Parliamentary Assembly
Assemblée parlementaire
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 15364
13 September 2021

Guidelines on the scope of the parliamentary immunities enjoyed by members of the Parliamentary Assembly

Report[1]
Committee on Rules of Procedure, Immunities and Institutional Affairs
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Summary

This report takes stock of the "European" regime of immunities and privileges enjoyed by members of the Parliamentary Assembly, in application of the Statute of the Council of Europe, the General Agreement on Privileges and Immunities of the Council of Europe and its Additional Protocol. It proposes to provide the Assembly with guidelines on the scope of these parliamentary immunities by issuing principles clarifying the application of the existing rules in the statutory framework. These guidelines are based on the interpretation of the immunity regime by the European jurisdictions and the principles derived from their case law, and enshrine the position of the Assembly where it has dictated its internal practices. They will ensure the consistent application of the regime of privileges and immunities in all member States in the handling of immunity-related requests, while preventing its possible misuse for personal purposes.

1. Reference to committee: Bureau decision, reference 4338 of 13 October 2017.

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A. Draft resolution[2]

1. In addition to national regimes, members of the Parliamentary Assembly benefit from a supranational regime of parliamentary immunity conferred by the Statute of the Council of Europe (ETS No. 1) and the General Agreement on Privileges and Immunities of 1949 (ETS No. 2), which could be described as "European" parliamentary immunity. This regime offers functional protection beyond national borders and opens up the scope of parliamentary action, in line with the mission that the Parliamentary Assembly is called upon to fulfil.

2. The Parliamentary Assembly recalls that it regularly reviews the mechanism for the protection of its members, taking into account the changes or challenges faced by national parliaments in the various aspects of parliamentary immunity, with a view to ensuring effective protection of its members and thus of the Assembly, in particular in the light of new political risks.

3. Notwithstanding the fact that the 70-year-old system of immunities has not evolved in the statutory and conventional texts, the Assembly has sought to improve it through successive resolutions in order to adapt it to the reality of the work of its members and to take account of activities linked to parliamentary diplomacy. It still has a solid legal basis to ensure effective protection of its members and the institution and, at the same time, to avoid abuses.

4. However, the Assembly notes that, in implementing the system of protection for its members, it is now essential to clarify the scope of the current provisions and to lay down clear and objective criteria enabling privileges and immunities to serve their institutional purpose while preventing the possible misuse of privileges by parliamentarians for personal purposes.

5. The Assembly recalls that both the Group of States against Corruption (GRECO) in 2017 and the Independent Investigation Body on the allegations of corruption within the Parliamentary Assembly in 2018 recommended that the immunity regime be supplemented and clarified by a set of criteria, in order to prevent immunities and privileges from being invoked in case of real suspicions of corrupt activity.

6. The Assembly therefore considers it appropriate to adopt guidelines on the scope of parliamentary immunities enjoyed by members of the Assembly with a view to clarifying the application of existing rules under the Statute of the Council of Europe, the General Agreement on Privileges and Immunities of the Council of Europe and its Additional Protocol. These guidelines do not create new rights and privileges. They summarise domestic practice, introduce the principles and interpretation established by the European Courts and provide practical information to make the handling of immunity-related claims smoother and provide safeguards against abuse. They will ensure the consistent application of the regime of privileges and immunities in all member States.

7. Furthermore, the Assembly considers that, in view of the absolute and perpetual nature of the immunity guaranteed by Article 14 of the General Agreement on Privileges and Immunities, Rule 73.6 of the Rules of Procedure should be supplemented in order to allow former members of the Assembly to make a request for the defence of their immunities and privileges in relation to an opinion expressed or a vote cast in the exercise of their functions as members of the Assembly.

8. Therefore, the Assembly decides to:

8.1. adopt guidelines on the scope of parliamentary immunities enjoyed by members of the Assembly and, accordingly, to add the following new sub-paragraph d. to Rule 73.6:

"The guidelines on the scope of parliamentary immunities enjoyed by members of the Parliamentary Assembly shall be appended to these Rules of Procedure as a complementary text";

8.2. replace the second sentence of Rule 73.6 with the following:

"A member or former member may address a request to the President of the Assembly to defend his or her immunity and privileges".

9. Furthermore, the Assembly notes that the vast majority of its members are unaware of the protection regime from which they benefit and the scope of the immunities granted to them, and considers it essential to promote the existing instruments and mechanisms both among Assembly members and in national parliaments.

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2. Draft resolution adopted unanimously by the committee on 8 September 2021.

10. Finally, the Assembly recalls the importance of the immunity enjoyed by its members in the exercise of their functions for the unhindered functioning of the Parliamentary Assembly and, referring to its Resolution 1325 (2003) "Immunities of members of the Parliamentary Assembly", and its Resolution 2087 (2016) and Recommendation 2083 (2016) "Introduction of sanctions against parliamentarians", reminds member States of their existing obligations; it calls on them to ensure scrupulous compliance with their commitments under the Statute and the General Agreement on Privileges and Immunities of the Council of Europe and its Additional Protocol.

Guidelines on the scope of parliamentary immunities enjoyed by members of the Parliamentary Assembly

11. The following principles pursue the objective of clarifying the application of the existing rules under the Statute of the Council of Europe, the General Agreement on Privileges and Immunities of the Council of Europe and the Additional Protocol thereto.

12. The members of the Parliamentary Assembly enjoy privileges and immunities which serve to preserve the integrity of the Assembly and ensure the independence of its members in the discharge of their office. They are granted by Article 40 of the Statute of the Council of Europe, Articles 13 to 15 of the General Agreement on Privileges and Immunities of the Council of Europe and Article 3 of the Additional Protocol thereto.

13. Their practical implementation is further detailed in the Rules of Procedure and relevant Assembly resolutions[3] bearing in mind:

– the need to protect the independence of the Assembly;

– the functional purpose underlying the concept of immunities;

– existing precedents.

14. The parliamentary immunity is not a member's personal privilege but an institutional privilege which members enjoy in their individual capacity.

Absolute immunity in respect of words spoken and votes cast (Article 14 of the General Agreement on Privileges and Immunities of the Council of Europe)

15. Freedom of expression is the most valuable tool enabling members to exercise their duties and it enjoys enhanced protection.

16. Therefore, the immunity guaranteed by Article 14 of the General Agreement:

16.1. is absolute, permanent and perpetual in nature; it continues to apply after the end of a member's mandate; it cannot be waived by the Parliamentary Assembly or the national parliament;

16.2. is an institutional privilege**;** a member or a former member has no liberty to waive or to renounce it;

16.3. applies to all legal proceedings (criminal, civil or administrative) which may arise in relation to words spoken and votes cast. As a corollary, no parliamentarian covered by such an immunity should be heard, including as a witness to testify concerning information obtained confidentially in the performance of their parliamentary duties which they do not see fit to disclose;

16.4. has an autonomous scope, which could be different from the scope of the absolute immunity which protects national parliamentarians, to be established bearing in mind relevant statutory provisions, the case law of the European jurisdictions and relevant Assembly practices;

16.5. given the exceptional protection, covers merely what is strictly necessary for the Assembly members to perform their duties, to carry out respectful debate or to express critical positions while precluding the misuse of the privileges and immunities for personal benefit. With this in mind, it does not cover activities prohibited by the Code of Conduct such as, for instance, paid advocacy.

16.6. covers votes cast and opinions expressed by the members of the Parliamentary Assembly "in the exercise of their functions" bearing in mind the present-day definition of core functions of the Assembly members;

3. In particular Resolution 1325 (2003), Resolution 1490 (2003) and Resolution 2127 (2016).

16.7. could, in addition to covering statements made by members during the debate in the plenary or during the meetings of the committees and sub-committees, be also extended to oral and written statements made by members outside official premises as well as to other activities performed by them in their capacity as Assembly members if there is an obvious and direct connection between these statements or activities and the exercise of their functions as Assembly members[4];

16.8. does not cover an inquiry into bribery-related offences (for example offering or requesting undue advantages in return for certain voting behaviour) given that those offences do not pertain to opinions expressed or/and votes cast.

17. It is the responsibility of the competent national court to recognise that a member or a former member enjoys absolute immunity owing to the direct and obvious link to his or her parliamentary functions. By doing so, the relevant Council of Europe bodies and national jurisdiction must co-operate so as to avoid any conflict in the interpretation and application of the provisions of the Statute and the General Agreement.[5]

18. Where a request for waiver of immunity is submitted to it by a national authority, the Assembly must first of all ascertain whether the facts giving rise to the request for waiver are covered by Article 14 of the Protocol, in which case immunity cannot be waived.

Immunity from detention and prosecution (Article 15 of the General Agreement on Privileges and Immunities of the Council of Europe)

19. The purpose of this immunity is to protect a parliamentarian from undue pressure which could be exercised against him or her in respect of acts which do not constitute a part of typical parliamentary activities and applies as follows:

19.1. the members of the Parliamentary Assembly enjoy the immunity provided for in Article 15 during the Assembly sessions. The term “during the sessions” covers the whole parliamentary year in view of the continuous activity of the Assembly and its bodies;

19.2. members of the Assembly enjoy the immunities secured by this provision when they are no longer members of their national parliament, and do so until their replacement as members of the Assembly or until the opening of the next session;

19.3. according to the Statute, protection afforded to members of the Assembly applies during their Assembly mandate. It could also cover proceedings initiated prior to becoming a member of the Assembly as long as those proceedings contain evidence of *fumus persecutionis*. This position, which intends to make protection fully effective, is in line with practices existing in several member States and does not contradict the Statute in that it links the acquisition of immunity to the beginning of the term of office. Nor does it contradict to the principle of the functionality of parliamentary immunity in that the protection will only be granted if factual elements indicate that the intention underlying the legal proceeding pre-dating the mandate of an Assembly member is to damage a member’s political activity and thus the Assembly. In all other cases if the prosecution is for no other reason than the proper administration of justice, immunity has to be lifted at the request of the national authority;

19.4. immunity cannot be invoked in the case of *flagrante delicto.* As the objective of this provision is to quickly restore public order and reduce the risk of evidence disappearing, its use by national authorities shall not be inspired by concerns unrelated to the proper administration of justice[6];

19.5. at all stages when parliamentary immunity is waived the presumption of innocence must be respected;

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4. For instance, when a member carries out duties following an official decision by a competent Assembly body (e.g. election observation, visits in the context of the monitoring procedure, a fact-finding visit of a committee rapporteur in a member State).

5. Consequently, where the national authority is informed of the fact that that member has made a request for defence of that immunity, it should stay the judicial proceedings.

6. In the case of a strong assumption that a member was groundlessly deprived of his or her privileges by the application of the provision on *flagrante delicto*, the President could take an initiative to assert the privilege and immunity of the member concerned. The member could also petition the President to defend his or her immunities.

19.6. when considering a request to waive the immunity the Assembly has to consider the following elements: legal proceedings initiated against the member do not jeopardise the proper functioning of the Parliamentary Assembly, and the request must be serious, that is not be inspired by reasons other than that of dispensing justice.[7] If neither of these elements could be established, the Assembly should normally propose to waive immunity;

19.7. the immunity cannot be waived except by the Assembly at the request of a "competent authority" of the member State concerned. The competent authority is 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;

19.8. where members are required to appear as witnesses or expert witnesses, there is no need to request a waiver of immunity, provided that they will not be obliged to appear on a date or at a time which prevents them from performing their parliamentary duties, or makes it difficult for them to perform those duties, or that they will be able to provide a statement in writing or in any other form which does not make it difficult for them to perform their parliamentary duties;

19.9. detention of an Assembly member requires very serious grounds as it prevents him or her from taking up his or her seat or representing the voters 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. Where there are no indications that the suspect will evade justice the proper conduct of the investigation shall be ensured, if possible, by other security measures (for example release on bail).

7. To consider if there are reasons which may be behind legal proceedings at stake the following elements could be taken into account: the broader political and legal context in which the legal proceedings against a member were launched; the timing of the prosecution; any indication of specific and personal targeting; a member's specific status and activities, even though the absence of a particular political status does not rule out political motivation behind the legal proceedings; the gravity of charges in comparison to what an ordinary citizen would face and the sufficient connection with the objectives of criminal justice; uncertainty as to the status and sources of the evidence presented as a basis for charges; the reasoning and the elements on which the request for waiver of immunity is based; the mean**s** to defend him or herself.

B. Explanatory memorandum by Mr Tiny Kox, rapporteur

1. Introductory remarks

1. The Parliamentary Assembly comes back to examining the various aspects of parliamentary immunities at regular intervals for manifold reasons: the need to interpret 70-year-old texts given the realities of the Assembly's work and to specify how the granted immunities would apply in practical terms. Also, the Assembly closely follows trends in immunity regimes at the European level and conducts a general reflection about how the afforded protection could be truly effective against existing political risks, while not being misused for personal benefit.

2. The last Assembly resolutions[8] addressed theoretically a practical application of immunities based on latest studies and a few cases where the immunities of the Assembly members were at stake.[9] They clarified and solidified the immunity regime and called on member States to honour their obligations with regard to relevant statutory provisions.

3. It is indeed in the interest of the Assembly as a parliamentary institution to guarantee its members enhanced and consistent functional protection in the face of the missions that members are called upon to carry out. The issue of unrestricted travel on official Assembly business (free movement) and the level of protection afforded in the exercise of the Assembly duties (immunities) occupies an important place in this endeavour.

4. In particular in Resolution 1325 (2003), the Assembly pointed to the evolved nature of the duties of its members which required their statements be protected not only during the debates in the Chamber but also in the course of official missions outside the Assembly precinct. Recommendation 1602 (2003) also successfully tackled the issue of free movement which resulted in the acknowledgment by member States of the laissez-passer which is now being issued to the members of the Assembly.

5. In its Resolution 1490 (2006) the Assembly raised the case of members who were unable to exercise their European mandate due to arrest or detention. It concluded that the combined reading of Article 15 of the General Agreement on Privileges and Immunities of the Council of Europe (ETS No.2) and Article 3 of its Additional Protocol (ETS No.10) established a basic immunity which derived from an international treaty and which guaranteed members immunity from arrest and detention, regardless of their country of origin. This immunity, the Assembly underlined, might not be restricted unless it was previously lifted by the Parliamentary Assembly itself. Today it could be said that this position has been fully confirmed.[10]

6. In Resolution 2087 (2016) and Recommendation 2083 (2016), the Assembly called for a uniform protective framework for parliamentarians travelling abroad and for more transparency and legal certainty in cases where a member State, acting within its jurisdiction and not in breach of undertaken international commitments, decided or was considering imposing restrictive measures banning the entrance of foreign parliamentarians. Though the Committee of Ministers ruled out the standard-setting work, it insisted on the respect of the existing obligation of member States. It also endorsed the Assembly's call to member States to

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8. Resolution 1325 (2003) and Recommendation 1602 (2003) "Immunities of members of the Parliamentary Assembly", Resolution 1490 (2006) "Interpretation of Article 15.a of the General Agreement on Privileges and Immunities of the Council of Europe", Resolution 2127 (2016) and Recommendation 2095 (2016) "Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly"; Resolution 2087 (2016) and Recommendation 2083 (2016) "Introduction of sanctions against parliamentarians".

9. The President of the Assembly intervened in the following cases to defend the immunities of members or former members: in the case of Ms Nadiia Savchenko where she was appointed as member of the Ukrainian delegation to the Parliamentary Assembly while in prison in the Russian Federation (2015); in the case of Mr Dick Marty in respect of the request of the Priština District Court requesting the waiver of parliamentary immunity to enable Mr Dick Marty to appear as a witness in the so-called Medicus clinic trial (2014); in the case of Senator Raffaele Iannuzzi, member of the Italian delegation, in respect of two prison sentences in respect of matters that had occurred prior to his parliamentary term of office (2002, 2004); in the case of Mr Paolo Caccia, member of the Italian delegation, arrested following the dissolution of the Italian Parliament, but while he was still a member of the Italian delegation to the Assembly and therefore, continued to enjoy the immunities(1994). Another case concerned Mr Ilie Ilaşcu (first elected to the Moldovan parliament (1994-2000) and then to the Romanian Senate (2000-2008): he was in detention for a long period of time when he was appointed member of the Romanian delegation to the Assembly and 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. One request to waive the immunity was submitted in 2001 by the Spanish Supreme Court of Justice of Spain (in the case of Mr Silvio Berlusconi; however, no decision was taken owing to Mr Berlusconi's prior resignation from the Assembly).

10. Junqueras [2019] Case C-502/19 (ECJ).

consider granting immunities and privileges to members of the delegations holding observer or partner for democracy status with the Parliamentary Assembly and who take part in sessions of the Assembly and meetings of its committees.

7. Following Recommendation 2095 (2016), the Committee of Ministers reiterated the Assembly's call to member States to honour their commitments and fully guarantee the immunity of members of the Parliamentary Assembly and their free movement on the territory of member States.[11]

8. The current report tends to take stock of the overall situation regarding how immunities have been invoked and applied over the past years in order to summarise both the general principles and the practice of the Assembly to make the immunity regime truly effective and easy to apply by both the members of the Assembly and relevant national authorities.

9. For instance, the rapporteur had in mind the cases which happened in the past and where some of the member States did not comply with their commitments to guarantee freedom of movement arising from the General Agreement. By doing so, national authorities put forward domestic law to justify a failure to comply with international commitments, which, as it was pointed out on many occasions, could not provide a valid justification under international law.[12]

10. Concerning a few other immunity-related cases, national authorities seemed to have made unilateral interpretation of the General Agreement to rule out the application of the Assembly immunities or the Assembly prerogative to lift it.[13] Therefore, the set of clear guidelines would constitute a necessary reminder to member States.

11. A set of criteria in relation to the immunity regime was also requested by the Independent investigation body on the allegations of corruption within the Parliamentary Assembly (IBAC),[14] which led to an investigation into corruption-related allegations against members and former members of the Assembly in 2017-2018. The investigation resulted in internal sanctions being imposed on those members whose misconduct was established in the course of the inquiry. Investigations have also been launched by national authorities in a few cases.[15] No request to waive immunity or a request to defend immunity has been received by the Assembly so far.[16]

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11. See the Committee of Ministers' replies to Recommendations 2083 (2013) and 2095 (2016), Doc. 14120 et Doc. 14266.

12. In particular, under the Vienna Convention on the Law of Treaties, Article 27 ("Internal law and observance of treaties – A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"). For more details see AS/Pro (2015) 23 "Challenges to the co-operation of member States with the Assembly as regards the free movement of Assembly members". For more information on restrictive measures the members of the Assembly may face see Resolution 2087 (2016) "Introduction of sanctions against parliamentarians" and Doc. 13944.

13. For example, criminal proceedings were initiated against Ms Filiz Kerestecioğlu Demir, a member of the Turkish Parliament and then still a member of the Assembly, because of the content of the question she had put to the Secretary General of the Council of Europe in plenary on 22 June 2018 (she had asked the following question: "Two days ago, Mr Erdoğan declared war on Afrin. It is claimed that many civilians have lost their lives in the region. Meanwhile in Turkey, all peaceful demonstration against the war is violently suppressed. Even the Minister of Foreign Affairs is making statements that link the French Prime Minister to terrorism. What does the Council of Europe plan to do in order to prevent civilian deaths in Afrin and the violent suppression of peaceful demonstrations in Turkey?"). The request to waive her immunity was made to the national parliament while she was still an active member of the Assembly. Apart from the fact that the action of the national authorities runs counter to the absolute protection against prosecution for opinions expressed by members of the Assembly in the exercise of their functions, the authorities were obliged, if they considered that absolute immunity did not apply, to direct the request for the waiver of immunity also to the Assembly, which did not occur. By a decision of 9 May 2018, the Ankara Prosecutor's Office, Parliamentary Crimes Investigation Section, qualified Ms Kerestecioğlu Demir's remarks as an apology for a terrorist organisation punishable under Article 7/2 of Law 3713 and Article 53/1 of the Criminal Code, and requested in the same decision that her national parliamentary immunity be lifted.

14. https://assembly.coe.int/Communication/IBAC/IBAC-GIAC-Report-EN.pdf.

15. In March 2021, the parliamentary immunity of Axel Fischer, former member and chairperson of the German delegation to the Assembly and the Head of the European People's Party group in 2016-2018**,** was lifted in relation to the changes of traffic of influence involving Azerbaijan. Two other former members of the German delegation – Ms Karin Strenz and Mr Eduard Lintner – were also accused of having their votes bought in favour of Azerbaijani interests. The former Italian member Luca Volontè, who led the European People's Party group in the Parliamentary Assembly until 2013, was convicted of corruption by a Milan court in the first instance but appealed.

16. Reportedly Mr Luca Volontè invoked the Assembly and national immunities in the course of pre-trial investigation into corruption charges leading to charges being dismissed. However, upon an appeal by the prosecutor, the Supreme Court overturned the pre-trial investigation judge's decision and ordered the continuation of the proceedings. "Report of the Independent Investigation Body on the allegations of corruption within the Parliamentary Assembly", paragraph 286.

12. The IBAC also made a number of recommendations, including on establishing a clear set of criteria on the application of immunity to make sure that privileges and immunity cannot be invoked in cases of genuinely suspected corruptive activities.

13. Though the immunities shall undisputedly not shield corruption activities, the rapporteur does not lose sight of the possible political context in which corruption related charges may also be used to put the pressure on the opposition.

14. It is against this backdrop that the rapporteur would draw his proposal for the guiding principles which would not merely provide a background to considering immunity-related questions but would also raise awareness among the Assembly members and their respective parliaments of the institutional privilege they enjoy.

15. The rapporteur wishes to thank those colleagues and former colleagues who responded to the questionnaire he prepared for this report, which sought to gather information on members' knowledge and possible use of the immunity they enjoy as members of the Assembly. 96 people, representing 32 national delegations, participated in the exercise. The data collected showed that 80% of the participants were not aware of the immunities granted to Assembly members. The vast majority of participants never invoked their immunity either to their national authorities or to the national authorities of other member States. Furthermore, 60% of respondents were in favour of strengthening the mechanism contained in Rule 73.6 of the Rules of Procedure allowing the President of the Assembly to take an initiative to defend the immunity of a member (see below); some indicated that, as this mechanism was already in place, it was more important that the President be able to make effective use of it and that national authorities respect it, with one person pointing out that this could be particularly relevant in the context of Assembly election observation. Other comments wished that information on the immunity of Assembly members be more widely disseminated both to members and to national authorities.

16. The rapporteur would also like to thank Mr Sascha Hardt, Assistant Professor of Comparative Constitutional Law, from Maastricht University; Ms Victoria Cherniychuk, Lawyer, from the Directorate of the Jurisconsult, Registry of the European Court of Human Rights; Mr Rogier Huizenga, Secretary of the Committee on the Human Rights of Parliamentarians and Human Rights Programme Manager of the Inter-Parliamentary Union (IPU); and Mr Remco Nehmelman, Secretary General of the Dutch Senate (Eerste Kamer) who participated in a hearing of the committee on 30 November 2020 or provided information on a number of legal issues on the immunity regime and the latest case-law of the European jurisdictions.

2. Scope of protection as defined by the Council of Europe texts

17. The immunities of representatives and substitutes to the Assembly are defined in the following texts:

– Article 40(a) of the Statute of the Council of Europe:

> *"(…) representatives of Members (...) 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";*

– The General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949 (hereafter the General Agreement) and the Protocol thereto of 6 November 1952, which supplement Article 40(a) of the Statute and establish two types of immunity:

> *Parliamentary privilege – Article 14:*
>
> *"Representatives to the Consultative (Parliamentary) 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."*
>
> *Parliamentary inviolability – Article 15:*
>
> *"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:*
>
> *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".

18. This immunity also applies when they are travelling to and from the place of meeting of the Consultative (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."

19. Article 5 of the Protocol states: "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. (…)".

20. Assembly members enjoy two forms of protection: parliamentary privilege, which is guaranteed by Article 14 of the General Agreement and gives them immunity from any judicial proceedings (criminal, civil and administrative) owing to an opinion they have expressed or a vote they have cast in the exercise of their parliamentary functions, and immunity from any arrest, detention or prosecution.

21. The aim of the immunity provided for in Article 14 is to protect the independence of parliamentarians and guarantee their freedom of judgment, expression and decision.

22. Article 15 incorporates the concept of inviolability. The purpose of this type of immunity is to protect a parliamentarian from undue pressure which could be exercised against him or her in respect of acts which do not constitute a part of typical parliamentary activities. It is possible to put pressure on and to hinder the performance of a political mandate by introducing legal suits for acts not related to the exercise of parliamentary functions, which may result in moral coercion or other restrictions on a parliamentarian's activities or freedom of movement. This immunity aims at ensuring the optimal working conditions for a parliamentary institution throughout the member's mandate and to grant its independence vis-à-vis other branches of power. This concept exists in a number countries and, depending on the country, could cover a variety of procedural safeguards[17] or types of offences.[18]

23. The competences of the Assembly with regard to immunities, in particular the procedure for waiver of immunities, is defined in Rule 73 of the Assembly's Rules of Procedure.

3. Clarifying the immunity regime of the Assembly members: a joint exercise of the two statutory organs

24. The rapporteur acknowledges from the outset that the interpretation of the provisions of the Statute of the Council of Europe and the General Agreement is a joint exercise which requires the adoption of the position by the Committee of Ministers and the Parliamentary Assembly as to the manner in which these provisions apply or the meaning vested in some of their terms.

25. The Statute of the Council of Europe and the General Agreement are international treaties which set forth the powers and functions of the organs, and the rights and duties of members. According to these texts, the organs of the Council of Europe – the Committee of Ministers and the Parliamentary Assembly of the Council of Europe – have different functions but equal standing with regard to their position in the organisation and enjoy relative autonomy in their operations. Both can establish their internal rule of functioning, provided those rules are compatible with the "primary law" of the Organisation, namely the Statute and the General Agreement. While carrying out the function attributed by the Statute, the Assembly may give effect to the provision of the primary law without, however, overstepping its competences.

26. In the past the issue of interpretation of the Statute already triggered lively inter-institutional debates leading to the conclusion that, in order to maintain an efficient dialogue and contribute to the fulfilment of relevant organs' mandates, the interpretation of the Statute should be a joint exercise.

27. This approach takes on more special meaning when it comes to interpreting provisions which define the boundaries of privileges and the protection granted to the members of the Assembly, especially in the absence of a specific provision on a competent authority in charge of interpretation.[19]

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17. For instance, arrest and detention, investigation and search, prosecution, criminal sanctions, civil proceedings, administrative actions. See Report on the scope and lifting of parliamentary immunities, adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014), CDL-AD(2014)011-e, paragraph 105.

18. For instance, exclude minor or serious offences.

19. Article 31 of the Vienna Convention on the law of treaties specifies general rules of interpretation which could be divided into three specific approaches: the subjective (the 'intention' of the parties) approach; "the objective (the 'textual') approach; and the teleological (the 'object and purpose') approach". The International Court of Justice established a

28. The original meaning is a fundamental principle of interpreting the General Agreement alongside the institutional purpose of immunities. Such immunities are an institutional privilege, originally granted to parliamentarians to avoid interference from other branches of power, and serve to protect Assembly members from proceedings intended to deprive the Assembly of the co-operation or freedom of action of its members. The role of the Assembly and its practice in shaping the immunity regime of its own members cannot therefore be overlooked. Indeed, it would be greatly incoherent to leave the decision concerning the protection of elected representatives in the hands of an executive body.

29. With regard to the origins of the immunities granted to the members of the Assembly, it shall be recalled that the wording contained in Article 14 reflects constitutional traditions of a number of the founding States, the constitutions of which embody similar provisions.[20]

30. 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 on 5 May 1949.[21] 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 and that**:** the members should also be protected against any restriction imposed by their own or other governments on the free exercise of their functions.

31. The first draft text 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".

32. 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 and on the territory of all member States. 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.

4. The Parliamentary Assembly and the European Parliament: different institutions, the same immunity regime?

33. Relevant precedents could not altogether be ignored while establishing the ordinary meaning to be given to the treaty provisions, especially when the precedents concern similar organisations.[22] That is why, given the common historical background surrounding the establishing of the immunity regime for the Parliamentary Assembly of the Council of Europe and the European Parliament, one should be mindful of practical application of the primary law retained by the European Parliament or the interpretation provided by the Court of Justice of the European Union (CJEU).

34. The immunities of members of the Parliamentary Assembly of the Council of Europe were established by texts adopted in 1949 and completed in 1952. The economic strand of European integration had also foreseen a parliamentary dimension – the Common Assembly composed of the appointed parliamentarians – which later became the European Parliament. The immunities worded in almost similar words as contained in the General Agreement were granted to members of the Common Assembly of the European Coal and Steel Community (ECSC) whose activity was extended in 1957 to cover in addition the European Economic Community (EEC) and the European Atomic Energy Community (EAEC), whose establishing treaties were also accompanied by protocols embodying a similar provision on parliamentary immunities. The provisions negotiated at the time have not been altered until today, notwithstanding numerous revision attempts undertaken by the European Parliament.

35. The similarity in the wording would not come as a great surprise given that out of the six ECSC founding members, five were also founding members of the Council of Europe.

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principle according to which "in accordance with customary international law, reflected in Article 31 of the Vienna Convention on the law of treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose". The Max Planck Encyclopedia of Public International Law.

20. Belgium, Italy, France.

21. See Doc. 10840.

22. "Privileges and immunities of international organisations and persons connected with them", Report of the Sub-Committee on Privileges and Immunities of International Organisations, revised and approved by the CCJ at its 11th meeting, CM 69 (92), p. 5.

36. Consequently, at the origin, the Council of Europe and the European Parliament provided for two different types of immunities – non-liability and inviolability – negotiated bearing in mind that the members of those assemblies were not directly elected and that the founding member States granted different scopes of immunities to their national parliamentarians. For instance, the Netherlands was unwilling to grant on its territory a level of inviolability that the members of the Dutch Parliament did not enjoy. Some other members were against limiting the scope of non-liability.

37. As a result, in addition to non-liability (absolute immunity), the General Agreement and the Protocol on the Privileges and Immunities of the European Union (hereinafter "the PPI") established, under its inviolability strand, two different regimes: one referring to national laws and another defined by the international treaty itself. Accordingly, in the territory of their member State, members of the Parliamentary Assembly and the European Parliament enjoy the same level of protection as national parliamentarians, while in the territory of other member States they enjoy immunity from any measure of detention and from prosecution (Parliamentary Assembly of the Council of Europe) or from any measure of detention or from any legal proceedings (European Parliament). In addition, the second paragraph of the corresponding articles also confers immunities on members "while they are travelling to and from the place of the meeting" of their respective parliamentary institutions.[23]

38. Finally, in a similar way, the corresponding provisions ban all administrative or any other restriction, as well as grant immunities to members travelling to and from meetings of their respective parliamentary bodies.

39. In the light of the above, the rapporteur opted for introducing in his analysis some relevant elements stemming from the practice of the European Parliament and the case-law of CJEU, especially when it comes to considering points the Assembly has not faced up until now. However, the rapporteur underlines that both the Parliamentary Assembly of the Council of Europe and the European Parliament, while learning from each other's experiences, are fully sovereign on their rules and decisions, as all other parliamentary assemblies, operating in (parts of) Europe, such as the Parliamentary Assembly of the Organization for Security and Co-operation in Europe, the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States, the Nordic Council, are. Their experiences could also contribute to a common interpretation of aspects of parliamentary immunity.

5. The material scope of privileges and immunities granted to members of the Parliamentary Assembly – parliamentary non-accountability (Article 14 of the General Agreement on Privileges and Immunities of the Council of Europe)

5.1. Immunity for opinions and votes

40. This immunity, which is also called absolute immunity, non-liability or non-accountability, could be described as basic parliamentary immunity and can be found in almost all democratic parliaments in the world. Though it may have different historical origins, its main objective remains similar and consists of protecting the elected representatives when acting in their official capacity. This type of immunity is often absolute and usually cannot be lifted, although there are some parliaments that can do this.[24]Notwithstanding its common acceptance the definition of its scope remains a complex issue. In most countries the formal definition and its scope are set out in the fundamental texts the practical application of which are further detailed by parliamentary practices and decisions by judicial authorities. When it comes to the Assembly, its scope, like the scope of inviolability, is initially defined by the General Agreement and its application is further specified in Assembly resolutions and opinions of the Rules Committee.

41. While defining the scope of the absolute immunity, special attention is to be paid to the need to protect the independence of the Assembly and its functional needs. The role of precedents is also important, as well as the case-law of the European Court of Human Rights, reports by the Venice Commission and other relevant documents. In 2003, the Rules Committee stated: "The decisive factor for the scope of the immunity under Article 14 of the General Agreement is therefore reference to the activities of the Parliamentary Assembly, bearing in mind its competences both explicit (Statute of the Council of Europe, Rules of Procedure and other legal texts) and implicit (Assembly practice, implied powers)".

23. Out of this number of provisions dealing with inviolability, a "core" immunity could be deduced which could be referred to as "European immunity", see Chapter 6.1.

24. Report of the Venice Commission on the scope and lifting of parliamentary immunities, *op. cit.*

42. The first observation which follows from these findings is that the absolute immunity granted to the members of the Assembly has an autonomous scope which could be different from the scope of the absolute immunity which protects national parliamentarians, if applicable. Both European jurisdictions have adopted a rather conservative interpretation of parliamentary functions requiring a substantial link between acts and the mandate. The *Patriciello* judgment[25]of the CJEU has introduced the criterion of "direct and obvious link" to performance of parliamentary duties. As is the case in national parliaments, the absolute immunity has no "endpoint" and protects members of the European Parliament during their term of office and beyond.

43. Second, it should be noted that the two official language versions of Article 14 of the General Agreement (both of which are authentic) differ from one another: the English version refers to "words spoken" and the French version uses the term "opinions". In the explanatory report accompanying Resolution 1325 (2003), the Rules Committee underlined that the term "words spoken" comprises both oral and written statements. This interpretation can be justified by historical and teleological arguments. Article 14 of the General Agreement seeks to protect the core duties of the Assembly and therefore typical activities the members undertake to carry out these duties. It is acknowledged that the way of performing the core duties as well as the forms of political communication have undergone some transformation since the basis text was drafted in 1949 and may continue to evolve. Consequently, when assessing the scope of Article 14, attention should be paid to what constitutes typical or core activities of the Assembly members and the obvious and direct link to their parliamentary functions.[26] For instance, today Article 14 would also cover public talks, radio and TV interviews, using traditional or digital media, as long as those are performed in the exercise of the function of the Assembly members.[27]

44. Thirdly, the exceptional nature of the absolute immunity does not mean that parliamentarians are allowed to say or do whatever they wish. The term "non-accountability" may be misleading. It simply means that parliamentarians benefit from absolute protection against lawsuits for what they say inside the parliament and cannot be held accountable in a national court (for example, they cannot be prosecuted or ordered to pay damages for acts or words said in the context of a debate in the Assembly). An example is the decision of the European Parliament not to waive the immunity of Ioannis Lagos.[28]

5.2. How absolute is the absolute immunity?

45. Absolute immunity can be characterised as a special regime that provides additional protection to a regime established by international treaties to protect political speech. This includes Article 10 of the European Convention on Human Rights (ETS No.5) and subsequent interpretative case-law.

46. Knowing that one would not be prosecuted for an action could open the door to abuses, for example provocative acts against political opponents.[29] That said, by asserting absolute immunity of its members before national authorities, the Assembly, like any parliamentary assembly, nonetheless remains in a position to place restrictions on freedom of expression, bearing in mind the criteria laid down by the case law of the European Court of Human Rights.[30] Immunity does not exempt members from sanctioning powers of parliament, provided these rules do not infringe with the member's rights under the European Convention on Human Rights.[31]

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25. *See* Patriciello [2011] (CJEU). This judgment remains the leading case law on establishing the scope of the absolute immunity granted by the PPI.
26. *Ibid.*
27. For instance, if the interview is given in a member's State in his or her capacity of member of the Assembly. See, *mutatis mutandis*, the report on the request for waiver of the immunity of Ana Gomes, A8-0363/2017, 22 November 2017.
28. See the report on the request for waiver of immunity of Ioannis Lagos, A9-0135/2021, of 22 April 2021. A criminal proceedings was initiated against him by the Greek authorities for tearing a sheet of paper with a picture of the Turkish flag on it during a debate on the humanitarian situation on the Greek islands. The European Parliament considered that Mr Lagos undertook his actions in the exercise of his functions as a Member of the European Parliament, which precluded criminal proceedings under the relevant article of the Protocol on Privileges and Immunities of the European Union. However, he was called to order during the debate. This could have led to internal sanctions if the President's order had not been followed.
29. One could think about a situation where the public use of certain symbols is prohibited in a given country and, at an official Assembly meeting in that country, a member would wear or display a symbol that could trigger criminal proceedings or administrative sanctions under the domestic law of that country.
30. Report on "the criminal liability for peaceful calls for radical constitutional change from the standpoint of the European Convention on Human Rights", adopted by the Venice Commission on 9 October 2020 at its 124th online Plenary session, CDL-AD(2020)028-e.
31. *Karácsony and Others v. Hungary* [GC] [2016] (ECtHR), *Demicoli v. Malta* [1991] (ECtHR).

47. In this respect, two elements often come up: bribery on the one hand, and the content and form of political discourse, especially hate speech, on the other.

5.2.1. Absolute immunity and bribery

48. To what extent "words spoken" or "votes cast" could be used as evidence relating to investigation of bribery offences allegedly committed by an Assembly member in the exercise of their duties? This point requires clarification in the light of corruption allegations which the IBAC had investigated and which had resulted or still could potentially result in a criminal investigations being launched by national authorities.

49. In the United Kingdom, in 1998, in the context of the discussion on how anti-corruption law could be improved, it was discussed how the parliamentary privilege granted by Article 9[32] of the 1689 Bill of Rights would apply in the context of criminal prosecution in bribery cases involving parliamentarians.[33] Among options proposed by the Home Office aimed at pairing historical parliamentary privileges, on the one hand, and modern requirements to fight corruption, the Joint Committee recommended the one which, should a member be brought within the criminal law of bribery, would allow evidence to be admitted in courts notwithstanding Article 9.[34]

50. The blanket prohibition from touching upon everything members say or do in the precinct of parliament correlates with the underlying idea of functionality of parliamentary privileges and the fact that immunity could only be claimed to protect the core activity of the parliament.

51. Much the same reasoning was adopted by the Supreme Court of the United States in 1972 *United States v. Brewster* where the Court held that the Speech or Debate Clause[35] does not protect a United States senator from prosecution for accepting a bribe in return for a vote on pending legislation. The clause only forbids inquiry into a legislative act or the motivation for a legislative act ("An inquiry into the purpose of a bribe does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them").

52. Consequently, requesting, accepting or paying a bribe is no part of the core parliamentary business which immunity is set to protect. On the contrary, such behaviour would obstruct the functioning of the parliament. What is to be investigated in such cases would be the illegal conduct consisting of accepting or requesting undue benefits, rather than "words spoken " or "vote cast".

53. Given the above, the rapporteur thinks that special mention should be made in the guidelines of the fact that any abuse of parliamentary privileges amounting to active or passive corruption is excluded from the remit of the privileges granted by Article 14 given that they do no pertain to opinions expressed or votes cast. This position would be in line with the IBAC recommendation to make sure that privileges and immunity cannot be invoked in cases of genuinely suspected corruptive activities.

5.2.2. Does the protection of political speech concern both content and form?

54. Visual expression is becoming more and more widely used in the parliamentary precincts. A traditional way of conveying a political message orally is, to a large extent, being supplemented, if not replaced, by a visual message. It's notorious that perception in most people proceeds from images to texts, which makes visual communication a powerful tool. A spontaneous gesture or wearing a given sign allows to catch instantly the attention of the auditorium and to deliver a quick message.

55. The European Court of Human Rights has interpreted the term "expression" to cover different forms of expression, including expression in words, images, video and conduct intended to convey an idea or information.[36] Therefore, expression combined with physical conduct or the display of symbols enjoys the protection afforded by Article 10 of the Convention.

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32. Article 9:"Freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".
33. https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4307.htm.
34. *Ibid*., paragraph 167.
35. «[F]or and Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place».
36. *Gough v. the United Kingdom* [2014] (ECHR), paragraph 147. In this judgment the Court found that the applicant's failure to wear clothing was a direct expression of his principled views on the human body and therefore fell within the scope of Article 10 of the European Convention on Human Rights.

56. In 2003 the Assembly already examined how the use of logos, symbols, a special dress code or sonorous interactions had to be dealt with by the Assembly in order to ensure the smooth running of its meetings. Resolution 1965 (2013) "The discipline of the members of the Parliamentary Assembly" reaffirmed its commitment to the right to freedom of expression, which may also cover the use of symbols expressing identification with ideas or representing them, which "is the most important parliamentary privilege and an essential precondition for the independence of elected representatives of the people." On the other hand, the Assembly has also acknowledged the position reiterated by the European Court of Human Rights on multiple occasions that the exercise of freedom of expression also has duties and responsibilities "the scope of which will depend on the situation and the means used".

57. The above provides a sound justification why some limitations could be imposed on the way the message is expressed during the debate.[37] According to the case law of the European Court of Human Rights,[38] both the manner in which the message could be delivered and the disciplinary power in relation to orderly debates, fall within the internal rules of parliament which could impose some limitations.[39] If limitations are to be set up, they could only concern the way the message is being conveyed and could not normally touch the content of the message.[40]

58. These restrictions must be carefully considered, taking into account the protective regime that political speech enjoys even when it is provocative and the nature of parliamentary debate. These limitations must provide adequate safeguards against abuse. Parliament's autonomy cannot justify the imposition of sanctions that are not prescribed by the Rules or that are grossly disproportionate to the alleged disciplinary violation. Procedural safeguards, such as the right to be heard, must be in place.

59. There is no reason to believe that the nature of parliamentary debate has undergone dramatic transformation. It continues to be confined to fair and reasoned oral debate, discussion and voting. So, there is no reason for special privileges to be extended to what is necessary to carry out a respectful debate or to express critical positions in the conventional manner.

5.2.3. Hate speech

60. The Assembly underlined in its Resolution 2127 (2016) that the absolute protection of the acts and statements of members of parliament, especially as far as hate speech is concerned, does indeed pose a problem in view of the rise in extremism and nationalism against the backdrop of an upsurge in terrorism and the migration crisis. The Assembly welcomed the fact that "in some States, insulting or defamatory utterances[41] incitement to hatred or violence or, in particular, racist remarks are not covered by non-liability rules".

61. The European Parliament took the view that parliamentary privilege does not extend to statements contrary to Article 21 of the Charter of Fundamental Rights ("prohibition of discrimination").[42] Rule 10 of the European Parliament's Rules of Procedure recalls that "the conduct of members shall be characterised by mutual respect and shall be based on the values and principles laid down in the Treaties, and particularly in the Charter of Fundamental Rights".[43] The Assembly's Rules of Procedure state more simply that "Words or expressions which affront human dignity, undermine the right to respect for private life, or which may prejudice orderly debate may not be used" (Rule 22.6).

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37. For example, the ban on displaying a small national flag on the pulpit is in place in the European Parliament. However, this measure is being challenged before the (EU) General Court on the grounds, *inter alia*, that the presence of such a flag does not "interfere with the smooth conduct of parliamentary business, the proper functioning of the Parliament's technical equipment or the good order of the Chamber, and does not constitute improper behaviour.", *Rivière and Others v Parliament*, T-88/20.

38. *Karácsony and Others v. Hungary* [GC] [2016] (ECtHR). In this case, some members of the Hungarian Parliament were fined for demonstrating their opposition with chants, banners and placards.

39. "Rules on non-liability must be distinguished from rules on internal disciplinary measures within parliament itself, which are of a different nature, and which are usually not included in the concept of parliamentary immunity. Most parliaments have internal rules of procedure or codes of conduct (house rules) under which the members can be silenced or disciplinarily sanctioned for certain forms of remarks or behaviour, although the nature of such sanctions vary greatly, from a call to order or curtailment of speaking time to reduction of remuneration, temporary exclusion, or in a few cases even stricter sanctions of a more penal nature", Report of the Venice Commission, *op.cit.*

40. In many parliaments defamatory statements or insulting speeches are not covered by parliamentary privilege, meaning that they could trigger legal action. Another question arises if the parliament itself sets limits on some types of speeches.

41. Germany, Latvia.

42. See European Parliament decision on the request for defence of the parliamentary immunity of Mario Borghezio, 2 April 2014.

62. That being said, the Inter-Parliamentary Union questioned the position of the Assembly expressed in Resolution 2127 (2016) as regards the validity of some limitations imposed on immunity by emphasising that "engaging in censorship, particularly within parliament, regardless of how it transpires, is unlikely to be a productive way of addressing even a very difficult social problem. Instead, respectful debate about issues is likely to cause underlying problems to surface, which opens the door to resolving them".[44]

63. It is true that the need to ensure discipline in the conduct of parliamentary business may place restrictions on the manner in which freedom of expression is exercised. On the other hand, a parliament has "very little latitude to regulate the content of speech by parliamentarians".[45] The rapporteur considers that, even though the Assembly may take steps to call its members to order for offensive statements, Article 14 should not be interpreted as automatically excluding such statements, if no fact of misuse of privileges can be established.

5.3. Who establishes if the absolute immunity applies?

64. In most of the European countries absolute immunity could not be waived either by the parliament or another institution or be renounced by a parliamentarian himself. However, there are also some countries in which the parliament could lift the non-liability under certain circumstances.[46]

65. In some countries, the parliament can determine whether the conditions for the application of absolute immunity have been met. This decision becomes binding in national courts.[47]

66. In 2008,[48] the CJEU clarified in a preliminary ruling some rules on the interpretation of the absolute immunity granted by Article 8 of the PPI in respect of opinions expressed by members of the European Parliament.

67. First, it was pointed out that this type of immunity could not be lifted[49] and the European Parliament has no authority to determine whether the condition for the application of immunity has been met[50] such an assessment being "within the exclusive jurisdiction of the national courts which are called on to apply such a provision, and which have no choice but to give due effect to that immunity if they find that the opinions or votes at issue were expressed or cast in the exercise of parliamentary duties".[51]Accordingly, "[o]nce the national court has established that the conditions for the absolute immunity […] are met, the court is bound to respect that immunity, as is the Parliament."[52]

68. That being said, the "duty of cooperation applies in the context of disputes such as those in the main proceedings. The European Parliament and the national judicial authorities should therefore cooperate in order to avoid any conflict in the interpretation and application of the provisions of the Protocol." Consequently, "where the national court is informed of the fact that a member has made a request" for defence of that immunity, "it must stay the judicial proceedings and request the European Parliament to issue its opinion as soon as possible".[53]

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43. Rule 10: "4. In parliamentary debates in the Chamber, Members shall not resort to offensive language.
The assessment of whether the language used by a Member in a parliamentary debate is offensive or not should take into consideration, inter alia, the identifiable intentions of the speaker, the perception of the statement by the public, the extent to which it harms the dignity and reputation of Parliament, and the freedom of speech of the Member concerned. By way of example, defamatory language, "hate speech" and incitement to discrimination based, in particular, on any ground referred to in Article 21 of the Charter of Fundamental Rights, would ordinarily constitute cases of "offensive language" within the meaning of this Rule.
44. IPU, Freedom of expression for parliaments and their members: Importance and scope of protection, Handbook for Parliamentarians No. 28, 2018.
45. *Janusz Korwin-Mikke v. Européen Parlement* [2013] (GC) T-77/16 § 48 et T-352/17, paragraph 49.
46. Venice Commission, CL-AD (2014)011-e, *op.cit.*, paragraphs 72-78.
47. For instance, in Italy, according to the case-law of the Constitutional Court, the Parliament could determine whether the conditions for the application of that absolute immunity were met in which case that decision is binding on the court. If the parliament and that court take different views, the system allows for the possibility of the dispute being brought before the Constitutional Court.
48. *Alfonso Luigi Marra v. Eduardo De Gregoria and Antonio Clemente* [2007] (CJEU), 21 October 2008, joint cases C-200/07 and C-201/07.
49. *Ibid.*, paragraph 44.
50. "The Protocol does not confer on the Parliament the power to determine, in cases of legal proceedings against one of its Members in respect of opinions expressed or votes cast by him, whether the conditions for applying that immunity are met.", *ibid.*, paragraph 32.
51. *Ibid.*, paragraph 33.
52. *Ibid.*, paragraph 44.
53. *Ibid.*, § 43.

69. The practical consequence of this is that the national authorities should postpone proceedings until the European Parliament issues its opinion on the request to defend the immunity. Also, where a request for waiver of immunity is submitted to it by a national authority, the European Parliament verifies first if the facts giving rise to the request for waiver can be covered by Article 8 of the Protocol, in which case immunity cannot be waived.[54]

70. The rapporteur is hesitant about granting national courts the exclusive competence to establish if the conditions to apply the absolute immunity have been met. Beyond the conflict in the interpretation which may arise among national courts across member States, another issue relates to the integrity or misuse[55] of the justice system.

71. At the level of the 47 Council of Europe member States, systemic issues faced by some states in relation to the independence and impartiality of the judiciary were pointed to by the European Court of Human Rights and the Council of Europe Commissioner for Human Rights in addition to evidence established in individual cases that national courts were not sufficiently independent from the executive authority,[56] or that public power was misused to target specific groups[57]or to suppress political pluralism. It was acknowledged that the political climate is capable of creating an environment which can influence certain decisions by the national courts.[58]

72. Following this observation, it would be unwise and even contrary to the institutional purpose of immunity – which is to grant parliament independence from other branches – to entirely grant national jurisdictions the authority to establish if conditions for the application of absolute immunity have been met.

73. In the rapporteur's view additional safeguards have to be provided that make sure that national authorities are not guided by politically-related motivations.

74. For instance, in a case where the President of the Assembly has taken a decision to defend a members' immunities in reaction to restrictions the member faces or can face, this decision should be considered by national authorities which have to provide compelling reasons should they decide to depart from his or her conclusions.

75. In addition, where a request for waiver of immunity is submitted to the Assembly by a national authority, the Assembly, before considering immunity under Article 15 of the General Agreement, must first of all ascertain whether the facts giving rise to the request for waiver can be covered by Article 14 of the Protocol, in which case immunity cannot be waived.[59]

6. Parliamentary inviolability (Article 15 of the General Agreement)

76. Parliamentary inviolability protects parliamentarians when their acts do not constitute part of typical parliamentary activities. It intends to grant protection when charges against them have been manipulated with the objective to remove them from active office.

77. Article 15 of the General Agreement, which provides for this type of immunity, is a complex article and the accumulation of different rules and concepts makes the reading of Article 15 difficult.

78. From the outset it grants, in its first sentence, two levels of protection as it refers to the "national territory" and "the territory of other member States".

79. In its second sentence it also deals with "travelling immunities" which applies when the members of the Assembly are travelling to and from the place of meeting of the Consultative Assembly.[60]

80. Finally, in its third sentence, it rules out the application of immunity in the case when a member is found committing, attempting to commit, or just having committed an offence or when the Assembly has waived the immunity.

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54. *Bruno Gollnisch v. European Parliament* [2013] (GC), paragraph 43.
55. In the context of the Catalan cases voices have been raised pointing to possible abusive use of the European arrest warrant system by Spain, www.europarl.europa.eu/doceo/document/E-8-2018-000746_EN.pdf.
56. *Merabishvilli v. Georgia* [GC] [2017] (ECtHR), paragraph 324.
57. *Mammadli v. Azerbaijan* [2017] (ECtHR), *Rashad Hasanov and Others v. Azerbaijan* [2018] (ECtHR).
58. *Selahattin Demirtaş v. Turkey* (No. 2) [GC] [2020] (ECtHR), paragraph 434.
59. *Bruno Gollnisch,* op.cit., paragraph 46.
60. Explicit reference to meetings of committees and sub-committees, omitted in the General Agreement, was added a couple of years later by Article 3 of the Protocol to the General Agreement.

81. The application of inviolability becomes problematic given that it is defined, depending on where a member is located or where legal proceedings are taking place, either by national legislation or by the General Agreement itself.[61] As a consequence, it does not grant equal protection to all Assembly members at all times.

82. A member who has participated in a TV interview or published a statement, not in relation to his or her duties as Assembly member,[62] could receive a protection, ranging from very limited to very extensive, depending on his or her nationality or where charges against him or her were brought. For instance, the Assembly would not be able to defend the immunity of members of the UK delegation in relation to criminal proceedings brought up in the United Kingdom (Article 15 (a)), given that members of the UK Parliament do not enjoy immunities from criminal prosecution.[63]

83. In addition, in cases where legal proceedings were brought against a member of the Parliamentary Assembly in his or her own state, Article 15 (a) requires consideration and interpretation of relevant national rules on immunities to decide if the immunity applies and if so, whether it has to be lifted. It could result in a delay in examining a request due to the availability of relevant texts (for example the national case law) in official Council of Europe languages.[64]

84. This twofold nature of parliamentary inviolability could also lead to a situation when, having a "cross-border element", namely to face a lawsuit in a country which is not the member's own State, would result in far reaching protection granted to a member given the authority of the relevant Council of Europe bodies not only to apply national legislations as requested in letter (a), but to interpret letter (b).

85. An illustrative example is the case examined by the European Parliament in which a member of Parliament elected in Germany was sued in Greece.[65] Consequently, the European Parliament was in a position to interpret the terms "legal proceedings" contained under letter (b) of Article 9 so as to extend them to civil proceedings which, consequently, imposed procedural barriers barring the lawsuit against Mr Sakellariou. Should Mr Sakellariou make his statement in Germany and be sued in Germany too, German Law would apply, which would prevent the European Parliament from developing the present reasoning.

86. Discrepancies equally relate to procedural aspects. For instance, in the case of lawsuits taken place in Poland against a Polish member of the European Parliament in the context of a private prosecution[66]it is possible for a private person to submit a request for waiver of immunities directly to the Polish Parliament without the prosecuting authorities or the court of jurisdiction being involved. So, the question would arise as to which authority is "the competent authority" for the purpose of submitting the request to the Assembly. The European Parliament has agreed to examine the request to waive the immunities submitted by a private person in the case of the private prosecution as long as these requests are formally transmitted by a court.[67] This solution could also be adopted by the Assembly should it be dealing with such a situation in future.

6.1. "European immunity": the basic protection afforded to all members of the Assembly

87. Despite its duality, Article 15 grants, however, a certain protection which could be described as basis in that it uniformly protects from detention and prosecution all members of the Assembly regardless where they find themselves: in their national territory or in another member State (provided they could act in their capacity as Assembly members).

88. Article 15 (b) already covers protection from arrest and prosecution which occur in a member State other than the state of a parliamentarian.

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61. "exemption from arrest and prosecution".
62. Otherwise, it would be covered by Article 14 of the General Agreement.
63. Report on the request for defence of the immunity and privileges of Ashley Mote, 27 June 2007, A6-0250/2007.
64. Eventually it would bring similar difficulties to those related to the application of foreign law: the linguistic accessibility of the law, legal methodology, knowledge of the procedures and the substantive law etc.
65. See the report on the request for defence of parliamentary immunity and privileges submitted by Jannis Sakellariou A-0309/2003, 12 September 2003, Committee on Legal Affairs and the Internal Market. In that case the amount of damages claimed in the course of an action for defamation were €150 000.
66. Which consists of a possibility of launching criminal proceedings following a request by the alleged victim and in which the victim supports the accusation before the courts. This procedure exists in a number of European countries and often concerns defamation-related complaints.
67. See the report on the request for waiver of the immunity of Guy Verhofstadt, A9-0037/2020.

89. Concerning the protection afforded to a member in his or her own state, the conclusion by the Assembly and, recently, by the CJEU[68] are similar in that they consider that the immunity granted by relevant articles[69] has to shield a member from restrictive measures (such as detention) even if it occurs in the territory of his or her own State which may not have a relevant provision on inviolability.

90. Both institutions rely on the objective of immunity to establish such interpretation.[70] Indeed, it would have been contrary to the objective of immunity – to ensure that the Assembly has full protection against interference in its work – if this immunity would not shield a member from a restrictive measure imposed by his or her own State in a case where immunity from arrest is not afforded by national law. Because of this immunity common to all Assembly members, regardless of their country of origin, their liberty may not be restricted unless their European immunity has been previously lifted by the Assembly.

91. This basic protection covers members when they exercise their function as Assembly members. If they do not exercise such a function and do not travel for Assembly business within the territory of their member States, their national immunity applies[71].

6.2. Duration of the immunity

6.2.1. The starting point

92. Article 25 (b) of the Statute stipulates:

> *"The term of office of representatives thus appointed will date from the opening of the ordinary session following their appointment; it will expire at the opening of the next ordinary session or of a later ordinary session, except that, in the event of elections to their parliaments having taken place, members shall be entitled to make new appointments."*

93. The PPI, likewise the General Agreement, does not explicitly state when the members of the European Parliament start enjoying these immunities and, in particular, if the immunities could already be enjoyed before the member's credentials have been verified and his or her term of office has begun.

94. In 2003, the Rules Committee took the view that the immunities are granted to Assembly members "from the moment their credentials are ratified. In case the credentials are challenged, the immunities are guaranteed provisionally till the Assembly or the Standing Committee has reached a decision. Moreover, the immunities also apply when new Assembly members travel to the Assembly part-session during which their credentials will be ratified."[72]

95. In its decision adopted the same year,[73] the European Parliament made a slightly different interpretation making immunities effective "from time of publication of the results of the elections to the European Parliament", rather than as from the beginning of a member's term of office which, according to the Electoral Act of 1976,[74] begins at the opening of the first session following each election.[75] That being said,

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68. *Junqueras* [2019] Case C-502/19 (CJEU).
69. Article 15 of the General Agreement, Article 9 of the PPI.
70. *Junqueras*, [2019] Case C-502/19 (CJEU), paragraph 83, for interpretation of Article 15.a see also Doc. 10840, paragraph 34.
71. Rule 73.7: "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".

See Resolution 1490 (2006) "Interpretation of Article 15.a of the General Agreement on Privileges and Immunities of the Council of Europe".
72. Report "Immunities of Members of the Parliamentary Assembly, Doc. 9718, paragraph 50.
73. See the "Report on the request for upholding of the immunity and privileges of Mr Francesco Musotto", 20 June 2003, A5-0248/2003.
74. The act concerning the election of the representatives of the European Parliament by direct universal suffrage of 1976.
75. Even though the interpretation made by the report pointed to the link between the immunity and a member starting his or her term of office, it has been noted that "although the result thus achieved may be textually pure, it is nonetheless shocking in legal terms since it is contrary to the spirit of the text. In fact, the protection thus accorded seems to be of a fragmented nature since Members are not usually regarded as enjoying such status as from the opening of the first sitting but rather as from the evening of the election. Therefore, Members may be attacked in their capacity as Members of the European Parliament immediately after the results are proclaimed and not enjoy any protection at the time."

this interpretation was not shared by all, given the wording of the Electoral Act of 1976[76] which, like Article 25 of the Statute of the Council of Europe, links the beginning of a parliamentary mandate to the opening of a session.

96. With its judgment in the *Junqueras* case of 19 December 2019[77] the CJEU resolved this debate with regard to the "travelling immunity"[78]by stating that it takes effect before the term of office begins.[79] Consequently, the persons elected to the European Parliament enjoy the travelling immunities as from the proclamation of the official results and not from the moment when they take office and their credentials have been ratified.[80]

97. The reason for such interpretation was the need to close an 'immunity gap'[81] between two constituent events – the election and the first sitting, which would be inconsistent with the objective of the parliamentary immunities if a member was prevented from travelling to take office.

98. The rapporteur welcomes the fact that four year prior to this judgement, the Rules Committee concluded that Ms Nadiia Savchenko, appointed to the delegation of the Ukrainian Parliament while being detained in a Russian prison, enjoyed Council of Europe immunities for acts which occurred prior to her enjoyment of immunities and, that the Russian judicial authorities were required to request that the Assembly waive the immunity if they wished to continue the judicial proceedings instituted against her. Regretfully, no request was submitted by the Russian authorities at that time.

99. The *Junqueras* interpretation does not seem, however, to concern absolute immunity given that "opinions" or votes" which are deemed to be protected by the absolute immunity may normally occur only starting with the opening of the first constitutive plenary session.[82]

100. As far as the immunity granted to new members to travel to the first part-session (or the part-session where the credentials are to be ratified), the 2003 Rules Committee position and the subsequent 2015 opinion on the "Status of Ms Nadiia Savchenko with regard to Council of Europe immunity"[83]followed the same lines as the recent conclusion by the CJEU in the *Junqueras* judgment.[84]

101. That being said, in the *Junqueras* judgment, the CJEU operated a distinction, which the Committee on Rules of Procedure had not examined, between the acquisition of the status of a member (which occurs with the proclamation of official election results in the case of the European Parliament) and the beginning of the term of office, the latter aiming at merely establishing an institutional link between a person and the institution".[85]

102. The rapporteur wonders to what extent this reason could or should be applied in the case of the Assembly.

103. He noted that the Statute of the Council of Europe (Article 25) and the Rules of Procedure (Rule 11.3) also use different terms, namely the "term of office" and "the appointment of the new delegation".[86]

104. The appointment of the delegation may take place several months prior to the beginning of the term of office. For instance, in September 2019 the Parliament of Ukraine appointed a new delegation following elections held in July 2019. As the new delegation decided not to submit their credentials at the 2019 October

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76. According to which the term of office begins at the opening of the first session following each election, Article 3.
77. *Junqueras*, op.cit.
78. The General Agreement contains the similar provision in Article 15, second paragraph.
79. In particular, it stated that "a person who has been officially declared elected to the European Parliament must be regarded as having acquired, as a result of this and from that time, the status of Member of that institution, for the purposes of Article 9 of the Protocol on the privileges and immunities of the European Union, and as enjoying, on that basis, the immunity provided for in the second paragraph of that article", paragraph 81.
80. Mr Junqueras was subject to restrictive measures, i.e. provisional detention, in relation to acts which had taken place prior to the election and before his credentials were verified. It was ruled that his immunities became effective as from the day of the proclamation of official election results, the day from which the provisional detention must be lifted or, failing that, the request to waiver the immunity must be submitted by the competent authority to the European Parliament. *Junqueras*, op.cit., paragraph 94.
81. Sascha Hardt, "Fault Lines of the European Parliamentary Mandate: The Immunity of Oriol Junqueras Vies: ECJ 19 December 2019, Case C-502/19, Junqueras, ECLI:EU:C:2019:1115".
82. Handbook on the incompatibilities and immunity of the Members of the European Parliament, p.30.
83. AS/Pro (2015) 04.
84. *Junqueras*, op.cit., paragraph 80.
85. *Junqueras*, op.cit.
86. Rule 11.3 of the Rules of Procedure.

part-session, according to Rule 11.3[87] of the Rules of Procedure, the term of office of the former delegation expired, while the term of office of the new delegation did not begin, because the credentials had not been submitted and ratified. Consequently, the term of office of the new delegation started on the first day of the opening of the 2020 ordinary session, almost four months after the appointment. Should the reasoning contained in the *Junqueras* judgment apply *mutatis mutandis*, the newly appointed delegation would already enjoy immunities to travel to public Assembly meetings.

105. However, the rapporteur does not wish to conduct any further analysis on this particular point until it gives rise to a practical case. Should such a case arise one day, according to the internal hierarchy of norms**,** precedence must be given to the Statute which, however, is to be interpreted as to give full efficiency to relevant provisions.

6.2.2. The endpoint

106. The position adopted by the Assembly in Resolution 1325 (2003) echoed the position established by the CJEU according to which, the period "during the sessions of the Assembly", during which the immunity applies, covers the entire parliamentary year.[88]

107. The explanatory memorandum to Resolution 1325 (2003)[89] stated that "[c]learly, immunity no longer applies if a member of the Assembly resigns or if there is some incompatibility with the office of the member. It must be recalled that as long as they are members of the Parliamentary Assembly and until their replacement as such, Representatives and their Substitutes retain their immunities in accordance with the General Agreement and Protocol of 1952, as prescribed by Article 15 of the General Agreement, because this is independent of national parliamentary office ("whether they be members of Parliament or not")." The rapporteur sees no reason to depart from this interpretation.[90]

108. In addition, the immunity ceases to apply in the case of incompatibilities such as those mentioned in Article 25 (a)[91] and Article 36 (d)[92] of the Statute or when the President of the Assembly has been appointed as a member of a government.[93] Previously, the Assembly has also called members to resign where they have accepted specific Council of Europe posts (for example as members of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment).

6.2.3. Does immunity apply to acts committed before elections?

109. This question is slightly different from the question of when immunity starts or ends. In a number of member States even though protection afforded by inviolability starts with the beginning of the mandate, it could also be applicable, in given cases, to judicial proceedings instituted against MPs before their election. It is the case in Bulgaria, Andorra, Denmark, Germany, Greece, Hungary[94] (the list is not exhaustive). In Czech Republic inviolability also covers judicial proceedings instituted against MPs before their election. However, if the Chamber has not been requested (or has not refused) to give its consent, the MP can be prosecuted after the expiry of the mandate. In Luxembourg inviolability protection does not cover judicial proceedings instituted against MPs before their election. However, such proceedings may be suspended by the Chamber for the duration of the session. In other countries, for example in France or Estonia, protection does not cover judicial proceedings instituted against MPs before their election.[95]

110. The European Parliament would not remove protection afforded to an MEP in any other member State (Article 9 paragraph 1(b) of Protocol No 7) only on the grounds that proceedings pre-dated the acquisition of the status of MEP and, thereby, the immunity. It would look into the global context as to whether proceedings

87. "The credentials of the existing delegation shall expire at the opening of the first sitting of the Assembly […] following the appointment of the new delegation by the national parliament or competent authority […]", Rule 11.3 of the Rules of Procedure of the Parliamentary Assembly.
88. *Roger Wybot v. Edgar Faure and Others*, Judgment of 10 July 1986, Case 149/85.
89. Doc. 9718.
90. *Ibid.*, paragraphs 55 to 58.
91. "Each representative [*of the Assembly*] must be a national of the member whom he represents, but shall not at the same time be a member of the Committee of Ministers.".
92. "No member of the Secretariat shall hold any salaried office from any government or be a member of the Consultative Assembly or of any national legislature or engage in any occupation incompatible with his duties.".
93. Rule 15.5 of the Assembly's Rules of Procedure.
94. IPU PARLINE database on national parliaments.
95. *Ibid.*

had been jeopardized by *fumus persecutionis*, namely it could be claimed "that the judicial proceedings were launched with the intention of hindering the future political activity" of the member and thus the European Parliament."[96]

111. The fact of applying protection to proceedings pre-dating the beginning of the mandate does not contradict the principle of the functionality in that the global assessment should be made if these proceedings had been initiated with the clear objective to impede the political activity of the person, which after the person's election would also result in impediment of the functioning of the parliamentary institution.

112. Therefore, if according to the Statute the inviolability is undoubtedly effective only during the session of the Assembly it could nevertheless apply in relation to actions committed before the Assembly mandate had started too, provided evidence of *fumus persecutionis* could be established.[97]

6.3. Act of committing an offence ("flagrante delicto")

113. The immunity granted to the member of the Assembly does not apply when members are found committing, attempting to commit or having just committed an office (*flagrante delicto*). Two interpretations exist.

114. According to the first, if a member of parliament is caught in *flagrante delicto*, no authorisation should be sought from the parliament of which he or she is a member at any stage of the proceedings, that is neither for his or her arrest nor for his or her possible referral to a court. The underlying grounds for this interpretation is that it would be highly unlikely that an on-the-spot offence would have a functional link to the exercise of parliamentary function.

115. Another position explains that the interruption of immunity is "only temporary, applying only at the moment of arrest proper so as to enable the member States to put an end to a situation in which public safety or law and order are endangered: once the danger concerned has been removed, the general provisions concerning immunity become fully applicable once again."[98]

116. In 2003, the rapporteur on "Immunities of Members of the Parliamentary Assembly" established, based on replies from national delegations, that the meaning of *flagrante delicto* requires that not more than 24 hours should have elapsed between the offence and the commencement of the prosecution. He also decided not to go any further in exploring the potential issues which may arise from the application of this concept. However, he recognised that its application could be problematic by mentioning the case of two members of parliament from the opposition, who had been found guilty by a court of taking part in an anti-government demonstration, which had started out peacefully but which had degenerated into acts of violence. Simply by taking part in the demonstration, the two members of parliament were deemed to be co-perpetrators of the offences and were convicted of having been found in *flagrante delicto*, despite the fact that their parliamentary immunity had not been waived beforehand.[99] An illustrative case of the *flagrante delicto* concerns is the case of a member of the European Parliament who was arrested while climbing over the fence of a military installation. Another example concerned a member who had failed to comply with a police order breaking up a demonstration.[100] The rapporteur also thinks about a situation when a statement, with allegedly illegal content, which has been published online, could trigger immediate response by public authorities. In all these cases, the application of the principle *flagrante delicto* may lead to convictions without immunity be lifted beforehand.

117. Therefore, the rapporteur is of the opinion that special safeguards are needed to minimise the political motivation of *flagrante delicto.* First, the use of this exemption to immunity should only be necessary, as the interpretation of the European Parliament suggested at time, to restore public order and reduce the risk of evidence disappearing. On the other hand, the Assembly has to be able to determine whether the lawsuit against a member of the Assembly is serious and not inspired by concerns unrelated to the proper administration of justice.

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96. European Parliament decision of 9 March 2021 on the request for waiver of the immunity of Carles Puigdemont i Casamajó (2020/2024(IMM)).
97. *Ibid*., p.37.
98. "Parliamentary Immunity in the European Parliament", Internal Study, Directorate-General Internal Policies, Policy Department C Citizens Rights and Constitutional Affairs, 2005.
99. Doc. 9718, paragraph 44.
100. A2 -0151/85; A2-0035/86.

118. Concerning the last point, the rapporteur suggests that if there is a strong assumption that a member was groundlessly deprived of his or her privileges by the application of the provision on *flagrante delicto*, the President could take the initiative to assert the privilege and immunity of the member concerned. The member could also petition the President to defend his or her immunities. Both possibilities are already encompassed in Rule 73.6.

6.4. Civil proceedings: experience of the European Parliament

119. The question of civil proceedings being covered by the immunities granted to members of the Assembly would potentially concern a very limited number of cases. Under letter (a) of Article 15, it would concern cases where the national rules on inviolability also cover civil proceedings.

120. If a member's situation falls under letter (b) of Article 15 (exemption from arrest and prosecution on the territory of all other member States), it would be up to the Assembly to decide on the opportunity to follow the precedents of the European Parliament.[101]

121. The immunity granted to members of the European Parliament in the territory of other member States (Article 9, first paragraph, letter (b)) shields them from detention and any legal proceedings. The option of having this provision applied to civil proceedings was for a long time ruled out given that the ECSC founding members did not grant such privileges to members of their parliament.[102] However, since 2003, the Parliament has been able to uphold the immunity of a member in civil proceedings, if those proceedings are "a roundabout means of taking legal action against Members in a manner similar to criminal proceedings."[103] Consequently, the wording of Article 9 of the PPI is interpreted in such a way as to cover civil proceedings if its objective is to secure punitive damages.

122. In addition to the precedents decided by the European Parliament,[104] some principles set out by the case law of the European Court of Human Rights may also suggest that in some cases "prosecution" referred to in Article 15, letter (b), could be interpreted as to cover civil proceedings given the punitive nature of sanctions.

123. In some cases where restrictions to freedom of expression were imposed, the European Court of Human Rights put the focus not on the nature of the restriction – criminal or other[105] – but to a "chilling effect" which a fear of sanction or punitive measure may have on the freedom of expression and, consequently, on unhindered functioning of the parliamentary institution. What is important is to examine if the manner in which the proceedings are used would have a similar deterrent effect on a member to criminal proceedings**,** to the detriment of the functioning of the parliamentary institution.

7. Status of the witness

124. Neither the General Agreement nor the PPI do not contain any specific provision concerning whether the immunity has to be lifted in order for a member to be able to testify as a witness or expert witness. The European Parliament has adopted a position whereby its members do not require, and should not require, Parliament's authorisation to appear as witnesses or experts. This conclusion was reached based on a duty of loyal co-operation between the European Union and national institutions, provided it does not create any prejudice to members' independence. A special rule has been added to the Rules of Procedure to reflect the institutional character of the immunity: members can appear as witnesses as long as it does not hinder the proper functioning of the institution – for example they will not be obliged to appear on a date or at a time which prevents them from performing their parliamentary duties. Also, the European Parliament completed this rule by a provision which exists in some national parliaments and which allows members to refuse to

101. *Jannis Sakellariou, op.cit.*, A5-0421/03, Gargani; A5-0184/04, Schulz; A5-0185/04, Lehne; A5-0281/04, Bossi.
102. Article 15 of the General Agreement and Article 9 of the PPI. The wording of Article 15 of the General Agreement is slightly different as it refers to "exemption from arrest and prosecution". Notwithstanding the different wording, the scope of both provisions seems to be identical given that it has been clarified that civil proceedings are left out of the scope of Article 9 of the PPI, unless the damages claimed are intended to be punitive. See also "Parliamentary Immunities in the European Parliament", *op.cit.*
103. *Jannis Sakellariou*, *op.cit*.
104. The European Parliament extended the term "legal proceedings" to merely cover "any attempt to secure punitive damages by means of civil proceedings", *Jannis Sakellariou, op.cit*.
105. In *Cumhuriyet Vakfı and Others v. Turkey* [2013] (ECtHR), an injunction against a national newspaper was issued in the course of civil proceedings for protection of personality rights.

testify in court if such testimony were to relate to their activities as members of parliament. This provision does not differentiate between the type of immunities and leaves at the discretion of members the decision to testify or not if the matter concerns parliamentary duties.

125. In its Opinion "On the request for the waiver of the parliamentary immunity of Mr Dick Marty", the Rules Committee took the view that no parliamentarians covered by such immunity may be heard, including as a witness, without however excluding the possibility that the member wishes to do so.

126. The rapporteur suggests combining both positions in the guidelines.

8. Procedural strand: how immunity could be invoked or asserted?

8.1. Binding decision following a request to waive the immunities

127. The members could invoke the immunities granted to the Assembly members if there are serious grounds to believe that the proceedings initiated against them or any restriction imposed on the right to travel to or from the Assembly meetings pursue the aim of causing damage to members' political activities and of depriving the Assembly of the member's co-operation and his or her freedom of action.

128. The competence of the Assembly to waive the immunity of a member of the Assembly is expressly provided for in Article 15, third sentence, of the General Agreement. Therefore, the decision reached according to this provision is binding on judicial authorities of the Council of Europe member States. Rule 73 of the Rules of Procedure encompasses the procedure related to submitting and examining a request to waive the immunity granted in Article 15. As this article was introduced to the Rules of Procedure in 2003 and followed similar lines to the corresponding Rule of the European Parliament, the rapporteur will examine if some modifications need to be introduced given the revision of the rules of the European Parliament which took place after 2003.

129. In the rapporteur's view, the guidelines should mention that as a general principle immunity has to be lifted in order to prevent impunity and effectively grant the principle of equality before the law, unless there is a strong presumption that the legal proceedings have been instituted with the intention of causing damage to the member's political activities.

130. When considering a request to waive immunity the Assembly has to consider the following elements: that the legal proceedings initiated against the member do not jeopardise the proper functioning of the Assembly, and the request is serious, namely not inspired by reasons other than that of dispensing justice. If none of these elements can be established, the Assembly should normally propose to waive immunity. The following elements, developed by the European Court of Human Rights, could constitute evidence that the legal proceeding may have a political background:[106]

– the broader political and legal context in which the legal proceedings against a member were launched;[107]
– the timing of the prosecution;[108]
– any indication of specific and personal targeting;[109]
– a member's specific status and activities[110] even though the absence of a particular political status does not rule out political motivation behind the legal proceedings;
– the gravity of charges in comparison to what an ordinary citizen would face and the sufficient connection with the objectives of criminal justice;[111]
– uncertainty as to the status and sources of the evidence presented as a basis for charges;

106. "Guide on Article 18 of the European Convention on Human Rights", published by the European Court of Human Rights, pp. 22-23.
107. For instance, recent changes in the legislation, statements by government officials but also international reports related to the integrity of justice in a given state or a risk of the law enforcement being subservient to the majority.
108. For instance, years after the alleged offences were committed. However, on the one hand, criminal prosecutions initiated against politicians after a change of power could suggest the existence of politically motivated charges. On the other hand, it could equally reflect a desire to deal with alleged crimes of the previous power, whose members could have been immune from prosecution for many years.
109. For instance, repetitive and/or identical restrictions a member had faced.
110. For instance, if a member is the leading member of the opposition. However, the mere fact that a member is involved in political activities is not enough to establish that the charges brought against him or her are politically motivated.

– the reasoning and the elements on which the request for waiver of immunity is based;

– procedural safeguards.

8.2. Defence of the immunity (Rule 73.6)

131. Under Rule 73.6 a current member involved in legal proceedings can request the President to have his or her immunity defended.[112] The request can be submitted where it is alleged that an infringement of the privileges and immunities of a member by the authorities of a member State has occurred or is about to occur. In particular, such a request for the defence of privileges and immunities may be made if it is considered that the circumstances would constitute an administrative or other restriction on the free movement of members travelling to or from the place of meeting of the Assembly or an administrative or other restriction on an opinion expressed or a vote cast in the performance of their duties or the involvement of a member or a former member in legal proceedings in relation to an opinion expressed or a vote cast in the performance of their duties as Assembly members.[113]

132. **The rapporteur considers that the possibility to submit such a request has to be open to former members too given the perpetual nature of the absolute immunity** and proposes to modify Rule 73.6 accordingly.

133. The rapporteur believes that if a member is detained, the President should, in the decision to defend the immunity, draw the attention of national authorities to the fact that 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 (for example 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.

134. Unlike the procedure for waiver of immunities which has its grounds in the General Agreement, the procedure for defence of immunities was inspired by national laws and practices and has its grounds in the Rules of Procedure only.

135. With respect to the procedure for defence of immunity introduced into the Rules of Procedure of the European Parliament, the CJEU has held that even the Rules of Procedure, which are rules of internal organisation, cannot grant powers to the Parliament which are not expressly acknowledged by the Protocol and, therefore, a decision to defend immunity would constitute “an opinion which does not have binding effect with regard to national judicial authorities”[114]; it also emphasised the duty of both interpretive authorities to cooperate[115] “to avoid any conflict in the interpretation”, which would also require from the national authorities that they delay the judicial proceedings until the Parliament takes a position.

8.3. Urgent procedure to assert immunity (Rule 73.6)

136. Rule 73.6 of the Rules of Procedure describes a specific procedure which allows the President to apply a specific procedure in the event of a member of the Assembly being arrested or deprived of freedom of movement in an apparent violation of privileges and immunities. The objective of this procedure is to provide an emergency response to a situation which amounts to supposed violation of provisions on privileges and immunities before other proceedings aiming at establishing the violation have been concluded or to prevent or minimise the potential (irreversible) harm the alleged violation may create. Before taking such a decision, the President may, where applicable, consult the competent committee.

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111. For instance, if a member has been accused of criminal charges for facts that, in the case of an ordinary citizen would lead to administrative proceedings. On the other hand, the fact that a member was a holder of public office could constitute aggravating circumstances.

112. This procedure was introduced to the Rules of Procedure by Resolution 1325 (2003) following the example of the similar procedure which existed in the European Parliament, which in its turn had been inspired by a procedure available in some member States and consisting of allowing a parliament to defend their members’ immunity where the national court does not recognise that immunity. In total, three decisions to defend the immunity have been taken by the President: in 2005 following the request by Mr Iannuzzi, in 2014 following the request by Mr Dick Marty and in 2016 following the request by Mr Ertuğrul Kürkçü.

113. Similar reasons are specified in Rule 7 of the Rules of the European Parliament.

114. *Marra*, op.cit., paragraph 42.

115. *Ibid*., paragraph 32.

137. According to the above provision, the President shall decide *ex officio* whether or not to take an urgent initiative to confirm the immunity of a member who has been arrested or deprived of his or her freedom of movement (the President "may take the initiative"). The President is under no obligation to take such an initiative and the decision to confirm a member's immunity remains entirely at the discretion of the President.[116]

9. Free movement vs "travelling immunity"

138. Finally, the rapporteur would like to draw attention to two different provisions contained in the General Agreement. Both have the same objective, namely, to safeguard the normal functioning of the Assembly and freedom of movement but trigger different mechanisms of protection.

139. Article 13 sets the general obligation to avoid restriction on free movement of the members of the Assembly to and from place of the Assembly meetings which could be set either by their own government or by the authorities of other members. It encompasses a large variety of possible restrictions of administrative, custom or of other nature and is not at variance with special formalities which could be complied with to avoid those restrictions. Therefore, Assembly members are in principle subject to the general visa regime, even though a member State hosting an official meeting or event organised by the Assembly shall issue a visa to the members concerned. However, this provision must be applied in fairly and lawfully. For instance, a member State would not be entitled to prevent an Assembly member from entering its territory on the grounds of his or her political views or his or her national or ethnic origin.

140. The travelling immunity (Article 15) deals with the concrete example of restrictions (arrest and detention) which applies to all members of the Assembly regardless of their state of origin and independent of the protection accorded by the relevant national laws. It guarantees to members of the Assembly immunity from arrest and detention while travelling on Assembly business including inside the territory, regardless of the immunity granted by the national law. Should a member State maintain or decide on detention of a member exercising its function as Assembly member, it has firstly to request the Assembly to lift this immunity.

10. Conclusions

141. The present report tends to summarise the principles governing the application of the immunity regime granted to the Assembly members and to establish the application criteria which were made necessary to address the concern of efficient protection of members of the Assembly, especially in the light of new political risks, but also by the need to set clear and objective criteria enabling the privileges and immunities to comply with their institutional purpose while preventing the eventual misuse of privileges by parliamentarians for personal benefit.

142. After having examined the scope of immunities granted to Assembly members, the rapporteur has reached a preliminary conclusion that the Council of Europe has a solid basis to combine both needs.

143. Of course, a twofold immunity regime of Article 15 which provides for different scope of protection and creates different situations makes protection less efficient. On the other hand, the underlying reasons for such a regime – the dual mandate of the members of the Assembly – is still valid today. Also, all the Assembly members enjoy, while acting as Assembly members, the "core" immunity from arrest and detention independent from their country of origin and their national legislation.

144. A pragmatic approach means not embarking on the long and difficult process of revising the General Agreement. Therefore, the rapporteur sets the objective of clarifying the application regime and reminding member States of the already existing obligations. This approach is in full line with the position of the Committee of Ministers which was "of the opinion that an efficient implementation of these rules [*governing privileges and immunities*] would solve most of the issues highlighted by the Parliamentary Assembly *[in*Recommendation 2083 (2016) *"Sanctions against parliamentarians*"].

145. The rapporteur highlights in addition that the core interpretation principles would avoid situations of unilateral interpretation by member States and reassure the Assembly competence over the lifting of immunities of its members.

116. *Junqueras*, Ordonnance du tribunal [15 December 2020] (GCEU, no T-24/20), paragraphs 109 and 110.

146. The guidelines contained in the draft resolution do not create new rights and privileges. They simply summarise internal practices, including those of the European Parliament with which the Assembly shares the immunity regime; introduce principles and interpretation set out by the European jurisdictions and provide some practical information to make more fluid the handling of immunity-related requests and provide safeguards against misuse.

147. Finally, the guidelines will allow more visibility to the Assembly members as to the privileges and immunities they enjoy.