I have the pleasure to inform you that, we consider the Recommendation as a clear and concise text which would facilitate to establish a harmonized system regarding the interpretation and application of European Parliamentary immunity among Member States.

UNITED KINGDOM

Comments submitted for the 27th meeting of the CAHDI

1. The United Kingdom refers to the request by the Secretariat of the CAHDI for comments on Recommendation 1602(2003) on immunities of Members of the Parliamentary Assembly.

2. The United Kingdom's views on paragraph 5 of the Recommendation which recommends that the Committee of Ministers invite member states to take various actions are:-

(i) In the United Kingdom, interpretation of the General Agreement on Privileges and Immunities of the Council of Europe, and the legislation implementing that Agreement, is a matter for the courts, not the Government, the Parliamentary Assembly or Committee of Ministers. We are therefore not in a position to take a view on the way in which Article 14 of the General Agreement should be interpreted. We do however have concerns that the Recommendation seeks to expand, rather than interpret, Article 14.

(ii) In the United Kingdom Members of Parliament enjoy immunity from certain civil proceedings, which can very rarely be waived. They do not have immunity from criminal prosecutions. The issue of waiver of European immunity by the Parliamentary Assembly, in addition to waiver of immunity by the national Parliament, under Article 15(a) of the General Agreement is therefore not of practical relevance to the United Kingdom.

(iii) It is clear that the waiver of parliamentary immunity should not affect the presumption of innocence of the individual.

(iv) The requirement that the competent authorities of a member state notify the President of the Parliamentary Assembly in the event of measures being taken in that state to detain or prosecute a member of the Assembly is not provided for in the General Agreement. Under Article 15 of the General Agreement a member of the Assembly may be prosecuted in the UK if he is a UK Representative; he may also be prosecuted if he is a Representative of another state found committing, or just having committed, an offence. In such cases, waiver of immunity is not required from the Parliamentary Assembly and, unless the individual concerned wished the UK authorities to notify the President of the Assembly of his detention or prosecution, it would not be appropriate to do so.

3. As regards paragraph 6 of the Recommendation, and the request that member states acknowledge as an official document the "laissez-passer" issued by the Council of Europe to members of the Parliamentary Assembly, for practical reasons the United Kingdom is unable to accept the "laissez-passer" as a valid travel document instead of a passport. Members of the Parliamentary Assembly travelling in the exercise of their functions are exempt from United Kingdom immigration control and should have little difficulty in entering the UK.

Additional comments submitted for the 28th meeting of the CAHDI

The following is the United Kingdom views on the Parliamentary Assembly's Recommendation 1604 (2003):

para 2 - we note that there is no necessity for CAHDI to comment upon this as the Parliamentary Assembly does not invite the Committee of Ministers to take any action in this respect.

para 5 (i) - we feel that the recommendation of the Parliamentary Assembly is seeking to expand the the scope of Article 14 of the General Agreement on Privileges and Immunities

rather than interpret it. The language of Article 14 is cast in standard terms, and there is a growing body of practice in relation to the interpretation of analogous provisions - including for example the Cumaraswamy Advisory Opinion of the ICJ. We believe that interpretation of Article 14 ought properly to be left to the courts.