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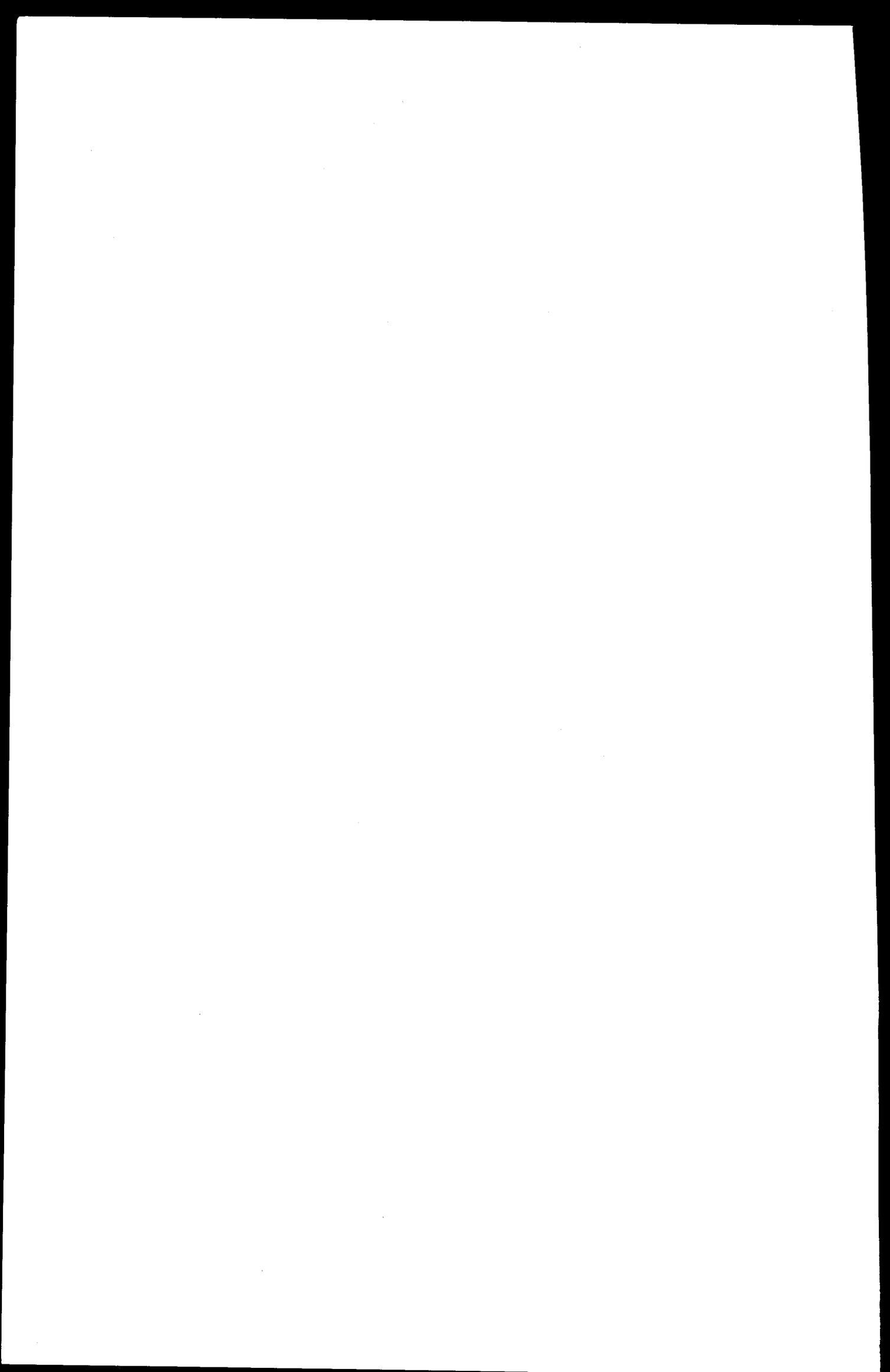
drawn up on behalf of the Committee on the Rules of  
Procedure, Verification of Credentials and Immunities

on the request for the waiver of Mr MALAUD's  
parliamentary immunity

Rapporteur: Mr G. DONNEZ

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At the sitting of 16 February 1987, the President of the European Parliament referred to the Committee on the Rules of Procedure, Verification of Credentials and Immunities, pursuant to Rule 5(1) of the Rules of Procedure, a request for the waiver of Mr MALAUD's parliamentary immunity made by the French Minister of Justice on 7 January 1986.

At the meeting of 23 and 24 February 1987, the committee appointed Mr DONNEZ rapporteur.

At its meeting of 19 and 20 May 1987, the committee heard Mr MALAUD in accordance with Rule 5(2) of the Rules of Procedure and had an exchange of views on the reasons for and against the waiver of immunities.

At the meeting of 22 and 23 June 1987, the rapporteur submitted a draft report and the Committee on the Rules of Procedure, Verification of Credentials and Immunities unanimously adopted the proposal for a decision contained therein.

The following were present: Mr AMADEI, chairman; Mr DONNEZ, rapporteur; Mr AVGERINOS, Mr HERMAN, Mr JANSSEN VAN RAAY, Mr PEGADO LIZ and Mr RINSCHÉ.

The report was tabled on 22 June 1987.

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A

The Committee on the Rules of Procedure, Verification of Credentials and Immunities hereby submits to the European Parliament the following proposal for a decision, together with explanatory statement:

PROPOSAL FOR A DECISION

on the request for the waiver of Mr MALAUD's parliamentary immunity

The European Parliament,

- having received a request forwarded by the French Minister of Justice on 7 January 1986 for the waiver of Mr MALAUD's parliamentary immunity,
  - having regard to Article 10 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 and to Article 4(2) of the Act of 20 September 1976 concerning the election of representatives of the Assembly by direct universal suffrage,
  - having regard to the judgments of the Court of Justice of the European Communities of 12 May 1964 and 10 July 1986<sup>1</sup>,
  - having regard to Article 26 of the French Constitution,
  - having regard to Rule 5 of the Rules of Procedure,
  - having regard to the report of the Committee on the Rules of Procedure, Verification of Credentials and Immunities (Doc. A 2-99/87),
1. Decides not to waive Mr MALAUD's parliamentary immunity;
  2. Instructs its President immediately to forward this decision and the report of its committee to the appropriate authority of the French Republic.

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<sup>1</sup> See CJEC, 12 May 1964 (Wagner v Fohrmann and Krier, Case 101/63, [1964] ECR 195) and the judgment in Case 149/85 (Wybot v Faure), not yet published in the ECR

EXPLANATORY STATEMENTI. THE FACTS

1. By letter of 7 January 1986, Mr Robert BADINTER, then Minister of Justice, forwarded to the President of Parliament a request for the waiver of Mr Philippe MALAUD's parliamentary immunity submitted to the Public Prosecutor at the Paris Court of Appeal by Mr TETE, Chairman of the organization 'Les Verts', on behalf of his organization.
2. The cause of the plaintiff's action is the fact that, in an interview published in the 12-18 September 1985 issue of 'L'évènement du jeudi', Mr MALAUD stated 'I believe, moreover, that the Soviet secret services must be involved (in the Greenpeace affair): they want to get rid of Hernu. The ecology movement Les Verts has been infiltrated by the KGB and is being manipulated by them. Clear proof of this is the fact that they have never demonstrated against Soviet nuclear tests. They toe the Moscow line. That is why I want 'Les Verts' banned in France'.
3. Since the applicant considered these remarks to be defamatory he had a summons issued against Mr MALAUD and asked that he be found guilty of complicity in the offence of defamatory libel, the author of the principal offence being, under French law, Mr Jean Francois KAHN, editor of the accused publication.
4. It is stated in the summons that Mr MALAUD was speaking in his capacity as chairman of the National Centre of Farmers and the Self-Employed (CNI).
5. Mr MALAUD, who, since the beginning of the second electoral period, has been a member of the European Parliament only, was not a member of the national parliament when the events in question occurred. The question of the dual mandate and its implications for his immunity does not, therefore, arise.

II. IMMUNITY OF MEMBERS OF THE EUROPEAN PARLIAMENT: TEXTS AND PRINCIPLES

6. Article 10 of the Protocol on the Privileges and Immunities of the European Communities<sup>1</sup> annexed to the Treaty establishing a single Council and a single Commission of the European Communities<sup>2</sup>, which restates the provisions of Article 9 of each of the Protocols annexed to the Treaties establishing the ECSC, the EEC and the EAEC, reads as follows:

'During the sessions of the Assembly, its Members shall enjoy:

- (a) in the territory of their own State, the immunities accorded to Members of their Parliament,
- (b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

<sup>1</sup> Also note the wording of Article 9 of the same protocol: 'Members of the Assembly shall not be subject to any form of enquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties'.

<sup>2</sup> Referred to in Article 4(2) of the Act of 20 September 1976 concerning the election of representatives of the Assembly by direct universal suffrage.

Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the Assembly from exercising its right to waive the immunity of one of its Members.<sup>1</sup>

7. The offence of which Mr MALAUD, a Member of the European Parliament of French nationality, is accused, relates to events which occurred on the territory of the French Republic. Mr MALAUD therefore enjoys the immunities accorded to Members of the French Parliament under Article 26 of the French Constitution<sup>1</sup>.

8. The procedure within the European Parliament is governed by Rule 5 of the Rules of Procedure<sup>2</sup>.

9. During its first electoral period and at the beginning of the second, the European Parliament decided on a number of requests for the waiver of the parliamentary immunity of its Members; the proceedings in Parliament established a certain number of general principles which were recognized definitively in the resolution adopted by the European Parliament at its sitting of 10 March 1987<sup>3</sup> on the basis of the report drawn up by Mr Donnez on the draft Protocol revising the Protocol on the Privileges and Immunities of the European Communities of 8 April 1985 in respect of Members of the European Parliament (Doc. A 2-121/86).

10. It seems useful to describe in this report those of the abovementioned principles which apply in this case, whilst stressing the need to ensure that decisions taken on the waiver of parliamentary immunity of Members have a firm legal basis and are not affected by various considerations relating in particular to the political party to which the Member in question belongs or even his nationality.

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<sup>1</sup> Article 26 of the French Constitution is annexed.

<sup>2</sup> Rule 5 reads as follows:

- <sup>1</sup>1. Any request addressed to the President by the appropriate authority of a Member State that the immunity of a Member be waived shall be communicated to Parliament in plenary sitting and referred to the appropriate committee.
2. The committee shall consider such a request without delay but shall not go into the merits of the case. It shall hear the Member concerned at his request. If he is in custody he may have himself represented by another Member.
3. Should a Member be arrested or prosecuted after having been found in the act of committing an offence, any other Member may request that the proceedings be suspended or that he be released.
4. The report of the committee shall be placed at the head of the agenda for the first sitting following the day on which it was tabled. Discussion shall be confined to the reasons for or against the waiver of immunity.
5. The President shall immediately communicate Parliament's decision to the appropriate authority of the Member State concerned.'

<sup>3</sup> OJ No. C 99, 16 April 1987

A. The purpose of parliamentary immunity

Parliamentary immunity is not a Member's personal privilege but a guarantee of the independence of Parliament and its Members in relation to other authorities. Pursuant to this principle, the date of the acts of which the Member is accused is not important; they may occur before or after the Member's election; all that has to be considered is the protection of the institution of Parliament through that of its Members.

B. Legal ineffectiveness of a renunciation of immunity

The Committee on the Rules of Procedure, Verification of Credentials and Immunities believes that it should not depart from the principle hitherto observed by the European Parliament according to which a renunciation of parliamentary immunity by the Member concerned has no legal effect.

C. Temporal limits on immunity

The Court of Justice has twice been called upon to interpret the words 'during the sessions of the Assembly' contained in Article 10 of the Protocol on the Privileges and Immunities of the European Communities.

It is stated in the Court's two judgments<sup>1</sup> that the European Parliament holds an annual session of one year during which (and also during the periods of adjournment of the session) its Members enjoy the immunity provided for in the above Protocol.

It follows, moreover, from the very purpose of parliamentary immunity that it operates throughout the whole of a Member's term of office and is effective against the commencement of proceedings, preparatory enquiries, measures for the execution of pre-existing judgments, appeals or applications for judgments to be set aside. Immunity ceases at the end of the Member's term of office.

D. Independent nature of European Parliamentary immunity compared with national parliamentary immunity

The fact that subparagraph (a) of the first paragraph of Article 10 of the Protocol refers to the immunities accorded to members of national parliaments does not mean that the European Parliament cannot create its own rules, a body of case-law as it were; as for the waiving of parliamentary immunity, there should be no confusion between the parliamentary immunity which is identical between members of the national parliaments and of the European Parliament and the waiving of parliamentary immunity which is a matter for each of the parliaments concerned; these rules, which stem from decisions taken on requests for the waiver of parliamentary immunity, tend to forge a coherent concept of European Parliamentary immunity which would in principle be independent of the divergent customs of the national parliaments; otherwise, the differences between members of the same parliament because of their nationality would be accentuated.

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<sup>1</sup> Cases 101/63 and 149/85, referred to above.

11. The application of these principles has given rise to a constant factor in Parliament's decisions which has become a fundamental criterion for the consideration of the action to be taken on each request for the waiver of immunity: in all cases in which the acts of which a Member of the European Parliament is accused form part of his political activities, immunity is not waived. Other considerations have been added to this criterion, relating in particular to:

- the fumus persecutionis, in other words the presumption that the criminal proceedings are based on an intention to prejudice the Member's political activities (for example, anonymous information at the basis of the preliminary investigation or belatedness of the request in relation to the acts of which the Member is accused);
- the particularly odious nature of the acts of which the Member is accused.

12. The question was raised in the Committee on the Rules of Procedure, Verification of Credentials and Immunities as to whether it would not be advisable also to take into account, before taking a decision on a request for the waiver of a Member's immunity, the fact that the legislation of Member States other than that of which the Member is a national is less severe in respect of the same charges or even does not consider the acts of which he is accused to be a legal offence. This new criterion must of course be examined in depth.

### III. JUSTIFICATION FOR THE PROPOSAL FOR A DECISION

13. It appears from perusal of the documents forwarded to Parliament with the request for the waiver of parliamentary immunity that the offence with which Mr MALAUD is charged is closely linked to the exercise of a political activity which forms an indissociable part of his work as chairman of the CNI.

### IV. CONCLUSION

14. In the light of the foregoing, the Committee on the Rules of Procedure, Verification of Credentials and Immunities, having considered the reasons for and against waiving immunity, in accordance with the second subparagraph of Rule 5(4) of the Rules of Procedure, recommends that the European Parliament should not waive Mr MALAUD's parliamentary immunity.

ARTICLE 26 OF THE FRENCH CONSTITUTION

No Member of Parliament may be subject to criminal proceedings, inquiry, arrest, detention or judgment on any account of opinions expressed or votes cast by him in the performance of his duties.

No Member of Parliament may, during the sessions, be subject to criminal proceedings or arrest for a criminal offence, save with the authorization of the House of which he is a Member, except in the case of flagrante delicto.

No Member of Parliament may, outside the sessions, be subject to arrest, save with the authorization of the Bureau of the House of which he is a Member, except in the case of flagrante delicto, authorized criminal proceedings, or final judgment.

The detention or prosecution of a Member of Parliament shall be suspended if the House of which he is a Member so requires.