

## OPINION OF THE CAHDI

### ON RECOMMENDATION 2083 (2016) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “INTRODUCTION OF SANCTIONS AGAINST PARLIAMENTARIANS”

1. On 10-11 February 2016, the Ministers' Deputies at their 1247<sup>th</sup> meeting agreed to communicate Recommendation 2083 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) on “Introduction of sanctions against parliamentarians” to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by 11 May 2016. The text of this Recommendation and the Resolution 2087(2016) associated with it appears in Appendix I and Appendix II respectively to this document.

2. The CAHDI examined the above-mentioned Recommendation at its 51<sup>st</sup> meeting (Strasbourg, 3-4 March 2016) and made the following comments concerning those aspects of Recommendation 2083 (2016) which are of particular relevance to the Terms of Reference of the CAHDI.

#### A. Comments in relation to the general question of the rights of members of the PACE

3. From the outset, the CAHDI notes that the legal situation of members of the PACE travelling in an official capacity to and in Council of Europe member States is governed by Article 40<sup>1</sup> of the *Statute of the Council of Europe*, as further elaborated in the *General Agreement on Privileges and Immunities of the Council of Europe* (GAPI) and its *Protocol*. Furthermore, the CAHDI notes that the rights of members of the PACE when seeking to attend an official meeting in a member State, in particular in relation to the freedom of movement, are defined in Article 13<sup>2</sup> of the GAPI. The immunities enjoyed by PACE members are defined in particular in Articles 14<sup>3</sup> and 15<sup>4</sup> of the GAPI. Moreover, Article 3<sup>5</sup> of the *Protocol* to the GAPI extends the immunities defined in

<sup>1</sup> **Article 40 (ETS No.1):** “The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all representatives to the Consultative Assembly from arrest and all legal proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions.”

<sup>2</sup> **Article 13 (ETS No.2):** “No administrative or other restriction shall be imposed on the free movement to and from the place of meeting of Representatives to the Consultative Assembly and their substitutes.

Representatives and their substitutes shall, in the matter of customs and exchange control, be accorded:

- a. by their own government, the same facilities as those accorded to senior officials travelling abroad on temporary official duty;
- b. by the governments of other members, the same facilities as those accorded to representatives of foreign governments on temporary official duty.”

<sup>3</sup> **Article 14 (ETS No.2):** “Representatives to the Consultative Assembly and their substitutes shall be immune from all official interrogation and from arrest and all legal proceedings in respect of words spoken or votes cast by them in the exercise of their functions”.

<sup>4</sup> **Article 15 (ETS No.2):** “During the sessions of the Consultative Assembly, the Representatives to the Assembly and their substitutes, whether they be members of Parliament or not, shall enjoy:

- a. on their national territory, the immunities accorded in those countries to members of Parliament;
- b. on the territory of all other member States, exemption from arrest and prosecution.

This immunity also applies when they are travelling to and from the place of meeting of the Consultative Assembly. It does not, however, apply when Representatives and their substitutes are found committing, attempting to commit, or just having committed an offence, nor in cases where the Assembly has waived the immunity.”

<sup>5</sup> **Article 3 (ETS No.10):** “The provisions of Article 15 of the Agreement shall apply to Representatives to the Assembly, and their Substitutes, at any time when they are attending or travelling to and from, meetings of committees and sub-committees of the Consultative Assembly, whether or not the Assembly is itself in session at such time”.

Article 15 of the GAPI to the representatives of the PACE and their substitutes attending or travelling to or from meetings of the PACE committees or sub-committees.

4. The CAHDI recalls that the Committee of Ministers of the Council of Europe has invited on several occasions the governments of member States to adopt specific measures in order to fully implement the above mentioned privileges and immunities enjoyed by the PACE members. For instance, in its Reply to PACE *Recommendation 1373 (1998) on freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe* adopted on 20 October 1998 at the 645<sup>th</sup> meeting, the Committee of Ministers invited the governments of member States to consider taking a series of measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit from full entry facilities on the territory of member States<sup>6</sup>. These measures were recalled by the Chair of the Committee of Ministers in his reply to the written Question No. 501 by Lord Russell-Johnston: "Visa requirements for members of the Assembly attending Assembly committee meetings". In this regard, the CAHDI recalls, as does the PACE itself in its Resolution 2087 (2016), that international law grants States full sovereignty over their territory. This implies that States can also freely decide, in conformity with their obligations under international law, on the entry of foreign nationals into their territory.

5. Furthermore, the CAHDI recalls its Preliminary Opinion on *Recommendation 1602 (2003) of the Parliamentary Assembly of the Council of Europe on "Immunities of members of the Parliamentary Assembly"* adopted at its 26<sup>th</sup> meeting in September 2003 (see Appendix III to this document). In this Preliminary Opinion "the CAHDI considered that the issues dealt with by this Recommendation, in particular paragraphs 2<sup>7</sup> and 5.1<sup>8</sup> 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" (document CAHDI (2003)14, Appendix III). The Committee of Ministers took into account this CAHDI Preliminary Opinion when replying to the PACE in relation to Recommendation 1602 (2003) on 21 January 2004 (Reply adopted at the 869<sup>th</sup> meeting of the Committee of Ministers)<sup>9</sup>. The CAHDI pursued its consideration of PACE Recommendation 1602 (2003) at its 27<sup>th</sup> and 28<sup>th</sup> meetings, and agreed "to propose 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" (document CAHDI (2004) 27 paragraph 27). At their 904<sup>th</sup> meeting (17 November 2004), the Committee of Ministers decided to follow the CAHDI's proposal and instructed the Secretary

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<sup>6</sup> In its reply to PACE Recommendation 1373 (1998) on freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe, the Committee of Ministers "*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 officials duties, in particular when supported by a Council of Europe 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 visas exceptionally at the port of entry;*
- v. *granting visas free of charge whenever possible".*

Reply adopted by the Committee of Ministers on 20 October 1998 at the 645<sup>th</sup> meeting of the Ministers' Deputies: See the text at the following [link](#).

<sup>7</sup> **Recommendation 1602 (2003) paragraph 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"*.

<sup>8</sup> **Recommendation 1602 (2003) paragraph 5:** "*It recommends that the Committee of Ministers invite member states:*  
**5.1.** *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; [...]"*

<sup>9</sup> See the text at the following [link](#).

General to transmit the invitation to member States<sup>10</sup>. The CAHDI notes that the Council of Europe Protocol will be issuing this year a Council of Europe laissez-passer to:

- members of Council of Europe institutions (Parliamentary Assembly and Congress of Local and Regional Authorities);
- judges of the European Court of Human Rights and the Administrative Tribunal;
- members of monitoring bodies, including the European Committee for the Prevention of Torture (CPT) and the European Committee of Social Rights (ECSR);
- staff members of the Council of Europe.

This document will replace the so-called "blue passport" issued by Council of Europe Protocol since the 1970s which will be discontinued.

## **B. Comments in relation to specific questions raised in Recommendation 2083 (2016)**

6. Concerning the reference contained in paragraph 4.3 of the PACE Recommendation 2083 (2016) in relation to the "current work by the United Nations International Law Commission (ILC)" on this subject, the CAHDI underlines that the ILC is currently examining the subject of "Immunity of State officials from foreign criminal jurisdiction". The ILC defined "State official" in its provisionally adopted "Draft articles" as "any individual who represents the State or who exercises State functions" (see draft Article 2(e))<sup>11</sup>. Even if this definition includes "the legislative (...) functions performed by the State"<sup>12</sup>, it must be underlined that the ILC has excluded "persons connected with (...) international organizations" from the scope of the "Draft articles" (see draft Article 1.2)<sup>13</sup>. Furthermore, the ILC is only dealing with immunity from foreign criminal jurisdiction.

7. The CAHDI considers that many political and legal issues are raised by the privileges and immunities of parliamentarians and their corresponding rights and obligations, which are governed by the applicable Council of Europe treaties. The CAHDI recalls the rules currently in force and considers that an efficient implementation of these rules would solve most of the issues highlighted by the PACE. Consequently, the CAHDI considers that at present the drafting of any standard-setting work would not be the best way forward.

8. The CAHDI further considers that the responsibility for imposing restrictive measures on particular individuals, be they foreign parliamentarians or not, rests with the States or the international organisations that have adopted them. It is up to those States or international organisations to meet the requirements of legal certainty and to accompany the said measures by appropriate procedural guarantees taking into account *inter alia* the relevant jurisprudence of the European Court of Human Rights. The CAHDI notes that with respect to the restrictive measures of the European Union, the Court of Justice of the European Union provides judicial protection to persons addressed in such measures. With respect to restrictive measures adopted by the United Nations, the procedures for listing and delisting have been improved.

9. The CAHDI consequently considers that the proposal of the PACE concerning the possibility of the CAHDI carrying out "a feasibility study on the creation of an international status for parliamentarians and any related rights and obligations" would require, in an area which falls to a large extent under the national sovereignty, a prior evaluation of the needs in this field. Accordingly, the question of creating a specific status for parliamentarians goes beyond the sole competence of the CAHDI. Furthermore, recalling its Terms of Reference wherein the CAHDI is instructed by the Committee of Ministers to deal with immunities of States and international organisations, the CAHDI considers the specific immunities, rights and obligations of parliamentarians to be outside its purview.

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<sup>10</sup> See the text at the following [link](#).

<sup>11</sup> Text of draft article 2(e) provisionally adopted by the ILC, see A/69/10, para. 131, p. 231.

<sup>12</sup> See Commentary to article 2 (e), see A/69/10, para.11 p. 235.

<sup>13</sup> Text of draft article 1.2 provisionally adopted by the ILC A/68/10, p.51; and see also commentary in particular paragraphs (1) (9) (10) (14) and (15), pp. 52, 55, 56 and 57.