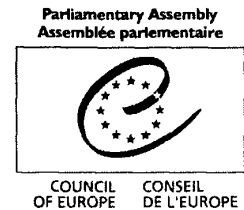


**Parliamentary Assembly**  
**Assemblée parlementaire**



For debate in the Standing Committee — see Rule 15 of the Rules of Procedure

**Doc. 10840**  
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**Interpretation of Article 15.a of the General Agreement on Privileges and Immunities of the Council of Europe**

Report  
Committee on Rules of Procedure and Immunities  
Rapporteur: Mr Erik Jurgens, Netherlands, Socialist group

*Summary*

During the last few years, the Assembly has, on the basis of immunity cases which have been dealt with by the Committee on Rules of Procedure and Immunities, built up a practice concerning the immunities of the Council of Europe which the members of the Assembly enjoy. This immunity exists in order to preserve the integrity of the Assembly and to safeguard the independence of its members in exercising their European office. One question which has previously raised difficulties on a regular basis is the scope of article 15.a of the General Agreement on Privileges and Immunities of the Council of Europe. This report brings before the Assembly proposals for the interpretation of this provision which take into account the developments in the area of European parliamentary immunity and national and international precedents in this area. Furthermore, the report presents different proposals with a view to reinforcing the legal value of the laissez-passer of Assembly members issued by the competent authorities of the Council of Europe.

**A. Draft resolution**

1. The Parliamentary Assembly refers to its Resolution 1325 (2003) and Recommendation 1602 (2003) on immunities of members of the Assembly which underlined that immunities are granted in order to preserve the integrity of the Assembly and to safeguard the independence of its members in exercising their European office.
2. The Assembly recalls that the protection granted to Assembly members by Article 40 of the Statute of the Council of Europe ("London Treaty"), Articles 14 and 15 of the General Agreement on the Privileges and Immunities of the Council of Europe and Article 3 of the Additional Protocol is part of a specific system of European immunity which is independent from any national immunities an Assembly member may enjoy. The autonomous character of the Council of Europe immunity is justified by the fact that the Assembly and its members have, independently from parliaments of the member States, a specific mandate to fulfil, to carry out the parliamentary functions arising from the application of the London Treaty of 5 May 1949.
3. One feature of the Council of Europe's institutional system is that the immunities of Assembly members are valid during the entire parliamentary year of the Assembly. It has always interpreted the terms "during the sessions" in Article 15 of the General Agreement and "during a session" in Article 25.b. of the Statute as covering the parliamentary year.
4. The Assembly recalls that, since 1952, the provisions governing the immunities of members of the European Parliament (Protocol on the Privileges and Immunities of the European Communities of 1965 and prior texts) and of the Parliamentary Assembly of the Council of Europe are identical. However, it is to be noted that the European Parliament (EP) has, in a resolution of 23 June 2005, called upon the EU member states to review the 1965 Protocol in respect of the provisions relating to members of the EP and to take the statute for members of the EP, approved on 3 and 4 June 2003, as a model. The Assembly hopes that the EU Governments will endorse these proposals and that they will be adopted at the next EU Intergovernmental Conference. Once the new EU Protocol has entered into force, it would be useful that the Assembly ask for a revision and up-dating of the General Agreement on the Privileges and Immunities of the Council of Europe (1949) and its additional Protocol (1952), insofar as Assembly members are concerned.
5. On the basis of the existing 1965 provisions, the EP has developed a rich practice concerning the scope of these immunities. Recent immunity practice of the EP shows that national authorities have not correctly interpreted European immunities of members in important cases concerning members' participation in demonstrations and their free movement. Sometimes, even the national parliamentary immunity provisions are not properly applied to EP members when in their home countries. On 15 November 2005, the EP adopted a resolution on a possible infringement of the Protocol on the Privileges and Immunities of the European Communities by a Member State (P6\_TA-(2005) 0426).
6. In its Resolution 1325 (2003), the Assembly agreed that the EP's practice should also form the basis for the interpretation of Article 15 of the General Agreement and, in particular, of its sub-paragraph a. concerning immunities of Assembly members on their national territory. Furthermore, in its Recommendation 1602 (2003), the Assembly invited the Committee of Ministers to take certain action with regard to the interpretation and application of Articles 14 and 15.a of the General Agreement.
7. However, the Committee of Ministers have not taken the proposed follow-up action on Recommendation 1602 (2003). As far as can be seen, the national courts which had to apply the immunity regime of the Parliamentary Assembly have not adhered to the Assembly's concept developed in Resolution 1325 (2003), but have given preference to a literal interpretation of Article 15.a. of the General Agreement, while not taking into account this provision in its entirety. In these circumstances, the Assembly has reviewed its position regarding Article 15.a.
8. It resolves to interpret Article 15.a. as follows: Whatever the national regime of immunity, Assembly Representatives or Substitutes shall be protected against prosecution and arrest in the exercise of their functions as Assembly members or when travelling on Assembly business, whether this is inside or outside of their national territory. If they are not active within this meaning or not travelling on Assembly business, the national regime shall apply within their country.

9. The Assembly also considers that it is appropriate for the relevant Assembly organs, when examining requests for the waiver of immunity and for the defence of immunity of its members, to bear in mind if the competent national authorities have respected the European Convention on Human Rights as interpreted by the European Court of Human Rights and other relevant Council of Europe legal instruments and texts which the respective countries have ratified or accepted. The Assembly should express its concern when Council of Europe norms have been obviously disregarded in respect of one of its members.

10. The Assembly recalls that in the reply to Recommendation 1602 (2003), the Committee of Ministers invited the member states, where national legislation permits, to acknowledge unilaterally as an official document the laissez-passer issued by the competent Council of Europe authorities.

11. Consequently the Assembly decides to:

11.1. add the following paragraph after paragraph 6 in Rule 64 of the Assembly's Rules of Procedure:

*"a. When dealing with requests for the waiver of the Council of Europe immunity, or with requests to defend that immunity of an Assembly member, the competent Assembly organs shall interpret Article 15.a of the General Agreement on Privileges and Immunities of the Council of Europe as follows. Assembly representatives or Substitutes are immune from prosecution and arrest in the exercise of their functions as Assembly members or when travelling on Assembly business, whether this is inside or outside of their national territory. If they are not active within this meaning or not travelling on Assembly business, the national regime shall apply within their country.*

*b. The terms "in the exercise of their functions" include all official duties discharged by Assembly Representatives and Substitutes in the member states on the basis of a decision by a competent Assembly body and with the consent of the appropriate national authorities.*

*c. In case of doubt, the Bureau of the Assembly shall decide if Assembly members' activities took place in the exercise of their functions."*

11.2. invite the Bureau of the Assembly to take measures aimed at:

- reinforcing the legal value of the laissez-passer issued by the competent Council of Europe authorities to members of the Parliamentary Assembly;
- making more member states acknowledge the laissez-passer as an official document;
- completing the information on the laissez-passer by adding the content of paragraph 11.1 above and its translation into the three working languages of the Assembly to it.

12. The Assembly decides that the new provision shall enter into force upon the adoption of this resolution.

## **B. Explanatory memorandum by Mr Jurgens**

### **I. Introduction**

1. In connection with a request to defend the immunity of an Italian member of the Assembly, the rapporteur wrote (see p.10 of document AS/Pro (2005) 5) that "to ensure that differences of interpretation by national authorities do not recur, the committee proposes that the Assembly should take a clear stand on the correct interpretation of Article 15 of the General Agreement on the Privileges and Immunities of the Council of Europe, relating to Assembly members". It was also proposed that this interpretation should be included in the Assembly's Rules of Procedure.

2. The Committee on Rules of Procedure and Immunities endorsed these proposals and asked its Chairman to request the authorisation from the Bureau of the Assembly to elaborate a report on the interpretation of Article 15 of the General Agreement.

3. On 29 April 2005 the Assembly ratified the Bureau's reference of this matter to the Committee on Rules of Procedure and Immunities.

4. This report will deal with the origin of Article 15 of the General Agreement and the various interpretations to which this provision has given rise in the past. The rapporteur will then submit his own proposals in this respect.

### **II. Origin of Article 15 of the General Agreement on the Privileges and Immunities of the Council of Europe and general observations on this provision**

#### **1. Origin of Article 15**

5. Article 15 (as well as Article 14) defines the immunities which are granted to Assembly members according to Article 40 of the Statute of the Council of Europe. Article 15 was elaborated by the so-called "Preparatory Commission" of the Council of Europe which had been instituted by the Conference of Ministers for Foreign Affairs which adopted the Statute of the Council of Europe ("London Treaty") on 5 May 1949.

6. The Preparatory Commission was active between May and July 1949. Its work was complicated by the fact that no precedent existed concerning the functioning of the Parliamentary Assembly, as it was the first parliamentary organ to be integrated into an intergovernmental organisation. When the Commission examined the privileges and immunities of the Council of Europe, the French delegation made the following proposal as regards Assembly members: "During the sessions of the (Consultative) Assembly, the representatives to the Parliamentary Assembly whether they be members of parliament or not, shall enjoy on the territories of member States the immunities granted to members of parliament of their country". Subsequently, the Preparatory Commission considered that:

- it was necessary to protect the Assembly representatives also when travelling to and from the place of meeting of the Assembly to their home countries;
- they should be protected against any restriction imposed by their own or other governments on the free exercise of their functions.

7. As there were divergences of opinions among the members of the Preparatory Commission concerning immunities of Assembly members, a legal committee of parliamentary experts was set up and asked to find an agreement on the text of Article 15.

8. The first draft text prepared by this expert committee read as follows: "no Representative or Substitute to the (Consultative) Assembly shall, during one week before the opening of sessions and during sessions be prosecuted, be subject to search, home search, be arrested in a criminal affair except when so authorised by the Assembly or when found committing, attempting to commit or just having committed an offence. The detention or prosecution of a representative or substitute to the (Consultative) Assembly shall be suspended at the Assembly's request".

9. At a later stage the French delegation presented a new proposal for a text making a distinction concerning immunities of Assembly's members

- on their national territory;
- on the territory of all member States.

10. After some minor changes this proposal was adopted by the experts and the Preparatory Commission and became the current Article 15 of the General Agreement.

## 2. Observations on Article 15

### 2.1. General

11. As can be seen from this summary description of the Preparatory Commission's work concerning immunities of Assembly members quite different drafts had been examined.

12. Thus, the current Article 15 is a combination of several elements which were at a certain moment envisaged as separate paragraphs or even articles. Because of its complex character Article 15 has given rise to interpretation problems.

13. Moreover, only one year after its adoption, it emerged that Article 15 was incomplete, as it did not cover participation of members at Assembly committee and sub-committee meetings. This matter was settled in Article 3 of the Additional Protocol to the General Agreement of 1952, which reads as follows: "The provisions of Article 15 of the General Agreement shall apply to Representatives to the Assembly and their Substitutes, at any time when they are travelling to and from, meetings of committees and sub-committees of the (Consultative) Assembly whether or not the Assembly is itself in session at that time".

14. The incomplete character of Article 15 is shown by another fact. Members of the Common Assembly of the European Coal and Steel Community set up in 1952 were granted exactly the same immunities as members of the Parliamentary Assembly. However and contrary to the Assembly, the Common Assembly considered it as important to include in its Rules of Procedure an additional rule providing that if a member is arrested or prosecuted in *flagrante delicto*, every member may table a motion requesting the suspension of the prosecution or arrest. These requests were referred to the relevant committee for report. It is interesting that this proposal corresponds to the last sentence of the French proposal quoted above (paragraph 8).

15. As has been explained in Mr Olteanu's report on immunities of members of the Parliamentary Assembly (Doc. 9718 rev. from 2003), Article 15 establishes a system of immunity which

- varies according to the nationality of the member when proceedings are brought against him/her in his/her own country (article 15.a.);
- is common to all members in respect of proceedings brought in other member States (article 15.b.).

### 2.2. The words "during the sessions" in Article 15

16. As was said above, the Preparatory Commission has discussed different possibilities to limit the character of the immunities granted to Assembly members, such as the reference to the duration of the Assembly's sessions.

17. It has to be recalled however, that the words "during the sessions" (or "in session") are not only to be found in Article 15 of the General Agreement, and Article 3 of its additional Protocol, but also in the Treaty setting out the Privileges and Immunities of the European Communities (EU) and the members of the European Parliament (EP). Because of the omissions in Article 15 (see paragraph 13 above), it had been necessary to widen the scope of the concept of "during the sessions" in Article 3 of the 1952 Protocol. In 1952 the authors of that provision overlooked the possibility that the Assembly and its members might have to take action in member states (e.g. negotiations in case of problems, election observation, fact-finding visits).

18. Moreover, the words "during a session" are contained in Article 25.b of the Statute of the Council of Europe. It is the Assembly's standing practice to interpret the terms "*during a session of the Assembly*" as covering the parliamentary year from the end of January to the end of January the following year. This interpretation also corresponds to the Assembly's practical needs, as the Assembly held respectively one and two sessions per year when the General Agreement was concluded in 1949 and its additional Protocol in 1952. Its major committees did not meet each month and the intervals between the meetings of the Assembly's steering bodies (the Bureau and the Standing Committee) were much longer than is currently the case. Prior to 1989 it was very rare for the Assembly to observe national elections or carry out on-the-spot visits. Today, however, the Assembly and its various organs are active virtually all year round.

19. To sum up, for the application of Article 15 of the General Agreement and of Article 25.b. of the Statute, the Assembly bases itself on the Council of Europe's institutional system and practice and not on national legislation.

20. This is also the current practice at EU level, already at the time when the EP was not yet directly elected, but composed of national parliamentary delegations, like the Assembly. The EP, where the relevant legal texts concerning immunities are identical to those of the Council of Europe, decided in 1963/64, that the words "*during the sessions*" covered the whole parliamentary year.

21. The precise nature of the concept covered by the phrase "*during the sessions*" was interpreted by the European Court of Justice in two judgements handed down, respectively, in May 1964 and July 1986. These confirmed the EP's decision. In the July 1986 judgment, the Court held that the term "*during the sessions*" should be interpreted exclusively in the light of Community law and not in relation to national legislation.

### **III. Different interpretations of Article 15**

22. The Committee on Rules of Procedure and Immunities has dealt with the interpretation of Article 15 on several occasions (see in particular Doc. 9718 revised and AS/Pro (2005) 5).

#### **1. Immunity of Assembly members when on the territory of other member states than their own (Article 15.b.)**

23. Article 15.b. stipulates that Assembly members shall enjoy on the territory of all member states other than their own, exemption from arrest and prosecution. This is genuine European immunity as it is independent of any national legislation or practice. The word "prosecution" includes any measure provided for in national criminal law preventing a member of parliament from discharging the functions inherent in his or her term of office in the Parliamentary Assembly.

24. In the past, the interpretation of Article 15.b. has not created any difficulties at Assembly level.

#### **2. Immunity of Assembly members when on their national territory (Article 15.a.)**

25. Article 15.a. stipulates that members shall enjoy during the sessions of the Assembly, on their national territory the immunities accorded in those countries to members of parliament. It is this part of Article 15 which raises the difficulties of interpretation already mentioned and which are summarised below.

##### *2.1. Interpretation given at Council of Europe level*

26. As the Council of Europe does not have a Court with a general competence, no judiciary institution of the Organisation has yet interpreted Article 15.a. This does not rule out that the European Court of Human Rights has in different cases had to deal indirectly with Article 14 of General Agreement on Privileges and Immunities of the Council of Europe which is related to words spoken or votes cast by Parliamentary Assembly members (see the judgments quoted in Resolution 1325 (2003) and in document AS/Pro (2003) 17).

27. The Assembly has not yet had the occasion to take a position in a concrete case, as the immunity problems which had emerged in some ten cases of Assembly members, could be solved otherwise than by a public debate and the adoption of a text.

28. However, with respect to the (European) immunity of its members in general, the Assembly has in its Recommendation 1602 (2003 ) expressed the position that (at least) the competent authorities of a member state which has a system of parliamentary inviolability and which wish to waive the immunity of a national parliamentarian who is at the same time a member of the Parliamentary Assembly should also request the Assembly to waive the European immunity of that member which is granted to him under Article 15.a. of the General Agreement. Furthermore, the Assembly has endorsed (see Resolution 1325) the concept of European parliamentary immunity developed by the EP. Its central idea is the following. The Agreements and Protocols relating to the immunities of the members of the European Assemblies and which in one of their clauses refer to the immunities accorded to members of national parliaments, do not preclude the European Assemblies from creating rules of their own aiming at developing a coherent concept of European parliamentary immunity. This concept is by definition separate from the national parliaments' respective practices. It emanates from the practice of the European Assemblies (particularly the EP) when considering requests for the waiver of the immunity of members or for the defence of their European immunity.

## 2.2. Interpretation by national Courts

29. In so far as national Courts are concerned, the Rapporteur has been informed only of several decisions of Italian Courts in the Iannuzzi case. In practically all these decisions a literal interpretation of Article 15.a. had been given the preference.

## 2.3. Interpretation by other Italian authorities than the Courts

30. Other Italian authorities have interpreted Article 15.a. of the General Agreement in the same way as the Assembly's Committee on Rules of Procedure and Immunities and thus differently from most of the Italian Courts.

31. The Legal Service (*Servizio del contenzioso diplomatico e dei trattati*) of the Italian Ministry of Foreign Affairs has in an aide-mémoire of 28 September 2004 set out that:

- the immunity of members of the Parliamentary Assembly is an instrument to allow the Assembly's functioning; it is distinct and independent from possible national immunity and thus at the sole disposal of the Assembly;
- the immunity according to Article 15.b. of the General Agreement on the Privileges and Immunities of the Council of Europe does not refer to the legislation of member states; therefore it is applicable also on their national territory and does not stop in front of the principle of territoriality;
- the fact that an Assembly member is not subject to any measure restricting his personal liberty is also valid in his own member state as otherwise there would be an unjustified disparity of treatment of members of European Assemblies based solely on their nationality and contrasting with their status.

32. On 13 January 2005, the Chairperson of the Italian Senate's Committee on Elections and Immunity handed over a detailed aide-mémoire to the Rapporteur of the Parliamentary Assembly's Committee on Rules of Procedure and Immunities. Afterwards, it was also forwarded to that Committee (see Doc. AS/Pro/Inf (2005) 1).

33. In its conclusions it is suggested that the last sub-paragraph of Article 15 ("this immunity also applies when members are travelling to and from the place of meeting of the Parliamentary 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") be interpreted as follows. This sub-paragraph protects the free movement of Assembly members in the same manner as the immunities of diplomats are protected and defines such prerogatives as "immunity". It is not one of "the immunities" referred to in the first sub-paragraph of Article 15 and it applies regardless of any reference to the constitutional law of the member state concerned.

61. Considering that academic or scientific publications on European parliamentary immunity are rare, the rapporteur should like to point out that an article on the parliamentary immunity of the Council of Europe has been published in Italy in 2005 (G.Baiocchi, *Immunità parlamentare del Consiglio d'Europa*, in «Rassegna parlamentare», pp 775-790). This article first deals with the Council of Europe rules concerning the immunity of members of the Assembly. It then analyses the application of these rules to three cases involving Italian members of the Assembly. Finally, the article contains a reflection on the emergence of the concept of European parliamentary immunity.

## **VII. Conclusions**

62. The Committee on Rules of Procedure and Immunities adopted unanimously the draft resolution contained in this report. The Committee considers that the proposed interpretation of article 15.a. of the General Agreement on Privileges and Immunities of the Council of Europe will help solving the practical problems with this provision which have emerged in several concrete cases.



Committee responsible for the report: Committee on Rules of Procedure and Immunities.

Reference to committee: Reference N° 3084 of the Bureau of the Assembly on 29.04.2005.

Draft resolution unanimously adopted on 12 December 2005.

Members of the committee: Mr Andreas **Gross**, (Chairperson), Mr Andrea **Manzella**, Mrs Ganka Samoilovska-Cvetanova (Vice-Chairpersons), Mr Sándor Albert (alternate: Mrs **Angyalova**), Mr Gulumhuseyn Alibeyli, Mr Alexander Arabadjiev, Mr Birgir Ármannsson, Mr Ioannis Bougas, Mrs Anne Brasseur, Mr Aslan **Cebeci**, Mr Jonas **Čekuolis**, Mr Manlio Collavini, Mrs Helen D'Amato, Mrs Krystyna Doktorowicz, Mr Miljenko Dorić, Mr Vangjel Dule, Mr Mats **Einarsson**, Mr Adolfo **Fernandez Aguilar**, Mr Herbert Frankenhauser, Mr Tihomir Gligorić, Mr John **Greenway**, Mrs Arlette Grosskost, Mr Gerd Höfer, Mr Serhiy Holovaty, Mr Tomáš Jirsa, Mr Armand Jung, Mr Erik **Jurgens**, Mr Tibor Kékesi, Mrs Mojca Kucler-Dolinar, Mr Markku Laukkanen, Mr Alan Meale (alternate: Mr **Vis**), Mrs Ana **Mendonça**, Mr Per Erik Monsen, Mr Jakob-Axel **Nielsen**, Mr Alexey Ostrovsky (alternate: Mr **Fedorov**), Mr Christos Pourgourides, Mrs Valentina Radulović Šćepanović, Mr Armen Rustamyan, Mr Peter **Schieder**, Mr Yuri **Sharandin**, Mr Christophe Spiliotis-Saquet, Mrs Rodica Mihaela Stănoiu (alternate: Mr **Păunescu**), Mr Victor Stepaniuc, Mr Karim Van Overmeire, Mr G.V. Wright.

*NB: The names of those members present at the meeting are printed in bold.*

*Secretaries of the committee: Mr Mario Heinrich, Ms Linda Nylund.*

