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Committee on Rules of Procedure, Immunities and Institutional Affairs

Status of Ms Nadiia Savchenko with regard to Council of Europe immunity

Opinion for the Bureau of the Parliamentary Assembly¹

prepared by the Chairperson of the Committee, Mr Haluk KOÇ (Turkey, Socialist Group)

1. Introduction

1. At its meeting on 26 January 2015, the Bureau of the Assembly asked for the opinion of the Committee on Rules of Procedure, Immunities and Institutional Affairs concerning the status of Ms Savchenko with regard to Council of Europe immunity.

2. Nadiia Savchenko, a member of the Verkhovna Rada and appointed as member of the Ukrainian delegation to the Parliamentary Assembly for the 2015 session, has, since June 2014 (i.e. prior to her election as member of parliament) been in prison in the Russian Federation.²

2. Applicable provisions under the statute, conventions and rules of procedure

3. Rule 67.1 of the Assembly's Rules of Procedure provides that:

"The members of the Assembly enjoy the privileges and immunities provided for in the General Agreement on Privileges and Immunities of the Council of Europe (of 2 September 1949) and its Additional Protocol (of 6 November 1952). These 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."

Article 40.a of the Statute of the Council of Europe concerning privileges and immunities states that:

"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 (Parliamentary) 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."

4. The General Agreement on Privileges and Immunities of the Council of Europe, concluded in application of Article 40 of the Statute establishes the dual principle of parliamentary non-accountability

¹ Approved unanimously by the Committee on 27 January 2015

² See also motion for a resolution "Call on the Russian authorities for the immediate release of Nadiya Savchenko and other illegally detained prisoners of war", tabled by Mr Chope and others (Doc. 13676)

(Article 14 – *not of relevance in the present case*) and parliamentary inviolability (Article 15), along with the principle of the free movement of members of the Parliamentary Assembly (Article 13).

5. These provisions set out a specific European system of immunity which is independent of any national immunities which members of parliament may also enjoy on the territory of their state (which is not the case for Ms Savchenko who, because of her detention in a foreign country, cannot lay claim to any national immunity protection system).

6. More specifically, in the case of concern to us, Article 15 of the General Agreement provides that

“During the sessions of the Consultative (Parliamentary) Assembly, the Representatives to the Assembly and their substitutes, whether they be members of Parliament or not, shall enjoy: (...) 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.”

and Article 13 of the Agreement states that:

“No administrative or other restriction shall be imposed on the free movement to and from the place of meeting of Representatives to the Consultative (Parliamentary) Assembly and their substitutes (...)”

Article 3 of the Protocol extends the immunity of members of Assembly, stipulating that:

“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 (Parliamentary) Assembly, whether or not the Assembly is itself in session at such time.”

7. The General Agreement therefore establishes the **principle of the inviolability of the member of parliament, immunity in the strict sense, protecting him or her from arrest, detention or prosecution without the authorisation of the parliament to which he or she belongs or the Parliamentary Assembly.**³

8. The Russian Federation has been a Party to the General Agreement on Privileges and Immunities and its Protocol since February 1996. It made no reservation or interpretative declaration upon signature or ratification of the Agreement. Consequently it is strictly bound by the rules the Agreement and Protocol lay down.

3. Interpretation of the provisions in the case of Ms Savchenko

9. Ms Savchenko enjoys “European” parliamentary immunity as a member of the Parliamentary Assembly of the Council of Europe since ratification of the credentials of the Ukrainian delegation on 26 January 2015.

10. However, the Rules Committee has taken the view that immunities also apply when new members travel to the Assembly part-session during which their credentials are to be ratified (Doc. 9718 rev, paragraph. 50).

11. With effect from the ratification of credentials, Ms Savchenko can no longer be subject to any detention or prosecution measures, bearing in mind that:

³ Article 5 of the Protocol provides that “Privileges, immunities and facilities are accorded to the representatives of members not for the personal benefit of the individuals concerned, but in order to safeguard the independent exercise of their functions in connection with the Council of Europe. Consequently, a member has not only the right but the duty to waive the immunity of its representative in any case where, in the opinion of the member, the immunity would impede the course of justice and it can be waived without prejudice to the purpose for which the immunity is accorded.”

- immunity cannot be invoked in the case of *flagrante delicto*;⁴
- the term “prosecution” is interpreted in a broad sense and includes all measures provided for in domestic criminal law preventing the member of parliament from exercising the functions inherent in his or her term of office in the Parliamentary Assembly;
- the members of the Parliamentary Assembly enjoy the immunity provided for in Article 15 during the Assembly sessions, and the term “during the sessions” covers the whole parliamentary year in view of the continuous activity of the Assembly and its bodies;
- the Assembly infers from a systematic interpretation of Article 15 that if a national authority wishes to prevent a member of the Assembly from travelling to and from the place where the Assembly’s plenary sessions or its committee meetings are held, or from being active in any other way as a member of the Assembly, the competent national authority must ask the Assembly in advance to waive the “European” immunity of the member in question;
- the immunity provided for in Article 15 cannot be waived except by the Parliamentary Assembly at the request of a “competent authority” of the member state concerned (Rule 67.2 of the Rules of Procedure). The competent authority is generally speaking the judge in charge of the case, but it could also be the public prosecutor or the Minister of Justice. The request to waive immunity may be submitted by an authority of a member state other than the one of which the member in question is a national.

12. The Rules Committee has taken the view that the immunity of members of the Assembly also extends to acts carried out by the member before the start of his or her term of office in the Assembly, including where proceedings against him or her have already been initiated prior to taking up that office (principle of the protection of the parliamentary institution, independence and the availability of the member to fulfil his or her term of office), with the effect that any ongoing proceedings are suspended for the duration of the term of office.

13. Consequently, the competent Russian judicial authorities are required to request that the Parliamentary Assembly waive the parliamentary immunity of Ms Savchenko, if they wish to continue the judicial proceedings instituted against her.

14. The President of the Assembly may, for her part, take “*the initiative of confirming the privileges and immunities of the member*” of the Assembly “*arrested or deprived of freedom of movement in supposed violation of their privileges and immunities*”, “where applicable following consultation of the competent Assembly bodies” (Rule 67.6). In a letter sent on 19 January last to Mr Naryshkin, Speaker of the State Duma of the Russian Federation, the President formally requested that Ms Savchenko be released in time to allow her to be present at the opening of the January part-session 2015.⁵

4. Similar precedents concerning the imprisonment of members of the Parliamentary Assembly

15. The case of Ms Savchenko is reminiscent of the Ilie Ilaşcu case. The latter had been detained in Transnistria for several years (since 1992) when he was elected first of all to the Moldovan parliament

⁴ The concept of “*flagrante delicto*” has not been officially interpreted by the Assembly. However, in the Assembly report on the immunities of members of the Parliamentary Assembly, reference is made in the explanatory memorandum to the “English version of the General Agreement on Privileges and Immunities [which] defines *flagrante delicto* as offences which Representatives of the Assembly or their Substitutes are found committing, attempting to commit or just having committed” (Doc. 9718 rev, paragraph. 44).

⁵ It should also be noted that the fact of holding an elected representative in detention for an unreasonable period prevents him or her from taking up his or her seat and in this way jeopardises the independence of the legislative and the effectiveness of the electoral process designed to determine the will of the people. This argument is all the more valid insofar as there are other security measures (release on bail) in criminal law which can ensure the proper conduct of the investigation where there are no indications that the suspect will evade justice. Since the beginning of her remand in custody, including after her election, Ms Savchenko has submitted, in vain, several requests to be released on bail. Her last such request to attend the PACE session was on 12 January 2015.

(1994-2000) and then to the Romanian Senate (2000-2008); he was in detention when he was appointed member of the Romanian delegation to the Parliamentary Assembly. He was released in May 2001, following long negotiations between the Moldovan and “Transnistrian” authorities, in which, international pressure, including from the Council of Europe and its Parliamentary Assembly, undoubtedly played a part. Subsequently, he obtained a finding against Russia and Moldova by the European Court of Human Rights.⁶

16. Senator Raffaele Iannuzzi was convicted on two occasions for defamation (2002 and 2004) while a member of the Parliamentary Assembly (2001-2006) but in respect of matters that had occurred prior to his parliamentary term of office. He was given a first prison sentence and was subject to an arrest warrant. In December 2002, his immunity was defended by the President of the Assembly. In June 2004 he was given a second prison sentence and once again the President of the Assembly intervened with the Italian authorities in defence of his immunity. His sentence was commuted to house arrest. Senator Iannuzzi was authorised, subject to certain conditions, to attend the Assembly’s 2004 October part-session, and to attend the meetings of the Assembly committees of which he was a member. Finally, he was pardoned.

17. Mr Paolo Caccia, member of the Italian delegation (1987-1994), had been arrested following the dissolution of the Italian Parliament, but while he was still a member of the Italian delegation to the Parliamentary Assembly. Following the intervention of the President of the Assembly with the Italian authorities in April 1994, reminding them that Mr Caccia continued to benefit from the immunities set forth in Article 15 of the General Agreement, he was released by judicial order in May 1994.

5. Conclusions and recommendations for the Bureau of the Assembly

18. At its meeting on 27 January 2015, the Committee on Rules of Procedure, Immunities and Institutional Affairs approved the present opinion to the Bureau of the Assembly, and concluded that:

- the members of the Parliamentary Assembly enjoy European parliamentary immunity (see Resolution 1325 (2003)); this immunity is of an autonomous nature, it is distinct from and independent of any national immunity; it has an absolute nature in that it is based on international law and can be interpreted only by the Parliamentary Assembly;
- the immunity of members of the Assembly also extends to any proceedings initiated against them before the beginning of their parliamentary mandate, in connection with acts carried out by the member before the start of his or her term of office in the Assembly, with the effect that any ongoing proceedings are suspended for the duration of the term of office;
- the parliamentary immunity of a member of the Assembly must be waived before his or her freedom can be restricted; the Assembly alone is able to waive the immunity of a member.

The committee called upon the President of the Assembly, as a matter of urgency, to “take the initiative of confirming the privileges and immunities” of Ms Savchenko, under the terms of Rule 67.6 of the Rules of Procedure.

The committee noted that, to date, no request was addressed to the President of the Parliamentary Assembly for the waiver of the immunity of Ms Savchenko, and that the Russian Federation therefore violates its obligations under international law.

⁶ See the European Court of Human Rights *Ilașcu and others v. Moldova and Russia* judgment (Application No. 48787/99) of 8 July 2004.