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CAHDI (2004) 14 Addendum

**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**

**RECOMMENDATION 1602 (2003) OF THE PARLIAMENTARY ASSEMBLY ON
IMMUNITIES OF MEMBERS OF THE PARLIAMENTARY ASSEMBLY**

Document submitted by Mr Johan G. Lammers,
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Recommendation 1602 (2003) of the Parliamentary Assembly on immunities of members of the Parliamentary Assembly

1. In the CAHDI meeting of 18-19 March 2004 I have been asked to coordinate the preparation of a possible supplementary draft opinion which will be examined at the CAHDI meeting of 13-14 September 2004. Delegations were invited to submit any comment to the Secretariat.
2. Since the CAHDI meeting of 18-19 March written comments have been submitted by the delegations of the Czech Republic, Greece, the Russian Federation and the United Kingdom.
3. In order to prepare a possible supplementary draft opinion, all relevant materials distributed by the Secretariat, the observations made by delegations during the two earlier CAHDI meetings, and the written comments received from delegations have been carefully examined. This has been done on the presumption that, as indicated in the preliminary opinion by the CAHDI adopted at the meeting of 18-19 September 2003, the CAHDI would need to concentrate on what it considered to be issues of public international law.

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4. Observations by delegations – expressed during the last two meetings and in written comments – related to paragraphs 2, 5 and 6 of Recommendation 1602 (2003) of the Parliamentary Assembly.
5. With respect to paragraph 2, the Parliamentary Assembly merely “recalls” that the notion ‘during the sessions of the Assembly’ covers the entire parliamentary year. The Assembly does not ask the Committee of Ministers to take any action on that point. For this reason, it does not seem necessary for CAHDI to express its opinion on this issue.
6. This is different for the issues mentioned in paragraphs 5 and 6 of Recommendation 1602. In paragraph 5, the Assembly issues a recommendation to the Committee of Ministers. In paragraph 6, the Assembly invites the Committee of Ministers to take certain measures.
7. With respect to paragraph 6(iii) the Assembly invites the Committee of Ministers “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 [...]”. One delegation has observed that such acknowledgement of an official document would require the amendment of national legislation. A national legal basis may also be necessary in other member states. Such a requirement should however not in principle prevent the Committee of Ministers from adopting a certain decision. Taking into account that it does not seem absolutely necessary for the functioning of the Parliamentary Assembly that the said laissez-passer is acknowledged in all member states, it is proposed that the Committee of Ministers will ask all member states to do so “where national legislation permits”.
8. In paragraph 5 of Recommendation 1602 the Assembly recommends the Committee of Ministers to invite member states to give a certain interpretation of Articles 14 and 15 of the General Agreement on Privileges and Immunities. Some delegations have indicated that the suggested interpretations would expand the scope of these articles and would therefore require amendment of the General Agreement. In this case such an amendment, although formally possible, would, however, not seem to be required. This is based on the following considerations.

9. In general, it is widely accepted that there is considerable room for organs of international organizations to interpret the laws and regulations of the organization. This is supported by abundant practice. (A well-known example is the interpretation of Article 27, paragraph 3 of the UN Charter, where it has become generally accepted that abstentions by one or more of the permanent members of the Security Council do not block decision-making in the Council, although the Charter explicitly requires the *concurring* votes of the permanent members.) Although there is a limit, flexible interpretation is an indispensable tool for international organizations. It allows them to continue to be able to perform their functions under circumstances different from those prevailing long ago, when the relevant rules and regulations were adopted.
10. The text of the articles on the privileges and immunities of representatives to the Parliamentary Assembly is largely similar to the articles on the privileges and immunities of representatives to the European Parliament, laid down in Articles 8 to 10 of the 1965 EC Protocol on Privileges and Immunities. On the basis of these three rather general provisions, a considerable practice of the European Parliament has evolved over the years, as summarized in Doc. 9718 revised of the Parliamentary Assembly (25 March 2003). Important elements of this practice are (1) the acceptance that the privileges and immunities for parliamentarians at the national level and those at the European level constitute *two separate regimes*, (2) frequent requests for a waiver of immunity to the European Parliament, and (3) the refusal of the European Parliament to waive immunity in cases where the alleged offences are considered to be part of the political activities of the parliamentarian concerned.
11. Although the Parliamentary Assembly is different from the European Parliament in a number of respects, it must be admitted that its position is also different from most parliamentary organs of international organizations. These other parliamentary organs are purely consultative bodies which usually meet once or twice a year and have extremely limited powers. The role of the Parliamentary Assembly of the Council of Europe is more significant. It often plays an important role in the making of conventions, in admitting new members and, for example, in electing judges of the European Court of Human Rights. Its role has evolved considerably since the time of its creation, as is also reflected in its change of name (from its original name "Consultative Assembly" to "Parliamentary Assembly"). The interpretation of the relevant privileges and immunities should go hand in hand with this evolution. It is appropriate that the Parliamentary Assembly, although not fully similar to the European Parliament, uses the practice of the European Parliament as an orientation for the interpretation of its own privileges and immunities.
12. This does not imply that the Parliamentary Assembly should by definition follow European Parliament practice. However, the recommendations contained in paragraph 5 of Recommendation 1602 may be deemed to amount to a reasonable interpretation of Articles 14 and 15 of the General Agreement.
13. The interpretation in paragraph 5(i) is closely linked to the carrying out of functions as circumscribed in Article 14. The expression of opinions is one of the core political activities of parliamentarians. Moreover, paragraph 5(i) refers to specific conditions that must be fulfilled if immunities are to be applicable (i.e. "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").
14. Article 15 distinguishes between the enjoyment of immunities by members on their national territory and on the territory of all other member states. On their national territory, members of the Parliamentary Assembly enjoy the same immunities as are accorded to members of the national parliament. However, as is the case for members of the European Parliament, this 'equalization' only relates to the substantive immunities

enjoyed and not to the request of a waiver. The immunities concerned are accorded exclusively in order to allow the Parliamentary Assembly to carry out its functions. Hence, whenever a waiver is requested, as far as *those* immunities are concerned, it is for the Assembly – and not for the national authorities - to decide whether or not such a request should be honoured. This is a power implied by the member states when the Parliamentary Assembly was created and privileges and immunities were accorded to its members in order to ensure its independence, in the common interest of all member states.

15. In view of the foregoing and taking into account the observations made by delegations during the two earlier CAHDI meetings and the written comments received, it is suggested that the CAHDI:
 - (a) does not need to express an opinion on paragraph 2 of Recommendation 1602;
 - (b) with regard to paragraph 6(iii) of Recommendation 1602, proposes to the Committee of Ministers to ask member states, *where national legislation permits*, 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;
 - (c) referring to paragraph 7 of the preliminary opinion adopted at its meeting of 18-19 September 2003, recommends that the Committee of Ministers adopt unanimously a position concerning the interpretation of the General Agreement on Privileges and Immunities of the Council of Europe as recommended by the Assembly in paragraphs 5(i) and 5(ii) of its Recommendation 1602;
 - (d) does not need to issue further recommendations concerning Recommendation 1602.